1983

Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction

William V. Luneburg

University of Pittsburgh

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Judges Commons, and the Jurisdiction Commons

Recommended Citation

Available at: http://www.repository.law.indiana.edu/ilj/vol58/iss2/1
Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction

WILLIAM V. LUNEBURG*

I.

My experience as a State court judge and as a State legislator has given me a greater appreciation of the important role the States play in our federal system, and also a greater appreciation of the separate and distinct roles of the three branches of government at both the State and the Federal levels. Those experiences have strengthened my view that the proper role of the judiciary is one of interpreting and applying the law, not making it.

Justice-designate Sandra Day O'Connor before the Senate Judiciary Committee, September 9, 1981."

When a nominee to the United States Supreme Court asserts her belief that the appropriate role for the courts is to “interpret and apply” and not “make” the law, certainly those with more than a passing knowledge of the law’s processes can be excused if they express considerable puzzlement. What must she mean? Even putting to one side the problems of “discovering” meaning in the general, often vague, language of the Constitution, the pronouncements of legislatures in the form of statutes hardly present the judiciary with self-applying maxims leaving little or no room

* B.A., Carleton College; J.D., Harvard University. Associate Professor of Law, University of Pittsburgh. Professors Arthur Hellman, Mark Nordenberg and Gerald Torres offered valuable suggestions on preliminary drafts of this article, which assistance was much appreciated. However, the final version purports to represent my own views. A research stipend from the School of Law assisted in its completion. Finally, I want to acknowledge the unflagging research and editorial assistance provided by Ms. Rona Pietrzak, a third-year student at the University of Pittsburgh School of Law.

for judicial creativity. Given her professional experience we must assume that Justice O'Connor would acknowledge at least that much.

The folklore that judges do not (or should not) "make law" is by no means restricted to the United States. Public promotion of that folklore, however, is of questionable value as a public service and seems inconsistent with the stress currently being placed on "open government" and citizen awareness of the actual processes of government. At the same time it must be admitted that there are instances where a court dealing with statutory materials may abjure a law-making function without imparting an entirely misleading impression regarding what is in fact occurring.

This is the case where a court refuses to supplement a statutory scheme with common law rules allegedly necessary to the successful implementation of the goals of the legislature or at least consistent with their realization. Perhaps it was law-making of this nature that Justice O'Connor was promising she would avoid. Given both constitutional and statutory restrictions on the federal courts, there is only a limited sphere in which judicial creativity of this nature can operate. Thus, her reassurance was unnecessary, unless it was intended to express her belief that the appropriate scope of federal common law should be particularly narrow.

On the one hand, an aversion to avoidable judicial law-making may be rooted in perceptions regarding the "appropriate" allocation of power, whether or not demanded by the Constitution, between the legislature and the courts and between the national and state governments. Judicial creativity is seen not only as a usurpation of the power of the electorally responsible co-equal branch and an impermissible intrusion on the reserved powers of the states but also in some cases as an unjustifiable technique which enables legislators to escape from making politically difficult decisions. The preeminent position of the legislature as policy-maker and Congress as guardian of the interests of the states is allegedly maintained by eschewing judicial creativity. On the other hand, criticism of judicial law-making may constitute an elliptical way of expressing disagreement with the substantive policies sought to be advanced by the courts, even where those policies are consistent with the ascertainable legislative will. In some of its manifestations, this critical approach may undermine, rather than advance, ultimate legislative supremacy.

See generally R. Dickerson, The Interpretation and Application of Statutes 13-33 (1975) [hereinafter cited as Dickerson].


See, e.g., Dickerson, supra note 2, at 250-51.

See infra text accompanying notes 432-54.

See Hetzel, supra note 3, at 373.
Justice O'Conner's opening remarks in her testimony before the Senate Judiciary Committee suggest a particular concern for maintenance of the "appropriate" balances between state and federal governments and among the three branches of the national government. She joins a tribunal recently characterized as "The Rehnquist Court." This label reflects a perceived predominance of his vision in the Supreme Court's current work product. Moreover, the newest Justice is expected to closely align herself with the views of her former Stanford classmate. In fact, the positions which she took during the 1981-82 Term provide some confirmation for early predictions, though there are exceptions to this.

Justice Rehnquist's opinions display a punctilious concern for issues of federalism and separation of powers. Not surprisingly, his perceptions regarding the appropriate allocation of governmental authority, along with his apparent substantive policy predilections, infuse his approach to statutory materials. Given his present and probable future prominence in the work of the Court, the time seems ripe to examine in detail some aspects of his approach.

The opinions of Justice Rehnquist in the area of federal court jurisdiction are particularly revealing sources of insight into his underlying views; therefore, they serve as the focus of this article. Specifically, this article will highlight his treatment of the problems of pendent jurisdiction, implied rights of action under federal statutes, and the displacement of federal common law by congressional action. An examination of his opinions

---

9 Id. at 17. Cf. Schenker, "Reading" Justice Sandra Day O'Connor, 31 CATH. U.L. REV. 487 (1982) (which, however, suggests she may be a "swing" vote).
10 For example, in Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982) (holding that the collision of two pleasure boats in navigable waters was within the admiralty jurisdiction of federal courts). Justices O'Connor and Rehnquist, and Chief Justice Burger, joined a dissent by Justice Powell bemoaning the fact that "[n]o trend of decisions by this Court has been stronger—for two decades or more—than that toward expanding federal jurisdiction at the expense of state interests and state court jurisdiction." Id. at 2260. The dissenters objected to, inter alia, the fact that expansion of federal admiralty jurisdiction was accompanied by application of substantive, pre-empting federal law. Id. at 2660-61.
11 See, e.g., Fair Assessment in Real Estate Assoc., Inc. v. McNary, 454 U.S. 100 (1981) (Justice Rehnquist for the majority found that the "principle of comity" barred federal court adjudication of a suit for damages under 28 U.S.C. § 1983 against county officials for allegedly unconstitutional administration of a state tax system. Id. at 107. Justice O'Connor concurred in an opinion by Justice Brennan arguing that federal jurisdiction should be merely conditioned on the exhaustion of state administrative remedies. Id. at 133-37. See also Schenker, supra note 9, at 490.
12 For other examinations of Justice Rehnquist's work product which do not deal directly with the specific topics under discussion here, see, e.g., Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 HARV. L. REV. 293 (1976) (hereinafter cited as Shapiro); Rydell, Mr. Justice Rehnquist and Judicial Self-Restraint, 26 HASTINGS L.J. 875 (1975).
13 Immunity of states from suit in federal court is an area not touched upon, but is one where Justice Rehnquist has also expressed his adherence to a clear statement approach. See Edelman v. Jordan, 415 U.S. 651 (1974). See also M. Redish, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 165 (1980) (hereinafter cited as Redish).
shows, among other things, an apparent willingness to accept broad delegations of law-making power to the courts in the procedural area but a vigorous assertion of limitations on congressional power to transfer substantive law-making to the other branches. His treatment of statutory materials also displays particular interest in both safeguarding the States' law-making competence and protecting, and even enhancing, their ability to provide alternative tribunals to the federal courts for dispute resolution. While some of these general conclusions are unlikely to provoke much surprise, what is particularly significant and not so well understood is Rehnquist's method of handling statutory sources which is employed to advance both these general concerns and other more specific (and perhaps less defensible) goals. Among other things, that approach reveals a particularly strong penchant for policies of clear statement which in some of their manifestations may not be entirely consistent with legislative supremacy. In fact, according to one commentator, the clear-statement model of statutory interpretation is becoming a prominent characteristic of the Court's technique. The following analysis confirms that conclusion and suggests factors motivating Justice Rehnquist which are likely shared by some of his fellow Justices.

To facilitate evaluation of the Rehnquist opinions, the first section of this article analyzes what is involved in statutory interpretation in general and the bases for judicial imposition of clear-statement requirements. It also gives an overview of the statutory subject matter jurisdiction of the federal district courts, which is relevant in various respects to each of the specific areas under examination. Following this, the focus shifts to pendent jurisdiction, and in particular the case of Aldinger v. Howard. There, in the context of emphasizing the statutory limitations on the subject matter jurisdiction of the federal courts, Justice Rehnquist's opinion for the Court refused to permit the exercise of pendent party jurisdiction based on such an unconvincing rationale that one must search beneath the surface to discover the real reasons for the result. Next, the Court's recent approach to implied rights of action is examined with emphasis on the analysis in Touche Ross & Co. v. Redington, another Rehnquist opinion. A refusal to allow the judiciary to assume a role which he sees as reserved to Congress underlies his position here, and is likewise mirrored in the Justice's recent attempted resurrection of the non-delegation doctrine. Finally, the issue of displacement of federal common law is

---

14 See infra text accompanying notes 37-71 for a discussion of policies of clear statement as a technique of statutory interpretation.

15 See Fiss, supra note 8, at 16, 18.


examined in the context of the Rehnquist majority opinion in *City of Milwaukee v. Illinois.* The already circumscribed area for the operation of federal common law is further narrowed as a consequence of that decision, for reasons ultimately very similar to those operating in *Aldinger* and *Touche Ross.*

II. FRAMEWORK FOR ANALYSIS

A. Statutory Interpretation and Policies of Clear Statement

Judicial opinions on the interpretation of statutes are replete with references to presumptions, or suggestions of the existence of presumptions, amounting to what are here called policies of clear statement. In effect, these presumptions all say to the legislature, “If you mean this, you must say so plainly.”

Henry Hart and Albert Sacks.21

It appears generally conceded that in dealing with the authoritative pronouncements of legislatures in a governmental structure characterized by a separation of powers, as found on the federal and state levels in the United States, the initial task for a court is to do its best to ascertain the “intent” of the popularly elected representatives regarding the problem to be decided.22 Only when the language of the statutory vehicle, read in its proper context, is unclear in its bearing on a case presented for decision does it become the judge’s task to fashion a meaning that appears to be the most “appropriate” one in the circumstances to assign to the statute in the case at hand.23 Thus, contrary to folklore,24 the interpretative task is twofold. It is cognitive in the sense of “discovering” meaning and creative in the sense of assigning meaning to otherwise unclear statutory directives.25 However, to preserve legislative supremacy in the creation of law, cognition must precede creativity.26 If cognition alone allows the judiciary to ascertain an intent regarding the problem at issue, the court is bound to effectuate that intent.

Conversely, the exclusive means by which a legislature may create new law is by enacting a statute.27 As the Supreme Court has acknowledged, “legislative intention, without more, is not legislation.”28 The courts are

---

22 *Dickerson,* supra note 2, at 7-9, 13, 15, 20.
23 *Id.* at 18.
24 *Id.* at 13.
25 *Id.* at 13-33.
26 *Id.* at 20.
27 *Id.* at 9.
thus constitutionally bound to respect the legislative will only to the extent that it is conveyed in the constitutionally permitted manner, that is, by means of the language of the enactment read in the appropriate context. The latter includes, for example, "the pervasive network or grid of concepts presupposed by the language" used in the jurisdiction.\(^2\) Context may narrow or, more rarely, broaden the literal meaning of statutory terms.\(^3\) It is frequently said that Congress can convey its intent either "expressly" or "impliedly."\(^4\) However, both types of meaning depend on context to a greater or lesser degree.\(^5\)

In attempting to quarry meaning, the courts rely heavily on certain presumptions regarding how legislatures operate and use language. Such presumptions include that the statutory vehicle employs established conventions of language common to the legislature and the intended legislative audience and that the same words are used consistently throughout a document prepared at the same time.\(^6\) In short, these presumptions, reflect in large degree the courts' perceptions of matters extraneous to the written vehicle relied upon and taken into account by the legislature in conveying its message, in other words the presumed context.\(^7\) A court may of course be incorrect in making one or more of these presumptions and, thus, miss the intended legislative message. Yet, even if a court could ascertain that one or more of these presumptions is incorrect as a matter of fact in a particular case, it may sometimes justifiably rely on them because of constitutional constraints that limit the legislature. For example, notions of fairness implicit in the due process clause of the fifth amendment\(^8\) arguably require Congress to speak in terms readily understood by the intended audience so that the latter can conform its behavior to the requirements of the law.\(^9\)

The statutory vehicle read in proper context may disclose a meaning with relative clarity or with varying degrees of obscurity. Inability to find clear guidance in a statute respecting an issue to be resolved in a situation where the statute appears to be applicable may result from, for instance, either the legislature's failure to consider the problem facing the court or the failure of the legislature, or its draftsman, to express themselves in sufficiently precise terms. Alternatively, the lack of clar-

\(^{29}\) DICKERSON, supra note 2, at 106.
\(^{30}\) Id. at 198-201.
\(^{32}\) DICKERSON, supra note 2, at 40-42. More precisely "express meaning" is "[l]iteral (dictionary) meaning, so far as permitted by particular context" and "implied meaning" is "[t]he meaning that particular context adds to express meaning." Id. at 284.
\(^{33}\) DICKERSON, supra note 2, at 222-24.
\(^{34}\) Id. at 124.
\(^{35}\) U.S. Const. amend. V.
\(^{36}\) Cf. DICKERSON, supra note 2, at 209.
ity may be traceable to the unwillingness of the legislature to confront squarely the matter at issue.

So-called clear-statement techniques of statutory interpretation function in part to free a court from its duty to abide by the results of its investigation into the meaning of the statute. That is, the court's demand for clarity on the part of the legislature if a certain result is to obtain may in fact result in disregard of the actual legislative intent which has been expressed in the constitutionally mandated manner, though with less precision than required by the court. To that extent, the principle of legislative supremacy is subordinated. The traditional disposition to strictly construe criminal statutes is an example of the operation of a policy of clear statement in the service of the constitutional value of fair notice.

For present purposes a more relevant instance of the operation of clear-statement methodology is found in New York Department of Social Services v. Dublino, an important preemption case which, as we shall see, relates directly to Justice Rehnquist's approach to the preservation of federal common law in the face of congressional action. The controversy in Dublino was whether the Federal Work Incentive Program (WIN) barred a state from independently requiring individuals to accept employment as a condition for receipt of federally funded aid to families with dependent children. Justice Powell, writing for the majority, stated as follows:

This Court has repeatedly refused to void state statutory programs, absent congressional intent to pre-empt them. "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." Schwartz v. Texas, 344 U.S. 199, 202-203 (1952).

... Moreover, at the time of the passage of WIN in 1967, 21 States already had initiated welfare work requirements as a condition of AFDC eligibility. If Congress had intended to pre-empt state plans and efforts in such an important dimension of the AFDC program as employment referrals for those on assistance, such intentions would in all likelihood have been expressed in direct and unambiguous language. No such expression exists, however, either in the federal statute or in the committee reports.

---

38 Dickerson, supra note 2, at 207.
39 Id. at 208-11.
40 413 U.S. 405 (1973).
42 See infra text accompanying notes 516-32.
43 413 U.S. at 413-14 (footnotes omitted and emphasis added).
The Court failed to find the required clarity of expression, and thus refused to void the state program.44

Justice Marshall, in dissent, viewed the operation of the state program differently. It was seen as operating to exclude persons eligible for assistance under federal standards by imposing additional conditions of eligibility. He countered with a different requirement of clear statement, which he found was not satisfied in the case at bar:

As we said in Townsend v. Swank . . . "in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." . . . Thus, according to the rules of interpretation we have heretofore followed, the proper inquiry is whether the Social Security Act or its legislative history clearly shows congressional authorization for state employment requirements other than those involved in WIN.45

In some instances the Court's refusal to accept one interpretation of a statute over another on account of the lack of "direct and unambiguous language" may reflect its perception of how a legislature in fact operates.46 For example, reading between the lines, the concluding excerpt from Justice Powell's opinion might be taken as saying that, given the widespread nature of state work requirements when Congress acted in 1967, it could reasonably be assumed that Congress knew of those measures and, given its traditional solicitude for protecting state prerogatives,47 legislators taking these factors into account would use "express" language of preemption if they really intended to displace state law. The use of the phrase, "such intentions would in all likelihood," suggests that the Court was at least in part weighing probabilities in coming to its conclusion. On this view the Court is attempting to divine and to carry out actual legislative intent.

On the other hand, the first portion of the excerpt from the Powell opinion uses the word, "should," implying that the Court may very well be unconcerned with ascertaining the true intent of Congress, but rather, has determined to set down a standard which the legislature is expected to meet. In other words, as a matter of policy, the Court may be making

44 Id. at 423. The Court refused to resolve, however, the question whether some particular sections of the New York Work Rules might contravene the specific provisions of the Federal Social Security Act.
45 Id. at 423-24 (footnotes omitted and emphasis added).
46 Cf. P. Mishkin & C. Morris, On Law in Courts 510 (1965) ("Isn't it true in fact that Congress does not generally try to infringe upon constitutionally protected values?") [hereinafter cited as Mishkin & Morris].
47 See Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954) [hereinafter cited as Wechsler].
demands on the Congress which that body must meet if it is to accomplish its objectives, in an area where the aims of the state program seem particularly important to the Justices, and perhaps even congenial to their personal policy predilections. 8

Unlike Justice Powell in Dublino, Justice Marshall was more willing to elaborate on the reasons for the clear-statement principles upon which he relied. He noted:

The policy of clear statement in Townsend serves a useful purpose. It informs legislators that, if they wish to alter the accommodations previously arrived at in an Act of major importance, they must indicate clearly that wish, since what may appear to be minor changes of narrow scope may in fact have ramifications throughout the administration of the Act. A policy of clear statement insures that Congress will consider those ramifications, but only if it is regularly adhered to.

Finally, it is particularly appropriate to require clear statement of authorization to impose additional conditions of eligibility for public assistance. Myths abound in this area. It is widely yet erroneously believed, for example, that recipients of public assistance have little desire to become self-supporting . . . . Because the recipients of public assistance generally lack substantial political influence, state legislators may find it expedient to accede to pressures generated by misconceptions. In order to lessen the possibility that erroneous beliefs will lead state legislators to single out politically unpopular recipients of assistance for harsh treatment, Congress must clearly authorize States to impose conditions of eligibility different from the federal standards. 9

Clear-statement requirements may be supported by a variety of rationales, some of which are adverted to by Justice Marshall. First, where the policies which the Court perceives to be central to a statutory scheme would be put at risk by the adoption of one construction arguably supported by text and proper context, the Court should be reluctant to adopt that construction absent “clear and unambiguous” language for fear of significantly, though perhaps mistakenly, undermining the scheme. 50 In

---

8 See Note, The Preemption Doctrine, supra note 41, at 643 (noting the tilt toward weighting state interests more heavily in the balance in preemption analysis). Cf. 413 U.S. at 413 [(Preemption] could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. New York has a legitimate interest in encouraging those of its citizens who can work to do so, and thus contribute to the societal well-being in addition to their personal and family support. To the extent that the Work Rules embody New York’s attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardship enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution.).

9 413 U.S. at 431-32 (footnotes omitted).

50 In Dublino, Justice Marshall was concerned that “Congress’ dual interests in guaranteeing the integrity of the family and in maximizing the potential for employment
short, an issue may appear so important and the risk of misunderstanding so significant that the Court may desire direction from Congress before accepting a proposed interpretation. While a subversion of actual congressional intent might thus occur, it would be in the name of ensuring that the Court was in fact serving the legislative will.

Moreover, the demand that Congress speak with special clarity is a way to ensure that Congress has not taken action trenching upon what the Court perceives to be important constitutional or well-established non-constitutional principles or policies inadvertently or, more significantly, without sufficient consideration. "Inadvertent" suggests again that, before it enforces a particular interpretation, the Court wants to be absolutely certain that its perception of the legislative intent is correct. For example, small changes in an elaborate statutory structure may appear to the Court to have far-reaching effects not perceived by even the most attentive legislator or legislative draftsman.

Yet in some cases Congress may have been aware, if only dimly, of changes wrought by its work and the impact on important interests, whether those interests have their source directly or remotely in constitutional law, statutory schemes, or the opinions of common law courts which over the years have "labored to discern and articulate a great number of principles of social relations." Forcing Congress to directly and expressly address an issue will assure that it does so "in a form which tends to focus its public responsibility for the action." Congress is thus given the opportunity for "sober second thought" which can occur in a context in which all affected interests will at least have an opportunity to have their say.

Other than protecting policies and principles which the Court finds to be deeply embedded in the legal system, the remand to Congress can be used to force the legislature to reconsider whether tasks assigned to the courts can in fact be appropriately handled by them. Moreover, where

---

of recipients of public assistance” could be threatened by a construction of the Social Security Act which would permit the New York Work Rules to operate. Id. at 428-29.

Cf. MISHKIN & MORRIS, supra note 46, at 510 (1965) ("Isn't it desirable in any event to have a 'presumption' that Congress has not in any specific case sought to [infringe upon constitutionally protected values]? In order to minimize the number of such infringements which might result from misconstruction of Congressional purpose?").


MISHKIN & MORRIS, supra note 46, at 510. See also Wellington & Albert, supra note 52, at 1560-61, 1563 n.50.

The phrase is Chief Justice Stone’s; see Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936) (referring to judicial review of official action).

Congress has attempted to delegate to the judiciary the resolution of politically sensitive issues which Congress is institutionally capable of resolving but intentionally or unintentionally avoided, a clear-statement barrier to the delegation allegedly can be invoked.  

The "remand" to Congress in such circumstances is "compatible with due respect for the peculiar powers and competences of both institutions [legislature and judiciary]." Requiring Congress to confront certain issues permissibly recalls Congress to its duty as the principal, electorally responsible policy-making institution in the three branch scheme. In cases where, for example, it is argued that federal law displaces state law absent the requisite clear statement of intent to preempt, traditional solicitude for protection of state interests and functions combines with a desire to avoid politically sensitive reallocation of the federal/state balance of power. These support a remand to Congress to assure that such displacement is determined in a forum, the national legislature, where the states' interests are in fact represented.

