IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 50 Original

STATE OF VERMONT, a sovereign state,
Montpelier, Vermont,

Plaintiff,

v.

STATE OF NEW YORK, a sovereign state,
Albany, New York,

and

INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

MEMORANDUM OF INTERNATIONAL PAPER COMPANY ON WHETHER FEDERAL OR STATE LAW GOVERNS SUBSTANTIVE ISSUES

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QUESTION PRESENTED

Whether federal or state law would govern the substantive issues sought to be presented for decision in this original action.

INTRODUCTORY SUMMARY

This case involves two related but distinct disputes, one between the State of Vermont and the State of New York, the other between the State of Vermont and International Paper Company. This memorandum discusses primarily the substantive law applicable to the latter dispute inasmuch as we believe that the proper choice of law as to the former is not open to serious question.

As to the claims by the State of Vermont against the State of New York, we submit that considerations of conflicting sovereignty indicate that such claims should be governed by interstate or federal common law, which is comprised of "[f]ederal law, state law, and international law, as the exigencies of the particular case may demand," Kansas v. Colorado, 185 U.S. 125, 147 (1902). In the circumstances of this case the laws of Vermont and New York, while not controlling with respect to the dispute between these two states, should be accorded substantial weight.

As to the dispute between Vermont and International Paper Company, Vermont's complaint, as we noted in our main brief, is grounded essentially upon common law claims of nuisance and trespass which should be governed by applicable state law. Upon further consideration in

response to this Court's inquiry, we adhere to this view. This Court's decision in Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), as well as relevant policy and historical factors, require that such claims be adjudicated under state law because they involve issues bottomed on local law which raise no serious issue of federal law.

ARGUMENT

STATE LAW GOVERNS THE CLAIMS ASSERTED BY VERMONT AGAINST INTERNATIONAL PAPER COMPANY

In Wyandotte, this Court denied the State of Ohio leave to file a complaint against several corporate defendants based on a theory of common law nuisance arising out of the alleged pollution of interstate waters. Vermont's claim here against International Paper Company is essentially the same. In declining to exercise its original jurisdiction in Wyandotte, the Court observed that the growing multitude of disputes between states and non-residents militates against the exercise of original jurisdiction over issues bottomed on state law as to which this Court has no special expertise, and that diverting this Court's energies into such unfamiliar areas would necessarily reduce its ability to deal with the increasing range of problems in the federal sphere where this Court's paramount responsibilities should lie. 401 U.S. at 497-99. Particularly is this true where state courts, under modern principles of jurisdiction

> "have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy,

and they would decide it under the same common law of nuisance upon which our determination would have to rest." 401 U.S. at 500.

The decision in Wyandotte was premised on the proposition that state law applied to the issues of common law nuisance raised by Ohio's complaint, and Mr. Justice Harlan expressly pointed out that Ohio's claims would have to be adjudicated under state law. 401 U.S. at 498-99n.3. Mr. Justice Douglas, although dissenting on other grounds, agreed that "[i]n light of the history of water pollution control efforts in this country it cannot be denied that a vast residual authority rests in the States. And there is no better established remedy in state law than authority to abate a nuisance. [footnote omitted]" 401 U.S. at 510.

Much earlier this Court had indicated, albeit in dictum, that state law controls the decision of substantive issues with respect to common law nuisance claims brought by a state against citizens of other states in original jurisdiction actions. Pennsylvania v. Wheeling and Belmont Bridge Co., 54 U.S. (13 How.) 518, 563 (1851).

