Mercer Law Review

Volume 32
Number 4 *Annual Fifth Circuit Survey*

Article 12

7-1981

Interstitial Lawmaking: Uniformity or Conformity?

Lillian Harris Lockary

COMMENTS

Interstitial Lawmaking: Uniformity or Conformity?

When Congress does not fully address the substantive law contemplated by a statute, federal courts have the responsibility to fashion a governing rule of decision according to their own standards—the conflict of laws rules of the forum.[1] More precisely, the task of judicial legislation could be labeled one of interstitial lawmaking, of interpreting an indeterminate statute, rather than conflict of law.[2] If subject matter jurisdiction is founded on a federal statute, and not diversity of citizenship, the source of law for the litigation is federal, and the rule of *Erie R.R. v. Tompkins*,[3] that state law applies of its own force, is generally inapplicable. This jurisdictional grant over suits involving a federal question, function or program, however, is "not in itself a mandate for applying federal law in all circumstances."[4] As the Court in *Clearfield Trust Co. v. United States*[5] suggested, state law occasionally may be adopted as the federal rule when Congress has not given a specific directive. Federal courts have the option to incorporate or to displace state law in giving content to a

---

1. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

2. United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973). For a discussion of the constitutional necessity that federal courts have the power to fill in the gaps of statutory patterns enacted by Congress, *see* Mishkin, *The Variousness of "Federal Laws": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957). *See also* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

3. 304 U.S. 64 (1938).

4. United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973).

5. 318 U.S. 363 (1943). *Clearfield* and its progeny are often cited for this proposition. Although federal jurisdiction in *Clearfield* was based on diversity of citizenship, the Court held that *Erie* did not apply because the rights and duties of the United States, in the exercise of a constitutional function (issuance of commercial paper), were directly impacted by the litigation. Therefore, federal law governed recovery on an express guaranty of prior endorsements on a government check. Of greater significance, however, was the federal nature of the government function, rather than the participation of the Government as a party. *Id.* at 366.

controlling federal statute, but not without certain limitations.[6]

Familiar examples of interstitial lawmaking are apparent in the adoption of state statutes of limitations as the federal rule,[7] in the measure of damages for wrongful death under the Federal Torts Claim Act,[8] and recently in condemnation proceedings initiated by a private licensee, pursuant to section 21 of the Federal Power Act.[9] The latter situation presents a narrow question of whether just compensation, in the exercise of an independent federal power of eminent domain, should be determined under federal law or under the substantive law of the jurisdiction where the condemned property is located. This question was reserved by the Supreme Court in *Grand-River Dam Authority v. Grand-Hydro, Inc.*[10] and only recently decided by the Fifth Circuit Court of Appeals in *Georgia Power Co. v. 138.30 Acres of Land (Sanders).*[11]

The purpose of this comment is to examine the standards that have developed for resolving disputes over the supplementation of federal law in cases founded on a federal statute and related to an operative national program. The discussion will focus primarily on those considerations that move a federal court to impute to Congress an intention to absorb state law or to establish a uniform, nationwide rule in a given dispute. Specifically, emerging methodology will be applied to the Georgia Power Company condemnation cases for the Lake Wallace Project,[12] as a means of

---

6. *See generally* Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823 (1976), for a comprehensive survey of choice of law problems.

7. Johnson v. Railway Express Agency, 421 U.S. 454 (1975). Remedies under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §§ 2000a-2000h (1976), were viewed as separate from those under 42 U.S.C. §§ 1981 (1976). Because the latter had no specific limitations period, the Court adopted the appropriate state statute of limitations. The court in Conerly v. Westinghouse Elec. Corp., 623 F.2d 117 (9th Cir. 1980), followed the directives of *Johnson*.

8. 28 U.S.C. § 2674 (1976). Mishkin, note 2 *supra*, at 806, n.33.

9. 16 U.S.C. § 814 (1976). Under § 21 entities licensed by § 4(e) of the Federal Power Act may in certain circumstances exercise a federal right of eminent domain. *See generally* 16 U.S.C. §§ 791a-828c (1976).

10. 335 U.S. 359 (1948). *See also* Louisiana v. Lindsey, 524 F.2d 934 (5th Cir. 1975).

