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Matthew Renick

Boston College Law School, matthew.renick@bc.edu

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WHY THE THIRD CIRCUIT PRO-COOPERATIVE FEDERALISM PREEMPTION HOLDING IN *BELL* SHOULD ULTIMATELY BE ADOPTED BY THE SUPREME COURT

MATTHEW RENICK*

Abstract: In *Bell v. Cheswick Generating Station*, the U.S. Court of Appeals for the Third Circuit reversed a decision by the U.S. District Court for the Western District of Pennsylvania, holding that state common law tort actions were not preempted by the federal Clean Air Act (“CAA”). The Third Circuit found that the savings clause of the CAA was nearly identical to that of the Clean Water Act (“CWA”), which had already been found to not preempt state common law tort actions by the U.S. Supreme Court. This Comment argues that the Third Circuit correctly compared the savings clauses of the CAA and the CWA. Further, it argues that the Supreme Court, with its history of allowing states to add to baseline federal safety legislation, would permit this action to stand. It then suggests that the Supreme Court should address the circuit split between the U.S. Courts of Appeals for the Third and Fourth Circuits on this issue, and predicts that the Court would come down on the side of the Third Circuit’s permissive analysis.

INTRODUCTION

According to Scientific American, fly ash—a by-product of burning coal in power plants—carries 100 times more radiation than the waste from a similarly sized nuclear power plant.¹ Fly ash can leach into the soil and water surrounding a coal-fired plant, which can affect crops, groundwater, and ultimately food sources.² Further, people living within a one-mile radius of a coal-fired plant are exposed to the potential of ingesting this radiation.³ Kristie Bell, Joan Luppe, and the other plaintiffs in the class action case *Bell v. Cheswick Generating Station* realized the consequences of living near a coal-fired power plant.⁴ Fly ash from the Cheswick Generating Station regularly

* Matthew Renick, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2014–2015.

¹ Mara Hvistendahl, *Coal Ash Is More Radioactive Than Nuclear Waste*, SCIENTIFIC AM. (Dec. 13, 2007), <http://www.scientificamerican.com/article/coal-ash-is-more-radioactive-than-nuclear-waste/>, archived at <http://perma.cc/752X-DC2P>.

² *Id.*

³ *Id.*

⁴ See *Bell v. Cheswick Generating Station (Bell II)*, 734 F.3d 188, 189, 192 (3rd Cir. 2013).

settled on their properties, requiring constant cleaning and leaving them feeling like “prisoners in their own homes.”⁵

“Coal-fired power plants produce more . . . hazardous air emissions than any other industrial pollution source.”⁶ These plants are responsible for 386,000 tons of air pollutants every year, and contribute over forty percent of the mercury emissions in the United States.⁷ Despite this, coal has been the largest domestic source of electricity generation for over sixty years, and constituted thirty-nine percent of domestic total net generation in 2013.⁸

The United States has “the largest estimated recoverable reserves of coal in the world,” and has enough coal to keep burning at current levels for 200 years.⁹ In 1970, in response to the growth in the amount of air pollution in the United States, Congress adopted the Clean Air Act (“CAA”) “to protect the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”¹⁰ To achieve those goals, the CAA, as implemented by the Environmental Protection Agency (EPA), sets National Ambient Air Quality Standards (“NAAQS”) that limit the concentration of listed air pollutants to certain maximum amounts.¹¹ NAAQS limitations apply to each state through state implementation plans and to certain electricity-generating power stations,¹² and they are enforced by EPA through air-permit programs.¹³ Each power plant is thus regulated at both the federal and state levels.¹⁴

The Supremacy Clause of the U.S. Constitution holds that federal law will be binding upon the laws of the states, and that federal law generally

⁵ *Id.* at 192.

⁶ AM. LUNG ASS’N, TOXIC AIR: THE CASE FOR CLEANING UP COAL-FIRED POWER PLANTS I (2011), available at <http://www.lung.org/assets/documents/healthy-air/toxic-air-report.pdf>.

⁷ *Id.* at 1–2.

⁸ *Energy in Brief: What Is the Role of Coal in the United States?*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energy_in_brief/article/role_coal_us.cfm (last updated June 2, 2014), archived at <http://perma.cc/U46X-A5R6>.

