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Federal Jurisdiction -- Environmental Law -- Do Private Citizens Have a Right To Bring Action To Abate Water Pollution Under Federal Common Law?

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dress grievances that are inextricably wound with much larger social, political and economic problems. While outlawing certain discriminatory credit-granting practices, the amendments do not challenge the catch-22 of the underlying economic system. Credit is often denied because the applicant does not have a credit history; for many this vicious circle cannot be broken. Persons with low incomes are often unable to obtain loans though they may be perfectly capable of slowly repaying a small loan. And because credit has become so integral a part of the American economic system[51] the individual defined as a "bad" credit risk all too frequently turns to the thriving underworld of loan sharks and extortionists.

And yet if credit is going to remain an important tool for improving the standard of living, as well as for aiding the individual through temporary periods of financial difficulty, it is imperative that such a tool be universally available. If the amendments result in efforts on the part of lending institutions to reassess established credit scoring schemes, as well as in greater consumer understanding of creditors' lending criteria, they should be called a success.[52]

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Federal Jurisdiction—Environmental Law—Do Private Citizens Have a Right To Bring Action To Abate Water Pollution Under Federal Common Law?

The Federal Water Pollution Control Act Amendments of 1972[1] set a goal of ending all pollutant discharges into navigable waters by 1985.[2] This lofty goal will be difficult to obtain[3] even with congres-

51. "Between . . . 1950 and 1971 consumer credit outstanding rose from $21.5 billion to $137.2 billion, an increase of over five times . . . ." NCCF REPORT, *supra* note 21, at 5.

52. The legislation, however, does not address the problems created by an ever-increasing national, corporate and individual debt. This increased debt is one manifestation of the "rising expectations" politicians have taught us to fear, but we are continually urged to "relax" and "charge it."

1. 33 U.S.C. §§ 1251-1376 (Supp. V 1975).

2. *Id.* § 1251(a)(1).

3. McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 WASH. & LEE L. REV. 195, 208 (1973).

sionally mandated state and federal cooperation.[4] In *Committee for the Consideration of the Jones Fall Sewage System v. Train*,[5] the Fourth Circuit Court of Appeals turned down an opportunity to become involved in pollution control by further judical expansion of "specialized federal common law."[6] The court held that private citizens have no federal common law right to enjoin intrastate water pollution that is not enjoinable under the Federal Water Pollution Control Act Amendments of 1972.[7]

The Committee for the Consideration of the Jones Falls Sewage System complained that the city of Baltimore was discharging sewage into Jones Falls Stream. Plaintiffs first sought injunctive relief under the federal water pollution statutes,[8] but it soon appeared that they had no cause of action under the statutes because the city had submitted an application for a discharge permit under 33 U.S.C. § 1342(k),[9] which provides that discharges will not be a statutory violation during the pendency of a proper application. The authorizing agency found that the city was meeting the statutory standards and a permit was issued during the pendency of the litigation. The issuance of the permit prevented any relief under the federal statute, so plaintiffs amended their complaint to allege a federal common law right of action for an injunction[10] against additional connections to the sewer system that

4. *See* 33 U.S.C. § 1251(b) (Supp. V 1975).

5. 539 F.2d 1006 (4th Cir. 1976).

6. For a discussion of the development of "specialized federal common law" since the ban on "generalized federal common law" in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), see Friendly, *In Praise of Erie—and the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

7. 539 F.2d at 1007.

8. *Id.*

9. (Supp. V 1975). This section states in part:

> Compliance with a permit issued pursuant to that section shall be deemed compliance [with all statutory standards, except those imposed] for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of [statutory standards], unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application.

