Preemption of Federal Common Law - City of Milwaukee v. Illinois

Dennis J. Gallitano

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol31/iss1/8

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, cmcclure@depaul.edu.
PREEMPTION OF FEDERAL COMMON LAW—
CITY OF MILWAUKEE v. ILLINOIS

Prior to 1938, federal courts had acquired significant power through the application of what was generally known as federal common law. Federal common law, as it then existed, consisted of a collective body of decisional law that was exclusive of state court decisions. The United States Supreme Court, in Erie R.R. v. Tompkins,\(^1\) effectively abolished the general principles of federal common law when it declared that federal courts derived their power from the common law authority of the states. The Court, however, did not completely eradicate the application of federal common law. In Erie's companion case, Hinderlider v. La Plata River & Cherry Creek Ditch Co.,\(^2\) the Court ruled that under the unique circumstances involving the apportionment of interstate waters, the governing principle would be federal common law.\(^3\) In the years following Hinderlider, the federal court system has witnessed the emergence of a “specialized” federal common law\(^4\) in areas such as foreign relations,\(^5\) maritime disputes,\(^6\) and

1. 304 U.S. 64 (1938). *Erie* declared that federal courts do not possess an independent “transcendental body of law” from which to draw their legal conclusions. “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.” *Id.* at 78.

2. 304 U.S. 92 (1938).

3. *Id.* at 110. The dispute in *Hinderlider* involved the apportionment of the La Plata River. The ditch company argued that the apportionment compact reached between Colorado and New Mexico violated its right to divert and use the waters of the river. In formulating equitable relief, the Supreme Court stated that “whether the water of an interstate stream must be apportioned between the two States is a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.” *Id.*


6. Article III, § 2 of the United States Constitution provides in pertinent part that “[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.” U.S. CONST. art. III, § 2. Thus, Article III provides a basis for extending federal common law to
the proprietary rights of the federal government. The underlying rationale for employing federal common law in these specialized areas has been the protection of strong federal interests and the compelling need for a uniform national policy.

This same rationale prompted the Supreme Court, in *Illinois v. City of Milwaukee* (Milwaukee I), to expand the application of federal common


7. The leading case on proprietary rights of the federal government, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), involved the right of the government to control the issuance of commercial paper. The *Clearfield* Court held that the government had a federal common law right to recover funds on a forged check guaranteed by Clearfield Trust. The Court stated:

In our choice of the applicable federal rule we have occasionally selected state law. . . . But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions . . . commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of several states. The desirability of a uniform rule is plain. *Id.* at 367. Similarly, in *National Metropolitan Bank v. United States*, 323 U.S. 454, 456 (1945), forged checks drawn on the United States Treasury were recoverable under federal common law. *Cf. Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33 (1956).


Federal law is no juridical chameleon, changing complexion to match that of each state. . . . It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law. . . .

*Id.* at 471-72 (Jackson, J., concurring).

In *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), the Supreme Court ruled that the rights of the government to recover the costs of hospitalization stemming from the injury of an army soldier by defendant's negligent truck driver was governed by federal, not state, law. The *Standard Oil* Court stressed uniformity of national policy as key in its decision to govern this action by federal law.

Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances . . . should vary in accordance with the different rulings of the several states, simply because the soldier marches . . . across state lines.

*Id.* at 310.

9. 406 U.S. 91 (1972). Because of the federal interests involved in maintaining clean water and the lack of an adequate remedy under existing statutes, the Court recognized the ap-
law to disputes involving pollution of interstate and navigable waterways. In the same year *Milwaukee I* was decided, however, Congress passed the Federal Water Pollution Control Act Amendments of 1972 (1972 Amendments),¹⁰—a comprehensive scheme of legislation aimed at controlling and eventually eliminating pollution discharges into navigable waterways.

In *City of Milwaukee v. Illinois*¹¹ (*Milwaukee II*), the Supreme Court ruled that federal common law was preempted by the congressional enactment of the 1972 Amendments.¹² The comprehensive remedies available under the 1972 Amendments and the lack of express preservation of federal common law convinced the Court that Congress intended to strip away the federal courts' common law powers. The *Milwaukee II* Court held that federal courts were prohibited from imposing stricter water pollution standards than those prescribed by Congress.¹³ As a result, *Milwaukee II* has effectively precluded federal courts from establishing any judicial standards to combat the pollution of interstate and navigable waterways.

There are several objections to *Milwaukee II*’s restriction on the ability of federal courts to apply federal common law. An examination of the language of the 1972 Amendments and its corresponding congressional records reveals that there is relatively little support for the Court’s conclusion that Congress intended to preempt federal common law. The inability of federal courts to apply common law remedies in the area of federal control of water pollution will undermine the effectiveness of judicial enforcement of the laws. On a broader scale, the *Milwaukee II* decision could have a major impact on the ability of federal courts to fashion federal common law in other environmental areas where Congress has provided a statutory scheme of regulation. Finally, the abrogation of federal common law evidenced by *Milwaukee II* could shift judicial power from federal to state courts. This may result in the erosion of the uniform national approach Congress strived for in solving the nation’s water pollution problems.

**BACKGROUND**

The United States Supreme Court has recognized a state’s inherent right and responsibility to protect its citizens from harmful pollution that crosses

---


¹² Id. at 314-15.

¹³ Id.
into its boundaries.\(^\text{14}\) When noxious gases produced by a Tennessee corporation drifted over into Georgia, the Court found ample grounds to grant an injunction against the corporation.\(^\text{15}\) In 1971, a federal court followed the Supreme Court’s approach and recognized Texas’ right to enjoin New Mexico citizens from spraying pesticides which ultimately polluted its water supply.\(^\text{16}\) Until 1972, however, the Supreme Court failed to expressly define a federal common law remedy in pollution cases.

**Federal Common Law in Interstate Water Pollution Disputes**

The silence was broken when the Supreme Court decided *Milwaukee I*.\(^\text{17}\) In that case, Illinois sought original jurisdiction in the Supreme Court to prevent Milwaukee from creating a health hazard through its daily discharge of approximately 200 million gallons of sewage into Lake Michigan.\(^\text{18}\) Although the Court declined to exercise original jurisdiction,\(^\text{19}\) it unanimously extended federal common law authority to resolve water pollution disputes involving interstate and navigable waters.\(^\text{20}\)

---

14. See, e.g., *Missouri v. Illinois*, 180 U.S. 208 (1901). *Missouri* was one of the first cases in which the Supreme Court recognized a state’s duty to protect its citizens from a foreign state’s pollution. The State of Missouri had complained that the new sanitary canal built by Illinois to divert all of its sewage away from Chicago posed a severe health threat to its citizens. In holding that Missouri was a proper party to file suit, the Court remarked: "It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But . . . if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." *Id.* at 241.

15. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). The gases were causing the total destruction of Georgia’s forests and cropland over a five county region. The Court described the inherent right of one state to have its neighboring state’s pollution abated as "a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted. . . ." *Id.* at 238.

16. *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971). *Pankey* was the first pollution case that expressly applied a federal common law remedy. The *Pankey* court relied on *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), as support for its application of federal common law. For an analysis of the *Pankey* decision see *Interstate Pollution*, supra note 9, at 1440-51.