⁹ *Id.*

¹⁰ Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401–7671 (2012)).

¹¹ See 42 U.S.C. § 7409(b).

¹² 42 U.S.C. § 7410(a)(1), (2)(C); see 40 C.F.R. § 52.21(b) (2015).

¹³ See generally *Air Quality Planning and Standards: Air Permit Programs*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/airquality/permjimp.html> (last updated Oct. 8, 2014), archived at <http://perma.cc/ZQ57-VKFP> (“The purpose of title V permits is to reduce violations of air pollution laws and improve enforcement of those laws.”).

¹⁴ *Bell II*, 734 F.3d 188, 190 (3rd Cir. 2013); see also *Electric Power Generation, Transmission, and Distribution (NAICS 2211)*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/regulatory-information-sector/electric-power-generation-transmission-and-distribution-naics-2211> (last updated Feb. 12, 2015), archived at <http://perma.cc/D7ET-PVPH> (listing applicable federal laws and providing a link to state law resources).

takes precedence over state law.¹⁵ The CAA attempted to resolve the issue of preemption by employing a “cooperative federalism” structure, under which the individual states, in adhering to the statute, build upon basic federal requirements.¹⁶ As part of this idea, the CAA includes a citizen suit provision, within which there is a “savings clause.”¹⁷

In April 2012, a group of approximately 1500 individuals residing near the Cheswick Generating Station (the “Plant”) filed a class action lawsuit in a Pennsylvania state court against the owners of the Plant (“GenOn” or the “Defendant”), “under several state law tort theories.”¹⁸ After removing the case to federal court, GenOn argued that because the plant is regulated under the CAA, it could not be sued under state tort law.¹⁹ After the district court dismissed the case,²⁰ plaintiffs appeals to the U.S. Court of Appeals for the Third Circuit.²¹ Upon review, the Third Circuit reversed and remanded the case, holding that the CAA does not preempt state common law tort actions.²²

This Comment argues that the Third Circuit correctly interpreted the savings clause of the citizen suit provision of the CAA as allowing source state common law tort claims.²³ The court’s careful textual comparison of the savings clause provision of the CAA and of the Clean Water Act (“CWA”) revealed virtually identical language and purpose in the statutes.²⁴ Because the U.S. Supreme Court had already ruled that the savings clause of the CWA does not preempt source state tort law claims, the Third Circuit correctly applied that ruling to its analysis in this case.²⁵ Furthermore, the Supreme Court has a history of allowing states to build upon federal safety legislation.²⁶ This Comment thus argues that the Court should resolve the circuit split on this issue between the Third Circuit and the U.S. Court of Appeals for the Fourth Circuit by applying the Third Circuit’s reasoning in *Bell*.²⁷

¹⁵ U.S. CONST. art. VI, § 2; see *Supremacy Clause*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/supremacy_clause (last visited Mar. 23, 2015), archived at <http://perma.cc/9ABS-DWCS>. When federal law conflicts with state law, it “displaces, or preempts, state law.” *Preemption*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/preemption> (last visited Mar. 23, 2015), archived at <http://perma.cc/8EGJ-KG44>.

¹⁶ See *Bell II*, 734 F.3d at 190.

¹⁷ *Id.* at 191.

¹⁸ *Id.* at 189 n.1.

¹⁹ *Id.* at 189.

²⁰ *Id.*

²¹ *Id.* at 190.

²² *Id.*

²³ See *infra* notes 97–132 and accompanying text.

²⁴ See *Bell II*, 734 F.3d at 196.

²⁵ See *id.*; *infra* notes 100–106 and accompanying text.

²⁶ See *infra* notes 113–122 and accompanying text.

²⁷ See *infra* notes 113–132 and accompanying text; see also Samantha Caravello, *Bell v. Cheswick Generating Station*, Comment, 38 HARV. ENVTL. L. REV. 465, 471 (2014) (noting the circuit split).

