Washington and Lee Law Review

Volume 37 | Issue 2 Article 8

Spring 3-1-1980

III. Civil Procedure

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Recommended Citation

III. Civil Procedure, 37 Wash. & Lee L. Rev. 423 (1980).

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III. CIVIL PROCEDURE

A. *Federalizing State Law*

Title 28, section 1331(a) of the United States Code (Code) grants to federal district courts original jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States where the matter in controversy exceeds $10,000.[1] Although the federal courts have applied the $10,000 requirement with relative ease,[2] those courts have had difficulty determining whether a case "arises under" federal law.[3]

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[77] *See* note 2 *supra*. Part of the judicial encouragement of private antitrust actions stems from the monetary benefit that private actions provide to taxpayers. *See* Loevinger, *supra* note 2, at 168. Unlike antitrust actions brought by the Federal Trade Commission or the U.S. Department of Justice, private actions do not require the expenditure of public funds for investigation and litigation counsel. *Id.* Additionally, damages awarded in private actions often substantially surpass fines that would be levied in criminal actions, thus making potential sanctions in private actions far more serious. *Id.* at 169.

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[1] 28 U.S.C. § 1331(a) (1976); *see* U.S. CONST. art. 3, § 2, cl. I.

Article III of the Constitution extends federal judicial power to cases arising under the Constitution, laws, and treaties of the United States. U.S. CONST. art. 3, § 2, cl. I. Article III also vests judicial power in one Supreme Court and in such inferior courts as Congress may ordain and establish. *Id.* art. 3, § 1. Congress exercised its power to establish lower federal courts in the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. The Judiciary Act, however, limited the courts' jurisdiction to cases arising under federal law. *Id.* § 9. Federal court jurisdiction was granted only over cases involving suits for penalties and forfeitures incurred under federal laws and in cases where an alien sued in tort for a violation of the law of nations. *Id.*; *see* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 845 (2d ed. 1973).

Congress, however, did not extend lower federal court jurisdiction to cases arising under the Constitution or laws of the United States until the passage of the Judiciary Act of 1875. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (current version at 28 U.S.C. § 1331(a) (1976)); *see* London, *"Federal Question" Jurisdiction—A Snare And A Delusion*, 57 MICH. L. REV. 835, 836 (1959).

[2] *See, e.g.*, Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (Each member of a plaintiff class in a class action filed under FED. R. CIV. P. 23(b)(3) must meet the $10,000 requirement of 28 U.S.C. § 1331(a) (1976)).

[3] Professor Wright has noted that, despite the tremendous amount of attention given to the area of federal question jurisdiction by legal scholars, there is no clear test which has yet been developed to determine when a case "arises under" the Constitution, laws or treaties of the United States. *See* C. WRIGHT, LAW OF THE FEDERAL COURTS, § 17 at 64 (3rd ed. 1976) [hereinafter cited as WRIGHT].

The Supreme Court has struggled with the meaning of Article III's "arises under" requirement. In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court held that a case arises under federal law when a federal question forms an ingredient of the original cause. *Id.* at 823. The *Osborn* test, however, was overly broad because, in almost every case, some argument can be made that a federal question is involved. *See* WRIGHT, *supra*, at 65. The *Osborn* test was therefore abandoned, and federal courts have continued to struggle to develop a workable test for determining the existence of federal

federal courts ordinarily cannot entertain jurisdiction under section 1331(a) when a claim is founded upon state law.[4] State law, however, may serve as federal law for section 1331(a) jurisdictional purposes in certain circumstances.[5]

The Supreme Court has held that the federal government may obtain exclusive jurisdiction over land ceded to it by a state.[6] Federal law should govern claims arising on land ceded to the federal government over which the United States has exclusive jurisdiction.[7] Where a cause of action arises on land over which the United States has obtained exclusive jurisdiction and no applicable federal law exists, a federal court may adopt state law as federal law[8] to insure that there will be no area left

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question jurisdiction. *See* Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936) (case "arises under" the Constitution or laws of the United States when right or immunity created by the Constitution or laws of the United States is an essential element of the plaintiff's cause of action); Cohen, *The Broken Compass: The Requirement That A Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 892 (1967).

[4] *See* Smith v. McCullough, 270 U.S. 456, 459 (1926); notes 1 & 3 *supra*.

[5] *See* Macomber v. Bose, 401 F.2d 545, 546 (9th Cir. 1968); Mater v. Holley, 200 F.2d 123, 124 (5th Cir. 1952); note 40 *infra*.

[6] The United States may obtain exclusive jurisdiction over an area by two methods. The United States may purchase land with the consent of the state legislature for military and defense needs. U.S. CONST. art. I, § 8, cl. 17. The United States may also acquire land by cession from the states. *See* James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99 (1940). In both instances the Supreme Court has held that the state is entitled to reserve jurisdiction consistent with the United States' use of the property for the purpose for which it is acquired. James v. Dravo Contr. Co., 302 U.S. 134, 147 (1937). The United States may obtain exclusive jurisdiction over certain claims arising from an area without obtaining exclusive jurisdiction over all claims arising from that area. Buttery v. Robbins, 177 Va. 368, 379, 14 S.E.2d 544, 548 (1941). Many states, on ceding jurisdiction over land to the federal government, reserve the authority to serve civil and criminal process to prevent the area from becoming a sanctuary for fugitives wanted by the state. Such a reservation is not inconsistent with federal exercise of exclusive jurisdiction over the area. United States v. Lovely, 319 F.2d 673, 680 (4th Cir. 1963); *see* REPORT OF THE INTERDEPARTMENTAL COMM. FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, pt. II, at 10 (1957) [hereinafter cited as COMMITTEE REPORT]; note 34 *infra*.

[7] Under conflict of laws principles, the law of the place where an alleged wrong was inflicted governs the rights of the parties. Capetola v. Barclay White Co., 139 F.2d 556, 558 (3rd Cir. 1943); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 175 (1971).

