NOTES

Bell v. Cheswick Generating Station: Preserving the Cooperative Federalism Structure of the Clean Air Act

I. INTRODUCTION

In April 2012, two women led a 1500-member class in filing a suit against GenOn, the owner of a 570-megawatt coal-fired power plant.[1] The class members owned or lived on property located within one mile of Cheswick Generating Station (Plant).[2] At the time of the initial filing, the first named plaintiff, Kristie Bell, had lived near the Plant for five years.[3] She reported that during that time, black and white particulates emanating from the Plant were so common and sulfur and burning odors were so strong, she could not sit outside.[4] Joan Luppe, the second named plaintiff, was prompted to sue because her children suffered from headaches.[5]

In their complaint, the plaintiffs wrote that the Plant's operation caused them "property damage, the invasion by and inhalation of . . . odors, and the deposit of . . . particulate coal dust, including fly ash and

1. Bell v. Cheswick Generating Station, No. 12-4216, 2013 U.S. App. LEXIS 17283, at *2 (3d Cir. Aug. 20, 2013).
2. *Id.*
3. Rich Lord, *Cheswick Residents File Suit Against Power Plant*, PITTSBURGH POST-GAZETTE (July 7, 2012), http://www.post-gazette.com/neighborhoods-north/2012/07/07/Cheswick-residents-file-suit-against-power-plant/stories/201207070141.
4. *See id.*
5. *See id.*

particulates formed by gases and chemicals emitted by [the Plant]."[6] The plaintiffs were "prisoners in their own homes."[7] The plaintiffs sued under four common law tort actions: nuisance, negligence and recklessness, trespass, and strict liability.[8]

After removal from state court, the United States District Court for the Western District of Pennsylvania held that the Clean Air Act (CAA) "provides a means to seek limits on emissions, and the Court will not create a parallel track."[9] The plaintiffs appealed to the United States Court of Appeals for the Third Circuit, arguing that the CAA does not preempt state common law tort claims.[10] The Third Circuit *held* that the CAA does not preempt state common law tort suits initiated by private property owners against a pollutant source located in the same state. *Bell v. Cheswick Generating Station*, No. 12-4216, 2013 U.S. App. LEXIS 17283, at *2-3 (3d Cir. Aug. 20, 2013).

II. BACKGROUND

A. Tort Law and Clean Air Act History

Tort actions date back to the sixteenth century.[11] Tort claims, like those used in the initial complaint, provide a cause of action for property owners whose interests have been harmed. Tort law has evolved over time, and it is still applicable today and has continually been used to challenge air pollution emissions, as any first-year law student scholar of *Boomer v. Atlantic Cement Co.* can attest.[12]

Common law tort actions were used throughout United States history to seek pollution abatement, but they were insufficient to achieve long-lasting pollution control. The courts' deficiencies in administering a pollution control program are numerous, and they include an inability to initiate inquiries, provide broad oversight, and administer pollution

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6. Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 315 (W.D. Pa. 2012).
7. *Id.*
8. *Id.* at 315-16.
9. *Id.* at 323.
10. Bell v. Cheswick Generating Station, No. 12-4216, 2013 U.S. App. LEXIS 17283, at *2 (3d Cir. Aug. 20, 2013).
11. *See* ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 208 (3d ed. 1991).
12. 257 N.E.2d 870 (1970) (involving a nuisance action by property owners against the owners of a cement plant for an injunction and damages due to interference from the plant's emissions of dirt, smoke, and vibrations); *see also* Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 706 (Ariz. 1972) (holding that a cattle feeding operation could be enjoined); Sullivan v. Jones & Laughlin Steel Co., 57 A. 1065, 1068 (Pa. 1904) (holding that a steel company should be enjoined from operating its furnaces).

controls.[13] Toward the end of the nineteenth century—when citizens and governments recognized air pollution as a problem—municipalities, counties, and states took responsibility and instituted legislative and administrative solutions.[14] In 1916, the Supreme Court of the United States upheld states' ability to regulate air pollution nuisances in *Northwestern Laundry v. Des Moines*.[15] The Court wrote:

> So far as the Federal Constitution is concerned, we have no doubt the State may by itself or through authorized municipalities declare the emission of dense smoke . . . a nuisance . . . and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections.[16]

