THE SUPREME COURT AND INTERSTATE ENVIRONMENTAL QUALITY: SOME NOTES ON THE *WYANDOTTE* CASE

WINTON D. WOODS JR.* AND KENNETH R. REED**

The law has always embodied the social ferment of the nation and the United States Supreme Court in its role as the final repository of judicial wisdom has from its beginnings reflected the controversy and crisis of its time. Thus in the "environmental decade" we can expect that the Supreme Court will, with increasing frequency, be required to adjudicate environmental controversies. A number of fascinating cases have already engaged the Court's attention.[1] One freeway has been stopped[2] and another left in controversy.[3]

None of these cases, however, rise to the stature of "landmark" decisions. Important though they are, they are not characterized by a level of philosphic significance that portends extended future development. One case, however, meets that standard—not because it opens the door to future doctrinal evolution as did *Escobedo v. Illinois*[4] or *Baker v. Carr*[5] and not because it settles for the foreseeable future a problem of great social importance as did *Brown v. Board of Education*[6] or *Shapiro v. Thompson.*[7]

Ohio v. Wyandotte Chemicals Corp.[8] will be remembered not for the problems it resolves, for it resolves none, but rather for the fundamental impact that it will have upon the relations between state and federal courts. While it deals primarily with the exotic and little understood original jurisdiction of the Supreme Court, the opinion is laden with dicta and gratuitous observation that will be the source of great jurisdictional controversy in the future. Despite a felicity of style that is reminiscent

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* Associate Professor of Law, University of Arizona College of Law; A.B., 1961, J.D., 1965, Indiana University.
** Third-Year Student, University of Arizona College of Law.

1 Zabel v. Tabb, 91 S. Ct. 873 (1971), *denying cert. to,* 430 F.2d 199 (D.C. Cir. 1970); Sierra Club v. Morton, 91 S. Ct. 870 (1971), *granting cert. to,* 433 F.2d 24 (9th Cir. 1970); Citizens to Preserve Overton Park, Inc. v. Volpe, 91 S. Ct. 814 (1971); San Antonio Conservation Society v. Texas Highway Dept., 91 S. Ct. 368 (1970) (Black & Douglas, JJ., dissenting).

2 Citizens to Preserve Overton Park, Inc. v. Volpe, 91 S. Ct. 814 (1971).

3 San Antonio Conservation Society v. Texas Highway Dept., 91 S. Ct. 368 (1970).

4 378 U.S. 478 (1964).

5 369 U.S. 186 (1962).

6 347 U.S. 483 (1954).

7 394 U.S. 618 (1969).

8 91 S. Ct. 1005 (1971).

of those bygone days when Supreme Court opinions were sometimes works of literary quality, the opinion is so full of unanswered questions that it seems destined for fame as a casebook leader.

The problem, however, is to guess where and in what sections of courses such as constitutional law, federal jurisdiction, conflict of laws, torts, criminal law or international relations the case will be used. It has implications for them all and therein lies its assurance of enduring citation and critique.[9] We will not pretend to trace the future course of each problem created by *Wyandotte*—that task must be left to a future day when commentators with the perspective of history can judge the long-term impact of the case. For the present it seems enough to limit analysis to the basic jurisdictional issues that remain when the plaintiff seeks to enforce its rights in some other appropriate forum. The implications of that narrow problem are quite enough to occupy us here.

The mercury crisis which led to the *Wyandotte* case is but one of the many techno-environmental disasters that have been discovered in the years since Dr. Haagen-Smit of Cal Tech first theorized the components of smog in the Los Angeles basin. In simple terms, the problem, well documented elsewhere,[10] stems from the fact that the relatively harmless inorganic mercury emitted by various industrial processes is under some recently understood circumstances transformed by nature into a deadly poison, methyl-mercury, that enters the natural food chain. By the time the mercury reaches fish of a size that is of commercial value, the concentration is often above the danger level.

That process was discovered in Lake Erie. In the Spring of 1970, the Canadian government discovered extraordinary levels of mercury in fish caught in Lake St. Clair which connects Lake Huron with the Detroit River which flows into Lake Erie. The Canadian side of Lake St. Clair was immediately closed to commercial fishing. Within a week, the United States Food and Drug Administration had discovered two sources of mercury in Lake Erie: a Dow Chloralkali plant in Sarnia, Ontario and a Wyandotte Chemical plant at Wyandotte, Michigan.[11] By the end of April, Ohio and Michigan had been forced to close the lake to commercial fishing.

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[9] *See, e.g.*, Comment, 1 ENVIRONMENTAL L. RPTR. 10038 (1971).

[10] *See, e.g., Hearings on Bills Amending the Federal Water Pollution Control Act and Other Pending Legislation Related to Water Pollution Control Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess., pt. 2, at 672-716, pt. 5, at 1871-1929 (1970); Montague & Montague, *Mercury: How Much are We Eating?*, SATURDAY REVIEW, Feb. 6, 1971, at 50.

[11] By November 30, 1970, the number of American sources known to have discharged mercury into Lake Erie had grown to eight. Among these sources was the Lewis Research Center of the National Aeronautics & Space Administration in Cleveland, Ohio. Letter from Lowell A. Van Den Berg, Federal Water Pollution Control Administration, to V.K. McEwan, counsel for defendant Dow Chemical of Canada, Ltd., Nov. 30, 1970, in Reply Brief for Defendant at 29a-30a, Ohio v. Wyandotte Chemicals, Corp., 91 S. Ct. 1005 (1971).

According to Justice Harlan's majority opinion, the State of Michigan and the Province of Ontario have set into motion administrative machinery to control the pollution created by the plants in their respective jurisdictions. But since neither of the then-known offenders was located within the State of Ohio, vindication of that state's interest required other action.[12] Ohio chose to file an original action in the United States Supreme Court. Amicus curiae briefs were entered by the State of Michigan supporting Ohio's action and by the United States arguing that the Supreme Court had jurisdiction.

The motion for leave to file a bill of complaint alleged damage to Ohio's interest in the water, fish, vegetation and wildlife in Lake Erie. It named as defendants Wyandotte Chemicals Corporation, a Michigan corporation having its principal place of business in that state; Dow Chemical Company, a Delaware corporation having its principal place of business in Michigan; and Dow Chemical Company of Canada, Ltd., an Ontario, Canada corporation, and a wholly owned subsidiary of Dow Chemical Company doing business in Canada.

The complaint sought a declaration that the defendants' activity was a public nuisance and asked for money damages as well as an injunction against further introduction of mercury into the waters of Lake Erie. Jurisdiction was based upon Title 28 U.S.C. § 1251(b)(3) and Article III of the Constitution.

Justice Harlan, speaking for an eight-man majority of the Court, refused leave to file the complaint. "That we have jurisdiction seems clear enough,"[13] Justice Harlan noted, but after an analysis of the facts of the case concluded:

> Thus, at this stage we go no further than to hold that, as a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions atune with its other responsibilities.[14]

Applying the first standard, Justice Harlan concluded that there was no need for the Supreme Court to act pursuant to the policies behind Article III since "it is *unlikely* that we would *totally* deny Ohio's competence to act [through its own courts] if the allegations made here are proved

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[12] On April 22, 1970, Ohio brought a separate action in its own courts against mercury emitters within the state. Plaintiff's Brief in Support of Motion for Leave to File Complaint at 24.

