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Policing Federal Supremacy: Preemption and Common Law Damage Claims as a Ceiling Regulatory Floor

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POLICING FEDERAL SUPREMACY: PREEMPTION AND COMMON LAW DAMAGE CLAIMS AS A CEILING TO THE CLEAN AIR ACT REGULATORY FLOOR

Sam Kalen[*]

> Intense, incessant citizen pressure is the only thing that will save us. We must assume that we are surrounded by rapacious developers, callous industrialists, inept public agencies, and insensitive politicians, and our only salvation is in our own two hands.
>
> . . . The battle for the earth will not be won by political promises and high-sounding platitudes about the hazards we face. It will be won by citizen action – by demonstrating against the polluters, by suing them in the courts, by leaning on glue-footed bureaucrats, by fighting for our environmental rights.[1]

Abstract

This Article challenges conventional accounts of whether those who drafted the 1970 Clean Air Act intended to preempt state common law claims for nuisance. Neither those who advance robustly deploying the common law to arrest air emissions nor, conversely, those who claim that common law suits would disrupt the air regulatory program appreciate the dynamic that occurred when Congress confronted the Nation's air pollution problem and crafted the first modern U.S. environmental laws. Yet that dynamic is essential to understanding the Clean Air Act's "citizen suit" provision and Congress's decision to preserve certain state common law claims. This Article explains how Congress rejected the post-New Deal attack on expert agency administrators and correspondingly stopped shy of accepting Professor Joseph Sax's vision for citizen suits—a vision influenced by pervasive dialogues about participatory democracy that left the savings clause in the citizen suit provision clouded amid converging doctrines. This Article argues that this history establishes (1) that Congress unquestionably sought to preserve state common law damage claims and (2) that common law claims for equitable relief are preserved if the state regulatory agency explicitly accepts the continued vitality of such claims or if the activity is not otherwise regulated under the Clean Air Act.

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1. Congressman Richard L. Ottinger, Political Pollution: The Next Environmental Challenge (Apr. 27, 1970) (on file with author).

INTRODUCTION

The judiciary employs heuristic devices for policing the boundary between state and federal authority. The U.S. Supreme Court throughout the nineteenth and early twentieth centuries, for instance, cabined state authority under the Dormant Commerce Clause (DCC),[2] narrowed aspects of federal authority under the Commerce Clause,[3] protected state authority by initially rejecting applying the Bill of Rights to states,[4] and limited state authority under the doctrine of intergovernmental immunity.[5] Classical dual federalism assisted by defining appropriate

2. *See* Sam Kalen, *Dormant Commerce Clause's Aging Burden*, 49 VAL. L. REV. 723, 758 (2015) (discussing Chief Justice Melville Fuller and his circumscription of state authority at the turn of the twentieth century).

3. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 17–18 (1895) (holding that the purchase of a sugar refinery located in Philadelphia by a New Jersey corporation did not constitute an interstate commerce issue), *abrogated by* United States v. Ballinger, 312 F.3d 1264 (11th Cir. 2002).

4. *See, e.g.*, Barron v. Baltimore, 32 U.S. 243, 250–51 (1833) (rejecting application of the Fifth Amendment to the laws of Maryland).

5. *See, e.g.*, Collector v. Day, 78 U.S. 113, 128 (1871) (denying the United States the authority to impose a tax on the income of a state judicial officer), *overruled in part by* Graves v. New York, 306 U.S. 466 (1939); Dobbins v. Comm'rs of Erie, 41 U.S. 435, 449–50 (1842) (holding that a Pennsylvania officer is not liable "for county rates, and levies" to the county commissioner), *overruled by Graves*, 306 U.S. 466, *and* North Dakota v. United States, 495 U.S. 423 (1990).

federal or state spheres of jurisdiction.[6] And not long ago, the Tenth Amendment and vague principles of state sovereignty similarly threatened to erect—albeit weak and fleeting—boundaries.[7] Today, though, boundaries are much more porous, which is not surprising given the predominance of rhetoric about cooperative federalism.[8] Two constitutional devices, in particular, shoulder most of the current responsibility for boundary setting: the DCC and preemption.

Modern preemption analysis, however, has become increasingly problematic as states and local communities experiment with new ideas and programs to arrest the complex problems left unaddressed by explicit congressional decision.[9] Professor Caleb Nelson's seminal article on preemption notes how "[m]ost commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle."[10] Indeed, the presumption against preemption of areas historically regulated by states surfaced when the Court was abandoning dual federalism.[11] And this "muddle" has left many commentators also agreeing that the modern doctrine cabins too much state and local flexibility by unnecessarily extending the federal reach when Congress has not indicated an intention to do so.[12]

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6. *See generally* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (discussing the evolution of the federal government into one consolidated power); Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978) (following a survey and brief analysis of the process of centralization); Harry N. Scheiber, *Federalism and the American Economic Order, 1789–1910*, 10 LAW & SOC'Y REV. 57 (1975–1976) (analyzing federalism and its influences in public sector development and economic policy). "Dual federalism," explains Professor Ernest Young, "died for a reason" by 1950, because it relied upon the false premise of separate and distinct spheres rather than overlapping spheres. Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 139 (2001).

7. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 854–55 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

8. *See, e.g.*, ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256 (2009). Professor Erwin Chemerinsky questions modern federalism theory, suggesting that federalism should be considered a device for empowering rather than limiting layered governmental structures. Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 KAN. L. REV. 1219, 1220 (1997); *see also* ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 241 (2008).

9. Mary J. Davis, *The "New" Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1222 (2010).

10. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000).

11. *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1377–78 (2001).

12. Even express preemption provisions, or conversely savings provisions, necessarily require applying the art of statutory construction to discern the scope of any particular provision.

Possibly nowhere is the preemption doctrine more "muddled" than in the relationship between state law and federal environmental programs.[13] Environmental statutory schemes often lack mechanisms for addressing damages to individuals or their property, forcing litigants to explore the utility of environmental claims.[14] Notably, for instance, in the historic *Silkwood v. Kerr-McGee Corp.*,[15] the Court held that the federal regulatory regime did not preempt state remedies, including punitive damage awards, for injuries associated with a nuclear hazard.[16] The preemption issue seems likely to intensify as litigants press a variety of state common law claims involving greenhouse gas (GHG) emissions.[17] In *American Electric Power Co. v. Connecticut*,[18] when the Court held that the Clean Air Act (CAA)[19] displaced any federal common law claims, it expressly avoided examining state common law claims.[20]

See, e.g., Bruesewitz v. Wyeth LLC, 562 U.S. 223, 231–32 (2011) (applying statutory interpretation to hold that federal law preempts state-law design-defects); Sprietsma v. Mercury Marine, 537 U.S. 51, 61–62 (2002) (stating statutory construction must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent" (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993))); Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996) (interpreting a statutory provision to identify the scope of the preemption).

13. "The predominant approach to environmental federalism currently employed by the federal environmental statutes is a 'cooperative federalism' model." Robert Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (2012).

14. *See* Adam D.K. Abelkop, *Tort Law as an Environmental Policy Instrument*, 92 OR. L. REV. 381, 410 (2013); Mark Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 754 (2011).

15. 464 U.S. 238 (1984).

16. *Id.* at 258.

17. *See generally* J.J. England, *Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without a Remedy*, 43 ENVTL. L. 701 (2013) (discussing the lack of recovery or assistance for individuals who seek damages caused by greenhouse gas emissions); Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1 (2011) (proposing emissions tax or a "cap-and-trade system" as possible policy responses); Scott Gallisdorfer, Note, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After* AEP v. Connecticut, 99 VA. L. REV. 131 (2013) (arguing that current laws only preempt public nuisance claims that apply the law of one state to an emissions source in another); Benjamin Reese, Note, *Too Many Cooks in the Climate Change Kitchen: The Case for an Administrative Remedy for Damages Caused by Increased Greenhouse Gas Concentrations*, 4 MICH. J. ENVTL. & ADMIN. L. 355 (2015) (proposing a federally regulated system of climate change compensation); Jeffrey N. Stedman, Note, *Climate Change and Public Nuisance Law:* AEP v. Connecticut *and its Implications for State Common Law Actions*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 865 (2012) (considering the political question doctrine).

18. 564 U.S. 410 (2011).

19. Pub. L. No. 88-206, 77 Stat. 392 (1970) (codified as amended at 42 U.S.C. §§ 7401–7671 (2012)).

20. 564 U.S. at 429 (leaving "the matter open for consideration on remand"). Plaintiffs

Asserting such claims—or relying upon a state regulatory program—first requires overcoming any purported constitutional barriers.[21] Next, litigants often must ground their claims in a recognized tort.[22] Professor Mary Wood, along with others, urges quite persuasively that courts should acknowledge a protectable public trust in the climate.[23] Indeed, a lower court in Washington State reacted favorably toward this argument.[24] If these or similar claims advance, it seems likely that defendants will attempt to shield themselves with the cloak of the CAA, now that the Environmental Protection Agency (EPA) regulates GHG emissions.[25] That shield, however, appears quite fragile following a wave of recent opinions rejecting the defense that the CAA preempts state common law claims for air emissions.[26] These cases, in turn, have

abandoned the issue, however. Order at 2, Connecticut v. Am. Elec. Power Co., No. 04-CV-05669 (S.D.N.Y. Dec. 5, 2011) (dismissing the plaintiffs' federal common law public nuisance claims).

21. *See* Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 914–19 (2008); David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVT. L. REV. 53, 66 (2003).

22. *See* David L. Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 30–32 (2012) (showing brief summaries of past claims regarding climate change).

23. MARY C. WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 14 (2014).

24. Order Affirming the Department of Ecology's Denial of Petition for Rule Making at 8, No. 14-2-25295-1 SEA, 2015 WL 7721362, at *4 (Wash. Super. Ct. Nov. 19, 2015); *see also* Juliana v. United States, 2016 WL 6661146 (D. Or. Nov. 10, 2016).

25. *See* Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2457–58 (2014).

26. *See infra* notes 42–46 and accompanying text. For discussions about some of the recent cases, see Mathew Morrison & Bryan Stockton, *What's Old Is New Again: State Common-Law Tort Actions Elude Clean Air Act Preemption*, 45 ENVTL. L. REP. 10,282 (2015) (discussing *Bell v. Cheswick* and *Freeman v. Grain Processing Corp*, and the resulting circuit split); Reese, *supra* note 17 (arguing for an administrative solution as a better alternative to the Supreme Court's holding in *AEP v. Connecticut*); Wesley Abrams, Note, *Bourbon Distillation & Its Collision with the Clean Air Act & Tort Law: Is the Angel's Share Actually a Devil to Kentucky Residents?*, 42 N. KY. L. REV. 129 (2015) (discussing *Merrick v. Diageo Americas Supply Inc.*); Scott Armstrong, Note, *The Continuing Necessity of Common Law Torts for Environmental Harms: Why the Clean Air Act Should Not Preempt State Law Claims Against Stationary Sources*, 44 TEX. ENVTL. L.J. 391 (2014) (discussing the Third and Fourth Circuit split resulting from *Bell v. Cheswick Generating Station* and *North Carolina v. Tenn. Valley Auth.*); Samantha Caravello, Case Comment, Bell v. Cheswick Generating Station, 38 HARV. ENVTL. L. REV. 465 (2014); Lisabel Cheong, Note, *Saving Private Remedies:* Bell v. Cheswick Generating Station *Arms Property Owners with a Private Cause of Action Against Energy Companies*, 59 VILL. L. REV. 771 (2014); Ingrid Pfister, Note, Bell v. Cheswick: *The Era of Court-Regulated Power Plants*, 42 ECOLOGY L.Q. 437 (2015); Caroline Wick, Note, Bell v. Cheswick Generating Station: *Preserving the Cooperative Federalism Structure of the Clean Air Act*, 27 TUL. ENVTL. L.J. 107 (2013); *see also* Rory Hatch, *Into Thin Air: Unconstitutional Taking by Preemption of State Common Law Under the Clean Air Act*, 33 REV. LITIG. 711 (2014); Justin A. Savage & Madeline Fleisher, *Litigating the Clean Air Act: Preemption of State Emissions Torts*, BNA DAILY ENVT. REP. (Apr. 18, 2014), http://www.hoganlovells.com/litigating-the-clean-air-act-preemption-of-state-emissions-torts-04

prompted strident calls by some in the industry for Supreme Court engagement, hoping the Court will elide further use of the common law for air emissions.[27]

The common law, though, serves an elemental function, particularly when the regulatory system fails to redress individual harm. Indeed, ethical and possibly constitutional issues might surface if common law remedies for individual harms were unavailable.[28] A regulatory system diminishes individual protection and instead promotes what regulators perceive as the common, community good.[29] But just how far the common law ought to fill the interstices of the modern regulatory system is a complex jurisprudential question. Those intent on developing effective tools for defending the natural environment from its many anthropogenic threats must consider the jurisprudential questions surrounding the means of protection. This type of conversation is absent from the unfolding dialogue about whether, or the extent to which, the CAA preempts state common law claims *and* remedies for air emissions. This Article fills that space, beginning by noting that the issue warrants a far more complex inquiry than presently undertaken.

The CAA's drafters unquestionably sought to preserve common law damage claims. They fashioned the first comprehensive cooperative-federalism model for resolving the Nation's pressing environmental threats, believing that the federal government would set a floor and allow states room to develop and enforce more stringent environmental controls. But can more stringent environmental controls flow from the application of state common law? Aside from awarding damages, can, for instance, a judge applying state common law impose more stringent technological standards on an emitter? When inserting a savings clause into the statute's novel citizen suit provision, the CAA's drafters never addressed this precise issue.[30] This Article submits that the answer is yes, *if* the state regulatory agency explicitly accepts the continued vitality of common law claims for regulated entities *or if* the CAA does not otherwise regulate the activity.

To illustrate why the answer is yes, as caveated, this Article proceeds in three parts. The first Part explores how preemption doctrine, a thorn in environmental law programs, has unfolded among courts considering the relationship between the common law and the CAA. In several recent

-18-2014/ (summarizing the emerging area of litigation as a whole).

27. *See, e.g.*, Richard O. Faulk, *Public-Nuisance Rulings Undermine National Clean Air Act Enforcement and Federal Preemption*, LEGAL BACKGROUNDER, Jan. 15, 2016, at 1, 3 ("Attempting to simultaneously resolve air pollution issues using common law claims will condone the use of multiple standards throughout the nation.").

28. *See* Thomas R. Phillips, Speech, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1340–43 (2003).

29. *See* Freeman v. Grain Processing Corp., 848 N.W.2d 58, 65 (Iowa 2014).

30. *See infra* notes 141–46 and accompanying text.

instances, particularly in cases before the Iowa Supreme Court and the U.S. Courts of Appeal for the Third and Sixth Circuits, courts confronting whether the CAA preempts state common law nuisance claims have rejected preemption. Their analysis, however, is somewhat superficial, offering little guidance and demonstrating a lack of appreciation for the issue's complexity, as this Article illustrates when discussing the legislative history of the CAA's citizen suit provision and its savings clause, which seems to preserve common law claims. In Part II, this Article argues that the savings clause's evident purpose, while ill-defined, was to ensure that state and local pollution-abatement programs and common law damage claims would remain viable in light of contemporary precedent, which favored preemption. Recognizing how the CAA establishes a floor rather than ceiling for addressing air pollution, and that it favors state and local enforcement, Part III suggests that courts should distinguish damage claims from injunctive relief, with the former unquestionably preserved by the CAA. Here, the Article explains how the CAA citizen suit provision embodied a theory of participatory democracy favoring decisions by regulatory agencies rather than the judiciary and argues that we should be cautious before entrusting the judiciary with the enhanced judicial powers triggered by claims for injunctive relief. Such decisions, this Article concludes, should be resolved not by determining whether the CAA preempts claims for relief, but instead by an analyzing whether, on a state-by-state basis, a particular state has opted to retain a robust common law regime—as the states in two of the principal cases affirmatively did.

I. PREEMPTION IN THE ENVIRONMENTAL REALM

Preemption doctrine is ubiquitous throughout environmental law.[31] After all, modern environmental programs emerged ostensibly from the common law's failure to arrest the exploding harm to the planet and population.[32] Professor Hope Babcock canvases the preemption field when exploring, for example, whether Vermont is preempted from blocking the continued operation of the Vermont Yankee Nuclear Power Plant—even though the plant received a license extension from the Nuclear Regulatory Commission.[33] Recently, the Court narrowly

31. Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 582–83 (2008); *see also* Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1676 (2009).

32. J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 331 (1967) (lamenting ineffectiveness of the common law).

33. Hope Babcock, *Can Vermont Put the Nuclear Genie Back in the Bottle?: A Test of Congressional Preemptive Power*, 39 ECOLOGY L.Q. 691, 693 (2012). In *Pacific Gas & Electric*

construed the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) explicit preemption provision to allow state statutes of repose (as opposed to statutes of limitations) to operate and curtail claims for personal injury or property damage.[34] And preemption surfaced this past Congress during debate over reforming the Toxic Substances Control Act.[35] Courts, in particular, are reluctant to find—and apply a presumption against—preemption under environmental programs.[36] Because health and the environment are areas where states traditionally exercised either common law or statutory jurisdiction to protect their citizens, judges are hesitant to upset that balance. When rejecting preemption as a defense to the "bellwether" claims against Exxon for contaminating water resources by using methyl tertiary-butyl ether as a gasoline additive, the U.S. Court of Appeals for the Second Circuit opined: "Imposing state tort law liability . . . falls well within the state's historic powers to protect the health, safety, and property rights of its citizens" and, "therefore, the presumption that Congress did not intend to preempt state law tort verdicts is particularly strong."[37]

Co. v. State Energy Resources Conservation & Development Commission, the Court permitted state activity that neither directly nor substantially affected safety. 461 U.S. 190, 216 (1983).

34. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2188 (2014) (citing Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–75 (2012))). Subsequent courts narrowly construe *CTS*, limiting it to CERCLA and then only to property and personal injury claims. *See* Duke Energy Progress, Inc. v. Alcan Aluminum Corp., No. 5:08-CV-460-FL, 2014 WL 4825292, at *2 (E.D.N.C. Sept. 25, 2014); *cf*. Nat'l Credit Union v. Admin. Bd. of Normoura Home Equity Loan, Inc., 764 F.3d 1199, 1217 (10th Cir. 2014) (declining to extend *CTS* to the Financial Institutions Reform, Recovery, and Enforcement Act), *cert. denied*, 135 S. Ct. 949 (2015); Fed. Deposit Ins. Corp. v. RBS Sec., Inc., 798 F.3d 244, 264–65 (5th Cir. 2014) (declining to extend *CTS* to the FDIC Extender Statute).

35. Judah Prero, *50 Ways to . . . Chemical Management, State and Federal Government, and Preemption Paranoia*, NAT. RESOURCES & ENV'T., Spring 2015, at 16, 16 (2015); Pat Rizzuto, *States to Congress: Preserve Our Authority over Chemicals*, BLOOMBERG BNA (Feb. 16, 2016), http://www.bna.com/preserve-authority-chemicals-n57982067354/.

36. Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 300 (2003).

37. *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 725 F.3d 65, 96 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1877 (2014). Exxon sought to avoid the preemption savings clause by claiming conflict preemption, arguing that the CAA required using MTBE. *Id.* at 97. The court found this claim "unavailing," concluding that the "[s]tate law here neither 'penalizes what federal law requires' nor 'directly conflicts' with federal law." *Id.* It distinguished *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), reasoning that the provision involved in *Geier* expressly provided a range of options (for automobile safety and passive restraints) not present within the CAA fuels program, which did not require any specific oxygenate. *Id.* at 98 n.15. When Exxon applied for a writ of certiorari, New York City responded by noting that preemption became "insubstantial" because federal law did not require the use of MTBE and because the jury did not find Exxon liable for just using MTBE. Brief in Opposition at 2, Exxon Mobile Corp. v. City of New York, 134 S. Ct. 1877 (2014) (No. 13-842), 2014 WL 1048628, at *2. Exxon

Three other provisions in the CAA signal that Congress did not intend to disrupt state statutory or common law. First, Congress's own finding provides that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments."[38] Then, in two savings clauses, Congress again expressly retained state authority, providing in one that "[e]xcept as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution."[39] And in the citizen suit provision, Congress further indicated its intent 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 seek any other relief."[40] The Supreme Court held that this same citizen suit savings clause language in the Clean Water Act (CWA)[41] did not preempt state law nuisance claims.[42] Yet such savings clauses are not always singularly dispositive. Professor Sandi Zellmer illustrates how normative judgments about federalism often infuse judicial construction of savings clauses, prompting unequal treatment.[43]

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unsuccessfully petitioned for certiorari from a $236 million verdict holding the company retroactively liable for refining MTBE. New Hampshire v. Exxon Mobile Corp., 126 A.3d 266 (N.H. 2015), *cert. denied*, 84 U.S.L.W. 3631 (2016). In its petition, Exxon raised—albeit quickly—a preemption defense that MTBE "was the only feasible means of complying with the" CCA "oxygenate mandate." Petition for Writ of Certiorari at 4, Exxon Mobile Corp. v. New Hampshire (No. 15-933), 2016 WL 324324, at *4.

38. 42 U.S.C. § 7401(a)(3) (2012).

39. *Id.* § 7416.

40. *Id.* § 7604(e).

41. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)).

42. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 499 (1987). The Court reasoned that pervasive federal regulation under the CWA limited the availability of state-based actions to those expressly "preserved" by the Act. *Id.* at 492. The Court, then, limited the savings clause's scope by reasoning that the purpose of the Act would be thwarted if states could impose their own law on sources originating in another state, but that the same considerations would not exist when applying the originating source state's law. *Id.* at 493–94. On remand, the lower court applied this same analysis to the Vermont landowners' claims involving alleged air pollution from the New York paper mill. Ouellette v. Int'l Paper Co., 666 F. Supp. 58, 60 (D. Vt. 1987). Another lower court similarly accepted *Ouellette*'s application, commenting that "[e]ven though a state's nuisance law may impose separate standards and thus create some tension with the federal permit system, the source [state] is only required to look to a single additional authority, the law of the source state." Gutierrez v. Mobile Oil Corp., 798 F. Supp. 1280, 1282 (W.D. Tex. 1992).

43. Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses' Rocky Judicial Reception*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 144, 144 (William W. Buzbee ed., 2009).

A. *The Clean Air Act and Preemption*

The recent consensus accepts that the CAA preserves most common law claims.[44] Three seminal decisions illustrate the judicial reluctance toward "finding" preemption: *Bell v. Cheswick Generating Station*,[45] *Merrick v. Diageo Americas Supply, Inc.*,[46] and *Freeman v. Grain Processing Corp*.[47] While several other cases confirm this tendency,[48] these three decisions are illustrative of the current conversation.

First, in *Freeman v. Grain Processing*, the Iowa Supreme Court considered class action claims against a corn wet-milling facility emitting harmful pollutants and odors.[49] The complaint alleged the facility was harming surrounding residents and that the company had "failed to replace its worn and outdated technology with available technology that

44. Earlier opinions exhibited less tolerance for allowing common law claims. *See, e.g.*, New Eng. Legal Found. v. Costle, 666 F.2d 30, 33 n.3 (2d Cir. 1981) (rejecting appellants' savings clause argument and holding that the EPA's approval to use high sulfur fuel preempted common law claim); *In re* Jackson v. Gen. Motors Corp., 770 F. Supp. 2d 570, 578–79 (S.D.N.Y. 2011) (holding that the CAA preempted claims involving diesel exhaust fumes); United States v. Kin-BUC, Inc., 532 F. Supp. 699, 702–03 (D.N.J. 1982) (holding that CAA section 304(e) language does not mean federal common law nuisance claims are not preempted). The court rejected earlier decisions in *California Tahoe Regional Planning Agency v. Jennings*, 594 F.2d 181 (9th Cir. 1979), and *United States v. Atlantic-Richfield Co.*, 478 F. Supp. 1215 (D. Mont. 1979), reasoning that those cases predated the Supreme Court's decision in *Milwaukee v. Illinois*, 451 U.S. 304 (1981). *See* Nat'l Audubon Soc'y v. Dep't of Water, 858 F.2d 1409, 1418 (9th Cir. 1988) (holding that the CAA preempted Appellees' federal common law claim for water pollution), *superseded by* 869 F.2d 1196 (9th Cir. 1988) (dismissing appellees' federal common law claim for air pollution but not expressly deciding whether the CAA preempted it, and suggesting a possible state claim). Indeed, Professor Gerald Torres critically observed in 2001, that "[s]ince 1981, federal courts have recognized that the regulatory framework of the Clean Air Act has replaced the federal common law cause of action in nuisance," and that "[t]he citizen suit has been the functional surrogate for the preempted common law nuisance claim." Gerald Torres, *Who Owns the Sky?*, 18 PACE ENVTL. L. REV. 227, 267, 271 (2001).

45. 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

46. 805 F.3d 685 (6th Cir. 2015).

47. 848 N.W.2d 58 (Iowa 2014), *cert. denied*, 135 S. Ct. 712 (2014).

48. *E.g.*, Alleyne v. Diageo USVI, Inc., 2015 WL 5511688, at *16 (Sup. Ct. Virgin Islands, Sept. 17, 2015) (deciding the CAA does not preempt black fungus claims); Elmer v. S.H. Bell Co., 2015 WL 5102707, at *4 (N.D. Ohio Aug. 31, 2015) (stating that the CAA does not preempt common law claims when the facility emitting pollution is located within the state); Keltner v. SunCoke Energy, Inc., 2015 WL 3400234, at *8 (S.D. Ill. May 26, 2015) (rejecting federal jurisdiction, and ruling in a class action lawsuit that the CAA does not necessarily preempt federal or state common law claims); Morrison v. Drummond Co., 2015 WL 1345721, at *4 (N.D. Ala. Mar. 23, 2015) (ruling the CAA did not completely preempt benzene exposure claims under state common law); *cf.* Anderson v. Teck Metals, Ltd., 2015 WL 59100, at *10 (E.D. Wash. Jan. 5, 2015) (holding that CERCLA preempted an air emission claim—although this decision seems unlikely to survive appellate review).

49. 848 N.W.2d at 63.

would eliminate or drastically reduce the pollution."[50] The Iowa Supreme Court began its analysis of CAA preemption by exploring the history of the common law, citing several scholarly articles about the importance of common law nuisance and trespass lawsuits.[51] The court then reviewed how common law limitations morphed into our modern regulatory regime, including the CAA, but it emphasized how the CAA operates within the "cooperative federalism" model, a model that entrusts states with significant authority.[52] Next, the court observed that common law and regulatory regimes serve different purposes and employ different standards.[53] From that background, the court reasoned that three factors militated against finding implied preemption. First, it concluded that the CAA provisions indicate an intent to preserve claims;[54] second, it observed that preemption ought to be narrowly applied for traditional state matters;[55] and third, it found illustrative the Supreme Court's CWA decision in *International Paper Co. v. Ouellette* favoring preserving state (rather than federal) common law claims.[56] The court found particularly instructive the Supreme Court's construction of a similar citizen suit savings provision in the CWA.[57] And it added that the *American Electric Power Co. v. Connecticut* Court left unresolved whether the CAA preempts state common law claims.[58] Notably, however, the court concluded that the question of whether the CAA might preempt injunctive relief was not ripe and would, instead, necessitate a "case-by-case" analysis until "the development of a full record."[59]

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50. *Id.*
51. *Id.* at 66.
52. *Id.* at 68–69.
53. *Id.* at 69–70.
54. *Id.* at 82 (citing 42 U.S.C. §§ 7401(a)(3), 7416, 7604(e)).
55. *Id.* at 83, 93.
56. *Id.* at 79 (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987)).
57. *Id.* at 71–72.

> [U]nder the CWA cases, a clear pattern emerges. Federal common law over pollution of interstate waterways is now preempted in light of the comprehensive nature of the CWA and the expertise vested in the EPA and state agencies to solve complex problems involved in environmental issues. State law claims against out-of-state sources are preempted because they would be inconsistent with the regulatory framework created by the CWA and would create chaos by imposing multiple regulatory schemes on a single source. State law claims against in-state sources of pollution, however, are saved by the citizen suit savings clause, [and] the states' rights savings clause . . . .

Id. at 80.

58. *Id.* at 81 (citing Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2014)).
59. *Id.* at 85.

The Third Circuit rejection of a preemption defense is perhaps the best example of the prevailing analysis. In *Bell v. Cheswick*, a group of landowners brought a class action against NRG Power Midwest LP (GenOn Power) in state court, claiming that GenOn was operating the Cheswick Generating Station negligently, causing a nuisance and trespass due to "noxious odors and other air contaminants including particulates" from the plant.[60] The remaining allegations were vague, merely alleging that the plant was being operated negligently and was "improperly constructed, maintained and/or operated."[61] However, the record suggests the landowners did not object to the plant's permits under the CAA.[62] They nevertheless sought, along with damages, injunctive relief and the installation of the "best available technology," a requirement, the court noted, that is limited to the CAA pre-construction permitting process.[63] The lower court held that the complaint did "not sufficiently state a plausible claim for relief to survive" a motion to dismiss.[64]

On appeal, a prominent industry litigation group filed an amicus supporting the lower court. According to the electric utilities, "chaos . . . almost certainly" would "ensue if common law nuisance suits were to serve as the basis for regulation inconsistent with that provided for by the Clean Air Act."[65] The utilities strenuously claimed that such suits would disrupt the balance struck by the CAA and would leave "electric utilities and other sources of air emissions without any way to determine the requirements applicable to their operations."[66] Yet its legal arguments lacked definition, focusing generally on how the environmental movement and passage of federal environmental laws supplanted what had been perceived of as an ineffective common law.[67] Of course, that approach ignores how common law claims survived after the CWA and how Congress expressly preserved such claims after the passage of CERCLA. Furthermore, accepting this argument would undermine modern fracking cases. Finally, the industry made vague

60. First Amended Class Action Complaint & Jury Demand at 2–3, Bell v. Cheswick Generating Station, 734 F.3d 188 (3d Cir. 2013) (No. 2:12-cv-00929), 2015 WL 661370.

61. *Id.* at 8.

62. Reply Memorandum in Support of Motion to Dismiss at 4, *Bell*, 734 F.3d 188 (No. 2:12-cv-00929-TFM), 2012 WL 5333800.

63. *Id.* at 2.

64. Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 318 (W.D. Pa. 2012).

65. Brief of Amicus Curiae Utility Air Regulatory Group in Support of Defendants/Appellees & in Support of Affirmance at vii, *Bell*, 734 F.3d 188 (No. 12-4216), 2013 WL 1102835.

66. *Id.* at viii.

67. *Id.* at 4–5.

arguments that allowing such claims would violate separation of powers.[68]

The Third Circuit found the utility industry's arguments unconvincing. To begin with, the court noted that GenOn's CAA operating permit should have signaled the company's susceptibility to common law claims.[69] Its permit expressly required that the company not "endanger the public health, safety, or welfare," that it take "all reasonable actions to prevent fugitive air contaminants," and further that it not operate in a manner that would cause "malodorous matter" from escaping beyond its site.[70] And even more importantly, the permit explicitly alerted GenOn that it would be subject to all federal, state, and local regulations and warned that "[n]othing in this permit shall be construed as impairing any right or remedy now existing or hereafter created in equity, common law or statutory law with respect to air pollution."[71] Next, the court reasoned that the Court's *Ouellette* CWA decision suggested how courts should resolve preemption claims under the CAA, specifically how to interpret the CAA savings clause.[72] Based on this guidance, the court concluded that the CAA "does not preempt state common law claims based on the law of the state where the source of the pollution is located."[73] Finally, the court rejected both the industry's policy argument about the merits of sweeping preemption and GenOn's suggestion that somehow the issue implicated the political question doctrine.[74]

In 2015, in *Merrick v. Diageo Americas Supply, Inc.*, the Sixth Circuit continued the trend of allowing state common law suits.[75] A class action

68. *Id.* at 22.

69. *Bell*, 734 F.3d at 191–92.

70. *Id.*

71. *Id.* at 192.

72. *Id.* at 194–95. According to the court, "a textual comparison of the two savings clauses at issue demonstrates there is no meaningful difference between them." *Id.* at 195; *see also id.* at 196 ("[W]e find no meaningful difference between the Clean Water Act and the Clean Air Act for the purposes of our preemption analysis . . . .").

73. *Id.* at 197.

74. *Id.* at 197–98. In its unsuccessful entreaty to the Supreme Court, the industry boldly asserted that the decision would "set[] a dangerous and unworkable precedent. The common law claims Respondents assert would upend the CAA's careful balance of federal and state regulatory authority, giving instead unelected judges and juries the power to regulate emissions based on vague and indeterminate common law nuisance principles." Brief of Amicus Curiae Utility Air Regulatory Group in Support of Petitioner at 2, GenOn Power Midwest, L.P. v. Bell, 134 S. Ct. 2696 (2014) (No. 13-1013), 2014 WL 1260138, at *2. On remand, the court denied the plaintiffs' ability to secure class certification. Bell v. Cheswick Generating Station, 2015 WL 401443 (W.D. Pa. Jan. 28, 2015).

75. 805 F.3d 685 (6th Cir. 2015). The court issued a companion order in *Little v. Louisville Gas & Electric Co.*, holding that the CAA does not preempt homeowners' claims against an

complaint alleged that a Kentucky whiskey distillery was emitting ethanol during, principally, its aging of whiskey in oak barrels, causing unsightly mold to develop on their property: a black fungus called "whiskey fungus."[76] Diageo Americas Supply, Inc. (Diageo) allegedly breached its duty of care by not installing emission-control technology in its warehouses to control the whiskey fungus, and plaintiffs sought damages as well as equitable relief, requesting that the company install regenerative thermal oxidizers.[77] Notably, although the company had a federally enforceable CAA permit from the Louisville Metro Air Pollution Control District,[78] the permit did not cover aging operations and expressly included a prohibition against nuisance clauses.[79] When nearby

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electric utility's emissions of dust and coal ash. 805 F.3d 695, 698 (6th Cir. 2015). Sixth Circuit precedent already supported the outcome. The case *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, involved the "nation's largest municipal trash incinerator," scheduled for construction in Detroit. 874 F.2d 332, 334 (6th Cir. 1989). After the facility had received a permit, the Detroit Audubon Society convinced the EPA to revisit whether the state should have issued a permit (and the EPA approved). *Id.* That prompted Detroit and the waste facility to seek to enjoin the EPA's efforts, a successful gambit that occurred without Detroit Audubon or the government of Ontario having the ability to participate in the litigation. *Id.* Detroit Audubon and Ontario then filed a state lawsuit under the Michigan Environmental Protection Act (MEPA), which defendants removed to federal court on a CAA preemption theory. *Id.* at 335. The Sixth Circuit began by observing that "the Michigan legislature has clearly left to the state courts the task of giving substance to MEPA by developing a state common law of environmental quality" and that "it is *error* for the trial court to *defer* to the expertise of the agencies." *Id.* at 338. According to the court, because the CAA did not preempt that common law, defendants improperly removed the case to federal court. *Id.* at 344. Interestingly, part of the court's analysis turns on how the CAA enforcement mechanisms do not incorporate MEPA and generic abatement concepts. *Id.* at 341. Yet the Louisville permit in *Merrick* expressly includes a generic nuisance provision. *Merrick*, 805 F.3d at 688.

76. Plaintiffs-Appellees' Brief at 5, *Merrick*, 805 F.3d 685 (No. 14-6198), 2014 WL 7405120, at *14. Other distilleries faced similar allegations. *See* Order at 1, Merrick v. Brown-Forman Corp., No. 12-CI-03382 (Ky. Jefferson Cir. Ct., Div. 9, July 31, 2013) (granting Defendant's Motion to Dismiss). *See generally* Abrams, *supra* note 26, at 131–33 (describing the whiskey-making process and germination of baudoinia, or black fungus).

77. Merrick v. Diageo Ams. Supply, Inc., 5 F. Supp. 3d 865, 868 (W.D. Ky. 2014). Brandy operations in California allegedly use such a technology. *Id.* at 868–69.

78. Diageo's counsel indicated that the company had obtained a construction and operating permit, which specifically authorized the company to "maintain 'warehouse storage operations for aging whiskey in 55 gallon barrels.'" Corrected Brief of Defendant-Appellant Diageo Americas Supply, Inc. at 13, *Merrick*, 805 F.3d 685 (No. 14-6198), 2014 WL 7006824, at *15–16. The permits classified emissions from the aging process as "fugitive"—not reasonably captured, although they required ongoing monitoring and reporting. *Id.* at 13–14.

79. *Merrick*, 805 F.3d at 688 (providing that the holder could not "permit or cause the emission of air pollutants which exceed the requirements of the District regulations or which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public or which endanger the comfort, repose, health, or safety of any such persons or the public or which cause or have a natural tendency to cause injury or damage to business or property"). Plaintiffs

residents, who neither participated in Diageo's permitting process nor challenged the permit,[80] complained to the District, the District issued a notice of violation to Diageo, indicating the operations were causing an injury and nuisance to nearby residents and requiring an abatement plan. Diageo responded by agreeing to close two of its warehouses.[81] But while this was occurring, nearby residents filed their class action lawsuit.[82] Diageo moved to dismiss the complaint by arguing the CAA preempted the claims.[83]

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refer to this incorporated permit requirement as the "Prohibition of Nuisances." Plaintiff-Appellees' Brief, *supra* note 76, at 14.

80. Corrected Brief of Defendant-Appellant Diageo Americas Supply, Inc., *supra* note 78, at 15–16.

81. *Id.* at 14–15.

82. *Id.* at 16. Arguably, the permit as federally enforceable required that Diageo avoid creating a nuisance and would have justified a citizen suit. However, the citizen suit provision would not have allowed recovering damages.

83. *See* Supplemental Memorandum of Diageo Americas Supply, Inc. in Support of Its Motion to Dismiss Plaintiffs' First Amended Complaint at 4, Merrick v. Diageo Ams. Supply, Inc., 5 F. Supp. 3d 865 (W.D. Ky. 2014), 2013 WL 8559271. The district court denied the motion, and Diageo filed an interlocutory appeal with the Sixth Circuit. On appeal, Diageo purportedly limited its preemption claim to arguing an actual conflict, not field preemption. Reply Brief of Defendant-Appellant Diageo Americas Supply, Inc. at 5, *Merrick*, 805 F.3d 685 (No. 14-6198), 2015 WL 301832, at *5. It nevertheless framed its initial argument to the Sixth Circuit as field preemption—albeit later calling it conflict preemption. Corrected Brief of Defendant-Appellant Diageo Americas Supply, Inc., *supra* note 78, at 22; *see also id.* at 37 ("Plaintiffs' claims would upset the balance of regulatory authority between the federal and state governments . . . ."); *id.* at 49 ("[T]his case concerns . . . conflict preemption.").

For defendants, framing a preemption argument presents a strategic dilemma. To request removal of state common law claims to federal court, defendants generally argue complete preemption, that "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.'" Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987) (quoting Metro. Life Ins. v. Taylor, 481 U.S. 58, 65 (1987)); *see also* Morrison v. Drummond Co., 2015 WL 1345721, at *1 (N.D. Ala. Mar. 23, 2015) (plaintiff directly linked his acute myelogenous leukemia to his exposure to toxic fumes, such as benzene.). *Technical Rubber Co. v. Buckeye Egg Farm* illustrates the difficulty confronting defendants. 2000 WL 782131 (S.D. Ohio June 16, 2000). There, plaintiffs alleged defendant's egg farm, in part, created a nuisance under federal and state law and, in remanding the case back to the state court, the federal court noted that defendants could not overcome the requirement to establish complete preemption under either the CWA or the CAA. *Id.* at *1. And, once in federal court, the court noted that defendants might need to moderate their arguments. *Id.* at *6. Indeed, in litigation against the oil and gas industry for its effect on the Gulf Coast, the industry sought removal and yet avoided raising complete preemption to secure removal, prompting the federal court to respond that it lacked jurisdiction under that theory but that the complaint nevertheless raised federal issues and retained jurisdiction. Bd. of Comm'rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., 29 F. Supp. 3d 808, 853–54 (E.D. La. 2014). Yet federal issues subsequently played an almost nonexistent role on the merits. *See* Bd. of Comm'rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., 88 F. Supp. 3d 615 (E.D. La. 2015). Sometimes

The Sixth Circuit, offering several reasons, concluded otherwise. The court initially observed that the language "'any requirement,' as used in the states' rights saving clause, clearly encompasses common law standards."[84] The court, however, avoided responding to the U.S. Chamber of Commerce and other amici's claim that the clause "preserves only those state law claims seeking to enforce an emissions standard established through statute or regulation, not claims under state common law."[85] It similarly deftly avoided the Utility Air Regulatory Group's argument that the state action conflicted with the CAA and, therefore, federal law preempted the state action under an actual conflict analysis.[86] Next, the court concluded that allowing such lawsuits is consistent with the congressional purpose of entrusting states with the "primary responsibility" of "prevent[ing] and reduc[ing] air pollution '*through any measures*.'"[87] Third, the court treated the legislative history of the CAA as justifying a broad interpretation of the savings provision: a Senate Committee Report explained that the citizen suit provision deliberately preserved other remedies and that, "if damages could be shown, other remedies would remain available."[88] And the court also echoed the reasoning from *Freeman* and *Cheswick Generating Station* that *Ouellette* supported interpreting the savings provision as preserving state common

federal diversity jurisdiction might exist. *See, e.g.*, Babb v. Lee Cty. Landfill, LLC, 298 F.R.D. 318, 323 (D.S.C. 2014).

84. *Merrick*, 805 F.3d at 690. The court observed that other statutes employing the term "requirement" embraced common law claims. *Id.* (citing Riegel v. Medtronic, Inc., 552 U.S. 312, 324 (2008); Bates v. Dow Agrosciences LLC, 544 U.S. 431, 443 (2005); Cipollone v. Liggett Grp., 505 U.S. 504, 521 (1992)). The court further held that the states rights' clause naturally covers state courts, as a governmental entity within a state. *Id.* at 690–91.

85. Brief of Amici Curiae the Chamber of Commerce of the United States of America et al. in Support of Defendant-Appellant at 23, *Merrick*, 805 F.3d 685 (No. 14-6198), 2014 WL 7006826, at *23.

86. The court opined how, absent clear statutory language, "principles of federalism and respect for states' rights would likely" militate against preemption in an area traditionally occupied by states. *Merrick*, 805 F.3d at 694. It added that, with the parallels between the CAA and the CWA, *Ouellette* suggests that federal law does not preempt state claims. *Id.* The Utility Air Regulatory Group (UARG), whose typical counsel (Hunton & Williams) represented Diageo in this proceeding, argued that *Ouellette* focused on the "CWA as a whole" and, effectively, obstacle preemption rather than either the particular savings clause or conflict preemption. Brief of Amicus Curiae the Utility Air Regulatory Group in Support of Defendants-Appellants Diageo Americas Supply, Inc. Urging Reversal at 8–10, *Merrick*, 805 F.3d 685 (No. 14-6198), 2014 WL 7006828, at *11–12. Yet, while URAG raised conflict preemption, its brief omits analyzing conflict preemption and instead focuses on chaotic results, Congress's purpose, and other vague suggestions about the specter of a parade of horribles. *See id.* at 16, 23, 25.

87. *Merrick*, 805 F.3d at 691 (emphasis added) (quoting 42 U.S.C. § 7401(a)(3) (2012)).

