University of Dayton Law Review

Volume 7 | Number 2 Article 11

1981

Environmental Law: States May No Longer Bring a Federal Common Law Nuisance Action to Abate Interstate Water Pollution

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Environmental Law: STATES MAY NO LONGER BRING A FEDERAL COMMON LAW NUISANCE ACTION TO ABATE INTERSTATE WATER POLLUTION. *City of Milwaukee v. Illinois,* 101 S.Ct. 1784 (1981).

I. INTRODUCTION

In the landmark decision *Erie Railroad v. Tomkins,*[1] the United States Supreme Court set forth the general proposition that the federal courts may not provide their own rules of decision under the guise of federal common law.[2] Since *Erie,* however, in cases involving a significant federal interest, the Court has consistently backed away from this rather harsh limitation on federal judicial power.[3] In the *City of Milwaukee v. Illinois*[4] decision, the United States Supreme Court apparently came full circle, returning to its rule preventing federal courts from fashioning federal common law, at least in the context of interstate water pollution controversies.[5] The immediate effect of *City of Milwaukee* is to preclude the states from bringing common law nui-

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1. 304 U.S. 64 (1938).

2. *Id.* at 78. "The federal common law is a body of decisional law developed by the federal courts untrammeled by state court decisions." BLACK'S LAW DICTIONARY 550 (5th ed. 1979). The federal common law is generally used by the federal courts "to fashion the governing rule of law according to their own standards." Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943). Although there is no explicit grant of authority to the federal courts, they generally derive this law-making function from the "Constitution and . . . statutes of the United States." *Id.* at 366. *See* Note, 82 HARV. L. REV. 1512, 1512-17 (1969). "The construction of constitutional or statutory language is a function that has traditionally been conceived to involve not the independent making of law but the interpretation of law made by political authority . . . . In these instances it is clear that the courts, on a case-to-case basis, establish the essential substantive content of the text being construed." Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption,* 67 COLUM. L. REV. 1024, 1026 (1967). The major source of the federal courts' authority to make federal common law comes from a statute containing a "grant of federal jurisdiction . . . adorned with a bit of legislative history." Friendly, *In Praise of Erie—And of the New Federal Common Law,* 39 N.Y.U. L. REV. 383, 413 (1964). *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (upholding the authority of the federal courts to fashion a federal common law decision based upon the policy of the national labor laws).

3. *See, e.g.,* Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (federal common law may be employed when there is a federal question or right involved); Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (rights concerning interstate waters present a federal question). *See also* Friendly, *In Praise of Erie—And of the New Federal Common Law* 39 N.Y.U. L. REV. 383, 413 (1964). Similarly, the need for a nationally uniform rule of decision has been said to be a sufficient interest to allow the federal courts to fashion a common law decision. Texas v. Pankey, 441 F.2d 236, 241-42 (10th Cir. 1971) (concerning a uniform rule involving environmental rights). For an application of the uniform rule principle to the situation in City of Milwaukee v. Illinois, 101 S. Ct. 1784 (1981), *see* Illinois v. Milwaukee, 406 U.S. 91, 105 n.6 (1972).

4. 101 S. Ct. 1784 (1981).

5. *Id.* at 1795.

sance actions[6] demanding relief from the harmful effects of extraterritorial pollution.[7]

Just nine years prior to *City of Milwaukee,* in *Illinois v. Milwaukee,*[8] a case involving the same dispute and parties,[9] the Supreme Court gave formal recognition to the federal common law nuisance action for the abatement of water pollution crossing state boundaries.[10] More important, the *Illinois v. Milwaukee* Court held that because interstate pollution is a federal concern, the nuisance action qualified for a grant of 28 U.S.C. § 1331 federal question jurisdiction.[11] Because of the Supreme Court's holding that it was no longer the only forum

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6. A nuisance action results from an "activity which arises from unreasonable, unwarranted, or unlawful use by a person of his own property, working obstruction or injury to [a] right of another, or to the public, and producing such material annoyance, inconvenience, and discomfort that the law will presume the resulting damage." BLACK'S LAW DICTIONARY 961 (5th ed. 1979), *cited in* ENVIRONMENTAL LAW HANDBOOK 9 (6th ed. 1979).

In *City of Milwaukee,* Illinois brought the action on a public rather than a private nuisance theory. The RESTATEMENT (SECOND) OF TORTS § 821B (1979) defines a public nuisance action as "an unreasonable interference with a right common to the general public." Illinois' claim is based upon a public nuisance to the extent that the pollution of Lake Michigan was detrimental to the health of all its citizens coming in contact with the body of water. 101 S. Ct. 1784, 1788 (1981). *See also* Illinois v. Milwaukee, 599 F.2d 151, 165 (1979), *vacated,* 101 S. Ct. 1784 (1981) (a federal common law nuisance action is established by "injury or significant threat of injury to some cognizable interest of complainant"). For a detailed explanation of the distinction between public and private nuisance actions, *see* Prosser, *Private Action for Public Nuisance,* 52 VA. L. REV. 997 (1966).

7. Common law nuisance suits, now the most prevalent tort action in the pollution field, originated in a case in which, quite ironically, Missouri complained that Illinois was polluting its waters through sewage discharges into Lake Michigan. Missouri v. Illinois, 200 U.S. 496 (1906). The Supreme Court, relying on common law nuisance theory, held that it had authority to grant relief when one state's waters are adversely affecting the interests of another state. *Id.* The basic rationale of the Court turned upon the fact that the federal common law was an effective means for settling disputes between states. *Id. See* Leybold, *Federal Common Law: Judicially Established Effluent Standards As a Remedy in Federal Nuisance Actions,* 7 B.C. ENVT'L. AFF. L. REV. 293, 298-99 (1978) [hereinafter cited as *Federal Nuisance Actions*]. In addition to its effectiveness in resolving state disputes, the federal common law nuisance action was recognized as a potential source of protection for a state's quasi-sovereign rights. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (state has a quasi-sovereign interest in the protection of its citizens from the air pollution produced in another state); Kansas v. Colorado, 206 U.S. 46 (1907) (state has a quasi-sovereign right to assure its ecological rights are protected from injury by another state); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971) (state has a quasi-sovereign right to be free from the extraterritorial effects of water pollution).