11. 617 F.2d 1112 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3619 (Feb. 24, 1981). In an earlier decision, Georgia Power Co. v. 54.20 Acres of Land (Dodson), 563 F.2d 1178 (5th Cir. 1977), *cert. denied*, 440 U.S. 907 (1979), a consolidation of several proceedings initiated in the United States District Court for the Middle District of Georgia, the Fifth Circuit held that federal law not only provided the source of law but also controlled the compensation to be paid. In a second appeal, Georgia Power Co. v. 138.30 Acres of Land (Larman), 596 F.2d 644 (5th Cir. 1979), *cert. denied*, 49 U.S.L.W. 3619 (Feb. 24, 1981), the court remanded so that the panel commission could adequately explain the basis for its conclusions regarding the amount of compensation due. At the same time the court restated its holding in *Dodson*. A final appeal to the Fifth Circuit was taken when *Larman* was reheard en banc.

12. 563 F.2d at 1178.

evaluating a sampling of the manifold policies which support one selection of law or the other, in what is arguably a classic example of a "vertical" choice of law problem.[13]

I. Analysis for Adoption of State Law or a Uniform, National Rule

A. *Presumption Favoring the Adoption of State Law*

That the role of state law in reference to a national program is more than a marginal one reflects certain enduring values of the federal system, principally that Congress legislates against a background of existing state law.[14] When an ambiguous or indeterminate federal statute requires gap-filling, some courts postulate that because "Congress acts . . . against the background of the total *corpus juris* of the states,"[15] federal courts should defer to state law if there is doubt as to congressional intent. In other words, judge-made common law should not displace established local rules "unless that result is manifestly in the national interest."[16]

There is a constitutional and statutory basis for this premise. When Congress, for example, exercises its plenary power to regulate commerce, its displacement of state law in some areas and not in others may be significant[17] and indicative of congressional intent to reinforce state law. The Constitution of the United States lends support to a presumption favoring state law, on the ground that the federal government originally received its powers through delegation. Those powers not expressly prohibited to the states or delegated to the national government were reserved to the sovereign states.[18]

Other considerations of federalism support a preference for state law. For example, the Rules of Decision Act[19] in one sense may provide a mandate for adopting the laws of the several states as rules of decision in civil

---

13. F. James & G. Hazard, Civil Procedure 39 (2d ed. 1977). The term "vertical" choice of law refers to a selection between federal and state law.

14. Mishkin, *supra* note 2, at 811.

15. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966) (*quoting* H. Hart & H. Wechsler, The Federal Courts and the Federal System 435 (1953)).

16. McKenna v. Wallis, 344 F.2d 432, 445 (5th Cir. 1965) (Wisdom, J., dissenting).

17. Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178 (5th Cir. 1977) (Simpson, J., dissenting), *cert. denied*, 440 U.S. 907 (1979). The court cited *Grand River*, 335 U.S. 359, for the proposition that the Federal Power Act was not intended to supersede a state's law of condemnation. 563 F.2d at 1199 n.4.

18. U.S. Const. amend. X. *See also* Georgia Power Co. v. 138.30 Acres of Land (Sanders), 617 F.2d 1112, 1124 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3619 (Feb. 24, 1981) (Fay, J., concurring). As Judge Fay facetiously remarked, it may be the "height of naievety" to recall this elementary constitutional principle. *Id.* at 1124 n.1.

19. 28 U.S.C. § 1652 (1976).

cases in federal courts, unless the "Constitution or treaties of the United States or Acts of Congress otherwise require or provide."[20] Some commentators, however, insist that the Rules of Decision Act only operates in an *Erie* situation and does not apply when the source of law is federal, as is the situation for most choice of law problems.[21] Although there may be a preference for state law in the analysis evoked by interstitial lawmaking, constitutional allocations of power do not invariably demand that state law provide the supplementation.[22] The presumption may be rebutted within a framework of standards currently guiding federal courts in their choice of law.