18. *Id.* at 93. Illinois alleged that Milwaukee’s daily discharge into Lake Michigan severely endangered the health and safety of its citizens. *Id.*

19. *Id.* at 93-98. The *Milwaukee I* Court held that it had original, but not exclusive, jurisdiction over the matter. The City of Milwaukee, the Court ruled, was merely a political subdivision and therefore not a "State" within the purview of 28 U.S.C. § 1251(a) (1976). Section 1251(a) provided that "[[i]he Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States." *Id.* For articles focusing on the jurisdictional aspects of *Milwaukee I*, see Comment, *Public Nuisance Suits Concerning Interstate Water Pollution—Illinois v. City of Milwaukee*, 49 DEN. L.J. 609 (1973); Note, *Cause of Action Under Federal Common Law for Pollution of Interstate Waters, Illinois v. City of Milwaukee*, 77 DICK. L. REV. 451 (1973); Note, *Federal Common Law in Interstate Water Pollution Disputes*, 1973 U. ILL. L.F. 141.

20. 406 U.S. at 101-08. *Milwaukee I* provided environmentalists with a more effective means to combat pollution problems. Water pollution legislation, prior to the 1972 Amendments, was regarded as ineffective and generally lacking strong enforcement mechanisms to
The *Milwaukee I* Court's justification for applying federal common law was founded upon congressional demonstration of a strong national interest in preserving the nation's waterways. The Court observed that federal agencies were subject to the command of the National Environmental Policy Act of 1969 which required each agency to promulgate environmentally sound procedures in all their programs. More recently, the Federal Water Pollution Control Act (FWPCA) clearly mandated that it was federal, not state, law that ultimately determined water quality standards for each state. The Court's conclusion that there was a strong federal interest in the purity of interstate waters was well supported by prior congressional activity in the area of environmental legislation. Writing for the *Milwaukee I* Court, Justice Douglas stated that "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." Federal common law, as pronounced in *Milwaukee I*, ostensibly became the vehicle for providing states with an effective remedy in interstate water pollution disputes.

This broad decision granting federal common law remedies was not, however, without its limitations. The *Milwaukee I* Court declared that federal common law would exist so long as Congress did not preempt it with new legislation. In a seemingly innocuous statement, Justice Douglas asserted: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law nuisance." Thus, the ability of federal courts to fashion federal common law remedies ultimately hinged on whether Congress passed legislation that would preempt it. The *Milwaukee I* Court, however, failed to characterize what constituted preemptive legislation.

---

21. 406 U.S. at 101-03.
22. 42 U.S.C. §§ 4321-4361 (1976). Congress was committed to cleaning up the nation's pollution and declared that "it is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans, functions, programs and resources to . . . assure for all Americans safe [and] healthful . . . surroundings." *Id.* § 4331(b), (b)(1).
24. If a state either delayed implementation of pollution standards or adopted standards that were inconsistent with the policy objectives of the FWPCA, standards would be imposed by the federal government. 33 U.S.C. §§ 1151 (1)(a)(b), (10)(c)(1)(-3) (1970) (amended 1972).
26. 406 U.S. at 105 n.6. See note 8 *supra*.
27. 406 U.S. at 107.
The Federal Water Pollution Control Act
Amendments of 1972

The Milwaukee I Court did not view the FWPCA as a bar to the application of federal common law. Although the Court failed to give a thorough explanation for its conclusion that the FWPCA was not a barrier, this decision was probably based on the severe inadequacies that existed in the FWPCA's enforcement mechanisms. The major criticisms of the FWPCA were that its enforcement procedures were complex and time-consuming, and that the water quality method of measuring pollution was too cumbersome and inaccurate. Given such an inefficiency-plagued enforcement program, Congress had ample justification for concluding that "the national effort to abate and control water pollution ha[d] been inadequate in every vital aspect. . . ."

In response to these deficiencies, Congress, only five months after the

28. It is surmised that when legislative protections in an area of national concern, such as interstate pollution are inadequate, the judiciary feels more compelled to intervene. See notes 14-16 and accompanying text supra.

29. The Milwaukee I Court summarily commented that the FWPCA used "long-drawn-out" procedures. 406 U.S. at 107. See notes 30-32 and accompanying text infra.

30. For instance, the FWPCA required that a governor or a state water pollution control agency initiate the procedure of abating water pollution by requesting the Secretary of the Interior to call a conference of all parties involved. No timetables were established for this procedure. 33 U.S.C. § 1160(d)(1) (1970) (amended 1972). If the Secretary did not believe that proper measures were being taken, he would "recommend" that the state water pollution control agency take legal action. The Secretary was then required to wait at least 180 days to see if the affected state was seeking adequate remedies. Id. § 1160(e). When these procedures failed, a hearing was held, and if the board found evidence indicating that pollution was affecting the health and safety of citizens, the Secretary prepared a report for distribution to all interested parties. Id. § 1160(f)(1). Finally, if these efforts did not elicit a response, only then was the Attorney General authorized to file suit. Id. § 1160(g)(1). Given the bureaucracy involved, it is not surprising that "[o]nly 53 enforcement conferences were called between 1956 and 1971; of these, four reached the hearing phase and only one suit finally went to court." H. LIEBER, FEDERALISM AND CLEAN WATERS 20 (1975) (emphasis added) [hereinafter cited as LIEBER].

31. The FWPCA used a "water quality" method of determining pollution levels. Under this formula, pollution was measured as a function of the amount of chemicals, sewage, etc., which a given body of water could tolerate, instead of the actual amount of pollution that was being discharged. 33 U.S.C. § 1160(c)(3), (c)(5) (1970) (amended 1972). The inappropriateness of this methodology is readily apparent given that each body of water possesses different "pollution-holding" capabilities. The Supreme Court has criticized the water quality method because it focuses on tolerable effects rather than preventable causes of water pollution. See Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200 (1976). In the Court's view "[t]he problems stemmed from the character of the standards themselves, which focused on the tolerable effects rather than the preventable causes of the water pollution. . . ." Id. at 202. See also LIEBER, supra note 30, at 21-23.

32. S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), reprinted in Senate Comm. on Pub. Works, 93rd Cong., 1st Sess., 2 A Legislative History of the Water Pollution Control Act Amendments of 1972 1425 (Comm. Print 1973) [reprinted material hereinafter cited as Leg. Hist. of 1972]. The Senate committee found that "[m]any of the Nation's navigable waters [were] severely polluted, and major waterways near the industrial and urban areas [were] unfit for most purposes." 2 Leg. Hist. of 1972, supra, at 1425.
Milwaukee I decision, enacted the 1972 Amendments\textsuperscript{33} to strengthen the FWPCA's enforcement procedures. Congress established a tough goal—the elimination of all pollution discharges by 1985.\textsuperscript{14} In order to meet this objective, Congress focused on streamlining the enforcement procedures. First, the 1972 Amendments replaced the vague water quality method of measuring pollution with affirmative effluent discharge standards.\textsuperscript{33} Second, the new legislation created the National Pollutant Discharge Elimination System (NPDES) to enforce compliance with effluent limitations.\textsuperscript{36} Under NPDES, effluent permits are granted by the Environmental Protection Agency (EPA)\textsuperscript{37} or an EPA-sanctioned state agency to dischargers of pollutants.\textsuperscript{38} The discharge permits specify exact effluent limitations with which dischargers are required to comply,\textsuperscript{19} and any deviation is considered unlawful.\textsuperscript{40} Unlike the FWPCA,\textsuperscript{41} the 1972 Amendments set specific deadlines for meeting effluent standards.\textsuperscript{42} The 1972 Amendments also en-

33. See note 10 and accompanying text supra.

34. The objectives of the 1972 Amendments were, in pertinent part:
   (a) [T]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that . . .
      (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
      (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983. . . .

35. Effluent discharge standards are measured at the "point source" or the actual place from which the polluter allows his discharges to flow. The 1972 Amendments defined point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch [or] channel . . . from which pollutants are or may be discharged." Id. § 1362(14). In addition, "effluent limitation" is defined as "any restriction established by a State or Administrator on quantities . . . and concentrations of chemical[s] . . . which are discharged from point sources into navigable waters. . . ." Id. § 1362(11).

