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Clean Air Act

Preemption

Hollingsworth's Richard O. Faulk argues that federal courts have erred by allowing state tort actions to proceed despite being preempted by the Clean Air Act. Doing so, courts have failed to adequately consider Congress's intent to ensure a level economic playing field as part of the Clean Air Act permitting process.

Is Nuisance Litigation Undermining the Clean Air Act's Preemptive Economic Purpose?

By Richard O. Faulk

The battle over federal Clean Air Act preemption continues to rage in the nation's courts, and until the U.S. Supreme Court decides to review the issue, the answer will probably remain unresolved. A group of slightly older cases held that the CAA preempts state tort actions, such as public nuisance claims, from proceeding[1], but recent federal decisions have reached precisely the opposite conclusion.[2] Importantly, however, the cases rejecting CAA preemption seem to put the legal ''cart before the horse'' by leapfrogging over Congress's purposes to preclude a preemptive result. In doing so, the courts failed to consider that Congress's objective under the CAA was not merely to control air pollution, but to do so while preserving and maintaining the *economic* incentives necessary to ensure balanced treatment of competing facilities. By preserving common law remedies, the courts undermined Congress's purpose to create a permitting system that guaranteed the ''level playing field'' essential to economic growth and stability. The Sixth Circuit's recent decision in *Merrick v. Diageo Americas*

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[1] *See North Carolina ex. rel. Cooper v. Tennessee Valley Authority*, 615 F.2d 291 (4th Cir. 2010), *("TVA")*, *Comer v. Murphy Oil USA*, 839 F. Supp.2d 849, 865 (S.D.Miss. 2012), and *United States v. EME Homer City Generation L.P.*, 823 F. Supp.2d 274, 296-97 (W.D. Penn. 2011).

[2] *See Merrick v. Diageo Americas Supply Inc.* 805 F.3d 685 (6th Cir. 2015); *Little, et al. v. Louisville Gas & Electric Co., PPL Corp.*, 805 F.3d 695 (6th Cir. 2015); *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) and *Grain Processing Corporation v. Freeman*, 848 N.W.2d 58 (Iowa 2014)., *cert. denied*, 135 S.Ct. 712 (2014).

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Supply Inc.[3] falls within the recent trend, as does its companion decision in *Little v. Louisville Gas & Electric Co., PPL Corp.*[4] Like similar rulings, *Merrick* addressed a situation where the alleged nuisance arose from facilities governed by CAA permits. The Sixth Circuit's decision in *Merrick* followed a familiar trail already blazed in prior decisions. Following precedents such as the Third Circuit's decision in *Bell v. Cheswick Generating Station*,[5] and the Iowa Supreme Court's decision in *Freeman v. Grain Processing Corp.*,[6] the court found few complications and coasted to a predictable result – one that preserved common law rights to sue for public nuisance against a facility operating pursuant to CAA permits.

This article examines the Sixth Circuit's decision in *Merrick* to determine whether the court conducted a proper conflict preemption analysis under controlling Supreme Court precedent. It studies *Merrick's* reasoning in relying on the CAA's ''state's rights'' savings clause to preserve nuisance actions under state law and whether that narrow perspective can be justified without considering Congress's broader purposes in the CAA. After reviewing those purposes, the article concludes that the narrow ''savings clause'' analysis applied in *Merrick* conflicts with controlling Supreme Court authority and undermines the economic stability of the CAA's permitting program – thereby unbalancing the competitive balance the CAA was created to ensure.

The Merrick Controversy

The controversy in *Merrick* arose from ethanol emissions from facilities that distill and age whiskey. The facility operated pursuant to a permit issued by the local air control district which capped fugitive ethanol emissions from its distillation facilities but not the warehouses. According to neighboring property owners, the distillation and aging process released ethanol vapors that drifted onto neighboring properties and, in combination with condensation, caused the development of ''whisky fungus.''[7] Allegedly, the fungus created ''unsightly'' conditions that required ''costly cleaning and maintenance,'' as well as ''early weathering of surfaces,''[8] and caused ''unreasonable and substantial annoyance and unreasonable interference with the use and enjoyment of the property.''[9]

After investigating the complaints, the local air pollution control district issued a notice of violation – and the complaining property owners filed a class action complaint in federal district court. They sought compensatory and punitive damages for negligence, nuisance and trespass, as well as an injunction requiring the facility to implement specific control systems to abate its ethanol emissions. The facility owner moved to dismiss the action, arguing that the plaintiffs' claims were preempted by the federal Clean Air Act. The district court dismissed the negligence claim, but it refused to dismiss the nuisance and trespass claims – and certified its ruling for interlocutory appeal to the Sixth Circuit.

