

NOTES

CLEAN AIR ACT PREEMPTION OF STATE COMMON LAW: GREENHOUSE GAS NUISANCE CLAIMS AFTER *AEP V.* *CONNECTICUT*

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INTRODUCTION

THE Supreme Court's 2007 decision in *Massachusetts v. EPA*¹ seemed to signal the beginning of large-scale federal regulation of greenhouse gases ("GHGs").² So far, however, the results of that decision have been less than dramatic. Taking a cautious approach to climate change regulation, the EPA has responded to *Massachusetts* by incorporating GHGs into the Clean Air Act only a piece at a time, while providing some significant accommodations to sources of GHG emissions along the way.³

Dissatisfied with the progress of regulation at the federal level, states and environmental groups have increasingly turned to litigation as a means of combating the potentially serious effects of GHG-induced global warming. Seeking injunctive caps on GHG emissions, much of this litigation has proceeded on a theory of public nuisance, a common law tort that prohibits "unreasonable interference with a right common to the general public."⁴ Traditionally, public nuisance claims implicating issues of interstate pollution arose under federal common law, not the common law of any particular state.⁵ But with its 2011 decision in *Amer-*

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¹ 549 U.S. 497 (2007).

² See, e.g., Jonathan H. Adler, Warming Up to Climate Change Litigation, 93 Va. L. Rev. In Brief 63, 74 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>.

³ See *infra* Section I.A; see generally Lisa Heinzerling, Climate Change at EPA, 64 Fla. L. Rev. 1 (2012).

⁴ Restatement (Second) of Torts § 821B (1977).

⁵ See *infra* Section I.B and sources cited *infra* note 43.

ican Electric Power Co. v. Connecticut (AEP),⁶ the Supreme Court essentially eliminated the federal common law as a viable means of imposing mandatory limits on GHG emissions.

AEP addressed the issue of legislative displacement—the idea that congressional legislation may supplant the role of federal common law in governing a particular regulatory subject.⁷ Finding that *Massachusetts* and subsequent regulation under the Clean Air Act had effected such displacement with respect to GHGs, the Supreme Court held that federal common law claims seeking to enjoin GHG emissions could no longer proceed.⁸ With public nuisance claims based on federal common law now foreclosed, the question for plaintiffs like those in *AEP* is whether state common law might step in to fill the void.

The potential for state law public nuisance claims to serve as an effective means of regulating GHG emissions depends on an important threshold question: whether, or to what extent, such claims are preempted by the federal Clean Air Act.⁹ This is an issue the Supreme Court raised, but declined to reach, in *AEP*,¹⁰ and it remains one of the most important questions for the future of GHG litigation. If state common law claims do become available to plaintiffs, public nuisance might yet prove to be a viable source of supplementary regulation of GHG emissions. If the Clean Air Act preempts state common law claims, would-be plaintiffs might instead have to rely solely on the political branches for redress of their GHG-related injuries.

The extent to which the Clean Air Act preempts state common law is a question that surprisingly few commentators have considered, and the few courts that have addressed the issue have reached somewhat conflicting conclusions.¹¹ This Note offers a detailed analysis of the prob-

⁶ 131 S. Ct. 2527 (2011).

⁷ *Id.* at 2537.

⁸ *Id.*

⁹ See *id.* at 2540 (“In light of our holding that the Clean Air Act displaces federal common law, the availability . . . of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.”).

¹⁰ *Id.*

¹¹ Compare *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 342–43 (6th Cir. 1989) (finding no Clean Air Act preemption of common law claims based on source-state law), and *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1284–86 (W.D. Tex. 1992) (same), with *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 309 (4th Cir. 2010) (dismissing source-state claims on preemption-like principles), and *Comer v. Murphy Oil USA*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (finding that the Clean Air Act preempts all GHG-related state law nuisance claims).

lem by addressing the proper result under current doctrine, and considering the wisdom of that result as a policy matter.

The analysis proceeds in three parts. Part I charts the course of federal regulation of GHGs and frames the preemption issue through a discussion of *AEP*. Part II argues that, under current law, the Clean Air Act preempts only those public nuisance claims that involve applying the law of one state to an emissions source in another state. Claims based on the law of the source state, by contrast, should constitute a viable avenue of relief for prospective plaintiffs. Despite this result, Part III argues that public nuisance is poorly suited to regulating GHG emissions. Therefore, this Note argues, Congress should provide for preemption of *all* GHG-related nuisance claims, regardless of which state's law applies.

I. FRAMING THE PREEMPTION QUESTION: FEDERAL CLIMATE CHANGE
POLICY AND *AEP v. CONNECTICUT*

A. *Greenhouse Gases and the Clean Air Act*

The scientific community now widely agrees that the earth is warming, and that human activities, which have led to increased atmospheric concentrations of greenhouse gases, are likely to blame.¹² GHGs, which include water vapor, carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (“HFCs”), perfluorocarbons (“PFCs”), and sulfur hexafluoride (SF₆), act as heat trapping agents in the earth's atmosphere.¹³ They absorb and reradiate energy from the sun that would otherwise dissipate into space. This “greenhouse effect” keeps the earth's atmosphere significantly warmer than it would be in GHGs' absence.¹⁴

Atmospheric GHG concentrations have increased dramatically over the last two hundred years.¹⁵ Scientists believe that much of this increase—particularly that of CO₂—has resulted from human activities, such as the burning of fossil fuels to produce energy.¹⁶ Increased GHG

¹² Bd. on Atmospheric Sci. & Climate, Nat'l Research Council, *Advancing the Science of Climate Change* 27–28 (2010), available at http://www.nap.edu/catalog.php?record_id=12782.

¹³ EPA, *Frequently Asked Questions About Global Warming and Climate Change: Back to Basics* 2–3 (April 2009), available at http://www.epa.gov/climatechange/Downloads/ghgemissions/Climate_Basics.pdf.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 2–3.

levels are very likely the cause of higher global temperatures,¹⁷ and most scientists expect the warming trend to continue.¹⁸ As temperature increases, so too does the potential for adverse secondary effects. These effects might include sea-level rise leading to destruction of low-lying coastal land,¹⁹ extinction of various species of wildlife,²⁰ higher incidence of wildfires,²¹ malnutrition due to crop failure,²² increased transmission of infectious disease,²³ and higher frequency of cardiovascular and respiratory disease,²⁴ among others.

Although several international agreements have sought to remedy the potentially dangerous effects of increasing GHG concentrations,²⁵ an effective policy response within the United States has been relatively slow to develop. Early efforts were centered mostly at the state level,²⁶ and,

¹⁷ Richard B. Alley et al., Intergovernmental Panel on Climate Change, Summary for Policymakers *in* Climate Change 2007: The Physical Science Basis 10 (S. Solomon et al. eds., 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>.

¹⁸ See Gerald A. Meehl et al., Global Climate Change Projections *in* Climate Change 2007: The Physical Science Basis, *supra* note 17, at 749–50, available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter10.pdf>.

¹⁹ Robert J. Nicholls & Anny Cazenave, Sea-Level Rise and Its Impact on Coastal Zones, 328 *Sci.* 1517, 1518–19 (2010).

²⁰ See Chris D. Thomas et al., Extinction Risk from Climate Change, 427 *Nature* 145, 145 (2004).

²¹ See Donald McKenzie et al., Climate Change, Wildfire, and Conservation, 18 *Conservation Biology* 890, 893 (2004).

²² See M.L. Parry et al., Effects of Climate Change on Global Food Production Under SRES Emissions and Socio-Economic Scenarios, 14 *Global Environ. Change* 53, 53 (2004).

²³ See Duane J. Gubler et al., Climate Variability and Change in the United States: Potential Impacts on Vector- and Rodent-Borne Diseases, 109 *Environ. Health Persp.* 223, 223, 226–27 (2001).

²⁴ See Jonathan A. Patz et al., Impact of Regional Climate Change on Human Health, 438 *Nature* 310, 310 (2005).

²⁵ These international agreements include the 1992 United Nations Framework Convention on Climate Change (“FCCC”) and the 1997 Kyoto Protocol. Kyoto, which commits developed nations to meeting specific GHG reduction targets by 2012, has been ratified by 128 nations, which are collectively responsible for fifty-five percent of the world’s CO₂ emissions. The United States to date has declined to ratify the treaty. Robert L. Glicksman et al., *Environmental Protection: Law and Policy* 562–63 (5th ed. 2007).

²⁶ For example, in 2003, California passed state legislation aimed at reducing GHG emissions from motor vehicles. Ann E. Carlson, Federalism, Preemption, and Greenhouse Gas Emissions, 37 *U.C. Davis L. Rev.* 281, 282 (2003). Similarly, a group of seven states in the Northeast agreed in 2005 to establish a cap-and-trade program for CO₂ emissions from electric utilities. Glicksman et al., *supra* note 25, at 572. For an up-to-date inventory of state and local initiatives aimed at redressing climate change, see Ctr. for Climate & Energy Solutions, *Climate Action: U.S. States and Regions*, <http://www.c2es.org/states-regions> (last visited Sept. 16, 2012).

until recently, broad federal policy action remained elusive. Among existing policy tools, the Clean Air Act has long been the most obvious potential source of federal GHG regulation. Under the Act, the EPA is required to issue various forms of regulations for “air pollutants,” defined as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.”²⁷ Though a rather straightforward reading of this definition might seem to cover most GHGs, however, the EPA had throughout the 1990s declined to exercise any regulatory authority over them under the Clean Air Act.

Frustrated with the lack of federal action, in 1999, a group of private organizations filed a rulemaking petition with the EPA formally requesting that the agency regulate certain forms of GHG emissions under the Clean Air Act.²⁸ After the EPA denied the petition, the organizations, joined by intervening states, eventually appealed to the United States Supreme Court.²⁹ In *Massachusetts v. EPA*, the Supreme Court held that greenhouse gases “fit well within the Clean Air Act’s capacious definition of ‘air pollutant,’”³⁰ and that the EPA could not simply decline to regulate them for its own reasons.³¹ Rather, the EPA had to decide “whether sufficient information exist[ed] to make an endangerment finding,” and to promulgate GHG regulations in the event that it made such a finding.³²

In response to the Court’s decision in *Massachusetts*, the EPA in 2009 formally found that GHGs from transportation sources “contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare.”³³ As a result of this endangerment finding, the Clean Air Act requires the EPA to issue emissions limits for certain classes of vehicles.³⁴ Due to the interconnectedness of the Act’s structure, the endangerment

²⁷ 42 U.S.C. § 7602(g) (2006).