The concluding portion of Justice Marshall's explication of the bases for his clear-statement requirement in the Dublino case may represent either a version of one of the traditional rationales for such methodology or the suggestion of an approach more directly at odds with legislative supremacy. He seems to be saying that, in order to protect a class of individuals which lacks sufficient political strength at the state level, the Court should intervene on its behalf, and despite any intent which Congress may have had in enacting the WIN program, interpret the statute in such a way as to protect that class's interests from the action of hostile state legislators. The Court has previously suggested that where prejudice exists against a particular group which "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to

---

56 See Wellington & Albert, supra note 52, at 1562-63.
57 Bickel & Wellington, supra note 55, at 34-35 (suggesting that the technique should be limited to issues "close to, but not quite constitutional ones").
(The doctrine of delegation is concerned with the sources of policy, with the crucial joinder between power and broadly based democratic responsibility, bestowed and discharged after the fashion of representative government . . . . When should the Court recall the legislature to its own policy-making function? Obviously the answer must lie in the importance of the decision left to the administrator or other official . . . . The more fundamental the issue, the nearer it is to principle, the more important it is that it be decided in the first instance by the legislature).
60 See Wellington & Albert, supra note 52, at 1563-64.
62 413 U.S. at 431-32.
protect minorities,"63 a more searching judicial scrutiny for constitutionality may be justified.64 The clear-statement requirement invoked by Justice Marshall in *Dublino* might have been an attempt to force Congress to undertake a sober second thought in view of the misconceptions that might result in irresistible political pressure on state legislators.65

In addition, Justice Marshall's invocation of clear-statement principles could have been a way to avoid having to decide the validity of the state program on equal protection or due process grounds.66 On the other hand, to the extent that reliance on a clear-statement requirement rooted in the judiciary's responsibility for the protection of a particularly misunderstood minority goes beyond this, it arguably trespasses to an unacceptable degree on the legitimate legislative sphere, exalting judicial over legislative policy making in disregard of the appropriate division of functions between article III courts and Congress.67 This is the danger of a clear-statement approach: judges may find in it an invitation to enforce their own values and policies in preference to those adopted by the electorally responsible branch.68

In sum, clear statement requirements can serve a variety of purposes. Their use is allegedly consistent with legislative supremacy in the sense that theoretically,69 Congress may, if it wishes, express its desires in sufficiently explicit terms that the judiciary has no choice but to obey. However, practically speaking, limitations on congressional time,70 as well as political constraints, may foreclose such a response. Moreover, the

---

63 *Id.*
64 Cf. *supra* text accompanying notes 52-54. Justice Marshall's reasoning is similar to that of Bickel and Wellington in justifying the result in United States v. Witkovich, 353 U.S. 194 (1957) (construing narrowly a statute requiring aliens against whom deportation orders were outstanding to give under oath certain information about themselves). Those commentators noted that in that case "[t]he Court was dealing with . . . persons who are not represented in the political process and to whose rights the Court might well be particularly alert." Bickel and Wellington, *supra* note 55, at 32.
65 See 413 U.S. at 432 (Marshall, J., dissenting) ("When across-the-board adjustments like those are made, legislators cannot single out especially unpopular groups for discriminatory treatment."); *id.* at n.12 ("That the possibility of treatment that is so discriminatory as to be unconstitutional is not insubstantial is shown by the Court's brief discussion of the jurisdiction of the District Court . . . .").
66 Cf. *Sandalow, Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162 (1977). First, difficulties encountered by Justice Marshall's apparent reliance on the *Carolene Products* footnote include the fact that he expressly relies on obstacles to protection of the favored class via the political process, not on the national level, but on the state level, and yet it is congressional intent that is at issue in *Dublino*. Second, the definition of protected classes especially deserving of judicial protection is far from clear; thus, it arguably leaves too much room for judicial policy making in disregard of legislative prerogatives. See, e.g., J. Nowak R. Rotunda & J. Young, *Constitutional Law* 619-23 (1978) (classifications based on wealth generally do not involve a more stringent test for validity).
67 See Wellington & Albert, *supra* note 92, at 1559 n.41.
68 See Fiss, *supra* note 8, at 18.
existence of clear-statement requirements may cause a court "to reject or ignore at least a portion of congressional intent as that intent is derived from legislative purposes." In support of doing so the courts invoke, among other justifications, the need for caution to avoid mistakenly undermining important congressional policies, and the need to force Congress to directly confront an issue and thus reinforce what is perceived as the appropriate allocation of institutional responsibilities between the legislature and the courts. While the remand function may defensibly recall Congress to its policy-making duties and thus respect the essence of the separation of powers, judicial erection of clear-statement barriers on the basis of what a court considers to be wise or fair public administration cannot so easily lay claim to legitimacy in terms of the constitutional allocation of power. Requirements of clear statement resting solely on the Justices' individual policy predilections and their hostility to congressional programs may be open to severe criticism as unacceptable transgressions beyond the judiciary's appropriate sphere of action.

B. The Statutory Jurisdiction of the Federal District Courts

The Act of 1875 [the grant of general federal question jurisdiction] is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy that have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding.

Romero v. International Terminal Operating Co.

The federal district courts are tribunals whose subject matter jurisdiction is limited both by the Constitution and by Congress. Justice Frankfurter, himself a preeminent student of the area, obliquely refers to this fundamental principle in the concluding portion of the excerpt from his opinion in the Romero case quoted above. While article III of the Constitution describes the types of cases and controversies whose disposition Congress may vest in "Tribunals inferior to the Supreme Court" created pursuant to article I, the national legislature constitu-

---

71 See Wellington & Albert, supra note 52, at 1559.
74 U.S. Const. art. III, § 2.
75 Id. art. I, § 8.
76 See, e.g., F. Frankfurter & J. Landis, The Business of the Supreme Court (1928).
77 U.S. Const. art. III.
78 Id. art. I, § 8.
79 Id. art. I, § 8, cl. 9.
tionally possesses the discretion to assign to the courts of its creation as little or as much of that judicial business as it deems desirable. Vesting in Congress, whose composition is protective of state interests, the power to determine whether lower federal courts should exist and what the extent of their subject matter reach should be represented a compromise. The solution attempted to satisfy those concerned with not only excessive federal displacement of the states' dispute-settling function, but also the cost to the national government of maintaining a separate set of tribunals and the expense to litigants in litigating in perhaps inconveniently located national courts.

Accordingly, where Congress has expressly denied the lower federal courts jurisdiction in a particular class of case, the Supreme Court has upheld the limitation and acknowledged the paramount authority of the legislature in this area. At the same time, however, there are instances where an express grant of jurisdiction supported federal adjudication, but the Court permitted refusal to exercise that jurisdiction for a variety of reasons, despite suggestions in some cases that there was no such discretion granted to the courts. Moreover, there are instances where, on one view, jurisdiction appeared not to have been affirmatively authorized by Congress and yet its exercise was sustained by the Court. This occurred in the face of substantial prior authority to the effect that the federal courts must look to statutory law as warrant for their authority and cannot go beyond the jurisdiction thus legislatively conferred.

---

80 See, e.g., Redish, supra note 13, at 21-24.
81 See Wechsler, supra note 47.
83 See, e.g., Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) (involving a provision of the Judiciary Act of 1879 vesting diversity jurisdiction in the lower federal courts but excepting from the grant suits where diversity was created by assignment of promissory notes.
84 See, e.g., Fair Assessment in Real Estate Assoc. Inc. v. McNary, 454 U.S. 100 (1981) (opinion by Rehnquist, J.) ("Principle of comity" barred damage suit under 42 U.S.C. § 1983 against various county officials for allegedly unconstitutional administration of a state tax system); see also C. Wright, Handbook of the Law of Federal Courts §§ 52, 52A (3d ed. 1976). Reasons for such abstention include avoiding of a federal constitutional question where the case may be disposed of based on questions of state law, avoiding of needless conflict with the administration by a state of its own affairs, leaving to the states resolution of unsettled questions of state law, easing the congestion of the federal court docket, id. at 218, as well as, "equity, comity, and federalism." See Redish, supra note 13, at 291.
85 See, e.g., Willcox v. Consol. Gas Co., 212 U.S. 19, 39-40 (1909). See also Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100, 119-25 (1981) (Brennan, J., concurring, and arguing that the abstention cases referred to in note 84 supra are largely examples of the denial of jurisdiction but of the exercise of the power of a court of equity to refuse to give relief.
Regardless, the constitutional allocation of power to Congress respecting the scope of the subject matter jurisdiction of the lower federal courts dictates that the appropriate starting point for an analysis regarding the propriety of, and necessity for, the exercise of subject matter jurisdiction in a particular case is what has aptly been described by Justice Frankfurter as "the mosaic of federal judiciary legislation." The tiles in that "mosaic" consist, for example, of the statutory grants of specific parts of the constitutional grant of judicial power respecting "[c]ases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." These include sections 1337, 1338, 1339, and 1340 of the Judicial Code, as well as the grants of subject matter jurisdiction found in many federal statutes which expressly create rights of action, both civil and criminal. A specialized grant of the constitutional jurisdiction in "Controversies ... between Citizens of different States" is found in the provision for statutory interpleader. Resting alongside these, however, are the jurisdictional centerpieces of the general federal question grant in section 1331 and the general diversity grant in section 1332.

While the broad outlines of the jurisdictional "mosaic" are the work of successive Congresses since 1789, the judiciary has been the craftsman responsible for creating the fine detail of this pattern. As Justice Frankfurter candidly admitted in *Romero*, in this task the courts have relied not only on the history of the enactments and any discernible legislative intent, but also on certain policies of judicial creation deemed consistent with the declared will of Congress. The parameters of each statutory grant have, moreover, not been drawn in isolation but rather

---

8 358 U.S. at 379.
9 U.S. CONST. art. III, § 2.
11 28 U.S.C. § 1338(a) (1976) (civil actions "arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks").
13 28 U.S.C. § 1340 (Supp. IV 1980) (civil actions "arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade").
14 See, e.g., 42 U.S.C. § 7413(b) (Supp. I 1977) (federal enforcement); id. § 7604(a) (Supp. I 1977) (citizen suits), both dealing with actions under the Clean Air Act.
16 28 U.S.C. § 1335(a) (1976) (imposing only a "minimum diversity" requirement, that is, diversity of citizenship between any two adverse claimants).
19 Cf. Dickerson, supra note 2, at 26-27 (analogyizing court to artisan "reconstructing" a damaged vase).
20 358 U.S. at 379. See supra text accompanying note 73 quotation.
in relation to the other statutes vesting jurisdiction in the lower federal courts.\(^{101}\)

Of all the grants of subject matter jurisdiction, the most significant for present purposes is section 1331, the judicial treatment of which illustrates both the cognitive and creative aspects of statutory interpretation. Not until 1875 did section 1331 appear in the pattern of judiciary legislation.\(^{102}\) While its language largely tracked the constitutional “arising under” grant,\(^{103}\) its scope was considerably narrowed by a complex gloss requiring that a federal question bear a certain relationship to the controversy\(^{104}\) in addition to necessarily appearing on the face of a well-pleaded complaint.\(^{105}\)

This restrictive interpretation, despite evidence of an intent suggested in the scanty legislative history to grant the full reach of constitutional “arising under” jurisdiction,\(^{106}\) has been attributed in part to the fear that if the provision were given the constitutional breadth suggested by its language, the flood of business into the federal courts would be “fatal to the peer status of the state courts.”\(^{107}\) Arguably the representation of the States' interests in the national legislature\(^{108}\) suggested to the courts that it was unlikely that Congress in 1875 intended such a result.\(^{109}\)

\(^{101}\) In \textit{Romero}, for example, the Court concluded that section 1331 could not support jurisdiction over maritime claims rooted in federal law which otherwise fell within section 1333 of the Judicial Code. 28 U.S.C. \$ 1333 (1976).

\(^{102}\) Act of March 3, 1875, \$ 1, 18 Stat. 470.

\(^{103}\) The statute as originally enacted referred to “\textit{all suits of a civil nature at common law or in equity ... arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority}.” \$ 1, 18 Stat. 470 (emphasis added). The constitutional grant extends the judicial power “to all \textit{Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority}.” U.S. \textit{Const.} art III, \$ 2, cl. 1 (emphasis added). The Supreme Court recently reiterated that the constitutional grant of “arising under” jurisdiction is broader than federal question jurisdiction under section 1331. \textit{See} Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962, 1972 (1983).

\(^{104}\) See, e.g., Gully v. First Nat'l Bank in Meridan, 299 U.S. 109 (1936). (The right or immunity created by federal law must be an “essential element” of the plaintiff’s cause of action). \textit{See generally Redish, supra note 13, at 64-71.}


The “arising under” grant in article III, \$ 2 had been interpreted with great expansiveness in \textit{Osborn v. Bank of the United States}, 22 U.S. (9 Wheat.) 738, 823 (1824), where Chief Justice Marshall declared that whenever the question of the construction of the Constitution or laws of the United States formed an “ingredient” of a case, Congress could vest jurisdiction over such a case in the lower federal courts. In \textit{Healy v. Batta}, 292 U.S. 263 (1934), the Court noted that in construing section 1331, “[d]ue regard” had to be paid to “the rightful independence of state governments.” \textit{Id.} at 270.

\(^{108}\) \textit{See Wechsler, supra note 47.}

\(^{109}\) \textit{See also} London, \textit{supra} note 107, at 840 (“[T]o impute to Congress such a radical change of policy with respect to the distribution of power between the state and national govern-
On the other hand, a clear-statement policy based on a concern for the position of the state courts may have played a part in the result. Given the significant intrusion on state interests threatened by a sweeping interpretation of the general federal question grant, the Court may have opted for a narrow construction either to avoid mistaking Congress' real intent or to give the legislature a chance for sober second thought regarding the desirability of changing the traditional federal/state balance of power.

Yet other explanations for the judicial narrowing of section 1331 have been offered. Concern over federal docket congestion resulting from an expansive reading is frequently suggested as having been a controlling factor, concern perhaps not entirely of judicial creation. Interrelated with that may have been a desire to avoid flooding the federal courts with cases of minimal national interest and having to decide the volume of issues of state law that would be presented for decision if Chief Justice Marshall's constitutional interpretation of the "arising under" grant in the Osborn case were adopted. As Professor Mishkin said, "If Congress, in full awareness of the situation, had unequivocally called for such a result, then it would be the duty of the courts to obey. But, short of that, only blind subservience to form would choose such a course when confronted (as Congress was not) with the consequences it would entail."

Certainly a policy of limiting the number of cases heard under section 1331 so as to ensure a high quality of decision-making in those controversies having a significant national interest, is entirely defensible.
and consistent with, if not demanded by, the overall structure of the statutory jurisdiction of the lower federal courts. The more specific grants of that power, such as section 1343, along with the various grants enacted in statutes which expressly create rights to sue for violation of their substantive provisions, arguably establish docket priorities for the federal courts. Section 1331 is largely a residual grant intended to cover those matters not falling within the specific grants. In fashioning the contours of section 1331, therefore, the courts should be sensitive to the impact their action may have on what Congress has perceived to be matters particularly deserving of attention by the national judicial tribunals.

The courts have arguably treated section 1331 as a general delegation of power to fashion their own jurisdiction in areas where issues of federal law may be implicated while at the same time paying appropriate deference to countervailing state interests and seeking to avoid undermining the judicial agenda established by the more specific subject matter grants. In short, section 1331 can be seen as a delegation of law-making power in the procedural area that has its analogue in the substantive sphere in the Sherman Antitrust Act.
In fact all statutory grants of jurisdiction delegate, intentionally or unintentionally, to a greater or lesser degree, law-making power to the courts. Of course, as to each of those, there was presumably a specific type of case (in terms of issues and parties involved) encompassed by the grant which was within the actual contemplation of those members of Congress sponsoring and voting for the statute, regardless of whatever other types of cases might come within the literal language used. Less likely, though still possible, Congress may have formed an intent that a particular type or types of controversy not be covered by the statute though they might fit within the parameters of the language actually employed. At the same time, it is extremely unlikely that the enacting Congress as a body, or any of its members, formed an intent regarding the application of the statute to the multifarious combinations of issues and/or parties which the literal meaning of the language employed might arguably encompass. It is that stark fact that shows the interpretative task to be at least as creative as cognitive.

Viewing federal jurisdictional grants in this manner is relevant in various ways to the issues of pendent jurisdiction, implied rights of action, and federal common law to be discussed later. At this point, however, only several implications of this conceptual approach need to be examined.

There is much talk in the cases expressing concern regarding improper “expansion” of the subject matter jurisdiction of the federal courts through broad interpretations of jurisdictional provisions. For example, in Snyder v. Harris, holding that separate and distinct claims of plaintiff class members in federal diversity actions could not be aggregated to meet the requisite jurisdictional amount in controversy, the Supreme Court observed that “[i]f there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.” There is no question, of course, that the more generous the gloss placed on those grants, thereby enlarging the number of different types of cases falling within them, the larger will be the number of cases crowding the courts’ dockets. If the Court could pinpoint an intent by Congress to bar the contracts and combinations in restraint of trade constitute a delegation of power to the courts to make law).

123 Cf. Dickerson, supra note 2, at 13-33. See, e.g., Snyder v. Harris, 394 U.S. 332 (1969) (refusing to allow aggregation of claims to meet jurisdictional amount under § 1332 based on, inter alia, fear of mounting caseload as well as the number of state law issues which would be presented).

124 See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler’s The Federal Courts and the Federal System 571 (2d ed. 1973) (noting that the 1875 “Act was a Senate amendment to a House bill relating only to the removal jurisdiction and was hurriedly enacted at the close of a session without substantial debate.”) [hereinafter cited as Hart & Wechsler].

125 See supra text accompanying notes 22-26.


127 Id. at 341-42.
type of controversy at issue from the federal courts, it would obviously be improper to ignore that expression of legislative will. It is likely however, that no such intent can be discerned and, as argued above, it is to a large degree within the courts' discretion whether or not to choose the construction of the statute which favors adjudication of the case, assuming, of course, that the limits of the language used by Congress in the grant are respected. The factors motivating such a choice are not always candidly admitted.

Other than expansions in federal jurisdiction brought about by generous constructions of jurisdictional grants, it has also been suggested that jurisdictional "expansion" occurs when the federal courts recognize a private right to sue for legal or equitable relief on account of alleged violation of a federal statute absent congressional creation of such a cause of action. Justice Powell's analysis is particularly significant. In his dissenting opinion in Cannon v. University of Chicago he noted: "When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." Later in the opinion he elaborated on his objection:

Because a private action implied from a federal statute has as an element the violation of that statute . . . the action universally has been considered to present a federal question over which a federal court has jurisdiction under 28 U.S.C. § 1331. Thus, when a federal court implies a private action from a statute, it necessarily expands the scope of its federal-question jurisdiction.

"Implication," he argues, "extends [the court's] authority to embrace a dispute Congress has not assigned it to resolve." This "conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction."

There is no question that, as in the case of expansive interpretation

---

127 See supra text accompanying notes 22-26 & 68-82.
128 See supra text accompanying notes 24-26.
129 Where two or more jurisdictional provisions may arguably apply on the basis of their literal language, context may suggest, if not necessarily the existence of a specific congressional intent against invocation of one as opposed to another, then at least the appropriateness of reliance on one rather than another. See infra text accompanying note 377.
130 In Snyder the Court did note concern over the increased federal caseload along with the infusion of state law issues. 394 U.S. at 340-41. That case has also been explained as an attempt to indirectly impede "the use of procedural rules with which [the Court] has become disenchanted." Goldberg, supra note 82, at 399 & n.11.
132 Id.
133 Id. at 730-31 (Powell, J., dissenting).
134 Id. at 746 n.17.
135 Id. at 746.
of jurisdictional provisions, judicial recognition of private rights of action may significantly increase the number of cases presented for federal adjudication, though there is some question whether this has yet occurred.\footnote{See Pillai, Negative Implication: The Demise of Private Rights of Action in the Federal Courts, 47 U. CIN. L. REV. 1, 38 (1978) [hereinafter cited as Pillai].} But Justice Powell's objection appears to be of a different nature. On one level, his objection seems to assume that section 1331 describes the cases within the subject matter reach of the federal courts more rigidly than in fact it does. Only on such a view does it make sense for him to object to assumption of jurisdiction over disputes which "Congress has not assigned" to the courts.\footnote{He criticizes, e.g., Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (state created cause of action whose disposition turned on an issue of federal law) and implicitly other cases and scholarly commentary which have taken a more pragmatic approach to interpretation of section 1331. See, e.g., Wheeldin v. Wheeler, 373 U.S. 647, 653 (1963) (Brennan, J., dissenting) (citing cases and comments) along with authorities cited supra note 116. His position may be that section 1331 applies only where Congress has created both the right and the remedy unless the right has a constitutional origin. See infra text accompanying notes 150-53. He fails, however, to support his analysis with any evidence that his more restrictive view is demanded by the text or proper context of the general federal question grant.} As Justice Powell himself appears to admit, in cases like Cannon the plaintiff is squarely relying on a federal statute to supply the definition of the defendant's liability. In terms of the role of the federal element in relation to the plaintiff's claim for relief,\footnote{In a recent dissent from the denial of certiorari, Justice Rehnquist appeared to suggest that even if the claim of a federal remedy for violation of the Constitution or federal \footnote{See supra text accompanying notes 117-21.} A similar argument obtains with regard to the somewhat more specific grants of jurisdiction, e.g., 28 U.S.C. §§ 1337, 1338 and 1339.} this is the quintessential type of case falling within the general federal question grant.