[13] 91 S. Ct. at 1008.

[14] *Id.* at 1010.

true."[15] In regard to the second standard, Justice Harlan expressed the view that the Court did not have at its disposal the tools necessary to resolve the controversy without an extraordinary commitment of judicial resources that were needed elsewhere. Moreover, he asserted that the availability of other forums made the Supreme Court ill-suited to hear the case as an original action.[16]

The application of the second standard in *Wyandotte* will be questioned by many, including no doubt, Professor Sax.[17] As Justice Douglas points out in dissent, the often used device of the special master flanked by a panel of scientific advisors would alleviate if not remove the burden of fact-finding. Be that as it may, the question of the propriety of a refusal to exercise the jurisdiction specifically vested by Article III remains. While the question is obviously intertwined with the burden such litigation would place upon the Court, it also stands on an independent footing.

THE APPROPRIATE FORUM

Central to Justice Harlan's thesis is the notion that the Supreme Court is *required* to exercise its original jurisdiction only in those cases where no other appropriate forum is available. He recognizes that proposition to be inconsistent with the intended purpose of Article III,[18] but adopts it

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[15] *Id.* at 1011 (emphasis added).

[16] Under the Boundary Waters Treaty, Jan. 11, 1909, 36 Stat. 2448, the United States and Canada agreed to establish an International Joint Commission to settle disputes regarding the boundary waters of the two countries. For a consideration of various aspects of this treaty, see Comment, *International Air Pollution—United States and Canada—A Joint Approach*, 10 ARIZ. L. REV. 138 (1968).

The defendants Dow Canada and Dow U.S. had argued that the Commission was the appropriate forum for deciding the litigation. Dow Canada's Brief in Opposition to Motion for Leave to File Complaint at 39-41; Dow U.S.'s Brief in Opposition to Motion to File Complaint at 30-34. Indeed, Dow U.S. argued that "since the United States-Canada international boundary waters pollution problem involves external affairs and foreign policy, this Court has no jurisdiction to adjudicate the issues raised in the proposed litigation." *Id.* at 34. In its amicus brief, the United States argued that the Treaty was not self-executing and did not divest the Court of jurisdiction. Brief of the United States as Amicus Curiae at 13-18. Consequently, the Court did not consider the Joint Commission as an alternative forum.

Statutory grants of jurisdiction may be limited by treaty. Hannevig v. United States, 84 F. Supp. 743, 744-45 (Ct. Cl. 1949). *See also* Gmo. Niehause & Co. v. United States, 373 F.2d 944, 957 (Ct. Cl. 1967). Treaties may, of course, expand the enumerated grants of Congressional power. Missouri v. Holland, 252 U.S. 416 (1920). Whether a treaty may contract the Article III grant of original jurisdiction to the Supreme Court is not within the scope of this article. *Cf.* Reid v. Covert, 354 U.S. 1, 15-19 (1957).

[17] J. SAX, DEFENDING THE ENVIRONMENT (1970).

[18] 91 S. Ct. at 1009:

> [A]lthough it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another even though the dispute may be one over which this Court does have original jurisdiction.

nonetheless on the ground that the time-honored doctrine that a court must exercise jurisdiction if it has it must give way to the realities of the modern docket burden:

> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and non-residents clash over the application of state laws concerning taxes, motor vehicles, descedents' estates, business torts, government contracts and so forth. It would, indeed, be anamalous were this Court to be held out as a potential principal forum for settling such controversies. The simultaneous development of 'long-arm jurisdiction' means, in most instances, that no necessity impels us to perform such a role. And the evolution of this Court's responsibilities in the American legal system has brought matters to a point where much would be sacrificed, and littled gained, by our exercising original jurisdiction over issues bottomed on local law.[19]

Wyandotte thus invokes a judge-made rule of discretionary jurisdiction applicable to original jurisdiction cases.[20] Because of the breadth of the constitutional language, Justice Harlan's desire to give the original jurisdiction a restrictive interpretation is understandable, but his compendium of petty horrors does not negate the wisdom of asserting jurisdiction in a case so demonstrably different.[21] Even assuming the validity of his two-fold test of the considerations of the Supreme Court as an initial arbiter, it seems singularly inappropriate to apply it in this case. Indeed, respected commentators have so suggested.[22] The alternative forum for the vindication of Ohio's interest is, according to the Court, the Ohio courts:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise

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19 *Id.*

20 *See also* Massachusetts v. Missouri, 308 U.S. 1, 19 (1939) (Hughes, C.J.).

21 "In all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original jurisdiction." U.S. CONST. art. III, § 2. Read literally, the jurisdictional grant in those cases between a state and a citizen of another state would extend to matters every bit as mundane as those "concerning taxes, motor vehicles, decedents' estates, business torts, [and] government contracts." 91 S. Ct. at 1009. The *Wyandotte* case, however, seems readily distinguishable from these examples cited by Justice Harlan because of the federal interests which permeate it. *See* THE FEDERALIST No. 80 (A. Hamilton).

22 *See* H. HART & H. WECHSLER, *Note on the Original Jurisdiction as an Inconvenient Forum*, in THE FEDERAL COURTS AND THE FEDERAL SYSTEM 258-60 (1953). *Id.* at 259:

> Is the doctrine of *forum non conveniens* properly applied in a case where the convenience being served is that of the court rather than the litigants? Can it be properly applied at all where the jurisdiction which the Court in its discretion declines to exercise is conferred by the Constitution? Recall that the idea of a discretionary jurisdiction did not appear in the Judicial Code until 1891. Is there a spreading contagion in this idea?

> jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest.[23]

A number of factors would seem to indicate that Ohio is really not an appropriate forum for the vindication of such rights: (1) the possibility that Ohio courts might not have jurisdiction under Ohio law;[24] (2) the practical problem of enforceability of a decree enjoining the discharge of mercury that takes place in another state and a foreign country;[25] (3) the likelihood of bias in favor of home state industry and against foreign industry.

At the outset it should be noted that at least since *Plaquemines*,[26] the general power of a state to adjudicate controversies between a state and a citizen of another state has been settled. *Plaquemines*, however, involved a quiet title action to land in the forum state—a form of action

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[23] 91 S. Ct. at 1010.

[24] The recent adoption of the *Ohio Rules of Civil Procedure* has greatly expanded the scope of personal jurisdiction in Ohio. OHIO R. CIV. P. 4.3. It should be noted, however, that the Ohio rule still contains limitations that are more restrictive than those imposed by the constitution:

> Rule 4.3. Process: out-of-state service
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> (A) When service permitted. Service of process may be made outside of this state . . . upon a person who . . . acting directly or by an agent, has caused an event to occur out of which the claim which is the subject of the complaint arose, from the person's:
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> (1) Transacting any business in this state;
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> (2) Contracting to supply services or goods in this state;
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> (3) Causing tortious injury by an act or omission in this state including but not limited to actions arising out of the ownership, operation or use of a motor vehicle or aircraft in this state;
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> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this state;
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> (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
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> (6) Having an interest in, using, or possessing real property in this state;
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> (7) Contracting to insure any person, property, or risk located within this state at the time of contracting;
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> (8) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state.