8. 406 U.S. 91 (1972).

9. Justice Blackmun, who was joined by Justices Marshall and Stevens, dissenting, criticized the majority's decision for its basic unfairness to Illinois. Following the Supreme Court's instruction in the *Illinois v. Milwaukee* decision, Illinois went through nine years of litigation only to have this majority reverse its earlier decision. City of Milwaukee v. Illinois, 101 S. Ct. 1784 (1981). According to Justice Blackmun, the decision to abolish the federal common law makes Illinois' efforts nothing more than a "meaningless charade." *Id.* at 1800.

10. Illinois v. Milwaukee, 406 U.S. 91, 103-04 (1972).

11. *Id.* at 99.

available to hear such a dispute between two states,[12] for the first time, a state could initiate a common law nuisance action in a federal district court.[13]

Congress severely criticized the judicial response to water pollution as being far too "ad hoc" and "sporadic" a method for adequately dealing with the mounting pollution problem.[14] Just six months after *Illinois v. Milwaukee*,[15] Congress passed the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA).[16] The new regulatory scheme changed the approach to water pollution from one of state control and authority to a federal framework of standards and enforcement.[17] Both Congress and the Supreme Court regarded the FWPCAA as a "comprehensive" legislative response to the inadequacies of past pollution control efforts.[18]

In *Illinois v. Milwaukee*, the Court acknowledged that, in time, the legislature might take action which would preempt any further need for the federal common law nuisance action.[19] *City of Milwaukee v. Illinois*[20] provided the Court with the first opportunity to determine the propriety of maintaining a federal common law nuisance action in light of the FWPCAA.[21] This case note explores whether, by abolishing such a nuisance action, the Court has laid to rest what Congress intended to be an important mechanism for enforcing and effectuating the FWPCAA.

II. STATUTORY BACKGROUND

Before Congress enacted the 1972 Amendments to the Federal

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12. *Id.* at 91.

13. "The district courts shall have original jurisdiction of all civil actions wherein the controversy . . . arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (amended 1980). The Court held for the first time that the word "laws" in § 1331(a) allows claims brought under the federal common law. 406 U.S. 91, 100 (1972). The Court further indicated that the existence of the Federal Water Pollution Control Act also supports the view that the regulation of interstate waters presents a federal interest requiring the use of the federal common law. *Id.* at 104.

14. 101 S. Ct. 1784, 1796 (1981).

15. 406 U.S. 91 (1972).

16. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (amended 1977).

17. 101 S. Ct. 1784, 1793 (1981). S. REP. No. 92-414, 92d Cong., 2d Sess. 7, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3675. F. GRAD, TREATISE ON ENVIRONMENTAL LAW, § 3.03 at 3-81 (1981) [hereinafter cited as GRAD].

18. 101 S. Ct. 1784, 1793 (1981).

19. 406 U.S. at 107. For further explanation of the Court's position, *see* note 57 *infra*.

20. 101 S. Ct. 1784 (1981).

21. 33 U.S.C. §§ 1251-1376. The FWPCAA was further amended in 1977. Although few substantive changes were made, the legislation is now referred to as the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376. None of the 1977 changes were relevant to the City of Milwaukee v. Illinois case, 101 S. Ct. 1784 (1981).

Water Pollution Control Act (FWPCA),[22] it placed the primary burden of regulating water pollution upon the states.[23] This approach proved to be inadequate for two major reasons. First, "[m]ore than four years after the deadline for submission of standards, only a little more than half of the States [had] fully approved standards."[24] Second, even in those states which had established standards, the only statutory enforcement mechanism available to abate pollution, the conference procedure,[25] did not effectively deter major violators.[26] Because the state-oriented scheme was not working, Congress shifted its focus to a federal program, placing more emphasis on a regulatory network centrally controlled by the Administrator of the Environmental Protection Agency (EPA).[27]

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22. 33 U.S.C. §§ 1251-1376 (amended 1977).

23. S. REP. NO. 92-414, 92d Cong., 2d Sess. 2, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3669. GRAD, *supra* note 17, at 3-53 to 3-56. The Senate Report points out that post-1972 water pollution efforts were premised on the policy that: "The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States." S. REP. NO. 92-414, 92d Cong., 2d Sess. 2, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3669. For example, water quality standards were to be established by the states. *Id.* In addition, the job of enforcing water quality standards rested primarily with the Governors of the states. *Id.*

24. S. REP. NO. 92-414, 92d Cong., 2d Sess. 3, *reprinted in* [1972] U.S. CODE CONG., & AD. NEWS 3668, 3671.

25. The conference procedure is an enforcement mechanism whereby the EPA Administrator calls a meeting for the purpose of establishing negotiations between the polluters, the parties affected, and government officials when there appears to be a threat to the health and welfare of a state's citizens as a result of the polluter's discharges. GRAD, *supra* note 17, at 3-60. This procedure seeks compliance with pollution standards through "conciliation and cooperation" between the Administrator and the polluter. *Id.* at 3-62. Grad describes the result of the various stages of the conference procedure:

> Following the conference procedure, the Federal Water Pollution Control Administration makes a recommendation to the state agency to take whatever action may emerge as appropriate from the conference. . . . If the problem is not resolved by state action, a second step takes place, namely a formal hearing before a board appointed by the administrator. The polluter is called before the hearing and the hearing may result in a direction to the polluter that abatement measures be taken within a reasonable time. . . . If no abatement measures are taken within the time provided by the direction of the conference, the Administrator may—but is not required to—make a request to the Attorney General to bring a suit for abatement—i.e., injuctive relief—on behalf of the United States.

Id. The inadequacy of this procedure is demonstrated by the fact that: "[s]ome fifty informal conferences were held through 1971, only four continued to the hearing stage, and only a single case was taken to court following the conference procedure during the entire 24 years of its availability." *Id.* at 3-61.