10. Injunctions for abatement of pollution have been granted on federal common law grounds. *See, e.g.*, Illinois v. Milwaukee, 406 U.S. 91 (1972); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971). *Illinois* involved a state seeking an injunction against a city of another state to abate water pollution. The Court felt that the national interest in pollution control and the interstate nature of the parties made it inappropriate to subject either party to the laws and processes of a foreign state, and consequently applied federal common law to permit the injunctive relief. 406 U.S. at 101-08.

was discharging pollutants into the stream.[11]

In the district court defendants moved to dismiss the complaint, alleging that the district court lacked subject matter jurisdiction or if jurisdiction was found, that the district court should elect not to exercise it under the doctrine of primary jurisdiction.[12] Defendants based their allegation of lack of subject matter jurisdiction on two premises: (1) that private citizens could not invoke federal common law to abate intrastate pollution of navigable waters, and (2) that the 1972 amendments to the Federal Water Pollution Control Act preempted the federal common law.[13] The district court held that only governmental units could invoke the federal common law cause of action to abate pollution of navigable waters,[14] and thus found it unnecessary to consider whether the 1972 amendments preempted the federal common law.[15]

The Fourth Circuit Court of Appeals affirmed the district court's decision and concluded that the amended complaint stated no claim upon which relief could be granted.[16] In reaching its decision the court of appeals indicated four reasons for not recognizing a body of federal common law conferring rights upon private citizens to enjoin pollution of intrastate waters not enjoinable under the Federal Water Pollution Control Act Amendments of 1972. The court first relied upon the *Erie Railroad v. Tompkins*[17] ban on general federal common law.[18] The

11. 539 F.2d at 1008.

12. Committee v. Train, 375 F. Supp. 1148, 1149 (D. Md. 1974). The doctrine of primary jurisdiction is often invoked when an administrative agency has been created to deal with problems that arise in a particular area, such as pollution control. The court will invoke that doctrine to deny jurisdiction to a plaintiff when it feels that the administrative agency is the proper body to decide the particular claim, or that plaintiff should exhaust any possible administrative remedies before the court grants jurisdiction. For a good discussion of the doctrine of primary jurisdiction in environmental litigation, see Hoffman, *The Doctrine of Primary Jurisdiction Misconceived: End To Common Law Environmental Protection?*, 2 FLA. ST. U.L. REV. 491 (1974). Neither the district court nor the court of appeals in *Committee v. Train* discussed or relied upon the doctrine of primary jurisdiction in its decision.

13. 539 F.2d at 1011 (dissenting opinion); 375 F. Supp. at 1153-55.

14. 375 F. Supp. at 1153-54. The district court felt that the federal common law respecting waters should be limited to governmental entities because it developed in disputes between states and the rationale of preventing subjection of one state to the laws and courts of another did not apply to disputes between citizens. *Id.*

15. 539 F.2d at 1011 (dissenting opinion); 375 F. Supp. at 1155.

16. 539 F.2d at 1010.

17. 304 U.S. 64 (1938). Justice Brandeis concluded that there was "no federal general common law." *Id.* at 78. Brandeis' decision was based upon considerations of the allocation of power in a federal system. Friendly, *supra* note 6, at 394-95; Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10 (1975).

18. 539 F.2d at 1008. Until the *Erie* decision federal courts were often developing generalized federal common law to settle disputes, and this practice spread to substantive areas where no congressional action had been taken. *Erie* stopped the advance-

court of appeals acknowledged that a body of "new federal common law"[19] respecting waters has developed,[20] but it distinguished the *Committee v. Train* case from earlier cases[21] that had recognized a federal common law right to abate water pollution. As a second reason for denial of plaintiff's requested relief, the court recognized a distinction between governmental entity plaintiffs[22] in the earlier cases and private citizen plaintiffs in *Committee v. Train.*[23] The court's third ground for not applying the federal common law respecting waters was that *Committee v. Train* involved an intrastate stream rather than interstate waters.[24] The fourth reason given by the court of appeals was that the 1972 act of Congress preempted[25] any federal common law that would proscribe conduct permitted under the Act.[26]

An understanding of the development of federal common law since the *Erie* decision is necessary to analyze properly the basis for the court of appeals' decision in *Committee v. Train.* On the same day that *Erie* banned federal common law, the Supreme Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[27] began to develop "spec-

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ment of federal common law into areas of state rather than federal concern, but soon after *Erie* the federal courts began to develop specialized federal common law in areas of federal concern. *See* Monaghan, *supra* note 17, at 10-14. *See generally* Friendly, *supra* note 6.

