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Surviving Preemption in a World of Comprehensive Regulations

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SURVIVING PREEMPTION IN A WORLD OF COMPREHENSIVE REGULATIONS

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The Clean Air Act imposes a federal regulatory regime on a number of sources of air pollution. It does not, however, provide a ready means of relief to individuals harmed by air polluters. Nevertheless, many courts have held that the Clean Air Act preempts state common law tort claims that do provide a means to such relief. The disparate benefits of the Clean Air Act and common law tort claims may indicate different purposes and make court-imposed preemption of common law tort claims improper. This Comment argues that the Savings Clause in the Clean Air Act and in parallel state statutes should be clarified so as to explicitly preserve an injured party's ability to seek relief through state common law.

INTRODUCTION

The Earth's climate is changing in large part because of the release of airborne pollutants. These pollutants may also cause serious damage to private property. And yet, the federal government's major legislation for regulating air emissions, the Clean Air Act (CAA), provides no opportunity for individuals harmed by air pollution to seek compensatory damages if the defendant followed CAA regulations.[1] This gap in remedies can be filled through common law tort claims. However, whether the CAA or its companion state statutes preempt state common law remains an unresolved question. Part I of this Comment will discuss basic preemption doctrine and federal courts' application of the doctrine to state common law claims regarding air quality. Part II lays out the more difficult burden state courts have in deciding the potentially preemptive effect of both the CAA and their own state companion statutes. While the different purposes of state common law and the CAA or its companion statutes should weigh against preemption, some state courts have decided otherwise. Part III suggests possible solutions that would preserve individual rights secured by common law claims by (1) embedding an individual right to damages within the CAA

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1. *See* 42 U.S.C. § 7604(a), (e) (2006) (providing the right to citizen suit enforcement but no right to compensatory damages except through common law).

or state companion statute or (2) clarifying the inconsistently applied savings clause in the CAA.

I. FEDERAL PREEMPTION AND AIR QUALITY

A. Federal Preemption in General

The Supremacy Clause of the United States Constitution makes clear that, where the federal government legislates within its enumerated powers, these laws reign "supreme" and therefore preempt the states' laws.[2] This preemption prevents state laws from interfering with an agency's complex regulatory scheme.[3] When conducting a preemption analysis, "particularly in [cases] in which Congress has legislated . . . in a field which the States have traditionally occupied," a court will apply a presumption that the "historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[4] The clarity of Congress's intent will depend on whether the preemption was express or implied. Express preemption occurs when Congress explicitly states that the law is preempted.[5] Implied preemption takes two forms. The first, "field preemption," occurs when federal regulations occupy a field of law almost completely or when the federal government's interest in the area of law is so compelling that state action is not welcome.[6] The second form, "conflict preemption," occurs when it is either impossible or difficult to comply with both state and federal law simultaneously.[7]

Congress can irrefutably avoid the preemption of state law by including a "savings clause" in an act.[8] These savings clauses explicitly limit the scope of the statute's preemptive force by stating that the federal statute shall not be construed to preempt some particular category of law.[9] However, even in areas already receiving a presumption against preemption (due to traditional state powers), courts have generally "decline[d] to give broad effect to saving clauses where

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2. U.S. CONST. ART. VI.

3. J.J. England, *Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without A Remedy*, 43 ENVTL. L. 701, 724-25 (2013).

4. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal citations omitted).

5. England, *supra* note 3, at 724.

6. *Id.* at 724; *see, e.g.,* Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).