²⁸ *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007). Specifically, the plaintiffs requested the EPA “to regulate ‘greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.’” *Id.* (quoting Joint Appendix at *5, *Massachusetts*, 549 U.S. 497 (no. 05-1120), 2006 WL 2569818 at *5).

²⁹ *Id.* at 511, 514.

³⁰ *Id.* at 510.

³¹ *Id.* at 534.

³² *Id.*

³³ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009).

³⁴ 42 U.S.C. § 7521(a)(1) (2006).

finding with respect to transportation emissions might also require other types of regulation under the statute. In particular, the EPA may now be required to regulate GHGs under its Prevention of Significant Deterioration (“PSD”) and Title V permitting schemes, as well as to issue National Ambient Air Quality Standards (“NAAQS”).³⁵

Although the EPA issued vehicle-emission standards in 2010 and 2011,³⁶ it has largely punted with respect to other forms of Clean Air Act regulation: it has so far declined to issue NAAQS for GHGs and has addressed the PSD and Title V programs through the so-called “Tailoring Rule,” an accommodation that, with respect to GHGs, relaxes certain Clean Air Act standards that would otherwise apply.³⁷ As a result, the EPA has greatly reduced a potentially immense regulatory burden on both itself and industry, though possibly at the expense of slower progress on reduction of GHG emissions. With comprehensive climate change legislation currently stalled in Congress, these somewhat meager efforts represent the bulk of current federal GHG regulation, and significant further action appears unlikely in the near term.³⁸

B. Redress Through Nuisance and AEP v. Connecticut

Given the slow pace of federal GHG regulation, proponents of bolder efforts have increasingly sought redress through the courts. One of the most prominent legal theories asserted by various plaintiffs has been

³⁵ See Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does Chevron Set the EPA Free?*, 29 *Stan. Envtl. L.J.* 283, 291 (2010) (discussing the endangerment finding’s potential triggering of NAAQS regulation); Teal Jordan White, Comment, *Clean Air Act Mayhem: EPA’s Tailoring Rule Stitches Greenhouse Gas Emissions into the Wrong Regulatory Fitting*, 18 *Tex. Wesleyan L. Rev.* 407, 422 (2011) (noting possible mandatory regulation of GHGs under PSD and Title V programs).

³⁶ See *Greenhouse Gas Emission Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles*, 76 *Fed. Reg.* 57,106 (Sept. 15, 2011); *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 *Fed. Reg.* 25,324 (May 7, 2010).

³⁷ See *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 *Fed. Reg.* 31,514, 31,535 (June 3, 2010); Arnold W. Reitze, Jr., *The Intersection of Climate Change and Clean Air Act Stationary Source Programs*, 43 *Ariz. St. L.J.* 901, 916–17 (2011).

³⁸ Heinzerling, *supra* note 3, at 9. Notably, the EPA has recently proposed GHG-based New Source Performance Standards (“NSPS”) for certain classes of refineries and power plants. These standards, however, apply only to new power plants, not existing sources. Juliet Eilperin, *EPA to Impose Carbon Limits on Power Plants*, *Wash. Post*, Mar. 27, 2012, at A3.

public nuisance.³⁹ Public nuisance, a common law tort, is defined as “an unreasonable interference with a right common to the general public.”⁴⁰ Particular circumstances that may give rise to a public nuisance finding include conduct that “involves a significant interference with the public health, the public safety, . . . the public comfort or the public convenience” and conduct that “is of a continuing nature or has produced a permanent or long-lasting effect”⁴¹ Importantly, public nuisance is one area in which the distinction between federal and state common law remains relevant.⁴² Specifically, in the context of interstate pollution, courts have held that the federal common law of public nuisance preempts claims brought pursuant to the common law of a state.⁴³ Thus, until recently, any public nuisance action seeking to abate GHG emissions from an out-of-state source had to invoke federal common law.

As a result of the 2011 decision in *AEP* however, the role of federal common law in combating climate change has been greatly curtailed. In that case—the first and most prominent attempt to redress climate change through the common law of nuisance—eight states and New York City sought to enjoin GHG emissions from four private companies and the Tennessee Valley Authority (“TVA”).⁴⁴ The five defendants were, according to the plaintiffs, “the five largest emitters of carbon dioxide in the United States.”⁴⁵ The plaintiffs initiated the suit in 2004, before the Supreme Court’s decision in *Massachusetts v. EPA* and the subsequent EPA endangerment finding.⁴⁶ Thus, at the time the litigation began, no federal statute regulated GHG emissions. But because the EPA began regulating GHGs under the Clean Air Act while the case was

³⁹ See, e.g., *Comer v. Murphy Oil USA*, 585 F.3d 855, 867 (5th Cir. 2009); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009); *California v. General Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 at *2 (N.D. Cal. Sept. 17, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005). See generally Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 Wash. L. Rev. 197 (2010).

⁴⁰ Restatement (Second) of Torts § 821B (1977).

⁴¹ *Id.*

⁴² See *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 103, 107 n.9 (1972).

⁴³ See *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (explaining that, in interstate pollution public nuisance cases, “state common law [is] preempted”); *Milwaukee I*, 406 U.S. at 107 n.9 (“Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State . . .”).

⁴⁴ *Am. Elec. Power Co.*, 131 S. Ct. at 2533–34.

⁴⁵ *Id.* (internal quotations omitted).

⁴⁶ *Id.* at 2533.

pending, the key question in the case eventually became whether that regulation “displaced” the federal common law with respect to GHG emissions.⁴⁷

The idea that a federal statute can displace federal common law was first articulated in a pollution context in *City of Milwaukee v. Illinois (Milwaukee II)*.⁴⁸ In that case, the state of Illinois sued the City of Milwaukee over an alleged public nuisance created by Milwaukee’s pollution of Lake Michigan.⁴⁹ While the case was pending, Congress passed amendments to the Clean Water Act that covered the conduct in question.⁵⁰ Finding that that the intervening legislation had obviated the need for federal common law, the Supreme Court held that Illinois could no longer maintain its public nuisance claim.⁵¹ As the Court explained, “when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by a federal court disappears.”⁵²

Applying the *Milwaukee II* decision in *AEP*, the Supreme Court held that the EPA’s regulation of GHGs under the Clean Air Act similarly displaced federal common law with respect to GHG emissions.⁵³ Noting that “it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest,” the Court explained that the test for determining whether legislation has displaced federal common law is “whether the statute ‘speak[s] directly to [the] question’ at issue.”⁵⁴ In this case, Congress had so spoken, because CO₂ emissions qualify as “air pollutants” under the Clean Air Act, bringing GHG emissions—including those from power plants—directly within the EPA’s regulatory reach.⁵⁵

Additionally, the Supreme Court rejected the plaintiffs’ argument that displacement would not occur until the EPA actually exercised its authority to regulate GHG emissions from the defendant power plants.⁵⁶ As the Court explained, “[t]he Clean Air Act is no less an exercise of the

⁴⁷ Id. at 2534.

⁴⁸ 451 U.S. 304 (1981).

⁴⁹ Id. at 308–10.

⁵⁰ Id. at 310.

⁵¹ Id. at 317.

⁵² Id. at 314.

⁵³ *Am. Elec. Power Co.*, 131 S. Ct. at 2537.

⁵⁴ Id. (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

⁵⁵ Id. at 2537–38.

⁵⁶ Id. at 2538.

legislature's 'considered judgment' concerning the regulation of air pollution because it permits emissions *until* EPA acts."⁵⁷ Indeed, as the Court noted, displacement makes sound policy sense. The EPA's expertise and its ability to establish consistent, uniform national regulations provide it with advantages over the courts, which can address GHG emissions only on an ad hoc basis.⁵⁸

Though the Supreme Court in *AEP* addressed only the plaintiffs' federal common law claims, the plaintiffs had pled state public nuisance claims.⁵⁹ The Court declined to reach these claims because they had not been addressed by the parties' briefs.⁶⁰ But by finding that the Clean Air Act displaces federal public nuisance claims, the decision in *AEP* raises the possibility that public nuisance claims based on *state* common law might now be viable. Such viability depends on whether the Clean Air Act, in addition to displacing federal common law, also preempts public nuisance claims brought pursuant to state law.⁶¹

Displacement and preemption may involve some overlapping concerns, but the two issues are analytically distinct. As the *AEP* Court noted, "Legislative displacement of federal common law does not require the same sort of evidence . . . demanded for preemption of state law."⁶² While displacement analysis focuses on the appropriate roles for the respective branches of the federal government, preemption implicates federalism concerns involving the allocation of state and federal power.⁶³ For this reason, the displacement finding in *AEP* hardly compels—or even presages—a corresponding finding of preemption. Rather, charting the contours of the Clean Air Act's preemptive scope requires an independent analysis of the Act's purpose, structure, and text.

II. CLEAN AIR ACT PREEMPTION OF STATE LAW NUISANCE CLAIMS UNDER CURRENT DOCTRINE AND LAW

This Part explores the immediate question raised by the displacement finding in *AEP*: whether, under current doctrine and law, the Clean Air Act preempts GHG-related nuisance claims brought pursuant to state

⁵⁷ *Id.*

⁵⁸ *Id.* at 2539–40.

⁵⁹ *Id.* at 2540.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 2537 (internal quotations omitted).

⁶³ *Id.*

law. In arguing that the Act preempts affected-state, but not source-state, claims, this Part begins by briefly reviewing the general principles governing federal preemption of state law. Section II.B then addresses express preemption by analyzing the Clean Air Act's text and structure. Next, Section II.C addresses implied preemption, primarily through an analysis of the Supreme Court's decision in *International Paper Co. v. Ouellette*,⁶⁴ explaining how the reasoning in that case controls the preemption inquiry with respect to the Clean Air Act. Finally, Section II.D examines the few lower court cases that have addressed the issue, arguing that although earlier cases provide mostly sound analysis, two more recent decisions have erred by finding in favor of broad Clean Air Act preemption.

