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FEDERAL CLEAN AIR ACT PREEMPTION OF PUBLIC NUISANCE CLAIMS: THE CASE FOR SUPREME COURT RESOLUTION

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I. INTRODUCTION

The ancient tort of public nuisance has shown surprising vitality over the past few years. Some observers may have counted the tort "down and out" after it was strongly rejected in lead paint[1] and climate change cases.[2] Despite these defeats, the tort has recently produced a significant lead paint judgment in California and a major lawsuit against the pharmaceutical industry.

In California, a state court judge ordered three producers of lead-based paints and pigments to pay $1.15 billion into a fund for public education as well as for inspection and abatement of all pre-1980 privately owned homes in various

[1] *See, e.g., State v. Lead Industries Ass'n,* 961 A.2d 428 (R.I. 2008); *In re Lead Paint Litig*., 924 A.2d 484, 499 (N.J. 2007) (rejecting public nuisance liability against lead paint and pigment manufacturers).

[2] *See American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011); *Native Village of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012)(declining to impose public nuisance liability against greenhouse gas emitters for climate change).

counties.[3] Another major nuisance action was subsequently filed in Los Angeles against pharmaceutical manufacturers[4] based upon the same theory, namely, that the defendants created a public nuisance by the "promotion" of their products with knowledge that they were dangerous to human health.[5]

Although the U.S. Supreme Court rejected public nuisance as a vehicle to control greenhouse gas emissions in *American Electric Power v. Connecticut,*[6] ("*AEP*"), the tort's application to more conventional air pollutants has found more receptive ears in the nation's federal and state courts. Given the Supreme Court's unanimous rejection of public nuisance as a regulatory tool to control emissions in *AEP*, many advocates were surprised when the Court denied *certiorari* in *Bell v. Cheswick Generating Station* [7] ("*Bell*")—a case in which plaintiffs asserted public nuisance claims to reduce emissions of pollutants even though the targeted facility was in

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[3]*See* Amended Statement of Decision and (second) Amended Statement of Decision in *The People of the State of California v. Atlantic Richfield Co., et al*, Case No. 1-00-CV-788657 (Superior Court, County of Santa Clara, March 28, 2014), *appeal pending*, No. H040880, California Court of Appeal (6th Dist.).

[4]*See The People of the State of California v. Purdue Pharma L.P., et al.,* No. 30-2014-00725287-CU-BT-CXC (Superior Court, County of Orange) at 94-97, *filed* May 21, 2014, copy of complaint available at http://documents.latimes.com/counties-sue-narcotics-makers/ (last visited Oct. 23, 2014).

[5]Liability for "promotional" public nuisance in California stems from decisions such as *County of Santa Clara v. Atlantic Richfield Co.* 137 Cal.App.4th 292, 309-10 (2006). In *Santa Clara,* the court held that merely manufacturing or distributing lead paint or failing to warn of its hazards were not sufficient to state a public nuisance claim. *Id.* at 310. Instead, plaintiffs must allege that the defendant engaged in the "affirmative promotion of lead paint for interior use," *Id.* at 310, that the defendant engaged in this affirmative promotion "with knowledge of the public hazard that such use would create," *Id.* at 309, and that the defendant's promotional activities "assisted in the creation of a hazardous condition." *Id.* at 309-10.

[6]131 S. Ct. 2527 (2011).

[7]734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

compliance with permits issued under the Clean Air Act ("CAA").[8]

The Iowa Supreme Court embraced *Bell* and expanded its rationale in *Freeman v. Grain Processing Corp*.[9] The Court endorsed a public nuisance claim against an industrial facility that possessed an emissions permit for its "grandfathered" equipment. This type of CAA permit allows facilities to lawfully utilize grandfathered equipment until it undertakes major upgrades. Under *Freeman*, nuisance suits could force such facilities to immediately upgrade the federally-grandfathered equipment.[10]

In contrast to the holdings in *Bell* and *Freeman*, prior decisions from the U.S. Court of Appeals for the Fourth Circuit and other federal courts have largely rejected the use of nuisance litigation as an alternative method of air pollution control. In *North Carolina ex. rel. Cooper v. Tennessee Valley Authority* ("TVA"),[11] for example, the Fourth Circuit held that the CAA preempted public nuisance claims regarding air pollution because they were "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[12] Despite this "circuit split," the Supreme Court denied *certiorari* in *Bell.* The Court will soon consider a petition for

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[8]On March 14, 2014, a federal district court in Kentucky agreed with *Bell* and held that the Clean Air Act ("CAA") does not preempt state tort claims brought by private property owners against sources of air pollution under the common law of the source's home state. *Merrick v. Diageo Americas Supply, Inc.*, 5 F. Supp. 3d 865 (W.D. Ky. 2014). The defendant has appealed to the Sixth Circuit. *See Diageo Americas Supply, Inc. v. Merrick,* No. 14-6198 (6th Cir., docketed Oct. 1, 2014).

