SMU | Dedman School of Law

SMU Law Review

Volume 25 | Issue 3 Article 7

January 1971

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tests of the *Restatement* to the specific facts of the case before them. However, this procedure raises one interesting question. In *Hyde* the court was dealing specifically with a breach of confidence in the appropriation of the trade secret. Though the court in *Hyde* discusses the *Restatement* rule at length, the final holding still relied only on the breach-of-confidence section. This point is accentuated by the fact that since 1958 only one other Texas trade secret case has specifically mentioned the *Restatement* rule, and in that case it was not the basis of the holding because the trade secret issue was dismissed.[42] Because *DuPont* was a case of first impression, however, the Fifth Circuit had to apply what it thought to be the relevant Texas law.[43] *Hyde* is the only case that mentions a cause of action for discovery by improper means. Since *Hyde* used section 757 of the *Restatement* as the basis of its decision, the use of the *Restatement* itself is not without precedent. It seems that it is upon this precedent that the Fifth Circuit decided *DuPont.* In applying the rule to the facts of *DuPont*, however, the court proceeded to adopt an even broader test for "improper" than that used in the *Restatement.*[44] With this decision the court took a large step toward establishing higher standards of commercial morality in the business world by opening the door to civil liability for commercial espionage. It is hoped that the Texas courts will follow this precedent.

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Freeing State Courts To Disregard Lower Federal Court Constitutional Holdings

Richard Lawrence was convicted in state court of violating a city ordinance against interfering with the duties of a police officer.[1] The conviction was appealed to the Supreme Court of Illinois. Before that court ruled on the appeal, the District Court for the Northern District of Illinois, in an unrelated action, declared the ordinance unconstitutional and void on its face.[2] Thereafter the Supreme Court of Illinois affirmed Lawrence's conviction without mentioning the federal court's invalidation of the ordinance.[3] Lawrence then attempted an appeal to the United States Supreme Court, but the Court dismissed the

[42] Furr's, Inc. v. United Specialty Advertising Co., 385 S.W.2d 456 (Tex. Civ. App.—El Paso), *error ref. n.r.e., cert. denied*, 382 U.S. 824 (1964).

[43] Judge Goldberg put the *Erie* question very stylistically: "This is a case of first impression, for the Texas courts have not faced this precise factual issue, and sitting as a diversity court we must sensitize our *Erie* antennae to divine what the Texas courts would do if such a situation were presented to them." 431 F.2d at 1014.

[44] RESTATEMENT OF TORTS § 757, comment *f* at 10 (1939); *see* notes 21, 41 *supra*, and accompanying texts.

[1] CHICAGO, ILL., MUN. CODE ch. 11, § 33 (1966). The ordinance was a broad prohibition against resisting or interfering with a police officer or "offering or endeavoring to do so." This ordinance was repealed by the city of Chicago on March 26, 1968. Landry v. Daley, 410 F.2d 551, 552 (7th Cir. 1969).

[2] Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968). The appeal of this decision by the city of Chicago was dismissed because of mootness since the ordinance had been repealed. Landry v. Daley, 410 F.2d 551 (7th Cir. 1969).

[3] City of Chicago v. Lawrence, 42 Ill. 2d 461, 248 N.E.2d 71 (1969).

appeal by treating the jurisdictional statement as a petition for a writ of certiorari and then denying it.[4] During his confinement Lawrence applied for a writ of habeas corpus in federal district court. The writ was denied, and an appeal was taken to the court of appeals. *Held, affirmed*: State courts are not bound by decisions of the lower federal courts on federal constitutional questions.[5] *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970), *cert denied*, 39 U.S.L.W. 3506 (U.S. May 18, 1971).

I. THE HISTORICAL DICHOTOMY

The constitutional power given Congress to establish a lower federal judiciary[6] was quickly exercised through the Judiciary Act of 1789,[7] which created a dual court system that has been the source of much friction. A feature of the dual court system as it has developed is that both state courts and lower federal courts at times must rule on federal constitutional questions.[8] The early reservations about the creation of a lower federal judiciary,[9] an aspect of the general distrust of the new central government, were later expressed in state assertions of the powers of nullification and interposition.[10] Although this states' rights attitude has endured,[11] it has not prevented the federal judiciary from being firmly established as a legitimate and authoritative arm of the federal government. Federal jurisdiction and decision-making power have been extended and delineated.[12]

In the determination of federal rights under the Constitution it is no longer disputed that under the supremacy clause[13] the Supreme Court's decisions are binding on all lower courts, both state and federal.[14] What has never been

[4] Lawrence v. City of Chicago, 396 U.S. 39 (1969).

