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Environmental Restoration Orders

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I. INTRODUCTION

The public, the courts, and the legislatures have all recognized that the integrity of our environment is a matter of public interest. The comprehensive environmental protection scheme which has been created to protect that public interest impinges upon many areas of private conduct. Since the enactment of state and federal environmental protection laws, courts have faced the problem of providing a form of relief in individual environmental enforcement suits that is an appropriate protection of the public interest but which at the same time is not disproportionate to the actual conduct of particular defendants.

One of the dilemmas of environmental enforcement is that a "punishment" does not seem to "fit the crime" unless it rationally responds both to private conduct and to the actual effect which that conduct has had on natural resources. Perhaps this is one of the reasons why large fines and criminal penalties have met with only limited acceptance and success.[1] While both seem reasonable mechanisms of deterrence, such penalties actually do little or nothing to rectify ecological damage.

Since the first days of serious concern for the environment, new uses of traditional legal devices have developed to respond to environmental problems. In an effort to address this enforcement dilemma, courts have begun to use the little-known equitable

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[1] *See* Reed, *EPA Noncompliance Penalty Regulations Upheld, But Will They Be Applied?* 13 ENVTL. L. REP. (ENVTL. L. INST.) 10104 (1983) (comment on Duquesne Light Co. v. EPA, 698 F.2d 456 (5th Cir. 1983) which upheld regulations implementing a 1977 amendment to the Clean Air Act, which provides for civil penalties calculated to eliminate the economic advantage of delaying compliance with that law. *See* 42 U.S.C. § 7420 (1982).

remedy of the restoration order.[2] Equity will require restoration in order to end the operation of a wrong, or in order to prevent the continuance of a violation.[3] As the term "restore" itself implies, this form of injunctive relief responds not only to an individual defendant's misconduct, but also to the consequences of that misconduct. A restoration order places the burden on the wrongdoer to take those affirmative steps that will, to the extent feasible, undo the effects of his wrongful actions.[4]

A court order that requires a defendant to remove soil contaminated with toxic chemicals or to restore wetland acreage exemplifies the general conception of judicial equitable power as "the instrument for nice adjustment and reconciliation between the public interest and private needs. . . ."[5] A restoration order actually remedies the ecological damage resulting from a violation of environmental law. An injunction to restore is not only "punishment" that "fits the crime" but also a way of repairing the environment and deterring future violations.

Injunctions to restore are relatively rare in common law cases. Nevertheless, this form of equitable relief was used in common law trespass and nuisance.[6] These tort actions developed to protect interests in land and were the precursors of modern environmental law.[7] A restoration order's ability to remedy a trespass or nuisance by requiring the defendant to fix a condition that wreaks continuing harm to land makes it an equally apt form of relief in cases brought under environmental laws.

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[2] An injunction to restore is a type of mandatory injunction. Injunctions are judicial orders that can be either prohibitory or mandatory in form. A prohibitory injunction *forbids* a person from taking certain actions, while a mandatory injunction *commands* a person to take certain actions. Strictly speaking, an injunction granted as a final remedy is called a decree or permanent injunction. An injunction issued as preliminary or interlocutory relief is a preliminary injunction, order, or writ. The terminology used by courts varies. In older nuisance cases, "abatement" is used as a general term for injunctive relief. *See* 4 POMEROY, EQUITY JURISPRUDENCE § 1337 at 933-34, § 1359 at 970 (5th ed. 1941); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1055-61 (1965) [hereinafter cited as *Injunctions*].

This article uses the terms "restoration order," "injunction to restore," and "restoration decree" interchangeably to refer to a final remedy.

[3] 4 POMEROY, *supra* note 2, § 1337 at 933-34, § 1359 at 970-72.

[4] *See* Wheelock v. Noonan, 108 N.Y. 179, 15 N.E. 67 (1888). *See infra* text and notes at notes 47-52.

[5] Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). *See generally Injunctions*, *supra* note 2, at 1063-64.

[6] *See infra* text and notes at notes 35-60.

[7] *See* ROGERS, HANDBOOK OF ENVIRONMENTAL LAW § 2.6 (1977); United States v. Solvents Recovery Serv., 496 F. Supp. 1127, 1147 (D. Conn. 1980).

Courts have also recognized restoration orders as an appropriate way to enforce state health and zoning laws in public nuisance actions.[8] The remedy's ability to protect the public interest by ordering that the policies embodied in such laws be carried out can also be used to bring private conduct into compliance with environmental norms.

With the enactment of environmental protection legislation, most current environmental litigation consists of statutory enforcement actions rather than common law nuisance cases. Nevertheless, restoration orders ought to be available under environmental statutes. The state legislatures and Congress intended to incorporate the full range of traditional equitable forms of relief in the judicial enforcement sections of environmental laws.[9] The restoration order can be a principled, sensitive remedy for violations of environmental protection laws.[10]

This article will first look at the origins of the restoration order in traditional equity doctrine and in common law trespass, nuisance, and public nuisance. Since state and federal environmental protection statutes have largely displaced common law nuisance in environmental law, the article will then turn to restoration as a remedy in cases brought under environmental statutes. State courts readily apply nuisance precedent to interpret state environmental legislation. The article will examine the types of state environmental cases in which restoration orders have been granted. The issues raised by the restoration order in federal environmental law are more complicated. The article will trace the injunction to restore in early federal environmental precedent and then argue that this particularly suitable form of relief continues to be available from federal courts in statutory enforcement suits.

II. Restoration Orders in Traditional Equity Doctrine and Common Law Actions

Restoration orders are relatively rare. In part this is due to the notion that injunctive relief, particularly mandatory injunctions, is "the strong arm of equity, that ought never to be extended unless to cases of great injury. . . ."[11] More important is the large

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[8] *See infra* text and notes at notes 61-87.

[9] *See infra* text and notes at notes 226-76.

[10] *See infra* text and notes at notes 351-66.

[11] Truly v. Wanzer, 46 U.S. (5 How.) 141, 142 (1847). *But see* 4 POMEROY, *supra* note 2, at

role judicial discretion plays in equity.[12] Traditional equity doctrine vests both the decision to grant or deny an injunction as well as the decision concerning what form an injunction will take with the court's discretion.[13] Courts reach these decisions by "balancing the equities" of each case.[14] Thus each result is closely tied to a particular fact pattern. Moreover, courts typically do not articulate why a particular form of injunction has been chosen. Indeed, equity has been criticized for being unprincipled and inconsistent because of the major role played by judicial discretion.[15]

Although restoration orders are rare, common law cases in which courts have granted this form of injunctive relief can be found.[16] The restoration order developed in common law trespass and nuisance, causes of action designed to protect land,[17] and in public nuisance, a cause of action designed to protect public health and welfare.[18] Thus, it is from its origin in common law trespass, nuisance, and public nuisance precedent that the restoration order's validity as an environmental remedy derives.

A. Traditional Equity Doctrine

The most basic principle of equity is that injunctive relief is not available unless a litigant has no adequate remedy at law.[19]

964-68. Pomeroy, whose treatise on equity was first published in 1883, commented that while courts continue to employ restrictive language about the availability of injunctive relief, "judges have been brought to see . . . that the common-law theory of not *interfering* with persons until they shall have actually committed a wrong is fundamentally erroneous, and that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it." *Id.* at 967.

[12] *E.g.*, Virginia Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 551 (1937). *See generally* Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 533-45 (1982); Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 ENVTL. L. 477 (1979).

[13] *See generally* McClintock, *Discretion to Deny Injunctions Against Trespass and Nuisance*, 12 MINN. L. REV. 565 (1928); *Injunctions*, *supra* note 2, at 1063-69; Plater, *supra* note 12, at 533-45.

[14] *E.g.*, Georgia v. Tennessee Copper Co., 237 U.S. 474, 476-78 (1915). *See also* Plater, *supra* note 12, at 535-46; Winner, *supra* note 12, at 484-510.

[15] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1974) (judicial discretion should entail principled application of standards, not equity which varies like the Chancellor's foot); *see* Winner, *supra* note 12, at 482 n.19.

[16] *See infra* text and notes at notes 35-87.

[17] 4 POMEROY, *supra* note 2, § 1350 at 955 (nuisance), § 1357 at 964 (trespass). *See infra* text and notes at notes 35-60.

[18] *See, e.g.*, Littleton v. Fritz, 65 Iowa 488, 22 N.W. 641 (1885); *see infra* text and notes at notes 61-87.

[19] 4 POMEROY, *supra* note 2, § 1338 at 936.

Monetary damages is the form of relief available at law.[20] Although the basis for this rule is largely historical,[21] the preference for legal remedies derives from a policy concern that equity's ability to affect conduct directly be used sparingly.[22] Injunctive relief is considered extraordinary because it operates directly upon a defendant's future conduct, whereas legal relief is less obtrusive. Monetary damages merely equalize the consequences of a defendant's misconduct by compensating his victim.[23]

A competing common law principle makes damages an inadequate remedy in many cases involving harm to land. Land is unique,[24] and "[a] particular piece of real estate cannot be replaced by any sum of money, however large. . . ."[25] The subjective value of a parcel of land to its owner is frequently incalculable, and this makes it impossible to fix compensatory damages.[26] Often it is impossible to determine the full extent of a continuing or recurring harm in a single lawsuit; an injunction will be appropriate in order to prevent a multiplicity of suits.[27] Thus injunctive relief was often granted in common law cases involving harm to land.[28]

An injunction is a judicial order that commands the person to whom it is directed to do or to refrain from doing a particular thing.[29] Injunctions can be prohibitory or mandatory in form. A

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[20] *See Injunctions*, *supra* note 2, at 997-98, 1001-04.

[21] Equity originated as an independent system of courts and arose to supplement common law during a period when that system was rigidly codified. Equitable remedies were available only if a given factual situation did not fit the requirements of a legal cause of action. *See generally* Winner, *supra* note 12, at 477.

[22] 4 POMEROY, *supra* note 2, § 1338 at 935-36.

[23] *See* Boomer v. Atlantic City Cement Co., 26 N.Y.2d 219, 257 N.E.2d 370, 309 N.Y.S.2d 312 (1970). *See also* Plater, *supra* note 12, at 540, where this proposition is framed as a question: "Will the court establish a rule for future conduct that prevents further tort injuries to the plaintiffs or relegate them to sequential damage actions?"

[24] Dickinson v. McKenzie, 197 Ark. 746, 752, 126 S.W. 95, 98 (1939).

[25] Lynch v. Union Inst. for Sav., 159 Mass. 306, 308, 34 N.E. 364, 365 (1893).

[26] *Injunctions*, *supra* note 2, at 1003.

[27] *See id.* at 1001.

[28] *See* Walsh, *Equitable Relief Against Trespass*, 7 N.Y.U. L. Q. REV. 56 (1929); Walsh, *Equitable Relief Against Nuisance*, 7 N.Y.U. L. Q. REV. 352 (1929); Van Hecke, *Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 TEX. L. REV. 521 (1954).

[29] Gainsburg v. Dodge, 193 Ark. 473, 479, 101 S.W.2d 178, 180 (1937). In his treatise, Pomeroy traces the term "injunction" to the "interdict" of Roman law. An interdict was the command which initiated a Roman legal proceeding. The most common general formula for this command was "*vim fieri veto, exhibiteas, restituas*," which translates to "I forbid you to use violence, you must produce, you must restore." 4 POMEROY, *supra* note 2, § 1337 at 933 n.1.

prohibitory injunction forbids someone from doing specified acts, while a mandatory injunction makes affirmative commands, directing the persons named to take certain actions.[30] While the prohibitory/mandatory dichotomy is mainly semantic,[31] judicial reluctance to grant a mandatory injunction derives from the fact that any injunction affecting on-going conduct is more burdensome than an injunction that merely restrains conduct that has yet to commence.[32] Nevertheless, this reluctance was often overcome by the need to protect land in trespass or nuisance cases, or to protect the public interest in public nuisance cases.[33] According to general precepts of equity jurisprudence, then, mandatory injunctions to restore are an appropriate way to end a continuing harm or wrong.[34]

B. Restoration Orders in Trespass and Nuisance Precedent

Trespass and nuisance are common law tort actions that protect interests in land.[35] Trespass is defined as entry upon land without the owner's consent.[36] Thus trespass focuses on the defendant's conduct.[37] A nuisance action, on the other hand, is less concerned with the defendant's actions than with the results of his actions. Nuisance is defined as unreasonable interference with a landowner's use and enjoyment of his property; actual physical invasion of land is not a necessary element of nuisance.[38]

From the point of view of the landowner, trespass and nuisance protect distinct property interests. In a trespass action the landowner seeks to protect his exclusive possession of land, while in nuisance he seeks to preserve those qualities of his property that he values and uses. Of course, many conditions interfere with both of these interests. Flooding or covering the plaintiff's land with stones involves both a trespass as well as a deprivation of use and enjoyment.[39]

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[30] *See Injunctions*, *supra* note 2, at 1061-63.

