

BELL V. CHESWICK GENERATING STATION

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INTRODUCTION

In *Bell v. Cheswick Generating Station*,¹ residents and property owners near a Pennsylvania power generating station brought state common law tort claims against the facility, alleging harm from fly ash and unburned coal combustion products that were released from the plant and settled onto their property. Defendant GenOn Power Midwest (“GenOn”) argued that the Clean Air Act (“CAA”)² preempted plaintiffs’ claims, but the Court of Appeals for the Third Circuit disagreed, allowing plaintiffs’ case to proceed.³ This Comment analyzes the court’s decision and argues that it serves two important functions: preserving the ability of common law to perform a “gap-filling” function against the CAA’s regulatory backdrop, and leaving open the possibility that state common law may be used to address greenhouse gas emissions.

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¹ 734 F.3d 188 (3d Cir. 2013), *reh’g en banc denied*, No. 12-4216 (3d Cir. Sept. 23, 2013).

² 42 U.S.C. §§ 7401–7671 (2012).

³ *Id.* at 190.

I. OVERVIEW OF CLEAN AIR ACT PREEMPTION

A. Federal Preemption of State Common Law

All preemption analyses necessarily begin with the Supremacy Clause of the United States Constitution, which establishes that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁴ Courts assessing a preemption claim are to be guided by two “cornerstones” of preemption analysis.⁵ First, “the purpose of Congress is the ultimate touchstone in every pre-emption case;” and second, there is a presumption against preemption where Congress has legislated in an area traditionally occupied by the states.⁶ Preemption analysis seeks to ensure that states do not upset the regulatory balance set by a federal agency⁷ or Congress.⁸

Courts have recognized two types of preemption: express, in which a federal statute makes explicit that state law is preempted; and implied, which may be found in the absence of explicit preemption.⁹ There are two types of implied preemption: field preemption and conflict preemption. Field preemption occurs when Congress has so fully regulated an area, or the federal government has such a strong interest in it, that there is no room for state action.¹⁰ Conflict preemption has three further subdivisions, and these can be considered to exist along a continuum of degrees of conflict.¹¹ At one extreme is impossibility preemption, which occurs when it is wholly impossible for an actor to comply with the requirements of both state and federal law.¹² Standard conflict preemption occurs when state and federal laws conflict, but it is not necessarily impossible to comply with both.¹³ At the other end of the continuum is obstacle preemption, which occurs when state law presents an obstacle to achieving the full purposes and objectives of Congress.¹⁴

B. Preemption Under the CAA

The CAA was enacted “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.”¹⁵ The Act em-

⁴ U.S. CONST. art. VI, § 1.

⁵ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

⁶ *Id.* (internal citations omitted).

⁷ *Id.* at 609.

⁸ *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

⁹ Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1259 (2010).

¹⁰ *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

¹¹ Untereiner, *supra* note 9, at 1259.

¹² *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011).

¹³ Untereiner, *supra* note 9, at 1259–60.

¹⁴ *Fidelity*, 458 U.S. 141 at 153.

¹⁵ 42 U.S.C. § 7401(b)(1).

loys a “cooperative federalism” structure, under which the federal government sets baseline standards that are implemented and enforced by the states through the means of their choosing.¹⁶ The Environmental Protection Agency (“EPA”) sets National Ambient Air Quality Standards (“NAAQS”), limits on the maximum concentration of certain pollutants in the ambient air nationwide in order to protect public health.¹⁷ States are tasked with ensuring the achievement and maintenance of the NAAQS through the creation and enforcement of State Implementation Plans (“SIPs”), which must be approved by the EPA.¹⁸ The CAA also requires states to establish permitting schemes; these are included in Title V, which streamlines air pollution regulation by consolidating all of a source’s air pollution control requirements into a comprehensive “operating permit.”¹⁹

The CAA is an enormously complex and detailed statute, and the above requirements and programs barely scratch the surface of its regulatory scope.²⁰ However, this complexity does not mean that the Act leaves no room for additional enforcement. True to its intent to develop cooperative federal and state action to address air pollution,²¹ the CAA contains savings clauses that preserve certain causes of action notwithstanding the comprehensive federal regulatory scheme. First, the states’ rights savings clause states that “[e]xcept as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution.”²² This savings clause establishes the ability of states to adopt protections that are more stringent than the minimum air quality levels set by the CAA.²³ Second, the citizen suit savings clause states that “[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief”²⁴

The Supreme Court has never issued an opinion on the preemptive effect of the CAA on state common law claims, but it decided a very similar question regarding Clean Water Act (“CWA”)²⁵ preemption in *International Paper Co. v. Ouellette*.²⁶ In *Ouellette*, the Court found that the CWA’s savings clauses—

¹⁶ Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013).

¹⁷ 42 U.S.C. § 7409(b).

¹⁸ 42 U.S.C. § 7410(a)(1).

¹⁹ EPA, OFFICE OF AIR QUALITY PLANNING & STANDARDS, *Air Pollution Operating Permit Program Update: Key Features and Benefits* 1 (Feb. 1998), <http://perma.law.harvard.edu/LH65-J65T>.

