California's Global Warming Bill:

Will Fuel Economy Preemption Curb California's Air Pollution Leadership?

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In 2001, the California legislature passed AB-1493, a law requiring substantial reductions in greenhouse gas (GHG) emissions from cars and trucks. AB-1493 is the latest in California's long history of pioneering regulations to reduce motor vehicle emissions, a leadership role that Congress encouraged by granting California a unique waiver to the Clean Air Act's preemption of state vehicle emissions laws. Yet automakers intend to challenge AB-1493 as preempted by the Energy Policy and Conservation Act (EPCA). EPCA sets federal fuel economy standards and preempts state fuel economy regulations with no exception for California.

Even though reducing vehicular GHGs will likely affect fuel economy, this Comment argues that AB-1493 should be upheld against an EPCA preemption challenge. Because every California emissions law has some impact on fuel economy, there is no logical way to apply EPCA preemption to California without eliminating California's CAA flexibility to pass its own emissions laws. Constricting California's autonomy would directly conflict with Congress's intent and would impede the kind of state innovation that should be favored by an administration and a Supreme Court friendly to federalism.

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INTRODUCTION

In the summer of 2001, California took a momentous step to combat global warming by passing AB-1493, a law mandating "regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles."¹ To date, AB-1493 represents the most substantial legal response to global warming at either the federal or state level. Both because California represents 10% of the U.S. market

for cars and trucks, and because other states may mimic California's requirements, the law could fundamentally alter vehicle design and stimulate nationwide reductions in greenhouse gas (GHG) emissions.

Before it takes effect, however, AB-1493 must survive an expected legal challenge from the auto industry it intends to regulate. The automakers will argue that California's bill is a burdensome and illegal state encroachment on federal fuel economy law. Under the Energy Policy and Conservation Act (EPCA), the federal government sets Corporate Average Fuel Economy (CAFE) standards to regulate the fuel efficiency of cars and trucks. For the sake of national consistency, EPCA broadly and explicitly preempts all state laws and regulations "related to fuel economy standards." Because a car's GHG emissions correlate closely with the amount of fuel it burns, regulations under AB-1493 very likely will entail a substantial impact on fuel economy. From the industry's standpoint, California has regulated fuel economy, not air pollution.

California will reply that AB-1493 is an emissions law authorized by specific provisions of the Clean Air Act (CAA). The CAA contains an express preemption clause analogous to that in EPCA, explicitly preempting states from enforcing standards "relating to the control of emissions" from cars and trucks. Yet unlike the EPCA, the CAA waives preemption for California alone, granting it the authority to adopt its own stricter standards. California believes that Congress created this waiver

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3. Under the Clean Air Act's "piggyback" provision, other states may adopt California's emissions standards. See infra Part I.A.
4. Fossil fuel-based transportation is the source of roughly one third of U.S. GHGs. See infra note 82 and accompanying text.
5. See Hertsgaard, supra note 2.
6. See id.; see also Danny Hakim, Detroit and California Rev Their Engines Over Emissions, N.Y. TIMES, July 28, 2002, at sec. 4, p. 3; Paul Rogers, Global Warming Bill Linked to Gas Mileage, SAN JOSE MERCURY NEWS, July 15, 2002, at A1 (quoting Alliance of Automobile Manufacturers spokesperson saying "[l]et's be clear what this is. This is a state version of fuel economy standards.").
8. The terms "fuel efficiency" and "fuel economy" are used interchangeably in this article. The simple definition is the miles a vehicle travels per gallon of gasoline burned. The legal definition of fuel economy is explored in greater detail in Part III.A, infra.
10. Id. § 7543(a).
11. Id. § 7543(b)(1); see infra Part I.A.
to encourage it to innovate in exactly the manner exemplified by AB-1493.16

Because EPCA's preemption clause is very broad and vehicular emissions usually relate in some way to fuel economy, EPCA seems to constrict severely California's power to regulate vehicular emissions. On the other hand, the CAA waiver tilts strongly in the other direction: Congress granted California broad authority and maximum flexibility to pass emissions laws. Resolution of the conflict between these two federal statutes will determine whether this major effort to mitigate global warming lives or dies. Such a resolution requires exploring a larger tension between the Supreme Court's preemption and federalism doctrines. The Court's vigorous efforts to enforce limits on national power and to protect state autonomy have gained much attention.17 In a somewhat less noticed trend, however, the Court has become increasingly willing to strike state laws and regulations as preempted by federal law.18

This Comment argues that the CAA waiver should take complete priority over EPCA's preemption clause. A close review of the statutes and their legislative histories suggests that Congress never meant EPCA to limit California's autonomy. The two statutes substantially contradict each other, and there exists no clear boundary between where the CAA waiver ends and EPCA preemption begins. Thus, the resolution of this statutory conflict turns on an understanding of the purpose of preemption itself—to promote national uniformity where state-by-state regulation would be inefficient and burdensome.

Just as preemption is unwarranted where the benefits of state flexibility and autonomy outweigh the nationwide costs imposed by state regulation, striking AB-1493 would poorly serve the purpose of EPCA's preemption clause. By stimulating innovation in emission control and vehicle design, California's broad CAA authority has been a superb example of the benefits of state autonomy. In contrast, applying EPCA preemption to California would only minimally promote uniformity, since under the CAA waiver and California's pursuant regulations, the automobile industry already alters its vehicle designs to conform to California's divergent emissions standards.

Where the benefits of state autonomy clearly outweigh the benefits of national uniformity, a court should be inclined to favor state sovereignty. A finding against California and the CAA waiver might suggest that preemption has become less a device for imposing national consistency, and more a general strategy for reducing or avoiding

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16. Id.; see infra Part I.A.
17. See, e.g., Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. CHI. L. REV. 429, 472 (2002) ("It seems agreed on all sides now that the Supreme Court has an agenda of promoting constitutional federalism.").
18. See infra Part II.D.
regulation. As the federal government continues to drag its feet on addressing global warming, striking AB-1493 could also stifle precisely the kind of state leadership and experimentation often touted as strengthening federalism.

Part I of this Comment discusses the origins of the CAA and EPCA, with particular attention to their respective preemption clauses and the basic tension between them. Part I then outlines the national context in which California's AB-1493 arose—federal inaction on global warming contrasted with surprising state and local attention to the issue. Part II reviews the current state of the Court’s preemption doctrine and its significant tensions with the Court’s recent federalism cases, discussing how recent developments could affect the upcoming battle over AB-1493. Part III discusses the relative merits of potential resolutions to the conflict. It begins with an overview of the regulations California might adopt pursuant to AB-1493—regulations which may be more or less likely to run afoul of EPCA preemption. Part III then reviews how courts have resolved similar statutory conflicts and discusses possible analogous compromises between the CAA and EPCA. After describing the problems with these solutions, Part III discusses why statutory construction, legislative history, and sound policy together militate for a complete prioritization of the CAA waiver.

AB-1493 could spark a sea change in U.S. global warming policy. But for that to happen, courts must prioritize state flexibility and innovation over simplistic textualism and a general preference against regulation—a preference that contradicts the purposes of federalism itself.

I. THE BASIC CONFLICT BETWEEN THE CAA AND EPCA: STATE INITIATIVE VERSUS FEDERAL ENVIRONMENTAL CONTROL

This section reviews the legislative history of the CAA, EPCA and their preemption clauses. While the CAA embodies a congressional intent to encourage California's flexibility and innovation, EPCA only vaguely refers to California and generally expresses congressional interest in federal occupation of energy and fuel economy law. Significantly, Congress did not resolve the potential conflict between the two statutes. After addressing this statutory backdrop, Part I.C. reviews current global warming policy at both national and state levels. This review reveals a surprising interest on the part of state and local governments in adopting global warming mitigation policies.
A. The Clean Air Act Grants California Broad Authority To Regulate Emissions

According to the Air Quality Act (AQA) of 1967, the precursor to the modern CAA, “[t]he prevention and control of air pollution at its source is the primary responsibility of States and local governments.” In the 1960s, the nation began to recognize the seriousness of air pollution and the need for a national strategy to address the problem. With the AQA, Congress definitively entered the field of regulating air pollution, but did so by adopting a regulatory program dependent upon cooperation between the federal and state governments. As the House Interstate and Foreign Commerce Committee described in reviewing the AQA’s air quality standards,

The provisions relating to the adoption of air quality standards are the heart of the legislation. They place a very high degree of reliance on action by State governments. In most States, implementation of the standard setting and enforcement provisions will clearly require State governments to take a much more active role in dealing with the problem of air pollution than they have played in the past.