19. Friendly, *supra* note 6.

20. 539 F.2d at 1008-09; *see* Illinois v. Milwaukee, 406 U.S. 91 (1972); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971).

21. Illinois v. Milwaukee, 406 U.S. 91 (1972); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971); United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110 (D. Vt.) *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973); United States *ex rel.* Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973).

22. *See* cases cited note 21 *supra.*

23. 539 F.2d at 1009.

24. *Id.* at 1009-10.

25. *Id.* For a summary of the statutory provision legitimatizing discharges pursuant to a permit, see note 9 *supra.*

26. 539 F.2d at 1009. In a dissenting opinion Judge Butzner stated that there is a federal interest in ending pollution in Jones Falls Stream because of its effect on the Chesapeake Bay and because it is within the broad definition of navigable waters that Congress and the courts have determined to be under federal control. *Id.* at 1011-13. Butzner argued that the 1972 amendments are further evidence of a national interest in allowing plaintiffs relief in that the amendments provide private citizens with the right to bring suits to enforce effluent standards and preserve any common law cause of action. *Id.* Butzner recognized the specific statement in *Illinois v. Milwaukee* that federal common law applied to "navigable waters" rather than just interstate waters, and that *Illinois* was not limited to suits brought by states. *Id.* at 1013. The dissenting opinion emphasized the fact that it would be inconsistent to allow state courts to fill federal interstices. *Id.* at 1014. After concluding that plaintiffs had standing because of their particular injuries, Judge Butzner said that any preemption question should be decided only upon a consideration of the merits. *Id.* at 1014-16.

27. 304 U.S. 92 (1938).

ialized federal common law."[28] In resolving a controversy concerning interstate waters, the Court in *Hinderlider* concluded that federal courts should fashion federal common law when the interstate nature of a dispute makes it inappropriate that the law of either state should govern.[29]

In *Illinois v. Milwaukee*[30] the Supreme Court relied partially on federal common law respecting disputes among the states, developed in *Hinderlider* and subsequent cases,[31] to recognize a federal common law cause of action to abate pollution of navigable waters.[32] The state of Illinois sought an injunction to abate pollution of Lake Michigan by the city of Milwaukee.[33] The Court felt the interstate nature of the dispute and the national interest in pollution control merited relief under the federal common law.[34] The basic rationale behind the generation of federal common law to govern interstate disputes was said to be the necessity for avoiding subjection of one state's rights to an adjudication in the forum of another state or under the laws of another state.[35]

Many other areas of specialized federal common law have developed[36] since *Hinderlider*. Much of the federal common law has developed in response to a broad exception contained in *Erie* itself:

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28. Friendly, *supra* note 6, at 405.

29. 304 U.S. at 110.

30. 406 U.S. 91 (1972).

31. *See, e.g.*, Vermont v. New York, 417 U.S. 270, 277 (1974); Texas v. New Jersey, 379 U.S. 674, 677 (1965). *See generally* Monaghan, *supra* note 17, at 14.

32. Illinois v. Milwaukee, 406 U.S. 91, 104-05 (1972); Texas v. Pankey, 441 F.2d 236, 239-40 (10th Cir. 1971).

33. 406 U.S. at 93-94.

34. *Id.* at 105-08.

35. *See id.* at 104-05; Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); Missouri v. Illinois, 180 U.S. 208, 241 (1901); Monaghan, *supra* note 17, at 14.

36. *See, e.g.*, Moragne v. States Marine Line, Inc., 398 U.S. 375, 381-403 (1970) (maritime law); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964) (foreign relations); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (overriding national interest).