²⁰ ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 531–32 (7th ed. 2013).

²¹ See 42 U.S.C. § 7401.

²² 42 U.S.C. § 7416.

²³ *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 336 (6th Cir. 1989).

²⁴ 42 U.S.C. § 7604(e).

²⁵ 33 U.S.C. §§ 1251–1387.

²⁶ 479 U.S. 481 (1987).

which are substantially similar to those found in the CAA²⁷—allow states to impose higher standards, including higher common-law restrictions, on sources within their borders.²⁸ Therefore, the Court held, nothing in the CWA barred individuals from bringing a nuisance claim pursuant to the law of the state in which the source of the discharge was located.²⁹ The Court further explained that applying the law of the source state does not disrupt the balance among federal and state interests or interfere with the overall CWA regulatory scheme, and that it does not subject the source to an excessive number of regulations.³⁰ However, *Ouellette* did hold that claims seeking to apply the law of an affected state to a source in a different state are preempted by the CWA, because allowing these claims *would* disrupt the balance of power and undermine the methods by which the Act was designed to address water pollution.³¹

Ouellette has informed lower court's interpretation of the CAA's savings clauses. In *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*,³² the Sixth Circuit held that the CAA did not preempt plaintiffs' claims under the Michigan Environmental Protection Act, relying on *Ouellette* to support its conclusion.³³ The court emphasized, "the CAA displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute."³⁴ The Fourth Circuit also relied on *Ouellette* in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*,³⁵ but unlike the Sixth Circuit, it read the case to create the "strongest cautionary presumption" against nuisance actions seeking to establish emissions standards different from federal and state regulatory law.³⁶

II. THE *BELL* CASE AND THE COURT OPINIONS

Kristie Bell and Joan Luppe are the named plaintiffs in a putative class of 1,500 individuals who own or inhabit property within a mile of GenOn's Cheswick Generating Station in Springdale, Pennsylvania, about twenty miles north-east of Pittsburgh.³⁷ According to the plaintiffs, GenOn's operation and maintenance of the plant releases malodorous substances and particulates into the neighborhood, causing fly ash and unburned coal combustion byproducts to settle onto their property, effectively making them "prisoners in their [own]

²⁷ The CWA's states' rights savings clause contains additional language that is missing from the CAA clause. This relevance *vel non* of this additional language is discussed in Part II.B, *infra*.

²⁸ *Ouellette*, 479 U.S. at 497.

²⁹ *Id.*

³⁰ *Id.* at 498–99.

³¹ *Id.* at 494–95.

³² 874 F.2d 332 (6th Cir. 1989).

³³ *Id.* at 343–44 (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987)).

³⁴ *Id.* at 342 (emphasis deleted).

³⁵ 615 F.3d 291 (4th Cir. 2010).

³⁶ *Id.* at 303 (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987)).

³⁷ *Bell v. Cheswick Generating Station*, 734 F.3d 188, 189 (3d Cir. 2013).

homes.”³⁸ Plaintiffs brought suit for damages and injunctive relief under state common law nuisance, negligence and recklessness, and trespass law.³⁹

A. *The District Court Opinion*

The District Court for the Western District of Pennsylvania held that the CAA preempted plaintiffs’ common law claims.⁴⁰ In doing so, it looked to *American Electric Power Co. v. Connecticut* (“AEP”),⁴¹ in which the Supreme Court held that the CAA displaced federal common law nuisance claims seeking to curb greenhouse gas emissions.⁴² The court also looked to *North Carolina*, in which the Fourth Circuit rejected North Carolina’s public nuisance claim against a number of out-of-state power plants, holding that such a claim would interfere with the CAA’s comprehensive regulatory regime if allowed to proceed.⁴³

Having concluded that the plaintiffs’ claims conflicted with the CAA’s regulatory scheme, the court determined that the Act’s savings clauses did not preserve space for these claims.⁴⁴ The court quoted *North Carolina* for its determination that *Ouellette* did not allow states to rely on the CWA’s savings clause “to impose separate discharge standards on a single point source because it would ‘undermine the carefully drawn statute through a general savings clause.’”⁴⁵

B. *The Third Circuit Opinion*

The Third Circuit reversed the district court’s preemption holding.⁴⁶ It began by considering *Ouellette* and the close similarity between the CWA and CAA savings clauses. The court made note of a number of important conclusions drawn in *Ouellette*: that nothing in the CWA preempted nuisance claims pursuant to the laws of the source state; that the CWA allowed states to impose more stringent statutory *and* common law restrictions on its own sources; and that although a source state’s more demanding nuisance law might create some tension with the permit system, this fact alone did not undermine the goals of the Act or require a finding of preemption.⁴⁷

The court then responded to GenOn’s argument that, although the CAA and CWA citizen suit savings clauses are nearly identical, the CWA states’ rights savings clause is broader than its CAA counterpart, making *Ouellette*

³⁸ *Id.* at 192 (alteration in original).

