When a Desire for Uniformity Can Lead to Confusion
A Primer on the Reverse-Erie Doctrine of Federal Common Law in Admiralty & Maritime Cases in State and Federal Courts

By F. Daniel Knight[1]

"It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." – The Honorable Justice Antonin Scalia[2]

"Was that wrong? Should I have not done that?
I tell you, I gotta plead ignorance on this thing …" – The Not So Honorable George Costanza[3]

These two quotes, each from a cultural icon, demonstrate the difficulty in applying state law in maritime[4] cases. The purpose of this paper is to attempt to (1) provide the reader with the necessary background to understand this complicated issue, (2) discuss examples of the application of state law in maritime disputes, and (3) provide an updated framework[5] to evaluate these issues in gray or novel areas going forward.

LOOKING BACKWARD TO LOOK FORWARD

Any lawyer reading this paper likely still has flashbacks to one of the most exciting and tense periods in their life … their first year of law school. Irrespective of where the reader matriculated, there are constant details in the 1L experience. Lack of sleep. Stress. Making new friends. Old friends believing you ran away due to lack of communication. Straining your eyes to the point of needing glasses (or a new prescription). Loss of natural Vitamin D from lack of sunlight exposure. And, a somewhat common curriculum. Meaning, of course, common shared painful experiences.

In contracts, we learned "the case of the hairy hand."[6] In property, we learned about Whiteacre, Blackacre, and the legal implications of hunting foxes in New York state.[7] In Constitutional Law, we all learned *Marbury v. Madison*[8] and both sides of substantive due process[9]. We learned how the tort concept of duty does not require privity in the way contractual obligations do.[10]

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[2] *American Dredging Co. v. Miller*, 510 U.S. 443 (1994).
[3] *Seinfeld: The Red Dot* (NBC Television Broadcast Dec. 11, 1991).
[4] Please note that in this paper, "maritime" refers to any case or controversy where appropriate maritime jurisdiction (as we understand it today) could be applied. The term Admiralty is often times synonymous with Maritime, but here it simply refers to those cases and controversies brought in Admiralty under Rule 9(h) of the Federal Rules of Civil Procedure.
[5] Several great legal minds already tackled a framework for Reverse-*Erie* issues. The work of those astute scholars is referenced below.
[6] *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (N.H. 1929).
[7] *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805).
[8] 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803).
[9] Compare *Lochner v. New York*, 198 U.S. 45 (1905) with *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[10] *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 [1916][Cardozo, J.].

In Federal Civil Procedure, every first year law student read *Erie R.R. Co. v. Tompkins*,[11] an ovular 1938 decision from the Supreme Court of the United States. Likewise everyone recalls the central holding of Erie, which is "there is no federal common law" and instead, a federal court sitting in diversity should apply the law of the state in which it sits.[12] But, proctors in Admiralty know *Erie*'s prohibition on federal common law does not apply in maritime cases.

JUSTICE BRANDEIS CHANGES COURSE

Before 1938, federal courts hearing cases under diversity jurisdiction "were generally free, in the absence of a controlling state statute, to fashion rules of 'general' federal common law."[13] An oft-read example of the federal common law power is *Swift v. Tyson*,[14] a Supreme Court of the United States Decision from 1842, which held a federal court hearing a dispute under diversity jurisdiction was free to apply or craft what that court felt was (or should be) the common law in the absence of a statute.[15]

In 1938, the *Erie* decision reversed the trend of proclivity of the federal courts to apply their own common law in diversity cases. In that case, a citizen of Pennsylvania injured himself on a train track owned by the Erie Rail Road Company in Pennsylvania.[16] However, the citizen, a man named Tompkins, chose to sue Erie in New York State, where Erie maintained is headquarters.[17]

Erie wanted Pennsylvania law to apply, because, if it did, Erie owed Tompkins only the duties owed to a trespasser.[18] However, the trial court rejected this argument.[19] The Court of Appeals affirmed the trial court, holding the trial court was not obligated to consider the state law rule.[20] The Supreme Court rejected the reasoning of the trial court and the Court of Appeals, over-ruled *Swift v. Tyson*, and in the process, eliminated approximately one hundred years of federal common law jurisprudence.

Specifically, the Supreme Court in *Erie* held any federal court, exercising diversity jurisdiction under 28 U.S.C. §1332, must apply the law of the state in which the federal court sat.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.[21]

This would seem to be the end of it. But we know this is not the case.

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[11] 304 U.S. 64 (1938).
[12] 304 U.S. 64, 78.
[13] *Boyle v. United Techs. Corp.*, 487 U.S. 500, 516-17 (1988)(Brennan, J., dissenting).
[14] 16 Pet. 1 (1842).
[15] 16 Pet. 1, 18-19.
[16] 304 U.S. at 69.
[17] *Id.*
[18] 304 U.S. 64, 70.
[19] 304 U.S. at 70.
[20] *Id.*
[21] 304 U.S. at 78.

A FOG ENVELOPED MARITIME ENCLAVE AMID AN OCEAN OF STATE LAW

As all good proctors know, the *Erie* doctrine does not apply to cases with a salty flavor, i.e., those arising under the maritime law of the United States. Professor Charles Alan Wright, a pillar of both practicing in and teaching about Federal Courts, considered the matter so settled he devoted one sentence to the subject in his last treatise, writing the Supreme Court of the United States:

> [c]onsistently has interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law.[22]

Twenty years before *Erie*, the Supreme Court decision of *Chelentis v. Luckenbach*[23] *S.S. Co.*[24] held a federal court hearing a case under diversity jurisdiction removed to it from state court must apply the general maritime law over state common law:

> [u]nder the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law.

And, as the Supreme Court held in *Offshore Logistics, Inc. v. Tallentire* in 1986:[25]

> The saving to suitors clause allows state courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-*Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

Nine years later, the Supreme Court determined exercise of federal admiralty jurisdiction does not automatically result in the displacement of all state law. As the Supreme Court stated in *Grubart v. Great Lakes Dredge & Dock Co.* in 1995:

> It is true that with admiralty jurisdiction comes the application of substantive admiralty law. But, to characterize that law, as the city apparently does, as a federal rules of decision, is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the

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[22] Charles Alan Wright & Mary Kay Kane, THE LAW OF FEDERAL COURTS, §60 (6th Ed. 2002), citing cases and to David W. Robertson, ADMIRALTY AND FEDERALISM (1970).

[23] Despite the author's meager research indicating Luckenbach Shipping owned four different vessels named the *Jakob Luckenbach*, there appears to be no relation between this shipping company, founded in New York City, and the Jakob Luckenbach who founded the traditional home of Willie Nelson's Fourth of July Picnic – Luckenbach, Texas.

[24] 247 U.S. 372, 384 (1918).

[25] 477 U.S. 207, 222-23 (1986)(cleaned up).

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