26. *Id.* at 3-63. The conference procedure is ineffective in deterring major violators because the courts lack sufficient powers. *Id.* at 3-61. The courts may only issue injunctions; they may not impose civil penalties such as fines. *Id.*

27. 101 S. Ct. 1784, 1792-93. S. REP. NO. 92-414, 92d Cong., 2d Sess. 7, *reprinted in* [1972] U.S. CODE CONG., & AD. NEWS 3668, 3675.

> The establishment of federal water quality standards—or actually water quality standards proposed by the states which then would, upon adoption, become the federally accepted

As amended, the FWPCA requires the Administrator of the EPA to establish uniform national effluent limitation[28] standards.[29] Some states may retain their current water quality standards to the extent that the permitted levels of pollution not only comply with the guidelines of the Act, but also meet with the Administrator's approval.[30] Under the amendments, the Administrator has the authority to require a state to adopt more stringent effluent limitations if he deems it necessary or desirable.[31]

The creation of a pollution permit system called the "National Pollutant Discharge Elimination System" (NPDES) is an innovative feature of the 1972 amendments.[32] The permits are issued by either the Administrator or appropriate state agency.[33] A permit establishes effluent limitations and overflow standards for specific point sources[34] based on a public hearing determining the ability of the particular polluter to meet such discharge levels.[35] The primary importance of the permit

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standards—meant that the federal government would aim at the improvement of water quality, but would accept situations where waters would be kept in their present condition—i.e., not be permitted to deteriorate any further—as long as their quality was adequate for particular designated purposes.

GRAD, *supra* note 17, at 3-81.

28. An effluent limitation is the elimination or appropriate restriction on the amount of discharge of pollutants for a point source. 33 U.S.C. §§ 1311-14 (1976), *construed in* E. I. Du Pont De Nemours & Co. v. Train, 430 U.S. 112 (1977) (EPA has the authority to limit discharges by existing plants through industrywide regulations setting forth uniform effluent limitations). For factors used in setting effluent limitations, *see* 33 U.S.C. § 1314 (1976).

29. 33 U.S.C. § 1316 (1976). Even though the FWPCAA allows the Administrator to establish only guidelines for effluent limitations, the word "guidelines" has been interpreted by the United States Supreme Court to allow the Administrator to establish specific effluent limitations for a particular pollution source. E. I. Du Pont De Nemours & Co. v. Train, 430 U.S. 112, 126-36 (1977).

30. 33 U.S.C. § 1313(a)(1), (2) (1976).

31. 33 U.S.C. § 1312(a) (1976).

32. 33 U.S.C. § 1342 (1976). The City of Milwaukee obtained its permits from "the Wisconsin Department of Natural Resources (DNR), which duly qualified under . . . 33 U.S.C. § 1342(b), as a permit granting agency under the superintendance of the EPA." 101 S. Ct. 1784, 1789 (1981). The permits issued to Milwaukee dealt with both overflows and discharges of sewage. *Id.* at 1794. For details of Milwaukee's permit requirements, *see Id.*

33. 33 U.S.C. § 1342 (1976).

34. A point source is defined as "any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1976).

35. 33 U.S.C. § 1342(b)(3) (1976). Any state whose waters may be affected by the issuance of the permit must be notified of the permit application and must be given the opportunity to participate in the hearings. *Id.* In addition, the state whose waters may be affected must have the opportunity to submit written recommendations to the permit issuing state and to the Administrator. 33 U.S.C. § 1342(b)(5) (1976). The offending state must either accept the affected state's recommendations or inform the Administrator why they were rejected. *Id.* Finally, "[u]nder . . . 33 U.S.C. § 1342(d)(2)(A), the EPA may veto any permit issued by a State when waters of another State may be affected." 101 S. Ct. 1784, 1797 (1981). In *City of Milwaukee,* the Court found these administrative procedures provided adequate means by which Illinois could seek relief from the pollution originating in the state. *Id.* For a further explanation of the majority and dissenting

system is that the Administrator uses it as a mechanism to enforce the Act,[36] which prohibits any discharge of pollutants into interstate waters unless pursuant to a permit.[37] Conversely, meeting the conditions of a permit is deemed the equivalent of compliance per se with the Act's standards.[38]

One of Congress' primary purposes behind amending the FWPCA was to provide a national uniform enforcement procedure.[39] National uniformity is necessary to effectuate the congressional policy of discouraging industries from forum-shopping for locations in states with less demanding water quality standards or without stringent enforcement.[40] This policy is important in maintaining a balance of industry among the states.[41]

The FWPCAA provide a number of mechanisms to enforce a permit violation. When a state is inadequately enforcing permit requirements or pollution standards, the Administrator may issue a compliance order or institute civil proceedings against the polluter for appropriate relief.[42] The remedy is generally in the form of an injunction, fines, or both.[43] Even without a permit or standard violation, the Administrator may seek an injunction on the grounds that a pollution

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positions, *see* text accompanying notes 117-127 *infra*.

36. 101 S. Ct. 1784, 1789-95 (1981). The permits are effective because:

> Such direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform.

EPA v. California State Water Resources Control Board, 426 U.S. 200, 204-05 (1976). In *City of Milwaukee*, the state agency (DNR) successfully brought an action in the state court enforcing the permit requirements. 101 S. Ct. 1784, 1789 (1981). Since these requirements still were not adequate to protect Illinois, the federal district court, on remand from Illinois v. Milwaukee, 406 U.S. 91 (1972), rendered a judgment imposing more stringent effluent limitations than required in the state permit. 101 S. Ct. 1784, 1789 (1981).

37. 33 U.S.C. § 1311 (1976).

38. 33 U.S.C. § 1342 (1976).

39. GRAD, *supra* note 17, at 3-81. The FWPCAA no longer relies on water quality standards set by the states as the primary enforcement standard for determining whether a pollution violation is occurring. *Id.* S. REP. NO. 92-414, 92d Cong., 2d Sess. 8, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3675. The effluent limitations and permits replaced the "water quality standards." *Id.*

40. GRAD, *supra* note 17, at 3-86.

41. *Id.*

42. 33 U.S.C. § 1319(a)(1) (1976). The Administrator is authorized to commence these proceedings for permanent and temporary injunctions to restrain any violation for which he is authorized to issue a compliance order. GRAD, *supra* note 17, at 3-164.2 to 3-165. Both the issuance of a compliance order and the commencement of judicial proceedings are left to the discretion of the Administrator. Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977).