The Sixth Circuit's Decision

On appeal, the facility owner argued that the plaintiffs' common law nuisance and trespass claims ''conflicted with the Clean Air Act methods for regulating emissions and that allowing such claims to proceed would frustrate the purposes and objectives of the Act.''[10] For all practical purposes, this argument mirrored the arguments previously rejected by the Third Circuit in *Bell v. Cheswick Generating Station*,[11] and by the Iowa Supreme Court in *Freeman v. Grain Processing Corp.*[12] After reviewing the authorities, the *Merrick* panel concluded – similarly to *Bell* and *Freeman* – that the CAA's ''state's rights savings clause'' expressly preserved the plaintiffs' right to seek relief via common law causes of action.[13] The ''state's rights savings clause,'' entitled ''Retention of State Authority,'' preserves the right of state and local governments to ''adopt or enforce'' standards, limitations or ''any other relief' regarding ''standards'' or ''limitations'' regarding ''emissions'' or ''requirements'' regarding ''control or abatement'' of air pollution.''[14]

According to the Sixth Circuit, The ''states' rights savings clause'' expressly preserved the state common law remedy on which the plaintiffs sued. The clause saves ''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'' unless the standard or limitation is ''less stringent'' than those under applicable implementation plans or federal statutes.[15] Since state courts are arms of the ''State,'' and the common law standards they adopt are ''requirement[s] respecting control or abate-

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

[4] 805 F.3d 695 (6th Cir. 2015). Since the Sixth Circuit's reasoning in *Little* is based on its holding in *Merrick*, the *Little* decision is not discussed separately here.

[5] 734 F.3d 188 (3d Cir. 2013), *cert. denied sub nom. GenOn Power Midwest, L.P. v. Bell*, 134 S. Ct. 2696 (2014).

[6] 848 N.W.2d 58 (Iowa), *cert. denied*, 135 S. Ct. 712 (2014).

[7] *Merrick,* 805 F.3d at 686.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 690.

[11] 734 F.3d 188 (3d Cir. 2013), *cert. denied sub nom. GenOn Power Midwest, L.P. v. Bell*, 134 S. Ct. 2696 (2014)

[12] 848 N.W.2d 58 (Iowa), *cert. denied*, 135 S. Ct. 712 (2014).

[13] The CAA actually contains two ''savings clauses.'' The first addresses ''citizen suits'' and preserves the rights of persons to sue for enforcement of ''any emission standard or limitation'' or ''any other relief'' including ''relief against the Administrator or a State agency.'' *See* 42 U.S.C. § 7604(e). Like the ''state's rights savings clause,'' the ''citizen suits'' clause also cannot be construed to undermine Congress' economic purposes under the CAA. *See infra* at 4-6.

[14] 42 U.S.C. § 7416.

[15] *See* 42 U.S.C. § 7416.

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ment of air pollution,''[16] states retain the right to ''adopt or enforce'' common law standards that apply to emissions.[17]

As in *Bell* and *Freeman*, the Sixth Circuit also supported its ruling by emphasizing similarities in the texts of CAA and the Clean Water Act (''CWA'') – and using those similarities to justify reliance on authorities construing the CWA. Drawing on textual analogies in the two statutes, the court stressed that many of the provisions in the CAA, including the savings clauses, were ''modeled'' after the CWA, so that the two acts are ''often in *pari materia*.''[18] Following this reasoning, the Sixth Circuit paralleled the reasoning of *Bell* and *Freeman* by holding that the Clean Water Act's savings provisions are ''materially indistinguishable'' from the Clean Air Act's state's rights savings clause.[19]

This holding provided the linchpin to the U.S. Supreme Court authority that the Sixth Circuit, *Bell* and *Freeman* used to justify their decisions – the high court's ruling regarding Clean Water Act preemption in *Int'l Paper Co. v. Ouellette*.[20] In *Ouellette*, the high court held that the CWA's savings provision preserved nuisance claims based on intrastate water pollution.[21] Given the Sixth Circuit's conclusion that the CWA's and CAA's savings provisions are ''materially indistinguishable,'' the Sixth Circuit held that the CAA's savings clause required the same result regarding intrastate air pollution in *Merrick*.[22]

Contrary Supreme Court Authority

The Sixth Circuit's use of analogies to the CWA's savings provisions – as well as its adoption of *Ouellette* as a controlling authority in CAA cases – raises serious questions that undermine the reliability of its decision. In fact, the *Merrick*, *Bell* and *Freeman* courts each committed the same fatal error by leaping to apply the CAA's savings clause *before conducting a proper conflict preemption analysis*. As a result, their decisions conflict with controlling Supreme Court authority that precludes the use of savings clauses to preserve common law claims that conflict with Congress's objectives.