At the same time, given current jurisdictional doctrine, there is one sense in which Justice Powell is perhaps correct in perceiving an "expansion" of federal jurisdiction where a court itself creates the right to sue for violation of a federal statute. Where a remedy is claimed for violation of federal law, jurisdiction under section 1331 is present where there exists, or after Bell v. Hood,\footnote{327 U.S. 678 (1946) (suit in the United States district court against agents of the FBI for money damages for alleged unlawful arrests, searches and seizures in violation of the fourth and fifth amendments).} there arguably exists,\footnote{In Bell the Court held that in cases seeking recovery directly under federal law a dismissal for lack of subject matter jurisdiction, rather than for failure to state a claim on which relief can be granted, is appropriate only "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Id. at 681-82.} a federal right and a federal remedy for that right.\footnote{See REDISH, supra note 13, at 65-71.} For there to be federal ques-
tion jurisdiction in these circumstances the combination of section 1331 and the existence, or arguable existence, of a federal right for which there is or may be a remedy is required.¹⁴⁶ Judicial creation, or the willingness to consider judicial creation, of a right on behalf of a particular person to sue for damages caused by violation of statutory proscriptions thus brings into existence, without congressional authorization, one of the prerequisites to federal subject matter jurisdiction.¹⁴⁶

Yet if there are separation of powers problems presented by judicial recognition of implied rights of action, the more substantial difficulties are on the substantive, not the procedural, level. That is, should the courts be in the business of deciding whether and to what extent policies established by the national legislature pursuant to its powers under article I, exclusive of its power to create the lower federal courts, should be advanced by remedies not brought into existence by the representatives of the states and the people in Congress assembled? That Justice Powell himself appreciated this is indicated by the comparative brevity of his treatment in Cannon of the jurisdictional issue per se¹⁴⁷ when seen in relation to his discussion of the more substantive reasons¹⁴⁸ why the Court

statute is entirely frivolous, the dismissal should be for failure to state a claim and not for lack of jurisdiction. See Yazoo County Indus. Dev. Corp. v. Suthoff, 454 U.S. 1157 (1982). This suggests that he would not view judicial creation of implied rights of action as judicial "expansion" of the subject matter jurisdiction of the federal courts even in the sense used in the text. Since, according to his suggested approach, an action apparently could not be dismissed for lack of subject matter jurisdiction even if it were established that the judiciary had no authority to create on its own a remedy for a statutory violation, the judiciary would clearly not be enlarging its subject matter reach even if it assumes the power to imply a remedy. In short, as long as a violation of federal law is clearly the basis for any remedy requested, subject matter jurisdiction is present. Whether a remedy can (or should) be granted is a separate matter. See also Carlson v. Green, 446 U.S. 14, 37 (1980) (Rehnquist, J., dissenting) ("it is analytically correct to view the question of jurisdiction as distinct from that of the appropriate relief to be granted."). Even the Court in Bell admitted that the "accuracy of calling ... dismissals [for immateriality or frivolousness] jurisdictional has been questioned," 327 U.S. at 683, and it is unlikely that Congress has mandated that they be so viewed. Cf. Yazoo County Indus. Dev. Corp. v. Suthoff, 454 U.S. at 1158 (footnote) (Rehnquist, J., dissenting).

¹⁴⁶ See London, supra note 107, at 855:

In order to determine, therefore, whether a case arises under federal law, in the sense that the plaintiff's cause of action has been created by federal law, the jurisdictional statute must be read in conjunction with the express federal right under which the plaintiff is claiming, and the two statutory provisions together then constitute the statutory predicate upon which federal jurisdiction must rest.

¹⁴⁷ A similar analysis would appear applicable to cases where jurisdiction is premised on the somewhat more specific grants of, e.g., 28 U.S.C. §§ 1337, 1338, 1339. Once recognized, however, it is clear that even where both the duty and remedy are judicially created, the case "arises under the ... laws ... of the United States" within the meaning of 28 U.S.C. § 1331. See Illinois v. City of Milwaukee, 406 U.S. 91, 98-100 (1972). In implied right cases, it is only the remedy which is judicially created since the relevant constitutional or statutory provision defines the defendant's duty.

¹⁴⁸ 441 U.S. at 746-47.

¹⁴⁷ Id. at 743-45, 747-49.
should not continue on a course the "unconstitutionally" of which "has now been made clear."\(^{149}\)

It is further interesting to note that while Justice Powell argues that judicial recognition of private rights to sue for violation of federal statutory requirements infringes on the power of Congress to control the jurisdiction of the federal courts, he apparently does not believe that federal court assertion of jurisdiction over judicially created causes of action arising directly under the Constitution,\(^{150}\) whether the relief requested be legal or equitable, is constrained to the same degree.\(^{151}\) He noted in *Cannon* that "this Court's traditional responsibility to safeguard constitutionally protected rights, as well as the freer hand we necessarily have in the interpretation of the Constitution, permits greater judicial creativity with respect to implied constitutional causes of action."\(^{152}\) But this hardly explains by itself why judicial creation of private rights of action based on statute impermissibly intrudes on Congress's power to limit the jurisdiction of the federal courts and yet judicial creation of constitutionally based causes does not. In both instances it would seem that the judicial creation of the remedy is itself a prerequisite to jurisdiction which thereby "expands" the statutory limits of the federal courts powers "to embrace a dispute Congress has not assigned it to resolve."\(^{153}\)

By this review of the nature of the statutory grants of jurisdiction and their relation to judicial recognition of rights of action, the stage has been set for an examination of the real issues at stake in the three areas on which this article focuses.

### III. PENDENT JURISDICTION

The question here, which it was not necessary to address in *Gibbs* or *Osborn*, is whether by virtue of the statutory grant of subject matter jurisdiction, upon which petitioner's principal claim against the treasurer rests, Congress has addressed itself to the party as to whom jurisdiction pendent to the principal claim is sought.

*Alldinger v. Howard*\(^{154}\)

---

149 *Id.* at 742 (quoting the famous remarks of Justice Brandeis in *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 77-78 (1938)).

150 *See, e.g., Carlson v. Green*, 446 U.S. 14, 25-30 (1980) (Powell, J., concurring in a case holding a damage action was available in federal court against federal officials for violations of the eighth amendment).

151 Justice Powell did indicate, without elaboration in *Carlson*, however: "In my view, the Court's willingness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers [citing his dissent in *Cannon*]." *Id.* at 29. *See also Cannon*, 441 U.S. at 746 n.17 (referring to implication from constitutional sources).

152 441 U.S. at 733 n.3.

153 *Id.* at 746.

154 427 U.S. 1, 16 (1976) (opinion by Rehnquist, J.) (emphasis in original).
A. From Gibbs to Aldinger

Pendent jurisdiction, as it has come to be developed by the courts, denotes a situation where "claims" which could not be sued upon independently in federal court because of a lack of subject matter jurisdiction bear a "sufficient relationship" to other "claims" as to which there is an express grant of subject matter jurisdiction such that the federal court feels justified in adjudicating the entire controversy. "Pendent party," as distinguished from "pendent claim," jurisdiction is present where the pendent claim joins additional parties who, in the absence of the "sufficient relationship," could not be sued alone in the federal courts on that claim.

The modern constitutional parameters for this jurisdictional concept were established in United Mine Workers v. Gibbs,\(^1\) where Justice Brennan for the Court observed:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." \(^2\) U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.\(^3\)

He then noted that the decision to assume pendent claim jurisdiction was within the discretion of the trial court,\(^4\) and that one of the factors to be weighed against the exercise of that discretion was the avoidance of "[n]eedless decisions of state law,"\(^5\) both as a "matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."\(^6\)

What Justice Brennan did not directly address was the statutory basis, if any, for the exercise of pendent jurisdiction. Dicta in such cases as Sheldon v. Sill\(^7\) and Cary v. Curtis\(^8\) suggested that any assertion of

---

\(^1\) 383 U.S. 715 (1966) (where suit was brought in federal court against a union asserting a federal statutory claim under section 303 of the Labor Management Relations Act of 1947 and a claim under the common law of Tennessee, both arising out of alleged concerted union efforts to deprive the plaintiff of contractual and employment relationships with coal mine owners).

\(^2\) Id. at 725 (footnotes omitted but emphasis from original).

\(^3\) Id. at 726.

\(^4\) Id.

\(^5\) Id.

\(^6\) 49 U.S. (8 How.) 441 (1850) (involving an express congressional denial of jurisdiction in the case of assignees of promissory notes).

\(^7\) 44 U.S. (3 How.) 236 (1845) (involving the express abolition of an action against a tax collector for taxes wrongfully levied).
FEDERAL JURISDICTION

jurisdiction must be directly founded upon a statute. However the wording of the jurisdictional grant expressly invoked by the plaintiff in *Gibbs*, section 303(b) of the Labor Management Relations Act of 1947, could only with extreme difficulty be "construed" broadly enough to encompass a parallel state law claim. This has apparently led some commentators to suggest that *Gibbs* can or should be read as finding jurisdiction over the federal claim premised on section 1331, rather than the jurisdictional provision in fact relied upon by the plaintiff, with the state law claim being seen as merely part of a "civil action" within the meaning of section 1331. Such a position obviously suggests that, in at least some contexts, section 1331 is more than purely a residual jurisdictional grant. Moreover, if that was the Court's approach, there is the problem of reconciling its view of section 1331 in this context, which view seems to read it as reaching to the constitutional limit, with the cases discussed previously which have imposed a much narrower gloss on its wording. Justice Brennan clearly acknowledged the latter line of precedent in his reference to *Gully v. First National Bank*. He expressly noted that "[t]he question whether joined state and federal claims constitute one 'case' for jurisdictional purposes is to be distinguished from the often equally difficult inquiry whether any 'case' at all is presented."

To the extent that *Gibbs* implicitly did rely on section 1331 as the statutory basis for pendant jurisdiction, perhaps the Court was laying down the following proposition: as long as there is at least one non-frivolous federal question presented in the manner demanded by the traditional narrow view of section 1331, section 1331 can justifiably be construed, at least in some contexts, to reach as far as the Constitution permits in terms of hearing non-federal law claims. In short, it is one

162 383 U.S. at 720.
163 29 U.S.C. § 187(b) (1964);
  Whoever shall be injured in his business or property by reason or [sic] any violation of subsection (a) [i.e. commission of an unfair labor practice] of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of suit.
164 Section 187(b) expressly seemed to give jurisdiction only over claimed unfair labor practices as defined by 29 U.S.C. § 158(b)(4) (1964).
165 The $10,000 jurisdictional amount in effect under section 1331 at the time suit was brought, 72 Stat. 415, would clearly have been satisfied.
167 See *supra* text accompanying notes 117-19.
170 *Gibbs*, 383 U.S. at 725 n.12.
171 See *supra* text accompanying notes 104-05.
thing to say that federal court jurisdiction should not be sustained when the federal question is at best "lurking in the background" and presents the prospect of flooding the national courts with cases of minimal national interest where the more substantial issues are those of state law. It is quite a different matter where there is a non-frivolous federal question directly present, particularly where Congress in an express grant of jurisdiction such as section 303(b) has evidenced its interest in having that issue litigated in the federal courts. The need to further the congressional policy of allowing vindication of federal rights in federal courts, evidenced by the Act of 1875 and other jurisdictional grants, combines with concerns of "judicial economy, convenience and fairness to litigants." Together they support a construction of section 1331 permitting the assumption of jurisdiction where, absent the availability of pendent jurisdiction, a party with state and federal claims might—on the basis of economies in litigating—feel compelled to choose the one court, state court, where it can bring the entire action.

Gibbs' focus on the constitutional, rather than the statutory, basis for pendent claim jurisdiction apparently suggested to other commentators, however, that such an exercise of power existed outside of any statutory grant. In support of such a view is the discretionary nature of the jurisdiction. As noted previously, though the general rule is subject to quite a few exceptions, the Supreme Court has occasionally remarked on the mandatory nature of legislatively conferred subject matter jurisdiction.

The best that can be said of the situation after Gibbs is that the intra- or extra-statutory nature of pendent claim jurisdiction was far from clear. The matter was not clarified, for example, in Rosado v. Wyman, another pendent claim case. There the plaintiffs attacked the New York Social Service Law as both a violation of the equal protection clause and, alternately, as incompatible with the federal Social Security Act. Jurisdiction of the former claim was grounded on section 1343 of the Judicial Code. The Court, through Justice Harlan, observed:

Since we conclude that the District Court properly exercised its pendent jurisdiction, we have no occasion to consider whether, as urged

---

172 299 U.S. at 117.
173 See supra text accompanying notes 106-16.
174 283 U.S. at 726.
179 U.S. Const. amend. XIV, § 1.
by petitioners, this statutory claim satisfies the $10,000 amount-in-controversy requirement of the general federal jurisdiction provision, 28 U.S.C. § 1331, or whether it could be maintained under 28 U.S.C. § 1343(3), which contains no amount-in-controversy limitation, as an action "[t]o redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by . . . any Act of Congress providing for equal rights of citizens . . . ." 181

Such language is, however, consistent with the view of pendent jurisdiction, where exercised, as existing outside the relevant statutory grants.

Four years later in Hagans v. Lavine,182 the Court was confronted with somewhat similar substantive constitutional and statutory issues, with subject matter jurisdiction over the former likewise based on section 1343. This time Justice White wrote the opinion which noted:

Concededly, § 1343 authorizes a civil action to "redress the deprivation, under color of any State . . . regulation . . . of any right . . . secured by the Constitution of the United States." Section 1343(3) therefore conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction. If it was, it is also clear that the District Court could hear as a matter of pendent jurisdiction the claim of conflict between federal and state law, without determining that the latter claim in its own right was encompassed within § 1343.183

It was necessary to rely on a pendent theory for the statutory claim because the jurisdictional amount then required by section 1331 was not satisfied for that claim.184 The passage quoted provides some ambiguous support for the notion that the pendent claim fell outside the relevant jurisdictional ground expressly invoked in that case, that is section 1343.

The dissenting opinion of Justice Rehnquist in Hagans is of particular importance. His disagreement with the majority centered largely on his differing evaluation of the "substantiality" of the constitutional claim and the propriety of the exercise of discretion to hear the pendent statutory claim.185 In his discussion of the jurisdictional issues raised, however, he adverted to a statutory argument against the exercise of pendent jurisdiction over a claim arising under federal law which did not meet the $10,000 jurisdictional amount requirement of section 1331: "But the presence of federal questions should not induce federal courts to expand their proper jurisdiction. As previously noted, Congress, by requiring a minimum dollar amount for federal question jurisdiction, made a legislative decision to leave certain claims to state courts."186 This comes close to saying that Congress had expressly or impliedly told the federal courts not to exer-

181 397 U.S. at 405 n.7.
183 Id. at 536 (emphasis added).
184 See 415 U.S. at 533 (Rehnquist, J., dissenting).
185 Id. at 561.
186 Id. at 559.
cise jurisdiction over the federal claim at issue. Under Sheldon v. Sill\textsuperscript{167} such a congressional negative would be both constitutional and controlling on the ability of the courts to exercise jurisdiction.

Yet Justice Rehnquist never made the foregoing argument in express terms.\textsuperscript{168} At one point he seemed to concede that if the equal protection claim had been "substantial," there would have been power in the district court to hear the statutory issue.\textsuperscript{169} He then moved to the issues of substantiability of the jurisdiction-conferring claim and the trial court's discretion.

The opportunity for a clarification of the statutory limitations on the exercise of pendent jurisdiction was finally\textsuperscript{190} seized in Aldinger v. Howard,\textsuperscript{191} another section 1983 action. There Justice Rehnquist was able to expound his ideas in the opinion for the full Court, in a way which appears to have set the terms for the Court's approach to issues of pendent jurisdiction.\textsuperscript{192}


Having been dismissed from her position in the office of the Spokane County treasurer, allegedly for reasons substantively improper under various constitutional provisions\textsuperscript{193} and in a manner procedurally deficient under the due process clause,\textsuperscript{194} the plaintiff sued various county officials for injunctive relief and damages. Their liability was premised on the Civil Rights Act of 1871\textsuperscript{195} and subject matter jurisdiction over those claims

\textsuperscript{167} 49 U.S. (8 How.) 441 (1850), supra note 83.

\textsuperscript{168} See 415 U.S. at 559-60.

\textsuperscript{169} Id. at 559. ("Considerations of convenience and judicial economy may justify hearing those claims when genuine federal business, as contrasted to weak claim intended merely to secure jurisdiction, is before the federal court.").

\textsuperscript{170} In Moor v. County of Alameda, 411 U.S. 693 (1973), where pendent party jurisdiction was attempted but, as a matter of discretion, refused, the Court, per Justice Marshall, expressly noted without elaboration the statutory limits on federal court jurisdiction. Id. at 715. See also Zahn v. International Paper Co., 414 U.S. 291 (1973) refusing to interpret section 1332 to permit class members with claims falling below the jurisdictional amount to join with named plaintiffs whose claims met that requirement, though the Court did not deal with the issue in terms of pendent or ancillary jurisdiction). \textit{But see id. at 302-12} (Brennan, J., dissenting) (urging analysis in ancillary terms).

\textsuperscript{171} 427 U.S. 1 (1976).

\textsuperscript{172} See, e.g., Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978) (invoking the \textit{Aldinger} approach in the context of a claim by a plaintiff against a non-diverse third-party defendant in a suit based on section 1332).

\textsuperscript{173} Specifically, the first, ninth and fourteenth amendments were involved. 427 U.S. at 4.

\textsuperscript{174} U.S. CONST. amend. XIV, \S 1.

\textsuperscript{175} 42 U.S.C. \S 1983 (1976), which reads:

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
\end{quote}
was based on its specific jurisdictional counterpart, section 1343(3) of the
Judicial Code. Spokane County, whose sovereign immunity from suit
had allegedly been waived by Washington law which also provided for
its vicarious liability for tortious conduct of its officers, was joined as
an additional party defendant. The county could not have been sued alone
in federal court since there was no diversity between itself and the plain-
tiff nor was there substantive liability imposed on it directly by federal
statutory law which could have been the basis for jurisdiction founded
on section 1331 or on section 1343. Thus the purported rationale for
subject matter jurisdiction over that defendant was "pendent party"
jurisdiction.

Justice Rehnquist in Aldinger expressly directed his attention to the
statutory limits on the subject matter jurisdiction of the lower federal
courts. In this regard, he appeared to accept a very expansive general
approach to the interpretation of those grants. At the same time, in
ultimately finding that pendent party jurisdiction was foreclosed, he relied
on a line of reasoning which suggested that a clear-statement require-
ment was functioning, at least with respect to the treatment of section
1343.

With respect to the question whether an exercise of pendent jurisdic-
tion is properly seen as falling within or without the statutory grants,
Justice Rehnquist indicated that the former was the appropriate view. He
observed that:

Parties such as counties, whom Congress excluded from liability in
§ 1983, and therefore by reference in the grant of jurisdiction under
§ 1343(3), can argue with a great deal of force that the scope of that
"civil action" over which the district courts have been given statutory
jurisdiction should not be so broadly read as to bring them back within
that power merely because the facts also give rise to an ordinary civil
action against them under state law. . . .

. . . [T]he joinder of a municipal corporation, like the county here, for
purposes of asserting a state-law claim not within federal diversity
jurisdiction, is without the statutory jurisdiction of the district court.

In distinguishing Gibbs from Aldinger, he noted that the former did
not pose "the need for a further inquiry into the underlying statutory
grant of federal jurisdiction or a flexible analysis of concepts such as
'question,' 'claim,' and 'cause of action,' because Congress had not

---

197 Until overruled two years after Aldinger in Monell v. Department of Social Services
to substantive liability of municipalities under section 1983 on the basis of its interpreta-
tion of the word "person" in that provision. The Court has, however, found that the general
analysis proposed in Aldinger survives the demise of Monroe. See Owen Equipment & Erection
1105, 1109 n.4 (1979) (Rehnquist, J., dissenting).
198 See supra text accompanying note 155.
199 427 U.S. at 17 (emphasis supplied in part).
addressed itself by statute to this matter.”209 In Gibbs, “Congress was silent on the extent to which the defendant, already properly in federal court under a statute, might be called upon to answer nonfederal questions or claims; the way was thus left open for the Court to fashion its own rules under the general language of Art. III.”210 While at first glance these observations might be construed to suggest a conception of pendent jurisdiction as existing outside the jurisdictional grants, in context they are consistent with the later analysis quoted above.202

What Rehnquist seemed to be saying was that in enacting the jurisdictional grant involved in Gibbs, Congress had not, understandably, considered the type of situation presented when a plaintiff with a federal claim against a defendant wanted also to litigate a state-created claim which was closely related in a factual sense. The relevant jurisdictional grant did not, therefore, explicitly deal with this matter, though presumably it was linguistically capable of being stretched to cover the entire controversy.203 Acknowledging the nature of at least some of these grants as de facto delegations of law-making power, within limits, to the courts,204 Rehnquist viewed Gibbs as construing that delegation to extend to the constitutional limit of the courts' pendent jurisdictional power.205 In short, in Gibbs Congress had formed no specific intent regarding the particular jurisdictional issue there presented and the courts, in applying the underlying jurisdictional grants, could engage in law-making within the broad contours of those grants which could be seen as limited only by article III. Of course to the extent these statutes are construed in

209 Id. at 13.
210 Id. at 15.
202 See supra text accompanying note 199.
203 In Aldinger, Justice Rehnquist does not expressly indicate what statutory grant was being "construed" in Gibbs. See supra text accompanying notes 162-64.
204 Aldinger, 427 U.S. at 15 ("fashion its own rules"). Such rules would include criteria applicable to the court's exercise of discretion in assuming jurisdiction over pendent matters. See Gibbs, 383 U.S. at 726-27.

Declination of jurisdiction over a pendent claim as a matter of discretion should be compared with invocation of one of the abstention doctrines, supra note 84. The concerns motivating each may be similar. Compare supra note 84 with supra text accompanying notes 158-59. The issue of discretion to hear a pendent matter is reached only after it is determined that there is constitutional power to hear the affiliated claim and there is no congressional negative on the exercise of jurisdiction. See infra text accompanying notes 210-18. Thus, unless there is an affirmative congressional intent that the pendent claim be heard, a rare case indeed, refusal to hear the claim as a matter of discretion will not run afoul of congressional intent.

