FEDERAL PREEMPTION OF STATE LAW — IMPLIED PREEMPTION — FOURTH CIRCUIT HOLDS THAT STATE PUBLIC NUISANCE SUIT AGAINST ELECTRICITY-GENERATING PLANT EMISSIONS IS PREEMPTED BY THE CLEAN AIR ACT REGIME. — *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010).

The doctrine of implied preemption allows the judiciary to limit state power in order to advance federal policy.[1] Because Congress in its legislation must strike a balance between uniform federal action and state power, however, implied preemption may encourage courts to rely on "judicially manufactured policies" to forbid states from acting in areas where Congress intended to preserve state power.[2] Through the federal regulatory scheme provided by the Clean Air Act[3] (CAA), Congress sought to regulate emissions of air pollutants.[4] But the CAA contains clear compromises, for it leaves substantial responsibility for air quality with the states;[5] as a result, the boundary between federal and state authority under the CAA is a matter of dispute.[6] Recently, in *North Carolina ex rel. Cooper v. TVA*,[7] the Fourth Circuit held that an injunction based on state public nuisance law could not be granted against emissions from another state because such relief would frustrate Congress's purposes in establishing a comprehensive scheme of federal regulation through the CAA.[8] The court used the doctrine of implied preemption to preempt state law even though the CAA's savings clause expressly preserves some state law powers.[9] In concluding that Congress implicitly preempted the suit, the court subordinated statutory text to court-perceived purpose, demonstrating the inherent danger that implied preemption undermines the constitutional values of federalism and separation of powers.

The CAA gives the Environmental Protection Agency (EPA) authority to set acceptable airborne emissions levels.[10] Rather than provide for direct regulation of emissions sources by the EPA, the CAA requires each state to submit to the EPA a state implementation plan

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1 *See* Wyeth v. Levine, 129 S. Ct. 1187, 1194–95 (2009).

2 *Id.* at 1217 (Thomas, J., concurring in the judgment); *see id.* at 1211–17.

3 42 U.S.C. §§ 7401–7671 (2006).

4 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845–46 (1984).

5 *See id.* at 846; *see also* 42 U.S.C. § 7416.

6 For examples of this dispute, see *Massachusetts v. EPA*, 549 U.S. 497 (2007); and *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004).

7 615 F.3d 291 (4th Cir. 2010).

8 *Id.* at 302–03, 309–10.

9 *See id.* at 303–04; *see also* 42 U.S.C. §§ 7604(e), 7416.

10 42 U.S.C. § 7409(b). All of the emissions at issue in *Cooper* were subject to EPA standards developed pursuant to the CAA. *Cooper*, 615 F.3d at 299.

(SIP) to meet the EPA's standards.[11] The SIP must ensure that the state's emissions sources do not "interfere" with other states' adherence to the standards.[12] The CAA allows for some regulation outside the SIP process through its savings clause, which states 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."[13]

In January 2006, the state of North Carolina filed a public nuisance action against the Tennessee Valley Authority (TVA), claiming that its citizens were harmed by emissions that entered North Carolina from eleven TVA coal-fired plants located in Tennessee, Kentucky, and Alabama.[14] The parties estimated that the pollution controls desired by North Carolina would cost TVA between three and five billion dollars.[15] TVA moved to dismiss the claim, arguing that the claim was not justiciable.[16] The district court denied TVA's motion to dismiss,[17] and the Fourth Circuit affirmed the denial.[18]

After a bench trial,[19] the district court granted in part North Carolina's requested injunction, holding that one of TVA's plants in Alabama and three in Tennessee "unreasonably interfere[d] with the rights of North Carolina citizens."[20] The court's injunction required TVA to install certain pollution reduction technologies at those plants,[21] and the court made extensive findings of fact with regard to the coal-fired plants' emissions, the adverse health and environmental effects, and the feasibility of pollution controls.[22] In determining whether a public nuisance existed, the court stated that it was applying the law of the states in which TVA's plants were located.[23]

The Fourth Circuit reversed and remanded.[24] Writing for the panel, Judge Wilkinson[25] explained three flaws in the district court's ruling.[26] First, the Fourth Circuit held that the CAA's emissions scheme

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11 42 U.S.C. § 7410.

