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## Bell v. Cheswick: The Era of Court-Regulated Power Plants

Ingrid Pfister

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# *Bell v. Cheswick: The Era of Court-Regulated Power Plants*

*Ingrid Pfister\**

*Bell v. Cheswick was a 2012 class action suit brought against GenOn Power Midwest, L.P. in the U.S. District Court for the Western District of Pennsylvania. Property owners in Springdale, Pennsylvania alleged that GenOn's local generating station's emissions caused tortious pollution that affected their homes and property. The district court found for the defendant. The case was appealed to the Third Circuit, which reversed and held for the plaintiffs. Specifically, it ruled that the Clean Air Act does not preempt state law tort claims brought by private property owners against a source of pollution located within the state.*

*This Note compares and contrasts the cases that laid the foundation for the Third Circuit's holding. Previous similar claims have failed and succeeded in ways that created a template to avoid preemption and bring a successful nuisance action. The Springdale residents' tort claims against the local generating station successfully followed that template and creates a guide for future plaintiffs. This Note outlines that guide, and argues state common law tort claims are an essential means of controlling local pollution that the statutory framework of the Environmental Protection Agency often fails to address.*

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## INTRODUCTION

The pollution that brought plaintiffs Kristie Bell and Joan Luppe to court was not as destructive as Deepwater Horizon,<sup>1</sup> as lethal as Bhopal,<sup>2</sup> or as scandalous as the pollution seen in *Erin Brockovich*.<sup>3</sup> Bell and Luppe's case, *Bell v. Cheswick Generating Station (Bell II)*, was about property damage.<sup>4</sup> A 570-megawatt coal-fired power plant, known as Cheswick Generating Station,

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1. In re Deepwater Horizon, 753 F.3d 570 (5th Cir. 2014); see also Clifford Krauss, *Judge Approves BP's \$4 Billion Criminal Settlement over Gulf Spill*, N.Y. TIMES (Jan. 29, 2013), [http://www.nytimes.com/2013/01/30/business/judge-approves-bp-criminal-settlement.html?\\_r=1&](http://www.nytimes.com/2013/01/30/business/judge-approves-bp-criminal-settlement.html?_r=1&) (profiling civil and criminal proceedings against BP resulting from the Deepwater Horizon oil drilling rig that created an enormous oil spill in the Gulf of Mexico in 2010).

2. See generally *Bhopal Gas Tragedy Information*, UNION CARBIDE CORP., <http://www.bhopal.com> (last visited June 18, 2015) (describing a gas leak in 1984 at the Union Carbide India pesticide plant in Bhopal, India, which killed thousands of people immediately and exposed hundreds of thousands more).

3. ERIN BROCKOVICH (Jersey Films 2000) (depicting the pivotal role of legal clerk Erin Brockovich in building a case against Pacific Gas & Electric for cancerous drinking water contamination in Hinkley, California).

4. *Bell v. Cheswick Generating Station (Bell II)*, 734 F.3d 188 (3d Cir. 2013), cert. denied, 134 S. Ct. 2696 (2014).

emitted coal ash and other pollutants that coated hundreds of homes in Springdale, Pennsylvania in noxious black dust and white powder.<sup>5</sup> In response, the affected residents and homeowners (the plaintiffs) successfully sued the facility's owner, GenOn Power Midwest, L.P., for compensation for tortious property damage.<sup>6</sup> Their victory reinvigorated state tort law, and provides a template for individuals to use such claims to hold companies accountable for the damage they cause. As an added benefit, these state common law torts allow victims to restrict pollution quickly and independently of the often cumbersome regulatory and statutory processes.<sup>7</sup> Successful claims can bind polluters even absent violations of emissions statutes or regulations, and thereby prevent corporations from legally externalizing local harms.<sup>8</sup> Thus, in an era of congressional paralysis and weak state environmental protections, *Bell II* serves as a reminder that common law tort claims provide affected communities an important means to protect themselves from pollution.

To facilitate *Bell II*'s use as a template, this Note examines the statutory background behind the opinion, the line of cases that led up to the Third Circuit's decision, and other aspects potential plaintiffs should consider. Beginning with the statutory background, three key points proved crucial to *Bell II*'s holding. First, the Clean Air Act (CAA) is a floor, not a ceiling; states are free to impose stricter laws.<sup>9</sup> Second, the CAA savings clause allows citizens to seek enforcement as well as "any other relief," which may include relief under state tort law.<sup>10</sup> Third, this permits the use of state common law claims to fill the holes in statutory law's protections.<sup>11</sup> Turning to the case law preceding *Bell II*, a consistent theme in these decisions is that federal preemption is the largest hurdle for plaintiffs to overcome when bringing environmental state common law tort claims.<sup>12</sup> Accordingly, this Note compares the characteristics of claims that the court has found preempted with those that have been successful to draw out why the *Bell II* plaintiffs succeeded, and to establish strategies for success in future cases. Yet while overcoming

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5. *Bell v. Cheswick Generating Station (Bell I)*, 903 F. Supp. 2d 314, 315–16 (W.D. Pa. 2012), *rev'd*, *Bell II*, 734 F.3d 188.

6. *Bell II*, 734 F.3d at 192.

7. See Samantha Caravello, Case Comment, *Bell v. Cheswick Generating Station*, 38 HARV. ENVTL. L. REV. 465, 476 (2014) (discussing that activists traditionally turn to tort litigation when the political process is inadequate); see also Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837 (2008) (discussing how tort litigation can fill gaps in regulatory schemes).

8. Eugene Dice, *CAA Preemption Limits after 3rd Circ. Case*, LAW360 (June 30, 2014), <http://www.law360.com/articles/552097/caa-preemption-limits-after-3rd-circ-case> (noting that, despite compliance with Clean Air Act (CAA) Title V permits, emitters can be liable for tort common law actions).

9. Christian D. Petrangolo, *Conflict in the Air? Federalism, the Clean Air Act, and Arkansas's Act 1302*, 38 COLUM. J. ENVTL. L. 36, 42 (2013).

10. See *Bell II*, 734 F.3d at 191–97.

11. See *id.*

12. See *id.* at 194–97.

preemption is necessary to succeed, it is not sufficient. Thus this Note also surveys other important factors a prospective plaintiff should consider, and closes by proposing alternatives to *Bell II*'s litigation approach, situating the holding in the wider policy landscape.

Part I provides a brief overview of the CAA, including the responsibilities given to states and the protections provided to citizens via the savings clause. Part II discusses preemption and the role it plays in *Bell II*. Part III examines the district and appellate court decisions in *Bell II*. Part IV describes the cases that preceded *Bell II* and laid the foundation for the case's holding. Part V consists of seven subparts that identify a strategy for plaintiffs' pollution claims to avoid preemption. Part VI suggests solutions for plaintiffs whose environmental harm does not fit within the *Bell II* litigation strategy, and examines *Bell II*'s concrete impact on today's legal community.

