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Federal Jurisdiction - Environmental Law - Damage Claims in Pollution Actions Brought under Section 304 of the Federal Clean Air Act

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NOTE

FEDERAL JURISDICTION—ENVIRONMENTAL LAW—DAMAGE CLAIMS IN POLLUTION ACTIONS BROUGHT UNDER SECTION 304 OF THE FEDERAL CLEAN AIR ACT

That damage is caused by air pollution is unquestioned.[1] The Clean Air Act, Congress' response to the problem, gives citizens the right in Section 304 of the Act to bring civil suits in the United States district courts against industrial polluters who are violating the substantive provisions of the Act.[2] Of crucial importance to a plaintiff suing under Section 304 is whether he can recover money damages for the harm he has suffered as well as injunctive relief.

Section 304(a) provides that:

> [A]ny person may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. . . . The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order. . . .[3]

The initial question is whether this section of the Clean Air Act permits civil damages. Although jurisdiction to enforce an emission standard or limitation or order would presumably allow the remedy of injunction or mandamus, allowance for civil damages is not apparent. The plaintiff's task will be either to try to persuade the federal district court to allow damages under this clause or to successfuly allege both a cause of action for injunctive relief under Section 304 and a cause of action for damages under state nuisance law and attempt to retain federal jurisdiction over the damage claim through the doctrine of

1. *See Hearings on H.R. 15848 (1970) Amendments to the Clean Air Act) Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce,* 91st Cong., 2d Sess., ser. 91-49, pt. 1, at 5-6 (1970) (hereinafter cited as *Hearings of the House Subcomm. on Public Health and Welfare). See also* Administrator of the Environmental Protection Agency, Report on the Economics of Clean Air 1-9 to 1-15 (1970); Council on Environmental Quality, *The President's 1971 Environmental Program,* 1971, in 1 A. Reitze, Environmental Law 3-22 (1972); Comment, *Equity and the Eco System: Can Injunctions Clear the Air?,* 68 Mich. L. Rev. 1254 (1970).

2. Clean Air Act §304(a), 42 U.S.C. §1857h-2(a)(1970).

3. *Id.*

pendent jurisdiction. By a third method the plaintiff might argue that Section 304(a) constitutes a law of the United States under Article III of the Constitution and that the federal district court could retain jurisdiction over a state created claim for damages through the doctrine of protective jurisdiction.

THEORIES FOR STATING A FEDERAL CLAIM FOR RELIEF

The two strongest arguments for allowing damages under Section 304(a) are: (1) such a cause of action should be implied in order to effectuate the purposes of the Clean Air Act; (2) such a cause of action can be incorporated into the federal common law of nuisance for air pollution. A third argument is predicated upon the assertion that the right to clean air is a "public" constitutional right protected under the 14th Amendment and 42 U.S.C. §1983 (1971) against state invasion of that right.[4] This Note will not deal with the issues in the third argument.

A. The Threshold Question of Federal Jurisdiction

The question whether a cause of action is to be implied or included in a federal common law could be raised in either a motion to dismiss for failure to state a federal claim or in a motion to dismiss for lack of federal subject matter jurisdiction. The latter approach was foreclosed by the Supreme Court in *Bell v. Hood*,[5] where the plaintiffs sought to recover damages from FBI agents for alleged violations of fourth and fifth amendment rights. In reversing the lower court's dismissal for lack of federal question jurisdiction, the Court held:

> [W]here the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions (where the claim is immaterial or insubstantial and frivolous) . . . must entertain the suit. . . . The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.[6]

4. Under this theory state action would occur in the federal and state governments' failure to enforce the Clean Air Act regulations against a polluter. *See* Note, *Toward a Constitutionally Protected Environment*, 56 Va. L. Rev. 458 (1970).

5. 327 U.S. 678 (1946).

6. *Id.* at 681-82. *See also* Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)(cases affirming the general rule of Bell v. Hood, *supra* note 5).

Citing Justice Brennan's dissenting opinion in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1959), *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972) held that an issue of federal common law implementing a federal statute arises under the laws of the United States and therefore would support federal subject matter jurisdiction. Under the *Bell v.*

A claim for damages under Section 304(a) cannot be said to be immaterial or insubstantial and frivolous because a construction of the language of Section 304(a) is necessary to determine whether "jurisdiction to enforce an emission standard" includes jurisdiction to award damages as a method of enforcing such standard.[7] If a court should hold that such damages are not allowed, the dismissal would be on the merits and not for want of subject matter jurisdiction.

The distinction between dismissal for want of subject matter jurisdiction and dismissal for failure to state a claim upon which relief can be granted is important for *res judicata* by bar. A cause of action is normally extinguished by dismissal on the merits, but this is not so when a cause of action is dismissed for lack of subject matter jurisdiction.[8] For example, if there were a conflict among the federal circuits—some rejecting and some accepting the remedy of damages under Section 304(a)—the dismissal for lack of subject matter jurisdiction by a district court in the first group would not preclude bringing the action in a court in the latter.

The choice between dismissal on jurisidictional grounds and on the merits is also important for the doctrine of pendent jurisdiction: a court dismissing a federal claim on the merits may arguably retain pendent jurisdiction over a state claim for damages if that claim is tied closely to an important question of federal policy such as injunctive relief under Section 304.[9]

B. The Doctrine of Implied Remedies

1. *Relevant Case Law:*

An implied cause of action is a judicial extension of a civil remedy to one injured by another's breach of a statute or regulation not providing for such relief. Most American courts now recognize the implied remedy in at least limited areas.[10] The doctrine was first

Hood doctrine, if issues of federal common law were in fact not stated, the claim should be dismissed for failure to state a claim and not for want of jurisdiction.

7. The general rule stated in Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921) is:

> The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or the application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a resonable foundation, the District Court has jurisdiction under this provision.

See also Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821); Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 822 (1824); Gully v. First National Bank, 299 U.S. 109, 112 (1936).

8. Note, *Implying Civil Remedies from Federal Regulatory States,* 77 Harv. L. Rev. 285, 289 (1963).

9. Text at 530-31 *infra.*

10. The doctrine had its origin in Couch v. Steel 3 E. & B. 402, 118 Eng. Rep. 1193 (1854). Today, however, it has largely been repudiated by English courts. *See* Williams, *The Effects of Penal Legislation in the Law of Tort,* 23 Modern L. Rev. 233 (1960).

enunciated in the federal courts in 1916 in *Texas & Pac. Ry. v. Rigsby*,[11] although the impetus for this decision dates to *Marbury v. Madison*.[12] Creating a private damage remedy for an employee injured by a Railroad's violation of the Federal Safety Appliance Acts, the Supreme Court states: "A disregard of the command of the statue is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . ."[13] Speaking for the Court, Justice Pitney noted further that:

> None of the Acts, indeed, contains express languages conferring a right of action for the death or injury of an employee; but the safety of employees . . . is their principal object, . . . (Thus) the inference of a private right of action in the present instance is rendered irresistible. . . .[14]

Although it has been held that the Federal Safety Appliance Act no longer provides a basis for an implied cause of action for damages,[15] the doctrine of implied remedies has been applied to other federal statutes and consitutional provisions with increasing frequency. The rationale has generally been that when federal statutes have given a general right to sue, damages are necessary and appropriate to make good the wrong done and to effectuate the purpose of the Act.[16] For instance, damages have been allowed under the Railway Labor Act[17] for the failure of a collective bargaining agent to represent black firemen,[18] under the Civil Rights Act of 1866[19] for violation of rights created by that Act,[20] under the 1965 Voting Rights Act[21] for violation of rights created by that Act,[22] under the Fourth and Fifth Amendments to the Constitution for unreasonable searches and for deprivation of liberty in violation of due process of law,[23] under

11. 241 U.S. 33 (1916).

