STATUTORY PREEMPTION OF FEDERAL COMMON LAW: *MILWAUKEE v. ILLINOIS*

Federal courts traditionally engage in interstitial lawmaking by interpreting congressional legislation.[1] Acknowledging this function, the United States Supreme Court in 1972[2] indicated that, absent germane federal water pollution legislation, the judicially formulated federal common law of nuisance provides a remedy for interstate water pollution.[3] Shortly thereafter, Congress, recognizing prior fed-

1. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 143 n.17 (1978). *See* United States v. Little Misre Land Co., 412 U.S. 580, 593 (1973) ("the inevitable incompleteness presented by all legislation means that interstitial federal law-making is a basic responsibility of the federal courts").

Commentators have also recognized that effective constitutionalism necessitates federal judicial competence to formulate federal common law to supplement established federal statutory programs. *See generally* Friendly, *In Praise of* Erie *and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 419-21 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules For Decision*, 105 U. PA. L. REV. 797, 800 (1957).

2. *See* Illinois v. Milwaukee, 406 U.S. 91 (1972). *See also infra* text accompanying notes 40-42.

3. *Id.* The Court in Illinois v. Milwaukee declared that congressional enactments prohibiting or controlling pollution of interstate or navigable waters were not the exclusive means by which federal courts may protect the federal policy concerning the quality of water under federal jurisdiction. *Id.* at 103. The Court recognized, however, Congress' power to preempt federal common law through statute or authorized administrative regulations. *Id.* at 107.

A state can bring suit in federal court on the basis of its sovereign interest in the integrity of its waters. The federal interest in the quality of interstate waters, evidenced by the substantial amount of federal water quality legislation, supports application of federal law in such situations. Leypold, *Federal Common Law: Judicially Established Effluent Standards as a Remedy in Federal Nuisance Actions*, 7 B.C. ENVTL. AFF. L. REV. 314 (1978).

In Washington v. General Motors Corp., 406 U.S. 109 (1972), the Court broadened the scope of Illinois v. Milwaukee's holding to the problem of air pollution. The Court observed that Congress had not established a uniform national solution to all aspects of air pollution. Indeed, Congress had expressly stated that "prevention and control of air pollution at its source is the primary responsibility of States and local governments." *Id.* at 114, *quoting* 42 U.S.C. § 1857(a)(3) (1976). The Court in *General Motors* recognized that the law, as well as practical necessity, mandate that cor-

eral statutory water quality programs' deficiencies,[4] enacted the Federal Water Pollution Control Act Amendments (FWPCAA or Amendments) of 1972.[5] Federal courts interpreted the FWPCAA as supplementing the existing rights and remedies under the federal common law of nuisance.[6] In *Milwaukee v. Illinois*,[7] the Supreme Court rejected this view and held that the FWPCAA fully preempted the federal common law's water pollution remedies.[8]

In 1972, Illinois sought original jurisdiction from the Supreme

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rective remedies for air pollution be considered in the context of localized situations. 406 U.S. at 116. To accomplish this desired end, the Court held that cases should be heard in the appropriate federal district courts. *Id.*

Not all courts have extended *Illinois v. Milwaukee* beyond its express language. In Committee for Jones Fall Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976) (en banc), a divided Fourth Circuit refused to broaden *Illinois v. Milwaukee* to include an action brought by an association of community organizations and citizens in which there was no interstate effect. *Id.* at 1010.

4. From its two-year study of the federal water pollution control program, the Senate Committee on Public Works concluded "the national effort to abate and control water pollution has been inadequate in every vital aspect." S. REP. No. 414, 92d Cong., 1st Sess. 7, 12 (1971).

The Federal Water Pollution Control Act, prior to the 1972 amendments, prescribed a regulatory system consisting primarily of state developed ambient water standards applicable to interstate or navigable waters. Required standards for any particular activity depended upon the priorities the state wanted to facilitate. The water quality protection system failed due to the lack, not infeasibility, of enforcement of state standards. R. FINDLEY & D. FARBER, ENVIRONMENTAL CASES AND MATERIALS 48 (1981).

5. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980)).