36. Id. § 1342. In addition to establishing a permit granting system, the NPDES section expressly supplanted any remedies previously existing under the Rivers and Harbors Act of 1899. Id. § 1342(a)(5).

37. Id. §§ 1251(d), 1342(a)(1).
38. Id. § 1342(a)(5).
39. Id. § 1342(a)(2).
40. Id. § 1311(a). The Administrator could seek civil as well as criminal penalties for a permit violation. Initially, the Administrator is required to give thirty days notification to the polluting state, and if no action has been taken to eliminate the pollution, the Administrator has the authority to commence a civil suit. Id. § 1319(a)(1), (b). If the frequency of violations persists, the Administrator can seek a one to two year prison sentence for polluters. Id. § 1319(c)(1)(2).

41. See note 30 supra.

42. Effluent or discharge limitation standards for private industry point sources were required to meet the "best practicable control technology" by July 1, 1977. 33 U.S.C. § 1311(b)(1)(A) (1976) (emphasis added). The second deadline required that by July 1, 1983 the "best available technology" be used to determine effluent standards. Id. § 1311(b)(2)(A) (emphasis added). Publicly owned water treatment plants were held to a less strict schedule requiring only that the "best practicable waste treatment technology" be met by July 1, 1983. Id. §§ 1281(g)(2)(A), 1311(b)(2)(B). Nowhere in the statute are the terms "best practicable" or
courage citizen suits and expressly provide that any person adversely affected by the pollution could initiate a civil action to force compliance.43

Despite the comprehensiveness of the 1972 legislation, Congress amended it further by passing the Clean Water Act of 1977.44 In an effort to fine-tune the 1972 Amendments, Congress revised, among other provisions,45 the sections pertaining to the issuance of permits under NPDES,46 extensions of compliance dates,47 and allocations of new funds to assess current municipal problems in wastewater treatment.48

In determining whether the 1972 Amendments were intended to have a preemptive effect on federal common law, it is important to note that Congress, in both the 1972 Amendments and the Clean Water Act of 1977, failed to expressly abolish federal common law. Nowhere did Congress indicate that either piece of legislation was to take precedence over federal common law.49

Supreme Court decisions after Milwaukee I were not dispositive on the preemptory effect of the 1972 Amendments on federal common law. In-
stead, most of the Court's decisions focused on the basic provisions of the 1972 Amendments. The Supreme Court did, however, provide insight into the judicial climate at the time of Milwaukee II when it decided a number of cases in an area closely related to the application of federal common law—implied private rights of action under statutory schemes.

50. See, e.g., Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200 (1976) (construing § 313—federal installations discharging pollutant not required to obtain permit); Train v. City of New York, 420 U.S. 35 (1975) (§§ 205 and 207 do not permit Administrator to allot states less than the authorized federal financial assistance).

Lower federal courts have generally held that federal common law is not displaced by the 1972 Amendments, but rather it supplements available statutory remedies. In Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979), the Seventh Circuit concluded that the 1972 Amendments did not preempt application of federal common law. On the contrary, the court found that Congress expressly sought to preserve this remedy in § 505(e)—the "savings clause". Id. at 164. See notes 115 & 119 infra. The district court had reached the identical conclusion in an earlier stage of the case when it ruled against a motion made by Milwaukee to dismiss the action. Illinois v. City of Milwaukee, 366 F. Supp. 298 (N.D. Ill. 1973). The district court found no congressional intent to make the 1972 Amendments the exclusive source of remedies. Its purpose, the court concluded, was to "supplement" and "amplify" available remedies. Id. at 301. See note 75 infra.

Two recent cases decided by the Seventh Circuit reinforce the notion that the 1972 Amendments supplement, rather than preempt federal common law. In Illinois v. Outboard Marine Corp., 619 F.2d 623, 626-28 (7th Cir. 1980), a federal common law remedy was granted to alleviate intrastate pollution which eventually would have caused the pollution of interstate waters. Similarly, in City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980), the plaintiff's failure to provide statutory notice was no bar from obtaining federal common law relief under the "savings clause".

For other decisions upholding the non-preemptive effect of the 1972 Amendments, see National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1980) (statutory and federal common law relief granted to fishermen in order to compel local, state, and federal environmental authorities to comply with statutory duties), rev'd sub nom. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1214-16 (D.N.J. 1978) (statutory relief was not exclusive but merely co-existent with a federal common law remedy); United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110 (D.Vt. 1973), cert. denied, 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1973) (absent any indication from Congress to limit the available remedies, equitable relief arising from federal common law is not precluded by the 1972 Amendments); United States ex rel. Scott v. United States Steel Corp., 356 F. Supp. 536 (N.D. Ill. 1973) (defendant's argument that the 1972 Amendments had "completely occupied" the area of water pollution struck down because there was no evidence of congressional intent to supplant federal common law). See also Committee for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1010-16 (4th Cir. 1976) (Butzner, J., dissenting) (federal common law not supplanted by the 1972 Amendments because Congress intended to preserve this remedy).

Only one court has prohibited the application of federal common law. See Committee for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1009 (4th Cir. 1976) (compliance with the NPDES permit system precludes any application of federal common law since "it would be an anomaly to hold that there was a body of federal common law which prescribes conduct which the 1972 Act of Congress legitimates"). See also Massachusetts v. United States Veterans Admin., 541 F.2d 119 (1st Cir. 1976) (court implied, but did not ultimately rule, that the 1972 Amendments could have a preemptory effect).
The adjudication of cases involving implied private rights of action raises issues and considerations similar to those involved in cases of federal common law. In implying a private right of action from a regulatory statute, a court grants a remedy for the plaintiff without explicit congressional authorization. A court must find that Congress intended the benefits of a particular statute to include a right for a private individual to bring a cause of action. By inferring such a right, a court fills in the "gaps" left by Congress, and in effect, performs a common law function. Like the plaintiff who seeks an implied right of action, the plaintiff who requests a federal common law remedy is asking the court to imply a cause of action based upon the unexpressed intentions of Congress. The Milwaukee I Court, for example, implied a federal common law remedy based upon congressional attempts to abate pollution through federal legislation. The touchstone in either instance is the court's statutory construction and analysis of congressional intent. In recent years, the Supreme Court, on a number of occasions, has confronted the issue of implied private rights of action under statutory schemes. With only one exception, the Court has rejected every attempt to establish such a right.

In 1975, the Supreme Court in Cort v. Ash, formulated a four-part test to determine when a private right of action was to be implied from a statute. Under the Cort test, a plaintiff must prove: (1) the statute was enacted for the benefit of a class of persons to which he belongs; (2) it was the intent of Congress to create the remedy; (3) the remedy was con-

---

51. The Petitioners in Milwaukee II recognized the similarity of issues raised in finding an implied private right of action and the application of federal common law. "Whether the authority of the 'private litigant' to pursue the second action is implied from the provisions of FWPCA [the 1972 Amendments] or is based upon federal common law, the problem is the same." Brief for Petitioners in Reply to Briefs Amici Curiae of the United States, State of New York and New England Legal Foundation at 9, City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

52. See notes 21-26 and accompanying text supra.

53. See notes 57 & 64 infra.


56. Id. at 78. This first requirement was based upon dictum set forth in Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916). The Court in Rigsby stated:

A disregard of the command of the statute is a wrongful act, and where it results
in damage to one of the class for whose especial benefit the statute was enacted,
the right to recover the damages from the party in default is implied, according to
the doctrine of . . . common law.

Id. at 39. The single factor test enunciated by the Rigsby Court was used by the federal courts until Cort v. Ash, 422 U.S. 66 (1975).

