MERRICK V. DIAGEO AMERICAS SUPPLY, INC.

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Introduction

The Clean Air Act ("CAA" or "Act")[1] depends on the cooperation of several actors.[2] The state and federal governments work together to set and enforce emissions standards.[3] The Act strikes this balance by charging the Environmental Protection Agency ("EPA") with setting a national floor for ambient air quality[4] while allowing states to set higher standards.[5] The Act also enlists the help of the local citizenry. Through the citizen suit clause, private individuals can enforce emissions standards and seek "any other relief" from courts.[6]

In *Merrick v. Diageo Americas Supply, Inc.*,[7] the Sixth Circuit considered the respective roles of federal, state, and private actors, analyzing whether the Clean Air Act preempts state common law tort claims. Pursuant to the CAA's citizen suit provision, neighbors of a Diageo Americas Supply, Inc. ("Diageo") distillery operation in Kentucky alleged that the facility was unlawfully emitting ethanol.[8] This pollutant in turn led to the spread of a fungus that caused property damage.[9] Plaintiffs brought a class action suit seeking compensatory and punitive damages based on state common law as well as injunctive relief that would require Diageo to install control technologies at its facilities.[10]

On interlocutory appeal from the U.S. District Court for the Western District of Kentucky, the Sixth Circuit concluded that the text of the statute, its legislative history, and Supreme Court precedent indicated that state common law tort claims do not interfere with the purpose of the CAA, and thus are not preempted.[11] In so holding, the Sixth Circuit joins the Third Circuit and the Supreme Court of Iowa in correctly interpreting the CAA as generally not preempting state common law claims. In *Merrick*, however, the court's broad hold-

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1. 42 U.S.C. §§ 7401–7671q (2012).
2. *See* Robert Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 Wake Forest L. Rev. 719, 738 (2006) (noting how Congress allocated roles among the federal and state governments).
3. *Id.* at 740–41.
4. 42 U.S.C. § 7409(b).
5. *Id.* § 7416.
6. *Id.* § 7604(e).
7. 805 F.3d 685 (6th Cir. 2015).
8. *Id.* at 686.
9. *Id.*
10. *Id.* at 689.
11. *Id.* at 686.

ing allows for common law claims without regard to the relief sought, allowing state judges to effectively establish new emission standards. All three courts distinguish this reading from that of the Fourth Circuit, which has held that state common law claims may be preempted when a party seeks to use the common law of one state to create emission standards that are applied in another.

Courts should be hesitant to follow the Sixth Circuit's wholesale allowance of common law remedies. While state common law claims yielding compensatory or punitive damages may not directly conflict with the text of the CAA, "the purpose of Congress is the ultimate touchstone in every pre-emption case."[12] The legislative history of the CAA demonstrates that the savings clauses were not meant to allow courts to unilaterally set new emissions standards using the common law. A close analysis of that history, considered alongside the decisions of the Third and Fourth Circuits and the Supreme Court of Iowa, reveals that the Sixth Circuit has set itself apart by being the sole court to allow injunctive relief that creates a new emissions standard.

I. Background

A. Preemption in the Clean Air Act

The Supreme Court reads the Supremacy Clause[13] to provide for three kinds of preemption: express preemption, conflict preemption, and field preemption.[14] Express preemption occurs when a statute has explicit language showing Congress's intent to invalidate state law.[15] Even without such language, though, Congress may implicitly preempt state law.[16] Conflict preemption occurs when "compliance with both state and federal law is impossible"[17] or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[18] Meanwhile, field preemption occurs "when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regu-

12. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

13. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . 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.").

14. ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594–95 (2015).

15. *Id.* at 1595; *see also* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 226 (2000).

16. *ONEOK*, 135 S. Ct. at 1595.