6. *See, e.g.*, Illinois v. Milwaukee, 599 F.2d 151 (7th Cir. 1979), *vacated*, 451 U.S. 304 (1981); City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7th Cir. 1979); United States v. Atlantic-Richfield Co., 478 F. Supp. 1215 (D. Mont. 1979). *See also* District of Columbia v. Schramm, 631 F.2d 854, 864 n.19 (D.C. Cir. 1980) (court quoting with apparent approval Seventh Circuit's decision in Illinois v. Milwaukee, 599 F.2d 151 (7th Cir. 1979)); Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980) (federal common law supplements FWPCAA), *vacated and remanded*, 451 U.S. 917 (1981) (for further consideration in light of Milwaukee v. Illinois, 451 U.S. 304 (1981)); National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1233 n.31 (3d Cir. 1980) (FWPCAA does not preclude an independent federal common law nuisance remedy), *vacated and remanded*, 453 U.S. 1 (1981) (for further consideration in light of Milwaukee v. Illinois, 451 U.S. 304 (1981)); Commonwealth of Puerto Rico v. Muskie, 507 F. Supp. 1035, 1061-62 (D.P.R. 1981) (FWPCAA does not preempt federal common law of nuisance), *vacated and remanded sub nom.* Marques-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981).

7. 451 U.S. 304 (1981).

8. *Id.* at 317.

Court[9] to block the City of Milwaukee from discharging untreated sewage[10] into Lake Michigan.[11] The Court refused to exercise its original jurisdiction, but recognized that Illinois could invoke the federal common law of nuisance to obtain an injunction barring Milwaukee's discharge of pollutants.[12]

Subsequent to Illinois' filing of suit in federal district court,[13] Congress enacted the FWPCAA.[14] The Amendments authorized qualified state agencies to establish new water quality standards in conformance with Environmental Protection Agency (EPA) regulations.[15] The Wisconsin Department of Natural Resources, in compliance with the FWPCAA regulatory scheme, issued a sewage discharge permit to the City of Milwaukee.[16] Thereafter, however, the district court[17] found that Milwaukee's sewage discharge practices constituted a nuisance under federal common law and ordered the city to comply with discharge levels more stringent[18] than those that the Wisconsin permit required.[19] The court, finding that the

9. *See* Illinois v. Milwaukee, 406 U.S. 91, 93-94 (1972).

10. 406 U.S. at 93. Illinois claimed the Milwaukee area alone discharged approximately 200 million gallons of raw or untreated sewage and other waste minerals into Lake Michigan. *Id.* In Milwaukee v. Illinois, 451 U.S. 304 (1981), the Court noted that untreated sewage contains pathogen concentrations. *Id.* at 309. The sewage discharges foster eutrophication, a process that gradually increases nutrient concentrates in a body of water. This causes increasing concentrates of phytoplankton, which in turn leads to reduced clarity and oxygen content, noxious gases, and eventually to the "death" of the lake through vegetative overgrowth. *Id.*

11. 406 U.S. at 91.

12. *Id.*

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

14. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251-1376 (1976 & Supp. IV 1980)).

15. 33 U.S.C. § 1251(b) (1976).

16. Milwaukee v. Illinois, 451 U.S. at 311.

17. 366 F. Supp. 298 (N.D. Ill. 1973).

18. *Id.* When the Court of Appeals reviewed the decision, 599 F.2d 151 (7th Cir. 1979), it found that the district court had not created new arbitrary requirements, but simply enforced Illinois discharge requirements. The court noted that the district court's holding required Milwaukee's discharges to contain less than five milligrams per liter (mg/l) of deoxygenating wastes (BOD) and five mg/l of suspended solids. *Id.* at 173-74. The standards enforced were nearly identical to those in effect under Illinois law for discharges into Lake Michigan from sources within Illinois. *Id.* at 173. Illinois limited discharges to a content not exceeding four mg/l BOD and five mg/l suspended solids. ILL. POLLUTION CONTROL BOARD RULES AND REGULATIONS, ch. 3 § 404(d) (standards effective December 31, 1974).

19. 451 U.S. at 312. *See also id.* at 353 (Blackmun, J., dissenting).

FWPCAA's language neither "expressly [n]or clearly manifested" an intent to derogate federal common law principles, held that the established federal common law rights and remedies survived the Amendments.[20]

On appeal, the Seventh Circuit affirmed in part and reversed in part.[21] The court agreed that the FWPCAA did not preempt federal common law, but found that the district court had erred in ordering relief exceeding the FWPCAA authorized standards.[22] On certiorari, the Supreme Court rejected the lower court's preemption test.[23] Justice Rehnquist, writing for the majority,[24] distinguished the tests for congressional preemption of state law and congressional preemption of federal common law.[25] The Court ruled that separation of powers' principles require that federal courts defer to expressions of congressional policy.[26] Accordingly, the Court held that the FWPCAA fully preempted existing federal common law of nuisance rights and remedies.[27]

Federal common law has an essential function in our federal system of government.[28] As a sovereign entity within the federal system,

20. 366 F. Supp. at 300. This constituted an application of the previously established test. *See* Isbrandsten v. Johnson, 343 U.S. 779 (1952) (held that it is well settled that statutes will not be construed in derogation of common law unless "such intent is clear from the words of the statute.").