57. 422 U.S. at 78. Legislative intent has been recognized as the principle factor in implying a private right of action. Justice Rehnquist recently summed up the essence of the Cort formula:
sistent with the objectives of the statute; and (4) the cause of action was brought most appropriately in federal court. Based upon these four factors, the Cort majority refused to grant a corporate stockholder an implied private right of action against the company's directors for making campaign contributions even though there was a criminal statute prohibiting such contributions.

Although the Supreme Court in Cannon v. University of Chicago found that a medical school applicant who alleged discrimination had an implied private right of action under Title IX, that was the last case to imply such a right. In Touche Ross & Co. v. Redington, the Court denied an implied private right of action to a securities insurance firm under the Securities Exchange Act. The Court took a modified approach to the Cort four-part test and focused its inquiry on whether there was congressional intent to confer a private right of action. The Touche Ross Court found nothing in the Securities Exchange Act or in the legislative history that suggested that

---

[T]he so-called Cort factors are merely guides in the central task of ascertaining legislative intent . . . that they are not of equal weight . . . and that in deciding an implied-right-of-action case courts need not mechanically trudge through all four of the factors when the dispositive question of legislative intent has been resolved.


58. 422 U.S. at 78.
59. Id.
60. Id. at 78-85.
61. 441 U.S. 677 (1979). In finding an implied private right of action, the Cannon Court analogized the private action provisions of Title IX to those specified in Title VII and concluded that it was the intent of Congress to confer such a right. Id. at 689-709. For a thorough discussion of Cannon, see Note, Title IX: No Longer An Empty Promise—Cannon v. University of Chicago, 29 DePaul L. Rev. 263 (1979).
63. The petitioner, an accounting firm, allegedly reported inaccurate financial statements of a securities brokerage firm whom the respondent had insured. The brokerage firm became insolvent and the respondent brought an implied action to recoup its losses. Id. at 563-66.
64. Id. at 568. Justice Rehnquist, writing for the majority, referred to the Cort factors and stated:

It is true that in Cort v. Ash, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in Cort—the language and focus of the statute, its legislative history, and its purpose . . . are ones traditionally relied upon in determining legislative intent.

Id. at 575-76 (citation omitted). See note 57 supra.
65. 442 U.S. at 570. The Touche Ross Court held that the Securities Exchange Act did not provide for recoupment of losses incurred as a result of incomplete financial statements. In reaching this conclusion, the Touche Ross Court reasoned that the Securities Exchange Act did not benefit any specific class of persons because the statute's purpose was to "forestill insolvency" by requiring complete access to financial records, and therefore, the statute did not regard any conduct as unlawful. Id. at 570-71.
Congress intended to confer a private right of action.\textsuperscript{66} Thus, the Court refused to allow the insurance company to maintain an action.\textsuperscript{67} Following \textit{Touche Ross}, the Supreme Court denied requests for an implied private right of action under at least four other statutes.\textsuperscript{68} Based on \textit{Touche Ross} and subsequent cases, it appears that absent any indicia of congressional intent, the Supreme Court is reluctant to fill in the "gaps" and find an implied private right of action. This reluctance has been translated into a refusal by the Supreme Court to expand the federal common law doctrine.

The similarity between federal common law and implied private rights of action was recently recognized by the Court in \textit{Northwest Airlines, Inc. v. Transport Workers Union}.\textsuperscript{69} Justice Stevens, writing for the majority, refused to grant the airline an implied private right of action under either the Equal Pay Act or Title VII.\textsuperscript{70} The Court also denied a request for a federal common law remedy of contribution.\textsuperscript{71} The \textit{Northwest Airlines} Court reasoned that once Congress enters a field and regulates it through comprehensive legislation, there is no longer a need for federal courts to imply any addi-

\begin{itemize}
\item \textsuperscript{66} \textit{Id.} at 571.
\item \textsuperscript{67} \textit{Id.} The \textit{Touche Ross} decision exposes the inconsistency of applying the four-part \textit{Cort} test to older statutes. Prior to \textit{Cort}, implied private rights of action were governed by the simple \textit{Rigsby} rule which provided that rights flowed to an injured individual if the statute was enacted for the benefit of a class of persons to which that person belonged. \textit{See} note \textsuperscript{56} \textit{supra}. It is unlikely that earlier Congresses expressed every remedy in detail because, under the \textit{Rigsby} rule, remedies were implied. Thus, under the four-part \textit{Cort} test, demonstrating the congressional intent behind statutes enacted prior to the \textit{Cort} decision would be nearly impossible. Accordingly, there will undoubtedly be fewer findings of implied private rights of action under the \textit{Cort} test because of the Court's reluctance to declare affirmative rights based upon congressional silence. Under the \textit{Touche Ross} rationale, "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." 442 U.S. at 571. The upshot of the \textit{Touche Ross} decision is that the Court will use its discretion to find or deny an implied right of action based on its own statutory interpretation. \textit{See} \textit{Cort} v. \textit{Ash}, 422 U.S. 66, 82 (1975) ("it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such a cause of action would be controlling") (emphasis in original). \textit{See also} \textit{Cannon v. University of Chicago}, 441 U.S. 677, 694-703 (1979).
\item \textsuperscript{68} \textit{See}, e.g., \textit{Northwest Airlines, Inc. v. Transport Workers Union}, 451 U.S. 77 (1981) (no implied private right of action found because of Title VII's and Equal Pay Act's comprehensive scope); \textit{California v. Sierra Club}, 451 U.S. 287 (1981) (Rivers and Harbors Act of 1899 was intended to benefit the public at large and thus no implied private right of action found for any one class of persons); \textit{Universities Research Ass'n v. Coutu}, 450 U.S. 754 (1981) (no implied private right of action found under the Davis-Bacon Act because Congress had not sought to protect the class of persons to which the employee belonged); \textit{Transamerica Mortgage Advisors, Inc. v. Lewis}, 444 U.S. 11 (1979) (because Congress expressly provided remedies in other portions of the Investment Advisers Act of 1940, the omission of other remedies was evidence that Congress never intended to confer implied private actions).
\item \textsuperscript{69} 451 U.S. 77 (1981).
\item \textsuperscript{70} \textit{Id.} at 91-95. In \textit{Northwest Airlines}, the petitioner airline brought suit to enforce its right to contribution from respondent unions stemming from an Equal Pay Act and Title VII class action suit that resulted in a judgment against the airline of over $20,000,000 in backpay, damages, and interest. \textit{Id.} at 81-82.
\item \textsuperscript{71} \textit{Id.} at 95-99.
\end{itemize}
tional rights or federal common law remedies. In regard to preemption, Justice Stevens remarked: "[O]nce Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." It appears that Northwest Airlines goes beyond a mere refusal to create federal common law remedies. In fact, the case indicates that in areas where federal common law has already been established, such as interstate water pollution, congressional enactment of legislation would automatically have it displaced.

THE MILWAUKEE II DECISION

Facts and Procedural History

One month after the Milwaukee I decision, Illinois filed suit in the Federal District Court for the Northern District of Illinois to abate the polluting of Lake Michigan allegedly caused by Milwaukee's discharge of sewage. Milwaukee moved to dismiss the complaint on the ground that the enactment of the 1972 Amendments preempted Illinois' right to seek relief under federal common law. The district court denied Milwaukee's motion and held that the 1972 Amendments did not supplant, but rather supplemented the federal common law remedy. After five years of discovery

72. *Id.* at 97. In denying both an implied private right of action and a federal common law remedy, Justice Stevens stated:

In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. . . . The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.

*Id.* (citations omitted). See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) ("[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted").


