The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance

Michael Collins

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LAW NUISANCE

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Michael Collins*

I. INTRODUCTION

The environmental pollution of the waters of the United States is a
major national concern which affects government, industries, and
the public alike.1 Water pollution problems also are involved in other
environmental areas such as the contamination of ground water
from hazardous waste disposal sites and oil spills in ocean waters.
Congress has responded by enacting the Federal Water Pollution
Control Act, recently redesignated as the Clean Water Act,2 which
regulates conduct that contributes to water pollution. Although
primary efforts to regulate polluters and control pollution have been

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1. ENVT'L LAW INST. FEDERAL ENVT'L LAW 2 (1974); A. REITZE, 1 ENV'T'L LAW 4-2 (1972);
Jackson, Foreword: Environmental Quality, the Courts, and the Congress, 68 MICH L. REV.
1073, 1073-74 (1970); Introduction to 1 HARV. ENV'T'L L. REV. at xvii-xviii (1976); Note, Federal
Common Law of Nuisance, 10 U. BALIT. L. REV. 107 (1981); 118 CONG. REC. 33,692
(1972), reprinted in 1 ENV'T'L POLICY DIV. OF THE CONG. RES. SERV., A LEGISLATIVE HISTORY
Muskie) [hereinafter cited as LEGISLATIVE HISTORY].
2. Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. §§ 1251-
Supp. V 1981). The FWPCA was substantially modified by the Federal Water Pollution Con-
trol Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. As amended, the FWPCA was
later renamed the Clean Water Act of 1977. Pub. L. No. 95-217, 31 Stat. 1566. This article will
refer to the FWPCA as amended from 1972 on as the Clean Water Act (CWA). All pre-1972
references will be to the FWPCA.
legislative, the courts continually are called upon to resolve many pollution problems.

In 1972, the Supreme Court, in *Illinois v. Milwaukee*, reaffirmed the right of a state to assert a federal common law action to abate a nuisance caused by interstate water pollution. Upon reviewing the same case in 1981, the Supreme Court, in *City of Milwaukee v. Illinois*, announced that the use of federal common law to control water pollution could not be justified where Congress had enacted a comprehensive regulatory scheme in the area. The Court held that the federal common law action formally approved for Illinois in 1972 had been “preempted” by extensive amendments made to the Federal Water Pollution Control Act which were enacted some five months after the Court’s 1972 decision in *Illinois v. Milwaukee*. Later in the 1981 term, the Supreme Court extended its preemption holding in *City of Milwaukee* and stated that federal common law had been extinguished throughout the entire field of water pollution.

Illinois’ unsuccessful odyssey though the courts is a dramatic example of the inefficacy of judicial decisionmaking dealing with major environmental problems. It also underscores the inability of a centralized statutory scheme to address all water pollution concerns in


7. Id. at 317. The 1972 amendments were enacted on Oct. 18, 1972, Pub. L. No. 95-500, 86 Stat. 816. The Court’s decision in Illinois v. Milwaukee, 406 U.S. 91 (1972), was announced on Apr. 24, 1972. The word “preemption” is usually reserved for analysis of federal-state law conflicts but as a generic term was used by the Supreme Court in reference to the conflict between Congress and federal courts within the federal branch. See Illinois v. Milwaukee, 406 U.S. 91, 105 (1972).


our complex, highly developed society. Illinois’ predicament is not unique; rather, it serves as a suitable model by which one can examine the interrelationship of various decisionmaking bodies — Congress, federal agencies, federal courts, and the states. As a case study, it focuses attention on the need to develop workable judicial remedies to supplement legislative approaches to recognized environmental concerns.

The wholesale preemption of federal common law in the area of water pollution was anticipated by some observers, but has left courts in considerable doubt as to the contours of this preemption and its application to other areas of resource pollution. In 1982 the State of Oklahoma petitioned the Supreme Court claiming that the discharge of pollutants from the neighboring state of Arkansas, although regulated under the Clean Water Act (CWA), severely damaged Oklahoma’s waters. Like Illinois, Oklahoma seeks to address interstate water pollution by means of federal common law. In light of its decision in City of Milwaukee, the Court may well refuse to hear Oklahoma’s case. On the other hand, the Court may have the opportunity to extinguish federal common law once and for all, or at least define the contours of its preemption more clearly. This article urges a thorough reexamination of the bases of such preemption.

In any event, the Oklahoma petition demonstrates the vitality of the Illinois case study. Indeed, the problems involved in both are essentially identical: 1) that certain pollutants are not regulated under the CWA; 2) that despite compliance with national minimum standards out-of-state discharges are causing pollution which consti-


15. See infra text and notes at notes 267-84; Plaintiff’s Reply, Oklahoma, supra note 14.
tutes a public nuisance;\textsuperscript{16} and 3) that the CWA does not address the problem of disputes from interstate water pollution.\textsuperscript{17} Interstate water pollution occurs when pollutants emanating from one state enter the waters or air of a neighbor state and cause adverse effects, degrading that state’s environment. This situation is referred to as the dilemma of the downstream state—what can the receiving state do to protect its own environment from discharges in another state? The phenomena of air and water pollution by their nature do not confine themselves to state boundaries.\textsuperscript{18} In the absence of clear and adequate statutory remedies to control such transboundary pollution it is inevitable that injured parties will pursue common law claims in the courts to abate pollution.\textsuperscript{19} The Supreme Court in City of Milwaukee has made clear its disapproval of such an approach.

The main contention of this article is that the Supreme Court’s decision in City of Milwaukee v. Illinois—that the Clean Water Act displaced federal common law—was based primarily upon the Court’s conception of the narrow lawmaking powers of federal courts rather than an accurate assessment of legislative intent. The CWA contains no legislative statement against the continued use of federal common law.\textsuperscript{20} On a case-by-case basis there are many strong practical reasons for using federal common law as a necessary supplement to the CWA.\textsuperscript{21} Instead, the Court inferred a congressional intent against federal common law.\textsuperscript{22} The Court’s interpretation of legislative intent in City of Milwaukee reflected many policy concerns of the federal courts which, as enunciated by the Court, would seem to require the extinction of federal common law under many other

\textsuperscript{16} See infra text and notes at notes 331-46; Plaintiff’s Complaint, Oklahoma v. Arkansas, No. 93-853 Orig. (U.S., filed May 24, 1982).
\textsuperscript{17} See infra text and notes at notes 314-18, 333-340; Plaintiff’s Reply, Oklahoma, supra note 14.
\textsuperscript{18} See Gallogly, Acid Precipitation: Can The Clean Air Act Handle It? 9 B.C. ENVT’L AFF. L. REV. 687, 698, 707 (1981); Post, supra note 13, at 120.
\textsuperscript{20} See Section 505(e), 33 U.S.C. § 1365(e).
environmental statutes as well. Nevertheless, it is within these same policy bases of federal courts' decisionmaking that the vitality of federal common law recognized in Illinois still remains. The very predominance of federal courts' policy preferences in the statutory interpretation of the CWA in City of Milwaukee suggests a flexible basis by which the Court may revise its view of federal common law. More significantly, as a decision premised upon its reading of legislative intent, City of Milwaukee is subject to revision by a positive declaration from Congress preserving federal common law.

This article first will set forth the factual and procedural background of the controversy in City of Milwaukee in Section II. Section III will discuss the development of federal common law in environmental case law. Section IV will present the various interpretations of legislative intent in the CWA by contrasting the analysis in Illinois with that of City of Milwaukee. An overview of the substantive provisions and problems of the Clean Water Act will be presented in Section V. The section will delineate the dilemma of the downstream state using Illinois as an example. In Section VI the various prudential concerns underlying City of Milwaukee will be analyzed. An attempt will be made to reconcile federal common law with due respect for these doctrinal policies. Section VII will discuss the implications of the Court's preemption holding in light of other environmental statutes. Finally, the article concludes by urging that a perspective be adopted which recognizes the crucial, albeit secondary, role of federal common law in the context of congressionally declared goals to restore and maintain the integrity of our national environment.

II. THE CONTROVERSY IN CITY OF MILWAUKEE V. ILLINOIS

The controversy in City of Milwaukee v. Illinois arose from Illinois' efforts to protect its interests in Lake Michigan as a source of drinking water and great recreational and aesthetic value. In 1966, Illinois became apprised of serious pollution problems in Lake Michigan generated by sewage discharges from industrial and municipal sources. Illinois became particularly concerned about discharges of

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24. On October 26, 1981 the Senate Committee on Public Works favorably reported a bill to the floor which would amend Section 511 of the CWA, 33 U.S.C. § 1371, to specifically allow the use of federal common law. S. 1716 (formerly S. 1274), 127 CONG. REC. 1716 (daily ed. Oct. 27, 1981) (Sen. Chafee, R.I., chmn, Envt'l Pollution Subcommittee of Senate Committee on Env't & Pub. Works). This amendment was regarded as necessary to correct the "misinterpretation" of the CWA given by the Supreme Court in City of Milwaukee. Id.


sewage from municipal treatment plants in the Milwaukee, Wisconsin area. These plants are located on the shore of Lake Michigan directly north of Illinois.\textsuperscript{27} Pollutants discharged into Lake Michigan from Milwaukee were transported by prevailing southerly currents and winds to the waters off Illinois' shoreline. Illinois charged that this concentration of pollutants created a serious health hazard to its citizens in the use of Lake Michigan for drinking water and for swimming, and that the Milwaukee discharges interfered with Illinois' own efforts to clean up its own waters.\textsuperscript{28}

\textbf{A. Factual Background}

Illinois' complaint focused on two categories of discharges from Milwaukee: municipal sewage treatment plant discharges and sewer overflows. An urban sewage system generally consists of a series of sewer networks which lead into one or more end-of-pipe collection facilities.\textsuperscript{29} There the sewage is treated according to various methods and then in its treated form discharged into a receiving body of water. These sewer conduits have overflow devices from which a discrete discharge is released when the capacity of the carrying pipe is exceeded.\textsuperscript{30} Although the sewer conduits eventually lead to a treat-
ment facility, overflows and bypasses release sewage before any treatment has occurred.\textsuperscript{31} Sewer overflows are a major source of water pollution because of the concentration of raw sewage in discharges.\textsuperscript{32}

Illinois attempted to abate this contamination of its waters through negotiation and use of the administrative procedures of the Federal Water Pollution Control Act (FWPCA).\textsuperscript{33} After several frustrating years of administrative efforts during which few enforceable commitments to abate interstate pollution were made,\textsuperscript{34} Illinois sought judicial abatement.\textsuperscript{35}

water. C. Mortimer, supra note 26, at 2-4; 451 U.S. 304, 309 n.2 (1981). Overflow devices are usually of two types, gravity overflows or mechanical bypasses. Gravity overflows are simply pipes placed inside the sewers which allow raw sewage to pour out when the overall level of sewage rises to the level of the pipe. The mechanical bypass points are usually pumps which are activated by electrodes inside the sewer. See 599 F.2d 151, 167-68 (1978); CEQ Report, supra note 29, at 114; C. Mortimer, supra note 26, at 2. The sewer systems of Milwaukee involved in the Illinois case had approximately 239 bypass or overflow points. 599 F.2d at 167 & n.33.

\textsuperscript{31} See C. Mortimer, supra note 26, at 11. Overflows and bypasses are designed to prevent damage to the central collection facility to which the sewer conduits lead. CEQ Report, supra note 29, at 114. They also serve to prevent back flooding into basements. When rainfall exceeds one-half inch, the sewer system can become overloaded and sewer overflows occur. C. Mortimer, supra note 26, at 11, 29; 599 F.2d at 167. Even in dry weather, both separate and combined sewers are subject to blockage which releases sewage as well. 451 U.S. at 309 n.2; CEQ Report, supra note 29, at 114-15; C. Mortimer, supra note 26, at 11.

\textsuperscript{32} On the occasion of an overflow the high velocity of the flow scour the sewer conduit clean of previously settled sludge which is then also discharged. Overflows are a source of long-term pollution because the discharged solids tend to settle to the bottom of the receiving waterway where they form sludge deposits. These deposits are not affected by conventional surface treatment of the water and so continue to deplete the oxygen supply of the water and contribute to the development of cloudy, foul-smelling water. CEQ Report, supra note 29, at 114-15.

\textsuperscript{33} These conferences did not result in specifically enforceable decisions and were subject to interminable delays. An action for enforcement of a conference decision had to allow for a six-month period in which other modification hearings could be held. See 33 U.S.C. § 1160(d)(1), (3), (4); id. § 1160(f)(1) (1970) (repealed 1972). Those requirements that were set were often unilaterally extended by individual states. 599 F.2d 151, 158 (7th Cir. 1970); Comment, The Federal Water Pollution Control Act Amendments of 1972, 14 B.C. IND. & COM. L. REV., 672, 674-77 (1973) [hereinafter cited as Comment, Amendments]. See EPA v. State Water Resources Control Bd., 426 U.S. 202-03 (1976).

\textsuperscript{34} Brief for Respondents, supra note 26, at 8, 9, 23; Comment, Federal Common Law in Interstate Water Pollution Disputes, 1973 U. ILL. L. F., 141, 144. Enforcement under the FWPCA was cumbersome, time-consuming, and rarely resulted in court action. Ipsen & Raisch, Enforcement Under the FWPCA Amendments of 1972, 9 LAND & WATER L. REV., 369, 370-75 (1974); McThernia, An Examination of the FWPCA Amendments of 1972, 30 WASH. & LEE L. REV. 195, 199-200 (1973).

\textsuperscript{35} Illinois statutes confirmed the common law power of the Attorney General to seek judicial abatement of a public nuisance. Ill. Rev. Stat. 14, §§ 11, 12 (1960). The Illinois legislature passed the Environmental Protection Act, Ch. 111 1/2, which provides, in part,
B. Procedural History

The gist of Illinois' complaint was that the inadequate treatment of sewage by municipal treatment plants in Milwaukee and the discharge of untreated sewage from overflow points released large quantities of pathogenic viruses, bacteria, and nutrients into Lake Michigan. These pollutants were transported by lake currents to Illinois' waters where they allegedly caused pollution. Illinois claimed this pollution constituted a public nuisance which threatened the health and welfare of its citizens and accelerated the

that no person shall cause or allow the discharge of any contaminants into the environment in any state so as to cause water pollution in Illinois, no matter what the source. Ill. Rev. Stat. 111 1/2, § 1012 (1968). Pursuant to these statutes the Attorney General of Illinois brought a series of abatement actions against in-state polluters. Unlike the administrative avenues in the FWPCA, these actions succeeded in setting detailed timetables and enforceable deadlines for the correction of water pollution problems. See, e.g., Illinois v. United States Steel Corp., Circuit Court of Cook County, 69 CH 3334 (1969); Illinois v. Republic Steel, Circuit Court of Cook County, 69 CH 3675 (1969) (zero discharge of industrial waste to Lake Michigan); Illinois v. Youngstown Sheet & Tube Company, Circuit Court of Cook County, 71 CH 3818 (1969) (Complete recycling with sand filtration of remaining wastewater discharged into Lake Michigan); Brief for Respondents, supra note 26, at 10.

36. The defendants were Milwaukee, Racine, Kenosha, and South Milwaukee. The sewerage commissions were the sewer commission for the City of Milwaukee and the Metropolitan Sewer Commission of the County of Milwaukee. The defendants will be referred to collectively as "Milwaukee." The Attorney General of Illinois filed the petition in the name of "The People of the State of Illinois," which will be referred to as "Illinois." In practice the Attorney General may represent or contest actions by various other agencies and offices as well. See, e.g., People v. Pollution Control Board, 83 Ill. App. 3d 802, 404 N.E.2d 352 (1980); See Fort, supra note 12, at 132 n.6.

37. Illinois was most concerned with enteric viruses. Enteroviruses are those that inhabit the gastroenteric tract of human beings and warm blooded animals which are contained in their feces waste. Many of these viruses are pathogenic, causing such diseases as polio, pleurodynia, myocarditis, meningitis, and encephalitis. See 599 F.2d 151, 167 n.32 (7th Cir. 1979). Viruses and bacteria are difficult to detect with accuracy. Public health officials usually refer to fecal coliform, a larger sized suspended solid, as a rough indicator of pathogenetic viruses in contaminated waters. Brief for Respondents, supra note 26, at 4; C. Mortimer, supra note 26, at 4-6.

38. Various pollutants act as nutrients for plant life when discharged into waterways. The prime nutrients are phosphate and nitrate from human and animal wastes. An increase in the presence of these nutrients stimulates massive growth of algae and can eventually produce obnoxious odors and reduce the quality of available drinking water supplies. C. Mortimer, supra note 26, at vi; 599 F.2d 151, 169 n.39 (7th Cir. 1979).

39. The pollution Illinois sought to prevent was alleged to have been caused by the discharge of "some 200 million gallons of raw or inadequately treated sewage" per day from facilities in Milwaukee. 406 U.S. 91, 93 (1972). In a single month in 1976 the untreated sewage discharge measured from just 11 of the 239 total sewer overflow points equalled 646.46 million gallons. 599 F.2d 151, 168 (7th Cir. 1979); 451 U.S. 304, 309 (1981).

eutrophication\textsuperscript{41} of Lake Michigan. As \textit{parens patriae} Illinois sought injunctive relief via the federal common law of nuisance to abate the pollution of its waterways from out-of-state sources.\textsuperscript{42}

Likening the dispute to one against the state of Wisconsin, Illinois invoked the original and exclusive jurisdiction of the Supreme Court pursuant to section 1251(a)(1) of the United States Code.\textsuperscript{43} The Court, however, denied without prejudice the petition for original jurisdiction. It was determined that for purposes of section 1251 the Milwaukee defendants were only political subdivisions of a state.\textsuperscript{44} The Court's jurisdiction was therefore original but non-exclusive.\textsuperscript{45} Although the Court could use its discretion to decline original non-

\textsuperscript{41} 451 U.S. at 310 \& n.3 (1981). Eutrophication is a rapid biological enrichment process characterized by over-nourishment from nutrient rich pollutants or other organic matter which enter a waterway from sewage discharges and agricultural wastes. Limnologists regard phosphorous as a controlling element in the process. The results of eutrophication can be a murky, greenish water appearance, depletion of oxygen supply, poor water quality, obnoxious odors, and reduced fish stock. The overall net effect of eutrophication is that it greatly accelerates the limnological aging and depletion of the waterway. C. Mortimer, supra note 26, at 6; 451 U.S. at 310 n.3 (1981); 599 F.2d 151, 169 n.39 (7th Cir. 1979). The state of Michigan joined Illinois on this issue only. 451 U.S. at 309 (1981).

\textsuperscript{42} A \textit{parens patriae} suit is unique to states and based on a concept of standing which allows a state in its role as sovereign and guardian to protect its quasi-sovereign interests such as health and welfare, interstate water rights, and the economy of the state. \textit{Black's Law Dictionary} 1003 (rev. 5th ed., 1979). \textit{Parens patriae} was first recognized in Missouri v. Illinois, 180 U.S. 208 (1901). See Note, \textit{State Protection of Its Economy and Environment; Parens Patriae Suits for Damages}, 6 COLUM. L. J. \& SOC. PROB. 411, 411-13 (1970).

\textsuperscript{43} Illinois argued that the controversy was one between two states because the municipalities and sewer commissions were instrumentalities of the state of Wisconsin. 406 U.S. 91, 93 (1972). 28 U.S.C. § 1251(a)(1)(1976) implements the grant of original jurisdiction in art. III, § 2, cl. 2 of the U.S. Constitution. The statute provides that "[t]he Supreme Court shall have original and exclusive jurisdiction of . . . [a]ll controversies between two or more states." 28 U.S.C. § 1251(a)(1) (1976).

\textsuperscript{44} 406 U.S. at 91, 97-98 (1972). The Court held that for purposes of 28 U.S.C. § 1251(a)(1) (1976), the word "states" did not include their political subdivisions. \textit{Id. at} 98. For litigation purposes it is generally agreed that a political subdivision is not the technical equivalent of a state. \textit{E.g.}, Bullard v. City of Cisco, 290 U.S. 179 (1933); Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1868). Municipalities have been subject to expanding liability in civil rights actions pursuant to 42 U.S.C. § 1883 (1970). \textit{E.g.}, Monell v. Dep't of Social Services, 436 U.S. 658 (1978); Owen v. City of Independence, 445 U.S. 622 (1980). Also, the extension of reserved state's rights given to municipalities in \textit{Nat'l League of Cities} v. Usery, 426 U.S. 833 (1976), suggests the line between a state and its political subdivisions has become increasingly blurred.

\textsuperscript{45} 406 U.S. 91, 95 (1972). 28 U.S.C. § 1251(b)(3) (1976) provides, in part, that the Supreme Court "shall have original but not exclusive jurisdiction of . . . [a]ll actions or proceedings by a State against the citizens of another State." Illinois unsuccessfully attempted to join the state of Wisconsin as a necessary party defendant. 406 U.S. 94-5, 97. Had Wisconsin been joined it is likely that the Court would have accepted jurisdiction of Illinois' case. Six weeks after \textit{Illinois} the Court exercised its original jurisdiction and used federal common law in an interstate dispute between two states in \textit{Vermont} v. New York, 406 U.S. 186 (1972).
exclusive jurisdiction, it acknowledged the special obligations under Article III of the Constitution which empower the Supreme Court to hear any controversy to which a state may be a party.46 Thus, the Court stated that its original jurisdiction should be declined only where another adequate forum was available to afford the complaining state the respect it deserved under the Constitution.47 The Court reasoned that remittance of the case to an appropriate federal district court using a federal rule of decision would satisfy the obligations of Article III while permitting the Court discretion to pursue pressing matters on its docket.48

Although the Court did not formulate actual relief for Illinois, its unanimous opinion formally recognized the validity of federal common law as a rule of decision in interstate resource disputes. The Court ruled that a federal district court could take jurisdiction of the

46. 406 U.S. at 93. Article III of the Constitution provides, in part, that "[i]n all cases or controversies in which a State shall be a Party, the Supreme Court shall have original jurisdiction." U.S. Const. art. III, § 2, cl. 2. The duty bound nature of this jurisdiction is an accepted tenet of federal courts doctrine. See Cohen v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). These duties are not inflexible, however, as the Court also has an obligation to promote the modern role of the Supreme Court as "the final federal appellate court." Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 496-97, 499 (1971). In Illinois, the Court stated it would honor original jurisdiction "only in appropriate cases" but did not delineate what factors must be present. 406 U.S. at 93. In Utah v. United States, 394 U.S. 89, 95 (1969), the Court expressed the desire to invoke its original jurisdiction sparingly. In Washington v. General Motors Corp., 406 U.S. 109 (1972), the Court reiterated its preference for the sparing use of its original jurisdiction so that mounting duties on its appellate docket would not suffer. This respect for the primarily appellate function of the Supreme Court and the conservation of its limited resources within the federal system were also the major impetus for the Court's denial of original jurisdiction in Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 497-99 (1971).


48. 406 U.S. at 93-94 (1972). The Court was uncomfortable in its role as a factfinder in a trial de novo situation which would result from its exercise of original jurisdiction. Earlier cases reveal the burden which original jurisdiction suits have placed on the Court because of the time and effort required to hear testimony, develop a record, and occasionally retain jurisdiction over a case. E.g., Arizona v. California, 373 U.S. 546 (1963) (22 hours oral argument, 2 special masters, 25,000 pages of transcript); Wyoming v. Colorado, 259 U.S. 413 (1922) (required 11 years for trial and argument before decree was issued, enforcement of which encompassed 35 years of continued litigation before the Court); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (modifiable decree issued in 1907 and finally vacated in 1938 by the Court). In the context of the rising number of cases on the Court's docket time constraints have led the Court to reconsider its role as a trial forum. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 497-99 (1971). See The Supreme Court, 1972 Term, 87 Harv. L. Rev. 1 (1973).
case by asserting that a federal common law claim raised a federal ques
tion in satisfaction of section 1331 of the United States Code.\textsuperscript{49} The opinion held that both a federal forum and a federal common law
rule of decision were necessary to protect two distinct federal inter-
ests: the federal concern for the purity of the nation's water supply;
and the state's quasi-sovereign interests in interstate natural re-
sources.\textsuperscript{50} Significantly, the federal environment statutes were
found to be inadequate to satisfy Illinois' complaint. The administra-
tive hearing procedures provided by the FWPCA had been proven
unsatisfactory, and the statute did not regulate those pollution prob-
lems which Illinois sought to control.\textsuperscript{51} Nevertheless, the Court
noted that Congress may in the course of future legislation choose to
"pre-empt" the field of federal common law.\textsuperscript{52}
Pursuant to the Supreme Court's decision, on May 19, 1972, Illi-
nois filed its complaint in the United States District Court for the
Northern District of Illinois.\textsuperscript{53} Following the Supreme Court's direc-
tives, the district court ruled that the case should be decided under
the principles of federal common law nuisance. Trial in the district
court did not actually commence for some time, however, as the par-
ties engaged in nearly four years of discovery and pretrial motions.
During this period, two significant events occurred. First, five
months after Illinois had filed its suit in federal district court,
Congress enacted the Federal Water Pollution Control Act Amendments
of 1972, which came to be known as the Clean Water Act (CWA).\textsuperscript{54}
The CWA was designed as a comprehensive overhaul of existing fed-

have original jurisdiction of all civil actions which arise under the constitution, law or treaties
of the United States.

\textsuperscript{50} 406 U.S. 91, 103 n.5, 105 n.6, 107 n.9 (1972). \textit{Compare} F. Grad. \textit{supra} note 9, at § 3.03
(dissing Court's choice of federal common law as dictum) \textit{with Friendly, In Praise of Erie
... and necessary basis for deciding does not become dictum ...")}. Previously the Court
had left open the question whether federal common law was considered to be a "law" for pur-
(1969). However, in that case four members of the Court stated that for purposes of § 1331(a)
"laws" included decisional law as well as statutes. 358 U.S. at 393 (Brennan, J., dissenting in
part, concurring in part). This assignment of federal question jurisdiction was anticipated by
lower court decisions. \textit{E.g.}, Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486,
492-93 (2d Cir. 1980); Texas v. Pankey, 441 F.2d 236, 242 (5th Cir. 1979). \textit{But see D. Currie,

\textsuperscript{51} 406 U.S. at 103, 105 (1972).

\textsuperscript{52} \textit{Id.} at 107.


\textsuperscript{54} 33 U.S.C. §§ 1251-1376 (1976). The CWA was enacted on October 18, 1972, Pub. L. No.
92-500, 86 Stat. 876.
eral water pollution legislation which was considered to have been wholly unsatisfactory. Second, the Milwaukee facilities did not comply with the requirements of CWA permits and, as contemplated by the Act, the Wisconsin Department of Natural Resources (DNR) brought an enforcement action in Wisconsin state court. The action resulted in a judgment ordering that the discharges from treatment plants meet minimum effluent limitations set forth in the CWA permits and required the elimination of sewer overflows. Despite this court action Milwaukee continued to violate the permit conditions and the overflows continued unabated.

Throughout four years of discovery preparatory to the suit in federal district court, Milwaukee made several unsuccessful motions to dismiss, including one based on the grounds that the newly enacted CWA had preempted federal common law nuisance. Trial on Illinois' claim finally commenced in the district court on January 11, 1979. A four-month trial ensued, during which the court made extensive technical findings on the discharge of sewage into Lake Michigan. On July 29, 1979, the district court rendered its decision that the discharges of inadequately treated sewage and untreated sewage from the Milwaukee facilities constituted a nuisance under federal common law.

Based on the evidence before it, the district court ordered essentially two basic remedies. First, the court ordered that Milwaukee treat all discharges from municipal treatment plants according to standards more stringent than those minimum levels required by the CWA. Secondly, the court ordered the eventual control and elimi-
nation of the occurrence of sewer overflows. This order required that Milwaukee construct additional sewage facilities besides those necessary to comply with existing CWA regulations. After receiving assurances of feasibility from Milwaukee, the district court developed a fiscal planning timetable, with the consent of both parties, to effectuate the construction necessary to control sewer overflows.  

Milwaukee sought appeal of the district court’s decision before the Seventh Circuit Court of Appeals. Milwaukee’s appeal was based on two issues: whether the relief available in an action of federal common law nuisance may go beyond that available under the federal statute (CWA); and whether compliance with CWA permits precluded federal common law. 62 The Seventh Circuit ruled that the CWA had not preempted federal common law nuisance and reiterated that compliance with CWA permits did not constitute an absolute defense to common law claims. The Seventh Circuit affirmed the district court order for the control and elimination of sewer overflows and the construction timetable; yet the Seventh Circuit revised the district court order insofar as it imposed effluent limitations more stringent than those required by the CWA. 63

The Seventh Circuit determined that the minimum standards of control in the CWA represented a sophisticated balance of technical and political factors by Congress and so reversed the district court’s order insofar as it imposed treatment standards more stringent than those in the CWA. Since the CWA did not address the nuisance caused by sewer overflows, the Seventh Circuit approved the district court’s order to control and eventually eliminate sewer overflow discharges. 64 In this way the court felt it had properly tempered federal courts’ equitable lawmaking powers with a respect for the legislative judgments of Congress. 65

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61. See 304 U.S. at 311-12 (1981). The district court ordered the elimination of combined sewer overflows by 1986 and the construction of collection and conveyance systems to practically eliminate sewer overflows by 1989. Such elimination essentially required that any effluent from combined sewer overflow be collected and treated along with other municipal sewage at a central plant before discharge. See 599 F.2d 151, 170-73 (7th Cir. 1979).

62. Id. at 155.

63. Id.

64. Id. at 173-75, 176-77.

The case was appealed to the United States Supreme Court on the single question of whether the CWA had supplanted federal common law. In *City of Milwaukee v. Illinois*, the Supreme Court found that the CWA represented a comprehensive regulatory scheme to control water pollution problems. The rigorous administrative mechanisms and detailed provisions of the Act were regarded as sufficient to fully address Illinois' complaints. Thus, despite the absence of a distinct congressional statement, the Supreme Court interpreted the CWA so as to require the displacement of federal common law in the resolution of interstate water pollution controversies. The Court emphasized that federal common law should be resorted to only in certain unusual circumstances. In view of the complex and comprehensive regulatory scheme in the CWA, the Court felt that federal courts should abstain from developing remedies to supplement the Act. In this light, the lower court's imposition of effluent limitations and control measures more stringent than the minimum requirements in the CWA was considered to be an encroachment on the legislative functions of Congress in violation of the separation of powers doctrine.