[8] State law may be adopted by a federal court as a matter of common or statutory law. The common law principle of adopting state law as it existed at the time the United States acquired exclusive jurisdiction is borrowed from the field of international law. Chicago, Rock Island & Pac. Ry. Co. v. McGlinn, 114 U.S. 542, 546 (1885); *see* James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99-100 (1940). Later changes in the laws of the state do not affect the law of the area under federal jurisdiction. *See* Arlington Hotel Co. v. Fant, 278 U.S. 439, 449-54 (1929).

Congress has stated that certain state laws may be adopted by the federal courts or applied by the states for areas under the United States' exclusive jurisdiction. These include state wrongful death laws, 16 U.S.C. § 457 (1976); state fish and game laws, 10 U.S.C. § 2671 (1976); and state workmen's compensation laws, 40 U.S.C. § 290 (1976). *See* Sewell, *The Federal Enclave*, 33 TENN. L. REV. 283, 306-07 (1966) [hereinafter cited as Sewell]. The Assimilative Crimes Act explicitly adopts state law as federal law to preserve federal jurisdiction. 18 U.S.C. § 13 (1976); *see* Robinson Protective Alarm Co. v. City of Philadelphia, 581 F.2d 371, 375 (3rd Cir. 1978).

without a legal system for the protection of private rights.[9] In a recent decision, the Fourth Circuit held that the plaintiff's cause of action did not arise in an area under the exclusive jurisdiction of the United States and therefore refused to adopt state law as federal law for jurisdictional purposes.

In *Pratt v. Kelly*,[10] the federal district court for the Western District of Virginia considered a wrongful death claim stemming from an automobile accident on the Blue Ridge Parkway.[11] The United States acquired the land that became the Blue Ridge Parkway by deed from Virginia. In the deed, Virginia ceded ownership of the land but reserved jurisdiction in all civil and criminal matters.[12] At time of suit, the Parkway was owned and operated by the United States.[13] The plaintiff in *Pratt* contended that since the Parkway in Virginia was owned and operated by the United States, the district court should entertain jurisdiction under section 1331(a). The plaintiff further argued that since there is no federal wrongful death statute, the Virginia wrongful death statute should serve as federal law. The district court disagreed with the plaintiff and dismissed the complaint for lack of subject matter jurisdiction.[14]

On appeal, the plaintiff contended that since the Parkway was owned by the United States, the grant of administrative control over the Parkway to the federal government contained in title 16, section 460a-2 of the Code should be construed so as to give the United States exclusive jurisdiction over the Parkway.[15] The plaintiff further argued that since section 460a-2 gives the United States exclusive jurisdiction over the

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[9] *See* James Stewart & Co. v. Sadrakula, 309 U.S. 94, 100 (1940).

[10] 585 F.2d 692, (4th Cir. 1978).

[11] *Id.* at 694 (discussing the district court's unpublished opinion). The plaintiff in *Pratt*, decedent's father and administrator, brought suit under the Virginia wrongful death statute, VA. CODE §§ 8.01-50-63 (1977), against the driver of the decedent's car as well as another driver. The plaintiff alleged that both cars involved in the accident were being driven at an excessive rate of speed and in a negligent manner. 585 F.2d at 694.

[12] *Id.* at 96-99. In the deed conveying the land which became the Blue Ridge Parkway, Virginia ceded exclusive jurisdiction to the United States only to regulate traffic on the highway, protect the land, and operate and administer the parkway. 1936 Virginia Acts, ch. 3, § 4. Virginia later prospectively ceded to the federal government concurrent governmental, judicial, executive and legislative power and jurisdiction over lands acquired by the United States. VA. CODE § 7.1-18.1 (Replacement Volume 1979). For crimes committed on lands "acquired" in any manner by the United States, the practice is to permit, if not require the federal government to prosecute. Virginia has adopted a "hands off" policy. United States v. Schuster, 220 F. Supp. 61, 64 (E.D. Va. 1963); *see* note 34 *infra.*

[13] The federal government has been granted statutory authority to administer and operate the Blue Ridge Parkway. 16 U.S.C. § 460a-2 (1976); *see* notes 15 & 19 *infra.*

[14] 595 F.2d at 694.

[15] *Id.* 16 U.S.C. § 460a-2 (1976) states in pertinent part:

> All lands and easements heretofore or hereafter conveyed to the United States by the States of Virginia and North Carolina for the right-of-way for the projected parkway . . . shall be known as the Blue Ridge Parkway and shall be administered and maintained by the Secretary of the Interior through the National Park Service.

Parkway, title 16, section 457 of the Code, which adopts the surrounding state's wrongful death statute as federal law for actions arising on areas under the exclusive jurisdiction of the federal government,[16] should be read to federalize Virginia's wrongful death statute.[17]

The defendants in *Pratt* contended that section 460a-2 was not intended to confer exlcusive jurisdiction upon the United States over the Parkway.[18] Instead, the defendants argued that section 460a-2 merely grants to the federal government the power to administer and maintain

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[16] 585 F.2d at 694. 16 U.S.C. § 457 (1976) states:

> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.

Section 457, by its own terms, expressly applies only to areas under the exclusive jurisdiction of the United States. During Senate debate of the bill which later became § 457, the sponsors explained that the bill was meant to fill the legal void left in areas where the United States had obtained exclusive jurisdiction. 58 CONG. REC. 2052 (1919). By allowing federal courts to use state law, dependents of a decedent killed in an area under the exclusive jurisdiction of the United States may recover against the persons answerable for his death. *Id.*

In Murray v. Joe Gerrick & Co., 291 U.S. 315 (1934), the Supreme Court held that § 457 authorized federal suits under certain state survival statutes. *Id.* at 319. Section 457, however, only applies to areas under the exclusive jurisdiction of the United States. 16 U.S.C. § 457 (1976); *see* The Tungus v. Skovgaard, 358 U.S. 588, 609 n.9 (1958) (Brennan, J., concurring in part and dissenting in part).

