

# The Burger Court Opinion Writing Database

## *Milwaukee v. Illinois*

451 U.S. 304 (1981)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

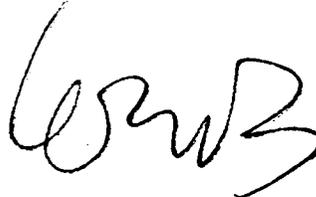
February 4, 1981

RE: 79-408 - City of Milwaukee v. Illinois and Michigan

Dear Bill:

I still find this a "close" call and will stand by and await a dissent. I made no request to anyone to do a dissent since I am really "on the fence" on this one.

Regards,



Justice Rehnquist

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U.S. SUPREME COURT CONFERENCE

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 5, 1980

RE: No. 79-408 City of Milwaukee v. Illinois

Dear Chief:

Bill Rehnquist has agreed to do the opinion for the  
Court in the above.

Sincerely,

*Bill*

The Chief Justice  
cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

January 22, 1981

RE: No. 79-408 City of Milwaukee v. Illinois

Dear Bill:

I agree.

Sincerely,

*Bill*

Mr. Justice Rehnquist

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

January 16, 1981

Re: No. 79-408, Milwaukee v. Illinois

Dear Bill,

I am glad to join your opinion for the  
Court.

Sincerely yours,

P.S.  
/

Justice Rehnquist

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U.S. DEPARTMENT OF JUSTICE

Supreme Court of the United States  
Washington, D. C. 20543

January 23, 1981

CHAMBERS OF  
JUSTICE BYRON R. WHITE

No. 79-408 - City of Milwaukee v. Illinois

Dear Bill,

Although I had some doubts about the overflow aspect of this case, you have allayed my fears, and I would like to join your opinion. I have some difficulty, however, with the sentence on page 9 following the citation to Atlantic Richfield in 435 U.S. You say: "Only a clear and unequivocal expression of congressional intent to displace state law will lead us to conclude that there has been pre-emption--". This sounds like a judicial enactment of H.R. 3, Howard Smith's perennially unsuccessful effort to require an express statement in any federal statute before pre-emption could be found. I doubt that our cases support your statement. In Atlantic Richfield, 435 U.S. 151, 157, we said that, "Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the states are prohibited--". In Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230, the Court said that the Congressional purpose could be evidenced in several ways: "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it--or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject--likewise, the objects sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose". Of course, state law must give way, where compliance with both federal and state regulations is a physical impossibility--", Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963) or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Atlantic Richfield, *supra*, at 158.

Sincerely yours,



Mr. Justice Rehnquist

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✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 5, 1981

Re: 79-408 - City of Milwaukee v.  
States of Illinois and Michigan

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 16, 1981

Re: No. 79-408 - Milwaukee v. Illinois

Dear Harry:

Please join me in your dissent.

Sincerely,

*JM.*

T.M.

Justice Blackmun

cc: The Conference

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U.S. SUPREME COURT ARCHIVES

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 13, 1981

Re: No. 79-408 - Milwaukee v. Illinois

Dear Bill:

I have spoken to John. I shall undertake a dissent in this case in due course.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

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U.S. SUPREME COURT ARCHIVES

April 2, 1981

Re: No. 79-408 - Milwaukee v. Illinois, et al.

Dear Bill:

I personally appreciate your patience with the dissent in this case. That dissent has now gone to the Printer.

Sincerely,

HAB

Mr. Justice Rehnquist

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun  
APR 6 1981

1st DRAFT

Circulated: \_\_\_\_\_  
Revised: \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

No. 79-408

City of Milwaukee et al.,  
Petitioners,  
v.  
States of Illinois and  
Michigan. } On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Seventh Circuit.

4/6  
John

[April —, 1981]

JUSTICE BLACKMUN, dissenting.

Nine years ago, in *Illinois v. Milwaukee*, 406 U. S. 91 (1972), this Court unanimously determined that Illinois could bring a federal common-law action against the city of Milwaukee, three other Wisconsin cities, and two sewerage commissions. At that time, Illinois alleged that the discharge of raw and untreated sewage by these Wisconsin entities into Lake Michigan created a public nuisance for the citizens of Illinois. The Court remitted the parties to an appropriate federal district court, "whose powers are adequate to resolve the issues." *Id.*, at 108.

Illinois promptly initiated the present litigation,<sup>1</sup> and pursued it through more than three years of pretrial discovery, a six-month trial that entailed hundreds of exhibits and scores of witnesses, extensive factual findings by the District Court, App. F to Pet. for Cert., and an exhaustive review of the evidence by the Court of Appeals. 599 F. 2d 151, 167-177 (CA7 1979). Today the Court decides that this nine-year judicial exercise has been just a meaningless charade, cf. *Hughes Tool Co. v. Trans World Airlines*, 409 U. S. 363, 389, 390 (1972) (dissenting opinion), inasmuch as, it

<sup>1</sup>This Court's decision was issued April 24, 1972. The complaint was filed in the United States District Court for the Northern District of Illinois on May 19, 1972.