Through both the AQA and its successor the Clean Air Act, the federal approach to air pollution control has maintained this high degree of dependence on state cooperation, principally through reliance on state adoption and enforcement of State Implementation Plans (SIPs). All versions of the CAA have also included a sweeping provision entitled

20. After the 1990 Clean Air Act Amendments, this phrase reads “air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3) (2003).
22. See, e.g., Gen. Motors Corp. v. United States, 496 U.S. 530, 532 (1990) (calling the Clean Air Act “a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution”); REITZE, supra note 21, at 13 (“After the passage of the Air Quality Act (AQA) of 1967, the federal government became the dominant force in the air pollution field, but its approach required states to handle the development and implementation of stationary source air pollution control programs.”).
24. See, e.g., Exxon Mobile Corp. v. EPA, 217 F.3d 1246, 1255 (9th Cir. 2000) (“The overriding purpose of the Clean Air Act is to force the states to do their job in regulating air pollution effectively so as to achieve baseline air quality standards.”); Union Elec. Co. v. EPA, 427 U.S. 246, 268 (1976) (The Clean Air Act affords states “the power to determine which sources [of air pollution] would be burdened by the regulations and to what extent . . . .”). The CAA requires each state to adopt a comprehensive SIP outlining the measures that will be implemented in a given air basin to ensure compliance with National Ambient Air Quality Standards. See REITZE, supra note 21, at 269.
25. The AQA was ratified in 1967; the CAA was enacted and amended in 1970, 1977 and 1990.
the "Retention of State Authority." This section provides that, with a few exceptions, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." Under this provision and its interpretation by courts, states are free to adopt stricter air pollution controls so long as they meet the federal minimum established by the CAA.

Within this cooperative approach to air pollution, no state was more instrumental to the formulation of national air pollution policy than California. Indeed, it was California and the California Air Resources Board (CARB) whose studies first raised the modern awareness of the sources and impacts of air pollution. In 1967, most of the nation had yet to adopt a response to growing air pollution, but California's regulations predated the federal effort. Even as Congress took its first steps toward regulating air pollution in the 1960s, California continued to develop more comprehensive and stringent restrictions of its own. For many years, Congress used California's regulations as a model for the standards it adopted under the federal Clean Air Act.

The major exception to the CAA's state-oriented approach has been the regulation of motor vehicle emissions. As Congress moved to regulate vehicular emissions in 1967, conflict arose as to whether the auto industry required consistent national standards that precluded state-by-state differences. The Second Circuit has explained that:

As originally introduced in the Senate, the Air Quality Act of 1967 did not contain an express preemption provision, though the topic of preemption quickly arose and immediately became the object of intense debate. The debate sharpened the differences between the states, which wanted to preserve their traditional role in regulating motor vehicles, and the manufacturers, which wanted to avoid the

27. Id.
29. See Patrick Schlesinger & Michael J. Horowitz, Regulation of Mobile Sources: Motor Vehicles and Nonroad Engines, in CLEAN AIR ACT HANDBOOK 279-80 (Robert J. Martineau, Jr. & David P. Novello eds., 1998). The California Air Resources Board (CARB) is the state administrative body that regulates air quality: AB-1493 directs CARB to draft regulations to meet AB-1493's GHG emissions reduction mandate. See supra note 1.
31. Id.
32. REITZE, supra note 21, at 15, note 118.
33. Id., at 269.
34. Unlike stationary sources of pollution, which states are free to regulate more severely than the federal standards, as described above.
economic disruption latent in having to meet fifty-one separate sets of emissions control requirements.\textsuperscript{35}

Congress decided that, given the potential burdens on auto manufacturers of conflicting state standards, federal preemption of such variation was appropriate. The final AQA therefore included an express preemption clause stating, "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this title."\textsuperscript{36}

Although Congress generally preempted state motor vehicle emissions standards under this clause, it granted California a special waiver in deference to California's "unique problems and pioneering efforts."\textsuperscript{37} This waiver was a compromise between the national uniformity sought by the auto industry and the autonomy sought by the states. It instructs the Secretary overseeing implementation of air pollution standards\textsuperscript{38} to waive preemption upon application for such waiver by California, except under certain uncommon circumstances.\textsuperscript{39} In so doing, Congress preempted forty-nine states from diverging from the federal vehicular air pollution standards, while California retained the unique right to regulate vehicles more severely than all other states. By including the "California waiver" ("CAA waiver") despite the auto industry's fierce opposition, Congress signaled its desire to encourage California's continued role as a "laboratory for emission control technology and regulation that could be applied later at the federal level."\textsuperscript{40}

Congress reaffirmed its unique blessing upon California through numerous amendments to the CAA. The legislature included the waiver as section 209 of the 1970 CAA and strengthened it in the 1977

\textsuperscript{35} Motor & Equip. Mfrs. Assoc. v. EPA, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (citations omitted).


\textsuperscript{37} S. REP. NO. 403, 90th Cong., 1st Sess. 33 (1967); Air Quality Act of 1967, Pub. L. No. 90-148, § 208(b), 81 Stat. 485 (1967); see also Motor Vehicle Mfrs. Assoc. of the United States, Inc., v. N.Y. Dept. of Env. Conservation, 17 F.3d 521, 525 (2d Cir. 1994) [hereinafter MVMA] (reviewing the origins of the California waiver and noting that California's then-Senator Murphy convinced the Senate that California's history of innovation and severe air pollution warranted the special exemption).

\textsuperscript{38} At the time, the Secretary of Health, Education and Welfare filled this role; now it is the job of the EPA Administrator.

\textsuperscript{39} The situations in which the Secretary is instructed to reject California's waiver application are discussed immediately below in the context of the California waiver as currently written. See infra notes 48-52 and accompanying text.

\textsuperscript{40} Schlesinger and Horowitz, supra note 29, at 280; see also Motor & Equip. Mfrs. Assoc. v. EPA, 627 F.2d at 1111 ("Congress intended [California] to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation.")
Amendments in two ways.\textsuperscript{41} First, the 1977 Amendments instructed the Environmental Protection Agency (EPA) to consider "in the aggregate" whether the emissions standards for which California seeks a waiver are at least as protective as federal standards.\textsuperscript{42} Congress devised this provision to increase California’s flexibility by looking at the protectiveness of its proposed standards as a package rather than standard-by-standard.\textsuperscript{43} Second, section 177 of the Amendments added the so-called “piggyback” provision, which allows other states to adopt California standards once California has received the formal EPA waiver.\textsuperscript{44} All states have been granted the choice of either continuing to enforce federal standards or to adopt California’s stricter standards.\textsuperscript{45} The CAA also encourages California’s innovation and flexibility by including a nearly identical California waiver to preemption of state emissions standards for non-road vehicles\textsuperscript{46} and by allowing California to pass its own fuel additive requirements without EPA approval.\textsuperscript{47}

As currently written, the CAA waiver instructs the EPA Administrator to grant California’s waiver application unless the Administrator finds that (1) California’s finding that its regulations are at least as protective as federal standards is arbitrary and capricious; (2) California does not need separate standards to meet “compelling and extraordinary conditions,” or (3) California’s standards are not consistent with CAA section 202(a), under which the EPA prescribes standards for vehicular air pollutants.\textsuperscript{48} Although these requirements sound strict, the