I. FACTS AND PROCEDURAL HISTORY

Owned and operated by GenOn, the Cheswick Generating Station is a 570-megawatt coal-fired electrical generation facility located in Springdale, Pennsylvania.²⁸ Kristie Bell and Joan Luppe represented the Plaintiff class (“Plaintiffs” or the “Class”), which included more than 1500 individuals who owned or inhabited residential property within one mile of the Plant.²⁹

On April 19, 2012, Plaintiffs commenced the action against GenOn in the Court of Common Pleas of Allegheny County, Pennsylvania.³⁰ Plaintiffs alleged that GenOn’s “operation, maintenance, control[,] and use” of the Plant caused damage to their properties and resulted in their inhalation of odors and in the deposit of coal dust and fly ash on their properties.³¹ They also claimed that the “atmospheric emissions” produced by the Plant “[fell] upon their properties” and remained either as “black dust” or “white powder,” precluding the full use and enjoyment of their homes.³² Plaintiffs then alleged that GenOn was notified of their complaints, and yet did nothing to resolve the issue.³³ Further, they alleged that GenOn “knew of or allowed the improper construction and operation of the [Plant] and that [it] continues to operate the . . . [P]lant without proper or best available technology or any proper air pollution control equipment”³⁴ The class sought to recover “compensatory and punitive damages under four . . . common law tort theories: (I) nuisance; (II) negligence and recklessness; (III) trespass; and (IV) strict liability.”³⁵

GenOn removed the case to the U.S. District Court for the Western District of Pennsylvania based on diversity of citizenship, and moved to dismiss the action on the grounds that the CAA preempted the Plaintiff’s state law tort claims.³⁶ In October 2012, the district court dismissed the case.³⁷ The court reasoned that the CAA preempted all of the Class’s state law claims because, “[b]ased on the extensive and comprehensive regulations promulgated by the administrative bodies which govern air emissions from electrical generation facilities, . . . to permit the common law claims would be inconsistent with

²⁸ *Bell v. Cheswick Generating Station (Bell I)*, 903 F. Supp. 2d 314, 314–15 (D. Pa. 2012), *rev’d*, 734 F.3d 188 (3rd Cir. 2013).

²⁹ *Id.* at 315.

³⁰ *Id.* at 314–15.

³¹ *Id.*

³² They were constantly cleaning and considered themselves “prisoners in their . . . own . . . homes.” *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 315–16.

³⁶ *Bell II*, 734 F.3d 188, 193 (3rd Cir. 2013).

³⁷ *Id.*

the dictates of the [CAA].”³⁸ The district court summarized the “extensive regulatory framework governing the Plant” and its operation.³⁹ It then examined whether the CAA preempted the state law tort claims, or whether the savings clause in the citizen suit provision allowed the claims to survive.⁴⁰ It determined that due to the regulations promulgated by pursuant to the CAA, permitting the state law claims would be “inconsistent with the [statute’s] dictates”⁴¹

In 2013, the Class appealed to the Third Circuit.⁴² The Third Circuit reversed the ruling of the district court, holding that “source state common law actions are not preempted” by the CAA.⁴³ The court determined that, according to a plain language reading of the statute, as well as the controlling Supreme Court precedent, the savings clause protected such state tort actions.⁴⁴ Additionally, the court compared the CAA’s savings clause to the CWA’s savings clause, and found no definitive differences between the two.⁴⁵

II. LEGAL BACKGROUND

The Supremacy Clause of Article VI of the U.S. Constitution states that federal law “shall be the supreme Law of the Land.”⁴⁶ The Supreme Court interprets the function of the Supremacy Clause as a preemption of any state law that “interferes with or is contrary to federal law”⁴⁷ The U.S. Court of Appeals for the Third Circuit has held that preemption can occur in one of three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption.⁴⁸

Express preemption occurs when Congress expresses “an explicit statement of intent to preempt state or local law and sets forth the scope of that preemption”⁴⁹ Field and conflict preemption—which fall under the larger category of “implied preemption”—occur in instances where Congress’s intent to preempt “is not clearly stated.”⁵⁰ Field preemption can be inferred when “[t]he scheme of federal regulation may be so pervasive as to make rea-

³⁸ *Id.* (quoting *Bell I*, 903 F. Supp. 2d at 322).