[25] Dow Canada had argued that Canadian courts would not enforce a foreign injunctive decree. Dow Canada's Brief in Opposition to Motion to File Complaint at 35-37. This argument, uncontradicted by the other parties, makes particularly ironic Justice Harlan's statement that "while we cannot speak for Canadian courts, we have been given no reason to believe they would be less receptive to enforcing a decree rendered by Ohio courts than on issued by this Court." 91 S. Ct. 1011. *See also* Comment, 1 ENVIRONMENTAL L. RPTR. 10038, 10040-42 (1971).

[26] Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898).

peculiarly appropriate to local resolution.[27] Where broader governmental interests are at stake, such as in interstate pollution cases, the Court has in the past assumed without discussion that the states are powerless to abate nuisances outside their boundaries.[28]

Despite the development of "long arm" jurisdiction noted by Justice Harlan, state courts have persisted in the notion that their extraterritorial governmental powers are limited.[29] Particularly that is so when a state is exercising its coercive powers against individuals. No one would assert, at least with any degree of assurance, that Ohio could constitutionally impose emission control standards on industries in Michigan and Canada.[30] To the contrary, such an assertion of extraterritorial regulatory power would be viewed as an unwarranted invasion of the legitimate interests of the foreign states. On the other hand, no one would deny in this day of the rampant long-arm[31] that action taken in one jurisdiction and having consequences in another may well be subject to challenge in an action for money damages in the state of injury. But Ohio sought broad equitable relief as well as money damages and therein lies the basic jurisdictional problem.[32]

The traditional learning would indicate that a court may not order the doing of an out-of-state act,[33] but the "modern principles of the scope

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[27] Even in original actions brought by a state, the Supreme Court has applied local law to questions involving real property. *See, e.g.*, Massachusetts v. New York, 271 U.S. 65 (1926); Georgia v. Chattanooga, 264 U.S. 472 (1924).

[28] See Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), *quoted infra* at text accompanying note 80.

[29] *See, e.g.*, Graham v. General U.S. Grant Post No. 2665, 43 Ill. 2d 1, 248 N.E.2d 657 (1969). *Compare* James v. Grand Trunk W.R.R., 14 Ill. 2d 356, 152 N.E.2d 858 (1958), *with* Donovan v. City of Dallas, 377 U.S. 408 (1964). *Cf.* Tarble's Case, 80 U.S. (13 Wall.) 397 (1872).

[30] The same result might, however, be accomplished by the imposition of effluent charges on wastes reaching a state's waters from out-of-state sources. Vermont has recently enacted a system which imposes a "pollution charge . . . to be paid per unit of waste discharged into waters of the state." VT. STAT. ANN. tit. 10, § 912a(e)(2) (Supp. 1971). This language clearly could be construed to include effluents from sources without the state and, as a tax imposed upon the use of the state's waters, should be able to withstand constitutional attack. *But cf.* National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). For a discussion of Vermont's effluent charge system, see Note, *Economic Incentives for Pollution Abatement: Applying Theory to Practice*, 12 ARIZ. L. REV. 511, 536-38 (1970).

[31] *See, e.g.*, Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966), *noted in* 8 ARIZ. L. REV. 356 (1967).

[32] It is not our intention to discuss the implications of Wyandotte for doctrine relating to personal jurisdiction. It is worth noting, however, that Justice Harlan's reference to "modern principles of . . . *in personam* jurisdiction" (91 S. Ct. at 1010) may portend an extension of the doctrine of International Shoe Co. v. Washington, 326 U.S. 310 (1945). Indeed, one commentator has already suggested that *Wyandotte* indicates that the Court is "willing to endorse an expansion of the jurisdictional power of the state courts that is indeed remarkable." Comment, 1 ENVIRONMENTAL L. RPTR. 10038, 10039 (1971). Can it be that the Court has rejected Chief Justice Warren's conclusion in Hanson v. Denckla, 357 U.S. 235, 251 (1958), that the limitations upon long arm jurisdiction stem from "territorial limitations on the power of respective states"?

[33] *See* R. LEFLAR, AMERICAN CONFLICTS OF LAW § 48 (rev. ed. 1968).

of subject matter and *in personam* jurisdiction"[34] that Justice Harlan uses to justify his reference to the Ohio forum may in some cases support the power to enjoin out-of-state acts. Section 53 of the Proposed Final Draft of the *Restatement (Second) of Conflicts*, which is evidently indicative of the "modern" principles, provides: "A state has power to exercise judicial jurisdiction to order a person, who is subject to its judicial jurisdiction, to do an act, or to refrain from doing an act, in another state." The comment to this section notes:

> *Illustrations*:
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> . . . .
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> 2. A court of equity is asked to enjoin a defendant, who is present in the state, from so using his property in a foreign state as, *by the local law of that state*, to constitute a nuisance. The court may exercise jurisdiction to make that order. (emphasis added).

Indeed, one need not refer to such modern principles as the Second Restatement for the proposition that a court of equity has the power to compel the doing of acts beyond the territorial jurisdiction of the court. No less a defender of principled adjudication than Professor Beale was of the view that a court exercising physical power over the body of a defendant had power to enjoin the commission of a continuing tort in another jurisdiction.[35] Of course that jurisdiction was often justified on the ground that the defendant could comply with the order of the court by simply refraining from taking action in the foreign jurisdiction,[36] but there are occasionally to be found cases, notably dealing with western water rights, in which equity decrees requiring the performance of some act in another jurisdiction have been upheld.

Most notable among these is *California Development Co. v. New Liverpool Salt Co. (The Salton Sea Cases)*[37] in which the defendants improperly constructed headgates on the Colorado River in both California and Mexico. In 1904, while the Colorado was in flood, the headgates allowed floodwater to inundate the plaintiff's lands creating the Salton Sea. The plaintiff who had been mining salt in the Imperial Valley

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[34] 91 S. Ct. at 1010.

[35] Beale, *The Jurisdiction of Courts over Foreigners*, 26 HARV. L. REV. 283, 295 (1913). Of course, Beale's theory depended upon physical power in the *Pennoyer* sense. Pennoyer v. Neff, 95 U.S. 714 (1878). Here, jurisdiction over the defendant exists, if at all, only by virtue of the due process theory articulated in International Shoe Co. v. Washington, 326 U.S. 310 (1945). It thus seems tautological to assert that the power to bring the defendant into the state extends the equity power of the court simply because the defendant is present. Obviously, the due process problem is more complicated than that. *Cf.* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959), *noted in* 2 ARIZ. L. REV. 143 (1960). *See also* R. CRAMPTON & D. CURRIE, CONFLICT OF LAWS 500 (1958).

[36] *See* Messer, *The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494 (1930).