7. England, *supra* note 3, at 724–25; *Arizona*, 132 S. Ct. at 2503.

8. Scott Gallisdorfer, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut*, 99 VA. L. REV. 131, 141 (2013).

9. *Id.*

doing so would upset the careful regulatory scheme established by federal law."[10]

B. Preemption of State Common Law Under the CAA

The CAA establishes comprehensive federal air quality standards and regulates certain hazardous air pollutants emitted from stationary sources and mobile sources, including motor vehicles and aircrafts.[11] The responsibility of achieving these standards is delegated to the states if they devise a strategy for attainment called a State Implementation Plan (SIP).[12] If the SIP is successful, states retain considerable power to enforce stricter emission standards by broadening the scope of regulated stationary sources (by including sources not regulated by the CAA, for example) and setting stricter standards for stationary sources that are covered by the CAA.[13] In other words, states act as final implementers of these statutes. This delegation of responsibility to state authority is known as "cooperative federalism."[14]

The CAA does include an express preemption clause regarding mobile sources: "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles . . . ."[15] This includes the preemption of tort claims under state common law.[16] The Act does not include an express preemption clause covering stationary sources, so, if the CAA preempts state common law relating to stationary sources of air pollution, it must be through one of the forms of implied preemption.

Additionally, the CAA includes a savings clause that provides: "[n]othing in this [CAA citizen suit provision] 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."[17] This general rule, however, is limited by an exception providing that states "may not adopt or enforce any emission standard or limitation which is less stringent" than that required under CAA §§ 111 and 112 or the state's SIP.[18]

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10. *Id.* at 141–42.
11. *See* 42 U.S.C.A. § 7521–7590 (2012)
12. England, *supra* note 3, at 707.
13. *See* 42 U.S.C. § 7413(a) (2012); 42 U.S.C.A. § 7410(a)(5)(A)(i) (2012).
14. England, *supra* note 3, at 725.
15. 42 U.S.C. § 7543(a) (2006).
16. England, *supra* note 3, at 733.
17. 42 U.S.C.A. § 7604 (West 2006).
18. 42 U.S.C. § 7416 (2012) [hereinafter "States' Rights Savings Clause"].

The CAA does not prevent states from adopting more stringent standards than those prescribed by the Act itself.[19] The CAA's States' Rights Savings Clause reserves for states the right 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 . . . ."[20] Because the CAA only dictates a floor for its quantitative emissions standard, state common law itself could impose a stricter standard, just as a state's companion statute might. Reaching a stricter standard in these ways still fulfills the state's obligations with the lower CAA standard.[21] Therefore, source-state common law does not appear to pose an obstacle to the CAA regime and therefore should not fall under conflict preemption.

1. Recent CAA Cases

To determine whether field preemption doctrine requires the CAA to preempt source-state common law, the Third Circuit in *Bell v. Cheswick* compared the CAA to the Clean Water Act (CWA).[22] In doing so they turned to *International Paper Co. v. Ouellette*,[23] where the Supreme Court interpreted the CWA's citizen suit savings clause and analyzed its preemptive effects on common law.[24] Finding the CAA to be substantially similar to the CWA and the citizen suit savings clauses to be nearly identical, the Third Circuit regarded *Ouellette* as a guide for determining the preemptive power of the CAA.[25] In *Ouellette*, the CWA did not preempt source-state common law claims under field preemption doctrine.[26] The Third Circuit found both the CWA and the CAA to be comprehensive in their fields with citizen suit savings clauses that protect individuals seeking to invoke state common law.[27]

In contrast, the Fourth Circuit—three years before *Bell*, in *North Carolina v. Tennessee Valley Authority* (*TVA*)[28]—voiced concerns that

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19. *Id.*
20. *Id.*
21. *Id.*
22. Bell v. Cheswick Generating Station, 734 F.3d 188, 194–97 (3d Cir. 2013); 33 U.S.C.A. § 1365(e).
23. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 482, 497–99 (1987).
24. *Id.* at 194–95; Ouellette, 479 U.S. at 482, 497–99.
25. Bell, 734 F.3d at 195.
26. *Id.* at 194–95 (reading the CWA and its Savings Clause to allow states to adopt more stringent standards through state statutes and state common law).
27. *Id.* at 196–97.
28. North Carolina ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291 (4th Cir. 2010).

state tort law could undermine the CAA's regulatory regime.[29] North Carolina brought a nuisance suit against the TVA for its emissions that allegedly harmed North Carolina's air quality.[30] The Fourth Circuit did not cite *Ouellette* for its focus on the problems created by allowing parties from each affected state to bring their state's common law claims against one polluter. The court instead read the *Ouellette* case as a warning against all common law nuisance actions for fear that they would interfere with the operation of federal statutes.[31] Consequently, the Fourth Circuit stated that *Ouellette* intended to preempt nearly all common law claims.[32]

