City of Milwaukee v. Illinois (Illinois II)

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INTRODUCTION

Within the last ten years the United States Supreme Court has both opened and closed the door on the use of the federal common law of nuisance in water pollution cases. A single conflict between the state of Illinois and the city of Milwaukee provided the context for this fluctuation in the law.

In the first decision, *Illinois v. City of Milwaukee (Illinois I)*, the Court held that there was a cause of action in Federal District Court for abatement of a common law nuisance arising out of pollution of interstate waters. The Court concluded that the Federal Water Pollution Control Act of 1948 did not preempt the federal common law, which was needed to provide a comprehensive scheme of federal remedies appropriate in an area of great federal concern.

Ten years later, in *City of Milwaukee v. Illinois (Illinois II)*, the Court held that the 1972 amendments to the Federal Water Pollution Control Act (FWPCA) preempted the federal common law action. The Court concluded that the amended statute provides a comprehensive regulatory program, fully displacing any need for a judicial remedy under federal common law.

This Note reviews the decision in *Illinois II* and concludes that preemption was not intended by Congress and was therefore not necessitated by the separation of powers doctrine. Since the Court's refusal to apply federal common law will cause serious harm to both state and federal interests, *Illinois II* should be narrowly applied.

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2. *Id.* at 98-108.
4. 406 U.S. at 104.
5. *See id.* at 105 n.6, 107 n.9.
8. 101 S. Ct. at 1792.
9. *Id.*
Illinois petitioned the Supreme Court to hear a suit against Milwaukee in 1972, under the Supreme Court's original jurisdiction. Illinois brought the action in nuisance against Milwaukee for polluting the waters of Lake Michigan, alleging pollution from combined sewer and storm drain overflows during periods of heavy rainfall and from discharges of inadequately treated sewage. Illinois maintained that Milwaukee's pollution endangered the health of Illinois residents. No statutory violation was alleged.

The Supreme Court declined to take original jurisdiction because the action was not between two states. The Court held, however, that a cause of action could be brought, and that this action arose under the laws of the United States for purposes of federal question jurisdiction.

The Court in Illinois I took note of Erie R. Co. v. Tompkins, which held that, generally, federal courts cannot apply federal common law. The Court noted, however, that it has carved out exceptions to the Erie doctrine where strong federal concerns suggest the need for a uniform federal rule in place of state law. The Illinois I court found such an overriding federal concern in interstate disputes where the court "deal[s] with air and water in their ambient or interstate as-

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12. Id.
13. Id. at 1789. The state of Wisconsin brought a separate action in state court to enforce the National Pollutant Discharge Elimination System (NPDES) permits that it had issued. The state court ordered Milwaukee to comply with the permits. Id.
14. See 406 U.S. at 104. The Illinois I case was before the Supreme Court on a motion for leave to file a bill of complaint under the Court's original jurisdiction under U.S. Const. art. III, § 2, cl. 2. The Supreme Court held that the City of Milwaukee was not a state under the original jurisdiction provision and thus the Court's original jurisdiction was not mandatory. The Court declined to hear the case under its permissive jurisdiction because an alternative forum was available to the parties. 406 U.S. at 104.
15. 406 U.S. at 107.
16. Id. at 100.
17. 304 U.S. 64 (1938). The Supreme Court in Erie overruled the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), which allowed the federal courts to apply their own common law to questions of general law not covered by a state statute. Id. at 11. Under the Swift doctrine, the law applied could thus vary depending on whether enforcement was sought in state or federal court. This selection of courts was dependent on whether the plaintiff was a citizen of the state of the defendant, because of the requirements for federal diversity jurisdiction under 28 U.S.C. § 1332 (1976). The majority in Erie held this discrimination between residents and non-residents to be unconstitutional. 304 U.S. at 76-78.
18. 304 U.S. at 78; 406 U.S. at 105 n.7.
19. 406 U.S. at 103, 105 n.6. Uniformity of law results when federal common law is applied, because federal common law preempts otherwise varying state law. Hinderlider v. La Plata Co., 304 U.S. 92 (1938).
pects," and a fair hearing could not be expected for either state in the other's courts. In those cases federal courts and federal law were needed to ensure that states retained a remedy against the acts of other states or citizens of other states. Overriding federal concern had also been found where federal statutes occupied the field, but did not specifically provide for the problem at issue. Since the application of state law might thwart the policies of the federal statute, a federal common law remedy must preempt state law.