Historical considerations dealing with the grant of original but non-exclusive jurisdiction in controversies between states and citizens of other states also lead to the conclusion that state law should be applied here. The grant of original jurisdiction in such controversies and the diversity jurisdiction evolved from similar underlying considerations. The primary concern of the framers of the Constitution in conferring original jurisdiction on this Court to hear controversies between a state and citizens of other states "was the belief that

no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. [citations omitted]" Ohio v. Wyandotte Chemicals Corp., 401 U.S. at 500. Those are the same considerations which motivated the grant of diversity jurisdiction. C. Wright, Federal Courts § 23, p. 73 et seq. (2d ed. 1970). Analysis of the proceedings of the Constitutional Convention supports this conclusion:

> "The grant of jurisdiction in controversies between a state and citizens of another state had no specific forerunner in any of the five plans. The clause first appears in a marginal note in Rutledge's handwriting on Randolph's draft for the Committee of Detail, and was reported out by that committee in its present form. There was no discussion of it. Without doubt the underlying considerations were akin to those which prompted the diversity clause -- indeed, this clause is a fortiori; and the diversity jurisdiction, too, stirred no comment. [footnotes omitted]" H. Hart and H. Wechsler, The Federal Courts and the Federal System 23-24 (1953)

Accordingly, state law should govern the dispute between Vermont and International Paper Company[1],

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[1] Vermont has also alleged an impediment to navigation and an alteration of the Vermont-New York boundary line. These unsupported claims provide no reason for departure from the principles expressed in Wyandotte. There is no showing, nor can there be, that these assertions, if true, are anything more than de minimis and hence not of sufficient magnitude to warrant exercise of this Court's original jurisdiction. Alabama v. Arizona, 291 U.S. 286, 292 (1934); New York v. New Jersey, 256 U.S. 296, 309 (1921); cf. Louisiana v. Mississippi, 202 U.S. 1, 35-36 (1906). Vermont further has asserted interference with a claimed constitutional right to a "protected environment." If this alleged deprivation of a putative constitutional right is appropriate for judicial consideration and development, that should be done through trial and appellate procedures and not by exercise of the original jurisdiction of this Court.

just as under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), federal courts must apply state law in diversity cases. Note, Rules of Decision in Nondiversity Suits, 69 Yale L.J. 1428, 1433 (1960). As the Court stated in Erie:

> "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." 304 U.S. at 78.

The considerations underlying the grant of exclusive original jurisdiction to this Court to hear controversies between states were quite different. There the concern was not with even-handed application of local law, but rather assurance that in a dispute between equal sovereigns, neither could impose its laws on the other and that only this Court, applying "[f]ederal law, state law, and international law, as the exigencies of the particular case may demand," could settle the dispute in such a way as to recognize the equal rights of both states, and at the same time establish justice between them. Kansas v. Colorado, 206 U.S. 46, 97-8 (1907). See also H. Hart and H. Wechsler, The Federal Courts and The Federal System 23.

Nor is there any legislative requirement or suggestion that federal law should govern here. On the contrary, Congress has expressly declined, in the enactment of water pollution and other ecological legislation, to pre-empt state law. Under these circumstances, there is no basis for imposition by this Court of a governing law inconsistent with that directed by Congress.

In determining whether federal or state law should govern the resolution of an issue, this Court first ascertains

whether Congress has spoken on the subject. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68-69 (1966). In the field of water pollution, Congress has clearly declared a policy of preserving the rights of the states. The Federal Water Pollution Control Act provides that:

> "(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution . . .
>
> (c) Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1151 (1970).

Under the caption "[e]ncouragement of State and interstate action" it is further provided that, except where the Attorney General has actually obtained a court order on behalf of the United States, "State and interstate action to abate pollution of interstate or navigable waters . . . shall not . . . . be displaced by Federal enforcement action." 33 U.S.C. § 1160(b) (1970).

That Congress did not intend to pre-empt the field of water pollution is further emphasized by the legislative history of the Federal Water Pollution Control Act and its amendments:

> "The bill reaffirms and clarifies congressional policy to recognize, preserve and protect the primary responsibilities and rights of the States in preventing and controlling water pollution.
>
> Nothing in the bill is intended to impair or in any manner affect any right or jurisdiction of the States with respect to the waters of the States, including but not limited to the power, authority, and jurisdiction of the States to enforce State water pollution control laws and regulations.