In an abstention case where the jurisdictional provision encompasses the claim only as a matter of judicial "creation" and not "cognition," refusal to hear the matter will also not usually run afoul of congressional intent. But where, as is more generally the case, the claim is the type which Congress had specifically in mind when it enacted the jurisdictional provision, see supra text accompanying notes 122-24, the court's refusal to hear the case, presumptively at least, flies in the face of congressional intent and thus bears a heavy burden of justification.

205 Aldinger, 427 U.S. at 15. See Schenkier, supra note 175, at 257.
was based on its specific jurisdictional counterpart, section 1343(3) of the Judicial Code.\textsuperscript{190} Spokane County, whose sovereign immunity from suit had allegedly been waived by Washington law which also provided for its vicarious liability for tortious conduct of its officers, was joined as an additional party defendant. The county could not have been sued alone in federal court since there was no diversity between itself and the plaintiff nor was there substantive liability imposed on it directly by federal statutory law which could have been the basis for jurisdiction founded on section 1331 or on section 1343.\textsuperscript{197} Thus the purported rationale for subject matter jurisdiction over that defendant was “pendent party” jurisdiction.\textsuperscript{198}

Justice Rehnquist in \textit{Aldinger} expressly directed his attention to the statutory limits on the subject matter jurisdiction of the lower federal courts. In this regard, he appeared to accept a very expansive general approach to the interpretation of those grants. At the same time, in ultimately finding that pendent party jurisdiction was foreclosed, he relied on a line of reasoning which suggested that a clear-statement requirement was functioning, at least with respect to the treatment of section 1343.

With respect to the question whether an exercise of pendent jurisdiction is properly seen as falling within or without the statutory grants, Justice Rehnquist indicated that the former was the appropriate view. He observed that:

Parties such as counties, whom Congress \textit{excluded} from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3), can argue with a great deal of force that the scope of that “civil action” over which the district courts have been given statutory jurisdiction \textit{should not be so broadly read} as to bring them \textit{back} within that power merely because the facts also give rise to an ordinary civil action against them under state law. . . .

. . . [T]he joinder of a municipal corporation, like the county here, for purposes of asserting a state-law claim not within federal diversity jurisdiction, is \textit{without} the statutory jurisdiction of the district court.\textsuperscript{199}

In distinguishing \textit{Gibbs} from \textit{Aldinger}, he noted that the former did not pose “the need for a further inquiry into the underlying statutory grant of federal jurisdiction or a flexible analysis of concepts such as ‘question,’ ‘claim,’ and ‘cause of action,’ because Congress had not


\textsuperscript{198} See supra text accompanying note 155.

\textsuperscript{199} 427 U.S. at 17 (emphasis supplied in part).
addressed itself by statute to this matter.”209 In Gibbs, “Congress was silent on the extent to which the defendant, already properly in federal court under a statute, might be called upon to answer nonfederal questions or claims; the way was thus left open for the Court to fashion its own rules under the general language of Art. III.”210 While at first glance these observations might be construed to suggest a conception of pendent jurisdiction as existing outside the jurisdictional grants, in context they are consistent with the later analysis quoted above.202

What Rehnquist seemed to be saying was that in enacting the jurisdictional grant involved in Gibbs, Congress had not, understandably, considered the type of situation presented when a plaintiff with a federal claim against a defendant wanted also to litigate a state-created claim which was closely related in a factual sense. The relevant jurisdictional grant did not, therefore, explicitly deal with this matter, though presumably it was linguistically capable of being stretched to cover the entire controversy.203 Acknowledging the nature of at least some of these grants as de facto delegations of law-making power, within limits, to the courts,204 Rehnquist viewed Gibbs as construing that delegation to extend to the constitutional limit of the courts' pendent jurisdictional power.205

In short, in Gibbs Congress had formed no specific intent regarding the particular jurisdictional issue there presented and the courts, in applying the underlying jurisdictional grants, could engage in law-making within the broad contours of those grants which could be seen as limited only by article III. Of course to the extent these statutes are construed in

209 Id. at 13.
210 Id. at 15.
202 See supra text accompanying note 199.
203 In Aldinger, Justice Rehnquist does not expressly indicate what statutory grant was being "construed" in Gibbs. See supra text accompanying notes 162-64.
204 Aldinger, 427 U.S. at 15 ("fashion its own rules"). Such rules would include criteria applicable to the court's exercise of discretion in assuming jurisdiction over pendent matters. See Gibbs, 383 U.S. at 726-27.

Declination of jurisdiction over a pendent claim as a matter of discretion should be compared with invocation of one of the abstention doctrines, supra note 84. The concerns motivating each may be similar. Compare supra note 84 with supra text accompanying notes 158-59. The issue of discretion to hear a pendent matter is reached only after it is determined that there is constitutional power to hear the affiliated claim and there is no congressional negative on the exercise of jurisdiction. See infra text accompanying notes 210-18. Thus, unless there is an affirmative congressional intent that the pendent claim be heard, a rare case indeed, refusal to hear the claim as a matter of discretion will not run afoul of congressional intent.

In an abstention case where the jurisdictional provision encompasses the claim only as a matter of judicial "creation" and not "cognition," refusal to hear the matter will also not usually run afoul of congressional intent. But where, as is more generally the case, the claim is the type which Congress had specifically in mind when it enacted the jurisdictional provision, see supra text accompanying notes 122-24, the court's refusal to hear the case, presumptively at least, flies in the face of congressional intent and thus bears a heavy burden of justification.

205 Aldinger, 427 U.S. at 15. See Schenkier, supra note 175, at 257.
those jurisdictional grants. Justice Rehnquist arguably did not believe that, at least with respect to actions where one claim came within the express terms of section 1343, there was a need to rely on section 1331 to support pendent jurisdiction over a related state law claim. In the absence of a congressional negative, the term "civil action" contained in section 1343 had enough semantic leeway to theoretically embrace claims based solely on state law as long as there was a constitutionally sufficient nexus (e.g., "common nucleus of operative fact") to the federal law claim falling expressly within the literal language of section 1343. Moreover, since the abolition in 1980 of the $10,000 jurisdictional amount requirement formerly found in section 1331, any linguistic difficulties in fitting the pendent claim within the terms of a specific "arising under" grant, as perhaps was the case in Gibbs, could be obviated by reliance on section 1331 and its broad language, absent, of course, an express or implied congressional negative. This assumes that section 1331 possesses more than a purely residual nature in certain contexts. In the absence of the congressional negative the full constitutional reach of pendent jurisdiction is available to the courts within the jurisdictional grants. Operating within these broad limits the courts can fashion jurisdictional doctrine in response to those party-neutral values that should characterize sound judicial administration.

Finally, while Aldinger dealt only with federal question jurisdiction, presumably the same approach applies in the case of diversity jurisdiction under section 1332. Therefore, as long as there is diversity of citizenship between two parties whose interests are adverse to each other, and the claims between any non-diverse parties bear the required constitutional nexus to the claims pending between the diverse parties, section 1332 can be construed to embrace the pendent claims, absent congressional intention to the contrary.

---

227 For example, where jurisdiction is based on section 1343, there must be a claim of the nature expressly described by that provision. Where section 1331 is expressly invoked, a federal question must appear in the manner required by the traditional narrow reading of that provision. See supra text accompanying notes 104-05.


229 See 427 U.S. at 17 (quoted in text supra note 199).

230 See supra note 119.

231 See supra text accompanying notes 162-64.

232 See supra text accompanying notes 117-19.


234 In State Farm Fire and Casualty Co. v. Tashire, 386 U.S. 523 (1967), the Court found that "minimal diversity" satisfied the requirements of article III. Of course, in the case where, for example, a plaintiff from New York sues two defendants, one from New Jersey and one from New York, the complete diversity requirement of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), as elaborated by the courts and allegedly approved by Congress though subsequent reenactment of section 1332 without relevant change, would constitute a congressional negative against finding jurisdiction. See Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). This congressional negative partakes more of the nature of the first type of negative intent described above. See supra text accompanying note 214. See also Zahn v. International Paper Co., 414 U.S. 291 (1973), which found a con-
Justice Rehnquist suggested that the approach in *Aldinger*, that is, the search for a congressional negative, was limited to attempted assertions of pendent party jurisdiction. But, given the undoubted congressional power to limit the jurisdiction of the lower federal courts recognized in *Sheldon v. Sill*, the search for a congressional denial of jurisdiction is required whether pendent party or pendent claim jurisdiction is asserted. Likewise, Rehnquist's conclusion that pendent jurisdiction, if exerciseable at all, must fall within the statutory grant of subject matter jurisdiction invoked is hardly less applicable to situations where only pendent claim jurisdiction is involved. Finally, there would seem to be no reason to distinguish assertions of so-called ancillary from pendent jurisdiction in terms of the required analysis.

Several theories have been propounded to justify the Court's ability to construe the jurisdictional grants in the broad fashion apparently accepted by the Rehnquist opinion in *Aldinger*.

a. The similarity of the language of various jurisdictional grants to that of the Constitution is emphasized. Such an argument is obviously not available in the case of a grant like section 1343 which does not track the "arising under" language of article III. Moreover, even with respect to sections 1331 and 1332, which do substantially conform to the constitutional phrasing, that similarity has not been found dispositive with respect to congressional intent as evidenced by the relatively consistent interpretation of those provisions, though in other contexts, that has narrowed them considerably from the constitutionally permitted scope.

b. With regard to those grants of subject matter power which have their source in the constitutional "arising under" grant, the purpose of Congress, which crystallized following the Civil War, was and continuously has been, with minor exception as in the case of matters of small monetary value, to assure a federal forum for the protection of federal rights. Without pendent jurisdiction, plaintiffs may be deterred from suing in the federal courts because they can generally join federal and state claims.
in state court and thus save the cost and inconvenience of two lawsuits. Of course, to say that it is consistent with congressional "purpose" to allow the exercise of pendent jurisdiction as far as article III permits does not necessarily establish that there was any congressional intent to that effect, or that refusal to recognize a doctrine of pendent jurisdiction would contravene the legislative will. In fact, it is unlikely that in enacting most of the jurisdictional provisions Congress gave any thought to the concept of "pendent jurisdiction" since Court opinions treating it extensively did not come until after these provisions were on the statute books.

c. In "approving" the Federal Rules of Civil Procedure, which permit, indeed encourage, joinder of claims and parties, Congress has impliedly approved the exercise of pendent jurisdiction. Since such "approval" takes the form of Congress' failure to enact a statute preventing rules proposed by the Supreme Court pursuant to the Rules Enabling Act from becoming effective, reading anything of substance into it regarding congressional intent, particularly on an issue not directly raised before the appropriate committees of Congress, is a hazardous enterprise at best. Moreover, even if one could safely assume that when Congress failed to veto the original rules in 1938 and amendments thereto in subsequent years, it was aware of the pendent jurisdiction cases the Court already had decided, and approved of the results in those, legislative inaction could hardly amend the outstanding jurisdictional statutes to encompass pendent jurisdiction. At best, such congressional inaction,
if expressive of congressional approval of pendent jurisdiction, is relevant only to the creative, not the cognitive, function of statutory interpretation.\textsuperscript{46}

d. Finally, there is a more subtle argument than any of those presented so far. Constitutionally, Congress could delegate to the Supreme Court power to make rules influencing the scope of the subject matter jurisdiction of the lower federal courts; in fact, the Rules Enabling Act\textsuperscript{27} may be seen as such a delegation. While rule 82 of the Federal Rules of Civil Procedure\textsuperscript{28} indicates that those Rules are not to be construed as directly enlarging the subject matter jurisdiction of the district courts for its own sake, it is purely a rule of judicial self-restraint and does not abjure all effects on jurisdiction arising from the broad provision for joinder of claims and parties. Additionally, since the Rules displace inconsistent federal statutes, they can, within limits, ensure that the scope of the statutory jurisdictional grants is sufficient to encompass pendent jurisdiction where that jurisdiction would be consistent with the terms and purposes of the Rules.\textsuperscript{29} This is not the time or place to evaluate the merits of this argument except to say that it appears not without merit. It is a sophisticated argument that the Supreme Court has not yet addressed, so its ultimate viability is still in question.

None of the foregoing arguments is, however, overly convincing in demonstrating the existence of a specific congressional intent that the jurisdictional grants reach as far as Gibbs and Aldinger suggest they may extend. This reinforces the point made earlier\textsuperscript{20} that, to a large degree, fashioning the contours of the jurisdictional grants is a matter of creative judicial interpretation, not cognition.

C. Congressional Negation and Section 1983

Since in Aldinger Justice Rehnquist found that the exercise of pendent jurisdiction in the circumstances presented was inconsistent with the statutory limitations on the subject matter jurisdiction of the federal courts, the final aspect of the opinion to be examined is the basis on which this conclusion was reached. His analysis can be simply stated:

a. Section 1343(3) confers on the district courts original jurisdiction "of any civil action authorized by law to be commenced by any person .. ."\textsuperscript{251} to redress violations of various federal rights.

the assumption that Congress took Hurn into account in reenacting these provisions. Id. at 182-83.
\textsuperscript{246} Cf. id. at 181.
\textsuperscript{248} FED. R. Civ. P. 82.
\textsuperscript{249} Cf. Goldberg, supra note 82, at 395.
\textsuperscript{250} See supra text accompanying notes 122-24.
b. The civil rights action authorized by section 1983 is included within the jurisdictional grant of section 1343(3).

c. Under *Monroe v. Pape* municipalities were exempt from substantive liability under section 1983.

d. Therefore, according to Rehnquist, there is "a great deal of force" to the argument that Spokane County could not be sued in federal court where jurisdiction over the main claim against the county's officers was based on section 1983.

e. "[The reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power has been extended by Congress."

The argument thus constructed appears to be an attempt to establish a negative intent of the first type described above, that is, a specific congressional intent to bar joinder of a certain kind of party.

But clearly the factors relevant to determination of the scope of substantive liability are not necessarily, or even ordinarily, the same as those determinative of the appropriate forum for the adjudication of that liability. As Justice Brennan points out in *Aldinger*, municipalities were originally thought to be exempt from liability under section 1983 because of concern by the Congress in 1871 regarding the constitutionality of federal imposition of such liability on those entities. This rationale is quite irrelevant to the question of whether a county's vicarious liability under state law for the acts of its officials should be litigated in the federal courts.

There are further weaknesses with Justice Rehnquist's argument in support of finding a congressional negative. First of all, he himself ad-

---


233 427 U.S. at 17.

234 Id. (emphasis omitted). See also Symm v. United States, 439 U.S. 1105 (1979) (Rehnquist, J., dissenting) (where Justice Rehnquist applied the "scope of the cause of action" test to a suit brought pursuant to 42 U.S.C. § 1973 (1976) [suits against states and political subdivisions to implement U.S. Const. amend. XXVI]).

235 See supra text accompanying note 214.

236 427 U.S. at 25.

237 See, e.g., Comment, *The Impact of Aldinger v. Howard on Pendent Party Jurisdiction*, 125 U. PA. L. Rev. 1357, 1367-71 (1977) [hereinafter cited as Comment, *The Impact of Aldinger*]. Of course, if Washington law was as the plaintiff alleged, Spokane County would be liable to the same degree that it would have been had Congress intended it to fall within the definition of "person" in section 1983. Thus, in a sense, what could not under federal law occur directly might come about indirectly. Still, the fact that there was no federal liability only because of constitutional doubts as to the federal government's power to impose it, hardly supports an argument that it would necessarily be inconsistent with congressional intent for the federal courts to impose a liability arising under state law.

Ironically, after *Aldinger*, the Court's decision in *Monell*, overruling *Monroe* on its broad holding exempting municipalities from liability, found that the real concern of Congress was not imposing liability on such entities per se but making them liable under federal law for failure to keep the peace. 436 U.S. at 665-89. It was this same concern that was the basis of *Monell*'s holding that a municipality could not be liable under federal law on a respondeat superior basis. *Id.* at 690-95.
mits that had there been diversity between the plaintiff and the county there would have been subject matter jurisdiction in the federal courts to hear the claim based on the county's vicarious liability for the federal torts of its officers. It is difficult to attribute to a Congress which, he appears to concede, may have taken such availability of diversity jurisdiction into account when considering sections 1983 and 1343 an intent to foreclose litigation in the federal courts of the very same type of claim, though brought there on the coattails of a federal law claim. Finally, it is highly unlikely that the Congress that passed the Civil Rights Act of 1871 had any intent whatsoever on the issue of pendent jurisdiction since such a doctrine did not come into vogue until long after the enactment of the statutes involved in *Aldinger*.

In short, the existence of a congressional negative in the situation presented by *Aldinger* is truly a work of judicial fiction, as most commentators on the case appear to admit. Rehnquist himself concedes that the literal language of the statutes at issue, which forms the exclusive basis for his conclusion, does not unambiguously require the result he reaches.

The transparent weakness of the Court's arguments in favor of finding a congressional negative raises suspicions regarding what was really at work behind the surface of Rehnquist's opinion. The lack of any real congressional intent either way on the matter, express or implied, would seem to leave it up to the Court to exercise its law-making power within the contours of the jurisdictional grant and to accept jurisdiction, particularly since no apparent constitutional obstacles stood in the way and, by the Court's own admission, considerations of judicial economy would have been served here as in *Gibbs*. Justice Rehnquist's general analysis of the nature of the jurisdictional grants was entirely consistent with such a result.

The Court thus refused to exercise jurisdiction where there was no discernable congressional intent to the contrary, and in the face of a strong congressional policy in favor of federal court adjudication of federal rights which might be substantially undermined by the refusal to permit

---

258 427 U.S. at 17-18 n.12.
259 Id.
260 See supra text accompanying notes 238-39.
262 427 U.S. at 17 ("Parties . . . can argue with a great deal of force.").
263 A "common nucleus of operative fact" seemed clearly to unite the federal and state claims. See supra note 109.
265 See id. at 30-37 (Brennan, J., dissenting) (accusing the Court of reaching a result in the face of "expressed congressional intent."). Any congressional "intent" regarding the issue of pendent jurisdiction is that inferable from the broader concept of "purpose." See Dickerson, supra note 2, at 101-02; Wellington & Albert, supra note 62, at 1559 (an inference that may or may not be reliable). See Dickerson, supra note 2, at 102. See also supra text accompanying note 260.
Perhaps then, Justice Rehnquist was implicitly saying that before pendent party jurisdiction is available, at least where the main claim is based on sections 1983 and 1343 and a local government unit is joined as an additional defendant, there must be a clear expression of congressional intent to specifically authorize (or require) the court to accept jurisdiction.

What might be the explanation for this approach? Avoidance of the necessity for determining issues of state law certainly may be involved.

266 See supra text accompanying notes 172-75.
267 Aldinger explicitly left open the door for pendent party jurisdiction in the case of, for example, tort claims against the United States under 28 U.S.C. § 1346 (1976 & Supp. IV 1980) where federal jurisdiction is exclusive. Allegedly in such a case arguments from convenience and economy not dispositive in Aldinger because of the existence of concurrent state jurisdiction and thus the availability to a plaintiff of at least one forum where he could pursue all his claims at one time might carry the day. 427 U.S. at 18. Compare Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977) (no pendent jurisdiction) with Pearce v. United States, 450 F. Supp. 613 (D. Kan. 1978) (pendent jurisdiction sustained). At the same time, however, it would seem that the tests relied upon to find a congressional negative in Aldinger would be equally strong in this instance: the scope of the federally created liability extends only to the United States, the party as to which Congress has directly addressed itself. By thus leaving the door open in this type of case for pendent jurisdiction, an argument might be constructed that the Court is really not requiring a clear statement to permit pendent party jurisdiction in all cases, since there obviously is no such clear statement in the case of section 1346. More importantly the inconsistency of his finding a congressional negative in section 1343 and not section 1346, arguably confirms the analysis of the basis for the clear statement requirement which is elaborated infra in text at notes 268-88.

It is interesting to compare the refusal to exercise jurisdiction in Aldinger with Justice Rehnquist's opinion for the Court in Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100 (1981). In McNary the Court refused to approve the exercise of jurisdiction in another 1983 action, this time where the plaintiffs were trying to recover damages from various county officials for alleged unconstitutional administration of the state tax system. Justice Rehnquist based the result on the "principle of comity between federal courts and state governments," a policy presumably having quasi-constitutional, statutory and judicial origins. In Aldinger the claim at issue arguably fell within the literal terms of section 1343. The Court, however, refused to so construe that provision, ostensibly because of its identification of a congressional intent that the claim not be heard, but in fact based largely on policy concerns which overcame evidence of congressional "intent." See infra text accompanying notes 268-88. In McNary, section 1343, which was the basis for subject matter jurisdiction, clearly encompassed the plaintiff's claim and the Court did not see fit to question this. 454 U.S. at 104 n.3. Presumptively, therefore, Congress had intended that a plaintiff with such a claim be able to litigate in the federal courts. See supra note 204. In refusing to exercise the jurisdiction admittedly present, Justice Rehnquist did not purport to identify an implied congressional negative, as in Aldinger. Rather the policy of comity was found to hold sway. Thus, rather than being able to justify the result in McNary as being merely a matter of "statutory interpretation," as in Aldinger, the policy basis for the declination of jurisdiction was entirely bared. However, the ultimate result in both cases is arguably the same: absent a much more unequivocal statement of congressional intent, the Court will fashion jurisdictional doctrine according to various policies, some of quasi-constitutional, statutory or judicial origin. The comity principle involved in McNary is arguably sufficiently well-established to justify invocation of a clear-statement requirement, see supra text accompanying notes 52-54, while some of the factors underlying the result in Aldinger may not so conveniently fit the accepted rationales for clear statement. See infra text accompanying notes 269-88.

