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Relationship of Federal Common Law and Federal Regulatory Statutes, City of Milwaukee v. Illinois and Michigan

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FEDERAL COURTS

Relationship of Federal Common Law and Federal Regulatory Statutes

City of Milwaukee v. Illinois and Michigan
101 S. Ct. 1784 (1981).

I. INTRODUCTION

ON MAY 19, 1972, the State of Illinois filed a complaint in the United States District Court for the Northern District of Illinois against the city of Milwaukee, the Sewerage Commission of the city of Milwaukee, the Metropolitan Sewerage Commission of Milwaukee County, and three other Wisconsin municipal corporations.[1] The complaint charged that these Wisconsin corporations were polluting Lake Michigan by dumping into its waters raw or inadequately treated sewage from the sewage disposal system they jointly operated which serviced the entire Milwaukee County area.[2] The complaint, which sought injunctive relief to abate the pollution, was based both on the law of Illinois,[3] and on the federal common law of public nuisance.[4]

Five months later, on October 18, 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972.[5] These Amendments

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[1] The United States Supreme Court had previously declined to exercise the original jurisdiction over Illinois' complaint available under U.S. CONST. art. III, § 2. Instead, in a unanimous decision, the Court remitted Illinois to the appropriate federal district court, having found that Illinois had a federal common law nuisance claim cognizable in federal court under 28 U.S.C. § 1331 (federal question). Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

[2] Milwaukee County covers approximately 420 square miles with a population of over one million. Its sewer system was both the "separated" and "combined" type, meaning that it handled both sewage *and* storm water in the *same* conduits. The system had approximately 240 overflow or bypass points, and operated two sewage treatment facilities located on the Lake Michigan shore within forty miles of Illinois. In wet weather, overflows occurred and raw sewage was discharged along with storm water from the overflow points directly into Lake Michigan or its tributaries. City of Milwaukee v. Illinois and Michigan, 101 S. Ct. 1784, 1787-88 (1981).

[3] Illinois alleged a public nuisance under Illinois common law and a violation of the Illinois Environmental Protection Act, ILL. ANN. STAT., ch. 111½ § 1001-07.1 (Smith-Hurd 1977 & Supp. 1981-1982).

[4] Illinois v. City of Milwaukee, 406 U.S. 91 (1972), established that the federal common law of public nuisance applied to this case. *See* note 1 *supra*.

[5] Pub. L. No. 92-500, 86 Stat. 816 (1972) (currently codified, *as amended*, in 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1977, Supp. II 1978, Supp. III 1979).

restructured the Federal Water Pollution Control Act entirely,[6] and shifted the focus of water pollution control from water quality standards to pollutant discharge limitations.[7] The Amendments also established a permit system to regulate pollutant discharges,[8] and made it illegal to empty pollutants into navigable waters except pursuant to a valid permit.[9] Discharge permits could be issued by the Environmental Protection Agency, or by a state agency approved by the EPA.[10] Other sections of the Amendments authorized citizen's suits,[11] and gave states authority to adopt more stringent limitation standards than those imposed by the Amendments, or established by EPA regulations.[12]

Trial on Illinois' complaint finally began on January 11, 1977.[13] During the pre-trial phase some of the defendant corporations had moved to dismiss the complaint on the grounds that the Federal Water Pollution Control Act Amendments of 1972 had preempted the federal common law of public nuisance.[14] The district court, after reviewing the legislative history, found that "Congress in no way intended to destroy any remedies available to the states prior to the passage of the 1972 amendments,"[15] and denied

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[6] The Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948), *as amended*, 33 U.S.C. §§ 1151-1160 (1970), was completely replaced by the 1972 Amendments. For a discussion of the 1972 Amendments and prior water pollution control legislation, see McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of* 1972, 30 WASH. & LEE L. REV. 195 (1973), and Smith, *Highlights of the Federal Water Pollution Control Act of* 1972, 77 DICK. L. REV. 459 (1973).