[37] 172 F. 792 (9th Cir.), *cert. denied* 215 U.S. 603 (1909).

sought equitable relief in federal court in California that would have required the defendant to reconstruct the headgates in Mexico as well as California. The trial court ordered the requested relief and on appeal the United States Court of Appeals for the Ninth Circuit affirmed. To the defendant's assertion that the decree was beyond the power of the court, the Ninth Circuit replied:

> Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court?[38]

Professor Beale thought the *Salton Sea Cases* to be correctly decided on the ground that "[i]f in such a case the defendant has by his wrongful conduct put himself in a position where he cannot refrain from further tort, except by doing some act abroad, it is his own affair; the court merely enjoins the continuance of the tort."[39] Of course the *Salton Sea Cases* were decided in federal court but the case makes no mention of any consideration being given to the qualities of the forum. It thus seems clear that as a matter of raw power a court of equity may compel a party over whom it has jurisdiction to undertake action in a foreign state.[40]

There are, however, substantial countervailing considerations at work in such a case. In the *Vanity Fair* case, Judge Waterman speaking for himself and Judges Frank and Medina suggested the alternative standard:

> Were this merely a transitory tort action in which disputed facts could be litigated as conveniently here as in Canada, we would think the jurisdiction of the district court should be exercised. But we do not think it the province of United States district courts to determine the validity of trade-marks which officials of foreign countries have seen fit to grant. To do so would be to welcome conflicts with the administrative and judicial officers of the Dominion of Canada. We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere. But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country.[41] (footnotes omitted).

As a careful reading of *Vanity Fair* shows, it was the conflicting governmental interests of Canada and the United States that led to the

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38 172 F. at 813.

39 Beale, *supra* note 35, at 293.

40 In A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 788-93 (1965), the authors express some concern for the implication of such extraterritorial power.

41 Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 647 (2d Cir. 1956).

declination of jurisdiction. Precisely the same conflict is evident in *Wyandotte* for, as the Supreme Court notes, the State of Michigan and the Province of Ontario have both set into motion administrative machinery to control the mercury emissions. If past experience is any guide it seems highly unlikely that either government would see fit to halt the pollution immediately at the cost of closing the plants with the consequent loss of employment and tax revenue. A recent Michigan nuisance case supports that conclusion.[42]

The legitimate interests of the State of Ohio, on the other hand, may require that deference be given not to the economic interests of Michigan and Canada but to water quality and the protection of wildlife, fish and vegetation. Thus, the "even-handed application of justice"[43] to which the Court promises to remain alert will come not from a single solution but from a broad spectrum of possible results reflecting the varying quantifications of environmental and economic factors required by the special judicial process typical of public nuisance cases.[44] That process requires judicial statesmanship of a high order, and when it is complicated by the addition of conflicting interstate and international governmental interests, it may require divine guidance as well. One is compelled to conclude that a state court is the least preferable forum for the resolution of such conflict. Even the Supreme Court may find it difficult to resolve effectively the international aspects of such a case.[45]

The tendency toward inter-governmental conflict led the framers to commit such issues to the national judiciary. As *Federalist No. 80* observed:

> Whatever practices may have a tendency to disturb the harmony of the states, are proper objects of federal superintendence and control.
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> . . . And if it be a just principle, that every government *ought to possess the means of executing its own provisions, by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, *the national judiciary ought to preside in all cases, in which one state or its citizens are opposed to another state or its citizens.* To secure the full effect of so fundamental a provision against all evasion and

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42 Fortin v. Vitali, — Mich. App. —, 184 N.W.2d 609 (1971).

43 91 S. Ct. 1011.

44 Some flavor of the decision-making process in such litigation is found in the leading *Ducktown Sulphur* case in which the court articulates the traditional notion of common-law public nuisance litigation:

> But in a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 367, 83 S.W. 658, 667 (1904).

45 Dow Canada so suggested in its brief. See note 25 *supra*.

> subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial, between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.[46] (emphasis added).

Similarly, the existence of potential international conflict demanded a national forum for the resolution of maritime disputes:

> The fifth point will demand little Animadversion. The most bigoted idolizers of state authority, have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. *These so generally depend upon the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.* The most important part of them are, by the present Confederation, submitted to federal jurisdiction.[47] (emphasis added).

The application of those principles led Mr. Justice Holmes to comment in a passage that did not commend itself to Justice Harlan:

> 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.*[48] (emphasis added).

Faced with the prospect of becoming the principal forum for the resolution of interstate pollution controversies, the Court has rejected that wisdom. The expediency of that decision cannot be gainsaid, but the wisdom of it must be doubted. In the "environmental decade" there will be many interstate and perhaps international pollution cases. Like the boundary disputes that underlay the grant of power in Article III, they are properly resolved by the national courts, not by the courts of the party plaintiff.

THE ALTERNATIVE FORUM

If the Supreme Court cannot or will not adjudicate an interstate controversy, the federal district court would seem to be the appropriate alternative forum. Unfortunately, and we think unwisely, the Court rejects that possibility. Strangely the rejection comes without analysis in a footnote that is worth reproducing in whole:

> In our view the federal statute, 28 U.S.C. § 1251(b)(3), providing that our original jurisdiction in cases such as these is

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[46] THE FEDERALIST No. 80, at 518-19 (Modern Library ed. 1937).
[47] *Id.* at 519.
[48] Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), *citing* Missouri v. Illinois, 180 U.S. 208, 241 (1901).

> merely concurrent with that of the federal district courts, reflects this same judgment. However, this particular case cannot be disposed of by transferring it to an appropriate federal district court since this statute by itself does not actually confer jurisdiction on these courts, see C. Wright, Federal Courts, at 502 (2d ed. 1970), *and no other statutory jurisdictional basis exists.* The fact that there is diversity of citizenship among the parties would not support district court jurisdiction under 28 U.S.C. § 1332 because that statute does not deal with cases in which a State is a party. Nor would federal question jurisdiction exist under 28 U.S.C. § 1331. So far as it appears from the present record, *an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law.* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).[49] (emphasis added).

Three propositions set forth in the quoted footnote are worthy of mention: (1) that diversity of citizenship does not exist; (2) that no federal question is present; and (3) that *Erie* requires the application of state law.

Diversity of Citizenship

As a general proposition, a state suing to vindicate its governmental interests is deemed not to be a citizen of itself for the purposes of diversity of citizenship jurisdiction.[50] It is at least arguable, however, that when a suit is brought by the state as *parens patriae* and the claim asserted thus depends not upon the state's proprietary interests but upon the collective health and welfare of its citizens that the state should be viewed as the representative of a class composed of the citizens of the state.[51] While many would correctly assert that such a rule is sophistry, it is certainly no more so than many of the rules that characterized the federal jurisdiction including, we might add, the rule that a state is not a citizen of itself for purposes of section 1332. Indeed, with a little "artful pleading," the very claims asserted in *Wyandotte* might still be brought in the federal district court.[52]

Federal Question Jurisdiction

Justice Harlan's observation that the case could not be brought in a district court under the federal question jurisdiction follows from his con-

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[49] 91 S. Ct. at 1009-10 n.3.
[50] Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482 (1894).
[51] *But see* Louisiana v. Texas, 176 U.S. 1 (1900).
[52] Such a result could arguably be achieved by naming the attorney general of the state as the representative of a class composed of the citizens of Ohio (*cf.* Krisel v. Duran, 258 F. Supp. 845, 848-55 (S.D.N.Y. 1966)), or by bringing the suit in the name of an incorporated political subdivision which is deemed to be a citizen of the state. *See* Bullard v. City of Cisco, 290 U.S. 179 (1933); Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 122 (1869).

clusion that *Erie* mandates the application of state law. Because the question was not properly before the Court for decision and since it had not been briefed by the parties,[53] that conclusion may be regarded as an unfortunate obiter dictum.[54] There is substantial authority that would indicate that an interstate pollution case in which a state is a party should be decided under federal law.

