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Federal Jurisdiction and Federal Common Law - Environmental Law - Public Nuisance Suits Concerning Interstate Water Pollution - Illinois v. City of Milwaukee

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COMMENT

FEDERAL JURISDICTION AND FEDERAL COMMON LAW — ENVIRONMENTAL LAW — Public Nuisance Suits Concerning Interstate Water Pollution — *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)

INTRODUCTION

IN a recent environmental suit the State of Illinois filed a motion for leave to file a bill of complaint under the original jurisdiction of the Supreme Court against four cities in Wisconsin, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee. The plaintiff requested that the Court abate the public nuisance being caused by the defendants' daily discharge of over 200,000,000 gallons of raw or inadequately treated sewage into Lake Michigan in and near the Milwaukee area. The Court's decision, written by Mr. Justice Douglas, denied the motion and remitted the parties to the appropriate federal district court for resolution of the controversy.[1] While declining to exercise its original jurisdiction, the Court held that the appropriate forum for the adjudication of the dispute was a federal district court. The Court further reasoned that since the issue of a state-created public nuisance affecting another state is a federal question[2] and that, in the absence of a specific substantive statutory remedy,[3] the federal question should be resolved by applying the federal common law of nuisance.[4]

The significance of the decision lies in the Court's jurisdictional mandate and in its acknowledgement of the validity of federal common law in the adjudication of an interstate water pollution issue. The purpose of this comment is to examine the question of jurisdiction and to show how and why federal common law was held applicable to the resolution of this issue in *Illinois v. City of Milwaukee.*

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[1] Illinois v. City of Milwaukee, 406 U.S. 91, 108 (1972).

[2] *Id.* at 98-101.

[3] The Federal Water Pollution Control Act, 33 U.S.C. §§ 1151, 1160 (1970), does not create the specific remedy for the abatement of interstate water pollution; The Rivers and Harbors Act of March 3, 1899, 33 U.S.C. §§ 401, 407 (1970), specifically exempts sewage from its control. *See also* Note, *A Comparison of Texas v. Pankey and Ohio v. Wyandotte Chemicals Corp. Reveals the Necessity for a Federal Common Law Right to Abate Interstate Pollution*, 50 TEXAS L. REV. 183, 191 (1970) for a discussion on the problems of existing remedies.

[4] 406 U.S. at 107.

I. JURISDICTION

A. *Original Jurisdiction*

The Supreme Court is granted original jurisdiction in a suit between a state and citizens of another state by the Constitution[5] and federal statute.[6] Although original and exclusive jurisdiction is applicable in a controversy between two states,[7] the Court has been reluctant to invoke its original jurisdiction in cases which are not "appropriate."[8] The "appropriateness" of a case for Supreme Court consideration is determined by the dual test of unavailability of an alternate forum to decide the case and inability of that forum to fashion adequate relief.[9]

When a state brings an action against citizens of another state, as in the *Illinois* case,[10] another forum is made available by virtue of federal statute. Although this statute implies that the federal district court is the appropriate forum,[11] court decisions have split on the issue. In a recent pollution case similar to the *Illinois* case, *Ohio v. Wyandotte Chemicals Corp.*,[12] the state supreme court was deemed the appropriate forum. In contrast to this holding, a 1907 Supreme Court case concerning interstate air pollution, *Georgia v. Tennessee Copper Co.*,[13] granted original jurisdiction in a suit by a state against citizens of another state.

That it is unlikely the Supreme Court will exercise its original jurisdiction in such cases appears to have been firmly established by *Wyandotte*. The *Georgia* case was decided over 60 years ago, and its usage with regard to the jurisdiction issue since that time is nonexistent. When the issue was finally confronted in *Wyandotte*, the Court adamantly held that it was not the appropriate forum for these cases. The Court

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[5] U.S. CONST. art. III, § 2.

[6] 28 U.S.C. § 1251(b)(3) (1970).

[7] *Id.* § 1251(a)(1). *See, e.g.*, New Jersey v. New York, 345 U.S. 369 (1963); Missouri v. Illinois, 200 U.S. 496 (1906).

[8] Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).