In *American Electric Power Company v. Connecticut* (*American Electric*),[33] which was decided after *TVA*, the Supreme Court held that the CAA fully displaced federal common law because the relief sought through federal common law—limits on carbon dioxide emissions—could also be achieved through the CAA's opportunity for the public to petition for rulemaking.[34] The Court saw no reason for parallel rulemaking.[35] While the Court eliminated one avenue of relief by preempting federal common law, it notably declined to decide whether the CAA also preempts state common law claims.[36]

Following *American Electric*, a federal district court in *Comer v. Murphy Oil USA*[37] found state common law nuisance claims to be preempted by the CAA because these claims called for juries to decide whether emissions were reasonable.[38] The court held that the CAA required this decision to be made by the Environmental Protection Agency (EPA).[39]

In contrast, the Third Circuit in *Bell,* discussed above, concluded that *Ouellette* found that cooperative federalism would allow states to set more stringent standards through tort law.[40] The *Bell* case involved particulates released from a generating station that settled in nearby neighborhoods, making the plaintiffs feel like "prisoners in their [own]

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29. *See id.* at 303.
30. *Id.* at 296–97.
31. *Id.* at 303.
32. *See id.*
33. Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527 (2011).
34. *Id.* at 2532–33, 2538.
35. *Id.* at 2532.
36. *Id.* at 2540.
37. Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012).
38. *Id.* at 865.
39. *Id.*
40. Bell v. Cheswick Generating Station, 734 F.3d 188, 197–98 (3d Cir. 2013) (citing Int'l Paper Co., *supra* note 23, at 498–99).

homes."[41] *Bell* set a rule in the Third Circuit that the CAA does not preempt state common law claims because the source state may impose a stricter standard through tort actions.[42] This holding could be a bellwether for other circuits.

C. The Importance of State Common Law

Although an in-depth discussion of the value of tort law in environmental policy is beyond the scope of this Comment, a brief overview will frame the discussion to follow.

The circumstances that led to the suit in *Bell* demonstrate the need for tort law in this field. Without a claim in tort, the plaintiffs could not seek redress for their property damage because the defendant abided by CAA regulations.[43] In other words, tort law preserves crucial remedies for plaintiffs who are not afforded protection by the CAA. Although the Third Circuit in *Bell* recognized this gap in compensation, the United States District Court (in the antecedent case) failed to appreciate these shortcomings.[44] The district court noted that the CAA provides plaintiffs with various sources of redress to enforce emission standards.[45] First, the CAA allows citizen suits against those who violate regulations issued by the EPA or the state.[46] Second, the EPA "retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court," but "may delegate implementation and enforcement authority to the States."[47] Plaintiffs, in their reply, explained that they were seeking money damages, and not enforcement of pre-existing standards.[48] The citizen suit provision within the CAA is, however, not structured to provide private individuals with money damages.[49] Instead, it may allow for civil penalties to be paid to the federal treasury, but compensatory damages can, by design, only be provided through state law.[50]

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41. *Id.* at 192.
42. *Id.* at 197–98.
43. *Id.* at 191–92.
44. Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 322–23 (W.D. Pa. 2012).
45. *Id.*
46. *Id.* at 323.
47. *Id.* at 322–23 (quoting Am. Elec. Power Co., *supra* note 33, at 2538).
48. *Id.* at 323 (quoting Am. Elec. Power Co., *supra* note 33, at 2538).
49. 42 U.S.C. § 7604(a), (e) (2006).
50. Samantha Caravello, *Bell v. Cheswick Generating Station*, 38 HARV. ENVTL. L. REV. 465, 475 (2014).