17. *Id.*

18. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1942)). Field preemption is also called obstacle preemption. *See* Nelson, *supra* note 15, at 228.

lation."[19] In accordance with federalism principles, the Court presumes that federal statutes do not preempt state law, especially in areas traditionally regulated by the states.[20]

The CAA is "a comprehensive federal law that regulates air emissions under the auspices of the United States Environmental Protection Agency."[21] The Act employs a cooperative federalism approach. By delegating significant implementation and enforcement authorities to states, the Act makes them "indispensable partners."[22] The Act further involves states through two savings clauses: one in the citizen suit provision[23] and another entitled "Retention of State Authority."[24] The citizen suit provision creates a cause of action, allowing private parties to seek the enforcement of emission standards or limitations.[25] At the same time, the section provides that

> [n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).[26]

The states' rights-focused Retention of State Authority clause preserves the ability of states to manage air pollution through means not specified within the Act. It reads,

> 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 . . . .[27]

The question before the *Merrick* court was whether the CAA preempted state common law suits or if these savings clauses indicate Congress's intention to allow such suits.

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19. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 491 (1987) (citations omitted).
20. Bond v. United States, 134 S. Ct. 2077, 2088–89 (2014).
21. Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013).
22. John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1190 (1995); *see also Bell*, 734 F.3d at 190.
23. 42 U.S.C. § 7604(e) (2012).
24. *Id.* § 7416.
25. *Id.* § 7604.
26. *Id.* § 7604(e).
27. *Id.* § 7416.

B. Split Interpretations of Supreme Court Precedent

The court's conclusions in *Merrick* are a product of two Supreme Court decisions. The first, *International Paper Co. v. Ouellette*,[28] involved the interpretation of similar savings clauses in the Clean Water Act ("CWA").[29] Ouellette, a Vermont resident, brought a Vermont common law claim alleging that the New York-based International Paper Co. had created a nuisance through its pollution of Lake Champlain.[30] Noting that the savings clause of the CWA preserved state common law actions,[31] the Court nonetheless held that *Ouellette*'s particular action was preempted by the CWA.[32] The problem, according to the Court, was that applying Vermont common law to a New York source "would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'"[33] The CWA represents an attempt to comprehensively regulate interstate water disputes, and so state common law claims that would hold parties in one state to a standard adopted by a second state would interfere with congressional intent. The Court held that injured parties could still bring nuisance claims based on the law of the source state.[34]

The Supreme Court addressed a similar issue in *American Electric Power Co. v. Connecticut* ("*AEP*").[35] In *AEP*, eight states, New York City, and three land trusts brought federal common law claims against several large greenhouse gas producers.[36] A unanimous Court held that, since the CAA gives EPA the authority to regulate greenhouse gases,[37] the CAA also preempts federal common law claims seeking abatement of greenhouse gas emissions.[38] The Court left open, however, the question of whether the CAA similarly preempts state nuisance claims.[39]

The issue beleaguering circuit courts since these two decisions, and answered by *Merrick*, is whether source-state common law also interferes with the purposes and objectives of the CAA. Prior to *Merrick*, two courts had found that the CAA does not preempt state common law. In *Bell v. Cheswick Generating Station*,[40] private citizens brought a class action suit against a power plant

28. 479 U.S. 481 (1987).
29. 33 U.S.C. §§ 1365(e), 1370 (1982).
30. *Ouellette*, 479 U.S. at 484.
31. *Id.* at 485.
32. *Id.* at 494.
33. *Id.* at 493 (quoting Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)).
34. *See id.* at 498.
35. 131 S. Ct. 2527 (2011).
36. *Id.* at 2532.
37. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).
38. *See AEP*, 131 S. Ct. at 2537.
39. *Id.* at 2540.
40. 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

under state tort law.[41] The plaintiffs alleged that the operation of Cheswick's power plant caused fly ash and coal byproducts to contaminate the neighboring property.[42] The citizens sought compensatory and punitive damages, as well as injunctive relief limited to an order for the plant operator to remove the particulate matter that fell onto the citizen's property.[43] The Third Circuit applied *Ouellette*, holding that the CAA did not conflict with state common law.[44] Although sources are required to abide by both permit standards and common law nuisance standards, this single additional authority does not conflict with the CAA's goal of predictability.[45] Furthermore, the court held that applying common law standards does not disrupt the CAA's balance between federal, source-state, and affected-state interests because the Act's permitting system creates a floor above which states can impose higher standards—even through state common law.[46]