There were some air pollution successes through local efforts—Pittsburgh, once called the "Smokey City," was cleaned up following World War II.[17] However, for the most part, emissions nationwide increased.[18] These higher emissions came at a price: for example, in October 1948, a "killer fog" killed 20 people and sickened more than 40% of Donor, Pennsylvania's 10,000 residents.[19]

In the 1950s and 1960s, scientists, the public, and government officials worried about air pollution.[20] The federal government passed the first law, the Air Pollution Control Act of 1955, which authorized the precursor to the Department of Health and Human Services to research air pollution control programs.[21] This Act was a significant step forward for at least two reasons: (1) it acknowledged the existence of invisible air pollutants, and (2) it established the notion of regional airsheds.[22] The 1955 Act established the foundation for the CAA with subsequent considerable revisions in 1970, 1977, and 1990.[23]

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13. PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY 229 (1994).

14. *See id.* at 241; Jan G. Laitos, *Legal Institutions and Pollution: Some Intersections Between Law and History*, 15 NAT. RESOURCES J. 423, 433 (1975).

15. 239 U.S. 486, 491-92 (1916).

16. *Id.*

17. MENELL & STEWART, *supra* note 13, at 242.

18. *Id.*

19. *Id.* at 230.

20. *Id.* at 242.

21. *Id.*

22. Laitos, *supra* note 14, at 437.

23. JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL30853, CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 1, 2 (2005), *available at* http://fpc.state.gov/documents/organization/47810.pdf.

B. The Clean Air Act

The CAA sets forth that states and local governments are primarily responsible for air pollution prevention and air pollution control, but to accomplish this, the federal government must assist with money and leadership.[24] The CAA is an "experiment in cooperative federalism" under which the Environmental Protection Agency (EPA) sets air quality standards and states implement them.[25]

The CAA requires the EPA to write national ambient air quality standards (NAAQS) at a level sufficient to protect the public health and welfare.[26] Individual states decide how to meet the NAAQS.[27] Each state writes a State Implementation Plan (SIP), which describes how the state will implement, maintain, and enforce the NAAQS.[28] States must submit their SIPs to the EPA for approval, and once given, the SIP becomes final and "its requirements become federal law and are fully enforceable in federal court."[29] States must regulate the stationary sources established in the areas covered by their SIPs.[30] This regulation is done through state-established permit programs that limit the types and amounts of emission that a stationary source can emit.[31] Accordingly, "each permit is intended to be 'a source-specific bible for [CAA] compliance' containing 'in a single, comprehensive set of documents, all CAA requirements relevant to the particular polluting source.'"[32]

The CAA includes two separate savings clause provisions: one reserves the right for citizens to sue; the second reserves states' rights to set more stringent air pollution standards. The citizen suit provision allows citizens to initiate civil suits "against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation."[33] Citizens can initiate suits against the EPA if the agency fails to perform a nondiscretionary responsibility; suits can also be initiated against an

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24. Clean Air Act, 42 U.S.C. § 7401(a)(3)-(4) (2006).
25. Michigan v. EPA, 268 F.3d 1075, 1083 (D.C. Cir. 2001).
26. 42 U.S.C. § 7409(a)-(b).
27. *Id.* § 7410(a)(1).
28. *Id.*
29. Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989).
30. 42 U.S.C. § 7410(a)(2)(C).
31. *Id.* §§ 7661a(d)(1), 7661c(a).
32. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 300 (4th Cir. 2010) (quoting Virginia v. Browner, 80 F.3d 869, 873 (4th Cir. 1996)).
33. 42 U.S.C. § 7604(a)(1).

emissions source if it fails to obtain the necessary permits.[34] The citizen suit provision includes a "savings clause" that 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 (including relief against the Administrator or a State agency)."[35]

Legislative history of the citizen suit provision demonstrates that Congress intended to safeguard a citizen's right to bring action for pollution damages under common law.[36] According to one author, the best legislative history comes from a Senate report written about the Clean Water Act's nearly identical clause: "[T]he section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would not be a defense to a common law action for pollution damages*."[37]

The second savings clause, entitled "Retention of State authority," states: "Except 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 . . . ."[38] As noted above, the Clean Water Act (CWA) has a similar set of savings clauses, and due to their similarity, courts have looked to the interpretation of one to inform the interpretation of the other.[39] The CWA's "State authority"—the parallel to the CAA's "Retention of State authority" clause—includes one extra sentence which addresses states' rights with respect to boundary waters: "[N]othing in this chapter shall . . . (2) 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."[40]

The Supreme Court addressed states' authority to regulate air pollution from stationary sources in 1972.[41] In *Washington v. General*

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34. *Id.* § 7604(a)(2)-(3).