Apart from damages, the common law also offers other benefits, such as exposing gaps in the regulatory scheme, and many suits of this kind can spur other government branches to fix these problems.[51]

II. STATE STATUTES AND EXTRA HURDLES TO STATE COURT RELIEF

A. Continuing Relevance of a Federal Preemption Defense in State Tort Actions

Although *Bell* could be viewed as a decisive case, a district court case in the Fifth Circuit, *Cerny v. Marathon Oil Corporation*,[52] strained to preserve the defendant's ability to raise a preemption defense in state court: "the Court's holding regarding complete preemption has no preclusive effect on the state court's consideration of the merits of a substantive preemption defense."[53] This suggests that state common law may be preempted by the CAA in state court, even though it may not be preempted in federal court. Additionally, state courts may find state common law to be preempted by their own companion statutes.[54] Though claims of state statutory preemption of state common law tort claims have not been widely litigated in state courts, this type of preemption defense seems likely in response to *Bell*. This is especially true when considering that the CAA gives states authority to regulate emissions more strictly and across a wider scope than the federal standards.[55] Because the doctrine of field preemption is only invoked when federal regulations occupy a field of law almost completely, the more comprehensive environmental regulatory plans are, the more likely they will fully occupy the field and preempt state common law. This idea is reflected in a brief by amicus curiae supporting defendant GenOn Power in *Bell*. The brief states, "the Clean Air Act 'is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation.' This is especially true where the states are involved in implementing, maintaining, and enforcing the Act."[56] The brief goes on to discuss the states' role in deciding the limits

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51. *Id.* at 476.

52. Cerny v. Marathon Oil Corp., No. CIV.A. SA-13-CA-562, 2013 WL 5560483 (W.D. Tex. Oct. 7, 2013).

53. *Id.* at 8.

54. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 70 (Iowa 2014).

55. *See* 42 U.S.C. § 7416 (2012).

56. Brief for DRI—The Voice of the Defense Bar as Amicus Curiae Supporting Respondents at 3–4, Bell v. Cheswick Generating Station, 437 F.3d 188 (3d Cir. 2013) (No. 13-1013), *quoting* Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

and types of emissions that each permit holder is allowed to discharge.[57] Despite the states' ability to set potentially more stringent standards, state courts should still not find these state regulations to preempt state common law.

B. State Statutes Preempting State Common Law

In determining whether a state statute preempts state common law, the state court would conduct an analysis similar to the one used to decide preemption under a federal statute. The preemption analysis starts with the principle that statutes that abrogate the common law must be strictly construed.[58] Courts should look for a legislature's explicit intent to preempt common law. Without an explicit intent, the court should then consider whether the "statute's timing, structure and purpose, or nonspecific statutory language . . . reveals a clear, but implicit, preemptive intent."[59]

The timing test examines whether the state enacted a statutory regime before the common law tort arose, finding preemption only where the common law tort arose after the enactment.[60] While the enactment date of common law torts varies from claim-to-claim and state-to-state, tort claims challenging environmental pollution generally trace back to the seventeenth century.[61] American case law dating back to the nineteenth century demonstrates how common law causes of action to address pollution have been part of historic state police powers.[62] Clearly, under a timing-test analysis, state statutes regulating emissions standards would not preempt state common law tort claims.

Under the field preemption test, legislative intent to preempt state common law is reasonably inferred based on a sufficiently comprehensive statutory regime.[63] A comprehensive regime effectively creates a presumption that the statute supplants the common law. The

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57. *Id.* at 5, *quoting* Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

58. *See* Van Waters & Rogers, Inc. v. Keelan, 840 P.2d 1070, 1076 (Colo. 1992) (en banc) ("[S]tatutes in derogation of the common law must be strictly construed, so that if the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication.").

59. Summit Water Distribution Co. v. Mountain Reg'l Water Special Serv. Dist., 2005 UT App 66, 108 P.3d 119, 122 (internal citations omitted).

60. Jarod S. Gonzalez, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 131 (2007).

61. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 66 (Iowa 2014).