³⁹ *Id.*

⁴⁰ *See Bell I*, 903 F. Supp. 2d at 321–23.

⁴¹ *Bell II*, 734 F.3d at 193.

⁴² *Id.*

⁴³ *Id.* at 190.

⁴⁴ *Id.*

⁴⁵ *Id.* at 194–97.

⁴⁶ U.S. CONST. art. VI, § 2.

⁴⁷ *Free v. Bland*, 369 U.S. 663, 666 (1962).

⁴⁸ *Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3rd Cir 2010).

⁴⁹ Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1259 (2010).

⁵⁰ *Id.*

sonable the inference that Congress left no room for the States to supplement it.⁵¹ Alternatively, field preemption will be implied when an “[a]ct of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”⁵² Finally, conflict preemption nullifies state law when it conflicts with federal law, either when it is impossible to comply with both laws or when state law blocks full execution of the federal law.⁵³

According to the U.S. Supreme Court, there are “two cornerstones of . . . pre-emption jurisprudence” that must guide a preemption analysis.⁵⁴ First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.”⁵⁵ Second, when “Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . [there is an] assumption that the historic police powers of the State were not to be superseded by the Federal Act,” unless it was made clear by Congress.⁵⁶ Preemption analysis thus seeks to prevent states from disturbing the regulatory balance “set by a federal agency or Congress.”⁵⁷

The Clean Air Act (“CAA”) employs “cooperative federalism,” meaning that it “authorizes the Environmental Protection Agency (the “EPA”) to establish air quality standards and empowers the states to achieve those standards.”⁵⁸ The CAA promotes further federal-state interactions by requiring states to implement national ambient air quality standards (“NAAQS”) through individualized state implementation plans (“SIPs”).⁵⁹ The CAA then requires states to submit the SIPs to the EPA for approval.⁶⁰

In the spirit of cooperative federalism, the CAA allows for states to implement additional requirements and enforcement mechanisms for air quality regulations.⁶¹ The CAA also “contains savings clauses that preserve certain causes of action notwithstanding the comprehensive federal regulatory scheme.”⁶² These savings clauses include a provision that aims to preserve states’ rights.⁶³ One such clause, in section 116, states, “nothing . . . shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce . . . any standard or limitation respecting emissions of air pollutants

⁵¹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231 (1946).

⁵² *Id.*

⁵³ *Farina*, 625 F.3d at 115.

⁵⁴ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

⁵⁵ *Id.* (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

⁵⁶ *Id.* (citing *Medtronic*, 518 U.S. at 485).

⁵⁷ Caravello, *supra* note 27, at 466.

⁵⁸ *GenOn REMA, LLC v. Env'tl. Prot. Agency*, 722 F.3d 513, 516 (3rd Cir. 2013).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Clean Air Act, 42 U.S.C. § 7416 (2012).

⁶² Caravello, *supra* note 27, at 467.

⁶³ *See* 42 U.S.C. § 7416.

...⁶⁴ Accordingly, the CAA establishes only minimum air quality levels and leaves the states “free to adopt more stringent protections.”⁶⁵

Although the Supreme Court has never ruled on the convergence of state common law tort claims and the savings clause in the context of the CAA, it did address the analogous clause in the Clean Water Act (“CWA”).⁶⁶ In *International Paper Co. v. Ouellette*, the Court held that the CWA savings clause preserves state actions that are compatible with the Act, and therefore “nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State.”⁶⁷ The CWA allows states to “impose higher standards on their own point sources,” thus allowing states to “adopt more stringent limitations . . . through state nuisance law, and apply them to in-state dischargers.”⁶⁸ The *Ouellette* Court further stated that, “application of the source [s]tate’s law does not disturb the balance among federal . . . and affected-state interests.”⁶⁹ *Ouellette* restricts the application of state law to the *source* state, and holds that only applying another state’s law to the source state would be preempted by the CWA.⁷⁰

The Supreme Court has stated that the citizen suit savings clause of the CWA is “virtually identical” to its counterpart in the CAA.⁷¹ Furthermore, *Ouellette* has been relied on by both the U.S. Courts of Appeals for the Sixth and Fourth Circuits to support similar contentions with respect to the CAA’s savings clause.⁷² In *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, the Sixth Circuit held that the CAA did not preempt the state law claims under the Michigan Environmental Protection Act.⁷³ The court held that the CAA takes precedence over state law only when the state law does not meet the federally mandated minimum requirements.⁷⁴

The Fourth Circuit cited to *Ouellette* in *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, in which it found that the CAA’s savings clause

⁶⁴ *Id.*

⁶⁵ *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 336 (6th Cir. 1989).