35. *Id.* § 7604(e).

36. *See* JJ England, Comment, *Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without a Remedy*, 43 ENVTL. L. 701, 715 (2013).

37. *Id.* at 715-16 n.106 (emphasis added) (quoting S. REP. NO. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746-47 (internal quotation marks omitted)).

38. 42 U.S.C. § 7416.

39. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 328-29 (1981) (writing that the citizen suit provision in the Clean Water Act is similar to the citizen suit provisions in numerous other statutes).

40. 33 U.S.C. § 1370 (2006).

41. *See* Washington v. Gen. Motors Corp., 406 U.S. 109 (1972).

Motors Corp., eighteen states filed suit against four car manufacturers (along with their trade associations).[42] The states initially claimed that the defendants had, among other things, engaged in conspiracy, thereby violating federal antitrust laws, and were a public nuisance in violation of federal and state common law.[43] The Supreme Court primarily addressed whether it had original jurisdiction to hear the case; the Court determined it did not.[44] However, the Court held that the case could proceed in a district court and reasoned that the local district courts would be more appropriate forums:

> Air pollution is, of course, one of the most notorious types of public nuisances in modern experience. Congress has not, however, found a uniform, nationwide solution to all aspects of this problem and, indeed, has declared "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." To be sure, Congress has largely pre-empted the field with regard to "emissions from new motor vehicles" . . . . *So far as factories, incinerators, and other stationary devices are implicated, the States have broad control . . . .*[45]

C. Preemption

Passage of the CAA has fueled questions regarding whether it preempts claims under federal and state common law. Preemption originates in the Supremacy Clause of the United States Constitution, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[46]

Under the Supremacy Clause, state law is preempted when it "interferes with or is contrary to federal law."[47] There are three ways in which federal law can preempt state law: express preemption, field preemption, and conflict preemption. Express preemption occurs when Congress includes a clause in a statute that clearly expresses that state law is preempted.[48] Field preemption, on the other hand, reflects a congressional decision to foreclose any state regulation in the area, even

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42. *Id.* at 111.
43. *Id.* at 111, 112 n.2.
44. *Id.* at 113-14.
45. *Id.* at 114-15 (emphasis added) (citations omitted).
46. U.S. CONST. art. VI, cl. 2.
47. Free v. Bland, 369 U.S. 663, 666 (1962).
48. *See* Arizona v. United States, 132 S. Ct. 2492, 2495 (2012).

if it is parallel to federal standards."[49] Conflict preemption occurs when a state law prevents a federal statute from being executed or acts as an obstacle to a federal statute.[50] When determining whether federal law preempts state law, "the purpose of Congress is the ultimate touchstone."[51]

D. Preemption and the Clean Air Act and Clean Water Act

The Supreme Court and federal appellate courts have addressed whether the CAA and CWA preempt federal and state common law claims.[52] In 2011, the Supreme Court examined whether the CAA preempts federal common law nuisance claims in *American Electric Power Co. v. Connecticut*.[53] Plaintiffs—eight states, New York City, and three land trusts—sued four electric power companies and the Tennessee Valley Authority, claiming that their emissions violated the federal common law of interstate nuisance.[54] The Supreme Court held that the CAA and the activities it authorizes the EPA to undertake preempts the right to bring a federal common law suit to reduce power plants' carbon dioxide emissions.[55] The Court reasoned that their decision in *Massachusetts v. EPA* requires that the EPA regulate carbon dioxide emissions; therefore, the CAA addresses power plant emissions.[56] The plaintiffs in *American Electric Power* pled in the alternative that their claims could fall under state tort law, but because the parties had not briefed the Court on the issue, the state law claims were not addressed.[57] However, the court noted that whether plaintiffs can pursue state law claims depends "on the preemptive effect of the federal Act."[58]