³⁹ *Id.* at 192–93.

⁴⁰ *Bell v. Cheswick Generating Station*, 903 F. Supp. 2d 314, 322 (W.D. Pa. 2012).

⁴¹ 131 S. Ct. 2526 (2011).

⁴² *Bell*, 903 F. Supp. 2d at 321.

⁴³ *Id.*

⁴⁴ *See id.* at 322.

⁴⁵ *Id.* (alterations omitted) (quoting *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 304 (4th Cir. 2010)).

⁴⁶ *Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013).

⁴⁷ *Id.* at 194–95.

distinguishable.⁴⁸ Both clauses state that, except as otherwise provided in the relevant Act, “nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof . . . to adopt or enforce (1) any standard or limitation respecting [pollution discharge or emission] or (2) any requirement respecting control or abatement of [pollution].”⁴⁹ However, the CWA adds language stating that nothing in the Act shall “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”⁵⁰ The court rejected GenOn’s argument that this additional language made the CAA clause narrower than the CWA clause, attributing its absence from the CAA to the fact that, unlike water, there are no jurisdictional boundaries or rights that apply to the air.⁵¹

From here, the court reviewed decisions from other circuit courts that had previously considered the application of *Ouellette*’s holding to a CAA case: first, *Her Majesty the Queen*, in which the Sixth Circuit relied on *Ouellette* in holding that the CAA did not preempt claims under Michigan state law; and second, *North Carolina*, which the court cited for its statement that *Ouellette*’s holding was “equally applicable to the Clean Air Act.”⁵² Based on its review of the savings clauses and sister circuit decisions, the Third Circuit concluded that *Ouellette* controlled the case, setting down the rule that the CAA does not preempt state common law claims based on the law of the source state.⁵³ Accordingly, the court found that the suit “brought by Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania [was] not preempted.”⁵⁴

The court briefly discussed GenOn’s argument that allowing the plaintiffs’ claims to proceed would undermine the comprehensive regulatory structure of the CAA, but rejected this assertion, highlighting *Ouellette*’s determination that cooperative federalism allows states to set higher pollution standards through tort law.⁵⁵ The Third Circuit then reversed the district court’s holding and remanded the case to proceed through the class certification process.⁵⁶ A month

⁴⁸ *Id.* at 195.

⁴⁹ *Id.*

⁵⁰ Compare 42 U.S.C. § 7416, with 33 U.S.C. § 1370.

⁵¹ *Bell*, 734 F.3d at 195.

⁵² *Id.* at 196. (quoting *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 306 (4th Cir. 2010)). The court’s discussion of *North Carolina* was limited to a brief summary of the case and its holding, glossing over the conflict between the Third and Fourth Circuits’ opinions, to be discussed in Part III.A *infra*.

⁵³ *Id.* at 196–97.

⁵⁴ *Id.* at 197.

⁵⁵ *Id.* at 197–98. GenOn argued in the alternative that plaintiffs’ claims should be barred by the political question doctrine, but the court rejected this argument as well and noted that had it been valid, *Ouellette* would not have been decided in the first place. *Id.* at 198.

⁵⁶ *Id.* at 198; see also Diana A. Silva, *Third Circuit Rules State Tort Law Claims Not Preempted by Federal Clean Air Act*, MGKF LITIG. BLOG (Aug. 21, 2013), <http://perma.law.harvard.edu/DF8A-PZCH>.

later, the Third Circuit denied GenOn's petition for rehearing *en banc*.⁵⁷ In June 2014, the Supreme Court denied GenOn's petition for writ of certiorari.⁵⁸

III. THE SIGNIFICANCE OF *BELL* AND ITS IMPLICATIONS FOR COMMON LAW CLAIMS

A. Bell Creates an Apparent Circuit Split with North Carolina

Bell itself presents as a simple extension of *Ouellette* to preserve CAA claims against in-state sources, but its practical effect is complicated by the Fourth Circuit's holding in *North Carolina*. In that case, North Carolina brought a public nuisance suit against the Tennessee Valley Authority ("TVA"), seeking an injunction against its coal-fired power plants in Alabama, Kentucky, and Tennessee, the emissions from which allegedly degraded North Carolina's air quality.⁵⁹ The district court issued an injunction requiring TVA to install control technology at four of the plants and established a schedule of emissions limits for the four plants.⁶⁰ The Fourth Circuit reversed⁶¹ in a manner that has implications for CAA preemption extending beyond the bounds of the question the court was asked to decide.