43. 33 U.S.C. § 1319 (1976).

source shows present, imminent, or substantial danger to health or welfare.[44] Even a citizen[45] may bring an action against a pollution source which has allegedly violated any effluent limitation or permit.[46]

The problem with the FWPCAA, addressed in *City of Milwaukee*,[47] is that Milwaukee's discharges of sewage into Lake Michigan did not violate the conditions of its permit.[48] Consequently, Milwaukee was in compliance per se with the FWPCAA, leaving Illinois no basis for invoking the Act's enforcement provisions.[49] Nevertheless, the effluent limitations established by the Milwaukee permit were insufficient to protect Illinois' citizens from health hazards.[50] Illinois brought a nuisance action to attempt to have its own higher effluent limitations imposed upon Milwaukee.[51]

III. FACTS AND HOLDING

The City of Milwaukee operated sewer systems under a NPDES permit granted by the Wisconsin Department of Natural Resources under standards promulgated by the EPA Administrator.[52] In the original suit,[53] Illinois instituted an action against the City of Milwaukee in the United States Supreme Court, invoking the Court's original jurisdiction.[54] Illinois claimed its citizens were being harmed by overflows into Lake Michigan of inadequately treated sewage from Milwaukee's plants.[55] The United States Supreme Court refused to hear the merits,[56] but did permit Illinois to go back to the federal district court to seek remedies under a federal common law nuisance action.[57]

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44. 33 U.S.C. § 1364 (1976).

45. The FWPCAA defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(a)(1) (1976). *See* Sierra Club v. Mortan, 405 U.S. 727, 734-35 (1972) (the citizen must have been injured in fact).

46. 33 U.S.C. § 1365(a)(1) (1976).

47. 101 S. Ct. 1784 (1981).

48. *Id.* at 1810 n.32. Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?* 49 FORDHAM L. REV. 500, 530 (1981) (discusses the deficiency in the FWPCAA in dealing with the *City of Milwaukee* situations where both states are in compliance with their permit requirements).

49. *See* note 48 *supra.*

50. 101 S. Ct. 1784, 1788 (1981).

51. *Id.* at 1794.

52. *Id.* at 1789.

53. Illinois v. Milwaukee, 406 U.S. 91 (1972).

54. *Id.* at 93.

55. *Id.*

56. 406 U.S. 91, 93 (1972). The Court decided that it would exercise its original jurisdiction only when necessary because of the inordinate amount of time required to hear and dispose of such cases. *Id.* For additional evidence on the amount of time spent on litigating interstate pollution cases, *see* Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?* 49 FORDHAM L. REV. 500, 506 n.37 (1981).

57. 406 U.S. 91, 108 (1972). The Supreme Court, however, qualified its holding that the

Six months after Congress passed the FWPCAA,[58] Illinois instituted the present suit in the United States District Court for the Northern District of Illinois, seeking to have Milwaukee's discharges abated.[59] In 1977,[60] after finding Illinois had sufficiently established a nuisance under the federal common law, the district court ordered Milwaukee to "eliminate all overflows and to achieve specified effluent limitations on treated sewage."[61] The district court's order established effluent limitations and overflow standards more stringent than those imposed under the procedures of the FWPCAA in the city's permit.[62]

On appeal to the United States Court of Appeals for the Seventh Circuit,[63] the City of Milwaukee maintained that the FWPCAA were preemptive of the federal common law, thus eliminating the possibility of using a federal common law nuisance action to enforce more stringent standards on a neighboring state.[64] The appellate court disagreed with the argument, holding that the FWPCAA had not preempted the federal common law.[65] Using the statute as a guideline, the appellate court nevertheless refused to enforce effluent limitations more stringent than mandated by the permit,[66] but did require Milwaukee to comply with the timetable that the lower court had set for the elimination of overflows.[67]

The City of Milwaukee appealed to the United States Supreme Court, challenging the seventh circuit's decision upholding the district court's order to eliminate overflows within the designated timetable.[68] The Supreme Court vacated the appellate court's decision,[69] overruling

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Federal Water Pollution Control Act, 33 U.S.C. § 1151 (1970), did not preempt the federal common law nuisance action. Justice Douglas wrote: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law 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." 406 U.S. 91, 107 (1972).

58. 33 U.S.C. §§ 1251-1376 (1976).

59. 101 S. Ct. 1784, 1788 (1981).

60. Although the suit was promptly initiated in 1972, the actual trial did not commence until 1977. *Id.* at 1788-89. A significant part of this five year delay was attributed to "three years of pretrial discovery." *Id.* at 1800 (Blackmun, J., dissenting).

61. *Id.* at 1789.

62. *Id.*

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

64. *Id.*, at 157-64; 101 S. Ct. 1784, 1789 (1981).

65. City of Milwaukee v. Illinois, 599 F.2d 151, 162-63 (7th Cir. 1979).

66. *Id.* at 176.

67. *Id.* at 177. 101 S. Ct. 1784, 1790 (1981). The timetable and standards concerning the elimination of overflows established by the district court were more stringent than overflow requirements in the permit. *Id.* The court of appeals upheld these more stringent requirements because the need for higher standards for overflows was reasonable and supported by adequate evidence. 599 F.2d 151, 170-72.

68. 101 S. Ct. 1784, 1790 (1981).

69. *Id.* at 1800.

Illinois v. Milwaukee,[70] *sub silentio*, by holding that the FWPCAA had precluded the use of the federal common law nuisance action.[71] The decision prevents a state injured by the water pollution of another state from using a nuisance action to impose effluent or overflow standards more stringent than those established under the Act upon the polluting state.

IV. ANALYSIS

A. *The Court's Rationale—Federal Common Law*

The Court's analysis of the continued availability of the federal common law nuisance action began with the assumption that only Congress should set the standards which will be used to effectuate the federal law.[72] The majority relied heavily upon the cases *Arizona v. California*[73] and *Mobile Oil Corp. v. Higginbotham*,[74] in which the Court refused to apply the federal common law principles, deferring instead to the statutory schemes for the apportionment of interstate waters and for damages calculations under maritime law, respectively.[75] The *City of Milwaukee* Court maintained that these cases stand for the proposition that when Congress directly addresses a question, courts are no longer free to provide their own rules of decision.[76] The Court considered deference to the legislature in such a situation important to the

70. 406 U.S. 91 (1972).

