

## Can the Common Law Survive in the Modern Statutory Environment

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# CAN THE COMMON LAW SURVIVE IN THE MODERN STATUTORY ENVIRONMENT?

*H. Marlow Green*<sup>†</sup>

## INTRODUCTION

In an era of statutory and regulatory dominance in the field of environmental law, lawyers might benefit from investigating the fate of the common law. Prior to the advent of the modern federal statutory and regulatory environmental regime, implemented circa 1970, the common law stood as the only legal system available to protect environmental quality. Indications from certain jurisdictions are that prior to the 1970s, the common law was rising admirably to the task of championing the cause of environmental well-being.<sup>1</sup> But beyond these earlier common law successes, there are other philosophical considerations that should prompt us to preserve environmental common law remedies in the face of the modern statutory and regulatory regime. The purpose of this article is neither to present these considerations nor to articulate a defense of

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<sup>1</sup> See, e.g., *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915) (holding that defendant copper smelters' new emission-control equipment, which defendant installed to prevent discharges earlier held to be public nuisances, not sufficiently effective); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (holding that discharges from defendant copper smelters caused a public nuisance and that defendants must build more emission-control equipment); *Maddox v. International Paper Co.*, 105 F. Supp. 89 (W.D. La. 1951) (holding that a downstream property owner had suffered damages resulting from discharges of an upstream paper mill) *upheld in* *International Paper Co. v. Maddox*, 203 F.2d 88 (5th Cir. 1953); *Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak*, 7 F.2d 583 (9th Cir. 1925) (holding that property owner suffered nuisance damages from the installation of a new city sewage system opposite it property); *Carmichael v. Texarkana*, 94 F.561 (W.D. Ark. 1899); *United Verde Extension Mining Co. v. Ralston*, 296 P 262 (Sup. Ct. Az. 1931) (holding that a property holder suffered nuisance damages resulting from discharges from a heavy-metal smelter nine miles from the property owner's farm); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. Ct. App. 1970) (holding that discharges from a cement plant caused a nuisance to a property owner and granting an injunction against the plant until such time as the plant paid permanent damages to plaintiff); *Whalen v. Union Bag & Paper Co.*, 101 N.E. 805 (N.Y. Ct. App.1903) (holding that paper mill must be enjoined in nuisance from polluting a downstream farmer and, further, rejecting a balancing of interests test that would have allowed the paper mill to continue despite its polluting activity); *Sammons v. City of Gloversville*, 67 N.E. 622 (N.Y. Ct. App. 1903) (holding that a city must be enjoined in nuisance from dumping sewage into a creek upon which plaintiff's farm was situated); and *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959) (holding that discharges from defendant's aluminum reduction plant trespassed onto plaintiffs property and that defendant must thus be enjoined from polluting).

the common law. Other sources have set forth these arguments and have described model common law systems that could treat environmental issues.<sup>2</sup> Rather, the purpose of this article is simply to present the results of two empirical studies designed to assess the viability of the common law in the environmental arena and, further, to use this empirical data to speculate as to the future viability of the common law. Toward this end, Part I describes a survey of environmental litigators designed to determine whether, despite conclusions one could reach as a matter of law, the common law remains a viable instrument in the minds of those who would be most apt to use it: environmental litigators. Part II describes a year-by-year survey through the case law on Westlaw. Both studies examine the extent to which the federal statutory system has, in fact, had either a positive or a negative impact on the common law.

Before assessing the de facto impact of the federal environmental statutes on the common law, it is worth discussing the extent to which those statutes have preempted the common law as a matter of law. The federal environmental statutes preserve common law actions. In particular, § 505(e) of the Clean Water Act and §304(e) of the Clean Air Act, also known as the "citizen suits" provisions, state that such suit provisions cannot be read to revoke other remedies provided under "any statute or common law."<sup>3</sup> In the process of interpreting the citizen suits provision in the Clean Water Act, the United States Supreme Court has limited plaintiffs who sue for common law relief in interstate pollution cases to using the common law of the state that is the source of the pollution, rather than the common law of the state that is the recipient of the subject pollution.<sup>4</sup>

Given that state common law claims against pollution have not, in general, been preempted by the federal statutes as a matter of law, the question thus becomes whether state common law claims have suffered

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<sup>2</sup> See, e.g., H. Marlow Green, *Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT'L. L.J. 542-44 (1997); Richard A. Epstein, SIMPLE RULES FOR A COMPLEX WORLD 275-305 (1995).

<sup>3</sup> Clean Water Act § 505(e), 33 U.S.C. § 1365(e) (1986); Clean Air Act § 304(e), 42 U.S.C.A. § 7604(e) (1986).

<sup>4</sup> See, e.g., *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). It is worth noting that the Supreme Court had dealt with the common law preemption issue prior to *Ouellette*. In *City of Milwaukee v. Illinois* 451 U.S. 304 (1981), another case involving interstate pollution, the Court held that, despite § 505(e) of the Clean Water Act, the Act had nevertheless preempted federal common law. As a result of the defendant's discharging sewage in compliance with federal permits granted pursuant to the Clean Water Act, and because the Act had preempted the federal common law, the plaintiffs could not sue for nuisance relief under the federal common law. This federal common law, oddly enough, was created by the Supreme Court almost a decade earlier in *Illinois v. Milwaukee*, 406 U.S. 91 (1972), in order to provide the same plaintiff relief from the same pollution at a time prior to the creation of the statutory relief that protected them in 1981.

de facto preemption at the hand of the federal statutory and regulatory system. To address to this latter question, I conducted the two empirical studies described below.

## I. ENVIRONMENTAL LITIGATORS SURVEY

### A. DESIGN

The survey presented environmental litigators across the nation with a hypothetical pollution scenario that had equally viable solutions under either the common law or the federal statutes. It was my hope that an analysis of the responses would provide insight into the extent to which environmental litigators would use the common law despite, or in addition to, the federal statutes. I designed the survey as follows.

I divided the nation into four geographic regions: East, West, Midwest and South/Southwest. Next, I collected the names of eight to ten law firms from each geographic region from the *Guide to Legal Employers* for 1995 produced by the National Association of Law Placement,<sup>5</sup> which listed themselves as having significant environmental practices. After assembling a sample of thirty-eight firms, I proceeded to "cold-call" each firm's environmental department to ask for survey volunteers. Seventeen out of the thirty-eight firms, or approximately forty-seven percent, had individual litigators who were willing to participate in the survey.

The hypothetical situation I presented to each of these litigators involved a factory that owned and operated its own sewage treatment plant that was discharging into a stream. The cattle of a downstream water rights holder (either riparian or appropriative) were being sickened from the treatment plant's discharge. Next, I asked each participant three questions:

1. Assuming the discharger is violating its National Pollution Discharge Elimination System permit ("NPDES")<sup>6</sup>, and assuming that settlement is not an option, what legal course of action would the participant take (if representing the plaintiff), or with what legal actions would the participant expect to be faced (if representing the defendant)?
2. Assuming the discharger is in compliance with its permit, what legal course of action would the participant take?
3. What is the participant's sense of the viability and vitality of the common law remedies in the participant's environmental law practice?