74. The entire complaint can be found in Joint Appendix, City of Milwaukee v. Illinois, 451 U.S. 304 (1981) [hereinafter cited as Joint App.]. The complaint set forth three counts. Count I alleged that the viruses and bacteria flowing from Milwaukee's sewage discharge would cause disease to Illinois citizens thereby violating the federal common law of nuisance. Joint App., *supra*, at 24-29. Count II alleged that pathogens, or disease carrying organisms, violated the Illinois Environmental Protection Act, ILL. REV. STAT. ch. 111 1/2, §§ 1003(n), 1012(a) (1971). The Illinois statute made unlawful any alteration of the chemical or biological waters of the State that would, or would likely, cause a nuisance or pose a threat to its citizens. Joint App., *supra*, at 29-31. Count III alleged that the discharge of inadequately treated sewage constituted a violation of the Illinois common law of nuisance. *Id.* at 31-32.

75. Illinois v. City of Milwaukee, 366 F. Supp. 298, 300 (N.D. Ill. 1973). The district court found that the 1972 Amendments "in no way intended to destroy any remedies available to the
DEPAUL LAW REVIEW

and months of trial, the district court entered a final judgment for Illinois on all counts.\textsuperscript{76}

The federal common law remedy granted by the district court set standards that were stricter than those imposed by NPDES under the 1972 Amendments. The court ordered Milwaukee to construct enough storm sewers to totally eliminate all wet-weather sewage overflows by the year 1986.\textsuperscript{77} Under NPDES, Milwaukee was required to take only "corrective measures" against wet-weather overflows.\textsuperscript{78} The second major requirement imposed upon Milwaukee was the setting of effluent limitations that were more stringent than those established under NPDES.\textsuperscript{79}

The Court of Appeals for the Seventh Circuit affirmed\textsuperscript{80} the district court's conclusion that the "obvious dangers" created by the discharges of
untreated sewage necessitated the elimination of all wet-weather discharges.\textsuperscript{81} The court concluded that when a real threat could not be avoided through the normal channels of statutory enforcement procedures, dischargers of pollutants could be held to a higher, federal common law standard.\textsuperscript{82} The court, however, reversed the ruling on the effluent discharge limitations because there was no evidence that more stringent effluent limitations would reduce the real or potential health threat to Illinois citizens.\textsuperscript{83}

\textit{The Milwaukee II Rationale}

The Supreme Court in \textit{Milwaukee II}\textsuperscript{84} reversed the lower court decision and held that the enactment of the 1972 Amendments supplanted federal common law.\textsuperscript{85} Federal common law, the Court noted, exists in only a limited number of areas,\textsuperscript{86} and when Congress passes legislation that addresses an area previously covered by federal common law, the need for the common law remedy ceases.\textsuperscript{87} The \textit{Milwaukee II} Court reemphasized that federal common law would apply "'[u]ntil the field has been made the subject of comprehensive legislation.'"\textsuperscript{88}

The Court viewed the 1972 Amendments as evidence of congressional intent to provide an "all-encompassing program" designed to clean up the nation's waterways.\textsuperscript{89} Numerous congressmen, the Court observed, regarded the 1972 Amendments as the most complete legislation ever devised to combat environmental problems.\textsuperscript{90} The \textit{Milwaukee II} Court concluded that because Congress had provided a comprehensive scheme of statutory

\textsuperscript{81.} Id. at 170-73.  
\textsuperscript{82.} Id. at 165. See note 115 and accompanying text infra.  
\textsuperscript{83.} 599 F.2d at 173-77.  
\textsuperscript{85.} Id. at 317. It is important to note that the Court did not render a decision on either state count II or III. See note 74 supra. The \textit{Milwaukee II} Court pointed out that "although respondent Illinois argues this point in its brief [that state law applies], the issue before us is simply whether federal legislation has supplanted federal common law." 451 U.S. at 310 n.4.  
\textsuperscript{86.} 451 U.S. at 312-14. From the outset, the \textit{Milwaukee II} Court made it clear that federal courts were courts of limited rule-making authority and were not empowered to develop their own rules of decision. The Court relied on \textit{Wheeldin v. Wheeler}, 373 U.S. 647 (1963), for the proposition that prior use of federal common law was the exception, not the rule.  
\textsuperscript{87.} 451 U.S. at 314.  
\textsuperscript{88.} Id. (quoting Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971)). The Court restated its earlier \textit{Milwaukee I} dictum: "'It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law nuisance.'" 451 U.S. at 310 (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972)).  
\textsuperscript{89.} 451 U.S. at 318.  
\textsuperscript{90.} Id. at 318 n.12. See 2 LEG. HIST. OF 1972, supra note 32, at 1269 (Sen. Randolph) ("It is perhaps the most comprehensive legislation . . . ever developed in this particular field of the environment"); id. at 1408 (Sen. Hart) ("This is indeed a comprehensive bill and a giant forward step"); 1 LEG. HIST. OF 1972, supra note 32, at 369 (Rep. Mizell) ("[T]he most comprehensive and far-reaching water pollution bill . . . ever drafted"); id. at 343 (Rep. Young) ("[V]ery comprehensive and complex bill").
remedies, federal courts cannot expand upon those remedies by supplementing them with federal common law.91

After applying the 1972 Amendments' enforcement provisions to Milwaukee II's factual situation, the Court was convinced that Congress had dealt comprehensively with the problems of effluent limitations and sewage overflow discharges. Milwaukee had been granted discharge permits by the Wisconsin Department of Natural Resources pursuant to NPDES, and effluent limitations were set at the prescribed amounts established by the EPA.92 Because effluent limitations were thoroughly addressed by the 1972 Amendments, the Court concluded that federal courts are prohibited from applying stricter federal common law standards for effluent limitations.93

The Milwaukee II Court also regarded the statutory enforcement procedures controlling sewage overflows as equally comprehensive. Overflows are "point sources" according to the 1972 Amendments,94 and therefore are subject to the same permit issuance scheme as effluent limitations. Milwaukee's discharge permits required "elimination or control of all discharge overflow and/or bypass points" in its system.95 In order to ensure compliance, the permits included extensive details regarding actual point sources, reporting procedures, and monitoring programs.96 Based on these facts, the Milwaukee II Court regarded the enforcement scheme developed by Congress complete in every aspect and stated: "There is no 'interstice' here to be filled by federal common law: overflows are covered by the Act and have been addressed by the regulatory regime established by the Act."97

The Court did not agree with Illinois' argument that sections 510 and 505(e) of the 1972 Amendments specifically preserve the federal common law remedy. Although section 510 expressly authorizes the states to adopt standards that are more stringent than statutory prescriptions,98 the Court

91. 451 U.S. at 319.
92. State agencies, such as the DNR, promulgate effluent limitations according to the EPA's guidelines, EPA Secondary Treatment Information, 40 C.F.R. § 133.102 (a), (b) (1980), and the Court regarded the permits issued to Milwaukee to be in compliance with EPA standards. 451 U.S. at 319-20.
93. 451 U.S. at 320. The Milwaukee II Court stated: "Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." Id.
94. See note 35 supra.
95. See Joint App., supra note 74, at 378-79, 416, 443.
96. Id. at 375, 412. The Court gave further evidence that statutory enforcement procedures were more than adequate when it recognized the efficacy of the state court action which resulted in a judgment order forcing Milwaukee to comply with its permits. 451 U.S. at 322. See note 78 supra.
97. 451 U.S. at 323. The fact that Illinois was not satisfied with the permits established by the state enforcement agency (DNR) did not, the Court noted, justify invoking federal common law. Id. at 324 n.18.
98. Section 510 provides, in pertinent part:

[N]othing in this Act shall (1) preclude or deny the right of any State . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or
interpreted this section to mean that states are given the freedom to legislate stricter standards only in regard to intrastate polluters. The Court reasoned that because section 510 affects only intrastate conflicts, the argument advanced by Illinois was invalid as applied to interstate disputes.