⁶⁶ *See* Clean Water Act, 33 U.S.C. § 1151 (2012); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987).

⁶⁷ 479 U.S. at 497.

⁶⁸ *Id.* (quoting *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 328 (1981)).

⁶⁹ *Id.* at 498–99.

⁷⁰ *Id.* at 496, 499.

⁷¹ *See City of Milwaukee*, 451 U.S. at 328; *see also* 33 U.S.C. § 1251(g) (“It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated[,] or otherwise impaired by this chapter.”).

⁷² *See North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 304 (4th Cir. 2010) (citing *Ouellette*, 479 U.S. at 494); *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989).

⁷³ *Her Majesty the Queen*, 874 F.2d at 334.

⁷⁴ *Id.* at 342.

and the CWA's savings clause were "similar."⁷⁵ The Fourth Circuit reviewed a district court injunction that ordered the Tennessee Valley Authority ("TVA") to immediately install emission controls at four power plants in Alabama and Tennessee.⁷⁶ A nuisance suit had been brought by the state of North Carolina, claiming its air quality had been degraded as a result of the TVA plants' emissions.⁷⁷ The Fourth Circuit overturned the district court decision and dissolved the injunction, holding that the CAA preempted North Carolina from bringing the suit.⁷⁸ The court held that the district court had erroneously applied the law of the affected state to the source state.⁷⁹ In so holding, the Fourth Circuit found that TVA had complied with the laws of the source state, and reasoned that, per *Ouellette*, the suit would have been allowed had TVA violated the law of the source state.⁸⁰

The Supreme Court has addressed the state common law tort preemption question, but not in cases concerning the CAA or the CWA.⁸¹ In *Freightliner Corp. v. Myrick*, the Court held that a Georgia state common law tort claim was not preempted by the National Traffic and Motor Vehicle Safety Act ("NTMVSA").⁸² In this case, the plaintiffs brought a common law action alleging negligent design defects in equipment—specifically brakes—manufactured by the defendants.⁸³ The estates of the decedent plaintiffs argued that the lack of ABS brakes on two 18-wheel trucks caused the plaintiffs' deaths.⁸⁴ The Supreme Court noted that the NTMVSA contained a savings clause stating that compliance with the Act would not exempt a person from common law liability.⁸⁵ The Court thus held that Georgia was free to establish or continue its own safety standards in addition to the NTMVSA, provided that it was still possible to comply with both the federal and state laws.⁸⁶ The Court further held that the NTMVSA did not explicitly or implicitly preempt the state common law claims asserted.⁸⁷

In *Sprietsma v. Mercury Marine*, the Supreme Court held that the Federal Boat Safety Act ("FBSA") did not preempt the plaintiff from bringing an Illinois state common law tort action, because the FBSA's savings clause did

⁷⁵ 615 F.3d at 304 (citing *Ouellette*, 479 U.S. at 494).

⁷⁶ *Id.* at 296.

⁷⁷ *See id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.*

⁸¹ *See* *Sprietsma v. Mercury Marine*, 537 U.S. 51, 54 (2002); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 282 (1995).

⁸² 514 U.S. at 283.

⁸³ *Id.* at 282–83.

⁸⁴ *Id.*

⁸⁵ *Id.* at 284.

⁸⁶ *Id.* at 286.