A. Preemption Principles

The idea that a federal statute can preempt state law derives from the Constitution's Supremacy Clause: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁶⁵ The "touchstone" of any preemption analysis is congressional intent,⁶⁶ and Congress "may indicate pre-emptive intent through a statute's express language or through its structure and purpose."⁶⁷

However, if there is any fixed principle in preemption doctrine, it is that courts will only grudgingly read preemptive intent into a federal statute. As the Supreme Court has explained, preemption analysis is to be undertaken "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."⁶⁸ And the presumption against congressional intent to preempt state law has "particular force when Congress has legislated in a field traditionally occupied by the States."⁶⁹ Putting these assumptions together, a court will read a statute that is ambiguous as to preemptive intent not to invoke preemption, par-

⁶⁴ 479 U.S. 481 (1987).

⁶⁵ U.S. Const. art. VI, cl. 2.

⁶⁶ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

⁶⁷ *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008).

⁶⁸ *Id.* at 77 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁶⁹ *Id.*

ticularly where any preemptive effect would disrupt the traditional balance between state and federal power.⁷⁰

With these principles in mind, the Supreme Court has developed a taxonomy used to determine whether a particular statute is preemptive. First, preemption may be either express or implied.⁷¹ Express preemption is the more straightforward form—it occurs when Congress includes language in a federal statute “explicitly withdrawing specified powers from the states.”⁷² Implied preemption, on the other hand, focuses more on structure and purpose, and includes both conflict preemption and field preemption as subcategories. Conflict preemption occurs when a state law “actually conflicts” with a federal law, especially where it becomes “impossible for a private party to comply with both state and federal requirements.”⁷³ A further derivative of conflict preemption, obstacle preemption, occurs where “state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”⁷⁴ Field preemption, on the other hand, occurs when “federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”⁷⁵

To avoid the invalidation of state law on the basis of preemption, Congress sometimes uses express language to limit the potential scope of a statute’s preemptive force. Such provisions, known as “savings clauses,” typically state that the federal statute shall not be construed to preempt some particular category of state law.⁷⁶ Although the Supreme Court has generally interpreted savings clauses to preclude any finding of express preemption, it has “‘decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme estab-

⁷⁰ See *id.* (“[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.” (internal quotations omitted)).

⁷¹ Thomas W. Merrill, Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules, *in* *Federal Preemption: States’ Powers, National Interests* 166, 166 (Richard A. Epstein & Michael S. Greve eds., 2007).

⁷² Caleb Nelson, Preemption, 86 *Va. L. Rev.* 225, 226 (2000).

⁷³ *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

⁷⁴ Nelson, *supra* note 72, at 228 (quoting *Boggs v. Boggs*, 520 U.S. 833, 844 (1997)).

⁷⁵ *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (quoting *Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982)).

⁷⁶ See James T. O’Reilly, *Federal Preemption of State and Local Law: Legislation, Regulation and Litigation* 18 (2006).

lished by federal law.”⁷⁷ Thus, savings clauses do not usually prevent the operation of ordinary implied preemption principles,⁷⁸ and they may even create a negative inference “that everything else not preserved by [the savings clause] is preempted.”⁷⁹

B. Express Preemption: Examining Text and Structure

To the extent that the Clean Air Act preempts state nuisance claims related to GHGs, it almost certainly does so through implied, and not express, preemption. This is because express preemption is a possibility that the Act’s text and structure wholly foreclose.

1. The Clean Air Act’s Only Express Preemption Clause Does Not Cover Most GHG-Related Nuisance Claims

The Clean Air Act contains only one express preemption clause, which is limited to a rather narrow slice of state regulation. Section 209(a) of the Act provides that “[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.”⁸⁰ This provision prohibits states from regulating emissions related to the purchase of new motor vehicles, even where a state wishes to impose stricter controls than those the Act imposes.⁸¹

The relevance of this provision to state law nuisance claims is twofold: First, it demonstrates that Congress clearly knew how to write an express preemption clause into the Clean Air Act when it so desired. Second, it indicates that, by restricting the coverage of the clause to new motor vehicles, Congress intended *not* to preempt any other form of state regulation. Thus, while one may presume that any GHG-related claims pertaining to the purchase of new motor vehicles would be preempted by Section 209(a), *non-motor-vehicle-related* claims—such as the kind asserted by the plaintiffs in *AEP*—should survive.

⁷⁷ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (quoting *United States v. Locke*, 529 U.S. 89, 106–07 (2000)).

⁷⁸ *Id.* at 869; see also O’Reilly, *supra* note 76.

⁷⁹ O’Reilly, *supra* note 76.

⁸⁰ 42 U.S.C. § 7543(a) (2006).

⁸¹ *Id.*

2. The Clean Air Act's Savings Clauses Preclude Express Preemption

Express preemption also appears to be incompatible with the Clean Air Act's savings clauses. The most important of these states that no provision of the Act:

[S]hall 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; except that . . . such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under [the Clean Air Act or an EPA-approved State Implementation Plan].⁸²

Assuming this clause encompasses state policies embodied in common law causes of action, it indicates that Congress expressly intended that those causes of action be *preserved*, rather than preempted.

Of course, one possibility is that the “any standard or limitation” and “any requirement” language in the clause applies only to “positive enactments, such as statutes and regulations,” and not to duties derived from the common law.⁸³ Relevant to this inquiry, however, is the Act's other savings clause, contained in its citizen suit provision, stating that nothing therein “shall restrict any right which any person . . . may have under any statute *or common law* to seek enforcement of any emission standard or limitation.”⁸⁴ Because this second clause specifically contemplates a “standard or limitation” arising from the common law, it is safe to assume the Act employs the terms consistently throughout, and that the first savings clause covers common law duties as well.⁸⁵

Further supporting this point, courts have interpreted the term “requirement” in the Clean Air Act and other environmental statutes to include common law duties. In *North Carolina ex rel. Cooper v. TVA*, the Fourth Circuit held that the term “requirement” in another provision of the Clean Air Act encompasses not only the kind of “objective, quantifiable standards” found in statutes and regulations, but also the more sub-

⁸² Id. § 7416.

⁸³ *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005).

⁸⁴ 42 U.S.C. § 7604(e) (emphasis added).

⁸⁵ See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (explaining that an Act of Congress “should not be read as a series of unrelated and isolated provisions,” as there is a presumption that “identical words used in different parts of the same act are intended to have the same meaning” (internal quotations omitted)).

jective standards embraced by the common law of nuisance.⁸⁶ In *Bates v. Dow Agrosciences LLC*, the Supreme Court reached an identical conclusion with respect to the same term in the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”).⁸⁷

Thus, because the primary savings clause of the Clean Air Act does appear to cover public nuisance claims based on state common law, there seems to be little basis for invoking express preemption. The possibility nevertheless remains, however, that nuisance claims might instead be precluded by one of the forms of *implied* preemption.⁸⁸

C. *Implied Preemption and International Paper Co. v. Ouellette*

1. *Field Preemption*

As “the primary mechanism under which emissions in the United States are managed,”⁸⁹ the Clean Air Act is an extensive web of standards, requirements, and programs aimed at reducing pollution in America’s air. But the Act does not simply dictate to states how such reductions are to be achieved; rather, it “preserves state primacy in implementing and enforcing standards, and issuing permits.”⁹⁰ The Act’s structure, which includes important regulatory roles for both the federal government and the states, has thus frequently been described as one of “cooperative federalism,”⁹¹ and provides little basis for any inference that “Congress left no room for the States to supplement” the Act’s regulatory scheme.⁹²

The states’ primary function under the Clean Air Act is to develop State Implementation Plans (“SIPs”) for achieving and enforcing

⁸⁶ 515 F.3d 344, 351–53 (4th Cir. 2008).

⁸⁷ 544 U.S. at 443–44.

⁸⁸ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (holding that a savings clause “does not foreclose (through negative implication) any possibility of implied . . . pre-emption,” even though it “removes tort actions from the scope of . . . express pre-emption” (internal quotations omitted)).

⁸⁹ *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010).

⁹⁰ James R. May, *Of Happy Incidents, Climate, Federalism, and Preemption*, 17 *Temp. Pol. & Civ. Rts. L. Rev.* 465, 471 (2008) (internal quotations omitted).

⁹¹ See, e.g., *MacClarence v. EPA*, 596 F.3d 1123, 1125 (9th Cir. 2010); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 467 (6th Cir. 2004); *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1045 (D.C. Cir. 2001).

⁹² *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (quoting *Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982)).

NAAQS.⁹³ NAAQS are overall emissions limitations that the EPA establishes for pollutants that “may reasonably be anticipated to endanger public health or welfare.”⁹⁴ In developing SIPs, states retain a great deal of flexibility, and are free to design their NAAQS compliance programs as they see fit, subject to certain requirements established by the statute.⁹⁵ Notably, NAAQS function as a floor, and not a ceiling, on emissions of criteria pollutants, allowing states to establish stricter emissions limitations than what the EPA requires.⁹⁶

Thus, although SIPs are ultimately subject to EPA approval (and become fully enforceable federal law once approved),⁹⁷ the individual states partner with the federal government to create and enforce them. Other features of the Clean Air Act—such as the mobile source, PSD, and Title V permitting programs under which the EPA has begun regulating GHGs⁹⁸—are more nationally uniform in character than are the SIP-enforced NAAQS, but they merely supplement the states’ role in reducing pollution. After all, “achievement of the NAAQS remains the [Clean Air Act]’s paramount objective,” and “[t]he *states* have the primary responsibility for designing and implementing plans to achieve the ambient standards.”⁹⁹

Indeed, if the Clean Air Act reflects any general congressional intent, it is that air pollution is an area in which the states will continue to play an active role. Specifically, the preamble of the Act notes a congressional finding that “air pollution prevention . . . is the primary responsibility of States and local governments,”¹⁰⁰ and lists as one of the Act’s purposes “provid[ing] . . . assistance to State and local governments in connection with . . . their air pollution prevention and control programs.”¹⁰¹ Given the large role that the Clean Air Act carves out for the states, then, there is little basis for a claim that the Act “so thoroughly occupies [the] field” of emissions control as to prohibit independent state regulation.¹⁰²

⁹³ 42 U.S.C. § 7410(a)(1) (2006).

⁹⁴ Id. § 7408(a)(1)(A).

⁹⁵ See, e.g., id. § 7410.

⁹⁶ Id. § 7416.

⁹⁷ Id. §§ 7410(a)(1), 7604(a).

⁹⁸ See *supra* text accompanying notes 35–37.