B. How the Presumption is Rebutted

As discussed, some courts begin their analysis with a presumption that state law should supply the federal rule. This presumption is a qualified rebuttable one, that is overcome if the controlling federal statute directs otherwise[23] or if there is a *significant* conflict between state law and federal interests or policies that are present in a given case.[24] The import of this premise is that the burden should be placed on the party asserting the use of uniform federal common law to come forth with affirmative and specific justification.[25]

Even if adoption of state law would "arguably interfere with an identifiable federal policy or interest,"[26] there may not be a substantial conflict

---

20. *Id.*

21. Georgia Power Co. v. Sanders, 617 F.2d 1112, 1127 n.7 (5th Cir. 1980). The Supreme Court, relying on *Clearfield*, has held, however, that federal common law may control even in diversity cases when it is necessary to protect the interests of the federal government. *See* Miree v. DeKalb County, Georgia, 433 U.S. 25, 29 (1977).

22. 617 F.2d at 1126.

23. Board of County Comm'rs v. United States, 308 U.S. 343 (1939). In reference to the recovery of interest from a local governing body for illegal taxation of a federally exempt Indian allotment, the Court acknowledged that "[i]n the absence of explicit legislative policy cutting across state interests, . . . the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions." *Id.* at 352.

24. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966); Miree v. DeKalb County, Georgia, 433 U.S. 25, 32 (1977). *Sanders*, 617 F.2d at 1116.

25. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544-45 (1954); Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823, 833 (1976).

26. Georgia Power Co. v. Sanders, 617 F.2d 1112, 1118 (5th Cir. 1980) (citing United States v. Yazell, 382 U.S. 341 (1966)). *See also* United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); United States v. Standard Oil Co., 332 U.S. 301 (1947); Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178, 1189 (1977), *cert. denied*, 440 U.S. 907 (1979). 43 U. CHI. L. REV., note 25 *supra*, at 843.

that would nullify federal objectives. If the conflict, viewed on a continuum, approaches hostility and threatens to frustrate explicit congressional aims or the direct interests of the United States, the application of an aberrant state law would seem to be precluded.[27] However, when a conflict is minor, amounting only to an insignificant interference, the adoption of state law may or may not be deemed proper. Further analysis is necessary.

Currently, the Fifth Circuit determines the propriety of supplementing federal law with a rule from state substantive law by means of an articulated interest analysis in which federal concerns are weighed against the state's interests in having its established rules apply.[28] Courts in general have considered a number of criteria in deciding to adopt or to displace state law, whether by use of an implicit or explicit interest analysis.[29] These criteria are examined in the following section.

II. Criteria Considered in Balancing Federal and State Interests

A. *Uniformity*

A perennial argument supporting the federal interest in a common law rule is the essential need for uniformity in operating a viable federal program, for example, the regulatory scheme established by the Federal Power Act.[30] *Clearfield Trust Co. v. United States*,[31] a diversity case that concerned the issuance of commercial paper, illustrates the content of this argument. In *Clearfield*, the Court was persuaded that ease of administration, as well as the need for certainty in government transactions, demanded the application of a uniform federal rule, on the ground that the United States uses commercial paper across the country and conducts similar transactions on a vast scale.

In *United States v. Little Lake Misere Land Co.*,[32] the danger to a federal land acquisition program, pursuant to the Migratory Bird Conservation Act,[33] also required the application of a uniform federal rule. Ease of administration, however, was less of a concern to the Court than its perception that Louisiana law, in denying the vesting of mineral rights to the federal government, was "plainly hostile" to the contractual interests

27. United States v. Little Lake Misere Land Co., 412 U.S. 580, 595-96 (1973).

28. 617 F.2d at 1112, 1118.

29. 43 U. Chi. L. Rev., note 25 *supra*, at 843.

30. 16 U.S.C. §§ 791a-793, 795-818, 820-825 (1976).

31. 318 U.S. 363 (1943); Similarly, in United States v. Standard Oil Co., 332 U.S. 301 (1947), a uniform rule was necessary because of federal fiscal policy and the special relationship between government and soldier.

32. 412 U.S. 580 (1973).

33. 16 U.S.C. §§ 715-715s (1976).

of the United States.[34]

The uniformity argument was later limited in *Bank of America National Trust & Savings Ass'n v. Parnell*,[35] a suit that also concerned commercial paper. Specifically, bearer bonds of the Home Owner's Loan Corporation, which were guaranteed by the United States, were converted. Since the United States was not a party, the Court reasoned that the need for a uniform federal rule appears less urgent in litigation among private parties, in the absence of a direct, adverse effect on the rights and duties of the United States, as was the situation in *Clearfield*.