12. 5 U.S. (1 Cranch) 137, 163 (1803): ". . . it is a settled and invariable principle in the laws . . . that every right, when withheld, must have a remedy, and every injury its proper redress."

13. Texas & Pac. Ry. v. Rigsby, *supra* note 11 at 39-40.

14. *Id.*

15. Moore v. Chesapeake & O. Ry., 291 U.S. 205 (1934).

16. J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964). *Cf.* Bell v. Hood, *supra* note 5 at 684; Bivens v. Six Unknown Named Agents, *supra* note 6 at 396.

17. 45 U.S.C. §§151a, 152 (1970).

18. Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944).

19. 42 U.S.C. §§1982 (1970).

20. Jones v. Alfred H. Mayer Co., 392 U. S. 409 (1968).

21. 42 U.S.C. §1973 (1970).

22. Allen v. State Board of Elections, 393 U.S. 544 (1969).

23. Bivens v. Six Unknown Named Agents, *supra* note 60.

Section 10(b) of the Securities Exchange Act of 1934[24] to sellers of securities,[25] under the Postal Statute of the United States[26] for abuse of franking privileges,[27] and under the Indian Civil Rights[28] for violations of rights created by that Act.[29]

The most important decision for claimants under Section 304 of the Clean Air Act is *J. I. Case Co. v. Borak.*[30] There, the Supreme Court construed the language of Section 27 of the Securities Exchange Act of 1934 which conferred jurisdiction on the district courts "to *enforce* any liability or duty created by this title or the rules and regulations thereunder."[31] (emphasis added) This language is strikingly similar to the language in Section 304(a) of the Clean Air Act. The Court held that stockholders had a right of action for damages where false statements had been used in proxy solicitation contrary to the proscription of Section 14(a) of the Act. Speaking for the Court, Justice Clark recognized that "the broad remedial purposes" of the Act were directed to "the protection of investors, which certainly implies the availability of judicial relief where necessary to achieve that result."[32]

Two theories have usually been advanced to explain the implication of a civil cause of action from the violation of a statute. Under one view the statute provides the evidence of the standard of conduct required within the framework of an already existing cause of action. Violation of a federal statute under this theory would itself be a tort which necessarily gives rise to an action for damages.[33] A second theory regards the statue as declaring wrongful certain behavior from which the Court itself creates a new cause of action. The latter theory allows the Court great power of judicial legislation.[34]

24. 15 U.S.C. § 78j(b)(1970).

25. Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 13 (1971); *see also* John R. Lewis, Inc. v. Newman, 446 F.2d 800, 803 (5th Cir. 1971) and Ellis v. Carter, 291 F.2d 270, 273-74 (9th Cir. 1961) where damages were held to be the appropriate remedy for buyers of securities under Section 10(b).

26. 39 U.S.C. §3210 (Supp. 1973)

27. Hoellen v. Annunzio, 348 F. Supp. 305, 311 (N.D. Ill. 1972).

28. 25 U.S.C. §§1301-1303 (Supp. 1973).

29. Loncassion v. Leekity, 334 F. Supp. 370, 374 (D. N.M. 1971).

30. 377 U.S. 426 (1964).

31. 15 U.S.C. §78aa (1970).

32. J. I. Case Co. v. Borak, *supra* note 30 at 431-32. *See also* Mills v. Electric Autolite Co., 396 U.S. 375, 386 (1970)(affirms holding in *Borak*).

33. *See e.g.*, Dorfman v. First Boston Corp., 336 F. Supp. 1089, 1094 (E. D. Pa. 1972); Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E. D. Pa. 1946); Restatement (Second) of Torts §286 (1965).

34. This theory makes the doctrine of Implied Remedies virtually identical to the doctrine of a federal common law, one aspect of which would allow a federal district court to fashion an appropriate remedy to implement an express provision of a federal statute. *See* the discussion of this doctrine *infra* at 518-22.

2. *The Doctrine applied to Section 304 of the Clean Air Act:*

The argument for implying a cause of action for damages for citizens suing a polluter under Section 304 of the Clean Air Act begins with a demonstration of the overriding purpose of the Act. This purpose is to insure that the health and welfare of the nation's citizens is not damaged by polluted air.[35] The National Environmental Policy Act of 1969 set forth the initial federal policy that:

> . . . it is the continuing responsibility of the Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.[36]

Federal regulation was deemed necessary to control air pollution because of its serious danger to the American environment.[37] The principal federal standard in the Clean Air Act which effectuates the Act's purpose—the primary ambient air standard—is grounded on scientific evidence of the actual damages and adverse effects of air pollution.[38]

In an action brought by the United States under the Clean Air Act prior to its 1970 amendments to restrain a food processing manufacturer from emitting air pollution, the United States Court of Appeals for the 4th Circuit held that the Clean Air Act provides all citizens with a federally protected right to clean air.[39] This right, based upon the purposes of the Clean Air Act, would also follow naturally from the tacit acknowledgment by the Supreme Court and other federal courts that there is a fundamental public right to a clean environment.[40] Therefore, it can be argued that federal courts should

35. The purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Clean Air Act §101(b)(1), 42 U.S.C. §1857(b)(1) (1970).

36. National Environmental Policy Act of 1969 §101, 42 U.S.C. §4331 (1970).

37. As stated in *Hearings of the House Subcomm. on Public Health and Welfare, supra* note 1, air pollution is not simply an unaesthetic eyesore; it causes death, serious personal injuries and damages vegetation and building materials. Furthermore it was noted that air pollution had reached such high levels in New York City during Thanksgiving of 1967 that 168 people were killed and countless others injured and sickened by it.

The Administrator of the Environmental Protection Agency, in his Report on the Economics of Clean Air, *supra* note 2, has stated that sulfur oxide pollution (the most common kind of industrial pollution) itself costs the nation approximately $13,780,000,000.00 each year.