## I. THE LEGAL BACKDROP TO *BELL II*

### A. *Regulatory Framework: The Clean Air Act*

The CAA is a comprehensive federal law that regulates air emissions through cooperative federalism.<sup>13</sup> Specifically, it empowers the Environmental Protection Agency (EPA) to develop baseline standards that states are primarily responsible for implementing and enforcing.<sup>14</sup> These include the National Ambient Air Quality Standards, which set a nationally uniform minimum level of air quality to protect public health and welfare.<sup>15</sup> Each state is required to create a State Implementation Plan that provides how the state will implement, maintain, and enforce the National Ambient Air Quality Standards.<sup>16</sup> Each state must regulate all stationary sources located within the areas covered by its State Implementation Plan.<sup>17</sup> The states' responsibilities include issuing mandatory permits to approve the types and amounts of emissions discharged by each source.<sup>18</sup> Of particular importance here, large stationary sources of air pollution, including power plants such as GenOn's Cheswick Generating Station, are required to obtain a Title V operating permit and comply with its pollution control requirements.<sup>19</sup> Title V permits often contain higher standards

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13. 42 U.S.C. §§ 7401–7515 (2012). Cooperative federalism is the “[d]istribution of power between the federal government and the states whereby each recognizes the powers of the other while jointly engaging in certain governmental functions.” *Federalism*, BLACK’S LAW DICTIONARY (10th ed. 2014).

14. *Bell II*, 734 F.3d at 190.

15. 42 U.S.C. § 7409(b)(1).

16. § 7410(a)(1).

17. *Bell II*, 734 F.3d at 190.

18. 42 U.S.C. §§ 7410(a)(2)(C), 7661(a)(d), 7661(c)(a).

19. *Operating Permits Basic Information*, EPA, <http://www.epa.gov/oaqps001/permits/basic.html> (last updated Oct. 28, 2014).

than set by EPA's National Ambient Air Quality Standards because states are free to impose stricter air quality standards than the federal baseline requires.<sup>20</sup>

Regardless of which level of protection a state selects for its air quality standards, enforcement is facilitated by the CAA's citizen suit provision, which authorizes filing a civil suit against any entity alleged to be violating an emissions limitation.<sup>21</sup> Crucially, the citizen suit also contains a "savings clause," which provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."<sup>22</sup> This critical provision allows citizens to bring suit to protect their communities from the negative externalities of local polluters.<sup>23</sup>

### B. Preemption: The Role of Federal Law

Federal preemption derives from the Supremacy Clause of the United States Constitution, which establishes that the Constitution and federal laws are the "supreme law of the land."<sup>24</sup> Federal law can preempt state law (both common law and statutes) in three ways: express preemption, field preemption, and conflict preemption.<sup>25</sup> Express preemption occurs when a federal statute expressly states its intent to displace state law.<sup>26</sup> Field preemption occurs when federal interest in an area is so dominant that it is assumed to bar state laws on the subject.<sup>27</sup> Field preemption is frequently found when the federal government has a comprehensive statutory regulatory scheme in place—as is common in the environmental context.<sup>28</sup> In such cases, the federal regulatory apparatus not only preempts state law, but also bars federal common law claims.<sup>29</sup> Hence, the CAA has displaced any federal common law actions

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20. See 40 C.F.R. pt. 70 (2014); see also *Laws and Regulations*, EPA, <http://www.epa.gov/oaqps001/permits/requirem.html> (last updated Oct. 28, 2014) (noting that specific rules apply in each state).

21. 42 U.S.C. § 7604 (2012).

22. § 7604(e). The CAA "citizen suit" provision permits civil suits in district court against violators of emission standards. *Id.*

23. See *Bell II*, 734 F.3d 188, 191–97 (3d Cir. 2013).

24. U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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.").

25. *Bell II*, 734 F.3d at 193 (quoting *Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3d Cir. 2010)).

26. *Farina*, 625 F.3d at 115. An example of express preemption would be when Congress includes language that declares that the statute shall "supersede any and all State laws" on the topic. 29 U.S.C. § 1144 (2012).

27. *Farina*, 625 F.3d at 115. For example, a federal law mandating the registration of all aliens in the country precluded a state alien registration law because the federal government occupies the field of immigration. *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941).

28. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

29. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

relating to the abatement of greenhouse gas emissions.<sup>30</sup> Conflict preemption occurs where the state law “erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>31</sup>

The latter two varieties of preemption are central to *Bell II* and the cases that precede it.<sup>32</sup> GenOn invoked field and conflict preemption to argue that the plaintiffs failed to state a claim upon which relief could be granted.<sup>33</sup> The significance of *Bell II* is the Third Circuit’s response to these allegations.<sup>34</sup>

## II. CASE BACKGROUND: *BELL V. CHESWICK*

In *Bell*, 1500 residents and property owners near GenOn’s coal-fired power plant brought a class action in state court for damage the plant had caused their property.<sup>35</sup> They claimed that the plant gave off an unpleasant odor, and emitted coal dust, fly ash, chemicals, and gases that polluted their property and endangered their health.<sup>36</sup> Plaintiffs asserted that this required them to constantly clean their properties and left them “prisoners in their own homes.”<sup>37</sup> They therefore invoked the CAA’s savings clause and sought compensatory and punitive damages for nuisance, negligence and recklessness,<sup>38</sup> trespass, and strict liability.<sup>39</sup> Nevertheless, the federal district court held that the CAA preempted their claims.<sup>40</sup> The court pointed to the numerous administrative bodies responsible for setting and reviewing emissions standards and compliance.<sup>41</sup> Since the complaint spoke directly to those standards, the opinion held it impermissibly encroached on, and interfered with, the regulatory scheme set by federal law, and was therefore preempted.<sup>42</sup>

In concluding that the plaintiffs could not use the CAA savings clause to bring their common law tort claims because the CAA preempted such claims,

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30. *Am. Elec. Power*, 131 S. Ct. at 2537–38.

31. *Id.* (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). An example of conflict preemption occurred when federal law authorized a widow to receive state law death benefits in addition to any other compensation, and a state law mandated the state benefits be reduced by the amount of any other compensation; the state law was found invalid. *Rose v. Ark. State Police*, 479 U.S. 1, 4 (1986).

32. Memorandum in Support of Motion to Dismiss at 8–12, *Bell I*, 903 F. Supp. 2d 314 (W.D. Pa. 2012) (No. 12CV00929), 2012 WL 4120802.

33. *Bell II*, 734 F.3d 188, 195 (3d Cir. 2013).

34. *Id.* at 189–90.

35. *Bell I*, 903 F. Supp. 2d at 315–16.

36. *Id.*

37. *Id.* at 315.

38. The plaintiffs alleged that GenOn was negligent because GenOn knew of or allowed the improper construction and operation of the facility without the best available technology, thereby allowing the plant emissions to damage local properties. *Id.*

39. *Id.* at 316. The plaintiffs also sought injunctive relief to require GenOn to remove the particulate that continually fell on plaintiffs’ properties. *Bell II*, 734 F.3d at 193.

40. *Bell I*, 903 F. Supp. 2d at 322.

41. *Id.* at 319.