In 1987, in *International Paper Co. v. Ouellette*, the Supreme Court addressed whether a plaintiff who lives in a different state (the affected state) than the polluter (whose facility resides in the source state) can bring a state common law claim under the affected state's law.[59]

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49. *Id.* at 2502.
50. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
51. Wyeth v. Levine, 729 S. Ct. 1187, 1194 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation marks omitted)).
52. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011); Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291 (4th Cir. 2010); Her Majesty the Queen v. City of Detroit, 874 F.2d 332 (6th Cir. 1989).
53. *See* 131 S. Ct. 2527 (2011).
54. *Id.* at 2532-34.
55. *Id.* at 2537.
56. *Id.*
57. *Id.* at 2540.
58. *Id.*
59. 479 U.S. 481, 483 (1987).

Residents living on the Vermont side of Lake Champlain sued the owner of a paper mill located on the New York side.[60] The plaintiffs claimed that the plant's discharges were a nuisance.[61] The Court held that courts must apply the source state's law when considering interstate pollution claims.[62]

The Court addressed the elephant in the room: whether a state common law action could be brought at all. The Court reasoned, "Although Congress intended to dominate the field of pollution regulation, the savings clause negates the inference that Congress 'left no room' for state causes of action."[63] The Court underscored the savings' clause's importance:

> The savings clause specifically preserves other state actions, and therefore nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State. By its terms the CWA allows States such as New York to impose higher standards on their own point sources, and in [a prior case] we recognized that this authority may include the right to impose higher common-law as well as higher statutory restrictions.[64]

While the Supreme Court has never addressed whether the CAA's savings clause allows common law claims, two United States courts of appeals have. In *Her Majesty the Queen v. City of Detroit*, the United States Court of Appeals for the Sixth Circuit held that the CAA did not preempt state law claims.[65] The plaintiffs initiated a suit against the City of Detroit under the Michigan Environmental Policy Act over the proposed construction of a city-owned incinerator.[66] The court reasoned that the savings clause "clearly indicates that Congress did not wish to abolish state control."[67] The Sixth Circuit also relied on the Supreme Court's holding in *Ouellette* to establish that Congress expressly chose not to preempt state actions.[68]

However, the United States Court of Appeals for the Fourth Circuit, applying *Ouellette*, held that a court cannot impose an injunction under affected state law against four power plants located in different states (the

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60. *Id.* at 483-84.
61. *Id.* at 484.
62. *Id.* at 500.
63. *Id.* at 492.
64. *Id.* at 497 (citing City of Milwaukee v. Illinois, 451 U.S. 304, 328 (1981)).
65. 874 F.2d 332, 342-43 (1989).
66. *Id.* at 333.
67. *Id.* at 342-43.
68. *Id.*

source states).[69] North Carolina sued the Tennessee Valley Authority (TVA) claiming that emissions from its eleven electricity-generating plants were a public nuisance.[70] The district court granted an injunction, which required TVA to implement emission controls on four plants.[71] The Fourth Circuit held that the district court improperly applied North Carolina law to plants located in different states.[72] Although the Fourth Circuit could overturn the district court's decision solely by correctly applying *Ouellette*, the court applied additional reasoning to reinforce its decision. First, the court reasoned that if the injunction remained in place it "would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air."[73] Second, the court found it puzzling that an activity permitted and regulated by both federal and state governments could comprise a public nuisance.[74]

III. THE COURT'S DECISION

In the noted case, the Third Circuit held that plaintiffs can bring state common law tort claims against air pollutant emitters that fall under the CAA's auspices.[75] The court began by reviewing the regulatory framework, covering relevant CAA history and clauses.[76] The court devoted most of its analysis to the preemption issue.[77] The court relied extensively on *Ouellette* and its holding that plaintiffs can bring common law tort claims against emitters according to the laws of the source state.[78]

Using the reasoning in *Ouellette*, the court addressed GenOn's argument that *Ouellette* does not apply because in that case the Supreme Court addressed the CWA's savings clauses, which GenOn argued is broader than the CAA's savings clauses.[79] The court first noted that the Supreme Court identified in a separate case that the CAA and CWA citizen suit savings clauses are "virtually identical."[80] Therefore, the court