[9] *Id.*

[10] 406 U.S. at 97. Political subdivisions, such as the defendants in *Illinois*, are considered citizens of the state.

[11] 28 U.S.C. § 1251(b)(3) (1970). *See* Ames v. Kansas, 111 U.S. 449, 469 (1884), in which the Court held that "we are unable to say that it is not within the power of Congress to grant to inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction." The Court removed this suit to the federal district court.

[12] 401 U.S. 493 (1971). *See* Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case*, 12 ARIZ. L. REV. 691 (1970) for a discussion on the jurisdictional choice between federal and state courts in connection with this decision and its impact on interstate pollution cases.

[13] 206 U.S. 230 (1907).

decided that the Ohio court was equally competent to resolve the dispute, and, given the awkward nature of interstate pollution cases and the Court's admission that it is hard-pressed to act competently as a fact finder in original jurisdiction cases, it felt that a lower court — in this case, the state court — should decide the dispute.[14]

B. *Federal Jurisdiction*

Assuming, then, that the Supreme Court is not the proper forum, the issue of where to adjudicate interstate water pollution cases not covered by substantive federal statute must be evaluated for federal jurisdiction through the diversity of citizenship[15] and federal question statutes.[16] It is important to note that a state, in an interstate water pollution suit against citizens of another state, might want to have its own courts apply its own laws to decide the dispute. However, if the issue in question involves a federally protected right, the state will probably be forced to seek relief in a federal forum. Since there are only two methods of obtaining federal jurisdiction, diversity of citizenship and the federal question statute, and the former is inapplicable when a state is one of the parties,[17] a pollution action of the *Illinois* type must fall within the latter statute in order to support the Court's holding in *Illinois*. An examination of the federal question statute will show how the decision was made.

1. Federal Question Statute

The federal question statute states that federal district courts have original jurisdiction over all civil actions in which the matter in controversy "arises under the Constitution, laws, or treaties of the United States."[18] Assuming that the monetary requirement is satisfied,[19] the central issue is whether the *Illinois* type of pollution creates an action arising under the

[14] Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498 (1971). *See* 49 J. URBAN L. 612 (1971) (comment on the Court's assertion of its modern role in light of *Wyandotte*); 40 U. CIN. L. REV. 391 (1971) (approval of plaintiff's choice of forum in *Pankey*); 25 U. MIAMI L. REV. 794 (1971) (discussion on original jurisdiction problem in *Wyandotte*). However, it should be noted that Mr. Justice Douglas' dissent in *Wyandotte* stresses the responsibility of the Court to exercise jurisdiction in this type of case.

[15] 28 U.S.C. § 1332 (1970).

[16] 28 U.S.C. § 1331 (1970).

[17] A suit between a state and citizens of another state is not one which will qualify under diversity of citizenship jurisdiction. Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894).

[18] 28 U.S.C. § 1331 (1970).

[19] *Id.* The federal question statute requires that the matter in controversy exceed $10,000 in value in order that a party can invoke federal jurisdiction.

"laws" of the United States within the meaning of the statute. Obviously, a federal statute which provides a suitable remedy would enable a state to invoke jurisdiction. However, when a statute does not exist or does not provide the specific remedy sought, a state, in order to qualify under the federal question statute, must prove that the right to be protected is a federal right, the infringement of which can be rectified by a federal common law remedy.[20]

a. *Federal Right*

The notion that the right of a state to be free of interstate water pollution is a federal right has never been explicitly stated in a judicial decision or federal statute. The first indication that such a right existed and had a remedy at common law came in the 1907 decision of *Georgia v. Tennessee Copper Co.* The Court held that a state has a legally protected interest to be free from pollution of its air caused by the citizens of another state.[21] The Court reviewed the issue again in *Hinderliler v. LaPlata Co.*,[22] and, although it did not directly address the fact that the apportionment of interstate waters was a federal right, it stated in dictum that the issue was a "question of 'federal common law.' "[23]

Despite the lack of specific authority on the question of the state's right as a federal right, it is plausible to argue that recent federal legislation has designated this right as federally protected. The Federal Water Pollution Control Act declares that it is federal policy to protect a state's right to control and prevent water pollution.[24] The National Environmental Policy Act of 1969[25] lends support to the argument that protection of the environment — including the state's right in question — is of federal concern and warrants federal protection.