[17] 585 F.2d at 694; *see* note 8 *supra*. Plaintiff relied on Stokes v. Adair, 265 F.2d 662 (4th Cir.), *cert. denied*, 361 U.S. 816 (1959), to support his contention that § 457 should be read to federalize Virginia's wrongful death statute. *Stokes* involved a suit between two Virginia citizens arising from injuries sustained in an auto collision on a military reservation in Kansas. The Fourth Circuit, reversing the district court's dismissal of the case for lack of subject matter jurisdiction, held that § 457 was an adequate basis for jurisdiction since the area involved was under the exclusive jurisdiction of the United States. *Id.* at 665-66.

The plaintiff also relied on Mater v. Holley, 200 F.2d 123 (5th Cir. 1952). *Mater* involved a negligence action for injuries sustained on a federal military fort in Georgia under the exclusive jurisdiction of the federal government. Georgia had ceded the land to the United States but retained concurrent jurisdiction only for the service of state process and the regulation of public utilities thereon. The Fifth Circuit held that the concurrent state jurisdiction had no effect on the federal jurisdiction. *Id.* at 125. Therefore, the court held that the claim arose under the laws of the United States, giving the district court jurisdiction under § 1331(a). *Id.; see* note 6 *supra*.

Plaintiff also cited Olsen v. McPartlin, 105 F. Supp. 561 (D. Minn. 1952), a case which involved facts resembling those of the *Pratt* case. The plaintiff in *Olsen* brought a negligence claim for injuries received in an auto accident on a United States military reservation in Minnesota. Minnesota had ceded jurisdiction over the reservation but reserved concurrent jurisdiction to serve state civil and criminal process. The *Olsen* court held that Minnesota law applied as federal law and therefore the action arose under the laws of the United States for federal question jurisdiction purposes. *Id.* at 563.

[18] 585 F.2d at 694; *see* note 19 *infra*.

the parkway.[19] As further support for the contention that the United States had not obtained exclusive jurisdiction over the Parkway, the defendants asserted that Virginia had reserved jurisdiction over all civil matters arising on the Parkway in its conveying deed to the United States.[20] The defendants therefore contended that the Fourth Circuit should not federalize Virginia's wrongful death statute since section 457 only applies where the United States has exclusive jurisdiction over an area.[21]

The Fourth Circuit agreed with the defendants and affirmed the district court's dismissal.[22] After summarily dismissing the plaintiff's claim that section 460a-2 gives the United States exclusive jurisdiction over the area,[23] the *Pratt* court held that a land transfer from a state to the United States does not necessarily imply that the United States acquires exclusive jurisdiction over that area.[24] In accepting the defendants' argument, the court took judicial notice of Virginia's reservation of jurisdiction in the conveying deed and the corresponding acts of the Virginia legislature.[25] In light of this reservation, and the dismissal of section 460a-2 as a possible basis for exclusive federal jurisdiction,[26] the *Pratt* court held that the federal government did not acquire exclusive jurisdiction over the Parkway and thus could not maintain jurisdiction under either section 1331(a) or section 457.[27]

Federal courts federalize state law to insure that no area will be left without a developed legal system for the protection of private rights.[28]

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[19] 585 F.2d at 694. During House debate on § 460a-2, Representative Doughton, one of the sponsors who introduced the bill, explained that the purpose of the bill was simply to give the Interior Department maintenance power over the Parkway. 80 CONG. REC. 10584 (1936); *see* note 15 *supra.*

[20] 585 F.2d at 696; *see* text accompanying note 12 *supra.*

[21] 585 F.2d at 694; *see* note 35 *infra.*

[22] 585 F.2d at 697.

[23] The *Pratt* court stated that § 460a-2 merely establishes the Blue Ridge Parkway and provides for its administration. The court concluded that § 460a-2 does not confer exclusive jurisdiction upon the United States. 585 F.2d at 694 n.2; *see* note 19 *supra.*

[24] 585 F.2d at 695. 40 U.S.C. § 255 (1976) states in pertinent part:

> Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required . . . unless and until the United States has accepted jurisdiction over lands hereafter to be acquired . . . [by filing notice with the governor of the state] . . . it shall be conclusively presumed that no such jurisdiction has been accepted.

The Fourth Circuit has held, consistent with other circuits, that § 255 applies only to land acquired by the United States after 1940. Markham v. United States, 215 F.2d 56, 58 (4th Cir. 1954); *see, e.g.,* United States v. Redstone, 488 F.2d 300, 302 (8th Cir. 1973). The Supreme Court has clearly established that a state may limit a cession of jurisdiction to the federal government. James v. Dravo Contr. Co., 302 U.S. 134, 148 (1937); *see* note 6 *supra;* note 34 *infra.*

[25] 585 F.2d at 696-97; *see* text accompanying note 12 *supra.*

[26] *See* note 23 *supra.*

[27] 585 F.2d at 697.

[28] James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99-100 (1940).

Such a legal vacuum may occur in cases where the United States has exclusive jurisdiction over an area.[29] In *Pratt,* the plaintiff's claim to federal jurisdiction depended upon establishing that the United States had exclusive jurisdiction over the Parkway. Although the Parkway is owned and administered by the federal government under section 460a-2,[30] the only reference to jurisdiction in that section merely provides for the maximum parkway right of way to be increased, if necessary.[31] In addition, the legislative history of section 460a-2 clearly indicates that section 460a-2 was intended only to provide for administration and maintenance of the Parkway, and not to give the United States exclusive jurisdiction over that area.[32] Therefore, the *Pratt* court's refusal to interpret section 460a-2 as granting exclusive jurisdiction to the federal government was correct.