[9]848 N.W.2d 58 (Iowa 2014).

[10]*Id.* at 74.

[11]615 F.2d 291, 306 (4th Cir. 2010).

[12]*Id.* at 302.

certiorari in *Freeman*.

The Court's current reluctance to resolve this circuit split, especially in light of its remand on the state nuisance claims in *AEP*, is troubling. Additional, compelling reasons exist for the justices to consider these issues. Plaintiffs' use of public nuisance claims as an alternative pollution control device will create a confusing and, ultimately, counterproductive "dual track" system where federal agencies and courts apply conflicting standards to redress identical concerns. A grant of *certiorari* in *Freeman* would allow the Court to clarify the respective roles of federal and state regulatory authorities and courts in air pollution control.

II. THE IMPORTANCE OF SUPREME COURT REVIEW

The arguments in cases involving preemption of pollution-oriented public nuisance claims typically present strikingly different views on how air pollution in the United States should be controlled. On the one hand, facility owners argue that the CAA sets forth a comprehensive system of cooperative federalism under which a unitary permitting program governs emission levels by each source and under which the exclusive methods for controlling air pollution are specified. On the other hand, neighboring residents assert that the CAA's system exists *concurrently* with common-law remedies under state law, such as public nuisance, under which emissions can be controlled by equitable relief and influenced by awards of money damages. They insist that such relief is available even when sources are in full compliance with CAA permits.

These controversies present an ideal opportunity to resolve a question lingering from the Court's remand of *AEP*. In *AEP*, the Court decided that the CAA "displaced" public nuisance claims under *federal* common law, but remanded the question of whether the CAA preempted *state* claims to the Second Circuit for consideration.[13] After remand, the plaintiffs withdrew their complaint, which denied the Second Circuit an opportunity to resolve the issue.[14] Nevertheless, the issue then arose in other federal and state courts—which reached an array of conflicting decisions.[15] As a result, a significant split exists not only among decisions in the federal circuit courts, but also between and within the judiciaries of states—creating a confusing legal quagmire.

The Supreme Court's refusal to review *Bell* in 2014 also leaves state courts in conflict, most notably in Kentucky, where dueling state courts have reached opposite results. A contributing factor to the conflicts described above was the holdings in *Bell* and *Freeman* that the "savings clauses" of the CAA and the Clean Water Act ("CWA") should be similarly construed to preserve nuisance claims under state law. There are, however, significant differences between the savings clauses in the two statutes, and those distinctions demonstrate that the CAA's provisions have much greater

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[13] *See* 131 S. Ct. at 2540 ("None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.").

[14] *See Connecticut v. AEP – The End is Very Near,* available at http://climatelawyers.com/post/2011/09/21/Connecticut-v-AEP-The-End-Is-Very-Near.aspx (last visited Oct. 26, 2014).

[15] *See* Section II.B. *infra* at 12.

preemptive force than those in the CWA.[16]

Whether examined as a macrocosm or a microcosm, the preemption issue remains divisive in the nation's courts—and the situation will not improve without definitive Supreme Court resolution. Moreover, unless this lingering controversy is resolved, the predictability and certainty of the CAA's carefully designed permitting system will be supplanted incrementally by the mutability and malleability of state common law—which will surely compromise the efficacy of the CAA's pollution control system.[17]

A. Unanswered Questions from *AEP v. Connecticut*

The Supreme Court has not been silent regarding the danger that public nuisance litigation poses to effective national pollution control. In *Int'l Paper Co. v. Ouellette*,[18] a decision involving the CWA, the Court held that interstate nuisance suits stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[19] The Court also cautioned against toleration of "common-law suits that have the potential to undermine this regulatory structure,"[20]

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[16] *See* Section II.C. *infra* at 16.

[17] *See* Sec. II.D. *infra* at 21.

[18] 479 U.S. 481, 491-492 (1987).

[19] *Id.* at 491-492 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc*., 471 U.S. 707, 713 (1985), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

[20] *Id.* at 497

and singled out nuisance standards in particular as "vague" and "indeterminate."[21]

More recently, the *AEP* Court rejected an attempt to use public nuisance litigation under federal common law to control air pollution. Although the issue in *AEP* concerned displacement of federal common law, rather than preemption of state common law, the same concerns justify *certiorari* in *Freeman* or other percolating cases.