12 *Id.* § 7410(a)(2)(D)(i)(II).

13 *Id.* § 7604(e); *see also id.* § 7416.

14 North Carolina *ex rel.* Cooper v. TVA, 593 F. Supp. 2d 812, 815, 818 (W.D.N.C. 2009). A public nuisance is generally defined as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

15 *See Cooper*, 593 F. Supp. 2d at 815.

16 North Carolina *ex rel.* Cooper v. TVA, 439 F. Supp. 2d 486, 488 (W.D.N.C. 2006).

17 *Id.* at 497.

18 North Carolina *ex rel.* Cooper v. TVA, 515 F.3d 344, 353 (4th Cir. 2008).

19 *Cooper*, 593 F. Supp. 2d at 818.

20 *Id.* at 831; *see id.* at 830.

21 *Id.* at 831–32.

22 *See id.* at 820–28.

23 *Id.* at 829.

24 *Cooper*, 615 F.3d at 312.

25 Judge Wilkinson was joined by Judges Niemeyer and Shedd.

26 *Cooper*, 615 F.3d at 296.

preempted the state public nuisance suit because the suit would "interfere[] with the methods by which the federal statute was designed to reach [its] goal."[27] Second, the Fourth Circuit rejected the district court's assertion that it had applied the law of the emissions-source states, noting that the specific remedy awarded by the district court had been derived from a North Carolina statute.[28] And third, the court emphasized that even if the district court had applied Alabama and Tennessee law, the injunction could not stand because an action permitted and regulated by Alabama and Tennessee could not be a public nuisance under those states' laws.[29]

The Fourth Circuit devoted most of its attention to the preemption issue, viewing the CAA as the basis of a comprehensive framework created by Congress to manage emissions.[30] The court relied on *International Paper Co. v. Ouellette*,[31] in which the Supreme Court held that the Clean Water Act[32] (CWA) preempted a common law nuisance suit that alleged injury from a pollution source in another state.[33] The Fourth Circuit stressed that the CAA promotes "the extensive application of scientific expertise" and "reliance interests."[34] According to the court, these purposes would be imperiled if the court system intruded on the CAA regime and set public nuisance standards "whose content must await the uncertain twists and turns of litigation."[35] Looking to congressional intent, the Fourth Circuit held that "field and conflict preemption principles" compelled preemption of the state suit because the CAA contemplates a specific role for the states: participation in the EPA's state implementation process.[36]

The court rejected North Carolina's argument that the CAA's savings clause preserved its suit.[37] The clause provides that "nothing in this chapter shall preclude or deny the right of any State . . . 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."[38] The Fourth Circuit had already ruled that state com-

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[27] *Id.* at 303 (second alteration in original) (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987)) (internal quotation mark omitted); *see id.* at 304.

[28] *Id.* at 306–09.

[29] *Id.* at 309–10.

[30] *See id.* at 298.

[31] 479 U.S. 481.

[32] 33 U.S.C. §§ 1251–1387 (2006).

[33] *Ouellette*, 479 U.S. at 483, 500.

[34] *Cooper*, 615 F.3d at 301.

[35] *Id.*

[36] *Id.* at 303; *see also id.* at 302–04.

[37] *Id.* at 303–04.

[38] 42 U.S.C. § 7416 (2006).

mon law tort actions constituted a "requirement" under the CAA.[39] North Carolina argued, then, that "[t]he plain language of the CAA . . . confirm[ed] the availability of [its] common law claim."[40] Based on the holding in *Ouellette*, however, the Fourth Circuit held that a "generic savings clause" could not interfere with the purposes of Congress as manifested in the CAA.[41]