20. 406 U.S. at 103.
21. Id. See also Kansas v. Colorado, 206 U.S. 46, 95 (1907); Hinderlider v. La Plata Co., 304 U.S. 92 (1938). In Hinderlider, decided the same day as Erie, the Court recognized that protecting a federal interest in an interstate issue would occasionally require uniform control even in the absence of a federal statute and therefore the federal common law exception to the Erie doctrine must be applied. 304 U.S. at 110. See also Note, Exceptions to Erie v. Tompkins—The Survival of Federal Common Law, 59 Harv. L. Rev. 966 (1946).
22. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1906). The Court held that when the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi sovereign interests; and the alternative to force is a suit in this court .... It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.
23. Id. at 237-38 (quoted in Illinois I, 406 U.S. at 104-05).
24. The Supreme Court, however, found a different situation in Illinois II—federal common law could not be applied since it would thwart the express provisions of a federal statute.

In Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1956), a labor union had entered into a collective bargaining agreement that provided for arbitration of grievances. When the employer refused to enter arbitration, the union sued under a provision of the Federal Labor Management Relations Act, 29 U.S.C. §§ 301-309 (1976). The district court had ordered the employer to arbitrate. 353 U.S. at 449. The court of appeal reversed, holding that the federal Act only granted jurisdiction to the district court and did not provide for the remedy applied. Id. Since, under state common law, such executory arbitration agreements were not enforceable, the court of appeal did not enforce the arbitration provision. Id. The Supreme Court upheld the district court, holding that it
In *Illinois I*, both types of reasons for federal common law confronted the Court. This dispute was interstate, and the Congress, in numerous environmental laws, had expressed strong concern about pollution. The Court recognized that "new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." Relying on a savings clause in the 1948 FWPCA, however, the Court found that federal common law was not preempted by that Act. The Court held that the federal interest in interstate water pollution required a federal common law nuisance action to fill the gaps of the then current FWPCA, and so remitted the case to federal district court.

II

ILLINOIS II

After the Supreme Court remanded the case to the district court, the 1972 amendments to FWPCA were passed. The case was subsequently tried in the Northern District of Illinois, and appealed to the Seventh Circuit Court of Appeals. Both the district court and the court of appeals agreed that the Act, as amended, did not preempt the federal common law of nuisance. The district court ordered the defendants to eliminate the raw sewage overflows and also imposed effluent limitations on the sewage treatment plant more stringent than those required by the current national pollution discharge elimination system (NPDES) permits. The court of appeals affirmed the order as to the overflows but held that the record did not contain sufficient evidence to

had authority to apply the federal remedy since the policy of the federal legislation occupied the field of labor law agreements and therefore federal, not state, remedies should be fashioned under the statute. *Id* at 456-57.

25. 406 U.S. at 103.


27. 406 U.S. at 107.

28. *Id* at 104. The savings clause, § 10(b) of the old FWPCA, as explained in *Illinois I*, stated that "save as a court may decree otherwise in an enforcement action, '[S]tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by federal enforcement action.'" 406 U.S. at 104.

29. *Id* at 107.

30. *Id* at 108.


33. 599 F.2d 151 (7th Cir. 1979).

34. 366 F. Supp. at 299; 599 F.2d at 162-63.

justify the more stringent effluent limitations.\textsuperscript{36}

The Supreme Court held, in \textit{Illinois II}, that the 1972 amendments to FWPCA preempted a federal common law suit by Illinois.\textsuperscript{37} The Court in \textit{Illinois II}, like its predecessor a decade earlier, recognized that federal common law may be applied "where there exists a significant conflict between some federal policy or interest and the use of state law,"\textsuperscript{38} and no federal statute is directly controlling.\textsuperscript{39} In those cases, "the court is compelled to consider federal questions which cannot be answered from federal statutes alone."\textsuperscript{40} The \textit{Illinois II} court, however, emphasized that under the separation of powers doctrine, federal common law is "subject to the paramount authority of Congress,"\textsuperscript{41} and federal common law must yield when Congress has closed the gaps in the statutory scheme. When Congress has "spoken directly to the question . . . previously governed by . . . federal common law, the need for such an unusual exercise of lawmaking by federal courts disappears,"\textsuperscript{42} and the federal courts have no authority to "supplement" Congress's answers so thoroughly that the Act becomes meaningless.\textsuperscript{43}

The \textit{Illinois II} Court found that the determination of whether Congress has spoken directly to a question previously governed by Federal common law involves a detailed assessment of the scope of the legislation.\textsuperscript{44} The assessment is made in light of certain presumptions, but not the same presumptions that govern Congressional preemption of state law.\textsuperscript{45} Preemption of state law, the Court stated, involves federalism and state sovereignty, which the federal constitution and courts go to great lengths to preserve.\textsuperscript{46} Preemption of federal common law, however, is rooted in the separation of powers, where the assumption\textsuperscript{47} is that legal standards are to be developed by Congress, not the federal courts.\textsuperscript{48} Accordingly, the court held that the rule that state law is not

