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City of Milwaukee v. Illinois: The Demise of Federal Common Law Nuisance Actions in Interstate Water Pollution Disputes

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NOTE

CITY OF MILWAUKEE V. ILLINOIS: THE DEMISE OF FEDERAL COMMON LAW NUISANCE ACTIONS IN INTERSTATE WATER POLLUTION DISPUTES

IN 1972 the State of Illinois instituted proceedings in federal district court against the city of Milwaukee and several area sewage commissions, seeking abatement of the public nuisance allegedly created by sewage discharged by the defendants.[1] Specifically, Illinois claimed that discharge of inadequately treated sewage from treatment plants and overflows polluted the state's territorial waters of Lake Michigan, thereby causing harm to the citizens of Illinois.[2] Illinois' action was based on the federal common law of nuisance involving interstate waters.[3] The defend-

1. The State of Illinois originally had filed a bill of complaint under the original jurisdiction of the United States Supreme Court, seeking abatement of sewage discharges by defendant municipalities located in Wisconsin. Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972). *See* 28 U.S.C. § 1251(a)(1) (1976), which provides that the Supreme Court shall have original and exclusive jurisdiction of "[a]ll controversies between two or more States." The Court's original jurisdiction in such controversies is constitutionally mandated under U.S. CONST. art. III, § 2, cl. 2. Illinois alleged jurisdiction based upon a characterization of defendants as "instrumentalities" of the State of Wisconsin. 406 U.S. at 94. Accordingly, the state claimed, the suit could not properly be brought in any other court. *Id.* Stating that "[i]t is well settled that for the purposes of diversity of citizenship, political subdivisions are citizens of their respective States," the Court held that although Wisconsin could be joined as a defendant in the abatement action, its joinder was not mandatory. *Id.* at 97. The Court concluded that the word "States" as used in 28 U.S.C. § 1251(a)(1) (1976), did not include political subdivisions. 406 U.S. at 98. The Court further concluded that the suit was within the jurisdiction of the federal district courts because the issues raised in the action involved federal common law, and represented, therefore, actions "arising under the 'laws' of the United States." *Id.* at 98-99; *see* 28 U.S.C. § 1331(a) (1976) (providing for federal district court jurisdiction of civil actions arising under United States laws).

2. Illinois v. City of Milwaukee, 366 F. Supp. 298, 299 (N.D. Ill. 1973). The state additionally alleged that the sewage discharges accelerated the eutrophication of Lake Michigan, thereby threatening the ecological health of that lake. Illinois v. City of Milwaukee, 599 F.2d 151, 155 (7th Cir. 1979). In eutrophication, nutrients introduced into a lake in sewage discharges stimulate the growth of animal and plant life, the subsequent decay of which depletes shallow water oxygen. Additionally, the influx of nutrients may stimulate the growth of undesirable plant and animal species. *See* Richerson & McEvoy, *The Measurement of Environmental Quality and its Incorporation into the Planning Process*, in ENVIRONMENTAL QUALITY AND WATER DEVELOPMENT 114-15 (C. Goldman, J. McEvoy & P. Richerson eds. 1973). Subsequent to filing of suit, the State of Michigan intervened as a plaintiff on the eutrophication issue. 599 F.2d at 155.

3. 366 F. Supp. at 299. Illinois also alleged causes of action based on state common

ants contended in a motion to dismiss that any cause of action that may have existed based on the federal common law of nuisance was preempted by the 1972 amendments to the Federal Water Pollution Control Act (FWPCA).[4] The district court granted the motion,[5] and subsequently granted relief to Illinois, entering judgment specifying effluent limitations, and establishing a timetable for construction of control facilities.[6] The Court of Appeals for the Seventh Circuit concurred with the lower court that the Act, as amended, had not preempted the federal common law of nuisance. The appellate court, however, reversed that part of the district court's order that applied stricter effluent standards than those in defendant's permits and applicable Environmental Protection Agency (EPA) regulations.[7] Defendants appealed the decision to the United States Supreme Court. *Held, vacated and remanded*: by establishing a comprehensive regulatory scheme for controlling water pollution in conjunction with a supervisory administrative agency, Congress preempted all remedies based on the federal common law of nuisance previously available in interstate water pollution disputes. *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981).