62. *See id.*

63. Gonzalez, *supra* note 60, at 131–32.

breadth of statutory coverage and the available remedies determine whether the statute is sufficiently comprehensive to invoke field preemption.[64] For example, several courts have held that a state antidiscrimination statute is insufficiently comprehensive to impliedly preempt the common law when the remedy under the statute does not provide an individual remedy to plaintiffs.[65] These courts failed to secure compensatory and punitive damages for injured individuals. As discussed above, CAA violations may result in violators paying civil money penalties to the government, but harmed individuals—similar to the antidiscrimination statute—are left without any monetary damages remedy.[66] The common law, however, provides compensatory and punitive damages for harmed property owners.[67] Because state companion statutes provide a limited scope of remedies,[68] it would be reasonable to conclude that such state emission standard laws do not create a regulatory regime so comprehensive that the court should find implied legislative intent to completely occupy the field and supplant state common law tort claims.

A third way to deduce implied preemption is to determine whether the conduct required to bring a state common law tort claim is the same conduct that is necessary to prove a violation of a state statute.[69] Namely, the statute impliedly preempts the common law if it regulates the same conduct.[70] Comparing environmental regulation and nuisance law, "the differences in the statutory and common law regimes are demonstrated by what must be shown to establish a violation."[71] The presence of a nuisance may or may not accompany a violation of a companion statute.[72] In other words, one may be in compliance with state statutory regulations, but still be liable for a common law tort claim of nuisance, negligence, or trespass.

Lastly, the independence test provides another means to analyze possible preemption of state common law. This test considers whether the harm that constitutes the common law tort claim matches the injury

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64. *Id.* at 132.
65. *See id.*
66. *See supra* Part I.C.
67. *See* Freeman, 848 N.W.2d at 69.
68. *See, e.g.*, IOWA CODE ANN. § 455B.111 (West 2013) (stating that a person may bring action against a defendant if that defendant has violated an emission standard set in chapter 455B—Iowa's companion statute).
69. Gonzalez, *supra* note 60, at 132.
70. *Id.* at 132.
71. Freeman *supra* note 54, at 70.
72. *Id.*

the state statute is designed to prevent.[73] In other words, is the statute designed to address this injury? Is fixing this problem the statute's purpose? If it is, the state statute is more likely to preempt the common law claim.[74] Because the relevant state statutes are designed to implement the CAA, the purposes of the federal statute are relevant in analyzing the purposes of the state statutes. Among other purposes, the CAA is written 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."[75] State common law tort claims range in their targeted objectives. Focusing on a typical allegation, e.g., nuisance, it is obvious that the common law cause of action seeks to rectify problems beyond public health and welfare.[76] "'A public nuisance is an unreasonable interference with a right common to the general public.' An interference is unreasonable if the conduct significantly interferes with the public health, safety, peace, comfort, or convenience . . . or has a permanent, long-lasting effect on a public right."[77] In addition, nuisance suits aid those who are disproportionately affected by pollution,[78] rather than the general population, which is the target of CAA statutes. The purposes and targeted populations of the CAA and of common law nuisance claims appear distinct. Consequently, under the independence test, state emission statutes do not seem to impliedly preempt state common law tort claims.[79]

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73. Gonzalez, *supra* note 60, at 133–34.

74. *See id.* at 133.

75. 42 U.S.C.A. § 7401 (2006).

76. *See* Freeman v. Grain Processing Corp., 848 N.W.2d 58, 63 (Iowa 2014) (bringing nuisance, trespass, and negligence claims and alleging that the full use and enjoyment of the plaintiffs' property was diminished); Bell v. Cheswick Generating Station, 734 F.3d 188, 192 (3d Cir. 2013) (complaining of noxious odors and "black dust/film . . . or white powder" which requires constant cleaning); Cerny v. Marathon Oil Corp., No. CIV.A. SA-13-CA-562, 2013 WL 5560483, at 1 (W.D. Tex. Oct. 7, 2013) (alleging that the plaintiffs have been harmed by noxious chemicals).

77. Adam D.K. Abelkop, *Tort Law As an Environmental Policy Instrument*, 92 Or. L. Rev. 381, 395 (2013) (internal citations omitted).

78. Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 Wash. L. Rev. 197, 201 (2010).