The court in *Cooper* discounted the CAA's plain language, illustrating the problems inherent in the implied preemption doctrine. While the *Ouellette* Court preempted a state nuisance action despite the CWA's savings clause, it did so only because the trial court had applied the law of the state affected by the pollution instead of the source state's law.[42] The textual differences between the savings clauses of the CWA and the CAA suggest that *Ouellette* is not controlling. But even if it were, the *Cooper* court held that the state suit was preempted *before* it found that the trial court applied the incorrect state law, and it made no reference to the choice-of-law issue in its preemption discussion,[43] expanding its preemption holding beyond *Ouellette*'s reasoning. Although the CAA seems to preserve nuisance suits brought under either source-state or affected-state law, and *Ouellette* held that the CWA preserves nuisance suits under source-state law,[44] *Cooper*'s analysis would preempt both types of suits. Because the court's preemption analysis neglects the statutory text, it undermines the Constitution's division of powers between the federal and state governments and among the branches of the federal government.

The CAA preserves the state's power to bring a common law nuisance suit regardless of whether it is brought under source- or affected-state law. The Fourth Circuit did not directly dispute that the plain text of the savings clause would permit North Carolina's suit. Seeking an injunction against the TVA's emissions seems to be a "right which any person [possesses] under . . . common law to seek enforcement of any emission standard or . . . any other relief."[45] To establish that the savings clause did not necessarily preserve North Carolina's nuisance action, the court relied on *Ouellette*'s holding that the CWA's savings clause — which is generally similar to that of the CAA[46] — did not

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[39] North Carolina *ex rel.* Cooper v. TVA, 515 F.3d 344, 351–52 (4th Cir. 2008); *see id.* at 353. The Supreme Court has repeatedly held that the term "requirements" encompasses state common law obligations. *See* Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1007–08 (2008).

[40] Final Brief of Appellee State of North Carolina at 74, *Cooper*, 615 F.3d 291 (No. 09-1623).

[41] *Cooper*, 615 F.3d at 304.

[42] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497–500 (1987).

[43] *See Cooper*, 615 F.3d at 301–09.

[44] *Ouellette*, 479 U.S. at 497.

[45] 42 U.S.C. § 7604(e) (2006); *see id.* § 7602(e) (defining "person" to include states).

[46] *Compare* 33 U.S.C. § 1365(e) (2006), *and id.* § 1370 (CWA), *with* 42 U.S.C. § 7604(e), *and id.* § 7416 (CAA).

preserve the power to bring a nuisance suit under affected-state law.[47] Yet differences between the texts of the CWA's and CAA's savings clauses indicate that the CAA preserves a broader range of state powers and thus that *Ouellette* is not binding precedent. The *Ouellette* Court used the CWA savings clause's reference to "any right or jurisdiction of the States with respect to the waters . . . of such States"[48] to suggest that the actual extent of power reserved to the states concerning their regulation of other states' emissions was ambiguous and that preemption could therefore be implied.[49] The relevant CAA provision contains no comparable language that might warrant making a similar distinction between source and affected states,[50] though the *Cooper* court implied that some ambiguity existed.[51] Even if the Fourth Circuit considered the text ambiguous, the court should have at least taken account of the textual indicator provided by the savings clause[52] and then turned to its preemption analysis.

Assuming that the savings clause itself did not preserve the state's power, and because the CAA does not contain a clause expressly preempting state claims against power plant emissions,[53] the court could consider two types of implied preemption: field preemption and conflict preemption.[54] The *Cooper* court relied on precedents resting on both types of implied preemption.[55] But, as *Ouellette* suggested, field preemption would make little sense in this context: only by ignor-

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[47] *See Cooper*, 615 F.3d at 304.

[48] 33 U.S.C. § 1370.

[49] *See Ouellette*, 479 U.S. at 493 ("This language arguably limits the effect of the clause to discharges flowing *directly* into a State's own waters . . . .").

[50] *See* 42 U.S.C. § 7416.

[51] *See Cooper*, 615 F.3d at 304 (referring to the CAA's "generic savings clause"). Similarly, the *Ouellette* Court explained that "[t]he fact that the language of [the CWA's savings clause] is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation . . . indicates that it does not reflect any considered judgment" by Congress. 479 U.S. at 494 n.14 (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 329 n.22 (1981)) (internal quotation mark omitted). Of course, if courts disregard the language of statutes enacted in accordance with Article I, Section 7, there is little reason for Congress to consider the contents of its legislation fully. It is unclear what other language Congress could have used in the CAA to preserve the state's nuisance action.