As discussed above in Part I.B, *Ouellette* held that the CWA preempts state common law to the extent that it is applied to an out-of-state source, but that the CWA does not preempt state common law when it is applied to an in-state source.⁶² The Fourth Circuit could easily have decided the case based solely on the application of this principle. First, it found that the district court had improperly applied North Carolina law to TVA plants in Alabama and Tennessee.⁶³ Next, it concluded that North Carolina had no valid common law claim even if Alabama and Tennessee law had been properly applied, because the plants were not nuisances under the laws of those states.⁶⁴ However, this analysis was not the cornerstone of the opinion and was instead conducted almost as an afterthought, "[i]n addition to" other "problems" that were

⁵⁷ Karen Winters & Emily Seidman, *Third Circuit Denies Rehearing in Clean Air Act Preemption Case*, FRESH: PERSPECTIVES ON ENVTL., SAFETY, & HEALTH (Sept. 24, 2013), <http://perma.law.harvard.edu/B62L-7PCJ>.

⁵⁸ *GenOn Power Midwest, L.P. v. Bell*, __ S. Ct. __, 2014 WL 695082 (June 2, 2014).

⁵⁹ *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296–97 (4th Cir. 2010).

⁶⁰ *Id.* at 298.

⁶¹ *Id.* at 296.

⁶² *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 499–500 (1987).

⁶³ *North Carolina*, 615 F.3d at 306. However, the Fourth Circuit's conclusion that the district court applied North Carolina law is somewhat questionable, as it seemed to be grounded in inferences and secondary sources rather than the facts of the case. See Nigel Barella, Comment, *North Carolina v. Tennessee Valley Authority*, 35 HARV. ENVTL. L. REV. 247, 258–59 (2011) (explaining that the Fourth Circuit based its conclusions on public records and the similarity of the remedy awarded to North Carolina law).

⁶⁴ *North Carolina*, 615 F.3d at 310.

presented earlier in the court's opinion and that occupied a majority of the text.⁶⁵

What really seemed to be driving the Fourth Circuit's decision was a concern about tort law undermining the CAA regulatory regime,⁶⁶ and so the court went beyond the questions described above to opine on the general permissibility of common law nuisance suits.⁶⁷ The court read *Ouellette* as establishing a strong cautionary presumption against all common law nuisance actions.⁶⁸ While the Fourth Circuit was correct that the *Ouellette* court was concerned about common law claims undermining the CWA regulatory scheme, it omitted *Ouellette's* focus on the troublesome effect of the *extraterritorial* application of affected state law.⁶⁹ *North Carolina's* preemption discussion treated both source claims and affected-state claims as equally problematic, misinterpreting *Ouellette* and expanding the reach of the CAA's preemptive effect.

The Third Circuit's refusal to adopt the Fourth Circuit's misinterpretation of *Ouellette* has resulted in a circuit conflict: In *North Carolina*, the Fourth Circuit suggested that *Ouellette* intended to preempt nearly all common law claims, while in *Bell*, the Third Circuit followed the dictates of *Ouellette* to firmly preserve common law claims against an in-state source.⁷⁰ Litigants have picked up on the regulatory uncertainty these incompatible decisions create. In *Little v. Louisville Gas & Electric Co.*,⁷¹ plaintiffs in the Western District of Kentucky are alleging state common law tort claims very similar to those as-

⁶⁵ *Id.* at 306; Barella, *supra* note 63, at 259 (noting that “the court’s treatment of Alabama and Tennessee law appear[ed] rather one-sided” and did not respond to arguments North Carolina raised in its brief).

⁶⁶ See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 408–09 (2011) (positing that the Fourth Circuit’s “disdain for tort law” was driven by its view of tort law as an “inelegant source of interference with the scheme devised by Congress”).

⁶⁷ *North Carolina*, 615 F.3d at 303.

⁶⁸ *Id.* (citing *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494–97 (1987)). The court acknowledged that *Ouellette* “refrained from categorically preempting every nuisance action brought under source state law,” but the tenor of its treatment of the case made it clear that it considered *Ouellette* to have established the highest bar for common law claims. *Id.*

⁶⁹ See *Ouellette*, 479 U.S. at 495–97.

⁷⁰ Possible distinctions can be drawn between *Bell* and *North Carolina*: the former involved a private nuisance case against an in-state source, while the latter involved a public nuisance suit against an extraterritorial, and quasi-governmental, entity. Nevertheless, the courts’ opposing interpretations of *Ouellette* suggest that their disagreement is more fundamental. See generally *Petition for Writ of Certiorari at 22, GenOn Power Midwest, L.P. v. Bell*, No. 13-1013 (U.S. Feb. 20, 2014), 2014 WL 709667 [hereinafter *GenOn Petition for Certiorari*] (asserting that the *Bell* decision “conflicts directly with the Fourth Circuit’s reasoning in *TVA*.”); Andrea Grossman, *A Revival of Air Pollution Common Law? The Third Circuit’s Holding in Bell v. Cheswick Generating Station*, GEO. WASH. J. ENERGY & ENVTL. L. (Oct. 20, 2013), <http://perma.law.harvard.edu/VZC3-M4LB> (noting an “apparent circuit split” between *Bell* and *North Carolina*); Seth Jaffe, *The Third Circuit Reinstates Nuisance Claims Against Cheswick Generating: Bad Idea*, FOLEY HOAG L. & THE ENV’T (Aug. 22, 2013), <http://perma.law.harvard.edu/NYM2-2APF> (arguing that the *Bell* court erred by misreading *North Carolina*).