Thus, through a nine-year period of litigation the Supreme Court had first approved and then disapproved the use of federal common law to resolve the controversy between Illinois and Milwaukee. In one sense, the Court merely pursued the avenue left open in its 1972 decision—that Congress may choose to preempt federal common law by future legislation. The Court's turnabout could be explained as a result of the new and improved federal water pollution legislation which, perhaps, obviated the need for federal common law relief. Yet the Court's abrupt undercutting of Illinois' federal common law cause of action also manifests the Court's principled conception of the limited role of federal courts in our federal system. Two major developments helped to change the course of Illinois' litigation after 1972. First, the Supreme Court's approach to federal common law, and its view of the role of federal courts activism generally, shifted to a markedly less expansive view of federal courts' power. Second, the Congress substantially improved water pollution control legislation in the CWA. The next section will trace the development of federal common law and the prudential policies which justify its ex-

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67. Id. at 313-15.
68. Id. at 313-17.
69. See infra Section VI.B.
70. See infra Section V.A.
exercise. Following this an overview of the CWA will be presented in an effort to determine whether the Act itself can be reasonably viewed as displacing federal common law.

III. FEDERAL COMMON LAW

In the development of the legal system of the United States neither Congress nor the Constitution expressly provided for the adoption of English common law as a whole. Thus, in the United States common law had been derived entirely from the judicial resources of state and federal courts. Significantly, in our constitutional federal system the federal courts are constrained in their exercise of common law by conditions which do not apply to state courts. First, as one of the three branches of the federal government, federal courts must observe the separation of powers doctrine. In deference to the legislative functions vested in Congress, federal courts have exercised only a limited range of lawmaking powers.

Secondly, as a branch of the federal government vis-a-vis the states, federal courts cannot exercise their lawmaking powers in a manner which derogates the powers reserved to state legislatures and courts. Historically, most common law matters have been controlled by state courts. The use of federal common law by federal courts is generally thought to imply the inapplicability of state common law in much the same manner as the more usual preemption of state law by federal legislation. Thus, under the doctrine embodied

74. Buckley v. Valeo, 424 U.S. 1, 122 (1976); TVA v. Hill, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them . . . ."); Collins v. Hardyman, 341 U.S. 651, 663 (1951) ("It is not for [courts] to compete with Congress or attempt to replace it as the nation's lawmaking body").
75. Erie Railroad v. Tompkins, 304 U.S. 64, 77-78 (1938). State courts are courts of general jurisdiction, so they are presumed to have power over most cases. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470-71, 800-03 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].
76. Since the Erie doctrine presumes the states are capable of resolving disputes according to their own laws, the decision to utilize federal common law has usually been legitimized by reference to some provision of the Constitution, a federal statute, or federal treaty. Monaghan, supra note 72, at 12; Note, Federal Common Law, supra note 72, at 1515.
in the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, the federal courts must give due respect to the traditional common law functions of state courts before contemplating the exercise of federal common law.

Third, as courts of limited jurisdiction under Article III of the Constitution, the judicial powers of federal courts are not broadly granted, but are delegated by Congress and supervised by the Supreme Court. In the broadest equitable sense, the lawmaking powers of federal courts arise from the need of the courts to resolve finally controversies which come before them. Yet in light of the limited jurisdiction and other fundamental constraints on federal judicial powers, it is apparent that even this broad equitable base of power is more narrow than that of the state courts, which are courts of general jurisdiction. For all of the reasons given above, the exercise of federal judicial lawmaking generally has required some special justification by the courts.

Despite these prudential and constitutional restraints, federal courts have continued to develop common law rules of decision. This section will trace the development of federal common law, particularly as it applies to interstate resource disputes. The 1972 Supreme Court decision in *Illinois v. Milwaukee* will then be considered as a representative case involving the historic justifications for federal common law.


78. U.S. Const. art. III, § 2 provides that federal courts may exercise jurisdiction over cases arising under the Constitution, laws of the United States, or treaties made under their authority. Article III is the fundamental source of federal judicial power, the corpus of which resides in the Supreme Court itself. Congress is empowered to create the lower federal courts which are thus subject to modification of jurisdiction by Congress. *Id.* at cl. 2. ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time obtain and establish"). Federal courts can hear only those cases which are within this constitutional grant and those which have been entrusted to the courts in a jurisdictional grant by Congress. See 28 U.S.C. § 1331 (1976) (federal question jurisdiction); 28 U.S.C. § 1332 (diversity jurisdiction); 28 U.S.C. § 1333 (admiralty jurisdiction); 28 U.S.C. § 1348 (jurisdiction over civil rights claims under 42 U.S.C. §§ 1983, 1985 (1976); Rules of Decision Act, 28 U.S.C. § 1652 (1976).

A. Judicial Development of Federal Common Law

The Supreme Court in *Erie Railroad v. Tompkins* pronounced: "[t]here is no federal general common law."\(^{80}\) Over time, however, the *Erie* doctrine has come to stand more for a shorthand reference to the policy considerations which restrain federal judicial lawmaking than an absolute preclusion of such powers.\(^{81}\) Thus, the courts have continued to develop federal common law within the narrow field allowed by the Constitution, federalism, and the *Erie* doctrine. In deference to Congress, a federal court must determine that congressional legislation has not addressed the problem before the court or otherwise denied the judicial power to formulate legislative-type relief.\(^{82}\) Even where these conditions are met, the common law relief must be consistent with relevant federal statutes and preserve the policies underlying those statutes.\(^{83}\) In its respect for the traditional common law domain of the state courts a federal court should determine that state law would be inappropriate or inadequate as a rule of decision to resolve a peculiarly "federal" problem.\(^{84}\) Finally, different prudential considerations, usually articulated by the Supreme Court, concerning the degree of activism or restraint most appropriate for federal courts have greatly influenced the promulgation of common law throughout different periods.\(^{85}\)

Although these factors have caused federal courts to exercise judicial lawmaking powers in a cautious and perhaps uneven manner, federal common law has become well established in many "specialized" situations.\(^{86}\) Unfortunately, it is nearly impossible to categorize

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80. 304 U.S. 64 (1938).
83. Cf. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393-403 (1970). "This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given appropriate weight not only in matters of statutory construction but also in those of decisional law." *Id.* at 390-91.
85. See Hart & Wechsler, *supra* note 75, at 800-06.
in the abstract those instances which justify the use of this specialized federal common law. Certain circumstances, either alone or in combination with others, historically have justified federal common law without actually requiring its use. This quixotic nature of federal common law reveals a fundamental insight: that while many of the constraints upon federal judicial powers are external, that is, ascribed to sources outside the courts such as the Constitution and our form of federalism, the ultimate decision regarding federal common law has been internal, that is, one made by the courts themselves. Thus, there appear to be no hard and fast rules, but rather an attempt to articulate in the context of each case those bounds beyond which federal courts should not step.

One area in which the use of federal common law has been well established is that of interstate resource disputes. For example, in Hinderlider v. La Plata River Cherry Creek Ditch Co., an opinion delivered on the same day as Erie, the Court decided the apportionment of interstate waters on the basis of federal common law nuisance. More broadly, the Supreme Court has fashioned federal common law to resolve such matters as disputes between states over interstate resources or protection of a state’s sovereign rights; issues related to the operations of federal statutory law or to foster federal policy; issues requiring uniformity of law such as obligations to or by the United States, regulation of interstate com-


88. See HART & WECHSLER, supra note 75, at 800-06.


90. 304 U.S. 92 (1938).

91. Id. The Court supplemented an interstate compact to apportion interstate waters which had originally been approved by Congress. The Court also overturned a decision by one state’s Supreme Court under the exercise of federal common law. Id. at 105. As viewed by the Court the case involved a classic federalist interest authorizing federal courts to settle interstate disputes. See U.S. CONST. art. III, § 2, cl. 5, 6, 7, 8; THE FEDERALIST No. 80 (A. Hamilton).


94. E.g., Ivy Broadcasting Co., Inc. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968);
merce,95 and regulation which expressly preempts state law;96 ques-
tions arising under maritime law;97 and issues of international law
affairs.98 Plainly, there exists a wide variety of "specialized" federal
common law.

In general, the Supreme Court has developed three basic criteria
for the utilization of federal common law: 1) that federal common law
is appropriate when an issue raises an overriding federal interest
which calls for a uniform federal rule of decision; or 2) that it is ap-
propriate where an issue touches basic interests of federalism;99 3)
that federal common law is "interstitial" in character and so should
be used to supplement federal legislation where it is consistent with
the purposes underlying the legislation.100 In this respect, disputes
over state boundaries, interstate water pollution, and degradation of
a neighbor state's environment have been classic instances calling
for the use of federal common law.101

The presence of federal legislation in an area has not of itself tradi-
tionally required a federal court to abstain from the exercise of fed-
eral common law. While federal courts must determine that federal
common law is used as a necessary supplement to legislation or that
it will not undercut the purposes of existing legislation, it is often dif-
ficult to tell whether federal common law is exercised because of
what Congress has said or not said, or despite what Congress has
said or not said.102 Put simply, the decision is one for the courts
themselves to make, ultimately policed by the Supreme Court.103 In

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Prieke & Sons, Inc. v. United
95. E.g., Francis v. So. Pacific Co., 333 U.S. 445 (1948); Huber Baking Co. v. Strohmann
1042-49.
99. Fort, supra note 12, at 137-38. These bases are determined in the context of the factors
embodied in Erie and the separation of powers doctrines as well as the particular facts present
in each case so that comparison of one substantive area of law with another is not particularly
helpful. Id. at 138; Note, Federal Common Law, supra note 72, at 1539.
100. See United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960). See also Hart &
Wechsler, supra note 75, at 756-832; Mishkin, supra note 81, at 780-83.
304 at 320 (1981) (Blackmun, J., dissenting); Note, Preemption, supra note 4, at 525-27;
Leybold, supra note 77, at 299.
103. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Mishkin, supra note 81, at 800-01;
Hart & Wechsler, supra note 75, at 756-832; Note, Competence of Federal Courts, supra
note 79, at 1090.
any event, a federal court’s decision will usually be based upon its reading of congressional intent. This is so because while federal courts submit to the paramount authority of Congress as the federal lawmaker, the interpretation of congressional legislation is a fundamental task of the federal courts. Indeed, legislative interpretation and the filling of statutory gaps are the most basic reasons for initiating federal common law and remain an integral function of the federal courts.\textsuperscript{104} For this reason federal common law is described as interstitial and supplemental in character. It arises from the interplay of the general equitable powers of federal courts retained within their limited jurisdiction to resolve conclusively a controversy and the power of the courts to interpret federal legislation. Thus, where federal courts have been compelled to consider federal questions “which cannot be answered from federal statutes alone,”\textsuperscript{106} they have exercised their lawmaker powers to resolve those questions.\textsuperscript{106}

Following this interstitial approach a federal court may interpret existing legislation as having provided certain norms or federal substantive rights for which federal common law is then fashioned to protect or advance.\textsuperscript{107} In the usual instance, the lack of a clearly ex-
pressed congressional intent on an issue is crucial. Does congressional silence imply that Congress wanted no supplemental remedies outside of the act or a recognition of them?; or does its expression of broad remedial purposes imply need for federal courts to fashion relief or preclude it? In most cases the limits on judicial interpretation and lawmaking are not clear. One limitation is clear, however: that although federal courts have the power to effectuate federal policy by filling gaps in legislation they are not free to “supplement Congress’s answer so thoroughly that [the statute] becomes meaningless.” As recognized by the Supreme Court in *Illinois v. Milwaukee*, such interstitial judicial lawmaking must be in accordance with the statutory scheme and consistent with the statute’s provisions rather than merely advance the statute’s underlying purposes in a generalized manner. Abstract considerations are not helpful, as nearly any federal judicial relief could be said to advance the purposes of an act in some manner.

1. Interstate Federal Common Law

In the context of the limited lawmaking powers of federal courts and the interstitial character of federal common law, the exercise of federal common law to settle disputes over interstate resources or the interference of one state’s environmental interests has been well established. Interstate federal common law is premised on both the federal interest in the area and the matter of federal relationships, each of which is a strong basis for federal common law.

108. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Where a dispute has been addressed by appropriate and competent legislation to provide a resolution of the controversy before the Court, federal common law has not been exercised. *Ohio v. Kentucky*, 445 U.S. 939, 940-43 (1980). For example, in *Arizona v. California*, 373 U.S. 546 (1963), the Court applied the provisions of the Boulder Canyon Project Act, 43 U.S.C. §§ 617(a)-617(t) (1976), which created a detailed scheme for the apportionment of interstate waters. Although the Court had previously used federal common law in this area, it declined to do so in this instance because the federal statute provided sufficient terms to resolve the case. On the other hand, the Court developed a common law rule to supplement federal legislation in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973). In the absence of a provision dealing with the effect of local mineral rights statutes on the acquisition of land by the United States under the Migratory Bird Conservation Act, the Court developed a federal rule of decision. *Id.* at 593.

The federal common law of nuisance was first applied to an interstate pollution problem in *Missouri v. Illinois*. There, Missouri complained that an artificial drain to be constructed by Chicago would discharge sanitary waste into the Mississippi River along Missouri's border. Missouri claimed that its ecological interests would be injured by the public nuisance that would be caused by the pollution of its waterways. The Supreme Court overruled Illinois' demurrer and held that a state may claim relief under federal common law to abate a nuisance in its waters caused by another state. One year later, in *Georgia v. Tennessee Copper Co.*, the Court provided Georgia a federal forum and a federal common law nuisance remedy to enjoin the emission of noxious fumes originating in Tennessee. Georgia alleged that sulfurous gas emissions were destroying crops and orchards within its borders. The Court found that Georgia had sufficiently met its burden of proof to show a nuisance and further emphasized the strong "quasi-sovereign" rights of a state over the natural resources within its domain. The protection of these interests required that a state have the right to demand that its environment not be denigrated by sources from without the state. The Court in *Tennessee Copper* recognized that the vindication of these quasi-sovereign interests of a state provided an adequate basis for granting federal common law relief. Subsequently, many other states successfully brought federal common law actions based on nuisance and other grounds.

111. 180 U.S. at 214; 200 U.S. at 498.
112. 206 U.S. 230 (1907).
113. *Id.* at 237. Here the use of the term "quasi-sovereign" was first used to describe the interests of a state, as opposed to those of the nation as a whole since a state's sovereignty is conditioned upon its union with others under the federalist system. Leybold, *supra* note 77, at 299 n.56.

In that [quasi-sovereign] capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

206 U.S. at 237.
114. The *Tennessee Copper* Court regarded the interests of one state as sufficient to invoke the federal common law even without an interstate dispute. Post *Erie* case law has tempered this extreme view with greater regard for judicial restraint and so the quasi-sovereign interest in an interstate dispute has evolved into the "federal relationship" rationale supporting federal common law. *See* Illinois v. Milwaukee, 406 U.S. 91, 105 n.6 (1972).
115. *E.g.*, New Jersey v. City of New York, 283 U.S. 473 (1931), *modified*, 290 U.S. 237 (1933), *construed*, 296 U.S. 259 (1935) (even when covered by a permit a municipality's dumping of garbage at sea constituted an enjoiable nuisance under federal common law when it harmed a neighbor state's shore); North Dakota v. Minnesota, 263 U.S. 365 (1923) (state's method of draining water into an interstate stream constituted a public nuisance when lands of
mon law to resolve interstate resource pollution disputes, the Supreme Court noted that it had developed "what may not improperly be called interstate common law."\textsuperscript{116}

The use of this interstate federal common law has been well-founded because it involves both the federal interest requiring a uniform rule of decision as well as matters of federalism between the states, each of which reasons alone has been regarded as justification for federal common law.\textsuperscript{117} These interests may be delineated as follows. Predominantly supported by the commerce clause, Congress may enact various statutes regulating and protecting the environment, thereby enlisting an independent federal concern for the environment of the Nation. Provided there is no congressional intent contrary to the use of federal common law, a federal court might proceed to fill legislative gaps through its interpretation of the statute. Nevertheless, federal courts, although a federal partner with Congress, are subject to peculiar restraints of the \textit{Erie} doctrine which may counsel against the promulgation of federal common law. Here the federalism rationale may overcome \textit{Erie} doctrine objections. As part of its status in the federal system each state retains quasi-sovereign rights to the use and control of its environment. When the exercise of these rights by one state interferes with the same rights of another state, the conflict raises issues peculiar to our federal system which require a federal rule of decision.\textsuperscript{118} Put simply, our federal system requires a federal rule to protect the interests of one state from encroachment by another as well as to prevent conflicts amongst the states.

Since this federalism rationale devolves from the structure and relationships set forth in the Constitution, it is regarded as having constitutional underpinning.\textsuperscript{119} As Judge Friendly explained: "[t]he Constitution can well be deemed to require that the federal courts

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\textsuperscript{118} Illinois v. Milwaukee, 406 U.S. 91, 105 n.6 (1972); Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 500 (1971). See Committee for Consideration of Jones Falls Sewage System v. Train, 559 F.2d 1006, 1008 (4th Cir. 1976); Friendly, supra note 50, at 408.
\textsuperscript{119} Hill, supra note 79, at 1030-32, 1075; Monaghan, supra note 72, at 13-14.
\end{quote}
should fashion law when the interstate nature of a controversy makes it inappropriate that the law of either state should govern."\(^\text{120}\)

That this federalism interest in interstate resource disputes is indeed derived from a federal source, the Constitution, was made explicit by the Tenth Circuit in \textit{Texas v. Pankey}.\(^\text{121}\) Texas sought an injunction to stop New Mexico ranchers from spraying a chlorinated camphene pesticide used to kill range caterpillars. Texas alleged that rainfall runoff containing the pesticide would pollute the Canadian River, an interstate waterway which flows from New Mexico into Texas. Texas further claimed that several municipal water supplies would become unuseable because of the infiltration of the pesticide. The Tenth Circuit granted the injunction requested based on federal common law nuisance. The court held that the ecological right of a state against improper impairment from sources outside its province was a matter of federal concern and relationship in our federal system, thereby invoking the application of federal common law.\(^\text{122}\)


The 1972 Supreme Court decision in \textit{Illinois v. Milwaukee}\(^\text{123}\) represented the confluence of the different strands of legal precedent supporting federal interstate common law. First, the Court recognized the application of federal judicial authority where federal concerns are directly implicated and call for a uniform rule of decision. The Court found an independent federal interest in the purity of the nation's waters. According to the Court's discussion this uniquely federal interest could be inferred from the various statutes which Congress had enacted concerning the protection and regulation of navigable waters, such as the Federal Water Pollution Control Act and the Rivers and Harbors Act.\(^\text{124}\) From its review of federal statutes and case law the Court concluded: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law. . . ."\(^\text{125}\)

\(^{120}\) Friendly, \textit{supra} note 50, at 408 n.119.

\(^{121}\) 441 F.2d 236, 237-38 (10th Cir. 1971).

\(^{122}\) \textit{Id.} at 238-39, 240.

\(^{123}\) 406 U.S. 91 (1972).


\(^{125}\) 406 U.S. at 105 n.6 (1972). This component was used to develop federal question
Second, the Supreme Court in Illinois relied upon the federalism rationale in support of interstate common law. The Court acknowledged the historical acceptance of federal common law as a rule of decision in interstate pollution disputes. More importantly, the Court specifically approved the use of federal common law to protect a state’s ecological interests within our federal system as set forth in Texas v. Pankey. Thus, to protect the federal interest in the nation’s waters and to foster the federalist interest in the protection of Illinois’ environment from out-of-state pollution the Supreme Court in 1972 called for a uniform federal rule rather than subject these concerns to various state laws.

Third, the Court in Illinois held that the application of federal common law to interstate pollution disputes was not inconsistent with the FWPCA or other federal legislation in the area. Legislative concern over pollution actually appears to have been a compelling reason for the application of federal common law in the Illinois decision. Describing the scope of its equitable powers in this instance the Court stated that federal environmental statutes were not necessarily the exclusive source of federal policy and that the exact provisions of the FWPCA need not define the outer boundaries of common law. The Illinois opinion reiterated that the exercise of federal common law involves the equitable powers of federal courts which allows them to draw upon many other sources, such as state law, in fashioning a federal rule of decision. Yet the opinion carefully pointed out that a federal court’s equitable discretion is bounded by the need to consider the underlying policies of existing federal legislation. The remedy granted under federal common law must be both supported

jurisdiction so that the lower federal courts could hear this interstate dispute case which ordinarily would have invoked the original jurisdiction of the Court. The Court made more clear the separate federal interest in water pollution when it stated that it was not only the character of the parties as states that required the application of federal law, but the nature of the dispute.


127. 406 U.S. at 103 n.5, 104 (1972) (“Congress has evinced increasing concern with the quality of the aquatic environment”); id. at 102; Leybold supra note 77, at 302.

128. 406 U.S. at 107-08 (1972). See also Textile Workers of America v. Lincoln Mills, 353 U.S. 448, 457 (1957). The consideration of state standards which are then incorporated into the federal rule of decision is particularly important in a case such as Illinois. “[A] state with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor.” 406 U.S. at 107 (1972).
by and consistent with the reasons for invoking federal common law in the first instance.\(^{129}\)

In these aspects of its decision, the Supreme Court in *Illinois* reaffirmed the interstitial use of federal common law to resolve interstate pollution disputes as an appropriate exercise of federal judicial powers. Rather than create a substantial body of law existing separately from federal statutes, the Court utilized federal common law to effectuate the policies of the FWPCA where no express statutory remedy existed.\(^{130}\)

While the Supreme Court reaffirmed the justifications for federal common law, it did not actually fashion relief for Illinois. Instead, the Court remitted the case to an appropriate federal district court, advising that a federal common law remedy be developed pursuant to the guidelines in the Supreme Court's opinion. The Court acknowledged that the facts of a particular case ultimately would determine the applicability of federal common law.\(^{131}\) While the *Illinois* opinion stressed the need for equitable discretion on the part of federal courts, it did not delineate the scope of such discretion, as it concluded: "There are no fixed rules that govern; these suits will be equity suits in which the informed judgment of the chancellor will largely govern."\(^{132}\)

### B. Illinois as Precedent: An Unruly Mandate

The Court in *Illinois* explicated the context in which federal common law can arise and set some parameters for the scope of federal judicial lawmaking, but the character of federal common law in any given case was left for development by the lower federal courts. The facts of the *Illinois* case involved three major justifications for federal common law: the protection of a federal interest in clean water; the federalism interest in preserving a state's ecological rights within the federal system; and the necessity of filling legislative gaps to grant equitable relief. The historical development of federal common law indicates that each of these rationales has been relied upon

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130. *Note, Preemption, supra* note 4, at 517; *Comment, Amendments, supra* note 33, at 781.

131. 406 U.S. 106-08 (1972). This is a function of the equitable nature of a federal court decision which turns on a case-by-case evaluation of the need for federal common law.

separately to justify federal common law. The *Illinois* decision represented a particularly strong case supporting the use of federal common law because of the intertwining of these strands of judicial reasoning. The Supreme Court did not clarify whether the presence of all three elements would be essential to the proper exercise of federal common law. Consequently, the *Illinois* decision has been subject to different interpretations depending on which consideration has been viewed as the compelling reason for federal common law. While the *Illinois* case has provided useful precedent for the lower courts in the resolution of pollution disputes, a number of circuits have taken divergent approaches to the use of federal common law because of their disagreement concerning the nature of the federal interests recognized in *Illinois*.\(^{133}\)

One predominant question was whether federal common law could be applied only to interstate resources or to virtually all navigable waters of the nation, including wholly intrastate waters.\(^{134}\) The latter approach actually was adopted in a few circuit court decisions,\(^{135}\) but is conceded to be an extraordinary application of the *Illinois* decision.\(^{136}\) The courts also split on the question whether *Illinois* authorized suits by parties other than states under federal common law\(^{137}\) and whether such relief should be limited to injunctive relief only.\(^{138}\)


134. In Illinois v. Milwaukee, 406 U.S. at 102, the Court stated that the federal interest in water pollution extends to all “navigable” waters, implying that federal common law might be applied to intrastate waters.


136. Committee for Consideration of Jones Falls Sewerage System v. Train, 539 F.2d 1006 (4th Cir. 1976); Reserve Mining Co. v. EPA, 527 F.2d 492, 520-21 (8th Cir. 1975) (federal common law not available where interstate effects not alleged), *modified and remanded on other grounds*, 529 F.2d 1006 (8th Cir. 1976).


Significantly, some courts had the opportunity to refuse to apply federal common law in cases where the defendants had complied with existing discharge or pollution reduction permits. While these courts voiced considerable doubts about the validity of federal common law in such cases, they stopped short of invalidating its exercise.

Although these differences in substantive interpretation of federal common law created an air of confusion, the doctrine gained credibility and stature as more courts applied it in concrete fact situations. After the Illinois decision and before the passage of the 1972 amendments to the FWPCA, the United States filed a number of common law actions against polluters. Further, the utility of federal common law was viewed as extending to the areas of air, noise, and hazardous waste pollution as well. In 1979, the Department of Justice and the EPA initiated a series of law suits based upon common law nuisance against owners of various hazardous waste dumps.

In 1980, the Supreme Court was afforded the chance either to provide more guidance for the lower courts or to reverse the development of federal common law when it received a petition for certiorari from a Seventh Circuit case which had broadly applied the doctrine. The Court, however, refused to hear the case, thus leaving the Seventh Circuit's holding intact. As a result, there appeared to be some basis, if only by inference, that this recent development of federal common law was not only consistent with the mandate of Illinois but also with the CWA. In any event, defendants in common law actions invariably argued that the common law had been legislatively preempted with virtually no success in the district courts.


140. Committee for the Consideration of Jones Falls Sewerage System v. Train, 539 F.2d 1006, 1009 (9th Cir. 1976) ("it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1973 Act of Congress [FWPCA] legitimates").


144. See Comment, Requiem, supra note 141, at 10,192.

145. Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979).
Nevertheless, by late 1980 the Supreme Court had accepted review of the Seventh Circuit’s decision in *Illinois v. Milwaukee*, which concluded that the CWA act had not preempted federal common law.

IV. STATUTORY INTERPRETATION AND CONGRESSIONAL INTENT

When the Supreme Court first considered Illinois’ complaint in 1972 under the FWPCA and federal common law, it warned that “new federal laws and new federal regulation may in time preempt the field of federal common law of nuisance.” The Court did not indicate what type of legislation would suffice to preempt federal common law; nor did it have the opportunity to review the FWPCA as amended in 1972. That question was first squarely addressed by the Seventh Circuit in *Illinois v. Milwaukee (Illinois 2).* The sole question before the Supreme Court in *City of Milwaukee* was whether the regulatory scheme of the CWA had supplanted federal common law nuisance. The CWA did not expressly preclude federal common law, but the Court interpreted the provisions of the Act and its legislative history to discern a legislative intent which precluded the use of federal common law.

Traditionally, in its reading of congressional intent the Supreme Court has construed federal statutes so as to respect existing common law rights. Repeatedly the Court has stated that in the absence of an explicit congressional declaration to preclude a common law right, “existing common law rights [are] not to be abrogated unless it be found . . . so repugnant to the statute that survival of such a right would in effect deprive the statute of its efficacy; in other words, render its provisions nugatory.” This respect for common law rights has been especially strong when the right is one typically asserted by a state. “Statutes that divest preexisting rights or privileges will not be applied to the sovereign [states]” without a clear expression to that effect.

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147. 599 F.2d 151 (7th Cir. 1979).
The Supreme Court in *City of Milwaukee* has effectively revised this standard of statutory construction. Indulging a presumption against the validity of federal common law, the Court required that Congress affirmatively preserve common law rights which the Court itself felt should have been supplanted by the comprehensive scheme of the Clean Water Act.152 As such, the Supreme Court in *City of Milwaukee* asked fundamentally “different” questions in its review of the legislative record than the usual Court analysis. It is not so surprising that the Court was able to derive significantly “different” answers in its statutory interpretation. The Court’s significant change in the mode of statutory construction and review is an indication of the present Court’s underlying notion of the limited scope of federal judicial powers.153 The impact of the Court’s presumptive policy inquiry into legislative intent is manifest in the divergent opinions of the Seventh Circuit in *Illinois 2* and the dissent in *City of Milwaukee* on the one hand, and the majority opinion in *City of Milwaukee* on the other. The next sections will outline these decisions as they considered the effect of the CWA on Illinois’ federal common law claim.

A. The Seventh Circuit’s Opinion in Illinois 2, 1979

In *Illinois 2* the Seventh Circuit Court of Appeals held that the CWA did not preempt federal common law or limit the relief available to Illinois under common law.154 This holding was posited on a thorough review of the CWA’s provisions, congressional intent discerned from legislative history, and specific examination of various sections of the Act. The court first reviewed the provisions of the FWPCA which the Supreme Court had found inadequate to address Illinois’ complaint in the 1972 case. Then the regulatory and hearing provisions of the CWA were analyzed in detail. The Seventh Circuit concluded that although enforcement and hearing procedures in the CWA had been improved and streamlined, Illinois could not be assured of an adequate remedy under the CWA any more than under the FWPCA.155

153. See infra Section V.C.
154. 599 F.2d 151, 164 (7th Cir. 1979).
155. Id. at 159-60. The FWPCA provided a series of conference procedures each of which entailed compliance periods of up to six months and seldom resulted in clear, enforceable orders. See 33 U.S.C. § 1160(d)(1), (3), (4) (1970) (repealed 1972); 599 F.2d at 158. These enforcement procedures were described by the Supreme Court as “cumbersome”, EPA v. State Water Resources Control Bd., 426 U.S. 200, 202 (1976), and “long” and “drawn-out”, Illinois v. Milwaukee, 406 U.S. 91, 103 (1972). By comparison, the CWA had shortened compliance
In addressing the specific language of the CWA, the court first turned to section 511. Section 511 of the Act provides that the CWA shall not be construed so as to limit the "authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter." The Seventh Circuit found this language "arguably broad enough to include the federal courts." The court also noted that the CWA provides for conflicting standards through water quality limitations, site-specific demands, and the technology forcing scheme of compliance, all of which were capable of being properly entertained by a federal court. Thus, where necessary to prevent harm to a complainant, the court held that the judicial imposition of effluent limitations more stringent than the minimum required by the CWA would not be inconsistent with the overall intent of the CWA.