The Supreme Court of Iowa also interpreted the preemptive force of the CAA in *Freeman v. Grain Processing Corp.*[47] In that case, neighbors of an industrial corn mill alleged that the mill generated pollutants and noxious odors and sought compensatory and punitive damages and injunctive relief based on state common law.[48] The *Freeman* court found no field preemption based on Congress's explicit retention of state common law[49] and the CAA's structural emphasis on cooperative federalism.[50] According to the court, source-state common law standards advance the values of cooperative federalism.[51] The court also found no conflict preemption as the plaintiff sought only remedies for specific harms, not broad injunctions.[52] Thus, awarding compensatory relief would not conflict with the CAA's permitting process which otherwise set emissions standards.[53] It concluded that "conflict preemption with the CAA does not apply to a private lawsuit seeking damages anchored in ownership of real property," but refrained from ruling on the claim for injunctive relief.[54] The

41. *Id.* at 192.
42. *Id.*
43. *Id.* at 192–93. Notably, Bell admitted that the injunctive relief could not include an order that would change the way in which Cheswick operated its plant. Oral Argument at 13:50, Bell v. Cheswick Generating Station, 734 F.3d 188 (2013) (No. 12-4216), https://perma.cc/9W8P-DDDY.
44. *Bell*, 734 F.3d at 194–97.
45. *Id.* at 197–98.
46. *Id.*
47. 848 N.W.2d 58 (Iowa 2014), *cert. denied*, 135 S. Ct. 712 (2014).
48. *Id.* at 63.
49. *Id.* at 82–84.
50. *Id.* at 83.
51. *Id.* at 83–84.
52. *Id.* at 85.
53. *Id.*
54. *Id.* at 85.

court reasoned that conflict preemption should be analyzed in light of the facts of each case and withheld judgment until a full record could be developed.[55]

These cases contrast with *North Carolina, ex rel. Cooper v. TVA*,[56] where the Fourth Circuit found that the CAA did preempt state common law claims.[57] Like *Ouellette*, *Cooper* involved the application of affected-state common law to polluters in other jurisdictions. North Carolina sought an injunction that would require emissions controls on four Tennessee Valley Authority ("TVA") plants in Alabama and Tennessee.[58] The court held that *Ouellette* controlled and that the CAA preempted such an injunction.[59] Additionally, the court held that even applying source-state common law could be problematic. It found the "vague and uncertain nuisance standards" of the common law incompatible with the rules and procedures set out by the CAA for setting standards.[60] The court reasoned that bench trials could not replicate the expertise of agencies, and permitting the common law to set standards would promote forum shopping and require courts to modify equitable decrees as technology changed.[61] The Fourth Circuit concluded that it was inappropriate for courts to "supplant the conclusions of agencies . . . and upset the reliance interests of source states and permit holders."[62]

C. Merrick *Finds No Preemption of State Common Law Claims*

Diageo operates a whiskey distillery in Louisville, Kentucky.[63] As whiskey ages, it produces ethanol, some of which escapes into the atmosphere.[64] This ethanol combines with condensation, producing an environment in which whiskey fungus thrives.[65] The black fungus proliferated on the property of Diageo's neighbors.[66] As part of a putative class action suit, Bruce Merrick, one of these neighbors, brought negligence, nuisance, and trespass claims against Diageo, seeking compensatory and punitive damages and an injunction requiring the abatement of the ethanol emissions.[67] Diageo sought a motion to dis-