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\item \textsuperscript{36} 599 F.2d at 175-76.
\item \textsuperscript{37} 101 S. Ct. 1784 (1981).
\item \textsuperscript{38} \textit{Id.} at 1790.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.} (quoting D'Oench, Duhme & Co., Inc. v. FDIC, 315 U.S. 447 (1941)).
\item \textsuperscript{41} 101 S. Ct. at 1790 (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931)).
\item \textsuperscript{42} 101 S. Ct. at 1791.
\item \textsuperscript{43} \textit{Id.} (quoting Mobil Oil Corp. v. Higgenbotham, 436 U.S. 618, 625 (1978)). An authorized federal agency may preempt federal common law. \textit{See} Arizona v. California, 373 U.S. 546 (1963).
\item \textsuperscript{44} 101 S. Ct. at 1792-97.
\item \textsuperscript{45} \textit{Id.} at 1792.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} The majority calls this standard an assumption, \textit{Id.} at 1792, while the dissent characterizes this standard as a presumption. \textit{Id.} at 1803. None of the cases cited by the majority or dissent expressly recognized either an assumption or a presumption in favor of standards to be developed by Congress. The majority also fails to cite any prior cases when it establishes the assumption. \textit{Id.} at 1792.
\item \textsuperscript{48} \textit{Id.} at 1792. The majority's distinction is not entirely accurate, since preemption of state law and of federal common law are interrelated. Federal common law has often been
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to be superseded absent clear and manifest Congressional intent does not apply to the preemption of federal common law.\textsuperscript{49}

Considering the presumption in favor of Congress, the Court concluded that the amended FWPCA spoke directly to the water pollution issues in this suit.\textsuperscript{50} The majority began its analysis of the FWPCA amendments by distinguishing them from the statute considered in \textit{Illinois I}, based on the magnitude of changes in the law and on the "self-consciously comprehensive" nature of the amendments, which suggested that no room remained for federal common law nuisance.\textsuperscript{51}

The Court confirmed this suggestion by noting that Congress, in FWCPA and through the Environmental Protection Agency (EPA), had spoken directly to the questions of sewage effluent standards and overflows.\textsuperscript{52} Sewage plants and overflowing sewers are point sources, which cannot discharge without a permit from EPA or an EPA-approved state agency such as Wisconsin's Department of Natural Resources (DNR).\textsuperscript{53} The permits issued to Milwaukee by the Wisconsin DNR spoke specifically to effluent standards and overflows.\textsuperscript{54} Any attempt by a federal court to speak to these problems, by imposing common law standards more strict than those of the permitting agency, would not fill a gap in the statute, but impose a different regulatory scheme.\textsuperscript{55} That result, said the Court, is beyond the authority of the federal judiciary.\textsuperscript{56}

The Court next addressed the problem of obtaining a neutral forum in interstate disputes, and identified several statutory remedies and forums available to control pollution crossing state borders.\textsuperscript{57} Neighboring states are "encouraged" to enter interstate compacts, subject to Congressional approval.\textsuperscript{58} States whose waters may be affected by a permit must be given notice, an opportunity for hearing, and an opportunity to submit comments on such permits.\textsuperscript{59} EPA can issue permits to break deadlocks in these proceedings, and may veto state-issued per-

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  \item 49. 101 S. Ct. at 1792.
  \item 50. \textit{Id.} at 1791-1800.
  \item 51. \textit{Id.} at 1793.
  \item 52. \textit{Id.} at 1793-94.
  \item 53. \textit{Id.}
  \item 54. \textit{Id.} at 1794.
  \item 55. \textit{Id.} at 1796 n.18.
  \item 56. \textit{Id.}
  \item 57. \textit{Id.} at 1796-97.
  \item 59. 33 U.S.C. § 1342(b) (1976); see 101 S. Ct. at 1797.
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mits that have possible interstate effects. The Court concluded that the amendments spoke to the interstate forum problem and provided "ample opportunity for a state . . . to seek redress." In sum, the Court found that the 1972 amendments were not merely another law "touching interstate waters." Rather, the amendments occupied the field of water pollution.

The Court rejected the argument that provisions of the amendments preserve federal common law. The Court found that Congress did not intend to allow states to use section 510(1) of the water pollution amendments to turn state standards into federal law through the federal common law of nuisance doctrine. Section 510(1) allows states to impose or enforce standards and limitations more stringent than those required under FWPCA. Consistent with its argument distinguishing the states' rights doctrine from the separation of powers doctrine, the Court reasoned that federalism supports a state's authority to control discharges within the state, and that section 510 recognized this power. However, when the issue is raised in a federal court, the court cannot rewrite a comprehensive Congressional system.