79. Merrick v. Diageo Americas Supply, Inc., 5 F. Supp. 3d 865, 875 (W.D. Ky. 2014), *citin*g Merrick. v. Brown-Forman Corp., No. 12-CI-3382 (Jefferson Cir. Ct., Div. 9, July 30, 2013) at 4. It should be noted that states might have additional purposes when implementing statutes that go beyond the floor set by the CAA. Therefore, a state court analyzing the preemptive effect of a state statute that more strictly regulates emissions would need to examine the possible additional purposes of the individual state statute and compare how those purposes relate to the state common law regime. Such an analysis would require an individualized, state-by-state assessment. Unfortunately, such a review is beyond the scope of this Comment. It should also be noted that the Appeals Court of Kentucky reversed the state court decision in *Merrick v. Brown-Forman Corp.*, No. 2013-CA-002048-MR, 2014 Ky. App. LEXIS 178, at *9-10 (Ky. Ct. App.). Though this is the only example in which a state court has held state common law to be preempted by the CAA, it is

C. Some State Courts Have Found State Common Law Federally Preempted

The Jefferson Circuit Court, a state trial court in Kentucky, found that the CAA preempted the state's common law.[80] It did so despite the fact that the common law in question predates the CAA, preserves different remedies, is triggered by different conduct, and is aimed at a disproportionately affected population. The court acknowledged the reasoning of the Third Circuit in *Bell*, but chose to follow the reasoning and holding of the Fourth Circuit in *TVA*.[81] The Jefferson Circuit Court noted that the application of common law tort could undermine the regulatory structure established by the state under the CAA.[82] However, another Kentucky lower court found that the CAA and state statutes do not preempt state common law tort claims.[83]

The Iowa Supreme Court also reached a different conclusion than the Jefferson Circuit Court.[84] In *Freeman v. Grain Processing Corporation*, residents based their claims on common law nuisance, trespass, and negligence, while the defendant claimed that the Iowa companion statute to the CAA, Iowa Code chapter 455B, preempted these claims.[85] The Iowa court found that the state's common law purpose—redressing harm to an individuals' enjoyment of their property—and the CAA's purpose—upholding the public interest in controlling emissions—did not overlap.[86] The court concluded that the Iowa legislature, therefore, did not provide a comprehensive scheme for nuisance-type disputes and the Iowa CAA companion statute did not preempt Iowa common law.[87] This overturned the trial court's holding that state nuisance laws were unpredictable enough to interfere with the state's complex regulatory scheme.

As mentioned above, state statutory preemption of state common law has not been widely litigated in state courts.[88] If state statutory

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important to discuss this possibility of preemption as state companion statutes can be stricter and broader—making them more likely to be preemptive—and because it is possible that these relatively recent cases are the first of many.

80. *Id.* at 875.

81. *Id.* at 875.

82. *Id.*

83. Mills v. Buffalo Trace Distillery, Inc., No. 12-CI-00743 (Franklin Cir. Ct., Div. 2, Aug. 27, 2013) at 3.

84. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 70 (Iowa 2014).

85. *Id.*

86. *Id.* at 88.

87. *Id.* at 89.

88. *See supra* Part II.A.

preemption arguments become more prevalent in courts,[89] it will be necessary to explore the contours of states' CAA companion statutes to determine whether each state's emission regulations supplant its own state common law tort claims. To the extent that the CAA alone does not preempt a state common law claim, the state statutory analysis will take on increased importance.[90] One such contour is the "no more stringent than" provisions in some state SIPs—which bars a state's ability to impose standards above the minimum "floor" set by the CAA.[91] For example, Pennsylvania's Air Pollution and Control Act's (APCA) companion regulations, 25 Pa. Code §§ 121–141, are also promulgated pursuant to the CAA. In other words, the standards set by the CAA and by the state are coextensive.[92] In *United States v. EME Homer City Generation*, the federal district court found that the CAA and the APCA preempted state common law nuisance claims.[93] In doing so, the court cited *TVA*: "where Congress has chosen to grant states an extensive role in the Clean Air Act's regulatory regime through the SIP and permitting process, field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted."[94] *EME Homer* was decided before *Bell*.[95] Under *EME Homer*'s logic, if the CAA preempts state common law, then state statutes parallel to the CAA would also preempt state common law. One may logically assume that the reverse would hold true as well; that is, a court could reasonably find that if state common law is not preempted by the CAA, then it should not be preempted by parallel state enforcement statutes. On the other hand, if a state emission statute were significantly more comprehensive, the question of preemption would prove more complex. These inconsistent preemption findings across federal circuits and in state courts must be addressed.