> The committee has exercised extreme care to assure that the language of the bill will allow continued comprehensive action by the States in the field of water pollution control. There certainly can be no assumption that the Federal interest in the field of water pollution abatement authorized by this bill is so dominant as to preclude State action. The proposition is well established that the protection of the health and welfare of the citizens of a State is a proper subject for the exercise of the State police power. The bill provides specifically for cooperation with the States and its aim is to encourage and assist States and local communities in their efforts to control water pollution, not to usurp or preempt their rights, powers, or responsibilities." H.R. Rep. No. 306, 87th Cong., 1st Sess.; 2 U.S. Code Cong. & Ad. News 2076, 2079 (1961).

Moreover, the Environmental Quality Improvement Act of 1970, while stating the general policy of Congress in protecting the environment, provides that:

> "The primary responsibility for implementing this policy rests with State and local Governments." 42 U.S.C. § 4371(b)(2) (1970).

Inasmuch as Congress did not choose to replace state law with federal law in the field of water pollution, we submit that this Court should be most hesitant to do so:

> "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating Erie R. Co. v. Tompkins, 304 US 64. The instances where we have created federal common law are few and restricted." Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

This Court often has declined to create new federal common law even in areas predominantly governed by federal statute. Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966); United States v. Yazell, 382 U.S. 341 (1966); United States v. Brosnan, 363 U.S. 237 (1960); De Sylva v. Ballentine, 351 U.S. 570 (1956). This policy is particularly compelling where, as here, there is no well-developed

federal common law of nuisance or trespass and no statutory framework to which this Court could refer in deciding specific issues. In effect, any declaration that federal common law governs would necessarily be made against a tabula rasa which would require many decisions over a period of years before any reasonably well-developed federal common law could be said to exist.

Thus, even assuming that this Court devoted a significant portion of its time to the resolution of such controversies, an extended period of unsettled and uncertain law would be inevitable. Nor would the task under such circumstances be a small one:

> "History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth. In Missouri v. Illinois, 200 U.S. 496, 520-522 (1906), Justice Holmes was at pains to underscore the great difficulty that the Court faced in attempting to pronounce a suitable general rule of law to govern such controversies." Ohio v. Wyandotte Chemicals Corp., 401 U.S. at 501.

The result would be to impede the resolution of this country's environmental problems.

Tort claims such as those asserted here by Vermont against International Paper Company are distinguishable from cases involving interstate compacts such as Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) and West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951), which understandably applied interstate common law. Hinderlider, not being an original action, does not consider the source or content of the law to be applied in such actions between states and citizens of other states. Hinderlider simply stands for the proposition that once an apportionment of rights among states

with respect to interstate waters has been made by interstate compact, that apportionment is binding upon and precludes the assertion under state law of rights inconsistent therewith by any of the states concerned or their citizens.[2]

Finally, we submit that Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), decided shortly before Wyandotte, is erroneous. There Texas sued several New Mexico citizens for polluting an interstate waterway. The court held that a state has a federal "quasi-sovereign ecological right" of protection "having basis and standard in federal common law." 441 F.2d at 240.

Pankey's first fundamental fallacy is its failure to recognize the intent of Congress by concluding that:

> "Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. * * * Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights." 441 F.2d at 241.

To the contrary, as Mr. Justice Douglas pointed

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[2] Before Wyandotte, Professor Wright, relying on Hinderlider, concluded that federal common law "apparently" applies to all original jurisdiction cases to which a state is a party, "although the matter is not clearly settled." C. Wright, Federal Courts § 109, p. 504 (2d ed. 1970). We submit that his tentative conclusion is unsound because it overlooks the fact that Hinderlider involved water apportionment under an interstate compact. For the same reason plaintiffs' reliance on Hinderlider in Washington v. General Motors Corp., No. 45 Orig. (U.S. Sup. Ct.), is misplaced. Plaintiffs' February 12, 1971 Supplemental Memorandum of Law, at 3-4.

out in Wyandotte, and as discussed above at 5-7, Congress has enacted a comprehensive legislative scheme based on a policy of not pre-empting the field of water pollution.