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\item \textsuperscript{41} Pub. L. No. 95-95, § 209(b), 91 Stat. 685, 755 (codified as amended at 42 U.S.C. § 7543(b) (2003)). As the relevant House report explained concerning the 1977 alterations to the waiver, “[t]he Committee amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.” H.R. REP. No. 95-294, at 301-02 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1380.
\item \textsuperscript{42} Id.; see Motor & Equip. Mfrs. Assoc. v. EPA, 627 F.2d at 1111.
\item \textsuperscript{43} See Schlesinger and Horowitz, supra note 29, at 283; MVMA, supra note 37, at 525.
\item \textsuperscript{44} Pub. L. No. 95-95, § 177, 91 Stat. 685, 750 (codified as amended at 42 U.S.C. § 7507 (2003)). The 1990 Clean Air Act Amendments made minor changes to the piggyback provision, essentially to guarantee that states other than California not create a “third vehicle,” i.e. a vehicle design different from those manufacturers currently create for either the California market or for the rest of the nation. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 232, 104 Stat. 2399, 2529 (codified as amended at 42 U.S.C. § 7507 (2003)). For discussion of the piggyback clause, see MVMA, supra note 37 (reviewing the legality under the piggyback provision of New York’s adoption of California’s low emission vehicles regulations).
\item \textsuperscript{45} Pub. L. No. 95-95, § 177, 91 Stat. 685, 750 (codified as amended at 42 U.S.C. § 7507 (2003)).
\item \textsuperscript{46} 42 U.S.C. § 7543(e)(1) (2003). Non-road vehicles include farm and construction vehicles and locomotives. Id.
\item \textsuperscript{47} Id. § 7545(c)(4)(B) (“California may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive”).
\item \textsuperscript{48} Id. § 7543(b). The waiver provision reads:
EPA and the courts have consistently interpreted them to require minimal oversight of California's emissions standards. For example, the EPA has interpreted the "compelling and extraordinary conditions" requirement to refer simply to general conditions in California, namely its topography and its large vehicle population, thus making it almost impossible to refute that such conditions exist. In practice, California's waiver applications are almost always approved. Congress made clear its persistent intent to grant California the widest possible latitude in the House report accompanying the 1977 Amendments:

The Administrator ... is not to overturn California's judgment lightly. Nor is he to substitute his judgment for that of the State. There must be clear and compelling evidence that the State acted unreasonably in evaluating the relative risks of various pollutants in light of the air quality, topography, photochemistry, and climate in that State, before EPA may deny a waiver.

Thanks to the waiver, California has extended its successful history of setting its own vehicular air pollution standards. By retaining and strengthening the waiver provision through numerous versions of the CAA, Congress has declared its satisfaction with letting California "blaze its own trail." Moreover, the entire nation arguably has benefited from the waiver, since a significant number of California's pollution

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

Id.


50. Id.

51. MVMA, supra note 37, at 534. It is unclear whether a California waiver request has ever been rejected; the author's search of the Federal Register since 1980 revealed 14 waiver approvals and no rejections. See, e.g., California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18887, 18896 (May 3, 1984) (waiver of CAA preemption for California's particulate emissions standards); California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision, 58 Fed. Reg. 4166 (Jan. 13, 1993) (waiver for California's Low-Emission Vehicles program); California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption—Notice of Waiver Decision and Within the Scope Determinations, 64 Fed. Reg. 42689 (Aug. 5, 1999) (waiver for California's evaporative emission standards and test procedures).


53. Ford Motor Co. v. EPA, 606 F.2d 1293, 1297 (D.C. Cir. 1979) ("Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight").
regulations—from unleaded gasoline to smog checks to low emission vehicles—have preceded and ushered in their national incorporation into the federal CAA.\textsuperscript{54}

Given this history, obtaining the EPA’s waiver for AB-1493 should not be a major hurdle. Even before the auto industry litigates the preemption issue, the industry will undoubtedly argue that the EPA should not grant California a waiver for AB-1493. Despite the EPA’s consistent leniency in granting California’s waiver requests, the manufacturers might argue that no “compelling or extraordinary conditions” justify an attempt by California to tackle global warming, or that AB-1493 conflicts with CAA section 202(a) because carbon dioxide is not a pollutant.\textsuperscript{55} Yet if legislative and administrative history provides any guide, Congress meant for California to act as it saw fit to combat automotive emissions. Within the larger national preemption of state motor vehicle emissions laws, Congress has consistently approved and expanded California’s discretion, and the Administrators evaluating California’s waiver applications have done the same. The CAA waiver constrains the EPA to approve California’s exercise of discretion with very limited exceptions.

\textbf{B. EPCA Preempts All State Fuel Economy Laws Without an Exception for California}

Congress passed the Energy Policy and Conservation Act of 1975 (EPCA)\textsuperscript{56} as a comprehensive response to the 1970s oil crisis focused on energy security and its economic implications.\textsuperscript{57} As the House reported at the time of the initial bill’s passage, Congress intended EPCA to serve the “collective goals of increasing domestic supply, conserving and managing energy demand, and establishing standby programs for minimizing this nation’s vulnerability to major interruptions in the supply of petroleum imports.”\textsuperscript{58} To this end, EPCA incorporated many different policy initiatives, including “programs to bring about measured savings in

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\item[54.] See Hertsgaard, \textit{supra} note 2.
\item[55.] An analysis of these waiver issues is beyond the scope of this article. However, history suggests that the auto industry faces an uphill battle in opposing the waiver. For example, the EPA Administrator has commented that
\item[57.] See, \textit{e.g.}, Competitive Enter. Inst. v. Nat’l Highway Traffic Safety Admin., 45 F.3d 481, 482 (D.C. Cir. 1995).
\end{enumerate}
\end{footnotesize}
consumption of energy by improving the efficiency of the products we use and the cars we drive."\textsuperscript{59} Given the limited mention in EPCA's legislative history of environmental limitations to such policy or the environmental co-benefits of conserving energy,\textsuperscript{60} perhaps it is unsurprising that the drafters of EPCA paid little attention to its potential conflict with the CAA waiver.

EPCA imposed strict new fuel efficiency requirements on the auto industry in the form of mandatory corporate average fuel economy (CAFE) standards. The original CAFE standards were quite severe, requiring improvements of 50\% in fuel economy by model year 1980 and double that target by 1985.\textsuperscript{61} To ensure that the new standards were broadly achievable, EPCA also directed the Transportation Secretary to adjust the CAFE standards to meet the "maximum feasible average fuel economy level for such model year."\textsuperscript{62}

Unsurprisingly, the auto industry opposed these harsh new mandates, and Congress responded to industry concerns by preempting additional regulation of fuel economy by the states. Congress stressed the need to ensure that CAFE would not cripple an economically important industry:

The Committee feels that the necessity for insuring major improvements in automobile fuel economy is so clear that legally enforceable requirement [sic] respecting improvement of fuel economy must be imposed. At the same time, the Committee recognizes that the automobile industry has a central role in our national economy and that any regulatory program must be carefully drafted so as to require of the industry what is attainable without either imposing impossible burdens on it or unduly limiting consumer choice as to capacity and performance of motor vehicles.\textsuperscript{63}

To mitigate CAFE's burden, EPCA included a broad express preemption clause stating that "[w]hen an average fuel economy standard . . . is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter."\textsuperscript{64}

\textsuperscript{59} Id.

\textsuperscript{60} See, e.g., Competitive Enter. Inst., 45 F.3d at 482.

\textsuperscript{61} S. REP. NO. 94-179, at 20 (1975).