268 Compare supra text accompanying note 113.
Moreover, as Judge Sobeloff noted in *Kenrose Manufacturing v. Fred Whitaker Co.*, "the efficiency plaintiff seeks so avidly is available without question in the state courts." Since absent a grant of exclusive federal jurisdiction, which is apparently not found in section 1343, a plaintiff with both federal and state claims can find a forum in state court for resolution of the entire controversy, a very likely result of the refusal to permit pendent jurisdiction is to funnel cases away from the federal and into the state courts. This is the case given the diseconomies of litigating twice and the fact that it is the local government which will probably have the "deep pocket." This is certainly consistent with Justice Rehnquist's belief in the equal competence of the state courts in vindicating federal rights and his apparent desire to relieve the docket congestion in the federal system, both of which partially underlay his objection to the assumption of pendent jurisdiction in the *Hagans* case.

---

255 512 F.2d 890 (4th Cir. 1972).
277 Id. at 894 (quoted in *Aldinger*, 427 U.S. at 15).
271 See 427 U.S. at 36 n.17 (Brennan, J., dissenting) (noting that *Aldinger* sub silentio implied that § 1983 claims are not exclusively cognizable in federal court).
278 See id. at 36 (Brennan, J., dissenting). Cf. Comment, The Impact of *Aldinger*, supra note 257, at 1383. See also Shapiro, supra note 12, at 294 (arguing that Rehnquist is guided by the basic principle that questions of the exercise of federal jurisdiction should, whenever possible, be resolved against such exercise). When *Aldinger* was decided, *Monroe* entirely shielded municipalities from liability under section 1983. Even after *Monell*, where the claim against the local government is based on vicarious liability alone, absent diversity, pendent jurisdiction is the only rationale available for federal jurisdiction. See supra note 257.

As a non-party to a section 1983 action brought in federal court, a municipality would presumably not be bound by findings adverse to its officers. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS §§ 34(3), 51 comment b (1982); but see id. § 57 comment g (1982). Moreover, since the Supreme Court has held that state proceedings can have later preclusive effect in § 1983 actions in federal court, see *Allen v. McCurry*, 449 U.S. 90 (1980), clearly a plaintiff might very well see little purpose in bringing separate actions in state and federal court, at least where he or she is inclined to pursue the "deep pocket" of the municipality first. Non-parties can foreclose relitigation by former parties of issues decided adversely to the latter. See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 518 (1971). *McCurry* came down after *Aldinger*, but, as early as 1975 Justice Rehnquist argued that his general disposition in favor of the result reached in *McCurry*, See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 n.18 (1975). See also *Neuborne*, The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection, 5 HOFSTRA L. REV. 545, 566-67 (1977) [hereinafter cited as *Neuborne*].

273 See, e.g., *Huffman v. Pursue, Ltd.*, 420 U.S. at 604 ("interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies."). See also, *Hagans v. Lavine*, 415 U.S. at 553 (Rehnquist, J., dissenting) ("state courts [are] likewise charged with enforcing the United States Constitution."); id. at 559.

274 See *Hagans v. Lavine*, 415 U.S. at 552 (Rehnquist, J., dissenting) (noting that "the lower federal courts have been confronted by a massive influx of cases challenging state welfare regulations."). See also *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (O'Connor & Rehnquist, JJ., concurring); 14 The Third Branch No. 10, at 2 (Oct. 1982). See generally Comment, Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right, 43 U. PITG. L. REV. 1035 (1982) (discussing, inter alia, other techniques invoked by the Burger Court to reduce the § 1983 case load); compare supra text accompanying notes 111-12.
This latter concern also motivates his current approach to implied rights of action and federal common law, though in the case of section 1983 actions, unlike either of those instances, Congress has in section 1343 established a docket priority for civil rights actions. Furthermore, even if a plaintiff is not deterred from suing on his federal claim in federal court, the litigation may be more quickly disposed of than if state law claims also have to be tried. Thus, the docket priorities established by the other specific grants of jurisdiction will not be undermined.

Delving a bit deeper, however, it should be noted that the assumption that state and federal courts are functionally interchangeable forums likely to provide equivalent protection for federal rights has been questioned. Among other things, state judges are allegedly more susceptible to majoritarian pressures, if only because of their method of selection and tenure, and, thus, may be more disposed to uphold collective societal judgments presumably represented in the behavior of state and local officials, elected and unelected. It is such judgments that Justice Rehnquist, along with others on the Burger Court, are purportedly so loath to intrude upon, a theme which will also become evident in the later discussion regarding implied rights of action and federal common law.

Funnelling section 1983 actions into state courts may decrease the likelihood of their success given the nature of the state tribunals and, thus, majoritarian decision-making may be indirectly protected. In a 1974 article, Justice Rehnquist himself observed that "there has been an apparent and obvious shift of authority to the federal courts, at the expense of state courts in particular and state and local governments in general." Aldinger is part of his effort to restore what he sees as the "appropriate" balance in this area.

In addition, it has recently been suggested that at the base of his judicial

275 See infra text accompanying notes 373-75.
276 See infra text accompanying notes 554-60.
277 See supra text accompanying notes 117-18.
278 Cf. Hagans v. Lavine, 415 U.S. at 559. (“But Congress left to state courts not only those claims involving state law but also those claims involving federal law which it felt did not merit the time of federal courts.”). The same concerns might suggest a similarly hostile approach to pendent claim jurisdiction, though Rehnquist purports to distinguish that from pendent party cases. See Aldinger, 427 U.S. at 18.
280 Id. at 1127.
283 See Neuborne, supra note 279, at 1131 (“the Court’s increasing preference for state court adjudication and its distrust of federal jurisdiction are explicable as the logical forum allocation corollaries to its major substantive premise [i.e. deference to majoritarian decision-making]”)
philosophy is a clear priority given state autonomy and the protection of property rights rather than other types of "liberty" and "equality."\textsuperscript{286} Thus, the result in Aldinger may in part be attributable to Justice Rehnquist's hostility on the merits (or indifference) to the types of constitutional claims asserted by the plaintiff in Aldinger\textsuperscript{287} and his feeling that the state courts would be much less sympathetic to those claims.\textsuperscript{288}

The concern with docket congestion is a traditional\textsuperscript{289} basis for refusing to exercise jurisdiction in the absence of an express congressional demand to the contrary. It is party-neutral and consistent with the purpose of the jurisdictional grants in the sense that it helps to maintain a high quality of decision-making in the cases that are heard. Use of clear-statement methodology for the other purposes suggested above is not justified by any of the defensible rationales for that approach.\textsuperscript{290} Regardless of the breadth of the de facto delegations made by Congress to the courts in the jurisdictional statutes, the national legislature clearly did not intend that they be manipulated for such purposes.

**IV. IMPLIED RIGHTS OF ACTION**

The question of the existence of a statutory cause of action is, of course, one of statutory construction. 

* Touche Ross & Co. v. Redington\textsuperscript{291}

**A. From Common Law to Statutory Interpretation**

In its approach to recognition of the right of private parties to sue for violation of federal statutes which do not expressly provide for a remedy on their behalf, the Supreme Court has moved from the liberal stance of *J.I. Case Co. v. Borak*,\textsuperscript{292} to the four factor test of *Cort v. Ash*,\textsuperscript{293} and

\textsuperscript{286} See Fiss at 20-21.


\textsuperscript{288} Cf. Neuborne, supra note 279, at 1106-07; Note, Intent, supra note 16, at 910-12 (suggesting that clear statement trend is one means to realize laissez-faire individualism).

\textsuperscript{289} See supra text accompanying notes 111-12.

\textsuperscript{290} See supra text accompanying notes 46-61.

\textsuperscript{291} 442 U.S. 560, 568 (1979) (opinion for the Court by Rehnquist, J.).

\textsuperscript{292} 377 U.S. 426 (1964) recognizing implied cause of action for damages in favor of shareholders for losses resulting from deceptive proxy solicitations in violation of § 14(a) of the Securities Exchange Act of 1934).

\textsuperscript{293} 422 U.S. 66 (1975) (no private cause of action for damages may be inferred from Federal Elections Campaign Act), where the Court laid down the test that allegedly still prevails: First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one
then to increasing emphasis in Cannon v. University of Chicago and subsequent cases on the existence of "congressional intent" as the sine qua non for the "implication" of a private remedy. The story of the evolution in doctrine in this area has been well told elsewhere and need not be repeated here. However, it is important to note for present purposes that Justice Rehnquist has been one of the moving forces in this change.

In Cannon, which recognized the existence of a private right to sue for alleged sex discrimination in admission to a medical school receiving federal financial assistance, Justice Rehnquist concurred in the result. But, his concurrence made a special point of noting that the Court had changed course since Borak where it had apparently exercised what it believed was an inherent judicial power to create common law remedies for statutory violations. As in the case of congressional displacement of federal common law, he emphasized that federal courts are more constrained in fashioning judge-made rules than are state courts of general jurisdiction. Therefore, the implication of private rights of action must be "basically one of statutory construction."

Yet, during the period the Court adhered to the approach epitomized by Borak, it was not entirely mistaken to regard the implication of private rights of action as a matter of statutory interpretation in dealing with regulatory schemes since that approach formed part of the legal framework in which Congress operated in enacting those programs. Arguably, it constituted part of the context which Congress took into account and relied upon in fashioning laws, a context which, as noted traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (emphasis in original; citations omitted).

441 U.S. 677 (1979) (inferring a private cause of action from § 901(a) of title IX of the Education Amendments of 1972).

Id. at 688.


See infra text accompanying notes 472-75.

441 U.S. at 717-18 (Rehnquist, J., concurring). See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 ("There is no federal general common law.").

441 U.S. at 717 (Rehnquist, J., concurring).

See Dickerson supra note 2, at 226. ("This is the presumption that the legislature has taken account of the rest of the legal order and has tried to integrate the statute with it, both fairly and rationally."). Of course such a presumption must be open to rebuttal in each case. In fact, a strong argument could be made in favor of the opposite presumption at least when it comes to decided cases, given their number and the inability of the
before, courts may consider in performing their cognitive function of discovering meaning. Justice Rehnquist himself was willing to concede as much in Cannon. In fact, this was the justification for his concur-
currence in Cannon's result. Accordingly, given the Borak approach there was a sense in which there was an identifiable congressional intent to authorize private rights of action. But, for reasons to be examined below, this judicial approach to the existence of rights of action was not suffi-
cient for the Justice who in Cannon apprised Congress that "the ball, so to speak, may well now be in its court." It is not sufficient for Congress to rely on the courts to decide whether there should be private rights of action. The legislature itself must directly confront the issue and, if it chooses, clearly provide for private rights to sue for violation of statutory duties.

Having been thus informed, the legislature will presumably take this changed legal climate into account and its failure to expressly mention a private right of action in statutes subsequently enacted will reflect a conscious decision that it not exist. But, even if Congress does not pay heed and nevertheless intends that private remedies exist, the Court will not feel bound by that intent unless it is expressed with unmistakeable clarity. While not expressed in exactly those terms in Rehnquist's Cannon opinion, we shall see that this is the upshot of his remarks there and in subsequent opinions.

B. A Rehnquist Opinion on Implied Rights of Action

While he has authored other opinions for the Court in the implied right area, Rehnquist's most elaborate treatment of a contention that such a remedy exists under a statute came in Touche Ross & Co. v. Redington. In that case, a broker-dealer, registered with the Securities and Exchange Commission, retained the services of a certified public accountant firm to conduct audits of its books and prepare for filing with the Commission

specialist committees of Congress to keep track of them. Perhaps the mention of the relevant case(s) in the committee reports accompanying a bill should be required to, at minimum, rebut a presumption of congressional ignorance of the caselaw.

See supra text accompanying notes 27-36.

See supra text accompanying notes 401-24.

441 U.S. at 718 ("Cases such as J.I. Case Co. v. Borak, supra, and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.").

See infra text accompanying notes 401-24.

441 U.S. at 718.

Id.

Id.


the annual reports of financial condition required by section 17(a) of the Securities Exchange Act of 1934. The brokerage firm later became insolvent and left insufficient property to make whole those customers who had left assets or deposits with it. The accounting firm was allegedly guilty of improper audit and certification of the financial statements and other records. This allegedly prevented revelation of the true financial condition of the brokerage concern until it was too late to take remedial action to forestall liquidation or to lessen the adverse financial consequences of liquidation to the customers. While the federal statute invoked as the basis for the action did not expressly provide the customers with a right to sue in these circumstances, the plaintiffs relied on an implied right theory to recover damages from the accountants. Finding that there was no congressional "intent" to create such a right of action, the Supreme Court upheld the district court's dismissal of the complaint.

Viewing the issue of implied rights as a conventional problem of statutory construction and divination of congressional intent, the Court, not surprisingly, began its analysis with the language of the statute itself. That language allegedly gave no hint of an intent to create a private cause for violations of the nature relied upon by the plaintiffs. Rather, the evident intent of section 17 was merely to require the keeping of certain records so that the Securities and Exchange Commission could perform its regulatory functions. Justice Rehnquist then shifted his attention to the legislative history which was equally silent regarding the issue presented. His analysis purported to show, at the least, the lack of any express congressional consideration regarding the existence of a private cause of action. Finally, flanking section 17 and enacted contemporaneously with it were two provisions expressly creating private damage remedies for other types of violations of the 1934 Act. Other sections in the same act also explicitly created private rights of action for their violation. "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."

Indeed, further inquiry suggested not merely the failure of Congress

311 442 U.S. at 568.
313 442 U.S. at 568-69.
314 Id. at 569-70.
315 Id. at 571.
318 442 U.S. at 572.
to address this issue, but a congressional intent that a private right to sue in the circumstances presented in Touche Ross not be permitted. Section 18 was particularly significant in this regard. It explicitly created a private damage remedy for those persons who purchased or sold securities in reliance on misrepresentations in reports filed with the Commission. However, the cause of action relied upon in the case at bar did not involve any purchaser or seller of a security, but otherwise was similar to the action authorized by section 18. The hoary maxim, "expressio unius est exclusio alterius" was, thus, presumptively relevant in this context.

Since the language, structure and legislative history of the 1934 Act did not provide evidence of a specific intent to create a private cause of action for violations of section 17, the argument was unavailing that implication of a private remedy for the parties in Touche Ross would advance the purposes of that provision. Legislative purpose might, in conjunction with other factors, shed light on congressional intent but, reliance on it alone to create a right of action partook more of judicial than of legislative law-making. The ultimate question is one of congressional intent, not one of whether the Court thinks that it can improve upon the statutory scheme that Congress enacted into law.

To protestations that failure to imply a right of action would sanction "injustice," Justice Rehnquist's response was that it was not its province to "legislate." Moreover, if the Court was mistaken in discerning past or current congressional intention regarding the problem at issue, Congress could remedy the hiatus thus created by clearly stating its intent in a manner which the Court could recognize, that is by amendment to the statutory vehicle or at least in the accompanying legislative history.

If it is accepted that the existence of a private right of action should depend on discovery of the actual existence of an affirmative congressional intent to create it, both the analytical method and result reached by Rehnquist in Touche Ross are defensible as far as they go. Certainly, the

---

320 "The expression of one implies the exclusion of another." It has been noted that sometimes the maxim accurately reflects intended meaning and sometimes it does not, depending on context. Dickerson, supra note 2, at 47.
321 See 442 U.S. at 574, expressly relying on, inter alia, National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) which directly cites this maxim. The Court in Touche Ross, however, said that it need not decide whether Congress expressly intended § 18(a) as the exclusive remedy for misstatements in § 17(a) reports. 442 U.S. at 574.
322 442 U.S. at 276.
323 See also Cannon v. University of Chicago, 441 U.S. 677, 740 (1979) (Powell, J., dissenting).
324 442 U.S. at 578.
325 Id. at 579.
326 Id. See also Carlson v. Green, 446 U.S. at 40 n.5 (Rehnquist, J., dissenting) ("[T]he statutes at issue in those cases did not expressly provide for such a remedy and there was no clear evidence of such a congressional intention in their legislative history.") (emphasis added).
sources relied upon are the traditionally accepted ones of statutory construction. The "expressio unius" maxim is probably more often invoked to justify a conclusion reached by other means since its accuracy in establishing an intent to foreclose certain actions depends on context. Nevertheless, the fact that various sections of the Securities Exchange Act do explicitly provide for private remedies at the least suggests that Congress did not specifically address the question of the right of private parties to sue for violations of section 17. That the implication of a private remedy might be consistent with or helpful, or even necessary, to the achievement of the purposes of the Act does not necessarily indicate that at the time the statute was enacted Congress formed an intent that the courts grant the remedy. It might in some contexts be suggestive of the existence of such an intent, but alone it is hardly dispositive. If the relevant materials for cognition are limited to those relied upon by Justice Rehnquist, the Court in Touche Ross may have been incorrect in divining the relevant congressional intent, but, as a matter of cognitive statutory construction the result was supportable.

The analysis arguably breaks down, however, to the extent it ignores part of the context in which the Congress responsible for the statute operated. While Borak was not decided until thirty years after the Securities Exchange Act was enacted, it might be contended that by 1934 there had been established a tradition of the judiciary utilizing statutory sources to create private rights of action which Congress could rely upon to fill any gaps in the regulatory schemes enacted by it. As

228 However, the use of legislative history by the courts has been challenged. See, e.g., Dickerson, supra note 2, at 137-97.

229 Id. at 47.

230 C.F. Dickerson, supra note 2, at 88 (legislative purposes in the sense of "ulterior purposes" are broad enough that they can be only partly served by such compliance); id. at 98-100 ("A statement of legislative purpose cannot be read as decreeing whatever is necessary to achieve it beyond what can be sustained by the specific working provisions of the statute when read in the context of the legislative purpose."). See also 447 U.S. at 578.

231 Since the record keeping requirement was intended at least in part "for the protection of investors," see 15 U.S.C. § 78q(a) (1970), the customers allegedly injured were presumably intended beneficiaries of the scheme. See 442 U.S. at 580-81 (Marshall, J., dissenting). This did not affect Justice Rehnquist's analysis which emphasized that "[Section] 17(a) neither confers rights on private parties nor proscribes any conduct as unlawful." Id. at 569. Section 17(a) did not in terms purport to impose any duties on accountants, let alone forbid misstatements in the required reports. It would seem, therefore, that the Court could have disposed of the case by accepting arguendo that section 17 created rights of action in customers in some instances but not in the case at bar where the provision invoked did not purport to condemn the defendant's conduct as unlawful.


233 California v. Sierra Club, 451 U.S. at 299-300 (Stevens, J., concurring). Of course, it may be questionable in a particular instance whether Congress has in fact acted with
indicated previously, Justice Rehnquist does not believe that Congress should be allowed intentionally or unintentionally to avoid directly confronting the issue of private rights to sue by such reliance. The reasons for his narrowing of the "proper context" for statutory interpretation in this area will be explored later.

Justice Rehnquist clearly accepted that Congress can convey its intent implicitly as well as expressly. The materials for ascertaining an intent, however communicated, are the same as are the limitations which he would impose on the relevant context as an aid in discovering meaning. However, with respect to the question of the right of private parties to sue for violation of statutory directives, inquiry into these sources will usually lead to a result similar to Touche Ross absent express language creating a private cause of action. This will be the case in view of the demonstrated ability of Congress to explicitly provide for private remedies when its attention has been specifically directed to the matter.

In his dissent in Cannon, Justice Powell argued that "[h]enceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist." While the opinion in Touche Ross did not explicitly invoke this observation in support of the result reached, Justice Rehnquist has recently indicated his concurrence with this strict standard.

C. Cases since Touche Ross

Over the last several years, arguments in favor of implied rights of action have generally been unsuccessful in the Supreme Court. The 1980-81 Term was particularly significant, both in terms of the number of opinions on this issue and the total lack of success of the contentions raised.
However, close reading of the opinions discloses an important division on the Court regarding the appropriate approach to take. *Touche Ross* proved to be a relatively easy case for almost all the Justices so the divergence in viewpoint did not surface there. The basic disagreement appears to be between those who adhere to the clear-statement approach of Justices Rehnquist and Powell and those who are favorably disposed toward the apparently more liberal stance of Justice Stevens. He continues to adhere to the formula first propounded in *Cort v. Ash* and seems willing to leave some room for judicial creativity in the remedial area. Justice Rehnquist has made it clear that he thinks (or hopes) that *Cort* no longer represents the law in view of *Touche Ross* and other recent decisions.

This basic split surfaced again in the recently decided case of *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, which recognized an implied right of action for damages under the Commodity Exchange Act (CEA). Justice Stevens delivered the opinion of the Court in which Justices Brennan, White, Marshall and Blackmun joined. Justice Powell filed a vigorous dissent with which Justices Rehnquist, O'Connor and Chief Justice Burger expressed their agreement. In the beginning of his opinion, Justice Stevens reiterated a point he has stressed in other implied right cases: historically, the federal courts had acted, to an extent, in the tradition of common law courts in fashioning remedies for federal statutory violations.

---


2. 422 U.S. at 78. The reasons it may have been so easy for some who do not share Justice Rehnquist's strict approach are discussed in *supra* note 331.


---

422 U.S. at 78, quoted in *supra* note 293. See *California v. Sierra Club*, 451 U.S. 287, 298-301 (1981) (Stevens, J., concurring). Justice Stevens wrote the opinion in *Cannon* (recognizing an implied right) from which Justice Powell so vehemently dissented given what he believed was the potential for judicial law making inherent in the *Cort* test. 441 U.S. at 731, 740. See *supra* text accompanying notes 132-53. Stevens also joined in Justice White's dissent in *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. at 25-36, which dissent adhered to the *Cort* analysis and appeared to give the courts more leeway in affording remedies. *Id.* at 30. Justice Stevens did, however, write the opinion for the Court in *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77 (1981) which refused to recognize a private right of action for contribution under the Equal Pay Act of 1963 and title VII of the Civil Rights Act of 1964 or, alternately, to create a federal common law right of contribution in the circumstances.
had been discarded in *Cort,* the contrasting approaches of the majority and dissenters in *Curran* are basically explained by a greater willingness on the part of the former to give some breathing room to judicial creativity.