The Court also rejected the argument that the savings clause in the citizens' suit provision of the FWPCA amendments indicated Congressional intent to preserve the federal common law. The savings clause states that "[n]othing in this section shall restrict any right . . . under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." The majority

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61. 101 S. Ct. at 1796-97. The majority expressly refused to concern itself with the effectiveness of these opportunities to seek redress. Id. at 1796 n.18.
62. Id. at 1792 (quoting Illinois I, 406 U.S. at 101-03).
63. Id.
64. 33 U.S.C. § 1370 (1976 & Supp. III 1979). This section reads:

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 of 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 other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or 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.

Id.
65. 101 S. Ct. at 1797-98. The Court did not address the effect of Section 510(2).
66. See id. at 1793 n.14.
67. Id. at 1798.
68. Id.
69. Id. at 1797-98.
70. 33 U.S.C. § 1365(e) (1976). This section provides that "[n]othing in this section
held that this savings clause means only that the citizen suit section does not restrict remedies established by Congress, not that the Act as a whole is not preemptive.\(^{71}\) The majority argued further that even if the clause showed an intent to preserve common law, it preserves only state and not federal common law.\(^{72}\) The majority found it unlikely that Congress would refer to something so uncommon as federal common law of nuisance,\(^{73}\) whose existence and extent the majority asserted to have been in doubt at the time the FWPCA amendments were drafted.\(^{74}\)

The majority thus found nothing to contradict its conclusion that the amended Act addressed the issues of effluent standards and overflow controls, provided a comprehensive scheme for remedying interstate water pollution, and therefore eliminated the need for a federal common law.

### III

**THE DISSENT**

Justice Blackmun, in dissent, rejected not only the majority's results, but much of its methodology. He found that the majority's analysis failed to "reflect the unique role" of federal common law in interstate disputes,\(^{75}\) and that the majority ignored the recognized responsibility of federal courts to remedy "the inevitable incompleteness presented by all legislation."\(^{76}\) Although he agreed that preemption must be found by reference to Congressional intent,\(^{77}\) Justice Blackmun rejected the majority's presumption of exclusively legislative remedies, arguing that mere legislation by Congress should not be presumptive evidence of Congressional intent to preempt.\(^{78}\) Rather, the Court should interpret what Congress said when it spoke,\(^{79}\) and find federal common law preempted only if preemption is the clear intent of the new statute.\(^{80}\)

Justice Blackmun found no such intent in FWPCA. He argued

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71. 101 S. Ct. at 1798.
72. *Id.* (citing Committee for the Consideration of Jones Fall Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976)).
73. 101 S. Ct. at 1798.
74. *Id.* at 1797; n.19.
75. *Id.* at 1801.
76. *Id.* at 1802 (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973)).
77. 101 S. Ct. at 1803.
78. *Id.*
79. *Id.* at 1803-04 n.8.
80. *Id.* at 1803 n.8.
that the Act, did not attempt to establish a "unitary" or exclusive scheme for pollution control. Justice Blackmun found that the "self-consciously comprehensive" nature of the 1972 legislation bears little relation to the question of exclusivity and the survival of supplemental remedies. Indeed, noted Justice Blackmun, the legislative history of the 1948 FWPCA contained similar claims of comprehensiveness, yet Illinois I indicated that Act did not prevent the application of federal common law. Rather than being exclusive, the Act, in Justice Blackmun's view, "recognized and encouraged many different approaches."

Justice Blackmun found such recognition expressed in both section 510, authorizing stricter state standards and the savings clause of section 505(e). Justice Blackmun did not agree with the majority's view that the latter subsection only prevented preemption by the savings clause. Rather, he read the words "this section" as intended to prevent the imposition of citizen suit procedures upon pre-existing remedies. The majority's strained reading would, according to Justice Blackmun, lead to the untenable conclusion that all prior rights and remedies were preempted by the 1972 legislation.

The dissent also found that the savings clause referred to and preserved both state and federal common law. Analyzing the legislative history and the long history of federal common law remedies in interstate water and pollution cases, Justice Blackmun argued that Con-
gress was aware of such remedies when it drafted and passed the 1972 amendments. Since section 505(e) "specifically preserve[d] any rights or remedies under any other law," without distinguishing federal common law from state common law, Justice Blackmun concluded that the clause prevented preemption of either common law by FWPCA.