Since the plain language of section 511 seems to refer only to the standard setting authority of agencies, textual support for a similar exercise of authority by the federal courts is equivocal at best. Only when viewed in light of the strong policy expressed in section 510 does section 511 add some vitality to the Seventh Circuit's view that Congress did not intend to preempt federal common law. Section 510 of the CWA provides that a state may promulgate and impose standards of pollution control and effluent limitations which are more stringent than federal minimum requirements. The Seventh Circuit found this to be another indication that uniformity of standards per se was not a congressional goal in the CWA. Differences among federal standards were considered to be part of the structure

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157. Id. § 1371(a).
158. 599 F.2d at 162.
159. Id. A literal reading of section 511 would restrict its provisions to officers of agencies only, not courts. District courts are plainly identified as having certain roles in sections 309, 504, 505 and 509(a), principally to enforce the provisions of the CWA. See 33 U.S.C. §§ 1319, 1364, 1365, 1369(a). Other provisions of the CWA plainly refer to officers. E.g., Section 502(11) defines effluent limitations as restrictions on quantities of pollutants set by a state or the administrator, 33 U.S.C. § 1362(11).
160. The concept of officers used throughout the CWA in 33 U.S.C. §§ 1363(a)(2)(B), 1322, 1322(a), 1313(a), appears to be in reference to an administrative agency. This does not necessarily exclude the judiciary and may still represent a policy judgment by Congress to allow for general federal authority to abate pollution by other legal devices, where necessary.
of the CWA.\textsuperscript{162} As the Seventh Circuit noted, even federal minimum standards in the CWA are not uniform because of necessary modifications for specific problems and variances among permit conditions.\textsuperscript{163} Sections of the Act governing standard promulgation and compliance further require that dischargers must not only meet minimum federal standards but that they must also meet more stringent standards established pursuant to any "other federal law or regulation" or state law pursuant to section 510.\textsuperscript{164}

The Seventh Circuit found nothing in the CWA to necessitate that a court limit injunctive relief abating pollution to those standards set forth in the Act. The court finally concluded that differences among federal standards caused by judicial imposition of effluent limitations would not be inconsistent with the regulatory scheme of the CWA, but would be appropriate where promulgated to prevent specific demonstrated harms such as those in Illinois' complaint.\textsuperscript{165}

In its analysis of citizen's suit provisions and the savings clause, section 505\textsuperscript{166} of the Act, the Seventh Circuit found that Congress "deliberately chose to preserve existing rights and remedies," including federal common law.\textsuperscript{167} The Court's review of the text and history of section 505(e) led to its conclusion that all pre-existing remedies had been preserved. There was no indication found to the effect that the term "common law" should be limited solely to "state" common law as opposed to "federal" common law.\textsuperscript{168} Congress reasonably could be deemed to have been aware of the continued use of federal common law in the resolution of interstate pollution disputes.\textsuperscript{169} Section 505(e) was interpreted as an affirmative preservation by Congress of both state and federal common law.\textsuperscript{170}

\textsuperscript{162} 599 F.2d at 162. \textit{See infra} text and notes at notes 257-66.
\textsuperscript{163} 599 F.2d at 162. Contrary to the Seventh Circuit, the environmental bar has considered section 510 as authorization for state regulations which defer only to requirements set by the EPA, not the federal courts. \textit{See KISSEL, RUSSELL & FORT, WATER POLLUTION} 6-73 to 6-74 (ICLE ENV'T'L LAW HANDBOOK, 1978).
\textsuperscript{164} 33 U.S.C. \textsection 1311(b)(1)(c). \textit{See infra} text and notes 257-66 (discussing the better-than-best problem in the CWA). The Court rejected state pollution statute claims by Illinois, strongly suggesting that for interstate waters a federal rule of decision governs. 599 F.2d at 177 n.53.
\textsuperscript{165} \textit{Id.} at 163-65.
\textsuperscript{166} 33 U.S.C. \textsection 1365.
\textsuperscript{167} 599 F.2d at 164.
\textsuperscript{168} \textit{Id.} \textit{See S. REP. NO. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 2 LEGISLATIVE HISTORY, supra note 1, at 1499.}
\textsuperscript{169} Congress is presumed to be aware of existing legislation and common law when enacting legislation. United States v. Neustadt, 366 U.S. 696, 707-08 (1961); \textit{St. Louis I.M. & So. Ry. v. United States}, 251 U.S. 198, 207 (1920); 4 C. \textsc{sands, sutherland's statutes and statutory construction} \textsection 50.01, at 255 (4th ed. 1974).
\textsuperscript{170} 599 F.2d at 164. The court noted that any other reading of the savings clause would
Using equitable discretion and restraint the Seventh Circuit tailored its remedy so as to be consistent with the CWA, advance its policies, and provide relief for the parties before it.\textsuperscript{171} In accordance with this standard of review, the Seventh Circuit felt that minimum standards acceptable to Congress provided an appropriate starting point since they represented congressional policy choices which had taken into account many social and economic considerations as well as technical concerns.\textsuperscript{172} The court also was mindful of the special concern for economic problems regarding municipal waste discharges and publicly owned treatment works which were at issue before the court.\textsuperscript{173} Further, the court expressed its respect for the limited lawmaking role of federal courts, as it stated that a court, unlike a legislature or an administrator, is not free to rest solely upon what it thinks desirable; there must be evidence to support its conclusion that the relief granted is necessary to protect the complaining party from harm.

Because of these self-restraint concerns, the Seventh Circuit made a refined analysis of the evidentiary record of the district court in order to ensure that there was sufficient evidence to support the necessity of the more stringent limitations imposed by the district court. The Seventh Circuit felt it could not sustain the district court’s order insofar as it imposed effluent limitations on Milwaukee sewer plant discharges which were more stringent than the “secondary treat-
ment” required by the CWA permits.\textsuperscript{174} The court found that the record below did not reveal that effluent limitations imposed by the district court were connected directly to the protection of Illinois’ residents from a public health nuisance. The Seventh Circuit was quick to note, however, that as soon as it could be shown that the minimum federal effluent limitations of secondary treatment were inadequate to protect against the harms complained of, more stringent limitations would be necessary.\textsuperscript{175}

On the other hand, the Seventh Circuit found that the evidentiary record amply supported the district court’s finding that Milwaukee’s discharge of raw sewage from sewer overflows posed a significant risk of injury to Illinois residents. The Seventh Circuit reiterated that the vague and sketchy provisions of the CWA in the area of sewer overflows left the problem unaddressed. The court noted that Milwaukee had conceded that compliance with the court-ordered deadlines to prevent sewer overflows was feasible.\textsuperscript{176} In light of these findings the Seventh Circuit upheld the district court’s order that Milwaukee build collection and treatment facilities and other construction to eventually eliminate sewer overflows into Lake Michigan.

\textbf{B. The Supreme Court Opinion}

In \textit{City of Milwaukee v. Illinois}, the Supreme Court rejected the Seventh Circuit’s interpretation of the CWA. The Court read section 510 to provide that only state agencies, including state courts using state nuisance law, may establish more stringent controls applicable to in-state polluters.\textsuperscript{177} The Court refused to find that this authority could be exercised by a state to affect out-of-state pollution sources through the federal common law of nuisance. It reasoned that any standards set by a federal court using federal common law would be federal standards and so the section 510 grant of state authority to set more stringent standards was regarded as inapposite to the support of federal common law.\textsuperscript{178} Authority given to the states could

\textsuperscript{174} 599 F.2d at 176-77.
\textsuperscript{175} Id. at 171-73, 176.
\textsuperscript{176} Id. at 173. (“Thus, it appears that defendant’s [Milwaukee’s] only complaint relates to the retention facilities required by the court”).
\textsuperscript{177} 451 U.S. 304, 327-28 (1981). The Court did not address the Seventh Circuit’s interpretation of section 511 of the CWA.
\textsuperscript{178} Id. at 327-28.

It is one thing, however, to say that States may adopt more stringent limitations \ldots even through state nuisance law, and apply them to in-state discharges. It is quite
not be deemed by analogy or other interpretation to allow federal courts to impose new standards when resolving individual cases.

The majority in *City of Milwaukee v. Illinois* also rejected the Seventh Circuit's broad interpretation of section 505 and its savings clause. The Court appeared to give no credence to the Congress' stated policy to encourage public participation and private enforcement where consistent with furthering the goals of the Act.179 Section 505(e), the savings clause, was restricted by the Court to its literal limits to mean only that nothing in the citizen suit provision itself precluded other remedies but that the remainder of the Act could and did restrict availability of relief.180 The specific inclusion of "common law" in its savings clause was interpreted as a reference to "the more routine state common law" rather than the "limited federal common law."181 Although admitting that the savings clause might be read so as to include federal common law, the Court refused to do so because it found no expression of affirmative Congressional intent to preserve federal common law in particular. Having thus neutralized the savings clause so as to neither support nor deny the use of federal common law, the opinion stated that the rest of the Act in its comprehensiveness eliminated the justification for federal common law.182

Unlike the district court, the Seventh Circuit and the Supreme Court in 1972, the Supreme Court in 1981 declared that existing federal legislation had thoroughly addressed the control and prevention of water pollution and the specific concerns of Illinois' complaint as well. The Court noted that the discharge of sewage from Milwaukee

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another to say that the States may call upon federal courts to employ federal common law to establish more stringent standards applicable to out-of-state dischargers.

*Id.* (emphasis the Court's).

179. *See S. REP. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 2 LEGISLATIVE HISTORY, at 1499 (stating that the CWA deliberately preserves all existing remedies at common law)*; 451 U.S. at 343 (Blackmun, J., dissenting).

180. The subsection [505(e)] is common language accompanying citizen suit provisions and we think it means only that the provision of such suit does not revoke other remedies. It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common law actions but only that the particular section authorizing citizen suits does not do so. 451 U.S. at 329. *See also id.* at 329 n.22.

181. *Id.* at 329. *See Committee for the Consideration of Jones Falls Sewerage System v. Train, 539 F.2d 1006, 1009 n.9 (4th Cir. 1976).*

182. 451 U.S. at 330-32. "There is nothing unusual about Congress enacting a particular provision, and taking care that this enactment by itself not disturb other remedies, without considering whether the rest of the Act does so or what other remedies may be available." *Id.* at 329 n.22.
was covered by duly issued permits under the CWA. Similarly, since the CWA regulated all point source discharges, including sewer overflows, the Court assumed that Illinois' complaint had been addressed sufficiently. The establishment of some technical guidelines by the expert agency of the EPA indicated to the Court's satisfaction that the problem of sewer overflow had been adequately regulated.\(^{183}\)

Moreover, the Court found that Illinois' interest in its waters was safeguarded under the CWA. The majority opinion determined that the CWA provided ample administrative opportunities for a state to protect its waters which may be adversely affected by a discharge from a neighbor state.\(^{184}\) The Court declared it would be inconsistent with the regulatory scheme and the hearing procedures of the CWA to allow federal courts to "write their own ticket" in modifying pollution control standards for complainants who had not participated in the administration hearings.\(^{185}\) The use of federal common law was considered to be particularly inappropriate in an area as complex as water pollution control. According to the Court, difficult technical issues and tough economic and social judgments made the area unsuited for the ad hoc approach which would be engendered by the use of federal common law.\(^{186}\) In sum, the Court concluded that these factors demonstrated there was no statutory interstice or inadequacy to be filed by federal judicial relief. Thus, the Court implied a congressional intent to extinguish federal common law under the CWA.\(^{187}\)

There were three dissenters from the decision in *City of Milwaukee*, all of whom joined in an opinion by Justice Blackmun. The dissent found that the language, structure, and legislative history of the Act left no doubt that Congress intended to preserve the federal common law of nuisance. While recognizing the detailed, comprehensive pro-

\(^{183}\) Id. at 318-23. See 33 U.S.C. § 1342(b)(1); 40 C.F.R. § 133.102 (1980), establishing hearing procedures. See infra text and notes at notes 331-47 (discussing problems with CWA hearing procedures).

\(^{184}\) 451 U.S. at 324-27. See 33 U.S.C. §§ 1342(b)(3), (5), 1342(d)(2)(A) (The EPA may veto the proposed permit); id. § 1342(d)(4) (1978) (the EPA may issue a permit directly if a stalemate develops between an issuing and objecting state); id. § 1369(b).

\(^{185}\) 451 U.S. at 326. The state enforcement action against Milwaukee resulted in an order in 1977 that the Milwaukee treatment plants meet the federal minimum standards in their permits. It also ordered the completion of planning and construction to correct some sewer overflows but contained no deadline for the complete control of overflows. 599 F.2d 151, 157-59 (7th Cir. 1979). See supra text and notes at notes 56-58 (discussing Illinois abatement efforts).


\(^{187}\) 451 U.S. at 318-19, 323, 326.
visions of the CWA, the dissent noted "[t]he fact that legislators may characterize their efforts as more 'comprehensive' than prior legislation hardly prevents them from authorizing the continued existence of supplemental legal and equitable solutions . . . ."188

The dissenters adopted what they regarded as a common sense reading of sections 511 and 510. The CWA regulatory system was not unitary, nor did it purport to enforce static uniformity. According to the dissent, section 510, which authorizes states to set more stringent standards, and section 511, which allows federal officers and agencies to adopt and enforce stricter controls, were further evidence of the Act's nonuniformity.189 Moreover, both the statutory scheme and legal precedent revealed that compliance with a permit under the CWA would not insulate a discharger from liability under state or federal common law.190

The dissent found the savings clause of section 505 to be a positive manifestation of Congress' intent to preserve federal common law as well as other existing remedies. Accordingly, the dissent viewed the savings clause as simply preventing all other existing forms of action from being subject to the procedural limitations of the enforcement actions of section 505.191 The language of section 505(e) referring to "other relief" under "any other statute or common law" suggested a broad recognition of other existing remedies outside the Act which was not dispelled by the legislative history of the CWA.192

The dissent found the majority's reading of the savings clause to be a "strained" attempt at interpretation unsupported by any other judicial precedent. To suggest that section 505 did not supplant other existing remedies but that the remainder of the Act did so was regarded as an unwarranted conclusion in the context of the Act itself.193 The dissent noted that the majority's construction would

188. Id. at 342 (Blackmun, J., dissenting).
189. Id. at 341-42 (Blackmun, J., dissenting).
192. 33 U.S.C. § 1365(e); 451 U.S. at 342 & n.12. (Blackmun, J., dissenting).
193. Id. at 342-43 (Blackmun, J., dissenting). The dissent further noted that Congress had
render "meaningless" the Act's other provisions for citizen suits and would require the preclusion of all pre-existing common law remedies.194

Bearing these divergent judicial interpretations in mind, the following section presents an overview of the provisions of the CWA.

V. THE CLEAN WATER ACT

This section will present the technical aspects of the CWA195 before developing the problem areas of the Act. The structural conflicts within the Act will then be presented. These conflicts not only highlight the inability of the EPA to implement the CWA so as to be truly comprehensive, but also indicate that the imposition of abatement standards by federal courts is not necessarily inconsistent with the Act. Next, the hearing and enforcement mechanisms will be discussed to demonstrate how some pollution problems are left unresolved under the CWA. Finally, these insights will be applied to the particular facts of Illinois' complaint and the problem of interstate pollution.

A. Provisions and Problems

The passage of the amendments to the FWPCA in 1972, five months after the Supreme Court decision in Illinois v. Milwaukee,196 was the culmination of a conscious effort to overhaul and improve previous federal water pollution legislation.197 The ambitious, far-reaching goal of water purity in the CWA indicates a strong policy judgment by Congress to pursue environmental concerns general-

[Note references]

194. Id. at 334-35 (discussing the Erie doctrine and the limited powers of federal courts, the dissent stated that the court has not "upset, nor has it since disturbed, a deeply rooted, more specialized federal common law that has arisen to effectuate federal interests embodied in the Constitution or an Act of Congress").


197. "The [CWA] . . . for all practical purposes replaces all federal water pollution control statutes." McThernia, supra note 34, at 202. "The impotency of . . . prior legislation is beyond question." Id. at 200. See generally Ipsen & Raisch, supra note 34; Note, Amendments, supra note 33.
The stated ultimate objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The Act also stated the national goal of eliminating discharges into the nation's waters and redefined pollution as any "man-induced alteration of the chemical, physical, biological, and radiological integrity of water." These goals all manifest a profound philosophical shift in the approach to water pollution control. Clean water was considered a necessary and worthwhile goal in itself.

In the spirit of this policy orientation of the CWA, Congress declared that the discharge of any pollutant by any person is unlawful unless pursuant to a permit under the provisions of the Act.

To implement these objectives Congress authorized the EPA to promulgate the National Pollutant Discharge Elimination System (NPDES), a federal permit program to reduce the amount of pollutants in each discharge into the nation's waters. The NPDES permits predominately apply to control point source discharges whereas section 208 of the CWA provides a broad-based manage-

198. 118 CONG. REC. 33,692 (1972), reprinted in LEGISLATIVE HISTORY, supra note 1, at 161 (remarks of Sen. Muskie); Fort, supra note 12, at 144-45.

199. 33 U.S.C. § 1251(a) (1976). In addition, Congress declared the short term national goal to "eliminate the discharge of pollutants into the waters of the United States by 1985," Id. § 1251(d)(1); H.R. REP. No. 911, 92d Cong., 2d Sess. 71 (1972). The Act sets out other interim goals such as the achievement of water quality sufficient for the protection and propagation of wildlife by 1981. Id. § 1251(a); H.R. REP. No. 911, 92d Cong., 2d Sess. 71 (1972), reprinted in LEGISLATIVE HISTORY, supra note 1, at 758.


201. Gould, Regulation of Point Source Pollution Under the Federal Water Pollution Control Act, in WATER QUALITY ADMINISTRATION 87 (B. Lamb ed. 1980). Congress expressly stated that it would be unacceptable to use waterways for the disposal of waste, as the FWPCA had allowed on occasion. Under the FWPCA, for example, a waterway could be designated as a refuse dump for some limited purposes. Zener, supra note 9, at 685; Goldfarb, Better than Best: A Crosscurrent in the Federal Water Pollution Control Act Amendments of 1972, in WATER QUALITY ADMINISTRATION 118 (B. Lamb ed. 1980).


203. 33 U.S.C. § 1342. The EPA is authorized to set up the NPDES program. It may authorize a state to issue permits under its own administratively approved program to dischargers within the state, but in all cases the promulgated federal standards must be met. Id. § 1370. See id. § 1342, construed in EPA v. State Water Resources Control Bd., 426 U.S. 200-05 (1976). No "person" may discharge without complying with a permit. "Person" is defined broadly as "an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5).

204. The term "point sources" generally refers to distinct or separate sources of discharge of pollutants, including pipes or ditches and other conduits. See infra note 217.
ment scheme for other sources of pollution such as agricultural waste runoff.205

Historically, Congress has sought to establish standards for various areas of pollution, beginning with the use of nuisance standards.206 The first legislative standards were water quality standards in the FWPCA.207 These standards were set by reference to the gross level of pollutants that a receiving body of water could hold without becoming polluted in a manner which would impair its use.208 Without regard to the cumbersome enforcement mechanisms of the FWPCA under which Illinois attempted to operate, the liabilities of the old water quality standards scheme were apparent by 1972.209 In most instances water quality standards were unenforceable because they often did not relate to the actual conditions of a particular waterway. In addition, it was nearly impossible to determine the impact of a single polluter on overall water quality.210 Thus, sanctions imposed on any individual discharger were difficult to justify.

In addition, the decentralized water quality standards scheme in the FWPCA relied primarily upon the states to regulate pollution problems. The lack of nationally uniform water quality standards,


206. Historically, the primary vehicle for controlling water pollution was the common law of nuisance. McRae, The Development of Nuisance in the Early Common Law, 11 U. PA. L. REV. 27, 37 (1968). The case-by-case approach of nuisance litigation was inadequate to deal with complex pollution problems of industrialized society. Zener, supra note 9, at 789; Comment, Equity and the Ecosystem, supra note 9, at 1254-55. Nuisance litigation by nature provided an ad hoc methodology for controlling the effects of pollution. Regulatory schemes sought to diminish this role. F. GRAD, supra note 9, at § 3.03.


208. The desired use of a waterway was designated as the predominant function which the waterway served, such as swimming, industrial dilution, or the disposal of municipal wastes. Thus, the implicit legal definition was "any condition which interferes with desired use of a water body." L. ZWICK & M. BERNSTOCK, WATER WASTELAND 285 (1971). This conceptual scheme, in which a waterway was not considered polluted until it became unuseable for an intended purpose, produced some bizarre results. If a municipality felt a river was tolerably clean to allow navigation the river would not be legally polluted until the water began to smell foul or corroded the hulls of boats. A most extreme example is that of the Cuyahoga River in Ohio, the designated use of which was the disposal of waste. Only after the river caught fire was it considered to be legally polluted under the FWPCA. Goldfarb, supra note 201, at 116.

The Total Maximum Daily Load number (TMDL) represented the legal limit of identified pollutants which could be allowed for each corresponding designated use classification. See 33 U.S.C. § 1160(C)(1) (repealed 1972).


210. Gould, supra note 201, at 86; Goldfarb, supra note 201, at 117.
the tendency for states not to actively regulate their own discharges, and the resulting interstate competition for industry at the expense of pollution controls contributed to the continual downgrading of water quality standards.\textsuperscript{211} For all these reasons, under the FWCPA water quality standards alone were conceptually unsound to deal with the diverse, mobile problems of modern pollution.\textsuperscript{212}

In an effort to rectify these problems the NPDES system of the Clean Water Act (CWA) provides for technology based pollution standards designed to apply to individual discharges.\textsuperscript{213} By controlling the amount of pollutants in each discharge Congress hoped to manage the overall level of pollution in a receiving waterway. Since technology based effluent limitations do not depend directly on the particular conditions of a given waterway, they may be applied uniformly to all discharges on a national basis.\textsuperscript{214} An effluent limitation restricts the amount of an identified pollutant which may be discharged from any point source.\textsuperscript{215} Technology based effluent limi-


\textsuperscript{212} \textit{S. REP. NO. 414, 92d Cong., 1st Sess. 7 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3674, reprinted in 2 \textit{LEGISLATIVE HISTORY, supra} note 1, at 1425; Stewart, \textit{supra} note 211, at 1226-28; Note, \textit{Preemption, supra} note 4, at 504-05; Note, \textit{Amendments, supra} note 33, at 674-76.


\textsuperscript{215} The term "source" or "point source" is defined as "any discernible, confined, and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (Supp. IV 1980). The term "effluent limitation" is defined as any restriction established on "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources ... ." Id. § 1362(11). "Discharge of a pollutant" is defined as any addition of any pollutants to navigable waters from any point source. Id. § 1382(12). "Navigable waters" is a term of art referring to the "waters of the United States including territorial seas." Id. § 1361(7). All point source discharges are subject to permits under the CWA, 33 U.S.C. § 1311, in which is contained applicable effluent limitations, 33
tions in the NPDES program are the basic device adopted by the CWA to control water pollution problems.\textsuperscript{216}

Another fundamental modification of the FWPCA was the predominant role given to the federal government in the CWA. The development of a stronger federal presence in water pollution control largely was in response to the inadequacy of a state-by-state approach. Under the decentralized scheme of the FWPCA many states were slow to accept responsibility to actively regulate water pollution.\textsuperscript{217} The CWA was designed to spur states into action, and to allow the federal government to intervene and assume responsibility where states lag.\textsuperscript{218} Congress hoped that since the CWA treats water pollution as a national problem and provides uniform national standards, industry could no longer threaten to relocate to another state to take advantage of lenient standards.\textsuperscript{219} Consequently, while the Act provides a degree of local responsibility and control,\textsuperscript{220} ultimately the CWA engages the regulatory power of the federal government to correct water pollution problems.

The CWA authorizes the administrator of the EPA to promulgate and implement increasingly strict performance standards on a na-

\footnotesize{U.S.C. § 1362(11). An effluent limitation can be expressed in various ways, such as maximum allowable concentrations (parts per million); maximum rates of discharge (pounds per day); or maximum discharge per unit of production (pounds per ton made). C. Mortimer, \textit{supra} note 26, at 21-24.  

\textsuperscript{216} There can be no doubt that the most effective control mechanism for point source of discharge is one which will provide for the establishment of conditions of effluent control for each source of discharge. A permit or equivalent program \ldots should provide for the most expeditious water pollution elimination program. S. Rep. No. 414, 92d Cong., 1st Sess. 72 (1971). "Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement." \textit{Id.} at 8.  

\textsuperscript{217} By definition, the CWA excludes such control for other sources of pollution which are not categorized as a point source. For example, storm water runoff, construction and agricultural spillovers are excluded from the effluent limitation treatment of permits.  

\textsuperscript{218} For example, in order to issue discharge permits under the CWA, a state must have its overall water program approved by the EPA. 33 U.S.C. § 1342(b). Where a state program has not been approved the EPA issues permits directly, \textit{id.} § 1342. In cases of emergency the EPA can intervene to regulate the hazard as it sees fit, \textit{id.} § 1364.  


\textsuperscript{220} \textit{See, e.g.}, 33 U.S.C. § 1370 (1976 & Supp. IV 1980).}
tional basis to control point source discharges. Section 301 of the Act develops a two-stage promulgation and compliance program for control standards. These standards constitute the minimum required level of pollution control. The federal standards are incorporated into the NPDES permits. NPDES permits are issued by the EPA, or the EPA may delegate its issuing authority to state agencies after approving a state's entire water pollution control program. In such instance, state issued permit conditions become in effect the federal minimum standards for that state. Under section 510 of the Act, a state may require its dischargers to meet more stringent conditions deemed necessary to properly control site-specific problems. Under the CWA the EPA also may continue to set effluent standards.


222. The CWA sets forth a two-stage plan for the control of pollutants in discharges. First, federal minimum standards must attain the "best practicable control technology currently available" (BPT) by 1977. The second phase, to be completed by 1987, requires that the standards apply the "best technology available" (BAT). The BAT phase, unlike the BPT phase, provides for no weighing of economic hardships in the promulgation of standards. Nonetheless, publicly owned treatment works — the type of pollution source at issue in City of Milwaukee — are treated as a separate category of point sources but follow a parallel timetable which allows for cost considerations and revisions. Publicly owned treatment works (POTW) need only adopt "secondary treatment" by 1977 and the "best practicable waste technology over the life of the works" by 1983. 33 U.S.C. § 1311(b)(1)(A).

Secondary treatment basically involves a biological decomposition process. It uses the bacteria already in wastewater to decompose organic matter with or without the use of chemical disinfectants. EPA (1974) PGM No. 8650-1 TOWARD CLEANER WATER. The EPA has promulgated particular regulations which define the degree of pollution reduction resulting from secondary treatment for three conventional pollutants only: biochemical oxygen demand (BOD₅), suspended solids, and phosphates (pH). 40 C.F.R. 133.102 (1980). Primary treatment involves screening and sedimentation to remove suspended organic and inorganic solids. As a practical matter, the EPA has defined the second, more stringent phase of treatment not as primary treatment, but as the best practicable treatment (BPT). Thus, the BPT phase one treatment standard is tantamount to secondary treatment. Blumm, supra note 214, at 152; CEQ REPORT, supra note 29, at 78-90.


224. The state must submit a detailed program to be reviewed and approved by the EPA. Id. § 1342(b); 40 C.F.R. §§ 123.1.62 (1979). Rather than require joint state-EPA coordination for every permit (33 U.S.C. § 1341(a)), the EPA can delegate issuing authority wholesale to a state yet retain the ability to object to individual state permits if it is inconsistent with EPA guidelines under the Act. Id. § 1342(d), construed in Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 193-94 (1980); E.I. duPont deNemours & Co. v. Train, 430 U.S. 112, 119-20 & n.7 (1977). Once a state program is approved, the federal permit program is in effect suspended but the EPA retains veto power over permits. Id. § 1342(d).

limitations more stringent than the federal minimum standards for certain water regions. For example, the EPA may set more stringent standards to protect water quality for public water supplies, wildlife and agricultural uses, or recreational needs.\textsuperscript{226} The overall approach to setting more stringent standards is consistent with the general balance between clean water imperatives and economic considerations implicit throughout the CWA. It should be noted, however, that the Act does not purport to reach its goals by applying cost-benefit-alternative analysis.\textsuperscript{227} Economic and political constraints are not established as key factors in setting pollution control standards. Instead, a gradual compliance timetable is expressly provided for which sets the period within which a polluter must comply with permit standards.\textsuperscript{228} The CWA links the establishment of effluent limitations with the ability to obtain pollution control technology, thus assuring that compliance with federal minimum standards is technologically feasible.\textsuperscript{229} While the Act allows for recognition of economic burdens in some specific situations and provides funding to aid others,\textsuperscript{230} it is available technology which serves as the basic determinant for setting effluent limitations.\textsuperscript{231} By apply-
ing evermore stringent limitations as new processes for the treatment of wastes are developed and available, the Act seeks to obtain its several interim goals of improved water quality and the eventual elimination of water pollution.\textsuperscript{232}

The CWA has been criticized for having proclaimed ambitious goals without a realistic assessment of the obstacles to achieving clean water on a national basis.\textsuperscript{233} Significantly, in the course of further amendments to the CWA in 1976, Congress authorized the EPA to modify the dates by which point source effluent limitations must be met.\textsuperscript{234} This extension of the deadline reveals that despite the firm intentions of the Act, economic factors and compliance problems have forced the EPA to modify its water standards in a manner which continues to downgrade water quality over time.\textsuperscript{235} Although cost-benefit-analysis is not normally a decision factor in the establishment of pollution standards, the economic problems and local inertia which plagued the FWPCA continue as obstacles to the progress of pollution control under the CWA.\textsuperscript{236} Any such postponement would be at the direct expense of achieving the objectives set forth in the CWA.