I. HISTORY OF FEDERAL COMMON LAW IN INTERSTATE WATER POLLUTION DISPUTES

Traditionally, the common law nuisance action was the primary mechanism employed to resolve water pollution disputes.[8] During the period of rapid industrialization, the number and severity of the nation's pollution problems greatly increased. As a result, the ad hoc approach of common law nuisance actions proved to be an ineffective response to the complex, large-scale disputes that had developed.[9] Consequently, in 1948 Congress enacted the Federal Water Pollution Control Act.[10] Although this Act was amended continually to conform to changing conditions, it too was grossly

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law nuisance law and violation of the Illinois Environmental Protection Act, ILL. ANN. STAT. ch. 111½, §§ 1001-1061 (Smith-Hurd 1977 & Supp. 1981-1982). 366 F. Supp. at 299.

4. 366 F. Supp. at 299; *see* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. The 1972 amendments brought about significant changes in the Federal Water Pollution Control Act of 1948, Pub. L. No. 845, 62 Stat. 1155. For the current version of the FWPCA, see 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979).

5. 366 F. Supp. at 302.

6. Illinois v. City of Milwaukee, 8 ENVT'L L. REP. (ELI) 20,503, 20,503 (N.D. Ill. Mar. 6, 1978). Between the commencement of trial and entry of judgment, a Wisconsin state court rendered a judgment against the defendants, requiring them to comply with the effluent limitations in the permits to discharge pollutants issued to them by the Wisconsin Department of Natural Resources. City of Milwaukee v. Illinois, 101 S. Ct. 1784, 1789, 68 L. Ed. 2d 114, 120 (1981).

7. Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979).

8. *See* McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27, 37 (1948). Nuisance actions were first applied to pollution cases in William Aldred's Case, 7 Eng. Rep. 816, 821 (K.B. 1611).

9. Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439, 1451-52 (1972).

10. Federal Water Pollution Control Act of 1948, Pub. L. No. 845, 62 Stat.1155 (current version at 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979)).

inadequate to contend with the growing environmental crisis.[11] The Act was particularly ineffective in resolving interstate water pollution disputes.[12] The deficiencies of the FWPCA in dealing with interstate controversies, however, were mitigated by applying the federal common law of nuisance.

A. The Federal Common Law of Nuisance

In 1938 the Supreme Court established the general rule that the federal courts are not at liberty to create and apply federal common law in all litigation.[13] The courts, however, do apply federal common law when an overriding federal interest in the subject matter exists or when a need for uniformity in applying the law is present.[14] Federal courts also apply federal common law in interstate disputes to protect the sovereign interests of the states involved.[15] One state cannot resolve a transboundary conflict without imposing its own law on another sovereign state, thereby violating the fundamental tenets of federalism.[16] Therefore, a state's sovereign right to be free from injury caused by the actions of another state[17] traditionally has been protected by the federal common law. Both of these considerations occur in interstate water pollution disputes. The federal government has a strong interest in maintaining the purity of interstate waters; additionally, the sovereign right of individual states to be free from injury caused by another state's pollution of transboundary waterways deserves

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11. The primary deficiency in the FWPCA prior to the 1972 amendments was the lack of effective means of enforcement. *See* Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1104-25 (1970); Ipsen & Raisch, *Enforcement Under the Federal Water Pollution Control Act Amendments of 1972*, 9 LAND & WATER L. REV. 369, 370-73 (1974).

12. The FWPCA held states responsible for developing water quality standards for intrastate waters. 33 U.S.C. § 1160 (1970) (repealed 1976). Consequently, state officials tended to disregard pollution discharges affecting neighboring states. *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1227 (1977).

13. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

14. *See* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964). Judge Friendly stated that

> *Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum, and therefore is predictable and useful. . . . The clarion yet careful pronouncement of *Erie*, "There is no federal general common law," opened the way to what, for want of a better term, we may call specialized federal common law.

Id. (footnote omitted). *See generally id.* at 405-22; Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

15. For cases involving the apportionment of interstate waters, see Nebraska v. Wyoming, 325 U.S. 589 (1945); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); Connecticut v. Massachusetts, 282 U.S. 660 (1931); Kansas v. Colorado, 206 U.S. 46 (1907). For cases involving pollution of interstate waters, see Illinois v. City of Milwaukee, 406 U.S. 91 (1972); New York v. New Jersey, 256 U.S. 296 (1921); Missouri v. Illinois, 200 U.S. 496 (1906).