[7] Water quality standards were to be set by each state with the approval of the Secretary of the Interior. If the state failed to set standards, the Secretary was authorized to prescribe criteria. Water Quality Act of 1965, Pub. L. No. 89-234, § 10(c)(1) & (2), 79 Stat. 907-08 (1965). (These provisions referred to the Secretary of Health, Education, and Welfare. Responsibility was transferred to the Secretary of the Interior in Reorganization Plan 2 of 1966, § 1, 80 Stat. 1608 (1966)). These standards could be challenged by affected states. Water Quality Act of 1965, Pub. L. No. 89-234, § 10(c)(4)-(7), 79 Stat. 908-09 (1965). The procedure created to enforce the water quality standards was rather cumbersome. *See* Water Pollution Control Act Amendments of 1956, ch. 518, § 8, 70 Stat. 504-05 (1956). The new permit system established by the Water Pollution Control Act Amendments of 1972 was much easier to enforce since the party either had a permit or it didn't, and it was either complying with the permit or it wasn't. *See* 33 U.S.C. § 1342 (1976 & Supp. I 1977, Supp. II 1978, Supp. III 1979).

[8] The National Pollutant Discharge Elimination System, established by the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1342 (1976 & Supp. I 1977, Supp. II 1978, Supp. III 1979), replaced a system administered by the EPA and the U.S. Army Corps of Engineers. *See* Exec. Order No. 11574, 3 C.F.R. 11574 (1970); Permits for Discharges or Deposits Into Navigable Waters, 33 C.F.R. 209.131 (1972).

[9] Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1311(a) (1976).

[10] 33 U.S.C. § 1342 (1976 & Supp. I 1977, Supp. II 1978, Supp. III 1979).

[11] 33 U.S.C. § 1365 (1976). (The Court refers to § 1365 as § 505, which was its public law section number).

[12] 33 U.S.C. § 1370 (1976). (The Court refers to § 1370 as § 510, which was its public law section number).

[13] City of Milwaukee v. Illinois and Michigan, 101 S. Ct. at 1789. All suits in equity seem to be subject to Jarndyce's disease (endless delay). *See* C. DICKENS, BLEAK HOUSE (Signet ed. 1946).

[14] Illinois *ex rel.* Scott v. City of Milwaukee, 366 F. Supp. 298, 299 (N.D. Ill. 1973).

[15] *Id.* at 300.

the motion to dismiss the complaint.[16] The district court rendered a decision against the defendant Wisconsin corporations on July 29, 1977. The district court found that Illinois had proven the existence of a federal common law public nuisance, and ordered the elimination of all sewage overflows in addition to setting specific effluent limitations.[17] The city of Milwaukee, the Sewerage Commission of the city of Milwaukee, and the Metropolitan Sewerage Commission of the county of Milwaukee appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit.[18] During this appeal the question of whether the federal common law had been preempted by the Federal Water Pollution Control Act Amendments of 1972 was again raised.[19] After reviewing and discussing the Amendment provisions, the court of appeals, like the district court below, concluded that the federal common law had not been preempted by the Amendments.[20] The city of Milwaukee and the two sewerage commissions appealed, and the United States Supreme Court granted their petition for *certiorari*.[21] In *City of Milwaukee v. Illinois and Michigan*,[22] the United States Supreme Court vacated the judgment of the court of appeals and remanded the case,[23] holding that the Federal Water Pollution Control Act Amendments of 1972 had indeed displaced the federal common law action authorized by the Court before the 1972 Amendments were enacted.[24] The environmental law ramifications of this decision are significant. However, of greater significance is the Court's attempt in *Milwaukee* to efface some of the uncertainty surrounding the federal common law, and to elucidate the relationship between federal regulatory statutes and federal common law.[25]

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[16] *Id.* at 302.

[17] City of Milwaukee v. Illinois and Michigan, 101 S. Ct. at 1789. This relief ordered by the federal court considerably exceeded the provisions of a Wisconsin state court's order issued May 25, 1977, in connection with a suit brought to enforce provisions of the discharge permits issued to the Milwaukee sewerage commission. *See* Illinois v. City of Milwaukee, 599 F.2d 151, 169-77 (7th Cir. 1979).

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

[19] The issue was raised, not by the defendant-appellant Wisconsin corporations, but in *amicus curiae* briefs submitted by the United States and the State of Wisconsin. Since the existence *vel non* of the federal common law concerned the federal court's jurisdiction to hear the case, the court of appeals was obliged to decide the issue. *Id.* at 157.