A simple classification of the areas in which federal common law has developed is not easy to obtain. In Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1519-26 (1969), one commentator has listed three categories of federal common law. The first category contains those cases that developed federal common law from the concept of national sovereignty, such as Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). A second category includes those cases that developed federal common law because Congress has expressly or impliedly authorized the courts to develop law in an area. Examples of express authorization to the courts to develop law in an area are the Rules Enabling Acts, 28 U.S.C. §§ 2071-2072 (1970). The third category includes those cases that have created federal common law to formulate remedies for the breach of duties imposed by federal laws. An example of a court-created remedy for a breach of a duty imposed by federal legislation is the creation

"*Except in matters governed by the Federal Constitution or by the Acts of Congress,* the law to be applied in any case is the law of the State."[37] The most significant expansion of specialized federal common law has been in matters governed by acts of Congress.[38] Federal courts used specialized federal common law to fulfill legislative intent and fill federal statutory interstices.[39]

In *Committee v. Train* the Fourth Circuit observed that *Erie* had banned general federal common law and stated that the facts presented did not justify the application of specialized common law that had developed since *Erie.*[40] In particular, the court examined and rejected the line of cases that had evolved to settle interstate disputes.[41] The court noted that the rationale of protecting one state from subjection to another state's laws or courts[42] applied only to cases involving governmental entities complaining of pollution that was of an interstate character,[43] and not to cases involving private citizens complaining of pollution of a local nature.[44] The court's distinction between the *Committee v. Train* case and many earlier cases[45] that had applied federal common law to solve interstate disputes is sound; however, the court failed to consider other areas of federal common law development that might have been appropriate in the *Committee v. Train* context. Although the court was correct when it stated that the Supreme Court in *Illinois* had given the interstate nature of the

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of a private cause of action in Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947), against a violation of an act of Congress making it a crime to intercept and divulge a telephone conversation.

37. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added).

38. Monaghan, *supra* note 17, at 10-14; *see* Friendly, *supra* note 6, at 405-22.

39. *See, e.g.,* Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (contracts between employers and labor organizations affecting interstate commerce); DeSylva v. Ballentine, 351 U.S. 570, 580 (1956) (patents and copyrights); Francis v. Southern Pac. Co., 333 U.S. 445, 450 (1948) (interstate carrier statutes); Huber Baking Co. v. Stroehmann Bros. Co., 252 F.2d 945, 952-53 (2d Cir. 1958) (unfair competition affecting interstate commerce).

40. *See* text accompanying notes 17-24 *supra.*

41. 539 F.2d at 1011 (dissenting opinion).

42. *See* text accompanying note 35 *supra.*

43. *See* Illinois v. Milwaukee, 406 U.S. 91 (1972); Reserve Mining Co. v. EPA, 514 F.2d 492, 520, 521, 532 (8th Cir. 1975); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971); United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110 (D. Vt.), *aff'd mem.,* 487 F.2d 1393 (2d Cir. 1973). *But see* United States *ex rel.* Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973), in which it was held that Illinois, as well as the United States, has a right of action to abate water pollution even when no interstate effect was alleged. Illinois was allowed to rely on federal common law to abate pollution discharges from its own banks into Lake Michigan.

44. 539 F.2d at 1008-10.

45. *See* cases cited note 43 *supra.*

dispute and parties as a reason for its decision,[46] it failed to note that in that decision the Supreme Court also put great emphasis upon the national interest in water pollution control in its determination that there was a federal common law with respect to water pollution.[47]

An analysis of the Federal Water Pollution Control Act Amendments of 1972 and the history behind those amendments might have convinced the court that the pollution of Jones Falls Stream was a proper situation for application of specialized federal common law to fulfill federal legislative intent or to fill federal statutory interstices.[48] The goals of the 1972 amendments[49] are even stronger evidence of the national interest in pollution control than the water pollution legislation existing at the time of *Illinois*.[50] The court's concern in *Committee v. Train* that the pollution was not interstate might have been nullified by investigation into what waters are now considered subject to congressional control. The 1972 amendments apply to "navigable waters," which are defined as "waters of the United States, including the territorial seas."[51] Legislative history discloses that Congress intended "navigable waters" to "be given the broadest possible constitutional interpretation,"[52] and the Environmental Protection Agency has stated that the Act extends to tributaries of navigable waters.[53] With this broad range of waters encompassed by the statute it may logically be asserted that Congress intended to reach pollutant discharges in the waters of Jones Falls Stream that eventually flow into the Chesapeake Bay;[54] otherwise, the congressional goal of elimination of pollution in navigable waters by 1985 would be jeopardized.