38. Clean Air Act §109(b), 42 U.S.C. §1857c-4(b) (1970).

39. United States v. Bishop Processing Co., 423 F.2d 469, 473 (4th Cir. 1970), *cert. denied,* 398 U.S. 904.

40. *See, e.g.,* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (concern with interstate water pollution); Washington v. General Motors Corp., 406 U.S. 109 (1972) (concern with automotive air pollution); Udall v. F.P.C., 387 U.S. 428 (1967) (concern with recreational purposes); United States v. Standard Oil Co., 384 U.S. 224 (1966) (concern with gasoline emitted into navigable waters); United States ex rel. Greathouse v. Dern, 289 U.S. (1933) (concern with conservation);

have the power to imply a remedy of damages for violations of this fundamental federal right.[41]

The express purpose of Section 304, "to provide citizen participation in the enforcement of standards and regulations established under the Act,"[42] provides an additional reason for implying a cause of action for damages. One important consideration in enacting the citizen suit provision was that the federal and state authorities had been somewhat "restrained" in their promulgation and enforcement of the pre-1970 air quality standards.[43] In the only case taken to the Courts under the 1967 Air Quality Act, *United States v. Bishop Processing Company*,[44] for example, the effectiveness of governmental action under the Act is seen to be transparent.[45] Furthermore, despite the Clean Air Act's provision allowing the Administrator of the Environmental Protection Agency or a State to bring an enforcement action of a civil fine action,[46] at the present time there has been no reported case of such an action. In fact, it appears that the Administrator has been less than zealous in performing even his nondiscretionary duties under the substantive provisions of the Clean Air Act.[47] In order to encourage citizens to assist the government and

Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (2d Cir. 1965) (concern with recreational purposes).

41. Text at 513-515, *supra*. Historically, damages have been regarded as the ordinary remedy for an invasion of federally protected rights. *See Nixon v. Condon*, 286 U.S. 73 (1932); *Swafford v. Templeton*, 185 U.S. 487 (1902). Also, the "familiar canon of statutory construction that remedial legislation is to be construed broadly to effectuate its purposes," *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *cf. United States v. Standard Oil Co.*, 384 U.S. 224, 225-26 (1966), is another reason for implying a remedy of damages under Section 304. Because its central purpose is to protect the health and welfare of citizens, the Clean Air Act falls into the category of remedial legislation.

42. Senate Comm. on Public Words, Report on National Air Standards Act of 1970, S. Doc. No. 4358, 91st Cong., 2d Sess. 36 (Comm. Print 1970). (hereinafter cited as Senate Report).

43. *Id* at 37: "It is the Committee's intent that the enforcement of these control provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them."

44. 423 F.2d 469.

45. During the period 1956 to 1970 the Bishop Processing Company operated a rendering plant which processed fish, chicken feathers, heads and entrails, sickening the residents of Bishop, Maryland and the adjoining town of Selbyvill, Delaware. During this time there were numerous attempts by citizens and federal and state agencies to abate the smells coming from the plant. Finally, on June 4, 1970, after a United States District Court decree to cease all operations, an appeal of that decree to the Second Circuit and a denial of the petition for certiorari by the Supreme Court, Bishop Processing Company was ordered to cease all operations. On July 14, 1971, the plant was held in contempt by the District Court for failure to close its operations. However, no penalty was imposed and the Judge ruled that the plant could remain open if it installed control equipment and cleaned the plant weekly. As of July 29, 1971, the plant was still in operation. Reitze, *supra* note 1 at 3-27 to 3-29; Washington Post, July 29, 1971, at B 1; J. Esposito, Vanishing Air 114-18 (1970).

46. Clean Air Act 113, 42 U.S.C. §1857c-8 (1970).

47. *See* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D. D.C. 1972) (predicated upon legislative intent, the Court held that the Administrator would be enjoined from approving state

participate in the enforcement of the Clean Air Act standards, damages would be a strong incentive. The fields of anti-trust legislation and securities fraud involve two areas of precedent for private damage actions as a supplement to enforcement of federal regulatory statutes.[48]

Two other reasons exist for allowing damages under Section 304. First, the deterrent effect of a private action for damages will provide a strong incentive for industry to comply with the Clean Air Act's air standards and implementation plans.[49] There is no guarantee that industrial sources of air standard violations will otherwise stop their polluting activities when called upon to do so by aggrieved citizens.[50] Second, industrial polluters should not be allowed to benefit from their violations of air quality standards at the expense of the health and welfare of private citizens. Such rationale has been utilized by the Supreme Court in *Schine Chain Theatres v. United States*[51] as a basis for awarding damages against a defendant violating the Sherman Anti-Trust Act.[52]

C. *The Doctrine of the Federal Common Law of Nuisance*

1. *Relevant Case Law:*

Governmental power in the United States is divided by the Constitution between the states and the federal government.[53] In the landmark decision of *Erie R.R. v. Tompkins*[54] Justice Brandeis declared that the Constitution did not give either the federal courts or Congress power to create substantive rules of general common law.[55] Nondelegated powers, therefore, were reserved to the states; federal courts were to apply the decisional and statutory law of the state in which they sat unless authority over the issue had been constitutional-

implementation plans which allowed existing clean air to be degraded by rising to pollution levels of the secondary standard level).

48. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) (Court referred to the private damage suit as the "bulwark of antitrust enforcement"); J.I. Case Co. v. Borak, 377 U.S. at 432 (Court noted that private enforcement of the proxy rules of the Securities Exchange Act provided a necessary supplement to Securities Exchange Commission action).

49. *See* 377 U.S. at 432: "(T)he possibility of civil damages or injunctive relief serves as a most effective weapon (against defendants) in the enforcement of the proxy requirements." *See also* Note, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 12 B.C.L. Rev. 571, 612 n.265 (1970-71).

50. *See* Bishop Processing Company example *supra* note 45.

51. 334 U.S. 110, 128-29 (1948).

52. 15 U.S.C. §1,2 (1970).

53. The Tenth Amendment reserves to the States all powers not delegated to the United States.

54. 304 U.S. 64 (1938).

55. *Id.* at 78.

ly vested in the federal government.[56] In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[57] decided the same day as *Erie*, Justice Brandeis stated that the construction of a water compact apportioning interstate streams was beyond the judicial competence of any one state and must be governed by federal common law.[58] *Erie* and *Hinderlider* thus apportioned state and federal judicial power to reflect the division of governmental powers inherent in American federalism.[59]

It is now recognized that federal courts are competent to fashion federal common law to implement express provisions of the Constitution or federal statutes.[60] In *Textile Workers Union v. Lincoln Mills*[61] the Supreme Court required a federal district court to fashion a remedy of specific performance of an executory agreement to arbitrate in order to effectuate the policy of the National Labor Laws. Writing for the majority, Justice Douglas stated:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.[62]

The doctrine of the federal common law was extended by a unanimous Supreme Court in *Illinois v. City of Milwaukee*[63] wherein

56. Summarizing in *Erie* Justice Brandeis stated: "(T)he lower courts have invaded rights which in our opinion are reserved by the Constitution to the Several States." *Id.* at 80. This language suggests that the Tenth Amendment furnishes the Constitutional authority for the decision.