16. Kansas v. Colorado, 206 U.S. 46, 95 (1907).

17. *See* Georgia v. Tennessee Copper Co., 206 U.S. 230, 238 (1907).

protection.[18]

The Supreme Court has long recognized the applicability of the federal common law of nuisance to interstate water pollution cases. In *Missouri v. Illinois*[19] the State of Missouri alleged that pollutants discharged into Lake Michigan under Illinois state authority were deteriorating local water supplies. While the Supreme Court denied relief due to a lack of proof, it nevertheless held that such an action was properly brought.[20] Only one year later, in *Georgia v. Tennessee Copper Co.*,[21] Justice Holmes reaffirmed the Court's position that a state has a sovereign right to be free from out-of-state nuisances, and that this right can be protected by an action in federal court.[22]

More recently the United States Court of Appeals for the Tenth Circuit applied the federal common law of nuisance to an interstate water pollution dispute in *Texas v. Pankey*.[23] The court noted that a state possesses certain ecological rights in its natural resources that are entitled to protection from impairment by external sources.[24] The court concluded that these rights were best protected by application of federal common law because this approach would ensure uniformity in dealing with the environmental concerns of different states.[25]

The *Pankey* decision foreshadowed the landmark decision of the Supreme Court in 1972, *Illinois v. City of Milwaukee*.[26] The Court, in the

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18. *See* Texas v. Pankey, 441 F.2d 236, 240-42 (10th Cir. 1971).

19. 200 U.S. 496 (1906).

20. *Id.* at 520-21.

21. 206 U.S. 230 (1907).

22. *Id.* at 237. The Court described the state's interest in such an action as "quasi-sovereign" in nature; accordingly, the "State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Id.*

23. 441 F.2d 236 (10th Cir. 1971). The *Pankey* decision was strongly criticized in Note, *supra* note 9.

24. In its discussion of the ecological rights of states, the court relied on the concept of "quasi-sovereign" rights articulated in Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907). 441 F.2d at 240.

25. 441 F.2d at 241. The court noted:

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. . . . In the outside sources of such impairment, more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable. Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

Id.

26. 406 U.S. 91 (1972). For a discussion of the procedural aspects of this decision, see note 1 *supra*. *Illinois v. City of Milwaukee* evoked extensive commentary. *See, e.g.*, Campbell, *Illinois v. City of Milwaukee: Federal Question Jurisdiction Through Federal Common Law*, 3 ENVT'L L. 267 (1973); Comment, *The Expansion of Federal Common Law and Federal Question Jurisdiction to Interstate Pollution*, 10 HOUS. L. REV. 121 (1972); Comment, *Federal Common Law in Interstate Water Pollution Disputes*, 1973 U. ILL. L.F. 141. *See generally* Leybold, *Federal Common Law: Judicially Established Effluent Standards as a*

latter case, approved the principle articulated by the Tenth Circuit in *Pankey*: federal common law was available to abate a public nuisance in interstate navigable waters.[27] As in *Pankey*, the Court reasoned that federal common law applied because of the interstate nature of the dispute and the need for uniformity in dealing with interstate waters.[28] Moreover, the Court held that application of federal common law was not precluded by federal environmental legislation.[29] The Court first reviewed the existing environmental laws and noted that the remedy sought by Illinois was not among those provided for by Congress.[30] The Court concluded, however, that "the remedies which Congress provides are not necessarily the only federal remedies available";[31] federal common law also was available as an additional means of redress.[32] Furthermore, federal environmental legislation did not constitute the "outer bounds" of federal common law, but rather provided "useful guidelines" for the courts in fashioning remedies.[33] The Court concluded by noting:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.[34]

Thus, the Court in *Illinois v. City of Milwaukee* left open the possibility that federal common law could be preempted by future federal legislation on the subject.

Only five months after the *Illinois* decision was announced, Congress enacted the amendments to the FWPCA, commonly known as the Clean Water Act of 1972 (CWA).[35] The CWA was Congress's most comprehensive and encompassing statement of federal water pollution policy to that date.[36] The CWA created a legislative-administrative partnership through

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Remedy in Federal Nuisance Actions, 7 B.C. ENVT'L AFF. L. REV. 293 (1978); Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?*, 49 FORDHAM L. REV. 500 (1981); Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 FORDHAM URB. L.J. 549 (1977).