⁷¹ Class Action Complaint, *Little v. Louisville Gas & Elec. Co.*, No. 3:13-CV-1214-JHM (W.D.Ky. Dec. 16, 2013), 2013 WL 6703002.

serted in *Bell*.⁷² The defendants' arguments for dismissing those claims follow *North Carolina's* reading of *Ouellette*, noting that the Supreme Court "was emphatic that a state law is preempted if it interferes with the methods by which the federal statute was designed to reach its goal," but ignoring *Ouellette's* conclusion that applying source-state law does *not* interfere with those methods.⁷³ Despite the strong factual similarities between the cases, the *Little* defendants mention *Bell* in a footnote only, calling its analysis "deeply flawed."⁷⁴ Other litigants are likely to invoke *Bell's* pro-plaintiff holding. In fact, the plaintiffs' attorney in *Bell* has already filed a similar suit against another facility in the same federal district.⁷⁵ If litigants and courts continue to highlight the conflicting rules created by *Bell* and *North Carolina*,⁷⁶ this issue will ultimately receive Supreme Court review.⁷⁷

B. *Bell Preserves Crucial Remedies for Plaintiffs Inadequately Protected by the CAA*

The *Bell* decision highlights the need for the continued role of tort law as a gap filler for harms not adequately corrected by environmental statutes and federal regulatory regimes. Prior to the enactment of the federal environmental statutes in the 1970s, states and cities regulated air and water pollution, and courts used common law torts of nuisance, trespass, and strict liability in order to protect the environment and the rights of individuals to be free from pollu-

⁷² Defendants Louisville Gas & Elec. Co. and PPL Corp.'s Memorandum in Support of Motion to Dismiss, *Little v. Louisville Gas & Elec. Co.*, No. 3:13-CV-1214-JHM (W.D.Ky. Jan. 24, 2014), 2014 WL 338837.

⁷³ *Id.*

⁷⁴ *Id.* n.29.

⁷⁵ *Clean Air Act Does Not Preempt Property Owners' State Tort Law Claims, Says Third Circuit in Case of First Impression*, CROWELL MORING ENV'T, ENERGY & RES. L. ALERT (Sep. 23, 2013), <http://perma.law.harvard.edu/6SDP-XTVL>.

⁷⁶ In addition to the cases discussed above, the District Court for the Western District of Kentucky considered "the conflicting rulings of other courts that have addressed [CAA preemption of common law tort claims]" in *Merrick v. Diageo Americas Supply, Inc.* No. 3:12-CV-334-CRS, 2014 WL 1056568, at *5 (W.D.Ky. Mar. 19, 2014). After reviewing *Bell* and *North Carolina's* opposing interpretations of *Ouellette*, the court found *Bell* to be the more persuasive authority on the issue. *Id.* at *6–8. The Iowa Supreme Court is also considering the conflict between *Bell* and *North Carolina* in a case involving common law tort claims against a corn processing facility. Ryan Koopmans, *This Week at the Iowa Supreme Court*, On Brief: Iowa's Appellate Blog (Mar. 10, 2014), <http://perma.law.harvard.edu/Q596-9GKX>. The trial court in that case, which dismissed the claims, cited *North Carolina* and the district court opinion in *Bell* (before the Third Circuit's reversal). See *Freeman v. Grain Processing Corp.*, No. LACV021232, 2013 WL 6508484, at *8–9 (Iowa Dist. Apr. 1, 2013).

⁷⁷ See GenOn Petition for Certiorari, *supra* note 70 at 29–30 (arguing that Supreme Court review is "necessary to address the conflict between the [Third Circuit's] decision and [Supreme Court preemption jurisprudence] and to avoid the severely adverse consequences—to industry and the economy as a whole—that will result if common law claims such as [those in *Bell*] are allowed to proceed"); Jaffe, *supra* note 70 ("I could imagine the Supreme Court [granting certiorari] in order to clarify the reach of *Ouellette*.").

tion.⁷⁸ A private nuisance claim, for example, asserts a cause of action for an invasion of another's interest in the private use and enjoyment of land.⁷⁹ Liability often requires that the invasion be intentional and unreasonable, with unreasonableness determined by a balancing test between the harm caused and the utility of the actor's conduct.⁸⁰ As concern over air pollution grew, however, courts began to relinquish their role in regulating in the area in favor of encouraging intervention from the other, political government branches.

In *Boomer v. Atlantic Cement Co.*⁸¹—the 1970 case from the New York Court of Appeals that has become a staple of most law school Torts courses⁸²—the court recognized that a cement plant emanating dirt, smoke, and vibration was a private nuisance, but it denied plaintiffs an injunction, concluding that air pollution regulation was a project for the full powers of government and not for a court to address as a byproduct of private litigation.⁸³ In line with *Boomer's* theory, the dominant pollution regulation narrative became that highly technical and often interstate pollution problems would best be addressed by comprehensive federal regulation implemented through federal statutes.⁸⁴ These statutes would provide broad, prospective regulation in contrast to tort law's narrow, retrospective adjudication of individual disputes.⁸⁵

However, the common law offers many benefits that make a case for its continued relevance as a tool in this field. This Comment will focus on two particular features the common law has to offer in this area, both of which are drawn into focus by *Bell*. First, tort law draws attention to the gaps left in a “comprehensive” regulatory scheme, and second, it allows plaintiffs the opportunity to seek compensatory remedies where federal statutes do not.