Section 505(e), the "savings clause", provides that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard . . . or . . . any other relief. . . ." The Court ruled that the savings clause, like section 510, did not preserve the federal common law remedy throughout the 1972 Amendment because that provision only retained a federal common law remedy for actions brought under the citizen suit section. Because the savings clause in the citizen suit section is the only provision in the 1972 Amendments that expressly retains the remedy, the Court reasoned that there was a presumption against preserving federal common law in all other sections. Furthermore, the Court declared that even if the savings clause could be interpreted to apply throughout the 1972 Amendments, congressional reference to "common-law" more than likely was intended to encompass state, rather than federal, common law. In arriving at the Milwaukee II decision, the Supreme Court gave Milwaukee its first victory in the ten-year long legal battle, and remanded the case for further adjudication.

(B) any requirement respecting control or abatement of pollution; except that . . . such [a] State . . . may not adopt or enforce any effluent limitation . . . which is less stringent than the effluent limitation . . . under this Act. . . .

100. Id. at 328.
102. 451 U.S. at 328-29. The Court highlighted the fact that the savings clause was contained within the subdivision entitled "Citizen Suits".

103. Id. The Court did not enunciate its reasons for finding that state common law was controlling. This may have stemmed from the fact that the legislative activity for the 1972 Amendments occurred prior to Milwaukee I and that the prevailing standard was state common law. See Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) (discussed in note 118 infra). See also Brief for Petitioners at 28 n.9, City of Milwaukee v. Illinois, 451 U.S. 304 (1981) [hereinafter cited as Brief for Pet.].

104. 451 U.S. at 332. Justice Blackmun's strong dissent criticized the majority's systematic displacement of federal common law. Justice Blackmun recognized the unique role federal common law played in complementing statutory policies and objectives, especially in the area of pollution control. Justice Blackmun argued that precluding Illinois from a federal common law remedy might be justified under circumstances where there was no actual injury and only the threat of harm prevailed. The Justice disagreed, however, with the majority's conclusion that federal courts "lacked authority" to impose stricter pollution standards—that authority was established by Milwaukee I. 451 U.S. at 350 (Blackmun, J., dissenting). Justice Blackmun further criticized the majority for failing to properly interpret the 1972 Amendment's savings clause and its legislative history. The majority's interpretation, Justice Blackmun commented, was "extremely strained" and did not further congressional intent. Id. at 341-42 (Blackmun, J., dissenting).

On remand to the Seventh Circuit, Illinois argued, in an unpublished statement, that Con-
ANALYSIS AND CRITICISM

Milwaukee II's restrictive holding raises questions about the accuracy of the Court's statutory construction and analysis of legislative history. Closer scrutiny of the statute and congressional reports does not support the conclusion that Congress intended to preempt federal common law. Furthermore, the Court's sweeping language suggests that, even in instances when Congress fails to address unforeseeable forms of pollution, federal courts will still be precluded from performing necessary interstitial functions to give effect to the pollution statute. Such a result seriously undermines the role of the judiciary to fulfill the spirit of the law.

Statutory Construction

The Milwaukee II Court took an extremely narrow view of the savings clause by holding that it applies only to citizen suits. It is a well-settled rule of statutory construction that the plain meaning of a statute's words should be followed unless literal construction would lead to an absurd result. The majority's interpretation of the savings clause violates the plain meaning rule because that section preserves supplemental remedies to persons other than individual citizens. The savings clause expressly declares that common law rights are preserved for those persons who bring suit. A "person", according to the 1972 Amendments, is defined as "an individual . . . State . . . or political subdivision of a State. . . ." Based upon the express inclusion of "State" within the definition of a "person", it is unlikely that the intent of the savings clause was to preserve federal common law remedies exclusively in citizen suits. Thus, under the plain meaning rule, the savings clause would seem to retain this remedy for actions brought by states.

The Court's denial of a federal common law remedy also contradicts the
principle that statutes are to be construed as non-preemptive of common law remedies unless Congress unequivocally mandates otherwise. The Supreme Court has previously stated that "[s]tatutes which invade the common law ... are to be read with a presumption favoring ... retention."\(^{109}\) In the present case, the federal common law of nuisance in interstate pollution disputes was unanimously established in Milwaukee I. Accordingly, a presumption exists in favor of preserving federal common law. Arguably, Congress could shift this presumption through express legislative mandate. The majority opinion, however, does not cite to any of the 1972 Amendments' provisions that suggest that this presumption of federal common law was to be overridden.\(^{110}\) In fact, Congress expressly set forth the remedies it wanted preempted,\(^{111}\) and those remedies did not include federal common law. Contrary to established common law and statutory principles, the Milwaukee II Court concluded that there was a presumption against preserving federal common law.

The statute's legislative history provides further support for the preservation of federal common law. In enacting the 1972 Amendments, Congress attempted to vest the power to set pollution standards in the federal government. Careful examination of the 1972 Amendments indicates that Congress did not want these standards developed solely through common law.\(^{112}\) According to a senate report, the standards used in citizen suits were to be similar to those employed in administrative proceedings.\(^{113}\) Congress recognized, however, that these standards might not be stringent enough to curtail pollution under all circumstances and that a common law remedy


In reference to federal statutory preemption of state law, the Supreme Court has stated: "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so." Schwartz v. Texas, 344 U.S. 199, 202-03 (1952). See New York State Dept. of Social Servs. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199 (1952)). See generally Hirsch, Toward a New View of Federal Preemption, 1972 U. ILL. L.F. 515; Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 COLUM. L. REV. 623 (1975).

\(^{110}\) Although there was no reference to federal common law in the statute's legislative history, Congress did remark on limiting common law relief under certain circumstances. See notes 112-16 and accompanying text infra.


\(^{112}\) Congress stated in the senate report that "Section 505 would not substitute a 'common law' or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological [sic] in other considerations at the enforcement stage." 2 LEG. HIST. OF 1972, supra note 32, at 1497.

\(^{113}\) Id. at 1498-99. The senate report stated: The standards for which enforcement would be sought either under ad-
might be appropriate. Congress expressed the view that "if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." Although compliance would normally constitute a valid defense, Congress realized that in cases where damages could be shown, a common law remedy would still exist. Based on this notion, it is reasonable to conclude that federal common law was not to be displaced by the 1972 Amendments, but rather it was to provide the necessary function of imposing stricter requirements in instances where remedies under the statute were found to be inadequate.

Administrative enforcement or through citizen enforcement procedures are the same. Therefore the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy.

... Authority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established administratively under the Act.

Id. The savings clause was also interpreted by the House of Representatives to mean that it "provides that the right of persons ... to seek enforcement or other relief under any statute or common law is not affected." H.R. REP. No. 911, 92d Cong., 2d Sess. 134 (1972), reprinted in 1 LEG. HIST. OF 1972, supra note 32, at 821.

114. 2 LEG. HIST. OF 1972, supra note 32, at 1499 (emphasis added). Milwaukee argued that under 33 U.S.C. § 1342(k) (1976), compliance with a permit was deemed compliance under § 505. Under Milwaukee's reasoning, a federal common law remedy was ultimately conditioned by the statutory limitation standards. See Brief for Pet., supra note 103, at 55-56. This analysis was only partially correct because it failed to take into account the fact that Congress provided for common law remedies to enforce stricter standards upon a showing of damages even when a discharger was in compliance with a permit.