Despite its remanding to the Second Circuit on the state preemption issue, the Court's three holdings in *AEP* strongly support review of *Freeman*. The first holding clarified the CAA's clear allocation of regulatory responsibility to "EPA in the first instance, in combination with state regulators."[22] Although the CAA requires a "complex balancing" of competing interests by administrative authorities,[23] neither *AEP* nor the CAA recognizes any role for federal or state courts in the complex balancing process that underlies air pollution control. Although parties aggrieved by administrative decisions may seek judicial review,[24] neither federal nor state courts are given the authority to interfere with that process through tort law. Indeed, judges have consistently construed the term "State or political subdivisions" to

[21] *Id*. at 496 (quoting *City of Milwaukee v. Illinois,* 451 U.S. 304, 317 (1981)) (internal quotation marks omitted); *see also North Carolina ex. rel. Cooper v. Tennessee Valley Authority*, 615 F.2d 291, 306 (4th Cir. 2010).

[22] *Id.* at 2539.

[23] *Ibid.*

[24] *Ibid.*

exclude courts.[25] Moreover, Congress never intended for nuisance claims to alter federally mandated standards, limitations, or requirements. Further, due to its amorphous nature, nuisance law is essentially *standardless* and "incapable of any exact or comprehensive definition."[26] By its terms, therefore, the CAA concentrates all regulatory authority in EPA and state regulators—and "leaves no room" for judges and juries to participate via tort actions.[27]

In *AEP*'s second holding, the Court concluded that the judiciary lacks the resources and tools needed to accomplish the CAA's regulatory goals:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator . . . The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal courts lack the scientific, economic and technological resources an agency can utilize in coping with issues of this order.[28]

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[25]*See Cannon v. Cooch,* 2011 WL 5925329 *4 (D. Del. Nov. 28, 2011) (courts are not a "public body" that includes "State or any political subdivision of the State."); *U.S. v. Amawi*, 552 F. Supp.2d 679, 680 (N.D. Ohio 2008) (judiciary is not a "government entity" that includes "any State or political subdivision thereof"); *Haudrich v. Howmedica, Inc.,* 642 N.E.2d 206 (Ill. Ct. App. 1994) (courts are not "States or political subdivisions").

[26]*See TVA*, 615 F.3d at 202 ("[W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide no standard of application. If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bullfights, we will be hard pressed to derive any manageable criteria . . ."); *see also* RESTATEMENT (SECOND) OF TORTS § 821B cmt. e. (1979) ("[I]f a defendant's conduct ... does not come within one of the traditional categories of the common-law crime of public nuisance or is not prohibited by a legislative act, *the court is acting without an established and recognized standard*.")(emphasis added); James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005). According to Professor Henderson, these amorphous tort theories are not lawless simply because they are non-traditional or court-made or because the financial stakes are high. Instead, "the lawlessness of these aggregative torts inheres in the extent to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring damages." *Id*. at 338.

[27]*Id. at* 2538.

[28]*Id*. at 2539-2540.

Although the CAA envisions extensive cooperation between federal and state authorities,[29] the Act conspicuously fails to include the federal and state judiciary as regulators because courts are not suited for these exercises.[30]

To make these judicial disabilities crystal clear, the *AEP* Court described a number of their limitations:

> Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined to a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.[31]

Although this language describes why federal courts are ill-equipped to create and enforce environmental policy through federal common law, the same considerations also apply to state courts and state common law. Each judicial forum is equally limited by the unique record of each particular case—and cannot bind judges in other locations to follow their reasoning and judgments.

Finally in its third *AEP* holding, the Court rejected an alarming proposal the plaintiffs made at oral argument. Notwithstanding the infirmities discussed above, counsel for the plaintiffs insisted that individual federal judges can determine, in the

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[29] *Ibid.*

[30] *See also TVA,* 615 F.3d at 305 ("[W]e doubt seriously that Congress thought that a judge holding a twelve day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider.").