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<sup>5</sup> NAT'L ASS'N FOR LAW PLACEMENT, INC., 1996-1996 NATIONAL DIRECTORY OF LEGAL EMPLOYERS (1998).

<sup>6</sup> 33 U.S.C. § 1342 (1986).

## B. RESULTS

The responses to questions one through three from the seventeen participants are summarized in charts one through three, respectively.

Summarizing the data presented in charts one through three, fifteen of the seventeen participants would have brought, or expected to face, as the case may be, both federal statutory and state common law actions under the scenario where the discharger was in violation of its NPDES permit. One participant indicated that he or she would have only brought a federal statutory claim. Surprisingly, one participant indicated that he or she would have only brought a state common law claim.

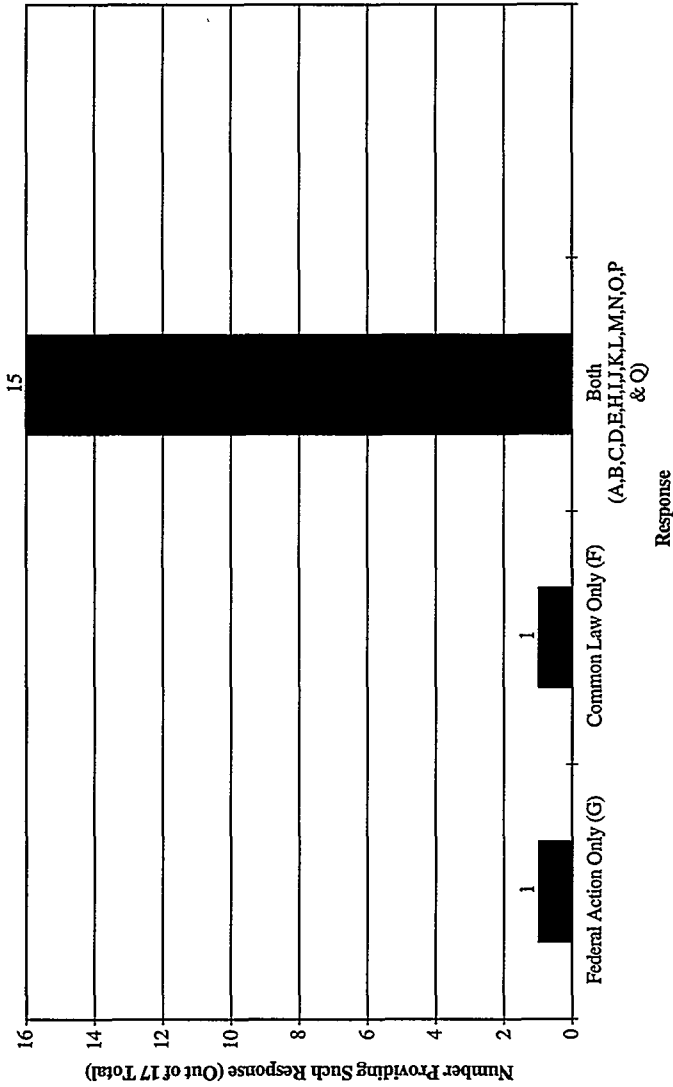
Under the scenario where the discharger was in compliance with its NPDES permit, fourteen of the seventeen participants indicated their belief that the state common law claim would have remained viable in their minds despite compliance with the permit. In other words, compliance with the federal permit would not have been a defense, or at least not a complete defense, to a nuisance or trespass claim according to these fourteen participants. Two of the seventeen, however, thought that compliance with a federal permit would have rendered the state common law claim nonviable.

Perhaps most enlightening were the responses to question three, which asked the participants to opine as to the common law's viability in their respective environmental practices. For the sake of convenience, I have categorized these responses into four groups: (1) "Viable Plus," (2) "Viable," (3) "Viable Minus" and (4) "Not Viable."<sup>7</sup> The "Viable Plus" category includes responses to the effect that the state common law not only remains viable, it is, in fact quite healthy. The "Viable Minus" category includes responses to the effect that state common law claims are viable, but not necessarily very strong. Respondents in the "Viable Minus" category expressed a general belief that common law claims are "kitchen sink" claims that environmental litigators bring in order to ensure that they have drafted a thorough complaint. Almost every participant thought that state common law claims are viable to varying degrees. Six participants, however, thought that state common law claims are viable, but not necessarily healthy, in comparison to four participants who thought that state common law claims are alive and well in present-day environmental jurisprudence.

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<sup>7</sup> Indeed, the participant who provided the single "Not Viable" response did so in the pattern of enthusiastic defense rhetoric, opining that state common law claims were "frivolous."

CHART 1. SCENARIO WITH POLLUTER IN VIOLATION OF PERMIT: NUMBER OF ATTORNEYS RESPONDING WITH FEDERAL ACTION, COMMON LAW OR BOTH



\* Each participant is labeled with a letter from the alphabet, A through Q, to provide the reader with a sense of the consistency of responses from individual participants from question to question.