71. 101 S. Ct. 1784, 1793 (1981).

72. *Id.* at 1790. The *City of Milwaukee* Court cited Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) as standing for the proposition that the federal common law may be used by the courts only "in the absence of any applicable Act of Congress." *Id.* at 367. This is not necessarily accurate. Justice Douglas, writing for the *Clearfield* Court, claimed that the absence of a congressional Act was merely one instance, not the only one, in which Courts were allowed to use federal common law. *Id.* at 366-67. This is evident from the fact that, despite the presence of congressional regulations on the subject, Justice Douglas applied the federal common law to fashion a rule of decision. *Id.* at 365-66. For further support of this interpretation of the Douglas opinion in *Clearfield, see* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1037 (1967).

73. 373 U.S. 546 (1963). Justice Black, writing for the majority, stated: "Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of 'an equitable apportionment' for the apportionment chosen by Congress." *Id.* at 565-66.

74. 436 U.S. 618 (1978).

75. 101 S. Ct. 1784, 1791 (1981). Justice Blackmun, dissenting in *City of Milwaukee*, complained that the majority gave *Arizona v. California* and *Mobil Oil Corp. v. Higginbotham* too broad an interpretation. *Id.* at 1803 n.7. He contended that these cases do not hold that any action by Congress in a particular field precludes the use of the federal common law. *Id.* He reasoned that in each case the Court deferred to the legislature's judgment concerning a particular aspect of a broad field—i.e., apportionment and damages. *Id.* Justice Blackmun found *City of Milwaukee* distinguishable because "unlike the statutes at issue in these two cases, the 1972 Act addressed a broad and complex subject to which state and federal law had previously spoken, and in doing so recognized and encouraged many different approaches to controlling water pollution." *Id.*

76. 101 S. Ct. 1784, 1791 (1981).

preservation of the separation of powers doctrine.[77] Based upon this view, Justice Rehnquist, writing for the *City of Milwaukee* majority, concluded the federal common law nuisance action was preempted by the FWPCAA, reasoning that any action by Congress in a given area eliminates the necessity for a federal rule of decision.[78] Justice Blackmun, dissenting, condemned this approach for its "automatic displacement" of the federal common law.[79] He viewed congressional action in an area previously a subject of federal common law as not presumptively extinguishing the federal courts' role in water pollution controversies.[80] Justice Blackmun's dissenting position is supported by the fact that the federal common law has historically served the function of filling gaps in federal legislation.[81] Thus it should continue to be used as a supplement to the FWPCAA. A weakness in the dissent, however, is its failure to point to specific gaps in the FWPCAA. Although Justice Blackmun intimated that the federal common law is needed to set-

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77. The separation of powers doctrine is a long-standing principle of our American government which stresses that one branch (executive, legislative, or judicial) of our government should not encroach upon the judgment, functions, and power of the other branches. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 16 (1978). "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." TVA v. Hill, 437 U.S. 153, 194 (1977). Autonomy is necessary to those branches to preserve their legitimacy and accountability when they exercise their appropriate and designated powers. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 16 (1978). In *City of Milwaukee*, Justice Rehnquist warned that if the federal courts were permitted to establish their own standards regarding water pollution under the guise of federal common law, then the judiciary would be encroaching on the designated authority and functions of the legislature. 101 S. Ct. 1784, 1791 (1981).

78. *Id.* at 1790-92.

79. 101 S. Ct. 1784, 1801 (1981). Justice Blackmun pointed out that the majority's "automatic displacement" approach was erroneous because "It fails to reflect the unique role federal common law plays in resolving disputes between one State and the citizens or government of another. In addition, it ignores this Court's frequent recognition that federal common law may complement congressional action in the fulfillment of federal policies." *Id.*

80. *Id.*

81. Justice Blackmun explained that the basis of the federal common law's gap-filling function is "to effectuate federal interests embodied either in the Constitution or an Act of Congress." 101 S. Ct. 1784, 1801 (1981). For a discussion of interstate water pollution as a federal interest, *see* note 3 *supra.*

> At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare as a matter of common law or "judicial legislation," rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.

Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957). For further discussion of the federal common law's gap-filling function, *see* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1028-29 (1967); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 407-16 (1964).

tle disputes between two states, he did not explicitly demonstrate that the Act is inadequate for dealing with such controversies.

The Court justified its decision to abolish federal common law and overturn *Illinois v. Milwaukee*[82] based upon three changes brought about by the FWPCAA[83] in 1972, which the majority found had eliminated the need for any gap-filling function for the federal common law.[84] First, the Court noted that the FWPCAA as a whole were comprehensive, thus leaving no gaps in the legislation.[85] Second, the Court reasoned that the change from water quality standards to the federal effluent limitations and permit system solved any problems with establishing standards.[86] Third, unlike the situation in *Illinois v. Milwaukee*,[87] Illinois had a forum under the FWPCAA to hear its dispute.[88]

Emphasizing that the FWPCAA were a total restructuring of the FWPCA,[89] the Court looked to the legislative history and found that the comments of the individual legislators[90] on the FWPCAA's comprehensiveness demonstrated a congressional intent to preempt the federal common law.[91] Justice Blackmun is correct in his statements that the Court placed too much emphasis on the legislators' references to the statute's comprehensiveness.[92] Justice Blackmun pointed out that the approach taken by the *City of Milwaukee* majority is inconsistent with the decision in *Illinois v. Milwaukee*.[93] Similar legislative comments on the statute's comprehensiveness were present there, but the Court nevertheless gave formal recognition to the federal common law nuisance action as a remedy necessary to supplement the statute.[94] Referring to this resulting inconsistency, Justice Blackmun said that the Court could ill afford to articulate a test under which a legislator's comments are dispositive of the issue whether there are any gaps to be filled in the legislation.[95] This position is further supported by the general rule that legislative comments concerning a specific statute have