1. Exposing Gaps in a “Comprehensive” Regulatory Scheme

A case like *Bell* demonstrates the inadequacies in the supposedly comprehensive federal regulatory system. Although no court in the *Bell* litigation has yet reached the merits of the plaintiffs' claims, it is clear that the plant is subject to extensive federal, state, and local regulation, and that, taking the plaintiffs' allegations as true, GenOn's operation of the plant causes them to suffer property damage despite this thorough regulation.⁸⁶ The very fact that plaintiffs are harmed by ongoing power plant emissions demonstrates a failure in the CAA's

⁷⁸ See, e.g., Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 567 (2005) (highlighting a series of court decisions using common law tort theories to enjoin pollution).

⁷⁹ RESTATEMENT (SECOND) OF TORTS § 821D (1979).

⁸⁰ RESTATEMENT (SECOND) OF TORTS §§ 822, 826.

⁸¹ 257 N.E.2d 870 (N.Y. 1970).

⁸² Klass, *supra* note 78, at 575.

⁸³ *Boomer*, 257 N.E.2d at 872.

⁸⁴ See, e.g., *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 325 (1981) (calling federal common law claims “peculiarly inappropriate in areas as complex as water pollution control” and suggesting that complexity is “the reason Congress vested authority to administer the Act in agencies possessing the necessary expertise”); Klass, *supra* note 78, at 568–69.

⁸⁵ Klass, *supra* note 78, at 569.

⁸⁶ *Bell v. Cheswick Generating Station*, 734 F.3d 188, 191–92 (3d Cir. 2013).

regulatory scheme, however thorough and complex it may be.⁸⁷ It further demonstrates that even if a facility is in compliance with its permits, those permits may fail to achieve some of the statute's goals to, for instance, promote the public health and welfare.⁸⁸

These regulatory failings come into view in a case based in tort law, which is grounded in societal norms of reciprocity, distributive justice, morality, and punishment for careless or malicious deeds.⁸⁹ The private nuisance "unreasonableness" balancing test described above is one example of the type of inquiry into our social consciousness that tort law presents: How do we quantify an activity's utility, and how does that affect whose rights we protect through tort law? Courts that avoid the merits of these suits through tools such as preemption obscure the "underlying visions of right, responsibility, and social order that are adopted (or implied) by judicial decisions," rather than putting them on display.⁹⁰ By contrast, adjudication of claims ensures that tort law remains actively available "as a critical forum for the articulation of public understandings of morality."⁹¹

2. *Providing Compensatory Remedies*

In addition to forcing consideration of our societal norms and revealing where statutory schemes have failed aggrieved parties, tort law provides a practical benefit that the federal environmental statutes do not: it allows compensatory damages for harms to plaintiffs. Citizen suit enforcement actions vindicate public rights but do not provide remedies for plaintiffs suffering personal injuries.⁹² While the CAA citizen suit provision authorizes injunctions and the assessment of civil penalties payable to the federal treasury, plaintiffs seeking compensatory damages for harm suffered must find relief through state rather than federal law.⁹³ The *Bell* plaintiffs indeed used common law tort claims to seek compensatory and punitive damages.⁹⁴

⁸⁷ See Ewing & Kysar, *supra* note 66, at 407–08 (discussing *North Carolina* and asserting that "[t]he only fact North Carolina needed a court to find was that out-of-state emission sources were seriously impairing its air quality and its ability to achieve the NAAQS. If such a finding were made, then it would constitute prima facie evidence of administrative failure.").

⁸⁸ *Id.* at 408.

⁸⁹ See Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1673 (2009).

⁹⁰ Ewing & Kysar, *supra* note 66, at 356.

⁹¹ *Id.*

⁹² Shay S. Scott, *Combining Environmental Citizen Suits & Other Private Theories of Recovery*, 8 J. ENVTL. L. & LITIG. 369, 378 (1994).

⁹³ Zellmer, *supra* note 89, at 1673. The potential availability of claims for damages outside of the Clean Air Act under federal common law was foreclosed by the Ninth Circuit in *Native Village of Kivalina v. ExxonMobil Corp.* 696 F.3d 849, 858 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013). See *infra* note 100 and accompanying text.

⁹⁴ *Bell v. Cheswick Generating Station*, 734 F.3d 188, 192 (3d Cir. 2013). Although plaintiffs also sought injunctive relief, they conceded that it would be limited to requiring GenOn to remove the particulate that continuously settles on plaintiffs' property. This acknowledgement that the facility will continue to operate demonstrates that plaintiffs' lawsuit was not intended to undermine the complex CAA regulatory structure, but to provide relief for a very real harm left unaddressed by the statute. *Id.* at 193.