57. 304 U.S. 92 (1938).

58. *Id.* at 110.

59. *See* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 394-95, 407 (1964).

60. *See* D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 471-72 (1942) wherein Justice Jackson stated:

> Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such at the present.

Accord, Sola Elec. Co v. Jefferson Elec. Co., 317 U.S.173, 175-77 (1942); Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968) (remedy in tort fashioned against a telephone company because of the comprehensive federal regulation of telephone companies); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

61. 353 U.S. 448 (1957).

62. *Id.* at 456-57.

63. 406 U.S. 91 (1972) (water pollution case).

it was held that a federal common law of nuisance should govern cases that involve ambient or interstate air and water pollution.[64] In that case the state of Illinois sought a private remedy of abatement against the City of Milwaukee for dumping sewage into Lake Michigan. Although the Water Pollution Control Act[65] (under which the action had been brought) did not allow for the remedy of a private cause of action, the Court held that such a remedy could be fashioned in order to effectuate the strong federal interest embodied in the Act.[66]

2. The Doctrine applied to Section 304 of the Clean Air Act

In this case the theory of the federal common law is somewhat similar to that of implied remedies. Under the federal common law theory the remedy of damages is fashioned by the federal court; under the implied remedies theory, the same remedy is implied from the statute. This distinction is based upon legislative intent. For instance, a remedy can be implied from a statute if the court determines that the legislature would have allowed that remedy if it had thought of it. On the other hand, a remedy can be fashioned to implement a federal common law covering the subject matter that might not have been allowed if the legislature had thought of it. The court's authority for fashioning such a remedy is the strong federal interest over the subject matter that the federal statute opens. The same reasons that have been used herein for implying a remedy of damages are available in order to include damages in a federal common law of nuisance.[67]

Federal common law is available to implement the provisions of the Clean Air Act for two further reasons: (1) Congress intended to provide for ultimate federal control in the area of air pollution despite

64. *Id.* at 103. *See also*, Washington v. General Motors Corp., 406 U.S. 109 (1972) (air pollution case).

65. 33 U.S.C. §1151 *et. seq.* (1970).

66. Illinois v. City of Milwaukee, 406 U.S. at 101-103. Writing for the Court Justice Douglas recognized that the right asserted was a federal right, governed by federal laws and remedies:

> The remedy sought . . . is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.' *Textile Workers v. Lincoln Mills*, 353 U.S. 488, 457. When we deal with air and water in their ambient or interstate aspects, there is a federal common law, . . . (406 U.S. at 103).

Furthermore, Justice Douglas distinguished *Illinois v. City of Milwaukee* from *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), a case in which the supreme Court had declined original jurisdiction to hear an interstate water pollution suit, because the latter case was preoccupied with public nuisance under Ohio law and not federal common law implementing a federal envionmental statute. 406 U.S. 91, 103 n.3.

67. Text at 516-18 *supra*.

the fact that the purpose of the Act declared that "(T)he prevention and control of air pollution at its source is the primary responsibility of States and local governments."[68] (2) Air pollution is interstate in character.

The policy of the Water Pollution Control Act was "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controling water pollution."[69] Interpreting the Act's provision for promulgation of water quality standards by a federal administrator in cases of state inaction,[70] Justice Douglas concluded in *Illinois v. City of Milwaukee* that Congress intended to provide for ultimate federal control in the area.[71]

Similarly, the language implying ultimate federal control in the Clean Air Act is as broad as it is in the Water Pollution Control Act. The Administrator of the Environmental Protection Agency promulgates the national air quality standards[72] and approves or disapproves all state implementation plans.[73] If a state fails to submit an implementation plan or its plan fails to meet the Act's requirements, the Administrator must establish a plan for the state.[74]

As emphasized in the *Illinois* case, the nature of the dispute and not the character of the parties must be interstate in order for a federal common law to fashion an appropriate remedy.[75] Federal common law is necessary in interstate pollution suits to prevent one state from imposing its common law upon another.[76] Justice Douglas's extensive quotations from *Georgia v. Tennessee Copper Co.*[77] and *Missouri v. Illinois*[78] suggest that there is a duty upon federal courts to fashion federal common law to settle interstate disputes because the states surrendered their right to settle such disputes amongst themselves when they entered the federal union.[79]

In dealing with air, it is fruitless to try to characterize it as "intrastate." Air not only flows interstate, air pollution directly affects

68. Clean Air Act §101(a)(3), 42 U.S.C. §1857(a)(3) (1970).
69. 33 U.S.C. §1151(b (1970).
70. 33 U.S.C. §1160(c)(2) (1970).
71. Illinois v. City of Milwaukee, 406 U.S. at 102.
72. Clean Air Act §109, 42 U.S.C. §1857c-4(1970).
73. Clean Air Act §110, 42 U.S.C. §1857c-5 (1970).
74. *Id.*
75. Illinois v. City of Milwaukee, 406 U.S. at 105 n.6.
76. Kansas v. Colorado, 206 U.S. 46, 97 (1906) holds:
> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others.
77. 206 U.S. 230, 237 (1907).
78. 200 U.S. 496, 520-21 (1906).
79. Illinois v. City of Milwaukee, 406 U.S. at 104.

most aspects of interstate commerce.[80] Congress based its power to enact the Clean Air Act on the Interstate Commerce clause of the Constitution.[81] The Clean Air Act was held to be a constitutional exercise of congressional power in *United States v. Bishop Processing Co.*[82]

D. Necessity of Allowing Air Pollution Damage Claims in Federal Courts

If a federal court would either imply a remedy of damages under Section 304 of the Clean Air Act or fashion such a remedy because there is a federal common law of nuisance, it seems clear that the court would be performing a lawmaking function. The weaknesses of the court as lawmaker—the lack of debates and hearings, the retroactive effect of its solution, the uncertainty of its public mandate[83]—are less serious when conduct has already been proscribed by a legislative or administrative standard and only an additional remedy is sought. The court may be in an even better position to provide the proper remedy than was the legislature because the court will have the advantage of the experience with an existing and functioning statute.[84]

It can be argued that a federal remedy of damages can be utilized whenever the Clean Air Act standards have been violated.[85] The amount can be based on common law standards of proof.[86] Congress has stressed that the "(e)nforcement of pollution regulations is not a technical matter beyond the competence of the courts."[87]

If, on the other hand, federal remedies under the Clean Air Act were limited to injunction or mandamus, victims of pollution violations would be obliged to go into state courts for remedial relief.

80. In testifying before the House Subcommittee on Public Health and Welfare concerning the 1970 Amendments to the Clean Air Act, Robert H. Finch, Secretary of Health, Education and Welfare, stated that:

> The . . . bill does break new ground in its recognition of the fact that the Nation's air resource is invisible. Air, polluted or not, crosses the imaginary lines that divide State from State. Air Quality, therefore, is not a matter of purely local or regional concern. It is of national concern. *Hearings of the House Subcomm. on Public Health and Welfare, supra* note 1).