55. *Id.*
56. 615 F.3d 291 (4th Cir. 2010), *cert. denied*, 132 S. Ct. 46 (2011).
57. *Id.* at 296.
58. *Id.*
59. *Id.* at 306.
60. *Id.* at 303–04.
61. *Id.* at 306.
62. *Id.*
63. Merrick v. Diageo Ams. Supply, Inc., 5 F. Supp. 3d 865, 867 (W.D. Ky. 2014).
64. *Id.*
65. *Id.* at 868.
66. Whiskey fungus is a black mold that rapidly discolors surfaces exposed to ethanol-rich environments. *See* Melena Ryzik, *Kentuckians Take Distilleries to Court Over Black Gunk*, N.Y. Times (Aug. 29, 2012), https://perma.cc/WDL5-CUWK.
67. *Merrick*, 5 F. Supp. 3d at 868.

miss on the grounds that, since the CAA regulated ethanol pollution, it also preempted state common law claims.[68] The district court disagreed.[69] Relying on *Ouellette*, *Bell*, and Sixth Circuit precedent,[70] the court held that the CAA's savings clause preserved the right of private plaintiffs to bring source-state common law claims.[71] The district court certified the case for interlocutory appeal on the sole issue of whether or not the CAA preempted the plaintiff's state common law claims.[72]

The Court of Appeals for the Sixth Circuit affirmed the district court's decision.[73] The court first explained the full implications of the CAA's savings clause. Reasoning that "State courts are arms of the 'State,' and the common law standards they adopt are 'requirement[s] respecting control or abatement of air pollution,'" the court held that the savings clause preserves state common law actions for nuisance.[74] Examining the legislative history of the CAA, the court found no indication that Congress intended to preempt source-state common law,[75] a theory that was supported by the Supreme Court's analysis of the CWA's nearly identical savings clause.[76]

The court then distinguished this holding from the sole circuit court decision that has found preemption, *North Carolina, ex rel. Cooper v. TVA*.[77] The *Merrick* court did not find the Fourth Circuit's decision persuasive, instead finding distinguishable factual circumstances.[78] It reasoned that *Cooper*'s preemption was based on the federalism principles found in *Ouellette*—it was inappropriate to apply North Carolina law extraterritorially to facilities outside of North Carolina.[79] Since *Merrick* would apply Kentucky law to a Kentucky facility, these federalism concerns were not in play, and thus *Cooper* did not apply.[80]

The court then disposed with Diageo's arguments that the CAA required preemption notwithstanding the savings clause. Diageo suggested that the Supreme Court's reasoning in *AEP* that the CAA displaces federal common law claims should also apply to state common law claims.[81] The Sixth Circuit noted

68. *Id.* at 869.
69. *Id.* at 876.
70. The district court cited *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989), in which the Sixth Circuit held that the CAA did not preempt the Michigan Environmental Protection Act. *Merrick*, 5 F. Supp. 3d at 871.
71. *Id.*
72. Merrick v. Diageo Ams. Supply, Inc. 805 F.3d 685, 686 (6th Cir. 2015).
73. *See id.* at 695.
74. *Id.* at 690 (quoting 42 U.S.C. § 7416 (2012)).
75. *See id.* at 695.
76. *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497–98 (1987).
77. *See Merrick*, 805 F.3d at 692–93.
78. *Id.* at 693.
79. *See Merrick*, 805 F.3d at 693.
80. *See id.*
81. *See id.*

the different circumstances in the two cases. The CAA explicitly reserves to states the power to prescribe more stringent emissions requirements than those set out in the CAA, but it refrains from giving federal courts any similar authority.[82] Additionally, although statutory law "natural[ly]" displaces federal common law, the presumption against preemption and federalism requires a stronger showing of congressional intent to preempt state law.[83] Diageo further argued that "allowing state common law claims would disrupt the CAA's balance of authority between federal and state law . . . ."[84] Applying *Ouellette*, the Sixth Circuit held that the savings clause evinces an understanding that the application of higher state standards does not upset this balance of authority.[85]