The following sections will explore some of the structural inconsistencies and unregulated problems in the provisions and implementation of the CWA which further threaten the attainment of clean water by a state downstream from a pollution source.


\textsuperscript{233} Blumm, \textit{supra} note 214, at 164.


\textsuperscript{236} Quarles, \textit{supra} note 235, at 27-30; CEQ REPORT, \textit{supra} note 29, at 114-20.
1. The Better-Than-Best Problem

Technology based effluent limitations in the NPDES program apply to point source discharges regardless of the conditions of the receiving waterway. Conceptually, these effluent limitations focus on just one aspect of the entire pollution chain—the discrete discharge—rather than encompassing a larger view including non-point source runoff and the existing condition of a waterbody.237 Technology based limitations are useful because they can provide a uniform national standard. But because they cannot account for all sources of pollution, the CWA provides that federal minimum standards shall not be the exclusive avenue to be followed in the control of pollution. Congress retained the water quality-type standards of the FWPCA as a necessary second line of defense.238 Congress recognized that water quality might deteriorate below desired levels even though all applicable point source effluent limitations were being enforced.239 The CWA provides that standards more stringent than the federal minimum may be set by both federal and state authorities to address certain situations.240 Consequently, the literal uniformity imposed by the CWA refers only to the minimum federal standards promulgated by the EPA and does not limit the obligations of a discharger merely to compliance with minimum technology based standards.241

Section 301 of the CWA, which outlines the obligations of a discharger under a permit, underscores the notion that compliance with

237. Blumm, supra note 214, at 154-55; Gould, supra note 201, at 88; Post, supra note 13, at 120 n.2.
238. 33 U.S.C. §§ 1312, 1313. See Blumm, supra note 214, at 154-55. The original draft of the Senate version under the supervision of Senator Muskie sought to substitute technology based standards for the supposedly discredited water quality standards approach. The House wanted to retain a water quality standards approach and distrusted the exclusive use of technology based limitations. As a compromise both chambers agreed to retain water quality standards as a back-up to technology based limitations. Id.
239. Gould, supra note 201, at 96; Goldfarb, supra note 201, at 121. This is usually due to the large numbers of discharges into one waterway. As water quality standards made it difficult to control the many point sources which empty into a waterway, so effluent limitations on each point source may fail to maintain the quality status of the overall waterway.
240. E.g., 33 U.S.C. § 1370 authorizes a state agency approved by the EPA to promulgate its own site-specific standards for individual discharges so long as they are at least as stringent as the federal minimum. The EPA may set stricter discharge conditions on an individual basis for toxic or unconventional pollutants, id. §§ 1312, 1313. Section 511 of the CWA generally emphasizes that the provisions of the CWA shall not restrict the authority of any “officer or agency of the United States” to take action to abate water pollution under any other law or regulation not inconsistent with the Act. Id. § 1371.
241. Section 402, 33 U.S.C. § 1342(b)(1)(O) provides that an NPDES permit must require compliance with all the effluent limitations in section 301, id. § 1311. Section 301 in turn requires compliance with water quality standards or other more stringent standards promulgated under the Act. Id. § 1311(b)(1)(O).
federal minimum standards does not suffice to satisfy all requirements of the statute. Pursuant to section 301 a discharger must comply with not only federal minimum conditions but also with any other more stringent limitations contained in the NPDES permit, whether promulgated by the state agency or the EPA directly.更更重要的是，与一个允许并不隔离的 defendant from other liability if damages should occur or an action at common law were to be commenced. 更重要的是，与一个允许并不隔离的 defendant from other liability if damages should occur or an action at common law were to be commenced. The Act contemplates a discharger will be subject to different standards from various sources of authority, all with a view towards improving pollution control. The uniform national effluent limitations set forth in section 301 of the CWA establish only the uniform rate at which the nation will move toward the goal of clean water. In essence, the uniformity provided in the CWA is a uniform floor of control, not a uniform ceiling of control.

It can be seen that the imposition of varying standards is inherent in the structure of the CWA whereas uniformity per se is not. The promulgation of different standards, however, each designed to satisfy a different goal or implement a certain policy of the Act, may work to cross purposes. Rather than extending the provisions of the CWA to cover all pollution needs, the structural conflict of the statute may actually prevent proper attention to some pollution problems. Further, it may cause confusion and be unfair to complying dischargers. This can be seen most clearly in the conflict between water quality standards and minimum technology based effluent limitations.

For example, the water quality standards retained in section 302 are designed to implement the interim goal to achieve water quality

242. Section 301, 33 U.S.C. § 1311(b)(1)(C), assumes that permitted discharges will meet minimum effluent limitations and requires that a discharger under an NPDES permit meet “any more stringent limitation, including those necessary to meet water quality standards, . . . .”

243. Id. § 1311(b), construed in EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 226-27 (1976). Despite the provision of section 402(k), 33 U.S.C. § 1342(k), that compliance with an NPDES permit will be deemed compliance with most sections of the CWA, it does not suffice to ensure that a discharger has met all requirements under the CWA, nor does it insulate the discharger from other liability. NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977). For example, compliance with a permit under the CWA would not be a defense to an action at common law. S. REP. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 8968, 8746-47, reprinted in 2 LEGISLATIVE HISTORY, supra note 1, at 1499. See generally Stream Pollution Control Bd. of Indiana v. U.S. Steel Corp., 512 F.2d 1036, 1043 (7th Cir. 1975).


245. Goldfarb, supra note 201, at 115.

246. 33 U.S.C. § 1312. Note that the goals to be protected are identical to those of section 101 of the CWA, id. § 1251(a)(3) (fishable/swimmable waters).
capable of supporting and protecting wildlife and recreation in and on the water. In the event that technology based effluent limitations applied to point sources will not result in sufficient water quality, the second line of defense, water quality based limitations, must be implemented. Regardless of the criteria used to establish uniform federal technology based limitations, water quality based limitations will impose more stringent limitations upon point source discharges. 247

The conflict between standards is most acute regarding section 303. 248 Section 303 requires that new water quality based limitations be promulgated to achieve water quality standards which cannot otherwise be met by the application of technology based limitations used in phase one BPT or secondary treatment. 249 Section 303 continues pre-1972 water quality standard procedures and presumes that these standards shall continue beyond phase one BPT to upgrade phase two BAT as necessary. 250 Pursuant to section 303 each state is required to establish and periodically revise water quality standards for its waterways. 251 Unlike section 302, section 303

247. The establishment of water quality based effluent limitations pursuant to section 302 is above and beyond the federal minimum effluent limitations in section 301. Section 302(a), id. § 1312(a) authorizes the Administrator to establish revised effluent limitations or alternative control strategies to achieve necessary water quality standards which would otherwise not be met by the application of phase one BPT effluent limitations. The Administrator is required to hold a public hearing to determine that the extra social and economic costs of compliance do not outweigh the need for stringent standards. Id. § 1312(b)(1), (2). The CWA is quite vague as to the criteria by which water quality standards are to be judged. Water quality standards are to be sufficient to "protect human health and welfare, enhance water quality, and serve the purposes of the Act." Id. § 1313(c)(2).

248. Id. § 1313. Problems of conflict attributable to § 302 should be limited since its water quality standards will terminate with the achievement of the interim goal of fishable/swimable waters by 1983 as set forth in 33 U.S.C. § 1251(a)(2). Also, § 302 provides for ameliorative weighing which eases its impact; § 303 has no such limits.

249. See id. § 1311, which sets forth a two-step plan of increasingly stringent effluent limitations to control the discharge of pollutants into water. See supra note 222.

250. 33 U.S.C. § 1313(e)(3), (f); R. Zener, supra note 9, at 719; Gould, supra note 201, at 106; Goldfarb, supra note 201, at 115, 122-23. 33 U.S.C. § 1313(d)(1)(A) provides that each state shall identify those waters within its borders for which the effluent limitations required by section 301(b)(1)(A) are not sufficient to attain water quality standards. The state must then establish a total maximum daily load (TMDL) for identified pollutants at a level sufficient to achieve water quality standards with a "margin of safety" to account for seasonal variations and lack of knowledge concerning the interrelationship of effluent limitations and water quality standards. Id. § 1313(d)(1)(C). The TMDL numbers for pollutants is dispersed by waste allocation among discharge point sources by incorporating the figures into individual discharge permits as effluent limitations under section 301(b)(1)(C). R. Zener, supra note 9, at 719.

251. See supra text and notes at notes 207-12. States must review all water quality standards every three years. 33 U.S.C. § 1313(c)(1). The states then submit proposed standards to
does not allow for the relevance of social or economic factors when setting water quality based limitations. 252 Plainly, this exacerbates possible conflicts and burdens of compliance. Where severely polluted waterways are concerned, water quality based limitation will require much greater expense and development by a discharger than federal minimum technology based limitations would otherwise require. 253 One commentator has aptly dubbed this conflict the "Better than Best" problem. 254

The EPA's approach to the better-than-best problem essentially has been one of delay. 255 The agency's reluctance to implement a strong water quality standards program is an operational aspect which undermines the CWA's ability to address problems such as those raised by Illinois. 256 The fundamental fear expressed by states and the EPA is that enforcement of the water quality standards as written would result in plant closures and a major disruption of the planning processes and consistency within the Act. 257 Since the exp
tra costs of compliance with water quality based limitations would be borne by the economy of the state itself, state program incentives run counter to the imposition of stricter standards on discharges. The result has been that most states merely comply with federal minimum technology based effluent limitations and nothing more.\textsuperscript{258}

The EPA has guidelines for downgrading water quality standards.\textsuperscript{259} To avoid the consequences of the better-than-best problem the EPA allows a state to obviate the need to adopt water quality based limitations by reclassifying its waterways. Where the condition of a waterway precludes the satisfaction of water quality standards even if all point source discharges complied with technology based limitations, the waterway may be classified as "water quality limited."\textsuperscript{260} This enables the state merely to continue compliance with federal minimum technology based effluent limitations. In practice, the EPA has chosen to grant three-year exemption periods from water quality standards altogether where it can be shown that man-made pollution or technical inadequacies prevent the necessary improvement of water quality.\textsuperscript{261} The original deadline for the promulgation and achievement of water quality standards passed without being met by most industrialized urban areas.\textsuperscript{262} Eventual com-

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pliance with section 303 water quality standards is expected to encounter nearly insurmountable obstacles of funding, scheduling, technical uncertainty, and state inertia. The EPA has wrestled with this dilemma without any resolution.

The administrative and economic concerns of the states and the EPA are certainly not unfounded. Further, they imply that it would somehow be unfair to a permit-approved discharger if the minimum compliance requirements were to become constantly more stringent to account for factors nominally outside the purview of a technology based standards approach. Nevertheless, Congress has changed neither the structure nor the goals of the CWA. It is clear that the Act requires that a discharger be subject to some conflicting sources of pollution reduction standards in order to attain pollution abatement goals. Section 301 plainly contemplates that compliance with an NPDES permit does not insulate a discharger from the obligation to meet more stringent requirements, including those resulting from common law actions.

Examination of the better-than-best problem reveals a more troubling flip-side to the problem. If the actual pressures of compliance under the CWA result merely in the achievement of NPDES minimum standards, how can one state protect its more stringent standards? The full implication of the better-than-best problem is that it results in the "leveling" of water quality, effectively downgrading water quality to minimum standards. This is the tide against which a state must push in order to protect its standards from degradation by neighboring states complying with minimum standards. Furthermore, although the NPDES minimum standards are virtually the

waters to a lower level of use, thereby downgrading the applicable water quality standards. See 40 C.F.R. § 35.155 (1980) (44 Fed. Reg. 30,400 (May 23, 1979)).

263. It is estimated that in many industrialized states it may be years before waste load allocations (TMDL) — the data necessary to establish more stringent standards — for water quality may even be developed, let alone enforced. In 1977 Congress extended the deadline for compliance with phase one from 1977 to 1984 on a case-by-case basis. Publicly owned treatment works must meet secondary treatment standards by 1983 instead of the original 1977 deadline. These extensions have forestalled the applicability of a strict water quality program, since it has become difficult to ascertain at what point phase one can be said to have failed definitively to meet water quality standards. More directly, the EPA has not actively developed the criteria to judge water quality standards. Goldfarb, supra note 201, at 123-25; Gould, supra note 201, at 99-101, 116.

264. See, e.g., GAO, REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES: MANY WATER QUALITY STANDARD VIOLATIONS MAY NOT BE SIGNIFICANT ENOUGH TO JUSTIFY COSTLY PREVENTIVE ACTIONS, CED-80-86 (July 2, 1980); Blumm, supra note 214, at 147, 155.

265. See supra text and notes at notes 190, 243; NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).
only standards to be met, these standards are not designed to be all-inclusive. They do not apply to all pollutants, nor to all pollution situations. Why should a demonstrable nuisance condition on a waterway go unabated when the discharges which brought about that nuisance were in compliance with such NPDES minimum standards? These are the fundamental issues raised by the better-than-best problem — the conflict between the need for uniformity and certainty, and the need to address a wide variety of pollution problems which are not amenable to a standard level of treatment. The following section examines the manner in which the provisions of the CWA hinder the treatment of a serious, but non-standard pollution problem: municipal sewer overflows.

2. Title II Funding and Sewer Overflows

This section will review the status of projects designed to control municipal sewer treatment discharges and sewer overflows. The discussion will serve as a concrete example of the manner in which the provisions of the CWA serve to restrict treatment standards more stringent than the federal minimum and actually leave some areas of water pollution unaddressed. Title II of the CWA authorizes a massive construction grants program for municipal sewage treatment facilities. Congress displayed special concern for the lack of municipal resources to meet sewage disposal needs and hoped to avoid municipal compliance delays by making funding available. Generally, the funding provisions of the CWA exert powerful gravitational pressures upon the states so that municipal sewage plants

266. See supra text and note at note 216.
268. S. Rep. No. 414, 92d Cong., 1st Sess. 40-41, reprinted in 2 LEGISLATIVE HISTORY at 1458-59; 599 F.2d 151, 176 (7th Cir. 1979); Blumm, supra note 214, at 156. Note that compliance does not depend upon the receiving of funds by a discharger. See 33 U.S.C. §§ 1292, 1297. The CWA provides that federal grant funds shall be used to fund “the most cost efficient alternative to comply with sections 301 ... .” Id. § 1292(2)(C). The EPA has defined “cost efficient alternative” as that treatment which will meet section 301 minimum requirements with the least resource cost over time. 40 C.F.R. Part 35 ¶ E App. A (1979), 43 Fed. Reg. 44,807 (Sept. 27, 1978).
are usually designed only to meet the federal minimum requirement of secondary treatment. Sewer overflows of the sort involved in *City of Milwaukee* rarely receive funding and hence remain largely uncorrected.

Conventional solutions to sewage treatment and sewer overflows are very expensive. Municipal collection and treatment facilities are usually huge, centralized, capital-intensive structures requiring detailed long-term construction timetables. By contrast, sewer overflows are usually dispersed over a broad geographic area and are not amenable to single centralized treatment. Successful approaches to the elimination of sewer overflows are decentralized, encompassing management practices, variations in routine maintenance, and a

269. The principle problem with compliance with federal minimum standards by municipal dischargers is that the standards themselves intrinsically are tied to a huge grant-in-aid program under Title II of the CWA, 33 U.S.C. §§ 1252-1265. See Blumm, *supra* note 214, at 152. Congress has not been reluctant to alter the guidelines governing funding, which has increased uncertainty and decreased the effectiveness of federal funds. Also, occasional presidential im­poundment of the construction funds have resulted in the EPA’s inability to disburse funds. Even when not encumbered by political influences, the funding program has been so inefficient that it was left with $1 billion in unobligated funds for each of the first three years of the program. J. WHITAKER, STRIKING A BALANCE: ENVIRONMENT AND NATIONAL RESOURCES POLICY IN THE NIXON-FORD YEARS 1, 80-83 (1976); Blumm, *supra* note 214, at 153.

270. Although sewer overflows are covered by the NPDES permits, the EPA has not established effluent limitations for sewer overflows. Instead, the level of control warranted for sewer overflows is made on a case-by-case basis, depending upon the availability of funding. 40 C.F.R. § 133.03(a) (1980); EPA, *Benefit Analysis for Combined Sewer Overflow Control* 4 (1979). See 33 U.S.C. §§ 1292(2)(A), (B).

Municipal sewer treatment plants generally are publicly owned treatment works (POTW) under the Act. “Treatment works” is not a term separately defined for purposes of Title III enforcement in the CWA. In Title II, Grants for Construction, treatment works are defined as “any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage . . . or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewage systems.” *Id.* §§ 1292(2)(A), (B). For purposes of Title II funding the definition of treatment works is broad and specifically includes sewer overflows; yet for purposes of Title III standards and enforcement, sewer overflows are excluded from the definition of treatment works, and so are not even subject to secondary treatment effluent limitations. *Id.* §§ 1311, 1342; 40 C.F.R. § 133.03(a) (1980). In 1981 Congress developed a grant program directed specifically toward control of combined sewer overflows, § 201(m) 33 U.S.C. § 1311(m), Pub. L. No. 97-117 (Dec. 1981).

271. CEQ REPORT, *supra* note 29, at 112-16. Congress authorized the EPA to obligate $18 billion to municipalities during fiscal years 1973 to 1977. 33 U.S.C. § 1287 (1972). Subsequent law appropriated $28.18 billion through fiscal year 1979. *Id.* § 1287 (Supp. II 1979). As of March, 1979, the EPA had committed $20.7 billion of the total $28 billion available, but only $1.7 billion of those funds represented completed projects. EPA, MUNICIPAL CONSTRUCTION DIV., OFFICE OF WATER PROGRAM OPERATIONS, CLEAN WATER FACT SHEET at 2 (1979). At an average outlay of $4 billion per year, the Municipal Treatment Construction Program under CWA is the single largest program in the EPA. *Id.* at 1. CEQ REPORT, *supra* note 29, at 115; EPA REPORT TO CONGRESS ON THE STATUS OF COMBINED SEWER OVERFLOWS, PGM 430/9-78-006 (1978) at 1-10 (hereinafter cited as CSO REPORT).
broader view of the interrelationship of sewer overflows and other water problems.272 The unconventional management oriented projects which are suited to sewer overflow correction are not easily evaluated under the construction oriented facilities planning regulations which determine eligibility for federal funds.273 Facilities planning analysis favors conventional large-scale construction solutions to municipal discharge problems generally. The decentralized management oriented model of sewer overflow correction is not within the usual experience of planners and designers. Further, the nature of sewer overflow correction often requires a large expenditure for a relatively minimal incremental gain of overflow control. Individual sewer overflow projects are therefore difficult to cost-justify under facilities planning.274 Because sewer overflows are difficult to qualify as a least-cost alternative eligible for federal funding, these projects are typically assigned lowest priority on a state’s project list.275 Since sewer overflow projects are traditionally low priority because of facilities planning uncertainties, they seldom receive funding and are rarely built.276

Another drawback of the grant provisions is that funds are geared only towards projects required to be built to meet federal minimum standards. Projects designed to achieve greater than minimum standards must withstand intensive facilities planning scrutiny. For sewage treatment plants this means that nearly all projects are designed merely to meet secondary treatment requirements and mini-
mum storage capacity. Projects which call for advanced wastewater treatment, even where necessary, must be separately justified.

These drawbacks hamper sewer overflow projects most acutely. The EPA has not yet promulgated effluent limitations for sewer overflows and the secondary treatment requirement does not apply to sewer overflows. Only monitoring and some containment practices are required under an NPDES permit. Indeed, the actual level of sewer overflow correction depends on a case-by-case evaluation tied to the availability of funding. The lack of existing predetermined standards by which to measure the adequacy of a project makes it difficult to design a sewer overflow project as a least-cost alternative. The net result of these funding provisions is that while sewer overflow projects are eligible for grants, they are rarely funded and so the problem of sewer overflow remains largely uncorrected.

Sewer overflows recently have been recognized as the second largest category of water pollution problems in the nation. In recent amendments to the CWA, Congress expressly recognized that neither the provisions of the CWA nor EPA’s implementation of the

277. Blumm, supra note 214, at 152, 153, 162; CEQ REPORT, supra note 29, at 120. Federal money is available only for planning and construction of facilities, not for operation and maintenance. Local governments often fail to commit sufficient local funds to continue the operation of plants at their minimum-design capacity. This results in “polluted waters and wasted federal dollars.” Blumm, supra note 214, at 153-54, 162.

278. Certain eligible innovative treatment works may receive as much as 85% funding. 33 U.S.C. § 1282(a)(2). Nevertheless, the overall thrust of the program has been to discourage projects designed to meet more than minimum standards. CEQ REPORT, supra note 29, at 117, 120; Blumm, supra note 214, at 153. More importantly, the program has been subject to occasional modifications by Congress. For example, Congress has strongly considered abandoning all advanced wastewater treatment programs, and the percentage of funding available for projects has varied from 75% to 50% over time.


280. As a result, the EPA regulations have established only some monitoring and control practices, leaving the actual limitations to be decided on a case-by-case basis. 40 C.F.R. § 125, 3(c)(2) (1980); id. § 133.103(a). See EPA, BENEFIT ANALYSIS FOR COMBINED SEWER OVERFLOW CONTROL 4 (1979). Actual limitations or pollution control judgments are made in practice by reference to engineering factors and the availability of funds rather than water quality or pollution factors. Blumm, supra note 214, at 154.

281. CEQ REPORT, supra note 29, at 117, 120. The least-cost alternative is that which will meet federal requirements with minimal resource costs over time. 40 C.F.R. § 35.155, 43 Fed. Reg. 44,807 (Sept. 27, 1978). Yet for sewer overflows, ‘standards’ and ‘least cost alternative’ effectively are defined in terms of each other because there are no predetermined federal requirements for sewer overflows. Tripp, supra note 279, at 229.

Act had satisfactorily addressed the problem of combined and separate sewer overflows in urban areas. In its Report to Congress in 1978 the EPA found that "only a small portion of combined sewer overflow needs have been addressed . . ." under the CWA. Despite the acknowledgment of the funding program's operational discouragement of sewer overflow abatement projects, the EPA Report recommended that Congress continue with the same grant program. As an existing, familiar program its retention would avoid further construction delays that the adoption of a revised funding program might cause. In effect, the program was retained for what it would not do rather than what it could do—an avoidance rationale.

The foregoing overview of the CWA, presentation of the better-than-best problem, and discussion of combined sewer overflow projects serves as a context for several basic observations. First, federal minimum standards are not exclusive levels of control, but are subject to upward revision by both state and federal authorities under the CWA. Second, such non-uniformity is a concomitant feature of the CWA which appears to allow some leeway for judicial action to abate particular water problems consistently with the Act. Third, compliance problems and powerful economic pressures contribute to state and EPA inertia and the adherence to NPDES minimum standards only. Fourth, the net result of the EPA implementation of its mandate has been to allow the continued downgrading of water quality to levels at or below the NPDES minimum and only rarely above that minimum. Fifth, these minimum standards are not necessarily designed to cover all pollutants and specifically do not control some major sources of pollution, such as combined sewer overflows. The emphasis on mere compliance with NPDES minimum standards has become an obstacle barring the maintenance of more stringent water quality standards. Finally, it is apparent that the CWA, like any other putatively comprehensive legislative scheme, does not address


284. EPA, Report to Congress on Control of Combined Sewer Overflow in the United States, MCD Rpt. No. 50 at 8-2, 8-3 (October 1, 1978).

285. Id. at 8-11; CEQ Report, supra note 29, at 117-18.
all water pollution problems and leaves virtually unregulated some areas which nominally have been addressed. It remains to be seen whether a state could successfully protect its more stringent standards from deterioration by polluting states upstream by resorting to the administrative procedures of the CWA to compel the upstream state discharger to upgrade its discharge requirements beyond the federal minimum.

B. The Dilemma of the Downstream State Under the CWA

The cooperative federalism enforcement scheme of the CWA provides that a state may impose its own pollution control standards so long as they are more stringent than the federal minimum. The authorization of section 510 permitting a state to set standards beyond those imposed by federal requirements raises the issue of conflicting state standards. Pollution spillover effects from one state to another have posed a major dilemma for any systemmatic attempt to regulate pollution. The use of nationally uniform technology based effluent limitations does relieve structural differentiation between pollution contained in one state and pollution with interstate effects, but this assumes that compliance with federal minimum limitations alone would prevent the occurrence of adverse effects of pollution in other states. The nonuniformity of standards provided for in the Act, environmental science and common experience strongly suggest otherwise.

The dilemma of the downstream state can be described generally as follows. In an effort to clean up its waters, State A has adopted standards more stringent than the minimum pursuant to sections 510 and 301 of the CWA. River X runs through State A and is a major target of this pollution abatement. Upstream from State A along River X lies State B. State B discharges pollutants into River X in compliance with NPDES minimum standards. Nevertheless, dis-

287. Post, supra note 13, at 117; Stewart, supra note 211, at 1229; Note, Preemption, supra note 4, at 531 n.198.
288. Post, supra note 13, at 120 n.32. The minimum federal standards set pursuant to section 301, 33 U.S.C. § 1311, and applied to all NPDES permits pursuant to section 402(b), 33 U.S.C. § 1342(b), are not set with health or welfare goals in mind. Commentators have noted that the phase one BPT standards adopted actually represented the average level of control that existed before the CWA was passed. See, e.g., Gould, supra note 201, at 96-102. The federal minimum standards may be deficient to prevent adverse spillover effects from one state to another. Citizens for a Better Environment v. EPA, 596 F.2d 720 (7th Cir., 1976).
289. See supra text and notes at notes 237-66.
charged pollutants from State B continually flow downstream to State A. State A has determined that compliance with minimum standards will not protect River X and will in fact result in further downgrading of its waters. Unless State A can convince or compel State B to respect its need for more stringent standards, State A's efforts will be fruitless and its waters will become polluted. To add a note of urgency to this dilemma, what if the influx of State B's discharges has resulted in a water condition in State A that presents an enjoinable nuisance as a threat to public health?

1. Hearings Provisions in the CWA

The CWA contains several hearing provisions which appear to provide a means of preventing one state's pollution from injuring the waters of a neighboring state. Nominally, federal overview is provided in an effort to accommodate conflicting state standards. Under the NPDES program, the permit issuing agency must notify the EPA of any permit to be issued by the state. If the state agency determines that discharge under a permit might affect the waters of another state, notice of the proposed permit issuance and opportunity to comment must be given to the neighboring state. The administrative hearing procedures of the CWA provide that the affected state may recommend that the issuing state modify its permit so as to prevent adverse effects on water quality outside the state. The Act, however, does not obligate the issuing state to incorporate recommendations to protect water quality in an affected state.

The permitting state need only inform the EPA and affected states

290. The EPA can delegate permit issuing authority to a state only after approval of the state's entire water program, 33 U.S.C. § 1342(b). The EPA may still veto the issuance of any individual permit. Id. § 1342(c)(2), (3). Where states have failed to promulgate satisfactory water quality standards, EPA must establish such standards directly. Id. § 1313(c). See Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 193-94 (1980); Fort, supra note 12, at 154-55.

291. To institute its own water program a state must submit to specific EPA procedures. 40 C.F.R. §§ 123.1-123.62 (1980). In order to receive approval, each state agency under the NPDES system is required to notify the EPA of any permit to be issued under the program. 33 U.S.C. § 1342(d)(1).

292. Id. §§ 1342(b)(3), (5); id. § 1341(a)(2).

293. Id. §§ 1342(b)(5), (j) (a state affected by the proposed permit may request public hearings and urge the imposition of higher standards); id. § 1341(a)(2) (the affected state may request the Administrator to veto a state permit and formulate a new permit); id. § 1313(c) (the affected state may request higher water quality standards to protect its own standards), construed in Costle v. Pacific Legal Foundation, 445 U.S. 193, 200-02 (1980). See 33 U.S.C. § 1342(b)(4), (5) (1976); 40 C.F.R. 123.23(b)(2) (1980). Note that by contrast, a permit issued directly by the EPA rather than a state must respect water quality standards of neighboring states at the outset. 33 U.S.C. § 1342(a)(2).
in writing with reasons for not accepting suggestions. In this event, the CWA provides for review of the challenged permit by the EPA. The Administrator may object to the issuance of the permit or veto it if the waters of another state may be adversely affected. This can be done, however, only on the basis that the permit violates the minimum standards already imposed by the Act.

The EPA also may choose to summarily affirm the proposed permit, without having to specify its reasons for so doing. Summary affirmance of the permit as being in compliance with federal standards is not directly subject to further judicial or administrative review. Veto and review authority of the EPA were designed to control the operation of permitted discharges, not as an impetus to upgrade pollution standards. Even in instances where a state permit on its face violates federal guidelines, EPA review has often deferred to the need for localized site-specific "variations" and approved the permit. Where the Administrator objects to a proposed permit as being outside the authority of the Act, the issuing state may request a formal hearing before the EPA. If the Administrator then endorses the permit, it will be issued directly by the EPA. This in turn would allow the affected state to seek judicial review of the formal


295. 40 C.F.R. § 123.75(c)(2) (1980); 33 U.S.C. §§ 1342(d)(1), (2)(B). The EPA cannot reject a permit which on its face is in compliance with the minimum federal limitation of section 301. Id. § 1311, and existing EPA regulations; District of Columbia v. Schramm, 631 F.2d 854, 861-62 (D.C. Cir., 1980).