21. Illinois v. Milwaukee, 599 F.2d 151 (7th Cir. 1979), *vacated*, 451 U.S. 304 (1981).

22. 599 F.2d at 177.

23. Milwaukee v. Illinois, 451 U.S. 304 (1981).

24. Six justices joined the Court's opinion. Justice Blackmun filed a dissenting opinion, which Justices Marshall and Stevens joined. *Id.* at 332.

25. 451 U.S. at 316-17.

26. *Id.* at 317.

27. *Id.* at 320.

28. The Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964), held that where the controversy touches basic interests of federalism or where an overriding federal interest in the need of a uniform rule of decision exists, federal courts apply federal common law. *See also* Illinois v. Outboard Marine Corp., 619 F.2d 623, 626 (7th Cir. 1980), *vacated*, 451 U.S. 917 (1981) (nation has an overriding interest, explicit in the FWPCAA, in interstate and navigable waters and in developing a uniform program of protecting these waters from pollution); United States v. Solvents Recovery Serv., 496 F. Supp. 1127, 1134 (D.C. Conn. 1980) (the strong federal interest in controlling certain types of pollution and protecting the environment forms the basis of federal common law causes of action).

The value of federal common law is its ability to respond and adapt itself to evolving concepts of legal procedure and social equity. Bryson & Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q.

states have the authority to regulate intrastate affairs not preempted by the federal government.[29] In exercising this power, however, the impact of a state's actions may extend beyond its boundaries, impairing the sovereignty of neighboring states.[30] Resolving such disputes poses difficult jurisdictional problems.[31] Recognizing that such dis-

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241, 275 (1972). Conversely, statutes alone usually provide only inflexible guidelines that are incapable of adequately responding to changing environmental situations. Another commentator suggests the creation of a federal common law remedy for abatement of interstate pollution would supplement rather than supplant the legislative process. *See* Note, *A Comparison of* Texas v. Pankey *and* Ohio v. Wyandotte Chemicals Corp. *Reveals the Necessity for a Common Law Right to Abate Interstate Pollution*, 50 TEX. L. REV. 183, 189 n.31 (1971). *See generally* Note, *State Ecological Rights Arising Under Federal Common Law*, 1972 WIS. L. REV. 597, 602. For a further discussion of the necessity for interstitial lawmaking, see *supra* note 1.

29. C. WRIGHT, LAW OF FEDERAL COURTS 278 (1976).

30. As Alexander Hamilton wrote, federal jurisdiction over cases involving interstate disputes "rests on [the] plain proposition that the peace of the whole ought not be left at the disposal of a part." THE FEDERALIST No. 80, at 588 (A. Hamilton) (J. Hamilton ed. 1869). In Kansas v. Colorado, 206 U.S. 46 (1907), the Court declared that, "[o]ne cardinal rule, underlying all the relations of the states to each other, is the equality of right. Each state stands on the same level as the rest. It can impose its legislation on no one of the others and is bound to yield its own view to none." *Id.* at 97. It does not follow that because Congress cannot determine the rule which shall control between two states or because a state may not enforce its policies on its neighbor that the controversy ceases to be one of a justiciable nature. *Id.* at 98. Through successive disputes and decisions the Court formulates "what may not improperly be called interstate common law." *Id.*

See Illinois v. Milwaukee, 406 U.S. 91, 105 (1972) (question of apportionment of interstate waters is a question of federal common law upon which statutes are not conclusive) (dicta); Georgia v. Tennessee Copper Co. 206 U.S. 230, 237 (1907) (a state's quasi-sovereign interest in its environment should not be circumscribed by inadequate pollution laws of neighboring states; one state's ecological rights preclude interference from other states); Missouri v. Illinois, 180 U.S. 208, 241 (1901) (while states, as sovereign entities, surrendered diplomatic powers and the right to make war when they joined the Union, "it was to be expected that upon the [federal government] would be devolved the duty of providing a remedy" for protecting a states remaining quasi-sovereign interests; federal court jurisdiction provides such a remedy); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 683 (1959). *See also* Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?*, 49 FORDHAM L. REV. 500, 525-26 (1981) [hereinafter cited as Note, *Federal Common Law*]. For a further discussion of federalism in interstate environmental quality, see Woods & Reed, *The Supreme Court and Interstate Water Quality: Some Notes on the* Wyandotte *Case*, 12 ARIZ. L. REV. 691, 706 (1970).