Although EPCA's preemption clause made no mention of a possible conflict with the California waiver under the CAA, Congress noted that emissions standards, including California's, would impact fuel economy. The House report on EPCA explained that

[the effects of emission controls on fuel economy are particularly difficult to assess. . . . Change in fuel economy is principally attributable to installation of catalytic converters. . . .] The 1975 California standards, which require a further reduction in emissions of about 1/3 from the 49-State standards, appear to result in a 5.7 percent fuel penalty relative to automobiles subject to the 49-State standards. Implementation of the [1978] standards would result in a 5-10 percent fuel penalty, from the 1975 level. Manufacturers projected a 15 percent fuel penalty.65

EPCA therefore allowed EPA to adjust downward CAFE standards for 1978-1980 where a manufacturer demonstrated that either federal or California emissions standards would impose a significant penalty on fuel economy.66 EPCA provided no avenue for California to obtain a waiver of fuel economy preemption.

Although both the CAA and EPCA placed substantial regulatory burdens on the auto industry, the industry succeeded in protecting itself from additional state regulation, with the sole exception of anything California was to adopt under its CAA waiver. The CAA and EPCA imposed national minimum standards on the industry, for vehicular emissions controls and for vehicular fuel efficiency respectively. Once these federal minimums were in place, of course, no state could override federal law by adopting more permissive standards.67 It thus appears that the industry's desire for preemption was essentially a means of preventing more stringent regulation by the states.68 When the legislative histories of both the CAA and EPCA pronounce that preemption will

65. H.R. Rep. No. 94-340, at 87 (1975), reprinted in 1975 U.S.C.C.A.N. 1762, 1848-49. A "percent fuel penalty" is the percentage decrease in the fuel economy of a vehicle due to the installation of a given emissions control, as compared with the same vehicle's fuel economy without the emissions control.
67. By virtue of the Supremacy Clause. U.S. Const. art. VI, § 1, cl. 2; see infra Part II.B.
68. As one commentator described.

The auto industry . . . undoubtedly would have preferred no government regulation of air pollution rather than federal legislation. When faced with the threat of inconsistent and increasingly rigorous state laws, however, they resolved their Politicians' Dilemma by using their superior organizational capacities in Washington to preempt or control the environmentalists' legislative victories at the state level.

avoid "burdens" on the automakers, Congress seems to be referring to the potential costs of inconsistent state-by-state regulation. Preemption also appears to serve the auto industry's basic goal of limiting regulation by setting a firm, national regulatory ceiling.69

Because EPCA and the CAA are at odds and fail to address their relationship to each other, federal preemption doctrine will play a central role in whether AB-1493 lives or dies. Part II discusses the inherent tension between preemption and federalism and the implications for AB-1493. The following section informs this discussion by providing an overview of how state and local governments currently surpass the federal government in addressing global warming.

C. States and Localities are Outpacing the Federal Government in Addressing Global Warming

A frequent justification for federalizing environmental law is that, absent national standards, states will engage in a "race to the bottom."70 By this argument, federal intervention in the environmental field is required because "public-choice pathologies" and lack of capacity lead states to under-regulate pollution in order to gain competitive advantage.71 Yet there are strong empirical reasons to doubt this common wisdom. Since the 1990s, state and local governments, not Congress and the President, have led the nation in innovative environmental policy.72 This state leadership is all the more striking because states have even embraced efforts to address global warming, the kind of cross-jurisdictional environmental problem which states normally would be assumed to be least equipped or inclined to address. In any case, fear that states will under-regulate cannot be the basis for creating a national regulatory ceiling through preemption.73

In contrast to the state global warming initiatives discussed below, there is glaring inaction at the federal level. Hopes for decisive federal action to address global warming have been dashed since the election of President George W. Bush. Most notably, in 2001, the United States became the only major emitter of greenhouse gases to reject the Kyoto Protocol and its binding targets to reduce GHGs.74 Subsequently, the

69. See id. at 285 (arguing that environmental policy would be better served if federal law created a regulatory floor but not a ceiling, allowing additional state experimentation and flexibility).


71. Id.

72. Id. at 631.

73. This topic is discussed in detail in Part II, infra.

74. Andrew C. Revkin, Climate Talks Will Shift Focus From Emissions, N.Y. TIMES, Oct. 23, 2002, at A8. The primary anthropogenic greenhouse gas is carbon dioxide (CO₂),
President has advocated only voluntary emissions reductions programs and has cautioned that global warming requires years of additional study before the country should adopt binding policies.

Congress has similarly resisted adopting policies to mitigate global warming. Despite a focus on independence from foreign oil, the current discussion of energy policy includes a greater emphasis on increasing supply than on promoting conservation and efficiency. In April 2002, the Senate narrowly defeated the House-approved Bush administration energy bill, which focused largely on incentives to increase energy production and on opening the Arctic National Wildlife Refuge to drilling. Congress has repeatedly rejected efforts to increase CAFE standards, despite the fact that the CAFE baseline has remained substantially unchanged since the 1980s.

This lack of federal leadership has kept U.S. GHG emissions on the rise, evidenced by an 11.9% increase between 1990 and 2001. Emissions from cars and trucks remain particularly daunting. Transportation sector emissions have grown nearly 19% since 1990 and now represent about a third of total U.S. energy related emissions. Moreover, primarily due to the popularity of sport utility vehicles (SUVs) and other “light trucks,” the fuel economy of the U.S. vehicle fleet is at its lowest point in twenty-two years. Since vehicular carbon dioxide (CO₂) emissions are directly representing about 84% of U.S. greenhouse gas emissions and primarily the byproduct of burning fossil fuels. The remaining significant greenhouse gases are methane (CH₄), at about 9% of U.S. emissions, and nitrous oxide (N₂O), at 5%. Hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride make up about 1.7% of U.S. emissions. See U.S. Dept. of Energy, Emissions of Greenhouse Gases in the United States 2001, Rep. No. DOE/EIA-0573, at x, Figure ES1 (2001), available at www.eia.doe.gov/oiaf/1605/ggrpt/index.html [hereinafter DOE/EIA].

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75. Eric Pianin, Group Meets on Global Warming; Bush Officials Say Uncertainties Remain on Cause, Effects, WASH. POST, Dec. 4, 2002, at A8; see also Elizabeth Shogren, Warming Up to Reducing Greenhouse Gases, L.A. TIMES, July 30, 2003, at 15 (“So far, the Bush administration has rejected mandatory measures to regulate greenhouse gas emissions”).

76. Pianin, supra note 75. Bush recently called for a decade-long study rather than mandatory emission cuts. Guy Gugliotta, Taking on Global Climate Change; Planned Study is Decreed as Stalling, WASH. POST, July 24, 2003, at A6.


80. Hakim, supra note 6, at D3.

81. DOE/EIA, supra note 74 at ix.

82. Id. at 21-22.

related to fuel economy, mobile GHGs are particularly intractable so long as fuel economy remains on the decline. To compound the problem, EPA expects vehicle miles traveled (VMT) for U.S. cars and trucks to grow to more than 150% of 1990 levels by 2010 as transportation demand continues to rise.

Yet while the federal government resists potentially costly measures to reduce GHG emissions, state and local governments have increasingly begun to adopt their own policies targeting global warming. In 2001, the governors of six New England states signed an agreement to reduce their states’ GHG emissions to 1990 levels by 2010, and 10% below that by 2020. States beyond New England are acting in diverse, creative ways. Oregon has adopted a maximum standard for CO₂ emissions from new power plants. New Jersey has set a 3.5% GHG emissions reduction target for 2005. Other states have adopted a range of policies addressing global warming, from monitoring and reporting regimes in Wisconsin, to renewable energy portfolio standards for electricity generators in fifteen states including California and Texas.

Local governments are taking action as well. Over 140 U.S. cities and counties, for instance, have joined a program called Cities for Climate Protection, setting targets for their own local reductions in GHG emissions. Some are taking substantial steps toward emissions reduction: Seattle and its municipal utility plan to generate all electricity

84. EPA, Light-Duty, supra note 83, at 1.
89. Id. at 36; see also Eric Pianin, supra note 86.
90. RABE, supra note 88, at 33-36.
with no net carbon dioxide emissions; San Francisco is spending $100 million to pay for solar power generation; Burlington, Vermont plans to cut community GHGs by 10%; Chicago is purchasing over eighty megawatts of renewable energy.

