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SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 47 | Number 2

Article 15

2-1-1969

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Recommended Citation

Ben F. Tennille, *Federal Jurisdiction -- The Delimitation of Erie and a Redefinition of "Laws"*, 47 N.C. L. REV. 447 (1969).

Available at: <http://scholarship.law.unc.edu/nclr/vol47/iss2/15>

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good and the individual's right to be free from injury. As the expansion of the "public use" doctrine has greatly augmented government's power to implement the former, *Sayre* seems to be a reaction to this power increase, thereby protecting the latter. However, by protecting the individual's rights, *Sayre* has not impaired the public's interest, for the streamlining of eminent domain procedures assures a quicker implementation of that interest while avoiding any accelerated deterioration of the property that is the subject of that interest.

KENNETH B. HIPP

Federal Jurisdiction—The Delimitation of *Erie* and a Redefinition of "Laws"

In *Ivey Broadcasting Co. v. American Telephone & Telegraph*,¹ plaintiff brought an action in federal court to recover damages for negligence and breach of contract in the rendition of interstate telephone service. Diversity of citizenship not being present, both the complaint and a counterclaim for charges due for the same services were dismissed. The Court of Appeals for the Second Circuit reversed, holding that federal common law was applicable and that the district court had original jurisdiction under 28 U.S.C. § 1331.²

Reversing the normal order of analysis,³ the court first held that federal law was controlling. It found that the field of interstate communications had been preempted by the federal government, especially where the outcome of the case might adversely affect the federal policy of uniformity of rates.⁴ The court held that a congressional policy of uniformity of services could be implied from the congressional policy of uniformity of rates embodied in the Interstate Communications Act of

¹ 391 F.2d 486 (2d Cir. 1968), *rev'd* 234 F. Supp. 4 (N.D.N.Y. 1964).

² 28 U.S.C. § 1331(a) (1964) reads:

The district courts shall have original jurisdiction of all civil actions where-in the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

³ Usually the courts treat the jurisdictional question first because there is a presumption that the court lacks jurisdiction until it is shown that it has jurisdiction over the subject matter. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 14 (1963).

⁴ See *Western Union Tel. Co. v. Speight*, 254 U.S. 17 (1920); *Western Union Tel. Co. v. Boegli*, 251 U.S. 315 (1920); *Postal Tel.-Cable Co. v. Warren-Goodwin Lumber Co.*, 251 U.S. 27 (1919).

1934.⁵ In the absence of federal statutory law governing negligence and breach of contract in interstate communications contracts, the federal law to be applied was that derived from federal judicial decisions. The court then interpreted the word "laws" in § 1331 to include such judicial decisions as a basis for original jurisdiction in the federal judicial system. The federal courts were thereby given jurisdiction where "the dispositive issues stated in the complaint require the application of federal common law. . . ."⁶ The cases requiring this application of federal common law are those in which "a distinctive policy of an Act of Congress requires that federal principles control the disposition of the claim."⁷

This unusual approach by the court is indicative of the interrelationship between the jurisdictional issue and an important judicial development—the delimitation of the *Erie*⁸ doctrine by the federal courts.⁹ This development originated in a reexamination of federal judicial competence by the federal courts.¹⁰ The basic finding of that reexamination was that the federal judiciary possesses the necessary competence to decide the rules of law to be applied in cases which are primarily concerned with the operation of congressional programs. *Erie* is read as holding only that there is insufficient federal judicial competence in those areas in which state law is in no way attributable to federal authority.¹¹ Professor Mishkin has gone so far as to say: "Such [federal judicial] competence is essential to the effective implementation of the legislative powers committed to the national government by the Constitution."¹²

The result of the new approach to *Erie* and federal judicial competence is the growth of a body of "specialized common law"¹³ as opposed to the "federal general common law" that Justice Brandeis declared in *Erie* to be beyond federal judicial power.¹⁴ This "specialized federal

⁵ 48 Stat. 1064, as amended 47 U.S.C. §§ 151-609 (1964).

⁶ 391 F.2d at 492.

⁷ *Id.* at 493.

⁸ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁹ See generally Friendly, *In Praise of Erie—and the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964); Comment, *Erie Limited: The Confines of the State Law in the Federal Courts*, 40 CORNELL L.Q. 561 (1955); Comment, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964); Note, *Clearfield: Clouded Field of Federal Common Law*, 53 COLUM. L. REV. 991 (1953); Note, *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law*, 59 HARV. L. REV. 966 (1946).

¹⁰ See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

¹¹ Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules of Decision*, 105 U. PA. L. REV. 797 (1957).