82. 406 U.S. 91 (1972).
83. 33 U.S.C. §§ 1251-1376 (1976).
84. 101 S. Ct. 1784 (1981).
85. *Id.* at 1792-93.
86. *Id.* at 1794.
87. 406 U.S. 91 (1972).
88. 101 S. Ct. 1784, 1796-97 (1981).
89. *Id.* at 1792. For an examination of several of the more important changes in the statute, *see* text accompanying notes 22-51 *supra*.
90. 101 S. Ct. 1784, 1792-93 n.12 (1981).
91. *Id.* at 1793.
92. *Id.* at 1805.
93. 406 U.S. 91 (1972). For legislators' comments referring to the Federal Water Pollution Control Act as comprehensive, *see* 101 S. Ct. at 1805 n.13 (1981).
94. 101 S. Ct. at 1805.
95. *Id.*

generally been given some weight in interpreting a statute, but clearly not to the extent of being conclusive as the majority proposes.[96]

A problem with using "comprehensive" as a catchword precluding the federal common law is that it leaves the power of the federal courts to fashion a rule of decision solely in the hands of the legislators. They may very well preempt the federal courts' authority with a mere reference to a statute as "comprehensive." This, in turn, could have deleterious effects on the separation of powers doctrine and the functions and legitimacy of the federal courts.

The Court also stressed that there was no gap to be filled by court-imposed pollution standards because in the FWCPAA Congress designed an elaborate administrative scheme to solve problems concerning effluent limitations.[97] The majority claimed that if a federal court adopted limitations or standards more stringent than imposed under the FWPCAA, it would, in effect, be merely substituting a court's judgment for that of the expert administrative agency established by Congress.[98] The *City of Milwaukee* Court held that by doing this, the district court went beyond its authority under the common law gap-filling function.[99] It concluded that because of the legislative regulatory approach, "there [was] no room" for the federal common law.[100]

Contrary to Justice Rehnquist's analysis, the issue before the district court did not involve the substitution of one regulatory scheme for another, but instead a determination whether states could obtain an adequate remedy from the provisions of the FWPCAA.[101] That legislation may be comprehensive in terms of effluent limitation standards does not prevent the statute from being wholly inadequate in providing a remedy to the injured party. In fact, the FWPCAA do not expressly provide for a damages remedy for injuries sustained by violations of the Act.[102] Since the case *Cort v. Ash,*[103] the Supreme Court generally

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96. United States v. United Mine Workers of America, 330 U.S. 258, 281-82 (1946) (views and opinions of individual legislators are not authoritative in construing a statute); Consumer Product Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980) (contemporaneous remarks of a legislator are not controlling in analyzing legislative history); Lewis v. United States, 445 U.S. 55, 60 (1980) (the starting point in interpreting a statute is the language of the statute itself).

97. 101 S. Ct. 1784, 1794 (1981).

98. *Id.* at 1796.

99. *Id.*

100. *Id.*

101. *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1977). As in *City of Milwaukee,* the *Mobil Oil Corp.* Court addressed the issue whether gaps existed in a federal statute because of a lack of adequate remedies. The Court said: "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Id.* at 625.

102. National Sea Clammers Ass'n. v. City of New York, 616 F.2d 1222, 1233 n.31 (1980).

analyzes a statute in terms of four factors to discover whether a private cause of action can be inferred from its provisions.[104] The majority did not apply the *Cort v. Ash*[105] analysis to the FWPCAA.

In *National Sea Clammers Ass'n v. City of New York*,[106] the Seventh Circuit Court of Appeals, applying the four-factored test, found a damages action for citizens implicit in the FWPCAA.[107] The seventh circuit first reasoned that one of the general purposes behind the FWPCAA was to protect private citizens from actual injury caused by pollution.[108] Therefore, an individual is one of the class which the statute was intended to benefit.[109] Second, the court found that the "savings clause"[110] of the statute shows a congressional intent to preserve an individual's right to bring an action for damages.[111] Third, the court held that the ability of a private citizen to bring an action seeking damages would help effectuate the purposes of the FWPCAA by aiding in achieving the goals of eliminating pollution and preserving the environment.[112] Fourth, the court reasoned that interstate water pollution was traditionally an area of federal concern with very little state involvement,[113] thus it was appropriate for the federal courts to provide the

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103. 422 U.S. 66 (1975).

104. *Id.* at 78.

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted. . . ." That is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of the legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff . . .? And finally, is the cause of action one traditionally relegated to State law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. The principle use of these factors is to determine legislative intent. Touche Ross & Co. v. Reddington, 442 U.S. 560, 575 (1979).

105. 422 U.S. 66 (1975).

106. 616 F.2d 1222 (7th Cir. 1980), *modified*, 101 S. Ct. 1509 (1981).

107. *Id.* at 1229.

108. *Id.*

109. *Id.*

110. A savings clause is defined as: "In a statute . . . a restriction in a repealing act, which is intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted repeal." BLACK'S LAW DICTIONARY 1205 (5th ed. 1979). The savings clause in the FWPCAA is 33 U.S.C. § 1365(e) (1976). This section provides: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator of State agency)." *Id.* For the Supreme Court's treatment of this section, *see* text accompanying notes 137-46, *infra*.

111. 616 F.2d at 1230.

112. *Id.*

113. For a discussion of the federal interest in interstate water pollution, *see* notes 3-8 *supra*.

primary mechanism for relief.[114] Even circuits failing to infer a private cause of action from the FWPCAA,[115] have agreed that the federal common law nuisance action remains available to a private citizen to sue for damages.[116]

When confronting the issue whether Illinois had a forum to protect its interests, the *City of Milwaukee* Court addressed the third change in circumstance eliminating the gap-filling function of the federal common law. The Court acknowledged that one of its core concerns in *Illinois v. Milwaukee*[117] was that if the Court failed to permit a common law nuisance action, Illinois would not have a forum to hear its dispute.[118] The Court said, however, that this concern no longer existed because of the passage of the FWPCAA.[119] It reasoned that Congress provided numerous administrative procedures[120] by which a state could bring a claim asking for pollution requirements more stringent than those which were in effect under a permit.[121] The Court noted that Illinois had not exhausted any of the FWPCAA's administrative procedures designed to effect a change in the effluent limitations before bringing suit.[122]

Justice Blackmun is correct in his contention that Congress never intended that the FWPCAA prevent a federal court from hearing an action because of a party's failure to fully exhaust administrative remedies.[123] Congress made an injured state's participation in the permit-granting procedures of another state purely "voluntary and optional."[124] Justice Blackmun reasoned that such nonmandatory procedures could not operate as a jurisdictional bar to bringing a court ac-

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114. 616 F.2d at 1233.