The Fourth Circuit relied primarily on Virginia's reservation of civil jurisdiction in the conveying deed to hold that the United States did not have exclusive jurisdiction over the Parkway.[33] Although the Fourth Circuit did not set forth the reasoning behind this conclusion, a state's reservation of jurisdiction over civil claims arising from an area necessarily negates the exercise of exclusive federal jurisdiction over that area.[34] The reservation by Virginia of civil jurisdiction coupled with the fact that section 460a-2 provides only for administration and maintenance of the Parkway compels this conclusion that the Parkway is not under the exclusive jurisdiction of the United States. Section 457 is therefore clearly inapplicable to the facts of *Pratt.*[35]

The decision in *Pratt* is consistent with prior Fourth Circuit cases dealing with the adoption of state law for section 1331(a) jurisdictional purposes.[36] A good method of handling other claims arising from areas

[29] *See* text accompanying notes 8-9 *supra.*

[30] 16 U.S.C. § 460a-2 (1976); *see* note 15 *supra.*

[31] 16 U.S.C. § 460a-2 (1976); *see* note 15 *supra.*

[32] *See* note 19 *supra.*

[33] 595 F.2d at 696-97; *see* note 23 *supra;* text accompanying notes 23-27 *supra.*

[34] A state's reservation of authority to serve civil and criminal process insures that the ceded area does not become a haven for fugitives. *See* note 6 *supra.* Thus, the state's desire to maintain minimal jurisdictional control does not conflict with the federal government's exercise of exclusive jurisdiction over the same area. *See* James v. Dravo Contr. Co., 302 U.S. 134, 148 (1937). Nevertheless, when the state and federal governments hold concurrent jurisdiction over an area, neither can successfully maintain that exclusive jurisdiction exists. Further, when a state reserves all jurisdictional control over a ceded area, no federal exclusive jurisdiction exists.

Although Virginia reserved adjudicative control over all criminal matters arising on the Parkway, federal courts regularly entertain these suits. *See* note 12 *supra.* Nevertheless, federal exercise of criminal jurisdiction is not inconsistent with Virginia's reservation of jurisdiction over criminal matters because Virginia has adopted a "hands off" policy regarding criminal matters. *See* note 12 *supra.*

[35] *See* note 16 *supra;* note 36 *infra.*

[36] *See e.g.,* Stokes v. Adair, 265 F.2d 662, 665 (4th Cir.), *cert. denied,* 361 U.S. 816 (1959); note 17 *supra.*

The Fourth Circuit relied on Board of Supervisors v. United States, 408 F. Supp. 556

under exclusive federal jurisdiction which are not covered by federal law might be for the United States to surrender a portion of its exclusive jurisdiction to the states.[37] By giving the states sufficient jurisdiction to resolve claims arising on federally owned land, the federal government could insure that all areas would have a developed legal system[38] and thereby eliminate the unusual problems related to federalizing state law.

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(E.D. Va. 1976), in affirming its dismissal of Pratt's claim. 585 F.2d at 695. The district court in *Supervisors* stated that where a state retains jurisdiction over civil and criminal matters, aggrieved citizens have the state forum for redress of their grievances. 408 F. Supp. at 564. Therefore, *Supervisors* held that where a state forum is available, the rationale behind federalizing state law is no longer compelling. *Id. See also* Mater v. Holley, 200 F.2d 123, 124 (5th Cir. 1952). In *Mater*, the Fifth Circuit held that any law which exists in a territory over which the federal government has exclusive jurisdiction must derive its authority from the federal government. The national source of authority transforms state law into federal law for jurisdictional purposes. *Id.* at 124; *see* Macomber v. Bose, 401 F.2d 545 (9th Cir. 1968). In *Macomber* the Ninth Circuit dealt with a riparian rights case arising on land that had been ceded along with complete jurisdiction to the federal government. *Macomber* held that state law served as federal law because federal authority was the only authority in the area. *Id.* at 546.

The *Pratt* court also cited Fowler v. Dodson, 159 F. Supp. 101 (E.D. Pa. 1958), as supporting its decision. 585 F.2d at 697. The facts in *Fowler* closely resemble those in *Pratt*. *Fowler* involved a claim arising from an automobile accident in the Shenandoah National Park. The *Fowler* court held that, since Virginia had retained concurrent jurisdiction over the Park land when ceding it to the United States, § 457 was inapplicable. Plaintiff's claim was therefore dismissed for lack of jurisdiction. *Id.* at 103-04. *But see* Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp., 425 F. Supp. 81, 87 (D. Conn. 1977). (§ 457 provides a basis for federal question jurisdiction because the cause of action derives from federal statute but the federal court must apply state law directly); *see* note 16 *supra*.

[37] Section 457 itself does not specify whether its provisions are an adoption of state law as federal law or an attempt to cede jurisdiction over wrongful death claims back to the states. The Committee Report regards § 457 as an adoption of state law. COMMITTEE REPORT, *supra* note 6, at 152-53. The Committee Report shows that in a case of retrocession of jurisdiction to a state, that state's consent is required. *Id.* Such retrocession statutes provide for application of state laws for workmen's compensation, unemployment compensation and other matters, and cannot be implemented without some action by the state. *See* note 10 *supra*. In contrast, § 457 has no provision for state consent and therefore the Committee Report classifies the application of the section as a federal adoption of state law rather than a retrocession of jurisdiction. COMMITTEE REPORT, *supra* note 6, at 153.

Plaintiffs generally desire to litigate their claims in federal court because of liberalized discovery, procedural and evidentiary rules. Conversely, federal courts want to keep litigants out of federal court because of overcrowded dockets. *See* WRIGHT, *supra* note 3, at 88. To eliminate the problem of determining whether an area is under the exclusive jurisdiction of the United States, Congress could cede back to the state sufficient jurisdiction to handle all civil and criminal cases. Plaintiffs then would realize, without wasting valuable court time, that they cannot gain access to federal courts by federalizing state law. A retrocession of jurisdiction obviously would ease overcrowded federal dockets. States, however, may not be able to take jurisdiction over areas acquired by the federal government for military purposes. *See* U.S. CONST. art. 1, § 8, cl. 17; Sewell, *supra* note 8, at 311-12; note 6 *supra*.

[38] *See* text accompanying note 28 *supra*.