298. Id. at 17-19.

299. 33 U.S.C. §§ 1342(d)(1), (d)(2)(B). The issuing state may either amend the permit or request an adjudicatory hearing. Id. § 1342(d). Thus, in order to get an offending state to modify its discharge, an adversely affected state would stand a better chance if the EPA were to veto the proposed permit. Id. § 1342(d)(3)(A) provides that after vetoing one state’s permit at the request of another, the EPA must issue a permit containing “conditions which such permit would include if it were issued by the Administrator” originally. Id. § 1342(d)(3), (4). Since the EPA should respect all neighboring states’ water quality standards when it issues an NPDES permit directly, id., the adversely affected state may be able to convince the EPA to tighten the proposed permit conditions. In any event, EPA vetoes of state permits have been very rare. Note, NPDES Hearings, supra note 297, at 17. Also, the EPA has never modified a state permit to respect water quality standards under section 312, 33 U.S.C. § 1312(a). Kakoullis, supra note 4, at 130.
EPA decision under the CWA and general provisions of the Administrative Procedure Act.\textsuperscript{300}

The efficacy of the provisions for federal oversight of state programs is undercut in practice. Actual federal review of state permits is sparse.\textsuperscript{301} This has been attributed to the lack of sufficient EPA resources and an emphasis on state autonomy which encourages lax federal review.\textsuperscript{302} The EPA also is burdened with the direct regulation of those many states whose programs have not been approved to issue NPDES permits.\textsuperscript{303} Although the EPA has authority to review any state permit, the legislative history of the CWA indicates that this authority is to be reserved for permits of major significance.\textsuperscript{304} Consequently, the CWA provides that the EPA may waive review authority for entire classes of discharges or for individual permits as it sees fit. This waiver is a discretionary function of the Administrator and, as such, is not directly subject to judicial review.\textsuperscript{305} A recent report to Congress confirmed that the EPA often waives broad classes of discharges, especially those for which detailed guidelines have not been drawn.\textsuperscript{306}

Recent judicial interpretations underscore the narrowness of review and veto power of the EPA even in cases of major significance.\textsuperscript{307} In \textit{Ford Motor Co. v. EPA},\textsuperscript{308} the Administrator objected to a state permit which allowed a polluter to meet water quality stand-

\textsuperscript{300} 33 U.S.C. § 1369(b)(1)(F). EPA decisions on effluent limitations are subject to circuit court review. \textit{Id.} § 1369(b)(1), \textit{construed} in Montgomery Envt'1 Coalition v. Costle, No. 79-1183, slip. op. at 10-15 (D.C. Cir., Oct. 8, 1980). The APA, 5 U.S.C. §§ 701-706 (1976), makes any final agency action reviewable and authorizes a court to set aside action that is arbitrary, capricious, or not in accordance with law. 5 U.S.C. § 706. If the decision is a formal adjudicatory hearing, it may be judicially set aside if not supported by substantial evidence on the record.


\textsuperscript{302} Note, \textit{NPDES Enforcement}, supra note 301, at 206-07.

\textsuperscript{303} There are approximately 32 states with approved programs. Nearly all remaining states are regulated directly by the EPA. Until 1982 Massachusetts had a unique joint regulation program with the EPA. \textit{See} Kakoullis, \textit{supra} note 4, at 1129.


\textsuperscript{305} 33 U.S.C. § 1342(d)(3); Note, \textit{NPDES Enforcement}, \textit{supra} note 301, at 205-06. Only non-discretionary acts of the Administrator are subject to review under section 509 of the CWA, 33 U.S.C. § 1369.

\textsuperscript{306} Note, \textit{NPDES Hearings}, supra note 297, at 20.

\textsuperscript{307} Neither the CWA nor the EPA have defined what constitutes a major discharge. Instead it has been left to an \textit{ad hoc} determination resulting in somewhat inconsistent regional standards of review by the EPA. CEQ REPORT, \textit{supra} note 29, at 8-9, 173.

\textsuperscript{308} 567 F.2d 666 (6th Cir. 1977).
ards by a process of flow augmentation — simply increasing the flow of water to dilute pollutants. The court ruled EPA could not veto the permit on this ground because nothing in the CWA expressly prohibited flow augmentation. The method itself was held not to violate any promulgated regulation even though in operation it would not attain compliance with federal standards. The court found the EPA veto to have been an ad hoc policy determination only.\textsuperscript{309} In \textit{Washington v. EPA},\textsuperscript{310} the court held that the EPA could not veto a proposed state permit on the basis of effluent limitations in the permit where the EPA had not established effluent limitations on a national basis for the discharge in question. Again, the agency judgment was considered to have been an ad hoc policy determination insufficient to support the veto.

In the context of transboundary pollution, the hearing and comment procedures do not provide definitive or satisfactory solutions to interstate disputes. The CWA mechanism is keyed merely to notice and opportunity to request that a victim state’s waters be respected. This input itself is geared only towards the minimum standards already established by the EPA.\textsuperscript{311} As the case decisions above indicate, the EPA could not impose stricter standards upon the discharger state’s polluters at the request of the victim state unless the EPA had previously established water quality standards or other criteria on which to base its administrative decision. Thus, while the hearing provisions appear to provide some help to a downstream state, ultimately, the CWA fails to specify how the burden of preventing or compensating for interstate spillover pollution is to be allocated between the polluter and the affected states.

2. Enforcement Provisions in the CWA

In light of the limited scope and effect of the administrative mechanism dealing with interstate disputes, the strengthened enforcement provisions of the CWA are regarded as significant.\textsuperscript{312} If the EPA finds a discharger in violation of any condition or limitation under the Act it may impose civil and/or criminal sanctions.\textsuperscript{313}

\textsuperscript{309} Id. at 669. In response to the decision in \textit{Ford Motor} the EPA proposed regulations to provide that flow augmentation is not an acceptable device for meeting point source requirements. 43 Fed. Reg. 37,037, 37,132 (1978), codified at 40 C.F.R. § 125.2(b)(3) (1979).

\textsuperscript{310} 573 F.2d 583 (9th Cir. 1978).

\textsuperscript{311} Note, \textit{Preemption}, supra note 4, at 530-31.

\textsuperscript{312} See \textit{Fort}, supra note 12, at 152.

\textsuperscript{313} 33 U.S.C. § 1319(d) lists the actual penalties available. The Administrator may impose civil penalties of as much as $10,000 per day of violation. Id. § 1319(d). The Administrator may
spite the ability to seek criminal penalties, the EPA has relied overwhelmingly on civil restraints. Civil enforcement actions have been used primarily as inducement for conference and conciliation processes between the EPA and the polluter. In addition, section 505 of the CWA provides two private enforcement actions to ensure compliance with requirements of the Act. Any citizen may commence a civil action against a party alleged to be in violation of existing standards under the statute. An action may be brought against the Administrator of the EPA for his failure to perform any non-discretionary duty imposed by the Act. The federal district courts have been granted jurisdiction over these suits without regard to amount in controversy or citizenship of the parties.

The citizen suits are subject to certain procedural conditions. Section 505 requires that notice be given to the EPA and the alleged
violator sixty days prior to commencement. Also, no suit may be initiated where the EPA is diligently pursuing an action against a discharger. The notice requirements are designed to encourage and afford opportunity for the EPA to institute administrative action before expiration of the notice period. This would in turn prevent the need for private litigation.

Section 505(h) specifically provides that the governor of a state adversely affected by a violation of an effluent limitation occurring in another state may sue the Administrator for failure to enforce the limitations. Like the citizen suit provisions, this action is geared towards enforcing standards which have already been promulgated by the EPA. Technically for purposes of section 505, the enforcement of any effluent standard or limitation under the Act does not include section 303 water quality based limitations. If a compliance deadline has not yet occurred, enforcement suits cannot induce a polluter to meet an earlier deadline. Suits to promulgate new standards or to review the efficacy of given standards in order to revise them are not provided for in the Act through any of the causes of action.

It can be seen that neither the administrative hearing procedures nor the enforcement actions of the CWA directly address the problem of interstate disputes from pollution spillovers. The regulatory scheme contains many gaps, as some areas of water pollution have remained unregulated and no effluent limitations or technical

319. Id. § 1364(b). These limitations were designed to "carefully channel public participation." Evansville v. Kentucky Liquid Recycling Corp., 604 F.2d 1008, 1015 (7th Cir. 1979). This is to prevent inconsistent results where both a citizen and the EPA bring enforcement actions against the same polluter simultaneously. See, e.g., Middlesex Cty Sewerage Authority v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981), where the EPA had brought an enforcement action against a discharger and received a compliance agreement but the plaintiff continued to press his claims on the same dischargers.


322. Id. § 1365(f); District of Columbia v. Schramm, 631 F.2d 854, 861-62 (D.C. Cir. 1980); United States Steel Corp. v. Train, 556 F.2d 822, 835 (7th Cir. 1975).

323. See 33 U.S.C. § 1365(f) which does not include the water quality standards of sections 302 or 303, id. §§ 1312, 1313, as enforceable under section 505, id. § 1365.

324. See Kakoullis, supra note 4, at 549-50.

325. Id.

326. Note, Preemption, supra note 4, at 524, 530; Note, Umbrella Equities, supra note 13, at 150-53.
criteria have been established for the control of many identified pollutants. The provisions of the CWA do not afford protection of a state's right to adopt more stringent water quality standards. The Act provides possible avenues by which an offended state may abate an out-of-state discharge, but only to the extent of maintaining federal minimum requirements.\textsuperscript{327}

It is in this context that the savings clause of the CWA becomes central to our inquiry. Section 505(e) provides, in part: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement . . . or any other relief . . . ."\textsuperscript{328} Illinois believed that the CWA did not preclude the use of federal common law and that section 505(e) specifically preserved its use. In recognition of the ambitious goals decreed by the Act, many courts and commentators have interpreted the savings clause broadly.\textsuperscript{329} The necessary incompleteness of any legislative scheme — and the gaps in the CWA particularly — would seem to make it inevitable that judicial action not specifically enumerated in the statute will be necessary to resolve unaddressed disputes.\textsuperscript{330}

3. Illinois' Dilemma: A Case Study

The nature of environmental processes and the mobility of pollution makes it quite conceivable that a state may find its own water quality harmed by permit-approved discharges from another state upstream. Pursuant to authority granted by section 510 of the CWA, Illinois had adopted effluent limitations and water quality standards more stringent than federal minimum to maintain the water quality level in its portion of Lake Michigan.\textsuperscript{331} The minimum standards in Milwaukee's permits were not sufficient to prevent degradation of Illinois' water quality standards.\textsuperscript{332} Further, the discharges were

\textsuperscript{327} See 33 U.S.C. § 1365(a), (h); Fort, \textit{supra} note 12, at 159-60; S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), \textit{reprinted in 2 LEGISLATIVE HISTORY, supra} note 1, at 1497.

\textsuperscript{328} 33 U.S.C. § 1365(e).


\textsuperscript{330} Kakoullis, \textit{supra} note 4, at 549; Note, \textit{State Ecological Rights}, \textit{supra} note 11, at 610.


\textsuperscript{332} Illinois standards require all effluent discharged into Lake Michigan to comply with the following: 5mg/l suspended solids; 1 mg/l phosphorous; 4 mg/l biochemical oxygen demand;
shown to have caused a nuisance. Even if Illinois could manage to obtain a hearing, EPA review, or EPA veto of the Milwaukee permits, Illinois could be assured only that federal minimum standards would be met, not that its own higher standards would be protected.333

The EPA had drawn secondary treatment requirements for municipal sewage discharge in terms of allowable limits of certain conventional pollutants. No regulations existed regarding the discharge of viral and bacterial pathogens and phosphates which Illinois sought to control.334 Since sewer overflows or sewer pipes which do not lead to a treatment facility are not considered publicly owned treatment works for purposes of section 301, sewer overflows are not even subject to secondary waste treatment requirements.335 Although covered by permits, no specific effluent limitations have been issued to control overflows from combined or separate sewers.336

The Better-than-Best conflict between technology based limitations and water quality standards served to place Illinois in an administrative bind. Illinois sought to preserve its water quality based standards which called for regulation of pollutants which the CWA and EPA had not yet addressed. Regarding those pollutants for which the EPA had set effluent limitations, Illinois' standards were stricter than the federal minimum. Water quality based limitations may have imposed more stringent limitations than those required by section 301 and contained in Milwaukee's permits. Yet throughout

40/100 ml fecal coliform. Illinois Pollution Control Board Rules and Regulations, Ch. 3 § 404(d) (1979). The standards in Milwaukee's permits were more lax: 30 mg/l suspended solids; 1 mg/l phosphorous; 30 mg/l biochemical oxygen demand (variable standard allowed 85% removal regardless of numerical amount); 200/100 ml fecal coliform.

333. See 33 U.S.C. §§ 1342(a)-(d), 1365(a)-(f).

334. Id. § 1311. Secondary treatment standards cover BOD₅, suspended solids, phosphorous, and fecal coliform. 40 C.F.R. § 135.102. These standards do not control viral and bacterial pathogens except to the degree that they may be diminished by fecal coliform treatment. See supra notes 37, 234, 253. Nevertheless, all these above mentioned groups of pollutants remain untreated when discharged from sewer overflows. 451 U.S. at 352 (1981) (Blackmun, J., dissenting); Brief for United States as Amicus Curiae at 31, City of Milwaukee v. Illinois, No. 79-408 (U.S., filed Sept. 3, 1980).

335. 40 C.F.R. § 133.03(a) (1978). See 599 F.2d 151, 172 (7th Cir. 1979). See supra text and notes at notes 288-90.

336. Sewer overflows are considered point sources and so must be covered by a permit pursuant to 33 U.S.C. § 1342. Technically, under this permit a sewer overflow must comply with the minimum effluent limitations set forth pursuant to id. §§ 1311(b)(1)(A), (b)(2). Nevertheless, no specific effluent limitations have been promulgated for sewer overflow discharges. Although they are defined as "treatment works" to satisfy Title II funding provisions, sewer overflows are not included in the definition of treatment works under id. § 1311. See 40 C.F.R. § 125.3(c)(2) (1980); id. § 122.3(bb) (1979); 45 Fed. Reg. 33,423 (1980) (to be codified at 40 C.F.R. § 123.3). See also 40 C.F.R. § 133.103(a); Brief for United States as Amicus Curiae, supra note 334, at 7.
the controversy, the EPA had not set TMDL criteria on which to base water quality standards.\textsuperscript{337} Illinois, therefore, had no technical basis by which to justify its request that the EPA impose newer more stringent standards on the Milwaukee discharges.\textsuperscript{338} Further, since the EPA had not promulgated control guidelines for water quality standards, its decision to impose stricter standards on Milwaukee would be characterized as an ad hoc policy determination.\textsuperscript{339}

Besides the confoundment of sections 301 and 303 (the better-than-best problem) the EPA has not promulgated TMDL guidelines for even the conventional pollutants in sewer overflow discharges.\textsuperscript{340} Like Illinois, it appears that any affected downstream state seeking to protect water quality based limitations would draw an administrative blank if it was concerned with pollution from sources not already covered by the EPA. The affected state would have difficulty persuading the EPA to modify another state’s otherwise valid permit on the basis of asserting control criteria which the EPA itself has not seen fit to develop.\textsuperscript{341} The background factor of EPA reluctance to implement strong water quality based standards beyond federal minimum standards and its assiduous avoidance of better-than-best conflict reinforce the uncertainty of an affected state’s prospects under the CWA.

As of 1972, Illinois no longer pursued any administrative remedies but persisted in its judicial federal common law claims. Although Illinois received notice of the Wisconsin DNR proceedings, it did not participate in the hearings. Certainly this may be viewed as a tactical

\textsuperscript{337} CEQ REPORT, supra note 29, at 117; Goldfarb, supra note 201, at 122. In 1978 the EPA further restricted the efficacy of invoking water quality standards to upgrade a neighbor state’s discharge by providing that water quality TMDL figures need only be set for those conventional pollutants already deemed suitable for minimum technology based limitations under section 301, 33 U.S.C. § 1311(a). Thus, water quality standards can be developed only to cover phosphorous, biochemical oxygen demand, suspended solids, and fecal coliform. Pathogenic viruses and bacteria are excluded. See id. § 1314(b)(4).

\textsuperscript{338} Another technical uncertainty is that the terms of the hearing procedures indicate they are to provide opportunity to review technology based limitations under section 301, not water quality based limitations under section 303. See id. § 1342(a)-(f).

\textsuperscript{339} See supra text and notes at notes 307-10. CSO REPORT, supra note 271, at 7-1, 7-3.

\textsuperscript{340} Decision on the actual level of control of sewer overflow discharge is made on a case-by-case basis and referred to available funding. EPA BENEFIT ANALYSIS, supra note 270, at 4; EPA PROGRAM REQUIREMENTS, supra note 274, at 02. See Note, Preemption, supra note 4, at 530; Note, NPDES Hearings, supra note 297, at 3. But see Fort, supra note 12, at 155 n.148. See also Brief of Plaintiff at 5-7, Oklahoma v. Arkansas, No. 93-853 Orig. (U.S., filed May 24, 1982).

\textsuperscript{341} 33 U.S.C. § 1342(b)(3) (state may only request public hearings and recommend higher standards); id. § 1342(b)(5) (state may request administration to veto proposed permit, but vetoes are rare); id. § 1313(c) (state may request higher standards as necessary to protect its water quality, but EPA has not developed water quality standards).
error on Illinois’ part. Yet Illinois’ mistrust of the CWA reflects part of the inadequacy of the CWA as implemented by the EPA. Similar to other administrative avenues, Illinois’ participation in the DNR hearings could only assure that federal minimum standards would be met. Under the CWA Illinois had no basis by which to modify the Milwaukee permit other than the need to protect its own standards. As a purely procedural matter, Illinois felt it could not get proper review of its factual case within the confines of agency hearings. Procedurally, Illinois faced the catch-22 of having to prove the very case for which it sought a hearing in order to obtain a hearing in the first instance.

In sum, this examination of the provisions and operation of the CWA reveals that despite the establishment of a detailed regulatory scheme by Congress, significant areas of water pollution problem are not regulated by the statute. Fundamentally, the pollution control standards in the CWA are not designed as part of a preventive or remedial scheme but as a regulatory mechanism. Under this scheme which focuses on the behavior of dischargers rather than the cleanup of a water body itself, nuisances which endanger the health and welfare of citizens may occur even where discharges comply with permit conditions. In these cases, the CWA implicitly, and its savings clause expressly, allows that common law remedies may be obtained. The occurrence of a nuisance condition notwithstanding permit compliance is most troubling when caused by permitted discharges from another state. While the CWA gives states a unique

342. See Fort, supra note 12, at 155-56 n.148. Such an exhaustion of remedies is argued in Defendant’s Opposition to Plaintiff’s Motion, Oklahoma v. Arkansas, No. 93-853 Orig. (U.S., filed July 23, 1982).
344. Illinois felt that it would have to substantially prove the need for effective water quality standards in order to invoke such standards in a hearing because the EPA had failed to provide or develop such standards. Phone conversation with Joe Karaganis, counsel for Illinois, Nov. 13, 1981. See Casenote, Costle v. Pacific Legal Foundation: Recent Developments, 11 Env’t L. Law 449 (1981); Comment, The Requirement of Formal Adjudication Under the Administrative Procedure Act: When Is Section 554(a) Triggered So As to Require Application of Sections 554, 556 and 557? 11 Env’t L. Law 97, 105-10 (1980).
345. The EPA has maintained that the CWA was not designed as a remedial scheme or one that could achieve the immediate cessation of pollution. EPA Petition for Certiorari at 12, Middlesex Cty Sewerage Auth. v. Nat’l Sea Clammers Ass’n, No. 80-12 (U.S., filed July 3, 1980); CWA construed in Metropolitan Sanitary Dist. v. United States Steel Corp., 30 Ill. App.3d 360, 332 N.E.2d 426, 433-34 (1975), cert. denied, 424 U.S. 976 (1976).
346. See, e.g., City of Milwaukee v. Illinois, 451 U.S. 304 (1981); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979); Citizens for a Better Environment v. EPA, 596 F.2d 720 (7th Cir. 1979) (EPA’s guidelines under CWA ineffective to prevent adverse pollution effects in neighboring states).
right to promulgate standards more stringent than minimum, the hearings and enforcement provisions have not afforded any solution for the violations of such standards by transboundary pollution. 347

Nevertheless, the Supreme Court in City of Milwaukee v. Illinois found that the CWA addressed the claims which Illinois brought. Further, the Court held that the comprehensive scheme of the CWA prevented federal courts from exercising their limited lawmaking powers. The following section presents an analysis of the Court's decision and then suggests an approach which reconciles the use of federal common law with the regulatory scheme of the CWA.

VI. CITY OF MILWAUKEE: ANALYSIS OF THE DECISION

The foregoing reviews of the CWA and the different interpretations given to the CWA by the various courts suggest the degree to which a court's presumptions and policies can be manifested in contradictory readings of congressional intent. The majority and the dissent in City of Milwaukee support their respective versions of congressional intent by citing carefully to the legislative record. Understandably, the most meticulous references and the sharpest distinctions involve the savings clause of the Act. The majority and the dissent focus specifically on an exchange involving Senators Muskie, Hart, and Griffin regarding the effect of the CWA on pending litigation in which a federal common law claim was raised. 348 As is frequently the case, legislative history yields contradictory indications which can be used to either side's advantage. 349 A deeper look into legislative history itself does not clearly reveal whether references to common law generally were meant to include or exclude federal common law particularly.

Perhaps, as has been suggested, the most satisfactory interpretation of section 505(e) is that it "takes no stand on the preemption

347. 33 U.S.C. § 1370 provides that states may unilaterally impose more stringent standards on their interstate waterways as a matter of state law. See supra text and notes at notes 222-25. In addressing the problem of conflicting state standards the CWA provides that an adversely affected state may only recommend that a discharger state adopt more effective control standards. 33 U.S.C. §§ 1342(b)(3), (5), 1313(c). See 451 U.S. 304, 350-51 (1981) (Blackmun, J., dissenting).

348. 451 U.S. at 330-32, 331 n.23; id. at 342-44 (Blackmun, J., dissenting). In response to a question by Senator Griffin, Senators Muskie and Hart expressed the opinion that the 1972 amendments to the FWPCA (CWA) would not affect a suit pending against Reserve Mining Co. based, in part, on federal common law nuisance. 118 Cong. Rec. 33,705-06, 33,713 (1972), reprinted in LEGISLATIVE HISTORY, supra note 1, at 191-94.

349. See L. Tribe, supra note 73, §§ 3-31 to 3-34; Hart & Wechsler, supra note 75, at 387-38.
Such a "wash" in legislative history is not at all uncommon. Section 505(e) does make it apparent that an enforcement action is not to be the exclusive remedy under the Act. The question whether Congress intended to save federal common law is still left to the federal judiciary for resolution. What other forms of action or relief are available will have to be determined by references to other provisions in the Act, its overall structure and the Court's own approach to discerning legislative intent. The various judicial conclusions as to whether federal common law was supplanted by the CWA were based on many different factors such as the conception of federal courts' powers, the breadth of the regulatory scheme, the efficacy of other remedies, and the need to address the complaint of an aggrieved party. Ultimately, the respective judicial retention or displacement was justified on the grounds of "congressional intent." Yet it can be said in light of the contrasting opinions in the *Illinois* litigation that such judicially derived congressional intent was in effect a product of all the many policy and prudential concerns made by a federal court.

The Seventh Circuit in *Illinois* and the dissenters in *City of Milwaukee* followed the usual judicial standard of review requiring that Congress evince some expression of an intent to displace well-established federal common law rights by the passage of the CWA. The majority opinion applied a new standard by which displacement of federal common law occurred by the enactment of the CWA unless Congress specifically and expressly retained federal common law. The very standards by which the courts approached the question of congressional intent embodied their general policy preferences.

It is in this policy sense that the Supreme Court decision purports to take a larger view of the *Illinois* controversy than did the lower federal courts. Recent decisions by the Supreme Court indicate its preoccupation with its role as the court of final appeal and of policy formulation rather than its role as a factfinder or equity court of first resort. The Supreme Court opinion reflects policy considerations which seem to inundate its reading of congressional intent regarding

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federal common law which would otherwise be equivocal at best. In this section the ostensible basis for the *City of Milwaukee* decision will be presented. Then the section will discuss the underlying policy concerns which in turn formed the Court's opinion that Congress intended to abrogate federal common law rights by passing the CWA.

**A. Comprehensiveness of the CWA**

Probably the most striking analytical feature of the *City of Milwaukee* opinion is its repeated reference to the "comprehensiveness" of the CWA. The majority continually cites to the legislative record that the Act was intended to be a comprehensive program for controlling water pollution\(^{355}\) as though the use of the word "comprehensive" was indicative of a congressional intent to exclude all other attempts to abate water pollution. The recurring theme of the opinion is that the comprehensive nature of the Act by definition militates against the use of any other remedies, especially judge-made remedies. As the Court stated, "the establishment of such a self-consciously comprehensive program by Congress ..., strongly suggests there is no room for courts to attempt to improve on that program with federal common law."\(^{356}\)

The dissenters in *City of Milwaukee* decried such "talismanic" use of the word "comprehensive." They pointed out that many bills are characterized by their proponents as being comprehensive.\(^{357}\) In fact, the FWPCA before its repeal in 1972 was described by Congress as a "comprehensive program."\(^{358}\) Moreover, the CWA itself has been subject to several substantive amendments since its inception as putatively comprehensive legislation by the Congress in 1972.\(^{359}\)

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356. Id. at 319.
357. Id. at 338-42 (Blackmun, J., dissenting). "There is nothing new about federal law in this area being characterized by its proponents as comprehensive." Id. at 342 n.13.
The dissent appears to be correct in its observance that the characterization by Congress of its legislation as comprehensive does not in itself constitute a statement as to the availability of other remedies. To invest such meaning in the word "comprehensive" or the number of times it is used in legislative debates is not supported by any mode of judicial interpretation or by an understanding of the legislative process.\textsuperscript{360} The majority opinion's idiosyncratic use of the word "comprehensive" appears to be a manifestation of its prudential concerns and policy preferences. The word "comprehensive" in \textit{City of Milwaukee} can best be viewed as symbolic of two things: the Court's desire to observe strictly the separation of powers doctrine, and the Court's conclusion that there are no interstices in the CWA to justify federal common lawmaking by the courts.

By this shorthand use of the word "comprehensive" the Supreme Court obviated the need to undertake detailed review of the provisions of the CWA as done by the Seventh Circuit, and avoided a full understanding of the inadequacies in the Act which gave rise to Illinois' claim before the Court. Once the Court found the CWA to be a comprehensive regulatory scheme, its categorical analysis of Illinois' claim proceeded inexorably to demonstrate that no interstice existed to be filled by federal common law. The CWA authorized the EPA to set effluent limitations which were incorporated into the NPDES permits. Milwaukee sewage treatment plants operated under such permits. Therefore, the Court concluded, Illinois may not complain to the courts that further effluent limitations are called for when an expert agency designated by Congress has already promulgated standards.\textsuperscript{361}

Illinois' request that standards be set for enteroviruses, bacteria, and other currently non-quantified pollutants was not regarded by the Court. The ambivalence of the EPA in efforts to upgrade water quality standards\textsuperscript{362} was not even considered as a general equitable factor favoring the need for judicial action when harms go unaddressed under a regulatory scheme. In addition, the Court did not address the peculiar status of sewer overflows under the CWA which leaves sewer overflow discharges effectively unregulated. The Court did not address recent congressional reports which showed that combined sewer overflow control needs were not being met under the


\textsuperscript{361} 451 U.S. at 319-24, 324 n.18.

\textsuperscript{362} See supra text and notes at notes 255-65.
CWA even though sewer overflows are a major source of water pollution. The case-by-case permit variances for sewer overflows were rationalized by the Court as necessary flexibility to address a discharge which is somehow of a different nature than other point sources. Thus, the Court found Illinois' complaint did not point to an inadequacy of the CWA but merely called for more attention to a problem already addressed, however ineffectively.

In stark contrast, the dissenters in *City of Milwaukee* observed: "[n]o provision of the Act explicitly addresses the discharge of raw sewage into public waters from overflow points." The dissent found that the record demonstrated that both Congress and the EPA were concerned with the inability of the CWA to address sewer overflows and that nothing in the record showed that either Congress or the EPA intended to preclude federal common law.

The Court avoided mention of the precedent that otherwise approved discharges under a permit may still be conducted so as to constitute a nuisance or cause harm. The majority in *City of Milwaukee* ignored the determination of the two lower federal courts below that the discharge of raw sewage from sewer overflows in Milwaukee, whether in compliance with a permit or not, constituted a public nuisance which posed significant risks to the health of Illinois' citizens. The Supreme Court characterized Illinois' complaint as en-

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364. "The difference in treatment between overflows and treated effluent by the agencies is due to differences in the nature of the problems, not the extent to which the problems have been addressed." 451 U.S. at 323. *See id.* at 324 n.18. Thus, Illinois must be satisfied with whatever level of control or treatment the EPA may have provided for sewage discharges under the CWA. In its rationalization of the apparent inadequacies of the CWA to prevent adverse nuisance effects from occurring in Illinois waters, the Court continued to overlook Illinois' basic claim that a permitted discharge may still be conducted so as to create a nuisance at common law. *See supra* notes 190, 243, 265.

365. *Id.* at 352 (Blackmun, J., dissenting). The dissent plainly recognized that sewer overflows were excluded definitionally from the technology based limitations of § 301, 33 U.S.C. § 1311.

366. 451 U.S. at 352-53.

367. The court gave no consideration to what judicial relief could be awarded outside the CWA, as it assumed that the CWA could answer Illinois' complaint. *Id.* at 310-12. As the dissent noted, legislative history clearly states that compliance with a permit under the CWA would not insulate a discharger from common law liability. *S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 2 LEGISLATIVE HISTORY, supra note 1, at 1457; H.R. Rep. No. 911, 92d Cong., 2d Sess. 132, 134, reprinted in LEGISLATIVE HISTORY, supra note 1, at 819, 821.