⁹⁹ Glicksman, *supra* note 25, at 407 (emphasis added).

¹⁰⁰ 42 U.S.C. § 7401(a)(3) (2006).

¹⁰¹ Id. § 7401(b)(3). Additionally, the Clean Air Act directs the EPA Administrator to “encourage cooperative activities by the States and local governments for the prevention and control of air pollution.” Id. § 7402(a).

¹⁰² *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992).

This is particularly true given the underlying presumptions of preemption analysis: that congressional intent is the “touchstone” of the inquiry and that ambiguous statutes should be read *not* to invoke preemption.¹⁰³

State and local governments were traditionally the sole source of air pollution regulation. The federal government did not begin regulating air quality until the mid-1950s, and even then began the project somewhat modestly, with Congress not passing comprehensive federal legislation until the late 1960s.¹⁰⁴ Given the particularly strong presumption against preemption in policy areas traditionally occupied by the states, this history indicates that any congressional intent to fully occupy the field of air pollution regulation would surely manifest itself in terms much clearer than any the Clean Air Act provides. And, if this is true of state power to regulate air pollution in general, it seems especially true with respect to public nuisance, which is in fact the very oldest form of local air quality regulation.¹⁰⁵

2. Conflict/Obstacle Preemption

Of the various forms of preemption, conflict preemption—or more specifically, obstacle preemption—perhaps provides the strongest case against allowing nuisance suits to proceed. Any analysis of whether conflict or obstacle preemption principles bar GHG-related common law nuisance claims must begin with the Supreme Court’s decision in *International Paper Co. v. Ouellette*.¹⁰⁶ Although that case dealt with the implied preemptive scope of the Clean Water Act, it nevertheless bears heavily on interpreting the similar structure and language of the Clean Air Act.

In *Ouellette*, a group of private plaintiffs who lived on the Vermont side of Lake Champlain filed a lawsuit against the International Paper Company, claiming that discharges from the company’s New York plant into the lake constituted a nuisance under Vermont common law.¹⁰⁷ The question for the Supreme Court was whether two savings clauses in the Clean Water Act insulated the plaintiffs’ claims from federal preemp-

¹⁰³ See *supra* text accompanying notes 68–70.

¹⁰⁴ Glicksman, *supra* note 25, at 401 (summarizing the history of early federal air quality regulation).

¹⁰⁵ See *id.* at 400 (noting that the use of nuisance as a means of regulating local air quality dates as far back as thirteenth-century England).

¹⁰⁶ 479 U.S. 481 (1987).

¹⁰⁷ *Id.* at 484.

tion.¹⁰⁸ Notably, the relevant Clean Water Act clauses mirrored the two Clean Air Act savings clauses discussed above, in one case employing nearly identical language.¹⁰⁹

In analyzing this question, the Court at the outset distinguished between the common law of the source state and that of the affected state.¹¹⁰ Because the plant at issue was located in New York, discharges from the plant flowed from New York (the source state) into Vermont (the affected state).¹¹¹ Thus, either state's law could potentially have served as the source of the Vermont plaintiffs' cause of action, and the Clean Water Act could conceivably preempt both, one, or neither set of claims.¹¹²

The Court began its analysis with a close reading of the language of the two savings clauses. Finding that the text of the provisions was ambiguous as to what combination of source- and affected-state claims they preserved, the Court concluded that the savings clauses themselves failed to compel any particular result.¹¹³ Because the plain language was not dispositive, the Court turned next to the Act's "goals and policies."¹¹⁴ Recognizing that the goal of both the Clean Water Act and the state laws at issue was "to eliminate water pollution," the Court noted that state law might nevertheless be preempted "if it interferes with the methods by which the federal statute was designed to reach this goal."¹¹⁵ According to the Court, the effluent standards under the Clean Water Act reflect a careful balance between public and private interests.¹¹⁶ In striking this balance, both the federal government and the states consider

¹⁰⁸ Id. at 485.

¹⁰⁹ Compare 33 U.S.C. §1365(e) (1982) ("Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation . . ."), and 33 U.S.C. § 1370 (1982) ("[N]othing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States."), with 42 U.S.C. § 7416 (2006) ("[N]othing in this chapter shall preclude or deny the right of any State . . . to adopt or enforce . . . any standard or limitation respecting emissions of air pollutants . . ."), and 42 U.S.C. § 7604(e) (2006) ("Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation . . .").

¹¹⁰ *Ouellette*, 479 U.S. at 486.

¹¹¹ Id. at 483–84.

¹¹² Id. at 486.

¹¹³ Id. at 493.

¹¹⁴ Id.

¹¹⁵ Id. at 494.

¹¹⁶ Id.

the costs and benefits of setting effluent limitations at any particular level. In fact, in order for the consideration of *both* costs and benefits to take place, the Clean Water Act expressly limits administration of the permitting system to states in which the relevant discharge sources are located.¹¹⁷ Had the Clean Water Act instead provided for administration of permits by non-source states, those states would have an incentive to consider only the benefits of more stringent controls, without considering any of the costs.¹¹⁸

The Court found that allowing affected-state nuisance claims to proceed would effectively undermine this carefully-designed structure. As the Court explained,

If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State. . . . Such penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits. . . . The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources.¹¹⁹

Additionally, there was no reason why potential out-of-state regulation would be limited to only one state. So long as a single discharge could result in effluent reaching the waters of multiple states, one source could ultimately find itself subject to a host of out-of-state standards.¹²⁰ And because nuisance standards are particularly subjective and indeterminate, “[t]he application of numerous States’ laws would only exacerbate the vagueness and resulting uncertainty” for an individual source.¹²¹

Faced with these concerns, the Supreme Court in *Ouellette* concluded that, notwithstanding the Clean Water Act’s savings clauses, affected-state nuisance claims would directly conflict with “Congress’ considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollu-

¹¹⁷ Id. at 495.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id. at 496.

¹²¹ Id.

tion.”¹²² Therefore, the claims were barred by obstacle preemption.¹²³ Because the savings clauses did, however, clearly contemplate the preservation of at least *some* state claims, the Court further concluded that claims based on source-state law could proceed.¹²⁴ Applying the nuisance law of the source state would still allow for the full consideration of the relevant costs and benefits while only subjecting sources to a single additional set of standards.¹²⁵

If anything, the Supreme Court’s reasoning in *Ouellette* applies even more forcefully to the Clean Air Act. Like those of the Clean Water Act, the Clean Air Act’s savings clauses do not specify what precise combination of source- and affected-state law they preserve. Also like the Clean Water Act, the Clean Air Act’s own terms establish a regulatory scheme through which source states, and not affected states, play the primary role in developing the regulations by which a particular source will be bound.¹²⁶ Through the SIP process, the Clean Air Act implicitly contemplates that states will consider both the costs and benefits of subjecting their own sources to a particular set of standards. In this way, the Act seeks to achieve the optimal balance between public and private interests in air.

The Clean Air Act does, however, provide a mechanism through which affected states can, in some cases, influence another state’s standards. Section 110(a)(2)(D) provides that, in setting standards through the SIP process, states must ensure that their emissions will not “contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to [Clean Air Act baseline standards].”¹²⁷ In the event that a state violates this provision or other similar provisions, Section 126 allows the affected state to petition the EPA, which in turn can force the source state to revise its SIP to eliminate the prohibited interstate effects.¹²⁸ In contrast to nuisance liability, however, these provisions do not provide affected states with plenary power to subject sources in neighboring states to *any* standard they choose. Rather, Sections 110 and 126 essentially function only as a modest constraint on

¹²² Id. at 497.

¹²³ Id. at 494, 497.

¹²⁴ Id. at 498–99.

¹²⁵ Id.

¹²⁶ See 42 U.S.C. § 7410(a)(1) (2006) (directing each state to establish a compliance plan for sources “within such state”).

¹²⁷ Id. § 7410(a)(2)(D)(i)(I).

¹²⁸ Id. § 7426(b)–(c).

source-state discretion, requiring that source states fully consider the costs they might impose on neighboring states when setting their own emissions standards. And in the event they fail to do so, it is the EPA—not the affected state directly—that ultimately intervenes to preserve the affected state’s ability to comply with mandatory federal requirements.¹²⁹

Were individual sources subject to nuisance suits based on affected-state common law, affected states could essentially usurp source states’ standard-setting power. In so doing, they could upset the careful consideration of costs and benefits envisioned by the statute, just as the Supreme Court described in *Ouellette*. And because air pollution more easily travels between states than water pollution, the cause for concern is perhaps even greater under the Clean Air Act. This is especially true in the GHG context, where, because of GHGs’ tendency to disperse evenly throughout the ambient atmosphere, an individual emitter could simultaneously become subject to the indeterminate nuisance standards of all fifty states.¹³⁰ Furthermore, precisely because the Clean Air Act *already* includes provisions that force states to consider neighboring states in the standard-setting process, out-of-state nuisance liability as a means of protecting affected-state interests is less necessary. Indeed, by expanding the limited role that the Clean Air Act provides to affected states in influencing neighboring states’ standards, nuisance liability under affected-state law might well “interfere[] with the methods by which the federal statute was designed to reach [its] goal.”¹³¹

Clean Air Act preemption of affected-state common law, then, appears to be a result that the *Ouellette* decision compels. After all, at least in terms of the *Ouellette* Court’s concerns, there is little basis for distinguishing the Clean Air Act from the Clean Water Act—the two statutes feature nearly identical savings clauses and employ similar “cooperative federalism” structures.¹³² Furthermore, by preserving nuisance claims

¹²⁹ Id. § 7426(c).

¹³⁰ See Nigel Barrella, Case Comment, *North Carolina v. Tennessee Valley Authority*, 35 Harv. Envtl. L. Rev. 247, 260 (2011) (noting the possibility of a single plaintiff initiating nuisance-based climate change litigation against “every coal-fired [power] plant in the United States”).

¹³¹ *Ouellette*, 479 U.S. at 494.

¹³² See Scott C. Seiler, Comment, Federal Preemption of State Law Environmental Remedies After *International Paper Co. v. Ouellette*, 49 La. L. Rev. 193, 203 (1988) (“In short, the statutes are sufficiently similar to extend the interpretation of the Clean Water Act in *In-*

based on the common law of *source* states, *Ouellette*-style preemption would not obviously upset the Clean Air Act's stated goals of maintaining and supporting the role of states in regulating air pollution.