The Supreme Court prohibited such analyses in *Geier v. American Honda Motor Co.*,[23] in which the court held that common lawsuits regarding driver's side airbags were impliedly preempted by the standards issued under the National Traffic and Motor Vehicle Safety Act. In an opinion by Justice Breyer, *Geier* precluded the use of savings clauses to bypass the application of ordinary preemption principles.[24] The *Geier* court held that a preemption analysis must include not only an evaluation of *express* preemption based upon actual statutory proscriptions, but also an assessment of *implied* or ''conflict'' preemption to determine whether state common law lawsuits stand ''as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress''[25]

''Obstacles'' that justify implied preemption include a wide variety of circumstances, including those which are ''conflicting'' or ''contrary to'' or ''different'' from federal purposes, as well as those which are ''inconsistent'' or ''interfere'' with them, and those which ''violate'' or curtail'' them.[26] According to the *Geier* court, state lawsuits that seek such relief are preempted *even if the federal statute contains a savings clause*:

Insofar as petitioners' argument would permit common-law actions that ''actually conflict'' with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary preemption principles, seeks to protect. *To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to ''destroy itself.''*[27]

By this reasoning, the Supreme Court concluded that savings clauses do not ''bar the ordinary working of conflict preemption principles.''[28] Under *Geier*, courts must first determine whether a preemptive conflict with Congress's purposes exists. If such a conflict is identified, state actions cannot be ''saved'' – otherwise, the savings clause would undermine Congress's legislative objective.

Although a conflict preemption analysis begins with the statutory text, interpreting that language ''does not occur in a contextual vacuum.''[29] The ''ultimate touchstone'' of preemptive effect is Congress's purpose.[30] In order to develop ''a fair understanding of congressional purpose,'' courts must evaluate the preemption language, the surrounding statutory structure and regulatory scheme, and how Congress intended ''to affect business, consumers, and the law'' through these combined factors. Unfortunately, the *Merrick*, *Bell* and *Freeman* courts did not apply a proper conflict preemption analysis. Instead, they bypassed *Geier's* requirements and misconstrued the Supreme Court's decision in *Ouellette* by narrowly reading the decision as turning on a ''savings clause'' analysis.

Properly construed, *Ouellette*'s holding is not justified because of the CWA's savings clause, but rather by *Ouellete's* extensive conflict preemption analysis – an

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[16] *Merrick*, 805 F.3d at 690.

[17] *See Riegel v. Medtronic, Inc.,* 552 U.S. 312, 324 (2008)(common law causes of action for negligence and strict liability imposed ''requirement[s]'' for purposes of the Federal Food, Drug, and Cosmetic Act); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005)(The word ''requirements'' in the Federal Insecticide, Fungicide, and Rodenticide Act ''reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties.''); *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 521 (1992)(''The phrase ''any requirement'' is similarly broad in its sweep, suggesting that it, too, encompasses common law rules.'').

[18] *Id.* at 692, *citing United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1187 (6th Cir. 1982).

[19] *Id.*

[20] 497 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987).

[21] 497 U.S. at 497-98.

[22] *Merrick,* 805 F.3d at 692.

[23] 529 U.S. 861, 125 S.Ct. 1913 (1999).

[24] *See id.,* 529 U.S. at 869 (Savings clause ''does not bar the ordinary working of conflict preemption principles.'').

[25] In expressing its preemptive intent, Congress can preempt state law through explicit statutory language or implicitly through the statute's structure and purpose. *See Cipollone*, 505 U.S. at 516.

[26] *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941); *seealso-Jones* v. *Rath Packing Co., 430* U. S. 519, 526 (1977).

[27] *Geier*, 125 S. Ct. at 1920.

[28] *Id.* at 1919.

[29] *Medtronic Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996).