For Justice Stevens a crucial distinction between the post-*Cort* cases, where the Court had refused to recognize an implied right of action, and the present controversy arose from the recognition by several federal courts of an implied right of action under the CEA prior to the 1974 amendments to that statute. The nature of the required inquiry was, therefore, not the traditional *Cort* test, but rather, "whether Congress intended to preserve the preexisting remedy." On the assumption that Congress legislated with an awareness of the existing legal context, an affirmative answer was required since the 1974 amendments constituted a "comprehensive reexamination and significant amendment of the CEA [leaving] intact the statutory provisions under which the federal courts had implied a cause of action." Presumably, had Congress not wanted to preserve the formerly recognized cause of action it would have spoken explicitly on that point. Moreover, Justice Stevens relied on various aspects of the 1974 amendments to the CEA and on their legislative history to provide what he suggested was additional evidence of the requisite intent. While the 1974 amendments added a provision for administrative award of reparations, which could apparently have been invoked for at least some of the violations alleged in the case at bar, this did not suggest to the majority any intent to extinguish the previously recognized remedy enforceable by the courts.

The dissenters found the majority's approach to be inconsistent with separation of powers principles and reiterated that the crucial intent was the intent to create formed by the Congresses that originally enacted and subsequently amended the CEA. The lower court opinions relied on by the majority were "erroneous" since they were not based on a search for such intent. In 1974, Congress did not amend or even reenact most of the provisions at issue and, thus, could not bind the Supreme Court.

---

349 Id. at 377-78.
351 456 U.S. at 379.
352 Id. See also supra text accompanying notes 301-02.
353 Id. at 1841.
354 Id. at 1841-44.
356 456 U.S. at 384.
357 Id. at 384-85.
358 Id. at 395.
359 Id. at 396-98.
360 Id. at 398-401. These decisions were handed down prior to *Cort* which was decided in 1975. They were thus "wrong" only in the sense that, in retrospect, they were out of line with the Court's subsequent change of position regarding the appropriate type of inquiry in implied right cases.
361 456 U.S. at 402-03 & n.11.
to this incorrectly reached result even if that silence could be construed as approval.\textsuperscript{362}

It is elemental that Congress "cannot legislate effectively by not legislating at all."\textsuperscript{363} Therefore, for the dissenters who viewed the intent to create a private remedy as absolutely essential in all circumstances, congressional intent can be effective, relevant, and binding on the courts only if expressed in the constitutionally required manner, that is, by means of the written statutory vehicle when viewed in proper context, which apparently includes legislative history made contemporaneously with the enactment.

On the other hand, Justice Stevens' opinion in \textit{Curran} need not be read as disregarding the principle that Congress can formally legislate only by statute. Rather, he was saying that congressional inaction in 1974, in the face of the judicial opinions recognizing an implied right, was only "evidence" of congressional feeling on the issue, confirmed by other aspects of the 1974 legislative history.\textsuperscript{364} While not binding in a legal sense, the available legislative materials supported the Court's decision not to disturb the previously recognized cause of action. In fact, it was not so much that the materials convincingly showed an affirmative intent to preserve, a matter the dissent made much of,\textsuperscript{365} rather, they at best showed that, in 1974, Congress did not form a specific intent to disturb the prior line of cases.\textsuperscript{366} The approach of the majority left the implied remedy without the statutory support deemed absolutely essential by the dissent, but, rested more on the courts' common law powers which had been invoked by the lower courts in originally recognizing the private cause of action prior to 1974.\textsuperscript{367} This did not escape Justice Powell, as indicated by his remark that "[t]oday's decision is also disquieting because of its implicit view of the judicial role in the creation of common law."\textsuperscript{368}

The Stevens opinion thus evidences the view that the federal courts and Congress are "collaborative instrumentalities of justice"\textsuperscript{369} and that implication of remedies can advance the legislative will in an ultimate sense by furthering the underlying purposes of the statutory scheme.\textsuperscript{370}

\textsuperscript{362} Id. at 402-03.
\textsuperscript{363} DICKERSON, supra note 2, at 181. The potential dangers of reading anything, in terms of legislative intent, into "silence" have been noted. Id. at 181-83.
\textsuperscript{364} 456 U.S. at 381-82.
\textsuperscript{365} Id. at 404-06.
\textsuperscript{366} Id. at 407-08 (Powell, J., dissenting).
\textsuperscript{367} Id. at 399-401 (Powell, J., dissenting).
\textsuperscript{368} Id. at 408.
\textsuperscript{369} Greater Boston Television Corp. v. Federal Communications Comm., 444 F.2d 841, 851-52 (1970), cert. denied, 403 U.S. 923 (1971) (citing United States v. Morgan, 313 U.S. 409, 422 (1941) (dealing with court-agency relationships)). In Bush v. Lucas, 103 S. Ct. 2404 (1983) Justice Stevens' opinion for the Court again emphasized his more liberal view regarding the remedial powers of the federal courts, id. 2403, 2411, though the Court there decided not to authorize a new non-statutory damage remedy for federal employees where first amendment rights are violated by their superiors.
\textsuperscript{370} 456 U.S. at 399-94. See also Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and States Rules for Decision, 105 U. PA. L. REV.}
On that basis, implication is desirable. The majority opinion in *Curran* bears a striking resemblance to the Blackmun-Stevens-Marshall dissent in *City of Milwaukee v. Illinois,* where a year prior to *Curran,* the Court, in an opinion authored by Justice Rehnquist, significantly cut back on the federal courts' common law powers. We will turn to analysis of that development, but not before examination of the factors which appear to have prompted Justice Rehnquist's strict approach to the implied rights area.

**D. Rationale for Clear Statement Approach to Rights of Action**

Unlike Justice Powell, who in *Cannon* elaborately described the reasons for his adherence to a clear statement requirement in the context of implied right cases, Justice Rehnquist has not always been explicit in making his concerns known in the opinions dealing with rights of action based on statute which he has authored. Nevertheless, there are reliable sources for inferring what those concerns must be.

Docket congestion in the federal system is clearly perceived as a significant problem. Not only has Rehnquist adverted directly to this in different, albeit related contexts, but other members of the Court have viewed such a concern as one of the motivating factors behind the shift from the *Borak* approach. As noted previously, an increased caseload impacts on the quality of federal justice in all cases that are heard. In addition, implication of private remedies without congressional authorization


451 U.S. 304 (1981). *See, in particular, id.* at 334 n.2 (“On the other hand, where federal interests alone are at stake, participation by the federal courts is often desirable, and indeed necessary, if federal policies developed by Congress are to be fully effectuated . . . . The whole concept of interstitial federal lawmaking suggests a cooperative interaction between courts and Congress. . . .”)

In the area of remedies for constitutional violations by federal officials, the Court follows an approach similar to that evidenced in *Curran* (remedy available unless Congress negates), *see* Carlson *v.* Green, 446 U.S. 14 (1980), an approach with which Rehnquist disagrees. *Id.* at 53. *Compare,* however, Rehnquist's approach to pendent jurisdiction (it exists absent congressional negative). *See supra* text accompanying notes 211-18.

441 U.S. at 730-49 (Powell, J., dissenting).

39 See *Patsy v. Board of Regents,* 457 U.S. 496, 518-17 (1982) (O'Connor & Rehnquist, J., concurring in opinion finding that exhaustion of state administrative remedies is not a prerequisite to a § 1983 suit); "At the very least, prior state administrative proceedings would resolve many claims, thereby decreasing the number of § 1983 actions filed in the federal courts, which are now straining under excessive caseloads." *See also* Foremost Ins. Co. *v.* Richardson, 457 U.S. 668, 677 (1982) (Rehnquist and O'Connor joining in dissent written by Justice Powell).


threatens to override the docket priorities which Congress has established through those specific grants of subject matter jurisdiction to the district courts which have been enacted as counterparts to legislatively created causes of action.\textsuperscript{276} If a right of action is largely the creation of the judiciary, arguably, it would be disingenuous to base subject matter jurisdiction on any specific grant of jurisdiction contained in the substantive statute which is allegedly violated; presumably the intended scope of any such grant matches those rights expressly or impliedly created by Congress elsewhere in the enactment.\textsuperscript{277} Therefore, if the right of action is court-created, the plaintiff must in most cases depend on the grant of general federal question jurisdiction in section 1331\textsuperscript{278} or perhaps a somewhat less encompassing grant such as section 1337.\textsuperscript{279}

In \textit{Carlson v. Green},\textsuperscript{380} the Court recognized a cause of action for damages based on allegations that federal prison officials had failed to provide medical attention to plaintiff's son in violation of the eighth amendment.\textsuperscript{281} Justice Rehnquist filed a vigorous dissent,\textsuperscript{282} arguing that "it is 'an exercise of power that the Constitution does not give us' for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision."\textsuperscript{383} During the course of his argument the Justice also noted:

\begin{quote}
It is clear under Art. III of the Constitution that Congress has broad authority to establish priorities for the allocation of judicial resources in defining the jurisdiction of federal courts . . . Congress thus may prevent the federal courts from deciding cases that it believes would be an unwarranted expenditure of judicial time or would impair the
\end{quote}

\textsuperscript{276} See supra text accompanying notes 117-18.

\textsuperscript{277} This is presumably one reason why Justice Rehnquist in \textit{Touche Ross} refused to infer congressional intent to create a private right of action from the jurisdictional provisions of the Securities Act of 1934. See 442 U.S. at 577.

The statement in the text, of course, assumes that Congress, in enacting a statute, does not expressly rely on the courts to fill the remedial gap. If it does so rely, perhaps any jurisdictional provisions enacted as part of the regulatory scheme, and not section 1331, were intended to encompass the judiciously created remedy.

In Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), jurisdiction of implied actions for rescission of contracts made void by \S\ 215 of the Investment Advisors Act of 1940 could allegedly be based on 15 U.S.C. \S\ 80 b-14 (1976). 444 U.S. at 19 n.9. But in that case, the Court found the requisite intent to create a private right of action for this type of remedy.

Arguably, absent such intent, if a court purported to rely on one of these specific subject matter grants, for example \S\ 27 of the Securities Exchange Act of 1934, 15 U.S.C. \S\ 78a (1976), in hearing a case based on a cause of action of its own creation, it would be "expanding" its jurisdiction in the sense referred to by Justice Powell in \textit{Cannon}, 441 U.S. at 746-47. See also supra text accompanying notes 131-63.

\textsuperscript{278} Cf. 441 U.S. at 746 n.17 (Powell, J., dissenting). See also supra text accompanying notes 117-19.


\textsuperscript{280} 446 U.S. 14 (1980)\S\ 1331 was the asserted subject matter jurisdiction base here.).

\textsuperscript{281} U.S. Const. amend. VIII (cruel and unusual punishment).

\textsuperscript{282} 446 U.S. at 31-54 (Rehnquist, J., dissenting).

\textsuperscript{283} Id. at 34 (citing \textit{Bivens v. Six Unknown Named Agents}, 403 U.S. 388, 428 (1971).
ability of federal courts to dispose of matters that Congress considers
to be more important . . . .

While it is analytically correct to view the question of jurisdiction
as distinct from that of the appropriate relief to be granted . . . con-
gressional authority here may all too easily be undermined when the
judiciary, under the guise of exercising its authority to fashion
appropriate remedies, creates expansive damage remedies that have
not been authorized by Congress.344

Clearly the same argument could be made against the practice of
implying private rights of action for statutory violations where there has
been no congressional authorization for those suits.

Unlike Justice Powell, Justice Rehnquist does not argue that judicial
implication of rights of action unlawfully "expands" the subject matter
jurisdiction of the federal courts.35 In fact, he specifically separates the
questions of jurisdiction and available remedy and later in the opinion
makes it clear that Bivens-type36 cases, like Carlson, should be dismissed
for failure to state a claim on which relief can be granted, not for lack
of subject matter jurisdiction.397 The "expansion" that is his principal
concern is the enlargement of the types and numbers of cases that the
courts will have to deal with, which in turn may undermine congressional
judgments regarding what types of cases should be the primary objects
of the courts' concern.388 The theme struck here is echoed in Rehnquist's
earlier dissent in Hagans v. Lavine.389

Justice Rehnquist's dissent in Carlson suggests additional concerns that
likely motivate his adherence to the requirement of clear statement in
the case of implied rights based on federal statutes. In fashioning an ap-
propriate sanction for disfavored conduct, obviously a variety of factors may
be taken into account, including not only the types of damages suffered
by victims injured by the conduct and the likely effect of the sanction
in deterring future misconduct by the wrongdoer and others, but also
the potential social costs of too generous a measure of compensation and
the risks of over-deterrence. The legislative branch may in some instances,

344 Id. at 36-37 (citations omitted).
35 See supra text accompanying notes 132-46.
397 446 U.S. at 42 (Rehnquist, J., dissenting).
388 See also id. at 39.
399 415 U.S. at 559 ("But Congress left to state courts not only those claims involving
statelaw but also those claims involving federal law which it felt did not merit the time
of federal courts.") While he disagrees with judicial implication of damage remedies for
constitutional violations, Justice Rehnquist concedes that the federal courts have long fash-
ioned equitable relief in such circumstances without express congressional authorization,
a tradition which he does not expressly question. 446 U.S. at 42-44. The logic of such a
distinction is hard to fathom in terms of the impact of actions on docket priorities, though
it does make some sense in terms of his other concerns regarding judicial implication of
remedies. See infra note 392.
th Although perhaps not in all,392 have resources for factual investigation not available to the courts which may contribute to more informed decision-making in this area. In addition, the legislature has a somewhat greater range of remedial options open to it than do the courts.391

Beyond pure questions of fact, there are important policy issues at stake in fashioning sanctions, such as whether vindication of the social interest of providing full compensation to the victim for his losses overbalances the social costs that are likely to ensue from a measure of damages so calculated.392 Congress, and not the federal judiciary, is the electorily responsible branch vested by article I of the Constitution393 with the principal substantive policy-making power of the national government.394 Constitutionally, Congress is clearly the preeminent maker of public policy within the sphere of federal competence and the initial law-making power is largely in its hands, not the courts'.395

It is to these matters of institutional superiority and constitutional preference to which Rehnquist both expressly and implicitly refers in Cannon396 and Carlson.397 To the extent that these concerns bulk large in the area of court-created actions for violations of constitutional rights where no statutory scheme is implicated,398 they are magnified when judicially-wrought remedies are engrafted onto specific statutory frameworks. For in such instances, the courts' handiwork may substantially undermine or otherwise distort carefully crafted balances, perhaps in the process, undoing the underlying political compromises, on the basis of either mistaken assumptions or policy preferences not shared by the legislature.399 Legislative, and therefore popular, supremacy is thereby

390 See Wellington, supra note 52, at 240.
391 Provision of civil penalties is one example.
392 446 U.S. at 47. Reliance on injunctive relief alone may avoid some of the problems created by damage remedies, however.
393 U.S. Const. art. I.
394 Id. cl. 8.
395 This is confirmed by the Rules of Decision Act, 28 U.S.C. § 1652 (1976), which reflects, inter alia, the constitutional allocation of policy-making power between the national legislature and the federal courts. See Mishkin, Some Further Last Words on Erie—The Thread, 87 Harv. L. Rev. 1682 (1974) [hereinafter cited as Mishkin, Some Further Last Words on Erie]. See also infra text accompanying notes 432-44. The considerations involved in fashioning remedies, particularly damage remedies, mark them as clearly “substantive” within the meaning of the Rules of Decision Act. Cf., e.g., Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 n.31 (1975) (attorney’s fees). Without express or implied support for them in the Constitution or federal statute, the Act limits federal judicial creativity, presumptively at least.
396 441 U.S. at 717-18 (Rehnquist, J., concurring).
397 446 U.S. at 31-54 (Rehnquist, J., dissenting).
398 In Carlson, though, a key issue was the compatibility of the Federal Tort Claims Act with a judicially created remedy.
399 See Carlson v. Green, 446 U.S. at 45 and n.10 (Rehnquist, J., dissenting) (“... or that Congress did not consider the marginal increase in deterrence here to be outweighed by other considerations.”). See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,
threatened, though perhaps with the best of intentions.

But for Rehnquist, the constitutional role of Congress as the preeminent policy-maker implies something at least as important as the need to protect its prerogatives from misbegotten judicial meddling.\textsuperscript{400} The Constitution vests the substantive powers of the federal government in the national legislature, elected by and therefore subject to majoritarian pressures, and this implies that there are some responsibilities that Congress itself cannot shirk, and from which the courts should not save the elected representatives.\textsuperscript{401} This was suggested by Rehnquist's concurrence in \textit{Cannon} where he noted that "Congress, at least during the period of the enactment of the several titles of the Civil Rights Act of 1964, tended to rely to a large extent on the courts to decide whether there should be a private right of action, rather than determining this question for itself."\textsuperscript{402} It may be easy enough to summon a political consensus that there should be a public policy in favor of this or that. The balances that must be struck in determining appropriate sanctions and methods for their administration allegedly may present issues where there is much less agreement.\textsuperscript{403} It may, therefore, be much easier to leave it to the courts to define, at least in part, the contours of the enforcement scheme through the creation of private remedies.

Rehnquist refuses to accept the responsibility thus delegated. The clear-statement approach to implied rights of action, therefore, informs Congress that "the ball, so to speak, may well now be in its court."\textsuperscript{404} To the extent such issues are directly confronted in the legislative, rather than the judicial, arena the chances that all affected interests may be heard are increased and any decisions reached will be subject to relatively widespread public scrutiny.\textsuperscript{405}

This theme received one of its most extensive treatments in Justice Rehnquist's concurrence in \textit{Industrial Union Department v. American

\textsuperscript{400} U.S. at 408 (Powell, J., dissenting) ("[C]ourts should recognize that intricate policy calculations are necessary to decide when new enforcement measures are desirable additions to a particular regulatory structure. Judicial creation of private rights of action is as likely to disrupt as to assist in the functioning of the regulatory schemes developed by Congress."); Cannon v. University of Chicago, 441 U.S. at 748 n.19 (Powell, J., dissenting). \textit{See also} Frankel, supra note 296, at 553. \textit{But see} Pillai, supra note 137, at 27.

\textsuperscript{401} The Rules of Decision Act preserves to Congress its policy-making prerogatives from judicial usurpation. But if Congress purports to delegate those powers to the courts, the Act by its terms provides no protection given the exception in cases "where . . . statutes of the United States otherwise require or provide. . . ." 28 U.S.C. § 1652 (1976). At the same time, a concern for democratic decision-making underlies both the RDA, \textit{see infra} text accompanying notes 436-37 and the non-delegation doctrine. \textit{See infra} text accompanying notes 401-05.

\textsuperscript{402} Id. at 718 (Rehnquist, J., concurring) (emphasis added in part).

\textsuperscript{403} Cf. id. at 743 (Powell, J., dissenting).

\textsuperscript{404} Id. at 718 (Rehnquist, J., concurring).

\textsuperscript{405} \textit{See id.} at 743 (Powell, J., dissenting).
Petroleum Institute, involving delegation of law-making power to an administrative agency. Invoking the authority of the very few cases in which the Supreme Court has invalidated such delegations, he found that even the indulgent tests evolved over the years in approaching matters of this nature could not sustain the power of the Secretary of Labor under the Occupational Safety and Health Act to establish regulations applicable to toxic substances where no "safe" level of occupational exposure is known. According to Rehnquist, the guidance given by Congress to the Secretary was entirely inadequate in supplying him any concrete direction on an issue which the Justice believed was fundamental: to what extent may or must cost to the regulated parties be considered in setting the permissible standard for worker exposure to harmful substances. It was not that the legislature had simply overlooked this problem. The legislative history established to his satisfaction that Congress was well aware what was at stake. It was obvious to Justice Rehnquist that the issue was so politically divisive that the members could at most agree to disagree and thereby intentionally or unintentionally "pass the buck" to the agency for resolution.

Of course, requiring Congress to confront this problem and come to a solution might mean that there would be no federal regulation of toxic substance exposure in the workplace. Such a result appeared inevitable to Justice Rehnquist, as he made clear during the next Term in his dissent in American Textile Manufacturers Institute, Inc. v. Donovan. The costs thereby imposed by adherence to the constitutional separation of powers as he conceived it to be might be significant; they must be borne nonetheless.

---

409 448 U.S. 607 (1980) (Although unable to agree on an opinion, five members of the Court agreed that the Secretary of Labor's occupational safety and health standard for benzene should be set aside.).
412 The provision at issue provided, in relevant part, that the Secretary of Labor . . . in promulgating standards dealing with toxic materials or harmful physical agents . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.
413 448 U.S. at 686 (Rehnquist, J., concurring).
414 Id. at 676-82, 685.
415 Id. at 685.
417 For a vigorous dissent from this view, see R.C. Davis, Administrative Law Treatise § 3:1-2 (Supp. 1982). While Professor Davis appears to admit that in some cases overbroad delegations might run afoul of constitutional limitations, id. at 16-17, according to him legislators can constitutionally agree to disagree and thereby grant an agency the power to make major policy decisions in at least some cases. Id. at 16.
Assuming a stance of that nature would prove particularly difficult for a judge receptive to the idea of governmental regulation of the economy, but considerably easier for one, like Justice Rehnquist, who is partial to classical laissez-faire theory.\(^{45}\) This is the case whether we are dealing with a delegation to an agency or in the area of judicial creation of rights of action where the existence or non-existence of these rights may determine the strength or weakness, in practice, of whatever legislative policy is embedded in the regulatory statute.