B. *The Seventh Amendment's Effect on* Erie

Since Congress granted diversity jurisdiction to federal courts in the First Judiciary Act of 1789 (the Act),[1] federal courts have considered the problem of determining whether state or federal law should be applied in diversity cases. Section 34 of the Act, known as the Rules of Decision Act, provides that the laws of the several states shall be regarded as rules of decision in the federal courts.[2] Courts have experienced difficulty in applying the Rules of Decision Act because of the ambiguous nature of the word "laws."[3] In *Erie Railroad v. Tompkins*,[4] the Supreme Court held that only state substantive law is binding on the federal courts in diversity cases, and that federal courts should continue to follow federal procedure.[5] *Erie*'s goal was to insure uniformity of decision between state and federal courts.[6] Nevertheless, the abstract nature of *Erie*'s substance versus procedure distinction made consistent application of that test difficult.[7] Because of this difficulty, the Court discarded the substance versus

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[1] 1 Stat. 73 (1789) (current version at 28 U.S.C. § 1332 (1976)). Section 1332 extends federal court jurisdiction to controversies between citizens of different states and between a state or the citizens thereof and foreign states, citizens or subjects.

[2] 28 U.S.C. § 1652 (1976). Section 1652 provides that the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

[3] The basic issue in interpreting § 1652, *see* note 2 *supra*, centers on the word "laws." Specifically, the issue is whether state common law is included in the laws of the several states which the federal courts are required to apply. One commentator has stated that determining the meaning of § 1652 has been the most difficult issue in the whole field of jurisprudence. *See* C. WRIGHT, LAW OF THE FEDERAL COURTS, § 54 at 249 (3d ed. 1976) [hereinafter cited as WRIGHT].

[4] 304 U.S. 64 (1938).

[5] *Id.* at 72-73.

[6] The *Erie* Court stated that uniformity of decision between state and federal courts would serve two purposes. *Id.* at 75. First, litigants should be prevented from forum shopping. Second, the Court indicated that their decision should serve to preserve state sovereignty in the federal system. *Id.* at 73. Whether *Erie* is based directly on the constitution has been a matter of dispute. The *Erie* Court held that the unconstitutionality of allowing federal courts to apply federal general common law required the decision. *Id.* at 77-78. The Court added that, by applying federal law, the federal courts invade rights reserved by the Constitution to the states. *Id.* at 80. Some commentators have argued that *Erie*'s basis is in the Rules of Decision Act itself because the Act gave power to the central government to make only procedural rules. Therefore, the use of the Constitution as a source of limitation on the federal government's power is unnecessary. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 704 (1974) [hereinafter cited as Ely]; *see* Smith, *Blue Ridge and Beyond: A Bird's Eye View of Federalism In Diversity Litigation*, 36 TUL. L. REV. 443, 443 (1962) [hereinafter cited as Smith]. *See also* Whicher, *The Erie Doctrine And The Seventh Amendment: A Suggested Resolution To Their Conflict*, 37 TEX. L. REV. 549, 550-52 (1959) [hereinafter cited as Whicher].

Lower federal courts have generally avoided the constitutional implications of *Erie*. *See* Smith, *supra*, at 446. The Supreme Court, in Bernhardt v. Polygraphic Co., 350 U.S. 198, 202 (1955), indicated that *Erie* has constitutional dimension.

[7] The First Circuit, in Sampson v. Channell, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940), showed that the *Erie* substance versus procedure distinction is of little aid

procedure test and adopted an outcome determinative test in *Guaranty Trust Co. v. York*,[8] holding that any state law which might affect the outcome of a case is binding on the federal courts.[9]

The Court again clarified the *Erie* doctrine in *Byrd v. Blue Ridge Rural Electric Cooperative*.[10] In *Byrd*, the Court was presented with a conflict between a state rule requiring trial court judges to decide a specific factual issue and the federal practice allowing the jury to decide the factual question.[11] The *Byrd* Court used a balancing test to resolve the conflict, holding that countervailing federal considerations outweighed the state interest involved.[12] Although *Byrd* indicated a shift from *Guaranty*

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in determining whether to apply state law. In determining whether a federal court should apply state burden of proof rules, the *Sampson* decision stated that merely classifying the issue as one of substance or procedure would have been an oversimplification. *Id.* at 754. The First Circuit instead looked to the policy behind *Erie* to resolve the issue. *Id.* at 756. Labeling a rule as substantive or procedural is the result of analysis, not the process of the analysis itself. 43 MINN. L. REV. 580, 581 n.7 (1959).

[8] 326 U.S. 99 (1945). The *Guaranty Trust* Court held that the determining factor in a choice between federal and state law is whether disregard of state law by the federal court would significantly affect the result of a litigation. *Id.* at 109. *See generally* Miller, *Federal Rule 44.1 And The "Fact" Approach To Determining Foreign Law: Death Knell For A Die Hard Doctrine*, 65 MICH. L. REV. 615 (1967) [hereinafter cited as Miller].

[9] 326 U.S. at 109. One commentator has noted that almost every procedural rule may have a substantial effect on the outcome of a case. WRIGHT, *supra* note 3, § 55 at 256; *see* Miller, *supra* note 8, at 708. Carried to its logical extreme, the *Guaranty Trust* outcome determinative test could mean the destruction of federal rules in diversity cases, most importantly the Federal Rules of Civil Procedure. The Supreme Court later neutralized the impact of *Guaranty Trust* in Hanna v. Plumber, 380 U.S. 460 (1965), by stating that the purpose of *Erie* was not to "bottle up" federal courts with outcome determinative "stoppers." *Id.* at 475; *see* Lumberman's Mutual Cas. Co. v. Wright, 322 F.2d 759, 769 (5th Cir. 1963). *See also* text accompanying notes 14-18 *infra*.

[10] 356 U.S. 525 (1958).

[11] 356 U.S. at 533-34. *Byrd* involved a claim for personal injury damages against an employer. The defendant argued that as an employee, plaintiff's only remedy was under the state workman's compensation act. The trial judge struck this affirmative defense, and the jury returned a verdict for the plaintiff. *Id.* at 526. On appeal, the Fourth Circuit held that under state law the employer had established his defense, and directed entry of judgment in his favor. Blue Ridge Electric Coop. v. Byrd, 238 F.2d 346, 357 (4th Cir. 1956).