81. Senate Report, *supra* note 42 at 1-2.

82. 423 F.2d 469. *See also* Perez v. United States, 402 U.S. 146 (1971); Wickard v. Filburn, 317 U.S. 111, 125 (1942).

83. *Implying Civil Remedies from Federal Regulatory Statutes, supra* note 8, at 291.

84. *See* Note, *Federal Common Law and Interstate Pollution*, 85 Harv. L Rev. 1439, 1453-54 (1972); *see also* Thayer, Preliminary Treatise on Evidence 195-200 (1898).

85. In this regard, it has been noted that the various federal environmental protection statutes could "provide useful guidelines in fashioning (the) rules of decision" for the common law. *Illinois v. City of Milwaukee*, 406 U.S. 103 n.5.

86. *See generally* W. Prosser, Law of Torts 602-603 (1971).

87. Senate Report, *supra* note 42 at 38.

And if the law of the State happened to attach no responsibility to violations of the pollution laws, the entire purpose of the Citizen Suit provision could become nugatory. As an example of this problem, it is generally held that the traditional common law remedy of nuisance requires a showing that the defendant's conduct was unreasonable.[88] "Unreasonableness" varies greatly from state to state[89] depending upon the benefits a particular state identifies in a polluting industry. Additionally, state law may provide other obstacles to effective relief. Statutes of limitation or prescription, security for costs statutes, procedural barriers such as compulsory joinder of necessary parties and the like could foreclose claimants from any compensatory redress.[90]

Because of the possible difficulties in state litigation of air pollution damage claims, such claims properly belong in a federal court so that a federal uniformity and consistency of interpretation are possible. In ambient air pollution cases the combination of a burgeoning amount of federal legislation directed towards the preservation of the environment and the federal interest involved present a case of far greater federal concern than has been found in previous cases.[91] By granting damages federal courts could begin to identify environmental interests protected by the common law, and could insure that the common law requirements imposed on conduct are consistent with statutory environmental ordering.[92] Finally, it should be noted that if there is a federal preemption where national air quality standards have been established,[93] damages should be allowed in federal court because this would be the only forum in which such an issue could be litigated.[94]

E. Statutory Obstacles

1. Legislative Scheme:

The argument can be made that damages under Section 304 are illogical since the Administrator of the Environmental Protection

88. W. Prosser, *supra* note 86 at 591-602.

89. *Id.* The balancing process employed by common law courts in determining whether to abate a nuisance was developed within the field of private nuisance actions.

90. *Cf.* J.I. Case Co. Borak, 377 U.S. 426 (1964).

91. *See* Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case*, 12 Ariz. L. Rev. 691 (1971) (commentary cited by Justice Douglas in the *Illinois* case).

92. *See Federal Common Law and Interstate Pollution*, *supra* note 84 at 1455.

93. Washington v. General Motors Corp., *supra* note 64 at 115 suggests this may be the case.

94. State and local governmental units, including state courts, probably are not equipped to regulate and control the harmful effects of air pollution. Despite the advantages of local control and despite Congressional rhetoric, federal supervision is gradually preempting development of state and regional programs. *See* J. Esposito, *supra* note 45 at 16; Rossano, *Federal Abatement of Major Intrastate Air Pollution Sources*, in Proceedings: The Third National Conf. on Air Pollution 480, 481 (U.S. Dep't of H.E.W. 1966).

Agency or a State, in bringing an action under the Act, is limited to remedies of enforcing compliance with standards, injunctive relief, or civil fines.[95] The thrust of this argument is that damages would constitute a windfall recovery to some plaintiffs in the instances when the Administrator or State had not acted.[96] Furthermore, a citizen suit cannot be started within 60 days after the plaintiff has given notice of the violation to the Administrator and the State, and if the Administrator or State files a suit within that time, the citizens cannot file under Section 304(a).[97] The answer that can be made to this argument is that citizens are always allowed to intervene in any civil action brought by the Administrator or State.[98] Therefore, it can be argued that citizens should always have the right to intervene in order to assert the remedy of damages, and thus there would be no windfall if the Administrator or State had not acted because the right to damages would always exist.

Another adverse argument would be that there is no need for the incentive of damages because Section 304 already provides adequate incentives for citizens to bring suits. These are: (1) that the Court may award costs (including reasonable attorney and expert witness fees) to any party it deems appropriate,[99] and (2) that Section 304(e) allows plaintiffs to seek any other relief for violation of any emission standard under any other statute or common law.[100]

Although it is true that the cost provision is an incentive for citizens to bring suits, it does not detract from the additional incentive of a damage remedy. Providing costs would not allow for any affirmative recovery as damages would.

The argument has been made that damages are not allowed under Section 204 because Section 304(e) preserves the right to seek this remedy under another law.[101] It can be argued, however, that this section does not restrict damage actions under Section 304(a). It only provides that the federal courts have not preempted the field in air pollution cases. Under the Clean Air Act, States are allowed to have emission standard limitations which are higher than necessary to meet

95. Clean Air Act §113, 42 U.S.C. §1857c-8 (1970).

96. Under Section 304(b)(1)(B) of the Clean Air Act, 42 U.S.C. §1857g-2(b)(1)(B) (1970) citizens cannot bring suits under Section 304(a) if the Administrator or State has commenced an action against a polluter and is diligently prosecuting the same in a court of the United States or in a state court.

97. Clean Air Act §304(b)(1)(A), 42 U.S.C. §1857h-2(b)(1)(A) (1970).

98. Clean Air Act §304(b)(1)(B), 42 U.S.C. §1857h-2(b)(1)(B) (1970).

99. Clean Air Act §304(d), 42 U.S.C. §1857h-2(d) (1970).

100. Clean Air Act §304(e), 42 U.S.C. §1857h-2(e) (1970).

101. Senate Report, *supra* note 42 at 38:"It should be noted, however, that the section [Section 304(e)] would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available."

the national ambient air standards. The purpose of Section 304(e), then, could well be to express Congress' intent that citizens can sue under other laws for violations of more stringent standards than the minimum set by the Clean Air Act.

2. *Legislative History:*

Statements of at least two Senate Floor Leaders of the Clean Air Act Bill indicate that Section 304 does not provide for damages.[102] If this is, indeed, the legislative intent, the argument for legislating judicially an action for damages, at least under the doctrine of implied remedies, is weakened because the legislature may well have settled the question.

It is a familiar principle that the best evidence of legislative intent is in the words of the statute itself.[103] Nowhere on the face of Section 304 is a damage remedy excluded. By stating that the district courts shall have jurisdiction to enforce an emmission standard,[104] damages can properly be awarded as a method of such enforcement.[105] Isolated statements of legislative intent should not restrict what the statute implies.