42. *Id.*

the district court relied on the Supreme Court's parallel examination of the Clean Water Act's (CWA) savings clause in *International Paper Co. v. Ouellette*.<sup>43</sup> The *Ouellette* court held that a common law claim cannot be brought under a federal statute's savings clause if doing so would undermine the statute, since this would be inconsistent with Congress's objectives in enacting the law.<sup>44</sup> Adopting this rationale, the district court in *Bell* found that the plaintiffs' private cause of action for compensatory damages for "alleged" violations of the CAA was inconsistent with the CAA and therefore preempted by the CAA.<sup>45</sup>

On appeal, the Third Circuit reversed, finding nothing in the CAA indicated that Congress intended to preempt "state law tort claims brought by private property owners against a source of pollution within the state."<sup>46</sup> The court's reasoning worked in two steps. First, the court noted that the CAA allows states to impose stricter standards than the specified federal minimums.<sup>47</sup> Second, the CAA's savings clause explicitly allows citizens to seek enforcement of any emission standard or limitation imposed, as well as any other relief—which would include relief via state common law.<sup>48</sup> This finding relied heavily on the Third Circuit's interpretation of *Ouellette*, an interpretation at odds with the district court's holding in *Bell*.<sup>49</sup>

*Ouellette* stressed that state law is preempted when it interferes with the means through which federal laws attempt to meet their goals.<sup>50</sup> Consequently, the Court held that the CWA preempted Vermont nuisance law to the extent that Vermont nuisance law sought to impose liability on a New York emissions source because allowing such claims would evade the national permit system created by the CWA.<sup>51</sup> However, *Ouellette* also found that a nuisance suit brought by Vermont citizens under New York state law would not be preempted because "nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State."<sup>52</sup> Indeed,

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43. *Id.* at 322 (quoting North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 303–04 (4th Cir. 2010). Cooper summarized *International Paper Co. v. Ouellette*, in which the U.S. Supreme Court analyzed whether the CWA preempted a Vermont common law nuisance claim from being brought against an alleged water pollution source in New York. See 479 U.S. 481, 483 (1987).

44. *Bell I*, 903 F. Supp. 2d at 322.

45. *Id.*

46. *Bell II*, 734 F.3d 188, 189–90 (3d Cir. 2013). Note that the plaintiffs dropped their strict liability claim because they agreed with the defendants that power generation is not an ultra-hazardous activity. *Id.* at 192 n.4.

47. See *id.* at 197–98.

48. *Id.* at 191–97. The Third Circuit also held that the political question doctrine did not bar the class action tort claim because the authority regarding the redress of individual property rights for pollution does not exist in the legislative or executive branches. *Id.* at 198.

49. *Id.* at 194–95.

50. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

51. *Id.*

52. *Bell II*, 734 F.3d at 194 (quoting *Ouellette*, 479 U.S. at 497).

the Court found that the CWA's savings clause demonstrated Congress's intent to preserve the right to bring suit under the law of any source state.<sup>53</sup>

While *Bell* concerned the CAA's savings clause rather than the CWA's, the Third Circuit found no meaningful difference between the two provisions.<sup>54</sup> It therefore held that *Ouellette* controlled, and that the CAA did not preempt Pennsylvania common law claims brought against a source of pollution located in Pennsylvania.<sup>55</sup> Nor was it problematic that plaintiffs' claims imposed more stringent pollution standards than the CAA required.<sup>56</sup> The Third Circuit noted that both the CWA and CAA allow states to impose higher standards on emission sources within their borders than the federal statute itself required.<sup>57</sup> Consequently, the CAA displaces state law only to the extent that state law imposes lower standards than the minimums required by federal law.<sup>58</sup> The higher standards imposed via state tort law therefore supplement, rather than override, the federal floor the CAA imposes on emitters as part of its cooperative federalism system of regulation.<sup>59</sup> This was not a novel interpretation of federal environmental law. As the *Bell II* court noted, the CAA explicitly laid out this approach, and other jurisdictions have consistently upheld it.<sup>60</sup>

### III. CASE LAW: THE ROAD TO *BELL V. CHESWICK*

The Third Circuit's holding places it alongside the Fifth and Sixth Circuits in rejecting the argument that federal law preempts state law claims for damages in environmental litigation.<sup>61</sup> As such, the *Bell II* plaintiffs' victory provides a useful opportunity to reflect on the expanding case law of environmental state common law torts, an exercise of growing importance in light of congressional paralysis and state inaction in the pollution arena.<sup>62</sup> With

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53. *Id.*

54. *Id.* at 195; *see also* North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 306 (4th Cir. 2010) (reaffirming the parallels between the CWA and CAA and that the holding of *Ouellette* equally applies to the CAA); *see also* Her Majesty the Queen in Right of Province of Ont. v. City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989).

55. *Bell II*, 734 F.3d at 197.

56. *Id.* at 198 (quoting *Ouellette*, 479 U.S. at 497–98).

57. *Id.* at 197 (quoting *Ouellette*, 479 U.S. at 498–99).

58. *Id.* at 196.

59. *Id.* at 197–98 (relying on *Ouellette*, 479 U.S. at 498–99).

60. *Id.* at 198; *see also* Ellis v. Gallatin Steel Co., 390 F.3d 461 (6th Cir. 2004).

61. Dice, *supra* note 8.

62. *See, e.g.*, Michael Bobelian, *Congressional Inaction Leads to Showdown at the Supreme Court over EPA's Greenhouse Gas Regs*, FORBES (Feb. 26, 2014), <http://www.forbes.com/sites/michaelbobelian/2014/02/26/congressional-inaction-leads-to-showdown-at-the-supreme-court-over-epas-greenhouse-gas-regs/> (discussing congressional inaction with regards to greenhouse gas regulation); Paul Rogers, *EPA History The Clean Air Act of 1970*, EPA J., Jan.–Feb. 1990, available at <http://www2.epa.gov/aboutepa/epa-history-clean-air-act-1970> (noting that state inaction was partially responsible for catalyzing passage of the CAA).

that in mind, this Part will examine some of the rulings that laid the foundation for the holding in *Bell II*, before synthesizing the state of the field in Part IV.

In 2010, the Fourth Circuit solidified *Ouellette* in *North Carolina ex rel. Cooper v. Tennessee Valley Authority* by repeating that it is the common law of the source state, not the law of the affected state, which controls in state common law environmental cases.<sup>63</sup> Holding that North Carolina could not apply its common law to facilities in Tennessee and Alabama, the Fourth Circuit reiterated that “[t]here is no question that the law of the states where emissions sources are located . . . applies in an interstate nuisance dispute.”<sup>64</sup> Thus, while *Cooper* ultimately ruled against the plaintiff on the crucial matter of which state’s law controls, its holding is consistent with *Bell II*.<sup>65</sup>

Superficially, *American Electric Power Co. v. Connecticut (AEP)* also appears inconsistent with *Bell II*, but in fact it helped create an opportunity for the Third Circuit’s holding.<sup>66</sup> In *AEP*, the city of New York, alongside eight other states and three nonprofit conservation organizations, brought a federal common law public nuisance claim against five electric power companies seeking relief from their carbon dioxide emissions.<sup>67</sup> The plaintiffs alleged that the emissions contributed to global warming, which interfered with public rights by putting public land, infrastructure, and health at risk.<sup>68</sup> The Supreme Court disagreed, holding that the CAA displaced the federal common law public nuisance claims because Congress had directly addressed the issue of carbon dioxide emissions.<sup>69</sup> Again, although seemingly contrary to the plaintiffs’ argument in *Bell*, in reality *AEP* left courts the opportunity to rule that state (as opposed to federal) common law claims are not preempted by the CAA.<sup>70</sup>

The Ninth Circuit reached the same conclusion in *Native Village of Kivalina v. ExxonMobil Corp.*, holding that the CAA displaces federal common law claims related to carbon emissions.<sup>71</sup> The plaintiffs in *Kivalina* were residents of an Alaskan village that sits upon a rapidly eroding sea ice coastline.<sup>72</sup> The residents sued a large group of energy producers over carbon emissions, alleging that the erosion of the sea ice was due to global warming,

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63. North Carolina *ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 305 (4th Cir. 2010); *see also Bell II*, 734 F.3d at 197–98.