[52] *See* Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

[53] *Cf.* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992) (involving express preemption clauses). *Compare* 42 U.S.C. § 7543(a) (expressly preempting state vehicle standards covered by the CAA), *with id.* § 7416 (preserving state standards where the CAA makes no express exceptions).

[54] *See* U.S. CONST. art. VI, cl. 2; Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995); *see also* Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000) (holding that the presence of a savings clause does not "limit the operation of ordinary pre-emption principles").

[55] *See Cooper*, 615 F.3d at 302–04 (citing *Ouellette*, 479 U.S. at 494, 497; Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212–13 (1983)).

ing the savings clause in the first place could the court determine that Congress intended to preempt emissions claims by occupying the field.[56] As for implied conflict preemption, a state action may neither conflict directly with a federal law nor frustrate its purposes.[57] A state suit seeking higher emissions standards, or at least a suit under source-state law, cannot directly contradict a federal scheme that explicitly permits states to use higher emissions standards.[58] The court, then, presumably based its preemption holding on whether allowing the state suit would frustrate Congress's purposes, which was the precise issue in *Ouellette*.[59]

*Ouellette*'s holding, however, concerned only actions brought under a law other than that of the pollution-source state,[60] and the *Cooper* court did not acknowledge this central choice-of-law distinction between source-state law and affected-state law. In *Ouellette*, the Court considered the effect of the CWA's savings clause on state nuisance actions and held that the CWA "pre-empts state law to the extent that the state law is applied to an out-of-state point source."[61] The *Ouellette* Court explained that "nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State."[62] Although the *Cooper* court later held that the district court failed to apply the laws of the source states, its discussion of the CAA's savings clause indicates that the court believed nuisance claims would be preempted regardless of whether they were litigated under the law of the source state.[63] The *Cooper* court said it could not "allow non–source states to ascribe to a generic savings clause a meaning that the Supreme Court in *Ouellette* held Congress never intended,"[64] but *Ouellette* explained that the foremost issue should not be whether an affected state brought suit or whether that suit was brought in an affected-state court, but rather whether source-state law was applied.[65]

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[56] *See Ouellette*, 479 U.S. at 492 ("[T]he saving clause negates the inference that Congress 'left no room' for state causes of action."). Although the Supreme Court has "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law," United States v. Locke, 529 U.S. 89, 106 (2000), adhering to the plain text of the statute can hardly be considered giving it broad — or narrow — effect. *See Cipollone*, 505 U.S. at 544 (Scalia, J., concurring in the judgment in part and dissenting in part) ("[O]ur job is to interpret Congress's decrees . . . neither narrowly nor broadly, but in accordance with their apparent meaning.").

[57] *See Geier*, 529 U.S. at 873; Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228–29 (2000).

[58] *See* 42 U.S.C. § 7416; *Ouellette*, 479 U.S. at 497.

[59] 479 U.S. at 493–94.

[60] *Id.* at 483.

[61] *Id.* at 500.

[62] *Id.* at 497.

[63] *See Cooper*, 615 F.3d at 302–04.

[64] *Id.* at 304.

[65] *See Ouellette*, 479 U.S. at 497, 500 ("[T]he [CWA] pre-empts laws, not courts." *Id.* at 500.). The *Cooper* court's concern with "allow[ing] multiple courts in different states to determine

According to the *Ouellette* Court, the application of a state law other than that of the source state would frustrate Congress's scheme by upsetting the CWA's permit process "and the policy choices made by the source State."[66] These concerns would not be present if source-state law were applied because its application would maintain "the [CWA's] regulatory partnership" and "prevent[] a source from being subject to an indeterminate number of potential regulations."[67] The *Cooper* court's decision did not address this significant choice-of-law distinction. Given the CAA's joint federal-state regulatory scheme, its savings clause, and *Ouellette*'s emphasis on state sovereignty over in-state pollution sources,[68] the Fourth Circuit's assertion that the CAA demands the preemption of source-state law when invoked by out-of-state litigants in out-of-state courts is implausible.