Such an approach was adopted by the Supreme Court in authorizing federal district courts full power to award appropriate relief (equitable and legal) under a federal statute if the statute expresses strong federal interests and does not on its face restrict that power.[106] In *Mitchell v. DeMario Jewelry,*[107] the Secretary of Labor brought an action to enjoin violations of Section 15(a)(3) of the Fair Labor Standards Act[108] which makes it unlawful for an employer to discharge or discriminate against an employee because the employee had initiated a proceeding under the Act. In ordering the further remedy of reimbursement of lost wages as part of its inherent power to give effect to the policy of the Act, the Supreme Court ignored a House Committee report which had stated that such reimbursement

102. Speech by Senator Muskie, 116 Cong. Rec. 33102, (1970); Speech by Sanator Hart, 116 Cong. Rec. 33104, (1970).

103. United States v. American Trucking Assns., 310 U.S. 534, 543 (1940) holds:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.

See also Perry v. Commerce Loan Co., 383 U.S. 392 U.S. 392, 400 (1966); Flora v. United States, 357 U.S. 63, 65 (1958); Gemsco v. Walling, 324 U.S. 244, 260-61 (1945).

104. Clean Air Act §304(a), 42 U.S.C. §1857h-2(a) (1970).

105. Text at 516-18, *supra.*

106. Mitchell v. DeMario Jewelry, 361 U.S. 288, 291 (1960).

107. *Id.*

108. 29 U.S.C. §215(a)(3) (1971).

would not be allowable.[109] Citing *Brown v. Swann*[110] Justice Harlan stated:

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'[111]

A citizen seeking damages for past injury under Section 304(a) would be invoking a federal district court's equity jurisdiction because he would also be seeking either the equitable remedy of injunction or mandamus to prevent future pollution violations. These remedies seem clearly to be allowed by Section 304(a). It is also a general rule that equity courts have the power to decree complete relief and for this purpose may accord what would otherwise be legal remedies.[112] Such rule has permitted one federal district court to imply the remedy of damages from Section 17(a) of the 1934 Securities Exchange Act[113] despite the fact that the legislative history indicated that the Act was only to be enforced by injunction or criminal action.[114]

In light of *Textile Workers Union v. Lincoln Mills*[115] it can be argued that federal courts would provide a damage remedy if the federal policy of preventing air pollution was thought to be very great. In *Textile Workers* an executory agreement to arbitrate between a labor union and an employer was specifically enforced. Such remedy was not afforded in the statute as construed. Also, executory agreements to arbitrate in this situation would not have been enforceable at the time in a federal court because of the common law and the Federal Arbitration Act.[116] In effect, the Court decided that the policy in the Labor Management Relations Act[117] of maintaining industrial peace was so great that a remedy would be fashioned to enforce that policy even though it was excluded by the language of the Federal Arbitration Act and by the common law.

109. Mitchell v. DeMario Jewelry, 361 U.S. at 295.

110. 35 U.S. (10 Pet.) 496, 503 (1836).

111. Mitchell v. DeMario Jewelry, at 291. *See also* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386 (1970); Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944).

112. Katchen v. Landy, 382 U.S. 323 (1966).

113. Securities Exchange Act of 1934 §17(a), 15 U.S.C. §78q (1971).

114. Dorfman v. First Boston Corp., 336 F. Supp. 1089 (E.D. Pa. 1972).

115. 353 U.S. 448 (1957).

116. 9 U.S.C. §1 (1971) *See* Frankfurter's dissenting opinion in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 466-67 (1957).

117. 29 U.S.C. §151 (1971).

Such a strong contradictory expression of legislative intent—the command of another federal statute—is not involved with respect to damages under Section 304 of the Clean Air Act.

THE DOCTRINE OF PENDENT JURISDICTION

Victims of pollution violations can attempt to establish federal jurisdiciton over a damage claim based upon state nuisance law by filing citizen suits for injunctive relief under Section 304(a) of the Clean Air Act and appending the state law damage claim as a second cause of action. The argument that the federal district court can properly retain jurisdiction to decide the damage claim rests upon the doctrine of pendent jurisdiction. The current standards for the exercise of pendent jurisdiction over a state claim have been set forth in *United Mine Workers v. Gibbs*.[118] These standards are phrased in terms of: (1) a federal district court's *power* to exercise jurisdiction over a state claim, and (2) the court's *discretionary* exercise of that power.

A. *Power to Exercise Pendent Jurisdiction*

Under Article III, Section 2 of the Constitution the federal courts are empowered to hear and decide all cases in law and equity arising under the laws of the United States. It has long been held that when a federal claim is an ingredient of the case a federal court has the power to decide the entire case even though other questions of law or fact may be involved.[119] Assuming substantiality of the federal claim, jurisdiction attaches at the filing of the complaint, and the court in its discretion has the power to decide all the state law questions at all.[120]

In *United Mine Workers v. Gibbs*[121] the plaintiff alleged that the defendant union had engaged in a secondary boycott against the coal company with which he had been employed, thereby violating Section 303 of the Labor Management Relations Act[122] and the Tennessee common law of conspiracy. In examining whether the district court properly entertained jurisdiction of the claim based on Tennessee law, the opinion of the Court by Justice Brennan articulated the present standard for determining the circumstances in which a federal court has the power to preside over a pendent state claim: "The federal claim must have substance sufficient to confer subject matter jurisdiction on the court [and] the state and federal

118. 383 U.S. 715 (1966).

119. Osborne v. Bank of United States, 22 U.S. (9 Wheat.) 738, 823 (1824).

120. Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 324-25 (1938); Siler v. Louisville & N. Ry., 213 U.S. 175, 191 (1909).

121. 383 U.S. 715 (1966).

122. 29 U.S.C. §187 (1971).

claims must derive from a common nucleus of operative fact."[123] If these requirements are met, then the federal court may properly retain jurisdiction over the state claim. The Court also formulated the test in the alternative:

> But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[124]

The substantiality of the federal claim is ordinarily to be determined from the pleadings.[125] It has been held that an insubstantial federal claim just appear plainly so,[126] or to be "so attenuated" or frivolous as to be "absolutely devoid of merit."[127] Expressing itself more specifically, one federal court has stated that an insubstantial federal claim is one unable to withstand a motion to dismiss for failure to state a claim upon which relief can be granted.[128]

Claims for injunctive relief under Section 304 are, of course, substantial ones provided the substantive and venue provisions of the statute are met.[129] An appended state claim must derive from a common nucleus of operative fact. However, a strong argument can be made that a claim for injunctive relief under Section 304 and a damage claim under state law do not meet this test. Because Justice Brennan used the word "operative" to identify the word "fact," the facts that must have a "common nucleus" would be those tending to prove each of the claims.[130] These facts of proof would be substantially different for each claim. Under Section 304 these facts need only be those which will show a violation of an emission standard or an order issued by the Administrator or the State.[131] On the other hand, the facts necessary to prove a common law nuisance action for damage are those which will show duty of due care on the part of the

123. United Mine Workers v. Gibbs, 383 U.S. at 725.

124. *Id.*

125. *Id.* at 726.