Justice Blackmun asserted that every court that had previously considered the question had agreed that the savings clause preserved federal common law. Moreover, both the Justice Department and EPA had relied on federal common law to supplement the 1972 Act. Justice Blackmun concluded that interpretation of a statute by its enforcing agency should receive considerable deference from the courts, especially where that interpretation has been repeatedly acted upon without reaction from Congress.

Turning from the savings clause to the effect of remedies created in the 1972 Act, the dissent found no inconsistency between creation of new forums and preservation of older remedies. In addition, Justice Blackmun noted that the administrative remedies outlined by the majority were not available when Illinois began its suit, and accused the majority of wrongly making participation in these new and optional remedies a jurisdictional prerequisite to judicial relief.

The dissent argued that federal common law did not conflict with the Act, because nothing in the Act spoke explicitly to overflows. Moreover, the dissenters contended both Congress and EPA had recognized the inadequacy of the 1972 Act to deal with sewage overflows, and EPA had advocated case by case resolution of overflow problems. Case by case application of federal common law thus seemed to the dissent a particularly appropriate means of controlling overflows.

The dissent, unlike the majority, did not discuss the imposition of judicial effluent standards in terms of its conflict with more lenient stat-

91. Id. at 1806.
92. The Senate Report stated: "It should be noted, however, that the Section [505(e)] would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. REP. NO. 414, 92nd Cong., 1st Sess. 81 (1971), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3668, 3746-47 also reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong., 1st Sess., 1499 (Comm. Print 1973).
93. 101 S. Ct. at 1806.
94. Id. at 1804.
95. Id. at 1807-08.
96. Id. at 1808.
97. Id. at 1807 n.19.
98. Id. at 1806-07.
99. Id. at 1810.
100. Id.
101. Id. at 1809.
utory and administrative standards. Rather, the dissent evaluated this imposition in terms of its reasonableness as a discretionary choice of law in a federal court. 102 Justice Blackmun noted that the standards imposed were the same as those required by Illinois for permits issued within the state, and concluded that the use of Illinois standards to define the reasonableness of conduct alleged to be a nuisance was well within the federal common law authority established in Illinois I and earlier cases. 103

The dissent closed with a "disturbing" speculation regarding the effects of the majority's decision. 104 States will probably turn in the future to their own law and courts, when the federal scheme is thought inadequate to control interstate pollution. 105 This response would destroy the uniform approach to interstate pollution advocated by Illinois I. 106 In addition, state law might be inadequate, so that rights granted to states by the Act—for example, the right to enforce stricter standards—would be effectively denied when the pollution originated out of state. 107 These results, said the dissent, were precisely what the Court sought to prevent by authorizing a federal common law nuisance action in Illinois I. 108

IV
DISCUSSION

The Court in Illinois II decided that the proper procedure in a preemption case is to examine the intent of Congress. Unfortunately, the intent of Congress in passing FWPCA is not clear. The savings clause and legislative history cited by both majority and dissent in Illinois II make no unmistakable reference to, nor preservation of, federal common law. Perhaps it is proper to resolve such a disputed case in favor of exclusively legislative federal remedies. Still, the Court's analysis in Illinois II leaves doubt whether Congressional intent has been furthered, or frustrated.

The savings clause of section 505 is the one provision of the Act which is nearly on point. The majority dismisses the clause by suggesting that it is the product of sloppy draftsmanship—a preservative inserted without regard for the decaying nature of the Act as a

102. Id. at 1808-09.
103. Id. at 1809 (citing Illinois I, 406 U.S. at 107-08, ("a State with high water quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor." Id.)).
104. 101 S. Ct. at 1811.
105. Id.
106. Id.
107. See id. at 1810 n.32.
108. Id.
This approach makes little effort to harmonize the savings clause with the rest of the statute. Moreover, read in conjunction with the Senate Report, the majority's interpretation may be strained. The Senate Report spoke of the savings clause affirmatively, saying that it preserved prior rights; the report did not merely state that the clause did not restrict prior rights. The majority may thus be reading the savings clause as preserving remedies, but allowing the rest of the Act to take the same remedies away. The majority does not address this language in the Report, nor the statement that compliance with FWPCA would not be a defense to a common law action for pollution damages. Under the majority reading, compliance is not a defense to a common law action, but the mere existence of the statute eliminates the need for a defense.

The majority sought to limit the latter of these peculiar conclusions by insisting that the savings clause refers only to state, not federal, common law. The Act, however, makes no such distinction, nor did the majority cite legislative history to support this conclusion. The majority merely asserted that federal common law is less common than state common law. Congress may not have realized this distinction when it passed the savings clause. As the dissent points out, federal common law has a long history of application in interstate water and pollution cases; a history that Congress may well have considered when it passed the savings clause.