31. Since 1875, Congress has provided that the district courts shall have original jurisdiction "of all civil actions arising under the Constitution, laws or treaties of the United States." Judiciary Act of 1875, 28 U.S.C. § 1331 (Supp. IV 1980). Courts interpret the word "laws" in § 1331 to include federal judicial decisions as well as

putes presented important questions about the operation of the federal system, federal courts created a justiciable claim under federal common law.[32] This judicially created body of law serves to protect the sovereign interests of the states from unreasonable interference by other actors in the federal system.[33]

Courts have used federal common law to protect states' environmental rights from interstate pollution.[34] In *Pankey v. Texas*,[35] the Tenth Circuit held that where no applicable federal statute exists, federal common law preserves a state's quasi-sovereign ecological rights.[36] In *Pankey*, Texas sued to enjoin New Mexico residents from using an insecticide that threatened to pollute Texas water supplies.[37] The court ruled that federal common law provides a basis for uniform rules of decision in cases involving the extraterritorial impairment of a state's environmental rights.[38] The court stressed that until an area of law received comprehensive legislation, federal common law provides the only adequate remedy for interstate pollution.[39]

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congressional legislation. *See, e.g.*, Illinois v. Milwaukee, 406 U.S. 91, 99 (1972) (federal courts have extensive responsibility to fashion substantive law in rules, which are as fully "laws" of the United States as those congressionally enacted); Ivy Broadcasting Co. v. American Tel. and Tel. Co., 391 F.2d 486, 492 (2d Cir. 1968) (rationale of the 1875 grant of federal question jurisdiction applies to judicially created rights as well as legislatively created rights). At least one commentator also has recognized that federal common law is among the "laws of the United States" referred to in the jurisdictional statute. *See* C. WRIGHT, *supra* note 29, at 562.

32. C. WRIGHT, *supra* note 29, at 562. *See* Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 457 (1957) (federal courts resolve problems lacking express statutory sanction by examining the statutory policy and formulating a remedy that will effectuate that objective); Board of County Comm'rs v. United States, 308 U.S. 343, 349 (1939) (when Congress neglects to provide for a contingency, it leaves such remedial details to judicial implication). For a discussion of the power of federal courts to make common law, see L. TRIBE, *supra* note 1, at 115-19.

33. *See* Illinois v. Milwaukee, 406 U.S. 91, 107 (1972) (federal common law protects a state's high water quality standards from impairment by the lower standards of a neighboring state).

34. *See* Leypold, *supra* note 3; Note, *Federal Common Law*, *supra* note 30.

35. 441 F.2d 236 (10th Cir. 1971).

36. *Id.* at 241.

37. *Id.* at 236. New Mexico ranchers planned to use the pesticide chlorinated camphene. Texas alleged that the run-off from rainfall would pollute a river that provided a major source of water for 11 Texas municipalities. *Id.*

38. *Id.* at 240.

39. *Id.* at 241.

Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uni-

Pankey received the Supreme Court's imprimatur in *Illinois v. Milwaukee*.[40] The Court there held that the federal common law of nuisance furnishes a remedy in cases of interstate water pollution.[41] Justice Douglas, speaking for a unanimous court, stated that federal courts have the capacity to fashion federal common law where there is an overriding federal interest requiring a uniform rule of decision or where the controversy involves basic interests of federalism.[42]

Courts also invoke federal common law to supplement the policies of federal enactments whose provisions inadequately address an interstate dispute.[43] In *Illinois*, for example, the Court ruled that the use of federal common law was not inconsistent with existing federal water pollution legislation.[44] Yet, reliance upon judicially created federal common law to resolve federal disputes when Congress later enacts applicable legislation raises serious questions about the proper role of the judiciary in the federal system.[45]

Both *Illinois* and *Pankey* recognized that federal statutory law may displace federal common law.[46] In such instances, federal courts defer to Congress' greater institutional competence to articulate federal

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> form standard with the environmental rights of a state against improper impairment by sources outside its domain . . . Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

Id.

40. 406 U.S. 91, 103 (1972).

41. *Id.* at 103.

42. *Id.* at 105 n.6.

43. *See infra* note 44 and accompanying text.

44. 406 U.S. at 103-04.

> The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. . . .
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> The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act.

Id. See also supra note 1.

45. *See* Milwaukee v. Illinois, 451 U.S. 304, 317 (1981).

46. *See supra* note 39. *See also* 406 U.S. at 107.

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.

Id.

policy.[47] The mere existence of federal legislation on the subject, however, does not automatically displace federal common law.[48] Federal courts have consistently refused to construe statutes in derogation of federal common law unless it is clear that Congress intended that result.[49] Congress' intent in enacting the FWPCAA has received extensive consideration in this context.