This great contrast between federal and state action demonstrates how global warming policy has become an area of state and local leadership and experimentation, with AB-1493 only the most dramatic example. Yet, while some might see these developments as welcome examples of robust federalism, others would argue that state and local global warming measures are ill-advised at best, and illegal at worst. As for Congress's encouragement of California's innovations through the CAA waiver, the auto industry maintains that Congress designed the exemption to help California battle smog, not to police the global environment. Of course, the general tension between state autonomy and federal preemption is not unique to AB-1493. Part II reviews the history and contours of such conflicts and the Supreme Court's efforts to resolve them.

II. PREEMPTION: FEDERALISM'S COUNTER-WEIGHT

This section demonstrates that while the Supreme Court has always taken care to protect state power from excessive preemption, it has recently become more receptive to claims that federal laws preempt state laws. This trend toward preemption calls into doubt the Court's commitment to state autonomy and suggests difficulties for defending the validity of AB-1493 against preemption claims. This section first reviews the federalist roots of preemption, a foundation that explains the development of the Court's "presumption against preemption." The preference for granting state flexibility is then discussed as it applies to express preemption clauses like those in the CAA and EPCA. The section concludes by discussing the Court's recent expansion of preemption and the added difficulties these developments pose for AB-1493.

A. Preemption’s Foundation: Preemption has Evolved into a Complex Doctrine for Deciding Whether Federal and State Laws Conflict

Modern preemption doctrine, which can be traced to *McCullough v. Maryland*,98 arose from the Supremacy Clause.99 As Chief Justice Marshall explained in *Gibbons v. Ogden*,100 federal supremacy demands that state laws which “interfere with, or are contrary to the laws of Congress... must yield.”101 More recently, the Court has explained that “[d]eciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.”102

The Supremacy Clause outlines only a rule of priority where federal and state laws conflict. Determining whether federal and state laws conflict enough to trigger preemption presents the real source of doctrinal difficulty. That ubiquitous question has led the Court to create a complicated web of interrelated preemption rules.103 The Court has explained three primary situations giving rise to preemption: (1) express preemption, where a federal law explicitly declares that it supersedes state laws of a given kind; (2) implied “field” preemption, where federal regulation is so pervasive that it has “occupied a field” and allows for no state action in that area; and (3) conflict preemption, where either (a) following both state and federal law would be impossible, or where (b) state law would “stand as an obstacle” to the purposes of federal legislation (“obstacle preemption”).104

AB-1493 principally gives rise to a question of express preemption, since both the CAA and EPCA include explicit preemption clauses. Whether California’s action intrudes in a federal area turns primarily on a statutory interpretation of the text and scope of those clauses. Yet recent Court decisions suggest that field and obstacle preemption, and the related methodology for determining congressional intent and the scope of preemption, apply even where the federal law in question contains an

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98. 17 U.S. 316 (1819).
99. The Supremacy Clause states that: “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.” U.S. Const., Art. VI, cl. 2. For discussion of the Supremacy Clause’s roots, see Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941).
100. 22 U.S. 1 (1824) (invalidating New York’s exclusive steamboat license as contrary to the federal steamboat licensing system). For a discussion of Gibbons and McCullough as the roots of preemption, see Caleb Nelson, Preemption, 86 VA. L. REV. 225, 267-72 (2000).
101. Gibbons, 22 U.S. at 211.
103. Preemption has been called “the most frequently used doctrine of constitutional law in practice.” Stephen A. Gardbaum, The Nature of Preemption, 79 CORNELL L. REV. 767 (1994).
104. See Nelson, supra note 100, at 226-29.
express preemption clause. Thus both the express preemption clause in EPCA and an asserted occupation of the "field" of fuel economy by the federal government may jeopardize California's authority to pass AB-1493. In Part III, this Comment discusses the implications of these doctrinal developments in assessing California's AB-1493.

B. The "Presumption Against Preemption": The Supreme Court Refined Preemption Doctrine to Counteract its Anti-State Potential

Preemption prevents states from regulating above and beyond federal standards. In the nineteenth century, the Supreme Court did not speak of "preemption" and the doctrine as currently understood did not exist. In that era, the Court invoked the Supremacy Clause only to favor the acts of Congress where actual conflicts arose between federal and state laws. In developing and refining the broader modern preemption doctrine, the Court has struggled to identify the proper balance between national preeminence and state autonomy.

Although preemption aims to impose national regulatory uniformity and predictability, preemption also has important de-regulatory and "anti-state" ramifications. Preemption promotes national uniformity only because it prevents state law-making beyond the regulatory minimum set by federal law. For example, CAFE standards require that cars sold in the U.S. get 27.5 miles per gallon on average. Even if EPCA did not preempt state fuel economy standards, it would serve no purpose for a state to adopt a laxer standard, since the federal minimum would apply; federal Supremacy would prevent states from contravening CAFE by directly mandating lower fuel economy standards. Thus, creating a regulatory floor does not require preemption; rather, preemption functions solely by setting a regulatory ceiling.

The expansion of preemption's limitation on the states correlated with the rise of the national economy, the growth of congressional power, and the perceived need for nationally uniform regulations. Field preemption first took root in the 1910s in connection with the national

105. See infra Part II.D.
106. See Michael S. Greve, Business, the States, and Federalism's Political Economy, 25 HARV. J.L. & PUB. POL'Y 895, 903 (2002); see also Weiland, supra note 68, at 242-43.
107. Gardbaum, supra note 103, at 787.
108. Id.
109. Id.
111. See Greve, supra note 106, at 903 (maintaining that national industries seek preemption as a means of adding a ceiling to the regulatory floor created by federal regulation).
112. See Gardbaum, supra note 103, at 783.
regulation of railroads.\textsuperscript{113} In \textit{Southern Railway Co. v. Reid}, the Court struck down a North Carolina law forbidding railroads to refuse to transport freight.\textsuperscript{114} Even though no clear provision in the Interstate Commerce Act contradicted this state law, the Court reviewed the legislative history and intent of the Act and held that "Congress has taken possession of the field of regulation," preventing state regulations of rail in any fashion.\textsuperscript{115} The related and similarly broad "obstacle preemption" doctrine arose most clearly in 1941 in \textit{Hines v. Davidowitz}.\textsuperscript{116} There, the Court found a Pennsylvania law requiring aliens to register preempted by the federal Alien Registration Act.\textsuperscript{117} The two laws did not directly conflict and might have been upheld as concurrent registration requirements. But the Court explained that the question presented was not merely whether compliance with both laws would be impossible, but whether Pennsylvania’s law represented an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{118} Citing Congress’s immigration power, its "broad and comprehensive plan" for regulating aliens and immigration,\textsuperscript{119} and Congress’s intent to create a uniform national immigration system,\textsuperscript{120} the Court found Pennsylvania’s law preempted.\textsuperscript{121}

Meanwhile, the Depression and Roosevelt’s New Deal were also pushing the Court to expand vastly Congress’s power under the Commerce Clause. By 1942, the Court had extended the commerce power to allow regulation of entirely local activities on the basis of their aggregate effect on interstate commerce.\textsuperscript{122} In light of this virtually limitless federal power, the broad doctrines of field preemption and obstacle preemption could potentially have swallowed nearly all state sovereignty.\textsuperscript{123} If the many fields now touched by federal regulation were all “occupied” by the federal government, state power would be dramatically circumscribed through implied (field) preemption. Similarly, had the Court been quick to read congressional acts as intending to

\textsuperscript{113} See Mary J. Davis, \textit{Unmasking the Presumption in Favor of Preemption}, 53 S.C. L. REV. 967, 974-75 (2002) (discussing the early breadth of preemption doctrine in the context of railway regulation and later the New Deal); Gardbaum, \textit{supra} note 103, at 801 (arguing that the perceived need for national uniformity, especially in regulating the railroads, drove the early development of preemption).