[31] 131 S. Ct. at 2540.

first instance, what amount of carbon-dioxide emissions are "unreasonable" and then decide what level of reduction is "practical, feasible and economically viable."[32] The plaintiffs noted that "[s]imilar lawsuits could be mounted . . . against 'thousands or hundreds or tens' of other defendants fitting the description of 'large contributors' to greenhouse gas emissions."[33] The Court unanimously rejected this proposal, holding that "the judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision-making scheme Congress enacted." [34]

When one applies *AEP's* reasoning to the state nuisance claims, it is apparent that the proposed tort remedy "interferes with the methods" by which the CAA "was designed to reach [its] goal," and that it has the potential "to undermine the regulatory structure."[35] In *Freeman*, for example, plaintiffs sought damages and injunctive relief to compensate them for injuries and to compel emission controls and equipment upgrades beyond those required by CAA permits.[36] That they did so in a state court under Iowa common law, rather than in a federal court under federal common law, is a distinction without a difference. Under the reasoning of *AEP,* public nuisance claims in either forum have the same disruptive effect on federal

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[32] *Ibid.*

[33] *Ibid*.

[34] *Ibid*.

[35] *See International Paper Co. v. Ouellette*, 497 U.S. 481, 494, 497 (1987).

[36] *See Freeman,* 848 N.W.2d at 63.

statutory and regulatory programs. Moreover, state judges have no greater resources or tools to address this issue than their federal counterparts. Both forums lack the scientific, economic and technological resources readily available to administrative agencies.

Given the *AEP* Court's serious concerns over the intolerable effects of public nuisance cases, and the limits of judicial power to resolve these controversies, lower courts should not deem those problems resolved merely because of a claim's state-law basis. If that were so, federal courts exercising *diversity* jurisdiction would be required to adjudicate nuisance claims under state law despite the infirmities that would preclude them from presiding over identical federal nuisance claims. Surely, claims that are non-justiciable under federal common law do not become justiciable merely because they are brought under state law. Accordingly, because the same limitations that preclude adjudication in the federal judiciary apply equally to the state judiciary, *AEP's* reasoning should apply equally to both court systems.

B. Conflicts Between the Federal Circuits and Within the State Courts

The Iowa Supreme Court's decision in *Freeman* represents just one example of the conflicting rulings that have accumulated regarding CAA preemption of state tort remedies**.** In the aftermath of the Court's denial of *certiorari* in *Bell*, a significant division regarding preemption persists between the federal circuits and within the nation's state courts. Only a Supreme Court decision can resolve these conflicts and

the resulting uncertainties that threaten to exacerbate this problem.

In *Bell*, the Third Circuit acknowledged that the Court in *AEP* "explicitly left open" the question of whether the CAA preempted public nuisance claims under state law.[37] The court then held that state nuisance claims were not preempted because they were preserved by the CAA's "savings clause."[38] Other decisions have reached similar results.[39]

The Fourth Circuit, however, took a different approach. In *North Carolina ex. rel. Cooper v. Tennessee Valley Authority*,[40] the court held that basing air pollution controls on "vague public nuisance standards" is inconsistent with the CAA's regulatory system.[41] The court observed "[t]he contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark,"[42] and explained that Congress "opted rather emphatically for the benefits of agency expertise in setting standards for emissions controls," especially in comparison with "judicially managed nuisance decrees."[43] As a result, the court held that "conflict preemption principles" caution against "allowing state nuisance law to

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[37]734 F.3d at 196, n.7.

[38]*Id.* at 196-197.

[39]*See Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989); *Gutierrez v. Mobil Oil Corp*., 798 F. Supp. 1280, 1285 (W.D. Tex. 1992). The problems with *Bell's* "savings clause" holding are examined *infra* at 14.

[40]615 F.2d 291 (4th Cir. 2010).

[41]*Id.* at 302.

[42]*Id.* at 304,

[43]*Id.* at 305.

contradict joint state-federal rules so meticulously drafted."[44]

Although the preemption issue has just begun its divisive run in the state courts, the early results suggest that conflict remains the trend. For example, two Kentucky courts recently disagreed regarding CAA preemption in *Merrick v. Brown-Forman Corp.*[45] and *Mills v. Buffalo Trace Distillery, Inc.*[46] In those cases, plaintiffs brought tort claims based on ethanol emissions from distilled spirits producers in neighboring counties. Although the cases were based on similar allegations, each court reached a different decision regarding whether the emissions can be regulated beyond the limits imposed by the CAA. Significantly, *Merrick* emphasized the functional conflict preemption analysis described in *AEP, TVA*, and *Ouellette* to find the tort claims preempted—while *Mills* relied on the "savings clause" analysis used in *Bell.*[47]

This example is particularly compelling because it demonstrates that manufacturers of similar products can be subjected to conflicting requirements by neighboring courts in the same state. Notably, even a Kentucky federal district court

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[44]*Id.* at 303; *see also Comer v. Murphy Oil USA, Inc*., 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013) (state nuisance claims would require court to determine "what amount of carbon-dioxide emissions is unreasonable as well as what level of reduction is practical, feasible, and economically viable," a task "entrusted by Congress to the EPA.").