[20] *Id.* at 163.

[21] City of Milwaukee v. Illinois and Michigan, 100 S. Ct. 1310 (1980).

[22] 101 S. Ct. 1784 (1981).

[23] *Id.* at 1800.

[24] *Id.*

[25] Deciding how the principles of the federal common law interlink with the intentions expressed by Congress in federal statutes is important because the answer affects not just interstate water pollution cases, but also "every controversy in which schemes of federal environmental legislation and regulation cut across fields of common law, such as land use, energy, safety and air pollution." Motion and Brief *Amicus Curiae* of Mid-America Legal Foundation in Support of Petition for Certiorari at 4, City of Milwaukee v. Illinois and Michigan, 101 S. Ct. 1784 (1981).

II. FEDERAL COMMON LAW

Although it has been the subject of much discussion by numerous commentators,[26] the federal common law has remained a nebulous entity. As a viable legal doctrine the concept of a federal common law was introduced in 1842 in *Swift v. Tyson*.[27] The United States Supreme Court held in *Swift* that a federal court exercising diversity of citizenship jurisdiction[28] could use its independent judgment and create common law to decide matters not governed by a state statute.[29] The federal courts followed the rule of *Swift v. Tyson* in an unbroken line of decisions for almost one hundred years.[30] Then, in 1938, came the well known decision of *Erie R.R. v. Tompkins*.[31] In an opinion authored by Justice Brandeis, the Court held *Swift* unconstitutional,[32] and stated that the controlling law in any case was the law of the state "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress."[33] This was interpreted for the next few years to mean that state law was the rule of decision in federal courts unless the Constitution or a *specific* federal statute mandated the use of a federal decisional rule.[34] Thus, it appeared that the federal *general* common law was dead.

However, the decision in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[35] decided the same day as *Erie*, and also authored by Justice Brandeis, indicated that federal common law in some form had survived *Erie*. *Hinderlider* involved apportionment of waters between two states, and the Court declared such apportionment presented "a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive."[36] Although this apparently contradicts the *Erie* decision, *Hinderlider* actually falls into one of the exceptions mentioned in *Erie*: "matters governed by the Federal Constitution."[37]

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[26] *See, e.g.*, Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Morgan, *The Future of a Federal Common Law*, 17 ALA. L. REV. 10 (1964); Comment, *Federal Judicial Law-Making Power: Competence as a Function of Cognizable Federal Interests*, 18 B.C. INDUS. & COM. L. REV. 171 (1976).

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

[28] Diversity of citizenship jurisdiction, currently authorized under 28 U.S.C. § 1332 (1976), was originally granted in the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789).

[29] 41 U.S. (16 Pet.) at 19.

[30] *E.g.*, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910); Baltimore & O.R.R. v. Baugh, 149 U.S. 368 (1893).

[31] 304 U.S. 64 (1938).

[32] *Id.* at 79.

[33] *Id.* at 78.

[34] *See, e.g.*, Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940); Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938).

[35] 304 U.S. 92 (1938).

[36] *Id.* at 110 (footnotes omitted).

[37] 304 U.S. at 78.

The grant of original jurisdiction to the Supreme Court over suits involving two states,[38] when coupled with the absence of congressional legislation enacting rules of decision for these cases, compels the conclusion that formulation of common law is required to allow just disposition of these cases.[39] Thus, federal common law appears to remain available to govern disputes between states.

Similarly, the grant of jurisdiction over disputes to which a state is a party[40] could support creation of federal common law to resolve disputes between states and citizens of other states.[41]

In 1942, four years after *Erie*,[42] *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*[43] established that there need not be a federal statute *specifically* prescribing a federal rule of decision before common law could be created. Instead, authority to create a federal rule could be implied from the *policy* expressed by a federal statute.[44] Justice Jackson summarized the decision in a concurring opinion, stating that:

> Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced . . . . Federal common law implements the federal constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present.[45]

Clearfield Trust Co. v. United States[46] carried the rationale of *D'Oench* even further. The suit involved the federal government's rights and duties on its commercial paper. The Court found the statutes permitting issuance of commercial paper, plus the federal regulations concerning commercial

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[38] U.S. CONST. art. III, § 2.