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

65. Brief of Appellants at 10, *Bell II*, 734 F.3d 188 (3d Cir. 2013) (No. 12-4216), 2012 WL 7004402.

66. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2533–34 (2011).

67. *Id.*

68. *Id.* at 2534.

69. *Id.* at 2537, 2540.

70. *Id.* at 2530 (stating that “legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest [congressional] purpose demanded for preemption of state law” (internal quotation marks omitted)).

71. *See infra* Part IV.B. (providing a more detailed discussion of *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012)).

72. 696 F.3d at 853–54.

and that the energy companies were therefore committing a public nuisance.<sup>73</sup> Their suit proved unsuccessful. The Ninth Circuit held that through the CAA and the work of EPA, Congress had directly addressed greenhouse gas emissions from stationary sources.<sup>74</sup> Therefore, federal common law had been displaced and the claim for public nuisance asserted under federal common law was precluded.<sup>75</sup> Still, as in *AEP*, the *Kivalina* ruling preserved the option for state common law claims.<sup>76</sup>

The plaintiffs' claims in *AEP* and *Kivalina* were not statute or regulation based; they did not seek to prove that the emitters were violating their permits or the CAA.<sup>77</sup> Rather, the plaintiffs in both cases sued under common law because the statutory framework did not protect them from the damage they suffered. Their claims, along with the judicial opinions denying them relief, highlight the inadequacy of existing statutory protections. The CAA fails to adequately protect individuals and communities from nearby pollution, much less address the global harm of climate change. Emitters can produce real damage even while in compliance with their allotted emissions.<sup>78</sup> These failures clarify *Bell II*'s importance. The plaintiffs in *AEP* and *Kivalina* tried to address the CAA's shortcomings through federal common law, to no avail. But the courts in those cases still preserved plaintiffs' chance to seek redress in future cases by not foreclosing state common law claims.<sup>79</sup> In sum, courts are aware that state law remedies are a necessary protectant against the inadequacy of the current statutory framework.<sup>80</sup> The *Bell II* decision capitalized on that necessity.

#### IV. FUTURE CLAIMS: USING STATE COMMON LAW TORT CLAIMS TO REGULATE POLLUTERS

Drawing on the discussion above, this Part considers factors from cases contemplating common law claims similar to those in *Bell*. It then draws out those facts and arguments that have led to success and those that have tended to fail, with an emphasis on avoiding findings of preemption.

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73. *Id.* at 853–54. *Kivalina* also involved a federal common law claim. *Id.* at 853.

74. *Id.* at 856 (citing *Am. Elec. Power*, 131 S. Ct. at 2530, 2537). The court in *Kivalina* relied on *AEP* in finding that Congress had addressed greenhouse gas emissions from stationary sources. *Id.* In *AEP*, the Supreme Court found the CAA displaced plaintiffs' nuisance claims against the five largest emitters of carbon dioxide, a greenhouse gas. 131 S. Ct. at 2534, 2537, 2540.

75. *Kivalina*, 696 F.3d at 857.

76. *Id.*

77. *Id.* at 854.

78. *Bell I*, 903 F. Supp. 2d 314, 315–16 (W.D. Pa. 2012), *rev'd*, *Bell II*, 734 F.3d 188 (3d Cir. 2013). In *Bell I*, the defendants were emitting under their allotted emissions level and still covered the plaintiffs' homes in toxic soot. *Id.*

79. See *Am. Elec. Power*, 131 S. Ct. at 2530.

80. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (demonstrating that state law remedies are necessary for victims of nuclear incidents even though federal law is exclusively authorized to regulate the safety of nuclear power plants).

A. *State Common Law vs. Federal Common Law Complaints*

An initial, and key, distinction in environmental tort cases where preemption is implicated is whether the claim is brought under state or federal common law.<sup>81</sup> Because both the CAA and the CWA preempt federal common law claims, the cases in which plaintiffs have been successful have involved state common law claims.<sup>82</sup>

As mentioned above, although cases such as *Kivalina* and *AEP* denied relief to plaintiffs, their holdings actually support *Bell II*. Indeed, while both cases found preemption and barred plaintiffs' federal common law claims, it is possible that state law claims might have evaded that particular pitfall.<sup>83</sup> In *AEP*, the plaintiffs originally brought state law claims but were preempted by federal law because the Second Circuit held that federal common law governed.<sup>84</sup> Therefore, the Supreme Court did not decide the state law claims.<sup>85</sup> Still, Justice Ruth Bader Ginsburg's majority opinion seems to suggest that had the plaintiffs argued for the availability of a state common law claim, they may have succeeded.<sup>86</sup> There are limits to this optimism: the Court could include such dicta because the Second Circuit had already decided the preemption issue.<sup>87</sup> And of course, greenhouse gas emissions-related claims, even if brought under state law, could still be preempted as they were in *Cooper* because causation remains untenable.<sup>88</sup> Nonetheless, Justice Ginsburg's dictum underscores that bringing state law claims in future cases remains a viable option.<sup>89</sup>

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81. *Bell II*, 734 F.3d 188, 197–98 (3d Cir. 2013).

82. *See, e.g., Am. Elec. Power*, 131 S. Ct. at 2537 (finding federal common law options are preempted by the CAA); *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (holding that Illinois could no longer maintain its [federal common law] public nuisance claim against the City of Milwaukee because intervening legislation had precluded the need for federal common law regarding pollution of Lake Michigan); *Bell II*, 734 F.3d at 192; *Kivalina*, 696 F.3d at 857; *Merrick v. Diageo Americas Supply, Inc.*, 5 F. Supp. 3d 865 (W.D. Ky. 2014) (holding that the CAA did not preempt state common law tort claims where a distillery's ethanol emissions allegedly created a fungus on plaintiffs' property); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280 (W.D. Tex. 1992) (holding the CAA did not preempt state common law tort claims where the defendant permitted toxic substances to contaminate plaintiffs' properties); Caravello, *supra* note 7, at 478.

83. *Am. Elec. Power*, 131 S. Ct. at 2540. Causation still would be difficult for the plaintiffs to prove, regardless of whether their claims are brought under federal or state law.

84. *Id.*

85. *Id.*

86. *See id.*

87. *Id.*

88. *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010). In *Cooper*, North Carolina sued under state law, not federal, bringing public nuisance claims for emissions at eleven different facilities. *Id.* at 297. The case was decided for the defendants because North Carolina had not sued under the *source* state laws. *Id.* at 302–04. Regardless, the court may not have ruled for the plaintiff since the damage was greenhouse gas emissions-based.

89. *See Am. Elec. Power*, 131 S. Ct. at 2540.