¹² *Id.* at 797.

¹³ Friendly, *supra* note 9, at 405.

¹⁴ 304 U.S. at 78.

common law" is applied in areas so controlled by federal statutory laws that the courts can claim that those statutory laws, or the federal policies that they embody, are the source of federal judicial authority.

*Sola Electric Co. v. Jefferson Electric Co.*¹⁵ and *Textile Workers Union of America v. Lincoln Mills*¹⁶ exemplify the application of "specialized common law" in areas dominated by federal statutory law. The decisions in these two cases effectuate congressional policy and protect it from possible contravention by state laws. In *Sola*, the Supreme Court ruled that the plaintiff, in responding to a counterclaim, could not invoke a state common law doctrine estopping the licensee of a patent from challenging its validity. If the state estoppel doctrine had been applied the licensor of an invalid patent would have been able to enforce a price-fixing stipulation in a license. Such an arrangement would have been in conflict with the Sherman Act.¹⁷ By applying the federal estoppel doctrine the Court allowed the defendant to challenge the validity of the patent and thus the validity of the price-fixing stipulation. It thereby helped protect and effectuate the federal policy against price restrictions not protected by a patent monopoly. *Sola* was in the federal courts on diversity of citizenship, but the courts have similarly applied "specialized common law" to effectuate a congressional policy where jurisdiction was based on a federal question.¹⁸ In *Textile Workers*, the Supreme Court interpreted a jurisdictional statute as a license to construct a whole body of federal common law governing labor arbitration. The majority of the Court claimed to be implementing the federal policy of promoting industrial peace and order.¹⁹ In both cases federal policy was controlling even though there was no specific statutory law governing the issue in controversy.

The negligence and breach of contract issues in the *Ivey* case are similar to issues in cases that are affected by the delimitation. The issues arise in federally preempted areas and are not precisely covered by a federal statute. Also, the resolution of the issues may adversely affect a federal policy. The principle to be drawn is that the federal courts will apply federal common law to fill the interstices of congressional legislation in order to effectuate congressional policy in federally preempted areas.²⁰

¹⁵ 317 U.S. 173 (1942).

¹⁶ 353 U.S. 448 (1957).

¹⁷ 15 U.S.C. §§ 1-7 (1964).

¹⁸ *E.g.*, *O'Dench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942); *Deitrick v. Greany*, 309 U.S. 190 (1940).

¹⁹ 353 U.S. at 452-56.

²⁰ Comment, *Erie Limited*, *supra* note 9, at 565.

The federal courts feel particularly qualified to make this application where the decision calls for uniformity of rules or involves the interpretation of federal statutes or the intent of Congress²¹

In cases where this delimitation is operative, original federal jurisdiction becomes an asset, if not a necessity. Its value can best be seen by examining the consequences of the alternative solution the *Ivey* court might have accepted.²² Since the state courts can be required to apply federal law where applicable,²³ the court could have allowed the negligence and breach of contract issues to arise through the state courts, with the Supreme Court reviewing any cases that might not conform with the desired uniform federal standard. This solution would face a potential problem of statutory interpretation, for the statute,²⁴ which, in such circumstances, accords the Supreme Court its appellate reviewing power, uses the word "statutes" instead of "laws." Thus, state decisions turning on federal judicial law would not appear to be reviewable. However, in reviewing state decisions interpreting judicially created maritime law, the Court seems either to have ignored the problem or not to have had it called to its attention.²⁵

The alternative approach via state court litigation would also raise the practical problem of the grounds upon which review could be sought. With no written law established, an attorney would be placed in the unenviable position of claiming that a state decision did not conform to an as yet non-declared federal standard. In such a situation few litigants would want to spend the time or money appealing; thus, the state court decisions would be left as controlling in most cases. To undertake so large a task as the creation of a whole body of contract law through this slow process would leave the federal law undeclared for an indefinite period of time. Original jurisdiction for the lower federal courts would speed the development of an acceptable, uniform body of law and insure that federal principles controlled. There would be less need for review of lower court decisions since these courts, by virtue of their more frequent exposure to the problems of federal programs and congressional plans, would be better qualified to deal with them.²⁶

²¹ *Id.*

²² Such an alternative was proposed by the appellants. Brief for Appellants at 10, *Ivey Broadcasting Co. v. American Tel. & Tel.*, 391 F.2d 486 (2d Cir. 1968).

²³ *Testa v. Katt*, 330 U.S. 386 (1947).

²⁴ 28 U.S.C. § 1257(3) (1964).

²⁵ Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 HARV. L. REV. 817, 824 n.36 (1960).