D. Clean Air Act Preemption of State Common Law in the Lower Federal Courts

I. Her Majesty the Queen v. City of Detroit and Gutierrez v. Mobil Oil Corp.

Relatively few lower courts have specifically addressed whether the Clean Air Act preempts nuisance claims arising from state common law. Of the courts that have taken up the issue, the first to do so was the Sixth Circuit in *Her Majesty the Queen v. City of Detroit*.¹³³ In that case, Canadian officials sought to enjoin, under Michigan law, construction of a Michigan trash incinerator because of the alleged inadequacy of the facility's air pollution control equipment.¹³⁴ Notably, the facility had already received a Clean Air Act permit.¹³⁵

In finding that the Clean Air Act did not preempt the state law cause of action, the court first pointed out that the Act's savings clauses, like those of the Clean Water Act, expressly preserve an ongoing role for the states in regulating air pollution.¹³⁶ And because the common law claims in the case were based on a Michigan statute—that is, source-state law—the court relied on *Ouellette* to find that they did not fall victim to implied preemption.¹³⁷ The court further explained that the facility's Clean Air Act permit had little relevance; the permit merely indicated compliance with the separate requirements of the Clean Air Act and would remain valid regardless of the outcome of the state law litigation.¹³⁸ In this case, Michigan's nuisance standard simply functioned as an additional,

ternational Paper to the Clean Air Act.”); see also *supra* text accompanying notes 91–99 (discussing the cooperative federalism structure of the Clean Air Act).

¹³³ 874 F.2d 332 (6th Cir. 1989).

¹³⁴ *Id.* at 334–35.

¹³⁵ *Id.* at 334.

¹³⁶ *Id.* at 342–43 (“[The Clean Air Act savings clause] clearly indicates that Congress did not wish to abolish state control.”).

¹³⁷ *Id.* at 343.

¹³⁸ *Id.* at 344 (“[T]he plaintiffs’ actions in state court, if successful, will not in any way alter or modify the validity of the federal permit previously issued.”).

more stringent limitation on emissions, which the Clean Air Act expressly allows.¹³⁹

The court in *Gutierrez v. Mobil Oil Corp.*¹⁴⁰ reached the same conclusion. In that case, the plaintiffs alleged that the defendants violated various state common law duties by negligently maintaining storage facilities for various fuels.¹⁴¹ In response, the defendants argued that the common law claims were preempted by the Clean Air Act.¹⁴² Citing both *Ouellette* and *Her Majesty the Queen*, the court held that the Clean Air Act preserved the state law claims.¹⁴³ As the court explained, “states have the right and jurisdiction to regulate activities occurring within the confines of the state. The Clean Air Act expressly allows the application of more stringent emission standards by the source state.”¹⁴⁴

The key to both *Her Majesty the Queen* and *Gutierrez* was the courts’ recognition that the Clean Air Act is sufficiently similar to the Clean Water Act to make *Ouellette* the controlling precedent. As previously explained, both statutes employ a “cooperative federalism” structure under which the federal government develops baseline standards that the states individually implement and enforce.¹⁴⁵ In doing so, states are expressly allowed by the statutes to employ standards more stringent than those specified by the federal requirements.¹⁴⁶ Under both statutes, states issue permits to individual sources that signify compliance with the relevant federal program,¹⁴⁷ yet the two statutes also feature nearly identical savings clauses contemplating preservation of independent forms of state regulation.¹⁴⁸

If there is any basis for distinguishing the two Acts, it is that the Clean Water Act’s primary savings clause does contain additional lan-

¹³⁹ *Id.* (“If the plaintiffs succeed in state court, it will simply be an instance where a state is enacting and enforcing more stringent pollution controls as authorized by the [Clean Air Act].”).

¹⁴⁰ 798 F. Supp. 1280 (W.D. Tex. 1992).

¹⁴¹ *Id.* at 1281.

¹⁴² *Id.*

¹⁴³ *Id.* at 1282–83, 1285–86.

¹⁴⁴ *Id.* at 1284 (citations omitted).

¹⁴⁵ See Glicksman, *supra* note 25, at 407 (discussing the role of the states in enforcing NAAQS); *id.* at 590–92 (describing state administration of National Pollutant Discharge Elimination System permitting under the Clean Water Act).

¹⁴⁶ See 33 U.S.C. § 1370 (2006); 42 U.S.C. § 7416 (2006).

¹⁴⁷ See, e.g., 33 U.S.C. § 1342(b) (Clean Water Act); 42 U.S.C. § 7410(a)(2)(C) (Clean Air Act).

¹⁴⁸ See 33 U.S.C. § 1365(e); 42 U.S.C. § 7604(e).

guage stating that nothing in the Act should “be construed as impairing or in any manner affecting any right or jurisdiction of the States *with respect to the waters . . . of such States.*”¹⁴⁹ Some commentators have suggested that the “of such States” qualifier limits the coverage of the savings clause to a state’s regulation of its *own* waters, thus driving the distinction between source- and affected-state law articulated in *Ouellette*.¹⁵⁰ The Clean Air Act, by contrast, lacks any such qualifier, perhaps indicating that this same distinction should not apply there.

However, while the *Ouellette* Court did mention the “such States” language in passing,¹⁵¹ a closer reading of the opinion indicates that the source-state/affected-state distinction was actually driven by the Court’s concern that affected-state law would fail to properly account for the costs inherent in regulation of out-of-state sources.¹⁵² Because the Court viewed the full weighing of costs and benefits as integral to the Clean Water Act, it was this concern, and not any particular textual provision, that led the Court to conclude that obstacle preemption principles ruled out affected-state claims.¹⁵³ And, as previously discussed, this concern is every bit as acute in the Clean Air Act context.

Thus, upon a full comparison of the Clean Air Act and Clean Water Act, there can be little doubt that the *Ouellette* Court’s reasoning applies with equal force to the Clean Air Act. For a lower court, then, the only task remaining in a Clean Air Act preemption case is determining whether the relevant claim arises under source-state or affected-state law: if source-state, the action may proceed; if affected-state, it is preempted. The courts in both *Her Majesty the Queen* and *Gutierrez*

¹⁴⁹ 33 U.S.C. § 1370 (emphasis added).

¹⁵⁰ See Recent Case; 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, 1817 (2011); Mary E. Reiner, Note, *International Paper Co. v. Ouellette*: Uneasy Resolution of Which State’s Law to Apply in Interstate Water Pollution Disputes, 1 Fordham Envtl. L. Rev. 119, 129 (1989) (arguing that the *Ouellette* Court “relied” on the language of the statute, including the “such States” provision, for its distinction between source- and affected-state law (internal quotations omitted)).

¹⁵¹ *Ouellette*, 479 U.S. at 493.

¹⁵² See *id.* at 495 (“An interpretation of the saving clause that preserved actions brought under an affected State’s law would disrupt this balance of interests.”).

¹⁵³ See *id.* at 493 (“Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact preempts an action based on the law of an affected State.”).

properly concluded that the source-state claims asserted by the plaintiffs in those cases were not preempted by the Clean Air Act.

2. *Comer v. Murphy Oil USA and North Carolina ex rel. Cooper v. TVA*

Though *Her Majesty the Queen* and *Gutierrez* were decided prior to *AEP*, the Supreme Court's analysis of Clean Air Act displacement of federal law does not undermine their conclusions. As noted above, displacement and preemption are distinct inquiries resting on independent analytical considerations.¹⁵⁴ However, in the most recent case to address Clean Air Act preemption of state common law, *Comer v. Murphy Oil USA*, the court mistakenly conflated the two questions and held that the displacement finding in *AEP* compelled a finding of state law preemption.¹⁵⁵

In *Comer*, a group of property owners sued several oil companies alleging that emissions by the companies contributed to global warming, which ultimately caused the damaging effects of Hurricane Katrina.¹⁵⁶ The property owners asserted a variety of state law claims, including public nuisance.¹⁵⁷ In considering whether those claims were preempted, the court first noted that the *AEP* decision rested primarily on the idea that Congress had entrusted to the EPA, and not the federal courts, the responsibility of determining what levels of GHG emissions are reasonable.¹⁵⁸ Because deciding a state nuisance suit would also involve an evaluation of the reasonableness of GHG emissions by courts, the court summarily concluded that *state* nuisance claims related to GHG emissions must be "displaced" as well.¹⁵⁹

This reasoning, however, misinterprets the relationship between displacement and preemption, doctrines that actually involve quite different issues. While displacement focuses on Congressional intent as to the *horizontal* allocation of power among the branches of the federal government, preemption is concerned with the *vertical* allocation of power between the federal government and the states. That Congress preferred for the EPA, and not the federal courts, to determine the obligations of

¹⁵⁴ See *supra* text accompanying notes 62–63.

¹⁵⁵ 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012).

¹⁵⁶ *Id.* at 852.

¹⁵⁷ *Id.* at 852–53.

¹⁵⁸ *Id.* at 865.

¹⁵⁹ *Id.*

GHG emissions sources under federal law says little about Congress's preferences with respect to GHG regulation under state law. Thus, by merely citing *AEP* and failing to engage in an independent preemption analysis, the *Comer* court unjustifiably enlarged the Supreme Court's holding in *AEP*.¹⁶⁰

Though engaging in a more thorough analysis of preemption than that of the *Comer* court, the Fourth Circuit in *North Carolina ex rel. Cooper v. TVA*¹⁶¹ reached a similarly mistaken conclusion. In that case, the court addressed state law nuisance claims brought by the North Carolina Attorney General to enjoin emissions of sulfur dioxide and nitrous oxides from eleven TVA power plants in Alabama, Kentucky, and Tennessee.¹⁶² After a bench trial, the district court below found that four of the plants, located in Alabama and Tennessee, were nuisances under source-state law and entered an injunction mandating installation of new emissions technology.¹⁶³

Reviewing the district court's decision, the Fourth Circuit began with an extensive analysis of the Clean Air Act's structure.¹⁶⁴ Due to "the comprehensiveness of [the Clean Air Act's] coverage,"¹⁶⁵ the court expressed a strong presumption that nuisance claims are preempted by the Clean Air Act.¹⁶⁶ According to the court, the Clean Air Act "reflects the extensive application of scientific expertise" and "has set in motion reliance interests and expectations," such that it "ill behooves the judiciary to set aside [the] congressionally sanctioned scheme."¹⁶⁷ The court expressed concern that "[d]iffering [nuisance] standards could create perverse incentives for power companies to increase utilization of plants in regions subject to less stringent judicial decrees,"¹⁶⁸ and thus declared it "unlikely . . . that Congress intended to establish such a chaotic regulatory structure."¹⁶⁹ Rather than observing the traditional presumption

¹⁶⁰ In particular, the *Comer* court's approach is rebutted by the fact that the Supreme Court in *AEP* expressly left the preemption issue "open for consideration on remand." *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

¹⁶¹ 615 F.3d 291 (4th Cir. 2010).