[45]Order, *Merrick* v. *Brown-Forman Corp.*, Civ. Action No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 July 30, 2013) (finding CAA preemption of common-law claims).

[46]Opinion & Order, *Mills* v. *Buffalo Trace Distillery, Inc.*, Civ. Action No. 12-CI-743 (Franklin Cir. Ct. (Ky.), Div. II Aug. 28, 2013) (rejecting CAA preemption of common-law claims).

[47]*Compare Merrick*, Order at 3-4 *with Mills*, Opinion & Order at 6; *see also* Order on Reconsideration at 2, *Merrick v. Brown-Forman Corp*., Civ. Action No. 12-CI-3382 (Jefferson Cir. Ct. (Ky.), Div. 9 Nov. 26, 2013) (declining to reconsider ruling in light of *Bell*).

has waded into the controversy—exacerbating the conflict rather than clarifying the issues.[48] This emerging quandary is consistent with the Fourth Circuit's prediction that "the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country" leading to "results that lack both clarity and legitimacy."[49] It also demonstrates that the conflicts between *TVA* and *Bell* are actively producing additional conflicts—even in states where neither case is a controlling precedent.

Given the Kentucky situation in microcosm, and the conflicts between *TVA* and *Bell* in macrocosm, the daunting dilemma Judge Wilkinson described in *TVA* has already been realized:

> Attempting to simultaneously resolve air pollution issues using common law claims will condone the use of multiple standards throughout the nation. In various states, facilities already subject to an EPA-sanctioned state permit could be declared "nuisances" when a judge in Iowa sets one standard, a judge in a nearby state sets another, and a judge in another state sets a third. Such a scenario ultimately leads one to question "[w]hich standard is the hapless source to follow?"[50]

Such a scenario strikes at the structural heart of the CAA, namely, the Act's allocation of priorities and responsibilities within a system of cooperative federalism. When Congress passed the CAA, it "made the States and the Federal Government

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[48] *See Merrick v. Diageo Americas Supply, Inc.*, 5 F. Supp. 3d 865 (W.D. Ky. 2014) (following *Bell* and refusing to find preemption) The Western District of Kentucky sits in Jefferson County, so the conflict with *Merrick v. Brown-Forman* is within the same county by court sitting a few blocks from each other.

[49] *TVA*, 615 F.3d at 301.

[50] 615 F.3d at 302 (4th Cir. 2010) (citing *Ouellette*, 479 U.S. at 496 n. 17).

partners in the struggle against air pollution."[51] If courts are permitted to conduct independent evaluations under state common law, they will exercise authority that conflicts with the cooperative federalism structure the CAA created.

In such proceedings, the balance struck by administrative agencies could be reopened and reexamined *de novo* by nuisance lawsuits under state common law. There are no assurances or requirements that courts presiding over such actions will apply the same criteria or reach the same conclusions regarding the reasonableness of a defendant's emissions and its pollution mitigation efforts.

Viewed in this light, the danger *Freeman* poses to the CAA's regulatory program is even greater than the problems presented in *AEP.* Nothing in the CAA remotely contemplates such confounding consequences, but they are entirely predictable if the Court does not intervene.

C. The CAA's "Savings Clauses" and State Common-Law Nuisance Claims

One of the legal profession's most beguiling temptations is to seek consistency between superficially similar statutory regimes. Although pursuing analogies sometimes yields valuable results, it is equally important to understand *distinctions* that may indicate divergent purposes. Both the *Bell* and *Freeman* courts fell into error by failing to appreciate the separate paths taken by the CWA and the CAA in their different savings clauses.

[51] *General Motors Corp. v. United States,* 496 U.S. 530, 532 (1990).

In *Bell*, for example, the court focused entirely on *one* of the CAA's savings clauses to justify its decision—as opposed to analyzing how that clause, as well as other such provisions in the CAA, operated within the context of the entire statute. Based upon that limited analysis and its conclusion that there were "no meaningful differences" between the CWA and CAA savings provisions,[52] the *Bell* court concluded that applying the same preemption analysis to the two statutes should lead to the same results.[53] In consequence, the *Bell* court followed the Supreme Court's holding in *Ouellette* and held that the CAA did not preempt the state nuisance actions.[54]

Nevertheless, there *are* meaningful distinctions between the savings provisions of the CWA and the CAA. Importantly, the CWA contains a unique and exceptionally broad savings clause that plainly preserves extraordinarily broad powers for the states. That clause provides that "nothing in this [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."[55] Such language is conspicuously *absent* from the CAA—thus demonstrating Congress' intent to circumscribe the power of states to regulate air pollution more narrowly.