\textsuperscript{114} 222 U.S. 424, 442 (1916).

\textsuperscript{115} Id. at 441-42.

\textsuperscript{116} 312 U.S. 52 (1941).

\textsuperscript{117} Id.; 8 U.S.C. § 451 et seq. (2003)

\textsuperscript{118} \textit{Hines}, 312 U.S. at 67.

\textsuperscript{119} Id. at 69.

\textsuperscript{120} Id. at 73-74.

\textsuperscript{121} Id. at 74.

\textsuperscript{122} Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal wheat quotas and price controls even as applied to wheat grown entirely for home consumption).

\textsuperscript{123} Davis, \textit{supra} note 113, at 978.
establish uniform national standards, state laws establishing related but
different standards could easily have been preempted in many areas
based on their being an "obstacle" to the purposes of Congress.

With these threats to federalism in mind, the Court articulated a
counterweight to the anti-state potential of preemption in the 1947 case
*Rice v. Santa Fe Elevator.* Rice, cited frequently by the Court as the
foundational case in implied preemption law, established the
"presumption against preemption." To assess whether the United States
Warehouse Act preempted state regulation of warehousing, the Court
explained that when Congress legislates in an area of traditional state
power, "we start with the assumption that the historic police powers of
the States were not to be superseded by the Federal Act unless that was
the clear and manifest purpose of Congress." After establishing this
strict test, the Court reviewed the comparatively broad circumstances
under which preemption arises. These situations, as previous cases had
suggested, include those where congressional regulation is "so pervasive"
as to have "left no room" for state supplementation (field preemption),
and where Congress evinces a clear purpose to preempt a state law that
would be "inconsistent with [that] objective" (obstacle preemption).

In subsequent preemption cases, the Court continued to invest
preemption decisions with a sensitivity to federalism, much as the *Rice*
Court had invoked federalist concerns by emphasizing "historic" and
Paul,* for example, the Court upheld a California regulation requiring 8%
oil content for avocados sold in-state, challenged as preempted by the
Department of Agriculture's certifications ascribing no significance to oil
content. The Court found no irreconcilable conflict between the laws,
explaining that "federal regulation of a field of commerce should not be
deemed preemptive of state regulatory power in the absence of
persuasive reasons—either that the nature of the regulated subject matter
permits no other conclusion, or that the Congress has unmistakably so
ordained." Whether finding preemption or not, the Court has

124. See id. (suggesting that the presumption against preemption arose as a bulwark against
excessive federal encroachment on state power); Nelson, supra note 100, at 291 (arguing that the
presumption against preemption helps the Court counterbalance the excesses of implied
preemption doctrine).

125. 331 U.S. 218 (1947).

126. See Davis, supra note 113, at 979.


128. Id.


130. Id. at 142.
frequently begun its analysis by declaring the assumption that state power remains unconstrained by federal laws.\textsuperscript{131}

As the Court has consistently explained since \textit{Rice}, congressional intent provides the touchstone for preemption analysis.\textsuperscript{132} Where Congress properly legislates pursuant to the commerce power, Congress may elect to preempt state laws as extensively as it sees fit.\textsuperscript{133} Thus, the presumption against preemption acts as a default rule forcing congressional intent to preempt to be clear before state laws are set aside.\textsuperscript{134}

As it has done in both the CAA and EPCA, Congress may statutorily declare its intent to preempt by including a preemption clause in federal legislation, presumably clarifying that Congress’s purpose includes uniformity and federal control of a particular range of regulation. The next section discusses the process of assessing the reach of such clauses, an endeavor that has engaged the Court in a somewhat confusing and inconsistent combination of standard statutory interpretation methods and traditional preemption analysis.

\textbf{C. Express Preemption Clauses: The Court Cannot Decide Whether The Presumption Against Preemption Should Limit Their Breadth}

That both the CAA and EPCA include express preemption provisions is unsurprising. Congress frequently employs such clauses, as well as their partners-in-arms, “savings clauses,” which explicitly declare Congress’s intent not to preempt state authority.\textsuperscript{135} According to the Court, “[i]t is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.”\textsuperscript{136} Yet as with any statutory language, preemption clauses are not always clear in their purpose or scope. How the Court should interpret such clauses—whether by applying standard statutory construction rules or by invoking

\begin{itemize}
\item \textsuperscript{131} \textit{Compare Rice}, 331 U.S. 218 (1947) (holding state law preempted after beginning analysis by declaring general presumption against preemption), with \textit{Fla. Lime & Avocado Growers, Inc. v. Paul}, 373 U.S. 132 (1963) (rejecting preemption claim after starting with the presumption).
\item \textsuperscript{134} The statute’s actual text or overall policy objectives can demonstrate that intent.
\item \textsuperscript{135} \textit{See Weiland, supra} note 68, at 258; \textit{Davis, supra} note 113, at 990.
\item \textsuperscript{136} \textit{See PG & E, supra} note 133, at 203.
\end{itemize}
the presumption against preemption and the doctrines of implied or obstacle preemption—remains an important question.\textsuperscript{137}

\textit{Rice} itself suggested that the presumption against preemption applies even where a federal statute explicitly describes its own preemptive reach.\textsuperscript{138} The U.S. Warehouse Act at issue in \textit{Rice} included language very similar to a modern preemption clause, stating that "the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this act shall be exclusive . . . ."\textsuperscript{139} Yet \textit{Rice}'s affirmation of a presumption against preemption, as well as the Court's description of field and obstacle preemption, made no particular note of the Warehouse Act's assertion of its own exclusivity. While the text of the Warehouse Act's exclusivity clause was essential to the Court's preemption decision, the Court did not apply ordinary methods of statutory interpretation and consider the clause only on its terms. Instead, the presumption against preemption colored the Court's statutory interpretation, setting a high bar for finding preemption in the statute's words.\textsuperscript{140} Simultaneously, the Court went beyond the statute's language to consider whether the Warehouse Act implied preemption based on Congress's overall regulatory intent.\textsuperscript{141} In subsequent cases, the Court has also cited both the presumption against preemption and has applied field and obstacle preemption even in disputes arising from express preemption clauses.\textsuperscript{142}

Reinforcing \textit{Rice}'s cautious refusal to overextend preemption, in \textit{Cipollone v. Liggett Group, Inc.}, the Court held that when an express preemption clause is present in a statute, it defines the furthest preemptive reach of that Act.\textsuperscript{143} The \textit{Cipollone} Court then explained that the presumption against preemption additionally advised in favor of a

\textsuperscript{137} Justice Scalia, for example, has been advocating that express preemption clauses be interpreted no differently than other statutory language, i.e. without the presumption against preemption. See, e.g., \textit{Cipollone}, 505 U.S. at 554-55 (Scalia, J., dissenting).

\textsuperscript{138} \textit{Rice v. Santa Fe Elevator}, 331 U.S. 218, 224 (1947).

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{Id.} at 230.

\textsuperscript{141} \textit{Id.} at 232-34.

\textsuperscript{142} See, e.g., \textit{PG & E, supra note 133}, at 206 (citing the presumption against preemption) and at 212-13 (applying field and obstacle preemption doctrine). \textit{PG & E} concerned the Court's interpretation of the Atomic Energy Act's express preemption language.

\textsuperscript{143} 505 U.S. 504, 517 (1992).

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.\textsuperscript{141}

\textit{Id.} (internal quotations and citations omitted).
“narrow reading” of the express preemption clause. This combination—eliminating the possibility of implied or field preemption while maintaining the presumption against preemption—would prove highly protective of state sovereignty against federal encroachment.

Yet the Court rarely approaches express preemption clauses with this degree of caution. Indeed, in many cases the Court assesses the reach of express preemption clauses without even noting the presumption against preemption. Even the holding in Cipollone calls into doubt the Court’s commitment to protecting state prerogatives in express preemption cases. Despite its rhetoric, the Court still found some of the state common law claims challenged in Cipollone preempted.