[30] *See id*. at 485.

analysis that *Merrick, Bell and Freeman* did not adequately pursue before leaping to rely upon the CAA's savings clauses. *Quellette* was decided only after a broad inquiry into Congress's purposes in enacting the CWA, and the Supreme Court expressly stated that it was ''guided by the goals and policies of the Act'' in reaching its decision. Indeed, the High Court's ultimate holding was entirely derived from a finding of conflict preemption:

After examining the CWA as a whole, its purposes and its history, we are convinced that if affected states were allowed to impose separate discharge standards on a single point source, the inevitable result would be the a serious interference with the achievement of the full purposes and objectives of Congress.[31]

Hence, the *Ouellette* court's decision was based primarily upon a conclusion that common law nuisance lawsuits by citizens in non-source states would ''frustrate the goals of the CWA.''[32] The court held that the law of the source state governed such actions and that applying a neighboring state's law would frustrate the CWA's uniform focus on liability *at the point of release*, as opposed to the law governing impacted areas.

Performing a Proper Conflict Preemption Analysis

With *Geier's* holdings and reasoning in mind, it is time to jettison the distractions posed by erroneous reliance on the CAA's savings clauses. Instead, the courts should have followed a decision that properly performed a conflict preemption analysis in an analogous case – the Fourth Circuit's decision in *North Carolina ex. Rel. Cooper v. Tennessee Valley Authority* (''*TVA*'').[33] TVA now stands revealed as the *only* CAA preemption case that applied a proper conflicts preemption analysis – as opposed to erroneous evaluations skewed by the CAA's savings clauses.

In *TVA*, the court held that basing air pollution controls on ''vague public nuisance standards'' is inconsistent with the CAA's regulatory system.[34] The court observed that ''[t]he contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark,''[35] and explained that Congress ''opted rather emphatically for the benefits of agency expertise in setting standards for emissions controls,'' especially in comparison with ''judicial managed nuisance decrees.''[36] The Fourth Circuit concluded that ''we doubt seriously that Congress thought a judge holding a 12-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider.'' As a result, the *TVA* court held that ''conflict preemption principles'' caution against ''allowing state nuisance law to contradict joint state-federal rules so meticulously drafted.''[37]

Merrick, *Bell*, and *Freeman* provide compelling examples of how nuisance suits conflict with the primacy of Congress's purpose in the CAA. Their holdings demonstrate the triumph of local vagaries over the consistency and reliability intended by Congress. As the TVA court stressed, such ''uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country . . . leading to ''results that lack both clarity and legitimacy.'' *TVA*, 615 F.3d at 301. Indeed, *Merrick*, *Bell* and *Freeman* have already realized the daunting dilemma prophesied in *TVA*:

Attempting to simultaneously resolve air pollution issues using common law claims will condone the use of multiple standards throughout the nation. In various states, facilities already subject to an EPA-sanctioned state permit could be declared ''nuisances'' when a judge in Iowa sets one standard, a judge in a nearby state sets another, and a judge in another state sets a third. Such a scenario ultimately leads one to question ''[w]hich standard is the hapless source to follow?''[38]

Such a scenario strikes at the structural heart of the CAA, namely, the Act's allocation of priorities and responsibilities within a permitting system based upon grounded in economic stability and ''cooperative federalism.''

Congress's Preemptive Economic Purpose

In the process of reconsidering the authority of *TVA*, it is important to re-examine the purposes of the CAA – and to focus on the dispositive congressional purpose which *Merrick*, *Bell* and *Freeman* failed to consider – the importance of the *economic* objectives and incentives that balance and guarantee the stability of the CAA's permitting system. This critical consideration, which frames the central process by which the CAA controls air pollution, is not based solely on health and safety considerations. Beyond those factors, the Act is also designed to preserve and maintain the *economic* incentives necessary to ensure balanced treatment of competing facilities – goals which are essential to economic growth and stability.

When Congress passed the CAA, it ''made the States and the Federal Government partners in the struggle against air pollution.''[39] One of Congress's principal purposes under the CAA is ''to ensure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.'' [40] Indeed, the history of environmental regulation reflects that ''[e]conomic incentives have assumed a prominent position among the tools for environmental management,'' and [n]owhere is this role more explicit than in the 1990 Clean Air Amendments.''[41]

The 1990 amendments authorized the EPA's permitting programs, which provide specific standards governing air pollution within the regulated community.