These benefits are noteworthy from an equitable perspective: An individual plaintiff seeking redress for emissions from a large corporate entity could more easily argue a common law private nuisance claim than she could launch a scientifically and technically complex case against the polluter under the federal environmental statute.⁹⁵ And although statutory actions may be unavailable if a polluter is in compliance with its permits, holding a permit does *not* constitute a defense to a nuisance suit.⁹⁶

Industry is adamant that “there’s just no room for nuisance claims against facilities in compliance with CAA permits.”⁹⁷ The Third Circuit’s reasoning demonstrates the falsity of that statement, and its holding leaves space for plaintiffs to benefit from the gap-filling role of the common law.

C. *Bell Leaves the Door Open to the Use of State Common Law Nuisance Claims to Abate Greenhouse Gas Emissions*

In *AEP v. Connecticut*, plaintiffs sought to address climate change by using federal common law nuisance claims to stop power plants’ carbon dioxide emissions.⁹⁸ The Supreme Court closed the door on this strategy, holding that such claims were displaced by the CAA.⁹⁹ A year later, the Ninth Circuit extended *AEP* to hold that the CAA displaced not only claims seeking abatement of current emissions, but also claims seeking damages for harms caused by past emissions, further depriving aggrieved parties of federal common law remedies.¹⁰⁰ However, in *AEP*, the Supreme Court explicitly left open the possibility that state common law claims might survive CAA preemption, citing *Ouellette*.¹⁰¹

Many commentators are critical or skeptical of the use of common law to address climate change.¹⁰² Arguments are made that judges are poorly suited to address complex scientific problems, that judicial adjudication of climate

⁹⁵ Ronald J. Rychlak, *Common-Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 *MISS. L.J.* 657, 661–62 (1989).

⁹⁶ *Id.* at 662.

⁹⁷ See Jaffe, *supra* note 70; see also Jonathan S. Martel, Michael D. Daneker & Thomas A. Glazer, *How to Defend Air Pollution Torts After Bell v. Cheswick*, *LAW360* (Sept. 27, 2013, 12:04 PM), <http://perma.law.harvard.edu/Q9VS-JJXX> (“[Bell] is a reminder that permit compliance may not always be a perfect safe harbor from a tort suit.”).

⁹⁸ *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2532 (2011). For a thorough explanation of the case, see David R. Brody, Comment, *American Electric Power Co. v. Connecticut*, 36 *HARV. ENVTL. L. REV.* 297 (2012).

⁹⁹ *AEP*, 131 S. Ct. at 2527.

¹⁰⁰ *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

¹⁰¹ *AEP*, 131 S. Ct. at 2540 (citing *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987)). The majority opinion in *Kivalina* did not address the availability of state law claims, but the concurring opinion noted that “[d]isplacement of the federal common law does not leave those injured by air pollution without a remedy,” because state law nuisance claims may be available. 696 F.3d at 866 (Pro, J., concurring).

¹⁰² See, e.g., Eric Biber, *Climate Change and Backlash*, 17 *N.Y.U. ENVTL. L.J.* 1295, 1305–11 (2009); Matthew Edwin Miller, Note, *The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 *MICH. L. REV.* 257, 260 (2010); Laurence H. Tribe et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political*

change disputes would lead to a mess of conflicting standards, and that even if judges could fashion a remedy for the problem, it would necessarily be inferior to one devised by Congress and the EPA.¹⁰³ However, activists have traditionally turned to and will likely continue to use tort litigation in areas in which the political process is perceived as inadequate in responding to injuries, and attorneys have successfully mounted public nuisance claims against entire industries.¹⁰⁴

Admittedly, it is difficult to envision a judicially created response to the climate change problem. However, the continued presence of these suits can have what Benjamin Ewing and Doug Kysar refer to as an important “prodding and pleading” function that may spur other branches of government to pay attention to and take action towards addressing the problem.¹⁰⁵ Ewing and Kysar are critical of the use of the political question, standing, and preemption doctrines as “escape hatches” by which courts dispose of climate law nuisance claims, arguing that judges should allow such suits to proceed to the merits where, even if claims are insufficient to prove tort liability, they “reveal gaps between the common law’s basic ideal of protection from harm . . . and the failure of other branches to step in.”¹⁰⁶ With greenhouse gas emissions in particular, given that a regulatory system is still in the process of being created, common law nuisance suits can be part of a “web or network of governmental authority,” helping to spur and shape the system that emerges from the other branches.¹⁰⁷ State common law nuisance suits of the type left open by *AEP* and *Kivalina* and endorsed by *Bell* may serve this prodding and pleading function, even if they are not ultimately successful on the merits.

Admittedly, a thorough exploration of the viability or desirability of state common law climate nuisance claims is beyond the scope of this Comment. However, given the continued lack of congressional action on the issue,¹⁰⁸ it is

Question Doctrine 13–20 (Wash. Legal Found., Working Paper No. 169, 2010), available at <http://perma.law.harvard.edu/PN9X-ZA2K>.