Where a statute includes an express preemption clause, then, the Court has not always been clear on whether the presumption against preemption applies. Indeed, cases adjudicating the reach of express preemption clauses often fail to mention the presumption at all. Still, Cipollone suggested that the presumption matters in such cases, even if it is not always discussed. Under Cipollone, where Congress expressly preempted certain state actions by including a preemption clause, the presumption against preemption acted as a rule of statutory interpretation not all that different from the presumption against implied repeals or the general presumption in favor of federalism during statutory construction. When judging whether Congress intended to

144. Id. at 518; see also Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1977) (examining implied preemption only after noting the absence of express provision).
145. Nothing even in Rice had suggested that a statute which describes its own preemptive reach cannot still trigger implied or field preemption.
147. Cipollone, 505 U.S. at 523-24. The Court focused on the fact that the federal law in question had expanded the scope of an express preemption provision found in a previous act. According to the Court, the textual changes signaled an intent to expand preemption, thus reaching certain state common law actions. Id. at 520. In an opinion concurring in part and dissenting in part, Justice Blackmun chastised the plurality for not holding to the pro-state standard it espoused. Id. at 533 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun argued that the majority relied on vague language in the new statute rather than truly requiring a “clear and unambiguous” expression of Congressional intent to preempt. Justice Blackmun framed his objection in federalist terms, stating that “[t]he principles of federalism and respect for state sovereignty that underlie the Court’s reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously.” Id.
148. See note 146, supra.
149. See, e.g., Rodriguez v. United States, 480 U.S. 522, 524 (1987) (“It is well settled ... that repeals by implication are not favored ... and will not be found unless an intent to repeal is clear and manifest” (internal citations omitted)).
150. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (finding that the court should assume that Congress does not lightly impose its will on the states).
preempt—either by “occupying a field” or by explicitly preempts state action—the Court stated that it would not impute such intent absent clear evidence.151 Even where a statute contained an express preemption clause, the presumption against preemption remained in place as the Court’s doctrinal device to protect state interests from excessive preemption.

D. Recent Developments: The Court Has Expanded the Reach of Preemption, Creating Additional Difficulties for AB-1493

Despite a long history of concern for preemption’s potential to constrict state sovereignty, the Court has recently broadened the reach of preemption in a number of cases. As numerous commentators have noted, the expansion of preemption contrasts sharply with the current Court’s avowed commitment to bolstering federalism.152 These recent developments in preemption law are important for the consideration of AB-1493 in three respects: (1) the Court’s move away from the presumption against preemption supports a broader reading of EPCA’s preemption clause; (2) the Court’s new willingness to find implied preemption even where an express preemption clause exists may further threaten AB-1493; and (3) the Court’s increasing reliance on plain language statutory interpretation makes it difficult to circumvent EPCA’s broadly worded preemption clause.

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151. The Court evinced a similar viewpoint in Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996). In Medtronic, the Court addressed another question of whether certain state common law claims were precluded by an express preemption clause. A federal medical device safety law included a clause stating that no state could maintain “requirements respecting [medical] devices” that were “different from, or in addition to,” those in the federal law. Id. at 481-82. The Court began its analysis with the presumption against preemption, explaining that “because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.” Id. at 485. After assessing the legislative history, the Court concluded that the federal law did not intend to preclude common law claims by preempting state “requirements” relating to medical devices. Id. at 488-89. Medtronic, like Cipollone, illustrates the recent high-water mark in the Court’s efforts to avoid excessive federal encroachment in preemption cases, whether they involve express or implied preemption. Id.

152. See, e.g., Fallon, supra note 17, at 472 (arguing that “substantive conservatism” explains the Court’s recent tendency to find preemption); Lynn A. Baker & Ernest A. Young, Federalism & the Double Standard of Judicial Review, 51 DUKE L.J. 75, 159-61 (2001) (proposing that any Court shift toward federalism has been more than offset by preemption decisions); Michael Greves, Upcoming Clash Between Federalism and Pre-emption Is Foretold in the Geier v. American Honda Opinions, LEGAL TIMES, June 12, 2000, at 74 (“Pre-emption law is on a collision course with the conservative justices’ celebrated project to re-establish structural constitutional principles on federalism”).
1. The Court has Moved Away from the Presumption Against Preemption

The Court has decidedly moved away from the presumption against preemption. The clearest example of this shift came with the 2000 Geier v. American Honda Motor Co. decision. In Geier, the Court found that federal standards mandating the phase-in of air bags preempted negligence claims against auto manufacturers who failed to install air bags earlier than mandated by those standards. The Court interpreted such common law claims as imposing state safety "standards" in addition to the federal phase-in standard, and therefore ruled them preempted by the express preemption clause of the federal Motor Vehicle Safety Act.

This broad reading of an express preemption clause is striking because the Safety Act includes an express savings clause explicitly protecting state common law actions from preemption.

Similarly, in United States v. Locke, the Court minimized the presumption against preemption when it found a Washington State oil tanker safety law preempted by federal tanker laws. The relevant federal law contained no express preemption clause, but contained two express savings clauses. Nevertheless, the Court found implied preemption of state safety regulations of oil tankers, even for the purposes of preventing local oil spills. In rejecting the presumption against preemption, the Court explained that "[t]he state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid

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153. See Davis, supra note 113, at 1005-09 (arguing that the Court can more accurately be characterized as having adopted a "presumption in favor of preemption").
155. Id. at 881.
156. Id. at 867. The relevant preemption clause states that:
   Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

157. Id. at 868. The savings clause states that compliance with a federal safety standard "does not exempt any person from any liability under common law." Id. Thus, the Geier Court rejected what might seem like the most obvious interpretation of the preemption and savings clauses together—that Congress sought to preempt state safety regulations addressing automotive design without preempting safety-related common law liability.
158. 529 U.S. 89 (2000).
159. Id. at 104-05. The savings clauses protected state power "to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil." Id.
160. Id. at 105.
exercise of its police powers."\textsuperscript{161} Given the breadth of Congressional commerce power, the presumption against preemption provides limited benefit if it is inapplicable wherever state law "bears upon" national commerce. The Court further suggested a turn away from the presumption against preemption by calling the presumption "artificial."\textsuperscript{162}

Without a forceful presumption against preemption, AB-1493 will be harder to defend against a preemption attack by the auto industry. The presumption against preemption would suggest that California's emissions regulations should not be preempted absent clearly expressed Congressional intent. Even though fuel economy and emissions overlap, a court weighing the presumption against preemption might be inclined to favor California's flexibility given the unclear effect of EPCA on the CAA waiver. Without the presumption, however, a court may instead focus on the text of EPCA's preemption clause (which applies broadly to every state) and give the California waiver less consideration.\textsuperscript{163} Part III, infra, discusses this line of inquiry at length.

2. The Court Has Declined to Limit Preemption to the Terms of Express Preemption Clauses

The Court has explicitly disavowed the notion that where federal law includes an express preemption clause, the extent of preemption is limited to the reach of that clause. In \textit{Geier}, the Court held that interpreting an express preemption clause does not end the Court's preemption inquiry.\textsuperscript{164} Instead, "ordinary preemption principles" (i.e. implied preemption) remain in effect.\textsuperscript{165} This line of analysis led the Court to find state common law airbag actions preempted, not by the express preemption clause in the federal Safety Act, but because such state common law "standards" would create an "obstacle" to the objectives of the federal airbag phase-in.\textsuperscript{166} This shift may further jeopardize AB-1493. Even if the express preemption clause in EPCA does not foreclose California's regulation of GHG emissions, California may still face preemption if, for example, a court sees AB-1493 in conflict with the

\textsuperscript{161} Id. at 108.

\textsuperscript{162} Id. ("[n]o artificial presumption aids us in determining the scope of appropriate local regulation.").