88. *Id.* (quoting S. REP. NO. 91-1196, at 38 (1970)).

law claims.[89] Counsel for the plaintiffs reported that the case validated the CAA's explicit language preserving common law actions—actions that "date[] back to 'before time of memory'" and afford citizens a right "to wholesome air."[90]

Not all courts, though, follow the savings clause's seemingly lucid language. Most notably, in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*,[91] the U.S. Court of Appeal for the Fourth Circuit accepted a preemption defense.[92] There, the district court held that Tennessee Valley Authority's (TVA) operations of four electric generating stations caused a public nuisance, and it ordered that TVA install certain emissions control technology at those plants.[93] On appeal, Judge J. Harvie Wilkinson wrote for a unanimous panel that the CAA preempted public nuisance claims. The court reasoned that the CAA's savings clause was not dispositive because it did not necessarily resolve precisely what types of claims Congress intended to preserve.[94] Significantly, the lawsuit involved interstate pollution, specifically North Carolina's concern that TVA's plants in Alabama and Tennessee were affecting North Carolina's compliance with its mono-nitrogen oxides (NO_x) and sulfur dioxide (SO_2) standards.[95] The Fourth Circuit's conclusion was influenced by what it considered a suite of federally designed CAA cooperative-federalism programs for regulating interstate pollution.[96] The court feared that equitable relief for alleged public

89. Because the Supreme Court ruled that the Act displaces *federal* common law claims, Diageo suggested a similar displacement for *state* law claims. *Id.* at 695. The court rejected this contention. *Id.*

90. Peter Hayes, *Clean Air Act Doesn't Preempt State Tort Claims*, BNA NEWS (Nov. 2, 2015), http://www.bna.com/clean-air-act-n57982063194/.

91. 615 F.3d 291 (4th Cir. 2010).

92. *See* Nigel Barrella, Case Comment, North Carolina v. Tennessee Valley Authority, 35 HARV. ENVTL. L. REV. 247, 248 (2011). A *Harvard Law Review* comment cogently observed how the court's rationale seemingly strayed too far into the legislative realm of deciding what is best by employing "vague notions of 'field and conflict preemption principles.'" Comment, *Federal Preemption of State Law—Implied Preemption—Fourth Circuit Holds That State Public Nuisance Suit Against Electricity-Generating Plant Emissions Is Preempted by the Clean Air Act Regime*—North Carolina ex rel. Cooper v. TVA, *615 F.3d 291 (4th Cir. 2010)*, 124 HARV. L. REV. 1813, 1820 (2011) (quoting *Cooper*, 615 F.3d at 303).

93. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., No. 1:06CV20, 2009 WL 2497934, at *2 (W.D.N.C. Aug. 14, 2009).

94. *Tennessee Valley Authority*, 615 F.3d at 303–04.

95. *Id.* at 296–97.

96. *Id.* at 297 ("[T]here are lengthy Clean Air Act provisions and regulations controlling such interstate emissions . . . ."); *id.* at 298 ("The system of statutes and regulations addressing the problem represents decades of thought by legislative bodies and agencies and the vast array of interests seeking to press upon them a variety of air pollution policies."); *id.* ("The real question in this case is whether individual states will be allowed to supplant the cooperative federal–state framework that Congress through the EPA has refined over many years."); *id.* at 300 (describing

nuisances would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system of accommodating the need for both energy production and clean air.[97]

The court also expressed reluctance to bar public nuisance claims for environmental threats.[98] While it acknowledged the difficulty of employing common law public nuisance to operations expressly authorized by some governmental authority,[99] the Fourth Circuit emphasized it was not holding that the CAA preempts all emissions regulation.[100]

Each of these opinions suffers from examining the preemption issue myopically. Analysis that simply parrots the savings clause and the *Ouellette* opinion fails to consider how the CAA's drafters envisioned the complex relationship between the CAA and state common law. The following sections explore this issue directly and offer what this Article hopes is a more analytically sound approach to examining CAA preemption claims.

B. *Congress's Illusory Intent*

The history surrounding the CAA savings provisions suggests that Congress paid insufficient attention to what it intended to preserve. As originally conceived, a citizen suit savings clause provision served an ill-

checks for interstate emissions); *id.* at 301 (noting that risk of collateral attack against CAA processes); *id.* at 310 (stating that CAA § 126 provides the "primary process for states to address interstate emissions"); *id.* at 311 (noting other processes for state comments on interstate emissions). The court concluded its opinion by observing:

> No matter how lofty the goal, we are unwilling to sanction the least predictable and the most problematic method for resolving interstate emissions disputes, a method which would chaotically upend an entire body of clean air law and could all too easily redound to the detriment of the environment itself.

Id. at 312.

97. *Id.* at 296 ("The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike.").

98. *Id.* at 302 ("[W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application."). The court invoked *Ouellette* to support its reluctance to either allow or completely bar all such cases. *Id.* at 302–03.

99. *Id.* at 309–10. The court distinguished between specifically authorized activities and those not *per se* illegal. *Id.* It effectively erected a universal defense to a public nuisance claim against a CAA-regulated entity, holding, "[i]f TVA is in compliance with the more demanding federal EPA requirements and state law SIPs, it cannot be in violation of less-stringent state law nuisance standards." *Id.* at 310.

100. *Id.* at 302.

defined but arguably limited purpose.[101] And its current function cannot be divorced from that theoretical genesis. Professor Joe Sax crafted the first version of a citizen suit provision in order to empower citizen engagement in decisions affecting ecological resources. "Citizenship," after all, is "a status that enables those who possess it to play a role in civic affairs."[102] Citizen engagement, therefore, is essential to the democratic process.[103] The first EPA Administrator championed the importance of active public participation in environmental decision-making.[104] Yet such engagement was hampered by cramped legal doctrines, inadequate statutory mechanisms for transparency in governmental decisions, and—all too often—politics.

Prior to 1970, citizen access to federal decision-making was quite limited. Congress had passed the Freedom of Information Act (FOIA) only four years earlier.[105] The National Environmental Policy Act (NEPA)[106] only became law on January 1, 1970, with active public involvement a few years away.[107] A host of unresolved issues chilled a

101. When, for instance, states initially began drafting regulatory programs for controlling pollution, Professor Julian Juergensmeyer urged that they insert language to avoid diminishing prior "private rights of control or recovery." Julian Conrad Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1154 n.91.

102. LYNTON K. CALDWELL, LYNTON R. HAYES & ISABEL M. MACWHIRTER, CITIZENS AND THE ENVIRONMENT: CASE STUDIES IN POPULAR ACTION xv (1976).

103. *Id.* at xxvii. Some states, such as Montana in 1972, explicitly embedded "reasonable opportunity for citizen participation" into their constitutions. MONT. CONST. art. II, § 8.

104. *See* William D. Ruckelshaus, *The Citizen and the Environmental Regulatory Process*, 47 IND. L.J. 636, 636 (1972). Administrator William Ruckelshaus favored reforming agencies and their practices rather than an increasing reliance on the judiciary. *Id.* at 643 ("The legislative and executive branches possess superior institutional advantages—including responsiveness to the electorate's value preferences, broad information gathering capacity, specialized expertise and capacity for sustained follow-through—that make them generally better equipped than the judiciary to make and implement basic environmental policy decisions.").

105. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2012)). The Judiciary Committee at the time observed how, "[a]lthough the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information." S. REP. NO. 813, at 3 (1965). In 1971, the Administrative Conference of the United States recommended expanding the public's access to federal agency information associated with rulemaking activities. ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION NO. 71-6, PUBLIC PARTICIPATION IN ADMINISTRATIVE HEARINGS 1 (1971), https://www.acus.gov/sites/default/files/documents/71-6-ss.pdf; *see also* ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION NO. 71-2, PRINCIPLES AND GUIDELINES FOR IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT 1–2 (1971), https://www.acus.gov/sites/default/files/documents/71-2.pdf. Early agency implementation circumscribed access. *See* Joan M. Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1262 (1970).

106. Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–70 (2012)).

107. Lack of public engagement became an early problem with NEPA's implementation. *See* 116 CONG. REC. 38,291 (1970) (discussing public disclosure of NEPA documents); *see also* E.W.

potential litigant's willingness to navigate through barriers to judicial review. To begin with, some federal courts questioned their own jurisdiction to hear environmental cases involving governmental actions.[108] Also, the law of standing under Article III of the Constitution was only slowly crystalizing when some lower federal courts began granting standing to plaintiffs concerned about the environment.[109] Next, the question of whether parties could challenge agency rulemakings was still unresolved—with precedent suggesting that challenges would need to await implementation.[110] In his seminal article, the renowned environmental champion David Sive chronicled some of these challenges, writing that "few litigation burdens are more onerous than those assumed by the environmentalist in attempting to secure court reversal of administrative determinations in review proceedings subject to the substantial evidence—rational basis rule."[111]

The idea of allowing citizen suits removed these hurdles *and* promoted citizen self-government. Many lawyers considered "[a]dmission to the courts of 'class action' suits" as "especially important in the present climate of public dissatisfaction with various phases of

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Kenworthy, *Hart Prods Nixon on Environment Act*, N.Y. TIMES (Nov. 19, 1970), http://www.nytimes.com/1970/11/19/archives/hart-prods-nixon-on-environment-act.html?_r=0 (discussing access to environmental documents).

108. *See* Citizens Comm. for Hudson Valley v. Volpe, 302 F. Supp. 1083, 1091 (S.D.N.Y. 1969) (explaining why the court believed it had jurisdiction under the Administrative Procedure Act (APA) to hear a Rivers & Harbors Act case, and then only secondarily suggesting that it might have federal question jurisdiction). Although rebuffed, the Justice Department apparently defended challenges by claiming that plaintiffs who might satisfy the APA's language of "aggrieved" parties might still need to confront sovereign immunity. *See, e.g.*, Parker v. United States, 307 F. Supp. 685, 687 (D. Colo. 1969). Not until 1976 did Congress amend 28 U.S.C. § 1331(a) to remove the amount in controversy requirement, and not until the following year did the Court effectively clarify that the APA waives sovereign immunity, creates a cause of action, but does not confer jurisdiction. Califano v. Sanders, 430 U.S. 99, 105–07 (1977).

109. Although discussing favorable cases such as *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), legal scholar Louis Jaffe observed that "[t]here stands at the threshold a veritable Cerberus against intruders into the sacred precincts of the halls of justice, a constitutional doctrine most prominently derived from the Third Article of the Constitution of the United States." Louis L. Jaffe, *Standing to Sue in Conservation Suits*, *in* LAW AND THE ENVIRONMENT 123–24 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970). *See generally* James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1 (2003) (describing history and trends).

110. Environmental champion David Sive expressed concern about the ease of challenging regulations even after *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (discussing ripeness). Joseph Sax et al., *Discussion*, *in* LAW AND THE ENVIRONMENT, *supra* note 109, at 67, 71. Sive added that, in the pre-*Overton Park* period, the absence of an adequate administrative record confounded individual agency decisions. *Id.* at 72.

111. David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 619 (1970); *see also* Donald W. Large, *Is Anybody Listening? The Problem of Access in Environmental Litigation*, 1972 WIS. L. REV. 62, 69.

governmental operations."[112] According to Sax, "[t]he citizen, as a member of the public, must be recognized as having rights enforceable at law, equal in dignity and status to those of private property owners."[113] In 1970, while acknowledging that "considerable progress" had occurred since 1965, Sax believed that "[a] theory and mechanism for implementing enforceable public rights remain to be developed."[114] By allowing citizen access to the judiciary, Sax favored affording citizens a public right to a healthy environment and a forum for exercising that right, offsetting the insensitive power of the federal bureaucracy. Agencies and their accompanying bureaucracies simply could not be trusted.[115]

Sax's solution reflected a division between those who accepted the New Deal paradigm of expert agency administrators and those who had become so disillusioned with agencies that they preferred the judiciary. Legal scholar Charles Reich's legendary book, *The Greening of America*, began by questioning the New Deal.[116] Clean air activist Carter F. Henderson championed citizen participation in fighting for clean air—to her, citizen activism was necessary to save democracy.[117] Earth Day organizer Denis Hayes remarked, in 1970, that "[w]e have learned not to

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112. Gladwin Hill, *Conservationists See Gains in U.S. Courts*, N.Y. TIMES, Oct. 19, 1970, at 1. Administrative law scholar Professor Kenneth Davis as well as Sive (who would testify with Sax) viewed public interest litigation as effectively "class action" lawsuits. *See* Richard E. McCann, Note, *Standing: Who Speaks for the Environment?*, 32 MONT. L. REV. 130, 140 (1971). Sive cited approvingly New York Congressmen Richard Ottinger's proposal for allowing class actions and attorney fees for prevailing plaintiffs as one approach for opening the courthouse doors. Sive, *supra* note 111, at 618 n.24.

113. JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION xix (1971). Sax's scholarship, according to Professor Gerald Torres, is infused with the notion of enhancing democratic principles by allowing citizens and the judiciary to "balance[] the private needs of an emerging market economy with the continuing solidary functions of property"—a property regime that expanded to include the public right to a healthy environment and protected common resources. Gerald Torres, *Joe Sax and the Public Trust*, 45 ENVTL. L. 379, 385 (2015); *cf. What Is the Public Trust?*, FLOW, http://flowforwater.org/public-trust-solutions/what-is-public-trust/ (last visited Oct. 28, 2016) (describing the Public Trust Doctrine).

114. SAX, *supra* note 113, at 125, 135.

115. He accepted the ostensible "charge . . . that agencies are not to be trusted to effectuate the public interest." Joseph L. Sax, *Emerging Legal Strategies: Judicial Intervention*, 389 ANNALS AM. ACAD. POL'Y & SOC. SCI. 71, 73 (1970). Litigation might be the "only tool for genuine citizen participation in the operative process of government." SAX, *supra* note 113, at 57.

116. CHARLES A. REICH, THE GREENING OF AMERICA 48–58 (1970). In particular, Reich wrote that New Deal reformers gave little thought to the question: "How would democracy survive the rule of the expert?" *Id.* at 53.

117. *See* 115 CONG. REC. 19,403 (1969) (reproducing speech at University of Massachusetts, on June 19, 1969); *see also* Carter F. Henderson, *What You Can Do to Combat Air Pollution*, PARENTS' MAG. & BETTER HOMEMAKING, Oct. 1996, at 76, 76–77, 96–98 (encouraging citizens to take action to reduce air pollution).

place our faith in regulatory agencies that are supposed to act in the public interest."[118] A few years later, Professor Richard Stewart thoroughly chronicled how expanding standing, by allowing new interests to protect themselves, was a "reaction to the agencies' perceived failure to represent such interests fairly, and the consequent perceived need for court review to correct the dereliction."[119]

An intellectual giant, Sax embraced this widespread sentiment and transformed it into enabling legal language. Describing the problems in the CAA, Professor Bruce Ackerman references Sax to explain how the New Deal "confidence in expert policymaking" was being challenged by those who "saw expertise as a myth concealing the inevitability of hard value choices, political insulation as a screen concealing the capture of the agency by special interests."[120] According to Professor Dan Tarlock, Sax lamented the influence on agencies of the political elite and wealthy and the corresponding failure of those agencies to protect the environment.[121] Sax presumably accepted post-WWII political-science

118. *"The Most Successful Environmental Idea I Ever Had,"* GAYLORD NELSON & EARTH DAY, http://archive.is/yap2J (last visited Oct. 28, 2016). In a letter to Columbia Broadcast System (CBS), Senator Gaylord Nelson explains Hayes's role in the first Earth Day. Letter from Sen. Gaylord Nelson to Dr. Frank Stanton, President, CBS (Apr. 7, 1971), http://nelsonearthday.net/docs/nelson_2-15_CBS_news_letter.pdf.

119. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1728 (1975). Professors Robert Dahl, David Truman, and Theodore Lowi echoed the post-WWII dialogue when they wrote about the powerful influence of interest groups. ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967); THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1969); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951). Leftist historian Gabriel Kolko even attacked progressives as pursuing the self-interest of the economic elite. *See* GABRIEL KOLKO, RAILROADS AND REGULATION, 1877–1916, at 238–39 (1965). Louis Jaffe raised the specter of capture in 1937, observing how citizens serve as the "prime political entity." Louis Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 201 (1937). Courts too fueled the dialogue about agency capture, when, for instance, they chastised the Federal Power Commission for effectively calling "balls" and "strikes" rather than examining the public interest, or lamented how citizen participation was necessary to ensure against rote approvals by the Federal Communications Commission. Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994, 1001 (D.C. Cir. 1966). Today, courts perhaps perceive their role as simply calling balls and strikes, as illustrated by the conversation surrounding Chief Justice Robert's Senate confirmation testimony, when he suggested that was the judicial function. *See* Eric Liu, *The Real Meaning of Balls and Strikes*, HUFFINGTON POST (July 27, 2010), http://www.huffingtonpost.com/eric-liu/the-real-meaning-of-balls_b_660915.html; Bruce Weber, *Umpires v. Judges*, N.Y. TIMES (July 11, 2009), http://www.nytimes.com/2009/07/12/weekinreview/12weber.html?_r=0.

120. Bruce A. Ackerman & William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1474 (1980). Indeed, Ackerman asserts that the 1970 Act's drafters believed "the New Deal agency had failed." *Id.* at 1479.

121. A. Dan Tarlock, Book Review, 47 IND. L.J. 406, 406 (1972) (reviewing JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971)).

dogma that treated "administrative agencies as nothing more than another instrument in the state's on-going attempt to respond to the desires of the private interest groups" or "entrenched elites."[122] Sax's work, however, did not necessarily represent a universal position. Legal scholar Louis Jaffe, for instance, believed that such Marxian analysis of agency influence ignored the multiplicity of factors affecting agency decisions.[123]

1. The Revolutionary (?) Sax Act Concept

When Sax drafted Michigan's citizen suit provision (the Sax Act),[124] he promoted more than simply a judicial review provision for checking bureaucratic insensitivity. He envisioned encouraging democracy and environmental values by infusing the judiciary with the authority to "bypass[] the administrative process" and, if necessary, balance environmental values or prompt legislative attention.[125] He created a

122. Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism*, *1945–1970*, 53 VAND. L. REV. 1389, 1401, 1410 (2000). While representational democracy might justify the former, the same is not so for the latter. *Id.* at 1412. The 1960s witnessed what Professor Reuel Schiller labels a "full scale assault" on agency independence, objectivity, and practice. *Id.* at 1413–14. "Many . . . political scientists" responded by advocating for "an activist judiciary" that could serve "as the institution [capable of] protect[ing] individuals from elite-dominated policy making and, ultimately, rescue the legislature and the executive from the grasp of self-interested pressure groups." *Id.* at 1415. Schiller posits that Sax exhibited that attitude by championing the role of the judiciary as a "democratiz[ing]" force for the "administrative process." *Id.* at 1416. Sax opined how society "should never lose sight of litigation as a technique that legitimately feeds into the political process." Sax et al., *supra* note 110, at 95. David Sive shared Sax's skepticism about agencies and instead "submit[ted] that the bulk of the important questions in environmental cases call more for the talents and training of the courts and judges than for those of the administrative agencies and administrators." Sive, *supra* note 111, at 629. "The problem," according to Sive, of "the restoration and maintenance of a livable environment is, to a large extent, the problem of the control of administrative agencies by the courts." *Id.* at 615. Of course, Sive and others wrote before modern environmental programs developed and imbued agencies with a mission and tools to arrest environmental harms.

123. *See* Louis L. Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFF. L. REV. 231, 232 (1970). Jaffe observed that "[i]t is the thesis of many environmentalists that the administrative agencies and bureaus have failed and that we must look to the courts for action." *Id.* at 233. Jaffe, instead, believed that only recently had environmental issues become a matter ripe for public administration and that society should await the development of new administrative programs. *Id.* at 233–34. The courts, he posited, "are not equipped to perform" the necessary tasks. *Id.* at 234.

124. The West Michigan Environmental Action Council requested that Professor Sax, then at Michigan's law school, "draft a bill that would be a new tool to help protect the environment." Joan Wolfe, *A 'History' of the Michigan Environmental Protection Act of 1970*, https://dspace.nmc.edu/bitstream/handle/11045/10580/wolfe-history-of-mepa.pdf?sequence=6 (last visited Oct. 28, 2016) (noting how the history was written at Sax's request).

125. *See* Tarlock, *supra* note 121, at 408. Tarlock further notes how Sax lacked sufficient trust in alleged "expert" agency administrators. *Id.* at 410. Here, Sax seemingly echoed the post-

forum—the judiciary—that would afford citizens the ability to "stop pollution."[126] The Act "enlarge[d] the role of courts because it permit[ted] a plaintiff to assert that his right to environmental quality has been violated in much the same way that one has always been able to claim that a property or contract right has been violated."[127] In short, Sax created a public environmental right.[128] The difficulty, however, was that this concept morphed into a federal program with a somewhat different purpose.

Conceptually, Sax's expansive citizen suit concept deftly avoided resolving its relationship with what would soon become an active federal regulatory state. Sax envisioned that enforcement under the state air act and environmental claims could proceed separately.[129] The Sax Act, for instance, contemplated that a state court could remit a matter to an

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WWII legal process school distrust of expert agencies and sought, instead, to cabin agency discretion that had been too freely afforded during the progressive-to-New Deal era. Schiller, *supra* note 122, at 1404. Consequently, Sax's original vision exhibited little tolerance for deference, favoring instead the judiciary's ability to examine whether decisions promoted clearly articulated legislative policies. SAX, *supra* note 113, at 152. Sax even suggested that the judiciary might be a "more appropriate form for decision-making" than administrators. Sax, *supra* note 115, at 75.

126. DAVE DEMPSEY, RUIN & RECOVERY: MICHIGAN'S RISE AS CONSERVATION LEADER 172 (2001). When introduced in spring 1969, the Michigan House Bill 3055 effectively "deputized any citizen willing to go to court to become a defender of the state's environment." *Id.* Michigan's Governor proclaimed that the law "would create 'a totally new and bold kind of 'common law' where the public trust in our environment is concerned.'" *Id.* at 174. House Bill 3055, the Michigan Environmental Protection Act (MEPA), became law in the summer of 1970. *Id.* at 176. Upon signing the legislation, Michigan's governor urged that other states follow suit. *Michigan Lets Anyone Sue on Pollution*, N.Y. TIMES, July 29, 1970, at 3.

127. Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003, 1005 (1972). Professor Sax's co-author, Roger Conner, had been a Michigan law student working with Sax. DEMPSEY, *supra* note 126, at 172. The statute furthers a Michigan constitutional provision, which provides that "[t]he conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people." MICH. CONST. art. IV, § 52.

128. According to Sax, "[m]any courts [had] become sensitive to the problem but [felt] constrained by the absence of a theory of citizens' rights to environmental quality and by a concern that courts are not equipped to adjudicate those rights." SAX, *supra* note 113, at 147–48. Sax, therefore, believed the court's first task would require "identifying the nature of public rights in matters pertaining to environmental quality." *Id.* at 148. Courts could then enforce public rights within the common law tradition "freed from excessive deference to the decisions, and the records made, by administrative officials. In short," he added, "public rights must be removed from the stranglehold which bureaucrats now have upon them and returned to their true 'owners'—citizens *as* members of the public." *Id.* at 148. Consequently, Sax's vision promoted "not only a procedural statute expanding the scope of standing to sue," but "also, in and of itself, a source of substantive law." Sax & Conner, *supra* note 127, at 1054.

129. *See* Sax & Conner, *supra* note 127, at 1030.

administrative body, retaining jurisdiction, for an initial determination "whether adequate protection from pollution, impairment or destruction ha[d] been afforded."[130] Or, at a state level, he noted that the doctrine of primary jurisdiction might surface and balance the role of the court and that of an administrative agency.[131] But Sax presumably believed that few instances of conflict would arise.[132] To Sax, the Act and state laws were equally capacious, each affording similar relief through "an alternate route."[133] The judicial avenue would serve as a check against "free-wheeling administrative discretion and . . . assure that regulatory agency decisions were environmentally defensible on their merits."[134] If, however, conflicts arose, he indicated that principles of statutory construction could be employed to resolve the problem.[135]

2. The Clean Air Act's Muted History

The history surrounding the statutory provision for empowering citizen activism suggests little attention to how the CAA ought to converge with state common law claims. Nor should it. The provision's purpose reflected the prevailing status of legal doctrine. Its drafters were concerned with access to federal courts as a means of promoting participatory democracy, securing meaningful judicial review, and curbing agency malaise or abuse. At the nascent stage of the era of federal pollution abatement programs, they could not have anticipated how an evolving common law would interact with emergent regulatory programs. Instead, they sought to remove legal hurdles inhibiting citizen engagement through the courts.

The debate surrounding the citizen suit provision reflects Congress's decision to accept a subdued version of Sax's idea. Congress promoted citizen participation, but the result was considerably different from Sax's vision for Michigan, and it occurred without any meaningful dialogue addressing the savings clause. After all, when the Senate inserted the citizen suit provision into the CAA,[136] Congress was also considering

130. *Id.* app. H at 1096.

131. *Id.* at 1023–25; *see also* Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037 (1964).

132. Sax & Conner, *supra* note 127, at 1060.

133. *Id.*

134. *Id.* at 1061.

135. *Id.* at 1064.

136. For discussions about the history of the citizen suit provision and enforcement, see JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 3–5, 10 (1987); Joseph DiMento, *Asking God to Solve Our Problems: Citizen Environmental Suit Legislation in the Western States*, 2 UCLA J. ENVTL. L. & POL'Y 169, 171–73 (1982); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws, Part I*, 13 ENVTL. L. REP. 10,309, 10,311 (1983); *cf.* Joseph DiMento, *Citizen Environmental Litigation in*

other significant proposals, including amending the NEPA to expressly afford a cause of action[137] and passing a stand-alone environmental citizen suit statute—introduced in the Senate by Michigan Senator Philip Hart (along with soon-to-be-presidential-hopeful George McGovern).[138] That latter bill would have afforded citizens the right to enjoin "unreasonable pollution, impairment, or destruction" and would even have allowed a court to second-guess an administrative judgment on appropriate controls.[139] Testifying in favor of the Hart–McGovern bill, Professor Sax expressed optimism that it would guarantee every person "a legally enforceable right to the protection, preservation, and enhancement of [the] environment."[140] While Sax trusted the judiciary rather than allegedly expert agency administrators, the CAA citizen suit provision favored those administrators: The provision was available only when the agency was not doing its job.[141]

The legislative debate evinces three salient facts. First, the enacted provision dramatically altered the participatory democracy model by transforming the citizen suit vision into a mechanism for simply augmenting and ensuring adequate regulatory compliance. When discussing the provision, the Senate Public Works Committee observed:

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the States: An Overview, 53 U. DET. J. URB. L. 413, 416 (1976) (discussing the overinclusive nature of the Sax Act).

137. Congressman Morris Udall informed his colleagues that the legislation's goal would be to afford all citizens "a federally guaranteed right to a pollution-free environment." 117 CONG. REC. 3845 (1971) (re-introducing the proposed Environmental Protection Act of 1970, and amending NEPA to afford citizens an express right to sue). He believed that such a provision was necessary to avoid the limitations on citizens' ability to initiate qui tam (or private attorney general) actions. *See id.*

138. *Environmental Protection Act of 1970: Hearings Before the Subcomm. on Energy, Nat. Res., & the Env't of the S. Comm. on Commerce on S. 3575*, 91st Cong. 1 (1970) [hereinafter *EPA Hearings*] (statement of Sen. Philip Hart); *see* Robert E. Lutz, II & Stephen E. McCaffrey, Comment, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L.Q. 561, 609 (1971). Discussions about the generic citizen suit statute surfaced during the CAA hearings. *Air Pollution—1970, Part 2: Hearings Before the Subcomm. on Air & Water Pollution of the S. Comm. on Pub. Works on S. 3229, S. 3446, S. 3546*, 91st Cong. 820 (1970) [hereinafter *Air Pollution Hearings, Part 2*]; *see also* 116 CONG. REC. 33,113 (1970) (adding S. 3575, the Environmental Protection Act of 1970, to the discussion about the Sax Act). During a dialogue over the relationship between the two proposed provisions, Senator Muskie posited the possibility that standards under the CAA might serve as a measure for assessing liability under the other. *Air Pollution Hearings, Part 2*, *supra* at 820–21. A year later, the Nixon Administration testified against the proposal. *See* E.W. Kenworthy, *Citizen Suits on Pollution Opposed by White House*, N.Y. TIMES, Apr. 16, 1971, at 73. Professor Sax naturally criticized the Administration's position. *Id.*

139. 116 CONG. REC. 6580–81.

140. *EPA Hearings*, *supra* note 138, at 27 (statement of Professor Joseph Sax).

141. The requirement for notice as well as the diligent prosecution bar illustrate favoring the regulatory process. Also, when considering an earlier version of § 304 contained in S. 4358, the Committee on Public Works emphasized that the provision would not allow a court to assess independently an emission limitation or standard. S. REP. NO. 91-1196, at 36 (1970).

> Section 304 would not substitute a "common law" or court-developed definition of air quality. 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. Therefore, an objective evidentiary standard would have to be met by the citizen who brings an action under this section.[142]

The history surrounding the Act's passage illustrates how Congress generally expected regulatory enforcement to occur at the state and local level—the citizen suit provision would furnish a check if the state or federal government failed in securing enforcement.[143] It would not sanction a new common law warranting upsetting the regulators' judgment.[144] This modified version of Sax's original vision for Michigan was so limited that it elicited favorable responses. The Administration's somewhat controversially belated comment on the legislation generally supported the provision.[145] An Advisory Committee to the Council on Environmental Quality passed a resolution supporting citizen access—albeit more limited than in Sax's vision.[146] When defending the provision

142. 116 CONG. REC. 32,926 (reproducing Committee Report). The notice requirement and diligent prosecution provisions underscore Congress's decision to focus first on state or federal enforcement with established statutory or regulatory requirements. *Id.* The House-passed bill omitted a citizen suit provision, and consequently much of the history surrounding the provision necessarily occurred in the Senate. H.R. REP. NO. 91-1783, at 55 (1970) ("The House bill did not include a provision for citizen suits."). And the Conference Report acknowledged that it included the provision, "with certain limitations." *Id.* at 56.

143. "The Clean Air Act as amended recognizes that the primary responsibility for control of air pollution rests with State and local government." S. REP. NO. 91-1196, at 21. "The Secretary should not interfere with effective State action and should take into consideration any recommendations for abatement action which have resulted from existing enforcement procedures." *Id.* "If the Secretary and State and local agencies should fail in their responsibility, the public would be guaranteed the right to seek vigorous enforcement action under the citizen suit provisions of section 304." *Id.*; *see also* 116 CONG. REC. 32,919 (1970) (statement of Sen. Spong) (provision "complement[s] and encourage[s]" abatement efforts and is not a substitute for enforcement efforts).

144. S. REP. NO. 91-1196, at 36–38.

145. Letter from Elliot Richardson, Secretary, to Jennings Randolph, Chairman, Comm. on Pub. Works, U.S. Senate (Nov. 17, 1970), *in* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970 TOGETHER WITH A SECTION-BY-SECTION INDEX PREPARED BY THE ENVIRONMENTAL POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS FOR THE COMMITTEE ON PUBLIC WORKS, U.S. SENATE 211, 211 (1974) [hereinafter A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970].

146. 116 CONG. REC. 33,103. The Advisory Committee included many of the folks at the Airlie house. *Id.* (listing the names of those on the Advisory Committee).

against comparisons with other proposals, Senator Edmund Muskie underscored how, unlike another proposed bill authorizing damages, the "pending bill" was "limited to seek[ing] abatement of violation of standards established administratively under the act, and expressly excludes damage actions."[147] Muskie even tasked his staff with preparing a memorandum for demonstrating the limited nature of the citizen suit provision, to show it was "based on the assumption that the Federal and State agencies will be incompetent, corrupt, or otherwise not discharge their responsibilities."[148] The sponsors anticipated that citizen enforcement would "not result in inconsistent policy," because the CAA would "achieve objective standards against which to measure air quality" and, as such, "[t]here should be no inconsistency in the enforcement of such standards."[149]

Second, because § 304 did not authorize a damage remedy, the history correspondingly suggests an expectation that the savings clause would preserve common law damage claims.[150] The legislative history unmistakably confirms that the provision itself would not serve as the basis for a damage claim.[151] Senator Muskie reiterated several times that

147. 116 CONG. REC. 33,102.

148. 116 CONG. REC. 33,102–03.

149. 116 CONG. REC. 32,926 (reproducing Committee Report); *accord* S. REP. NO. 91-1196, at 37–38. The Committee Report adds that, "[w]hether abatement were sought by an agency or by a citizen, there would be a considerable record available to the courts in any enforcement proceeding resulting from the Federal and State administrative standard-setting procedures." S. REP. NO. 91-1196, at 38.

150. *Id.* at 65 ("The section does not, however, affect in any way whatever remedies such citizens or class of citizens might have under statutory or other law . . . ."). The original Committee Print preserved rights "under any other law to seek enforcement of such standards or any other relief." *Id.* at 123 (emphasis omitted). Subsequent language added the common law. But the Committee further reported that "[c]ompliance with standards under this Act would not be a defense to a common law action for pollution damages." *Id.* at 38. And the Committee added "that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available." *Id.*

151. *Id.* at 65 (adding that "nor does it provide for damage or nuisance actions"). According to Professor Jeffrey G. Miller, "[i]t is clear from the legislative history of Clean Air Act § 304 that Congress had no intent to create a cause of action for damages under the Clean Air Act." Miller, *supra* note 136, at 10,321 (citing 116 CONG. REC. 32,926–27 (1970), *as reprinted in* Nat. Res. Def. Council, Inc. v. Train, 510 F.2d 692, 725 (D.C. Cir. 1975)). *Train* explored the jurisdictional division between the district court under the Administrative Procedure Act and the circuit court under the CWA citizen suit provision. As part of its inquiry, the court included an appendix conveying the legislative history of the CAA citizen suit provision. *Train*, 510 F.2d at 699–700, app. B. Title II of the CAA contains its own preemption provision. 42 U.S.C. § 7543(a) (2012). That provision only preempts states' authority to impose numeric limits on emissions themselves. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 251 (2004); Ass'n of Taxicab Operators USA v. City of Dallas, 720 F.3d 534, 536 (5th Cir. 2013); Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist., 644 F.3d 934, 938 (9th Cir. 2011); *In re* Caterpillar, Inc., No. 1:14-CV-3722, 2015 WL 4591236, at *9 (D.N.J. July 29, 2015).

the provision did not authorize damage claims, and he even asked for a staff memorandum confirming that measure did not authorize any "action for damages."[152] Senator Hart, defending the provision, similarly noted that the language "makes no provision for damages."[153]

Senator Jim Cooper echoed a common sentiment in Congress when he observed how

> [the CAA] breaks new ground in extending public participation, an essential element throughout the act . . . . The citizen suit provision has developed in a context of other proposals authorizing citizen access to the courts for environmental remedies at both the State and Federal level. Some of these proposals by, in effect, authorizing the development of a common law of pollution could reduce the effectiveness of the Clean Air Act. The most significant of

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Considerably more discussion surrounds the preemption provisions of Title II and the accompanying savings provision of Section 209 than Title I. 42 U.S.C. § 7543(d); *see also* David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-Emption*, 68 MICH. L. REV. 1083 (1970) (discussing the futility of the preemption provision of the Air Quality Act). This is explained, in part, because of Congress's decision in 1967 to treat mobile sources differently because of a perceived need for national uniformity for mobile sources. *See* Peter J. Rathwell, Comment, *Air Pollution, Pre-Emption, Local Problems and the Constitution—Some Pigeonholes and Hatracks*, 10 ARIZ. L. REV. 97, 97–98 (1968). Of course, only a few years later, Justice William Douglas curtly posited that state common law actions might still persist for motor vehicles. Washington v. Gen. Motors Corp., 406 U.S. 109, 115 n.4 (1972); Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, 1123–24 (S.D.N.Y. 1972) (preempting emission standards only for new motor vehicles), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

152. Senate Debate on S. 4358 (Sept. 21, 1970), *in* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, *supra* note 145, at 223, 351–53. The Washington, D.C. law firm Collier, Shannon, Rill, and Edwards's Memorandum of Law on the summer 1970 Committee Print language opined, as well, that the language did not authorize damages. Memorandum of Law from Collier et al., *in* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, *supra* note 145, at 727, 727. It suggested, however, that the section on hazardous air pollutants might allow damages under language allowing a court to award '"relief as may be appropriate"' in federal civil enforcement actions. *Id.* at 729. When addressing the savings clause, the Memorandum merely noted the potential conflict between state and federal actions:

> [N]o provision is made to prevent conflict between overlapping private national actions and private state actions which would be preserved under § 304(a)(2). It would seem appropriate that national citizen actions sufficient to invoke federal court jurisdiction should not be simultaneously tried in the state courts. The state courts are, however, appropriate repositories for those actions seeking remedies for alleged wrongs under state law whose impact is largely intrastate.

Id. at 731. The Memorandum, however, generally opposed the citizen suit concept as allegedly contrary to the theme of "enforcement . . . through a federal-state cooperative program." *Id.* at 730.

153. 116 CONG. REC. 33,104.

> these is an act recently signed into law by Governor Milliken of the State of Michigan.[154]

But congressional members paid little attention to the portion of the clause referencing "any rights or remedies under any other law."[155] The Committee Report merely notes that, if a party could obtain damages under any other law, "other remedies would remain available."[156] Some may have believed that this preserved the ability of litigants to use those state and local abatement programs that would remain in place following the passage of the CAA. Also pointing to this fact is that congressmen and their staff discussed not preempting states and local communities from imposing stricter emission standards.[157]

One witness observed how the trial bar was "frustrated" by various "archaic" barriers confronting litigants in their quest to obtain relief in state courts.[158] When a prominent trial attorney appeared before the Committee at Senator Muskie's request, he discussed—almost in passing—the earlier draft of the "savings" provision and briefly observed that the CAA should not preempt all other rights:

> The last proviso of Section 13 to the effect that nothing in this Section shall affect the rights of persons "under any other law to seek enforcement of such standards" should be broadened to make it clear that the Federal Government has not completely preempted the field and this law should not affect any other rights. That would include such rights as redress to grievances and damage to personal property, et cetera, but it should not exclude action or suits under any

154. 116 CONG. REC. 33,117. Senator Cooper included into the record a lengthy memorandum on the Sax Act, prepared by Michigan Governor's legal adviser. 116 CONG. REC. 33,106–12.

155. S. REP. NO. 91-1196, at 38.

156. *Id.* An earlier bill (S. 3546) included language allowing a court to award "any other appropriate order," prompting one witness to assume the language "may be sufficient to permit a damage award in special situations." *Air Pollution—1970, Part 4: Hearings Before the Subcomm. on Air & Water Pollution of the S. Comm. on Pub. Works on S. 3229, S. 3446, S. 4546*, 91st Cong. 1480, 1484 (1970) [hereinafter *Air Pollution Hearings, Part 4*] (statement of Edward F. Mannino, Chairman, S. Comm. on Environmental Quality of the Philadelphia Bar Association). The final Conference Report notes that "[o]ther rights to seek enforcement of standards under other provision of law were not affected," a few paragraphs later altering its language slightly by noting "[t]he right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected." H.R. REP. NO. 91-1783, at 55–56 (1970).

157. *See Air Pollution Hearings, Part 4*, *supra* note 156, at 1489 (statement of Dr. John T. Middleton, Comm'r, National Air Pollution Control Administration).

158. *Air Pollution Hearings, Part 2*, *supra* note 138, at 826 (statement of Bernard S. Cohen, Vice Chairman for Federal Legislation, The American Trial Lawyers Association).

> other law. So limited as it is now, it could be construed by the Courts to completely preempt the field.[159]

And third, the dialogue about the provision focused in large part on whether the provision altered traditional principles of class action lawsuits under the federal rules of civil procedure.[160] When Roman Hruska, a conservative Senator from Nebraska, questioned the citizen suit provision, lamenting that he believed it warranted additional consideration and claiming he only learned of it six hours earlier, he omitted any discussion of the savings provision and instead feared the impact on the judiciary.[161] Senator Muskie responded that members should have been aware of the language and that the savings clause was "not a class action provision."[162] The Senate Public Works Committee, as of September 1970, made it abundantly clear that the CAA did not intend to alter or even authorize class action lawsuits.[163]

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159. *Id.* at 819 (statement of Stanley Preiser, Esquire). Mr. Preiser further indicated that he believed "nothing contained in this law [should] in any way affect the right of any person, persons or class to maintain any action or suit in any court, State or Federal, upon any claim legal or otherwise, or to seek enforcement of the standards under any other law." *Id.* Both Senators Jennings Randolph and Marlow Cook acknowledged Preiser's stature. 116 CONG. REC. 33,103–04.

160. Members also expressed concern about affording prevailing parties' fees and costs, and conversely protecting against "frivolous harassing actions." S. REP. NO. 91-1196, at 38. In May 1970, for instance, staffer Leon Billings (for Senator Muskie) was informed how absent an attorney fee provision (albeit writing as if the language authorized class actions), the citizen suit provision would be "almost completely worthless for the foreseeable future." Letter from Peter Buchsbaum, Univ. of N.C., to Leon G. Billings, Subcomm. on Air & Water Pollution, U.S. Senate (May 18, 1970), *in Air Pollution Hearings, Part 4*, *supra* note 156, at 1545, 1549.

161. 116 CONG. REC. 32,925–26. Rep. Hruska inserted into the record a staff prepared memorandum on his concerns, not mentioning the savings provision. *Id.*

162. 116 CONG. REC. 32,927; 116 CONG. REC. 33,102 ("[T]his is not a class-action provision.").

163. S. REP. NO. 91-1196, at 36–38 (noting the provision only authorized citizens acting on their own behalf). How participants in the dialogue discussed enforcement may have precipitated this issue. When he first raised the issue in Executive Session in May 1970, Leon Billings for Senator Muskie referred to "the question of class actions, for citizen suits to enforce violations of standards." *Air Pollution Amendments: Hearings Before the Subcomm. on Air & Water Pollution of the S. Comm. on Pub. Works*, Exec. Sess. 20 (1970) (statement of Leon Billings). Shortly thereafter, Collier & Shannon's memorandum on the language highlighted the issue of whether the provision would alter class action principles. *See* Memorandum of Law from Collier et al., *supra* note 152, at 728–29. The American Mining Congress suggested revisions to limit allegedly harassing and frivolous lawsuits, but observed that the provision "as drafted represents an improvement over other proposals for class action suits in the environmental field." *Air Pollution—1970, Part 5: Hearings Before the Subcomm. on Air & Water Pollution of the S. Comm. on Pub. Works on S. 3229, S. 3466, S. 3546*, 91st Cong. 1574, 1575 (1970) (statement of American Mining Congress).

II. CONFRONTING CONGRESSIONAL PURPOSE

Understanding the citizen suit savings clause thus requires understanding what its "drafters" likely sought to avoid: a capacious preemption doctrine that threatened states' ability to self-regulate. The changing legal paradigm left them with little choice. They had to avoid resolving how prior federal and state efforts to control emissions would be affected by the development of a stronger, more effective federal clean air program. Soon after the passage of the CAA, two staff attorneys for the Natural Resources Defense Council suggested different ideas about how CAA standards and the common law might operate coextensively, but both expressed doubt about the latter's utility other than "in filling in the cracks in the statutory framework."[164]

The next two sections, therefore, review, first, litigants' ability to bring pollution abatement cases and, second, why a savings clause might have been necessary considering a growing preemption doctrine.

A. *Pollution Abatement and the Judiciary*

Congressional policy makers undoubtedly appreciated the forces affecting access to the courts in environmental issues. Senator Muskie studiously examined environmental threats and championed what he believed were the most promising legal mechanisms for arresting those threats.[165] Senator Henry Jackson recognized that legislative activity was eclipsing lagging common law efforts.[166] Each of these senators

164. John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241, 278–79 (1972). The authors cited two state cases where state law did not preempt nuisance claims. *Id.* at 278 n.177, 178 (citing Urie v. Franconia Paper Corp., 218 A.2d 360 (N.H. 1966); Wisconsin v. Dairyland Power, 187 N.W.2d 878 (Wis. 1971)).