Moreover, it would appear that if courts are seen as impermissibly taking Congress off the hook by exercising common law powers in creating private remedies for statutory violations, there are limits on the legislature’s ability to expressly or implicitly delegate substantive law-making power to the courts\(^{46}\) in other areas where, in Justice Rehnquist’s view, “fundamental” policy decisions have not been made by the people’s elected representatives.\(^{47}\) Rehnquist never purports to suggest criteria for determining when a decision can be so characterized. Perhaps it is a question of “I know it when I see it.”\(^{48}\) Absent a more definite judicial standard for testing impermissible delegations of power, the dangers of arbitrary decision-making and invocation of this doctrine to mask policy disagreements with Congress are obviously substantial.\(^{49}\)

In addition, since every statute intentionally or unintentionally contains some delegation of power to the courts to make law\(^{50}\) under the name of “statutory interpretation,”\(^{51}\) one wonders if the Rehnquist approach would lead to instances where the Court refuses to apply (or invalidates) a statute which it believes asks too much of the judiciary in terms of making “fundamental” decisions.\(^{52}\) While he seems willing to accept broad delegations in the case of jurisdictional grants,\(^{53}\) control of judicial creativity in the substantive area presumably strikes at what he perceives to be the heart of the problem of redressing the “dramatic shift of power from the legislative to the judicial branch” and reducing the large “role

\(^{45}\) Fiss supra note 8, at 21. See also Note, Intent, supra note 16, at 910-12 (1982) (suggesting that the clear statement approach of the current Supreme Court masks a “vision of laissez-faire individualism.” Id. at 911.).

\(^{46}\) The Sherman Act is such a delegation. See supra text accompanying note 121. See also Note, Intent, supra note 16, at 989 n.54.

\(^{47}\) In fact, in the Industrial Union case, Justice Rehnquist specifically noted that Congress had “improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court,” 448 U.S. at 672. (emphasis added).


\(^{49}\) Justice Rehnquist himself never explains why he views questions regarding what the available remedies for statutory violations should be as meeting the test for “fundamental” policy decisions.

\(^{50}\) See supra text accompanying note 23.


\(^{52}\) See American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. at 547 (noting that “I do not mean to suggest that Congress ... must resolve all ambiguities.”) (Rehnquist, J., dissenting) (emphasis added).

\(^{53}\) See supra text accompanying notes 203-05.
that the federal judiciary now plays in the day-to-day operations of
government."424

In short, an approach demanding that "fundamental" decisions be made
by Congress may result in more than just refusal to recognize a private
right of action to sue for violations of a federal statute because, as a matter
of statutory construction, there is no "express" or "implied" congressional
intent to create the action. The Court's examination of the statute in its
proper context may also lead to the even more drastic result of in-
validating the statutory scheme in the name of democratic decision-making.

Many of the same concerns which arguably underlie Justice Rehnquist's
treatment of pendent jurisdiction problems in the section 1983 context425
are found in the area of implied rights of action, including docket conges-
tion and the desire to vindicate majoritarian decision-making. The
importance of the latter factor differs in the two contexts. By remitting
section 1983 actions to state courts, collective societal decisions may more
likely survive. Refusing to exercise a law-making power in the remedial
area is a two-edged sword, attempting both to preserve policy decisions
made by the elected representatives and, at the same time, to ensure
that key policy decisions are determined by the branch of government
most responsive to the popular will,426 even at the price of political
deadlock.

Rehnquist's clear-statement requirement in the implied rights area,
supported as it purportedly is by desires to avoid disruption of, for
example, congressionally established priorities for the use of judicial
resources427 and to reinforce the institutional responsibility of the
legislature428 is, at least on the surface, consistent with the traditional
view of the appropriate function of such an approach.429 At the same time,
to the extent it is motivated in part by his hostility to the substance of
congressional programs fueled by his own laissez-faire philosophy, it is
ultimately inconsistent with the legislative supremacy and
majoritarianism430 to which he pays such obeisance.

V. CONGRESSIONAL DISPLACEMENT OF FEDERAL COMMON LAW

Thus the question was whether the legislative scheme "spoke directly
to a question"... not whether Congress had affirmatively proscribed
the use of federal common law.

City of Milwaukee v. Illinois and Michigan431

425 See supra text accompanying notes 268-90.
426 448 U.S. at 685 (Rehnquist, J., concurring).
427 See supra text accompanying 376-89.
428 See supra text accompanying notes 390-423. See also Industrial Union Dep't v. American
Petroleum Inst., 448 U.S. at 687 (Rehnquist, J., concurring).
429 See supra text accompanying notes 46-61.
430 See Fiss supra note 8, at 16, 20.
A. The Role of Federal Common Law

In resolving an issue, the further a federal court must stray from federal statutory and constitutional sources the more restricted its ability becomes to rely on judge-made rules which disregard state law. As Justice Brandeis observed in *Erie Railroad Co. v. Tompkins*, 322 U.S. 434 (1944), "[t]here is no federal general common law." 433

This restriction on federal judicial law-making has several sources, one which was expressly adverted to in the *Erie* case, that is, the limited substantive competence of the national government as compared with the states, which under the Constitution retain all powers not delegated to the United States. 434 More relevant for present purposes, however, is an additional limitation related to the constitutional allocation of power among the three branches of the national government. Congress is the only branch established by the Constitution which is expressly vested with law-making powers, thereby making it the unchallengeable policy-maker within its constitutionally prescribed limitations. 435 Thus, Congress is presumptively, absent special circumstances, the forum in which such policy should be initially made, subject to popular control exercised through the electoral process. 436

The intended consequence of the constitutional scheme is, however, more than the assurance of popular sovereignty. The composition of the national legislature is such that the interests of the states as political entities are represented. 437 This is particularly important in view of the principle of federal supremacy which may dictate the supersession of state law-making competence. 438 When, therefore, existing or potential state law is displaced by congressional action which conflicts with that law or where Congress acts with a view toward occupying the "field," 439 the states at least have been represented in the decision-making process leading to that result. 440 To the extent that rule-making by the federal judiciary qualifies as part of "the Laws of the United States" within the meaning of the Supremacy Clause, 441 a matter about which there appears to be no doubt, 442 federal judge-made law, created by an unelected, life-tenured

---

432 304 U.S. 64 (1938).
433 Id. at 78.
437 See Wechsler, supra note 47.
438 U.S. Const. art. VI, cl. 2.
441 U.S. Const. art. VI, cl. 2.
corps of officials, is presumptively inconsistent with these two constitutional premises.

The Rules of Decision Act\textsuperscript{43} is the statutory expression of the underlying principles of limited national substantive competence and limited judicial power to create law even within the sphere of policy-making committed to the national government.\textsuperscript{44} As indicated previously,\textsuperscript{45} Justice Rehnquist bases his strict approach to implication of private remedies from statutory and constitutional provisions, in part, squarely on the separation of powers aspect of the \textit{Erie} case.\textsuperscript{46}

There is, however, room for judicial law-making in substantive matters on the federal level. The application of statutes provides opportunity in this regard since, as noted before,\textsuperscript{47} this may involve not just "discovery" of meaning, but also an "assignment" of meaning.\textsuperscript{48} Moreover, in admiralty and other unique areas of federal concern,\textsuperscript{49} as well as pursuant to express or implied delegations of power from Congress,\textsuperscript{50} the federal courts have exercised an important substantive policy-making competence. Limitations on congressional time and lack of foresight by its members may create gaps in statutory schemes; so too may the lack of consensus in the legislature regarding the appropriate handling of a problem. All these factors have been suggested as justifying the existence of federal common law,\textsuperscript{51} though creation of a judge-made rule on a "fundamental" issue as to which there was no political consensus in Congress presumably presents for Justice Rehnquist the "worst case" for judicial law-making.\textsuperscript{52} Concern regarding undercutting delicately wrought congressional balances is clearly another factor counselling restraint in judicial intervention.\textsuperscript{53}

\textsuperscript{43} 28 U.S.C. § 1652 (1976): "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."
\textsuperscript{44} See Mishkin, \textit{Some Further Last Words On Erie}, supra note 395. By its terms, however, the RDA is not a restriction on congressional delegation of law-making power to the courts, see supra note 400, but rather on the courts' usurping law-making competence without congressional consent.
\textsuperscript{45} See supra text accompanying notes 290-99.
\textsuperscript{46} See supra text accompanying notes 24-25.
\textsuperscript{48} Id. at 95-96.
\textsuperscript{50} See Mishkin, \textit{The Variousness of "Federal Law"}, supra note 370, at 800. See also Comment, \textit{Private Rights of Action Under Amtrak and Ash: Some Implications for Implication}, 123 U. Pa. L. Rev. 1392 (1975) (noting as rationale for judicial implication of remedies under federal statutes the ability of the courts to assess the need for private enforcement to carry out the legislative goals, which ability may not be shared by Congress).
\textsuperscript{51} See supra text accompanying notes 401-24.
\textsuperscript{52} See supra text accompanying notes 398-99.
However, regardless of the difficulty of the task, it would seem that ultimate legislative supremacy demands that, while respecting the presumption in favor of democratic decision-making on issues of major importance, the courts put forth the effort to carefully ascertain whether, on balance, their creation of interstitial rules is necessary to give effect to legislative policies which have a political consensus.\footnote{Reasonable persons may differ in their analysis of the desirability of federal common law in particular instances. Additionally, one must confront the reality that judicial perceptions are likely to be heavily influenced by differing political philosophies and, less defensibly, by hostility to the substantive programs enacted by Congress.}

B. The Creation and Displacement of Federal Common Law of Interstate Pollution Control

An issue which has not often been confronted by the Supreme Court is the effect on existing federal common law of subsequent enactment or amendment of a regulatory scheme. An express statement by Congress that the judge-made rule is thereby displaced obviously controls and presents an easy case. On the other hand, what if the legislature fails to make its intent, if any, crystal clear on the issue of displacement? The Court confronted this very problem in the recent case of City of Milwaukee v. Illinois\footnote{\textit{Cf.} City of Milwaukee v. Illinois, 451 U.S. 304, 339 n.8 (Blackmun, J., dissenting). \textit{See supra} text accompanying note 370. \textit{See also} D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 470 (1942) (Jackson, J., concurring) ("Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes. . . .")}. The majority opinion. As in the area of implied rights of action, the argument favoring judicial power to supplement regulatory schemes was the loser. Moreover, the approach adopted seemed to create a presumption in favor of displacement of federal common law remedies when Congress had "entered the field."

Nine years earlier, in Illinois v. City of Milwaukee (Milwaukee I),\footnote{406 U.S. 91 (1972).} the Supreme Court held that the lower "federal courts [would] be empowered to appraise the equities of the suits alleging creation of a public nuisance\footnote{451 U.S. 304 (1981).} affecting interstate or navigable waters, at least when the action was brought by a state against the political subdivision of another state. Several months after that decision was handed down, Congress enacted the Federal Water Pollution Control Act (FWPCA) Amendments of 1972\footnote{Pub. L. No. 92-500, 86 Stat. 816, codified in pertinent part at 33 U.S.C. §§ 1251-65, 1281-92, 1311-28, 1941-45, 1361-76 (1976 & Supp. IV 1980).} which drastically altered the previous federal approach to controlling pollu...
tion of the nation's waters. Henceforth, both municipal and private dischargers of pollutants into the navigable waters of the United States would have to obtain permits from either the United States Environmental Protection Agency or from state agencies delegated permit-issuing authority by the EPA. Issued permits would include effluent limitations which, at times in conjunction with water quality standards, became the principal weapon in the fight against water pollution.

The State of Wisconsin was delegated permit authority by the federal government and issued permits to several of its municipal corporations which were responsible for the discharge of sewage into Lake Michigan. Violations of those permits prompted an enforcement action by the Wisconsin Department of Natural Resources which, in turn, resulted in a state court order that the sewage authorities comply with the terms of their permits as well as take additional steps to control sewage overflows. However, in response to a suit brought by the State of Illinois which claimed that its waters were being polluted by the out-of-state discharges, a federal district court in Illinois invoked its federal common law powers under Milwaukee I to enter an order imposing even more stringent effluent controls on the Wisconsin defendants, though the restrictions imposed by the administrative and judicial action of the State of Wisconsin met the minimum requirements established by federal statutory law.

In concluding that no federal common-law remedy was available to Illinois in these circumstances, Justice Rehnquist began his analysis in Milwaukee II in the entirely predictable manner of noting the narrow scope of federal common law in view of the separation of powers considerations underlying the Erie case:

459 See, e.g., Comment, The Federal Water Pollution Control Act Amendments of 1972, 14 B.C. INDUS. & COM.L. REV. 672 (1973). What follows in the text is merely a barebones outline of the post-1972 water pollution regulatory scheme which has been well described elsewhere. See, e.g., W. RODGERS, ENVIRONMENTAL LAW §§ 4.1-4.21 (1977) [hereinafter cited as RODGERS].


461 See, e.g., id. (b)(1)(A), (b)(2)(A).

462 See id. § 1362(6) (1976).

463 See id. § 1362(7) (1976).


465 See id. § 1342(b).

466 See id. § 1362(11) (1976).

467 Water quality standards are basically "legal expressions of permissible amounts of pollutants allowed in a defined water segment." See RODGERS, supra note 459, § 4.8 at 415. In contrast, an effluent limitation is a restriction on quantities, rates and concentrations of chemical, physical, biological or other constituents discharged from a particular point source.

468 451 U.S. at 311.

469 Id.

470 Id. at 311-12.

471 Id. at 319-20.

472 451 U.S. at 332 (Rehnquist, J.).
Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision. *Erie R. Co. v. Tompkins* . . . . The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposely insulated from democratic pressures, but by the people through their elected representatives in Congress.\(^4\)

While grudgingly admitting that the Court had found it necessary in a "few and restricted" instances\(^4\) to develop federal common law, Rehnquist noted that it was essential to acknowledge the "paramount authority of Congress" to displace such judge-made rules.\(^4\)

When does that displacement occur? "[W]hen 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."\(^4\) Or when the legislative scheme has "spoke[n] directly to a question,"\(^4\) displacement of the previously existing federal common law occurs. The "scope of the legislation" must be reviewed\(^4\) but the crucial inquiry is clearly "not whether Congress ha[s] affirmatively proscribed the use of federal common law."\(^4\)

In *Aldinger*, the somewhat similar phraseology, "whether . . . Congress has *addressed* itself to the *party*,"\(^4\) was apparently not intended as the "test" for the existence of pendent party jurisdiction but merely as an introduction to the type of inquiry deemed crucial.\(^4\) In *Milwaukee II*, however, the various formulations quoted above appear designed to function as some sort of test\(^4\) for ascertaining the continued viability of federal common law. As such, the question becomes what do they mean?

In one of the cases relied on by Justice Rehnquist, *Arizona v. California*,\(^4\) the Court refused to apply the federal common law doctrine of equitable apportionment, which it had developed in dealing with interstate water disputes, where it found that Congress had, by statute, provided its own method of apportionment.\(^4\) In *Mobil Oil Corp. v.*

---

\(^4\) Id. at 312-13 (citations omitted in part).

\(^4\) Id. at 313 (quoting *Wheedlin v. Wheeler*, 373 U.S. 647, 651 (1963)). See also *Milwaukee II*, 451 U.S. at 314 (federal common law exists where "the Court is compelled to consider federal questions 'which cannot be answered from federal statutes alone.'") (emphasis added).

\(^4\) Id. at 313-14 (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)).

\(^4\) Id. at 314. See also id. at 315 n.8.

\(^4\) Id. at 315 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). See also id. at n.8.

\(^4\) Id. at 315 n.8.

\(^4\) Id. at 319.

\(^4\) 427 U.S. at 16 (emphasis added in part).

\(^4\) See supra text accompanying note 297.

\(^4\) 451 U.S. at 315 ("Thus the question was whether the legislative scheme spoke directly to a question . . . .") (emphasis added). See also id. at n.8.


\(^4\) Id. at 565-66.
Higginbotham,485 another case cited in Milwaukee II, it was necessary to determine whether to permit recovery of damages for “loss of society” under the general maritime law when Congress had not authorized such damages in the Death on the High Seas Act,486 though in that statute it had expressly provided for pecuniary losses. The Court refused to allow such relief, rejecting the argument that Congress did not have the last word on this issue.487 While in neither case had Congress “affirmatively proscribed” the judicially created remedy which was sought, the Court in both cases seemed to feel that providing a different or additional remedy would disregard the implicit congressional intent that the expressly provided legislative solution be the only one.

Ascertaining the existence of such an implied intent often presents the judiciary with such subtle and difficult problems that the invocation of, for example, the “expressio unius” maxim488 is often the easiest way out. In short, the line between “rewriting” of congressionally established ground rules, thereby undercutting legislative supremacy, and permissible “supplementation” is a very thin one indeed. The Rehnquist analysis in Milwaukee II certainly established that Congress had said something about the problem vexing the State of Illinois. But what implications arose from what it did say?

Justice Rehnquist devoted approximately three pages of his analysis to generalized references regarding the “comprehensive” nature of the 1972 amendments, along with numerous citations to the legislative history which similarly repeated that conclusory language.489 Moving to specifics, he correctly noted that the defendants had been issued permits in compliance with applicable federal statutory requirements and administrative guidelines.490 Congressional intent to require, as a matter of federal law, compliance with those provisions, and no more, might very well be assumed in the case of a private or municipal source located in Wisconsin and discharging pollutants which allegedly injured a downstream Wisconsin citizen. For example, the FWPCA preserves the right of the states to enact and enforce more stringent controls than required under federal law,491 but a state need not take advantage of this option. Thus, one can make a strong argument that Congress did not intend the federal courts to usurp the choice of a state in regulating sources located within its borders by fashioning federal common law.492

488 See supra text accompanying note 214.
489 451 U.S. at 317-19 & n.12.
490 Id. at 319-24.
Milwaukee II, however, did not involve the typical case of intrastate pollution, but rather involved interstate pollution which impinged on Illinois' ability to do better than the federally required minimum in maintaining water quality\textsuperscript{459} and to protect its quasi-sovereign interests in preserving its resources and mitigating health risks to its residents.\textsuperscript{460} Justice Rehnquist pointed to various provisions in the FWPCA which purport to give some solace to a state in Illinois' position.\textsuperscript{461} In spite of these provisions, there is considerable doubt whether the receptor state has any effective recourse under the FWPCA to protect its interests in those cases where the permit-issuing state fails to take the objections posed by a neighboring state into account in fashioning the terms of the final permit and the EPA thereafter fails to veto the issuance of the permit thus drafted.\textsuperscript{462} Oddly enough, however, there are provisions in the statute which might, in some instances, be invoked by a state desiring to protect its public health or welfare or its policy in favor of higher water quality standards from pollution originating elsewhere.\textsuperscript{463} Yet, due to over-

\textsuperscript{459} Note, Federal Common Law and Water Pollution, supra note 492, at 530. See also 451 U.S. at 352-53 & n.32.
\textsuperscript{461} 451 U.S. at 325-26. See 33 U.S.C. § 1342(b)(3) (state whose waters are affected by issuance of permit must receive notice of permit application and be allowed to participate in public hearing on the permit); id. § 1342(b)(5) (affected state must have opportunity to submit written recommendations concerning the permit applications to the issuing state and EPA; both the affected state and EPA must receive notice and statement of reasons, if any, if recommendations of affected state not accepted); id. § 1342(d)(2)(A) (1976 & Supp. IV 1980) (EPA may veto any permit issued by a state when the waters of another state may be affected); id. § 1342(d)(4) (EPA may issue a permit if issuing state is not responsive to its objections).
\textsuperscript{463} Of course, even if a state could obtain judicial review of a failure by the EPA to veto a permit, the deference that would be shown the administrative agency's decision might be seen as assuring less than optimal protection for the interests of the receptor state. It should also be noted that the EPA can waive, as to any permit application, its veto power. See 33 U.S.C. § 1342(d)(3).
\textsuperscript{464} Not expressly discussed by Justice Rehnquist was the possibility of a suit by Illinois against Milwaukee pursuant to 33 U.S.C. § 1365 (1976) (citizen suit). "Citizen" includes "persons" with an interest affected by unlawful pollution, id. § 1365(g); "person" includes states, id. § 1362(2), (5); and the enforceable "effluent standards or limitation," id. § 1365(a), includes limitations under § 301, id. § 1365(b), which in turn encompasses more stringent standards adopted by a state pursuant to authority preserved in § 307, id. § 1311(b)(1)(c). Compare Commonwealth of Massachusetts v. United States Veterans Admin., 541 F.2d 119 (1st Cir. 1976) (state can invoke § 1365, with United States v. City of Hopewell, 508 F. Supp. 526 (E.D. Va. 1980) (state cannot invoke § 1365), both cases dealing, however, with suits by states where the pollution originated. This is not to say there are not counterarguments to the availability of a citizen suit in the circumstance of Milwaukee II (e.g., the oddity of considering a state as a "citizen" as well as whether § 1370 refers to standards made applicable to out-of-state dischargers).
\textsuperscript{465} More significantly, § 1365 expressly contemplates suits by a governor of a state against
sight or for some other undisclosed reason, the Court in Milwaukee II
never mentioned these provisions, though reference to them might have
strengthened the argument in favor of displacement.

Finally, the Court was unwilling to read a provision which expressly
saves common law remedies to preserve the federal common law
recognized by Milwaukee I in view of what the Court considered persuasive
evidence previously marshalled by it establishing that in enacting the
FWPCA Congress had "addressed" and "spoken directly to the issue"
and thereby displaced federal common law. Similarly unhelpful to Illinois
was a pre-enactment colloquy among Senators Muskie, Griffin, and Hart
which, according to Justice Rehnquist, in no way suggested any intent
concerning the continued validity of federal common law.