The majority's inference of poor draftsmanship also conflicts with its prior cases dealing with statutory preemption of federal common law. In the past, the Court held federal common law remedies preempted where a statute "announces Congress' considered judgment" on the remedies which should be available in a particular field of federal law. In *Illinois II*, the Court found common law preempted, yet cited no provision in FWPCA that expressly limited federal common

109. *Id.* at 1798.
111. 101 S. Ct. at 1805.
113. 101 S. Ct. at 1798-99.
115. 101 S. Ct. at 1798.
116. *Id.* at 1801-02.
117. *See id.*
law remedies. The Court instead relied on a presumption that legal standards and remedies are to be developed by Congress. Thus if the statute arguably addresses the issues in the suit, federal common law will not apply. Such a presumption has not been developed in prior case law.

Neither the majority nor the dissent in Illinois II devoted much attention to section 510 of the 1972 amendments. Section 510(1) provides that "nothing in this chapter" denies states or interstate agencies the right to "adopt or enforce" discharge standards or pollution control requirements more strict than FWPCA minimum standards. The majority concluded that the section refers only to state adopted, intrastate standards. To reach this conclusion, the majority must have construed the section as saying that nothing in the Act shall preclude states from adopting and enforcing limitations. Since states do not "adopt" federal common law pollution controls, the Court concluded that section 510(1) is not relevant to the preemption or preservation of federal common law. Interpreting the conjunction is critical to the majority's argument. If the "or" in the section means that enforcement rights are independent of adoption rights, then the section should be construed as follows: nothing in this chapter shall . . . deny the right of any state . . . to . . . enforce any standard . . . or requirement. Illinois' federal common law nuisance action was precisely such an attempt to enforce a stricter state standard through federal common law. The majority's conclusion that federal common law is preempted by FWPCA has construed the Act to deny states a right to enforce stricter standards, and thus may have frustrated the intent of section 510.

There are other weaknesses in the majority's treatment of section 510. The majority ignores section 510(2), which provides that nothing in FWPCA shall affect states' rights or jurisdiction with respect to boundary and other waters. The federal common law of nuisance conferred upon states an identical right regarding their boundary and other interstate waters. In addition, the explicit mention of boundary waters in section 510(2), and of interstate agencies in section 510(1), contradicts the majority's conclusion that the section deals only with application of stricter standards to intrastate discharges.

The majority does not compare the savings clauses in the 1972 Act to the clause in Illinois I that made federal common law con-

120. 101 S. Ct. at 1797-98.
121. Id.
122. Id. at 1798.
124. 101 S. Ct. at 1798.
125. 33 U.S.C. § 1370 (1976) (section 510); 33 U.S.C. § 1365(e) (1976) (section 505(e)).
sistent with the 1948 FWPCA.\textsuperscript{127} Such a comparison suggests that pre-
emption of federal common law nuisance may be due to a change in the
outlook of the Court, and not solely to a change in FWPCA. The
clause relied upon in\textit{Illinois I} does not seem any stronger than section
505(e) and section 510 of the 1972 Act; indeed, it may be weaker, since
it prevents displacement of other law "save as a court may decree
otherwise."\textsuperscript{128} There is no such exception in the 1972 savings clause.
In addition, both the 1948 and 1972 clauses refer to state abatement or
enforcement actions, but are silent on federal common law actions.
The\textit{Illinois II} Court found this silence preemptive, while the\textit{Illinois I}
Court apparently thought that federal common law was only a variety
of "state and interstate action to abate pollution," within the ambit of
section 10(b) of the 1948 Act.\textsuperscript{129} Finally,\textit{Illinois II} found it unlikely
that the provisions of the 1972 Act "were designed to preserve a federal
common law remedy not . . . recognized by [the Supreme] Court" un-
til shortly before passage of the Act.\textsuperscript{130} If this is correct, then the Court
in\textit{Illinois I} indulged an even less likely conclusion that the 1948 Act
preserved a remedy which the Court did not recognize until 24 years
after the passage of the Act.

In some cases, frail and incomplete analysis may be justified by the
result achieved.\textit{Illinois II} is not such a case, for the loss of a federal
common law remedy will leave important state and federal interests
unprotected. This lack of protection may be discerned by examining
the scope and quality of remedies which have survived\textit{Illinois II}.

The majority in\textit{Illinois II} found that the various non-judicial rem-
edies of FWPCA provide adequate opportunity to protect state inter-
ests.\textsuperscript{131} The Court refused to concern itself with the effectiveness of
these opportunities.\textsuperscript{132} There are at least two flaws in the majority’s po-
position. First, there were means available in\textit{Illinois I} and earlier federal
common law cases which could have protected the plaintiff states.\textsuperscript{133}
Second, a finding of adequate opportunity should rest on something
more than a mere possibility of redress.