In 1972, Congress, dissatisfied with the ineffective existing federal water protection statutes and regulations,[50] enacted the Amendments to strengthen the Federal Water Pollution Control Act.[51] The Amendments established a comprehensive long-term policy aimed at effectively eliminating water pollution.[52] Congress authorized the EPA to establish pollutant discharge standards for various industrial categories. Nevertheless, the FWPCAA explicitly preserved the right of states to regulate intrastate water pollution.[53] Section 510[54] of the

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47. *Id.*

48. *See supra* note 44.

49. *See* Nader v. Allegheny Airlines, 426 U.S. 290, 298 (1976) (even without savings clause, a common law right survives unless it be found that the right is so repugnant that its survival would render the provisions of the statute nugatory); Isbandsten Co. v. Johnston, 343 U.S. 779, 783 (1952) (statutes that encroach upon common law are to be read with a presumption favoring retention of long-established and familiar principles when a contrary statutory purpose exists); Texas v. Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907) (statutory preemption occurs only if a federal court finds either a statutory provision purporting to abolish the federal common law of nuisance or a pre-existing right so repugnant to the statute that the survival of that right renders the statute nugatory); United States *ex rel.* Scott v. United States Steel Corp., 356 F. Supp. 556, 559 (N.D. Ill. 1973) (to abolish the federal common law of nuisance a statutory provision purporting such must be present).

50. *See supra* note 4. *See generally* H. LIEBER, FEDERALISM AND CLEAN WATERS: THE 1972 WATER POLLUTION CONTROL ACT (1975).

51. 33 U.S.C. § 1251 (1976).

52. "The major purpose of this legislation is to establish a comprehensive long-range policy for the elimination of water pollution. . . ." S. REP. No. 414, 92d Cong. 1st Sess. 95 (1971) (statement of Sen. Jennings Randolph, Chairman of the Senate Committee that drafted the Senate version of FWPCAA.), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1511 (1973) [hereinafter cited as LEG. HIST.]. A House sponsor, Representative Wilmer Mizell, described the bill as "the most far reaching water pollution bill we have ever drafted. . . ." 1 LEG. HIST., *supra* at 369.

The provisions of the FWPCAA exhibit Congress' intent to establish uniform national water quality standards. *See* 33 U.S.C. § 1251(a) (establishing national goals for the elimination of pollution); § 1316(c) (allowing state enforcement only if its standards comply with federal regulation); and § 1319(a)(2) (Supp. V 1981) (allowing Administrator to enforce pollution limitations if state defaults).

53. 33 U.S.C. § 1251(b) (Supp. V 1981). The FWPCAA expressly acted to "recog-

Amendments, for example, provides that states retain the right to impose stricter standards than those the EPA promulgated.[55] Congress further recognized that the Act did not displace existing remedies available to effectuate the federal policy.[56] Accordingly, Section 505(e)—the savings clause—establishes a right to seek enforcement or relief "under any statute or common law."[57]

Several decisions have discussed the extent of federal common law remedies in light of the 1972 Amendments. In *United States ex rel. Scott v. United States Steel Corp.*,[58] the court found that the FWP-

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nize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution. . . ." *Id.*

54. Section 510 provides that:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Pub. L. No. 92-500, 86 Stat. 816, 893.

55. *Id.* The House Committee Report stated that it considered:

> Section 510 to be of extreme importance in assuring the States of *the right to adopt or enforce provisions at least as strict as those established in this legislation.* Thus, the Committee rejected in most instances suggestions for preemption by the Federal Government and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in Section 312(f) relating to marine sanitation devices.

H.R. REP. No. 911, 92d Cong., 2d Sess. 136 (1972) (emphasis added).

56. 33 U.S.C. 1251(e) (1976). *See infra* note 57.

57. Section 505(e) provides that: "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 of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 86 Stat. 816, 889.

Congress' intent in enacting § 505(e) is well documented. "Section 505(e) 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." H.R. REP. No. 911, 92d Cong. 2d Sess. 134 (1972). *See also* S. REP. No. 414, 92d Cong. 1st Sess. 81 (1971). *See generally* Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 FORDHAM URB. L.J. 549 (1977).

58. 356 F. Supp. 556 (N.D. Ill. 1973).