The Supreme Court considered whether the factual issue raised by the defense should have been tried to a jury, or whether the state rule of allowing the judge to decide the stated issue should prevail. 356 U.S. at 528. The *Byrd* court could have avoided the judge-jury issue because the trial judge did not pass on the question and thus committed no error. In addition, the Supreme Court's mandate directed that the case first be sent to the court of appeals because rulings on these issues might have made the judge-jury question moot. Whicher, *supra* note 6, at 555; *see* Smith, *supra* note 6, at 447.

[12] The *Byrd* court cited the independent nature of the federal system as a countervailing federal consideration requiring application of the federal rule in the case. 356 U.S. at 537. One of the more confusing countervailing considerations utilized by the *Byrd* court was the seventh amendment. The Court held, "An essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Id.* (footnote omitted). As several commentators have pointed out, this quasi-seventh amendment interest has caused a great deal of uncertainty. A more reasonable approach for analyzing cases would be to apply

Trust's outcome determinative test to a test favoring certain federal policies, the *Byrd* opinion did not completely abandon the outcome determinative test.[13]

The most recent Supreme Court decision in this area, *Hanna v. Plumer*,[14] again modified the outcome determinative test.[15] Citing *Erie*'s underlying goals as discouragement of forum shopping and avoidance of inequitable administration of the law,[16] the *Hanna* Court set forth a rejuvenated outcome determinative test.[17] The Court indicated that, in deciding whether to apply state or federal law, state law is important only in ascertaining whether the state rule would be unfairly discriminatory to a litigant or would cause a plaintiff to choose the federal court.[18]

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the seventh amendment fully or not at all. *See* Redish and Phillips, *Erie And The Rules Of Decision Act: In Search Of The Appropriate Dilemma*, 91 HARV. L. REV. 356, 387 (1977) [hereinafter cited as Redish and Phillips); Whicher, *supra* note 6, at 557.

The *Byrd* Court employed a three step analysis in reaching its decision that the federal rule applied. First, the Court concluded that the state rule was not bound up with state created rights and obligations and therefore the federal court was not required to apply the rule. 356 U.S. at 535. Second, while the outcome of the case may have been affected by who decided the issue, affirmative countervailing considerations required that courts adhere to the federal policy of jury trial. *Id.* at 539. Third, the likelihood of a different result was not strong enough to require application of the state rule. *Id.* at 540.

[13] 356 U.S. at 539. The third part of the *Byrd* opinion indicated the continuing vitality of the outcome determinative test by stating that the use of a jury might not change the outcome of the litigation. *Id.* at 540. *Byrd* demonstrated an awareness that the federal rule would likely produce a different result than the state rule, and the Court was hesitant to abandon completely *Guaranty Trust*. *Id.* at 539.

[14] 380 U.S. 460 (1965). The issue in *Hanna* was whether FRCP 4(d)(1) or state law governed service of process. *Hanna* held that the federal rule governed. *Id.* at 474. The *Hanna* Court emphasized that the purpose of the federal rules is to insure uniformity in the federal system. The Court noted that *Erie*, even as interpreted by *Guaranty Trust*, was not intended to "bottle up" federal courts with outcome determinative and integral-relations "stoppers." *Id.* at 473; *see* Lumberman's Mutual Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963). The Court indicated that constitutionally supported federal considerations must prevail over state rules. *Id.* at 473.

[15] Although the *Hanna* decision ultimately turned on the superiority of the Federal Rules of Civil Procedure, the decision indicated a shift in the Court's analysis of cases involving *Erie* questions. The Court held that the outcome determinative test could not be read without reference to *Erie*'s aims of discouragement of forum shopping and avoidance of inequitable administration of the laws. 380 U.S. at 468.

[16] *Id.*

[17] The *Hanna* Court carefully distinguished previous cases where a state rule was held applicable despite the apparent relevancy of a federal rule. The Court held that these cases did not control in *Hanna* because the federal rule involved in each was not broad enough to be applied. Therefore, *Erie* required the enforcement of state law. 380 U.S. at 470; *see* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949); Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530, 532 (1949); Palmer v. Hoffman, 318 U.S. 109, 117 (1943).

[18] 380 U.S. at 468 n.9. Because the *Hanna* analysis is premised on the goals of avoiding forum shopping and insuring equitable administration of the law, the opinion appears to be inconsistent with *Byrd*. The *Byrd* Court looked primarily to the importance of competing state and federal interests, wholly apart from forum shopping considerations. 356 U.S. at 537-38. *Byrd* indicated that the relevant inquiry was whether a state rule was bound up with the parties' rights and obligations. *Id.* at 535; *see* note 12 *supra*. *Hanna* indicated that the

Byrd and *Hanna* demonstrate that federal rules are basic to our federal system.[19] When state and federal rules conflict, compelling federal interests often require that state sovereignty be sacrificed.[20] If the federal rule is supported by constitutional considerations, as illustrated by the seventh amendment in *Byrd*,[21] the state rule should not prevail. The Fourth Circuit has consistently applied *Byrd* in diversity cases without recognizing *Hanna*'s impact on the *Byrd* analysis.[22] The Fourth Circuit recently reexamined the applicability of state or federal law in diversity cases in *Justice v. Pennzoil Co.*[23]

In *Justice*, the Fourth Circuit faced the issue whether federal or state law applied in determining whether the judge or the jury should decide a question of unreasonable and negligent use of land. The court held that the federal district court was required to apply state law.[24] In *Justice*, the owner of surface rights in a parcel of land claimed that the Pennzoil Company, which held rights to the oil and gas underneath the land, had unreasonably and negligently damaged the surface during Pennzoil's drilling of several oil wells.[25] Plaintiffs brought suit in state court, defendant removed,[26] and the issue of unreasonable use was submitted to the jury despite the existence of contrary state law.[27] The plaintiff obtained a verdict

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importance of the state rule is relevant, but not in terms of how valuable the rule is to the state. A state rule is important only in the context of determining whether application of the rule would unfairly discriminate against citizens of the forum state or cause a plaintiff to choose the federal court. 380 U.S. at 468 n.9.