126. Armstrong Paint and Varnish Works v. Nu-Enamel Corp., 305 U.S. at 324.

127. Baker v. Carr, 369 U.S. 186, 199 (1962); Bell v. Hood, 327 U.S. at 683; *accord* Levering & G. Co. v. Morrin, 289 U.S. 103, 105 (1933).

128. A. H. Emery Co. v. Marcan Products Corp., 389 F.2d 11 (2d Cir. 1968), *cert. denied* 393 U.S. 835.

129. Clean Air Act §304(c), 42 U.S.C. §1857h-2(c) (1970).

130. Interpreting *United Mine Workers v. Gibbs, Denys Fisher v. Louis Marx & Co.*, 306 F. Supp. 956, 960 (N.D. W. Va. 1969) held:

> . . . whether the particular character of (the state claim) is sufficiently 'related' to the federal (claim) is primarily an issue of identity of proof.

131. Clean Air Act §304(a)(1), 42 U.S.C. §1857h-2(a)(1) (1970).

defendant, breach of that duty, causation, injury and damages.[132] Since none of the elements of proof in the damage claim would be necessary in the federal claim,[133] it could be argued that a federal district court would not have jurisdiction over the state damage claim.

The argument in favor of finding that the two claims derive from a common nucleus of operative fact begins with *Gibbs* and its stress on the word "fact" and not the word "proof." The act upon which a claim for injunctive relief under Section 304 and a damage claim under state law is based would most likely be the act of a smelter polluting the air. Such an act would be an operative act and thus would constitute the common nucleus of operative fact, or causative fact,[134] upon which both claims would be grounded.

Secondly, in properly defining the term "common nucleus of operative fact" anology can be made to an area definitionally close to pendent jurisdiction—compulsory counterclaims under Rule 13(a) of the Federal Rules of Civil Procedure. As noted by the Supreme Court, the Federal Rules manifest the intention to encourage the resolution of all aspects of a dispute in one suit, and to that extent they emphasize policies similar to those underlying the concept of pendent jurisdiction.[135] Furthermore, the policy of compulsory counterclaims is grounded in notions of judicial economy, fairness and convenience to the parties,[136] notions which have been identified in *Gibbs* as basic to the doctrine of pendent jurisdiction.[137]

Rules 13(a) instructs federal courts, when possible, to adjudicate counterclaims growing out of the "same transaction or occurrence" as the plaintiff's claim. It has been held that the claims arise out of the "same transaction" if the facts of the claims have a "logical relationship" to each other.[138] Interpreting this language, one federal circuit has held that a counterclaim was complusory if it grew out of

132. F. Harper & F. James, The Law of Torts 74 (1956).

133. Certainly these facts would not "overlap considerably," *River Brand Rice Mills, Inc. v. General Foods Corp.*, 334 F.2d 770, 773 (5th Cir. 1964), or be "substantially identical," *Obrien v. Westinghouse Elec. Corp.*, 293 F.2d 1 (3rd Cir. 1961).

134. Several federal courts have construed the language "common nucleus of operative fact" to mean "causative set of facts." *See, e.g., Roberts v. Williams*, 456 F.2d 828 (5th Cir. 1972); *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836 (E.D. N.Y. 1972); *Peerless Dental Supply Co. v. Weber Dental Mfg. Co.*, 299 F. Supp. 331 (E.D. Pa. 1969).

135. United Mine Workers v. Gibbs, 383 U.S. at 725 n. 13; Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 320 (1927).

136. *See, e.g.*, Green, *Federal Jurisdiction Over Counterclaims*, 48 Nw. U. L. Rev. 271, 276-77 (1953).

137. United Mine Workers v. Gibbs, 383 U.S. at 726; *see also* Rosado v. Wyman, 397 U. S. 397, 405 (1970).

138. Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926) (interpreting Equity Rule 30 which was the basis for Federal Rule 13a).

the "same basic controversy" as the principle claim.[139] It can be argued, therefore, that the "same basic controversy" amplification of the "logical relationship" formula is a realistic definition of "common nucleus of operative fact" in the pendent jurisdiction doctrine because it directs the inquiry to ascertaining whether the claims asserted are part of a single lawsuit and would ordinarily be litigated on one judicial proceeding.[140]

B. *Discretionary Exercise of Pendent Jurisdiction Power*

United Mine Workers v. Gibbs broadened the discretion of federal district courts to exercise or not to exercise their power to invoke pendent jurisdiction.[141] Trial courts, it said, were instructed to look to "considerations of judicial economy, convenience and fairness to litigants" in exercising their discretion, and to avoid needlessly deciding questions of state law.[142] The decision appeared to require that dismissal of state claims should occur in three situations: (1) if the federal claim, even though substantial enough to confer jurisdiction, were dismissed before trial;[143] (2) if the state issues substantially predominate over the federal issues in terms of proof, scope, or of the comprehensiveness of the remedy sought;[144] or, (3) if the possibility of jury confusion would justify separating the state and federal claims for trial.[145] Finally, the Court noted that the discretion to dismiss state claims exists throughout any case.[146]

It appears likely that at least one of the three situations for dismissal of a state claim would be present were a state claim for damages appended to a federal claim for injunctive relief under Section 304 of the Clean Air Act.[147] However, the argument would be

139. Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633-34 (3rd Circ. 1961); *see also* Revere Copper & Brass, Inc. v. Aetna Ca. & Sur. Co., 426 F.2d 709, 714 (5th Cir. 1970).

140. This is the alternative test of the *Gibbs* case, Text at n. 124, *supra*.

141. United Mine Workers v. Gibbs, 383 U.S. at 726:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.

142. *Id.* at 726.

143. *Id.*

144. *Id.*at 726-27.

145. *Id.* at 727.

146. *Id.*

147. The claim for injunctive relief could be dismissed before trial either because of procedural defect or because the defendant polluter would have closed down its operation. It. can also be argued that the issues in the state claim in terms of proof and the comprehensiveness of the remedy sought substantially predominate over these issues in the claim for injunctive relief. Note the development of this argument as based on the lack of federal court's *power* to exercise pendent jurisdiction, Text at *supra*. There is probably no reason to believe that any jury confusion would occur from appending a damage claim to a claim for injunctive relief.

stronger for retaining the state claim if it were closely tied to questions of federal policy,[148] as was the case in *Gibbs* itself where the scope of the state claim implicated the federal doctrine of preemption.[149] The argument for retaining the damage claim, therefore, is based upon the fact that a state common law of nuisance which allows for damages is closely tied to both a claim for injunctive relief under Section 304 and the federal common law of nuisance in air pollution suits.[150] Also, the damage claim "implicates" the cogent federal policy of preventing the harmful effects of air pollution on public health and walfare.[151] If a federal remedy of damages is not allowed under Section 304 of the Clean Air Act, assumption of jurisdiction over a pendent damage claim could be justified because the specific federal relief is inadequate to fully vindicate the federal interest that the substantive right to clean air reflects.[152]

Since pendent jurisdiction is directed toward the conservation of judicial energy and the avoidance of a multiplicity of litigation,[153] presumably it would not be good policy to require victims of pollution violations to have to go into state court to protect some of their rights when all of their rights could more economically be determined in one forum, here the federal court. The federal system is not a mixture that is wrapped in neat packages marked all federal or all state.[154] Especially where there are strong federal links in the field of air pollution, the distinction between federal and state law begins to blur.[155] One commentator has summed this up by stating:

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148. United Mine Workers v. Gibbs, 383 U.S. at 727:

> There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.