115. The dissenting opinion in Milwaukee II agreed with the Seventh Circuit in its conclusion that stricter pollution standards were required. Justice Blackmun commented that congressional legislation did not mark the outer boundary of standards that could be applied. 451 U.S. at 348 (Blackmun, J., dissenting).

The Seventh Circuit recognized that there may be instances when sanctioned permit standards will not give an aggrieved party adequate protection:

[If] the evidence ... shows that requirements more stringent than those imposed in the NPDES permits are necessary to protect Illinois residents ... plaintiffs are entitled to have the more stringent requirements imposed. We can think of no other reason for Congress' preserving previously existing rights and remedies than to protect the interests of those who would be able to show that the requirements imposed pursuant to the federal statute are inadequate to protect their interests. When the complaining party is a neighboring state, the federal common law of nuisance provides a peculiarly appropriate remedy.

599 F.2d at 165.

116. This analysis was not employed by either Illinois or Milwaukee. Milwaukee argued for a strict holding that federal common law was preempted under all circumstances, while the suggested alternative analysis would allow for the application of federal common law upon a showing of damages. Illinois, on the other hand, most likely failed to proffer this interpretation because there was little, if any, evidence of actual damage. Counsel for Milwaukee remarked that a "fundamental, basic and controlling fact of this case is that no witness and no exhibit in the entire record found any virus or other pathogen from any source in any Illinois or Michigan waters." Brief for Pet., supra note 103, at 69. Note also that the Illinois complaint sought injunctive relief exclusively and did not claim any damages. See note 74 supra.
The majority’s conclusion that Congress preserved state common law instead of federal common law is difficult to justify, especially given the fact that Milwaukee I, which endorsed federal common law, was decided before the 1972 Amendments were passed. It is more likely that Congress, realizing that federal common law could remain an effective tool for controlling pollution, intended to preserve this remedy in order to further carry out the statute’s policies and objectives. The Milwaukee II Court was somewhat precipitous in assuming that the common law referred to in the statute was exclusively state common law.  

The Necessity of Federal Common Law

By preempting federal common law, the Milwaukee II Court stripped the federal courts of a primary function. Without the ability to fashion federal common law interstitially, federal courts may become ineffective in shaping adequate remedies for aggrieved parties. It is questionable why the Court proceeded to use overreaching language to preclude federal common law in all cases of water pollution.

The Court relied upon legislators’ remarks that the legislation was “comprehensive” and “far-reaching” in drawing the conclusion that federal

117. The Court cited Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976), as support for its conclusion that common law referred to state common law. 451 U.S. at 329. The court in Jones noted that “Congress recognized the continuing validity of state common law nuisance actions in subsection 1365 (e) of the Amendments.” 539 F2d at 1009 n.9. The Jones court distinguished Milwaukee I, however, in that the Jones controversy was strictly “local”, and thus lacked the federal, interstate interests enunciated in Milwaukee I. “Where the controversy is strictly local ... and where there is no allegation of interstate effect, we conclude there is no body of federal common law to which plaintiffs may resort. ...” Id. at 1010.

118. Milwaukee argued that Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), was controlling at the time Congress had substantially completed the drafting of the bill. Wyandotte mandated that it was state, not federal, common law that was applicable. See Brief for Pet., supra note 103, at 28 n.9. It should be noted, however, that prior to the enactment of the 1972 Amendments, Congress did review other major judicial decisions that impacted the bill. Thus, Congress had the opportunity to address the Milwaukee I decision, yet there was no mention in the legislative history of any negative effects stemming from Milwaukee I. See 1 LEG. HIST. OF 1972, supra note 32, at 179. See also Brief of Amicus Curiae, New England Legal Foundation at 17-18 n.12, City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

There is additional evidence that Congress intended to preserve federal common law. For example, even though Congress was well aware of the Illinois v. City of Milwaukee district court decision during the debates which preceded the adoption of the Clean Water Act of 1977, it did not attempt to disturb that ruling or its application. See Brief of Respondent at 42-45, City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

119. In his dissent, Justice Blackmun set forth legislative history that supported the conclusion that Congress was fully aware of federal common law during the passage of the 1972 Amendments. 451 U.S. at 343-44 (Blackmun, J., dissenting). The Seventh Circuit also refuted the state common law argument. “There is nothing in the phrase ‘any statute or common law’ that suggests that this provision is limited to state common law. There is no reason to believe that Congress would have wished to preserve state common law claims and preclude federal common law claims.” 599 F.2d at 163.
common law was preempted. These descriptive terms are problematic because even though a statute may be enacted with the intent that it will encompass all possible violations, it will inevitably be incomplete. Congress cannot possibly anticipate every conceivable factual pattern that could arise under a particular piece of legislation. There will always be gaps in legislation that will eventually result in inadequate remedies for aggrieved parties.

Illustrative of this problem is the recent decision of *Tennessee Valley Authority v. Hill* in which the Court was confronted with enforcing the Endangered Species Act. The Court noted that although the Endangered Species Acts of 1966 and 1969 had been previously considered replete in every aspect, Congress was forced to amend the statute due to its latent ineffectiveness. The *TVA* Court commented that "[d]espite the fact that the 1966 and 1969 legislation represented 'the most comprehensive of its type to be enacted . . .', Congress had to amend it further if its goals were to be realized." Thus, Congress saw a continuing need to "re-legislate" those portions of the Endangered Species Act that obviously lacked the comprehensiveness Congress originally had intended.

*TVA* exemplifies the proposition that every statute is enacted with inherent, inescapable deficiencies. The 1972 Amendments are no exception. Regardless of the import that the *Milwaukee II* opinion placed on the views of the numerous Congressmen who commented on the "comprehensiveness" of the 1972 Amendments, subsequent revisions clearly indicate that Congress did not consider it to be complete. For instance, the Clean Water Act of 1977 made revisions and improvements to nearly every section of the 1972 Amendments. Thus, the argument made by the *Milwaukee II* Court

120. See note 89 and accompanying text supra. The Court, in New York Dept. of Social Servs. v. Dublino, 413 U.S. 405 (1973), ruled that preemption of federal law over state law should not depend on the "comprehensiveness" of a particular statute. The *Dublino* Court rejected "the contention that pre-emption is to be inferred merely from the comprehensive character of the federal [statute]." *Id.* at 415.

121. As one commentator noted:

Although Congress has in rare instances delegated to the judiciary the authority to create a comprehensive body of decisional law in a particular area, the role of the courts is ordinarily interpretive and implemental. The exercise of this judicial competence is premised on the inevitable incompleteness of legislation. . . . In these cases it is the task of the judiciary to fill in the legislative lacunae in the manner most compatible with the statutory framework.


124. 437 U.S. at 174-75.

125. *Id.* at 176 (emphasis added). Note that the Endangered Species Act of 1973 did not profess any "newly declared national policy" per se, but rather only enforcement procedures were being strengthened. *Id.* at 174-75.

126. The Clean Water Act of 1977 amended over thirty-five sections with substantial
that the "comprehensiveness" of the 1972 Amendments justified the ousting of federal common law is undermined by the fact that Congress substantially rewrote the legislation only five years later.

Because of the inherent deficiencies in legislation, the primary function of federal common law has been to provide statutes with the necessary interstice to effectuate statutory goals and objectives. The Supreme Court once stated that "[t]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." It may well be that enforcement mechanisms in place today will be ill-equipped to deal with the nation's future pollution problems. Thus, the federal common law is necessary to remedy environmental problems that Congress was unable to foresee. In short, the power of the federal courts to fashion remedies not expressly prescribed within the 1972 Amendments, but contained within its main objectives, is crucial in giving effect to congressional goals and in strengthening the underpinnings of the statute.