### B. Greenhouse Gas Emissions and Global Warming

Similar to claims that allege public nuisance, those that allege damage caused by greenhouse gas emissions and global warming tend to be preempted.<sup>90</sup> For example, while the plaintiffs in *Kivalina* and *AEP* erred in suing for public nuisance under federal common law, their mistake may not have mattered—their case was, arguably at least, doomed from the outset for the more political reason that courts loath to embrace public nuisance claims for greenhouse gas emissions.<sup>91</sup> Beyond the potentially ruinous damages, this reluctance stems from the scope and goals of the CAA, which all relate specifically to national air quality and are set by the EPA.<sup>92</sup> Thereby, the CAA preempts a state common law tort claim when the claim “interferes with the methods by which the federal statute was designed to reach [its] goal.”<sup>93</sup> Thus, courts seem reluctant to allowing state common law tort claims to interfere with national air quality issues, including both global warming and greenhouse gas emissions.

Consequently, plaintiffs need to ensure that the damage they allege is not just due to greenhouse gas emissions, global warming, or national air quality broadly. Such claims tend to be construed as attempts to regulate air quality, which would interfere with the CAA, and are therefore preempted by it.<sup>94</sup> And although courts have found that nuisance claims can still be adjudicated even if they are not “the simple kind that was known to the older common law,” case law shows plaintiffs are more likely to succeed if their facts can be molded to fit a more traditional nuisance claim.<sup>95</sup> The evidence demonstrates, then, that a successful plaintiff must make a state common law claim and private nuisance claim based on damage more tangible than greenhouse gas emissions.

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90. See generally *id.* at 2530 (holding that plaintiffs’ claims against greenhouse gas emitters alleging their emissions interfered with public rights was preempted); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (holding that plaintiffs’ claims against defendants for contributing to greenhouse gases and the destructive effects of global warming on plaintiffs’ town was preempted); *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012) (holding that the CAA preempted state law nuisance, trespass, and negligence claims where plaintiffs claimed oil companies’ *alleged release of by-products that increase global warming* led to the development of conditions that formed hurricanes, resulted in higher insurance premiums, and caused sea level to rise).

91. See *People v. Gen. Motors Corp.*, 2007 WL 2726871, at \*16 (N.D. Cal. Sept. 17, 2007). The State of California sued car manufacturers under both federal and state common law nuisance claims, alleging that emissions from the cars they manufactured contributed to climate change, which subsequently has caused California’s mountain snow to melt earlier and faster than in the past. *Id.* at \*1. The district court dismissed the federal public nuisance claim on nonjusticiability grounds because it would have required the court to make inappropriate policy determinations without “judicially discoverable or manageable standards.” *Id.* at \*16.

92. See *supra* notes 14–15 and accompanying text.

93. *Cooper*, 615 F.3d at 303 (quoting *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

94. See, e.g., *Am. Elec. Power*, 131 S. Ct. at 2530.

95. *Missouri v. Illinois*, 200 U.S. 496, 522 (1906).

There is a potential silver lining to bringing greenhouse gas claims, regardless of their success in court.<sup>96</sup> These types of cases could draw Congress's attention by serving as a "prodding or pleading" for it to take action on this issue.<sup>97</sup> Moreover, the adjudication of climate change claims forces judges to consider the issue in detail, and begin to develop potential solutions in light of the other branches' failure to act.<sup>98</sup> There is also the added benefit of bringing light to the issue through media coverage of the litigation. For example, *Kivalina* was the topic of multiple *New York Times* articles, the basis for an entire documentary, and discussed on human rights websites and numerous legal blogs.<sup>99</sup> In sum, a plaintiff's climate change case may not need to succeed on the merits to have an impact.

### C. Private Nuisance vs. Public Nuisance

The plaintiffs in a state common law tort case will almost certainly bring a nuisance suit.<sup>100</sup> Within that category, a private nuisance claim is preferable to a public nuisance claim since they tend to be more successful.<sup>101</sup> Private nuisance occurs when "[a] condition, activity, or situation (such as a loud noise or foul odor) . . . interferes with the use or enjoyment of property."<sup>102</sup> Public nuisance, on the other hand, is defined by federal common law as "unreasonable interference with a right common to the general public," thus causing the public "substantial and widespread harm."<sup>103</sup> Such injury is much more difficult to prove than that caused by private nuisance, since showing

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96. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 409 (2011) (arguing the judges should utilize climate change claims to prod and plea Congress to respond to the threat climate change poses).

97. *Id.*; see Caravello, *supra* note 7, at 477.

98. See Ewing & Kysar, *supra* note 96, at 410–17.

99. See, e.g., Felicity Barringer, *Flooded Village Files Suit, Citing Corporate Link to Climate Change*, N.Y. TIMES (Feb. 27, 2008), <http://www.nytimes.com/2008/02/27/us/27alaska.html>; <http://business-humanrights.org/en/kivalina-lawsuit-re-global-warming?page=1>; John Schwartz, *Courts as Battlefields in Climate Fights*, N.Y. TIMES (Jan. 26, 2010), [http://www.nytimes.com/2010/01/27/business/energy-environment/27lawsuits.html?\\_r=0](http://www.nytimes.com/2010/01/27/business/energy-environment/27lawsuits.html?_r=0); Mark Walker, *Global Warming Litigation Heating Up—Village of Kivalina Lawsuit*, AM. C. ENVTL. LAW., <http://www.acoel.org/post/2008/08/21/Global-Warming-Litigation-Heating-up-Village-of-Kivalina-Lawsuit.aspx> (last visited Apr. 2, 2015); *Climate Justice in Kivalina*, CTR. ON RACE POVERTY & ENV'T, <http://www.crpe-ej.org/crpe/index.php/campaigns/climate-justice/kivalina-ak> (last visited Apr. 2, 2015); *Kivalina v. Exxon The Most Dangerous Litigation in America*, <http://www.kivalina-film.com> (last visited Apr. 2, 2015).

100. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2529 (2011); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 484 (1987); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

101. See Caravello, *supra* note 7, at 478; see also *Merrick v. Diageo Americas Supply Inc.*, 5 F. Supp. 3d 865 (W.D. Ky. 2014) (holding the CAA did not preempt state common law tort claims where a distillery's ethanol emissions allegedly created a fungus on plaintiffs' property); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1281 (W.D. Tex. 1992) (holding that although injunctive relief would be an extraordinary remedy against legislatively authorized activities, a court could still find an unreasonable interference in a private nuisance case).

102. *Nuisance, Private Nuisance*, BLACK'S LAW DICTIONARY (9th ed. 2009).

103. RESTATEMENT (SECOND) OF TORTS § 821B (1979); see also *Kivalina*, 696 F.3d at 858.

harm to one individual or an identifiable group of individuals is necessarily easier than showing widespread unreasonable interference with a public right.<sup>104</sup> In addition, it is especially difficult, and some would argue impossible, to successfully argue that a statutorily authorized activity constitutes a public nuisance.<sup>105</sup>

#### D. Intrastate vs. Interstate

Evading preemption is not the only hurdle for state common law environmental tort cases—proving causation can be just as large of a barrier to success. Interstate cases involve pollution that crossed state lines and thus likely traveled a significant distance; as the distance between source and damage increases, so does the difficulty of proving causation.<sup>106</sup> In contrast, *Bell* was an entirely intrastate case: the harm to plaintiffs occurred in Pennsylvania within a one-mile radius of the Pennsylvania facility, and the claims were based on Pennsylvania common law.<sup>107</sup> However, a plaintiff's case is not hopeless if damage crosses state lines—those who suffer harm may sue under the laws of the source state, even if they are not citizens of the same state as the emitter.<sup>108</sup> Admittedly, geographic proximity of intrastate cases, and especially the one-mile radius in *Bell*, helps to show causation and prove standing, but purely interstate pollution is not required.<sup>109</sup> The requisite factor is that the common law of the source state is utilized, and the shorter the distance between source and damage, the more likely it is the claim will succeed.<sup>110</sup> When causation is difficult to prove because of the distance between a source of damage in one state and the actual damage in another state, the issue arises again where plaintiffs' claims appear less like a tort, and more as an attempt to regulate national air emissions. And as noted above, only the CAA regulates national air quality.