CAA supplemented and amplified the federal common law of nuisance.[59] In *United States Steel*, the United States and Illinois sought to restrain the defendant from discharging waste water into Lake Michigan.[60] They asserted that the practice constituted a federal common law nuisance.[61] U.S. Steel contended that the FWPCAA preempted federal common law.[62] The Northern District Court for Illinois rejected this contention and held that judicial enforcement of federal common law served both the federal government's proprietary interest in the navigable waters of Lake Michigan and its interest in establishing a uniform rule of decision.[63]

The Ninth Circuit adopted a similar reading of the Amendments in *California Tahoe Planning Agency v. Jennings*.[64] In *Jennings*, California invoked the federal common law of nuisance to enjoin the construction of hotel casinos on the Lake Tahoe Basin, claiming that the development would cause an interstate nuisance.[65] As in *United States Steel*, the defendants countered that federal statutory law displaced federal common law remedies.[66] The Court of Appeals ruled that neither the Clean Air Act nor the FWPCAA preclude the existence of the federal common law of nuisance.[67] The court found that both acts had "citizen suits" provisions, protecting remedies that persons may have under previously existing statutory or common law.[68] The Ninth Circuit interpreted the "citizen suits" provisions as preserving federal common law rights and remedies from statutory preemption.[69] Nevertheless, the court affirmed the district court's dismissal of suit as failing to state a claim under the federal common law of nuisance.[70]

The Seventh Circuit discussed the relationship between federal

59. *Id.* at 559.
60. *Id.* at 558.
61. *Id.*
62. *Id.* at 558-559.
63. *Id.* at 559.
64. 594 F.2d 181 (9th Cir. 1979).
65. *Id.* at 186.
66. *Id.* at 192.
67. *Id.* at 193.
68. *Id.*
69. *Id.*
70. *Id.* at 194.

common law remedies and the FWPCAA in *Illinois v. Milwaukee*.[71] Defendants contended that the Amendment's comprehensive statutory scheme demonstrated Congress' intent to preempt federal common law.[72] Rejecting this assertion, the Court of Appeals found that Congress neither "expressly [n]or clearly manifested" an intent to preempt federal common law.[73] The court thus explicitly retained the federal common law of nuisance within the FWPCAA regulatory scheme.[74] The Seventh Circuit attempted to accommodate the statute, however, by ruling that the remedy for a violation of federal common law should reflect the "policies and principles" contained within related federal statutes.[75]

The Supreme Court reversed the Seventh Circuit's decision on appeal.[76] The majority found the "clearly manifested intent" rule inappropriate for determining whether a congressional act preempted common law.[77] The Court ruled that Congress' traditional role as articulator of national policy required a standard more solicitous of this function.[78] In his opinion for the Court, however, Justice Rehnquist failed to define clearly the new test for preemption.[79]

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71. 599 F.2d 151 (7th Cir. 1979).

72. *Id.* at 155.

73. *Id.* at 162.

74. *Id.* at 163. The Seventh Circuit recognized that Congress preserved previously existing common law rights and remedies to protect the interests of those demonstrating that the requirements imposed pursuant to the federal statute inadequately protected their interests. *Id.* at 165. *See generally* Note, *Federal Common Law, supra* note 30, at 528.

75. 599 F.2d at 164.

> The conclusion that the Federal Water Control Act, as amended, does not preempt the federal common law of nuisance or limit the relief available in this case does not render that Act irrelevant. A statute that does not by its terms govern the case before a court may contain indications of the legislature's judgement in relevant issues of policy or provide an appropriate principle for decision of the case. In applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance.

Id. (footnote omitted). The Supreme Court suggested such an approach in Illinois v. Milwaukee, 406 U.S. 91, 103 n.5 (1972): "While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision." *Id.*

76. Milwaukee v. Illinois, 451 U.S. 304 (1981).

77. *Id.* at 317.

78. *Id.* at 315-17.

79. Justice Rehnquist suggested at least four possible preemption tests. At various points in the opinion, Justice Rehnquist indicated that statutory preemption of federal

The Court began its analysis by distinguishing between congressional preemption of state law and congressional preemption of federal common law.[80] Justice Rehnquist read the Court's prior cases as requiring a "clearly manifested intent" only for the former category of cases.[81] He concluded that this more demanding preemption standard served to protect state power, thereby effecting the diffusion of power envisioned by the Constitution's system of federalism.[82] The Justice saw a different set of concerns when the case fell within the second category. He emphasized the limited role of a judicially created federal common law in light of the Constitution's implicit allocation of policymaking powers to Congress.[83] The Court viewed this separation of power principle as "too fundamental" to permit federal courts' continued reliance on federal common law after Congress has "addressed the problem."[84]

In reaching its conclusion that the Amendments displaced federal

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common law occurs when Congress (1) subjects a federal concern to comprehensive legislation or authorizes regulation by an expert administrative agency, *id.* at 317; (2) "Thoroughly addresses" a subject, *id.* at 320; (3) "spoke directly" to a subject, *id.* at 315; or "addresses" a subject, *id.* at 314. Unfortunately, the Court's opinion does not state whether preemption occurs only when all four criteria are satisfied or if preemption occurs when only one factor is present.

80. *Id.* at 316.