**IMPLICATIONS OF MILWAUKEE II**

The danger of the Milwaukee II decision lies not only in the fact that federal common law has been preempted by the 1972 Amendments, but also that in the future the Court may draw perfunctory conclusions as to the preemptive effect of other "comprehensive" environmental laws. Based on a recent case, the abrogation of federal common law in all forms of environmental legislation appears almost inevitable.

The Milwaukee II rationale has already been applied to another en-rewrites in many of those sections. See 3 LEG. HIST. OF 1977, supra note 45, at 55-179. See notes 45-48 and accompanying text supra.

127. Professor Miskin, in his oft-quoted work on federal law stated that "[a]t the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation', rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted . . . by Congress." Miskin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules For Decision, 105 U. PA. L. REV. 797, 800 (1957).


129. Justice Jackson eloquently summed up the benefits of federal common law: "Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself." D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 470 (1942) (Jackson, J., concurring).

vironmental statute. In *Middlesex County Sewerage v. National Sea Clammers Association*, a decision handed down less than two months after *Milwaukee II*, the Supreme Court ruled that federal common law had been preempted by the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA). The *National Sea Clammers* Court gave little supporting evidence for its conclusion that Congress intended federal common law to be preempted. The Court merely noted that the MPRSA's citizen suit provision had its counterpart in the 1972 Amendments. Conspicuously missing from the *National Sea Clammers* Court's reasoning was an analysis of the differences between the MPRSA and the 1972 Amendments. For example, the MPRSA does not utilize the extensive NPDES program or its effluent standards, the very aspects of the 1972 Amendments which prompted the *Milwaukee II* Court to conclude that the legislation was comprehensive. Nonetheless, the Court concluded that MPRSA was as comprehensive in addressing the problems of ocean dumping as the 1972 Amendments were in regulating pollution of navigable waterways.

The implications of the *National Sea Clammers* decision are most severe when one analyzes the process used by the Court in reaching its conclusion of preemption. The *National Sea Clammers* Court did not use the kind of in-depth analysis given to the 1972 Amendments in *Milwaukee II*. Instead,

131. 453 U.S. 1 (1981). Plaintiffs were fishermen who brought an action against officials from the states of New York and New Jersey to enjoin the dumping of sewage into the ocean. Plaintiffs alleged that defendants' actions were causing the "collapse" of the fishing industries in the greater New York metropolitan area. *Id.* at 4-5.

132. *Id.* at 22.

133. 33 U.S.C. §§ 1401-1444 (1976). MPRSA's policy is to "regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health. . . ." *Id.* § 1401(b). The savings clause in the MPRSA is somewhat analogous to that in the 1972 Amendments because it provides a common law remedy to seek enforcement of the statute's standards. The savings clause provides, in pertinent part, that "the injunctive relief provided by this subsection shall not restrict any right which any person . . . may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief." *Id.* § 1415(g)(5).

The Court also ruled on the availability of an implied private right of action for the plaintiff. Because the association failed to comply with statutory notice provisions it was precluded from seeking statutory relief. Instead, the association sought, but was denied, an implied private right of action under both the savings clause of the 1972 Amendments the analogous MPRSA section. 453 U.S. at 13-15, 17-18.

134. 453 U.S. at 14.

135. Although the *National Sea Clammers* Court listed the pertinent portions of each statute, it failed to provide any comparative analysis. *Id.* at 6 nn.9-11.

136. The MPRSA does have a permit program. However, it is vastly different from the 1972 Amendments in that it vests the permit granting power in the Secretary of the Army and employs little, if any, of the EPA enforcement mechanisms. See 33 U.S.C. § 1412 (1976).

137. See notes 92 & 93 and accompanying text supra.

138. 453 U.S. at 22. It is difficult to compare the MPRSA's comprehensiveness to that of the 1972 Amendments. There are over 60 sections within the 1972 Amendments comprising more than 125 pages of standards and sanctions while the MPRSA contains 17 sections comprising only 16 pages.
the National Sea Clammers Court evinced a strong desire to infer preemption. The only apparent justification for the inference was a perfunctory reliance on the Milwaukee II decision.

The Court's summary treatment of the MPRSA in National Sea Clammers characterizes its unwillingness to extend the application of federal common law under other environmental statutes. If such a policy is carried through to all environmental statutes, it is conceivable that federal common law of nuisance will be totally eradicated.139

There is another significant ramification of the Milwaukee II decision—one that goes directly to the heart of federalism. Congress, in witnessing the degradation of the nation's environmental resources, found it necessary to strike a balance in favor of federal regulation rather than to allow the states and their varying laws to control. The 1972 Amendments, for example, stress a uniform national approach toward solving environmental problems. By enacting the 1972 Amendments, Congress mandated that federal law was to govern disputes arising out of pollution of interstate and navigable waters.

The Milwaukee II decision abrogating federal common law will disrupt the balance established by Congress because it shifts judicial power away from federal courts. Since federal common law is no longer available, many states will be unable to obtain adequate remedies in federal court. This could potentially force many parties into state courts to seek relief under state law. As more actions are brought in state courts, the number of varying standards applied will likely increase to a point where there will no longer be a uniform set of pollution laws, and the uniform federal statutory scheme established by Congress will be defeated.140

CONCLUSION

The Supreme Court in Milwaukee II ruled that in the area of water pollution, federal common law has been preempted by congressional enactment of the Federal Water Pollution Control Act Amendments of 1972. The Court reasoned that once Congress addressed the problem of water pollution through a comprehensive statutory scheme, federal courts were precluded from imposing stricter federal common law standards.

139. In calling for the total abolition of all federal common law nuisance remedies, the Illinois Chamber of Commerce, as amici curiae, maintained that any encroachment upon congressional regulatory programs would be an "unconstitutional usurpation of legislative power." The Chamber of Commerce not only argued for the preemption of federal common law in the area of water pollution, but also in the areas of air pollution, control of toxic substances, insecticides, and hazardous wastes. See Brief of the Illinois State Chamber of Commerce as Amicus Curiae in Support of the Petitioners, Illinois v. City of Milwaukee, 451 U.S. 304 (1981).

140. Justice Blackmun found Milwaukee II's "de-control" of the power of the federal courts to be one of the more "disturbing" aspects of the decision. The dissent feared that there would no longer be a uniform approach toward solving interstate pollution disputes. 451 U.S. at 353 (Blackmun, J., dissenting).
The majority’s reasoning can be attacked on the grounds that proper statutory construction and legislative history strongly support a contrary conclusion. Under the statute’s savings clause, Congress expressly sought to preserve the federal common law remedy. Furthermore, the Court’s conclusion that a presumption exists against retaining common law remedies is misplaced. Long established principles mandate a finding of preemption only in instances when it is expressly and unequivocally stated by Congress. There is no affirmative language to be found in the 1972 Amendments or in the legislative history that would support a conclusion of preemption.

On a broader scale, the fundamental principles underlying federalism are also affected because Milwaukee II disrupts the careful balance of federal control Congress sought when it enacted the statute. With federal common law unavailable to federal courts, many aggrieved parties will be unable to get adequate relief under federal law. This will result in future plaintiffs favoring state courts for adjudication of their disputes. A shift in judicial power away from federal courts is precisely the antithesis of what Congress was trying to achieve when it enacted the 1972 Amendments.

When Congress enacts federal legislation which establishes national priorities, it is incumbent upon the judicial branch to ensure that congressional objectives are carried out. The ability of federal courts to fashion federal common law in the area of environmental pollution is paramount in meeting this end. The Supreme Court’s restrictive holding in Milwaukee II severely damages this once cooperative relationship in the area of pollution control. Milwaukee II strips away the very mechanisms that enabled federal courts to give full effect to federal pollution control legislation.

Dennis J. Gallitano