27. 406 U.S. at 103.

28. *Id.* at 103-07.

> [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. . . . Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan, bounded, as it is, by four States.

Id. at 105 n.6.

29. *Id.* at 103, 107.

30. *Id.* at 103; *see* note 11 *supra*.

31. 406 U.S. at 103.

32. *Id.*

33. *Id.* n.5.

34. *Id.* at 107.

35. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

36. Congress viewed the previous versions of the FWPCA as "inadequate in every vital aspect." S. REP. No. 414, 92d Cong., 1st Sess. 7, *reprinted in* A LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1425 (1973) [hereinafter cited as LEGISLATIVE HISTORY]. The bill was described as "the most compre-

which specific regulatory programs were developed, implemented and, for the first time, effectively enforced.[37] The existence of this elaborate legislative scheme presented the question of preemption of federal common law in environmental disputes in a new light.

B. Preemption of Federal Common Law

The doctrine of separation of powers is a central principle of American government.[38] The delicate balance of power between the branches of the federal government is of vital importance to its successful operation and has been strictly observed by the Supreme Court.[39] As a rule, the courts are not free to develop and apply their own rules of decision in the face of congressional legislation on the subject.[40] The courts do have the power, however, to develop federal law in the "interstitial regions," those areas of law not specifically addressed by statute, in order to effectuate the legislative policies expressed in the statutory scheme.[41] In *New Jersey v. New York*,[42] a case involving interstate water apportionment, the Court recognized that federal common law is "subject to the paramount authority of Congress."[43] Later, in *Clearfield Trust Co. v. United States*,[44] the Court elaborated on this rule by suggesting that federal common law should be applied only in the absence of congressional action.[45] The courts followed this perception of the appropriate application of federal common law in cases involving interstate waters.[46] The courts generally applied federal

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hensive and far-reaching water pollution bill we have ever drafted." LEGISLATIVE HISTORY, *supra*, at 369 (remarks of Rep. Mizell).

37. 33 U.S.C. §§ 1251(d), 1361 (1976).

38. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 126-27 (1978); Clark, *Separation of Powers*, 11 WILLAMETTE L.J. 1 (1974).

39. *See* TVA v. Hill, 437 U.S. 153, 194-95 (1978).

40. The Supreme Court has stated:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and the constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

Id. See also Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) ("the courts are not free to 'supplement' Congress' answer so thoroughly that [congressional legislation] becomes meaningless"); Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?*, 44 FORDHAM L. REV. 500 (1981).

41. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) (federal common law applied to prevent impairment of federal statutory programs for land acquisition); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (court applied federal common law when it enforced arbitration agreement in suit brought under § 301 of the Taft-Hartley Act); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943) (duty of federal courts to fashion governing rule of federal law in determining rights and duties of United States on commercial paper that it issues, because of the need for uniformity); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942) (federal common law applied to uphold federal policies, evinced by Federal Reserve Act, 12 U.S.C. § 264 (1940), protecting Federal Deposit Insurance Corporation).

42. 283 U.S. 336 (1931).

43. *Id.* at 348.

44. 318 U.S. 363 (1943).

45. *Id.* at 367.

46. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972) (pollution of inter-

common law in these cases because federal legislation on the subject was by no means comprehensive, and federal common law was necessary to fill gaps in the statutory scheme in order to effectuate clear congressional intent.[47] Since the enactment of the CWA, however, the federal courts have been divided on the question of whether the CWA preempted the federal common law of nuisance.

The Fourth Circuit, in *Committee for the Consideration of the Jones Falls Sewage System v. Train*,[48] refused to circumvent the CWA by imposing stricter common law remedies. The court could not reconcile the fact that federal common law could prohibit conduct that was expressly permitted by the CWA, and rejected the common law remedy to prevent what it perceived as an anomalous result.[49] More recently, however, the Third Circuit in *National Sea Clammers Association v. City of New York*[50] bypassed the procedural notice requirements of the CWA and held that a federal nuisance action by a private party was valid.[51] Due to the varying federal decisions regarding the preemptive consequences of the CWA, the status of the federal common law nuisance action as a tool for environmental control became confused.