CHART 2. SCENARIO WITH POLLUTER IN COMPLIANCE WITH PERMIT: NUMBER OF ATTORNEYS RESPONDING THAT COMMON LAW REMAINS VIABLE

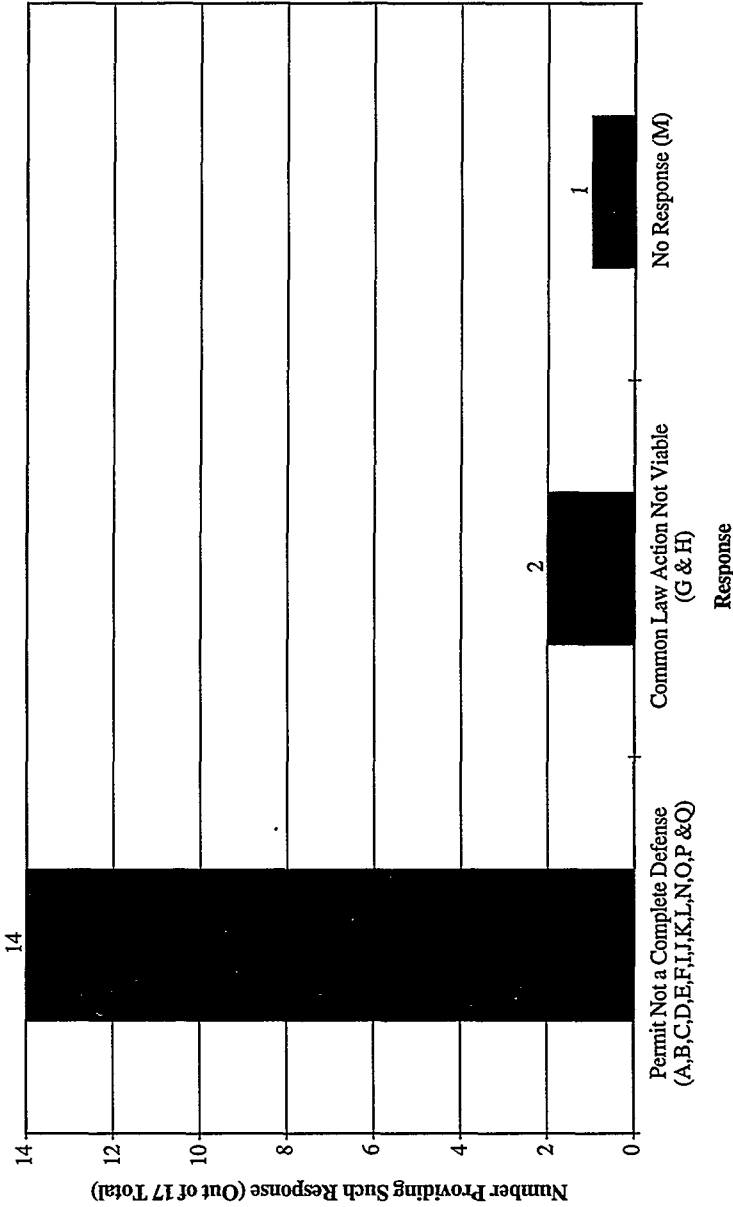
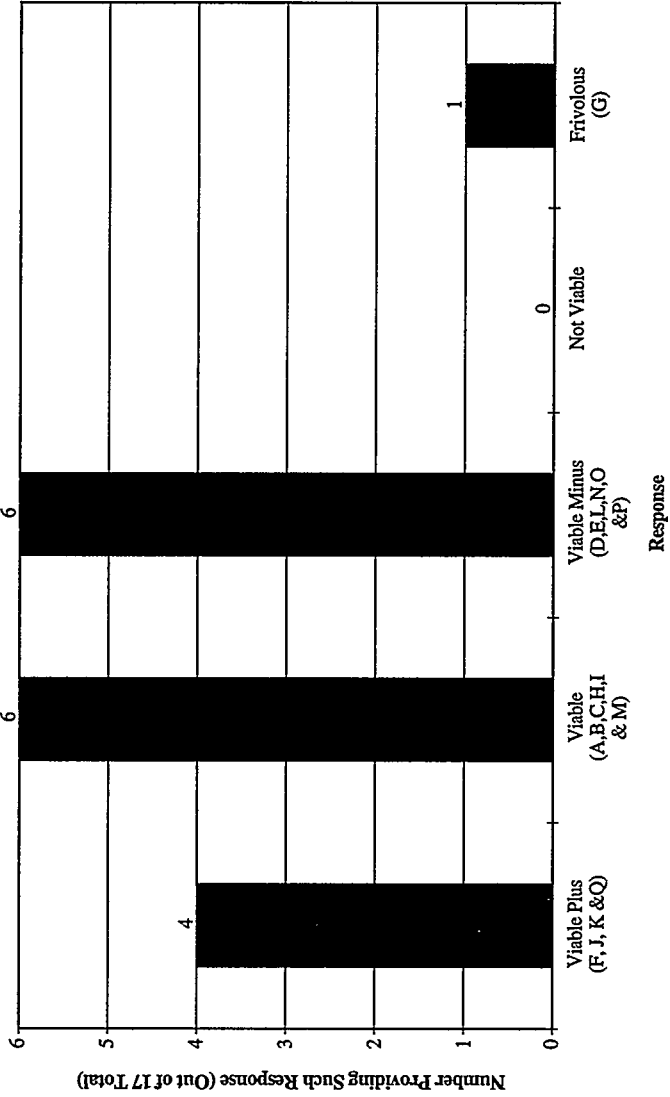


CHART 3. GENERAL SENSE OF VIABILITY OF COMMON LAW





### C. DISCUSSION

The design of the environmental litigators survey is admittedly open to criticisms directed at its scientific weaknesses. The survey sample was not very large. The response rate was not very impressive. The sample was not particularly random, and biases—especially those in favor of defense counsel—lurk in the nature of many firms included in the NALP Guide. Nevertheless, the results are instructive because they indicate that environmental litigators do consider common law claims such as trespass and nuisance to be alive. An overwhelming majority (approximately ninety-four percent) of those surveyed expressed this view, and the size of this majority quells some of the weaknesses of the survey. Thus, the survey provides evidence that those most likely to use, or to face, common law environmental claims consider them viable.

The chief difficulty with interpreting the results of the environmental litigators survey lies in discerning a consensus view as to the degree of vitality that these common law claims possess. Sixteen of the seventeen attorneys surveyed thought that the common law was a viable remedy to some degree, but they were split in their opinions as to the strength of this viability. We are thus left with a general sense that the common law is alive but not necessarily healthy.

## II. WESTLAW DATABASE SURVEY

### A. DESIGN

My intention, with respect to the Westlaw survey, was simply to count the number of reported cases in which trespass or nuisance were brought against environmental harm each year in state courts versus federal courts from and including 1945 through 1994. The objective was to determine if there were any noticeable trends in the numbers of such cases, in each of these categories of courts, over the designated time span. The search that I used initially was broad: NUISANCE or TRESPASS and POLLUT! This search produced a number of “hits” that were in fact landlord and tenant cases. After reading through several, I determined them to be unrelated common law environmental claims. Hence, I revised the search and used the following for the study: NUISANCE or TRESPASS and POLLUT! but not LANDLORD but not TENANT. I ran this search in each of the ALLSTATES and ALLFEDS databases, restricting the date by year for each year from and including 1945 through 1994. I then skimmed through each case to sort out those that were unrelated to common law environmental claims. Some cases involved solely a common law environmental claim, while some involved claims in combination with common law environmental claims, including federal statutory claims.

## B. RESULTS

The tabulated results of this Westlaw survey are illustrated in graphical form in chart four (Federal) and chart five (State). Chart six places the graphs from charts four and five together in order to aid comparison. Perhaps the most apparent trend in this data is the significant increase in the number of common law cases reported circa 1970, the dates of which approximately correspond with the passage of significant federal environmental legislation.

A second noticeable trend occurs in the 1980s. Until the latter half of the 1980s, for all prior years in the time span, the number of state-reported common law environmental claims was greater than the number reported in federal courts for each and every year. After the mid 1980s, the number of state-reported common law environmental claims became less than the number reported in federal courts with two exceptions for 1988 and 1992.

The numbers provided in charts four through six are raw. Hence, to construct a more accurate rendition of any phenomena that might exist in this data, these same numbers must be presented in real terms. Charts seven and eight present the numbers from their respective counterpart charts four and five as percentages of the per-year total number of cases reported in each of the respective federal and state databases.<sup>8</sup> Chart nine places the graphs from charts seven and eight together to aid comparison. To further aid comparison and discussion of this "real" data, charts ten and eleven present the percentage data from charts seven and eight in terms of the average number of cases reported per 10,000 throughout ten five-year periods, beginning with the period from and including 1945 through 1949. Chart twelve presents the graphs from charts ten and eleven together.