165. *See* Edmund S. Muskie, *An Environmental Program for America*, 1 ENVTL. L. 2, 6 (1970) (stressing the importance of "active participation of all concerned citizens, working at the local level" to solve the environmental crisis); Edmund S. Muskie, *Foreword*, 55 CORNELL L. REV. 663, 663–65 (1970) (discussing threats to the environment and imploring citizens to take action); Edmund S. Muskie, *The Role of the Federal Government in Air Pollution Control*, 10 ARIZ. L. REV. 17, 23–24 (1968); *see also* Robert F. Blomquist, *Nature's Statesman: The Enduring Environmental Law Legacy of Edmund S. Muskie of Maine*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 233 (2000) (summarizing Muskie's environmental law legacy); Robert F. Blomquist, *Senator Edmund S. Muskie and the Dawn of Modern American Environmental Law: First Term, 1959-1964*, 26 WM. & MARY ENVTL. L. POL'Y REV. 509 (2002) (recalling Muskie's greatest contribution to modern American environmental law); Joel K. Goldstein, *Edmund S. Muskie: The Environmental Leader and Champion*, 67 ME. L. REV. 226 (2015) (describing Muskie's involvement with the Clean Air Act of 1970 and the Clean Water Act of 1972).

166. Henry M. Jackson, *Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073, 1075 (1970) ("The elaboration and refinement of common-law rights to clean, healthy, and aesthetically pleasing surroundings has lagged behind both public aspirations and public needs and has failed to keep pace with the progress that we have made through legislation.").

employed talented staffers, acutely aware of the new "environmentalism" and of the legal obstacles confronting environmentalists. Staffer Leon Billings for Senator Muskie and both staffers William Van Ness and Dan Dreyfus for Senator Jackson attended the historic 1969 Airlie House conference, where many leading environmental advocates convened and discussed foundational principles for environmental law.[167] These congressional staffers understood how the law of standing and nascent administrative law doctrines restricted access to the courts.[168] Along with many in the legal community, they also were likely aware that common law requirements for establishing individual harm were changing. Those preparing the 1971 edition of the Restatement of Torts strengthened the concept of a public nuisance, expanding tort law to afford greater recognition of public and not just individual harm.[169] Concurrently evolving *public* statutory and common law "represented a powerful new intersection of private law torts and public law developments" and a "broad[er] social, political, and legal upheaval playing out across" the nation during the "late 1960s to early 1970s."[170]

But two parallel and yet converging developments prevented the CAA's drafters from seamlessly merging state and federal pollution abatement efforts. First, leading up to the CAA, federal programs to protect the public had already surfaced. Correcting certain

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167. *See* Sam Kalen, *Ecology Comes of Age: NEPA's Lost Mandate*, 21 DUKE ENVTL. L. & POL'Y F. 113, 123, 145 n.139 (2010).

168. *See supra* notes 136–41 and accompanying text.

169. For an insightful history of the public nuisance tort, see Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755 (2001); *see also* Bryson & Macbeth, *supra* note 164 (discussing various drafts of the tort of public nuisance); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003) (tracing the history of public nuisance torts with respect to products liability); William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966) (describing the emergence and use of the public nuisance tort). In 1961, legal scholar William Prosser crafted preliminary draft language for a separate public nuisance tort, and he submitted language to the American Law Institute Council (ALI) several years later. *See* Antolini, *supra* at 820–22, 824–25. As the language changed and was discussed by ALI members, one champion of expanding the doctrine was influenced by Sax and even echoed Sax's distrust of agencies, stating "I must say with due regard for the problems of life in my State, at least, the chance that the public bodies will ever regulate the copper companies that are polluting the air over our State is very, very small." *Id.* at 836–37 n.417 (quoting Professor John P. Frank); *see also id.* at 839 (noting Frank's comments on the need to arrest environmental threats). Professor Thomas Merrill, alternatively, questioned the appropriateness of Prosser's efforts to encourage "public nuisance" actions. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 5 (2011). This broad conversation about the history of public nuisance, however, ought to be viewed alongside the evolving law of standing, which is an inquiry beyond this Article's focus. *See* Antolini, *supra* at 828–32.

170. *Id.* at 842. The final language of the Restatement (Second) of Torts for public nuisance "fuse[d]" the public and common law developments, arguably precipitating the dilemma we confront today—delimiting the appropriate boundaries of the latter. *Id.* at 845.

misunderstandings surrounding the history of federal clean air regulation, Professor Christopher Ahlers recently explained that Congress, as early as 1955, sought to avoid "endangerment" to the "public health and welfare."[171] The earlier, 1963 version of the CAA empowered the Secretary of Health Education and Welfare to pursue abatement actions against private actors when the activity endangered public health or welfare.[172] This occurred, however, within an admittedly powerful political constraint: the need to avoid usurping the traditional or "primary" role of the states.[173] The 1963 CAA, consequently, expressly encouraged pollution abatement programs, which would not be "displaced by Federal enforcement action except as otherwise provided by or pursuant to a court order under subsection (g)."[174] "The philosophy of the Clean Air Act of 1963," wrote Senator Muskie, "was to encourage state, regional and local programs to control and abate pollution, while spelling out the authority of the national government to step into interstate situations with effective enforcement authority."[175] A federal air attorney

171. Christopher D. Ahlers, *Origins of the Clean Air Act: A New Interpretation*, 45 ENVTL. L. 75, 80 (2015). Ahlers suggested the 1963 Act's enforcement program operated better than generally portrayed. *Id.* at 97–102.

172. *Id.* at 90. The 1963 Act, Ahlers added, "depart[ed]" considerably from the prior law, by taking on "the look and feel of a modern regulatory statute." *Id.* at 85. The language Congress used, though, incorporated common law concepts. *Id.* at 88, 90–91. These early efforts paralleled developments addressing water pollution. *See* Frank J. Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1104 (1970) (discussing the Federal Water Pollution Control Act's role in fighting water pollution); Robert L. Glicksman, *Watching the River Flow: The Prospects for Improved Interstate Water Pollution Control*, 43 WASH. U. J. URB. & CONTEMP. L. 119, 131–33 (1993). Professor Barry's article, in particular, explores the difficulty of establishing how pollution in state A might affect downstream residents in state B, a requirement of the Water Pollution Act of 1948. Barry, *supra* at 1105. The subsequent 1956 Water Pollution Act suffered from additional defects, *id.* at 1108–09, and left the courts "determin[ing] in each case whether the alleged pollution was in fact harmful to the health and welfare of individuals." *Id.* at 1111. In 1961, Congress expanded abatement authority to include "pollution caused or contributed to by discharges within the same state in which the 'health or welfare of persons' is endangered." *Id.* at 1113. With the establishment of water-quality standards in the 1965 Water Pollution Control Act, Congress made "subject to abatement the discharge of matter which reduces below the established standards the quality of interstate waters." *Id.* at 1116. By 1970, however, when Congress again strengthened water-pollution legislation, Barry suggests that Congress failed to address adequately the division between state and federal authority, and particularly skirted difficult preemption problems by leaving too much overlap. *Id.* at 1118.

173. Ahlers, *supra* note 171, at 81, 84. The 1963 Act further "required the Department [of Health Education and Welfare] to encourage cooperative activities between state and local governments, improvement in uniform state law, and interstate compacts." *Id.* at 86.

174. Clean Air Act, Pub. L. No. 88-206, sec. 5, 69 Stat. 322, 396 (1963).

175. Edmund S. Muskie, *The Role of the Federal Government in Air Pollution Control*, 10 ARIZ. L. REV. 17, 18 (1968). While Senator Muskie favored national ambient air quality standards,

underscored that the 1963 Act, as amended in 1967, was not intended to preempt "the field of air pollution control" and instead expressly recognized the continuing importance of primary state and local responsibility.[176] After all, while before 1963 only eleven states had adopted general air-pollution legislation, all states adopted programs in the years before the CAA.[177] Professor Christopher Ahlers, therefore, concludes that the 1970 CAA reaffirmed this historical approach toward affording state and local communities the "primary responsibility for the prevention and control of air pollution."[178]

The second problem facing the CAA's drafters' attempts to anticipate the effects of the CAA was that air pollution abatement efforts had already become common at the state and local level. In a detailed account, Professor David Stradling portrays how "progressives," between 1881 and 1951, developed state and local programs for abating the threat of smoke and corresponding air emissions.[179] Communities passed local ordinances, often establishing offices for abatement inspectors, while states passed both local enabling legislation authorizing community action as well as state-level abatement statutes. Many of these programs focused narrowly on smoke abatement, although some expanded by including particulate matter.[180] According to Arthur Stern, President of the Air Pollution Control Association during part of the 1970s, "municipal ordinances reached their zenith in the period from 1945 to 1950."[181] Of particular salience, some later ordinances required installing certain technologies or switching fuels.[182] When a defendant attacked an

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he preferred (at that time) affording states the primary responsibility for adopting emission standards (outside of the context of automobile emissions standards). *Id.* at 19–20.

176. Sidney Edelman, *Air Pollution Abatement Procedures Under the Clean Air Act*, 10 ARIZ. L. REV. 30, 31 (1968). Another attorney at the EPA noted how "federal *enforcement*" under the 1967 Act "was limited to *interstate* air pollution, except when federal action was requested by the governor of the state involved." Terry A. Trumbull, *Federal Control of Stationary Source Air Pollution*, 2 ECOLOGY L.Q. 283, 288 (1972).

177. *See* Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. AIR POLLUTION CONTROL ASS'N 44, 47–48 (1982).

178. Ahlers, *supra* note 171, at 126.

179. DAVID STRADLING, SMOKESTACKS AND PROGRESSIVES: ENVIRONMENTALISTS, ENGINEERS, AND AIR QUALITY IN AMERICA, 1881–1951 (1999). Shortly after the turn of the century, the federal government too began researching technologies for diminishing smoke. *Id.* at 97 (discussing Geological Survey and then Bureau of Mines).

180. Stern, *supra* note 177, at 46–47.

181. *Id.*

182. *See, e.g.*, William L. Andreen, *Of Fables and Federalism: A Re-Examination of the Historical Rationale for Federal Environmental Regulation*, 42 ENVTL. L. 627, 670, 670 n.396 (2012) (Pittsburgh and St. Louis); *cf. id.* at 633–34 (noting the industry's fight against efforts to curtail burning coals). Although the programs for combating emissions failed, they arguably lessened what otherwise would have occurred. *Id.*

ordinance in New Jersey for holding it liable without regard to any evidence of harm, the court responded by observing that such ordinances "constitute[] a legislative declaration that certain conditions or circumstances causing air pollution are deemed a public nuisance and are prohibited for the reason that they constitute a hazard to the public welfare."[183] To be sure, at least some ordinances contained variances for major industries, and consumer advocate Ralph Nader's classic 1970 study on air pollution showed how some of these instances exacerbated the dire need to address our "vanishing air."[184]

The common law also allowed individual recovery for damages caused by air emissions.[185] Early cases often employed a balancing test that effectively favored damages over injunctive relief, particularly if the defendant employed the best available technology.[186] For instance, the Michigan Supreme Court historically observed:

> An injunction is not a process to be lightly ordered in any case. Where the effect will be to present to the owners of a valuable mill the alternative either to purchase complainant's lands at his own price or to sacrifice their

183. State v. Mundet Cork Corp., 86 A.2d 1, 6 (N.J. 1952).

184. JOHN C. ESPOSITO, VANISHING AIR: THE RALPH NADER STUDY GROUP REPORT ON AIR POLLUTION 81–83 (1970).

185. *See generally* William C. Porter, Comment, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107, 116–19 (1968) (discussing damages and the award of damages in one nuisance case). For a seminal article generally addressing the ability of tort law to abate emissions, see Julian Conrad Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126.

186. Bliss v. Washoe Copper Co., 186 F. 789, 824–25, 827 (9th Cir. 1911) (deferring to special master and lower court in affirming denial of injunction). Other courts were less favorable to polluters. *See, e.g.*, People v. Selby Smelting & Lead Co., 163 Cal. 84, 94 (1912) (adopting views in *Hulbert* effectively rejecting balance of hardships); Hulbert v. Cal. Portland Cement Co., 118 P. 928, 930 (Cal. 1911) ("To permit the cement company to continue its operations, even to the extent of destroying the property of the two plaintiffs and requiring payment of full value thereof, would be, in effect, allowing the seizure of private property for a use other than a public one—something unheard of and totally unauthorized in the law."); *see also* Am. Smelting & Refining Co. v. Godfrey, 158 F. 225, 230 (8th Cir. 1907) ("[W]e do not think the fact that an actual injury resulting from the violation of a right is small, and the interest to be affected by an injunction is large, should weigh against the interposition of preventive power in equity, when it is clear that on one hand a right is violated and on the other a wrong committed."); Mountain Copper Co. v. United States, 142 F. 625, 638 (9th Cir. 1906) (denying injunctive relief because of the balance of equities, despite the United States being the plaintiff). Principles of equity occasionally constrained available remedies. *See, e.g.*, New York City v. Pine, 185 U.S. 93, 99 (1902) (noting injunctive relief might not be available if a party waits too long to sue). Professor Juergensmeyer wrote how "[m]ost courts have reached the result of allowing air pollution as long as the pollution is not unreasonable or unnecessary by 'balancing the equities' between property-owning litigants asserting their right to use their property as they wish." Juergensmeyer, *supra* note 185, at 1131.

> property, any court having the power to order it ought very carefully to scrutinize the case and make sure that equity requires it. In theory its purpose is to prevent irreparable mischief; it stays an evil the consequences of which could not adequately be compensated if it were suffered to go on.[187]

The history surrounding the infamous Ducktown Sulfur abatement litigation, which wound its way to the Supreme Court, shows that the litigation often focused on ensuring that a company had installed the best available technology.[188] When issuing injunctive relief, therefore, some courts required installing available technology.[189] Later on, the Restatement (Second) of Torts promoted balancing interests, counseling judges to explore whether an activity is unreasonable by weighing whether "[t]he harm caused by the conduct is substantial and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct."[190]

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187. Edwards v. Allouez Mining Co., 38 Mich. 46, 49 (1878).

188. *See generally* DUNCAN MAYSILLES, DUCKTOWN SMOKE: THE FIGHT OVER ONE OF THE SOUTH'S GREATEST ENVIRONMENTAL DISASTERS (2011). Although "Ducktown smelter smoke had drifted across the border for more than half a century," the politics, optics, and changing southern interests finally precipitated action. *Id.* at 97–98. Notably, the defendant's lawyer originally suppressed (for litigation reasons) that the company had developed a technology for suppressing smoke, a technology that if known might have averted a lawsuit. *Id.* at 121–22. When subsequently installed, the new technology used higher smokestacks, enlarging the group of affected Georgia residents and precipitating the need for a subsequent entreaty to the Court. *Id.* at 123–24, 145, 152–54. Thirteen years and several studies later, the company was found not to have used the best technology available for controlling sulfuric acid. *Id.* at 152–55. And, while Justice Holmes issued an open-ended injunction, yet again many more years passed before the parties resolved the lawsuit through settlement (and damages via an arbitration process) following the War. *Id.* at 178, 179, 195, 207, 216. Another instance of litigation surrounding efforts to explore installing sufficient technology is *Dutton v. Rocky Mountain Phosphate, Inc.*, 450 P.2d 672, 674–76 (Mont. 1969).

189. *E.g.*, United States v. Luce, 141 F. 385, 422–23 (D. Del. 1905) (ordering deodorizers and disinfectants for fish factory). Even if a defendant installed pollution-abatement equipment, the failure to establish it "did everything reasonably possible to eliminate or minimize the damage" might justify not only compensatory damages but also punitive damages. McElwain v. Ga.-Pac. Corp., 421 P.2d 957, 959–60 (Or. 1966) (en banc). In cases involving emissions allegedly violating a nuisance ordinance, the same considerations often applied. *E.g.*, Koseris v. J.R. Simplot Co., 352 P.2d 235, 239 (Idaho 1960) (remanding for consideration of evidence of whether defendant controlled emissions to the "maximum efficient extent, consonant with modern methods of control"); State v. Lloyd A. Fry Roofing Co., 158 N.W.2d 851, 852–53 (Minn. 1968) (accepting expert opinion on whether defendant employed best technology); State v. Mundet Cork Corp., 86 A.2d 1, 8 (N.J. 1952) ("There was no evidence . . . that compliance with the provisions of the ordinance by reduction of density of the emission, as opposed to complete elimination thereof, had been attempted or was not possible.").

190. Bryson & Macbeth, *supra* note 164, at 270–74.

Consequently, it arguably would have required too much prescience from the CAA's drafters to expect them to have resolved the unfolding relationship between expanding state-based public tort law and evolving federally based public statutory law.[191] Both gravitated toward the common theme of balancing interests by ensuring that emitters used adequate technology. Yet cooperative federalism had not sufficiently developed to resolve precisely how the two would coexist comfortably. When passing the CAA, therefore, Congress undoubtedly favored *generally* promoting expanding efforts by states and local communities to thwart environmental degradation and worried about the strangling effect of prevailing preemption doctrine.

B. *Federalism's Preemptive Check*

Preemption doctrine, after all, had become—and remains today—troubling and unpredictable. While "[p]reemption has emerged as the contemporary federalism battleground,"[192] its elusiveness illustrates the difficulty of allocating federal and state responsibility in areas where Congress has legislated.[193] Professor Stephen Gardbaum observes that the doctrine "is almost certainly the most frequently used doctrine of constitutional law in practice."[194] Yet, as Hope Babcock notes, the doctrine is judicially crafted and not necessarily "dictated by the Constitution nor required by our federal structure of government."[195]

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191. Antolini explains how, in 1969, ALI Director Herbert Wechsler responded to William Prosser's expansion of public nuisance by observing that as

> a matter of substantial import in a legislative age—an aspect, indeed, of the larger problem of how far the law of torts adds to the public sanctions that may be prescribed by statute the further sanction of a private action. There also is the question of whether the common law of nuisance really retains the vitality it had of old.

Antolini, *supra* note 169, at 826. Antolini adds that one idea Wechsler posited was "that courts could consider regulatory prohibitions in nuisance cases." *Id.* at 841.

192. Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 2 (2011).

193. *See* Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption,* 33 PEPP. L. REV. 69, 70 (2005) (arguing that the Supreme Court has "used federalism and its concern over states' rights to greatly narrow the scope of Congress's powers"); Karen V. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretative Issues*, 51 VAND. L. REV. 1149, 1156 (1998) ("[P]reemption turns on an assessment of the state and federal law and whether Congress intended the federal law to invalidate a challenged state law."); Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 2 (1995) ("Express preemption provisions have frequently led to results that are questionable on the merits and that give insufficient attention to federalism concerns.").

194. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994).

195. Babcock, *supra* note 33, at 718.

Article VI, clause 2, after all, merely provides that the "Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding."[196] In any case, the unfolding preemption doctrine was too ill-defined for the CAA drafters to anticipate how the judiciary would treat the new Act's preemptive power or the import of a small savings clause embedded in a robust regulatory program.

Today, we treat preemption doctrine as formulaic, obscuring its jurisprudential foundations. Generally, three forms of preemption exist: (1) express preemption, when Congress expresses a preference for federal over state law and that expression occurs unambiguously through statutory language on particular matters;[197] (2) implied preemption, when Congress signals an intent to preempt either particular areas or an entire field (field preemption);[198] and (3) conflict preemption, when compliance with both federal and state law is impossible or when state law presents an obstacle to fulfilling the congressional purposes.[199] Certain substantive canons overlay this framework with a general presumption against preemption. For areas involving matters historically entrusted to state regulation, the Court applies a somewhat stronger presumption against preemption, but the presumption is rebuttable by a clear and manifest expression by Congress to the contrary.[200]

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196. U.S. CONST. art. VI, cl. 2 (emphasis omitted).

197. Congress occasionally drafts preemption provisions broadly enough to embrace common law claims within the realm of laws, rules, or standards that otherwise are preempted. *See, e.g.*, Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422, 1427, 1429–30, 1433 (2014) (addressing the Airline Deregulation Act of 1978's preemptive effect of implied good faith and fair dealing claims against frequent flyer programs).

198. As a corollary to field preemption, Professor Kristen Blankley argues the Court has expanded the realm of preemption in the Federal Arbitration Act to include impact preemption—broader than field preemption. Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 713, 716–17, 746, 748 (2015).

199. In *English v. General Electric Co.*, for instance, the Court observed that "state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found preemption where it is impossible for a private party to comply with both state and federal requirements . . . ." 496 U.S. 72, 79 (1990).

200. In *Wyeth v. Levine*, the Court reaffirmed the "two cornerstones of [its] pre-emption jurisprudence," noting that Congress's intent controls and that when the area involves traditional state authority there must be "clear and manifest purpose" to upset state authority. 555 U.S. 555, 565 (2009). If, therefore, the issue involves an area of "traditional state regulation," the Court is reluctant to upset allegedly "historic police powers" without a "clear and manifest" congressional purpose to do so. N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 655 (1995); *see also English*, 496 U.S. at 79 (if the area is one that has "been traditionally occupied by the States," then Congress's intent to preempt must be "clear and manifest" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))); *cf.* Cuomo v. Clearing House Ass'n, 557 U.S. 519, 554 (2009) (Thomas, J., concurring in part and dissenting in part) (suggesting that

Implied preemption presents the most troublesome questions. It allows courts to explore the nature, function, and purpose of a federal program and to make a judgment about whether the program ought to displace state or local law.[201] Few would contest, even absent statutory language, that when a state or local law actually conflicts with the operation of a federal statute the latter ought to preempt the former. But it becomes problematic when courts conclude that federal legislation preempts an entire field, thus removing from state authority broad categories of potential regulation. In *Parker v. Brown*,[202] for example, Chief Justice Harlan Stone observed how Congress may, by occupying a "legislative 'field,'" "suspend state laws."[203] But he added, without citation, "[i]n a dual system of government . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[204] More recently, Professor Caleb Nelson posited that "[t]he Court has grown increasingly hesitant to read implicit field-preemption clauses into federal statutes."[205] Indeed, while earlier the Court intimated that field preemption applies to the regulation of wholesale sales and transportation of electric energy and natural gas, it recently held otherwise in rejecting a preemption defense to violations of state antitrust laws.[206] Yet when an issue involves national sovereignty,

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the presumption may disappear if the subject is matter over which Congress too has regulated for quite some time). Of course, the Court even suggests that its presumption is universal: "[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *Travelers*, 514 U.S. at 654.