II. *CITY OF MILWAUKEE V. ILLINOIS*

Against this background, the Supreme Court reviewed in *City of Milwaukee v. Illinois* the Seventh Circuit's holding that the 1972 amendments to the FWPCA had not preempted the federal common law of nuisance.[52] Justice Rehnquist, writing for the majority,[53] recognized the importance of interstate common law to controversies not specifically covered by federal legislation,[54] but found that the regulatory program established under the CWA directly addressed the sewage overflows in question.[55]

The Court's decision suggested that when no gaps are to be filled in the regulatory framework, the federal courts are not free to apply federal common law.[56] In *City of Milwaukee* the majority clearly viewed the CWA as

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state waters of Lake Michigan); Arizona v. California, 373 U.S. 546, 565 (1963) (apportionment of waters of the Colorado River among neighboring states); Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971) (federal common law applies until field is occupied by comprehensive legislation or administrative regulatory scheme).

47. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 103-04 (1972). *See also* notes 8-11 *supra* and accompanying text.

48. 539 F.2d 1006, 1009-10 (4th Cir. 1976).

49. *Id.* at 1009.

50. 616 F.2d 1222 (3d Cir. 1980), *vacated sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

51. 616 F.2d at 1235.

52. Illinois v. City of Milwaukee, 599 F.2d 151, 164 (7th Cir. 1979).

53. Justice Rehnquist was joined in his opinion by Chief Justice Burger, and Justices Brennan, Stewart, White, and Powell.

54. 101 S. Ct. at 1790, 68 L. Ed. 2d at 124 (1981) ("When Congress has not spoken to a particular issue, however . . . the Court has found it necessary, in a 'few and restricted' instances to develop federal common law") (citing Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

55. 101 S. Ct. at 1795, 68 L. Ed. 2d at 130.

56. *Id. See also* Note, *supra* note 40, at 517.

comprehensive legislation.[57] As such, the interstitial areas, previously recognized by the Court as adaptable to federal nuisance law,[58] were eliminated by the enactment of the 1972 amendments.

The majority in *City of Milwaukee* began its analysis of the preemption question with a review of prior Court decisions in which federal common law doctrines were displaced by legislation.[59] In support of this rationale, Justice Rehnquist carefully distinguished his analysis from that used to determine whether federal law preempts state law in a particular field.[60] Federal preemption of state law concerns basic notions of federalism and requires a showing of a clear and manifest purpose of Congress to preempt.[61] In discussing whether federal statutory or federal common law governs a given field, the inquiry begins with the assumption that the legislative branch is to develop federal law.[62] According to the majority, therefore, the question is not whether Congress has explicitly proscribed the use of federal common law, but merely whether Congress has occupied the field.[63]

Justice Blackmun, writing for the dissent,[64] was dissatisfied with the Court's distinction between federal preemption of state law and congressional displacement of common law.[65] He maintained that the simplistic, "automatic displacement" approach used by the majority was inadequate in two respects. He argued first that the analysis ignored the unique role of federal common law in resolving interstate disputes, and secondly, that it failed to acknowledge the usefulness of common law doctrines in furthering federal policies.[66] In support of these contentions, Justice Blackmun relied on *Georgia v. Tennessee Copper Co.*[67] and related cases standing for the proposition that each state has a right to federal protection from out-of-state nuisances.[68] He implied that such protection is provided through

57. 101 S. Ct. at 1792, 68 L. Ed. 2d at 126.

58. Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972).

59. 101 S. Ct. at 1791, 68 L. Ed. 2d at 125. The Court quoted extensively from Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), and Arizona v. California, 373 U.S. 546 (1963).

60. 101 S. Ct. at 1792 n.9, 68 L. Ed. 2d at 126 n.9.

61. *Id.* at 1792, 68 L. Ed. 2d at 126. *See also* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959) (requiring "due regard for the presuppositions of [the] embracing federal system").

62. 101 S. Ct. at 1792, 68 L. Ed. 2d at 126.

63. *Id.* at 1796, 68 L. Ed. 2d at 131. The Court stated the test as follows: "Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.*

64. Justice Blackmun was joined in his dissenting opinion by Justices Marshall and Stevens.

65. 101 S. Ct. at 1800 n.2, 68 L. Ed. 2d at 137 n.2. Justice Blackmun recognized, however, the distinction between the interests of federalism which exist in assessing federal preemption of state law and the issues of separation of powers present in *City of Milwaukee*. *Id.*

66. *Id.* at 1801, 68 L. Ed. 2d at 137.