368. *See 366 F. Supp. 298 (N.D. Ill. 1977); 599 F.2d 151, 176-77 (7th Cir. 1979).*
tailing at most the inadequacy of certain permits rather than the inadequacy of the CWA itself. This minimization of Illinois' claim was perhaps necessary to the Court's conclusion that there were no regulatory gaps to be filled in the CWA, but such a categorical review of Illinois' case denigrates the Court's equitable powers. From the Court's decision it is plain that a state such as Illinois must be content with whatever level of pollution control has been developed by the EPA. According to the Court, "the question is whether the field has been occupied, not whether it has been occupied in a particular manner."369

The shorthand use of the concept of comprehensiveness in City of Milwaukee permitted the Court merely to view the overall scheme of the CWA on its face rather than determine whether the Act as implemented afforded relief to Illinois. Such a generic view of legislation did not require that the particular facts in the complaint be addressed by the statute, nor did the Court seem concerned about the adequacy of whatever remedies were available under the statute. In fact, the majority in its analysis appears to have relaxed the degree of specificity with which a judicial claim need be addressed by a statute. For example, three years earlier, in Mobil v. Higginbotham,370 the Supreme Court refused to provide a federal rule for damages for a claim of loss of society under maritime common law where Congress had not provided for such damages action. The Court found enough in the provisions of the relevant federal statutes by which to dispose of the controversy before it. There the standard of statutory review was stated: "the Act does not address every issue of wrongful death law . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answers. . . ."371 The majority in City of Milwaukee seems not to require that the statute speak directly to the question before it, as it states: "[t]he question whether a previously available federal common law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem . . . ."372

When combined with the Court's predisposition against the exercise of common law by federal courts, it would appear that any broad, detailed federal legislative scheme which explicitly made some remedies available would by its nature require the displace-

369. 451 U.S. at 324.
371. Id. at 625 (emphasis added).
372. 451 U.S. at 315 n.8 (emphasis added).
ment of federal common law.\textsuperscript{373} Certainly, the majority’s approach in \textit{City of Milwaukee} provides a useful, simple test for the displacement of federal common law which skirts the various complexities involved in a federal court’s decision to exercise its lawmaking powers in any given instance. But the Court’s approach may be overly simplistic, and as a result prove too much. For example, the majority states: “When Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”\textsuperscript{374} The dissent’s charge of “automatic displacement” of federal common law is not inaccurate. It reflects an uneasiness with the majority’s analysis which is so skewed by its underlying presumptions. For example, the dissent properly distinguished \textit{Mobil v. Higginbotham} by noting that the common law remedy there did not exist when the statute was enacted and thus, the question of congressional intent to preempt or preserve federal common law could not arise as it did in \textit{City of Milwaukee}.\textsuperscript{375} Ultimately, the dissent is correct to note simply that “[t]he fact that Congress once again addressed the difficult problem of national water policy should not be taken as presumptive evidence, let alone conclusive proof, that Congress meant to foreclose pre-existing remedies to controlling interstate [pollution] disputes.”\textsuperscript{376}

\textbf{B. Interstate Forum Under the CWA}

Having determined that the comprehensive scheme of the CWA satisfactorily addressed the elements of Illinois’ complaint, the Supreme Court proceeded to find that the hearing procedures in the Act provided an adequate forum for the protection of Illinois’ interests and the pursuit of its claim against Milwaukee. The majority opinion stated that the CWA provided ample opportunity for a state affected by decisions of a neighboring state’s permit granting agen-

\textsuperscript{374} 451 U.S. at 315; id. at 334 (Blackmun, J., dissenting). “To say that Congress ‘has spoken,’... is only to begin the inquiry; the critical question is what Congress said.” Id. at 339 n.8. The dissent found the automatic displacement approach flawed in two respects. First, it failed to respect and consider the unique role federal common law has played in resolving interstate resource disputes. Second, it ignored the Court’s frequent recognition that federal common law may complement congressional legislation. Id. at 334-35.
\textsuperscript{375} Id. at 338-39 & n.7. In addition, the Death on the High Seas Act contained no savings clause. Further, the majority’s reliance on Arizona v. California, 373 U.S. 546 (1963), is misplaced because \textit{City of Milwaukee} did not entail a direct conflict between federal common law and statute as did Arizona.
\textsuperscript{376} 451 U.S. at 336.
cy to seek redress. Furthermore, the majority suggested that the availability of the opportunity for a hearing under the CWA functioned somewhat like a jurisdictional bar. The Court stated that because Illinois had not pursued statutory opportunities for relief under the CWA, it would be inconsistent with the purposes of the Act for federal courts to provide separate relief under the guise of federal common law. 377

The majority's view that the administrative procedures of the CWA were adequate to resolve Illinois' complaint can also be attributed to its view of the Act as capable of resolving all water pollution problems. Yet this characterization and the conclusion based upon it are misguided as regards the adequacy of hearing procedures to resolve interstate disputes. The CWA hearing procedures are geared towards opportunity for input from an affected state and do not impose any obligation upon a polluting state to modify its discharges. Although the Act does provide the opportunity for a state to persuade a permit issuer to modify its standards, the most a state could be assured of would be compliance with federally established minimum standards. 378 Illinois' claim in this suit was that Milwaukee's compliance with federal minimum standards, without more, constituted a public nuisance in Illinois' water. The Court overlooked the fundamental administrative dilemmas faced by a state seeking to protect its waters by upgrading the minimum standards of another state. The EPA had not established objective criteria on which Illinois could base its call for more stringent water quality standards. As a practical regulatory matter, the EPA has experienced great difficulties in its efforts to impose more stringent water quality based limitations upon discharges. A proper scrutiny of the actual facts of the case before the Court would have revealed the administrative cul-de-sac inherent in the CWA. 379

The majority opinion is suspect in its elevation of the administrative procedure in the CWA to the status of an exclusive remedy. Nothing in the structure of the CWA indicates that participation by a state in section 402 proceedings was intended as any sort of exhaustion of remedies requirement. Section 402 hearing and comment pro-

377. Id. at 323-27.
378. See supra text and notes at notes 291-311; 33 U.S.C. § 1342(a)-(d). These provisions relied on by the majority merely ensure notice and an opportunity to comment on a proposed permit. They do not obligate the issuing state to modify its discharge.
379. This is not to suggest that the Court was obliged to find a forum which could assure Illinois that its claims could be vindicated, nor that an "adequate" forum must be a successful forum.
procedures are not mandatory, but voluntary and optional. Nowhere in the Act is it suggested that these procedures are to be the exclusive mechanism for resolving disputes between states with conflicting standards.\textsuperscript{380} In fact, the dissenters in City of Milwaukee pointed to legislative history concerning a proposed amendment that would have made participation in section 402 hearings a jurisdictional prerequisite to judicial relief. The proposal was rejected by the Senate Conference Committee in 1977.\textsuperscript{381} Among the stated reasons for its rejection was the Justice Department’s statement that federal common law would continue to be relied upon in the effort to control national water pollution. In practice, the EPA has continued to rely upon federal common law for remedies outside the provisions of the CWA to protect water quality.\textsuperscript{382}

On a theoretical level, the problem with maintaining a federal common law nuisance lies in its possible interference with the federal regulatory scheme for pollution control. The issue is not one of exhaustion of administrative remedies, or primary jurisdiction, or of equity deferring to law, even though application of these judicial self-restraint principles might yield the same result.\textsuperscript{383} In this sense, the majority opinion’s approach to the implicit jurisdictional bar in the CWA is really a further manifestation of the Court’s concern with the separation of powers doctrine. This being so, the concern with judicial encroachment of legislative functions should not have been embodied in the form of a remedies exhaustion rationale.

On a practical level, the facts of the Illinois case appear to make the erection of such a jurisdictional bar somewhat absurd and unfair. It was conceded by the majority that Illinois had exhausted the administrative remedies which existed prior to the commencement of judicial action in 1972.\textsuperscript{384} The hearing procedures which the majority suggests Illinois should have exhausted before seeking judicial relief were not available until well after Illinois had received a judgment from the Supreme Court in 1972 and filed suit in the federal district.
As the dissenters in *City of Milwaukee* noted, this is an unprecedented and harsh notion of exhaustion of remedies concerns. The use of such a jurisdictional prerequisite would impose severe burdens on a complainant by obligating him to pursue newly developed administrative avenues as they occur in the course of ongoing litigation in the courts.

The majority opinion's determination that the CWA provided an adequate forum for Illinois' complaint to the exclusion of federal courts fails to account for the respect granted to the legal complaints of a state in our federal system. The failure of the FWPCA in 1972 to provide an effective mechanism for protecting a state's quasi-sovereign interests was a primary impetus for the Supreme Court's decision to employ federal common law in *Illinois*. Similarly, the failure of the mechanisms of the CWA to address these concerns was a crucial basis for the Seventh Circuit's decision to utilize federal common law. The dissent in *City of Milwaukee* also voiced concerns that the comment procedures of the CWA might not adequately protect Illinois' ecological interests.

The procedural history of the *City of Milwaukee* controversy and the *Oklahoma* complaint currently before the Court both indicate the importance of considering the need to provide a federal court forum capable of respecting the important quasi-sovereign rights of a state. The dispute between Illinois and Milwaukee was one to which the original jurisdiction of the Supreme Court extended. Although the Court in 1972 declined to exercise original jurisdiction within the bounds of its discretion, the Court was careful to note that such discretion should be exercised only when it was assured that an alternative forum was available capable of respecting the status of a state's complaint, and so remanded the case to the federal courts. In *City of Milwaukee* this original jurisdiction is not questioned by the Court, but the reasons for it are ignored. No consideration is given to the quasi-sovereign nature of Illinois' complaint, nor is there discussion of the special federalism rationale supporting the exercise of interstate common law by the Supreme Court to resolve interstate disputes. As intimated by the dissenters, a more balanced approach by the majority would have led the Court to respect the traditional need for a federal court forum and a federal rule of decision which had

385. See supra text and notes at notes 292-329.
386. 451 U.S. at 345-46.
387. 406 U.S. 91, 104 (1972); 599 F.2d 151, 163, 165 (7th Cir. 1979). See Note, Preemption, supra note 4, at 531 n.191.
been announced by the Court upon first viewing the *Illinois* case. Instead, the Court informed Illinois that the very legal rule under which it continued to litigate for nine years was displaced some five months after it was originally granted.

**C. Policy and Presumption in Judicial Inquiry**

A broader perspective of the principles of analysis used by the Court can be gained by viewing the recent development of the Court’s strict view of federal courts lawmaking powers. Perhaps the most dramatic restriction of judicial lawmaking is evidenced in the Court’s approach to the problem of judicially implied private rights of action. The judicial implication of a private cause of action not otherwise expressed in a statute represents but one specific instance in which a federal court may exercise its judicial lawmaking powers and entails many of the same jurisprudential considerations as federal common law generally.\(^{389}\)

1. Federal Courts and Judicially Implied Rights of Action

The presumptive method of inquiry used in *City of Milwaukee* to displace federal common law despite the absence of an express congressional intent represents a change in the traditional approach of federal courts towards their lawmaking powers. Recently the Court has developed a restrictive, narrow conception of the discretionary lawmaking powers of federal courts in the context of implied rights of action cases.\(^{390}\) Nevertheless, the Court has continued to recognize the broad equitable powers of federal courts to formulate federal rules of decision to protect federally granted rights, especially Constitutional rights.\(^{391}\) In its strict adherence to separation of

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powers doctrine, the presumption against federal common law, and its method of gleaning congressional intent from the overall scheme of legislation, the majority opinion in City of Milwaukee is representative of the more restrictive view of federal courts’ powers developed in implied rights of action cases. In fact, the majority seems to have transplanted the analysis used in these cases to further narrow the reach of federal common law powers.

While policies respecting the separation of powers doctrine, federalism, and the limited nature of Article III courts have always infused the Supreme Court reading of congressional intent, the Court has sought to provide some objective guidelines to structure its inquiry. In Cort v. Ash the Supreme Court promulgated a four factor test to determine whether a private right of action should be judicially implied from a federal statute. The development of Supreme Court cases since the Cort decision has witnessed the predominance of a more limited view of federal courts’ powers as the Court’s inquiry in implied rights of action cases has focused wholly on legislative intent to the exclusion of the more flexible Cort test. In its reading of legislative intent the Court has brought a renewed concern for the observance of separation of powers doctrine and Article III constraints to the forefront of its analysis.

where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute’); Davis v. Passman, 442 U.S. 240 (1976); Sea Clammers, 453 U.S. 1, 18 (1981) (Stevens, J., concurring) (“[O]ur truly conservative federal judges... readily concluded that it was appropriate to allow private parties who had been injured by a violation of a statute enacted for their special benefit to obtain judicial relief”).

392. See HART & WECHSLER, supra note 75, at 800-06; Monaghan, supra note 72, at 12; Note, A New Direction for Implied Causes of Action, 49 FORDHAM L. REV. 505 (1980).

393. 422 U.S. 66 (1975).

The Cort factors are: 1) Does the statute create a federal substantive right in favor of the plaintiff? 2) Is there any explicit or implicit indication of legislative intent to create or deny a private remedy other than those specifically set forth in the act?; 3) Is the implication of a private remedy consistent with the underlying purpose of the legislative action?; and 4) Is the cause of action one traditionally relegated to state law?

394. The Cort test has been criticized by the Supreme Court and commentators for providing insufficient guidance as a legal principle and allowing too much discretion on the part of a federal court to merely advance the policies of a statute by implying a remedy. In short, the Cort test appeared to have permitted the implication of a private remedy too often, as virtually any implied action could be said to effectuate the purposes of a statute. Touche Ross v. Redington, 442 U.S. 560 (1979); Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981); Cannon v. University of Chicago, 441 U.S. 677, 731 (1979) (Powell, J., dissenting). See Note, Implied Private Rights of Action Under Federal Statutes: The Emergence of a Conservative Doctrine, 18 WM. & MARY L. REV. 429, 459 (1976).

395. In his dissent to Cannon v. University of Chicago, 441 U.S. 677 (1979), Justice Powell expounded the policy premises which have since come to dominate the Court’s approach towards federal courts’ lawmakers powers. See Transamerica Mortgage Advisors, Inc. v.
To safeguard these concerns a new presumption has been developed by the Court. This presumption requires that absent some compelling evidence of affirmative congressional intent, federal courts should not infer private actions from federal legislation. 396 This presumptive method of inquiry is designed to prevent a federal court from making an active policy analysis and emphasizes the narrow range of discretion a court enjoys in its capacity as a statutory interpreter. 397 In Touche-Ross v. Redington, 398 the Supreme Court adopted the new proscriptions against the implication of a private cause of action. In Touche-Ross the Court found that section 17(a) of the Securities Act of 1934 provided certain regulatory devices to protect the plaintiff. The Court refused to imply a private action for damages, since considerations of judicial restraint and statutory construction militated against the inference of broader rights from those specifically delineated by Congress. 399

Lewis, 444 U.S. 11, 22 (1979) (Powell, J., concurring). The Cort test was criticized for allowing a federal court to substitute its views for those of the legislature in the construction of a statute. Such discretion was seen as tantamount to judicial encroachment of legislative functions which could not be squared with the separation of powers. Cannon, 441 U.S. at 731, 746-47 (Powell, J., dissenting). The discretion permitted under the Cort test was regarded as beyond the sphere of federal court powers. According to Justice Powell, even where the courts did not actually usurp legislative powers, it resulted in a form of government by abdication in that it encouraged Congress to leave legislative problems unresolved to be filled by judicial second-guessing.

396. Cannon, 441 U.S. 677, 746-47 (1979) (Powell, J., dissenting). By contrast, the Cort test had allowed a court to look for any explicit or implicit intent to create or deny a remedy. 422 U.S. 66, 68 (1975). Nevertheless, in the area of constitutional rights the Court may still presume that the federal courts are the ultimate protectors of federal rights and will fashion federal common law or imply a private right unless there are "special factors counseling hesitation," Carlson v. Green, 446 U.S. 14, 21 & n.5 (1980), or Congress has provided an equally effective remedy explicitly declared to be a substitute for direct recovery under the Constitution. Id. at 1474, n.10; Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388 (1974).

This proliferation of standards based upon the characterization of a federal court's exercise of power in a given instance is especially confusing because no clear delineations exist among the court's exercise of its lawmaking powers when implying a remedy, interpreting a statute, and filling an interstice. All these aspects may be involved in a single case. See Monaghan, supra note 72, at 20; Hart & Wechsler, supra note 75, at 800-06.

397. E.g., Middlesex Cty Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981). Since the key to the inquiry is the intent of the legislature, it is "unnecessary to discuss at length the principles set out in recent decisions, Cort test concerning the recurring question whether Congress intended to create a private right of action . . . without saying so explicitly." Id. at 9-10.


399. Id. at 568, 573. Once Congress created an express remedy the Court stated it should be "extremely reluctant" to imply a cause of action broader than one Congress provided. Id. at 574. This form of literal review approaches that of expressio unius alterius unum. See Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers (Amtrak), 414 U.S. 453 (1974).
In *Transamerica Mortgage Advisors, Inc. v. Lewis (TAMA)*,400 the Supreme Court's inquiry focused on a narrow reading of legislative intent to the exclusion of nearly all other considerations. Since *Transamerica*, where a federal statute on its face appears to provide a generally comprehensive enforcement scheme the Court will be reluctant to imply any further remedies. The adequacy of expressed remedies to deal with an individual complaint will not be considered by the Court.401 Since Congress is presumed to know how to create a private right of action when it intends to, no private right will be found without affirmative evidence to that effect in the text of the statute, or in its legislative history. In *Transamerica* the presumption favoring some limited judicial lawmaking to advance congressional goals has come full circle. When legislative history demonstrates no positive specific intent to preserve or imply a remedy, this lack itself becomes "persuasive evidence" that federal courts should not infer a private remedy beyond those enumerated in the statute itself.402

The strongest statement of the Supreme Court's restrictive view of federal court's powers came in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.403 The Supreme Court held that where an express cause of action with procedural requirements has been given in the CWA federal courts should not imply other actions or remedies even under the savings clause which preserves any other relief under common law. Although the enforcement actions provided by section 505 of the CWA did not provide for damages, the actual adequacy of these express remedies to relieve the plaintiffs was not given separate consideration; rather, adequacy was assumed in the Court's determination that the legislative scheme of the CWA is comprehensive.404

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401. "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 442 U.S. at 571-74 (1979).
402. By contrast, the Court has explicitly declared the need to evaluate the efficacy of an express remedy in other statutory implication cases where the protection of particular federal rights are involved. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 393-95 (1974) (Harlan, J., concurring) (damages action against federal officials implied for violation of 4th amendment rights where none had existed before); Carlson v. Green, 446 U.S. 14, 20-21 (1980) (the remedy provided by Congress must be "equally effective" relief for the violation of 5th amendment nondiscrimination rights); Cannon v. University of Chicago, 441 U.S. 677, 682 (1979) (remedy implied by Court to effectuate Title IX of the Education Act guaranteeing nondiscriminatory treatment where no damages action had existed).
404. See 33 U.S.C. § 1365(e). The Third Circuit court had implied a private right of action for damages from the CWA because plaintiffs had failed to provide notice of their intent to sue
Two recent Supreme Court cases in the area of federal securities law reaffirm this approach to the interpretation of statutes and congressional intent, and the implication of federal common law remedies. The Court allowed plaintiffs to seek implied remedies in conjunction with the express remedies for fraud or misrepresentation, but was careful to note that the implied remedy was directed toward distinctly different types of wrongdoing. Whether or not this distinction is capable of being applied consistently, the cases represent the Court's longstanding concern for federal securities fraud remedies more so than any shift in the Court's approach to federal judicial lawmaking powers.

2. Application to Federal Common Law

Since the presumption in the Court's analysis is now decidedly against the judicial implication of remedies, it is apparent that the Court's inquiry into legislative intent asks a fundamentally different question than its traditional analysis posed. In the context of City of Milwaukee, the view disfavoring implied rights of action has been expanded to create a negative presumption against the exercise of any judicial lawmaking where a federal statute is involved. Despite the Court's examination of the legislative intent of the CWA, it need not have found any intent to displace federal common law. The Court's own emphasis on the comprehensiveness of the statute effectively as required by the CWA, 33 U.S.C. § 1365(b) (1976), and so were precluded from injunctive relief under the Act. Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1979), vacated and remanded sub nom., Middlesex Cty Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

In Sea Clammers the Court built upon the City of Milwaukee opinion which found the comprehensiveness of the CWA sufficient to address nearly all problems of water pollution. See Note, Middlesex County Sewage Authority v. National Sea Clammers Ass'n: Implied Rights of Action for Damage Under the Federal Water Pollution Control Act Amendments of 1972, 12 ENVT'L L. 197 (1981). This piggy-back mode of analysis and the narrow statutory review engaged in by the Court in Sea Clammers has been criticized. "The Court's current approach . . . is out of step with the Court's own history and tradition." 453 U.S. at 19-20 (Stevens, J., dissenting). "No matter how comprehensive we may consider a statute's remedial scheme to be, Congress is at liberty to leave other remedial avenues open." Id. at 23 (Stevens, J., dissenting). The majority's approach was considered particularly inappropriate in light of the savings clause of the CWA which explicitly preserved all available remedies at common law or from other statutes.


406. The Court's reasoning in Curran supporting the implication of remedies is irksome in its observance that such common law remedies for fraud were recognized generally on June 4, 1975, the date Congress adopted the Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97. Why, then, was the recognition of federal common law nuisance to abate pollution at the time of the FWPCA Amendments not regarded as significant in City of Milwaukee?
answered the question whether Congress intended to preserve a common law remedy.\textsuperscript{407}

The Supreme Court's reversal of the traditional standard of construction respecting the preservation of common law rights in the absence of express legislative intent to displace common law does not appear to be justifiable in \textit{City of Milwaukee}. First, even in its limited role of statutory interpreter, the Court has not recognized that the comprehensiveness of an act is of itself the crucial element requiring judicial restraint.\textsuperscript{408} Second, the restrictive view of federal courts' powers was developed in the implied rights cases as a function of the ordinary limits on a court's discretion in statutory construction. The Court has since continued to acknowledge that it acts very much like a general federal law court in its protection of federal rights and in declining to exercise equity powers in the context of environmental pollution.\textsuperscript{409} In cases of constitutional and federally granted rights the Court has engaged in a broad range of policy analysis and exercised a choice among traditionally available judicial remedies according to the substantive social policies embodied in the federal statute.\textsuperscript{410} In the case of \textit{City of Milwaukee}, the federal common law of nuisance was a well established existing remedy to pro-
tect the federal rights granted to Illinois under the CWA, and the federalist rights of Illinois as a state.

A third fault in this utilization of a presumption against common law in *City of Milwaukee* is that, unlike the implied rights of action cases, the CWA contained a savings clause which explicitly preserved any other common law relief.411 In its sophisticated analysis the Court in *City of Milwaukee* reasoned that although the savings clause of the CWA appeared to preserve federal common law, the rest of the provisions in the Act implicitly displaced it. The Court did not point to any legislative history or provision in the CWA which affirmatively stated that federal common law should be supplanted. Legislative debates demonstrate that Congress specifically considered federal common law and concluded that the enactment of the CWA would not limit or preclude this cause of action.412 In light of the savings clause and the legislative history of the CWA, it becomes apparent that the Supreme Court's conclusion that the CWA displaced federal common law was largely a result of the Court's own conception of the role of federal courts and its own policy preferences as embodied in its mode of analysis.

While this section has argued that the presumptive method of inquiry followed by the Court was inappropriate in *City of Milwaukee*, it certainly does not suggest that the underlying premises which formed its presumptions are invalid. Considerations of Article III constraints, separation of powers, and federalism are factors in any federal court's decision to invoke its lawmaking powers. The next section will advert to the principles of separation of powers and federalism to show that a proper respect for these concerns need not require the restrictive view of judicial lawmaking taken by the Court in *City of Milwaukee* and *Sea Clammers*.

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412. 118 Cong. Rec. 10780 (1972), reprinted in 1 Legislative History, supra note 1, at 688 (Rep. Dingel); id. at 33,705-09, reprinted in 1 Legislative History, supra note 1, at 191-94 (Sen. Griffin) ("federal courts have . . . traditionally upheld the right of the States to protect the health and safety of their citizens"); id. at 10,773, reprinted in 1 Legislative History, supra note 1, at 676 (Rep. Fraser); id. at 33,705, 33,713, reprinted in 1 Legislative History, supra note 1, at 191, 211.
D. Reconciling Federal Common Law With Separation of Powers Doctrine

At the heart of the *City of Milwaukee* decision lies the Court’s conception of the limited, circumscribed powers of federal courts under the constraints of Article III, *Erie* principles and separation of powers doctrine. The Court’s analysis emphasizes the special constraints on federal courts vis-a-vis the Congress: the separation of powers doctrine. In order to assure the proper judicial deference to the legislative functions of Congress, the basic tenet of separation of powers requires that federal courts are not free to provide solutions as they see fit when Congress has specifically addressed the problem in its legislation. In *City of Milwaukee*, the Court gave expression to the importance of this consideration by stating: "[O]ur commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with ‘common sense and the public weal.’"

The majority stressed the extraordinary circumstances in which federal common law has been justified, characterizing its use as a "necessary expedient" only. The Court then cited to cases which underscored the ambivalent status of the exercise of federal common law powers. Nonetheless, as the above discussion of federal common law precedent indicated, the Court has not always interpreted federal judicial lawmaking powers narrowly. It is more accurate to say


414. 451 U.S. at 315 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)). See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 626 (1978) (A court has "no authority to substitute its views for those expressed by Congress in a duly enacted statute"); Collins v. Hardyman, 341 U.S. 244, 248 (1951) ("It is not for courts to compete with Congress or attempt to replace it as the Nation's lawmaking body").

415. 451 U.S. at 314 (quoting Committee for the Consideration of Jones Falls Sewerage System v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976)). Nevertheless, the full quote from *Jones Falls* actually supports the use of federal common law:

This 'new federal common law' ... came into being as a necessary expedient in the resolution of interstate controversies. ... The law of the state whose citizens were subject to injuries by the interstate pollution ought not to govern the conduct of citizens and municipalities in another state, while to apply the law of the offending state would be a utilization of the laws of a state whose selfish interest was in the protection of the offenders, herself, her political subdivisions or her citizens.

539 F.2d at 1008.
that the Court has had difficulty defining those instances or classes of cases in which the use of federal common law would be appropriate.\footnote{416} A thorough review of common law precedent reveals that despite the \textit{Erie} doctrine and separation of powers principles, federal courts do possess a degree of general lawmaking power. The common law powers of federal courts are limited because they are tempered by considerations not incumbent upon state courts.\footnote{417} Nevertheless, it is well established that federal courts possess significant equity powers and have a special responsibility in the process of creating a "living" body of federal law with Congress.\footnote{418} In effect, a federal court "makes law" whether it decides to fashion federal common law or declines to do so for policy reasons. This is a uniquely reflexive feature of federal courts' jurisprudence: the powers of


418. \textit{Hart & Wechsler}, supra note 75, at 830. The basic premise of law is its capacity for growth and it must include the creative work of federal courts. D'Oench, Duham & Co. v. FDIC, 315 U.S. 447 (1942). "Were we bereft of the common law, our federal system would be impotent. This follows from the futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself." \textit{Id.} at 468-69 (Jackson, J., concurring); United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) ("[I]nterstitial federal lawmaking is a basic responsibility of the federal courts").

Commentators suggest that \textit{Erie} is not controlling on problems implicated in the operation of a congressional program. \textit{Erie}'s basic holding is that where an area is one that is usually governed by state law of its own authority the mere grant of federal jurisdiction does not carry with it the power to declare an independent federal rule. \textit{Erie} considerations are much less important in the operation of a federal statute. Mishkin, supra note 81, at 799-800. See Comment, \textit{Federal Common Law and Article III: A Jurisdictional Approach to Erie}, 74 \textit{YALE L. J.} 325 (1964); \textit{Hart & Wechsler}, supra note 75, at 763. Friendly, supra note 50, at 398 ("the complementary concepts of \textit{Erie} and federal common law are a natural development. Federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within the national sphere"). See Monaghan, supra note 72, at 12-14, 20-24. See generally Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 386 (1971). The very issues of choice of law in diversity cases and in cases dealing with federal relations of the courts and Congress are for federal courts themselves to decide. Note, \textit{Federal Common Law}, supra note 72, at 1531-35.}
federal courts are potentially broad, but for a number of policy reasons — implicit and explicit — they have been limited by the federal courts in practice.419

1. Interstate Federal Common Law

The majority in City of Milwaukee was suspicious of the somewhat discretionary, unruly nature of federal common law. They felt that the potentially discretionary aspects of the exercise of federal judicial powers should yield to a more controlled, strict observance of the separation of powers doctrine. It is significant that the Court in City of Milwaukee did not fully address the continued use of interstate common law. Although federal common law is subject to the quirks and inconsistencies by which the majority portrays it, the category of interstate common law has been embraced by the Supreme Court with decidedly fewer misgivings than other areas of federal common law.420 Interstate resource and pollution disputes have been a particular circumstance consistently requiring the use of federal common law. As suggested in the Supreme Court’s decision in Illinois in 1972, the unique strength of the justification for interstate common law in pollution disputes lies in its intertwined bases of federal interests, the federalism rationale and its constitutional underpinnings.421 In City of Milwaukee, the Court relegated its consideration of interstate common law to a single footnote. Interstate common law was considered by the Court to be subject to all the shortcomings of federal common law generally, and to be without special justification.422

419. See Hart & Wechsler, supra note 75, at 471; Hart & Sacks, supra note 104, at 367-68; Mishkin, supra note 81, at 803-05. While they may be self imposed, such restraints implement very real constitutional limits which cannot be transgressed. Nevertheless, there is some slippage between the self restraint policies of federal courts and the constitutional limitations because jurisdictional statutes and policies have usually been drawn more narrowly than the ultimate constitutional extension of federal courts’ powers. C. Wright, THE LAW OF FEDERAL COURTS, § 3 (3d ed. 1976); Hart & Wechsler, supra note 75, at 553. See Osborne v. Bank of the United States, 103 U.S. 738 (9 Wheat.) (1824); American Well Works v. Layne & Bowler Co., 241 U.S. 257 (1916); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

420. 451 U.S. at 334-35 (Blackmun, J., dissenting). See supra Section III.A.; Friendly, supra note 50, at 408 n.119; Hill, supra note 79, at 1030-32, 1075-76; Monaghan, supra note 72, at 13-14 & n.72; Leybold, supra note 75, at 293.