¹⁰³ E.g., Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut*, 99 VA. L. REV. 131, 159–63 (2013).

¹⁰⁴ See, e.g., *California v. Atlantic Richfield Co.*, No. 1-00-CV-788657, 2014 WL 280526, at *52–53 (Cal. Super. Jan. 7, 2014) (holding defendant corporations liable for public nuisance based on their knowing promotion of hazardous lead paint and creating a complex abatement plan); Monty Cooper, *AEP v. Connecticut—Global Warming Litigation and Beyond*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10996, 10999 (2011) (offering *AEP* as useful guidance for defendants in future public nuisance litigation); Eric A. Posner, Review, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1155 (2003) (asserting, in the context of tobacco litigation, that tort law is and always has been a form of regulation); *Tobacco Control Litigation*, PUB. HEALTH LAW CTR., <http://perma.law.harvard.edu/4YLS-566P> (describing the history of tort litigation against tobacco manufacturers).

¹⁰⁵ Ewing & Kysar, *supra* note 66, at 354–55.

¹⁰⁶ *Id.* at 355–57.

¹⁰⁷ *Id.* at 405, 409.

¹⁰⁸ See, e.g., H.R. Con. Res. 57, 113th Cong. (2013) (stating Congress’s opposition to EPA’s rule establishing new source performance standards to limit greenhouse gas emissions from new power plants); H.R. 2127, 113th Cong. (2013) (proposed legislation that would prohibit EPA from imposing performance standards for carbon dioxide emissions from fossil fuel-fired electric generating units); Carl Hulse & David M. Herszenhorn, *Democrats Call Off Climate Bill Effort*, N.Y. TIMES, July 22, 2010, <http://perma.law.harvard.edu/TR5A-C7JA>.

likely that public and private parties will continue to use common law tort claims to seek judicial remedies to injuries related to climate change. *Bell*, of course, does not ensure the success of these claims. *Bell*, following *Ouellette*, preserves only those claims that arise under *source* state law, a troublesome caveat for any attempt to use state common law to address a problem that is not merely local, but national or even international in scope.¹⁰⁹ Even if potential claims are able to proceed to the merits, *Bell* is still not a perfect model—*Bell* was a private nuisance case with the type of pollutants and property damage that fit the traditional and historical tort claims model,¹¹⁰ while a public nuisance claim involving a diffuse pollutant and a not-yet-specific collective future harm does not easily fit that mold.¹¹¹ Still, *Bell* leaves the door open to creative common law tort arguments, whereas a finding of preemption would have had the opposite effect, foreclosing yet another path for addressing climate change.¹¹²

CONCLUSION

The Third Circuit in *Bell* was correct to overturn the district court's decision and hold that the CAA does not preempt state common law claims under the law of the source state. This result is required by the language of the statute and follows from the Supreme Court's explicit holding in *Ouellette*. Moreover, the Third Circuit's decision is notable for its preservation of tort law claims for aggrieved plaintiffs whose interests are not adequately protected by the current CAA regime. After *Bell*, a homeowner whose property is damaged by emissions from an industrial facility or a community threatened by the effects of global warming pollution may continue to seek out a common law remedy to address those harms. Although *Bell* does not authorize or ensure the viability of a state law global warming nuisance claim, it does leave open the possibility for such a claim to be successful, whereas a contrary ruling may have foreclosed all attempts. Finally, *Bell* is particularly important because the apparent circuit split between *Bell* and *North Carolina* makes it likely that this issue and this case will continue to be debated.

¹⁰⁹ See J. Wylie Donald, *Whatever Happened to State Law Carbon Dioxide Liability Claims? Still No Music After Bell*, CLIMATE LAWYERS BLOG (Oct. 27, 2013, 10:30 PM), <http://perma.law.harvard.edu/BS5R-CXMG>.

¹¹⁰ Caroline Wick, Note, *Bell v. Cheswick Generating Station: Preserving the Cooperative Federalism Structure of the Clean Air Act*, 27 TUL. ENVTL. L.J. 107, 118 (2013) (distinguishing *Bell*, a private nuisance case, from *Cooper*, which involved public nuisance claims).

¹¹¹ Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L.J. 1, 4 (2011).

¹¹² See Nicole Johnson, *Native Village of Kivalina v. ExxonMobil Corp.: Say Goodbye to Federal Public Nuisance Claims for Greenhouse Gas Emissions*, 40 ECOLOGY L.Q. 557, 563 (2013) (noting that if the *Bell* district court decision is upheld, another door in Kivalina's quest for recovery will be closed). GenOn's petition for a writ of certiorari indicates that industry defendants indeed view *Bell* as leading the way for increasingly frequent state common law lawsuits, including lawsuits targeting "ubiquitous emissions such as carbon dioxide and other greenhouse gases." GenOn Petition for Certiorari, *supra* note 70, at 18.