²⁶ Mishkin, *The Federal "Question" in the District Court*, 53 COLUM. L. REV. 157, 195 (1953).

The *Ivey* court, seeing the need for such original jurisdiction, extracted the reasoning from Justice Brennan's dissent in *Romero v. International Terminal Operating Co.*²⁷ and made it the basis of their decision. Justice Brennan had argued that the word "laws" in § 1331 encompasses judicial decisions as well as statutes.²⁸ He argued that jurisdiction should be determined by the law that created the cause of action—whether statutory or judicial.²⁹ In *Romero*, the court neither accepted nor rejected Justice Brennan's argument.³⁰ The court in *Ivey* read the majority in *Romero* as holding only that since the Federal Judiciary Act of 1875³¹ was intended to give the federal courts a new content of jurisdiction, it did not apply to maritime law over which they already had jurisdiction.³²

There are valid arguments for and against Justice Brennan's interpretation. The *Ivey* court points out that the new interpretation is in accord with the purpose behind the Act of 1875,³³ which was to create a forum specifically to protect federally created rights. If the federal courts are going to make judicial law in the absence of statutes in federally preëmpted areas, the causes of action under those decisional laws should be accorded the same weight as causes of action arising under statutory law. In this respect the new interpretation embodies the idea that it is the *source* of the law—state or federal—and not the *form* that is of primary importance in deciding jurisdictional issues. There should be no distinction drawn between statutory and judicial law for jurisdictional purposes.

It can also be argued that the Supreme Court has almost found that federal jurisdiction can be acquired where a federal statute and its policy require that federal principles control the issues. In *Tunstall v. Brotherhood of Locomotive Firemen & Engineers*,³⁴ the emphasis placed on federal policy by the Court and its references to *Clearfield Trust Co. v. United States*³⁵ might be taken as indicative of a willingness to find that jurisdiction could be based on judicially created rights.

²⁷ 358 U.S. 354, 389 (1959) (Brennan, J., dissenting).

²⁸ *Id.* at 393.

²⁹ *Id.*

³⁰ Justice Brennan argued for his interpretation again in *Wheeldin v. Wheeler*, 373 U.S. 647, 653 (1963). Once again the majority did not accept or reject his argument; it based its decision on a finding of no federal cause of action.

³¹ Federal Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470.

³² 391 F.2d at 493.

³³ See ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 77-79 (Tent. Draft No. 5, 1967).

³⁴ 323 U.S. 210 (1944).

³⁵ 318 U.S. 363 (1943).

The fact remains, and weighs most heavily against the new interpretation, that in interpreting § 1331 no federal courts have ever used the word "laws" to mean judicial decisions.³⁶ Thus, there is neither substantial authority nor precedent for the inclusion of judicial decisions in the definition of "laws." It is true that in *Erie* the Supreme Court interpreted the Rules of Decision Act³⁷ as including judicial decisions in addition to statutory enactments.³⁸ But there the Court was reacting to evidence³⁹ that it believed made clear a congressional intent that the word "laws" be read to include judge-made law. The analogy is even further weakened by the holding in the case.⁴⁰ To accept the new interpretation, the Supreme Court will have to find a meaning in statutory language that neither the courts nor the Congress have found for almost a hundred years.

The future of the development of federal common law is uncertain. What is certain, however, is that if the development expands it will create an even greater need, and serve as further justification, for federal lower court jurisdiction in those cases controlled by federal principles. It will strengthen the attitude that it is the source of the law, not the form, that is controlling. This will tend to make the federal courts the overseers of the expansion of jurisdiction. In this respect, and also in their efforts to protect and effectuate congressional legislation, the federal courts are retreating from an established policy of leaving the extension of federal powers to the Congress.⁴¹ The delimitation of *Erie* and the finding of original federal jurisdiction in this case indicate that federal law is no longer solely an interstitial product, building normally upon legal relations established by the states, but has a force and authority all its own.⁴²

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³⁶ Only two courts have expressly excluded judicial decisions from the definition and one of those was an admiralty case. *Foster v. Herly*, 330 F.2d 87, 90 (6th Cir. 1964); *Jordine v. Walling*, 185 F.2d 662, 667 (3rd Cir. 1950) (admiralty).

³⁷ Federal Judiciary Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73.

³⁸ 304 U.S. 64, 66-67 (1938).

³⁹ See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1924).

⁴⁰ Note, *The Expansion of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory*, 66 HARV. L. REV. 315, 324 n.86 (1955).

⁴¹ Mishkin, *supra* note 11, at 814 & n.64.

⁴² Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 545 (1954).