[39] *See* Kansas v. Colorado, 206 U.S. 46, 94-98 (1907). *See generally* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Comment, *The Invalid Growth of the New Federal Common Law Dictates the Need for a Second Erie*, 9 HOUS. L. REV. 329 (1971); Comment, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084 (1964); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

[40] U.S. CONST. art. III, § 2.

[41] Georgia v. Tennessee Copper Co., 206 U.S. 230, 237-39 (1907) and Missouri v. Illinois, 200 U.S. 496, 520, 526 (1906) are cited by Justice Blackmun in his *Milwaukee* dissent as cases demonstrating that the states have a "federal common law . . . right to be free from unreasonable interference with [their] . . . environment . . . when the interference stems from another State or its citizens." 101 S. Ct. at 1801 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.).

[42] 304 U.S. 64 (1938).

[43] 315 U.S. 447 (1942).

[44] *Id.* at 457-58. *Cf.* Deitrick v. Greaney, 309 U.S. 190, 198 (1940) (using the policies and purposes of a federal statute as grounds for the decision).

[45] 315 U.S. at 471-72 (footnote omitted).

[46] 318 U.S. 363 (1943).

paper, allowed a federal rule of decision.[47] Additionally, the Court found that the application of state law would be adverse to the federal interests, since applying the laws of the several states "would subject the rights and duties of the United States [on its commercial paper] to exceptional uncertainty."[48] The "desirability of a uniform rule" was thus clear.[49] So, where there is both a need for a uniform rule to govern federal interests, and no federal statute imposing standards for decision, federal common law may be created.[50]

Finally, *Textile Workers v. Lincoln Mills,*[51] and *United States v. Little Lake Misere Land Co.,*[52] provided for the use of federal common law to fill the interstices of federal statutory schemes. In *Lincoln Mills,* a suit brought to compel labor arbitration, the Court recognized that the key to resolving some problems may lie within "the penumbra of express statutory mandates,"[53] and that federal courts could supply necessary rules of decision "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."[54] *Little Lake Misere,* a land acquisition case concerned with choice of law under a federal conservation statute, supports *Lincoln Mills,* stating "the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts."[55]

Illinois v. City of Milwaukee,[56] also supports the creation of federal common law to fill statutory interstices in order to effectuate federal policy. In *Illinois,* after reviewing the current federal water pollution legislation,[57] the Court held that federal common law could provide a remedy not within the precise scope of those prescribed by Congress, as a supplement to those existing remedies.[58]

So, it appears that federal common law can be made in a variety of circumstances, yet the permissible scope of the rule of decision created has not always been clearly delineated.

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[47] *Id.* at 366-67.

[48] *Id.* at 367.

[49] *Id.*

[50] *Id. See, e.g.,* United States v. Standard Oil Co., 332 U.S. 301 (1947); National Metropolitan Bank v. United States, 323 U.S. 454 (1945).

[51] 353 U.S. 448 (1957).

[52] 412 U.S. 580 (1973).

[53] 353 U.S. at 457.

[54] *Id.*

[55] 412 U.S. at 593.

[56] 406 U.S. 91 (1972).

[57] *Id.* at 101-03.

[58] *Id.* at 103, *See also* Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971). *But cf.* Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971). (The Court is "ill-equipped . . . to play the role of fact finder," 401 U.S. at 498, and refusing to assume jurisdiction will not "disserve" federal policies, 401 U.S. at 499).

III. THE *Milwaukee* OPINIONS

Milwaukee is noteworthy because of the Court's attempt to explain the relationship between the federal common law and federal statutes. However, it is the *dissent* in *Milwaukee* that seems to present the better reasoned and more practical view of this relationship.