The advantages of uniformity and ease of administration are not always apparent. Some commentators have suggested that the call for uniformity represents a utopian "desire for symmetry of abstract legal principles and a revolt against the complexities of a federated system of government."[36] Arguments based on this criterion also seem to ignore the limited probability of actually developing a nationwide rule that would indeed be applied uniformly.[37]

B. Areas of Traditionally Local Concern

In *Parnell*, the Court observed that liability of a converter is a matter essentially of local concern, despite the role of the United States as a guarantor.[38] Similarly, the states' interest in the field of "family and family-property arrangements" was recognized in *United States v. Yazell*,[39] in which the Small Business Administration sought to recover on a note taken for a disaster loan to a married couple. In obtaining the loan, the wife had acknowledged her awareness of the Texas law of coverture,[40] which disabled a married woman from binding her separate property unless she first obtained a court decree removing her disability to contract. Because the loan, a local transaction, was negotiated with specific reference to Texas law, the adoption of federal law was deemed inappropriate. Other considerations included the court's recognition that the SBA was chargeable with knowledge of the local laws and that the impact of coverture had little consequence to the federal treasury, because the United States, in this context, was no different from a private creditor.

Additional decisions have identified real estate as an area of tradition-

---

34. 412 U.S. at 601-02 (1973).

35. 352 U.S. 29 (1956).

36. *See* Mishkin, note 2 *supra*, at 813 and authorities cited therein.

37. *Id.*

38. 352 U.S. 29, 33 (1956).

39. 382 U.S. 341, 352 (1966).

40. The Court held in favor of state law despite its recognition that the quaint doctrine of coverture "is now, with some exceptions, relegated to history's legal museum." *Id.* at 343.

ally local concern. In *Reconstruction Finance Corp. v. Beaver County*,[41] the dispute concerned the appropriate definition, state or federal, of real property for purposes of taxation. Congress, through the Reconstruction Finance Corporation Act,[42] had forbidden states and local governments to tax personalty of the corporation, but had permitted local taxation of the corporation's real property. In adopting state law, the Court recognized that "concepts of real property are deeply rooted in state traditions, customs, habits, and laws"[43] and that the bundle of valuable rights called "property" usually is defined with reference to state law. To avoid confusion and the hampering of local tax machinery, the Court determined that:

> [c]ongressional purpose can best be accomplished by application of settled state rules as to what consitutes "real property," so long as it is plain, as it is here, that the state rules do not effect a discrimination against the Government, or patently run counter to the terms of the Act.[44]

United States v. 145.30 Acres of Land[45] presented the issue of whether an exclusive contract right to remove sand on condemned tracts was compensable, and if so, in what amount. Again, state law was said to determine the nature of the property interest for which just compensation must be paid when taken by the United States. A similar respect for local definitions of real property appeared in *United States v. Certain Property Located in the Borough of Manhattan*,[46] in which the Court decided that the question of what the United States takes, in the exercise of its power of eminent domain, was a matter about which the federal courts could make an independent determination. On the other hand, although federal rules applied, the Court swiftly observed that any interest in uniformity did not *require* federal courts to ignore state property law.

C. *Private Parties*

A third criteria in the calculus is the presence of private parties as primary participants in the litigation. A number of cases regard as significant, but not always determinative, the fact that a controversy principally

---

41. 328 U.S. 204 (1946).
42. Act of Jan. 22, 1932, ch. 8, 47 Stat. 5 (1932) (repealed 1957).
43. 328 U.S. at 210. In Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944), the Court observed: "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state."
44. 328 U.S. at 210.
45. 385 F. Supp. 699 (W.D. La. 1974), *aff'd*, 524 F.2d 1231 (5th Cir. 1975).
46. 344 F.2d 142 (2d Cir. 1965).

involves the interests of private groups (or the government acting in a quasi-private capacity) and not the immediate rights and duties of the federal government.[47] When the rights of private parties are litigated, there seems to be more of a reason to absorb state law on the ground that federal interests are not as compelling. In *United States v. Kimbell Foods, Inc.*,[48] the Court, in the absence of an articulated statutory standard, evaluated the priorities of private and consensual liens under state law. Deference to customary commercial practices did not frustrate specific objectives of the SBA and FHA lending programs, according to the Court, since there was "no indication that variant state priority schemes would burden current methods of loan processing"[49] by the agencies, the goal being a method of funneling money on a local level to needful farmers and businessmen. The programs were actually a form of welfare legislation, with the Government in the role of a quasi-commercial lender or a voluntary private creditor. Thus, the Government's fiscal interests did not require the same priority, for example, as the Government compels when it acts as sovereign in its tax-collecting capacity, in which case, the Court noted, use of the federal choate lien test[50] would have been proper.