115. 33 U.S.C. §§ 1251-1376 (1976).

116. National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1233 (7th Cir. 1980) (the common law nuisance action is available in suits by private parties attempting to receive damages awards); City of Evansville v. Kentucky Liquid Recycling Corp., 604 F.2d 1008, *cert. denied*, 444 U.S. 1025 (1979) (despite the court's finding that Congress did not intend to create a private right of action for damages in the FWPCAA, it held that a municipality could maintain a federal common law nuisance action for damages). *Contra*, Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?* 49 FORDHAM L. REV. 500 (1981), in which the author takes the view that the federal common law should not be continued for the purpose of providing compensation for private injuries because Congress provided a "mechanism for compensating injuries caused by pollution activities." *Id.* at 519. In effect, the author contends that redress for injuries under nuisance should be brought under the state common law because that is the common law which the savings clause preserved. *Id.* at 519-20.

117. 406 U.S. 91 (1972).

118. 101 S. Ct. 1784, 1796 (1981).

119. *Id.*

120. For a discussion of these administrative procedures, *see* notes 32-36 *supra*.

121. 101 S. Ct. at 1797.

122. *Id.*

123. *Id.* at 1807.

124. *Id.*

tion.[125] In fact, at the time Illinois brought the nuisance action, it had exhausted without success all administrative remedies then available.[126] Justice Blackmun criticized the Court for its dicta implying Illinois had the burden of going back to pursue administrative procedures under the FWPCAA after the state had brought the suit.[127]

B. The Court's Rationale—Statutory Interpretation

The *City of Milwaukee* Court rejected Illinois' contention that Congress intended to preserve the common law nuisance action through section 510[128] and section 505(e)[129] of the FWPCAA. Section 510 allows the states to adopt and enforce effluent limitations more stringent than those established under the guidelines of the FWPCAA.[130] Section 505(e) is a savings clause which preserves a person's right to sue under any statute or common law for enforcement of a standard or to "seek any other relief."[131] Looking at section 510, the Court said that Congress clearly intended for the more stringent standards allowed by section 510 to be imposed by state administrative processes solely upon "in-state" discharges.[132] Because the federal common law would create a federal standard, the Court reasoned that a federal rule of decision is inappropriate and unnecessary for enforcing more stringent standards "in-state."[133]

The Court's interpretation of section 510 is questionable. It failed to justify its interpretation as to the "in-state" nature of section 510 by referring to any specific statutory language. Nor did the Court cite to

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125. *Id.*

126. *Id.* at 1806 n.18.

127. *Id.* at 1806.

128. 33 U.S.C. § 1370 (1976). In its discussion in *City of Milwaukee*, the Court cites to the FWPCAA §§ 510 and 505(e) instead of the parallel United States Code section. For clarity and consistency, the text of this casenote will follow the Court's use of §§ 510 and 505(e), however, the footnotes will continue to cite to the applicable United States Code sections.

129. 33 U.S.C. § 1365(e) (1976).

130. In full, § 1370 (§ 510) provides:

> Except as expressly provided in this chapter nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (a) any standard or limitation respecting discharges or pollutants or (b) any requirement respecting control or abatement of pollution; except that if any effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or any other limitation, effluent standard, prohibition, pretreatment standard, or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

131. 33 U.S.C. § 1365(e) (1976). For a discussion at the savings clause 33 U.S.C. § 1365(e), *see* note 110 *supra*.

132. 101 S. Ct. 1784, 1796 (1981).

133. *Id.*

any legislative history which might have provided support for its interpretation. Section 510 gives a state the explicit right "to adopt or enforce any standard or limitation respecting discharges of pollutants."[134] There is no express qualification in the wording which limits the application of more stringent effluent standards to exclusively "in-state" discharges. Based upon the language of section 510, it would have been just as logical for the Court to conclude that the more stringent standards applied to both in-state and out-of-state discharges which affect waters in or bounding the state. This interpretation would comport not only with the FWPCAA's goal of encouraging states to assist in the interstate water pollution problem, but also with administrative procedures designed to allow a state to participate in another state's permit-granting process when the outcome of the process may have an effect on waters in non-permit-seeking states.

In addition, the majority's interpretation of section 510 is weakened by its failure to consider the impact of the second clause in section 510 on its position that this section did not preserve the federal common law nuisance action. This clause provides that section 510 is not to be construed as "impairing or . . . affecting" any right or jurisdiction a state may possess with regard to boundary waters.[135] Since the Court had previously recognized the right of a state to protect its quasi-sovereign ecological right in its environment and natural resources from interstate pollution sources,[136] the second clause in section 510 apparently preserves that right.[137] To the extent that the state's ecological rights are to be protected, section 510 appears to have implicitly preserved the federal common law nuisance action as a valuable tool for protecting that right.[138]

When interpreting section 505(e), the Court gave special significance to the words "this section,"[139] finding that these words evince an intent on the part of Congress merely to preserve individual rights and remedies, which does not prevent the statute as a whole from preempt-

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134. 33 U.S.C. § 1370 (1976).

135. *Id.*

136. For cases dealing with a state's quasi-sovereign right to protect its environment, *see* note 7 *supra.*

137. 101 S. Ct. 1784, 1804-06 (1981) (the dissent's analysis combines both § 1370 (§ 510) and § 1365(e) (§ 505(e)), concluding that Congress intended to preserve the state's right to defend its ecological rights). *Contra,* Fort, *The Necessary Demise of Federal Common Law Nuisance,* 12 LOY. CHI. L.J. 131, 157-59 (1981) (the author takes the position that § 1370 (§ 510) preserves only state law because the section allows states to adopt standards that are more stringent than imposed under the FWPCAA).

138. Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?* 49 FORDHAM L. REV. 500, 524-34 (1981).

139. 101 S. Ct. 1784, 1798 (1981).

ing the federal common law nuisance action.[140] Even so, the *City of Milwaukee* Court suggested that the reference to the preservation of common law remedies meant state as opposed to federal common law.[141]

The Court's sparse analysis of section 505(e) completely overlooked not only the express language of the section, but also evidence of a congressional intent to preserve the federal common law.[142] The phrase "statute or common law" does not contain any language suggesting that it is limited to only state common law. Congress is generally presumed to be aware of and incorporate into a legislative enactment all preexisting common law rights and duties, unless it uses express words to the contrary.[143] Based upon this statutory construction principle, the more logical interpretation of section 505(e) would be that the general reference to the "common law" preserves both state and federal common law, because there is no express preclusion of the federal common law nuisance action.

Justice Blackmun condemned the *City of Milwaukee* majority for ignoring legislative comments which showed that section 505(e) was clearly intended to preserve federal common law nuisance actions.[144] He said that if one followed the Court's interpretation of the words "this section" as to the scope of the remedies which section 505(e) preserves, the consequence would be to extinguish all preexisting remedies both inside and outside the FWPCAA.[145] He noted that this was

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140. *Id.*

141. *Id.*

142. Concerning § 1365(e), Justice Blackmun noted: "In my view, the language and structure of the Clean Water Act leaves no doubt that Congress intended to preserve the federal common law." *Id.* at 1804 (Blackmun, J., dissenting). Justice Blackmun pointed to a discussion in the legislative debates on § 1365 between Senators Griffin, Muskie, and Hart concerning a pending interstate pollution suit based on a federal common law nuisance action. *Id.* at 1806. All the Senators were in agreement that the FWPCAA "would not affect or hinder the suit now pending against the Reserve Mining Co. under the Refuse Act of 1899 . . .[,] the existing Federal Water Pollution Control Act, or other law." *Id.* Thus the legislative debates demonstrate a Congressional intent to preserve the federal common law. For a list of further authorities showing legislative intent to preserve the federal common law nuisance action through § 1365(e), *see* 101 S. Ct. 1784, 1806 n.17 (1981); Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?* 49 FORDHAM L. REV. 500, 528 n.176 (1981). For the majority's response to Blackmun's interpretation of the Griffin, Hart, and Muskie colloquy, *see* 101 S. Ct. at 1798-1800.

143. United States v. United Mine Workers, 330 U.S. 258, 272 (1946). "Statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without a clear expression of implication to that effect." Hancock v. Train, 426 U.S. 167, 179 (1976) (citing United States v. UMW, 330 U.S. at 272).

144. For evidence of congressional intent to preserve the federal common law, *see* note 137 *supra.*

145. 101 S. Ct. at 1805 (Blackmun, J., dissenting). Justice Blackmun offered a more plausible interpretation of § 1365(e): "I would construe the reference to 'this section' as simply preventing pre-existing right of action from being subjected to the procedural and jurisdictional

clearly contrary to congressional intent permitting more stringent remedies under both federal and state laws.[146] Finally, Justice Blackmun pointed out that all the other federal courts which have dealt with section 505(e) have concluded that Congress intended to preserve the federal common law nuisance action when it enacted that provision of the FWPCAA.[147] Other cases also stressed the importance of the nuisance action in enforcing and remedying violations of the FWPCAA.[148] The *City of Milwaukee* majority concluded that the federal common law was preempted without addressing this substantial number of lower court opinions.

V. CONCLUSION

The factual setting in *City of Milwaukee* illustrates an inherent problem with the remedial and enforcement provisions of the FWPCAA, if the United States Supreme Court abolishes a federal judicial mechanism available to supplement the administrative permit-granting processes. Because Milwaukee was complying with the requirements of its permit, the enforcement mechanisms of the FWPCAA could not be commenced in order to provide immediate relief to Illinois. Additionally, the invocation of alternatives such as the permit-granting process or civil proceedings is entirely up to the Administrator's discretion. Consequently, Illinois itself is not left with the option of effectively defending its own quasi-sovereign rights and interests as injury to the health of its citizens continues.

Even with the FWPCAA, the federal common law nuisance action could still provide an effective federal tool for enforcing interstate water pollution standards to solve problems such as that in the *City of Milwaukee* case. There is nothing to suggest that the federal courts could not work within the guidelines of the permits and standards established by the EPA Administrator in fashioning an equitable remedy. In addition, several factors which are commonly used by the Supreme Court to trigger the application of the common law taken not only from pollution cases, but also the legislative history of the FWPCAA, point to the continued use and viability of the federal common law nuisance action: (1) there is a dispute between two states; (2) a federal interest

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limitations imposed by § 505 on persons who could sue under the Act." *Id.*

146. *Id.*

147. For federal courts which have held that § 1365(e) (§ 505(e)) preserves the federal common law nuisance action, *see* National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1233-35 (3d Cir. 1980), *modified*, 101 S. Ct. 2615 (1981); City of Evansville v. Kentucky Liquid Recycling Corp., 604 F.2d 1008, 1017-19 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); California Tahoe Regional Planning Agency v. Jennings, 594 F.2d 181, 193 (9th Cir. 1979), *cert. denied*, 444 U.S. 864 (1980).

148. *See* text accompanying notes 139-40 *supra*.

is involved—interstate water pollution; (3) federal legislation creates a federally enforceable right; (4) there is a need for a uniform rule of decision; (5) Congress intended to preserve the federal common law—at least it is not expressly prohibited; (6) the FWPCAA provide inadequate injunctive and damages remedies for an individual or state injured by another state's pollution. Nothing in the statute or its legislative history except the word "comprehensive" suggests that the nuisance action and the FWPCAA could not work hand-in-hand to enforce national pollution standards. Yet, *City of Milwaukee* has the effect of emasculating the grant of original jurisdiction given to the federal courts in *Illinois v. Milwaukee* by holding that the FWPCAA preempt a federal common law nuisance action attempting to abate extraterritorial water pollution.

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