[31] *Id.*

[32] *Id.*

[33] *See infra* text and notes at notes 35-94.

[34] *See* 4 POMEROY, *supra* note 2, § 1337 at 933, § 1350 at 955, § 1351 at 957, § 1357 at 964.

[35] PROSSER & KEETON, THE LAW OF TORTS, § 13 (trespass to land), § 87 (nuisance) (5th ed., 1984).

[36] *Id.* § 13 at 67, 70.

[37] *Id.* § 87 at 619.

[38] *See id.* § 87 at 619-26.

[39] *See id.* at 69-72; 624.

Restoration orders have been granted in trespass and nuisance cases where the fact pattern shows compelling harm to the usefulness of land.[40] Generalizations about the factors governing the issuance of mandatory injunctions to restore are difficult because formulating appropriate injunctive relief is a matter for the court's discretion.[41] Early court opinions in which injunctions to restore were granted do not carefully set forth the factors leading to the issuance of this form of injunction.[42]

However, the cases do demonstrate that intentional wrongdoing, bad faith, or even negligence on the part of a defendant are not prerequisites for a mandatory injunction to restore.[43] Once the court has held that a trespass or nuisance exists, and that injunctive relief is appropriate, the court will shift the focus of its inquiry away from the defendant's conduct. Formulating the appropriate injunctive relief entails a separate 'balancing of the equities.'[44] To determine what form of injunction to issue, courts focus on the actual condition of the property.[45] Courts often view different forms of injunctive relief simply as alternative ways of implementing a decision on the merits. If equity can enjoin conduct that causes flooding on a plaintiff's orchard, for example, it can also order "the removal of the means" which bring about the flooding.[46]

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[40] *See* Learned v. Castle, 78 Cal. 454, 21 P. 11 (1889); Allen v. Stowell, 145 Cal. 666, 79 P. 371 (1905); Shreck v. Coeur D'Alene, 12 Idaho 708, 87 P. 1001 (1906); Denver & Rio Grande W. Ry. Co. v. Himonas, 190 F.2d 1012 (10th Cir. 1951); McCauseland v. Jarrell, 136 W.Va. 569, 68 S.E.2d 729 (1952); Stuart v. Lake Washington Realty, 141 W.Va. 627, 92 S.E.2d 891 (1956); Wilson Concrete Co. v. Sarpy, 189 Neb. 312, 202 N.W.2d 597 (1972); Franzen v. Dubinok, 45 Md. App. 728, 415 A.2d 621 (Md. Ct. Spec. App. 1980).

[41] Webb v. Town of Rye, 108 N.H. 147, 153, 230 A.2d 223, 228 (1967) ("[O]nce a right to equitable relief has been established, the powers of the Trial Court are broad and the means flexible to shape and adjust the precise relief to the requirements of the particular situation.")

[42] *E.g.*, Learned v. Castle, 78 Cal. 454, 21 P.11 (1889).

[43] *Id.*; *see also* Shreck v. Coeur D'Alene, 12 Idaho 708, 87 P. 1001 (1906) (defendant's attempts to mitigate conditions did not bar injunction against municipal dump).

[44] *See* Crushed Stone Co. v. Moore, 369 P.2d 811 (Okla. 1962); Riter v. Keokuk Electro-Metals, 248 Iowa 710, 82 N.W.2d 151 (1957); Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107 (7th Cir. 1976). *See also, generally*, Plater, *supra* note 12, at 544-51:

> Analytically, [this] remedy decision involves a weighing of the comparative efficacy of available remedies rather than a comparative weighing of interests. Since the tailoring of remedies involves choices between options, shaped by the court's judgment about the practicalities and relative effectiveness of those options, it does no violence to the term "balance of equities" to include this latter balance within it.

[45] *See, e.g.*, Wilson Concrete Co. v. Sarpy, 189 Neb. 312, 202 N.W.2d 597 (1972); Desberger v. University Heights, 126 Miss. App. 206, 102 S.W. 1060 (1907).

[46] Allen v. Stowell, 145 Cal. 666, 669, 79 P. 371, 372 (1905).

A restoration order also places the burden of rectifying harm on the wrongdoer. *Wheelock v. Noonan*,[47] an 1888 New York case, provides an example. The plaintiff had informally given the defendant permission to place a few stones upon his vacant lot temporarily, while the defendant completed some construction on his own land. When the plaintiff discovered that the defendant had blanketed six of his lots with boulders to a height of fifteen feet, he brought suit for equitable relief requiring the defendant to remove the stones.[48] The defendant asserted that the plaintiff's proper remedy was at law. The defendant argued that an injunction was not justified because the plaintiff could remove the rocks himself and then recover his costs as damages.[49]

The court rejected the defendant's legalistic distinctions between forms of relief on the grounds that such a doctrinaire approach would lead to an unfair and impracticable result.[50] Under the defendant's approach the plaintiff would be required to find and rent another vacant lot and advance the costs of men and machines to move the stones. The court rejected this scenario,[51] adding, "If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance of the trespasser what the latter is bound to do, I should very much doubt its authority."[52]

Restoration orders are common in another type of trespass action. Where the defendant has constructed a fence, wall, road, or building that extends beyond the boundary of his lot and onto the plaintiff's property, this continuing trespass is termed an "encroachment."[53] Courts frequently require the defendant to remove an encroaching structure and restore the rightful boundary, even where the defendant did not intend to appropriate the plaintiff's land and was simply mistaken about the location of the line.[54] This use of restoration orders is based on the uniqueness of

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[47] 108 N.Y. 179, 15 N.E. 67 (1888).

[48] *Id.* at 183, 15 N.E. at 68.

[49] *Id.* at 184-85, 15 N.E. at 68-69.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] Creely v. Bay State Brick Co., 103 Mass 514 (1870); Baron v. Korn, 127 N.Y. 225, 27 N.E. 804 (1891); Pile v. Pedrick, 167 Pa. 296, 31 A. 646 (1895); Long v. Ragan, 94 Md. 462, 51 A. 181 (1902); Hirschberg v. Flusser, 87 N.J. Eq. 588, 101 A. 191 (1917); Pradelt v. Lewis, 297 Ill. 347, 130 N.E. 785 (1921); Ottavia v. Savarese, 338 Mass. 330, 155 N.E.2d 432 (1959).

[54] *E.g.*, Creely v. Bay State Brick Co., 103 Mass. 514 (1870).

land; courts use this form of equitable relief because it is best able to preserve the integrity of the plaintiff's parcel of real estate.[55]

Courts view relief against an encroachment as incomplete unless it restores the plaintiff to full possession.[56] Anything less is often viewed as tantamount to allowing the defendant, a private party, to exercise the power of eminent domain by forcing the plaintiff to accept compensatory damages in place of a portion of his land.[57] If not removed, the encroachment can ripen into a legal right to continue to use the plaintiff's land.[58] An order requiring the defendant to actually remove the trespassing structure and restore the victim's property to its "former and usual condition"[59] fully resolves the dispute in a single action. The restoration order is practicable because requiring the defendant to undertake the necessary modifications himself avoids risking injury to other portions of his building and does not inconvenience the plaintiff.[60]

C. Restoration Orders in Public Nuisance

Unlike trespass and nuisance, the tort of public nuisance is not founded upon private property interests. The public nuisance action developed to protect essentially public rights. As defined in a Kentucky case, "A common or public nuisance is the doing of or the failure to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public."[61] Restoration decrees against public nuisances are virtually as old as the cause of action itself. For example, a writ[62] dating from 1532 ordered the Mayor of Oxford, England to clean the public streets and keep them clear of offal dangerous to the public health.[63]

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[55] *See, e.g.*, Lynch v. Union Inst. for Sav., 159 Mass. 306, 34 N.E. 364 (1893).

[56] *See, e.g.*, Herr v. Bierbower, 40 Md. (3 Johnson Chancery) 456 (1851).

[57] Geragosian v. Union Realty Co., 289 Mass. 104, 109, 193 N.E. 726, 728, 96 A.L.R. 1282, 1286 (1935).

[58] *Id.*

[59] Creely v. Bay State Brick Co., 103 Mass. 514, 516 (1870). *Accord* Gulick v. Hamilton, 287 Ill. 367, 122 N.E. 537 (1919).

[60] *E.g.*, Weis v. Cox, 205 Ind. 43, 185 N.E. 631 (1933).

[61] State v. So. Covington and Cincinnati St. Ry. Co., 181 Ky. 459, 463, 205 S.W. 581, 583 (1918). *See generally* Bryson & Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241 (1972).

[62] "Writ" is another term for injunction. *See supra* note 2.

[63] FITZ-HERBERT, NEW NATURA BREVIUM 185D, *reprinted in* RE, CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES § 4 at 856 (5th ed. 1975).

More recent public nuisance cases typically involve a violation of a public health law or zoning code.[64] Frequently such laws explicitly declare violations public nuisances.[65] Mandatory injunctions, including restoration orders, have been viewed as appropriate ways of implementing the public policy embodied in such regulatory statutes.[66]

As in trespass and nuisance, deliberate wrongdoing or bad faith on the part of the defendant are not absolute prerequisites for a restoration order in public nuisance.[67] The character of the defendant's conduct is more relevant to the determination of whether he is liable for a public nuisance. The type of injunction to grant, once liability has been established, is a separate issue determined by a separate 'balancing of the equities.'[68] A mandatory injunction to restore may be the most practicable way to protect the public interest.[69] Mandatory injunctions to restore are not confined to public nuisance actions brought on behalf of the government, but are also appropriate in suits brought by individuals.[70]

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[64] *E.g.*, Board of Health of Lyndhurst v. United Cork Co., 116 N.J. Eq. 4, 172 A. 347 (1934); Goldsmith & Powell v. Texas, 159 S.W.2d 534 (1942).

[65] *E.g.*, 35 PA. CONS. STAT. ANN. § 750.14 (Purdon 1977), which reads "A violation of [the Pennsylvania Sewage Facilities Act] shall constitute a nuisance and shall be abatable in the manner provided by law." *See generally* Bryson & Macbeth, *supra* note 61, at 246-47.

[66] Village of Pine City v. Munch, 42 Minn. 342, 44 N.W. 197 (1890) (municipality may obtain that injunctive relief which may be necessary to abate public nuisance of flooding); Pennsylvania *ex rel.* Chidsey v. Black, 363 Pa. 231, 69 A.2d 376 (1949) (state not limited to one remedy but may obtain injunction ordering removal of mine waste causing contamination of streams); Cohen v. Rosedale Realty Co., 120 Misc. 416, 199 N.Y.S. 4, *aff'd* 206 A.D. 681, 199 N.Y.S. 916 (1923) (dictum) (injunction available even if writ of mandamus compelling the taking down of a building erected in violation of zoning could also be issued) ; Town of Grundy v. Marion, 231 Iowa 425, 1 N.W.2d 677 (1942) (injunction requiring junkyard owner to remove junk from yard whose location violated zoning).

Public nuisance cases involving harm to land are relatively uncommon. Most of the authority supporting injunctive relief against statutory nuisances consists of cases enforcing laws against gambling, prostitution, or the manufacture and sale of liquor; these public nuisance cases have no factual similarity with environmental cases. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 672-73 (1887).

[67] Mills County v. Hammack, 200 Iowa 251, 202 N.W. 521 (1925) (injunction to abate obstruction of a river by removing a dam).