¹⁶² *Id.* at 296–97.

¹⁶³ *Id.* at 298.

¹⁶⁴ *Id.* at 298–301.

¹⁶⁵ *Id.* at 301.

¹⁶⁶ *Id.* at 303.

¹⁶⁷ *Id.* at 301.

¹⁶⁸ *Id.* at 302.

¹⁶⁹ *Id.* (quoting *Ouellette*, 479 U.S. at 497). Notably, the Fourth Circuit seemed to apply this statement in *Ouellette* to all state nuisance claims, despite the fact that the *Ouellette*

against preemption, the court instead held that preemption principles cautioned “against . . . allowing state nuisance law to contradict joint federal-state rules so meticulously drafted.”¹⁷⁰ While the court did cite to *Ouellette*, it only grudgingly acknowledged that decision’s distinction between source-state and affected-state law, and implied that even some source-state claims might nevertheless be preempted.¹⁷¹

Ultimately, the Fourth Circuit held that the district court had improperly applied affected-state law, because the remedy it imposed appeared to borrow from requirements contained in North Carolina legislation.¹⁷² And even if the district court *had* applied the nuisance law of Alabama and Tennessee, the court explained, any finding of liability was itself an error because Alabama and Tennessee expressly permitted the emissions in question under their SIPs.¹⁷³ Of most immediate concern here, however, is the Fourth Circuit’s invocation of conflict preemption principles to suggest that nuisance liability may *never* be imposed where the emissions in question are the subject of a Clean Air Act permit, regardless of

Court was clearly referring only to the application of affected-state common law. See Emily Sangi, Note, The Gap-Filling Role of Nuisance in Interstate Air Pollution, 38 Ecology L.Q. 479, 514–15 (2011) (noting that the Fourth Circuit quoted several statements from *Ouellette* that applied only to affected-state claims “out of context,” implying they instead applied to *all* state nuisance claims).

¹⁷⁰ *North Carolina ex rel. Cooper*, 615 F.3d at 303.

¹⁷¹ *Id.* (“The *Ouellette* Court itself explicitly refrained from categorically preempting every nuisance action brought under source state law. At the same time, however, the *Ouellette* Court was emphatic that a state law is preempted ‘if it interferes with the methods by which the federal statute was designed to reach [its] goal’” (citation omitted) (quoting *Ouellette*, 479 U.S. at 494)).

¹⁷² *Id.* at 306–07. As other commentators have noted, the facts appear otherwise. See Barrella, *supra* note 130, at 258–59; Sangi, *supra* note 169, at 505–06. The district court took great pains to emphasize that it was finding liability under Alabama and Tennessee’s substantive law of nuisance, even quoting the respective states’ relevant common law standards. *North Carolina ex rel. Cooper v. TVA*, 593 F. Supp. 2d 812, 829–31 (W.D.N.C. 2009). To the extent that the district court borrowed from North Carolina’s Clean Smokestacks Act, it was only for the purpose of fashioning a remedy, not for imposing liability. See Barrella, *supra* note 130, at 258.

¹⁷³ *North Carolina ex rel. Cooper*, 615 F.3d at 309. This conclusion, too, is likely in error. See Barrella, *supra* note 130, at 259 (noting the Fourth Circuit’s failure to address North Carolina’s contention that source-state law does not preclude nuisance liability for permitted emissions); Sangi, *supra* note 169, at 507–09 (arguing that the Alabama and Tennessee cases cited by the Fourth Circuit are factually distinguishable and thus inapplicable); see also *Petition for Writ of Certiorari* at 30–37, *North Carolina ex rel. Cooper*, 132 S. Ct. 46 (No. 10-997) (collecting Alabama and Tennessee cases suggesting nuisance liability *may* attach to conduct that is the subject of a regulatory permit).

whether the nuisance action is brought pursuant to source- or affected-state law.¹⁷⁴

This suggestion is almost certainly misguided. First, such a view is inconsistent with general nuisance principles: though a valid permit might insulate a defendant from criminal prosecution, it does not usually constitute a defense to civil nuisance liability.¹⁷⁵ Some states do immunize conduct expressly authorized by *statute* from civil liability,¹⁷⁶ but the mere possibility that a state could enact such a rule is not a reason to read into the Clean Air Act a broader preemptive effect than what its terms provide.

Second, the Fourth Circuit's view misapplies preemption doctrine more generally. In contrast to the court's suggestion that the differing standards imposed by Clean Air Act permits and state nuisance law are sufficient to trigger conflict preemption, the Supreme Court in *Ouellette* allowed source-state claims to proceed *despite* the discharges in question being permitted under the Clean Water Act.¹⁷⁷ What the Supreme Court recognized is that a state permit under the Clean Water Act (or in this case, the Clean Air Act) in no way conflicts with a finding of nuisance liability under state common law: the defendant may easily comply with both standards simply by meeting the stricter demands of source-state nuisance law.¹⁷⁸ And the freedom of the states to impose separate, more

¹⁷⁴ *North Carolina ex rel. Cooper*, 615 F.3d at 309 (“It would be odd, to say the least, for specific state laws and regulations to expressly permit a power plant to operate and then have a generic statute countermand those permissions on public nuisance grounds.”).

¹⁷⁵ See 58 Am. Jur. 2d Nuisances § 395 (2012) (“A governmental license does not carry with it immunity for private injuries that may result directly from the exercise of the powers and privileges conferred.”).

¹⁷⁶ See, e.g., Cal. Civ. Code § 3482 (Deering 2005) (“Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.”); Idaho Code Ann. § 52-108 (2009) (same); Mont. Code Ann. § 27-30-101(2) (2011) (“Nothing that is done or maintained under the express authority of a statute may be deemed a public or private nuisance.”); *Messer v. City of Dickinson*, 3 N.W.2d 241, 245 (N.D. 1942) (“In this state the legislature has seen fit to declare that an act which it has expressly authorized shall not be deemed a nuisance.”).

¹⁷⁷ *Ouellette*, 479 U.S. at 499 (“Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable.”).

¹⁷⁸ See *id.* at 506 (Brennan, J., concurring in part and dissenting in part) (“By complying with the most stringent requirement . . . the polluter necessarily complies with the more lenient standards.”); *Barrella*, *supra* note 130, at 260 (“The court made no effort to explain why, exactly, these two layers of regulation could not coexist.”); *Sangi*, *supra* note 169, at 512.

stringent requirements is provided to them by the structure and text of the federal statutes.¹⁷⁹

Under the Fourth Circuit's approach, the only viable nuisance claims are those where the relevant emissions also violate requirements of the source-state SIP. But because the Clean Air Act would itself provide a remedy in such situations, it is hard to understand why a plaintiff would, in that case, ever rely on nuisance.¹⁸⁰ Thus, because its approach essentially eliminates any role for nuisance in the regulation of air pollution, the Fourth Circuit's decision in *North Carolina ex rel. Cooper* is incompatible with *Ouellette*.

Finally, much like the *Comer* court, the Fourth Circuit unduly enlarged the preemption inquiry to encompass policy-based considerations about the branch of government best suited for addressing scientifically complex pollution issues. Repeatedly emphasizing the EPA's greater expertise and resources vis-à-vis the federal courts, the Fourth Circuit seemed to invoke preemption on the basis that agency decision-making processes invariably produce better outcomes than judges applying common law.¹⁸¹ These concerns may be valid,¹⁸² but their relevance to the preemptive effect of an existing statute is dubious. Determining whether a statute preempts state law, after all, requires inquiring into what Congress *actually* intended, not what it *should have* intended.¹⁸³ And though the court cited its own policy conclusions as evidence that Congress *must have* intended the Clean Air Act to preempt state law nuisance claims,¹⁸⁴ it more or less ignored the wealth of evidence to the contrary discernible in the text and structure of the Act itself.¹⁸⁵

In short, the courts in *Her Majesty the Queen* and *Gutierrez*, unlike those in *Comer* and *North Carolina*, properly analyzed Clean Air Act preemption of state nuisance claims under current doctrine and law: as required by the Supreme Court's holding in *Ouellette*, the Act preempts

¹⁷⁹ See supra Section II.B.

¹⁸⁰ See 42 U.S.C. § 7604(a)(1) (2006).

¹⁸¹ *North Carolina ex rel. Cooper*, 615 F.3d at 304–06 (“[T]he district court properly acknowledged that ‘public nuisance principles . . . are less well-adapted than administrative relief to the task of implementing the sweeping reforms that North Carolina desires.’” (quoting *North Carolina ex rel. Cooper v. TVA*, 593 F. Supp. 2d 812, 817 (W.D.N.C. 2009)).

¹⁸² See generally infra Part III.

¹⁸³ See supra text accompanying notes 66–67.

¹⁸⁴ See, e.g., *North Carolina ex rel. Cooper*, 615 F.3d at 305 (“[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider.” (emphasis added)).

¹⁸⁵ See supra Section II.B & Subsection II.C.1.

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only those claims brought pursuant to the law of an affected state, and preserves those under the law of the source state.

III. POLICY CONSIDERATIONS: WHY NUISANCE SHOULD PLAY NO ROLE IN REGULATING GHG EMISSIONS

Although the Fourth Circuit likely erred as a matter of law in *North Carolina ex rel. Cooper v. TVA*¹⁸⁶ by finding even source-state nuisance claims preempted, the policy concerns expressed in the decision are nonetheless sympathetic ones. Even if preservation of source-state claims is a result compelled by *International Paper Co. v. Ouellette*,¹⁸⁷ it is worth inquiring whether that result is necessarily desirable. At least when it comes to GHG emissions, this Note posits that it is not. As this Part will demonstrate, policy considerations counsel in favor of complete preemption of GHG-related nuisance claims; therefore, Congress should amend the Clean Air Act, or pass separate legislation, to provide for that result.