The court's preemption holding, then, may undermine Congress's purposes as manifested in the CAA, resulting in the exact harm to federalism that both the *Cooper* court and the Framers sought to avoid: upsetting the balance of power between the federal and state governments.[69] Because the court's holding would preempt nuisance suits even if litigated under source-state law, states would be prohibited from regulating emissions in a manner that Congress allowed. Such preemption would weaken what James Madison called the "double security [that] arises to the rights of the people" from the division of power between the federal and state governments.[70]

The *Cooper* court's preemption holding also illustrates the general danger that the doctrine of implied preemption may undermine the Constitution's separation of powers. The *Cooper* court was concerned about substituting the judiciary's opinion for agency expertise,[71] but judicial departure from statutory language risks substituting the judiciary's policy opinion for the legislature's judgment, weakening the le-

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whether a single source constitutes a nuisance," 615 F.3d at 302, misstates the issue as one of choice of forum rather than choice of law.

66 *Ouellette*, 479 U.S. at 495; *see id.* at 493–97.

67 *Id.* at 499.

68 *See id.* at 494–95, 498–99.

69 *See Cooper*, 615 F.3d at 298 (referring to the "cooperative federal-state framework" created by Congress through the CAA); THE FEDERALIST NO. 28, at 176–77 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."); *see also* Wyeth v. Levine, 129 S. Ct. 1187, 1205–08, 1216–17 (2009) (Thomas, J., concurring in the judgment) ("[O]ur federal system in general, and the Supremacy Clause in particular, accords pre-emptive effect to only those policies that are actually authorized by and effectuated through the statutory text." *Id.* at 1216.).

70 THE FEDERALIST NO. 51 (James Madison), *supra* note 69, at 320. *See generally* Gregory v. Ashcroft, 501 U.S. 452, 457–60 (1991) (explaining the "numerous advantages" that the "federalist structure of joint sovereigns preserves to the people," *id.* at 458).

71 *See Cooper*, 615 F.3d at 304.

gitimacy of both the judiciary and the law.[72] When a court strays from statutory language and bases its decision on vague notions of "field and conflict preemption principles,"[73] it increases its discretion and thus its power relative to that of Congress.[74] A court that uses implied preemption may take away Congress's constitutional power to decide whether to preempt state law.[75] If Congress did not intend to permit states to set higher emissions standards through statute or suit, it need not have included the CAA's savings clause.[76] The *Cooper* court recognized that the CAA was a result of "carefully wrought compromises,"[77] and Congress could well have had multiple purposes for the CAA.[78] Casting aside the statute's text in favor of the court's "own conceptions of a policy which Congress has not expressed"[79] subverts congressional prerogatives and power. As it stands, the court's preemption holding implies that Congress meant what it did not say and said what it did not mean, undermining the first principle that ours is "a government of laws and not of men."[80]

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[72] *See* TVA v. Hill, 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute."); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64–65 (1988).

[73] *Cooper*, 615 F.3d at 303.

[74] *See* Easterbrook, *supra* note 72, at 62; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 111 (2006) ("If the Court feels free to adjust the semantic meaning of statutes when the rules embedded in the text seem awkward in relation to the statute's apparent goals, then legislators cannot reliably use words to articulate the boundaries of the frequently awkward compromises that are necessary to secure a bill's enactment.").

[75] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law."); Nelson, *supra* note 57, at 304–05 ("[T]he Court's current tests for 'implied' preemption let judges infer obstacle-preemption clauses that are hard to attribute to Congress.").

[76] *Cf.* Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring in the judgment) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."). *But see generally* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 376–78 (emphasizing the "difficulties and burdens," *id.* at 377, faced by Congress in explicitly resolving preemption questions ex ante).

[77] *Cooper*, 615 F.3d at 298.

[78] *Cf.* Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

[79] Hines v. Davidowitz, 312 U.S. 52, 75 (1941) (Stone, J., dissenting).

[80] MASS. CONST. pt. I, art. XXX.