Both charts nine and twelve illustrate the same dramatic increase in the number of common law environmental claims reported in the early 1970s that was revealed in the raw data (as illustrated in chart six), although the real increase does not seem to be as impressive with respect to the state courts. Notably, chart 12 shows that the average number of common law claims reported in federal courts in the first half of the 1970s was more than six times the average number reported in the last half of the 1960s.

The second trend revealed in the raw numbers persists in the real numbers as well, but it becomes even more striking when viewed in real terms. Chart nine shows that, in real terms, the number of common law environmental claims reported in state courts was always greater than the number reported in federal courts until 1978. After this time, the number

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<sup>8</sup> These total reported cases figures were provided courtesy of Westlaw.

CHART 4. NUMBER OF COMMON LAW CASES REPORTED PER YEAR (RAW) — FEDERAL

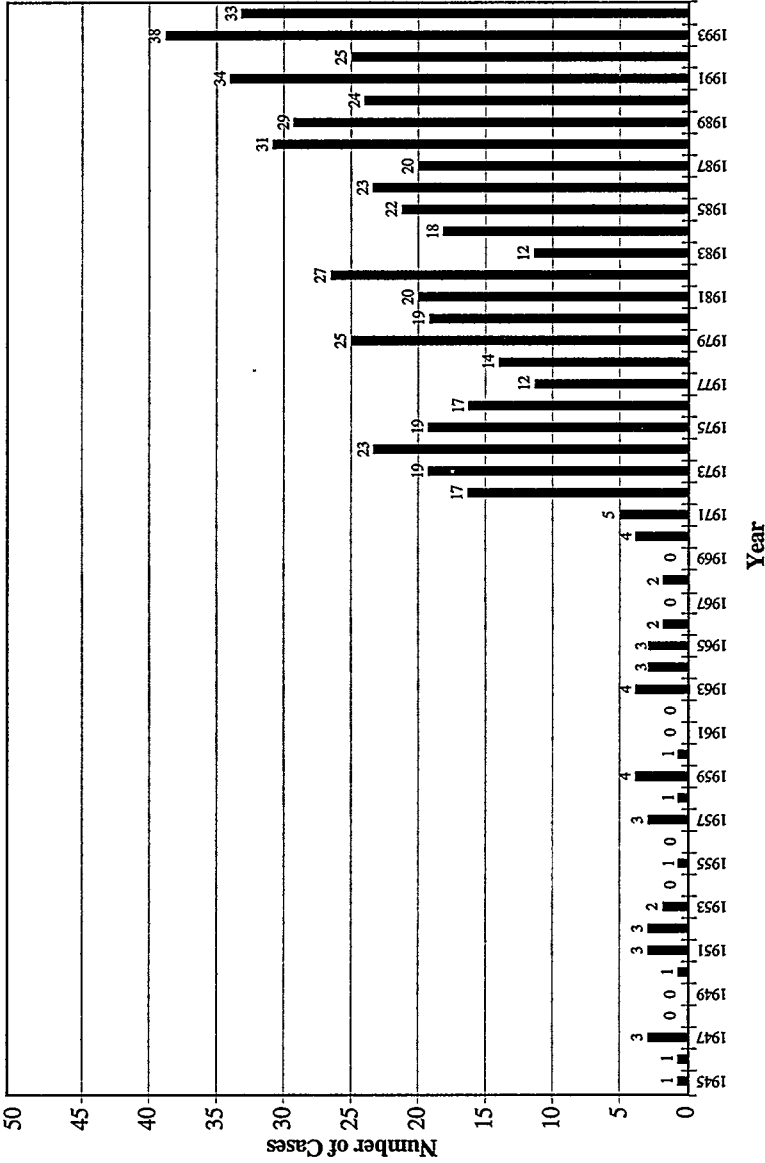


CHART 5. NUMBER OF COMMON LAW CASES REPORTED PER YEAR (RAW) — STATE

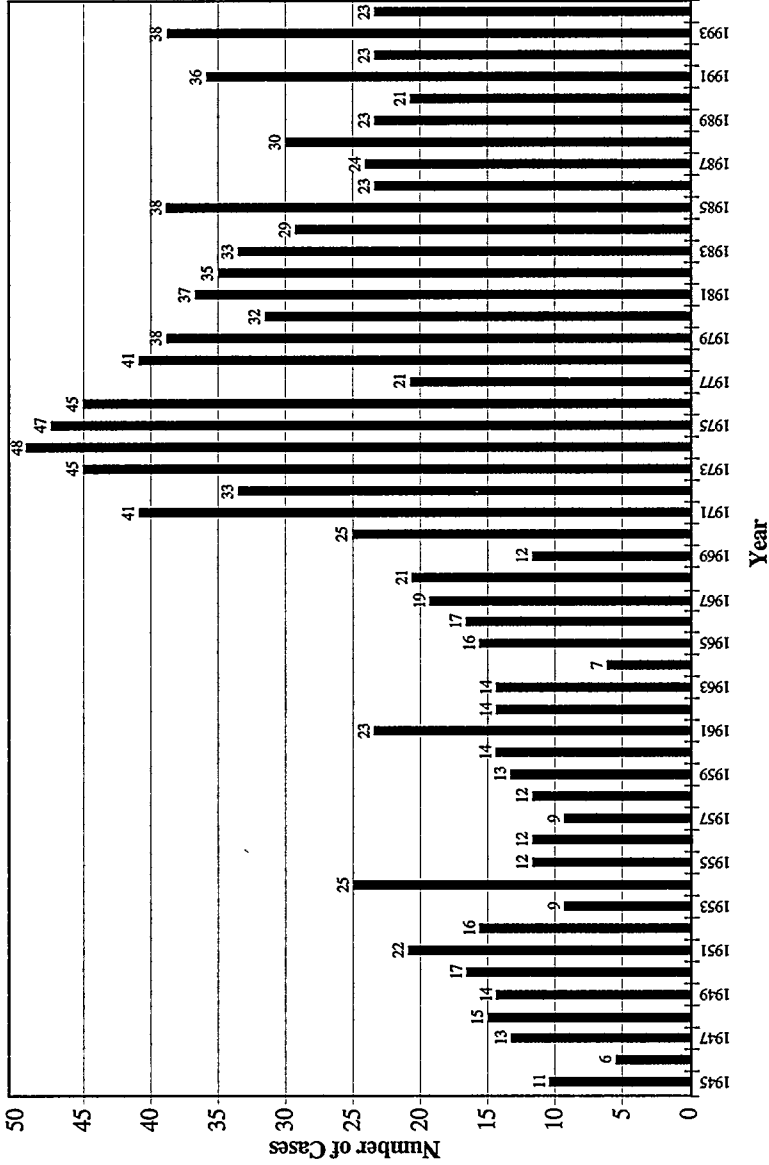
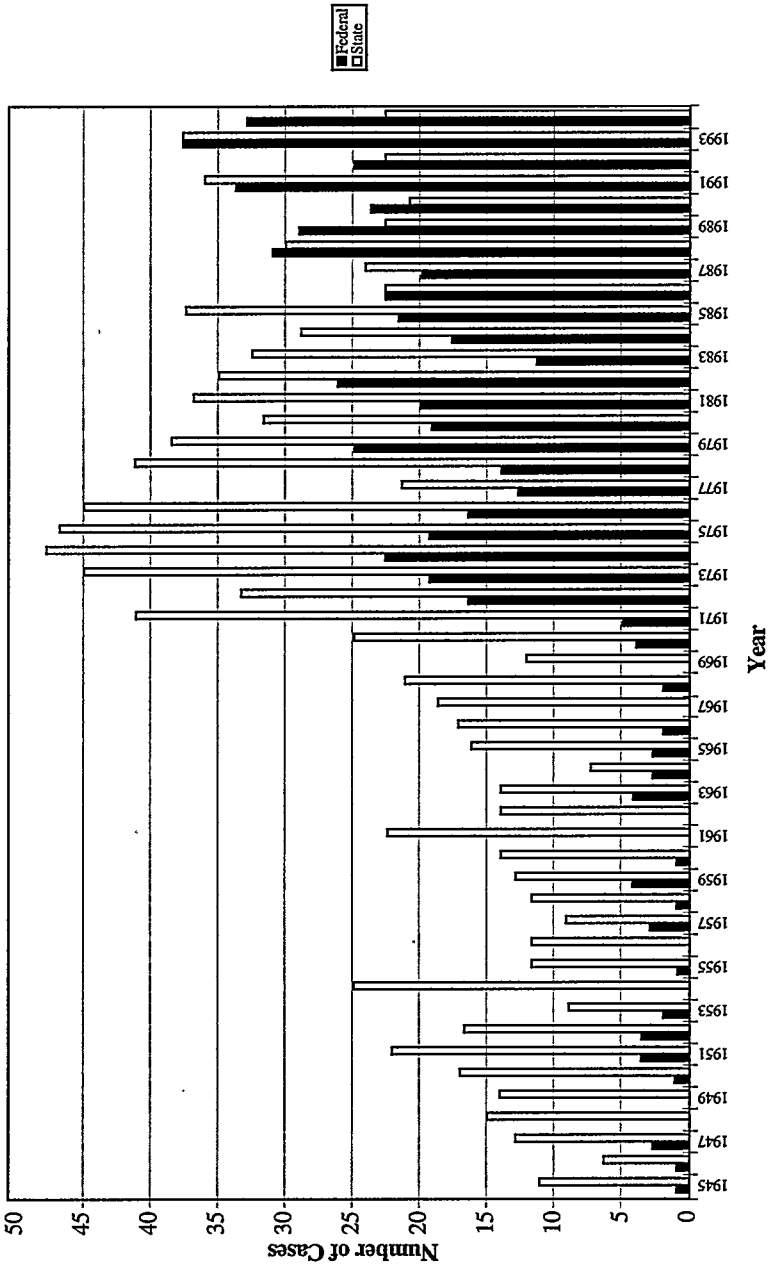


CHART 6. NUMBER OF COMMON LAW CASES REPORTED PER YEAR (RAW) — FEDERAL & STATE



of claims reported in federal courts always exceeded the number reported in state courts, except in 1979 and 1984. Chart twelve makes the point even more vividly. Looking at chart twelve, one might wonder whether, beginning in the last half of the 1970s and continuing through the remainder of the time span, federal courts began to siphon off common law environmental claims from the state courts.

One final observation from both the raw and the real data is that after the dramatic increase in reported common law environmental claims that occurred circa 1970, the number reported in both state and federal courts tapered off for the remainder of the time span. Furthermore, in real terms, the number of common law environmental claims reported in state courts for the 1980s and beyond, on average, were at an all-time low when compared to previous periods for the time span.