A. Scientific Uncertainty and Judicial Competence

The first and most obvious problem with judicial adjudication of GHG-related nuisance claims is that courts simply lack the necessary expertise. As the court in *North Carolina ex rel. Cooper* explained, allowing courts to address complex scientific problems like climate change through vague nuisance standards “would reorder the respective functions of courts and agencies.”¹⁸⁸ Unlike the expert scientists responsible for setting emissions limits at the EPA, judges are unlikely to have much experience with the “specialized knowledge in chemistry, medicine, meteorology, biology, engineering, and other relevant fields” necessary for determining an appropriate level for GHG emissions.¹⁸⁹ Though judges may be able to rely on outside experts, “[o]ne can argue whether expert witnesses in bench trials can replicate the resources that EPA can bring to bear in deciding appropriate emissions standards.”¹⁹⁰ Furthermore, the strictures of a time-limited trial allow courts to consid-

¹⁸⁶ 615 F.3d 291.

¹⁸⁷ 479 U.S. 481 (1987).

¹⁸⁸ *North Carolina ex rel. Cooper*, 615 F.3d at 304.

¹⁸⁹ *Id.* at 305.

¹⁹⁰ *Id.* at 304.

er only “a mere fraction of the information that regulatory bodies can consider” through notice-and-comment rulemaking.¹⁹¹

At the same time, defenders of nuisance liability in the climate change context rightly point out that courts are *frequently* called on to adjudicate questions involving difficult scientific problems.¹⁹² Some cases have even raised precisely the same kinds of complex causation and tracing difficulties as GHG-induced climate change. For example, in toxic tort cases, courts have used innovations like market-share liability to successfully apportion damages to individual defendants, despite injuries that were aggregately inflicted by a host of contributing causal agents.¹⁹³ In asbestos litigation, courts have resolved claims despite “scientific uncertainty regarding the biological mechanism underlying asbestos-related diseases.”¹⁹⁴ Finally, courts have successfully analyzed difficult scientific questions involved in environmental nuisance claims, even adjudicating large-scale cases involving pollution across state lines.¹⁹⁵ When it comes to complicated empirical questions about climate change, then, some commentators have suggested courts can rise to the challenge just as they have in these other contexts.¹⁹⁶

Such optimism, however, underestimates the true scope of the scientific problems that adjudicating GHG nuisance claims presents. While courts might in some cases be capable of managing complex scientific issues, those presented by climate change rise to a higher order of magnitude. As the court noted in *Native Village of Kivalina v. ExxonMobil*

¹⁹¹ Id. at 305; see also *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011) (“Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person Rather, judges are confined by a record comprising the evidence the parties present.”).

¹⁹² See, e.g., *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 326–330 (2d Cir. 2009), rev’d, 131 S. Ct. 2527 (2011) (citing examples of the “federal courts’ masterful handling of complex public nuisance issues”); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 *Yale L.J.* 350, 370 (2011) (noting examples of courts having “devised a number of doctrinal devices to accommodate the difficulties of proof associated with [complex environmental and toxic tort] cases”).

¹⁹³ Ewing & Kysar, *supra* note 192.

¹⁹⁴ Id.

¹⁹⁵ *Am. Elec. Power Co.*, 582 F.3d at 326–30 (collecting cases where courts successfully applied complex scientific principles to large-scale interstate pollution problems).

¹⁹⁶ See Ewing & Kysar, *supra* note 192; see also David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 *Colum. J. Envtl. L.* 1, 22–27 (2003) (applying causation principles from other complex tort contexts to climate change claims).

Corp., “considerations involved in the emission of greenhouse gases and the resulting effects of global warming are ‘entirely different’ than those germane to [more traditional pollution cases].”¹⁹⁷ Rather than involving a “discrete, geographically definable waterway,” global warming claims are based on emissions “from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere.*”¹⁹⁸ Though other cases have involved complicated causation issues with multiple causal agents, one would be hard-pressed to find an example of a court apportioning responsibility for an injury to which every person on the planet arguably contributes.¹⁹⁹

Furthermore, the scientific issues are not the only ones that may lie beyond the bounds of judicial competence. Climate change also implicates complex economic considerations. For instance, though a particular nuisance suit would likely be targeted at only a small set of emissions sources, “to determine a ‘reasonable’ emissions level for a single defendant, a judge would first have to determine the ‘reasonable’ level of *global* emissions in light of . . . the *global* costs and benefits,” among other considerations.²⁰⁰ Because “virtually everyone on Earth is responsible on some level for contributing to [GHG] emissions,”²⁰¹ quantifying these economic costs and benefits would be a massive undertaking for even the most expert and well-resourced deliberative body; if possible at all, it is surely a task that lies beyond the competence of a nonexpert judge in a routine judicial proceeding.

Similarly, precisely because climate change is a global problem, policy action related to the issue presents difficult international relations

¹⁹⁷ *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009); see also Matthew Edwin Miller, Note, *The Right Issue, The Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 Mich. L. Rev. 257, 272 (2010) (“Unlike in [other] cases, consideration of injury, causation, and reasonableness in [a climate change nuisance case] would entail confronting a diffuse causal process with billions of culprits and novel lag-effect dynamics, internal feedback loops, and statistically manifesting harms.”).

¹⁹⁸ *Native Vill. of Kivalina*, 663 F. Supp. 2d at 875.

¹⁹⁹ *Id.* at 877.

²⁰⁰ Brief for the Petitioners at 47, *Am. Elec. Power Co.*, 131 S. Ct. 2527 (No. 10-174), 2011 WL 334707 at *47 (emphasis added); see also Miller, *supra* note 197, at 276 (“[I]t would be impossible for judges to evaluate the reasonableness of individual emissions without promulgating an aggregate limit behind the published opinion. It would be meaningless to label an individual contribution as ‘too much’ without determining maximum acceptable aggregate emissions.”).

²⁰¹ *Native Vill. of Kivalina*, 663 F. Supp. 2d at 877.

challenges. For example, despite having declined to ratify the Kyoto Protocol, the United States continues to lead international emissions reduction initiatives.²⁰² Put simply, even if these delicate issues of foreign affairs do not rise to the level of making GHG-related lawsuits legally nonjusticiable,²⁰³ the political branches, with their more intricate understanding of international relations, are certainly *better* positioned to accurately and effectively address them than are the courts.

This last point is worth emphasizing. That courts are poorly suited to resolving the complex scientific, economic, and international relations challenges that GHG nuisance suits present does not mean they are utterly incapable of the task. The point, rather, is that resolutions fashioned by courts are likely to be inferior to those produced by legislatures and administrative agencies.²⁰⁴ So, while judicial resolutions of nuisance suits might well be worth their imperfections in a regulatory environment where the political branches were simply refusing to address climate change at all, such suits are best left dormant given the EPA's ongoing efforts to incorporate GHG regulation into the Clean Air Act.

B. Drawing on the Political Question Debate: The Opacity of Public Nuisance and the Lack of Manageable Standards

One of the most controversial legal issues throughout the relatively short history of GHG nuisance litigation has been whether climate change issues present a nonjusticiable "political question" beyond the cognizance of the courts.²⁰⁵ Much of this analysis has focused on whether public nuisance, as applied to GHG emissions, provides "judicially

²⁰² See, e.g., John M. Broder, U.S. Pushes to Cut Emissions of Some Pollutants That Hasten Climate Change, N.Y. Times, Feb. 16, 2012, at A12 (describing U.S.-led initiative by a small group of countries to reduce emissions of certain short-lived pollutants).

²⁰³ See *Native Vill. of Kivalina*, 663 F. Supp. 2d at 873.

²⁰⁴ Cf. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.").

²⁰⁵ See, e.g., *Comer v. Murphy Oil USA*, 585 F.3d 855, 869–76 (5th Cir. 2009); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 321–32 (2d Cir. 2009), rev'd, 131 S. Ct. 2527; *Native Vill. of Kivalina*, 663 F. Supp. 2d at 871–77; see also Nathan Howe, The Political Question Doctrine's Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties?, 40 *Envtl. L. Rep. News & Analysis* 11,229 (2010); Miller, supra note 197, at 264 (arguing that "[t]he political question doctrine should bar adjudication of public nuisance cases").

discoverable and manageable standards” for resolving disputes.²⁰⁶ Though this question lies beyond the scope of this Note as a legal matter, many of the same considerations that make the legal question a close one indicate that, as a matter of policy, public nuisance is simply too blunt an instrument to consistently or effectively regulate GHG emissions, even if the scientific issues involved were more accessible.

The key issue in a public nuisance case is whether the conduct in question “contribute[s] to an unreasonable interference with public rights.”²⁰⁷ Beyond this vague standard, however, courts are provided with little guidance as to what combination of costs and benefits makes particular conduct “reasonable,” or as to the methods through which costs and benefits should be weighed. For this reason, before deciding on the reasonableness of particular emissions, a court would first have to resolve a host of difficult normative questions. Among these issues, the court must decide what contribution to the aggregate global emissions limit is reasonable for a particular source, which kinds of “costs” and “benefits” of emissions should even be considered, and how to compare abstract values like health, welfare, and aesthetics to more readily quantifiable economic costs.

Given the inherent subjectivity of these questions, one could hardly expect any two courts to apply the “reasonableness” standard the same way. Rather than a sensible, uniform approach to regulating GHGs, sources would be left with a hodgepodge of competing court interpretations about what kind of conduct is “reasonable,” with the legality of any particular set of emissions resting on nothing more than the identity of the judge who happened to draw the eventual nuisance suit.²⁰⁸ Surely this is not a desirable means for solving the challenges of climate change, and legislation preempting state law nuisance suits would prevent such a chaotic state of affairs from arising.

C. Nuisance Litigation as ‘Gap-Filler’

One of the standard arguments in favor of preserving common law nuisance actions is that nuisance can serve as a flexible tool for filling in

²⁰⁶ *Native Vill. of Kivalina*, 663 F. Supp. 2d at 871–72 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

²⁰⁷ *Id.* at 874 (quotations omitted).