[68] Costas v. City of Fond Du Lac, 24 Wis. 2d 409, 129 N.W.2d 217 (1964) (form of injunction depends upon the needs of the case). *See generally* Note, *Environmental Law—The Nuances of Nuisance in a Private Action to Control Air Pollution*, 80 W. VA. L. REV. 48, at 72-80 (1977).

[69] *See* Pennsylvania *ex rel.* Chidsey v. Black, 363 Pa. 231, 69 A.2d 376 (1949); Clearview Land Development Co. v. Commonwealth, 15 Pa Commw. 303, 327 A.2d 202 (1974).

[70] *See* Weinstein v. Lake Pearl Park, Inc., 347 Mass. 73, 196 N.E.2d 638 (1964) (injunction requiring defendant to move drainage culvert back to original location and remove

Welton v. Forty East Oak Street Building Corp.[71] was a public nuisance action in which a mandatory injunction was issued to remedy a zoning violation. The defendant's building violated a 1934 Chicago zoning requirement that tall buildings be set back from the perimeter of the lot in order to preserve urban light and air.[72] The defendant's application for a variance from this rule had encountered strong opposition from neighboring property owners, but the building corporation went ahead with construction without obtaining the variance. The project was actually completed during the zoning litigation.[73] The plaintiffs, the owners of neighboring buildings, then filed a public nuisance action.[74] The plaintiffs contended that the building did not comply with the set-back ordinance, deprived their property of access to light and air, and thus constituted a public nuisance.[75] Ruling that the plaintiffs had standing to bring the suit, the court found the building corporation liable for creating a public nuisance.[76] The court issued a mandatory injunction requiring the completed building modified to comply with the set-back ordinance.[77]

The *Welton* court engaged in two distinct processes of balancing the equities. When ruling on whether the defendant was liable for a public nuisance, the court gave great weight to the corporation's bad faith.[78] The court was unwilling to balance the financial equities as framed by the defendant. The defendant argued that the cost involved in modifying the finished building would be greatly disproportionate to the slight diminution of the value of the plaintiffs' property.[79] The court refused to accept this argument, asserting that this approach would effectively allow the defendant to escape full liability by completing construction in bad faith.[80]

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fill material placed in a state-protected great pond appropriate if private plaintiff establishes special damages). In order to have standing to bring an action against a public nuisance, an individual citizen must show that he has sustained "special damages" distinct from the harm caused to the public at large. *See generally* Bryson & Macbeth, *supra* note 61, at 250-58.

[71] 70 F.2d 377 (7th Cir. 1934).

[72] *Id.* at 378.

[73] *Id.* at 379.

[74] *Id.* at 377-78.

[75] *Id.*

[76] *Id.* at 381.

[77] *Id.* at 383.

[78] *See id.* at 379.

[79] *Id.* at 381.

[80] *Id.* at 382.

When discussing its decision to grant a restoration order, however, the *Welton* court shifted its attention from the defendant's conduct to the necessity of enforcing public policy.[81] Reasoning that zoning regulations must be preventative in order to be effective, the *Welton* court identified the overwhelming factor in its decision to issue the mandatory injunction as "that immeasurable but nevertheless vital element of respect for, and compliance with, the health ordinance of the city."[82] The court ordered the building modified to restore the plaintiffs' access to light and air as guaranteed under the zoning code.[83]

While bad faith on the part of the defendant is often present in public nuisance cases in which mandatory injunctions are issued,[84] a restoration order may also be simply the most effective solution for an existing violation. *Heinl v. Pecher*,[85] a Pennsylvania case, involved a solid waste incinerator plant built in a residential area in violation of local zoning. In this case, the court asserted that ordering the incinerator plant removed, in order to restore the residential character of the locale, was no more drastic than permanently enjoining the plant's operation.[86] "[T]here is no injustice in ordering its removal, for it was not built as a landscape ornament; it was built for use. It would be idle for equity to stay its hand until the plant was operated."[87] Restoration orders and prohibitory orders are simply alternative forms of injunctive relief.

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[81] *See id.* at 381, 383.

[82] *Id.* at 383.

[83] *Id. But see Injunctions, supra* note 2, at 1005, noting that the alterations were never made. The author of that note characterizes *Welton* as an example of how an injunction can enable a plaintiff to "extort a money settlement disproportionate to the harm." *Id.* The cost of modifying the twenty story building was set at $343,837.00, and the case was decided in 1934, during the Depression. "The plaintiff apparently sold his right to enforcement for more than he could have obtained in compensatory damages." *Id.*

However, a careful reading of the case indicates that this analysis is inaccurate. The *Welton* opinion as a whole is aimed at resisting the argument that the only values involved in the controversy were private, financial ones, and that all the 'equities' were reducible to monetary terms. A close reading of the opinion indicates that the court was concerned with protecting the residential use of the small landowners from forced sale to the building corporation, and with giving effect to the zoning code. *See Welton* at 381, 389.

[84] *E.g.*, Morgan v. Veach, 59 Cal.App.2d 682, 139 P.2d 976 (1943); McCarie v. DeLucca, 233 Minn. 372, 46 N.W.2d 873 (1951); Higgins v. Builders Fin., 20 N.C. App. 1, 200 S.E.2d 397 (1974).

[85] 330 Pa. 232, 198 A. 797 (1938).

[86] *Id.* at 236, 198 A. at 799.

[87] *Id.* at 237, 198 A. at 799. *See also* Seekonk v. Anthony, 339 Mass. 49, 157 N.E.2d 651 (1959) (when offending building cannot be put to any lawful use, court may order it removed).

Trespass and nuisance are designed to protect land; nuisance, in particular, seeks to protect those qualities of land that are valuable and useful to the owner. The public nuisance action arose as a way of promoting public safety, health, and welfare. The restoration order originated in these common law causes of action. Similar concerns—the need to protect land and natural resources of all types, and to protect the public from harmful pollutants—are the bases of environmental legislation. The rest of this article will examine the injunction to restore as an environmental enforcement tool.

III. THE RESTORATION ORDER AS AN ENVIRONMENTAL REMEDY

Before the enactment of state and federal environmental protection legislation, common law actions were the only vehicles for advancing environmental claims. Indeed, one of the reasons for enacting environmental laws was because private litigation was inadequate to protect the public interest inherent in natural resources.[88] Drawing upon the use of injunctive relief in common law nuisance,[89] Congress and the state legislatures made injunctions available in the civil enforcement sections of most environmental protection laws.[90] The statutory language typically leaves the form of enforcement injunctions to be decided on a case-by-case basis.[91] It seems reasonable to conclude that the courts' traditional equitable discretion to fashion effective, complete relief in particular factual situations has been enlisted in the environmental protection effort. The restoration order ought to be part of the judicial enforcement arsenal.

State courts readily apply common law nuisance precedent to interpret environmental protection statutes.[92] The facts of a statutory enforcement suit brought under a civil enforcement provision state a cause of action for public nuisance as well. This similarity allows state courts to carry common law principles and

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[88] *See* S. Rep. No. 414, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668.

[89] *See* S. Rep. No. 172, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5019. *See also infra* text and notes at notes 251-57.

[90] *E.g.*, 33 U.S.C. § 1319(b) (1982) (Federal Water Pollution Control Act); N.Y. ENVTL. CONSERV. LAW § 71-1931 (McKinney 1973) (New York Water Pollution Control Law).

[91] *See infra* text and notes at notes 97-127, 226-57.

[92] *See, e.g.*, State *ex rel.* Stream Pollution Control Bd. v. Town of Wolcott, __ Ind App. __, 433 N.E.2d 62 (1982). *See also infra* text and notes at notes 97-127.

forms of relief over from nuisance precedent to environmental enforcement suits. The next section of the article will examine the types of state environmental cases in which restoration orders have been issued.

While the federal courts' equity powers are comparable to the state courts', their common law powers are more narrowly circumscribed.[93] The limitations bearing upon federal courts' power to apply common law in the environmental area have been emphasized in recent Supreme Court doctrine.[94] Hence the issue of whether the restoration order continues to be available in federal environmental enforcement suits, as it was in common law nuisance suits, is complex. The final section of the article will examine the validity of the restoration order as a federal environmental enforcement remedy.

A. Injunctions to Restore in State Environmental Enforcement Suits

Injunctions to restore have been used in cases brought under state environmental protection laws. State courts draw upon common law nuisance precedent to interpret state environmental legislation.[95] As in public nuisance actions, the validity of a restoration order in an environmental enforcement suit does not hinge upon who has brought the suit. Injunctions to restore have been granted in cases brought by private plaintiffs as well as in cases initiated by the government.[96] As in public nuisance cases, the restoration order in statutory enforcement cases is grounded on the need to protect the public interest.

The issue of whether a restoration order was available under Indiana environmental laws was squarely presented in *State ex rel. Stream Pollution Control Board v. Town of Wolcott*.[97] In this case, the state Stream Pollution Control Board brought suit against the Town of Wolcott under two state environmental statutes, the Indiana Environmental Management Act (EMA)[98] and

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[93] *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945). *See infra* text and notes at notes 155-225.

[94] *E.g.*, City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

[95] *See, e.g.*, Ryan v. Commonwealth, 30 Pa. Commw. 180, 373 A.2d 475 (1977).

[96] *Compare* Eyde v. State, 393 Mich. 453, 225 N.W.2d 1 (1975) *with* State *ex rel.* Stream Pollution Control Bd. v. Town of Wolcott, __ Ind. App. __, 433 N.E.2d 62 (1982).

[97] *Wolcott*, __ Ind. App. __, 433 N.E.2d 62 (1982).

[98] IND. CODE §§ 13-7-1-1 to 13-7-19-3 (1982).

the Refuse Disposal Act,[99] in order to force the town to clean up a municipal dump. In the trial court, the town argued that since the EMA's section on solid waste merely stated that "[n]o person may operate or maintain an open dump,"[100] the legislature intended only to prohibit the active operation of open dumps in the future.[101] Since the site had been officially closed, the town argued that it was not operating an open dump and not violating the EMA.[102] The trial court, agreeing with the town's interpretation, ruled that courts were not empowered by the EMA to order clean-up or restoration of sites formerly used for open dumping.[103]

The Indiana Court of Appeals reversed, ruling that the courts' power to enforce the EMA did extend to restoration orders.[104] The appellate court disagreed with the trial court's interpretation of the statutory proscription against operating or maintaining open dumps, and rejected the town's contention that simply by closing the dump site to future use the town was in compliance with state environmental law.[105]

The court of appeals examined the section prohibiting open dumps in the Refuse Disposal Act,[106] which declared that "[f]ailure to comply with this section constitutes a nuisance inimicable to human health."[107] The court then ruled that "in the context of nuisance, passive as well as affirmative conduct is included within the meaning of the word 'maintain'."[108] The court held that the EMA authorized it to abate existing open dumps by issuing restoration orders based on the procedures prescribed in regulations governing sanitary landfill operations.[109] The restoration order in *Wolcott* served to implement a specific state environmental protection goal.

A restoration order was granted in an environmental suit brought by an individual citizen of Michigan in *Eyde v. State*.[110] In *Eyde*, the state had obtained an easement to build a sewer line

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[99] IND. CODE §§ 36-9-30-1 to 36-9-31-23 (1982).
[100] IND. CODE § 13-7-4-1 (1982).
[101] *Wolcott*, at —, 433 N.E.2d at 64.
[102] *Id.* at —, 433 N.E.2d at 66.
[103] *Id.* at —, 433 N.E.2d at 64.
[104] *Id.* at —, 433 N.E.2d at 67.
[105] *Id.* at —, 433 N.E.2d at 66.
[106] *Id.*
[107] IND. CODE § 36-9-30-35 (1982).
[108] *Wolcott* at —, 433 N.E. at 66-67.
[109] *Id.* at 67.
[110] 393 Mich. 453, 225 N.W.2d 1 (1975).

across the plaintiff's land in a condemnation proceeding.[111] The plaintiff then commenced an action under the Michigan Environmental Protection Act (Michigan EPA),[112] charging that the ill-conceived sewer project would not only harm local streams but also lead to far-reaching water pollution.[113]

Unlike the Indiana statutes at issue in *Wolcott*,[114] the Michigan EPA makes no reference to the word "nuisance."[115] The Michigan law does provide, in expansive terms, for citizen enforcement suits "for declaratory or equitable relief . . . for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction."[116]

In the *Eyde* case, the Michigan Supreme Court asserted that the state environmental protection act gave individual citizens a sizeable share of the initiative for enforcement[117] and agreed with the plaintiff that pollution from the planned sewer project would flow downstream, eventually reaching Lake Michigan.[118] The court reinstated the county court's restoration order, which appointed a Master to formulate an alternative sewer plan and oversee the restoration of the plaintiff's property to its original condition.[119]

A restoration order has also been used to enforce state environmental law in the area of toxic waste. In *Village of Wilsonville v. SCA Services, Inc.*,[120] the Illinois Supreme Court drew upon common law nuisance principles to interpret the Illinois Environmental Protection Act.[121] The court affirmed a lower court's mandatory injunction requiring the defendant site operator to "restore and reclaim"[122] the site.