In *Miree v. DeKalb County, Georgia*,[51] a diversity suit operating on a theory of third-party beneficiaries, the distinction between private and public interests was paramount. That the United States ascribes importance to regulating air travel was not sufficient for the Court to find an overriding national interest that compelled application of a federal rule. The salient concern was the rights of private litigants who sought damages for breach of grant contracts between DeKalb County and the Federal Aviation Administration, in which the county had agreed to restrict the use of land adjacent to the airport to activities "compatible with normal airport operations."[52] The county's operation of a dump site near the airport, said to have caused the accident in question by attracting birds which swarmed into the aircraft's engines after takeoff, constituted the alleged breach of contract. In comparison to these private concerns, the

47. Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33-34 (1956).

48. 440 U.S. 715 (1979).

49. *Id.* at 733. The *Kimbell* approach was followed in United States v. Hargrove, 494 F. Supp. 22 (D.N.M. 1979), an action to foreclose an FHA mortgage, in which the law in one forum state allowing redemption was adopted as the federal rule. The court identified as the most important factor the consideration "whether the presumptively applicable state law can be given effect without thwarting federal policy or destroying needed uniformity in the operation of the federal program." *Id.* at 23.

50. 440 U.S. at 720-21. The choate lien test refers to federal methods devised to afford federal statutory liens, especially in the area of tax, special priority over state and private liens.

51. 433 U.S. 25 (1977).

52. *Id.* at 27.

interests of the federal government, despite any policies aimed at inducing compliance with FAA safety standards, were seen as remote, speculative, and highly abstract.

III. Analysis of Condemnation Cases

The principles discussed in preceeding sections may be demonstrated by a study of *Georgia Power Co. v. 138.30 Acres of Land (Sanders)*.[53] While the case is actually a consolidation of condemnation proceedings, under a statutory grant of eminent domain power to section 21 licensees of the Federal Power Commission,[54] the dispute focuses on the appropriate methodology for ascertaining just compensation—Georgia substantive law or federal common law. Not only is the controlling statute silent on this point, but also the legislative history offers no illuminating guidance.[55] Pursuant to section 21 of the Federal Power Act, Georgia Power Company, a state controlled utility company, is seeking to condemn private properties located in Hancock and Putnam Counties, Georgia, for the purpose of constructing a hydroelectric generating facility across the Oconee River, known as the Lake Wallace Project.[56] The venture has a twofold aim, supplying a needed source of energy to the public, as well as profitmaking for private investors.[57]

There probably would be no controversy without the substantial difference in monetary terms between the federal measure of compensation and the treatment afforded by Georgia law. By way of illustration, under the federal rules a three person commission may be appointed to determine the amount of just compensation.[58] The panel must ignore any in-

---

53. 617 F.2d 1112 (5th Cir. 1980).

54. 16 U.S.C. § 814 (1974) provides:

> When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with any improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts.

55. Georgia Power Co., v. 54.20 Acres of Land, 563 F.2d 1178, 1182, 1183 (1977), *cert. denied*, 440 U.S. 907 (1979).

56. *Id.* This related case provides a complete summary of the facts underlying the consolidated condemnation proceedings that led to the dispute in *Sanders*.

57. 617 F.2d at 1119 (*citing* Public Utility District No. 1 v. City of Seattle, 382 F.2d 666, 669-670 (9th Cir.), *cert. dismissed*, 396 U.S. 803 (1969)); 563 F.2d at 1197.