### C. DISCUSSION

Interpreting the trends perceived in the data from this Westlaw survey is not a straightforward task. The striking increase in the number of reported common law claims beginning circa 1970 certainly correlates with the advent of the federal environmental statutes. Still, one must not be too hasty in attributing a cause and effect relationship between the federal statutes and the increased number of common law claims. It could be the case that both the increase in common law claims and the passage of the federal statutes were in response to the same underlying cause—a growing societal environmental awareness perhaps.

What is possibly more crucial to the issue of the vitality of environmental common law going forward, is an analysis of the second-discussed observation from the Westlaw survey. What of the apparent siphoning-off, on the part of federal courts, of state common law claims?

One plausible theory for this siphoning-off phenomenon is founded in federal civil procedure. In order for a federal court to exercise jurisdiction over a particular claim, it must have either diversity jurisdiction over the parties to the claim<sup>9</sup> or jurisdiction over the claim itself.<sup>10</sup> If a federal court has jurisdiction over a claim, it may also exercise pendant jurisdiction over state common law claims arising out of the same transaction or occurrence.<sup>11</sup> Each of the Clean Air and Clean Water Acts has a citizen suit provision that allows private citizens to bring claims against polluters in federal court.<sup>12</sup> Perhaps private citizens who found themselves armed with federal environmental citizen suit provisions began bringing claims against polluters beginning in the 1970s, and, to give

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<sup>9</sup> See 28 U.S.C. § 1332 (1996).

<sup>10</sup> 28 U.S.C. § 1331 (1980).

<sup>11</sup> See 28 U.S.C. § 1367 (1990).

<sup>12</sup> 33 U.S.C. § 1365(e) (1986); 42 U.S.C. § 7604(e) (1986).