> Contrary to the suggestions of respondents, the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law preempts state law. In considering the latter question " 'we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress' " . . . While we have not hesitated to find preemption of state law, whether express or implied, when Congress has so indicated . . . or when enforcement of state regulations would impair "federal superintendence of the field," . . . our 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" . . . Such concerns 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. Indeed, as noted, in cases such as the present "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.

Id. at 316-17 (citations omitted).

81. *Id.* at 316.

82. *Id.*

83. *Id.*

84. *Id.* at 315. "Our 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with

common law, the Court considered two factors.[85] First, it evaluated the intended breadth and scope of the statute.[86] Statements in the legislative history referring to comprehensiveness of the 1972 amendments[87] pursuaded the Court that Congress intended to establish an "all-encompassing" water pollution regulatory scheme.[88] Congress' delegation of supervisory powers for implementing the FWPCAA to

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"common sense and the public weal" ' when Congress has addressed the problem." *Id.* (quoting TVA v. Hill, 437 U.S. 153 (1978)).

85. In a footnote, the Court stated that "the 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 formerly governed by federal common law." *Id.* at 315 n.8.

86. *Id.* at 315-22.

87. *Id.* at 317-19.

88. *Id.* at 318. Justice Rehnquist regarded the FWPCAA as not simply another law " 'touching interstate waters.' " *Id.* at 317. He referred to Congress' view that the amendments were a " 'total restructuring' " and " 'complete rewriting' " of the existing water pollution legislation considered by the Court in *Illinois v. Milwaukee*. *Id.*

Throughout his opinion, Justice Rehnquist relied on the FWPCAA's establishment of *a comprehensive* regulatory program. *Id.* The Act did establish a comprehensive long-range policy. 33 U.S.C. § 1251 (1976 & Supp. V 1981). Justice Rehnquist, however, strained the meaning of this expression.

"A comprehensive long-term policy" arguably differs from "a comprehensive statute." The former indicates an all-encompassing solitary objective. "A comprehensive statute" represents only one cohesive route toward achieving that objective. The word "a," unlike the word "the," is totally inclusive only when modified by descriptive words, *e.g.* single, only, long, short, etc. "An" option indicates the presence of one option. It does not preclude other options whereas "the" option does preclude all other options. When Congress refers to, "a" comprehensive statute, it intends just that. It is important to recognize this distinction when examining the Court's analysis in the principal case.

The majority mistakenly relied on the Congressional proponents' characterization of the FWPCAA as comprehensive. As the dissent poignantly observed, proponents of prior water pollution legislation advance similar claims of statutory comprehensiveness. 451 U.S. at 342 n.13.

The EPA General Counsel's response to a letter from Senator Griffin bolsters the dissent's interpretation. The General Counsel wrote that: "It is reasonable to conclude that the courts will not interpret any legislation to deprive them of jurisdiction of pending litigation in the absence of *clear and explicit language. There is no clear and explicit language to this effect in the bill.*" 1 LEG. HIST., *supra* note 52, at 193 (emphasis added). Representing the Executive Branch of the United States, the Solicitor General, Assistant Attorney General, and Attorney of the E.P.A.'s brief strongly urged the Court to find that the FWPCAA did not preempt or limit the federal common law of nuisance governing water pollution. Brief of the Solicitor General for the United States, Milwaukee v. Illinois, 451 U.S. 304 (1981).

an "expert administrative agency" buttressed this finding.[89] These actions, the Court concluded, demonstrated Congress' implicit intention to eliminate all non-statutory remedies.[90]

The Court directed the second part of its analysis to whether remedies provided by the Amendments displaced those formerly available under federal common law.[91] In concluding that the statutory remedies now governed the field,[92] the majority adopted an exceedingly narrow interpretation of Section 505(e), the savings clause.[93] The Court preserved only those remedies enumerated within Section 505 and those provided by existing state common law.[94] This interpretation, which is contrary to several lower appellate court views,[95] ap-

89. 451 U.S. at 317.

90. *Id.* at 323-26. Federal courts, the majority contended, "lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." *Id.* at 320.

91. *Id.* at 327-32.

92. *Id.* at 332.

93. *Id.* at 328. Examining the provision's language (*see supra* note 57) Justice Rehnquist ruled that "we . . . are inclined to view the quoted provision as meaning what it says: that nothing in *§ 505*, the citizen-suit provision, should be read as limiting any other remedies which might exist." *Id.* The majority further asserted § 505(3) ". . . 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." *Id.* at 329. The dissent strenuously challenged the majority's reading of the provision. *Id.* at 339-44 (Blackmun, J., dissenting).