[5] As the court pointed out, in a particular dispute in which a lower federal court has jurisdiction over the subject matter and the parties, its adjudication is the law of the case and thus binding. United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1076 (7th Cir. 1970); *see* Falgout v. People, 459 P.2d 572 (Colo. 1969). Another issue resolved by the court, but not discussed in this Note, was the question of the mootness of the application for a writ of habeas corpus. Lawrence had been released, but the court held that the appeal was not moot because there were "potential disabilities or burdens" which might have resulted from the conviction being on his record. *Id.* at 1074-75.

[6] U.S. CONST. art. III, § 1.

[7] Act of Sept. 1789, ch. 20, § 11, 1 Stat. 73.

[8] *See* United States v. Bank of New York, 296 U.S. 463 (1936). As this relates to the problems of uniformity of laws, *see* Comment, *The State Courts and the Federal Common Law*, 27 ALBANY L. REV. 73 (1963).

[9] *See* 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 124-25 (1911).

[10] These state efforts are analyzed in *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1 (1913), and Note, *Interposition vs. Judicial Power—A Study of Ultimate Authority in Constitutional Questions*, 1 RACE REL. L. REP. 465 (1956).

[11] An excellent example of modern states' rights philosophy can be found in C. BLOCH, STATES' RIGHTS—THE LAW OF THE LAND (1958).

[12] *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (political questions); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), and Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933) (declaratory judgments); Moore v. New York Cotton Exchange, 270 U.S. 593 (1926) (ancillary jurisdiction).

[13] U.S. CONST. art. VI, § 2, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[14] *See, e.g.*, Henry v. City of Rock Hill, 376 U.S. 776 (1964); South Carolina v. Bailey, 289 U.S. 412 (1933); Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209 (1931).

satisfactorily decided is the degree of authority with which lower federal courts speak in this area. The Supreme Court has not directly decided the matter,[15] and there has been no real weight of authority established by lower court decisions.

II. TRADITIONAL APPROACHES TO THE PROBLEM

Two distinct general approaches seem to have been applied in regard to this problem area. First, judicial and statutory means of avoiding friction between federal and state courts have limited the incidence of cases presenting the question. Secondly, the issue has been expressly confronted in a sparse and inconsistent line of federal and state decisions.

Begging the Question. Perhaps the explanation for the paucity of authority on the question of the binding effect of lower federal court decisions is that traditionally direct conflicts have been avoided by the use of judicial abstention. The question of the duty of a state court to follow a lower federal court decision will not arise when the federal court abstains from the case, even though it has jurisdiction. A leading example of such forbearance is *Railroad Commission v. Pullman Co.*,[16] in which a state action was being challenged in federal court on constitutional grounds, but there were questions of state law which might have made unnecessary any determination of constitutionality. The Court ordered the trial court to abstain, but to retain jurisdiction until the state court ruled on the state matters. Clearly such abstention would not be appropriate in a case in which the state statute would be unconstitutional no matter how the state court interpreted it,[17] nor when the matters of state law are clear.[18] Another possibly important exception to abstention is in cases in which "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."[19] The abstention doctrine is not statutory;[20] it is rather

Of course the Supreme Court is physically unable to answer all constitutional issues raised. Regarding the extent to which time limits Supreme Court review, see *The Supreme Court, 1950 Term*, 65 HARV. L. REV. 107 (1951). *See also* Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465 (1953).

[15] The Supreme Court has on several occasions spoken in language which might indicate the direction it would take were it directly confronted with the question presented in *Lawrence*. "The decisions of the courts of the United States within their sphere of action, are as conclusive as the laws of Congress made in pursuance of the Constitution." Mayor v. Cooper, 73 U.S. 247, 253 (1867). In Cooper v. Aaron, 358 U.S. 1, 18 (1958), the Court referred to "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, . . . [which] has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." Again, in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964), the Court spoke of "the primacy of the federal judiciary in deciding questions of federal law."

[16] 312 U.S. 496 (1941).

[17] Harman v. Forssenius, 380 U.S. 528 (1965).

[18] City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958).

[19] Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965). Admittedly it will take further decisions by the Court to make clear the extent and applicability of the *Dombrowski* doctrine. There are indications that the Court may narrowly construe *Dombrowski*. In several recent cases the Court has tersely denied relief under the doctrine. *See, e.g.*, Zwicker v. Boll, 391 U.S. 353 (1968); Brooks v. Briley, 391 U.S. 361 (1968). Most often relief has been denied by using the rationale that an adequate showing of potential irreparable injury has not been made. *See, e.g.*, Dyson v. Stein, 401 U.S. 200 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971).