CHART 7. NUMBER OF COMMON LAW CASES REPORTED PER YEAR (AS A PERCENTAGE OF YEARLY TOTAL IN DATABASE) — FEDERAL

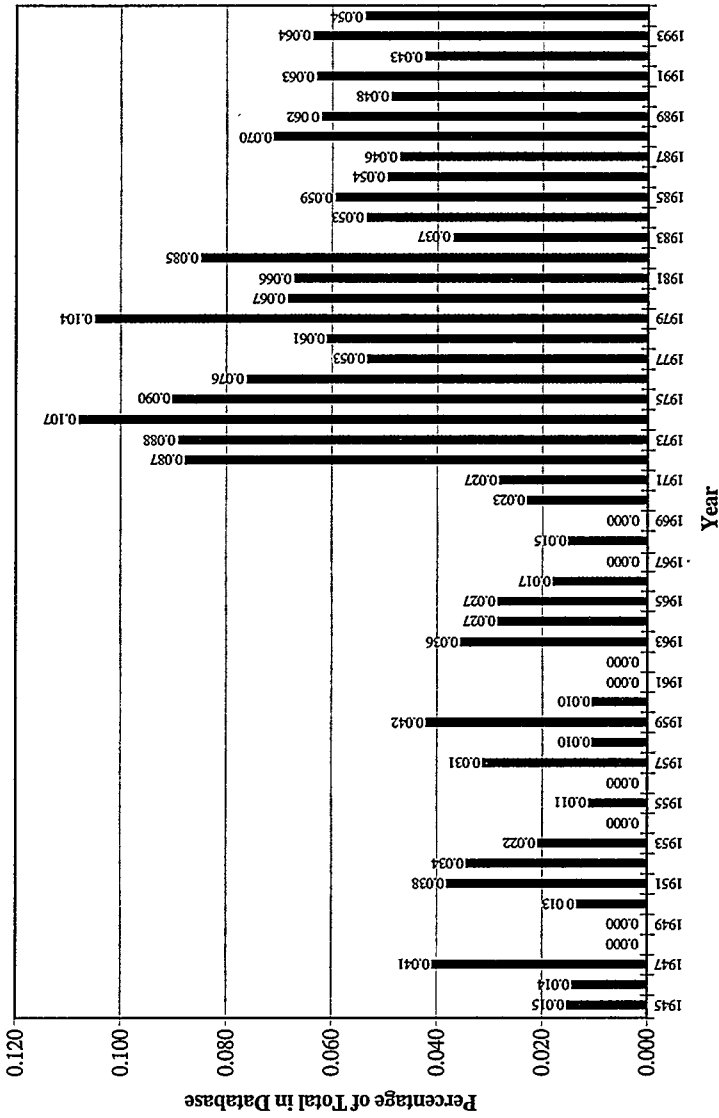


CHART 8. NUMBER OF COMMON LAW CASES REPORTED PER YEAR (AS A PERCENTAGE OF YEARLY TOTAL IN DATABASE) — STATE

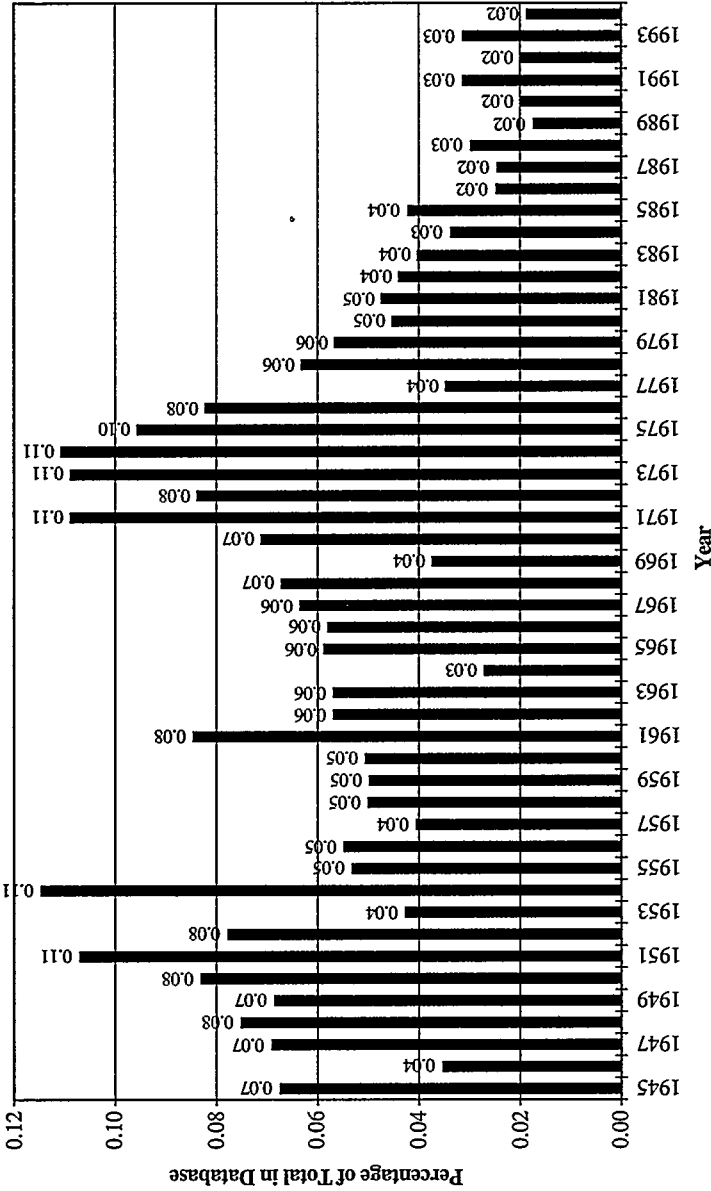




CHART 9. NUMBER OF COMMON LAW CASES REPORTED PER YEAR (AS A PERCENTAGE OF YEARLY TOTAL IN DATABASE) — FEDERAL & STATE

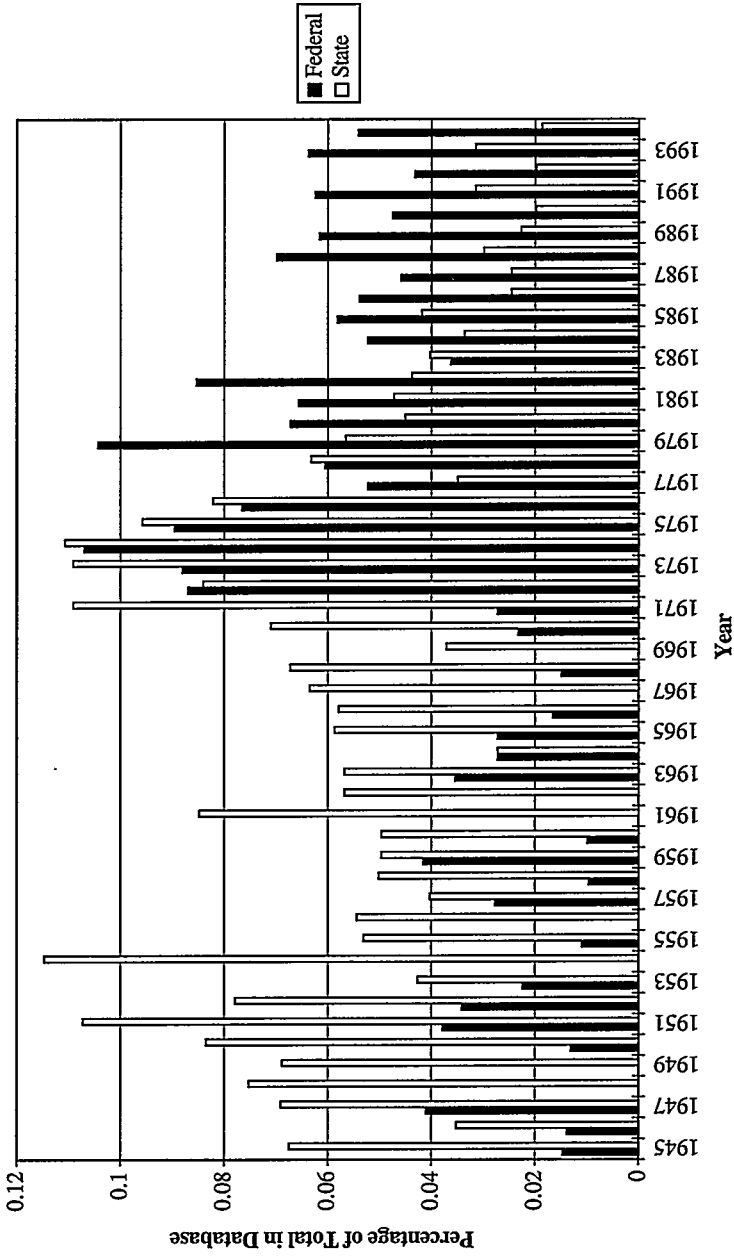


CHART 10. AVERAGE NUMBER OF COMMON LAW CASES REPORTED PER 10,000 FOR EACH FIVE-YEAR PERIOD — FEDERAL

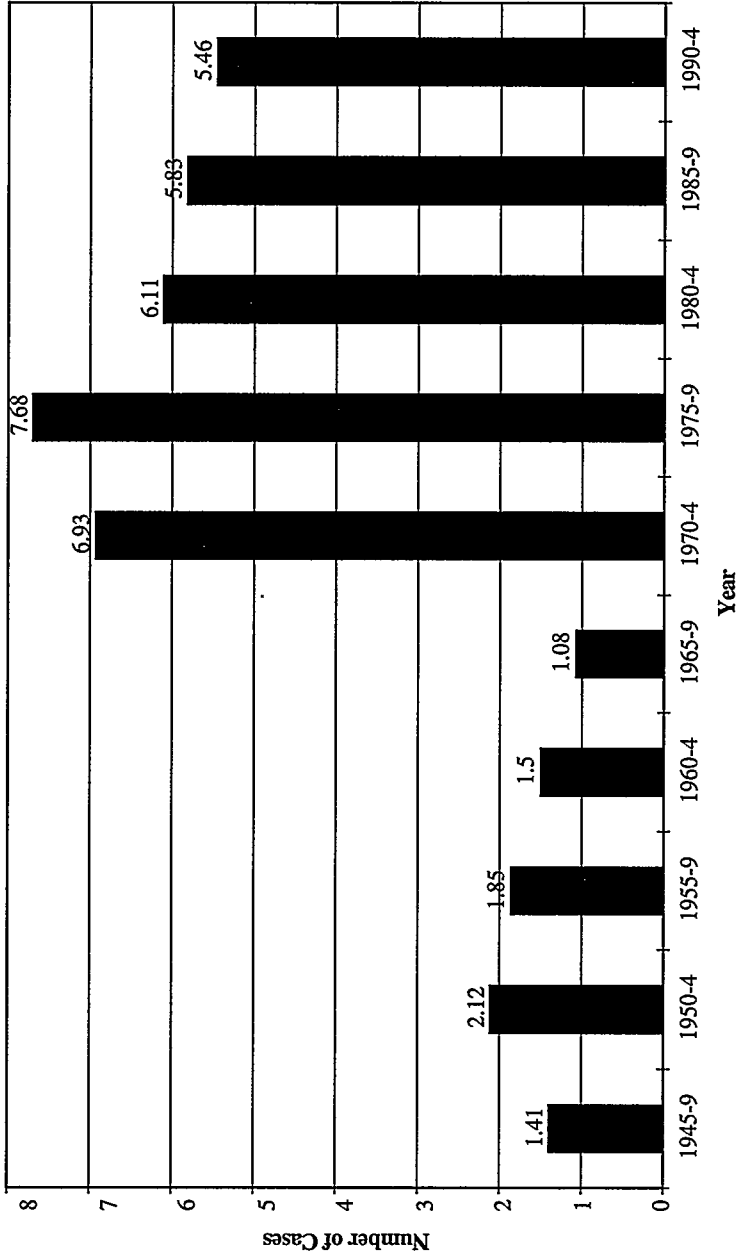


CHART 11. AVERAGE NUMBER OF COMMON LAW CASES REPORTED PER 10,000 FOR EACH FIVE-YEAR PERIOD — STATE

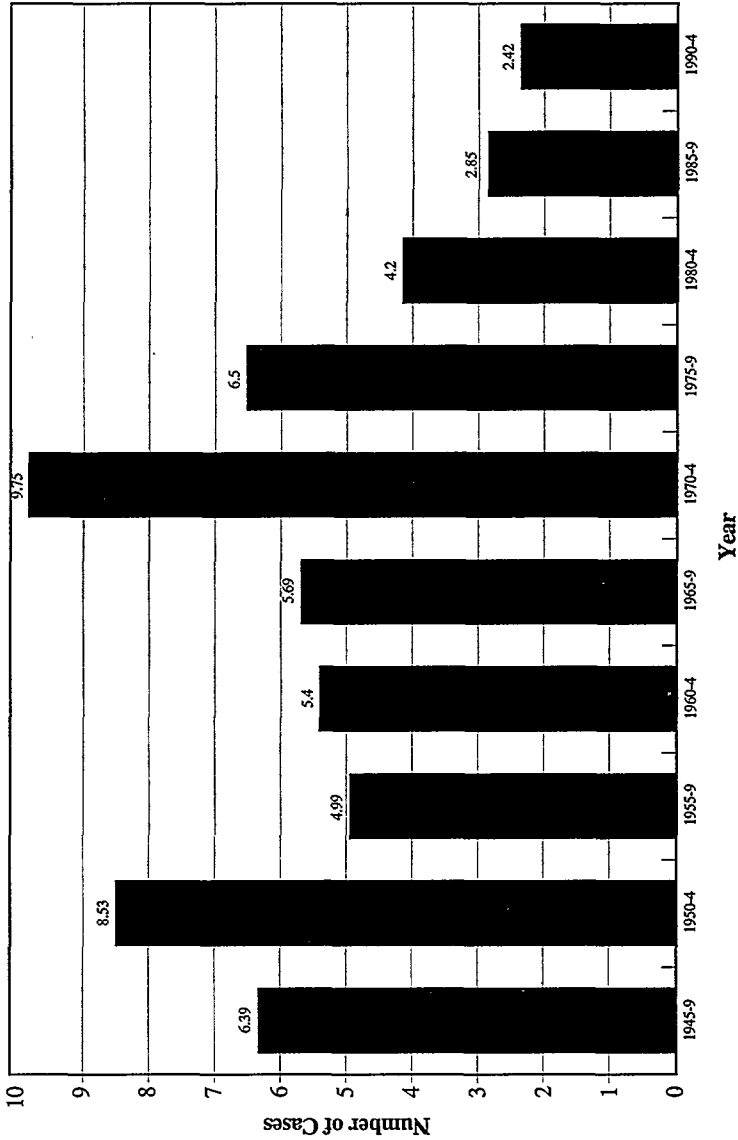
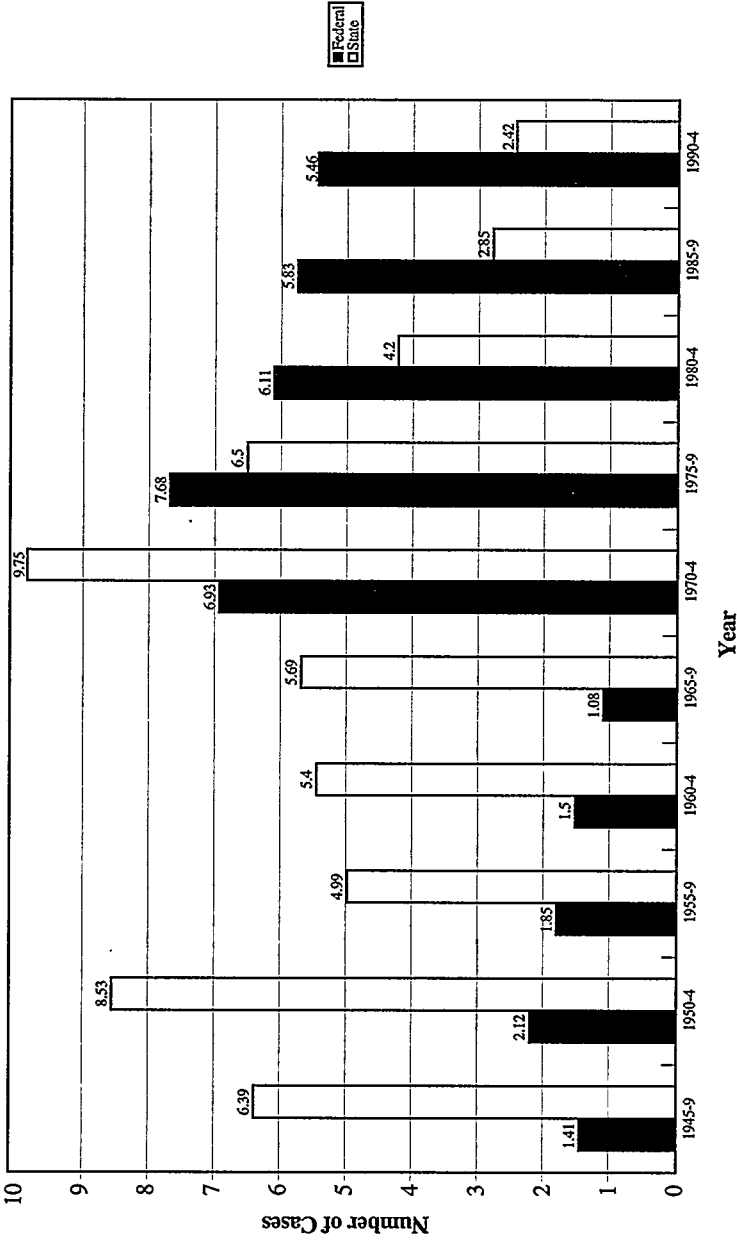


CHART 12. AVERAGE NUMBER OF COMMON LAW CASES REPORTED PER 10,000 FOR EACH FIVE-YEAR PERIOD — FEDERAL & STATE



themselves every chance for success, they brought pendant claims under state nuisance or trespass laws as well. As more claims against polluters were brought in reliance upon the federal citizen suit provisions — some of which had state common law claims thrown in — fewer claims were left to the state courts. In this manner, the federal statutes would have provided the mechanism through which federal courts essentially siphoned off state common law claims from the state courts.

If this explanation for the observed decline of state common law claims after the mid-1970s is correct, such would imply rather negative consequences for the development of environmental common law going forward. As previously mentioned, in real terms, the number of reported state common law environmental claims is at an all-time low. And yet it is in the state courts, where nuisance and trespass claims are more likely to receive careful contemplation, that the common law evolves and develops to meet the needs of a changing society. This type of thoughtful evolution would likely not occur in federal courts