67. 206 U.S. 230 (1907); *see* text accompanying notes 21-22 *supra*.

68. 101 S. Ct. at 1801, 68 L. Ed. 2d at 138.

application of federal common law doctrines.[69] The dissent also emphasized the importance of interstitial federal law-making as a basic responsibility of the federal courts, relying heavily on the Court's previous decision in *Illinois* to apply federal nuisance law in the face of an abundance of pertinent legislation.[70] Contrary to the majority opinion, Justice Blackmun argued that federal interest in a field should support, rather than preclude, the application of federal common law principles.[71] Thus, he reasoned that the proper question is not merely whether Congress has occupied the field, but whether Congress specifically intended to supplant preexisting federal remedies.[72] The dissent stated that the duty of a reviewing court should be to examine the specific congressional intent as well as the magnitude of the legislation.[73]

The majority, however, did examine the congressional intent in some detail. Focusing on the legislative history surrounding the 1972 amendments, Justice Rehnquist placed great emphasis on the abundance of legislative commentary proclaiming the comprehensive and all-encompassing character of the amendments.[74] Based on this perception of congressional intent, the majority had little difficulty in finding that both the problem of effluent limitations and overflows were covered by the Act.[75]

Justice Blackmun contended that the generalized references to the comprehensive nature of the Act relied on by the majority were entitled to little weight.[76] Instead, he centered his attention on section 505(e) of the Act, the citizen suit provision, which declares that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law."[77] Agreeing with the Seventh Circuit, the dissent interpreted "common law" to include federal common law.[78]

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69. *Id.* at 1800-02, 68 L. Ed. 2d at 137-38. *See generally* Hill, *supra* note 14, at 1026-42; Leybold, *supra* note 26, at 294-301.

70. 101 S. Ct. at 1802, 68 L. Ed. 2d at 138-39. *See also* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973).

71. *See* 101 S. Ct. at 1802, 68 L. Ed. 2d at 138-39.

72. *Id.* at 1803, 68 L. Ed. 2d at 139.

73. *Id.*, 68 L. Ed. 2d at 140. Justice Blackmun stated: "[T]o say that Congress 'has spoken' . . . is only to begin the inquiry; the critical question is what Congress has said." *Id.* n.8 (quoting the majority, *id.* at 179 n.8, 68 L. Ed. 2d at 125 n.8). *See also* Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (Congress preempted questions of deductions, based on dereliction of duty, against a seaman's claim to his wages by excluding all deductions except those explicitly listed).

74. 101 S. Ct. at 1792-93, 68 L. Ed. 2d at 127-28. The Court cited LEGISLATIVE HISTORY, *supra* note 36, at 350-51 (remarks of Chairman Blatnik indicating that the amendments were a "total restructuring" and "complete rewriting" of the existing legislation).

75. 101 S. Ct. at 1792, 68 L. Ed. 2d at 126.

76. *Id.* at 1805-06, 68 L. Ed. 2d at 142-43.

77. 33 U.S.C. § 1365(e) (1976).

78. 101 S. Ct. at 1804, 68 L. Ed. 2d at 141; *see* National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1233 n.31 (3d Cir. 1980), *vacated sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981); California Tahoe Regional Planning Agency v. Jennings, 594 F.2d 181, 193 (9th Cir. 1979) (court allowed action brought under federal common law of nuisance against county commissioners for approval of construction permits for hotel-casinos on shores of Lake Tahoe), *cert. denied*, 444 U.S. 864 (1979). *See also* Illinois v. Outboard Marine Corp., 619 F.2d 623, 626 (7th Cir. 1980) (Seventh Circuit validated a federal common law nuisance action

The majority, however, held that the entire savings clause was irrelevant. They contended that the phrase "in this section," limited the effect of the savings clause to citizen suits.[79] Further, Justice Rehnquist argued that section 510,[80] which reserves to the states the right to impose stricter limitations than those enumerated in the statute, applies only to intrastate polluters through application of state administrative processes or nuisance law.[81] Thus, only state, not federal, common law is available for enforcement of more stringent standards.[82]