#### E. One Defendant vs. Multiple Defendants

As in *Bell*, many successful environmental state common law tort cases have only one defendant,<sup>111</sup> but this does not preclude claims against multiple

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104. *Bell I*, 903 F. Supp. 2d 314, 315 (W.D. Pa. 2012), *rev'd*, *Bell II*, 734 F.3d 188 (3d Cir. 2013); *see also Kivalina*, 696 F.3d at 855–56.

105. *See, e.g., Michigan v. U.S. Army Corps of Eng'rs*, 911 F. Supp. 2d 739, 755 (N.D. Ill. 2012) *aff'd*, 758 F.3d 892 (7th Cir. 2014).

106. *See Kivalina*, 696 F.3d at 868; *see also Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2534 (2011); *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 308 (4th Cir. 2010). Although causation was not discussed in either opinion, both cases represent interstate claims that were preempted.

107. *Bell I*, 903 F. Supp. 2d at 315.

108. *Id.*

109. *Id.*

110. *Kivalina*, 696 F.3d at 854.

111. *See, e.g., Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 484 (1987); *Merrick v. Diageo Americas Supply, Inc.*, 5 F. Supp. 3d 865 (W.D. Ky. 2014); *Tech. Rubber Co. v. Buckeye Egg Farm, L.P.*, No.

defendants.<sup>112</sup> Although *Bell II* did not discuss whether a plaintiff could successfully allocate liability among multiple defendants,<sup>113</sup> if a source belongs to multiple defendants, plaintiffs can bring their claims against multiple defendants.<sup>114</sup> However, courts have been reluctant to allow these claims to proceed if the damage stems from multiple sources because causation is too ambiguous.<sup>115</sup> Again, when causation is too ambiguous in a claim based on emissions pollution, the state law claim will appear as an attempt to regulate air emissions and therefore be preempted.<sup>116</sup>

#### F. Permit Violation vs. No Permit Violation

*Bell II* also symbolizes a hole in the permit shield defense. The term “permit shield” derives from section 504(f) of the CAA, which allows emitters to receive a permit issued under a Title V program and be deemed in compliance with CAA permit program requirements.<sup>117</sup> This rests on the belief that a permit’s conditions will contain all applicable air quality requirements, meaning permit approval equates with complete compliance.<sup>118</sup> Historically, as long as an emissions source complies with its permit as issued, it is protected from enforcement action.<sup>119</sup>

That is no longer the case after *Bell II*. While the plaintiffs accused GenOn of violating its permit requirements, this was merely in support of their tort claim—they did not bring suit under the CAA to enforce the permit’s terms.<sup>120</sup> This choice is all the more surprising since, if proven, the facts underlying their tort claim would also prove permit violations.<sup>121</sup> Plaintiffs, then, chose state

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2:99–CV–1413, 2000 WL 782131 (S.D. Ohio 2000); *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 63 (Iowa 2014).

112. *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1281 (W.D. Tex. 1992) (holding that the CAA did not preempt plaintiffs’ state common law tort claims against six defendants that owned and operated a facility together). Other cases have involved claims brought against a company and its affiliates. *See Little v. Louisville Gas & Elec. Co.*, Civ. A. No. 3:13–CV–01214–JHM, 2014 WL 3547331 (W.D. Ky. 2014) (suing both a company and its parent); *Cerny v. Marathon Oil Corp.*, Civ. A. No. SA–13–CA–562–XR, 2013 WL 5560483 (W.D. Tex. Oct. 7, 2013) (suing both Marathon Oil Corporation and Marathon Oil EF LLC).

113. *See Bell II*, 734 F.3d 188, 192–93 (3d Cir. 2013). Nowhere in the statement of facts are multiple defendants mentioned.

114. *See, e.g., Gutierrez*, 798 F. Supp. at 1281.

115. *See Kivalina*, 696 F.3d at 869.

116. *Id.*

117. 42 U.S.C. § 7661c (2012).

118. *See, e.g., Roy Rakiewicz, Does My Permit Shield Have Me Covered?*, ALL4 (Apr. 2008), <http://www.all4inc.com/does-my-permit-shield-have-me-covered>.

119. *Dice, supra* note 8.

120. *Bell II*, 734 F.3d 188, 192 (3d Cir. 2013).

121. Specifically, GenOn was not permitted to “operate . . . any source in such manner that emissions of malodorous matter from such source are perceptible beyond the property line” or “conduct . . . any materials handling operation in such manner that emissions from such operation are visible at or beyond the property line.” *Id.* at 191–92.

121. Yet if plaintiffs’ allegations are taken as true, GenOn was doing both.

common law over its federal statutory counterpart. The Third Circuit followed *Ouellette* and held that even if GenOn had been in compliance with its permit, source state tort law could impose separate, and stricter, standards than permits.<sup>122</sup> Therefore, even if an emitter is in compliance with its Title V permit, it may still be liable under a state's common law. This hole in the permit shield has been widely noted: law firms and industry groups have issued warnings to emitters that they could still be liable for emissions that their permits allow.<sup>123</sup> So while it remains true that permit violations make a court more likely to find against an emitter in a state law tort claim, *Bell II* opened the door for state common law lawsuits against polluters who are in compliance with their permits, but whose emissions nonetheless violate individuals' common law rights.<sup>124</sup> In sum, *Bell II* has strongly undermined the CAA's permit shield defense.

### G. Remedies

Generally, remedies in successful pollution cases are damages and injunctions.<sup>125</sup> Yet the usefulness of the latter category can be overstated. Courts are reluctant to impose any kind of cap, or emission standard, as relief—even in cases that do not concern greenhouse gases.<sup>126</sup> This is a problematic aspect of common law remedies because it may preclude large-scale change. Still, plaintiffs should not overlook the common law's benefits: tort claims also allow them to recover personal damages. In contrast, plaintiffs bringing citizen suits under the CAA cannot receive any personal compensation, and must instead settle for forcing an emitter to comply with emissions standards.<sup>127</sup> Most problematic of all, where the emitter is not violating its permit, CAA citizen suits are futile. The only realistic option is to utilize the CAA's savings clause; plaintiffs must bring common law claims to protect themselves and their communities from pollution.<sup>128</sup>

A discussion on the sufficiency of remedies begs the question: do permits even matter? GenOn was allegedly violating its permit by allowing

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122. *Bell II*, 734 F.3d at 198 (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497–98 (1987)).

123. See Dice, *supra* note 8 (noting that, despite compliance with Title V permits, emitters can be liable for tort common law actions); see also Jonathan Martel, *How to Defend Air Pollution Torts after Bell v. Cheswick*, LAW360 (Sept. 28, 2013), <http://www.law360.com/articles/475613/how-to-defend-air-pollution-torts-after-bell-v-cheswick> (reminding emitters that after *Bell II*, permit compliance is not a “perfect safe harbor from a tort suit”).