Although the *Bell* court determined that the CWA's language was excluded from the CAA because, unlike water, no "jurisdictional boundaries or rights" apply to

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[52] *Bell*, 734 F.3d at 192

[53] *Id.* at 196-97.

[54] *Ibid.*

[55] 33 U.S.C. § 1370.

air, that conclusion overlooks Supreme Court jurisprudence that, prior to the CAA's passage, expressly recognized each state's exclusive interest in its air resources:

> The State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.[56]

To the extent the CAA allows state regulatory authorities to adopt more stringent emission standards, these "independent" interests of the states as *parens patriae* remain viable.[57] Since the savings clause of the CAA is substantially narrower in focus than the expansive clause in the CWA, *the preemption analysis must focus solely on the CAA's language*, not the broader clauses of the CWA.

When that language is considered, nothing in the CAA purports to preserve claims under state common law, whether they are grounded in public nuisance or any other cause of action. Instead, the Act provides:

> [N]othing in this [A]ct shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or (2) any requirement respecting control or abatement of air pollution.[58]

Significantly, this section merely preserves the rights of sovereign entities, *i.e.* "States" and "political subdivisions," to set more conservative emission standards by statute or regulation than those provided by CAA requirements. Similar terms are defined elsewhere in the Act, and there is no reason to presume they should have a

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[56] *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

[57] *Cf. Massachusetts v. EPA,* 549 U.S. 497 (2007) (recognizing that "in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted").

[58] 42 U.S.C. § 7416.

different meaning here.[59]

A legal framework that entrusts these alterations solely to regulatory bodies sensibly recognizes their greater capacity to investigate and evaluate broad social concerns. For example, the 1990 CAA amendments directed the EPA Administrator to "conduct a comprehensive analysis of the impact of this Act on the public health, economy, and environment of the United States," and further required her to consider the effects on "employment, productivity, cost of living, economic growth, and the overall economy of the United States."[60] Such a task is quintessentially *administrative* and lies far beyond the boundaries of the judicial process. As the Supreme Court recognized in *AEP*, courts "lack the scientific, economic and technological resources" to deal with "issues of this order."[61] Since courts are "confined by a record comprising the evidence the parties present,"[62] they cannot broadly assess the impact of their rulings on the overall environment, much less consider the policy impact their decisions may have on complex issues of investment, employment, and other concerns entrusted to regulatory authorities.[63] For those reasons, the CAA entrusts those powers to the EPA and state regulatory agencies.

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[59]*See* 42 U.S.C. § 7604(f) (defining emission "standard" and "limitation" solely as statutory or regulatory requirements).

[60]*See id.* at §§ 7612(a) and (c).

[61]*AEP*, 131 S. Ct. at 2539-40.

[62]*Ibid.*

[63]*Id.* at 2538-39 (CAA processes provide "informed assessment of competing interests," including "energy needs and the possibility of economic disruption.").

Although some may argue that the CAA's "citizen suit" provision preserves the right to pursue nuisance actions, it does not supplant broader preemptive language elsewhere in the Act. In the section that enables "citizen suits," the CAA provides that "nothing in *this section* shall restrict any right which any person may have under any statute or common law *to seek enforcement of any emission standard or limitation or to seek any other relief.*"[64] Nothing in that limited provision, however, purports to control the preemptive impact of *other* portions of the CAA. Indeed, in construing similar language regarding citizen suits under the CWA, the *Ouellette* Court observed that the clause "merely says that '[n]othing in this section' *i.e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude preemption of state law by other provisions of the Act."[65]

By concentrating on the CAA's limited savings provisions, both the *Bell* and *Freeman* courts took an erroneously narrow perspective. In particular, they failed to conduct a correct "conflict preemption" analysis to determine whether state common-law nuisance suits *actually conflict* with the CAA *as a whole*—and whether they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[66] Instead, the courts used the savings clause, *standing*

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[64]42 U.S.C. § 7604(e) (emphasis added).

[65]*Ouellette*, 479 U.S. at 493.