There was no issue of bad faith on the part of the disposal site operator in *Wilsonville*; the result hinged upon conflicting federal and state environmental regulations. The disposal site was duly licensed and followed up-to-date landfill techniques, but was lo-

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[111] *Id.* at 454, 225 N.W.2d at 2.
[112] MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West 1979).
[113] *Eyde*, 393 Mich. at 455-56, 225 N.W.2d at 3.
[114] *See infra* text and notes at notes 97-109.
[115] *See* MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (West 1979).
[116] MICH COMP. LAWS ANN. § 691.1202 (1979).
[117] *Eyde*, 393 Mich. at 454, 225 N.W.2d at 2.
[118] *Id.* at 455-56, 225 N.W.2d at 3.
[119] *Id.*
[120] 86 Ill. 2d 1, 426 N.E.2d 824 (1981).
[121] ILL. REV. STAT. ch. 111½ §§ 1001-1051 (1979).
[122] 86 Ill. 2d at 6, 31, 426 N.E.2d at 827, 839.

cated above an extensive abandoned mine shaft.[123] After the disposal site had been licensed by the federal Environmental Protection Agency, the Illinois legislature passed an amendment to the Environmental Protection Act explicitly prohibiting the location of hazardous waste disposal sites above mine shafts.[124]

Finding it highly probable that the Wilsonville site would bring about substantial injury,[125] the court held that an injunction requiring the defendant operator to exhume and remove the toxic waste, along with any contaminated soil, was "the best and safest alternative."[126] As the court explained, "One distinguishing feature of equitable relief is that it may be granted upon the threat of harm that has not yet occurred. . . . [S]ince the likelihood exists that great harm will be done if the materials are not moved, it seems only reasonable that the materials must be taken somewhere safer than where they are now deposited."[127]

In sum, in state environmental protection suits, restoration orders are not confined to enforcement actions brought by governmental plaintiffs or to circumstances where a defendant has acted in bad faith. The remedy has been used as an effective tool for protecting public safety and the public interest in natural resources. By requiring a defendant to take affirmative steps to clean up an open dump, replant trees removed in the construction of a poorly-designed sewer line, or remove toxic waste from an unsafe disposal site, a restoration order simultaneously brings a defendant's conduct into compliance with state law and repairs the environment.

B. The Restoration Order in Federal Environmental Law

1. Early Federal Environmental Precedent

Before the enactment of federal environmental protection legislation, there were a few federal common law nuisance cases in which environmental claims were asserted.[128] Most of these cases

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[123] *Id.* at 7-9, 426 N.E.2d at 827-28.

[124] ILL. REV. STAT. ch. 111½ § 1021(g). *See Wilsonville*, 86 Ill. 2d at 18, 426 N.E.2d at 832.

[125] 86 Ill. 2d at 26-27, 426 N.E.2d at 836-37.

[126] *Id.* at 36, 426 N.E.2d at 841.

[127] *Id.* at 26, 426 N.E.2d at 836 (quoting W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 90 at 603 (4th ed. 1971)).

[128] *See, e.g.*, Missouri v. Illinois, 288 U.S. 496 (1906); North Dakota v. Minnesota, 263 U.S. 365 (1923). *See generally* Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41 (1983).

involved disputes between neighboring states, and were decided by the Supreme Court under its original jurisdiction of interstate controversies.[129] Because the complainant states sought injunctive relief, these early cases were equity suits decided by a process of 'weighing the equities.'[130] For example, in *Georgia v. Tennessee Copper Co.*,[131] decided in 1907, the State of Georgia sought an injunction against a copper plant located across the state line whose emissions were damaging Georgia farmland.[132] The Supreme Court balanced the equities and held that it was "a fair and reasonable demand on the part of [Georgia] that the air above its territory should not be polluted on a great scale by sulphurous acid gas. . . ."[133] In *Tennessee Copper*, as in the rest of these early federal common law nuisance decisions, the Supreme Court took the same approach to determining the outcome of a nuisance action as state courts;[134] the legal standard or rule of decision applied was a common law "reasonableness" standard.[135]

The history of the restoration order as an environmental remedy in federal court began with *United States v. Republic Steel Corp.*,[136] decided in 1960. *Republic Steel* was not a common law nuisance action, but rather a suit brought under the Rivers and Harbors Act.[137] This statute was enacted in 1899 to protect navigation,[138] and prohibits releasing refuse[139] and creating obstructions[140] in navigable waters. The government alleged that steel tailings released by the company's plant into a navigable river and accumulating on the riverbed violated the Rivers and Har-

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[129] U.S. CONST. art. 3, § 2, cl.1. The Supreme Court has original and exclusive jurisdiction of controversies between two or more states, 28 U.S.C. § 1251(a)(1) (1982), and original but not exclusive jurisdiction over actions brought by one state against citizens of another state, *id.* at § 1251(b)(3).

[130] *See supra* note 128.

[131] 206 U.S. 230 (1907).

[132] *Id.* at 236.

[133] *Id.* at 238.

[134] *See id.* at 239-40 (Harlan, J., concurring) (Court should apply the same principles and rules of equity that would apply in a factually similar suit wholly between private parties). *See also In re* Oswego Barge Corp., 439 F. Supp. 312, 322 n.9 ("[T]here does not appear to be any substantial difference between these federal common law principles and the New York law of common nuisance (non-criminal).").

[135] *See Tennessee Copper*, 206 U.S. at 238.

[136] 362 U.S. 482 (1960).

[137] 33 U.S.C. §§ 401-426(m) (1982) (as amended).

[138] *See* Cummings v. Chicago, 188 U.S. 410, 427 (1902).

[139] 33 U.S.C. § 407 (1982).

[140] 33 U.S.C. § 403 (1982).

bors Act.[141] The government contended that the accumulating pollutants impaired the navigable capacity of the river and sought an injunction requiring the steel company to dredge and remove them.[142]

The Supreme Court adopted the government's liberal interpretation of the Rivers and Harbors Act's protection of navigable waters, permitting the 1899 law to serve as a vehicle for environmental protection.[143] The Court quoted Justice Holmes' admonition in an earlier case that "a river is more than an amenity, it is a treasure."[144] The Court ruled that the steel company's release of industrial waste constituted a violation of both the refuse and the obstruction sections of the statute.[145]

The Court also affirmed the trial court's mandatory injunction ordering the steel company to dredge the deposits and restore the navigable capacity of the river.[146] The Court reasoned that since discharging the pollutants and creating the obstruction in the river were proscribed by federal law, an injunction to repair the damage was an appropriate remedy.[147] Otherwise, said the Court, "we impute to Congress a futility inconsistent with the great design of this legislation."[148] Another section of the statute explicitly authorized injunctions to remove illegal structures.[149] The Court asserted that Congress had made its purpose clear, providing "enough law . . . from which appropriate remedies may be fashioned even though they rest on inferences."[150]

Republic Steel's approach to the question of remedies set a pattern for fashioning environmental relief under the Rivers and Harbors Act.[151] In a Rivers and Harbors Act case decided seven years later, the Court said "The government may, in our view, seek an order that a negligent party is responsible for rectifying the wrong done. . . . Denial of such a remedy would permit the result, extraordinary in our jurisprudence, of a wrongdoer shift-

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[141] 362 U.S. at 483.

[142] *Id.* at 483-84.

[143] *Id.* at 487.

[144] *Id.* at 491 (quoting New Jersey v. New York, 283 U.S. 336, 342 (1930)).

[145] 362 U.S. at 489, 491.

[146] 362 U.S. at 492.

[147] *Id.*

[148] *Id.*

[149] 33 U.S.C. § 406 (1982).

[150] 362 U.S. at 492.

[151] *See* United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); United States v. Sunset Cove, Inc., 514 F.2d 1089 (9th Cir. 1975). *See infra* text and notes at notes 351-66.

ing responsibility for the consequences of his negligence onto his victim."[152] Environmental restoration orders continue to be issued under the Rivers and Harbors Act.[153]

However, since *Republic Steel* was decided in 1960, Congress has enacted sweeping legislation that now imposes a pervasive regulatory scheme in the field of environmental protection. This scheme is founded on comprehensive national standards governing the release of pollutants. The federal courts' role in enforcing these standards is explicitly set out in the civil enforcement provisions of each statute. While most federal environmental laws provide for enforcement actions for injunctive relief, the question whether restoration orders continue to be available as they were in common law nuisance actions and Rivers and Harbors Act suits is complex.

2. The Restoration Order as a Remedy Under Federal Environmental Protection Statutes

Because of the restoration order's heritage in common law nuisance and federal environmental precedent that antedated most environmental protection legislation, its use by a federal court might appear to run afoul of recent Supreme Court decisions that comprehensive environmental statutes impliedly preempt federal common law.[154] This section of the article will argue that this particularly suitable form of relief is available in federal courts. In order to reach this conclusion, however, it is important to examine both federal common law and the implied preemption doctrine.

a. Federal Common Law

The Supreme Court repudiated the idea of "federal general common law" in *Erie Railroad Co. v. Tompkins*.[155] Since *Erie*, however, courts and commentators have recognized the validity of federal *specialized* common law.[156] Federal jurisdiction in *Erie*

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[152] *Wyandotte Transp. Co.*, 389 U.S. at 204.

[153] *See infra* text and notes at notes 354-65.

[154] *E.g.*, City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

[155] 304 U.S. 64, 78 (1938).

[156] *See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Note, *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law*, 59 HARV. L. REV. 966 (1946); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

was founded on diversity.[157] Federal specialized common law has developed in cases where federal jurisdiction is based on the existence of a federal question.[158] Specifically, the Supreme Court has recognized the validity of federal specialized common law in areas presenting an overriding federal interest[159] or the need for uniform national rules of decision.[160]

Another recognized form of federal specialized common law consists of statutory construction.[161] One of the most basic functions of federal courts is filling the interstices of federal statutory law.[162] Justice Jackson's concurring opinion in *D'Oench, Duhme & Co. v. FDIC*[163] is often cited for this proposition:

> The federal courts have no *general* common law. . . . But that is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all the source materials of the common law. . . .[164]
>
> 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. . . .[165]
>
> Federal common law implements the federal Constitution and statutes, and is conditioned by them.[166]

Restoration orders fall into this category of federal judicial lawmaking. The role of the federal courts is to apply broadly drafted legislation in individual cases.[167] Particularly since the merger of law and equity in 1934,[168] federal courts are authorized to grant both legal and equitable relief in order to 'implement'[169]

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[157] *See* 28 U.S.C. § 1332 (1982); 304 U.S. at 65.

[158] *E.g.*, Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938); Board of County Comm'rs v. United States, 308 U.S. 343, 349-52 (1939).

[159] Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

[160] *Clearfield Trust*, 318 U.S. 363 (1943).

[161] *See* Smith v. Alabama, 124 U.S. 465, 478-79 (1888) (When construing the Constitution and federal statutes, federal courts are "evolving a true common law dependent upon national authority.").

[162] Southern Pac. Co. v. Jensen, 244 U.S. 205, 244 (1917) (Holmes, J., dissenting); United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973).

[163] 315 U.S. 447, 465 (1942).

[164] *Id.* at 469.

[165] *Id.* at 470.

[166] *Id.* at 472.

[167] *See* HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Tent. ed. 1958).