where the state common law claims would rarely receive the greater part of the court's attention. Indeed it would likely be the case that, in federal court, the federal claim would receive the bulk of the court's consideration. And so common law environmental actions, although perhaps given lip service in a federal complaint or judicial opinion, would be abandoned as a relic of the pre-statutory past.

Like the environmental litigators survey, the design of this Westlaw survey is also subject to attack on certain fronts. Electronic searches are always exposed to the related problems of over- and under-inclusiveness. If a search is exceedingly overinclusive, the researcher must wade through mountains of irrelevant material. If it is underinclusive, the researcher will never see relevant data.

Another flaw may lie in the nature of the types of cases that are reported. Reported cases are primarily appellate cases. Some might argue that the most substantial developments in the common law occur at the trial court level rather than at the appellate court level. This observation, if true, stands as an attack on much more than the strength of this Westlaw survey. The casebooks from which lawyers are trained and educated rarely have trial court opinions in them. As a rule, we study appellate decisions in order to learn about the evolution and development of the common law on particular subjects. It is within the constraints of this tradition that the results of this Westlaw survey might cause concern for the vitality of environmental common law. If environmental common law is dying at the appellate level, is it not in fact dying?

## CONCLUSION

The studies presented herein are in the family of first generation studies. They are rough and untested. An underlying goal of presenting this data is to stimulate the production of additional data so that we can gain a more accurate understanding of what has happened to the common law over the last half of this century and particularly since circa 1970. Information about its past will aid in forecasting its future.