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[31] 479 U.S. at 493.
[32] 479 U.S. at 498-500.
[33] 615 F.2d 291 (4th Cir. 2010).
[34] *Id.* at 302.
[35] *Id.* at 304.
[36] *Id.* at 305.
[37] *Id.* at 303. *See also Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2013) (State nuisance claims would require court to determine ''what amount of carbon-dioxide emissions is unreasonable as well as what level of reduction is practical, feasible, and economically viable,'' a task ''entrusted by Congress to the EPA.'').
[38] *Id.* at 302.
[39] *General Motors Corp. v. United States,* 496 U.S. 530, 532 (1990)
[40] 42 U.S.C. 42 U.S.C. § 7470 (3).
[41] *See* Robert C. Anderson and Andrew Q. Lohof, *the United States Experience with Economic Incentives in Environmental Pollution Control Policy* (Env. L. Inst. 1997).

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The EPA's permitting system reflected a ''maturing'' process influenced by the increasing costs of pollution control. In that environment, ''standards for evaluating performance in pollution prevention'' have played a ''more important role.''[42] As Dean Anderson explained:

When large reductions in pollution are easy, everyone can afford to be lenient about how a baseline is measured or how different methods of pollution are compared. As the easy reductions play out, that leniency fades. *As competition heats up, the certainty, predictability, and evenhandedness of pollution reduction requirements become centrally important.*[43]

Since failing to prevent pollution and voluntary industry collaboration were not viewed as acceptable options, the ''last hope'' for the ''future of pollution prevention'' was a ''level playing field among companies undertaking (or failing to undertake) pollution prevention.''[44] Since this option is ''indispensable'' to effective pollution control, the government recognized that its role was ''to provide that level field.''[45]

Congress acted to establish the ''level playing field'' with the 1990 amendments to the CAA, which specifically incorporated pollution prevention into the fabric of EPA operations. Shortly thereafter, the EPA began ''busily incorporating pollution prevention into the regulatory process and into targeted Clean Air Act regulations.''[46] Because the EPA was charged by law to review its regulations to determine their impacts on reducing pollution at its sources, the agency created a ''Regulatory Targeting Project'' that covered rulemaking for all media affected by seventeen major industries. Under this broad program, EPA required rules and permits to contain pollution reduction measures whenever possible.[47]

As a result of these efforts, pollution control became the ''basis for regulatory standard setting'' throughout the agency's operations, including permitting and enforcement.[48] Permitting and enforcement placed the agency into a position of ''considerable bargaining power,'' and incorporating pollution control into those issues was ''clearly an effective means for EPA to mandate particular pollution prevention methods or standards.''[49]

Since their authorization in 1990, permits issued pursuant to the CAA have remained one of the EPA's most important tools for air pollution control. Simultaneously, they have also served as trustworthy guideposts for regulated parties in the planning and execution of business operations. The reliability, predictability, certainty and finality of CAA permits provide the stability needed for businesses to make investments that improve and expand their facilities and empower the development and improvement of their products. By providing clear regulatory standards to guide the regulated community's conduct, strong incentives to conform to those standards, and a secure permitted environment within which businesses conduct their operations, the EPA made great strides in reducing and controlling air pollution.[50]

Nuisance lawsuits against permit holders threaten this progress by undermining the carefully balanced economics of EPA's permitting authority under the CAA. These permits specify clear standards that guarantee certainty, predictability, and evenhandedness to the regulated community by *preempting competitive advantages and disadvantages that would otherwise arise from varying standards*.[51] Once permits are issued, they provide sufficient regulatory certainty and finality for industries to make the necessary capital investments to ensure compliance without sacrificing competitiveness.

In this way, the CAA's regulatory and permitting process provides an ''informed assessment of competing interests'' – an assessment that is ''not limited to environmental benefits,'' but which also considers a broad array of other factors, including ''our nation's energy needs and the possibility of economic disruption.''[52] The CAA's program creates a ''level playing field'' for industry that ensures that members of the regulated community are regulated similarly, thereby precluding any particular member from enjoying an unreasonable competitive advantage.[53] The permitting process achieves this essential equilibrium by providing definitive pollution control requirements which can be relied upon for future business planning and operations.