421. Interstate federal common is regarded as constitutionally compelled and so distinct from other areas of federal common law. Mishkin, supra note 81, at 805-07; Friendly, supra note 50, at 408 & n.119. See 406 U.S. 91, 95-97 (1972). Interstate common law was used as an adjunct to the original jurisdiction of the Supreme Court in disputes to which a state was a party. Comment, Article III Courts, supra note 418, at 80.

422. Interstate common law was subsumed by the Court into the general category of federal common law. “Whether interstate in nature or not, if a dispute implicates ‘commerce among the several states’ Congress is authorized to enact the substantive federal law governing the dispute.” 451 U.S. at 315 n.8.
In this manner the opinion most directly brought its policy preferences to bear. A better reasoned analysis would have addressed the unique justifications for the utilization of interstate common law. In particular, the element of the federalism rationale which inheres in our constitutional structure should have been given some weight to counterbalance the Court's doctrinaire adherence to the separation of powers.

In the majority's view of federal relations there may be only two categories of pollution control standards under the CWA: federal legislative standards, and state legislative or common law standards. Separation of powers principles dictate that federal standards be set by Congress alone. The Court stated: “We start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.” Having found no interstices in the comprehensive scheme of the CWA, the Court declared: “Federal courts lack authority to impose more stringent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme.”

This passage intimates a formalized, rigid view of Article III and the separation of powers doctrine. Separation of powers doctrine entails a harmonization of powers, not the static displacement of one branch’s recognized powers by the mere exercise of powers by another branch. The historical development of federal courts under the Constitution and our federal system demonstrates that policies restraining federal courts are not inflexible, but subject to change. It is through an active balance of competing policy demands and shifting conceptions of the proper function of federal courts that Article III doctrines have evolved. As the dissent notes, there is a kind of dynamic tension between a federal court’s obligation to apply federal common law in some cases, and its need to exercise self-restraint and defer to Congress in others. A federal court is no more free to dis-

423. Id. at 316-17.
424. Id. at 317.
426. 451 U.S. at 339 & n.8. This is especially so when the Court has continually held that statutes will not be construed in derogation of the common law unless such an intent is clear. Isbrandtsen & Co. v. Johnson, 343 U.S. 779, 783 (1952); Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976); Carlson v. Green, 446 U.S. 14 (1980).
regard congressional intent to further its own principles of restraint than it is to overlook legislative acceptance of the continued use of federal common law.

2. Federal Common Law and the CWA

Most recently, in *Weinberger v. Romero-Barcelo,*427 the Supreme Court reaffirmed the equitable powers of federal courts under the CWA, albeit with somewhat curious results. The Court held that federal courts may apply traditional common law balancing of hardships in an injunctive action where plaintiffs sought to halt unpermitted discharges of pollutants. As a result of such equity balancing, the Court’s decision allowed violations of the CWA to continue unabated instead of requiring immediate abatement pending NPDES permit variance or an exemption.428 Accordingly, *Romero-Barcelo* supports the notion of federal courts’ equitable powers, but leaves the content and application somewhat unclear and further suggests that the CWA should be regarded as the sole source of pollution control — no matter how ineffective.

The grant of relief to Illinois by the lower federal courts in the form of effluent limitations and sewer overflow control standards highlights the tension between the lawmaking powers of a federal court and principles of judicial restraint under the separation of powers doctrine. In *City of Milwaukee* the Supreme Court was critical of the lower court’s imposition of technical control standards on the offending discharges. The Court charged that the district court in *Illinois* had plucked effluent limitations “out of thin air” despite

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428. The district court refused to enjoin the unpermitted discharges from a Navy training area, finding that a balancing of equities favored continuation of the discharges because of the high public interest in military training activities and public defense. The First Circuit reversed and remanded, ordering an injunction until permits or necessary exemptions were obtained under the CWA. The court ruled that in such cases of clear violation of the Act the court’s duty is not to weigh hardships but to enforce the statute in an effective manner. *See TVA v. Hill, 437 U.S. 153, 155-56 (1978); Plater, Statutory Violations and Equitable Discretion, 70 CALIF. L. REV. 524 (1982)* (legislative balancing of public interests and hardships is embodied in legislation, therefore, court’s equitable discretion is not to set priorities of behavior but to decide how best to enforce the policies set forth in the statute).

The Court’s decision in *Romero-Barcelo* is the first under any theory to allow violations of a statute to continue without abatement. It seems an incongruous result when one considers that the CWA does not prohibit pollution itself, but prohibits only pollution without a permit. It seems reasonable that federal courts should use their equitable powers to enjoin pollution problems where appropriate. Nevertheless, such discretion also entails the ability to decline to exercise equitable powers.
the establishment of an expert agency by Congress to develop such standards.429 The Court emphasized that in this form of relief the effects of possible violation of the separation of powers were manifest and further stated that it demonstrated the inappropriateness of exercising federal common law under the CWA.

For a federal court to substitute its own standards simply because they are deemed more desirable would certainly constitute the usurpation of legislative function in violation of the separation of powers.430 The grant of a judicial remedy in the form of technical standards does not of itself, however, require the conclusion that a federal court has exceeded its limited powers. A judicial remedy may mirror other remedies prescribed in applicable statutes as a function of the equitable powers of a court to fashion appropriate relief for the parties before it. The actual formulation of an equitable remedy does not undermine the antecedent judicial decision to apply common law.431 Thus, the ultimate question is whether the remedy imposed by the lower federal courts in Illinois 1 & 2 was justified by the principles of federal common law upon which the decisions were based, not whether the form of the remedy negated federal common law power.432

In City of Milwaukee, the Court's use of the form of the remedy awarded to reveal the impropriety of federal common law obscures this fundamental issue. By criticizing the form of relief which paralleled standards of control set forth in the CWA, the Court masked a thornier underlying problem. That problem is to what extent a polluter discharging under a permit will be subject to further liability under other laws. The language and history of the CWA state that compliance with a permit will not be a defense to an action pursuant to other laws.433 The legislative history of the Act unequivocally says

429. 451 U.S. at 322-24, 324 n.18.
433. Compliance with administrative pollution standards is no defense to other liability since these standards represent only the legal minimum requirements, and a court legally may require greater care. W. PROSSER, supra note 40, at § 36. Even a legislative waiver or permission to violate standards may not protect a polluter against common law actions. See Urie v.
"[c]ompliance with requirements under this Act would not be a defense to a common law action for pollution damages."434 The EPA itself ruled conformance with the terms of a permit would not "[a]uthorize any injury to private property or invasion of other private rights, or any infringement of Federal, State, or local laws or regulations."435 The Court in City of Milwaukee condemned the use of federal common law because court imposed discharge standards would subject dischargers to multiple liabilities and conflicting standards. This overlooks previous Supreme Court interpretation of the nature of a permit in which the Court noted that NPDES permits merely "insulate permit holders from changes in various EPA regulations during the period of the permit."436 Compliance with an NPDES permit under the CWA is not a defense to common law or statutory action outside the Act, yet polluters may offer compliance as a relevant factor as to liability or relief to be weighed by the court in equity. Injured parties have continued to seek solutions to pressing pollution problems in the courts as well as under the federal environmental statutes. The gaps and inadequacies of a single statutory scheme make it inevitable that the courts will continue to be called upon to abate pollution. Put simply, the exclusive reliance on statutory and regulatory remedies may be inadequate. The CWA does not prevent pollution or its effects; it only prohibits discharge of pollutants without a permit.437 The


436. See U.S.C. § 1342(k), construed in E.I. du Pont de Nemours v. Train, 430 U.S. 112, 121 (1977). It has been established that conformance with the terms of an NPDES permit does not even constitute compliance with all of the provisions of the CWA, only with those provisions contained in the actual permit. See supra text and notes at notes 241-43.

437. Scientific data used to promulgate regulations seldom are conclusive as to what is "safe" or "unsafe." See Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1137-43 (D.C. Cir. 1980) (scientific basis for ambient air standards for lead). In some regulations the EPA must take into account the technological and economic factors of control which vitiate the level and quality of pollution control. See, e.g., 33 U.S.C. § 1314(b)(2)(B) (factors in adopting effluent limitations). See supra text and notes at notes 237-60, 269-80 (discussing the better-than-best problem and CSO funding). While actions under environmental statutes have been successful in compelling the EPA to regulate some previously unregulated sources of pollution, there are long delays in such procedures before actual promulgation and subsequent control occur, resulting in continued and cumulative harm from pollution. E.g., NRDC v. Train, 545 F.2d 320 (2d Cir. 1976), aff'd 411 F. Supp. 864 (E.D.N.Y. 1976) (compelling the EPA to list lead as an air pollutant); NRDC v. Train, 396 F. Supp. 2127, 8 ENV'T REP. CAS. (BNA) 2120, 2123-25 (D.D.C. 1975)
Supreme Court’s concern over the form of remedy granted by the lower courts would appear to regard any judicial relief which mirrors penalties or standards in pollution control statutes as an encroachment of legislative functions.

A quick review of the lower court’s decisions in the Illinois litigation will reveal the propriety of the relief granted. The district court in Illinois was asked to abate a nuisance in an interstate waterway caused by discharges emanating from out-of-state.438 Traditionally, the courts in other federal nuisance cases have enjoined the emission of pollutants at the source or developed cooperative agreements to abate the pollution through a modified injunction. These cases acknowledge that an otherwise lawful activity may be conducted so as to be a nuisance but that such compliance may temper the court’s remedy.439 The lower court’s imposition of effluent limitations on Milwaukee’s discharges is defensible as an equitable remedy short of an outright injunction tailored to the facts of the controversy before the court. The requirement of eventual sewer overflow elimination and the timetable to effectuate that order most closely resemble a modified injunction.440

Illinois had proven the existence of a nuisance by clear and convincing evidence in the district court. The Seventh Circuit confirmed (compelling new source performance standards for water pollutants). Often, the EPA cannot meet set deadlines and continually requests extensions. See Note, EPA’s Ten Years of Rulemaking for Water Quality Standards Nears Completion, 15 Nat. Res. L. 511 (1983).

438. Illinois v. Milwaukee, 366 F. Supp. 298 (N.D. Ill. 1977); 451 U.S. 304, 305-06 (1981). In a federal common law nuisance suit the traditional limitations on equitable remedies apply. Thus, injunctive relief can be granted only when the right to relief is clearly shown and the remedy at law is inadequate. United States v. Stoeco Homes, 498 F.2d 597, 611 (3d Cir. 1974); C. Wright & A. Miller, 11 Federal Practice and Procedure § 2942, at 364-69 (1973).

439. E.g., New Jersey v. City of New York, 283 U.S. 473 (1931); Vermont v. New York, 406 U.S. 186 (1972); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971). See Leybold, supra note 75, at 309. The Court in Illinois discussed the need for equitable remedies. See 406 U.S. 91, 106-08 (1972). The Court made clear that the results of a federal common law case will depend upon its facts. The Court engaged in a balancing in the formulation of relief for a nuisance. Equity requires a court to balance the relative harm a defendant will suffer in relation to the benefits bestowed on the plaintiff in public nuisance. W. Prosser, supra note 40, at 603-04; R. Stewart & G. Krier, Environmental Law & Policy, 244-47 (1978); C. Wright & A. Miller, supra note 438, at § 2942.

this finding.\textsuperscript{441} The lower federal courts did not fabricate effluent limitations from whole cloth. The courts looked to the standards set forth in the CWA as a guideline for the development of a particular remedy. Also, the courts simply sought to protect the exercise of Illinois’ right under section 510 of the CWA to adopt more stringent water quality standards for its water. Most fundamentally, the lower courts were motivated by the need to prevent the adverse effects of a proven nuisance in a manner consistent with the policy balances struck in the CWA.\textsuperscript{442} The district court’s remedy is justifiable as the least restrictive measure to abate the nuisance in Illinois’ water. To enjoin the discharges completely would have impinged directly upon the gradual compliance schedule contained in the Act.\textsuperscript{443} In recognition of Congress’ realization that pollution could not be eliminated immediately, and in deference to the more lenient guidelines for municipal sewage treatment compliance, the court imposed effluent standards similar to those Illinois had adopted for its own water.\textsuperscript{444}

\textsuperscript{441} Illinois v. Milwaukee, 366 F. Supp. 298, (N.D. Ill. 1977). In the exercise of its original jurisdiction the Supreme Court has applied a clear and convincing evidence standard when the defendant is a state. New York v. New Jersey, 256 U.S. 296, 309 (1921). Recently the Court suggested that this was to offset any deficiencies of the Court when acting as a trial forum, since it is structured to perform more as an appellate tribunal, Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 498-99 (1971). The Seventh Circuit found the clear and convincing standard unnecessary because the district court regularly functioned as a trial court and because political subdivisions are not states for jurisdictional purposes. 599 F.2d 151, 166-67 (7th Cir. 1979).

\textsuperscript{442} 33 U.S.C. § 1370. Pursuant to the CWA Illinois had adopted more stringent effluent limitations and water quality controls than the federal minimum. 451 U.S. 304, 305 (1981). See supra Section V.B.3. To disallow the use of a common law remedy in this instance would in effect nullify a state’s more stringent pollution control standards, even where a nuisance to public health has been established. 351 U.S. at 353 n.32; 599 F.2d at 175, 176 (7th Cir. 1979).

\textsuperscript{443} Leybold, supra note 75, at 312-13. To abate the nuisance in Illinois waters the court could have taken two approaches: 1) that, insofar as possible, the objectionable results of the discharges should be halted; 2) that only those effects of the discharges which create a nuisance should be curtailed. The first approach would require a finding that virtually any discharge constituted a nuisance, and so should be enjoined. The equitable balancing of cost and availability of alternatives and the social utility of the activity would likely preclude an injunction. Leybold, supra note 75, at 313; Note, State Ecological Rights, supra note 11, at 738. The second approach is more plausible since it abates only that degree of the discharge which has created a nuisance while allowing for the continuance of modified discharges. See 33 U.S.C. §§ 1281(b), 1311(b), 1316(a)(1). The CWA requires only the application of best practicable technology and secondary treatment for phase one until 1983. This suggests built-in considerations of economic burdens and the problems of overcoming existing pollution. An injunction would upset the balance of these concerns embodied in the timetable and ignores Congress’ implicit recognition that pollution will not be eliminated immediately. Leybold, supra note 75, at 313; Note, Preemption, supra note 4, at 518, n.116.

\textsuperscript{444} See supra text and notes at notes 331-47. The levels Illinois had set for its waters were regarded as a model level of control which would prevent the nuisance from occurring. 366 F. Supp. 298 (N.D. Ill. 1973). See Barrett v. Mt. Greenwood Cemetery Ass’n, 159 Ill. 385, 390, 42 N.E. 891, 892 (1896).
The Seventh Circuit displayed greater solicitude for the Act by modifying the relief to coincide with federal minimum effluent limitations. The court also took note of the special leniency which Congress demonstrated for municipal sewage problems before affirming the district court's relief ordering the elimination of sewer overflows. The remedy thus imposed was the level of control necessary to prevent a nuisance in Illinois' waters. This remedy was not chosen because the courts felt they were better decisionmakers, but rather because the inadequacies of the Act had given rise to the controversy before them. The implicit justification of the remedy lies in the notion that some pollution effects are reasonably to be expected in populated areas, but not to the degree that they cause a provable nuisance. Thus, only the discharge levels which resulted in a nuisance were abated while those levels of discharge that did not interfere with Illinois' water quality, although undesirable, continued unabated.\footnote{See 599 F.2d 151, 165 (7th Cir. 1979); 451 U.S. 304, 352-54 (Blackmun, J., dissenting).}

The control standards applied by the lower federal courts in Illinois would not be warranted merely on the grounds that they approximate Illinois' standards. The nature of the right to be defended is not that Illinois is entitled to govern the interstate waters within its borders but that Illinois is entitled to be free from outside interference which creates a nuisance.\footnote{Leybold, supra note 75, at 312. Otherwise the court's reasoning would have been tautological in the sense that the nuisance would have been defined functionally in terms of the degree of the degradation of Illinois' standards caused by the discharges from Milwaukee. See 28 U.S.C. 1251(a) (1976).} Under the circumstances of the case, Illinois' standards are only a model representing a feasible level of control which can abate nuisance effects. These standards were coopted under the federal lawmaking of the courts which, in turn, formed relief in accordance with the provisions in the CWA and the separation of powers doctrine.

\begin{equation*}
E. Federalism and the Problems of State Law
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Another policy basis in the City of Milwaukee decision is the Court's concept of the federal system. The majority opinion's view of federal-state relations emphasized the element of state autonomy under the CWA, respected the reserved police powers of the states, and showed concern for the fiscal burdens of states and municipalities. The Court evaded those aspects of the federalism rationale which support the use of federal common law. There was no discus-
sion of the need for a federal rule of decision to protect the quasi-sovereign rights of one state from impairment by another state. Instead, the Court appeared to advance a simplistic state-versus-federal model\textsuperscript{447} of pollution control standards rather than a more organic view of the federal system as a whole. In the Court's analysis, the separation of powers demanded that Congress, not the federal courts, promulgate federal standards. The Court held that Congress had not preempted state common law in the CWA. Therefore, it would be impermissible that federal common law should preempt the state common law which Congress had not itself preempted.

This line of reasoning was translated through the Court's reading of legislative intent: "[W]e start with the assumption that the historic police power of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."\textsuperscript{448} The contrast to the presumption against the continued validity of federal common law is apparent. The Court required express affirmative intent to preserve federal common law; it required clear and manifest intent to preempt state common law. Since the concerns for state autonomy were not presented in federal common law, the Court did not insist on similar evidence of an express purpose to displace federal common law.\textsuperscript{449} It appears that the Court's development of separation of powers and federalism principles overlap to presumptively negate the exercise of federal common law.

1. State Common Law and Statutory Law

The Court in City of Milwaukee is correct in its observance that the determination of preemption of state law differs from that of the dis-

\textsuperscript{447} The Court disclaimed any such intention, as it stated: "[O]ur analysis has included 'due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy.'" 351 U.S. 304, 316 (quoting San Diego Unions v. Garmon, 359 U.S. 236, 243 (1959)). This statement occurred in the context of the Court's discussion of preemption of state law, not its analysis of federal common law. The Court's failure to address the federalism rationale for federal common law, its emphasis on the financial burdens of municipalities, \textit{id.} at 322-23, and its use of Jones Falls, an intrastate pollution case, as support to displace a federal rule in an interstate pollution case, \textit{id.} at 326-27, all indicate a concern for localism.

\textsuperscript{449} "Such concerns for state law are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required." \textit{Id.} See HART \& WECHSLER, \textit{supra} note 75, at 800-03, 470-71; Mishkin, \textit{Some Further Last Words on Erie -- The Thread}, 87 HARV. L. REV. 1682, 1683 (1974) ("That Congress may have constitutional power to make federal law displacing state substantive policy does not imply any range of power for federal judges").
placement of federal common law. Judicially developed principles of statutory construction have required more evidence of congressional intent to preempt state law than to supplant federal common law.\textsuperscript{450} But this does not require a literally expressed intent by Congress as suggested by the Court in \textit{City of Milwaukee}. Under traditional state-federal law preemption analysis, even in the absence of express indication by Congress, state law has been preempted where the Court has determined it would conflict significantly with federal concerns,\textsuperscript{451} subject a federal regulatory scheme to multiple inconsistent burdens,\textsuperscript{452} or where Congress dominates an area so as to afford no place for the use of state law.\textsuperscript{453} While state law has been accorded special respect in the interpretation of federal legislation, the Court has been sensitive to the potential frustration of national policies if the states are allowed to control conduct which is covered by a federally regulated scheme.\textsuperscript{454} In \textit{City of Milwaukee} the Court’s configuration of federal-versus-state laws has minimized the unique role of federal courts in the promotion of federal legislation. Although the concept of interstitial federal courts lawmaking suggests a cooperative interaction between the courts and Congress that should be less active where federal-state questions are involved, these considerations do not require the wholesale displacement of federal common law. This is especially so in the context of interstate pollution disputes such as \textit{City of Milwaukee} where both a unique federal interest and a constitutional federalism interest are at stake.

The Court’s use of federalism principles to displace federal common law is hardly compelling. The plain language of section 505(e) of the CWA preserving relief under “any statute or common law” is arguably broad enough to pose a choice of law question.\textsuperscript{455} The Court

\textsuperscript{450}. Generally, when there has been no manifest intent by Congress to preempt state laws, the courts look to find an implied preemption. In doing so, the traditional police powers of the states have been accorded respect. \textit{See, e.g.}, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 448 (1960); Jones v. Rath Packing Co., 430 U.S. 519-25 (1977); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).


\textsuperscript{452}. Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).


\textsuperscript{455}. 33 U.S.C. § 1365(e). \textit{See 451 U.S. at 350-51; Note, Preemption, supra note 4, at 521. The choice whether federal law applies is decidely a federal task for a federal court. Nevertheless, “[t]he inner logic of federalism . . . supports placing the burden of persuasion on those urging national action.” \textsc{Wechsler}, supra note 75, at 545. “In deciding whether rules of federal
has answered this question by requiring that "common law" can mean only "state common law" in the CWA. The Court's recognition of state common law seemed to come about as a result of its efforts to construe "common law" so as to exclude "federal common law" rather than as an affirmative identification of alternative common law relief.456

Having suggested that state common law must be accepted before federal common law under the CWA, the Court gave no further consideration to the content, operation, or effect of state common law remedies under the Act. The Court's efforts to exclude federal common law relief avoids a recurring underlying issue: to what extent will a polluter discharging under a permit be subject to liability under other laws? Since compliance with a permit under the CWA is not a defense to other liabilities, an action for damages or injunctive relief could only exist if Congress intended that some conditions other than those set by the CWA could apply to discharges.457 As of the decision in City of Milwaukee, these other legal standards must be found in state statutes or common law.458

The Supreme Court in City of Milwaukee surmised that state common law was acceptable as a vehicle for redressing wrongs outside the provisions of the CWA. The Court expressed no concern over whether the state court imposition of more stringent standards would result in the same disruptions of federal regulation, usurping of legislative functions, and multiple liabilities upon dischargers which the Court found so objectionable in the use of federal common

456. "It is one thing, however, to say that States may adopt more stringent limitations through state administrative processes, or even that states may establish such limitations through state nuisance law, . . . ." 451 U.S. at 328. But see, H.R. REP. No. 91, 92d Cong., 2d Sess. 134, 136 (1972), reprinted in 1 LEGISLATIVE HISTORY, supra note 1, at 823. ("It should be noted, however, that the section 505(e) would specifically preserve any rights or remedies under any other law"). The savings clause makes no distinction between state and federal common law and legislative debates indicate that Congress was specifically aware of federal common law when it amended the FWPCA in 1972. See 451 U.S. at 344-45 (Blackmun, J., dissenting).


458. Note, Preemption, supra note 4, at 519-20. The only source of federal injunctive relief must be the citizen enforcement suit provisions of section 505 of the CWA, 33 U.S.C. § 1365.
law. Short of an immediate injunction of polluting discharges or the award of permanent damages, a state court is just as likely to employ the effluent limitations scheme embodied in the CWA to grant flexible relief, as did the lower federal courts in the Illinois litigation.\(^459\) State common law injunctive relief in the form of revised effluent limitations or pollution control standards implicitly would interfere with the regulatory scheme of the CWA. Similarly, injunctive relief which forces the shutdown of a plant or requires the immediate cessation of a discharge would subject permit-conforming discharges to great burdens in apparent conflict with the CWA.\(^460\) Without further restricting the scope of the injunctive powers of state courts, the City of Milwaukee opinion would permit state common law to encroach upon federal legislative functions in the very manner which was condemned in the use of federal common law.

2. The Problem of State Law and Interstate Pollution

It would seem that only state common law damages actions can be reconciled with the CWA after the City of Milwaukee decision. The legislative history of the CWA reveals that Congress at least preserved the ability to obtain compensatory damages at common law.\(^461\) The CWA itself does not provide an action for damages incurred as a result of water pollution.\(^462\) It is logical to conclude that the case for the preservation of common law damages is strongest. Since injunc-

\(^{459}\) Although not noted by the Court, section 510, 33 U.S.C. § 1370, has been construed so as to allow states to impose more stringent effluent limitations and order immediate cessation of pollution under state common law. People ex rel. Scott v. United States Steel Corp., 40 Ill. App. 3d 607, 611, 352 N.E.2d 225, 228-29 (1976); Metropolitan Sanitary Dist. v. United States Steel Corp., 30 Ill. App. 3d 360, 370, 332 N.E.2d 426, 433-34 (1975), cert. denied 424 U.S. 976 (1976).


\(^{461}\) 33 U.S.C. § 1365(e). "[T]he section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 414, 92d Cong., 1st Sess. 81, reprinted in Legislative History, supra note 1, at 1499 (1971).

\(^{462}\) See, 33 U.S.C. § 1365(a)(d). The Court has also refused to imply a cause of action for damages. Middlesex Cty Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981). Since the EPA has maintained the CWA is only a regulatory scheme, not a remedial scheme, it is highly unlikely any damage actions will be inferred. Note, Impling Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285, 291-292 (1963).
tive relief is not specifically mentioned in legislative history and is subject to the restrictions voiced in *City of Milwaukee*, its preservation is perhaps not so certain even under state common law. Some commentators have suggested that state common law damages actions would not disrupt the federal scheme in the manner to which the Court objected in *City of Milwaukee*. Notably, similar arguments have not been made for the use of injunctive relief.

Commentators urging the acceptability of state common law damages reason that since the nonuniformity of standards under the CWA is primarily to encourage state initiative, the application of state common law was intended for parties seeking damages from pollution. It is said that an action for damages between private parties would be far removed from the federal interest in the regulation of water pollution under the CWA and would only indirectly affect the finality of standards under the Act. The argument for state common law damages actions concludes that the polluter merely pays the judgment as a license to continue polluting. Because damages are seen as having only a deterrent effect it is said that disparate results in case law would not frustrate any policies or goals of the CWA.


464. When a state institutes its own permit program under § 1342(b), the enforcement of these permits are considered state law actions. *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980). This, combined with the authorization of a state to set more stringent standards, 33 U.S.C. § 1370, and the *Erie* presumption which favors the retention of state law in the role of state police power, are advanced as the reasons that state common law is preserved: See Note, *Preemption, supra* note 4, at 521, n.132, 522 & n.135.

465. In this sense the resolution of factual questions of injury and causation between private parties is thought to involve the federal interest only insofar as it might indirectly advance pollution control. Thus, the federal interest would be "far too speculative, far too remote a possibility to justify the application of federal law to an area essentially of local concern."


Once damage actions for pollution have been characterized as essentially local disputes, the *Erie* doctrine and state law preemption principles are used to fortify the use of state common law. *See, e.g.*, Miree v. DeKalb County, 433 U.S. 25, 31-33 (1977) (damage action for breach of federal contract causing fatal airplane crash governed by state law despite federal interest in airline safety); *Huron Portland Cement Co. v. City of Detroit*, 382 U.S. 440, 442 (1960) (state regulation may be concurrent with federal regulation where it serves a differing purpose and is in an area traditionally regulated by the state, such as health). *But see* Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 L. & CONTEMP. PROB.
This reasoning, however, cannot support the retention of state common law to the exclusion of federal common law. First, it avoids the inevitable conflicts arising from the character of injunctive relief under the CWA by focusing on state law damages actions. There is no real basis for this distinction between common law remedies. Second, the CWA anticipates the imposition of stricter standards from both state and federal sources of authority. The nonuniformity of standards under the Act does not mean that state law should be the exclusive source of more stringent standards. In fact, the cooperative federalism enforcement scheme of the CWA guarantees that, in the final analysis, all promulgated standards are federally approved. Third, while the federal interest in the outcome of a damages action between two private parties may be minimal, the federal program is not unaffected where major polluters are involved. Certainly, the federal interest would not be minimal where a state is involved. In the case of City of Milwaukee, Illinois sought to protect its higher standards which were promulgated pursuant to section 510 of the CWA. The federal interest in adjudicating the rights granted to a state under a federal program is significant. Fourth, polluters are not likely to regard damages merely as a license to pollute, especially when damages escalate. The disruption of economic planning and financial burdens imposed upon polluters was a salient factor in the Supreme Court's disapproval of federal common law in City of Milwaukee. The same dislocation of resources strongly argues against the reasonableness of expecting that permitted dischargers will pay damage awards without offering their compliance with the CWA as a defense. Furthermore, to expect litigants to be content with common law damages is unrealistic. Damages can only attempt to re-


466. Commentators note that injunctive relief from nuisance is the prime state common law remedy, not damages. Pfennigstorf, Environment, Damages, and Compensation, 1979 AM. BAR FOUND. J. 349, 368-69; Note, Nuances of Nuisance, supra note 10, at 70-72.

467. See 33 U.S.C. §§ 1311(b)(1)(C), 1312(b), 1313, 1329. See supra text and notes at notes 251-77.

468. 406 U.S. 91, 105 n.6 (1972). Also, the argument for state common law restricts itself to private nuisance or damages, not public nuisance. Note, Preemption, supra note 9, at 522.


470. Note, Private Nuisance, supra note 469, at 1171; Comment, Eco-System, supra note 9, at 1257. In addition, the traditional balancing of equities often would prevent the court from ordering injunctive relief. Note, Private Nuisance, supra note 469, at 1162.
pay amounts lost to pollution whereas injunctive relief can actually prevent pollution from occurring. There is an ineluctable tendency in environmental litigation to seek injunctive relief. Thus, the very distinction between injunctive relief and damages actions used to support the use of state common law breaks down in practice.