II. The Court's Error: The Relief Sought Changes the Preemption Analysis

As a straightforward application of *Ouellette*, the Sixth Circuit correctly decided *Merrick*. The court's decision, however, ignores the tension between the two savings clauses. While the states' rights clause ensures that states will have the power to enforce emissions standards that are higher than the federal baseline, the legislative history of the citizen suit clause suggests that private citizens would not be able to use the common law to create higher standards. In fact, the legislative history indicates that the citizen suits could serve only two purposes: either enforcing objective emissions standards or providing compensation for harms. The Sixth Circuit's broad holding allows for a third type of citizen suit, one that would require polluters to reduce emissions according to judicially created standards. This result confounds the CAA's intended roles for citizens, courts, states, and the federal government. Both the Third Circuit and the Supreme Court of Iowa have allowed injunctions more cautiously, and the Fourth Circuit has explicitly held that the CAA preempts such relief.

A. Roles in Cooperative Federalism

Environmental law has traditionally been the province of the States.[86] Until recently environmental issues were largely local matters, addressed by local

82. *See id.*

83. *See id.* at 693–94.

84. *Id.* at 695.

85. *See id.*

86. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) (noting that the authority of states "to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power"); S. Rep. No. 84-389, at 2 (1955) ("The committee recognizes that it is the primary responsibility of State and local governments to prevent air pollution."); Frank Grad, *Intergovernmental Aspects of Environmental Controls*, *in* 1 Managing the Environment 323, 326 (Alan Neuschatz ed., 1973) ("The states and localities have dealt with envi-

laws.[87] Even when the federal government took a role in environmental protection, that role was initially limited to research and technical assistance.[88] Only with the widespread pollution of natural resources and a growing fear that relying upon states would lead to a "race to the bottom" did the federal government exercise its capacity to regulate the environment.[89] The 1970s and 1980s saw an expansion of federal regulation over environmental matters[90] through the National Environmental Policy Act,[91] the Clean Air Act,[92] the Federal Water Pollution Act (Clean Water Act),[93] Resource Conservation And Recovery Act of 1976,[94] and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.[95] Still, Congress understood that these programs required a balance between state and federal interests.[96]

This balance was particularly important in the Clean Air Act. As the House Committee Report noted before the passage of the 1970 Amendments to the CAA,

> While the basic strategies in the Nation's war against air pollution must be developed in a unified and consistent way by the Federal

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ronmental problems under the state's police power practically from the beginning of time . . . . [T]here has never been any real question that the states or the municipalities . . . had the power to enact laws or regulations that protect the health, safety and welfare of the people against adverse effects of environmental pollution.").

87. *See* Glicksman, *supra* note 2, at 728 (detailing the history of cooperative federalism in environmental law).

88. *See* Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351, 360 (2000).

89. *See* Thomas W. Merrill, *Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 ECOLOGY L.Q. 485, 486–87 (1994) (arguing that federalism of environmental law was a form of economic protectionism); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1226–27 (1992) (suggesting that one of the driving purposes behind the CAA is an attempt to avoid a race to the bottom among states).

90. *See* David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 30 (2000) (describing the creation of federal programs as "establish[ing] federal norms" to control pollution).

91. 42 U.S.C. §§ 4321–4370f (2012).

92. 42 U.S.C. §§ 7401–7671q (2012).

93. 33 U.S.C. §§ 1251–1388 (2012).

94. 42 U.S.C. §§ 6901–6992k (2012).

95. 42 U.S.C. §§ 9601–9675 (2012).

96. *See* 1 ENVTL. L. INST., LAW OF ENVIRONMENTAL PROTECTION § 9.5 (2015 ed.) ("The legislative process [which produced the federal environmental laws of the 1970s] . . . forced an uneasy and evolving compromise which recognized, on the one hand, the entrenched position of state pollution control agencies and the need to temper federal mandates with local implementation and flexibility and, on the other hand, the need for strong federal enforcement by EPA as well as by the state.").