The remedies discussed by the majority in\textit{Illinois II} provide only
a slim probability of adequate redress of interstate conflicts. States af-
fected by pollution have a right to participate in permit proceedings,
but the proceedings and the decision are controlled by the polluting

\textsuperscript{127} 406 U.S. at 104.
\textsuperscript{128} \textit{Id.}
\textsuperscript{130} 101 S. Ct. at 1797 n.19.
\textsuperscript{131} \textit{Id.} at 1797.
\textsuperscript{132} \textit{Id.} at 1796 n.18.
\textsuperscript{133} Interstate compacts were available in the 1948 Act. 62 Stat. 115 § 2c. The 1948 Act
also provided for interstate conferences to discuss and resolve interstate disputes. 33 U.S.C.
state. The licensing state may be indifferent to its neighbor's concerns and more concerned with the severity of restrictions imposed on local industry and government. Participation in the political process of permit grants may therefore provide a poor substitute for impartial adjudication in a federal court. Interstate compacts have different, but equally serious, drawbacks, among them the sheer difficulty of negotiating a mutually acceptable agreement and obtaining Congressional approval.

Congress provided means in the FWPCA amendments to mitigate problems of local bias and politics. EPA has veto and permitting authority where discharge may affect another state, and federal officials may enforce standards stricter than those of state issued permits. EPA, however, may well lack the money and manpower to exercise this authority. If EPA wishes to exercise its authority, it will face political opposition from the state involved; EPA may not be willing or able to withstand this pressure.

Administrative appeal and judicial review of NPDES permit decisions offer another avenue of relief for states, but review is lengthy and often cluttered with administrative law questions. The federal common law nuisance action might provide a speedier and more fair resolution.

Given the real or perceived inadequacy of FWPCA, resort to state law is likely. Unfortunately, the use of state law will harm both state and federal interests. The first problem is lack of a neutral forum for suit by a polluted state. Federal courts have no diversity jurisdiction where a state is a party. Absent federal common law or a violation of FWPCA, federal question jurisdiction, and hence jurisdiction over pendent state law claims, would also be unavailable. The only federal jurisdiction available would be the original jurisdiction of the United States Supreme Court, a tribunal unfamiliar with conducting complex factual trials. Where the defendant is a state, the Supreme Court's jurisdiction will be exclusive and mandatory. Where the

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135. For an extensive discussion of the political aspects of NPDES permitting, see Zerbe and Zemanski, Adjudicatory Hearings as Part of the NPDES Hearing Process, 9 ECOL. L.Q. 1 (1980).
140. See Hurn v. Owsler, 289 U.S. 238 (1933).
142. A state may itself be a polluter, or it may, in some cases, be joined as a defendant with a polluting political subdivision. Illinois I, 406 U.S. at 94. ("[T]here is no doubt that the actions of public entities might, under appropriate pleadings, be attributed to a State so as to warrant joinder of the State as a party defendant.")
144. Id.
defendant is any other citizen, however, the jurisdiction is not exclusive and may be declined, leaving a polluted state without a federal forum.

The polluting state would still have jurisdiction in that case, and probably the state suffering from the pollution as well, depending on the breadth of its long-arm statute and the extent of the defendant's contacts with the polluted state. In either state, however, one party will be in a hostile forum. Moreover, in the absence of federal common law or violation of a federal statute, one or both states or their citizens must be subjected to the law and bias of an unfriendly neighbor.

As the Supreme Court long ago recognized, the health of the federal system depends upon states having fair, peaceful, and effective means to resolve their disputes. FWPCA, by itself, does not provide the means to resolve these disputes. In addition, the many and varied state laws that may be applied to interstate waters could hamper federal pollution control, since the confusion may tend to increase public and Congressional antipathy for pollution control, and uncertainty may lead to bureaucratic inaction and private avoidance of pollution control laws.