58. Fed. R. Civ. P. 71A(h).

crease in value created by the project.[59] Georgia law, however, allows a state court to include in the award for the property actually taken consequential benefits; that is, appreciation value.[60] In addition, the panel has the option to offset compensation for the value of the land actually taken with benefits accruing to any remaining property, while Georgia law prohibits a set-off against the value of the recovery for the condemned land and only permits a set-off against any recovery for *damages* to the remaining land.[61] Present Georgia law allows recovery for attorney fees, but the award is no longer mandatory.[62] Consequently, the two methods of computation manifest an appreciable difference in recovery, with the possibility under the federal common law that condemnees may receive nothing for their property.[63] Such a result could not occur under Georgia law, according to the arguments of the landowners' counsel.[64]

With this factual background, the court's rationale can be explored. The decision was reached to adopt state substantive law as the appropriate methodology through an explicit interest analysis, as described above in Part II. Commencing its analysis with a presumption in favor of state law, because of the Federal Power Act's silence on the measure of just compensation for section 21 condemnations, the court in *Sanders,* unlike the court in *Little Lake,* found only marginal interference by a state rule with federal objectives under the controlling statute. Those policies were identified as follows: first, maximizing hydroelectric development; second, reducing energy costs; and third, minimizing acquisition costs to the Government should it later decide to exercise its option[65] to acquire the project.[66] There was no impermissible burden on these goals merely because the Georgia rule resulted in higher acquisition costs, apparently because private investors would not necessarily be deterred nor consumers benefitted by envisioned cost savings. If anything, application of the fed-

---

59. United States v. Miller, 317 U.S. 369 (1943).

60. Hard v. Housing Authority, 219 Ga. 74, 132 S.E.2d 25 (1963).

61. 617 F.2d at 1115.

62. DeKalb County v. Trustees, Decatur Lodge No. 1602, 242 Ga. 707, 251 S.E.2d 243 (1978), *overruling* White v. Georgia Power Co., 237 Ga. 341, 227 S.E.2d 385 (1976).

63. Any argument against this result on the basis of equal protection is apparently discounted in United States v. Miller, 317 U.S. 369 (1943), since the federal rules satisfy the requirements of the fifth amendment.

64. 617 F.2d at 1115.

65. 16 U.S.C. § 807(a) (1974) provides in part:

> Upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee . . . .

66. 617 F.2d at 1120.

eral rule would mean that certain Georgia citizens would be asked to subsidize a private Georgia utility.[67]

The Court then employed a balancing test to ascertain whether congressional aims concerning the development of hydroelectric power could be achieved only through the displacement of state law. The majority found that *Clearfield's* rationale did not require uniform, national treatment. As in *Miree*, the rights of private parties were at stake, not the immediate concerns of the United States acting in a sovereign capacity. Whatever interest the Government may have in promoting energy development through the Federal Power Commission was regarded as secondary to the interests of the private litigants.[68]

According to the court, the value of uniformity is necessarily less when a private section 21 licensee seeks to condemn property. Before a license may be issued under the Act, the Commission must first conclude that the project does not affect the "development of any water resources for public purposes [that] should be undertaken by the United States itself."[69] In other words, if the project had been critical to national, rather than to local interests, the United States itself would have undertaken development. Under those circumstances, at least with the presence of public funding, there would have been a firmer basis for applying the *Clearfield* rationale.

The possibility that the government's interest would be adversely impacted by higher costs if and when it exercised its option to acquire the project was also seen as a remote, speculative concern. Whether the award made to condemnees in a section 21 proceeding would later affect the option price was by no means certain.[70] The court's preference for state law was further reinforced by the dispute's focus on property rights, an area of traditionally local concern, the definition of which has long been made by recourse to state law.[71] The local nature of the project, as a profitmaking venture by a private corporation using private funds, subject to heavy regulation by a state utility commission, tipped the scales in favor of adopting state law.[72]

---

67. *Id.* at 1124.

68. *Id.* at 1117-18, 1121. Similar reasoning appeared in Pankow Constr. Co. v. Advance Mortgage Corp., 618 F.2d 611 (1980), relating to a dispute between a contractor and a mortgage lender over loan proceeds. Since the dispute was wholly between private parties and the United States was not a party, the possibility that the goals of the National Housing Act, Pub. L. No. 479, 48 Stat. 1246 and amendments (codified in scattered sections of 12, 41, 49 U.S.C. (Supp. 1979)), might be adversely impacted was viewed as too speculative and remote to justify displacing state commercial law in an area of great local concern.

69. 617 F.2d at 1118 (*citing* 16 U.S.C. § 800(b) (1976)).