> Government, the implementation and enforcement of these strategies will have to be effected in every community in the United States. Therefore, prompt and effective regional, State, and local efforts are needed to win the campaign for clean air.[97]

The CAA assigned clear roles to the states and to the federal government. With the passage of the 1970 Amendments,[98] Congress charged the federal government with setting national air quality criteria and coordinating state action, while the states were charged with implementing and enforcing standards.[99] The 1970 Amendments also identified a role for local efforts by envisioning citizen participation as an integral part of maintaining air quality. The Senate Committee on Public Works originally proposed the "citizen suit" provision at issue in *Merrick*.[100] This section authorized citizens to sue to enforce "objective standards" of air quality as set out by federal or state administrative procedures.[101] When outlining this, the Committee stated that the new 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 standards under this Act would not be a defense to a common law action for pollution damages."[102] The House Committee reiterated this understanding when accepting the citizen suit provision.[103] Notably, the citizen suit section itself provides a means for enforcing standards, but offers no compensation for the damages suffered by private parties beyond attorneys' fees.[104] Thus, the CAA did not give the federal government responsibility for making affected citizens whole, but rather preserved the common law as a means to address the harms caused by pollution.[105] The Senate Committee, however, was

97. H.R. REP. NO. 91-1146, at 15 (1970).

98. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

99. Grad, *supra* note 86, at 326.

100. S. REP. NO. 91-1196, at 36 (1970).

101. "An alleged violation of an emission control standard, emission requirement, or a provision in an implementation plan, would not require reanalysis of technological or other considerations at the enforcement stage. These matters would have been settled in the administrative procedure leading to an implementation plan or emission control provision." S. REP. NO. 91-1196, at 36; *see also id.* at 36–38 (describing the rationale behind the amendment of section 304, codified at 42 U.S.C. § 7604).

102. *Id.* at 38.

103. H.R. REP. NO. 91-1783, at 56 (1970) ("The right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected.").

104. *See* S. REP. NO. 91-1196, at 38 ("There would be no . . . provision [in the section] for the recovery of property or personal damages."); *see also* Jeffery Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 ENVTL. L. RPTR. 10407, 10426 (1984) (describing how only the CWA allows for penalties in citizen suits and how these penalties are paid to the government, not the private citizens).

105. For a discussion of how tort law works with the CAA by filling regulatory gaps, see, for example, Scott Armstrong, Note, *The Continuing Necessity of Common Law Torts for Envi-*

explicit about the limited use of common law claims. The Committee wrote, "[The Citizen Suit Clause] would not substitute a 'common law' or court-developed definition of air quality."[106] The implication is that Congress intended to identify two types of suits available to citizens: one in which a private citizen may act as an enforcer of objective air quality standards, and another in which private parties may recover for air pollution damages.

B. Conflict Preemption with Remedies

Courts should be mindful of the roles various remedies play in their conflict preemption analysis. As Justice Powell argued in dissent in *Silkwood v. Kerr-McGee Corp.*,[107] different damages serve different purposes, and thus the preemption analysis should be tailored according to the type of relief sought.[108] The *Silkwood* majority held that punitive damages arising from a personal injury were not preempted by the Atomic Energy Act.[109] Justice Powell disagreed, characterizing punitive damages as "regulatory" rather than compensatory.[110] He found that this type of regulation conflicted with the federal government's comprehensive safety regulation of nuclear energy.[111]

The argument that a preemption analysis should include the type of remedy sought was echoed by the Solicitor General in *Ouellette*. In his *amicus curiae* brief on behalf of the United States, the Solicitor General argued that the CWA preempted actions seeking punitive damages or injunctive relief but not those seeking compensatory damages.[112] Although the Solicitor General relied on federalism principles when arguing that the CAA prohibited both injunctive relief and punitive damages based on non-source-state common law,[113] he did not conclude that these principles prohibited all relief.[114] The Solicitor General argued that compensatory damages based on non-source-state common law re-

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ronmental Harms: Why the Clean Air Act Should Not Preempt State Law Claims Against Stationary Sources, 44 TEX. ENVTL. L.J. 391, 411 (2014) and Samantha Caravello, Comment, *Bell v. Cheswick Generating Station*, 38 HARV. ENVTL. L. REV. 465, 473–76 (2014).

106. S. REP. NO. 91-1196, at 36.

107. 464 U.S. 238 (1984).