201. Judges and scholars who ascribe to textualism as an interpretative methodology ought to question implied preemption. *See* Glicksman & Levy, *supra* note 31, at 590.

202. 317 U.S. 341 (1943).

203. *Id.* at 350.

204. *Id.* at 351.

205. Nelson, *supra* note 10, at 227.

206. Oneok, Inc. v. Learjet, 135 S. Ct. 1591, 1602, 1606 (2015). Justice Stephen Breyer, having written on the history of natural gas regulation before joining the Court, not surprisingly authored the majority opinion. Even though the United States filed an amicus brief favoring preemption, the Court rejected field preemption, in part, because of its conclusion that Congress did not intend to upset traditional historical (and jurisdictionally appropriate) state jurisdiction, thus warranting proceeding "cautiously." *Id.* at 1599; *cf.* Pub. Util. Dist. No. 1 of Grays Harbor Cty. v. IDACORP, 379 F.3d 641, 647–50 (9th Cir. 2004) (discussing both field and conflict preemption). In *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.—E. v. Tenn. Gas Pipeline Co.*, natural-gas-pipeline companies unsuccessfully sought to avoid tort liability by seeking removal of state-based claims on a theory of field preemption, but they were successful in their argument that the state tort-based claims raised federal issues. 29 F. Supp. 3d 808, 848, 849, 852–54 (E.D. La. 2014); *see also* Abramson v. Fla. Gas Transmission Co., 909 F. Supp. 410, 416 (E.D. La. 1995) (stating that the federal Natural Gas Act "reveals nothing which specifically states that actions" for property damages "through which pipelines run are preempted"). The U.S. Court of Appeals for the D.C. Circuit similarly rejected a preemption argument, holding that Maryland

such as with immigration, at least one author suggests the Court employs "plenary power preemption."[207]

Caleb Nelson offers an insightful portrayal of the historical evolution of the Supremacy Clause and suggests the framers intended a "logical-contradiction" test that would apply state law unless it contradicts a federal rule (the framework for implied repeals).[208] Indeed, in *Gibbons v. Ogden*,[209] Chief Justice John Marshall observed that state laws that "interfere with, or are contrary to" a federal law must yield to that law.[210] Nelson invokes *Rutgers v. Waddington* as illustrative of the importance of the repeal and *non obstante* framework, where the court narrowly construed a local law to avoid repugnancy with the law of nations.[211] But this case was more about the dominance of treaties, with Chief Justice John Jay arguing that once the treaty with Great Britain became operative it "superadded to the laws of the land, without the intervention, consent

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could apply its local laws requiring an air permit for a natural gas compressor station (reasoning that Congress expressly "saved states' CAA powers from preemption")—albeit further concluding that federal law mandated that the state act on the air-permit application. Dominion Transmission, Inc. v. Summers, 723 F.3d 238, 243, 245 (D.C. Cir. 2013).

Federal Energy Regulatory Commission regulation of hydroelectric facilities presents a similar preemption issue. In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, the Court reasoned that Title I of the Federal Power Act supersedes state regulation except where Congress expressly "saved" state law. 328 U.S. 152, 176 (1946) (citing 16 U.S.C. § 821 (2012) (saving state water appropriation law)). Section 10(c) of the Federal Power Act, for instance, expressly preserves state tort law. 16 U.S.C. § 803(c) (2012); *see, e.g.*, Attorney Gen. v. Consumers Power Co., 508 N.W.2d 901, 903 (Mich. App. 1993) (destruction of fish). Yet not always. *See* Simmons v. Sabine River Auth. La., 732 F.3d 469, 476 (5th Cir. 2013) ("Because the state law property damage claims at issue here infringe on FERC's operational control, we hold that they are conflict preempted. Essentially, Plaintiffs allege that Defendants were negligent because they failed to act in a manner FERC had expressly declined to require. But FERC, not state tort law, must set the appropriate duty of care for dam operators."). *Compare* California v. Fed. Energy Regulatory Comm'n, 495 U.S. 490, 498 (1990) (state minimum instream flow preempted by federally established flow regime), *with* PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology, 511 U.S. 700, 710–12 (1994) (no preemption for state minimum flow regime established as a 401(d) condition under the CWA).

207. Kerry Abrams, *Essay: Plenary Power Preemption*, 99 VA. L. REV. 601, 603 (2013) (arguing the analysis employs "a kind of rhetorical 'penumbra'" of federal power over immigration infusing the preemption conversation).

208. Nelson, *supra* note 10, at 231, 260. Nelson underscores the importance of *non obstante* clauses, which instruct that courts avoid construing new laws as repealing older laws unless the two laws are repugnant. *Id.* at 237–42. This repeal framework, he posits, provided the framework for analyzing what today would be preemption. *Id.* at 253.

209. 22 U.S. 1 (1824).

210. *Id.* at 211. Similarly, Caleb Nelson invokes Chancellor James Kent as writing in terms of "interfere with each other." Nelson, *supra* note 10, at 268.

211. Nelson, *supra* note 10, at 243–44.

or fiat of state legislatures."[212] If accepted, Nelson's theory of preemption would constrict the doctrine by collapsing the modern formulation into a singular test of contradiction.[213]

By the mid-1900s, however, preemption doctrine had strayed considerably from its genesis. The doctrine had become expansive, taking on aspects of the Court's DCC analysis—the implied prohibition of the Commerce Clause that limits certain state and local efforts. In many ways, the rise of field or obstacle preemption signifies the resurgence of the *Cooley v. Port of Wardens*' DCC analysis.[214] *Cooley* provided the foundation for distinguishing matters demanding uniform, national standards and from matters susceptible to local regulation.[215] The former fell within Congress's initial domain.[216] That same analysis seemed to

212. CHARLES GROVES HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789–1835, at 97 (1944). Chief Justice Jay argued further that Congress ought to expressly deny the right of state legislatures to even interpret the treaty and that all state laws "contrary to the treaty of peace were to be repealed—the repeal to be in general terms." *Id.* Nelson too uses Chief Justice Jay's remarks. Nelson, *supra* note 10, at 257. The idea of supremacy, therefore, surfaced during discussions about Chief Justice Jay's treaty and whether it would be supreme. 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 436 (1836) (containing Justice James Wilson's statement that treaties would be supreme, and that, in England, when a treaty omitted specifically repealing a prior law, the practice would be to go back to the Parliament to correct the problem). Justice Joseph Story's Commentaries similarly responded that "treaties constitute solemn compacts of binding obligation among nations . . . . It is, therefore, indispensable, that they should have the obligation and force of a law." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 685 (1833). This, according to Justice Story, was imperative because states "grossly disregarded" treaty obligations "under the confederation." *Id.* at 686.

213. Nelson, *supra* note 10, at 262. Nelson would remove obstacle preemption and employ a canon of construction for narrowly construing federal statutes to avoid conflicting with state and local programs. *Id.* at 304–05. Nelson's portrayal of a "repeal" framework, as thorough as it is, seems limited: The preemption doctrine is too complex, after all, to permit simple constructs—and this Article too cannot do it justice. The doctrine, however, reflected the framers' appreciation that, when creating two overlapping governmental entities, an *imperio et imperio*, one of those entities, in this case the federal government, necessarily needed to be "supreme." STORY, *supra* note 212, at 684. President James Madison suggested that the "evil of *imperia in imperio* necessitated some "controuling [sic] power." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), http://press-pubs.uchicago.edu/founders/documents/v1ch17s22.html.

214. 53 U.S. 299 (1851).

215. *Id.* at 301, 303, 314, 319, 326.

216. In *Rice v. Santa Fe Elevator Corp*., for instance, Justice William Douglas observed how the Court assumed "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." 331 U.S. 218, 230 (1947). The case involved the 1916 Warehouse Act, which expressly provided that it was not to "be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses, warehousemen." *Id.* at 222–23. Congress amended the Act in 1931, providing that, while the Secretary of Agriculture would cooperate with state officials, "the power, jurisdiction, and authority conferred upon [him]

animate the Court's approach toward field or obstacle preemption, particularly since cases often involved both preemption and DCC claims.[217]

In several areas, the Court seemed to favor field preemption (occasionally called "supersession"), for policy reasons.[218] Justices William Douglas, Felix Frankfurter, and Hugo Black, dissenting in a DCC case, noted that fields demanding national uniformity often cried for national legislation.[219] And when Congress acted, it confirmed the necessity of a national, uniform rule and further justified invalidating a state statute, particularly once the DCC had been limited by the New Deal Court. Chief Justice Earl Warren, for instance, noted that "[w]here . . . Congress has not stated specifically whether a federal statute has occupied a field in which the States are otherwise free to legislate, different criteria have furnished touchstones for decision" and that those criteria were lumped together with "no one crystal clear distinctly marked formula."[220] Justice Black expressed that point years earlier in *Hines v. Davidowitz*, when he methodically canvassed precedent and indicated that a principal question is whether regulation

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under this Act shall be exclusive with respect to all persons." *Id.* at 223–24. Similarly, in *Pennsylvania Railroad v. Public Service Commission*, Justice Oliver Holmes cryptically remarked that "when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them." 250 U.S. 566, 569 (1919).

217. *E.g.*, Savage v. Jones, 225 U.S. 501, 525, 528 (1912).

218. *E.g.*, Hines v. Davidowitz, 312 U.S. 52, 73, 78 (1941). In 1964, Louis Jaffe noted how the Court's "exaggerated application of the doctrine of preemption created a no man's land of cases which the state courts were forbidden to handle." Jaffe, *supra* note 131, at 1053. In *Linn v. United Plant Guard Workers*, the Court held that the National Labor Relations Act did not preempt state tort libel actions for statements made "during labor disputes." 383 U.S. 53, 57 (1966). Referencing prior holdings in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *Plumbers' Union v. Borden*, 373 U.S. 690 (1963), the Court concluded the states' interest in "redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that" it would "not infer that Congress had deprived the States of the power to act." *Linn*, 383 U.S. at 62, 59 (quoting *Garmon*, 359 U.S. at 243–44). The Court, however, limited the availability of tort actions to malicious statements to minimize the potential adverse effect on national labor policy. *Id.* at 64–65. The Court's liberals, Chief Justice Earl Warren and Justices Abe Fortas and William Douglas, countered with a broad, results-driven view of preemption, suggesting that allowing such lawsuits would arm "disputants with the weapon of libel suits" and "jeopardize[] the measure of stability painstakingly achieved in labor-management relations." *Id.* at 69 (Fortas, J., dissenting). Such a broad approach toward preemption, headed toward what today is called field preemption, also surfaced in the unfair-trade context, where the Court held that state unfair-trade statutes could not indirectly encroach upon the federal patent system by protecting activity "of a kind that clashes with the objectives of the federal patent laws." Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 (1964).

219. *E.g.*, McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 185, 189 (1940) (Black, J., dissenting).

220. Pennsylvania v. Nelson, 350 U.S. 497, 501–02 (1956) (quoting *Hines*, 312 U.S. at 67).

"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[221] The absence of a clear formula was understandable. The Court's precedent generally involved the DCC, but once the DCC waned as a significant barrier to state legislation, litigants naturally tested the preemptive scope of the burgeoning field of federal regulation. The Court responded by trying to decouple the two concepts, arguably leaving preemption principles ill-defined.[222] Circumstances involving actual conflicts were not problematic, but inferring preemption forced the Court to examine familiar questions posed by DCC cases. Did, for instance, the matter involve a traditional exercise of a state's police power? Or, conversely, did the matter warrant promoting national uniformity? Naturally, answering these questions and exploring how Congress's objective and purpose would interact with state law offered the Court considerable leeway in its analysis. And this all occurred at a time when the Court willingly explored legislative history and broad congressional purposes.[223]

A few cases are illustrative. In *Union Brokerage Co. v. Jensen*,[224] for instance, Justice Frankfurter examined whether Minnesota could impose on federally licensed customhouse brokers its requirement that foreign corporations have a registered agent in the state as a condition for accessing its judicial system.[225] In concluding it could, Justice Frankfurter noted that the question "touches different and not common interests between Nation and State," with the Court's "task . . . that of harmonizing these interests without sacrificing either."[226] He then examined both the DCC and preemption, dismissing the latter because of the absence of any conflict: The Treasury Department had indicated an intent to allow state legislation.[227] But the bulk of his analysis was on the DCC, where he similarly concluded that state legislation was constitutionally permissible, and this analysis seemed to influence the

221. *Hines*, 312 U.S. at 67. Justice Black also invoked the Wagner Act's purpose when restricting Florida's ability to require that business agents for labor unions pay a nominal licensing fee. Hill v. Florida, 325 U.S. 538, 541–43 (1945).

222. *E.g.*, Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 151–54, 154 n.3 (1942) (employing DCC cases in preemption analysis); *see* Recent Decisions, *Federal Preemption in Television Antitrust*, 13 STAN. L. REV. 629, 634 n.38 (1961) (noting cases that blurred DCC and preemption analysis); Recent Developments, *Labor Law: Preemption of State Legislation Interfering with Free Collective Bargaining*, 66 COLUM. L. REV. 391, 391 (1966) (noting that there has been much litigation over the extent of preemption).

223. *See* Nicholas R. Parrillo, *Leviathan and Interpretative Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History*, *1890–1950*, 123 YALE L.J. 266, 283 (2013).

224. 322 U.S. 202 (1944).

225. *Id.* at 202–03.

226. *Id.* at 207–08.

227. *Id.* at 208–09.

preemption opinion.[228] Similar considerations affected the Court's decision in *New York Central Railroad Co. v. Winfield*,[229] with the Court holding that the Employers' Liability Act preempted state tort actions against interstate carriers.[230] There again, the Court focused on whether a nationally uniform rule seemed necessary—reminiscent of past DCC cases.[231]

In *Kelly v. Washington*,[232] the Court similarly confronted a particular activity that Congress had expressly chosen not to regulate, involving the inspection of certain tugboats.[233] The principal question was whether Congress had impliedly preempted state action by occupying the field.[234] The Court's analysis was informed by the DCC analysis of whether the field demanded uniformity—if so, regulation would reside only within the federal realm.[235] And where, instead, the matter fell within the traditional realm of local police power, the Court would require clear evidence before preempting that authority.[236]

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228. *Id.* at 209–11.

229. 244 U.S. 147 (1917).

230. *Id.* at 148–49, 153–54.

231. *Id.* at 149. The Court examined legislative history, as well. *Id.* at 150–53. Dissenting, Justice Louis Brandeis noted how New York's regulation fell within an accepted exercise of the state's police power. *Id.* at 154–55 (Brandeis, J., dissenting). Thus, to upset such a regulation, three rules governed: (1) indirect effects on commerce would not necessarily "cut the states off from" a permissible exercise of state police power; (2) state law would yield to the federal law if the "purpose" of the federal law would be "frustrated and its provisions be refused their natural effect," but the mere entry into the field by Congress would not supersede state law "unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state"; and (3) state law would yield if the state's exercise of authority "direct[ly]" and "positive[ly]" conflicted with the federal exercise. *Id.* at 155 (first quoting Sherlock v. Alling, 93 U.S. 99, 103 (1876); then quoting Savage v. Jones, 225 U.S. 501, 533 (1912); then quoting Mo., Kan. & Tex. Ry. v. Haber, 169 U.S. 613, 623 (1898)). Justice Brandeis discerned no expression of an intent to supersede nor any justification based on events precipitating the Act's passage. *Id.* at 169–70. In *Napier v. Atlantic Coast Line Railroad*, Justice Brandeis examined whether the federal locomotive Boiler Inspection Act occupied the field and removed Georgia's ability to regulate the doors on an engine firebox and Wisconsin's ability to require a cab curtain. 272 U.S. 605, 606–07 (1926). Both state measures involved an exercise of the state's traditional police power and, absent any actual conflicting federal and state requirements, Justice Brandeis asked whether "the legislation of Congress manifest[ed] the intention to occupy the entire field of regulating locomotive equipment?" *Id.* at 610–11. He concluded it had, because of the broad authority granted to the federal agency. *Id.* at 613.

232. 302 U.S. 1 (1937).

233. *Id.* at 2–3.

234. *Id.* at 4.

235. *Id.* at 9.

236. *Id.* at 12–13. The Court explained:

> It would hardly be asserted that when Congress set up its elaborate regulations as to steam vessels, it deprived the State of the exercise of its protective power

Finally, in the seminal opinion *Rice v. Santa Fe Elevator Corp.*, Justice Douglas exhibited little tolerance for precision.[237] He addressed how the federal Warehouse Act affected state granger-movement laws regulating the interstate grain market.[238] The original federal act provided that "nothing in this Act shall be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses."[239] Congress amended the Act to provide that, for federally licensed warehousemen, the authority of the Secretary of Agriculture would be exclusive.[240] While the federal and state programs overlapped considerably, the state program regulated more than the federal.[241] And for those areas not actually regulated under the federal program, Justice Douglass examined whether state regulation was permissible.[242] He began by observing that the area was one traditionally regulated by the states.[243] For such areas, state authority was "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[244] That purpose might be evidenced in several ways, although Justice Douglas did little to articulate any tests, choosing instead to summarize precedent (some of which

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> as to vessels not propelled by steam. The fact that the federal regulations were numerous and elaborate does not extend them beyond the boundary they established.

Id. at 13.

237. 331 U.S. 218 (1947).

238. *Id.* at 220. In the companion case, Justice Douglas observed that the federal Commodity Exchange Act lacked any congressional declaration that its provisions were "exclusive of state regulation." Rice v. Bd. of Trade of Chi., 331 U.S. 247, 253 (1947). While holding that the question of whether the Commodity Act superseded state regulation was premature, he intimated that absent an actual conflict Congress seemingly intended to allow state regulation. *Id*. at 254–55. In particular, he wrote: "Where Congress used such care to preserve specific state authority, even when it duplicated federal regulation, it is a fair inference not only that supersedure was to take its natural course where rights not saved to the States were involved, but also that non-conflicting state authority was left undisturbed." *Id.* at 255 (citation omitted). Earlier, Justice Douglas, in *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, indicated that preemption would require a "clearly manifested" expression of congressional intent. 315 U.S. 740, 749 (1942). He limited *Hines v. Davidowitz* by distinguishing between when "a State was exercising its historic powers over such traditionally local matters" and when it was exercising power in delicate fields such as foreign relations, which raise "grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system." *Id.*

239. *Rice*, 331 U.S. at 222–23 (quoting Warehouse Act, Pub. L. No. 64-190, 39 Stat. 486 (1916)).

240. *Id.* at 223–24.

241. *Id.* at 238 (Frankfurter, J., dissenting).

242. *Id.* at 229–30 (majority opinion).

243. *Id.* at 230.

244. *Id.*

involved DCC rather than supersedure questions).[245] He then concluded that federal policy (illustrated by the specific provision for exclusive power), the forces that necessitated legislation, and the legislative history all reflected an intent to occupy the field.[246] Justice Frankfurter dissented, demonstrating his tendency toward finding preemption only when state and federal power actually conflict.[247] Indeed, the case reflected a division among the Justices, particularly rival Justices Douglas and Frankfurter—the former willing to focus on purpose and policy and find preemption more easily than the latter.[248]

This engulfing application of preemption doctrine likely precipitated the need for a savings clause to accompany the citizen suit provision. But the presence of the savings clause tells us little about whether or how, in specific cases, preemption ought to apply. This next Part, therefore, explores the relevant factors that courts should consider when assessing whether the CAA preempts applying state common law to air emissions.

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245. *Id.* at 230–31.

246. *Id.* at 234–36.

247. *Id.* at 239 (Frankfurter, J., dissenting). Justice Frankfurter warned that Justice Douglas's approach threatened the federal/state balance:

> Suffice it to say that due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered.

Id. at 241.

248. *See supra* notes 224–28 and accompanying text (similar actual conflict analysis by Justice Frankfurter). Justice Douglas, however, reflected the Court's majority in *Rice*, joined by his ally on the Court, Justice Robert Jackson. In *Bethlehem Steel Co. v. New York State Labor Relations Board*, Justice Jackson rejected the argument that state authority could proceed "until the federal power is actually exercised as to the particular employees." 330 U.S. 767, 771, 774 (1947). Dissenting, Justice Frankfurter favored an actual conflict analysis and observed how the State and the National Labor Relations Board (NLRB) had an arrangement for sharing responsibility that the majority effectively eviscerated. *Id.* at 777–82 (Frankfurter, J., dissenting). At one point, Justice Frankfurter termed the "occupied the field" concept a "metaphor" that arguably ignored "scrupulous regard for State action where Congress has not patently terminated it." *Id.* at 782. This dialogue among the Justices occurred shortly after Chief Justice Harlan Stone had passed away, prompting an open feud among the Justices, with Justice Douglas uncertain about his tenure on the Court and shying away from any conservatism. BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 243–50 (2003). Examining Justice Douglas's tenure, one biographer noted that "[i]t is difficult to imagine a man more intellectually capable or temperamentally ill-suited to sit on the Supreme Court than William Douglas." JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 274 (2006).