[20] It has been suggested that abstention should generally be made discretionary, but

a developing judicial policy, a "judge-fashioned vehicle for according appropriate deference to the respective competence of the state and federal court systems."[21]

There have been several attempts by Congress to limit the area of state-federal judicial friction. Since 1793 the enjoining of state proceedings by federal courts has been restricted.[22] The applicability of these statutes has not been free from ambiguity.[23]

The three-judge court acts provide for a special court of three judges, with direct appeal to the Supreme Court, when an injunction is sought against the enforcement of state statutes by state officers.[24] Three judges are required only when injunctive relief is sought; therefore, a single federal judge can declare a statute unconstitutional when it is challenged but restraint against its enforcement is not sought.[25]

While the doctrine of abstention and the statutes mentioned have limited and defined the areas in which lower federal courts may act to obstruct state enforcement of challenged state laws, they have only avoided the question of the duty of a state court to follow a lower federal court's constitutional holding.

Facing the Problem Squarely. The question does not seem to have been considered extensively in the federal courts; however, the Fourth Circuit has held that "state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state . . . [but] they are not obliged to do so."[26] Prior to *Lawrence* this decision stood alone in the federal courts.

The state courts have not failed to consider the question, but they have failed to establish any clear weight of authority.[27] Most of the decisions are terse and conclusory. For instance, the Oklahoma court of criminal appeals has declared it to be "axiomatic that in a case involving an interpretation of federal statutes . . . state courts of last resort are bound by all pertinent applicable federal statutes and decisions . . . ."[28] Some state courts have based their decisions on policy rationale. The Supreme Court of California has stated:

> Any rule which would require the state courts to follow in all cases the decisions of one or more lower federal courts would be undesirable, as it would have the effect of binding the state courts where neither the reasoning nor the number of federal cases is found persuasive. Such a rule would not sig-

that abstention of the type stated in the *Pullman* case should be made statutory. AMERICAN LAW INSTITUTE, STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371(c) (Official Draft 1969).

[21] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964).

[22] Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334. The present anti-injunction statute is 28 U.S.C. § 2283 (1964).

[23] *See* Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 482 (1965).

[24] 28 U.S.C. § 2281 (1964) (originally enacted as Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557).

[25] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[26] Owsley v. Peyton, 352 F.2d 804, 805 (4th Cir. 1965).

[27] The state authority is analyzed in Annot., 147 A.L.R. 857 (1943).

[28] Ellis v. State, 386 P.2d 326, 328 (Okla. Crim. App. 1963).

> nificantly promote uniformity in federal law, for the interpretation of an Act of Congress by a lower federal court does not bind other federal courts except those directly subordinate to it.[29]

On the other hand, the Supreme Court of Pennsylvania has reasoned that forum shopping would result were a state court not bound to follow a clear prior federal court holding.[30] The court held that, lacking a Supreme Court decision in point, the Third Circuit is the "ultimate arbiter in Pennsylvania" on federal questions.[31] The Supreme Court of Michigan has "adhered to the rule that a State court is bound by the authoritative holdings of Federal courts upon Federal questions."[32] The court added, however, that when "the Federal circuit courts of appeals themselves are in disagreement upon the proper interpretation of a Federal act," it feels free to select the interpretation which seems most reasonable.[33]

An examination of the federal and state decisions reveals that there is a deep split in the authorities and that the analyses used by the courts in deciding the question have not been satisfactory.

III. UNITED STATES EX REL. LAWRENCE V. WOODS

The Seventh Circuit in *Lawrence* held that state courts are not bound by constitutional holdings of lower federal courts. The court "found no federal court decisions dealing directly with the point."[34] Thus the 1965 Fourth Circuit opinion[35] and past Supreme Court dicta on the effect of the supremacy clause[36] were ignored. The court instead briefly mentioned the split in the

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[29] Rohr Aircraft Corp. v. County of San Diego, 51 Cal. 2d 759, 764, 336 P.2d 521, 524 (1959), *rev'd on other grounds*, 362 U.S. 628 (1960). *See also* People v. Bradley, 1 Cal. 3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969). One writer has agreed with the court:

> The policy of uniformity which prompted the ruling in the *Erie* case does not militate against the conclusion that lower federal court decisions need have no more than persuasive effect in the state courts . . . . Whichever forum, state or federal, is chosen, the same opportunity for ultimate resolution by the Supreme Court is available. The uniformity thus assured prevents advantage being taken of temporary disharmony between state and lower federal court decisions.

Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943, 947, 948 (1948).