[168] Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072 (1982)).

[169] *D'Oench, Duhme*, 315 U.S. at 472.

federal legislation. Federal courts bear "a heavy responsibility to tailor the remedy to the particular facts [of each case] so as to best effectuate"[170] Congressional enactments.

Under traditional equity doctrine, the particular form that injunctive relief will take in a given case is a matter for the court's equitable discretion.[171] Modern courts interpret this as a requirement that they make an independent assessment of the circumstances of the case in order to formulate an appropriate and effective remedy.[172] Many federal regulatory laws explicitly authorize injunctive relief in civil enforcement suits.[173] Presumably, when Congress simply authorizes federal courts to issue injunctions to enforce a statute, it has left the determination of what *form* such injunctions will take to the court's reading of the statute and assessment of the facts of each case.[174]

However, the precise wording of the civil enforcement provisions in federal environmental laws varies;[175] it is unclear to what extent Congress intended to limit or displace federal courts' equitable discretion concerning remedies.[176] One might begin to analyze this displacement issue in the context of environmental legislation by invoking three longstanding rules of statutory interpretation.[177] First, Congress is presumed to be aware of existing common law when enacting new legislation.[178] Second, "[t]he Supreme Court has long been committed to a presumption that statutes encroaching upon the common law retain familiar and long-established principles."[179] Third, "especially when a statute is

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[170] Gilbertville Trucking Co. v. United States, 377 U.S. 115, 130 (1965).

[171] *See infra* text and notes at notes 11-12.

[172] *See, e.g.*, United States v. American Tobacco Co., 221 U.S. 106, 185 (1910). *See also* cases cited *infra* note 44.

[173] *E.g.*, Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987, at §§ 6928, 6972, 6973 (1982). *See infra* text and notes at notes 226-40.

[174] *E.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944) ("[T]he federal courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case."); Deckert v. Independence Shares Corp., 311 U.S. 282, 288 (1940) ("The power to enforce implies . . . the power to utilize any of the procedures normally available to the litigant according to the exigencies of the particular case.")

[175] *See infra* text and notes at notes 226-40.

[176] *See* Collins, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B. C. ENVTL. AFF. L. REV. 297, 316-17 (1984). *See generally* Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982).

[177] This approach is taken by Lind, *Umbrella Equities: Use of the Federal Common Law of Nuisance to Catch the Fall of Acid Rain*, 21 URB. L. ANN. 143, 168-69 (1981).

[178] *See* United States v. Neustadt, 366 U.S. 696, 707-08 (1961).

[179] Lind, *supra* note 177, at 168. *See* Isbrandtsen & Co. v. Johnson, 343 U.S. 779, 783 (1952).

of a remedial . . . nature the Court hesitates to repeal by implication existent common law remedies."[180] This approach would not challenge federal courts' traditional equitable discretion to fashion remedies and would affirm the restoration order, as it has developed in common law, as an apt and viable environmental enforcement remedy. However, two recent Supreme Court decisions have announced a new doctrine governing the relationship of federal common law and comprehensive environmental legislation. This implied preemption doctrine appears to cast doubt upon the continued availability of the restoration order.

b. The Implied Preemption Doctrine of *City of Milwaukee v. Illinois*

The Supreme Court has taken a newly restrictive approach to federal common law in two recent decisions. In *City of Milwaukee v. Illinois*[181] and *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[182] the Court held that the comprehensiveness of federal environmental legislation evinces Congressional intent to preempt federal common law.[183] A brief examination of these two decisions is necessary in order to assess the preemption doctrine's impact upon the environmental restoration order.

The *Milwaukee* case involved an interstate pollution dispute.[184] The State of Illinois alleged that inadequately treated sewage, discharged by Milwaukee into Lake Michigan and carried by lake currents into Illinois waters, threatened the health of Illinois citizens.[185] The state instituted a common law nuisance action, and petitioned the Supreme Court to hear the case under its original jurisdiction of controversies between states.[186] In *Illinois v. Milwaukee* (*Milwaukee I*),[187] the Court declined to exercise its original jurisdiction[188] but ruled that the dispute was a case 'aris-

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[180] Lind, *supra* note 177, at 168-69. *See* Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907); United States v. Ashland Oil Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

[181] 451 U.S. 304 (1981).

[182] 453 U.S. 1 (1981).

[183] *E.g.*, *id.* at 22.

[184] Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).

[185] *Id.*

[186] *Id. See supra* note 129.

[187] 406 U.S. 91 (1972).

[188] *Id.* at 108.

ing under' federal law for the purposes of general federal question jurisdiction.[189] Reasoning that the national environment was an area of overriding federal concern in which the development of federal common law was justified,[190] the Court held that Illinois' common law public nuisance claim presented a federal question adjudicable in federal district court.[191] The *Milwaukee I* Court declared, "When we deal with air and water in their ambient or interstate aspects, there is federal common law."[192] The *Milwaukee I* decision gave lower federal courts jurisdiction to decide common law nuisance actions involving air or water pollution.[193]

Milwaukee I explicitly recognized that federal environmental common law would be subject to the paramount authority of Congress.[194]

> It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of suits alleging creation of a public nuisance by water pollution.[195]

The case was remanded to the district court for a decision on the merits.[196]

Soon after *Milwaukee I* was decided, Congress enacted the Federal Water Pollution Control Amendments of 1972, or the Clean Water Act (CWA).[197] The CWA established a pervasive regulatory scheme aimed at wholly eliminating the discharge of pollutants into the nation's waters by 1985.[198] The CWA prohibits the discharge of pollutants except in compliance with a permit issued by the Environmental Protection Agency (EPA).[199]

While *Illinois v. Milwaukee* was pending, the City of Milwaukee was issued permits under the Clean Water Act for the discharges at issue in the federal nuisance suit.[200] When the case again

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[189] *Id.* at 99.

[190] *Id.* at 101-07.

[191] *Id.* at 107.

[192] *Id.* at 103.

[193] *Id.* at 107. *See generally* Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?* 40 FORD. L. REV. at 501-2; Bleiweis, *supra* note 128, at 45-48.

[194] *Milwaukee I*, 406 U.S. 91 at 107.

[195] *Id.*

[196] *Id.* at 108; *on remand* 366 F. Supp. 298 (N.D. Ill. 1973), 599 F.2d 151 (7th Cir. 1979).

[197] Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (1982)).

[198] 33 U.S.C. § 1251(a)(1) (1982).

[199] *Id.* at § 1311(a).

[200] *See* City of Milwaukee v. Illinois, 451 U.S. 304, 319-20 (1981).

reached the Supreme Court, the Court ruled in favor of Milwaukee, stating that "no federal common law remedy was available" to Illinois.[201] In *City of Milwaukee v. Illinois (Milwaukee II)*,[202] the Court noted *Milwaukee I*'s recognition of the potential preemption of federal common law nuisance[203] and announced:

> Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.[204]

The Court held that *Milwaukee I*'s federal common law of interstate water quality had indeed been preempted by the comprehensive Clean Water Act.[205]

Justice Rehnquist, writing for the Court, articulated a doctrine of implied preemption based upon the constitutional principle of separation of powers.[206] Separation of powers dictates that it is for Congress, not the courts, to make federal law.[207] Federal common law is merely an expedient, resorted to only when a federal question cannot be answered from federal statutes alone.[208] Justice Rehnquist cast this in the form of a presumption against federal common law in any area where Congress has spoken:

> [W]hen the question is whether federal statutory or federal common law governs, ... evidence of a clear and manifest purpose [to displace common law] is not required.... [W]e start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.[209]

Where Congress has occupied the field with a comprehensive legislative scheme, like the CWA,[210] existing common law is *impliedly* preempted.[211]

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[201] *Id.* at 332.
[202] 451 U.S. 304 (1981).
[203] *Id.* at 310.
[204] *Id.* at 317.
[205] *Id.*; *see also id.* at 320.
[206] *See id.* at 312-17.
[207] *See, e.g.*, TVA v. Hill, 437 U.S. 153, 164 (1978).
[208] *Milwaukee II*, 451 U.S. at 314.
[209] *Id.* at 316-17.
[210] *Id.* at 317.
[211] *See id.* at 315, 319.

The presumption against the survival of federal common law announced in *Milwaukee II* can only be rebutted with evidence of an affirmative Congressional intention to preserve common law.[212] Justice Rehnquist examined the evidence presented by Illinois and ruled that the Clean Water Act and its legislative history did not demonstrate the requisite legislative intent to preserve common law.[213]

The Court applied *Milwaukee II's* implied preemption doctrine in *Middlesex County Sewerage Authority v. National Sea Clammers Association* (*Sea Clammers*).[214] In this case, the plaintiff Association sought compensatory and punitive damages for the harm done to fishing grounds in the vicinity of New York harbor by sewage released by several surrounding municipalities.[215] The Association invoked "a wide variety of legal theories,"[216] including federal common law nuisance, as bases for its damages claim. The Court ruled that the Association had no federal cause of action because "the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the [CWA]. . . ."[217]

The Court went on to summarily extend the preemption doctrine to another federal statute,[218] the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA),[219] without engaging in the careful sifting of statutory language and legislative history performed by the *Milwaukee II* Court. The MPRSA is aimed at eliminating ocean dumping of pollutants. The Court asserted in *Sea Clammers* that since the regulatory scope of the MPRSA was no *less* comprehensive than the CWA scheme,[220] any federal common law in the area of off-shore water pollution was impliedly preempted.[221]

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[212] *Id.* at 315 n.8. *See also In re* Oswego Barge Corp., 664 F.2d 327, 335-44 (2d Cir. 1981) (presumption against the survival of federal common law is rebuttable). *See also generally* Bleiweiss, *supra* note 128, at 50-54.

[213] *See Milwaukee II*, 451 U.S. at 319-32. Justice Blackmun, writing for the dissent, also analyzed the CWA and its legislative history, reaching the opposite conclusion as to Congress' intention to displace the federal common law of nuisance. *Id.* at 339-53.

[214] 453 U.S. 1 (1981).

[215] *Id.* at 4-5.

[216] *Id.* at 5.

[217] *Id.* at 22.

[218] *Id.*

[219] 33 U.S.C. §§ 1401-1444 (1982).

[220] *Sea Clammers*, 453 U.S. at 22.

[221] *Id.*

The contours of the implied preemption doctrine after *Sea Clammers* are unclear.[222] In *Sea Clammers*, the Court did not examine the statutory language or legislative history of the MPRSA before concluding that the statute preempted federal common law.[223] Federal courts have since held that further environmental statutes preempt federal common law in other areas of environmental protection.[224] One court has held that the Clean Water Act preempts *state* common law claims brought in federal court against non-resident polluters.[225] Because the restoration order originated in common law trespass and nuisance, and was used by federal courts in early environmental cases antedating most of the federal environmental legislation in force today, it is vulnerable to attack as a vestige of the common law that *Milwaukee II* intended to overrule.

The rest of this section of the article argues that the restoration order is still valid in federal environmental enforcement suits. First, the evidence of Congress's affirmative intent to preserve the restoration order will be presented. The article will then argue that the restoration order should survive *Milwaukee II* and *Sea Clammers* because it is a form of relief, not a judge-made rule of decision.

3. Congressional Intent to Invoke the Full Panoply of Injunctive Relief in Federal Environmental Legislation

Most environmental laws provide for civil enforcement actions for injunctive relief.[226] Such civil enforcement provisions may be categorized into three types. Most federal environmental laws provide for (a) civil actions by the EPA to enforce the regulatory

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[222] *See* Bleiweiss, *supra* note 128, at 55-63.

[223] *See Sea Clammers*, 453 U.S. at 21-22.

[224] *See, e.g.*, United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J. 1982) (Clean Air Act); United States v. Waste Indus., 556 F. Supp. 1301 (E.D.N.C. 1982) (Resource Conservation and Recovery Act).

[225] Chicago Park Dist. v. Sanitary Dist. of Hammond, 530 F. Supp. 291 (N.D. Ill. 1981). *See generally* Trauberman, *Common Law Nuisance in Hazardous Waste Litigation: Has It Survived Milwaukee II?* 13 ENVTL. L. REP. (ENVTL. L. INST.) 1043 (1983).