The most recent and strongest argument classifying this state right as a federally protected one is found in the Tenth Circuit *Texas v. Pankey* opinion. In discussing the earlier *Georgia* case, the *Pankey* court said:

[20] Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U.L. REV. 385, 410 (1964). *See Future of Federal Common Law* (Panel discussion, E. Morgan, Reporter), 17 ALA. L. REV. 10, 16 (1964) (discussion of two ways to formulate federal common law).

[21] 206 U.S. at 237: "This is a suit by a State for an injury to it in its capacity as a quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

[22] 304 U.S. 92 (1938).

[23] *Id.* at 110.

[24] 33 U.S.C. § 1151(b) (1970).

[25] 42 U.S.C. § 4321 (1970).

> The source or basis for such a quasi-sovereign ecological right . . . was not discussed, but the right apparently was regarded as having existence in the common law . . . . While the case cannot be said to have recognized the right as in itself having a federal source, the Court's holding that a State is entitled to federal judicial protection of it from violation by outside sources would at least cause it to have a status of direct protectability and justiciability in relation to the Constitution.
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> . . . .
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> [W]e think the legal concepts and developments which have occurred since [*Georgia*] would presently call for it to be viewed as one which is within the purview of the [federal question] statute as being a right entitled to have existence under federal common law.[26]

Thus, it can be said that the state's right, if not technically a federal right, has at least a sufficient quantum of federal recognition to qualify as a federally protected right.

b. *Federal Common Law*

Since the state's ecological right concerning interstate water pollution appears to be federally protected, an infringement upon that right in the form of a public nuisance should be adjudicated by federal law. As in state courts, the federal forums recognize two kinds of law: statutory and common. In the absence of a statutory remedy, a federal court can create federal common law in fashioning an appropriate remedy.

Federal common law as a legal doctrine can be traced back to the 1842 decision in *Swift v. Tyson*,[27] which held that federal courts exercising diversity of citizenship jurisdiction were free to create common law as applied to a state.[28] In spite of the celebrated ruling in *Erie Railroad Co. v. Tompkins*,[29] which stands for the rejection of the concept of a general federal common law, the Court's ruling on the same day in *Hinderliler v. LaPlata Co.* gave rise to what has been called specialized federal common law.[30]

Of significance in these cases is the tendency of the federal courts to recognize federal common law only when there is a federal right involved. The plaintiff's right in *Erie* was a personal right protected by state law; under the diversity of citizenship jurisdiction exercised by the federal court in the case, that right was properly adjudicated under state law.

[26] Texas v. Pankey, 441 F.2d 236, 240 (10th Cir. 1971).

[27] 41 U.S. (16 Peters) 1 (1842).

[28] *Id.* at 18.

[29] 304 U.S. 64 (1938).

[30] Friendly, *supra* note 20, at 405: "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."

In contrast, the right in *Hinderliter* was the right of the state in connection with the apportionment of water in interstate streams. The Court's dictum stating that a controversy involving this right of a state is a question of federal common law is justified independently of the holding in *Erie.*

The tendency to recognize specialized federal common law is borne out strongly in the decision of *Clearfield Trust Co. v. United States.*[31] The Court there held that since the rights of the federal government are governed by federal law, the courts can fashion federal common law in the absence of an applicable federal statute.[32] This trend was further clarified by the decision of *Textile Workers v. Lincoln Mills,*[33] in which it was held that a federal court can create federal common law if a federal right is at issue.[34]

Once it is established that federal common law offers a cause of action where a federal right is involved, it is still necessary to show that federal common law comes within the meaning of the federal question statute. The first indication that it could be so considered appeared in the dissent in *Romero v. International Terminal Operating Co.*[35] Mr. Justice Brennan stated that since causes of action based on admiralty law are created by federal common law, these cases come under the "laws" of the federal question statute.[36]

The breakthrough on this issue came in the decision of *Ivy Broadcasting Co. v. American Telephone and Telegraph Co.*[37] The Second Circuit held that, in the absence of a statutory remedy,[38] not only are claims for negligence and breach of contract with regard to interstate communications services governed by federal common law, but that the word "laws" in the federal question statute should be construed to include laws created by federal judicial decisions as well as those created by federal legislation.[39] Thus, Brennan's theory as

[31] 318 U.S. 363 (1943).