The Court also found no basis for using federal common law to enforce state regulations adopted pursuant to § 510 (*see supra* note 54) that exceeded the minimum requirements established by Congress and the EPA. The Court interpreted Section 510 as to "contemplate state authority to establish more stringent pollution limitations; nothing in it, however, suggests that this was to be done by federal court actions premised on federal common law." 451 U.S. at 328. One might question whether Congress would provide a right but implicitly deny the enforcement of that right. Congress made clear, moreover, that federal officers and agencies can adopt or enforce stricter pollution controls and standards than those required by the act. (*See* § 511(a)). *See* 451 U.S. at 314 (Blackmun, J., dissenting). This indicates Congress' intent for federal courts to enforce all authorized state pollution limitations, including those exceeding the floor established by Congress and the regulatory agency.

94. *Id.* at 319 n.14.

95. *See, e.g.*, Illinois v. Milwaukee, 599 F.2d 151, 163 (7th Cir. 1979) (discussed *supra* notes 71-75 and accompanying text), *vacated*, 451 U.S. 304 (1981); California Tahoe Regional Planning Agency v. Jennings, 594 F.2d 181 (9th Cir. 1979) (discussed *supra* at notes 64-70 and accompanying text). *See also* 451 U.S. at 340 (Blackmun, J., dissenting).

pears to further the majority's desire to limit the federal judiciary's discretion in utilizing federal common law in the absence of express congressional approval.[96]

The Court's preemption analysis alters the prior standard for preemption employed in *California Tahoe Regional Planning Agency v. Jennings*,[97] *United States ex rel. Scott v. United States Steel*,[98] and the Seventh Circuit's decision in *Illinois v. Milwaukee*.[99] The former standard required a showing that Congress "expressly or clearly manifested" an intent to preempt federal common law.[100] While the opinion makes clear that the Court no longer thinks this necessary,[101] the Court's new test fails to specify what type of congressional action suffices to preempt an area from federal interstitial lawmaking.[102] The new test undercuts the implicit understanding of preceding cases that a court must examine both the words and spirit of a statute

96. *See* 451 U.S. at 319 n.14, 329 n.22.

97. 594 F.2d 181 (9th Cir. 1979) (discussed *supra* at notes 64-70 and accompanying text).

98. 356 F. Supp. 556 (N.D. Ill. 1973) (discussed *supra* at notes 58-63).

99. 599 F.2d 151 (7th Cir. 1979) (discussed *supra* at notes 71-75 and accompanying text).

100. *See supra* note 49 and accompanying text.

101. *See* 451 U.S. at 319 n.14.

102. *See supra* note 79. The Court's failure to clarify any of the broad tests it enumerated may lead to inconsistent results. More significantly, however, a lower court, depending on the test applied, could invalidate an entire region of federal common law simply by noting that Congress "addressed" a question. A recent case demonstrates this problem. In United States v. Kinbuc, Inc., 532 F. Supp. 699 (D.N.J. 1982), the federal government, alleging violation of the FWPCAA, sought penalties against a landfill operated as a disposal site for municipal, industrial, and chemical wastes. The government based its damage claim on the federal common law of nuisance for air and water pollution. The court dismissed the common law claim for damages for water pollution in light of *Milwaukee v. Illinois*. When it addressed the common law claim for damages for air pollution, the court summarily dismissed defendant's argument.

Relying on *Milwaukee v. Illinois*, the court held that the proper test to apply is "whether the scope of the legislative scheme established by Congress is such that it addresses the problem formerly governed by federal common law." *Id.* at 702. After a cursory examination of the Clean Air Act's legislative history, the court decided that the Act establishes a complete regulatory procedure whereby pollutants are identified, air quality standards are set, and procedures for strict enforcement are created. The court correctly quoted *Milwaukee v. Illinois* for the general principle that "when Congress occupies the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency, there is no need for federal common law." *Id.* Based on this reasoning, the court found that the Clean Air Act preempted federal common law. *Id.* at 703.

before determining whether the act preempts federal common law.[103]

Milwaukee v. Illinois effectively eliminates the federal common law rights and remedies previously complementing the FWPCAA.[104] After this decision, state pollution controls more restrictive than those imposed by the federal government have no adequate legal enforcement remedy available in interstate forums. This result frustrates the congressional policy of preventing, reducing, and eliminating pollution.[105] The Court's new test means that Congress, to preserve rights and remedies existing under federal common law, must specifically state its intentions within a separate section at the beginning or end of an act. By requiring such a savings clause as Section 505(e), the Court transferred federal protection of a state's quasi-sovereign ecological rights from the realm of equity to that of politics.

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103. *See supra* note 49 and accompanying text.

104. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981) (the federal common law of nuisance has been fully pre-empted in the area of water pollution by the FWPCAA).

105. 33 U.S.C. § 1251 (1976 & Supp. V 1981).