The court's distinction in *Committee v. Train* between citizen plaintiffs and governmental entity plaintiffs[55] is also weakened by an analysis of the portion[56] of the 1972 amendments that authorizes citizens' suits to enforce certain provisions of the Act. This extension of federal rights to individual citizens could have been relied upon by

46. 406 U.S. at 103-05.
47. *Id.* at 101-04. The Supreme Court felt that federal legislative attempts to limit water pollution demonstrated the national interest in pollution control.
48. *See* text accompanying notes 37-39 *supra.*
49. *See* text accompanying notes 1-3 *supra.*
50. *See* text accompanying note 47 *supra.*
51. 33 U.S.C. § 1362(7) (Supp. V 1975).
52. S. REP. No. 92-1236, 92d Cong., 2d Sess. 144, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3776, 3822.
53. 40 C.F.R. § 125.1(p)(2) (1976).
54. 539 F.2d at 1011 (dissenting opinion).
55. *See* text accompanying notes 22-23 *supra.*
56. 33 U.S.C. § 1365 (Supp. V 1975).

the court as demonstrating a congressional intention that citizens be allowed the same rights as governmental entities under federal pollution laws, whether they be statutory laws or decisional common laws. The provision for citizen suits should be evidence of a national interest in allowing citizens to enter the fight against pollution. The validity of the distinction between the citizen plaintiff and the governmental entity plaintiffs is further weakened by the Supreme Court's refusal in *Illinois* to base its application of federal common law solely upon the nature of the parties in the disputes.[57]

The court's holding that the 1972 amendments preempted any federal common law right[58] must also be considered largely in light of the legislative intent. The court's reasoning that federal common law could not prohibit something that had been specifically permitted by Congress seems to be sound logically, but further investigation reveals some support for the continued viability of the federal common law. First, it should be noted that 33 U.S.C. § 1342(k) provides that pollutant discharges allowed under a permit are not violation of the statute,[59] but nothing within that provision says that compliance with the statute is compliance with the federal common law.[60] As is characteristic of environmental legislation, the 1972 amendments preserve "any right which any person (or class of persons) may have under any statute or common law."[61] This statutory clause preserves federal common law rights as well as state common law rights.[62] In *Illinois*

57. "[I]t is not only the character of the parties that requires us to apply federal common law." 406 U.S. at 105 n.6.

58. *See* text accompanying note 25 *supra*.

59. 33 U.S.C. § 1342(k) (Supp. V 1975).

60. At least two commentators believe that satisfaction of pollution control standards established by a legislature does not create a defense to a common law action to abate a nuisance. Hoffman, *supra* note 12, at 505-07; Maloney, *Judicial Protection of the Environment: A New Role for Common-Law Remedies*, 25 VAND. L. REV. 145, 156-57 (1972). Hoffman cites, *inter alia*, the following cases as supportive of his view: Illinois v. Milwaukee, 406 U.S. 91 (1972); Eastern Shore Natural Gas Co. v. Staufer Chem. Co., — Del. —, 298 A.2d 322 (1972); State *ex rel.* Shevin v. Tampa Elec. Co., 291 So. 2d 45 (Fla. Dist. Ct. App.), *cert. denied*, 297 So. 2d 571 (Fla. 1974); J.D. Jewell, Inc. v. Hancock, 226 Ga. 480, 175 S.E.2d 847 (1970); Lexington v. Cox, 481 S.W.2d 645 (Ky. 1972). Maloney compared the effect of statutory pollution control standards to that of statutory standards in negligence cases, saying that just as in negligence cases compliance with the statutory standard should not acquit the defendant of any charges based upon an alleged violation of common law standards. Maloney cited the following cases for his position that compliance with statutory standards is not conclusive on the question whether reasonable care has been exercised: Mitchell v. Hotel Berry Co., 34 Ohio App. 259, 171 N.E. 39 (1929); Curtis v. Perry, 171 Wash. 542, 18 P.2d 840 (1933).

61. 33 U.S.C. § 1365(e) (Supp. V 1975).