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69. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 296 (2010).
70. *Id.* at 297.
71. *Id.* at 298.
72. *Id.* at 296.
73. *Id.*
74. *Id.*
75. Bell v. Cheswick Generating Station, No. 12-4216, 2013 U.S. App. LEXIS 17283, at *2-3 (3d Cir. Aug. 20, 2013).
76. *Id.* at *3-9; *see supra* Part II.A-B.
77. *See Bell*, 2013 U.S. App. LEXIS 17283, at *13-26.
78. *Id.* at *16-17.
79. *Id.* at *18.
80. *Id.* at *17 (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 328 (1981) (internal quotation marks omitted)).

reasoned, GenOn's argument depended on the difference between the CWA's and CAA's states' rights savings clauses.[81] The court acknowledged the obvious: the two states' rights saving clauses are very similar barring the extra sentence in the CWA's savings clause and "[t]he reason why such language is not included [in the] Clean Air Act is clear: *there are no such jurisdictional boundaries or rights which apply to the air*."[82] The court then took its analysis one step further and wrote:

> If anything, the absence of any language regarding state boundaries in the states' rights savings clause of the Clean Air Act indicates that Congress intended to preserve more rights for the states, rather than less. In no way can this omission be read to preempt all state law tort claims.[83]

The court also used *Ouellette* to address the argument advanced by GenOn and an amicus, Utility Air Regulatory Group, that allowing state law claims to proceed will (1) destabilize the CAA's regulatory configuration because the courts and juries will establish emission standards and (2) "creat[e] a patchwork of inconsistent standards across the country that would compromise Congress's carefully constructed cooperative federalism framework."[84] In response, the court cited *Ouellette*'s reasoning in full:

> First, application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the 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.[85]

The Third Circuit also briefly looked at the two circuit court decisions that had examined whether the CAA displaces state law.[86] The court reiterated that the Sixth Circuit relied on *Ouellette* in *Her Majesty the Queen*, to find that the CAA's language indicates Congress did not intend

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81. *Id.* at *18; *see supra* text accompanying footnotes 39-40.
82. *Bell*, 2013 U.S. App. LEXIS 17283, at *19.
83. *Id.* at *19-20.
84. *Id.* at *24.
85. *Id.* at *25-26 (alteration in original) (quoting Int'l Paper Co. v. Ouelette, 479 U.S. 481, 489-99 (1987) (internal quotation marks omitted)).
86. *Id.* at *20-22.

to remove state control.[87] The court also reviewed the facts and decision in *North Carolina ex rel. Cooper* and referenced the Fourth Circuit's decision to overturn the district court's injunctions based on the faulty application of *Ouellette*. The Third Circuit also referred to the Fourth Circuit's reasoning that *Ouellette* applied because the savings clause in the CWA and CAA are similar.[88]

The court concluded by reiterating that the judges could find nothing in the CAA expressing Congress's intent to preempt the state claims at issue.[89] The court wrote, "If Congress intended to eliminate such private causes of action, 'its failure even to hint at' this result would be 'spectacularly odd.'"[90]

IV. ANALYSIS

CAA history demonstrates that for decades state and local governments were responsible for regulating air pollution; the text of the CAA and legislative history corroborate that Congress chose to write the law to preserve state's abilities to regulate air pollution. As opposed to undermining the cooperative federalism structure, as GenOn argued and the district court maintained, the Third Circuit's ruling strengthens it. As the Sixth Circuit reasoned in *Her Majesty the Queen*, "If the plaintiffs succeed in state court, it will simply be an instance where a state is enacting and enforcing more stringent pollution controls as authorized by the CAA."[91]

The Third Circuit missed an opportunity to strengthen its holding by addressing the district court's reasoning, which relied extensively on *North Carolina ex rel. Cooper*.[92] Incorporating additional analysis differentiating this case from the Fourth Circuit's would have the added benefit of eliminating any appearance of a split among the United States courts of appeals regarding whether the CAA preempts state common law claims.