The majority regards law-making by the federal courts as an "unusual exercise"[59] to be resorted to only where "Congress has not spoken to a particular issue" and federal policies conflict with state law.[60] The majority also states that the federal common law has always been recognized as "subject to the paramount authority of Congress."[61] The majority relies heavily on *Arizona v. California*[62] and *Mobil Oil Corp. v. Higginbotham*[63] to support their contention that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such . . . lawmaking by federal courts disappears."[64] Thus, in analyzing whether federal common law has been displaced by statutes, the majority starts with the presumption that "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law,"[65] and then proceeds to assess the scope of the legislation to determine whether Congress has addressed "the problem formerly governed by federal common law."[66] If it has, and there is nothing to rebut the presumption against applying the common law, then there is no room for judicial law-making. Thus, the majority cites the comprehensive nature of the Amendments,[67] reviews the legislative history,[68] and, finding nothing to indicate that the common law has been preserved, declares that it has been entirely preempted.[69]

The dissent in *Milwaukee* presents three compelling rationales for preserving the common law. First, the dissent notes that the majority approach "ignores this Court's frequent recognition that federal common law may complement congressional action in the fulfillment of federal policies."[70] As the Court has previously mentioned, "[w]ere we bereft of the common law our federal system would be impotent. This follows from the recognized futility

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[59] 101 S. Ct. at 1791.

[60] *Id.* at 1790.

[61] *Id.* at 1790 (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931)).

[62] 373 U.S. 546 (1963).

[63] 436 U.S. 618 (1978).

[64] 101 S. Ct. 1791. *See* Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571, 1583 n.34 (1981).

[65] 101 S. Ct. at 1792.

[66] *Id.* at 1791 n.8.

[67] *Id.* at 1792-93.

[68] *Id.* at 1798-1800.

[69] *Id.* at 1800. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 101 S. Ct. 2615 (1981).

[70] 101 S. Ct. at 1801 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.).

of attempting all-complete statutory codes . . . ."[71] Thus, the majority's total preemption rationale seems impractical, and the common law should be allowed to co-exist with and supplement the federal statutory scheme where this proves to be necessary.

The dissent also points to the doctrine that "statutes will not be construed in derogation of common law unless such an intent is clear."[72] In another case the Court stated:

> a common-law right, even absent a savings clause, is not to be abrogated 'unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.'[73]

Here, there was a savings clause[74] in the Amendments which could have supported the preservation of federal common law.[75] But, regardless, the better view would seem to be that before *totally* preempting the common law, there should be some indication that the statute compels this result.[76]

Finally, the dissent tangentially discussed another applicable doctrine of statutory construction.[77] "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ."[78] The United States filed an *amicus curiae* brief supporting the existence of common law,[79] and the EPA itself has used federal common law to enforce water quality.[80] Thus, in the absence of indications in the statute that common law is entirely preempted, it would seem reasonable to allow it to coexist with the statute.

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[71] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 470 (1942) (Jackson, J., concurring).

[72] 101 S. Ct. at 1803, n.8 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.) (citing Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).

[73] Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 298 (1976) (quoting Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907)).

[74] "Nothing in this section shall restrict the right which any person . . . may have under . . . common law to seek enforcement of any effluent standard or limitation or to seek any other relief." Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(e) (1976).

[75] Nothing in the legislative history compels the conclusion that this clause precludes consideration of the federal common law. *See* 101 S. Ct. at 1804-06 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.). *See, e.g., Proposed Amendments to the Federal Water Pollution Control Act: Senate Consideration of the Report of the Conference Committee, October* 4, 1972, 93d Cong., 1st Sess., *reprinted in* 1 LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 190-94 (1973) [hereinafter cited as LEGISLATIVE HISTORY]; S. REP. No. 414, 92d Cong., 1st Sess. 79-82 (1971), *reprinted in* 2 LEGISLATIVE HISTORY at 1497-1500 (1973); S. REP. No. 1236, 92d Cong., 2d Sess. 145-46 (1972), *reprinted in* 1 LEGISLATIVE HISTORY at 328-29 (1973).

[76] "A 'silently vocal' Congress is a high fiction . . . ." Monaghan, *supra* note 26, at 16.

[77] 101 S. Ct. at 1807-08 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.).

[78] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnotes omitted). *See* Udall v. Tallman, 380 U.S. 1, 16 (1965).

[79] Illinois v. City of Milwaukee, 599 F.2d 151, 155 (7th Cir. 1979).

[80] 101 S. Ct. at 1807-08 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.).

IV. CONCLUSION

Thus, the dissent presents a better view. If, after examining a statutory provision and its legislative history, no compelling reason emerges to pre-empt the common law, the potential benefits of allowing it to coexist with the statute should compel its preservation.

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