The rationale of *Erie* and its progeny[55] seems inapplicable to interstate pollution cases since the nature of the substantive rights involved is beyond the legislative competence of any single governmental entity.[56] Moreover, the nature of the parties[57] and the matter in controversy[58] in *Wyandotte* would both appear to call for federal common law. Finally, because of the burgeoning amount of federal legislation directed towards the preservation of the environment, a federal rule of decision applicable to such controversies may be called for.[59]

1. Erie *and Cases in Which a State is a Party.* Article III of the Constitution extends federal jurisdiction "to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . . and between a State, or the Citizens

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[53] Ohio's initial motion alleged that the defendants were violating federal and Ohio law. The only other mention of choice of law in the briefs submitted to the Court was the statement by the United States that "so long as the federal government has not prescribed, by treaty or statute, a "system" of regulation of water pollution which precludes state action in this field, Ohio may apply its common law against those whose acts created nuisance within the state." Brief of the United States as Amicus Curiae at 13 (citation omitted).

[54] *But see* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[55] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), required federal courts sitting in diversity cases to apply the conflict of laws rules of the state in which they were sitting. *But cf.* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513-15 (1964); Keefe, *In Praise of Joseph Story, Swift v. Tyson and "the" True National Common Law*, 18 AM. U.L. REV. 316, 366 (1969). *Klaxon* was founded on the characterization of "our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." 313 U.S. at 496.

Aside from the sheer sophistry of woodenly attempting to apply *Klaxon* to a case brought under the Supreme Court's original jurisdiction, *Wyandotte* seemingly involves one of the clearest instances in which federal conflict of laws rules should be applied. *But see* Richards v. United States, 369 U.S. 1 (1962). The choice which a court must face in deciding *Wyandotte* is not merely the selection of the applicable law from those of all jurisdictions touching upon the controversy. Rather, because this action is to abate a public nuisance, the court must weigh whether the interests of the community would be better served by continuing or abating the source of the nuisance. *See generally* W. PROSSER, THE LAW OF TORTS § 89 (3d ed. 1964). *See also* note 44 *supra.* Because the "community" in *Wyandotte* is interstate in nature, much more than the "local policies" of the several states are involved and the rationale of *Klaxon* is inapplicable.

[56] Note, *The Operation of Federalism in Diversity: Erie's Constitutional Basis*, 40 IND. L.J. 512, 520-23 (1965).

[57] Connecticut v. Massachusetts, 283 U.S. 789 (1931); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 200 U.S. 496 (1906).

[58] Hinderlinder v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

[59] See text accompanying notes 110-123 *infra.*

thereof, and foreign States, Citizens or Subjects." The Supreme Court's original jurisdiction includes "all Cases . . . in which a State shall be [a] Party." Although jurisdiction over cases in which a state is a party and private diversity litigation have both been justified by the same policy considerations,[60] each has a distinct historical heritage[61] and the rule of decision applicable to each is not necessarily the same. Chief Justice Hughes, after all, has reminded us that "[b]ehind the words of the constitutional provisions are postulates which limit and control."[62] Analysis of these two jurisdictional grants leads ineluctably to the conclusion that, despite their stylistic parallelism, they differ fundamentally in their operation.

Although Justice Harlan used only a very narrow justification to explain the existance of federal jurisdiction over cases in which a state is a party,[63] there are clear indications that the jurisdiction was created in order to satisfy the overriding federal interests inherent in such litigation. Consequently, in such suits the Supreme Court has developed what it has called "interstate common law."[64] In diversity litigation between private parties, on the other hand, the federal interest extends only to providing a forum free from local prejudices,[65] and there are strong indications that the draftsmen of the Constitution questioned its need even for this purpose.[66] This has led to what Judge Friendly has characterized as the "far, far better [world]" where "federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states

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[60] THE FEDERALIST No. 80 (A. Hamilton).

[61] *Compare* Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928), *with* Missouri v. Illinois, 180 U.S. 208, 219-24 (1901).

[62] Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934). *See also* Missouri v. Illinois, 180 U.S. 208, 219 (1901):

> As there is no definition or description contained in the Constitution of the kind and nature of the controversies that should or might arise under these [original jurisdiction] provisions, it might be supposed that, in all cases wherein one State should institute legal proceedings against another, the original jurisdiction of this court would attach.
>
> But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look, not merely to its language but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration.

[63] 91 S. Ct. at 1010:

> Two principles seem primarily to have underlain conferring upon this Court original jurisdiction over cases and controversies between a State and citizens of another State or country. The first was the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. The second was that a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State. (citations omitted).

[64] Kansas v. Colorado, 206 U.S. 46, 98 (1907) (bill to enjoin diversion of river).

[65] Bank of United States v. Deveaux, 19 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.).

[66] Friendly, *supra* note 61, *passim*.

whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed."[67]

When Governor Edmund Randolph of Virginia introduced his proposal for a new constitution to the Constitutional Convention on May 29, 1787, he argued that one of the shortcomings of the confederation was "that the federal government could not check the quarrels between the states."[68] The memories of the internecine economic warfare between New York and New Jersey, and the compact between Virginia and Maryland settling their differences over the oyster fishery to the exclusion of other interested states were fresh in the minds of the delegates. The Virginia Plan, therefore, proposed to remedy the defects of the Articles of Confederation and create a central government exercising power over the several states. Part of this plan was the creation of a "National Judiciary . . . to hear & determine . . . cases in which foreigners or citizens of other States . . . may be interested . . . and questions which may involve the national peace and harmony."[69]

The New Jersey Plan, introduced by Governor William Paterson on June 15 on the other hand, envisaged a central government with more circumscribed powers and a more narrow basis of jurisdiction for federal courts. This jurisdiction would extend only to the impeachment of federal officers, cases involving foreigners, or the interpretation of treaties, acts regulating trade and the collection of federal revenue.[70] No provision was made for broad federal question jurisdiction or for jurisdiction over those cases where, because of the nature of the parties, interests of federalism were present.

The New Jersey Plan soon came under attack from the Federalists.[71] The bitter interstate disputes of the previous few years which had raked the Confederation and indeed had precipitated the Constitutional Convention hung heavy over the debates as the delegates sought to create a government capable of dealing with these problems. Madison criticized the New Jersey Plan for its inability to resolve these conflicts between the states and promote the interests of national unity, saying, "It leaves the will of the States as uncontrouled as ever."[72] Madison was particularly critical of the limited federal jurisdiction created under the New Jersey Plan.[73]

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67 Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 422 (1964).

68 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (1911). *See generally* FEDERALIST NOS. 6 & 7 (A. Hamilton); S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 276-81, 304-05 (1965).

69 1 FARRAND, *supra* note 68, at 21-22.

70 *Id.* at 244.

71 Alexander Hamilton, for example, criticized the New Jersey Plan as being little more than an amendment of the Articles of Confederation. As such, he felt, it left the states with too much power and did not strengthen the national government sufficiently. *Id.* at 282-93.

72 *Id.* at 316.

73 *Id.* at 317.