What do the preliminary data presented in this article suggest about the future of the common law? The uneasy sense of common law viability communicated by environmental litigators in the survey, combined with the exposed siphoning-off of common law actions from state courts to federal courts, promises a grim fate for the common law. These data suggest that the common law is dying at the hands of federal statutory and regulatory law.

The most compelling study is the Westlaw case count. The trend since circa 1975, apparent in the adjusted year-to-year numbers illustrated in chart nine, is made explicit in the five-year numbers presented in chart twelve. The overall number of common law actions against environmental harm being reported is shrinking and, further, reported common law cases at the state level are dwindling in the face of federal statutory dominance. One could readily hypothesize, based on these data, that if the trend continues, there will soon (perhaps by the year 2010) be no common law cases at the state level left to report. It will probably not be too long thereafter before the same extinction will occur at the federal level. Even if this phenomenon does not occur at the federal level, the common law will be little better off, given that the cores of environmental claims brought in federal courts are most likely to be based upon federal environmental statutes.

These preliminary data thus spell out the new task with which we are confronted. We must gather sufficient additional data to assess precisely what is happening to the common law as statutory law continues its expansion. If additional data support the conclusions drawn herein, that the common law is on the road to extinction at the hands of statutory law, then the question will become not whether the common law can survive in the midst of the current statutory environment, but rather, whether we should care to reverse its fate.