124. *Bell II*, 734 F.3d at 189–90.

125. Daniel Farber, *The Story of Boomer Pollution and the Common Law*, 32 ECOLOGY L.Q. 113, 113 (2005).

126. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011); *Bell I*, 903 F. Supp. 2d 314, 319 (W.D. Pa. 2012), *rev'd*, *Bell II*, 734 F.3d 188.

127. *New Wave of State Law Air Pollution Torts?*, LATHAM & WATKINS, Aug. 18, 2014, at 4, available at [www.lw.com](http://www.lw.com) (search “Bell v. Cheswick”; then follow “New Wave of State Law Air Pollution Torts?” hyperlink).

128. *Id.*

“malodorous” content to cross the power plant’s property line.<sup>129</sup> Hence, if the only remedy that the plaintiffs sought was an end to the pollution, they could have simply sued under the CAA citizen suit provision and enforced the Title V permit. Yet they did not. One explanation is that tort law, unlike suits under the CAA, allows for monetary damages. It would be naive to argue monetary damages have no bearing on plaintiffs’ decision to sue under tort law. However, it would be oversimplifying the issue to argue money damages is the only reason. Plaintiffs utilize tort law where the federal statutory framework provides insufficient protection against harm. The CAA permits do not provide adequate protection against point source pollution, as is evident by the damage alleged in these cases.<sup>130</sup> Yet, when plaintiffs’ claims appear to allege inadequacy of emissions standards, judges lean towards finding the claim preempted.<sup>131</sup> So plaintiffs have no choice but to take a different approach. State common law tort claims provide recourse for plaintiffs where statutory law *should* have provided protection, but case law, business, and politics show that it will not.

#### H. A Perfect Plaintiff’s Claim under Bell II

*Bell II* and the related case law illuminate the components of a successful preemption-proof claim for damages from energy facility emissions. Because the CAA preempts federal common law claims, the tort claim is based on state common law.<sup>132</sup> If the tortious claims include nuisance, the plaintiffs can bring a private nuisance claim that cannot be construed as an attempt to regulate emissions.<sup>133</sup> The claim is brought under the law of the source state, even if the damage has traveled interstate.<sup>134</sup> One source is identified to solidify causation and standing, even if multiple defendants are to blame for the tortious emissions.<sup>135</sup> A Title V permit violation by the defendant bolsters the claim.<sup>136</sup> However, even if the defendant is in compliance, the permit does not shield it from a claim alleging violation of state common law.<sup>137</sup>

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129. *Bell II*, 734 F.3d at 191–92.

130. *Id.*; see also *Merrick v. Diageo Americas Supply, Inc.*, 5 F. Supp. 3d 865 (W.D. Ky. 2014); *Johnson v. NRG Energy, Inc.*, No. CAL14-23355, 2014 WL 4354506 (Md. Cir. Ct. Aug. 26, 2014).

131. See, e.g., *Am. Elec. Power*, 131 S. Ct. 2527.

132. See *id.*

133. See, e.g., *Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

134. See *Bell I*, 903 F. Supp. 2d 314, 319 (W.D. Pa. 2012), *rev’d*, *Bell II*, 734 F.3d 188 (3d Cir. 2013).

135. See *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1281 (W.D. Tex. 1992) (holding that the CAA did not preempt plaintiffs’ state common law tort claims against six defendants that owned and operated a facility together).

136. *Bell II*, 734 F.3d 188, 192 (3d Cir. 2013) (involving plaintiffs describing permit violations as facts to show tortious emissions).

137. *Bell I*, 903 F. Supp. 2d at 315.

While the claim described above is an ideal use of *Bell II*'s strategy, it also has limitations. For instance, the case law shows the odds of a claim's success are substantially higher when the plaintiff's damage is entirely intrastate, and better still when the damage occurs close to the source.<sup>138</sup> So what about plaintiffs whose damage comes from far away? Or people who have damage that does not constitute a private nuisance, or even worse, those whose harm has a tenuous causal link to emissions, such as asthma, headaches, or decreases in property value?<sup>139</sup> Indeed, while the *Bell II* plaintiffs succeeded, cases like *Kivalina* have denied others a remedy for their harms. Hence what emerges most from an examination of *Bell II* and this group of cases is that statutory law is simply not working. And while *Bell II* helps fill the gaps in federal environmental statutes, it is a partial solution, not a panacea.

## V. THE POLICY IMPLICATIONS OF *BELL II*

The *Bell* litigation embodied a grassroots approach to environmental regulation, an approach that uses state common law at the local level that higher state and federal governments are either unable or unwilling to provide. Yet the litigation approach embodied by *Bell* is not the only method of local regulation—there are alternative options. Similarly, *Bell* is not a flawless option; it too can be criticized for its potential negative effects.

### A. Another Model to Follow: Strengthening Local Regulations

Communities can also pass local laws to address harms that would otherwise be ignored.<sup>140</sup> The town of Dryden, New York adopted local zoning laws that banned fracking.<sup>141</sup> Riverside, California used a zoning ordinance to prohibit the operation of marijuana dispensaries and abate this use of land as a public nuisance.<sup>142</sup> In cases where state common law is preempted or a lawsuit is not a desirable option, this type of local regulation can prove invaluable to

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138. *Id.*; see also *Tech. Rubber Co. v. Buckeye Egg Farm, L.P.*, No. 2:99-CV-1413, 2000 WL 782131, at \*4 (S.D. Ohio June 16, 2000) (“This litigation, however, involves Ohio plaintiffs complaining about alleged water pollution in Ohio, allegedly caused by the Ohio activities of persons and entities, most of whom are residents of Ohio. [*Ouellette*] is, quite simply, inapposite.”).

139. Lucas Davis, *The Effect of Power Plants on Local Housing Values and Rents* (May 2010) (unpublished), available at <http://faculty.haas.berkeley.edu/ldavis/pp.pdf>.

140. See, e.g., *Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1191–92 (N.Y. 2014) (utilizing the home rule authority vested in municipalities to regulate land use and adopting local zoning laws that banned fracking); *Cooperstown Holstein Corp. v. Town of Middlefield*, 964 N.Y.S.2d 431, 432 (N.Y. App. Div. 2013), *aff'd sub nom. Wallach*, 16 N.E.3d 1188 (enacting zoning laws that categorized fracking as a prohibited land use in the Town of Middlefield); *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494, 496 (Cal. 2013) (utilizing a zoning ordinance to prohibit the operation of marijuana dispensaries and abate such use of land as a public nuisance).

141. *Wallach*, 16 N.E.3d at 1191–92.

142. *City of Riverside*, 300 P.3d at 496.

communities dealing with pollution.<sup>143</sup> Neither Dryden nor Riverside alleged that the relevant industries were violating any law—they simply created a new one.<sup>144</sup> Like state common law claims, this form of ingenious community action can give citizens the ability to protect their homes and health.<sup>145</sup> Perhaps, then, *Bell II*'s narrowness should be seen as specialization rather than weakness—parties with claims that do not fit its requirements have other ways to achieve their goals.