III. SPLITTING FLOORS AND CEILINGS

Today, as regulatory programs lag behind environmental threats, scholars tend to support a robust common law.[249] The common law enjoys an almost mythical past, leading many contemporary scholars to support its restoration. When explaining how the concept of pollution has evolved, Professor John Nagle informs us that, even in the nineteenth century, at least some courts noted how the "right to pure air is incident to the land."[250] And while, according to Professor Robert Percival, it may have "vacillated at times," the common law "established firm foundational principles for what became known in the last three decades of the twentieth century as the field of environmental law."[251] With such a venerable tradition, few today favor limiting its vitality. Professor Jason Czarnezki and attorney Mark Thomsen chronicle how the rebirth of common law claims is expanding the suite of options for protecting the environment.[252] Professor Alexandra Klass explores how state common law claims ought to be informed by current statutory programs rather than replaced by them.[253] She suggests that twentieth-century theorists echoed a consistent theme that the common law would continue "as a vehicle for dynamic legal change that fully encompassed statutory law, data, and public policy as it developed through time."[254] She adds, for instance, that

249. *See* Robert H. Abrams, *Broadening Narrow Perspectives and Nuisance Law: Protecting Ecosystem Services in the ACF Basin*, 22 J. LAND USE & ENVTL. L. 243, 273–74 (2007); Ronald J. Rychlak, *Common-Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 MISS. L.J. 657, 661 (1989). Professor J.B. Ruhl, for instance, examines the common law's ability to protect natural capital through its property law lens, which may then influence other doctrines such as nuisance. J.B. Ruhl, *The "Background Principles" of Natural Capital and Ecosystem Services—Did* Lucas *Open Pandora's Box?*, 22 J. LAND USE & ENVTL. L. 525, 526 (2007); J.B. Ruhl, *Toward a Common Law of Ecosystem Services*, 18 ST. THOMAS L. REV. 1, 1–2 (2005); J.B. Ruhl, *Ecosystem Services and the Common Law of "The Fragile Land System,"* NAT. RESOURCES & ENV'T, Fall 2005, at 3, 3–4. This common law interest extends into exploring a more expansive federal common law, even after *AEP v. Connecticut*. *See, e.g.*, Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 3–4 (2015). Unfortunately, such inquiries often ignore the actual history surrounding the development and demise of federal common law as well as its jurisprudential dimensions. *See* Sam Kalen, *Expanding the Federal Common Law?: From* Nomos *&* Physis *and Beyond*, 96 MARQ. L. REV. 517, 523 (2012).

250. John C. Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1, 11 (2009) (quoting Sellers v. Parvis & Williams Co., 30 F. 164, 166 (C.C.D. Del. 1886)).

251. Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 5 (2007).

252. Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 2–3 (2007).

253. Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 547 (2007).

254. *Id.* at 556. Klass references Professor Roscoe Pound as a principal scholar advocating for the continued resonance of the common law, *id.* at 551–52, but one should be cautious before

the savings clause in environmental programs, such as the CAA, "left ample room for state common law to be a major player in environmental-protection efforts."[255] Professor Denise Antolini explains how "[t]he Bush Administration's efforts to roll back vigorous enforcement of federal environmental laws . . . reignit[ed] the interest of scholars and practitioners in common law remedies as judicial tools to address a wide range of environmental ills."[256]

Indeed, several of environmental law's most prominent scholars are actively testing the possibility of developing a *Restatement* for the field of environment, natural resources, and energy.[257] To them, the field warrants engaging in such a drama, hopefully promoting significant progress rather than maintaining "today's dross in hopes of future gold."[258] They note how many of the objections to this entreaty

> minimize the ALI's capacity and flexibility to tackle areas of law that lie outside traditional common law spheres. . . . While the ALI's early efforts undeniably focused on traditional common law fields, nothing about the ALI's current deliberative approach and consensus-based process makes it unfit for other fields of law that arise from statutory roots. The core prerequisites—richness of caselaw, complexity of issues, and need for clarity—apply equally to code-driven law that has spurred the development of its own dense caselaw and regulatory framework.[259]

This effort sparked an insightful riposte by Professor Dan Tarlock, one of the field's first and foremost scholars.[260] Professor Tarlock "concludes that there are no insurmountable barriers to the preparation of a Restatement, but that the ALI should not do so because environmental law needs to be reimagined, not restated."[261]

The chorus urging a fortified common law, however, ignores how preemption ought to apply. The principal case rejecting a blanket preemption of state common law claims is *International Paper Co. v.*

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parading Pound, as he straddled two worlds and differed in many respects from his more "progressive" cohorts. *See generally* N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997) (exploring the historical context of the work of legal scholars Roscoe Pound and Karl Llewellyn).

255. Klass, *supra* note 253, at 570.

256. Antolini, *supra* note 169, at 757.

257. Tracy Hester, Robert Percival, Irma Russell, Victor Flatt & Joel Mintz, *Restating Environmental Law*, 40 COLUM. J. ENVTL. L. 1, 3–5 (2015).

258. *Id.* at 35.

259. *Id.* at 34.

260. Dan Tarlock, *Why There Should Be No Restatement of Environmental Law*, 79 BROOK. L. REV. 663, 663–64 (2014).

261. *Id.* at 664. Tarlock posits that "[e]nvironmental law is profoundly antithetical to . . . the function of the common law." *Id.* at 667.

Ouellette.[262] Courts, litigants, and the academy almost uniformly suggest that *Ouellette* categorically favors allowing state common law air-emission claims.[263] *Ouellette* involved a common law nuisance claim by Vermont landowners against a New York paper mill.[264] Plaintiffs invoked Vermont's common law of nuisance, rather than that of New York where the pollution emanated, and the Court treated that as significant for assessing when the CWA preempts state common law claims.[265] The Court concluded that the Act only barred relief that would impose conflicting "standards of effluent control" and that "[t]he saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* [s]tate."[266] Klass suggests that *Ouellette* "lays the groundwork for a different vision than that expressed in *Boomer* and provides a strong basis for states and their citizens to use their common law, in addition to statutory and regulatory efforts, to increase environmental protection."[267]

Conversely, the 1970 decision *Boomer v. Atlantic Cement Co.*[268] symbolizes the failure of the common law. The case, according to Professor Dan Farber, "has become an established part of the legal canon."[269] It involved considerable harm to local residents from emissions and blasting generated by a nearby cement plant.[270] When

262. 479 U.S. 481 (1987). Professor Richard Epstein describes the outcome of the case as a "makeshift compromise." Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NW. U. L. REV. 551, 574 (2008). His description of the history of federal common law, however, is considerably truncated. *See* Kalen, *supra* note 249, at 523 (exploring the evolution and basis of common law, which shaped the growth and demise of federal common law).

263. *See, e.g.*, Scott Armstrong, *The Continuing Necessity of Common Law Torts for Environmental Harms: Why the Clean Air Act Should Not Preempt State Law Claims Against Stationary Sources*, 44 TEX. ENVTL. L.J. 391, 399–402 (2014).

264. *Ouellette*, 479 U.S. at 483–84.

265. *Id.*

266. *Id.* at 497. A student note aptly observed how the Court's analysis departed from principles of statutory construction, when it distinguished without any statutory directive source from affected state law. Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1060–61, 1073 (2013).

267. Klass, *supra* note 253, at 576.

268. 257 N.E.2d 870 (N.Y. 1970).

269. Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law*, 32 ECOLOGY L.Q. 113, 113 (2005) [hereinafter Farber, ECOLOGY L.Q.]; *see also* Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law*, *in* ENVIRONMENTAL LAW STORIES 7 (Richard J. Lazarus, Oliver A. Houck eds., 2005). According to Professor Mark Sagoff, "[n]uisance cases like *Boomer* present us with the fundamental question whether courts should grant injunctive relief in tort or balance interests instead." MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT 183 (1988).

270. *Boomer*, 257 N.E.2d at 871.

deciding whether to grant equitable relief along with damages, Judge Francis Bergan echoed a sentiment antithetical to public nuisance litigation when he wrote:

> A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.[271]

Klass criticizes *Boomer* for its failure to appreciate the difference between public and private nuisance.[272] But *Boomer* reflected a typical perspective at the time, even by those involved in the environmental movement.[273] In *Renken v. Harvey Aluminum Inc.*,[274] for instance, plaintiffs sought to enjoin an aluminum-reduction plant's emissions of fluorides, which damaged nearby fruit orchards.[275] The court held it would only issue an injunction if the defendant failed to install adequate pollution control devices within a year.[276] In Michigan, following the

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271. *Id.*

272. Klass, *supra* note 253, at 571–72.

273. *E.g.*, Diamond v. Gen. Motors Corp., 97 Cal. Rptr. 639, 645 (Ct. App. 2d 1971) ("Once it is acknowledged that a superior court cannot, by decree, abolish air pollution, it is appropriate to face some demonstrable realities . . . . We do not deal with a simple dispute between those who breathe the air and those who contaminate it. The need for controls is not in question. The issue is not 'shall we,' but 'what kind, how much, how soon.'"); *see also* Bryson & Macbeth, *supra* note 164, at 273–74.

274. 226 F. Supp. 169 (D. Or. 1963).

275. *Id.* at 170.

276. *Id.* at 176. Defendant operated the plant under the auspices of the Defense Production Act of 1950, with an annual gross payroll of over $3 million. *Id.* at 170. The plant emitted roughly 1.3 thousand pounds daily of fluorides, and the court was convinced "of the feasibility of the introduction" of technology to reduce the emissions. *Id.* at 171–72. Particularly, the court added:

> While the cost of the installations of these additional controls will be a substantial sum, the fact remains that effective controls must be exercised over the escape of these noxious fumes. Such expenditures would not be so great as to substantially deprive defendant of the use of its property. While we are not dealing with the public as such, we must recognize that air pollution is one of the great problems now facing the American public.

Id. at 172. The court also rejected the defendant's claim that the Oregon Air Pollution law preempted the common law. *Id.* at 175–76. The parties eventually entered a consent decree for

passage of Michigan's Environmental Protection Act of 1970, one court treated balancing as a necessity and, absent administratively set standards for emissions, would not enjoin the operation of a pig farm if the defendant minimized the odor as much as practical.[277]

With this questionable common law background, any claim about the efficacy of the common law is somewhat distracting. That the common law is a necessary tool for responding to past and imminent environmental threats seems uncontestable. Most will agree that the end of environmental protection sanctions all appropriate means for achieving that end. And surely common law remedies ought to remain a viable means absent some clear signal by those crafting a regulatory program that common law claims impermissibly intrude into the regulatory realm. The issue becomes deciding whether equitable judicial relief is an appropriate means, particularly when such relief mirrors the modern regulatory state. The outcome of common law nuisance cases, after all, often depended upon a defendant's use of sufficient pollution-abatement technology, and that inquiry morphed into modern regulatory programs that similarly rely upon technology-based standards as well as health- and welfare-based standards. The next two sections, therefore, explore whether the CAA ought to preempt particular common law remedies.

A. *Common Law Damage Ceiling*

Should courts continue to allow common law damage remedies for air emission damages instead of injunctive or other equitable relief?[278] For statutes such as the Resource Conservation and Recovery Act (RCRA) and CERCLA, the availability of a common law damage action is fundamental. Similarly, Daniel Farber notes how the victims in *Ouellette* would have had no other remedy available to them, under the CWA or otherwise.[279] Nuisance law then serves, in Farber's words, as a "backstop

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damages and subsequently fought over an arbitration decision under the decree. Renken v. Harvey Aluminum (Inc.), 347 F. Supp. 55, 56 (D. Or. 1971).

277. Crandall v. Biergans, 2 E.L.R. 20,238, 20,238–40 (Mich. Cir. Ct. 1972) (expressing a lack of competence to address what standard might be appropriate to reduce odors from agricultural activities); *see also* Wayne Cty. Dep't of Health v. Olsonite Corp., 263 N.W.2d 778, 790–91 (Mich. Ct. App. 1977) (discussing *Crandall* but rejecting its application if a court adopts an emission standard more specific than under the general common law, reasoning that Michigan's Act allowed courts to "supersede the common law of nuisance" and adopt "standards more precise").

278. Indeed, a familiar rule is that "an injunction is an extraordinary remedy which may be granted when the plaintiff establishes that his remedy at law is inadequate." Sadat v. Am. Motors Corp., 470 N.E.2d 997, 1002 (Ill. 1984).

279. Farber, ECOLOGY L.Q., *supra* note 269, at 146. In *Potomac River Ass'n v. Lundeberg Maryland Seamanship School, Inc.*, the district court allowed plaintiffs to proceed with a damage

to pollution statutes."[280] Further, judges may, as Professor Klass observes, employ statutory standards to discern whether a defendant breached a duty of care, and consequently then use that breach to justify awarding damages.[281] Where, for instance, a defendant has ignored the requirements of a federal statute, the "rule of law" at the time of the citizen suit provision allowed a

> private party who suffers injury from the act of another, which act is in violation of the requirements of a federal statute, is normally entitled to civil redress for his injury, unless that statute expressly prohibits such actions or unless the maintenance of such actions would interfere with the operation of the statutory scheme.[282]

Appropriately, therefore, the Act's proponents emphasize that the drafters designed the savings clause to ensure that common law damage claims would remain available following the Act's passage. And nothing suggests the opposite.

B. *CAA Regulatory Floor*

The real question is whether, in conjunction with common law damage claims, a party may also seek affirmative equitable relief—for instance, ordering the installation of the best available technology? First, some remnant of participatory democracy, originally fueling Sax's campaign, counsels against remedies other than damages. When the Students for Democratic Society crafted the Port Huron Statement in 1962, they envisioned a political environment influenced by the citizenry rather than by the corporate and political elite.[283] "Participatory

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action for activities not expressly covered under a Section 403 Rivers and Harbors Act permit. 402 F. Supp. 344, 352–54 (D. Md. 1975). The court added that, when a party fails to secure a permit, affirmative relief requiring a permit might be warranted. *Id.* at 356 n.12.

280. Farber, *supra* note 269, at 147.

281. Klass, *supra* note 253, at 585.

282. James River v. Richmond Metro. Auth., 359 F. Supp. 611, 638 (E.D. Va. 1973); *see also* Conn. Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 82, 87 (2d Cir. 1972) (rejecting *qui tam* action for injunctive relief under a public nuisance theory but preserving the issue of whether damage action is available if statute violated). The cause of action need not be based on an implied cause of action arising under the federal statute. *E.g.*, Chambers-Liberty Ctys. Navigation Dist. v. Parker Bros., 263 F. Supp. 602, 607 (S.D. Tex. 1967) (admiralty case, cause of action under state law, and federal violation of federal act not an element of the tort).

283. The concept first gained notoriety here in the United States during the social and civil justice movements in the 1960s and early 1970s, particularly from its significance in the 1962 Port Huron Statement. *See Preface to the New Edition*, PARTICIPATORY DEMOCRACY: PROSPECTS FOR DEMOCRATIZING DEMOCRACY x (Dimitrios Roussopoulos & C. George Benello eds., 2005); *see also* Julie A. Clements, *Participatory Democracy: The Bridge from Civil Rights to Women's Liberation*, 1 PUB. PURPOSE 5, 21 (2003) ("[P]articipatory democracy placed a paramount role in

democratic theory," according to Professor Jeffrey Hilmer, "envisions the maximum participation of citizens in their self-governance, especially in sectors of society beyond those that are traditionally understood to be political . . . ."[284] This theory reverberated throughout the New Left community in the late 1960s and early 1970, and Sax looked for avenues to codify aspects of its objectives into our legal fabric.[285] Indeed, in 1970, Professor Carole Pateman published her seminal assessment on the theory of participatory democracy and its capacity in industry as well as government to reduce political apathy.[286] While participatory democracy theory is less noticeable today, and indeed questions aspects of liberal democracy, it nonetheless remains part of the international dialogue and embedded within the citizen suit concept.[287]

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both the Civil Rights Movement and the second wave of the Women's Movement."). Philosopher Jean-Jacques Rousseau is credited with originating the concept that "authority over a people can only be legitimate if it leaves those who it governs as free as they were prior to their submitting to that authority. Participatory democracy grants individuals the ability to participate in 'making' the laws they must obey." Christiana Ochoa, *The Relationship of Participatory Democracy to Participatory Law Formation*, 15 IND. J. GLOBAL LEG. STUD. 5, 7 (2008). Through participatory democracy, citizens not part of a direct democracy can offset the insulating effects of representational democracy, such as here in the United States. Yet "[m]any of the theoretical concepts of participatory democracy put forward during the early 1970s developed a very broad concept of participation but were often not very specific as to the forms of participatory channels." Theo Schiller, *Direct Democracy and Theories of Participatory Democracy—Some Observations*, *in* DIRECT DEMOCRACY IN EUROPE: DEVELOPMENTS AND PROSPECTS 52, 56 (Zoltán Tibor Pállinger et al. eds., 2007). Possible avenues for participation include initiatives and referendums, easy access to the political system, and expanding access to all community members. Tom Hayden, *Participatory Democracy: From the Port Huron Statement to Occupy Wall Street*, NATION (Mar. 27, 2012), http://www.thenation.com/article/participatory-democracy-port-huron-statement-occupy-wall-street/. The Sax Act directly furthered that ideal for the America polity.

284. Jeffrey D. Hilmer, *The State of* Participatory *Democratic Theory*, 32 NEW POL. SCI. 43 (2010) (emphasis omitted).

285. In 1970, author and activist Tom Hayden wrote how the New Left wanted "a transformation in which the masses of people, organized around their own needs, create a new, humane, and participatory system." TOM HAYDEN, TRIAL 157–58 (1970).

286. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 1–10 (1970). Pateman's analysis countered classical liberal democratic theorists, such as political scientists Joseph Schumpeter and Robert Dahl, who accepted that a pluralistic society required an elite, expert ruling class and that the role of the citizenry was merely to elect such rulers. *See* FRANK CUNNINGHAM, THEORIES OF DEMOCRACY 29 (2002). When, for instance, philosopher John Stuart Mill wrote that the first order of government is promoting the "virtue and intelligence" of the governed, he believed that could occur through a representative system that installed the "wisest members" into positions of power. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 39, 42 (1861).

287. *See* UNITED NATIONS DEMOCRACY FUND, HUNGER PROJECT, 2014 STATE OF PARTICIPATORY DEMOCRACY REPORT (2014), https://stateofparticipatorydemocracy.files.wordpress.com/2013/09/spdr14.pdf; *see also* Joel D. Wolfe, *A Defense of Participatory Democracy*, 47 REV. POL. 370, 371 (1985); Joel D. Wolfe, Book Review, *Varieties of Participatory Democracy and Democratic Theory*, 16 POL. SCI. REVIEWER 1, 1 (1986) (noting how three books in the mid-1980s

While the federal regulatory model provides all so-inclined citizens with equal access, the judicial equitable relief model favors only those who have the economic means of access. In this way, a citizen lawsuit urging equitable remedies in an area otherwise regulated through the federal regulatory model is in tension with the tenet of participatory democracy that counsels for egalitarian access.[288] Senator Muskie regaled his colleagues about how participatory democracy under the CAA would afford citizens the opportunity to "participate most actively" at the state and local level for fundamental enforcement decisions.[289] Participatory democracy is more about access than results, because access reduces the barriers between citizens and the political process, thereby promoting democracy.[290] The judicial system, however, limits access to adversaries with cognizable interests who have both the savvy and economic capability of participating. While today access—albeit possibly not influence—is open to virtually all in the administrative regulatory state, the same is not necessarily true in the judicial arena. A court is constrained by the parties before it, the arguments of counsel, and the lack of access by silent citizens. Unlike an administrative agency, moreover, a court need not respond to all legitimate interests and concerns. This was the unsuccessful argument raised by Diageo's counsel:

> Plaintiffs' preferred approach of regulation by tort law would negate the role that the CAA provides for public involvement in regulating sources of air emissions. Under the Act, members of the public are invited to provide input at every stage of regulation by submitting written comments, attending hearings, and petitioning for agency action. . . .
>
> The CAA relies on these public participation provisions to ensure that regulators are able to make informed decisions as to what emission control requirements are reasonable. . . .

"presuppose that participatory democracy is now needed more than ever as a solution to the crisis of liberal democracy"). In 2012, the prominent activist (and participant in drafting the Port Huron Statement) Tom Hayden wrote how "[t]he SDS call for a participatory democracy echoes today in student-led democracy movements around the world, even appearing as the first principle of the Occupy Wall Street September 17 declaration." Hayden, *supra* note 283. Indeed, Presidential Candidate Bernie Sanders's campaign was premised upon a "revolution" in political participation by the economic underclass against the powerful economic elite. *On The Issues*, BERNIE 2016, https://berniesanders.com/issues/ (last visited Nov. 1, 2016). This is the core issue for some participatory democracy advocates. *E.g.*, PETER BACHRACH & ARYEH BOTWINICK, POWER AND EMPOWERMENT: A RADICAL THEORY OF PARTICIPATORY DEMOCRACY ix–xi (1992) ("The widening gap between the powerful few who rule and the alienated many who are ruled threatens the very existence of American democracy.").

288. BACHRACH & BOTWINICK, *supra* note 287, at 133.

289. 116 CONG. REC. 32,903 (1970).

290. BACHRACH & BOTWINICK, *supra* note 287, at 133.

> But Plaintiffs' common law claims would shut out these interested persons from the process of determining what level of emission control is ultimately required for individual sources. Judges and juries hearing state common law claims are "confined by a record comprising the evidence the parties present," and opportunities for members of the public to become involved in a trial court proceeding and submit additional evidence are limited.[291]

Indeed, when the Second Circuit (with Judge Henry Friendly on the panel) removed the availability of *qui tam* (or private attorney general) actions for alleged violations of federal environmental laws—confirming the necessity of a citizen suit provision—it distinguished between private damage actions and public nuisances.[292] The court opined that the latter implicated matters of public policy that might stretch the concept of participatory democracy.[293]

Next, the claim that the judiciary can achieve better decisions than experts is most likely flawed.[294] Courts are not the appropriate venue for making informed decisions that necessitate continual management and review. Environmental law, as noted by Dan Tarlock, "is positive, science-based."[295] Yet while science acutely informs environmental decisions, it rarely dictates them. The CAA, for instance, requires that EPA consider health and welfare, along with an adequate margin of safety, when establishing national ambient air quality standards. However, as the recent debate over establishing new ozone standards illustrates,[296] no singular answer emerges—merely a choice amid a range

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291. Corrected Brief of Defendant-Appellant Diageo Americas Supply, Inc., *supra* note 78, at 33–35 (citations omitted) (quoting Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011)). Common law claims pose an unresolved jurisdictional dilemma. What happens, for instance, if a party frames the issue as separate from the CAA and part of a common law claim? When either the EPA or a state acting in the EPA's shoes approves a CAA permit, the challenge to that decision must first go to the Environmental Appeals Board (EAB) and then upon judicial review into the relevant circuit. When a state incorporates a new regulation into its State Implementation Plan (SIP) and receives EPA approval, a party may not go into U.S. district court to challenge that regulation under a supremacy theory, because that would bypass the normal approach toward reviewing the EPA's decisions in the courts of appeal. *See* Cal. Dump Truck Owners Ass'n v. Nichols, 784 F.3d 500, 502 (9th Cir. 2015).