²⁰⁸ See *North Carolina ex rel. Cooper*, 615 F.3d at 306 (“A company, no matter how well-meaning, would be simply unable to determine its obligations ex ante under such a system, for any judge in any nuisance suit could modify them dramatically.”).

the “gaps” not covered by more general legislative or administrative regulation.²⁰⁹ In essence, such arguments contend that statutory regimes inevitably result in underinclusive coverage and inconsistent enforcement; common law actions, then, allow private parties to seek redress against harmful and undesirable sources of pollution that other forms of regulation might overlook.²¹⁰

Although this argument might carry some weight in other pollution contexts, it has little application to climate change. The tendency of GHGs to diffuse uniformly across the globe means there are few discrete enforcement “gaps” to fill. Any individual emissions source contributes only a miniscule amount to global atmospheric concentrations of GHGs, and thus is only minimally responsible for any corresponding adverse effects. As a result, attempts to use the common law to abate emissions from sources not covered by otherwise generally applicable statutes or regulations are unlikely to produce any real benefits.²¹¹ The harms inflicted on any potential plaintiff are a result of the global aggregate of GHG emissions, and not just the few that may rest within some discrete regulatory “gap.”

At the same time, such supposed “gap-filling” litigation might nevertheless impose substantial costs, as it could result in the elimination of economically productive activities. This concern is particularly acute when it comes to power-generating electrical utilities, one of the largest sources of GHG emissions. As one commentator has noted, applying more stringent emissions controls to utilities increases the cost of electricity for consumers, and because “many of the nation’s utilities are connected in a massive interstate grid . . . the stringent regulation of CO₂ emissions in one state could cause electricity prices to rise in other

²⁰⁹ See, e.g., Abate, *supra* note 39, at 240–47 (“[E]ngaging the judiciary to secure common law relief through remedies such as public nuisance litigation may be a viable short-term remedy in that it is the most immediate way to redress the harm for victims in the United States.”); Barrella, *supra* note 130, at 260 (“[Nuisance] suits could have the potential to fill a regulatory gap, rather than upsetting existing regulatory structure.” (emphasis omitted)); Sangi, *supra* note 169, at 518 (arguing that “the common law of nuisance co-exists with, complements, and fills the gaps in, statutory regimes”).

²¹⁰ See Sangi, *supra* note 169, at 519–22.

²¹¹ A similar argument has frequently been offered as support for the idea that climate change plaintiffs lack standing due to their inability to demonstrate that the desired relief will redress their injuries. See, e.g., Brief for the Petitioners at 23–24, *Am. Elec. Power Co.*, 131 S. Ct. 2527 (No. 10-174), 2011 WL 334707 at *23–24; Brief for the Federal Respondent at 13–15, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 3043970 at *13–15; Miller, *supra* note 197, at 280–87.

states.”²¹² That is, the costs of a single, aberrant injunction issued by a district court in a public nuisance case would not necessarily be confined to the particular defendant-utility appearing before the court; rather, the injunction may well increase costs for a mass of energy consumers across the country, a fact the reviewing court is unlikely to factor into its decision.

Weighing such costs against the likely minimal benefits that eliminating GHG emissions from any single source would provide, using common law remedies as a mere “gap-filler” would ultimately prove largely counterproductive. Furthermore, an injunction against emissions in one locale may simply cause the offending source to relocate, ultimately effecting no reduction in *overall* GHG concentrations (or corresponding harms) whatsoever.²¹³ In sum, it is unclear what, if any, supplementary role there is for nuisance suits to play in the effective regulation of GHGs, and without such a role, the problems inherent in their adjudication provide little policy justification for saving them from the sword of preemption.

D. Nuisance Litigation as Catalyst

Recognizing some of the problems inherent in adjudicating GHG nuisance claims, a few commentators have nevertheless argued that the shortcomings of nuisance might in fact be its virtues. That is, by bringing climate change issues to public attention, nuisance claims might act as a “plea[.]” or “prod[.]” to the other branches of government.²¹⁴ Precisely because nuisance is a relatively blunt instrument for addressing climate change, leaving common law claims available might encourage the political branches to replace them with better, more comprehensive regulation.²¹⁵ In this way, nuisance might act as a catalyst for policy change.

²¹² 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, 639 (2008) (citing Kirsten H. Engel & Scott R. Saleska, Subglobal Regulation of the Global Commons: The Case of Climate Change, 32 Ecology L.Q. 183, 230 (2005)).

²¹³ See Miller, *supra* note 197, at 286.

²¹⁴ Ewing & Kysar, *supra* note 192, at 409.

²¹⁵ See Robert V. Percival, Of Coal, Climate and Carp: Reconsidering the Common Law of Interstate Nuisance 40 (U. of Md. Legal Studies Research Paper No. 2012-12, 2012), available at <http://ssrn.com/abstract=2017071> (“[T]he threat of litigation under the common law of interstate nuisance remains a useful prod to action by other branches of govern-

This idea certainly has some intuitive appeal, and given evidence of industry groups advocating for federal regulation as a replacement for unpredictable obligations imposed by common law,²¹⁶ it might enjoy some empirical support as well. At the same time, there is reason to be wary of a theory that promotes nuisance as a cure-all for under-regulation by the political branches. Most importantly, it is possible that nuisance liability might actually have much the *opposite* effect, inhibiting development of more desirable political solutions.

For instance, in an international context, it may be important that the United States have a single, consistent approach to regulating its own emissions. And, at this stage in the process, there very well could be long-run benefits to that approach being one of *less-than-stringent* controls. This is because the President may have more leverage to “extract commitments by foreign governments to reduce their GHG emissions if United States sources have not yet done so or committed to do so.”²¹⁷ Nuisance injunctions against GHG emitters could partially destroy this uniformity, signaling to foreign nations an apparent commitment to unilateral emissions reductions on the part of U.S. states, thus reducing other countries’ incentives to strengthen their own controls.²¹⁸ Similarly, unless nuisance suits were preempted, they could potentially distort the market for emissions allowances under a proposed cap-and-trade system.²¹⁹ That threat could discourage agreement on a market-based approach to comprehensive national emissions regulation.

ment.”); see also Abate, *supra* note 39, at 244 (“Public nuisance litigation is a useful mechanism to spur ‘institutionalized’ relief in the form of a federal statutory or treaty-based remedy in the near future for . . . climate change impacts.”); Ewing & Kysar, *supra* note 192, at 378 (noting that it is the “gap[s]” in tort law where judges can “meaningfully prod and plead”); Amelia Thorpe, Tort-Based Climate Change Litigation and the Political Question Doctrine, 24 J. Land Use & Envtl. L. 79, 103–04 (2008).

²¹⁶ See Felicity Barringer, A Coalition for Firm Limit on Emissions, N.Y. Times, Jan. 19, 2007, at C1.

²¹⁷ Glicksman & Levy, *supra* note 212, at 619.

²¹⁸ See *id.*; see also Laurence H. Tribe, Joshua D. Branson, & Tristan L. Duncan, Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine 21–22 (Wash. Legal Found., Working Paper No. 169, 2010), available at http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf.

²¹⁹ See Glicksman & Levy, *supra* note 212, at 646–47 (“In sum, state regulation may distort markets in pollution allowances and thus undermine the efficiency goals of cap-and-trade programs, which would support a congressional decision in favor of ceiling preemption.”); Tribe, Branson, & Duncan, *supra* note 218, at 22 (“[T]he prior existence of an ad hoc mishmash of common law regimes will frustrate legislators’ attempts to design coherent and systematic market-based solutions.”).

Of course, the biggest conceptual problem with nuisance liability as a “plea” or “prod” is that proponents of increased regulation lack sufficient leverage. Although the drawbacks of common law liability for sources of GHG emissions *could* lead legislatures to propose more comprehensive regulatory schemes as a substitute, legislators may instead respond by simply nullifying nuisance claims without providing a replacement. In fact, this is precisely the approach that legislatures in Texas and Utah have taken, passing laws that functionally eliminate climate-change-related nuisance liability altogether.²²⁰

Laws like those passed in Texas and Utah also serve to illustrate an important point. Though the problems inherent in GHG-related nuisance claims make them an inferior policy choice as compared to uniform federal regulation, nuisance claims might still be better than no regulation at all. That is to say, preemption of nuisance claims is only desirable *because* the EPA is, however slowly, already addressing the problem. However, were the EPA stripped of its regulatory authority over greenhouse gases—a not inconceivable possibility given certain recent proposals²²¹—nuisance may well have some role to play as a backstop.

One advantage of federal legislation *preempting* state nuisance claims, then, is that it would still provide for the revival of nuisance in the event that more desirable federal solutions to global warming become moribund. Allowing nuisance claims to proceed *on top of* administrative regulation, by contrast, might encourage states to follow the lead of Texas and Utah in eliminating GHG-related common law liability entirely, thus potentially preventing nuisance from stepping in as an alternative were the federal government to discontinue its own regulatory efforts.²²² Thus, by preempting state nuisance claims while the EPA acts, policymakers may ultimately better serve the long-term interests of advocates for increased GHG regulation.

²²⁰ Tex. Water Code Ann. § 7.257 (West Supp. 2012); Utah Code Ann. § 78B-4-515 (LexisNexis Supp. 2012). While these provisions do allow for nuisance liability in the event that a source violates legislative or administrative GHG restrictions, they eliminate nuisance as an *independent* constraint on emissions.

²²¹ See, e.g., Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (as passed by House, Apr. 7, 2011).

²²² Of course, were Congress to decline to exercise regulatory authority under the Clean Air Act, the federal common law of public nuisance might be revived as well.

CONCLUSION

With federal common law claims barred by the displacement finding in *American Electric Power Co. v. Connecticut*, the new frontier for greenhouse gas litigation may well be public nuisance claims based on state common law. The viability of such claims depends, however, on whether they survive potential preemption by the Clean Air Act. In addressing this issue, this Note has sought to demonstrate that, under the current state of the law, the Act preempts only one subset of state common law claims: those based on the law of a state other than that where the offending source is located. Claims based on the law of the source state, on the other hand, should be able to proceed.

At the same time, regulating greenhouse gas emissions through public nuisance in any form raises serious policy concerns. In short, courts are simply ill-suited to the task of examining the complicated issues of science, economics, and international relations that climate change presents, and the potential virtues of public nuisance bear little weight in the current regulatory environment. So long as federal regulation of GHG emissions proceeds, Congress would be well-advised to amend the Clean Air Act, or pass separate legislation, to provide for complete preemption of GHG-related public nuisance claims.