### B. Criticisms of the Bell Strategy

The defendants in *Bell* argued that a holding maintaining that the CAA does not preempt state common law would lead to uncertainty as to which laws a facility must comply with.<sup>146</sup> The Third Circuit was unconvinced, finding its ruling only requires sources to look to the laws of the state in which they emit—no more than before *Bell II*.<sup>147</sup> Similarly, scholars have argued that beyond the mess of conflicting standards, judge-created remedies would be inferior to those devised by the expertise of Congress and the EPA.<sup>148</sup> But it was Congress's own intent to have these industries further regulated by the states, which is why permitting programs and the savings clause exist.<sup>149</sup> In addition, an argument has been made that state environmental statutes can supplant common law remedies through "No More Stringent Rules" (NMSRs).<sup>150</sup> NMSRs limit, or prohibit, state environmental agencies from adopting standards any tougher than those required by federal law.<sup>151</sup> But a strategy like that in *Bell II* is based on common law tort claims, not state environmental regulations.<sup>152</sup> The possibilities for NMSRs to affect state common law tort claims are a stretch. Regulations would have to supplant

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143. The *Wallach* and *Cooperstown Holstein Corp.* courts both analyzed preemption of local law by the Oil, Gas and Solution Mining Law. 16 N.E.3d at 1191–92; 964 N.Y.S.2d at 432. *Inland Empire Patients* analyzed preemption by the California Health & Safety Code. 300 P.3d at 496.

144. See *Wallach*, 16 N.E.3d at 1191–92.

145. Steven Mufson, *How Two Small New York Towns Have Shaken up the National Fight over Fracking*, WASH. POST (July 2, 2014), [http://www.washingtonpost.com/business/economy/how-two-small-new-york-towns-have-shaken-up-the-national-fight-over-fracking/2014/07/02/fe9c728a-012b-11e4-8fd0-3a663dfa68ac\\_story.html](http://www.washingtonpost.com/business/economy/how-two-small-new-york-towns-have-shaken-up-the-national-fight-over-fracking/2014/07/02/fe9c728a-012b-11e4-8fd0-3a663dfa68ac_story.html) (calling the *Dryden* decision a "victory for local control"). To be clear, this Note is not suggesting that plaintiffs create new emissions standards through the court system. This clearly would violate the CAA. But plaintiffs can utilize the court system to seek relief for damage that emissions standards are not protecting them from. To rebut the court in *Comer*, this precisely is *applying* the law, not "creating it." *Contra Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 864 (S.D. Miss. 2012).

146. *Bell II*, 734 F.3d 188, 197 (3d Cir. 2013).

147. *Id.*

148. See Caravello, *supra* note 7, at 477.

149. 42 U.S.C. §§ 7604(e), 7661c (2012).

150. See Martel, *supra* note 123 (discussing the potential of "No More Stringent Laws" as a reaction to *Bell II*).

151. Andrew Hecht, Note, *Obstacles to the Devolution of Environmental Protection States' Self-Imposed Limitations on Rulemaking*, 15 DUKE ENVTL. L. & POL'Y F. 105, 112 (2004).

152. *Bell II*, 734 F.3d at 192.

environmental tort claims, or NMSRs would be required to restrict both state agencies and the courts from imposing stricter standards. Most unlikely, the courts could decide to introspectively restrict their own powers to impose stricter standards because the state legislature has restricted state agencies.<sup>153</sup> Unless any of these far-fetched scenarios occurs, then NMSRs would not hinder the litigation opportunity created by *Bell II*.<sup>154</sup>

#### CONCLUSION

Ultimately, one can recognize *Bell II*'s holding is at best a partial solution while still acknowledging its significance.<sup>155</sup> Cases are currently being filed using *Bell II* as foundational support.<sup>156</sup> For example, NRG Energy recently had a tort claim filed against it for property damage caused by the emissions from its coal ash storage facility.<sup>157</sup> An additional testament to the legitimacy of the opportunities created by *Bell II* is the level of the energy industry's concerns, as evidenced in client alerts, legal publications news articles, and more.<sup>158</sup> Law firms have published articles discussing the "blow" that *Bell II* deals to regulated parties that had relied on the *AEP* outcome.<sup>159</sup>

There is good reason for polluters' worry. The decision handed down in *Bell II* makes state common law tort claims an accessible tool for private enforcement of environmental justice in local communities. This can be an important solution for communities plagued with local environmental issues, but lacking the political power necessary to force change. The damage on record in *Bell* was simplified to ash and dust residue settled on property. But for the people it affected, it was like "living in hell."<sup>160</sup> Yet, *Bell II* opened a

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153. See Martel, *supra* note 123 (suggesting that "courts may question why state legislatures would have prohibited state agencies from adopting tougher rules administratively if they thought that the courts were empowered to impose the same 'more stringent' obligations").

154. See *id.*

155. See Cerny v. Marathon Oil Corp., 2013 WL 5560483, at \*8 (W.D. Tex. Oct. 7, 2013) (adopting the Third Circuit's decision in *Bell II* and holding that common law tort claims against an oil company for the emissions of its oilfield operations were not completely preempted by the CAA); see also Merrick v. Diageo Americas Supply, Inc., 5 F. Supp. 3d 865, 873 (W.D. Ky. 2014) (holding the Third Circuit [in *Bell II*] captured the prevailing law for CAA preemption); Freeman v. Grain Processing Corp., 848 N.W.2d 58, 85 (Iowa 2014) (following *Bell II* and holding that "conflict preemption with the CAA does not apply to a private lawsuit seeking damages anchored in ownership of real property").

156. See, e.g., Johnson v. NRG Energy Inc., No. CAL14-23355, *complaint filed* (Md. Cir. Ct. Prince George's Cnty., Aug. 26, 2014).

157. *Id.*

158. See, e.g., *New Wave of State Law Air Pollution Torts?*, *supra* note 127; see also Carl Pernicone, *We're Still Waiting on Whether the CAA is Preemptable*, LAW360 (July 11, 2014), <http://www.law360.com/articles/555751/we-re-still-waiting-on-whether-the-cao-is-preemptable> (estimating that the Supreme Court is unlikely to find the CAA preempts state tort law).

159. *Clean Air Act Does Not Preempt Property Owners' State Law Tort Claims, Says Third Circuit in Case of First Impression*, CROWELL & MORING (Sept. 23, 2013), <http://www.crowell.com/NewsEvents/AlertsNewsletters/Environment-Energy-Resources-Law-Alert/Clean-Air-Act-Does-Not-Preempt-Property-Owners-State-Law-Tort-Claims-Says-Third-Circuit-in-Case-of-First-Impression>.

door of opportunity for victims of pollution to take on the energy industry. However, it should be recognized that *Bell II* is not necessarily a weapon. Rather, its plaintiffs' victory should underscore that the people in communities affected by pollution cannot be ignored. Nonetheless, this realization need not lead to business-community conflict. A more productive outcome would be for each side to recognize the other's strength, and for both to choose to settle their differences at the negotiating table.<sup>161</sup> Only time will tell if both sides are willing, and welcomed, to sit at that table. Until then, plaintiffs have *Bell II*.

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161. See Dice, *supra* note 8 (advising “[t]his result reinforces the importance of all pollution sources paying attention to citizen complaints regarding air pollution, while also adopting a proactive policy of community involvement in order to minimize the likelihood of being subject to common law actions”).

**We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**