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89. *See supra* notes 37–39 and accompanying text.

90. *See* Justin A. Savage & Madeline Fleisher, *Clean Air Act Preemption*, Daily Env't Rep. (Bloomberg BNA), Apr. 18, 2014, at 4.

91. *Id*.

92. United States v. EME Homer City Generation L.P., 823 F. Supp. 2d 274, 294 (W.D. Pa. 2011).

93. *Id.* at 297.

94. *Id*.

95. *Id*. at 274*;* Bell v. Cheswick Generating Station, 734 F.3d 188, 188 (3d Cir. 2013).

III. PROPOSED REFORM

There are three relatively straightforward ways to resolve the preemption problems discussed above, establish the legitimacy of tort claims, and secure relief for injured individuals. Congress can amend the CAA (1) to create an individual cause of action under the CAA and an avenue for individual redress within the statutory scheme aimed directly at remedying the harms addressed by relevant state common law tort claims (e.g., nuisance, trespass, and negligence) or (2) to clarify the CAA's citizen suit savings clause, making it explicit that state common law is not preempted by the CAA. Lastly, because the CAA does not limit state companion statutes from providing more expansive protection, state legislatures could also implement the first and second proposed reforms by amending their companion statutes.

A. Creating an Individual Cause of Action for Damages Under the CAA

Either Congress, by amending the CAA itself, or individual state legislatures, by amending their CAA companion statutes, could simply and definitively answer the preemption question and secure an individual remedy for injured parties by creating an individual cause of action and damages within their respective statutes. This solution would cause the CAA to fully occupy the field of clean air regulation and clearly preempt state common law because the harms formerly remedied only by the common law could instead be remedied under the CAA. This solution should involve an avenue for individual redress within the CAA. Pursuant to this amendment, a comprehensive system would be implemented to handle all possible nuisance grievances. This option has certain benefits. For example, a committee, or some deciding body with authority that has an in-depth familiarity with the regulatory framework of the CAA, could propose solutions that serve disproportionately harmed individuals, while avoiding interference with the complex CAA scheme. Creating an entire grievance regime would, however, be very costly because it would require resources to create and enforce federal statutes aimed at the same harms as state common law. And, considering the idiosyncrasies of many nuisance, trespass, and negligence cases, designing and implementing a streamlined, uniform process for addressing every case could be very challenging. Considering the CAA's reliance on cooperative federalism, a more feasible solution in the spirit of the Act would be to allow the states to manage individual relief mechanisms—either through their own grievance regimes or the existing

state common law.

B. Amending the CAA's Citizen Suit Savings Clause

The second main approach to addressing the problem of state and federal preemption of common law tort claims is to clarify the citizen suit savings clause in the CAA to make it explicit that state common law is not preempted by the CAA. This could be accomplished by eliminating the words "this section" from the CAA's citizen suit savings clause[96] to avoid the false impression of a limited reach. The citizen suit savings clause currently states: "nothing 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."[97] State citizen suit savings clauses may contain similar language. For example, the citizen suit savings clause in Iowa Code § 455B.111(5) provides, "*this section* does not restrict any right under statutory or common law of a person or class of person to seek enforcement of provisions of this chapter."[98] Based on precedent, defendants may argue that this language saves the common law only for that particular section.[99] In *City of Milwaukee v. Illinois*, the court held that the language of the citizen suit savings clause "cannot be read to mean that the Act as a whole does not supplant formerly available federal common law actions but only that the particular section authorizing citizen suits does not do so."[100] Without the words *this section*, defendants would have difficulty applying a field preemption argument by arguing that the citizen suit savings clause in the CAA does not preserve a plaintiff's state common law claim.