[226] *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7413(b), 7523, 7603, 7604 (1982); Safe Drinking Water Act, 42 U.S.C. §§ 300g-3(b), 300h-2(b), 300j-8 (1982); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1415(g) (1982); Clean Water Act, 33 U.S.C. §§ 1319(b), 1364(a), 1365(a) (1982); Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7920(a)(5) (1982).

scheme set up by the statute,[227] (b) civil actions by citizens, typically defined to include states,[228] to restrain violations of regulations, EPA permits, or EPA orders,[229] and (c) civil actions by the EPA for immediate relief against "imminent hazards," or emergency situations.[230] A comparison of the language used by Congress in these three types of provisions indicates that while Congress may have intended to limit the forms of injunctive relief available in general enforcement and citizen suits, it clearly intended *not* to limit the federal courts' traditionally broad equitable power to fashion relief against imminent hazards.[231]

The judicial enforcement scheme of the Clean Air Act (CAA)[232] provides an example. The CAA contains two general enforcement sections, one that applies to the emission standards for stationary sources[233] and one for the standards for moving sources.[234] In another section, the CAA provides for citizen suits "to enforce an emission standard or EPA order."[235] The CAA's Emergency Powers provision,[236] on the other hand, broadly authorizes injunctive relief "to immediately restrain any person causing or contributing to" an imminent and substantial endangerment of public health *or* to require him *"to take such action as may be necessary."*[237] The Clean Water Act,[238] Safe Drinking Water Act,[239] and Resource Conservation and Recovery Act[240] all follow a similar scheme and employ similar language.

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[227] *E.g.*, Clean Water Act, 33 U.S.C. § 1319(b) (1982) (enforcement actions to restrain violations and enforce compliance).

[228] *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. §§ 6903(15), 6972 (1982) [hereinafter cited as RCRA].

[229] *E.g., id.*, § 6972 (1982) (citizen suits to enforce permits, regulations, or orders).

[230] *E.g.*, Clean Water Act, 33 U.S.C. § 1364 (1982) (emergency powers); RCRA, 42 U.S.C. § 6973 (1982) (imminent hazard).

[231] *See generally* Miller, *Private Enforcement of Federal Pollution Control Laws* (pt. 2), 14 ENVTL. L. REP. (ENVTL. L. INST.) 10063, 10079 (1984).

[232] 42 U.S.C. §§ 7401-7642 (1982).

[233] *Id.* at § 7513(b).

[234] *Id.* at § 7523.

[235] *Id.* at § 7604.

[236] *Id.* at § 7603.

[237] *Id.*

[238] 33 U.S.C. §§ 1251-1376 (1982).

[239] 42 U.S.C. §§ 300f to 300j-10 (1982).

[240] 42 U.S.C. §§ 6901-6987 (1982). The notion of a restoration order under the Clean Air Act seems absurd. Congress' use of the same general wording in all environmental emergency powers sections, however, is evidence of how much discretion Congress expected the courts to exercise when framing enforcement orders.

The restoration order is a particularly suitable remedy in the area of hazardous waste. Evidence of Congress' intention to preserve the availability of this type of injunction is apparent in the structure and language of federal hazardous waste laws. The legislative histories of the Resource Conservation and Recovery Act (RCRA)[241] and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[242] also demonstrate that Congress intended to incorporate the full range of injunctive relief used at common law into these statutes' enforcement schemes.

RCRA was designed to regulate hazardous waste "from cradle to grave."[243] RCRA is comparable to the Clean Water Act and the Clean Air Act; it regulates the disposal of pollutants on land. RCRA's Hazardous Waste Management scheme[244] provides for comprehensive, national regulation of hazardous waste generators, transporters, and disposal sites.[245] Embedded within this scheme is a general enforcement provision for policing these regulations through EPA compliance orders, criminal fines, and civil penalties.[246] RCRA also contains a citizen suit section for civil actions to enforce regulations, permits, standards, or EPA orders.[247] RCRA's imminent hazard section,[248] by contrast, broadly authorizes EPA suits against any practice which "may present an imminent and substantial endangerment to health or the environment."[249] The federal district courts are authorized to restrain the dangerous practice or order "such other action as may be necessary."[250]

The legislative history of the RCRA Amendments of 1980[251] shows that Congress was not merely aware of existing common law remedies but drew upon and intended to codify them in

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[241] 42 U.S.C. §§ 6901-6987.

[242] 42 U.S.C. §§ 9601-9657 [hereinafter cited as CERCLA].

[243] H. Rep. No. 1016, 96th Cong., 2d Sess. 2, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120.

[244] 42 U.S.C. §§ 6921-6934 (Subch. III) (1982).

[245] *Id.*

[246] 42 U.S.C. § 6928 (1982).

[247] *Id.* at § 6972.

[248] *Id.* at § 6973.

[249] *Id.*

[250] *Id.* at § 6961. This section subjects federal hazardous waste facilities to the RCRA scheme in the same manner as any other facility, and withholds immunity "with respect to the enforcement of any such injunctive relief."

[251] Pub. L. No. 96-482, 94 Stat. 2334 (1980) (codified at 42 U.S.C. §§ 6901-6987).

RCRA and in other federal environmental legislation.[252] The Senate Committee Report[253] explains that certain additions were made to RCRA's hazardous waste generator provision in order to codify existing common law duties in the substantive requirements of the federal statute.[254] The Report also specifically addresses the role of common law remedies in the imminent hazard provision, which was also amended:

> Like other imminent and substantial endangerment provisions in environmental statutes ... § [6973] is essentially a codification of common law public nuisance remedies. The Congress made this intent clear as early as 1948 when, in section 2(d) of the Water Pollution Control Act (the forerunner of present day imminent hazard provisions), it expressly declared that "the pollution of interstate waters ... which endangers the health or welfare of persons ... is hereby declared to be a public nuisance...."
>
> § [6973] therefore incorporates the legal theories used for centuries to assess liability for creating a public nuisance ... *and to determine appropriate remedies in common law.*[255]

The Report states that because Congress intended to *liberalize* common law requirements for equitable relief the courts should

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[252] *See* S. Rep. No. 172, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5019.

[253] *Id.*

[254] *Id.* at 5021.

[255] *Id.* at 5023 (emphasis added). Although the Committee here uses the word "liability," it is important to recall that this passage deals with the imminent hazard provision of RCRA, not the liability provision of CERCLA, 42 U.S.C. § 9607 (1982), which enables the government to recover money damages for cleanup costs and injuries to the environment.

The Committee's reference to "centuries" of common law invites the inference that Congress does not differentiate between state and federal common law, at least in the context of common law nuisance. Indeed, the principles of nuisance originated in England. *See supra* note 62; McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948). An argument could be made that Congress was "adopting" common law nuisance remedies in environmental statutes. In Wheaton v. Peters, 33 U.S. (8 Pet.) 223 (1834) the Supreme Court said, "[T]here can be no common law of the United States.... There is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption." *Id.* at 229.

For the proposition that the common law public nuisance action is part of the body of law transplanted to this country from England, see Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 563-64 (1851). This proposition was rejected, with respect to areas in which Congress has not legislated, in Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1887).

not construe the provision solely with reference to common law.[256] Imminent hazard provisions simply invoke federal courts' traditional equitable power.[257]

The Third Circuit has followed this interpretation of federal environmental laws' imminent hazard provisions in *United States v. Price*.[258] This case involves a landfill site discovered to be the source of toxic chemicals which were contaminating the public water supply of Atlantic City, New Jersey.[259] The EPA sued for injunctive relief under the imminent hazard sections of both RCRA[260] and the Safe Drinking Water Act.[261]

The *Price* court noted that, applying common law criteria, a mandatory injunction requiring the defendants to commission a study to determine how best to cure the landfill site's leaking problem would be valid preliminary relief against an actively harmful condition.[262] The court then said that the language and legislative history of RCRA, as noted above, constituted clear evidence of Congress's intention to confer upon federal courts full authority to grant mandatory injunctions to the extent necessary to eliminate risks posed by hazardous waste.[263] "There is no doubt that [RCRA] authorizes the clean-up of a site, even a dormant one, if that action is necessary to abate a present threat to the public health or the environment."[264]

CERCLA[265] was enacted to launch a national effort to locate and clean up inactive or "dormant" hazardous waste sites[266] like the one involved in the *Price* case. Congress determined that

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[256] *Id.*

[257] *Id. See also* United States v. Price, 688 F.2d 204, 211 (3d Cir. 1982); United States v. Solvents Recovery Serv., 496 F. Supp. 1127, 1142 (D. Conn. 1980).

[258] 688 F.2d, 204, 211 (3d Cir. 1982), *aff'g* 523 F. Supp. 1055 (D.N.J. 1981).

[259] 688 F.2d at 209.

[260] 42 U.S.C. § 6973 (1982).

[261] 42 U.S.C. § 300i (1982).

[262] 688 F.2d at 212. A preliminary injunction serves to maintain the status quo pending a final decision on the merits. The *Price* court cited Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 F. 730 (C.C.N.D. Ohio 1893) for the proposition that, depending upon whether the status quo is a condition of rest or of action, a defendant may be required to take affirmative steps in order to preserve it.

[263] 688 F.2d at 214.

[264] *Id.* The *Price* case has not yet reached trial. Under a case management order issued May 31, 1984, the issue of remedies will be tried *before* the issue of liability. United States v. Price, 20 Env't. Rep. Cas. (BNA) 2229 (D.N.J. May 31, 1984).

[265] 42 U.S.C. §§ 9601-9657 (1982).

[266] *See* H. Rep. No. 1016, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119.

RCRA was inadequate to deal with the inactive site problem because RCRA applies to closed or abandoned sites "only to the extent that they are posing an imminent hazard. . . ."[267] While a major component of the CERCLA scheme is federal funding for clean-up efforts,[268] Congress did not intend CERCLA to replace private clean-up activities.[269]

Many parts of CERCLA provide evidence of Congress' intention to add to, but not replace, common law remedies.[270] For example, twice within CERCLA's liability provision[271] Congress made federally permitted releases of certain substances immune from liability under the statute but clearly stated, "Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any provision of State or Federal law, *including common law*, for damages *or for removal or remedial action*. . . ."[272] CERCLA's emergency powers provision, entitled "Abatement Actions,"[273] also demonstrates Congress' intention to invoke the federal courts' broad and flexible equity power. In situations involving imminent danger to public health, welfare, or the environment the federal government may sue "to secure such relief as may be necessary to abate such danger. . . ."[274] In these suits the federal courts "shall have jurisdiction to grant such relief as the public interest and the equities of the case may require."[275]

While federal environmental laws no longer expressly declare pollution a "public nuisance" subject to "abatement,"[276] they do evince Congress' intention to codify and preserve common law. The broad language used to define equitable relief against imminent hazards in particular indicates that federal courts should be

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[267] *Id.* at 6125.

[268] *Id.*

[269] *Id.* at 6120.

[270] *See* 42 U.S.C. §§ 9614 (1982) (relationship to other law), 9607(i)(j) (1982) (preserving non-CERCLA bases of liability), 9609 (1982) (emergency injunctive relief), 9651(e) (commissioning a study of existing common law remedies), 9652 (1982) (savings clause preserving rights under other laws).

[271] 42 U.S.C. § 9607 (1982).

[272] 42 U.S.C. § 9607(i)(j) (1982) (emphasis added). *See also id.* at § 9652, a savings clause preserving remedies under other federal and state law, including common law. Compare the savings clause in the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365(e) (1982), which was interpreted in *Milwaukee II* to apply to the citizen's suit section only, and not to the preemptive effect of the CWA as a whole. *See* 451 U.S. at 327-32.

[273] 42 U.S.C. § 9673 (1982).

[274] *Id.*

[275] *Id.*

[276] *See* S. Rep. No. 172, *supra* note 252, 1980 U.S. CODE CONG. & AD. NEWS at 5023.

permitted to exercise their traditional equitable discretion when fashioning relief against emergencies. Statutory language and legislative history show that Congress affirmatively intended to incorporate the full range of injunctive relief usually available in federal courts into the enforcement scheme of environmental protection legislation. The restoration order ought to be available in statutory environmental enforcement actions as it was at common law.