[66]*Geier v. Am. Honda Motor Co., Inc.,* 529 U.S. 861, 869 (2000); *see also Boggs v. Boggs,* 520 U.S. 833, 844 (1977).

alone, to preclude "the ordinary working of conflict pre-emption principles" an approach the Supreme Court has expressly disapproved.[67] Since even an *express* preemption clause in a federal statute does not necessarily foreclose the application of *implied* preemption,[68] the *Bell* and *Freeman* courts failed to apply an entire line of Supreme Court authority which requires a thorough and exacting consideration of the purposes and policies of the CAA—an analysis which, if undertaken, would inexorably lead to preemption of common-law nuisance claims under state law.[69]

D. Nuisance Litigation Threatens the Reliability of CAA Permits

Although the United States has made great strides in controlling and reducing air pollution, state public nuisance litigation threatens that progress. The history of environmental regulation reflects that "[e]conomic incentives have assumed a prominent position among the tools for environmental management," and "[n]owhere is this role more explicit than in the 1990 Clean Air Act Amendments."[70] Those amendments authorized the EPA's permitting programs.

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[67] *Id.* at 871 ("Moreover, this Court has repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'").

[68] *Id* at 869.

[69] *Id.* at 870 (concluding that "the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.").

[70] *See* Robert C. Anderson and Andrew Q. Lohof, *The United States Experience with Economic Incentives in Environmental Pollution Control Policy* (Env. L. Inst. 1997).

The EPA's permitting system reflects a maturing process influenced by the increasing costs of pollution control. In that setting, standards for evaluating performance in pollution prevention have played a more important role.[71] As Dean Frederick Anderson explained:

> When large reductions in pollution are easy, everyone can afford to be lenient about how a baseline is measured or how different methods of pollution are compared. As the easy reductions play out, that leniency fades. *As competition heats up, the certainty, predictability, and evenhandedness of pollution reduction requirements become centrally important.*[72]

Dean Anderson noted that failing to prevent pollution and voluntary industry collaboration were not acceptable options. Instead, he wrote, the "last hope" for the "future of pollution prevention" was a "level playing field among companies undertaking (or failing to undertake) pollution prevention."[73] Since this option was "indispensable" to effective pollution control, the government recognized that its role was "to provide that level field."[74]

Congress established the "level playing field" with the 1990 CAA amendments, which specifically incorporated pollution prevention into the fabric of EPA operations. Shortly thereafter, the EPA began "busily incorporating pollution prevention into the

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[71]Frederick R. Anderson, *From Voluntary to Regulatory Pollution Prevention*, THE GREENING OF INDUSTRIAL ECOSYSTEMS, 98, 102 (Nat'l Academy Press, 1994).

[72]*Id.* (emphasis added).

[73]*Id.* at 103.

[74]*Ibid*.

regulatory process and into targeted Clean Air Act regulations."[75] Because the CAA required the EPA to review its regulations and determine their impacts on reducing pollution at its sources, the agency created a Regulatory Targeting Project that covered rulemaking for all media affected by 17 major industries. Under this broad program, the EPA required rules and permits to contain pollution reduction measures whenever possible.[76]

As a result of these efforts, pollution control became the basis for regulatory standard-setting throughout the agency's operations, including permitting and enforcement.[77] The issue of permits and enforcement placed the agency into a position of considerable bargaining power, and incorporating pollution control into those programs was "clearly an effective means for EPA to mandate particular pollution prevention methods or standards."[78]

Since their authorization in 1990, CAA permits have remained one of the EPA's most important tools for air pollution control. Simultaneously, they have also served as trustworthy guideposts for regulated parties in the planning and execution of business operations. The reliability, predictability, certainty, and finality of CAA permits provide the stability needed for businesses to make investments that improve and expand their facilities and empower the development and improvement

[75] *Id*. at 105.

[76] *Ibid.*

[77] *Id.* at 106.

[78] *Ibid.*

of their products. By providing clear regulatory standards to guide the regulated community's conduct, strong incentives to conform to those standards, and a secure permitted setting within which businesses conduct their operations, EPA has made great strides in reducing and controlling air pollution.[79]

The CAA's regulatory and permitting process provide an "informed assessment of competing interests"—an assessment that is "not limited to environmental benefits," but which also considers a broad array of other factors, including "our nation's energy needs and the possibility of economic disruption."[80] For example, the Act expressly directs EPA to consider the economic impact of its actions,[81] as well as the employment effects of the administration or enforcement of the Act,[82] and even provides a mechanism for employees and employee representatives to request an investigation of employment impacts.[83] The CAA's program creates a level playing field for industry that ensures members of the regulated community are regulated similarly, thereby precluding any particular member from enjoying an unreasonable competitive advantage.