[30] Commonwealth v. Negri, 419 Pa. 117, 213 A.2d 670 (1965). A contrary opinion has been expressed:

> Evidently the prevention of forum shopping is not a factor in the federal rights situation. In FELA cases, in fact, Congress seems to have encouraged forum shopping for plaintiffs by granting concurrent jurisdiction to state courts. Actually, the federal-rights doctrine amounts to a sort of money-back guarantee to such a forum shopper. If a plaintiff picks a state court but it turns out that he made a mistake, he can rely on federal procedure to help bail him out.

Note, *Procedural Protection for Federal Rights in State Courts*, 30 U. CIN. L. REV. 184, 192 (1961).

[31] 213 A.2d at 672.

[32] Schueler v. Weintrob, 360 Mich. 621, 105 N.W.2d 42, 48 (1960). One scholar would seem to concur. "The supremacy clause, of course, makes plain that if a state court undertakes to adjudicate a controversy it must do so in accordance with whatever federal law is applicable." Hart, *The Relations Between Federal and State Law*, 54 COLUM. L. REV. 489, 507 (1954).

[33] 105 N.W.2d at 48. *See also* Robertson Lumber Co. v. Progressive Contractors, Inc., 160 N.W.2d 61 (N.D. 1968).

[34] 432 F.2d 1072, 1075 (7th Cir. 1970).

[35] *See* note 26 *supra*, and accompanying text.

[36] *See* note 15 *supra*.

state courts on the question, and then chose to adopt the view of the New Jersey and Iowa state courts.[37] The decision does not make clear the magnitude of the split on the matter in the state courts, nor does it detail the various rationale used by the state courts in deciding the matter.

Deciding not to treat the issue in the context of the historical conflict between state and federal courts, the court thus omitted any reference to abstention or to the statutory restrictions mentioned above.[38] Nor was any policy argument advanced. The reasoning used was simply that Supreme Court rulings on federal questions are binding on state and federal courts, but that since lower federal courts exercise no appellate jurisdiction over state courts, the decisions of lower federal courts are not binding on state courts. Thus, state courts may disregard prior lower federal court determinations of federal questions,[39] and questioned state conduct such as that involved in *Lawrence v. Woods* may continue until it is specifically enjoined or until the state statute being enforced is held unconstitutional by the Supreme Court.

IV. CONCLUSION

In a two-page portion of the *Lawrence* opinion the Seventh Circuit cursorily disposed of an extremely important constitutional issue. The decision seems to raise more questions than it answers. When a lower federal court has declared a state statute unconstitutional, should not the decision be binding on the state courts if the state does not appeal the decision? If the Supreme Court denies certiorari, are the state courts free to disregard the lower federal courts? What about the proposition that since a federal circuit court encompasses the entire state, its ruling should be binding on the state's courts? The court did not discuss these questions. The attitude of the court seems to have been that if a complainant chooses to have his federal rights determined in a federal court, he must be able to persuade the court to grant an injunction against the enforcement of the state statute (something federal judges are naturally reluctant to do)[40] or else he must see that the case gets to the Supreme Court (something which he has little control over).[41]

The failure of the Seventh Circuit to weigh any policy considerations in its decision seems most unfortunate.[42] Surely uniformity of federal law would

[37] The court cited State v. Coleman, 46 N.J. 16, 214 A.2d 393 (1965), and Iowa Nat'l Bank v. Stewart, 214 Iowa 1229, 232 N.W. 445 (1930).

[38] *See* notes 22 and 24 *supra*, and accompanying text.

[39] The court limited its holding to the facts of the case, that is, a situation where the two actions are unrelated. *See* note 5 *supra*.

[40] *See* Douglas v. Jeannette, 319 U.S. 157 (1943); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941). *See also* 22 SW. L.J. 537 (1968). A strong statement of the general reluctance of federal judges to interfere with state proceedings was given by Mr. Justice Holmes. 5 THE SACCO-VANZETTI CASE, TRANSCRIPT OF THE RECORD 5516 (1929). Mr. Justice Cardozo delivered a statement similar in nature. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

[41] *See* note 14 *supra*. Of course, if the complainant wins in the lower federal court, the question of appeal is entirely in the hands of the state authority.

[42] It should be noted, however, that the case seems to have been argued primarily on a power basis: "An analysis based on power, which is the underlying issue, leads to the conclusion that a decision of a lower federal tribunal declaring federal law is, as are the decisions of this Court, imbued with the strength of the Supremacy Clause." Petitioner's Brief for Certiorari at 12, United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3506 (U.S. May 18, 1971).