4. The Restoration Order Survives *Milwaukee II*'s Implied Preemption Doctrine

The section above presented evidence that many parts of federal environmental legislation codify and preserve the remedies available under common law, including federal common law. Where Congress has authorized "such relief as may be necessary,"[277] or "such relief as the equities of the case may require,"[278] the question of what particular decree is proper in each case "cannot be answered from statutes alone."[279] Congress intended federal courts to continue the interstitial lawmaking of formulating effective relief to "implement"[280] environmental statutes.

This section will outline an alternative approach by arguing that the implied preemption doctrine of *Milwaukee II* and *Sea Clammers*[281] does not even apply to the restoration order. A close examination of federal common law cases leading up to the *Milwaukee II* decision, and of subsequent preemption cases, indicates that the preemption doctrine ought to be limited to federal common law causes of action and rules of decision and should not extend to forms of relief.

The distinction between rules of decision and causes of action, on the one hand, and forms of relief, on the other, is discernible in many cases.[282] Rules of decision are "the laws which are applied by

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[277] 42 U.S.C. § 7413(b) (1982) (Clean Air Act).

[278] 33 U.S.C. § 1415(d) (1982) (Marine Protection, Research and Sanctuaries Act).

[279] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469 (1942) (Jackson, J., concurring); *see also Milwaukee II*, 451 U.S. at 314.

[280] *D'Oench, Duhme*, 315 U.S. at 472.

[281] *See supra* text and notes at notes 206-213.

[282] *E.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945) ("substantive right" distinguished from "equitable remedy"). *See also* Bell v. Hood, 327 U.S. 678, 684 (1945); J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Davis v. Passman, 442 U.S. 228 (1979). One commentator distinguished "primary" from "remedial" law. *See* Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1523 (1969). "While the distinction between the

courts to determine [the outcome] of questions put before them."[283] The rule of decision in a case determines the question whether particular *conduct* falls under the condemnation of a particular statute.[284] Forms of relief, by contrast, govern the extent and nature of the *legal consequences* of conduct condemned by a particular statute.[285] As one commentator put it, federal specialized common law is valid in the area of "the formulation of remedies for the breach of duties imposed by federal law."[286]

The term "cause of action" is also difficult to define, but it too has been distinguished from forms of relief.[287] A party has a cause of action when statutorily prohibited conduct has invaded some interest of his own, thus entitling him to invoke the power of the courts.[288] By contrast, "relief is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all. . . ."[289] A litigant would have a cause of action yet be entitled to no relief when his claim is barred by the doctrine of sovereign immunity, for example.[290]

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right and remedy is difficult, primary rights may be defined as consisting of provisions describing what is to happen if a directive arrangement is successful. Remedial law consists of provisions specifying the consequences of noncompliance with the relevant primary provisions." *Id.* at 1523.

[283] Note, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428 n.6 (1960).

[284] Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUMB. L. REV. 1025, 1027 (1967) (analysis of Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942)).

[285] *Id. Accord* Deitrick v. Greaney, 309 U.S. 190, 200-1 (1940).

[286] Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1523. (1969).

[287] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[288] *See Davis v. Passman*, 442 U.S. at 236-39. "If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a 'cause of action' under the statute." *Id.* at 239. This right to invoke judicial redress is different from the injury-in-fact requirement involved in the issue of standing. *Id.*

[289] 442 U.S. at 239 n.18.

[290] *Id.* These distinctions are made more murky by the fundamental ambiguity in the term "remedy." A "remedy" can be a cause of action, that is, the *means* of obtaining legal redress, *or* a form of relief, that is, the *end* a litigant seeks by going to court. *See generally* Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PENN. L. REV. 1 (1968).

Many of the cases articulating the distinction between rights and remedies involve judicially implied private causes of action under federal statutes. In these cases, the term "remedy" means cause of action. *E.g.*, J. I. Case Co. v. Borak, 377 U.S. 426 (1964). Nevertheless, even *Borak*, the leading case on judicially implied private actions under federal statutes, kept the main issue, of an implied private cause of action, distinct from the subsidiary issue of what *relief* would be available in an implied private action. *See id.* at 435. Recent Supreme Court doctrine on judicially implied rights of action is restrictive, based on the rationale that the federal courts cannot themselves enlarge their own

The Supreme Court's first decision in the *Milwaukee* litigation, *Illinois v. Milwaukee* (*Milwaukee I*),[291] declared that common law public nuisance cases involving air and water pollution were adjudicable by federal district courts.[292] By proclaiming this new category of cases 'arising under' federal law,[293] *Milwaukee I* in effect expanded federal courts' federal question *jurisdiction*.[294] *Milwaukee I* essentially sanctioned a new federal cause of action.

The federal specialized common law of nuisance announced by the Court in *Milwaukee I* derived from interstate resource controversies involving water rights or pollution.[295] These early federal common law cases were equity suits because the complainant states sought injunctive relief;[296] since at that time there were no federal statutes governing these areas, the Court applied common law principles to decide these controversies.[297] Thus, in early federal pollution nuisance precedent the issues of whether the facts alleged constituted a nuisance and of what relief should be granted were both matters for the court's equitable discretion.[298]

Milwaukee I was such an interstate controversy.[299] The Supreme Court's opinion specified that federal common law environmental suits would be "equity suits in which the informed judgment of the chancellor will largely govern."[300] The federal district courts were empowered to "appraise the equities"[301] in

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jurisdiction. Under article III, section 2, clause 2 of the Constitution, the jurisdiction of the federal courts is controlled by Congress. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Assoc., 453 U.S. 1 (1981).

[291] 406 U.S. 91 (1972).

[292] *Id.* at 103. *See supra* text and notes at notes 184-93.

[293] 28 U.S.C. § 1331(a) (1982).

[294] *See supra* text and notes at notes 191-2.

[295] Among the cases cited in *Milwaukee I* are Kansas v. Colorado, 206 U.S. 46 (1907), Hinderlider v. LaPlata & Cherry Creek Ditch Co., 304 U.S. 92 (1938), and New Jersey v. New York, 345 U.S. 369 (1963), which involved appropriating water rights; and Missouri v. Illinois, 180 U.S. 208 (1901), Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), and New York v. New Jersey, 256 U.S. 296 (1921), which involved pollution. Federal jurisdiction in these cases derived from the existence of an interstate controversy.

[296] *See, e.g.*, Missouri v. Illinois, 180 U.S. 208, 244 (1901).

[297] *See, e.g., Tennessee Copper*, 206 U.S. at 237-8; *Hinderlider*, 304 U.S. at 110.

[298] *See, e.g.*, Harrisonville v. W.S. Dickey Clay Mfg., 289 U.S. 334 (1933).

[299] *See Milwaukee I*, 406 U.S. at 93. After *Milwaukee I*, the federal courts were divided on the question whether federal common law nuisance was limited to interstate controversies. *See generally* Comment, *Federal Common Law of Nuisance Reaches New High Water Mark as Supreme Court Considers Illinois v. Milwaukee II*, 10 ENVTL. L. REP. (ENVTL. L. INST.) 10101 (1980).

[300] 406 U.S. at 108.

[301] *Id.* at 107.

order to determine on a case-by-case basis whether the pollution involved constituted a public nuisance.[302] If so, it followed under common law that the court would again weigh the equities to fashion appropriate relief.[303]

The justification given by the *Milwaukee II* Court for resorting to federal common law was the need for federal protection of the national public interest in the environment.[304] Shortly after *Milwaukee I* was decided, the Congress enacted legislation with the same goal. The Clean Water Act[305] subjected water pollution to a comprehensive regulatory scheme based on uniform national water quality standards.[306] The new legislation also provided for "swift and direct" enforcement of these national standards through administrative orders, civil monetary penalties, and "rapid access to the federal district courts. . . ."[307] A potential conflict within federal law emerged between statutory enforcement suits implementing Clean Water Act standards, on the one hand, and federal common law suits decided according to the court's appraisal of the equities on the other.

Both *Milwaukee II*,[308] the Supreme Court's second opinion in the *Milwaukee* litigation, and *Middlesex County v. National Sea Clammers Association*[309] were federal common law nuisance actions and each case raised a direct conflict with the terms of federal statutory law. In *Milwaukee II*, the city sewerage authority had been issued federal permits, based on Clean Water Act standards, by the EPA for the discharges the State of Illinois alleged constituted a public nuisance.[310] In *Sea Clammers*, the plaintiff Association was pursuing a federal common law nuisance action in order to recover damages,[311] a form of relief Congress deliberately made unavailable to private plaintiffs under federal environmental statutes.[312]

The issue at the heart of *Milwaukee II* was what *standard*

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[302] *Id.*

[303] 406 U.S. at 108 n.10.

[304] *Id.* at 101-03.

[305] Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (1982)).

[306] *See* S. Rep. No. 414, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668.

[307] *Id.* at 3729-31.

[308] 451 U.S. 304 (1981).

[309] 453 U.S. 1 (1981).

[310] *See Milwaukee II*, 451 U.S. at 319-20.

[311] *See Sea Clammers*, 453 U.S. at 4-5.

[312] *See id.* at 17, n.27.

ought to govern the City of Milwaukee's sewage discharges: a Clean Water Act standard embodied in the EPA permit, or a federal court's common law 'appraisal of the equities.'[313] The Supreme Court held, based on separation of powers, that it was for Congress, not federal courts, "to articulate the appropriate *standards* to be applied as a matter of federal law."[314] Justice Rehnquist wrote, "[t]he problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress. . . . [F]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme."[315]

As first articulated and applied by the Supreme Court in *Milwaukee II*, then, the implied preemption doctrine involved a legal standard or rule of decision. When the Court concluded that "no federal common law remedy was available"[316] to the State of Illinois, the Court was using the word "remedy" to denote a cause of action, not to refer to a form of relief. *Milwaukee II* did not involve forms of relief.

The issue at the heart of *Sea Clammers* was whether the plaintiff Association had a cause of action for damages in federal court.[317] The Clean Water Act expressly allows citizen suits for injunctive relief to enforce federal water quality standards.[318] The plaintiff Association contended that it should be allowed to pursue a federal common law action, for damages, as an alternative to the statutory citizen's suit.[319] The Court was unwilling to allow a federal common law nuisance action for damages based upon an environmental statute whose own terms expressly limited private enforcement to injunctive relief.[320]

The *Sea Clammers* decision involved a conflict between common law and statutory causes of action; the result did not hinge upon the issue of forms of relief. The opinion as a whole discusses doctrine concerning private causes of action implied under federal

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[313] *See Milwaukee II*, 451 U.S. at 317.
[314] *Id.* at 320, 325 n.18.
[315] *Id.* at 317.
[316] *Id.* at 332; *see also id.* at 315 n.8.
[317] *See Sea Clammers*, 453 U.S. at 10.
[318] 33 U.S.C. § 1365 (1982).
[319] 453 U.S. at 15.
[320] *Id.* at 16.

statutes,[321] and granted under 42 U.S.C. § 1983,[322] and concludes that the Clean Water Act citizen suit provision is the exclusive means of private enforcement of federal water quality standards in federal court.[323] As articulated and applied by the Supreme Court in *Milwaukee II* and *Sea Clammers*, then, the implied preemption doctrine simply does not reach the federal judicial lawmaking involved in fashioning relief against statutory violations.[324]

One current environmental case exemplifies this limitation on the scope of the implied preemption doctrine. In *Illinois v. Outboard Marine Corp.* (OMC),[325] the State of Illinois alleged that Outboard Marine's plant had been discharging wastewater containing polychlorinated biphenyls (PCBs)[326] into Lake Michigan since 1959.[327] The state instituted a federal common law nuisance suit, based on *Milwaukee I*, seeking an injunction that would require OMC to dredge contaminated soil from an area of the lakebed near OMC's plant.[328]

At first, the legal argument focused on federal common law nuisance as a cause of action. OMC argued that a *Milwaukee I* suit had to be based on an interstate dispute.[329] Illinois countered that the pollution of an interstate body of water was sufficient basis for a federal common law nuisance action.[330] The Supreme Court granted *certiorari* on this question.[331] However, after holding in *Milwaukee II* that the Clean Water Act preempted federal common law nuisance in the area of water pollution, the Court vacated the Seventh Circuit's decision of *Outboard Marine* and remanded the case for consideration in light of *Milwaukee II*.[332] The

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[321] *Id.* at 13-18.