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Pages: 1-6, 8, 10-13 and  
Footnotes 14-32 Renumbered

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: APR 10 1981

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 79-408

City of Milwaukee et al., Petitioners, v. States of Illinois and Michigan.	}	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
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[April --, 1981]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

Nine years ago, in *Illinois v. Milwaukee*, 406 U. S. 91 (1972), this Court unanimously determined that Illinois could bring a federal common-law action against the city of Milwaukee, three other Wisconsin cities, and two sewerage commissions. At that time, Illinois alleged that the discharge of raw and untreated sewage by these Wisconsin entities into Lake Michigan created a public nuisance for the citizens of Illinois. The Court remitted the parties to an appropriate federal district court, "whose powers are adequate to resolve the issues." *Id.*, at 108.

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<sup>1</sup> This Court's decision was issued April 24, 1972. The complaint was filed in the United States District Court for the Northern District of Illinois on May 19, 1972.

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U.S. SUPREME COURT

March 23, 1981

No. 79-408 Milwaukee v. Illinois

Dear Bill:

Over the weekend I reviewed files in which I have not stated my position on circulated opinions, and find that I "owe" you some response.

As I voted with you at Conference to reverse, I will at least join your judgment. I was convinced, as you may recall, that CA7 applied an incorrect standard of proof in evaluating the common law nuisance claim.

You have written a persuasive opinion and now have four votes. I may well join you to assure a Court opinion. I will, however, await Harry's dissent on the preemption issue.

Sincerely,

Mr. Justice Rehnquist

LFP/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 22, 1981

No. 79-408 City of Milwaukee v. Illinois

Dear Bill:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Rehnquist

LFP/lab

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: Jan 16 1981

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-408

City of Milwaukee et al., Petitioners, v. States of Illinois and Michigan.	} On Writ of Certiorari to the United States Court of Ap- peals for the Seventh Circuit.
--	--

[January —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

When this litigation was first before us we recognized the existence of a federal "common law" which could give rise to a claim for abatement of a nuisance caused by interstate water pollution. *Illinois v. Milwaukee*, 406 U. S. 91 (1972). Subsequent to our decision, Congress enacted the Federal Water Pollution Control Act Amendments of 1972. We granted certiorari to consider the effect of this legislation on the previously recognized cause of action.

I

Petitioners, the City of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee, are municipal corporations organized under the laws of Wisconsin. Together they construct, operate, and maintain sewer facilities serving Milwaukee County, an area of some 420 square miles with a population of over one million people.<sup>1</sup> The facilities consist of

<sup>1</sup> It is the statutory responsibility of the city commission to "project, plan, construct, maintain and establish a sewerage system for the collection, transmission, and disposal of all sewage and drainage of the city." Wis. Stat. § 62.41 (1). The city commission is specifically given the authority to "plan, construct, and establish all local, district, lateral, inter-

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P. 9

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: JAN 27 1981

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 79-408

City of Milwaukee et al.,  
Petitioners,  
v.  
States of Illinois and  
Michigan. } On Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit.

[January —, 1981]

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9, 11, 20, 22-26

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: \_\_\_\_\_

3rd DRAFT

Recirculated: APR 6 1981

**SUPREME COURT OF THE UNITED STATES**

No. 79-408

City of Milwaukee et al.,  
Petitioners,  
v.  
States of Illinois and  
Michigan. } On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Seventh Circuit.

[January —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 13, 1981

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 79-408, City of Milwaukee v. Illinois

The only petition held for No. 79-408 is a cross-petition, No. 79-571. In the cross-petition the state of Illinois raises two questions: (1) whether the Court of Appeals for the Seventh Circuit erred in reversing the findings of the District Court that higher effluent limitations than those called for in Milwaukee's permits were required to abate the alleged federal common law nuisance; and (2) whether the Court of Appeals erred in ruling that Illinois' state common and statutory law claims should not be considered.

The first question is moot, since our opinion ruled that federal courts had no common law authority to impose effluent limitations beyond those established by duly-authorized agencies pursuant to the statutory permit scheme. See slip op., at 13.

Our opinion did not reach the second question raised in Illinois' cross-petition. As noted in the opinion, slip op., at 4, n.4, we considered simply the question whether federal statutory law had displaced federal common law, not the question of the availability of state law as well as federal law. The Court of Appeals declined to consider Illinois' state law claims, relying on Illinois v. Milwaukee, 406 U.S. 91, 102 (1972), where the Court ruled that "it is federal, not state law that in the end controls the pollution of interstate or navigable waters." See 599 F.2d, at 177, n.53.

Nothing in No. 79-408 detracts from that conclusion. Illinois v. Milwaukee held that federal law controls

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

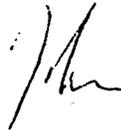
January 23, 1981

Re: 79-408 - City of Milwaukee v. Illinois

Dear Bill:

Unless someone else dissents, I expect to do so briefly pretty much along the lines of what Judge Tone said in his opinion for the Court of Appeals.

Respectfully,



Justice Rehnquist

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 7, 1981

Re: 79-408 - City of Milwaukee v. Illinois

Dear Harry:

Please join me in your excellent dissenting  
opinion.

Respectfully,



Justice Blackmun

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