Putting aside the strength of the case that might have been summoned
in favor of displacement, the overall analysis offered by Rehnquist falls
far short of convincingly demonstrating an express or implied intent of
Congress to confine the remedies for interstate pollution to those explicitly
referred to in his opinion. In fact, the available evidence was arguably
consistent with the existence of a congressional intent to preserve
Milwaukee I, as Justice Blackmun argued in dissent, or at least the lack
of intent either way on the issue. The existence of some mechanisms
to adjust the conflicting interests of neighboring states is suggestive of
an intent to displace, but unless the "expressio unius" maxim is given
controlling weight, their creation in 1972 by Congress is hardly
dispositive. Moreover, even aside from the decision in Milwaukee I, the

the EPA where the latter agency is failing to enforce an "effluent standard or limitation,
the violation of which is occurring in another State and is causing an adverse effect on
the public health or welfare in his State, or is causing a violation of any water quality
requirement in his State." 33 U.S.C. § 1365(h) (1976). One case has in fact suggested that
this provision pre-empted the federal common law of nuisance. See Commonwealth of
Massachusetts v. United States Veterans Admin., 541 F.2d 119, 123 (1st Cir. 1976). Interestingly
the Court in Milwaukee II at one point directs its attention to part of § 1365, 451 U.S.
at 327-29 (discussing § 1365(e)). Moreover at one point the opinion of the court of appeals
of discharge is in compliance with the requirements of the state where it is located (the
situation in Milwaukee II), this provision might not be available. Had the Court expressly
considered this provision, it would, therefore, have had to determine if a negative implica-
tion arose from this section.

499 451 U.S. at 328-29.
500 Id. at 329-32.
501 See supra text accompanying note 497.
502 See 451 U.S. at 337-47 (Blackmun, J., dissenting).
503 Justice Blackmun's dissent suggests that only if Congress had formed an intent to
foreclose the use of federal common law would Milwaukee I be superseded. See, e.g., 451
U.S. at 338. Thus, the lack of intent either way on the issue would permit continued exer-
cise of the Court's law-making powers. Compare this with the discussion of Curran, supra
text accompanying notes 364-68.
504 See supra text accompanying note 214.
505 See 451 U.S. at 345 n.19 (Blackmun, J., dissenting).
Supreme Court, in the exercise of its original jurisdiction, had on numerous prior occasions displayed a willingness to fashion federal common law when interstate disputes arose.\textsuperscript{6} Congress arguably was aware of this tradition in enacting the 1972 FWPCA Amendments which expressly preserved at least some common law remedies.\textsuperscript{507} Furthermore, the fact that the federal agency responsible for administration of this “comprehensive” regulatory scheme believed that federal common law survived the enactment of the 1972 amendments\textsuperscript{508} should have counted for more than it apparently did in the Court’s analysis.\textsuperscript{509} It certainly suggested that the existence of federal common law would not necessarily undercut administration of the statute. At one point Justice Rehnquist himself seems to suggest that Congress gave no thought to the impact of the Act on federal common law.\textsuperscript{510}

Examination of the statutory framework with a view toward discovering an intent, express or implied, to preclude reliance on judge-made rules for dealing with the problem of interstate pollution would have been consistent with the Court’s approach in the Arisona and Higginbotham cases.\textsuperscript{511} But Rehnquist’s approach is expressly not phrased in terms of a search for such congressional intent.\textsuperscript{512} Rather, the question he posed was merely whether the legislature had “addressed” and “spoken” to the type of problem before the Court. Apparently, if Congress has made any provision for treatment of the problem, a presumption arises against court supplementation of the legislative provisions.

The ease with which displacement occurs, even in the face of evidence consistent with a congressional intent to preserve the pre-existing common law, indicates that implicitly operating in the Rehnquist approach may be another clear-statement requirement. He may be saying this: at least where Congress has entered a “field” with the enactment of what the Court considers a “comprehensive” regulatory scheme dealing in some part with the issue under scrutiny, pre-existing federal common law remedies in the area covered by the new statute will be considered as extinguished unless Congress, in clear and unambiguous words, has evidenced its intent that such remedies be preserved. That those judicially created remedies appear to usefully supplement the statutory scheme will not save them. Since even the savings clause in the FWPCA\textsuperscript{513} was not

\textsuperscript{506} See, e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), and other cases cited in 451 U.S. at 335-36 (Blackmun, J., dissenting).
\textsuperscript{507} 451 U.S. at 337-38 (Blackmun, J., dissenting).
\textsuperscript{508} See 451 U.S. at 347 (Blackmun, J., dissenting).
\textsuperscript{509} The Court’s opinion never mentions the EPA’s interpretation.
\textsuperscript{510} 451 U.S. at 329 n.22.
\textsuperscript{511} This was in part Justice Blackmun’s approach. See id. at 338. See also supra note 503.
\textsuperscript{512} See also 451 U.S. at 315 (“the question [is]... not whether Congress ha[s] affirmatively proscribed the use of federal common law.”); id. at 329 n.22 (explicitly suggesting that Congress gave no thought to the impact of the Act on federal common law). But see id. at 332 n.24 (referring to congressional intent in 1972).
\textsuperscript{513} 33 U.S.C. § 1365(e) (1978).
sufficient evidence of the requisite intent to preserve, the requirement for clarity is a stringent one indeed. Absent a clear declaration of intent to preserve, the Court will, in Justice Rehnquist's words, be deemed to have "occupied the field through the establishment of a comprehensive regulatory program."\footnote{451 U.S. at 317.} Furthermore, it seems that this general approach would likewise obtain with regard to not only the displacement of pre-existing common law rules, but also, creation of at least some judge-made law following enactment of a "comprehensive" regulatory scheme.\footnote{See 451 U.S. at 319 n.14 ("Federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law.").} That is, Congress must clearly permit such judicial supplementation if it is to occur.

\section*{C. Comparison with Preemption Analysis}

Rehnquist's use of language familiar in cases involving preemption of state law by federal statutes\footnote{See 451 U.S. at 319 n.14 ("Federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law.").} was clearly not unintentional. Early in the opinion he expressly compared the Court's approach in preemption cases with that deemed appropriate in regard to the displacement of federal common law.\footnote{Barely a week before Milwaukee II was decided, the Court per Justice Stevens, in Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77 (1981), refused to create a federal common law right of contribution on behalf of an employer whose violations of the Equal Pay Act and title VII of the Civil Rights Act of 1964 were allegedly caused by a union. The Court relied in part on the "comprehensive" nature of the regulatory scheme. Id. at 97. In so holding the apparently more liberal approach of Justice Stevens, see supra text accompanying notes 349, 364-71, came to the fore: "Thus, once Congress addresses a subject, even a subject previously governed by federal common law, the justification for law-making by the federal courts is greatly diminished." Id. at 95 n.34 (emphasis added) (not eliminated!).} Various commentators have suggested the close affinity which preemption analysis bears to the question of whether an issue should be governed by federal judge-made law.\footnote{See, e.g., BATOR & MISHKIN, supra note 123, at 800-06; Monaghan, The Supreme Court 1974 Term: Foreward: Constitutional Common Law, 89 HARV. L. REV. 1, 12-13 (1975) [hereinafter cited as Monaghan].} In both, the basic inquiry is whether the relevant federal interests demand the subordination of state substantive policy.\footnote{Compare Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) ("In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.")., with D. CURRIE, FEDERAL COURTS 667 (2d ed. 1975) (under preemption doctrine, the "question ... is the familiar choice-of-law problem of accommodating conflicting governmental interests: Does the purpose of the federal law require subordination of state policy?"). See also Note, The Preemption Doctrine, supra note 41, at 654.} In recent years the Court has given increasing weight to state interests in preemption analysis.\footnote{See Note, The Preemption Doctrine, supra note 41, at 624.} As illustrated.
by the *Dublino* case, a federal statute will not be found to oust state law except when absolutely necessary, or, otherwise stated, absent a "clear expression" of Congress to that effect. In the past, federal common law, whose establishment similarly displaces state law-making competence, has frequently been created with somewhat less regard given to state interests. However, on occasion, as in *Wallis v. Pan American Petroleum Corp.*, the Court has suggested that only a "significant" conflict between state and federal policy can justify a federal court's exercise of law-making powers. In *Milwaukee II*, Justice Rehnquist explicitly relied on *Wallis.*

The clear-statement requirement may be part of an attempt to bring the approach to creation of federal common law into closer harmony with recent preemption analysis in terms of the weight attached to state interests in the balance. The Court's reticence to oust state law in each instance can be traced in large part to an increased unwillingness to disturb the traditional preference for local, not national, solutions to problems of governance, absent clear guidance from the only branch of the federal government where the interests of the states are represented.

Once Congress has "entered the field" with a "comprehensive" regulatory scheme, the Court's solicitude for state interests is at least as strong. The Court's solicitude is likely magnified, based on the assumptions: that the express intrusion on state prerogatives thus sanctioned represents all that Congress, as representative of the states, could reasonably have considered appropriate; that further incursions created by federal common law possess a peculiar likelihood of unwittingly undoing political compromises thus reached; and that, having once marked out a field for national action, Congress should assume the responsibility of facing and unambiguously sanctioning further politically sensitive displacement of state law-making competence. From this view would follow the importance of a requirement for a "clear statement" to permit the operation of federal common law.

For a commentator urging such a result, see Monaghan, supra note 518, at 13 n.69. See also Monaghan, supra note 518, at 13 n.69.


See Wechsler, supra note 47 and text accompanying notes 59-61.

*Cf.* City of Milwaukee v. Illinois, 451 U.S. at 317 n.9. It is not entirely clear when Justice Rehnquist would classify a scheme as "comprehensive" in ways relevant to the analysis suggested in the text. Obviously the manipulation of that classification based on a judge's substantive preferences would not be overly surprising. *Compare, e.g.,* supra text accompanying notes 68 & 419.

See supra text accompanying notes 50-61.
seen as sufficient to oust the New York Work Rules,\textsuperscript{531} while in \textit{Milwaukee II}, that same characteristic of the regulatory scheme at issue purportedly played a part in the displacement of the pre-existing federal common law.\textsuperscript{532}

But even if similar concerns generally animate a parallel approach to issues of preemption and the appropriate scope of federal common law, they do not necessarily dictate an equally restrictive attitude in all contexts. First, the creation of federal common law need not displace state regulation, for the judge-made rules may be fashioned to incorporate state standards.\textsuperscript{533} More importantly, in a case such as \textit{Milwaukee II}, where the real clash was between states with differing perceptions regarding the needs for pollution control,\textsuperscript{534} the issue was no longer the simple one of state versus federal interest. This, in itself, created a significant argument based on the structure of the federal union in favor of federal resolution according to an independent body of federal law,\textsuperscript{535} though it did not by itself necessarily lead to the conclusion that that body of federal law should be court-created.

\textbf{D. Rationales for Clear-Statement Requirement in Milwaukee II}

Other than the general considerations discussed above,\textsuperscript{536} were there peculiar factors at work in \textit{Milwaukee II} which led to the result in that case?

On the one hand, the Supreme Court has functioned as an umpire of the federal system in disputes between the states,\textsuperscript{537} as well as served to protect the quasi-sovereign interests of one state against interference by citizens of other states.\textsuperscript{538} It has done so based on the constitutional grant in article III of original jurisdiction\textsuperscript{539} and its statutory counterpart.\textsuperscript{540} In the process it has formulated federal common law.\textsuperscript{541} Moreover, as the Court in \textit{Milwaukee I} indicated, where federal common law provides the basis of an action, section 1331 assures an alternative federal forum in the federal district courts for resolution of claims by one state against the citizens of another.\textsuperscript{542} All this assures a neutral tribunal which can

\begin{thebibliography}{9}
\bibitem{footnote} See 413 U.S. at 414-15.
\bibitem{footnote} See 451 U.S. at 317-19 & 319 n.14.
\bibitem{footnote} See supra text accompanying notes 492-94.
\bibitem{footnote} See Monaghan, supra note 518, at 14.
\bibitem{footnote} See supra text accompanying notes 526-32.
\bibitem{footnote} See, e.g., Kansas v. Colorado, 206 U.S. 46 (1907) (apportioning waters of interstate stream).
\bibitem{footnote} See, e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (air pollution).
\bibitem{footnote} U.S. Const. art. III, § 2, cl. 2.
\bibitem{footnote} See City of Milwaukee v. Illinois, 451 U.S. at 335-36 (Blackmun, J., dissenting) (citing cases).
\bibitem{footnote} 406 U.S. 91 (1972). Where there is a dispute between political subdivisions of a state the diversity grant may be available. Id. at 97-98. In disputes between states per se, however, the Supreme Court's jurisdiction is original and exclusive. See 28 U.S.C. § 1251(a) (1976).
\end{thebibliography}
flexibly adapt its remedies to the types of cases brought before it, without being bound to apply the law of one of the contestants.

At the same time, Congress is constituted in such a way that the states' interests are directly represented. Determination of the extent to which the social and economic costs of attaining or maintaining environmental quality standards higher than the federally required minimum should be imposed on jurisdictions other than the receptor states requires delicate, politically sensitive policy choices which might more appropriately be made by the electorally responsible branch of the national government which is directly reflective of state interests. At least Congress can establish the general framework of criteria for making decisions in this area even if it delegates their implementation to an administrative agency. That agency can assure that not only the required technical competence, but also continuous oversight and uniform treatment, to the extent desirable, is brought to the solution of a problem that may not be an isolated one.

Adequately tackling interstate pollution on a case-by-case basis may in fact be a task which appears beyond "judicial expertness" and thus one which Congress should permit the courts to engage in, if at all, only after a sober second thought.

On one occasion prior to Milwaukee I, similar considerations caused the Supreme Court to refuse to exercise its original jurisdiction to hear an interstate pollution dispute. There are indications in Rehnquist's Milwaukee II opinion that a similar view may have in part motivated the clear-statement approach as applied there. At the outset of his analysis he emphasized the electoral responsibility of Congress as contrasted with the courts. Later in the opinion he noted the "vague and indeterminate" nature of nuisance concepts, as well as the technical difficulty of the subject matter area and the unsuitability of "sporadic" and "ad hoc" approaches to the problem of water pollution. The opinion may have reflected not merely a concern over displacement of state law by federal judge-made law, but also, the feeling that in adjusting conflicting state interests in this area, the federal courts had nothing to offer to make a bad situation better.

---

543 See Wechsler, supra note 47.
545 Cf. Wellington & Albert, supra note 52, at 1561.
547 See also Comment, Federal Common Law and Interstate Pollution, 85 HARV. L. REV. 1439 (1972).
548 451 U.S. at 313.
549 Id. at 317.
550 Id. at 325 (quoting S. REP. NO. 92-414, 92d Cong., 1st Sess. 95 (1971).
It is, of course, possible that the 1972 amendments to the FWPCA represented a compromise whereby some states accepted the federally imposed minimum on the condition that the remedies for interstate pollution which might be used to require higher levels of pollution control be limited.\footnote{Cf. Leybold, Federal Common Law: Judicially Established Effluent Standards as a Remedy in Federal Nuisance Actions, 7 ENVIRON. AFF. 293, 310-11 (1978).} A desire to avoid upsetting such a political compromise could have played a role in Milwaukee II. Even if this was not the case, the political difficulties involved in adjusting the divergent interests of the various states with regard to transboundary pollution are a likely explanation for the failure of Congress to confront this problem in a comprehensive fashion.\footnote{Cf. Luneburg, supra note 544.} Therefore, even if Congress had, in 1972, clearly made known its desire that the federal courts continue to fashion a federal common law of interstate pollution control, Justice Rehnquist’s approach in the delegation and implied rights area\footnote{See supra text accompanying notes 400-24.} suggests that perhaps he would not be willing to take the legislature off the hook.\footnote{In fact, it is not at all clear where Justice Rehnquist would draw the line between those decisions regarding available remedies which can be expressly delegated by Congress to the courts and those which are so fundamental (as in the implied right area) that only Congress can make them. See supra text accompanying notes 418-19.} Besides concern over the suitability of the federal courts as policy makers in this complex area, an additional rationale may underlie Justice Rehnquist’s presumption in favor of displacement of judge-made law in Milwaukee II. Unlike much federal common law,\footnote{See, e.g., Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957).} the federal common law of interstate pollution itself gave rise to subject matter jurisdiction in the federal courts under the general federal question grant.\footnote{See Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (federal common law is “law” of the United States within the meaning of 28 U.S.C. § 1331).} The extinguishment of that body of substantive law could have been designed, in part, to reduce the docket congestion in the federal courts and any resulting distortion of congressionally established docket priorities.\footnote{Cf. Note, Federal Common Law Under Federal Statutes, Supreme Court, 1980 Term, 96 HARV. L. REV. 290, 299 (1981).} Regardless of the number of suits like Milwaukee II likely to arise, the demands on a court’s time created by the formidable nature of the fact-finding process involved in cases of that nature\footnote{401 U.S. at 503-05.} had been remarked upon ten years earlier by Justice Harlan in Ohio v. Wyandotte Chemicals Corp.\footnote{In Milwaukee II, the trial alone lasted six months. See 451 U.S. at 333 (Blackmun, J., dissenting).} Absent section 1331 as a basis for jurisdiction, the only alternative federal forum for a suit by a state against the political subdivision of another state (or another citizen thereof) would in most instances be the Supreme
Court in the exercise of its original jurisdiction. But the Court has viewed that jurisdiction as discretionary, at least where there is an alternative forum, which apparently can include the state courts.

The ultimate result of Milwaukee II may be, therefore, to force states in Illinois' position into their own courts or the courts of the states where the polluting sources are located, in which case, any available remedy will depend on state law. Justice Rehnquist does not suggest that state nuisance law in the interstate context has been preempted by the FWPCA and, in fact, at one point he seems to imply that in the absence of federal common law, state law can function in this area. This would also seem to follow from the presumption against preemption of state law which he so much emphasizes.

But even if state nuisance law is theoretically available in the case of interstate pollution, the remedy may be of little practical use. A suit by Illinois in the courts of Wisconsin to limit the discharges from a Wisconsin source largely for the benefit of Illinois citizens is not likely to be well received. Moreover, even though Milwaukee II suggests that, consistent with federal constitutional limitations, Illinois courts could exercise territorial jurisdiction over the Wisconsin defendants, it is not clear that the courts of Illinois would be willing to enter an equitable decree against an out-of-state defendant.

---

559 See 28 U.S.C. § 1251(b)(3) (Supp. IV 1980). This is the case except where § 1365 of the FWPCA provides the basis for a suit. See supra note 497. Justice Rehnquist failed to expressly consider in the opinion the possibility of a § 1365 suit, see supra text accompanying note 497, suggesting perhaps his lack of awareness of that option.


561 See 451 U.S. at 353-54 (Blackmun, J., dissenting).

562 See 451 U.S. at 313 n.7 ("If state law can be applied, there is no need for federal common law; if federal common law exists it is because state law cannot be used."). See also, e.g., 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution."); id. § 1370 (preservation of state authority). But see 451 U.S. at 328 (referring, in passing, to more stringent state nuisance law under § 1370 as being applicable to in-state discharges.).

563 At no point does the FWPCA expressly preempt the use of state law in this context. Justice Blackmun in his dissent seems to interpret the majority opinion as not suggesting preemption. 451 U.S. at 353-54.

564 Of course, if Rehnquist would in addition find preemption of state law in this context, the states must await congressional action on the issue.

565 See Ohio v. Wyandotte Chemicals Corp., 401 U.S. at 500-01. Accord, e.g., R. Leflar, AMERICAN CONFLICTS LAW § 46 (3d ed. 1977). The availability of damage remedies would be a different matter, though in many cases the receptor state might not consider that fully effective in preventing future harmful discharges or providing full compensation.

An interesting question is whether the refusal or likelihood of refusal by state courts to enter requested relief would cause the Supreme Court to assume original jurisdiction, see Ohio v. Wyandotte Chemicals Corp., 401 U.S. at 500-01, and if it did, whether it would apply state or federal law. The case just cited seemed to assume either that state law
To the extent that state adjudication proves of little practical assistance in these cases, Congress will be the only forum in which effective action can be taken. Absent a response from that body, *Milwaukee II* may mean, therefore, that the problem of interstate pollution goes without an effective solution, a distressing result to those concerned with environmental protection. However, for those, like Justice Rehnquist, apparently imbued with a philosophy of *laissez-faire*, the result may not be altogether displeasing. Whether this was the intended upshot of the decision is difficult to tell.

**CONCLUSION**

If Justice O'Connor's remarks at her Senate confirmation hearings regarding the proper role of the judiciary were intended to reassure her interrogators and their constituents that she will not knowingly disregard ascertainable legislative intent and in that manner "make law," the response must be that the constitutional separation of powers demands no less, unless perhaps in some instances she wishes to recall the Congress to its constitutional policy-making duties by means of clear-statement requirements. Hopefully Justice Rehnquist would concur. If her remarks were intended to suggest that she sees no room for judicial creativity in statutory interpretation, Justice Rehnquist may be forced to dissent.

If Justice O'Connor sees a small role for the federal courts in supplementing congressional enactments with federal common law, Justice Rehnquist will no doubt welcome her concurrences in his opinions dealing with such matters and happily concur in hers. Hopefully, however, their views in that regard will not be motivated by their hostility to particular congressional programs. If they are, both Justices will be making law in a matter which is fundamentally at odds with the separation of powers principles to which they pay such obeisance.

would apply, id. at 498 n.3, 504, or that the state and federal common law of nuisance were the same. Id. at 500. Yet by Justice Rehnquist's analysis the federal common law of interstate pollution has been displaced and this is arguably the case regardless of the jurisdictional base relied upon. Query also what law would apply if Illinois sued Wisconsin in the Supreme Court where subject matter jurisdiction in such a case is exclusive. See 28 U.S.C. § 1251(a).

It should also be noted that Justice Rehnquist has read § 1251(a) to apply only in the most compelling cases. See *Maryland v. Louisiana*, 451 U.S. 725, 760-61 (Rehnquist, J., dissenting). This opinion also suggests that he would determine the existence of an alternative forum by a strict standard. Id. at 769-70.

See supra text accompanying note 415.

Compare this result to his approach in *Aldinger*. See supra text accompanying notes 279-90.