292. Conn. Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 84 (2d Cir. 1972) (involving the Rivers and Harbors Act of 1899, with the court indicating citizens could act as private attorneys general only if Congress had expressly authorized such suits).

293. *Id.* at 89.

294. "One can argue whether expert witnesses in bench trials can replicate the resources that EPA can bring to bear in deciding appropriate emissions standards." North Carolina v. Tenn. Valley Auth., 615 F.3d 291, 304 (4th Cir. 2010).

295. Tarlock, *supra* note 260, at 666.

296. Amy Harder, *EPA Sets Stricter Standard for Ozone*, WALL ST. J. (Oct. 1, 2015), http://

of possibilities. When deciding whether to list a species as either endangered or threatened under the Endangered Species Act, the U.S. Fish and Wildlife Service may not consider costs.[297] Yet, while ample data may suggest a species is at risk, the Service still retains flexibility in deciding how to respond—including by not listing.[298] When managing natural resources—including rivers, lakes, national parks, and other public lands—decisions require a balancing of interests that naturally requires choices.[299] And the process is often iterative, dynamic, and subject to ongoing scrutiny. The CAA, for example, provides for periodically reviewing national ambient air quality standards.[300] The Endangered Species Act contemplates an occasional review to assess whether a species's designation under the Act warrants changing.[301] And today scholars argue that decisions must be susceptible to adaptive management.[302] Indeed, judgments about technological capability can be equally difficult. When Senator Muskie defended the CAA's assessment of the technological capability of the automobile industry, he observed how, if Congress were too optimistic, another Congress could always change any policy upon an adequate demonstration of need.[303] Critically, each of these processes affords the interested public a right to participate.

If we favor courts balancing equities in air nuisance cases, we must confront whether this limits participatory democracy, whether it entrusts the judiciary with a task for which it is not well-suited, and whether adaptive-management requirements and the pace of technological changes will turn the judiciary into another regulatory-type body. The New Deal advocates generally thought that Congress lacked sufficient competence to address sophisticated and dynamic problems, and correspondingly trusted that a broad delegation of decision-making

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www.wsj.com/articles/epa-to-set-stricter-air-pollution-standard-for-ozone-1443715727 (noting the new ozone standard reflects "an attempted compromise that left some businesses relieved and environmental and health leaders upset").

297. *See* SAM KALEN & MURRAY FELDMAN, ESA: ENDANGERED SPECIES ACT 17 (2d ed. 2012).

298. *Compare* Permian Basin Petroleum Ass'n v. Dept. of the Interior, 127 F. Supp. 3d 700, 712 (W.D. Tex. 2015) (challenge to listing decision), *with* 80 Fed. Reg. 59858 (Oct. 2, 2015) (finding that listing the greater sage-grouse was not warranted).

299. *See* Robert W. Adler, *Restoring the Environment and Restoring Democracy: Lessons from the Colorado River*, 25 VA. ENVTL. L.J. 55, 57 (2007) (describing how uncertainty and values often play a role in decision-making).

300. 42 U.S.C. § 7408(c) (2012).

301. *E.g.*, Humane Soc'y v. Jewell, 76 F. Supp. 3d 69, 79 (D.D.C. 2014) (delisting of grey wolf).

302. *See, e.g.*, Robin K. Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1 (2014).

303. 116 CONG. REC. 32,904 (1970).

authority to expert administrators would resolve that problem.[304] When the Supreme Court adjudicated the Ducktown smoke problem, it hired a Vanderbilt University professor.[305] In *Renken v. Harvey Aluminum (Incorporated)*,[306] evidence established that over 1,000 pounds of fluoride ion was escaping from an aluminum reduction plant and harming nearby agricultural lands. The judge inspected the facility and observed that "[t]here is no doubt . . . but that better controls can be exercised over the escape of the material in question. No sound reason has been advanced by defendant why hoods, similar to those employed by [another company], should not be installed."[307] When, more recently, Judge James Redden opted to retain jurisdiction over the management of the Columbia River basin, for protecting salmon populations, he too championed the need for expert assistance.[308] And when Congress debated the CAA citizen suit provision, it concluded that courts would have sufficient competence because the Act would "provide manageable and precise benchmarks for enforcement."[309]

But lack of trust in government is now pervasive. In his famous article *Tragedy of Distrust*, Professor Richard Lazarus describes a "pattern of regulatory failure" and a cycle of distrust of agencies, a cycle he suggests "results from the way in which our governmental institutions have

304. *See* Ackerman, *supra* note 120, at 1472 ("Instead of imposing a hard and fast solution on a complex and changing problem, the legislature should instead invite the agency to organize the expert knowledge required for intelligent regulation.").

305. MAYSILLES, *supra* note 188, at 220–21.

306. 226 F. Supp. 169 (D. Or. 1963).

307. *Id.* at 171. The court effectively "tried" the reasonableness of alternative control strategies and noted, even, that installing controls might necessitate passing on the costs to the consumer. *Id.* at 172. Oregon law already allowed claims (including for trespass) against aluminum reduction plants. *See* Martin v. Reynolds Metals Co., 342 P.2d 790, 794 (Or. 1959). By contrast, in *Reynolds Metals Co. v. Wand*, the court emphasized that the defendant had installed what apparently was the most modern pollution-control equipment. 308 F.2d 504, 506 (9th Cir. 1962). In *Arvidson v. Reynolds Metals Co.*, an aluminum plant originally constructed for the war effort caused considerable damage to nearby farms. 125 F. Supp. 481, 483 (W.D. Wash. 1954). That court noted, "Whether the [over $2 million] measures taken by defendant to minimize the escape of fluorides from its plant are the maximum possible consistent with practical operating requirements is yet to be determined, but apparently the American industry has not yet developed anything better." *Id.* And in *York v. Stallings*, the lower court issued an injunction requiring burning sawmill waste products at another location and limited nightly hours of operation—a conclusion the Oregon Supreme Court held lacked a meaningful evidentiary inquiry. 341 P.2d 529, 531, 535 (Or. 1959).

308. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d 1196, 1205 (D. Or. 2003). Judge Redden subsequently reflected his personal bias toward protecting salmon and against the destructive lower Snake River dams. *See* Aaron Kunz and David Steves, *Judge Redden on Saving Salmon: Tear down Those Dams*, EARTHFIX (Apr. 25, 2012), http://www.opb.org/news/article/judge-redden-on-saving-salmon-tear-down-those-dams/.

309. S. REP. NO. 91-1196, at 38 (1970).

responded to persistent public schizophrenia concerning environmental protection policy."[310] That cycle includes, for instance, occasionally radical shifts in enforcement activity and policy.[311] Many still remember how, when President Ronald Reagan appointed James Watt as Secretary of the Department of the Interior, the Department's culture and approach toward public lands shifted dramatically toward disposal rather than preservation. President Reagan's appointee to the EPA, Ann Gorsuch, equally sought to undermine the enforcement of waste, water, pesticide, and air programs. Distrust is only exacerbated when, for instance, the public learns that the Office of Management and Budget has watered down a particular rule for political rather than scientific reasons or that the Minerals Management Service (MMS) engaged in lax review of British Petroleum's (BP) Macondo Well exploration permit while some MMS employees shared an illicit cozy relationship with industry personnel—regardless of whether it had any impact on the BP review. This lack of trust in agencies imbued dialogues about citizen involvement in the late 1960s and early 1970s.[312] And it is still an elemental component of our political dialogue, fueled by the rhetoric of political campaigns.

The theory of regulatory capture, however, understates its limitations, at least in the environmental context. Much has occurred since the 1970s: several statutes now afford citizen participation, and Congress created additional agencies that often engage with their sister agencies. The current hydra-headed bureaucracy, for all its warts, serves as a check against aberrant agency behavior. After NEPA and § 309 of the 1970 CAA, the EPA reviews and grades every agency's Environmental Impact Statement, with a bad review often creating too high of a litigation risk

310. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROB. 311, 314, 321 (1991).

311. *See* William L. Andreen, *Motivating Enforcement: Institutional Culture and the Clean Water Act*, 24 PACE ENVTL. L. REV. 67, 71–72 (2007) ("EPA enforcement, unfortunately, is quite vulnerable to administrative or political manipulation because the level and quality of EPA enforcement activity is not particularly transparent."). Political ideology often affects the level or type of enforcement activity. *See generally* JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 40–59 (1995); Joel A. Mintz, "*Neither the Best of Times nor the Worst of Times": EPA Enforcement During the Clinton Administration*, 35 ENVTL. L. REP. 10,390 (2005) (analyzing "an era of sharp contrasts, bitter partisan conflicts and, toward its end, some bold innovations and significant strides for the Agency's enforcement efforts"); Joel A. Mintz, *"Treading Water": A Preliminary Assessment of EPA Enforcement During the Bush II Administration*, 34 ENVTL. L. REP. 10,933 (2004).

312. *E.g.*, Robert E. Lutz, II & Stephen E. McCaffrey, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L.Q. 561, 567–74 (1971).

for an agency to ignore.[313] Similarly, environmental documents are available not just for public scrutiny and input but also to other agencies for review and comment as well.[314] Many decisions involve more than one statute and correspondingly more than a single agency decision. This is particularly apparent in decisions triggering the Endangered Species Act.[315] Also, decisions involving public lands often involve collaboration (and thus "checks") among various agencies, including the Bureau of Land Management, the National Park Service, the Fish and Wildlife Service, the United States Forest Service, the National Marine Fisheries Service, and occasionally the Department of Justice. This evidently occurred in the well-publicized decision not to list the sage grouse.[316] And, of course, added to the list is the Council on Environmental Quality, within the Executive Office, which Congress created in NEPA and which often engages, on matters of importance, with multiple agencies. Indeed, in conversations about agency consolidation that occurred when I was in the government, a common refrain was that multiple agencies checked their sister agencies' behavior. In short, while agency independence and freedom from political influence and pressure may have appeared problematic in 1970, the issue today is far more complex.[317]

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313. *See* S. REP. NO. 91-1196, at 44 ("Mission-oriented agencies often lack the expertise to give adequate evaluation to the environmental impact of their own activities.").

314. *See* Comment, *Section 309 of the Clean Air Act: EPA's Duty to Comment on Environmental Impacts*, 1 ENVTL. L. REP. 10,146 (1971). The Bureau of Reclamation and California's attempt to address the urgent problems confronting the Bay Delta prompted letters from the EPA commenting on the draft environmental analysis. *See, e.g.*, Memorandum from EPA Region IX to David Murillo, Regional Dir., Bureau of Reclamation, Supplemental Draft Environmental Impact Statement Bay Delta Conservation Plan/California WaterFix CEQ#20150196 (Oct. 30, 2015), https://www.epa.gov/sites/production/files/2015-10/documents/waterfix-ltr-murillo-103015.pdf.

315. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. § 1531 (2012)).

316. 80 Fed. Reg. 59858-01 (Oct. 2, 2015) ("[L]isting the greater sage-grouse is not warranted . . . .").

317. One aspect of the current dialogue surrounding agencies is the extent they ought to be susceptible to political influence. *See* David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1502 (2015) ("[T]here is tremendous diversity in the structural features that make agencies responsive to democratically elected officials."); *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 555 (2003) ("[S]uggest[ing] that we move forward by examining more directly the concern for arbitrariness."); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 842 (2013) (finding that "there is no binary distinction between agency types [as either independent or executive]"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2384 (2001) (concluding that presidential administration "both satisfies legal requirements and promotes the values of administrative accountability and effectiveness"); Lawrence Lessig &

Conversely, lawyers tend to take a leap of faith and trust that the adversarial-based judicial system is—albeit not entirely—immune from the modern critique confronting agencies. When Sax advocated an enhanced judicial role for environmental protection, he expressed a decided preference for having courts rather than agencies make public policy choices.[318] Elsewhere, Sax testified that judges could hear and evaluate the testimony of technical experts.[319] Another CAA witness (a trial lawyer) intimated that, more specifically, federal, but not state, judges would need to make those choices.[320] State judges, after all, appear more susceptible than federal judges to the sort of undue influences confronting agencies. At least at state high courts, judges occasionally reflect the biases of the dominant trial bar—plaintiff or defendant.[321]

Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 119 (1994) (arguing that "that the belief in a unitary executive does not derive from the framers themselves").

318. Sax explained how "[t]he new ecological perspective" that agencies "have been asked to respond [to] implements a fundamental modification in the nature of the questions before them. To ask an agency to accommodate," for instance, "the demand for roads with the demand for parks and low-cost housing is to thrust upon them far-reaching public policy choices." Sax, *supra* note 115, at 74. And "[t]o make such choices, traditional administrative agencies are peculiarly ill-suited." *Id.* Today, however, that is precisely what agencies are now more capable of doing than they were in 1970.

319. *EPA Hearings*, *supra* note 138, at 30. Sax was troubled by the Justice Department's insensitivity toward promoting citizen engagement and environmental protection. *Id.* at 32. And when addressing the biases of agencies, he added that "the heart of the problem" is that some agencies are "single-minded[]" and have "limited expertise." *Id.* at 33.

320. *Air Pollution Hearings, Part 2*, *supra* note 138, at 823 ("I think the Federal courts are needed because the State judges in many States are required to run in an election contest, with political considerations, even though not consciously, certain subconscious feelings, I think, would affect any judge, no matter how honest he wants to be. This situation, the effects of political matters, in my opinion, does not exist as much in the Federal Courts as it does in the State Courts.") (statement of Mr. Preiser). State judiciaries at the time were reforming, focusing on merit-based selection and tenure, including a wider adoption of the Missouri Plan (judicial retention elections). Glenn R. Winters and Robert E. Allard, *Judicial Selection and Tenure in the United States*, *in* THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 146, 152 (Harry W. Jones ed., 1965). *See generally* RICHARD A. WATSON & RONALD G. DOWNING, POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN (1969).

321. THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF LAISSEZ FAIRE REVIVAL 278 (2013) (stating "the high courts in several important states have become dominated by judges who lean heavily toward defendants in" certain types of cases). The academe continues exploring judicial selection processes and the role of politics and money at the state court level. *See* James C. Foster, *Rethinking Politics and Judicial Selection During Contentious Times*, 67 ALB. L. REV. 821, 821–22 (2004). Politics is not necessarily "Democratic" or "Republican" but instead can include embedded ideological biases influencing judicial decision-making. *See* Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naïve Legal Realism*, 83 ST. JOHN'S L. REV. 231, 239 (2009). The reader might be familiar with the true story behind John Grisham's *The Appeal* (2008), which involves the West Virginia judiciary and a coal company's effort to purchase freedom from liability. *See* LAURENCE LEAMER, THE PRICE OF JUSTICE: A TRUE STORY OF GREED AND CORRUPTION (2014) (discussing Caperton v.

CONCLUSION

It should now be clear that understanding how judges craft a workable association between state common law claims and regulatory programs entails much more than the type of analysis employed to date, as in cases such as *Cheswick Generating Station*, *Merrick*, and *Freeman*. These cases confirm what should be unassailable: The legislative history of the CAA demonstrates that the Act does not preempt damage claims. But that history equally illustrates that the citizen suit provision stopped shy of Professor Sax's vision. Congress chose instead to limit the emerging participatory democracy model and accepted the progressive paradigm of expert administers, albeit with citizen oversight—breaking down barriers to citizen access to the courts. In doing so, Congress ushered in a form of cooperative federalism that afforded layered governance, with the states able to impose stricter standards than those established at the federal level. But to avoid the preemption doctrine, which had grown to eclipse the DCC as a limit on state and local authority, the drafters necessarily fashioned a broad savings clause—one that preserved common law damage claims as well as state enforcement under state statutory or regulatory programs. While this decision doubtless avoided disrupting the state and local pollution abatement programs that extended back decades, it left unresolved precisely how the savings clause might operate for common law claims seeking affirmative injunctive relief.

In *Freeman*, the court declined to answer whether the CAA preempts particular injunctive relief.[322] But why? If the rationale for allowing state common law claims is that states may impose stricter standards than the EPA, then an actual conflict analysis seems inapt. If, for instance, one treats the savings clause as equating state courts with states for purposes of preserving claims, and states may exceed federal standards, then a conflict ought not arise. Conversely, if one distinguishes state courts from state political or regulatory bodies, the rationale for allowing the savings clause to sweep broadly is weakened.

Massey Coal Co., 556 U.S. 868 (2009)). Other state courts have received scrutiny as well. *See* Nelson P. Miller, *"Judicial Politics": Restoring the Michigan Supreme Court*, MICH. B.J., Jan. 2006, at 38, 38 (discussing loss of confidence in the judiciary). *Citizens United* magnified the problem with state judicial elections and lax recusal standards. *See* Editorial, *Judicial Elections and Recusal Standards*, 97 JUDICATURE 69 (2013); *see also Experts: Judicial Elections Are More Politicized*, CJONLINE.COM (Jan. 4, 2015, 6:35 PM), http://cjonline.com/news/2015-01-04/experts-judicial-elections-are-more-politicized ("Legal experts are predicting that elections to decide whether to retain judges will continue to become more politicized . . . ."). Another example is the campaign by an Alabama Supreme Court judge who was willing to defy the Constitution and the Supreme Court. Kim Chandler, *Roy Moore: No Gay Marriage in Alabama*, U.S. NEWS (Jan. 6, 2016), http://www.usnews.com/news/articles/2016-01-06/supreme-court-of-alabama-chief-roy-moore-rejects-gay-marriage-again.

322. *See supra* note 29 and accompanying text.

The issue, then, is not whether the CAA preempts the claim, but rather whether the state through its legislature or regulatory action has withdrawn the availability of a common law claim for injunctive or other relief that requires the installation of particular technology.[323] In 1967, after all, Congress established its continuing preference "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments."[324] And states today may signal, through either CAA state-implementation plans or individual permits, that permittees remain susceptible to state common law claims. Here, both *Diageo* and *Cheswick Generating Station* are illustrative. In *Diageo*, the permit expressly incorporated a nuisance provision.[325] So too, in *Cheswick Generating Station*, the permit explicitly alerted the permittee that it would be subject to common law claims.[326]

Overlapping programs that address the same activity is neither novel nor problematic.[327] States are adept at expressly removing, or adjusting, common law claims, as they have done through right-to-farm laws targeting noxious odors.[328] But until states begin—if at all—to confront this issue, a serious issue will persist: How should courts respond absent sufficient state legislative or regulatory guidance? In 1971, the Chief of the New York Times Los Angeles Bureau indicated that the adversarial

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323. For an exploration of the separate issue of whether a federal agency may preempt state law through regulatory action, see Kent Barnett, *Improving Agencies' Preemption Expertise with* Chevmore *Codification*, 83 FORDHAM L. REV. 587 (2014).

324. Air Quality Act of 1967, Pub. L. No. 90-148, sec. 101(a)(3), 81 Stat. 485 § 101(a)(3) (codified as amended at 42 §§ U.S.C. 7401–7671 (2012)).

325. *See supra* note 46 and accompanying text.

326. *See supra* note 45 and accompanying text.

327. *E.g.*, Little Hocking Water Ass'n, Inc. v. E.I. du Pont Newmours & Co., 91 F. Supp. 3d 940, 965 (S.D. Ohio 2015) (air emissions under the Resource Conservation and Recovery Act); *cf*. Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry., 764 F.3d 1019 (9th Cir. 2014) (emission of diesel particulate matter from exhausts at railroad yard not actionable under the Resource Conservation and Recovery Act).

328. *See, e.g.*, Dalzell v. Country View Family Farms, LLC., 517 F. App'x 518, 519 (7th Cir. 2013); Powell v. Tosh, 942 F. Supp. 2d 678, 693 (W.D. Ky. 2013); Vill. of Lafayette v. Brown, 27 N.E.3d 687, 693 (Ill. App. Ct. 2015); *see also* McVicars v. Christensen, 320 P.3d 948, 952–53 (Idaho 2014) (holding Farm Act inapplicable to indoor horse arena); *cf.* Bridget Huber, *Law and Odor: How to Take Down a Terrible-Smelling Hog Farm*, MOTHER JONES (May/June 2014), http://www.motherjones.com/environment/2014/04/terrible-smell-hog-farms-lawsuits. Ignoring a Farm Act's prescriptions may vitiate immunity from nuisance claims. *See, e.g.*, Aana v. Pioneer Hi-Bred Int'l., Inc., No. 12-00231 LEK-BMK, 2015 WL 1534445, at *3 (D. Haw. Apr. 3, 2015). States, for instance, may decide to remove equitable relief in nuisance claims for air emissions regulated under the CAA but then provide that such relief may be available if the emitter violates any requirements under the CAA. This might deter CAA violations. Of course, the difficulty might be in having the state court adjudicate whether a CAA act violation has occurred as an element of a defense to the nuisance suit. *Cf.* Williamstown Twp. v. Hudson, No. 321306, 2015 WL 2437172, at *1 (Mich. Ct. App. May 19, 2015) (examining defense to Farm Act).

political system could address the "extraordinary problem of air pollution" as an apolitical issue.[329] But today, unfortunately, it is political, and so perhaps the best solution is for courts to employ a presumption that common law injunctive relief claims for activities otherwise regulated under the CAA are unavailable under state law until the relevant state says otherwise. This, after all, might best reflect the premise of the original Act: leaving primary implementation to the states and their political judgment.

329. Gladwin Hill, *The Politics of Air Pollution: Public Interest and Pressure Groups*, 10 ARIZ. L. REV. 37, 39 (1968).