108. *Id.* at 274 (Powell, J., dissenting); *accord* Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENVTL. L. REV. __ (forthcoming 2016).

109. *Id.* at 258 (majority opinion).

110. *Id.* at 274–75 (Powell, J., dissenting).

111. *Id.* at 278–81.

112. *See* Brief for the United States as Amicus Curiae Supporting Affirmance at 20–28, Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) (No. 85-1233), 1986 WL 728327.

113. *Id.* at 22, 26 ("The object of federal preemption is the interstate application of the abatement remedy . . . . The primary purpose of punitive awards is to coerce the discharger into changing its behavior and, consequently, such awards are more akin in effect and design to an abatement remedy.").

114. *Id.* at 22.

mained viable without any indication of congressional intent to prevent them.[115] Relying on *Silkwood v. Kerr-McGee Corp.*, he argued that claims could be preempted based on the type of relief sought.[116] The Supreme Court responded to this proposition in a footnote, rejecting the distinction between different types of remedies.[117] The Court found no indication in the CWA or legislative history to suggest that Congress intended to "draw a line between the types of relief sought."[118]

While this issue has been given little treatment in CWA cases, courts have paid more attention to the difference between suits imposing an emissions standard and those seeking remedy for harms in CAA cases. The Fourth Circuit did so in *Cooper*. When discussing whether North Carolina could use common law public nuisance claims to require the abatement of power plant emissions, the court characterized the state as having "requested the federal courts to impose a different set of [emission] standards."[119] The court recognized that public nuisance was the wrong tool for setting standards, as it "provide[s] almost no standard of application."[120] Such a use of the common law would assign to courts a function not envisioned by the CAA.[121] This is fully in accordance with the CAA's legislative history, which indicated that the common law should not be used to set standards, but must merely apply administratively determined objective standards.[122]

The Sixth Circuit erred in distinguishing its holding from that of the Fourth Circuit's in *Cooper*. Diageo argued that under *Cooper*, state common law claims were preempted because of the federalism concerns raised when applying state common law extraterritorially *and* because application of the common law conflicted with the purpose of the CAA.[123] The Sixth Circuit disagreed, main-

115. *Id.* at 22–26 ("Congress completely refrained from addressing the issue of the availability of private damages for water pollution in the Clean Water Act. That would ordinarily indicate that Congress intended to preserve, rather than prohibit, any common law damage remedy for compensatory relief that might otherwise apply.").

116. *Id.* at 22.

117. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 499 n.19 (1987).

118. *Id.* The Court also reasoned that federalism principles decried the awarding of compensatory damages. The Solicitor General argued that compensatory damages based on Vermont law would cause the New York polluters to realize the externalities of their conduct in a way that would not constitute regulation. The Court rejected this argument as well, finding that only the source state and the federal government had authority to regulate emissions. *Id.*

119. North Carolina, *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 301 (4th Cir. 2010).

120. *Id.* at 302.

121. *Id.* at 304 ("North Carolina's approach would reorder the respective functions of courts and agencies.").

122. S. Rep. No. 91-1196, at 36 (1970) ("Section 304 would not substitute a 'common law' or court-developed definition of air quality.").

123. Corrected Brief of Defendant-Appellant Diageo Americas Supply, Inc. at 58, Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685 (6th Cir. 2015) (No. 14-6198), 2014 WL 7006824 ("Although the Fourth Circuit did address the federalism implications of applying 'affected

taining that *Cooper* dealt primarily with federalism.[124] While it is true that the Fourth Circuit relied on federalism principles to reach its holding,[125] the Court also characterized North Carolina's action as an attempt "to impose a different set of standards."[126] This is a meaningful distinction that *Merrick* ignored entirely.