70. *Id.* at 1123.

71. *Id.* at 1123-24.

72. *Id.*

After considering the various criteria outlined in Section II of this comment, the Fifth Circuit concluded that no compelling federal interests required displacement of state law to resolve the question of the appropriate methodology for ascertaining just compensation. The presumption in favor of adopting local substantive law apparently was not overcome by any affirmative showing that Congress intended otherwise. Repeated references in the Federal Power Act itself, limiting the Commission's regulatory powers to situations in which the states do not have specified regulations, further reinforced the perceived absence of congressional intent that uniform federal common law should resolve the question of compensation.[73]

The decision in *Sanders,* by recognizing a distinction between the federal government and a private licensee as opposing parties, also comports with the insights of other circuits, principally the Ninth Circuit. In *Public Utility District No. 1 v. Seattle,*[74] one issue was whether a licensee of the Federal Power Commission exercised identical powers of the federal government. The court concluded that "the position of a licensee is distinguishable from that of the United States with respect to furthering of the national interest"[75] and that Congress did not intend to bestow complete sovereign powers on private licensees. The difference in position emanated from the Government's dominant navigational servitude, a sovereign power akin to an easement which allows the Government, "in aid of navigation, to utilize the stream bed and shorelands of navigable waters up to the ordinary high water level."[76] As the court noted:

> By issuance of a license the United States is not acting in the national interest through the licensee to the same extent as it would if it undertook the project itself. The United States acts in the public interest on a national scale; the licensee often on a local scale, on projects thought to be of insufficient dimensions to warrant the assertion of national power.[77]

Therefore, as in *Seattle,* it seems unlikely in the situation presented by *Sanders* that Congress, in the absence of an express directive, intended to bestow on a private licensee the full measure of its constitutional power.

IV. CONCLUSION

The court's decision in *Sanders* has validity despite recent legislation

---

73. *Id.* at 1121-22 n.14.
74. 382 F.2d 666 (1967), *cert. dismissed,* 396 U.S. 803 (1969).
75. *Id.* at 669.
76. *Id.*
77. *Id.* at 669-70.

heralding the implementation of a coordinated national energy policy.[78] After the original action leading to the *Sanders* decision, the Federal Power Commission was abolished and its functions absorbed into the newly created Department of Energy, with expanded powers.[79] Nevertheless, the legislative histories of both the Department of Energy Organization Act[80] and the Public Utility Regulatory Policies Act of 1978[81] suggest that Congress probably intended continued deference not only to state regulatory schemes, but also to state law in doubtful areas of applicable federal statutes.

An imaginative argument might be advanced that the question of just compensation under the exercise of the Federal power of eminent domain is not essentially a problem for interstitial lawmaking, thus requiring no balancing, but is actually a matter of interpreting the just compensation clause of the fifth amendment.[82] This theory may be persuasive when the United States condemns property in its sovereign capacity, directly pursuant to the fifth amendment, but, as discussed earlier, when the condemnor is a private licensee, motivated by profitmaking, whose powers are delegated by an indeterminate, ambiguous federal statute, the argument seems less compelling. Therefore, in light of extensive authority sanctioning adoption of state law when Congress, either deliberately or inadvertently, is silent as to its full intent, the result as well as the rationale of the Fifth Circuit in *Sanders* is arguably the correct one. Even more significantly, the case serves to illustrate the proper approach to a problem of interstitial lawmaking.

LILLIAN HARRIS LOCKARY

78. *See* Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30, 42, 43 U.S.C. (Supp. II 1978)). Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (current version at 42 U.S.C. §§ 7101-7352 (Supp. III 1979)).

79. Department of Energy Organization Act, Pub. L. No. 95-91 § 401(f), 91 Stat. 583 (1977) (current version at 42 U.S.C. § 7172(h) (Supp. I 1980)).

80. 42 U.S.C. §§ 7101-7352 (Supp. III 1979). *See* S. Rep. No. 95-164, 95th Cong., 2d Sess, 2, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 854.

81. *See* note 78, *supra*. For the legislative history, *see* S. Rep. No. 95-141, 95th Cong., 2d Sess. 6, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7659.

82. The Court in Kohl v. United States, 91 U.S. 367 (1875), recognized a federal power of eminent domain that is separate and independent from the state power. *See also* Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977).