149. *Id.*

150. *See* Washington v. General Motors Corp., 406 U.S. 109 (1972) *accord* Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

151. Clean Air Act §101, 42 U.S.C. §1857 (1970). *See also* Clean Air Act §109, 42 U.S.C. §1857c-4(1970) which states that the national ambient air quality standards are fully applicable to the states.

152. *Accord*, Note, *UMW. v. Gibbs and Pendent Jurisdiction*, 81 Harv. L. Rev. 657, 668 (1967-68). *See also* Forest Laboratories, Inc. v. Pillsbury Co., 452 F.2d 621, 629 (7th Cir. 1971) (held that a pendent state claim for misappropriation of trade secrets made the exercise of federal jurisdiction appropriate because the claim implicated federal patent policy); Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 167, 172-73 (1953) (argument made that where the complaint asserts a claim of federal right which is substantial but not yet established as a matter of law, the case is one in which adjudication by a federal court is most appropriate and deterrence of access to federal jurisdiction most clearly undesirable.)

153. Rosado v. Wyman, 397 U.S. at 405 (federal statutory claim joined with a constitutional claim that would have required a three-judge court.).

154. H. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 540 (1954).

155. *Id.*

> . . . we may fail to keep in mind the fact that the relationship between the state and federal governments in the United States is not at all comparable to the relationships that exist between sovereign nations, nor is it even fully comparable to the relationships that exist between states. If there is going to be deference, it must be integrated deference by the parts to the whole and to the parts by the whole. That is what federalism is all about. It is not susceptible to a mechanical division of functions.[156]

THE DOCTRINE OF PROTECTIVE JURISDICTION

In *Textile Workers Union v. Lincoln Mills*[157] two members of the Supreme Court rejected the view that federal common law was to be applied to that case, but concurred in the result of the theory of protective jurisdiction.[158] The basics of this have been well stated by Justice Frankfurter:

> Called 'protective jurisdiction,' the suggestion is that in any case for which Congress has the constitutional power to prescribe federal rules of decision and thus confer 'true' federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law. Analysis of the 'protective jurisdiction' theory might also be attempted in terms of the language of Article III—construing 'laws' to include jurisdictional statutes where Congress could have legislated substantively in a field. This is but another way of saying that because Congress could have legislated substantively and thereby could give rise to litigation under a statute of the United States, it can provide a federal forum for state-created rights although it chose not to adopt state law as federal law or to originate federal rights.[159]

This theory of protective jurisdiction could be utilized in order to provide a federal district court subject matter jurisdiction over a state created damage claim under Section 304 of the Clean Air Act. Section 304(a) is a jurisdictional statute, and a claim for damages would "arise" under this "law" of the United States. Although the remedy of damages is not spelled out, such a remedy could have been afforded by Congress.

The argument for protective jurisdiction rests on Chief Justice

156. Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. Pitt. L. Rev. 759, 781 (1972); *see also* the Federalist, Nos. 6-17 (H. Lodge ed. 1888) (A. Hamilton); The Federalist, No. 46 at 292 (H. Lodge ed. 1888) (J. Madison).

157. 353 U.S. 448 (1957).

158. Justices Harlan and Burton, concurring in the result, 353 U.S. 448, 460 (1957).

159. Justice Frankfurter, dissenting in Textile Workers Union v. Lincoln Mills, 353 U.S. at 473-74. *See also* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216, 224-25 (1948); Mishkin, *supra* note 152 at 184-96.

Marshall's opinion in *Osborn v. Bank of United States*,[160] wherein it was stated that Congress could authorize a bank chartered by the federal government to sue in federal court even though only state issues were involved, and on two cases permitting a trustee in bankruptcy to pursue in federal court a private cause of action arising under, and completely governed by, state law.[161] It is true that in those cases there is, in the background at least, some federal right other than the bare right to sue in federal court.[162] Justice Frankfurter apparently assumes, however, that for protective jurisdiction there need be no federal law "somewhere in the background."[163] Nevertheless, claims for damages under Section 304 of the Clean Air Act would have a federal law in the background, that being the question whether Clean Air Act standards had been violated. Therefore the doctrine of protective jurisdiction in this case is based on *Osborn*. The argument can further be supported by the belief that protective jurisdiction theory protects a strong federal interest which should not be discriminated against in the state courts.[164]

Justice Frankfurter, on the other hand, in a dissenting opinion in which he considered the arguments at great length, asserted that " 'protective jurisdiction,' once the label is discarded, cannot be justified under any view of the allowable scope to be given to Article III [of the Constitution]."[165] The principle reason is that the protective jurisdiction theory would vastly extend federal jurisdiction. "For example," said Frankfurter, "every contract or tort arising out of a contract affecting commerce might be a potential cause of action in the federal courts, even though only state law was involved in the decision of the case."[166] The protective theory would also reflect an inadequacy on the part of state tribunals to determine state law, an assumption that would presumably do violence to the judicial system.[167]

It is asserted by the author that the doctrine of protective jurisdiction should be available to damage claimants under Section 304 of the Clean Air Act only as a last resort. Because the precedent it would establish would have such drastic consequences on the

160. 22 U. S. (9 Wheat.) 738 (1824).

161. Schumacher v. Beeler, 293 U.S. 367 (1934); Williams v. Austrian, 331 U.S. 642 (1947).

162. The bank's very existence was a creature of federal law; in the bankruptcy cases the trustee was an officer of a federal court, and his ancillary suit was a part of the whole bankruptcy process, itself governed by federal law.

163. Textile Workers Union v. Lincoln Mills, 353 U.S. at 474.

164. This reason overlaps with the reasons given to support each of the previous two theories for maintaining federal jurisdiction.

165. Textile Workers Union v. Lincoln Mills, 353 U.S. at 474.

166. *Id.*

167. *Id.* at 475.

accepted understanding of Article III as a limitation on the federal courts, it is believed that most federal courts would decline the opportunity to exercise it.

CONCLUSION

A plaintiff seeking damages under Section 304 of the Clean Air Act should be permitted to avail himself of federal jurisdiction. This Note has discussed three methods by which this might be accomplished. The first method involves a process of judicial construction of Section 304(a) allowing for a federal claim for damages. The second is based upon the doctrine of pendent jurisdiction over state claims. The third, and most tenuous, is based upon the doctrine of protective jurisdiction. Within these theories lies federal jurisdiction over such a claim for the plaintiff and the federal judge who wish to see the federal courts compensate these injuries.

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