[32] *Id.* at 366, 367.

[33] 353 U.S. 448 (1957).

[34] *Id.* at 456.

[35] 358 U.S. 354 (1959).

[36] *Id.* at 393. Mr. Justice Brennan also cites Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314 (1955): "[I]n the absence of controlling acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty."

[37] 391 F.2d 486 (2d Cir. 1968).

[38] *Id.* at 491. The court held that federal legislation had pre-empted the field of interstate service by communication carriers, but "[w]here neither the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law." *Id.*

[39] *Id.* at 492.

stated in his *Romero* dissent became the majority view in *Ivy Broadcasting,* and federal common law based on federal rights outside the admiralty area came within the meaning of the statutory language.

Having proved that federal common law is deemed to have existence within the meaning of the federal question statute, all that a state involved in an interstate water pollution dispute must do is look to the decision in *Texas v. Pankey*[40] for the definitive opinion sanctioning federal common law and federal jurisdiction in this area. In *Pankey,* the state sought to enjoin the defendants, citizens of New Mexico, from using a certain pesticide which was threatening to pollute an interstate stream and affect the plaintiff's use and enjoyment thereof.[41] The court held that the public nuisance involving the ecological rights of the state are to be adjudicated under federal common law, and therefore, federal jurisdiction of the district court could properly be invoked under the federal question statute.[42] Thus, given *Pankey* and the preceding cases, one should be able to prove that the state's right is a "federal right" protected by federal common law to be created by a federal district court.

II. The *Pankey-Wyandotte* Conflict

The appropriate forum and federal common law issues connected with federal jurisdiction appeared to be well settled by *Pankey.* But the Supreme Court's decision of *Ohio v. Wyandotte Chemicals Corp.* created confusion and despair among environmentalists with regard to interstate water pollution. Not only did the Court, in its refusal to exercise original jurisdiction,[43] remit the parties to the state court for adjudication of the issues, but it also implied disapproval of the validity of federal common law to govern a fact situation similar to that in *Pankey.*[44]

Federal jurisdiction was not granted in *Wyandotte* because the Court did not think the state's right was a federal right or the public nuisance issue one to be adjudicated under federal common law. The Court stated that the public nuisance issue,

[40] 441 F.2d 236 (10th Cir. 1971).

[41] *Id.* at 238, 239.

[42] *Id.* at 240.

[43] Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498 (1971). The Court's concern with its primary responsibility as an appellate tribunal and its fear of possible abuse of the opportunity to resort to its original jurisdiction in suits of this nature prompted the exercise of its discretion to deny original jurisdiction. *See* note 14 *supra.*

[44] The only significant difference between the two cases is that in *Wyandotte* the interstate waterway was Lake Erie.

being involved in local law, could more properly be resolved by the Ohio Supreme Court, especially since no important problems of federal law were involved.[45]

The conflict between *Pankey* and *Wyandotte* becomes most confusing when one considers that the Court in *Wyandotte* dismissed the federal common law issue in a dictum footnote:

> [T]his particular case cannot be disposed of by transferring it to an appropriate federal district court since this [diversity of citizenship] statute by itself does not actually confer jurisdiction on these courts . . . and no other statutory jurisdictional basis exists. . . . Nor would federal question jurisdiction exist under 28 U.S.C. § 1331. So far as it appears from the present record, an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).[46]

The Court did not explain its decision with regard to the notion of the state's federally protected right. Although *Pankey* was not specifically overruled, the Court's pronouncement that state law should govern the dispute created an irreconcilable conflict[47] with the *Pankey* holding on both the federal right and federal common law issues.