62. 539 F.2d at 1011 (dissenting opinion). For support of this view see note 60 *supra* and cases cited therein.

the Supreme Court said that the use of federal common law to abate pollution of navigable waters is permissible even though the remedy sought was not within the scope of remedies prescribed under the Federal Water Pollution Control Act.[63] In *United States v. Ira S. Bushey and Sons, Inc.*,[64] the court stated:

> What is important about *Illinois v. City of Milwaukee* . . . is the declaration there that the numerous laws Congress has enacted to prohibit or control pollution of interstate or navigable waters do not establish in themselves the exclusive means by which the federal policy concerning, and interest in, the quality of waters under federal jurisdiction may be protected in the federal courts.[65]

Committee v. Train is a significant limitation on the judicial expansion of specialized federal common law. Several commentators have expressed concern that federal courts are increasingly asserting federal common law in new and unusual areas.[66] The fear of expanding federal common law arises because such decisions bind state courts through the supremacy clause and allow judicial action in areas where power had been delegated only to Congress.[67]

Committee v. Train is also significant because of its possible adverse effect on pollution enforcement and the realization of the goals set by the Water Pollution Control Act Amendments of 1972. While the decision involved intrastate parties that arguably should be subject to state common law, the holding of the court seems to deny all private citizens access to the federal common law respecting water pollution. This denial may not be so harsh when the alleged nuisance is nearby and within the same state, but when a private citizen of one state is injured by a nuisance originating in another state, the denial of any access to federal common law to the injured individual and the consequent subjection of that individual to the laws and courts of the state where the nuisance originates appear harsh indeed. An injured individual's rights to a remedy should not be any different from the right

63. 406 U.S. at 103. It should be noted that the *Illinois* decision also said that future federal laws might preempt the federal common law. *Id.* at 107. The 1972 amendments, however, specifically preserve common law rights. 33 U.S.C. § 1365(e) (Supp. V 1975).

64. 346 F. Supp. 145 (D. Vt. 1972).

65. *Id.* at 149.

66. Monaghan, *supra* note 17, at 10-11; Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

67. Monaghan, *supra* note 17, at 10-11. Monaghan expresses concern that the federal courts are allowed to act in areas normally left only to Congress, but are not subject to the political checks imposed on Congress. *Id.* at 11.

of an injured state. Even if the courts and laws of the injured individual's state were allowed to adjudicate the matter "under modern principles of the scope of subject matter and in personam jurisdiction,"[68] the right of the alleged polluter would be determined by the laws and courts of another state. In either case, one citizen would be subjected to the laws and courts of a state where he had not performed any act. Furthermore, this subjection could be particularly ominous in the area of nuisance law, which normally involves balancing of interests.[69]

In addition to any problems that an injured individual might face in asserting jurisdiction over a nonresident, there is always the problem of enforcing extraterritorial injunctive decrees, especially when there is suspicion of partiality of judgment.[70] All these problems arising from an interstate pollution dispute suggest that the *Committee v. Train* denial of a federal common law cause of action to allow private citizens to abate pollution should be limited to its particular facts of intrastate citizens and should not extend to private citizens of different states.[71]

The court of appeals could have expanded the specialized federal common law to accommodate the private plaintiffs in *Committee v. Train* and supported that decision with an interpretation of legislative intent and a statement of national interest in water pollution abatement. It seems that the court balanced the evil of invading further the ideology of *Erie* and opposing specific statements of the Water Pollution Control Amendments of 1972 with the possible benefit that allowing citizens suits under federal common law might have on ending certain types of water pollution. Apparently, it concluded that it was better to avoid the evils rather than pursue the uncertain benefit.

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68. Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 500 (1971). Mr. Justice Harlan suggested that the courts of the injured party's state would have jurisdiction and the laws of the injured party's state would apply in a suit by an injured party against a polluter of another state.

69. Note, *Federal Jurisdiction—Environmental Law—Nuisance—State Ecological Rights Arising Under Federal Common Law*, 1972 WIS. L. REV. 597, 608-09.

70. "[T]he efficacy of any relief granted too often depends on the cooperation of a sister state's legal machinery in carrying out the injunction." *Id.* at 609 n.60.

71. The denial of access to the federal common law to private citizens also will hinder the achievement of uniformity of laws in an area of express national interest and concern.