The strength of the state and federal interests involved suggests that Congress should not lightly preempt federal common law, and that despite Illinois II, courts should not lightly attribute such preemption to Congress. Rather, the courts should construe Illinois II narrowly, and give it only careful extension beyond its own facts. Where the parties are both states, rather than a state plaintiff and a municipal defendant, the lack of state and lower federal court remedies might properly influence the Supreme Court's preemption analysis. Where damages are sought, rather than injunctive effluent standards, the courts should

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147. The Court may give weight to this potential dilemma in its decision whether to exercise its original jurisdiction, see id. at 93, especially if no other federal court would have jurisdiction. See id. at 98. Original jurisdiction would, however, deliver the parties to an inexpert trial court.
150. See Committee for the Consideration of the Jones Falls Sewerage System v. Train, 539 F.2d 1006 (4th Cir. 1976). ("[T]he law of the polluted state ought not to govern the conduct of cities in other states, but to apply the polluting state's law would use the law of a state whose selfish interest is to protect her citizens, self, and cities." Id. at 1008). But see Illinois I, 406 U.S. at 107. State law, however, might be inapplicable because it is preempted by FWPCA or other bars prevent jurisdiction. The Supreme Court did not address the issues of state law protection. 101 S. Ct. at 1789 n.4.
152. Illinois I, 406 U.S. at 105 n.6; id. at 107 n.9 (citing Texas v. Pankey, 441 F.2d 236, 241-42 (10th Cir., 1971)).
carefully consider that the Act authorizes no similar remedy. Finally, where the underlying facts are not addressed by the Act, as where the pollution arises from a non-point source, no preemption should be found.

Regrettably, the Supreme Court shows no sign of narrowly applying Illinois II. Another recent case has held federal nuisance claims preempted by FWPCA without making any meaningful examination of the preemption question.

CONCLUSION

The Court in Illinois II appears to apply a blanket preemption of

153. The savings clause, section 505(e), may be more clearly aimed at preservation of damage remedies than of injunctive relief. "Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. REP. No. 414 92nd Cong., 2nd Sess. 81 (1971) reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3668 also reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93RD CONG. 1ST SESS. (Comm. Print 1973). It is not clear, however, whether the report uses "damages" in the sense of injury, or of monetary relief.


Similar caution should be exercised where FWPCA addresses the facts and authorizes a remedy, but does not specify standards for granting the authorized relief. For example, the EPA Administrator may sue to restrain or otherwise control pollution which "is presenting an imminent and substantial endangerment to the health of persons or to . . . the livelihood of such persons. . . ." 33 U.S.C. § 1364(a) (1976). The federal common law has provided the substantive standards for a similar emergency provision in the Resource Conservation and Recovery Act. See United States v. Solvents Recovery Service, 496 F. Supp. 1127 (D. Conn. 1980) (federal common law used to define "imminent hazard" as used in 42 U.S.C. § 6973 (1976)). Suit under the emergency clause of FWPCA, however, can be brought only by the Administrator.

155. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n., 101 S. Ct. 2615 (1981). In National Sea Clammers, the Court devoted only two paragraphs to discussion of a cause of action in federal nuisance for ocean pollution, stating: "We need not decide whether a cause of action may be brought under federal common law by a private plaintit[s] [sic], seeking damages. The court has now held that the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of FWPCA, which was completely revised soon after the decision in Illinois v. Milwaukee."

Id. at 2627. The Court went on to find that the Marine Protection Research and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. §§ 1401-44 (1976), similarly preempts federal common law of nuisance in ocean waters. 101 S. Ct. at 2627.

The refusal of the Court, in Sea Clammers, to decide whether a private party might sue under federal common law nuisance, also avoided the question of whether statutory authorization of pollution would be a defense in a private federal nuisance action. Statutory authority usually is a defense to public nuisance, e.g., Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P.2d 171 (1946), but not to private nuisances. E.g., Squaw Island Freight Terminal Co. v. City of Buffalo, 273 N.Y. 119, 7 N.E.2d 10 (1937) (city's statutory authority to dump sewage into river was not a defense to the unreasonable harm caused to plaintiff's property); Hakkelma v. Old Colony Broken Stone & Concrete Co., 264 Mass. 447, 162 N.E. 895 (1928) (defendant liable in nuisance for rock thrown on plaintiff's land during blasting operations despite defendant's possession of a permit authorizing blasting).
the federal common law of nuisance. The decision need not be that broad. Separation of powers would be maintained, and the supremacy of Congress recognized, even if the Court required clear Congressional intent to preempt the federal common law. The Act authorized relief of the same type granted by the lower court in Illinois II—effluent standards and timetables for overflow control. The federal common law, however, did not speak primarily to the type of relief it was to provide. Rather, it spoke to the avoidance of state law remedies in order to protect state and federal interests in uniform and fair resolution of inter-state disputes. The Act does not speak to protection of these interests. Moreover, even if the bulk of the statute did speak directly to the questions formerly governed by federal common law, the savings clauses appear to preserve the common law remedy. The majority's strained reading of the savings clauses, and its uncritical application of a pre-emption test, have needlessly recreated the very problems that originally justified the federal common law of nuisance.

Jay Derr