While both opinions focused largely on the intent of the Congress, additional considerations supported the decision. Initially, the majority indicated that the application of federal common law was peculiarly inappropriate in light of the complexity of the problems associated with water pollution control.[83] Justice Blackmun rejected this argument and pointed to the fact that the EPA itself often used federal nuisance law remedies where appropriate.[84] Additionally, the Court emphasized the fact that the permit granting process of the Act provided Illinois with a forum in which to protect its interests.[85] Prior to the Act's amendments the plaintiff had no available forum unless federal common law was judicially created.[86] Justice Blackmun contended, however, that because the hearing procedures were not in place until two years after Illinois commenced the action, denying relief on that basis would be unfair.[87] Furthermore, he argued that Congress had intended the hearing process to be a voluntary option, rather than a jurisdictional bar.[88]

The majority opinion in *City of Milwaukee* sends a clear message to the lower federal courts that they are not free to supplement congressional water pollution policy by creation of federal nuisance law. This holding significantly alters the former methodology of the national water pollution control effort.[89] The new approach will have varying effects on the resolu-

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brought by Illinois against in-state polluter (*see* note 95 *supra*)), *vacated*, 101 S. Ct. 3152, 69 L. Ed. 2d 1000 (1981).

79. 101 S. Ct. at 1798, 68 L. Ed. 2d at 133-34.

80. 33 U.S.C. § 1370 (1976).

81. 101 S. Ct. at 1797-98, 68 L. Ed. 2d at 132-33.

82. *Id.* The Court cited Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971), for the proposition that state common law would control a claim such as Illinois'. 101 S. Ct. at 1797 n.19, 68 L. Ed. 2d at 132 n.19.

83. 101 S. Ct. at 1796, 68 L. Ed. 2d at 131.

84. *Id.* at 1807-08, 68 L. Ed. 2d at 145. The EPA consistently has viewed interstate common law as a supplementary mechanism to the CWA. Brief for the United States as Amicus Curiae at 27-29, City of Milwaukee v. Illinois, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981); *see* Reserve Mining Co. v. EPA, 514 F.2d 492, 501 (8th Cir. 1975). *See also* Note, *supra* note 40, at 529. As the primary enforcement agency, the EPA's views are entitled to substantial deference. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 134-35 (1977).

85. 101 S. Ct. at 1797, 68 L. Ed. 2d at 132. The majority found significant the availability of public hearings established under 33 U.S.C. § 1342(b)(3) (1976). 101 S. Ct. at 1797, 68 L. Ed. 2d at 132.

86. Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972).

87. The dissent acknowledged the existence of the forum but argued that it did not preclude the use of other forums. 101 S. Ct. at 1807 n.19, 68 L. Ed. 2d at 144 n.19.

88. *Id.* at 1807, 68 L. Ed. 2d at 144.

89. In the wake of the decision in *City of Milwaukee*, the former widespread use of

tion of interstate water pollution disputes, but it is likely to reduce the flexibility that may be needed to resolve special problems on a case-by-case basis. Nevertheless, the advantages of uniformity, in an area replete with uncertainty, may outweigh any loss in flexibility. Before conclusions may be drawn, however, the effect of the decision must be examined in light of the two federal interests relied upon in *Illinois* and recognized by the dissent.

The federal interest in protection of the nation's waterways is not significantly affected by the holding.[90] The CWA clearly is a comprehensive and all-encompassing statement of federal water pollution policy. Its detailed regulatory regime and complex enforcement procedures adequately protect the federal interest in the purity of our navigable waters. In this sense, creation of federal common law is an unnecessary judicial encroachment upon the legislative scheme.

In the past, however, some federal courts have sidestepped the procedural and substantive requirements of the CWA in the name of effectuating federal policy. Although not mentioned in the majority opinion, *National Sea Clammers Association v. City of New York*[91] presents an example of such a case. In *National Sea Clammers* the Third Circuit allowed the plaintiffs to avoid statuory notice procedures required by the CWA by permitting them to bring a common law nuisance action.[92] In so doing, the court also ignored the fact that the city of New York was operating under a valid EPA permit.[93] By circumventing the statutory procedures and invalidating conduct authorized by the EPA, the court clearly interfered with legislative action.[94] The *National Sea Clammers* case was appealed to the Supreme Court and decided shortly after *City of Milwaukee*. Thus, the Court was presented with an immediate opportunity to establish the effects of the holding in *City of Milwaukee*.[95]

The Court in *Middlesex County Sewerage Authority v. National Sea Clammers Association*[96] reiterated the position announced in *City of Milwaukee* that the federal common law of nuisance in the area of water pollution is entirely preempted by the CWA. On this basis, the Court

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federal common law remedies by the EPA inevitably will cease. *See* Brief for the United States as Amicus Curiae at 27-29, City of Milwaukee v. Illinois, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981).