Pankey's second basic fallacy is its seeming reliance on Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), as support for the conclusion that federal common law should apply. In Tennessee Copper, Georgia brought an original action seeking to enjoin the defendant corporations from discharging from their Tennessee plants noxious gas which was carried into Georgia. Noting that there was no applicable federal common law, Georgia contended that these emissions constituted a nuisance under Georgia law, and because it could not obtain personal jurisdiction over the defendants in its own courts, Georgia needed to invoke the original jurisdiction of this Court.[3] Brief for Georgia, Georgia v. Tennessee Copper Co., at 13-18. Tennessee Copper dealt with the exercise of discretionary jurisdiction and with the standard of equitable relief to be applied once the plaintiff state had proved its case rather than with which substantive law governed. Indeed, Tennessee Copper did not discuss the source or basis for the "quasi-sovereign ecological right" found by Pankey, as that court explicitly recognized. 441 F.2d at 240. Moreover, it would seem most unlikely that Mr. Justice Holmes, the

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[3] In exercising jurisdiction, this Court stressed that "the alternative to force is a suit in this Court." 180 U.S. at 237. Today, however, with the development of long-arm jurisdiction, the states have little, if any, need to resort to this Court in suing non-residents. Ohio v. Wyandotte Chemicals Corp., 401 U.S. at 497, 500.

author of the Tennessee Copper decision, would have urged the application of a federal common law in view of his well-known belief that "[t]he common law is not a brooding omnipresence in the sky". Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (dissenting opinion).

We therefore submit that neither Tennessee Copper nor Pankey provides any basis for departure from the principle recently enunciated by this Court in Wyandotte that state law should govern disputes between a state and a citizen of another state founded essentially upon local common law issues.

In summary, we urge that at this stage the creation of another tier of law, independent of federal legislation and state law, would hinder rather than help the development of water pollution control. If this Court were to create a federal common law of nuisance and trespass, the effect would be to unsettle the certainty resulting from past and present development of state law and replace it was a new concept, the scope of which would only gradually become known over the decades.

CONCLUSION

For the reasons stated above, we submit that state law governs the claims asserted by the State of Vermont against International Paper Company and that

Vermont's motion for leave to file a complaint in this Court should be denied in all respects.

Dated: New York, New York
February 21, 1972

Respectfully submitted,

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Certificate of Service Under Rule 33

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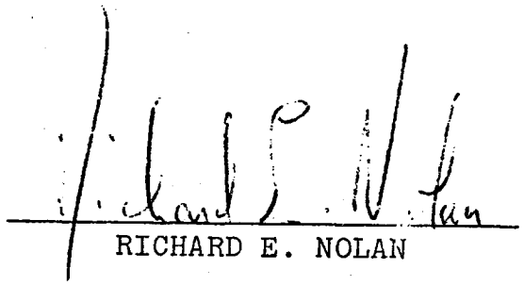
INTERNATIONAL PAPER COMPANY, a corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

RICHARD E. NOLAN, attorney for Defendant International Paper Company and a member of the Bar of this Court, certifies that all parties required to be served with said Defendant's Memorandum dated February 21, 1972 were served the 21st day of February, 1972, three copies having been mailed this day respectively to the Honorable Deane C. Davis, Governor of the State of Vermont, National Life Drive, Montpelier, Vermont 05602; the Honorable James M. Jeffords, Attorney General of the State of Vermont, State Library Building, Montpelier, Vermont 05602, attorney for plaintiff; the Honorable Louis J. Lefkowitz, Attorney General of the State of New York, 80 Centre Street, New York, New York 10013, attorney for defendant State of

New York; and Wayne M. Harris, Esq., 226 Powers Building, Rochester, New York 14614, attorney for applicant for intervention, by causing the same to be deposited in a mail box maintained by the United States Post Office at the General Post Office, Eighth Avenue at 33rd Street, New York, New York, with first class postage prepaid.

February 21, 1972



RICHARD E. NOLAN