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[79] *See generally* EPA, *The Clean Air Act – Highlights of the First 40 Years* (Sept. 2010), *available at* http://www.epa.gov/air/caa/40th_highlights.html(last visited Mar. 12, 2014); EPA, *The Clean Air Act: Highlights of the 1990 Amendments*, available at http://www.epa.gov/air/caa/pdfs/CAA_1990_amendments.pdf (last visited Mar. 12, 2014); Remarks of Lisa P. Jackson, former EPA Administrator, on the 40th Anniversary of the Clean Air Act, http://yosemite.epa.gov/opa/admpress.nsf/12a744ff56dbff8585257590004750b6/7769a6b1f0a5bc9a8525779e005ade13!OpenDocument (last visited Mar. 12, 2014).

[80] *See AEP,* 131 S. Ct. 2527, 2538-2539.

[81] *See* 42 U.S.C. § 7617.

[82] *See id.* at § 7621.

[83] *See id.* at § 7621(b).

By contrast, common-law lawsuits proceed from a narrower perspective and entail unpredictable economic results. Courts presiding over such controversies lack the authority, tools, resources, and expertise to ensure that their judgments maintain the level playing field the CAA's regulatory process so painstakingly created. Moreover, unlike regulatory agencies, which apply clear standards to derive specific requirements for compliance, public nuisance lawsuits employ liability standards that are notoriously vague. Procedures to coordinate nuisance proceedings pending in different states do not exist—and many states lack procedural rules to coordinate similar proceedings within the same state. As a result, emission sources could be governed by a plethora of conflicting directives issued by state courts in multiple jurisdictions—or even by edicts issued by multiple state courts within the same state.

The Iowa Supreme Court's decision in *Freeman* is a prime example of how state nuisance litigation can upset the CAA's carefully considered policies. There, the plaintiffs sought an injunction ordering the replacement of "grandfathered" equipment permitted under the facilities' permit. In the CAA, Congress provided a program to address the timing of such upgrades.[84] To accommodate economic concerns,[85] the program required upgrades only when facilities modify, replace, or construct new emission sources or when the facilities' emissions result in the local

[84] *See* 42 U.S.C. §§ 7475, 7502.

[85] *See National Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1319 (11th Cir. 2007) ("This system is intended to achieve environmental controls without unduly hampering economic growth.").

area's failure to attain compliance.[86]

If courts are permitted to vary this congressional decision through nuisance lawsuits, the outcomes will plainly conflict with the legislative prerogative the CAA entrusted to Congress. Such infringements by private litigation are inconsistent with Supreme Court precedent.[87] In *TVA*, Judge Wilkinson summarized why the federal permitting system has primacy in such matters:

> It would be odd, to say the least, for specific state laws and regulations to expressly permit power plants to operate and then have a generic statute countermand those permissions on public nuisance grounds. While North Carolina points out that an activity need not be illegal to be a nuisance, that is not the situation before us. *There is a distinction between an activity that is merely not illegal versus one that is explicitly granted a permit to operate in a particular fashion*.[88]

Failure to protect the interests the CAA safeguards will allow individual courts to adjust or ignore the terms of permits and carefully crafted legislation on an *ad hoc* basis—with no perspective other than the limited records supplied by private litigants. Such a practice necessarily "interferes with the methods" by which the CAA "was designed to reach [its] goal" and unquestionably "has the potential to undermine the regulatory structure."[89]

No consistent or informed environmental policies can emerge from such disparate proceedings. Since the evidence, rulings, and outcomes can vary according

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[86]*See* 42 U.S.C. §§ 7475, 7502.

[87]*See, e.g., Geier,* 529 U.S. at 881.

[88]*TVA*, 615 F.3d at 309 (emphasis added).

[89]*See Ouellette*, 497 U.S. at 481, 494, and 497.

to the unique record of each case, consistent results are not guaranteed even as between similar facilities. Until the Supreme Court reviews this issue, state common law will endanger the CAA's carefully designed permitting system.

III. CONCLUSION

The current circuit-by-circuit and state-by-state approach to the question of preemption precludes any uniform standards for environmental compliance and enforcement, and also vitiates any reliable basis for capital investment, expanded operations, and workforce stability. Because Congress enacted the CAA to promote those goals—as well as jobs and a healthy economy—delaying review prolongs the uncertainty and intensifies the dilemma facing not only the courts, but also the regulated community.