⁸⁷ *Id.* at 286–87.

not relieve a person from liability under state law.⁸⁸ In this case, the plaintiff's wife was killed in a boating accident when a propeller manufactured by the defendant struck her.⁸⁹ The Supreme Court held that the FBSA's express preemption clause did not extend to the plaintiff's common law claims, and that Act's statutory scheme did not implicitly preempt the plaintiff's claims.⁹⁰ The Court further held that the Coast Guard's decision not to regulate propeller guards did not preempt the plaintiff's claim because that decision was simply preserving the power of the states to choose to regulate propeller guards.⁹¹

Although the Supreme Court displayed consistency in *Sprietsma* and *Freightliner*, it has held differently on this same issue in the past.⁹² In *Geier v. American Honda Motor Co., Inc.*, the Court held that the Federal Motor Vehicle Safety Standard ("FMVSS") preempted a state common law tort claim.⁹³ In this case, the plaintiff, while driving an automobile not equipped with passive restraints, was seriously injured during a crash.⁹⁴ The plaintiff sued under District of Columbia tort law alleging negligence.⁹⁵ The Supreme Court ruled that this was an example of conflict preemption, as the claim was in direct conflict with FMVSS.⁹⁶

III. ANALYSIS

In *Bell v. Cheswick Generating Station*, the U.S. Court of Appeals for the Third Circuit overturned the ruling of the U.S. District Court for the Western District of Pennsylvania.⁹⁷ The Third Circuit held that the Clean Air Act ("CAA") did not preempt the plaintiff's state common law tort claims, focusing its analysis on the similarities of the language between the Clean Water Act's ("CWA") savings clause and the CAA's savings clause.⁹⁸ The court determined that the U.S. Supreme Court's decision in *International Paper Co. v. Ouellette* controlled because the pollution was based, and the lawsuit was brought, in a single source state.⁹⁹

In *Bell*, the Third Circuit held that the Supreme Court's reasoning in *Ouellette* with respect to the CWA should apply to the CAA savings clause at

⁸⁸ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002).

⁸⁹ *Id.* at 54.

⁹⁰ *Id.* at 62–64.

⁹¹ *See id.* at 64–65.

⁹² *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 865 (2000).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 872; *see supra* note 53 and accompanying text (defining conflict preemption).

⁹⁷ 734 F.3d 188, 190 (3rd Cir. 2013).

⁹⁸ *Id.* at 196–97.

⁹⁹ *Id.*; *see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987).

issue.¹⁰⁰ The court reasoned that although *Ouellette* dealt with the CWA specifically, the text of the CWA savings clause and that of the CAA savings clause revealed, “there is no meaningful difference between them.”¹⁰¹ The court explained that the only meaningful difference between the two savings clauses was the CWA’s reference to the boundary waters of states.¹⁰² It nonetheless concluded that this omission from the CAA does not “preempt all state law tort claims.”¹⁰³ The court then cited other cases—including *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit* and *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*—that evince strong similarities between the CAA and CWA.¹⁰⁴

Citing *Her Majesty the Queen* and *Cooper*, the Third Circuit concluded that the Supreme Court’s decision in *Ouellette* had adequately addressed GenOn’s public policy concerns.¹⁰⁵ Further, the court rejected GenOn’s claim that the lawsuit should be barred by the political question doctrine, stating “no court has ever held that such a constitutional commitment of authority regarding the redress of individual property rights for pollution exists in the legislative branch.”¹⁰⁶

Although the question of preemption of state common law by the CAA presented an issue of first impression for the Third Circuit, it has been previously examined in the Fourth Circuit, which reached a different result.¹⁰⁷ Notably, in *Cooper* the Fourth Circuit held that the CAA preempted the nuisance action brought by the plaintiffs.¹⁰⁸ The Fourth Circuit stated that allowing North Carolina to impose its own laws on power plants already regulated by the CAA would lead to differing rules all over the country and uncertainty regarding industry regulations.¹⁰⁹ The Fourth Circuit’s consideration of *Ouellette*, however, was incompatible with the Third Circuit’s analysis in *Bell*.¹¹⁰ The Fourth Circuit cited *Ouellette* to highlight its conclusion that having dif-

¹⁰⁰ *Bell*, 734 F.3d at 196–97; see *Ouellette*, 479 U.S. at 498–99.

¹⁰¹ *Bell*, 734 F.3d at 195; see *Ouellette*, 479 U.S. at 498–99.

¹⁰² This, the Court noted, is not applicable to the CAA (as there are no jurisdictional boundaries between states in the air), and as such the two savings clauses are essentially the same. *Bell*, 734 F.3d at 195; see Clean Water Act, 33 U.S.C. § 1365(e) (2012).