After the great compromise proferred by Roger Sherman was adopted by the convention and the new federal government took shape, it became apparent that a narrowly defined judiciary would be unsuited to the nation's needs. Consequently, when Madison proposed "that the jurisdiction shall extend to all cases arising under the Nat[iona]l laws: And to such other questions as may involve the Nat[iona]l peace & Harmony," it was adopted unanimously.[74] The Committee of Detail, which had been charged with the task of "reporting a Constitution conformably to the Proceedings,"[75] later submitted a proposal of the Article III grant of jurisdiction which is in substantial conformity with the final version.[76]

The jurisdiction over cases in which a state is a party was created in direct response to interstate conflicts which had existed under the confederation and the actions of individual states which had undermined national unity. The jurisdictional grant set forth by the Committee of Detail can be seen, therefore, as a means of effectuating Madison's desire for "national peace and harmony." Because it was enacted to limit the actions of individual states and to serve the paramount federal interest of minimizing interstate conflicts, it would seem that this jurisdictional grant should require the application of a federal body of law. Indeed, application of state law in such cases would contravene the reasons for which the jurisdiction was created.

The need to apply a federal body of law to disputes in which a state is a party finds further support in Alexander Hamilton's *Federalist No. 80.* Hamilton noted that federal jurisdiction over cases in which a state is a party "rests on this plain proposition that the peace of the WHOLE ought not to be left at the disposal of a PART."[77] Because of the actions of the individual states which had undermined the well-being of the confederacy, Hamilton argued that interstate action must be subject to federal control: "Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendance and control."[78]

Until Justice Harlan's gratuitous observation in footnote 3 of *Wyandotte*, it appeared well-settled that where these federal interests were present, federal law would be applied as a rule of decision. In *Georgia v. Tennessee Copper Co.*,[79] for example, Georgia brought an original action in the Supreme Court seeking the abatement of damaging smoke emissions from the defendant's out-of-state plant. Speaking for the Court, Justice Holmes granted the requested relief but noted that because of the nature of the parties a different rule of decision would be applied than if

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74 2 *id.* at 46.
75 *Id.* at 86.
76 *Id.* at 186-87.
77 THE FEDERALIST No. 80, at 516-17 (Modern Library ed. 1937).
78 *Id.* at 518.
79 206 U.S. 230 (1907).

the case were between private parties. In reaching that conclusion, he indicated the effect which the compromises wrought that summer in Philadelphia had on the choice of law:

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. . . .
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> . . . 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.[80]

New Jersey v. City of New York[81] presents a situation strikingly analogous to *Wyandotte* and further indicates the need for a federal court to apply its own rule of decision to interstate pollution cases involving states as parties. The City of New York had been dumping its garbage in the Atlantic Ocean under a permit issued by the federally-appointed supervisor of New York Harbor. The garbage washed up onto the New Jersey shores and, after its complaints to New York City went unanswered, New Jersey successfully sought relief under the Supreme Court's original jurisdiction. In framing its various decrees in this case, the Court did not seem to be as inhibited by state law as was Justice Harlan in footnote 3. Indeed, the Court made no reference to the laws or decisions of any state in fashioning its broad equitable remedies.

The need to apply federal common law as a rule of decision does not necessarily apply to all aspects of a case in which a state is a party.[82] In *Connecticut v. Massachusetts*,[83] involving a dispute over the allocation of the waters of an interstate stream, the absolute pre-eminence of federal law was rejected. Even though both states had adopted riparian rights as their municipal law, however, Justice Butler felt that such a rule would "not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented."[84] He then explained the need for approaching such controversies from a federal perspective:

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[80] *Id.* at 237.

[81] 283 U.S. 473 (1931), *decree modified*, 290 U.S. 237 (1933), *decree construed*, 296 U.S. 259 (1935).

[82] The Rules of Decision Act provides only that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1964). Federal jurisdiction over cases in which a state is a party was intended to preserve the "national peace and harmony." Consequently, in such cases federal common law should be applied to those aspects presenting conflicts between the governmental interests of two or more states. For other matters, however, the Rules of Decision Act requires the application of state law.

[83] 282 U.S. 660 (1931).

[84] *Id.* at 670.

> For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require. The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right. And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight.[85] (citation omitted).

Private diversity litigation, on the other hand, is founded on quite different considerations. Professor Crosskey to the contrary notwithstanding,[86] the federal government is one of delegated powers and federal law is applied only interstitially against the broader fabric of state law.[87] Given the narrow, if not now outdated, federal interest in providing a forum for conflicts between citizens of different states, the rights of the parties are necessarily determined under the vast residuum of state law.

Thus, when national interests are not present, matters within state legislative competence may properly be decided according to state law even though federal jurisdiction is exercised because a state is a party. Justice Harlan's examples of "the frequency with which States and nonresidents clash over . . . taxes, motor vehicles, decedents' estates, business torts, government contracts and so forth"[88] are all instances where individual states have competence to act, interests of federalism are normally absent, and the municipal law of the individual states should therefore apply. In *Ohio v. Chattanooga Boiler & Tank Co.*,[89] for example, Ohio invoked the Supreme Court's original jurisdiction seeking reimbursement of its workmen's compensation fund from an out-of-state employer. Because the award would not impinge upon the interests of other states or the union and since the matter was clearly within Ohio's legislative competence, the Court was able to apply state law without consideration of other alternatives.

Justice Harlan's comment that "so far as it appears" the district

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85 *Id.*

86 Professor Crosskey has argued that the Commerce Clause vests Congress with the power to regulate all gainful activity among the states or with foreign nations and the Indians. 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 115-86 (1953). Even assuming the merit of Professor Crosskey's arguments, the interpretation of the Commerce Clause has not developed in the manner that he suggests and, at this late date, such a broad reading of federal power would depart sharply from 180 years of history.

87 *See, e.g.*, H. HART & H. WECHSLER, *Introductory Note: The Interstitial Character of Federal Law*, in THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435-36 (1953); Friendly, *supra* note 67; Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition of the National Government*, 54 COLUM. L. REV. 543, 544-46 (1954).

88 91 S. Ct. at 1009.

89 289 U.S. 439 (1933).

court would apply state law can thus be construed as either reversing the pattern of federal law application or creating a special choice of law rule for district courts when they adjudicate cases over which the Supreme Court has concurrent original jurisdiction. Both alternatives depart from the tenents of federalism, while the second also creates an unnecessary opportunity for forum shopping and a resulting disunity within the federal system. Either course seems eminently unwise and inconsistent with the policy articulated in the development of the "*Erie* jurisprudence."

Wyandotte lies far afield from private diversity litigation or the situation in which a state seeks to apply its municipal law to acts occurring wholly within its boundaries. *Erie* was based on the assumption that the primary respnsibility for ordering the legal relationships in ordinary diversity litigation lay with the States absent federal preemption.[90] "By focusing judicial attention on the nature of the right being enforced, *Erie* caused the principle of a specialized federal common law, binding in all courts because of its source, to develop within a quarter century into a powerful unifying force."[91] Interstate pollution cases, however, have little in common with private diversity cases. They are, to the contrary, strikingly similar to the Chesapeake Bay oyster controversy which emphasized the need for a strong central government and which precipitated the Constitutional Convention. They are, in short, cases raising the self-same issues that lie at the roots of Article III.