90. *See* Note, *supra* note 40, at 512-13.

91. 616 F.2d 1222 (3d Cir. 1980), *vacated sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

92. 616 F.2d at 1225-26.

93. While the *Illinois* Court recognized that federal common law remedies were not barred by the statutory regime, it contemplated an intersitial remedy rather than the creation of a substantive body of law outside the statute. *See* Note, *supra* note 40, at 517.

94. *See id.* at 516.

95. The Court also granted certiorari and vacated the judgment in Outboard Marine Corp. v. Illinois, 101 S. Ct. 3152, 69 L. Ed. 2d 1000 (1981), in light of the decision in *City of Milwaukee*. The Seventh Circuit in *Outboard Marine* had held that Illinois could sue a private *intrastate* polluter regardless of the lack of extraterritorial effects. Illinois v. Outboard Marine Corp., 619 F.2d 623, 630 (7th Cir. 1980), *vacated*, 101 S. Ct. 3152, 69 L. Ed. 2d 1000 (1981).

96. 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

summarily dismissed the plaintiffs' federal common law claims.[97] The decision in *Middlesex County* underscores the effect of the Court's holding in *City of Milwaukee*: compliance with the requirements of the CWA is a complete defense to a federal common law nuisance action. As noted by the dissent in *Middlesex County*,[98] this effect may be contrary to congressional intent. Nevertheless, both *Middlesex County* and *City of Milwaukee* eliminate errant and intrusive judicial law-making in this area.

The federal interest in resolution of interstate conflicts, however, was apparently ignored by the *City of Milwaukee* majority. Historically, federal common law has been applied to resolve disputes involving the quasi-sovereign rights of states in interstate resources.[99] The majority's decision precludes application of "interstate common law"[100] to interstate water pollution disputes. While the majority conceded that the policy of the CWA is to "recognize, preserve, and protect the primary . . . rights of States,"[101] Justice Rehnquist failed to acknowledge that such rights have long been considered of primary importance and worthy of federal protection by the Court.

The CWA allows the states to promulgate stricter effluent standards than those provided in the Act.[102] It has no provision, however, for enforcement of those standards against neighboring states in transboundary pollution disputes.[103] When state programs are in conflict, as in *City of Milwaukee*, the CWA provides no means for protecting the state's sovereign ecological rights. Federal common law properly could be used to fill the gap left by the Legislature.

The majority suggests that the permit-granting process provides the complaining state a forum in which to recommend adoption of its own stricter standards.[104] While this process may be effective in some instances, the elimination of federal common law nuisance remedies may leave unprotected the sovereign rights of the States to be free from transboundary pollution. This could upset the balance of federalism in the Union by creating tension between the states and encouraging political battles in Congress.

III. CONCLUSION

City of Milwaukee v. Illinois represents a significant change in the methodology of the nation's water pollution control program. The Supreme Court reconsidered its 1972 decision in *Illinois v. City of Milwaukee* in light

97. *Id.* at 2627, 69 L. Ed. 2d at 451-52.
98. *Id.* at 2632, 69 L. Ed. 2d at 458.
99. *See* notes 15-22 *supra* and accompanying text.
100. The phrase "interstate common law" first was used in Kansas v. Colorado, 206 U.S. 46, 98 (1907), to describe the federal common law developed to resolve disputes over interstate resources.
101. 33 U.S.C. § 1251(b) (1976).
102. *Id.* § 1370.
103. *Id.* § 1342(b). The CWA addresses conflicting state programs only insofar as it provides for recommendation of standards by the complaining state.
104. 101 S. Ct. at 1797, 68 L. Ed. 2d at 132.

of the 1972 amendments to the FWPCA and concluded that the comprehensive statutory scheme enacted by Congress precluded actions for water pollution damage based on the federal common law of nuisance. In so doing, the Court eliminated an important mechanism of water pollution control while protecting the delicate balance inherent in the doctrine of separation of powers.

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