¹⁰³ *Bell*, 734 F.3d at 195.

¹⁰⁴ See *id.* at 196 (citing *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 304 (4th Cir. 2010), and *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 336 (6th Cir. 1989)).

¹⁰⁵ *Id.* at 197. *Ouellette* held that state nuisance actions do not frustrate the CWA, both because the Act explicitly allows source states to impose stricter standards, and because operators need only know the law of the state in which it is operating. See 479 U.S. at 498–99.

¹⁰⁶ *Bell*, 734 F.3d at 198.

¹⁰⁷ Caravello, *supra* note 27, at 471.

¹⁰⁸ 615 F.3d 291, 296 (4th Cir. 2010); see Nigel Barrella, Comment, *North Carolina v. Tennessee Valley Authority*, 35 HARV. ENVTL. L. REV. 247, 247–48 (2011).

¹⁰⁹ See *Cooper*, 615 F.3d at 301.

¹¹⁰ See *id.*; Caravello, *supra* note 27, at 471–72.

ferent laws in different states controlling a single plant would create “chaotic confrontation” between them.¹¹¹ Further, it held that state common law tort claims are not the correct vehicle for resolution of environmental disputes, and stated that the clearly defined standards of the CAA should take precedence over an “ill-defined omnibus tort of last resort.”¹¹²

Although the Supreme Court denied certiorari in both *Bell* and *Cooper*, its precedent suggests that it would likely agree with the Third Circuit’s preemption analysis.¹¹³ The holding in *Freightliner Corp. v. Myrick*—that a Georgia state common law remedy was not preempted by a federal statute¹¹⁴—closely mirrors the reasoning in *Bell*.¹¹⁵ Both cases begin with the framework of a state common law tort claim facing possible preemption by a far-reaching federal statute.¹¹⁶ Furthermore, both courts employed a liberal reading of the savings clauses found in the two statutes, thus enabling state common law tort claims to move forward.¹¹⁷ Finally, both courts appear to agree with the assumption that federal statutes only preempt state common law where it is clear that they do so, and are thus unlikely to find implied preemption in these types of statutes.¹¹⁸

The Supreme Court’s decision in *Sprietsma v. Mercury Marine* continued with this line of reasoning by holding that the Federal Boat Safety Act (“FBSA”) did not preempt an Illinois state common law tort action.¹¹⁹ Much like its decision in *Freightliner*, the Court held that the FBSA’s savings clause did not relieve a person of liability under state law.¹²⁰ The Court cited the FBSA’s savings clause, which is very similar to both the CAA’s and the NTMVSA’s savings clauses.¹²¹ Both *Freightliner* and *Sprietsma* suggest that the Supreme Court, much like the Third Circuit in *Bell*, maintains a more restrictive notion of federal preemption that leaves the states significant leeway to add laws that build on the federal floor.¹²²

¹¹¹ See *Cooper*, 615 F.3d at 301.

¹¹² *Id.* at 302. The Fourth Circuit was clear that its holding in *Cooper* did not represent a finding that Congress had preempted the entire field of emissions regulation, but rather that in the instant case, the CAA specifically preempted North Carolina’s claims. *Id.* at 302–03.

¹¹³ See *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), *cert. denied sub nom.* GenOn Power Midwest, L.P. v. Bell, 134 S. Ct. 2696 (2014); *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010), *cert. denied*, 132 S. Ct. 46 (2011).

¹¹⁴ 514 U.S. 280, 289 (1995); see *supra* notes 81–87 and accompanying text.

¹¹⁵ See *Freightliner*, 514 U.S. at 289; *Bell*, 734 F.3d at 193–95.

¹¹⁶ See *Freightliner*, 514 U.S. at 283–84; *Bell*, 734 F.3d at 189–90.

¹¹⁷ See *Freightliner*, 514 U.S. at 286, 290; *Bell*, 734 F.3d at 196–98.

¹¹⁸ See *Freightliner*, 514 U.S. at 287; *Bell*, 734 F.3d at 194–95, 198.