The current "Caterpiller War"[92] between Texas and New Mexico indicates the futility of attempting to resolve interstate pollution cases in local forums according to local law. Cattlemen in five northeastern counties in New Meixco saw their rangelands endangered by an infestation of the New Mexico range caterpiller. They sought to combat the potential blight by spraying massive doses of the pesticide toxaphene. Toxaphene, however, has noxious side effects and its use would have endangered the gamefish in the Canadian River basin and threatened the water supply in 11 Texas municipalities.

New Mexico and federal agencies were divided on the question whether the pesticide should be used, but none moved to prevent its use. Texas Governor Preston Smith asked New Mexico Governor David Cargo to intervene against the use of toxaphene and thus preserve the water supply of these Texas cities. When this request was denied, Texas sought an injunction against the cattlemen in the United States District Court for the District of New Mexico. Although the district court dismissed the complaint for lack of jurisdiction, the Tenth Circuit reversed. In *Texas*

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90 *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 474-75 (Harlan, J., concurring); Friendly, *supra* note 67; Note, *supra* note 56.

91 Friendly, *supra* note 67, at 407. *See also* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967).

92 Montague & Montague, *The Great New Mexico-Texas Caterpiller War*, N.M. REV. & LEGIS. J., March-April, 1971, at 3 *et seq.*

v. Pankey,[93] it held that interstate pollution cases should be decided under federal common law and that this common law would support federal question jurisdiction:[94]

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of a State about its ecological conditions and impairments of them. *In the outside sources of such impairment, more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable. Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.* And the logic and practicality of regarding such claims as being entitled to be asserted within the federal-question jurisdiction of § 1331(a) would seem to be self-evident.
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> On what has been said, we hold . . . that the ecological controversy involved is one which is entitled to the application of federal common law as a basis for the existence and determination of the rights in the situation; that the rights asserted and the nature of the controversy are such as properly to entitle the matter to be regarded as one arising under the laws of the United States within the jurisdictional language of § 1331(a). . . . .[95] (emphasis added).

In both *Pankey* and *Wyandotte*, the aggrieved states had no legislative jurisdiction over the out-of-state polluters,[96] and the fundamental requisite for the application of state law under *Erie* was consequently missing. In considering the ecological degradation of Lake Erie, Michigan, Canada and Ohio all have legitimate interests and it seems obvious that it is within their power to reach different conclusions in regard to the relative weight to be accorded the various environmental and economic concerns. Ohio might legitimately give preeminent weight to the value of its fishing industry, while Canada and Michigan might consider the value of the chemical industry to outweigh the marginal disbenefits accruing from mercury pollution.

These legitimate yet antagonistic governmental interests indicate the futility of attempting to apply *Erie* in such a situation. The resolution of

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[93] No. 353-70 (10th Cir. Feb. 8, 1971).

[94] *Accord*, Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968). The *Pankey* court, however, does not deal with the venue problem raised by the local action rule. *Compare* Still v. Rossville Crushed Stone Co., 370 F.2d 324 (6th Cir. 1966), *with* Laden v. Tennessee Copper Co., 218 U.S. 357 (1910). *See also* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft 1969).

[95] No. 353-70 at 13-15.

[96] See text accompanying notes 28-32 *supra*.

this controversy will affect the interests of all states in the eastern Great Lakes basin. Indeed, because of its international ramifications, any decision will necessarily affect this nation's relations with Canada. To apply state law to a controversy of such proportions is to return to the provincialism which so weakened the confederacy. Here, no less than in litigation between two states, a federal common law is required.

2. *Lake Erie and the Need for a Federal Common Law.* Justice Harlan's reference to *Erie* and state law not only places litigation between a state and a citizen of another state on the same plane as that based on ordinary diversity of citizenship, but it also ignores the obligation to apply federal law to a case involving the pollution of an interstate body of water. Such a decision departs from earlier opinions of the Court which had applied federal common law to interstate bodies of water[97] or where there was a federal interest in a uniform rule of decision.[98] In thus declining to apply a federal rule of law to the Lake Erie pollution crisis, Justice Harlan has left it to be answered by the voices of Babel.

Lake Erie is abutted by four states and the Canadian province of Ontario. It serves as a highway connecting the industrial heartland of this nation to the ports of the world. It is a common boundary which the United States and Canada have agreed "shall not be polluted on either side to the injury of health or property on the other."[99] Lake Erie, once beautiful, is dying.

The pollution of an international body of water the size of Lake Erie is not susceptible to localized or piecemeal solutions.[100] What is required is a broad approach which considers all of the sources of effluent which enter the water—whether they be the runoff from farm land, municipal sewage or industrial waste. A single decision by the Supreme Court will not return Lake Erie to its natural state. But the Court's abdication of the role of the federal judiciary makes this objective all the more distant.

Where there is a federal need to have a uniform rule of decision applied, the Supreme Court has had little difficulty in formulating a federal rule to displace the residuum of state law. In *Clearfield Trust Co. v.*

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97 Hinderlinder v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

98 The leading case in this area is, of course, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See also* cases collected in C. WRIGHT, THE LAW OF FEDERAL COURTS 249 (2d ed. 1970).

99 Boundary Waters Treaty, Jan. 11, 1909, art. 4, 36 Stat. 2448.

100 A. Kneese, Approaches to Regional Water Quality Management 4, June 1967 (Resources for the Future, Inc. Reprint No. 64):

> Pollution control efforts are generally focused on treatment of waste at individual outfalls. However, water quality management conducted as a regional undertaking is not limited to this single and often economically inferior solution. . . . Regional water quality management requires that the many possibilities [for abatement] be brought into some sort of optimal balance.

Air pollution is likewise confined within geographic rather than political boundaries and its abatement requires a regional approach also. *See* Coons, *Air Pollution and Government Structure*, 10 ARIZ. L. REV. 48, 60 (1968).

United States,[101] for example, the Court referred to the federal common law extant under *Swift v. Tyson*[102] to determine the rights of the United States against the endorser of a forged government check. Noting that "[w]hen the United States disburses its funds or pays its debts, it is exercising a constitutional function or power,"[103] and stressing the need for uniformity in decisions affecting federal paper,[104] Justice Douglas applied the federal rule rather than that of the state in which the transaction occurred.

The application of federal law under the *Clearfield* doctrine is not without its limitations, however. In litigation between private parties involving the conversion of federal paper, for example, the Supreme Court applied local law because the case did "not touch the rights and duties of the United States."[105] "This is far too speculative, far too remote," the Court went on to say, "to justify the application of federal law to transactions essentially of local concern."[106] Even where the United States was a party to the contract and the litigation, the Supreme Court has applied local law involving "intensely local interests of family property" to defeat the government's claim.[107] It did so because the government entered into the contract knowing of the obligor's immunity under local law.

In such cases where there is "no significant threat to any identifiable federal policy or interest,"[108] state law is properly applied. *Wyandotte*, however, is readily distinguishable from these exceptions to *Clearfield*. Involved here is not a private matter touching only tangentially on federally created rights. Rather, the decision in *Wyandotte* will necessarily affect a number of federal interests such as treaty obligations with Canada, the pollution of an interstate body of water and the federal water quality control program.[109] Under such circumstances, it is at least arguable that a federal rule of decision should be applied on *Clearfield* grounds alone.