III. THE CONFLICT RESOLVED

The conflict that the *Pankey* and *Wyandotte* decisions created has been resolved by *Illinois v. City of Milwaukee.*

A. *The Appropriate Forum*

The Court resolved the issue of the proper forum for adjudication of a public nuisance suit concerning interstate water pollution by construing article III of the Constitution[48] and the federal question statute[49] to declare that original jurisdiction will be declined where another court has the authority to decide the dispute.[50] While apparently following the rationale in *Wyandotte* with regard to the problems inherent in original jurisdiction, the Court stated that the federal district court is the proper forum *if* the defendants can be sued in a federal court.[51] Thus, the holding in *Wyandotte* that federal courts would not exercise jurisdiction in this type of suit was revised.

B. *Federal Common Law*

Having selected the appropriate forum, the Court then

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45 401 U.S. at 498-500.
46 *Id.* at 498.
47 For a discussion of this conflict, see Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 439 (1972); Note, *supra* note 3, at 186-98.
48 U.S. CONST. art. III, § 2.
49 28 U.S.C. § 1331 (1970).
50 406 U.S. at 93-94.
51 *Id.* at 98.

held that the public nuisance involves a federal right to be adjudicated by federal common law — the prerequisites necessary to invoke jurisdiction under the federal question statute.

The Court cited *Georgia* and *Hinderliler* to imply that the state's ecological right can effectively be classified as a federal right.[52] Being cognizant of the trend in recent federal environmental legislation of declaring the national environment to be federally protected, the Court merely clarified the concept of the state's right as a federal right and overruled the basis upon which *Wyandotte* was decided.

With the federal right issue resolved, the Court sanctioned the *Pankey* rationale on the federal common law issue and cited *Ivy Broadcasting* and *Pankey* as authority for its ruling. The Court stated that when the state's right is infringed upon by public nuisance, the dispute is to be governed by "the applicable federal common law [depending] on the facts peculiar to the particular case."[53]

The *Illinois* case thus resolved the conflict between *Wyandotte* and *Pankey* by adopting a portion of each decision. From *Pankey* the Court took the holding which validated federal common law, and from *Wyandotte* it accepted the decision to avoid original jurisdiction.

Conclusion

The Court in *Illinois* was aware of the temporary nature of its decision:

> 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 time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.[54]

However limited this decision may be, it represents a clear statement of principles of law and procedure which will have a significant impact on future environmental litigation.

A. *The Decision and the Role of Equity*

The traditional remedy for a public nuisance is an injunction; yet, the Court's final remedy in *Illinois* is less than unwavering: "There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern."[55] A court sitting in equity will undoubtedly take into consideration the economic and political

[52] *Id.* at 104-05.
[53] *Id.* at 106.
[54] *Id.* at 107.
[55] *Id.* at 107-08.

aspects of the controversy before it. There is the possibility that the flexibility of injunctive relief may, in some instances, weaken the impact of a pro-environmental verdict.[56] It is equally possible that equity may fashion remedies more appropriate than an injunction.

B. *Impact of the Decision*

The *Illinois* decision stands for the fact that federal common law will be used or created to resolve this aspect of interstate water pollution. The need for a relatively uniform body of law, consistent with the avowed federal policy of protecting the environment, is potentially satisfied by this decision. There may be some concern over the ability of a court to decide the complex issues involved in litigation of this nature,[57] but most commentators have faith in the role of the courts in this area.[58] Future litigation will indicate the true measure of a court's capacity to deal with this type of suit.

The most encouraging aspect of *Illinois* is the specificity with which the Court lays down the mandate of federal district court jurisdiction and the use of the appropriate theory of law. How much litigation this decision will precipitate is unknown, but if a state is harmed by interstate water pollution and seeks a remedy, that state is now assured that its problem is of enough importance to the well-being of the national environment to be dealt with as a federal question and to be resolved by federal common law.

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[56] The Court may have been wary of the adverse effects of an absolute injunction similar to the one issued in Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), where it was stated that the "possible disaster to those outside the State must be accepted as a consequence of her standing on her extreme rights." *Id.* at 239. *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 309, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (example of the flexible nature of injunctive relief in a nuisance case).

[57] For a discussion of the limitations of the courts, *see* Note, *The Role of Courts in Technology Assessment*, 55 CORNELL L. REV. 861 (1970).

[58] Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 566 (1970): "[T]he courts, in their own intuitive way — sometimes clumsy and cumbersome — have shown more insight and sensitivity to many of the fundamental problems of resource management than have any of the other branches of government."