By contrast, common law lawsuits view the issues from a narrower perspective and entail unpredictable economic results. Unlike regulatory agencies, which provide clear standards to derive specific requirements for compliance, nuisance lawsuits have liability standards which are notoriously vague.[54] They provide no

[42] Frederick R. Anderson, *From Voluntary to Regulatory Pollution Prevention*, The Greening of Industrial Ecosystems, 98, at 102 (Nat'l Academy Press, 1994).
[43] *Id.* (emphasis added).
[44] *Id.* at 103.
[45] *Id.* (emphasis added).
[46] *Id.* at 105.
[47] *Id.*
[48] *Id.* at 106.
[49] *Id.*

[50] *See generally*, EPA, *The Clean Air Act – Highlights of the First 40 Years* (September 2010), available at http://epa.gov/oar/caa/Clean_Air_Act_40th_Highlights.pdf (last visited March 12, 2014); EPA, *The Clean Air Act: Highlights of the 1990 Amendments*, available at http://www.epa.gov/clean-air-act-overview/clean-air-act-highlights-1990-amendments (last visited December 16, 2015); (Remarks of Lisa P. Jackson, former EPA Administrator, on the 40th Anniversary of the Clean Air Act, http://yosemite.epa.gov/opa/admpress.nsf/a883dc3da7094f97852572a00065d7d8/7769a6b1f0a5bc9a8525779e005ade13!OpenDocument (last visited December 16, 2015).
[51] *See* Arnold W. Reitze, Jr., Air Pollution Control Law: Compliance & Enforcement (2001) at 202. (''[S]ources that violate major NSR requirements often gain a competitive advantage due to their ability to (1) avoid the time involved in the permitting process and (2) invest money that should have been allocated to emission reduction efforts to other activities.'').
[52] *American Electric Power Co., Inc. v. Connecticut,* 131 S.Ct. 2527, 2538-39 (2011).
[53] *See* Katarina Mahutova, John J. Barich III, Ronald A. Kreizenbeck, Defense and the Environment: Effective Scientific Communication (2004), at 16 (The ''level playing field'' principle is ''common to every environmental statute'' and envisions sources in both the ''public and private sectors'' being ''required to comply with the same set of requirements, thereby preventing situations an organization that chooses to ignore requirements achieves by this act an unfair competitive advantage.'').
[54] *See generally*, Richard O. Faulk & John S. Gray, Public Nuisance at the Crossroads: 15 Chapman L. Rev. 495, 500-501 (2011); Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom: The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 947-951 (2007); Victor E. Schwartz

coordination between proceedings in different states – or even between similar proceedings within the same state. Since the evidence, rulings and outcomes can vary according to the unique record of each case, there is no guarantee of consistent results even between similar facilities. In the process of exercising such vast regulatory powers via tort litigation, courts ''exceed the legitimate limits of both their authority and their competence.''[55]

Conclusion

As a result of their failure to conduct proper conflict preemption analyses, the *Merrick*, *Freeman*, and *Bell* courts failed to evaluate the impact of nuisance litigation on Congress's purposes. Although the CAA certainly mandated improvements in air quality, that goal was not addressed in a vacuum. Congress also insisted that improvements be made consistently with economic growth and predictable standards. The CAA's permitting system was designed to effectuate Congress's intentions by creating and sustaining a ''level playing field'' that balanced those priorities. Although the text of the CAA demonstrates these conjoined goals, and the history of their application demonstrates their efficacy, the *Merrick*, *Freeman* and *Bell* decisions failed to appreciate their importance. As a result of this ''cart before the horse'' reasoning, *Merrick*, *Freeman and Bell* erroneously allowed common law remedies to trump Congress's economic purposes in the CAA.

If courts are permitted to adjust federally permitted emissions under state common law, their judgments will disrupt the competitive balance the CAA was created to ensure. In such proceedings, the competitive balance struck by administrative agencies can be ''reopened'' and ''reexamined'' *de novo*. If the ''level playing field'' mandated by Congress can be tilted unilaterally by individual courts throughout the nation, those decisions will compromise the CAA's cooperative regulatory structure. There is no assurance that tribunals presiding over nuisance actions will apply the same criteria, consider the same evidence, or reach the same conclusions regarding the ''reasonableness'' of a defendant's emissions. Indeed, there is no guarantee that state tort law will even allow courts to *consider* economic feasibility and competitive impacts in their liability and damage determinations.

Nothing in the CAA remotely contemplates such confounding consequences, but they are entirely foreseeable if the Supreme Court does not act to reverse the economically destructive reasoning embraced by *Merrick* and similar decisions. It is time to recognize the primacy of Congress's preemptive economic purpose – and to protect the economic equilibrium ensured by the CAA's permitting programs from common law disruption.

& Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L. Rev. 541 (2006); *Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort*, 741, 745 (2003).

[55] *See* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329, 330 (2005).

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