Finally, the prospect of requiring all fifty states to pursue the resolution of pollution problems through their respective common laws is not comforting. This would be particularly troublesome in an interstate pollution dispute. On a practical level, issues of the extent of long-arm jurisdictional statutes and proper venue will continue to be contested as they were in the Illinois litigation. Variations among states' long-arm statutes might prevent some states from obtaining the necessary jurisdiction over a polluting source outside their borders. Presuming these hurdles are cleared, enforcement problems will persist since the courts of one state may find it necessary to retain jurisdiction over an out-of-state polluter. In such cases, full faith and credit principles should provide for necessary oversight and enforcement of the remedy. Nevertheless, the incentives for one state to maintain a remedy imposed by another state's courts on a discharger in the first state are lacking.

471. Note, Nuances of Nuisance, supra note 10, at 48. Injunctive relief is preferred because: 1) it affords greater opportunity for parties to adjust their differences before trial; 2) it permits the court to award flexible, tailored relief to account for various factors; 3) it avoids the nagging problem of dollar valuation of pollution damages; 4) it can actually halt the adverse effects of pollution. Id. Note also that in general there are still many restrictions on the use of state law to abate pollution, such as standing, exhaustion of remedies, and balancing of equities barriers. W. de FuniaK, Handbook of Modern Equity § 18, at 31 (2d ed. 1956).

472. See 451 U.S. 304, 353-54 (Blackmun, J., dissenting).

473. Note, Nuances of Nuisance, supra note 10, at 48-49; Fischer, supra note 22, at 439. The recent Supreme Court decisions in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), and Hanson v. Denckla, 357 U.S. 235 (1958) require that for due process purposes a defendant must have a reasonable expectation that his activities in a state would be such that he could anticipate being haled into court there, or that he purposefully avails himself of the privileges of that state. These standards are not amenable to environmental litigation jurisdictional problems. Id. at 439-40.

474. Commentators note that the chief difficulty of state common law or statutes to abate interstate pollution is that of enforcing an equitable decree outside the state. Comment, Developments in the Law, 78 HARV. L. REV. 994, 1031-32 (1965). Full faith and credit cannot be relied upon to enforce an equitable decree where the nuisance originates in another state. Note, Interstate Pollution, supra note 72, at 1458 n.62. The Supreme Court has not ruled whether full faith and credit require the enforcement of another state's equitable decrees. See Restatement (Second) of Conflict of Laws § 102 comment c (1971). State courts have typically assumed that it does not. Developments, 78 HARV. L. REV. 994, 1044. Also, injunctive or damages relief requiring administrative burdens and oversight by the enforcing court present the least favorable class of judgment for full faith and credit. Note, Interstate Pollution, supra note 72, at 1458. These special difficulties do not arise if a federal forum and federal rule of decision are applied.
On a theoretical level, the use of one state's common law to enjoin or modify pollutants discharged in another state poses serious constitutional questions. The importance of an impartial federal rule of decision in such an interstate pollution conflict is manifest. Nonetheless, City of Milwaukee would restrict the avenues of a state seeking relief to the hearing procedures of the CWA or the use of state common law.

In summary, the use of state common law to control pollution within the context of the CWA is replete with problems not addressed by the Court in City of Milwaukee. In light of these problems the Court's use of state common law to exclude federal common law from the common law preserved by the CWA seems ill-advised. The use of federal common law to abate interstate spillover pollution is not inconsistent with the recognition of state autonomy. Pollution effects do not confine themselves to conform with state boundaries. Spillover effects are the most persistent and troubling type of pollution to regulate in a centralized manner. When pollution from one state causes harm to a sister state the offending state should not escape liability by using its sovereign status as a shield because to do so would implicitly infringe on the autonomy of the offended state. The same considerations which support state autonomy require the accountability of a state when pollution emanating from its sources invade the autonomy of its sister states.


476. Post, supra note 13, at 123-25; Fischer, supra note 22, at 430-32.

477. The existence of substantial spillover effects would . . . justify coercing state enforcement of federal measures . . . .

Where, as here, the harm imposed upon sister states is attributable to pollution emanating from a state's own facilities, the offending state should not be able to escape liability to corrective measures by asserting claims to state autonomy that would implicitly deny the autonomy of sister states . . . . [T]he very claims of state
The policies guiding our federalism do not simply entail leaving matters to the states in a localized manner. They involve the safeguarding of each state’s sovereign interest amongst the other states under the umbrella of the federal union. It is in this sense that the use of interstate federal common law is a vital and efficient tool to implement the federal legislative policies of water pollution control.

F. Summary: The Contours of Preemption After City of Milwaukee

In light of the broad language of the Supreme Court opinions in *City of Milwaukee* and *Sea Clammers*, and the Court’s underlying approach to legislative intent in each of those cases it appears that virtually any legislative scheme which regulates a given area requires the preemption of federal common law. It may well be that the Court’s analysis of congressional intent in *City of Milwaukee* simply proves too much. The Court’s legislative inquiry in *City of Milwaukee* does not directly support the conclusion that Congress intended that pollution control standards under the NPDES program be the exclusive means to abate pollution hazards. First, such an intent to preempt federal common law is merely inferred by the Court; it is not expressed in the CWA, and a congressional intent to preempt appears on its face to be wholly inconsistent with the savings clause of the CWA. 478 Second, the Court’s inquiry began with a presumption against the continuance of common law rights which is contrary to established judicial modes of interpretation of legislation. By extending the mode of inquiry developed recently in implied rights of action cases, the Court required that Congress affirmatively express a desire to retain federal common law. This standard of review not only is the reverse of the Court’s usual approach, but it also plainly alters the “rules of the game” well after Congress passed the legislation. 479 Third, that legislation is dubbed “comprehensive” by legislators does not demonstrate the extent of its actual coverage and provides even less guidance as to Congress’ intention regarding matters not addressed in the legislation. The word “comprehensive” is not the

autonomy which underlie *Usery* [Nat’l League of Cities v. Usery] dictate accountabili-

ty qua state when harms emanating from state facilities invade the autonomy of

sister states.

Stewart, *supra* note 211, at 1241-42. To allow the state a defense of compliance with statutory

permits in the context of transboundary pollution “runs counter to the basic concerns of comi-

ty; it would permit states to foist the consequences of local industrial activity on neighboring


478. See *supra* text and notes at notes 407-12.

479. See *supra* text and notes at notes 371-76.
equivalent of the word "exclusive"; nor does the Court's declaration make it so. Such wholesale, automatic displacement of federal common law undermines the vital equitable powers of federal courts in an area of interstate conflict.\footnote{See supra text and notes at notes 398-410.}

Finally, the broad reasoning of the Court in \textit{City of Milwaukee} is specious — it seems plausible at first, but obscures fundamental issues. Furthermore, the Court's analysis invites lower federal courts to apply the Court's conclusions without engaging in an analysis of congressional intent or a review of the facts. This aspect of the Court's decision was made evident in \textit{Sea Clammers}, where the Court extinguished federal common law nuisance throughout the entire field of water pollution. In \textit{Sea Clammers}, the Court suggested that its opinion in \textit{City of Milwaukee} had already laid the groundwork for such extinguishment of federal common law, requiring merely that the Court view the Marine Protection, Research and Sanctuaries Act (MPRSA) as being "comprehensive" in the manner of the CWA. Thus, the Court precluded not only implied rights of action, but federal common law as well under the CWA and the MPRSA.\footnote{453 U.S. at 4-5, 22 (1981).}

A closer look at \textit{City of Milwaukee} reveals that the factors supporting the Court's decision all relate to the legislative delegation of authority to a specialized expert agency, the EPA, charged with policing dischargers and thoroughly regulating discharges through a permit program. \textit{Sea Clammers} involved similar concerns. There the dischargers all held permits issued by the EPA and the Army Corps of Engineers pursuant to the CWA and MPRSA, respectively. The activities complained of were regulated—nominally, at least—and reviewable by an expert agency of some sort.

The \textit{City of Milwaukee} and \textit{Sea Clammers} opinions are most acceptable and least objectionable when viewed from this perspective. In fact, this is the view which accurately reflects the issue presented...
to the Court: whether federal courts should exercise their lawmaking powers to address a fact situation which is already addressed by federal legislation. By holding that Congress in the CWA has legislatively preempted federal common law, the Supreme Court in City of Milwaukee displayed a healthy respect for the detailed regulatory scheme of the CWA in general and the NPDES program in particular. Even without regard to whether or not the CWA program "works" the Court's decision makes sense on this basic level. Whatever the drawbacks in the scheme of the Act, a federal court may legitimately refuse to exercise its equitable powers to remedy a nuisance and, indeed, may be bound to such self-restraint according to its view of relevant legislation. The Court was concerned that the legislative program of the CWA should have the opportunity to prove itself. This required an absence of judicial second-guessing of permit standards. Otherwise, what legal and economic significance could be accorded to the compliance with permit standards when a court in a separate nuisance action could require different standards? Finally, it is not unreasonable to assume that Congress would prefer that the expert agency to whom the implementation of the CWA has been delegated set discharge standards, as opposed to the courts, whose expertise is limited.

Nonetheless, one can accede all of these points and still disagree with the holding in City of Milwaukee. The arguments against preemption are equally compelling. The states have the authority to set water quality goals more stringent than those of their neighbors. This right is explicit in the federal legislation and is an integral part of an overall federal, national effort to clean the nation's waters. In addition, by virtue of the federal compact of states, a state whose environment is materially violated by pollution from neighboring states is entitled to a federal judicial resolution of the dispute even where federal legislation provides some relief. The ostensible bases of the Court's opinion in City of Milwaukee may be unobjectionable in themselves, but they do not address the conflicting concerns involved in federal common law. Nor do they address the dilemma of the downstream state in pollution problems. The recent Oklahoma complaint makes it plain that the CWA still does not address the very same problems raised by Illinois over ten years ago.

482. See 406 U.S. 91, 105 (1972); 599 F.2d 151, 164 (7th Cir. 1979).
483. See Fort, supra note 12, at 151-52.
484. See id. at 160-61.
485. See supra text and notes at notes 331-47.
486. See supra text and notes at notes 377-88.
Assuming that the Court is correct in its determination that the discharges in question are regulated under the CWA, there would be little objection to the narrow basis of preemption described above — that federal courts should not interfere with an active regulatory program run by an expert agency. The cases would then simply represent a hearty respect for the maturing NPDES program under the legislative scheme of the CWA. Unfortunately, the Court’s reasoning and language have set a broad foundation for the displacement of federal common law throughout a wide range of legislative subject areas. The following section examines the effects of City of Milwaukee in other areas of environmental regulation.

VII. City of Milwaukee as Environmental Precedent

In response to the Court’s decision in City of Milwaukee, lower federal courts have dismissed federal common law nuisance claims under the CWA.487 The question whether City of Milwaukee signals the preemption of federal common law in the area of air pollution is an active one. The interests supporting federal common law recognized in Illinois v. Milwaukee were extended expressly to interstate air pollution by the Court in Washington v. General Motors.488 Several federal courts have wrestled with its application since then.489 After City of Milwaukee, however, the federal and federalism interests delineated in Illinois must be supported by a legislative intent favoring federal common law. In this context, whether the Clean Air Act490 (CAA) is sufficiently comprehensive to preclude federal common law may pose a troublesome inquiry.

The controversy surrounding acid precipitation most clearly illustrates the similarities and differences between the CWA and the


CAA. The problem of acid rain distinctly is one of interstate and international dimensions. It is also one of continuing scientific debate. The CAA, however, directly regulates neither acid precipitation itself nor the sulfates of which it is composed. The CWA, by contrast, has been considered comprehensive because it is designed to regulate every point source discharge in the nation. The CAA regulates only major emitters which threaten national ambient air quality standards; it does not extend to smaller emitters. Under the CAA, not all known emitters are regulated, nor are all emissions which form acid precipitation regulated. Thus, on its face, the CAA appears to be a less comprehensive scheme than that of the CWA.

On the other hand, the EPA is charged with a broad mandate to administer the CAA to achieve a national goal of clean, healthy air. More importantly, the CAA contains provisions for mechanisms to resolve disputes arising from emissions which have transboundary effects. In this sense, the CAA may be at least as comprehensive as the CWA, if not moreso. Concededly, as with the CWA, the federal minimum goal of healthful air quality levels does not require a federal common law rule of decision for every instance of interstate air pollution. As pertains to acid precipitation and unregulated pollutants and unregulated emitters, however, a judicial federal rule may be deemed necessary to fill a distinct gap in the CAA in order to fulfill national air quality goals. Even in light of Erie


492. The EPA has conceded that current scientific knowledge is insufficient to justify rational regulations of acid rain problems. See Lee, supra note 491, at 71-73; Ruckleshaus Announces Delay in Acid Rain Controls, Boston Globe, Dec. 2, 1983, at 2, col. 2-4.

493. Acid rain forms as a conversion product of emitted sulfur dioxide after it has been present and transported in the atmosphere for several hours or days. Under the Clean Air Act, neither acid rain nor sulfates (an intermediate form) are directly regulated. Sulfur dioxide is regulated only in the instances of new plants which must comply with nationally uniform performance standards, 42 U.S.C. § 7411. Older plants are regulated only to the degree that each individual state chooses to impose emission restrictions in order to achieve the national ambient levels required, 42 U.S.C. § 7410. All federal law requires is that states do not exceed national ambient air quality standards. States must also comply with “prevention of significant deterioration” provisions of the Act, 42 U.S.C. § 7470-7479, but these provisions allow for significant latitude among state standards.


496. Section 126(b), 42 U.S.C. § 7426(b), authorizes a state to petition the EPA for relief from air pollution emissions emanating in other states. Section 110(a)(2)(E), 42 U.S.C. § 7410(a)(2)(E), allows EPA approvals of a state implementation program only if it provides adequately for interstate pollution problems.
doctrine concerns, interstate air pollution implicates matters of federalism moreso than matters of traditional local concerns. As a result, several commentators have argued forcefully that federal common law is appropriate in many instances under the CAA.497

The decision by the Second Circuit Court of Appeals in New England Legal Foundation (NELF) v. Costle,498 appears to be the first to tackle the question of CAA preemption of federal common law. In NELF the court concluded that the challenged emissions were exempt as a matter of law from common law claims because the emissions were federally approved under variances permitted by the CAA. The court further indicated that all other sources regulated either by the CAA directly or by State Implementation Plans pursuant to the CAA would be similarly exempt, even where the emissions exceeded the specified limitations of such regulation.499 This sort of blanket preemption is not required at all by the Supreme Court’s opinion in City of Milwaukee. This approach is especially ill-founded where the emitter has not complied with permit conditions.500 Finally, even under City of Milwaukee federal courts must inquire into the legislative intent and interpret that intent to make a judicial determination regarding the comprehensiveness of the regulatory scheme. This analysis is not at all evident in the NELF opinion; rather, the court simply followed the results reached in City of Milwaukee.

Unfortunately, the deficiencies of the Second Circuit’s reasoning in NELF v. Costle are not unique. After City of Milwaukee, other federal courts have ruled that the CAA preempts federal common law nuisance as it applies to air pollution emanating from various sources.501 The courts in these decisions do not undertake an analysis of legislative intent. In addition, once a court preempts federal common law as it pertains to one aspect of an environmental area, that court often finds it a very short logical leap to conclude that federal common law must be precluded from the entire area to which the

497. See Lee, supra note 491, at 75-77; Post, supra note 13, at 125; Note, Umbrella Equities, supra note 13, at 152.
498. 666 F.2d 30 (2d Cir.1981). The district court had declined to apply an equitable remedy to pollution sources approved by the EPA, thereby avoiding the federal common law issue, 475 F. Supp. 425 (D. Conn. 1979).
499. 666 F.2d at 35-36.
500. The problem of “midnight dumping”, or knowing violations or pollution caused by unregulated sources, is a significant area calling for the exercise of federal common law. See City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979).
The cases illustrate the fear expressed by the dissenters in *City of Milwaukee* — that the majority's approach would lead to unreasoning, wholesale, or "automatic" displacement of federal common law. To date, federal courts have applied *City of Milwaukee* in its broadest, least supportable interpretation so as to preclude federal common law relief in the area of air pollution altogether.\(^5\)

The status of federal common law in the area of hazardous wastes presents a particularly complex situation concerning the interplay of legislative intent and statutory interpretation. The field of hazardous wastes is governed broadly by three federal statutes, the Toxic Substances Control Act of 1976 (TSCA)\(^6\), the Resource Conservation and Recovery Act of 1976 (RCRA)\(^7\), and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)\(^8\). TSCA provides for a mechanism to identify various toxic substances introduced into commerce in order to prevent unreasonable risks of injury to health or the environment. RCRA sets forth a regulatory program for the transport, handling, and disposal of hazardous wastes. RCRA provides a permit scheme for such activities and authorizes the federal government to bring abatement actions in cases of imminent hazard to health or the environment.\(^9\)

In 1980, RCRA was supplemented by the emergency enactment of CERCLA, often referred to as the "Superfund" legislation because of its special trust fund set up to compensate clean-up costs at hazardous waste sites.\(^10\) CERCLA is directed toward the clean-up of designated inactive hazardous waste sites and is not designed as a regulatory statute in the manner of the CWA and the CAA — even when operating in conjunction with its counterpart, RCRA.\(^11\)

Concern for this legislative pattern and application of *City of Milwaukee* could lead to the conclusion that in the area of hazardous waste generally, federal common law is preempted. While such a view is not implausible, it fails to account for the express legislative language preserving common law as a supplemental, complementary basis of liability for hazardous waste pollution. Indeed, Congress ex-

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Explicitly stated that Section 7003 is a codification of federal common law principles, which at the time of RCRA's passage represented the predominant body of law in the area.509 Congress intended that the federal common law of nuisance should be the substantive basis of decision for actions under the imminent hazard provisions of RCRA and CERCLA.510 Furthermore, the savings clause of CERCLA is drawn broadly to provide exemptions for certain "federally permitted releases" but states that:

nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of each hazardous substance.511

These provisions and such legislative history would appear to satisfy the requirement of the Court in City of Milwaukee that congressional intent to preserve common law be affirmatively expressed, and should avoid the unique interpretation given to the savings clause of the CWA.512 It appears likely, however, that federal courts will apply the broadest preemption rationale of City of Milwaukee so that even the legislative intent of RCRA and CERCLA may be viewed simply as not "affirmative" enough. Perhaps the better view is that federal courts should apply the more supportable basis of City of Milwaukee and look to the degree and nature of statutory regulation. Application of this judicial approach might result in the displacement of federal common law in the area of hazardous wastes despite the clear legislative intent to the contrary. Like the CWA, the legislative reports on RCRA indicate that it was intended to be a "comprehensive" approach to the management of the hazardous waste field. Similarly, both RCRA and CERCLA are administered by an expert agency, the EPA, charged with implementing the statutes in an area of highly technical, recently recognized problems. These represent the same sort of concerns which underly the Court's


insistence in *City of Milwaukee* that the ad hoc approach of common law is ill-suited to resolving pollution problems.

Several courts recently have addressed these problems. Few have engaged in extensive analysis of legislative history; rather, most courts have concluded simply that federal common law has been preempted by the relevant regulatory schemes of RCRA or CERCLA. The absence of inquiry into legislative intent in these post-*City of Milwaukee* cases reveals the danger of the Court's own broad language and presumptive policy analysis in *City of Milwaukee* and *Sea Clammers*. These cases demonstrate the need for reasoned analysis and an objective view of legislative intent balanced with a temperate consideration of federal courts policies rather than the mechanical "comprehensiveness" approach of *City of Milwaukee*.

VIII. THE RATIONALE OF FEDERALISM And FEDERAL COMMON LAW

In the situation presented to the Court in *City of Milwaukee*, the use of federal common law could be justified by all three necessary criteria — a uniquely federal interest in water pollution, the need to resolve interstate disputes, and the lack of legislative intent contrary to its use. The Supreme Court, however, found that all three criteria were left unsatisfied. In fairness, the weight of the federal interest as justification for a federal rule of decision by itself poses a close question. Similarly, congressional intent always is problematic, although the Court's new rules of interpretation made the question look easy. While the Court's reading of legislative intent is assailable on many fronts, ultimately, it is the Court's treatment of the federalism rationale for federal common law which is the most inadequate.

Put simply, the Court did not address properly the federalism interest justifying the use of interstate federal common law. Case law precedent, especially that delineated in the Court's earlier *Illinois* decision, acknowledges the particular application of federal common law to interstate pollution disputes. A greater regard for these
principles of federalism and a thorough examination of the nature of Illinois’ complaint—the dilemma of the downstream state—would have revealed the strengths of interstate common law. Similarly, the deficiencies of relegating Illinois to remedies under state common law or “improved” legislation would have been apparent. Indeed the most recent complaint by Oklahoma before the Court clearly indicates not only that Illinois’ dilemma was not unique, but also that the CWA still does not address the problem of downstream state water pollution today, some ten years after the initiation of Illinois’ suit.515

Interstate common law was developed by the Supreme Court as an equitable rule of decision for the adjudication of disputes between neighboring states concerning their respective quasi-sovereign interests in interstate resources. Although states may freely utilize resources within their own borders, the ecological rights of one state preclude the detrimental use by another of the resources shared by both. This federalism concern has long been within the purview of federal common law.516

The federalism rationale remains an important principle in the protection and ordering of interstate relations.517 Under the CWA a state may find that its waters remain or become polluted despite its strict compliance with federal requirements. This condition may be due to extremely poor existent water conditions, non-point source pollution, or discharges emanating from another state. Having determined that more stringent standards are necessary to protect

517. E.g., Georgia v. Pennsylvania R.R., 324 U.S. 439, 447 (1945) (interstate transportation railroads); Wyoming v. Colorado, 286 U.S. 494, 509 (1932) (interstate water); Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923) (interstate natural gas); New York v. New Jersey, 256 U.S. 296, 301-02 (1921) (interstate water); Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (interstate air); Missouri v. Illinois, 180 U.S. 208, 241 (1901) (interstate water). Historically, once such an injury was shown, the state was allowed to assert its interests by invoking the original jurisdiction of the Supreme Court.
its waters, a state must have some means of safeguarding that decision. Irrespective of actual water quality standards, there is no justification under the CWA or elsewhere for requiring that one state tolerate a nuisance or degradation of its waters solely because the offending state’s discharge complies with some minimum technical regulations. The very decision of a state to adopt more stringent standards under the CWA exemplifies the recognized bases for the application of interstate common law: an express federal interest in the nation’s waters and the quasi-sovereign interests of a state within our federal system. These federal and federalism interests are especially pronounced where a state’s more stringent standards are the result of the exercise of a specifically granted right pursuant to a federal legislative scheme such as the CWA.

It is recognized that pollution does not confine itself to one state geographically and that the spillover effects of pollution are not prevented by minimum effluent limitations on point sources. Out-of-state discharges may continue to degrade a state’s adopted standards, interfering with the rights of that state as a state, and rights of that state under the CWA. The CWA does not solve this dilemma. In addition, interstate pollution still poses difficult questions of conflicting state economic and social policies as well. In the area of interstate and boundary waters this dilemma calls for a clear resolution. The CWA provides none. Neither state should have these important policy decisions made by the EPA alone or the courts of its neighboring state.

518. Kansas v. Colorado, 206 U.S. 46, 98 (1907). “Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own to none.” Id. at 97-98. See 406 U.S. 91, 107 (1972) (“Thus a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor”). In an interstate conflict the vested interests and potential parochialism of either state’s courts would find expression in the state’s laws. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 500 (1971); Woods & Reed, at 710-11. The offending state would seek to protect its economy and regulation procedures from any injunction while the victim state would seek vindication of its health and ecological concerns. Such intergovernmental disputes should be resolved by an impartial uniform federal rule.

519. 33 U.S.C. § 1370 allows the states to adopt more stringent standards. Both the court and Congress could foresee that neighboring states might differ in their approaches to their regulation of pollutant discharges. 451 U.S. at 350-51 (1981). See Illinois v. Outboard Marine Corp., 619 F.2d 623, 630 (7th Cir. 1980); United States Steel Corp. v. Train, 556 F.2d 822, 830 (7th Cir. 1977); Homestake Mining Co. v. EPA, 477 F. Supp. 1279 (D. S.D. 1979); Citizens For A Better Environment v. EPA, 596 F.2d 720 (7th Cir. 1979).

520. Stewart, supra note 258, at 1227; Woods & Reed, supra note 354, at 710; Post, supra note 13, at 126-28.
The premise of precedent case law is that interstate common law is the suitable rule of decision to reconcile the rights of both states involved.\textsuperscript{521} Wisconsin and Illinois each ran federally approved water pollution programs under the CWA. The purpose and effect of Illinois' program standards were defeated by the pollutant discharges from Milwaukee. When these discharges degraded Illinois standards and created a public health nuisance as well, the CWA failed to provide a means of protecting Illinois' resources and its decision to adopt certain standards of pollution control under the Act.\textsuperscript{522} Interstate common law fills this void in the legislative scheme of the CWA. The issuance of effluent limitations as an element of the judicial remedy does not interfere with the prerogatives of the Congress; nor does it negate the validity of such an interstatial exercise of federal common law by the courts. The submission of interstate conflict to the impartial rule of interstate federal common law is both a necessary rule of federalism and an exercise of judicial power wholly in accord with the provisions and intent of the CWA.

\textbf{IX. Conclusion}

The Supreme Court decisions in \textit{City of Milwaukee v. Illinois} and \textit{Middlesex County Sewerage Authority v. National Sea Clammers Association} set forth a broad foundation for the displacement of federal common law nuisance by environmental statutes generally. While the decisions are compelling in their concern for the complex, technical legislative schemes for regulating polluting conduct, the decisions are objectionable on several levels. First, the Court's unique standards of review and discernment of legislative intent are difficult to reconcile with past precedent and the strong sources of

521. See \textit{supra} text and notes at notes 110-22.
522. 406 U.S. 91, 107 n.9; Friendly, \textit{supra} note 50 at 408 n.119. Much of the use of federal common law grew out of the court's grant of original jurisdiction over interstate disputes where the nature of the controversy made the application of one state's law inappropriate. From this grant the power to utilize federal common law was inferred. Woods & Reed, \textit{supra} note 354, at 708-11. The Illinois decision in 1972 diverted these disputes to federal district courts by assigning federal question jurisdiction to a federal common law claim. 406 U.S. 91, 100 (1972). This does not alter the underlying rationale justifying the use of federal common law. Stewart, \textit{supra} note 258, at 1229-30 (pollution spillovers require federal court adjudication until specifically addressed by federal legislation); Post, \textit{supra} note 13, at 143 (problem of conflicting state standards under CAA, 42 U.S.C. §§ 7401-7642, could be solved through use of interstate common law). Interstate common law presents no irreconcilable conflict with policies of CWA. See \textit{Nader v. Allegheny Airlines, Inc.}, 426 U.S. 290, 298 (1976) (quoting \textit{Texas & Pacific Ry. v. Abilene Cotton Oil Co.}, 204 U.S. 426, 437 (1907)); \textit{accord}, Isbrandsten Co. v. Johnson, 343 U.S. 779, 783 (1952). Far from conflicting, federal common law is a "vital supplementary mechanism" for protecting states. Note, \textit{Preemption, supra} note 4, at 529.
the legislative history of the CWA and other environmental statutes which support the use of federal common law. Second, the prudential concerns expressed by the Court limiting federal courts' lawmaking powers are well established, but the Court gave short weight to the unique prudential bases of interstate common law. The justification for federal common law is especially strong when used to protect a state's ecological interests and to safeguard that state's authority within the federal system. Third, the preeminent factor in the Court's preemption analysis — a finding that the CWA was "comprehensive" legislation in the field of water pollution — encourages the wholesale displacement of federal common law by other environmental statutes in many areas notwithstanding the apparent or actual legislative intent of such statutes. Fourth, the Court's decisions leave unresolved thorny issues pertaining to the applicability and efficacy of state laws to resolve or control interstate pollution disputes. Further, the Court has advanced no reasons why the application of state laws would not have disruptive effects upon regulatory schemes similar to those associated with the use of federal common law. Fifth, while a federal court certainly is free to decline to exercise its equitable powers, the Court's refusal to look closely at the facts of the dispute in City of Milwaukee and its recent decision in Romero-Barcelo allowing continued violation of pollution control regulations to remain unabated both suggest a one-way view of the discretion of federal courts. Finally, the Court in City of Milwaukee avoided the clear weight of case law authority and explicit congressional intent indicating that compliance with statutory standards may be relevant to liability remedies, but is not a defense to common law nuisance claims.

Primary efforts to control and prevent environmental pollution have been and must continue to be statutory. By its nature litigation is suited only to solving immediate problems in particular circumstances, and is not a vehicle for the promulgation of standards of general applicability. Yet the inevitable incompleteness of some statutory schemes and the very design of others make it certain that federal courts will be called upon to remedy pollution problems not otherwise resolved directly by relevant statutes. In such instances a federal court should not hesitate to undertake an active and forthright analysis of the particular statutory scheme as well as a thorough examination of the full scope of its own equitable and lawmaking powers. This much is wholly in accord with the decision in City of Milwaukee.
In the context of interstate water pollution disputes the use of federal common law does not necessarily present irreconcilable conflicts with the CWA. The CWA is not designed to be a remedial statute. Nor does it prohibit pollution per se, only pollution without a permit. Thus, waterways may develop conditions which threaten human health and the environment despite full compliance with minimum statutory standards. Federal common law can fill such statutory gaps in the CWA while advancing its purposes in a manner which is consistent with the provisions of the Act. The flexibility and temperance intrinsic to a federal court's equitable discretion can mitigate potential hardships on polluters or disruptions of the consistency of statutory regulation and other economic effects.

Ultimately, however, the responsibility for a vital and effective program of federal environmental law rests not only with the federal courts, but with the legislature in the first instance. After *City of Milwaukee* perhaps federal courts cannot be expected to advance federal common law remedies without further indication or guidance from Congress as to the role of federal common law. With positive congressional impetus federal common law may fulfill its potential as a crucial, case specific supplement to broadly drawn environmental regulatory legislation in order to develop a truly comprehensive approach to the control, abatement and eventual elimination of harmful environmental pollution.