The Supreme Court of Iowa, on the other hand, has acknowledged the difference between setting standards and providing relief in a way that gives full effect to the CAA's legislative history. In *Freeman*, the court contrasted its factual situation from that of *Cooper*.[127] It noted that the plaintiffs in *Cooper* asked for equipment modification at a number of plants in Alabama and Tennessee, while Freeman sought "damages related to specific properties at specific locations allegedly caused by a specific source."[128] This level of specificity would result in only "indirect and incidental" impacts on the regulatory scheme set out in the CAA, hence there was no conflict preemption with a "private lawsuit seeking damages anchored in ownership of real property."[129] The court refrained from ruling on the preemption of injunctions,[130] however, stating that conflict preemption analysis "must be done on a case-by-case basis."[131] This limited holding is entirely in line with the congressional intent behind the CAA. While the court could offer common law remedies to address the harms to real property, an injunction requiring emissions controls would act more as a standard. Creation of a new standard based on the common law could indeed run afoul of the legislative intent and be preempted.

Bell also represents the acknowledgment of the distinction. In *Bell*, the Third Circuit read *Ouellette* as holding that state common law could be used to create higher standards,[132] using this holding to refute the power company's

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state' law extraterritorially, this analysis was *in addition to* its previous and separate discussion of preemption." (emphasis in original)).

124. Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685, 692–93 (6th Cir. 2015).

125. *Cooper*, 615 F.3d at 306.

126. *Id.* at 301.

127. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 85 (Iowa 2014).

128. *Id.*

129. *Id. Cf.* Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 862 (Mo. Ct. App. 1985) ("States may be preempted from setting their own emissions standards, but they are not preempted from compensating injured citizens.").

130. *Freeman*, 848 N.W.2d at 85 ("With respect to the question of whether injunctive relief would conflict with the CAA, we do not find this issue ripe at this time . . . . We simply cannot evaluate the lawfulness of injunctive relief that has not yet been entered.").

131. *Id.*

132. *See* Bell v. Cheswick Generating Station, 734 F.3d 188, 197–98 (2013) ("Thus, the Court recognized that the requirements placed on sources of pollution through the 'cooperative federalism' structure of the Clean Water Act served as a regulatory floor . . . and expressly held that states are free to impose higher standards on their own sources of pollution, and that state tort law is a permissible way of doing so.").

argument that, as a matter of public policy, courts should not use the common law to set emissions standards.[133] As a factual matter, however, the Third Circuit was considering only whether these higher standards could be used to provide compensatory and punitive damages as well as injunctive relief limited to the removal of particulate matter.[134] The court was not asked to consider whether the CAA allowed for common law injunctive relief requiring the installation of emissions controls.

Conclusion

Although *Merrick* was correctly decided, the breadth of the Sixth Circuit's holding runs contrary to the structure and legislative history of the CAA. When Congress enacted the CAA, it fully intended to involve private citizens as partners in environmental regulation.[135] The role provided, though, was limited. The citizen suit clause allows citizens to enforce existing standards and provides for compensation to adversely affected parties. The *Merrick* court erred by expanding the scope of this clause and allowing "vague and indeterminate"[136] state common law torts to create new standards enforceable by injunctions. Instead of making a broad holding that the CAA did not preempt any state common law torts, the court should have made a more cautious ruling. It should have allowed state common law claims that would award compensatory and punitive damages and declined to rule on the issue of injunctive relief until the district court had issued such relief. As the *Merrick* court noted, "the CAA's permitting program provides sources with the regulatory certainty needed to support broad reliance interests and significant investments in emission controls."[137] Limiting the scope of injunctive relief would have protected these reliance interests by denying judges the power to set state pollution-control standards.

133. *Id.*

134. *Id.* at 192–93.

135. *See* Jeffrey Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens, Part One: Statutory Bars in Citizen Suit Provisions*, 28 Harv. Envtl. L. Rev. 401, 408 (2004) ("Not confident that federal and state authorities would fully enforce against violations of the statutes, it also authorized citizens to enforce through an ingenious new device, the citizen suit provision.").

136. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 496 (1987).

137. Corrected Brief of Defendant-Appellant Diageo Americas Supply, Inc. at 40, Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685 (6th Cir. 2015) (No. 14-6198), 2014 WL 7006824.