[19] *See* note 14 *supra*.

[20] *See* text accompanying note 12 *supra*.

[21] *See* note 12 *supra*.

[22] In decisions subsequent to *Hanna*, the Fourth Circuit has cited various federal considerations in each case which allowed the court to dispense with the state rule. In Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir.), *cert. denied*, 402 U.S. 932 (1970), the Fourth Circuit recognized that the federal courts should function as a cohesive, relatively unitary system for the administration of justice. *Id.* at 538. *Atkins* held that the federal rule applied for determining the tolling effect of a pending identical suit in another federal court. *Id.* at 527-28.

In Wratchford v. S. J. Groves & Sons Co., 405 F.2d 1061 (4th Cir. 1969), the Fourth Circuit was influenced by the seventh amendment as utilized in *Byrd* and the need to maintain an independent federal judicial system. *Id.* at 1064 & 1066. *Wratchford* held that the federal standard applied for determining the sufficiency of evidence necessary to raise a jury question. *Id.* at 1062.

Finally, in Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965), the Fourth Circuit noted the federal interest in providing a convenient forum for the adjudication of claims. *Id.* at 65. *Szantay* utilized a balancing test to hold that a state statute which would ordinarily bar the suit would not operate in a federal court. *Id.* at 66; *see* text accompanying notes 32-42 *infra*.

[23] 598 F.2d 1339 (4th Cir. 1979).

[24] *Id.* at 1341.

[25] *Id.*

[26] *Id.*

[27] *Id. See* Adkins v. United Fuel Gas Co., 134 W. Va. 719, 61 S.E.2d 633 (1950). In *Adkins*, the West Virginia Supreme Court held that the court, not the jury, should decide whether the use of the surface by an owner of minerals lying underneath the surface has exceeded the fairly necessary use thereof. *Id.* at _, 61 S.E.2d at 636.

of $10,000, and the defendant appealed.[28]

The Fourth Circuit disagreed with the trial court and reversed and remanded the case for a new trial.[29] The court held that the district court erred in submitting the issue of unreasonable use to the jury.[30] The *Justice* court employed a two part analysis to decide whether the state or federal rule should have been applied. First, the Fourth Circuit determined that the state rule delegating the unreasonable use issue to the judge was bound up with the rights and obligations of the parties, and the federal court was therefore obligated to apply the state rule.[31] Second, the court stated that the state rule allowing the judge to determine the unreasonable use issue from the jury's findings of fact was compatible with *Byrd* and therefore that state rule was binding on a federal court.[32] In distinguishing *Byrd,* which required use of the federal rule, the *Justice* court made no reference to the seventh amendment.[33]

In an earlier Fourth Circuit case, *Szantay v. Beech Aircraft Corp.,*[34] the Fourth Circuit set out a three part analysis for a federal court to employ in resolving federal-state rule conflicts.[35] First, if the state provision comprises the substantive right at issue, the state rule must be applied. Second, if the state provision is intimately bound up with the right or obligation being asserted, the state rule must be applied. Third, if the

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The vast majority of decisions indicate that whether use of the surface by a mineral owner is reasonable is a question of fact for the jury, provided that there is sufficient evidence to raise the issue. *See, e.g.,* Bourdieu v. Seaboard Oil Corp., 48 Cal. App. 2d 429, _, 119 P.2d 973, 977 (1941); Schlegel v. Kinzie, 158 Okla. 93, _, 12 P.2d 223, 224 (1932); Getty Oil Co. v. Jones, 470 S.W.2d 618, 623 (Tex. 1971). *See also* Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEX. L. REV. 1, 4 (1956).

[28] 598 F.2d at 1341.

[29] *Id.* at 1345.

[30] *Id.* at 1343.

[31] *Id.* at 1342-43; *cf.* Williams v. Gibson, 84 Ala. 228, _, 4 So. 350, 354 (1888) (state law mandates jury should hear reasonable use issue). The *Justice* court applied the first level of the *Byrd* analysis to determine whether the state rule was bound up with the parties' rights and obligations. 598 F.2d at 1342-43; *see* note 12 *supra.*

The *Justice* court also indicated in the first part of its analysis that the nature of the unreasonableness issue made it unsuitable for jury determination. The court cited Adkins v. United Fuel Gas Co., 134 W. Va. 719, 61 S.E.2d 633 (1950), as support for the proposition that unreasonable use of land by a mineral owner is not measured by the normal tort standard of a reasonable man. The court stated that the issue is measured by concrete legal standards rooted in the common law. 598 F.2d at 1342. Although the *Justice* court cited *Adkins* as support for the conclusion that legal standards would determine the unreasonableness issue, *Adkins* failed to enumerate the applicable legal standards.

[32] 598 F.2d at 1343. The *Justice* court held that the jury should find the factual issues relating to damages, perhaps on special interrogatories, and from those findings the judge should then decide the issue of unreasonable use. *Id.* Relying on the state classification of the issue as one of law enabled the *Justice* court to hold that the state's allocation of functions between judge and jury was compatible with *Byrd. See* text accompanying notes 10-13 *supra.*

[33] *See* notes 11 & 12 *supra,* & note 47 *infra.*

[34] 349 F.2d 60 (4th Cir. 1965); *see* note 22 *supra.*

[35] 349 F.2d at 63-64.

state provision is not so bound up, but its application would substantially affect the outcome of the litigation, the federal court must apply the state rule unless there exist countervailing federal considerations.[36] The second step of the *Szantay* analysis compelled the *Justice* court's conclusion that the state procedural rule must be applied because the *Justice* court held that the state rule was bound up with the parties' rights and obligations.[37]

Szantay, a representative treatment of *Erie* problems by the Fourth Circuit, seems inconsistent with *Byrd* and *Hanna.* The *Hanna* decision indicated a shift away from *Byrd* type balancing in the analysis of state law versus federal law conflicts.[38] The *Hanna* court was motivated by the goals of promoting fairness between litigants and avoiding the evils of forum shopping.[39] Significantly, the decision respected state rules as being important, but only in the context of achieving these two goals.[40] The *Szantay* interpretation of *Byrd,* therefore, was at least modified if not abandoned by *Hanna.*[41] By limiting the inquiry to a consideration of whether the state rule is bound up with state rights and obligations, the *Szantay* analysis, and therefore the first step of the *Justice* analysis, is highly suspect.[42]