In *Textile Workers Union v. Lincoln Mills*,[110] the Supreme Court directed the lower courts to fashion a federal common law of labor contracts in cases bottomed on section 301 of the *Labor Management Relations Act*.[111] Of course, *Lincoln Mills* may be distinguished from *Wyandotte* on at least two grounds: (1) there was a specific jurisdictional grant for a

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101 318 U.S. 363 (1943).
102 41 U.S. (16 Pet.) 1 (1842).
103 318 U.S. at 366.
104 *Id.* at 367.
105 Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33 (1956). *But cf.* Free v. Bland, 369 U.S. 663 (1962).
106 352 U.S. at 33-34.
107 United States v. Yazell, 382 U.S. 341, 349 (1966).
108 Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966).
109 In his *Wyandotte* dissent, Justice Douglas noted, "This litigation, as it unfolds, will of course implicate much federal law." 91 S. Ct. at 1014. He went on to detail some of the federal statutes which would govern the decision.
110 353 U.S. 448 (1957).
111 29 U.S.C. § 185 (1964).

narrow class of cases from which could be implied a congressional directive to apply federal law, and (2) there was a carefully articulated federal policy from which that law might be drawn.[112] The doctrines of federalism articulated in *Federalist No. 80*, on the other hand, are far more substantially threatened by the interestate and international implications of *Wyandotte* than they would be by variant rules in labor contract cases. *Wyandotte* thus falls somewhere between *Clearfield* and *Lincoln Mills*. That it is distinguishable from either is, of course, no reason to reject the application of federal law.

The federal concern in legislation regulating common carriers engaged in interstate telegraph and telepone transmission, for example, led the Second Circuit in *Ivy Broadcasting Co. v. American Telephone and Telegraph Co.*[113] to adopt a federal common law of negligence and breach of contract applicable to such matters. *Ivy Broadcasting* has met with uncertain critical acclaim,[114] but the opinion of a respected court cannot be dismissed out-of-hand. In interstate pollution cases, the combination of extensive federal regulation,[115] and the previously noted federal interest in the resolution of interstate conflicts presents a case of far greater federal concern than *Ivy*.

Congress, in the *Federal Water Pollution Control Act*,[116] has articulated a federal policy toward interstate pollution,[117] the Great Lakes[118] and even "hazardous polluting substances."[119] In the same Act, Congress has specifically dealt with the necessity of balancing the various interests involved[120] and concluded that such issues are subject to resolution by judicial means.[121] Congress has even implied that water pollution originating in one state and having its effect in another is a federal problem and has provided a procedure by which one state can ask the Secretary of the Interior to call a conference of agencies in the affected states as well as foreign countries.[122] In broader terms, the Congress has declared a national policy that articulates a "continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy" to attain for all Americans a "safe, healthful, productive" environment.[123]

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112 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 (1957).

113 391 F.2d 486, 490-92 (2d Cir. 1968) (Lumbard, C.J.).

114 WRIGHT, *supra* note 98, at 249, 249-50 n.20.

115 HOUSE COMM. ON PUBLIC WORKS, LAWS OF THE UNITED STATES RELATING TO WATER POLLUTION CONTROL AND ENVIRONMENTAL QUALITY, 91st Cong., 2d Sess. (1970).

116 33 U.S.C. §§ 466 *et seq.* (Supp. V, 1965-70).

117 *Id.* § 466g(b).

118 *Id.* § 466c(f) (1964).

119 33 U.S.C.A. § 1162 (1970).

120 33 U.S.C. §§ 466g(c)(5), 466g(h) (Supp. V, 1965-70).

121 *Id.* § 466g(h).

122 *Id.* §§ 466g(d)(1), (2).

123 42 U.S.C.A. § 4331(b), (b)(2) (Supp. 1971).

Against that background of leigslation, it would not seem improper to conclude that a federal common law was appropriate, and the *Pankey* court has reached that conclusion.[124] Certainly the issue is of far greater moment than one would suspect after reading footnote 3 in *Wyandotte*.

3. *Federal Common Law and Section 1331.* Even assuming the propriety of applying federal common law to interestate pollution cases, the question of the jurisdiction of the lower federal courts must be faced. By characterizing the rule of decision in *Wyandotte* as local rather than federal, the Court avoided consideration of this issue. In *Ivy Broadcasting* and *Pankey*, however, the courts concluded that the word "laws" in 28 U.S.C. § 1331 embraced federal common law and that a suit based upon that common law could be entertained by a federal district court.[125] A line of contemporary Supreme Court opinions supports this conclusion.

Justice Brennan, speaking for the four members of the *Romero*[126] Court who reached the issue, assumed that a claim based on federal common law would support district court jurisdiction under section 1331. The Court's decisions in *Sabbatino*[127] and *Wheedlin*[128] indicated support for, but did not specifically adopt, Justice Brennan's position. This led the *Ivy* court to conclude:

> The word 'laws' in § 1331 should be construed to include laws created by federal judicial decisions as well as by congressional legislation. The rationale of the 1875 grant of federal question jurisdiction—to insure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights—is as applicable to judicially created rights as to rights created by statute.[129]

Justice Harlan's summary rejection of an alternative federal forum in *Wyandotte* may thus be avoided. If the rationale of *Pankey* and *Federalist No. 80* is adopted to created a federal rule of decision applicable to interstate pollution cases, then district courts will have, under section 1331, a statutory basis for exercising jurisdiction in such cases.

CONCLUSION

Justice Harlan concluded that the principal policies underlying Article III would not be disserved by declination of federal jurisdiction in the *Wyandotte* case. But *Wyandotte* and the interstate pollution cases which will inevitably confront the Court, seem to us to be classic Article III con-

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124 See text accompanying note 95 *supra*.
125 *See* WRIGHT, *supra* note 98, at 249; Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964).
126 Romero v. International Terminal Operating Co., 358 U.S. 354, 389-93 (1959). *See generally* Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 HARV. L. REV. 817 (1960).
127 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
128 Wheedlin v. Wheeler, 373 U.S. 647 (1963).
129 391 F.2d at 492.

troversies. Their social importance far exceeds that of the great bulk of the federal judicial business and their interstate character demands a disinterested forum.

Perhaps the fear of inundation, which we think was the real basis of the decision, is fully justified. If that is so, it was unwise in the extreme to reject the alternative federal forum, particularly when it was done in so cavalier a manner, without apparent analysis or consideration. Perhaps the Court will one day class footnote 3 of *Wyandotte* as an unfortunate dictum that disserves the needs of federalism and return to the compelling logic of Justice Holmes in *Georgia v. Tennessee Copper Company*. Perhaps it will not need to do so for the Congress has it within its power to correct the error. Hopefully, we shall see the day when interstate pollution cases are returned to the forum of choice, the federal judicial system.[130]

[130] The American Law Institute study of the Division of Jurisdiction Between State and Federal Courts, *supra* note 94, is now pending before the Senate Committee on the Judiciary. 117 CONG. REC. S6920 (daily ed. May 14, 1971) (remarks of Senator Burdick). The ALI study supports federal jurisdiction in cases based upon federal common law but makes no change in regard to cases in which a state is a party plaintiff.