In addition to removing any possible limiting language, the citizen suit savings clause should also clearly state that state common law is not preempted. A comparable example is the National Traffic and Motor Vehicle Safety Act, which includes a citizen suit savings clause that permits any state common law action.[101] With this level of clarity, courts more easily decipher the legislature's intentions. This ease is emphasized in one judge's interpretation of the Motor Vehicle Safety Act: "It does not take a genius to figure out that the preemption clause tells states that

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96. *See* 42 U.S.C. § 7413(a) (2012).
97. *Id.*
98. IOWA CODE ANN. § 455B.111 (West 2013) (emphasis added).
99. City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 327–28 (1981).
100. 451 U.S. at 329 n.22.
101. Cooper v. Gen. Motors Corp., 702 So. 2d 428, 441 (Miss. 1997).

they cannot have any nonidentical laws in any area which is governed by federal regulations, and for those areas in which there are no regulations, the states can still apply their common law."[102] Under this reasoning, individuals should still be able to apply state common law for issues such as nuisance and trespassing that are not covered by the federal regulations.

If states choose to include a citizen suit savings clause in their companion statutes, they should model it after the proposed amended CAA provision to avoid inconsistency between state and federal parallel statutes—inconsistencies such as state statutes preempting state common law while matching federal statutes would not preempt state common law. This latter solution of clarifying the language in the CAA's citizen suit savings clause would likely be a relatively easier means of resolving the preemption question favorably because it would merely secure the continuation of common law enforcement.

C. Likely Criticism

Businesses may criticize these legislative changes. As voiced in *TVA,* companies believe that allowing state common law claims will create concerns of business operability.[103] Companies may fear becoming burdened with unpredictable layers of regulation as individuals demand standards that differ from federal and state-regulated emission levels, arguably upsetting the comprehensive nature of the regime.[104] The court in *Ouelette* addressed this concern in its holding with respect to the CWA:

> [T]he restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although [source-state] nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.[105]

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102. *Id.*
103. North Carolina ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 302 (4th Cir. 2010).
104. *Id.*
105. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 498–99 (1987).

In addition to multiple sources of scrutiny, companies may also worry that some judgments made while upholding state common law will lead to haphazard regulations unsupported by scientific findings.[106] As a former EPA attorney stated, "[t]ort liability, by its very nature, is not a product of technical experts working together and analyzing all of the factors that are enumerated in the environmental statutes."[107] However, stricter emissions standards enacted by states are generally contemplated through state administrative law and scientifically driven standards. Further, a company's compliance with applicable federal and state standards may be sufficient to show that a company's emissions do not cause the level and type of injury necessary to give the plaintiff standing.[108] Also, compliance with standards set by technical experts may demonstrate that a defendant acted reasonably and according to the standard of care.

This understanding of compliance with regulations as a partial defense against common law tort claims may quell some companies' fears that they will be held liable under divergent standards. In addition, the benefits served by allowing state common law claims—providing damages to harmed individuals, exposing gaps in the regulatory scheme, and motivating other branches to take steps to fill these gaps—may very well justify this added layer of inconvenience to companies.

CONCLUSION

Courts in different federal circuits and across different states are split in their application of federal preemption to state common law or companion state statute preemption to state common law. When courts have held the common law to be preempted, disproportionately harmed individuals are left without a remedy. In order to limit inconsistent holdings among courts and to further purposes beyond regulatory compliance—most notably securing relief for individuals' injuries—Congress should clarify the citizen suit savings clause in the CAA and, where applicable, state legislatures should similarly amend their state companion statutes.

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106. Cooper, 615 F.3d at 304–05.

107. Keith Goldberg, *3rd Circ. Ruling Gives Courts Broad Air Permit Powers*, LAW 360, 115, Aug. 23, 2013, http://www.law360.com/articles/467121/3rd-circ-ruling-gives-courts-broad-air-permit-powers.

108. *See* Freeman v. Grain Processing Corp., 848 N.W.2d 58, 70 (Iowa 2014).