[322] *Id.* at 19-21. 42 U.S.C. § 1983 (1982) provides for a federal civil action on behalf of any person deprived, under color of state law, of any "rights, privileges, or immunities secured by the Constitution or laws" of the United States.

[323] *Id.* at 21-22.

[324] *See also* United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J. 1982) (Clean Air Act preempts federal common law claim for damages).

[325] 619 F.2d 623 (7th Cir. 1980), *vacated mem.*, 453 U.S. 917 (1981), *rev'd in part* 690 F.2d 473 (7th Cir. 1982), *on remand sub nom* United States v. Outboard Marine Corp., 549 F. Supp. 1032, 549 F. Supp. 1036, 556 F. Supp. 54 (N.D. Ill. 1982).

[326] PCBs are highly toxic chemicals. *See* 619 F.2d at 624 n.1.

[327] 619 F.2d at 624-25.

[328] *Id.*

[329] *Id.*

[330] *See* United States v. Outboard Marine Corp., 680 F.2d 473 at 474 (7th Cir. 1982).

[331] 453 U.S. 917 (1981) (mem.).

[332] *Id.*

court of appeals then ruled that Illinois' common law nuisance action was indeed preempted by the Clean Water Act.[333]

Meanwhile, the federal EPA had instituted an enforcement action against OMC under the Clean Water Act.[334] The EPA brought suit under the statute's general enforcement provision,[335] alleged a statutory violation based on the same facts as the State of Illinois' nuisance action, and sought the same injunctive relief.[336] The Seventh Circuit permitted the state to intervene in this statutory suit.[337]

On remand to the district court,[338] OMC raised the preemption doctrine again.[339] OMC argued that any "judge-made remedy"[340] ordering the clean-up of soil contaminated with PCBs was 'preempted' by the Clean Water Act's government clean-up section.[341] The statute's enforcement scheme includes a section authorizing the government to clean up extremely hazardous substances and then recover costs from polluters.[342]

The district court ruled that the preemption doctrine did not govern, nor even aid, interpretation of the Clean Water Act's enforcement provisions.[343] The general enforcement provision which formed the basis of the government's suit authorized "appropriate relief, including a temporary or permanent injunction. . . ."[344] The district court held that this provision and the government clean-up and recovery scheme cited by OMC were simply alternative remedies.[345] The court said the statutory lan-

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[333] United States v. Outboard Marine Corp., 680 F.2d 473 (7th Cir. 1982). The district court has also held that Monsanto Corp., supplier of the PCBs, cannot be held liable in an action based on the Refuse Act, 33 U.S.C. § 407 (1982) (part of the Rivers and Harbors Act of 1899). *See* 549 F. Supp. 1032 (N.D. Ill. 1982).

[334] *See* 680 F.2d at 480.

[335] 33 U.S.C. § 1319(b) (1982).

[336] *Outboard Marine*, 680 F2d at 480. The EPA later amended the complaint to add claims against OMC under the Refuse Act, 33 U.S.C. § 407 (1982), *see* 549 F. Supp. 1036 at 1037-41, and under CERCLA, 42 U.S.C. § 9606(a), *see* 556 F. Supp. 54.

[337] *See* 680 F.2d at 480-81.

[338] United States v. Outboard Marine Corp., 549 F. Supp. 1036 (N.D. Ill. 1982).

[339] *Id.* at 1039, 1042.

[340] *Id.*

[341] 33 U.S.C. § 1321 (1982); *see* 549 F.Supp. at 1042.

[342] 33 U.S.C. § 1265 (1982) authorizes the government to expend up to $15,000,000 to remove in-place pollutants; § 1321 authorizes the government to clean up certain discharges pursuant to a detailed regulatory plan and then recover cleanup costs from the polluters. *See* 549 F. Supp. at 1043.

[343] *United States v. Outboard Marine*, 549 F. Supp. at 1043.

[344] 33 U.S.C. § 1319(b) (1982).

[345] *Outboard Marine*, 549 F. Supp. at 1043.

guage of the general enforcement section was broad enough to include a clean-up order, a form of relief "designed mainly to avoid future violations or to abate continuing violations."[346] In sum, the *Outboard Marine* court rejected the defendant's attempt to apply the preemption doctrine as a way of limiting the relief available in a statutory enforcement suit.[347]

The *Outboard Marine* court's approach illustrates how the uncertain contours of the preemption doctrine ought not extend to the very provisions of environmental protection statutes. Congress drafted these environmental laws to include a variety of enforcement mechanisms;[348] judicial enforcement by means of injunctions is a vital component of this comprehensive statutory scheme.[349] Simply because "the need for a federal common law cause of action to further the federal interest in clean water no longer exists,"[350] it does not follow that the need for *forms of relief* developed at common law to protect natural resources has also disappeared.

Nor should the preemption doctrine be seized upon to shield conduct that violates federal law. The implied preemption doctrine is based upon the principle of separation of powers, that is, on the limited function of the federal courts to interpret and implement the laws which Congress makes. The doctrine should not be so broadly applied as to impinge upon this constitutionally circumscribed function.

5. Current Restoration Orders Issued Under the Rivers and Harbors Act

The restoration order is an apt and effective remedy for violations of federal environmental law because it responds directly to the resulting ecological damage. A restoration order requires the violator to undo the effects of his misconduct, carrying the goal of environmental protection laws into effect. In *Republic Steel*,[351] the Supreme Court affirmed an order, granted under the Rivers and

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[346] *Id.* at 1043-44.

[347] *Id.*

[348] *See infra* text and notes at 226-50.

[349] *See supra* note 226. *See also* S. Rep. No. 414, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668.

[350] Note, *Federal Common Law and Water Pollution: Statutory Preemption or Preservation?* 49 FORD. L. REV. 500, 513 (1981).

[351] 362 U.S. 482, 492 (1960).

Harbors Act,[352] which required the steel company to remove accumulated pollutants from the bottom of a navigable river. The Court reasoned that this remedy carried into effect the statutory prohibitions against releasing refuse and creating obstructions in navigable waters.[353]

The Rivers and Harbors Act gives the Army Corps of Engineers regulatory power over navigable waters; the Corps issues permits for private dredge and fill projects.[354] The Corps takes conservation and environmental factors into consideration when determining whether to grant a permit, and may refuse to authorize a project on environmental grounds.[355] The Corps of Engineers often seeks restoration orders against developers who have undertaken dredge and fill projects without the required permit.[356] In these cases, restoration decrees have evolved into a principled, individualized mechanism for remedying violations of federal environmental law.

The evolution of the restoration order into a sensitive and principled environmental remedy under the Rivers and Harbors Act began with *United States v. Sunset Cove, Inc.*[357] In *Sunset Cove* the Ninth Circuit ruled that a restoration order requiring the defendant to remove *all* the landfill material it had deposited illegally was unfair.[358] Such extensive restoration was simply more costly than the defendant could bear.[359] The court of appeals modified the lower court's order to require removal of only so much of the landfill as would "permit nature, in a reasonable period of time, to take its course and approximately re-establish former topographic conditions."[360] In *Sunset Cove*, the Ninth Circuit recognized that the equitable origin of mandatory injunctions to restore requires that courts tailor a decree that is both effective and feasible for the defendant to carry out.

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[352] 33 U.S.C. §§ 401-466g-1 (1982).

[353] *Id. See also* Converse v. Portsmouth Cotton Oil Refining Corp., 281 F. 981 (4th Cir. 1922). *See also infra* text and notes at 136-52.

[354] 33 U.S.C. § 403 (1982).

[355] *See* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).

[356] *See, e.g.*, United States v. Sunset Cove, Inc., 514 F.2d 1089 (9th Cir. 1975); United States v. Board of Trustees of Florida Keys Comm. College, 531 F. Supp. 267 (S.D. Fla. 1981).

[357] 514 F.2d 1089 (9th Cir. 1975).

[358] *Id.* at 1090.

[359] *Id.*

[360] *Id.*

Several Fifth Circuit cases involving development projects in Florida wetland areas have elaborated on the *Sunset Cove* approach to environmental restoration orders.[361] The Fifth Circuit recognizes restoration as an appropriate remedy against developers who have done dredging or filling work without authorization from the Army Corps of Engineers. However, the court of appeals requires that restoration decrees be based on a careful factual inquiry into both ecological conditions as well as the practicalities of each case.[362]

Under the Fifth Circuit's approach, the trial court conducts a full hearing on the issue of restoration.[363] Each side presents a detailed plan.[364] The court evaluates both proposals and chooses a restoration plan that will (1) "confer maximum environmental benefits" (that is, undo or reverse ecological harm without entailing more extensive tampering with existing conditions than necessary); (2) "be achievable as a practical matter" (that is, be feasible and cost-effective); and (3) "bear an equitable relationship to the degree and kind of wrong which it is intended to remedy" (that is, be proportionate to the severity of the defendant's misconduct.)[365]

This approach articulates criteria for a court's 'weighing of the equities' to formulate relief against a wrongdoer. These criteria fulfill traditional notions of judicial equitable power as "the instrument for nice adjustment and reconciliation between the public interest and private needs. . . ."[366] Restoration decrees issued to enforce the Rivers and Harbors Act under this approach map out how the defendant will bring his conduct into compliance with federal law. In practice, then, as well as in theory, the restoration order can be an environmental remedy that responds to the type

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[361] United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976); Weiszmann v. United States, 526 F.2d 1302 (5th Cir. 1976), *on remand*, 545 F. Supp. 721 (S.D. Fla. 1982); United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976); United States v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980); United States v. Board of Trustees of Florida Keys Comm. College, 531 F. Supp. 267 (S.D. Fla. 1981).

[362] *See, e.g., Weiszmann*, 526 F.2d at 1304.

[363] *See, e.g., Weisman*, 489 F. Supp. at 1342.

[364] *Id.*

[365] *Id.* at 1343. *See also Sexton Cove*, 526 F.2d at 1301.

[366] Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). Moreover, each trial court's application of the three criteria outlined in *United States v. Weisman* to each fact pattern fosters principled, rational decisionmaking as well as the development of a body of remedial caselaw. *See generally* Winner, *supra* note 12 *passim*; Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1309 (1977).

of wrongdoing involved in each particular violation and also accomplishes the larger goal of the federal environmental protection scheme by repairing ecological damage.

IV. CONCLUSION

Since the first days of serious concern for the environment, traditional legal devices have been put to new uses in order to protect the public interest inherent in natural resources. At first, common law tort actions designed to protect interests in land, like trespass and nuisance, were the only vehicles for environmental claims. The mandatory injunction to restore originated in these common law forms of action as a effective way to end compelling harm to land. A restoration order places the burden upon the wrongdoer to take those actions that are necessary to undo the effects of his misconduct. The restoration decree was also recognized as a suitable remedy against a common law public nuisance. A restoration order carries into effect the public policy embodied in laws designed to protect public health and welfare. Similar concerns—the need to protect land and all forms of natural resources, and the need to protect the public interest—underlie environmental law.

The restoration order originated in the common law precedent from which environmental law developed. Congress and the state legislatures made injunctive relief available to enforce environmental protection laws. Hence the restoration order could be put to use as an environmental enforcement tool. A restoration decree is a way of providing relief in individual environmental suits which responds to both the defendant's misconduct as well as the ecological damage which the defendant's misconduct has caused.

Restoration orders ought to be available to enforce state and federal environmental protection statutes. State courts readily draw upon common law nuisance precedent in cases brought under state environmental laws. Restoration decrees have been issued by state courts in a variety of contexts. Federal environmental laws also provide for civil enforcement actions for injunctive relief. Despite the Supreme Court's restrictive view of federal common law in the environmental area, the restoration order ought to continue to be available in federal statutory enforcement suits as it was in common law and early federal environmental cases. Rather than displacing the federal courts' equitable discretion to fashion effective remedies, federal environmental legisla-

tion was designed to incorporate the full panoply of injunctive relief into the comprehensive federal environmental enforcement scheme. The restoration order can develop into a principled and sensitive remedy for violations of environmental protection laws.