Bell can be differentiated from *North Carolina ex rel. Cooper*. First, North Carolina is a state, not a private citizen, and as a state North Carolina has remedies under the CAA to challenge interstate emissions. Under 42 U.S.C. § 7426(b), North Carolina can petition the EPA

87. *Id.* at *20-21.
88. *Id.* at *21-22.
89. *Id.* at *23.
90. *Id.* at *27 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).
91. Her Majesty the Queen v. City of Detroit, 874 F.2d 332, 344 (1989).
92. *See* Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 321-23 (W.D. Pa. 2012).

administrator "for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)(ii) of this title or this section."[93] In other words, North Carolina can seek assistance from the EPA and does not have to resort to the courts.

A second important distinction is that North Carolina filed a broad complaint against eleven power plants.[94] North Carolina complained that TVA's power plant emissions were generally a nuisance and that the emissions entered in "unreasonable amounts," which threatened its residents' health, the region's economy, and the aesthetics of the state's ecosystem.[95] In contrast, the plaintiffs in *Bell* filed suit because one plant's emissions caused extensive property damage.[96] The property damage claims in *Bell* fit the historic tort claims mold, whereas North Carolina's broader claims do not. North Carolina's claims raise questions regarding whether tort is the appropriate means by which to resolve a dispute between a state and a federal executive agency.[97]

Furthermore, the third prong of the Fourth Circuit's reasoning was flawed: it is possible for a nuisance claim and a fully permitted plant to coexist. The facts of *Bell* provide case and point. The class here suffered real property damage from a CAA-permitted plant. Especially in an era of reduced state budgets with fewer plant inspectors and diminished state environmental protection agency capacity, it seems increasingly possible that a plant may have received a CAA permit but still release pollutants that cause a nuisance.[98] A citizen's right to sue is fundamental to the CAA cooperative-federalism structure.

Following the release of the Third Circuit's decision, the blogosphere is abuzz.[99] *Bell* introduces a potential new avenue: state (as opposed to federal) common law tort claims. After *American Electric*

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93. 42 U.S.C. § 7426(b) (2006).

94. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 593 F. Supp. 2d 812, 815, 818 (W.D.N.C. 2009).

95. *Id.* at 815.

96. *See* Bell v. Cheswick Generating Station, No. 12-4216, 2013 U.S. App. LEXIS 17283, at *2 (3d Cir. Aug. 20, 2013).

97. *See North Carolina ex rel. Cooper*, 593 F. Supp. 2d at 815.

98. *See, e.g.*, R. STEVEN BROWN ET AL., ENVTL. COUNCIL OF THE STATES, STATUS OF STATE ENVIRONMENTAL AGENCY BUDGETS, 2011-2013 (2012), *available at* http://www.ecos.org/section/publications.

99. *Compare Third Circuit Finds Clean Air Act Does Not Preempt Toxic Tort in Pennsylvania*—Bell v. Cheswick Generating Station, PHILA. TOP INJ. LAW. BLOG (Sept. 19, 2013), http://www.philadelphiatopinjurylawyerblog.com/2013/09/third-circuit-finds-clean-air.html, *with* Seth Jaffe, *The Third Circuit Reinstates Nuisance Claims Against Cheswick Generating: Bad Idea*, L. & ENV'T (Aug. 22, 2013), http://www.lawandenvironment.com/2013/08/the-third-circuit-reinstates-nuisance-claims-against-cheswick-generating-bad-idea/.

Power Co., which prohibited plaintiffs from bringing federal common law tort claims due to CAA preemption, the Third Circuit has introduced a big question mark: can state common law claims provide a means by which plaintiffs can hold power plants responsible for global warming? If plaintiffs can clear the causation bar, it seems likely the question will be asked in courts across the country soon.[100] Plaintiffs across the country anticipated this decision. For example, the residents of a small town in Alaska recently had their federal common law public nuisance claim against utilities companies for global warming-induced damage dismissed by the United States Court of Appeals for the Ninth Circuit (which applied *American Electric Power Co.*).[101] Now, they may want to refile their complaint under state common law.

V. CONCLUSION

The Third Circuit correctly held that the CAA does not preempt source state common law tort claims. The *Bell* holding aligns with Supreme Court precedent and the CAA's language and legislative history. This holding preserves the historic federal-state partnership that addresses "one of the most notorious types of public nuisance in modern experience."[102]

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100. *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 22-33 (2003) (discussing common law tort suits that could be brought by victims of climate change).

101. *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

102. Washington v. Gen. Motors Corp., 406 U.S. 109, 114 (1972).

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