¹¹⁹ 537 U.S. 51, 55–56, 70 (2002).

¹²⁰ See *id.* at 60.

¹²¹ See *id.* at 63; *Freightliner*, 514 U.S. at 286, 290; *Bell*, 734 F.3d at 196–97, 198.

¹²² See *Sprietsma*, 537 U.S. at 63; *Freightliner*, 514 U.S. at 286, 290; *Bell*, 734 F.3d at 196–97, 198.

Although the Supreme Court came out on the other side of the preemption issue in *Geier v. American Honda Motor Co., Inc.*, the facts of *Bell* are readily distinguishable.¹²³ The *Geier* Court found actual preemption, as the state common law tort claim was in direct conflict with the federal statute.¹²⁴ The opinion was careful, however, to preserve the savings clause in the statute at issue, stating that preemption can only be found after reading the statute narrowly to avoid restricting state common law rights.¹²⁵ The Court, despite finding that the lawsuit was preempted, was clear in its affirmation of the preemption principles found in *Freightliner* and *Sprietsma*.¹²⁶ The common law claim in *Bell* does not directly conflict with the CAA, and as such, it is likely the Supreme Court would not find conflict preemption.¹²⁷ As the Court stated in *Geier*, “[t]his Court traditionally distinguishes between ‘express’ and ‘implied’ pre-emptive intent.”¹²⁸

In light of *Freightliner* and *Sprietsma*, which were both decided by a majority of the current Court, it seems likely that the Third Circuit’s *Bell* analysis would prove more persuasive than the Fourth Circuit’s *Cooper* analysis.¹²⁹ Even though the statutes at issue in both Supreme Court cases are broad reaching, the Court appears loath to cut the states out of the regulatory equation.¹³⁰ Further, the Court has clearly deferred to the states in cases where the federal act has a pronounced savings clause.¹³¹ These holdings thus suggest that the current Supreme Court would embrace the Third Circuit’s analysis in *Bell* and extend its reading of *Ouellette*, upholding state common law tort claims.¹³²

CONCLUSION

In *Bell v. Cheswick Generating Station*, the U.S. Court of Appeals for the Third Circuit held that the Clean Air Act does not preempt state common law tort claims against power plant polluters. By recognizing the history of constitutional preemption and Congress’s intent in crafting the Clean Air

¹²³ See *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 886 (2000); *Bell*, 734 F.3d at 196–97.

¹²⁴ *Geier*, 529 U.S. at 867; see *supra* notes 49, 93–96 and accompanying text.

¹²⁵ *Geier*, 529 U.S. at 868.

¹²⁶ See *id.* at 886; *Sprietsma*, 537 U.S. at 62–63; *Freightliner*, 514 U.S. at 284.

¹²⁷ Compare *Bell*, 734 F.3d at 198 (holding that the powers of the states were not preempted by the CAA because it was not the “clear and manifest purpose of Congress”), with *Geier*, 529 U.S. at 885–86 (discussing implied preemption in cases of actual conflict).

¹²⁸ 529 U.S. at 884 (citation omitted).

¹²⁹ See *supra* notes 113–128 and accompanying text.

¹³⁰ See *Sprietsma*, 537 U.S. at 63; *Freightliner*, 514 U.S. at 287.

¹³¹ See *Sprietsma*, 537 U.S. at 63; *Freightliner*, 514 U.S. at 287.

¹³² See *Sprietsma*, 537 U.S. at 70; *Freightliner*, 514 U.S. at 289–90; *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987); *Bell*, 734 F.3d at 194–95.

Act's savings clause, the court provided a remedy for citizens to bring an action against an industry that is broadly regulated by the federal government. The decision in *Bell* is a victory for individuals affected by pollution. No longer, in the Third Circuit, are power stations able to operate only according to federal minimums. Because the Fourth Circuit takes a different approach, however, it is likely the Supreme Court will need to address this circuit split in the near future. If and when that happens, the Supreme Court should, and likely will, adopt the Third Circuit's reasoning and establish a standard consistent with its extensive precedent on state common law rights: to preserve the ability of states to build upon the federal floor established by the Clean Air Act, and thus add their own robust measures to environmental laws.