Justice held that the state practice of trying issues of fact to the jury and issues of law to the judge, with the unreasonable use issue classified as an issue of law, is compatible with *Byrd.*[43] *Justice* is consistent with the principle that, in jury trials, issues of fact are sent to the jury and issues of law are given to the judge.[44] The more important issue, however, is which law determines whether the stated issue is one of law or fact.[45]

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[36] *Szantay* held that the state rule involved in the case was not "bound up" and that countervailing federal considerations necessitated application of the federal rule. The *Szantay* court relied on the constitutional grant of diversity jurisdiction as well as the federal interest in providing a convenient forum. 349 F.2d at 64.

[37] Under *Szantay,* when a state rule is bound up with the parties' rights and obligations, the federal court is required to apply it. The *Justice* court did not address the other two parts of the *Szantay* analysis. *See also* text accompanying note 36 *supra.*

[38] *See* note 18 *supra.*

[39] 380 U.S. at 468.

[40] *See* note 18 *supra.*

[41] The *Szantay* analysis revolved around whether or not the state rule is bound up with the parties' rights and obligations. *See* note 36 *supra. Szantay's* deference to the state rule, is therefore, inconsistent with *Hanna. See* note 14 *supra. Hanna* apparently abandoned *Byrd's* balancing test as well as the concept that a state rule can prevail only when the rule is bound up with the rights and obligations of the parties. *See* Miller, *supra* note 8, at 714.

[42] *See* notes 18 & 37 *supra.*

[43] 598 F.2d at 1343.

[44] The Supreme Court has held that in a jury trial the power of direction and superintendence is committed to the judge, and the ultimate determination of the issues of fact is committed to the jury. Slocum v. New York Life Ins. Co., 228 U.S. 364, 382 (1912); *see* ABC-Paramount Records, Inc. v. Topps Record Distr. Co., 374 F.2d 455, 460 (5th Cir. 1967); Taylor v. Cirino, 321 F.2d 279, 281 (6th Cir. 1963).

[45] The classification of the unreasonable use issue as a question of law or fact determines whether the issue is to be tried to the judge or the jury. *See* note 44 *supra.* The terms question of law and question of fact are synonyms for a judge question and a jury question respectively. Weiner, *The Civil Jury and the Law-Fact Distinction,* 54 CAL. L. REV. 1867, 1867-68 (1966) [hereinafter cited as Weiner].

Federal courts should make this determination according to federal, not state law.[46] If the unreasonable use issue is classified as an issue of fact, the *Byrd* case, and more specifically the seventh amendment, indicate that the *Justice* analysis is incomplete.[47] In *Byrd,* the Court balanced state and federal interests and determined that the federal rule allowing the jury to decide the issue of fact prevailed.[48] Since the conflict was resolved by balancing state and federal considerations, the *Byrd* Court was able to avoid the question of whether the seventh amendment required that the jury resolve the issue.[49]

In *Justice,* the Fourth Circuit held that the *Byrd* balancing test required application of the state rule of giving the unreasonable use issue to the judge.[50] The next question the *Justice* court should have considered was whether the seventh amendment required that the jury decide the

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[46] The state's classification of an issue as fact or law should not determine whether the issue should be tried to a jury in federal court. The vast majority of jurisdictions classify the unreasonable use of land issue as one of fact. *See* note 27 *supra.* Negligence is normally a question of fact for the jury to decide. Weiner, *supra* note 45, at 1876-77.

In Burcham v. J.P. Stevens & Co., 209 F.2d 35, 40 (4th Cir. 1954), the Fourth Circuit, in the context of a negligence claim arising from an automobile accident, held that whether a question is for the judge or for the jury is a question of federal practice and a federal court is bound by federal and not state decisions. The court held that substantive state law was applicable to the case, but federal law determined whether a question is for the decision of the judge or jury under the seventh amendment. *Id.* Applying federal law, the court held that issues such as whether the litigants exercised due care clearly required a jury trial by express provision of the seventh amendment. *Id.* at 38; *see* Gillespie v. Travelers Ins. Co., 486 F.2d 281, 283 n.1 (9th Cir. 1973); Weiner, *supra* note 45, at 1889-90.

In Goodman v. Mead Johnson & Co., 534 F.2d 566 (3d Cir. 1976), the court held that the issue of when discovery of an actionable claim occurred is a question of fact for the jury, despite state law to the contrary. *Id.* at 573. In Nunez v. Superior Oil Co., 572 F.2d 1119 (5th Cir. 1978), the Fifth Circuit considered whether the issue of unreasonable delay in payment of royalties required resolution by a jury. The court stated that where federal rules would entitle litigants to a jury determination of a particular issue, the federal court would not yield to contrary state practice. The court therefore concluded that the issue of whether defendant had acted reasonably was a jury question. *Id.* at 1125. The *Nunez* court relied on *Byrd* and Simler v. Conner, 372 U.S. 221 (1963) (per curiam). The question in *Simler* was whether the stated issue should be classified as legal under federal law or equitable under state law. The *Simler* Court held that the right to jury trial in the federal courts is to be determined under federal law in diversity as well as other actions. *Id.* at 222. *Simler* compels use of federal law to classify issues as law or fact. *See* Ely, *supra* note 6, at 709.

[47] *See* Weiner, *supra* note 45, at 1889-90; note 45 *supra.* The seventh amendment states:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

U.S. CONST., amend. VII.

[48] *See* note 12 *supra.*

[49] The Supreme Court generally does not decide constitutional questions unless such a decision is absolutely necessary to resolve a case. Burton v. United States, 196 U.S. 283, 295 (1905); *see* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[50] 598 F.2d at 1342-43; *see* text accompanying notes 31-32 *supra.*