\textsuperscript{163} See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (beginning an express preemption analysis by reiterating the presumption against preemption, but finding broad preemption based mainly on the statutory text of the preemption clause and deciding the case with no further reference to the presumption).

\textsuperscript{164} Previously stated in \textit{Cipollone} and discussed above; see note 143 and associated text, supra.


\textsuperscript{166} Id. at 881.
larger objectives of federal energy law, or if the court concludes that the field of fuel economy leaves no room for California’s regulation.

3. **The Court has Emphasized the Text of Broad Express Preemption Clauses Even Where a Statute’s Overall Purpose or the Presumption Against Preemption Might Suggest a Narrower Preemptive Reach**

The Court has moved close to explicitly adopting Justice Scalia’s view that when a federal statute includes an express preemption clause, the Court should interpret only the language of that clause without considering the presumption against preemption, even if the preemption goes beyond that which Congress probably intended. In *Lorillard Tobacco Co. v. Reilly*, the Court found a Massachusetts zoning law forbidding cigarette advertising within one thousand feet of schools preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). The FCLAA expressly preempts “requirement[s] or prohibition[s] based on smoking and health ... with respect to the advertising or promotion of any cigarettes.” The Court rejected the argument that the FCLAA intended to preempt state regulation of the content of cigarette advertising, but not to preempt fundamental state regulatory power over the zoning and location of advertising. In the majority’s view, “the content/location distinction cannot be squared with the language of the pre-emption provision, which reaches all ‘requirements’ and ‘prohibitions’ ‘imposed under State law.’”

Looking only at the text of the FCLAA’s preemption clause, the majority’s holding makes sense. Massachusetts’ advertisement zoning law reasonably seems to fall afoul of the clause’s broad preemption of any “prohibition” “with respect to” cigarette advertising. But as the four dissenters pointed out, the majority found preemption even though Massachusetts had legislated pursuant to two fundamental state powers—the power to regulate land use and the power to protect the health and safety of minors. Moreover, the FCLAA’s preemption clause aimed to protect the cigarette industry from inconsistent state regulations, which might force cigarette makers to develop different packaging and advertisements for every state. Massachusetts’ zoning law was a purely local regulation that in no way subjected manufacturers to such a

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167. See *supra* note 137.
169. *Id.* at 541.
170. *Id.* at 548.
171. *Id*.
172. *Id.* at 591.
173. *Id.* at 593-94.
burden. Thus, the holding of *Lorillard* simply does not square with the congressional purpose of preemption. The finding can be explained as a commitment to interpret the "ordinary meaning" of express preemption clauses without limiting the reach of those clauses by taking account of a presumption in favor of state sovereignty.

Just as the move away from the presumption against preemption and the continued relevance of implied preemption doctrine make AB-1493 harder to defend, a highly textual approach to preemption clauses also makes AB-1493 more vulnerable. The text of the EPCA preemption clause directly preempts any state regulations related to fuel economy standards. Under *Lorillard*, it would seem that if AB-1493 "relates to" fuel economy, then EPCA preempts it and the inquiry ends. California will not benefit from a presumption in its favor. So long as AB-1493 falls afoul of the preemption clause's text, the larger implications for federalism will be unimportant.

Yet as Part III explains, the interplay of the CAA and EPCA distinguishes the potential preemption challenge to AB-1493 from the challenges in *Lorillard* and other express preemption cases. While EPCA on its own may seem to preempt California's law, the CAA expressly grants authority to California. Even if a court prefers ordinary textualism and rejects the presumption against preemption, a court reviewing a challenge to AB-1493 must address the direct tension between the CAA and EPCA. In a sense, the very breadth of EPCA's preemption clause may help California because it reveals a direct statutory conflict with the California waiver. Given that Congress has legislated in a contradictory manner, the presumption against preemption, or even a general preference for protecting state autonomy, should favor California and AB-1493.


175. Justice Scalia has remarked that:

[I]t seems to me that [the presumption against preemption] dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the *scope* of that pre-emption is meant to be.

Thereupon, I think, our responsibility is to apply to the text ordinary principles of statutory construction.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 545 (1992) (Scalia, J., dissenting). However, it is not at all obvious why the presumption against preemption would be in tension with "ordinary principles of statutory construction." As discussed in Part II.C., *supra*, the presumption has always acted to augment ordinary statutory construction in cases involving the interpretation of express preemption clauses. That it is the more conservative justices who have recently moved away from the presumption and expanded preemption is especially striking and suggests that substantive conservatism—i.e. a general preference for limited regulation, state or federal—is driving many of the Court's preemption decisions. See *supra* note 152; see also Davis, *supra* note 113.
III. MAKING SENSE OF THE CAA WAIVER IN LIGHT OF EPCA PREEMPTION

This section seeks to interpret the California CAA waiver and the EPCA preemption clause together in light of modern preemption doctrine. As a backdrop for the subsequent legal discussion, Part III.A. begins by outlining the different regulations CARB might adopt under AB-1493. Since different implementation strategies will affect fuel economy differently, EPCA preemption might reach only some, but not all, of CARB's regulations. The legal analysis of the conflict begins with a discussion of possible constructions of the key phrase in EPCA, the preemption of measures "related to fuel economy standards." While superficially this phrase seems perfectly clear, as a guide to defining the extent of preemption it is neither precise nor even particularly sensible. Part III.B. rejects this straightforward textual interpretation of EPCA because it would effectively eliminate all of California's authority under the CAA waiver.

Part III.C. reviews potential compromises between EPCA preemption and the permissive grant of California's CAA waiver. These solutions are unsatisfactory both practically and legally. Instead, Part III.D. explains why statutory construction, legislative history, and sound policy support the conclusion that EPCA's preemption clause should not apply to California.

A. Any Regulations CARB Adopts Under AB-1493 Arguably Relate To Fuel Economy and Run Afool Of EPCA

This section describes the wide range of regulations CARB might adopt under AB-1493 in order to illustrate that almost any potential rule relates to fuel economy. The following sections pursue the legal implications of this technological reality in depth.

Carbon dioxide (CO$_2$) accounts for nearly 95% of greenhouse gas emissions from motor vehicles. CO$_2$ is a direct by-product of burning fossil fuels, and the amount emitted depends only on the quantity and type of fuel burned. For example, burning a gallon of gasoline results in roughly twenty pounds of CO$_2$, regardless of the characteristics of the

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176. See supra note 29.
vehicle that burned the fuel.\textsuperscript{179} Not only does CO\textsubscript{2} constitute the vast majority of vehicular greenhouse gas emissions, but there is no practical way to "scrub" vehicular emissions to remove the CO\textsubscript{2} from the emissions stream.\textsuperscript{180} Thus, a more fuel-efficient vehicle emits less CO\textsubscript{2} per mile traveled in direct proportion to the increase in its fuel efficiency. Of course, if California adopted direct fuel economy regulations pursuant to AB-1493, such regulations would relate to fuel economy standards.

Since directly regulating fuel economy would create tension with EPCA's preemption clause, California may instead require manufacturers to install a range of technological measures that result in reduced CO\textsubscript{2} emissions, without specifying fuel economy targets. CARB provided several options in a September 2002 presentation.\textsuperscript{181} Because CO\textsubscript{2} emissions directly relate to fuel efficiency, these measures can only succeed at reducing emissions by making vehicles more fuel-efficient. Thus, arguing that such technologies are unrelated to fuel efficiency is difficult.

Instituting "transportation demand management" (TDM) measures, regulations designed to reduce the use of motor vehicles, provides a second option for reducing vehicular GHGs.\textsuperscript{182} Such regulations would bear no relation to fuel economy and would face no risk of preemption under EPCA. In fact, TDM measures such as mass transit, carpool incentives, or land use decisions designed to reduce driving are not emissions regulations at all; they are typical objects of state statutes and regulations and would not require California to obtain a CAA waiver. However, AB-1493 itself prevents the adoption of TDM. AB-1493 specifically instructs CARB that its regulations under AB-1493 cannot include mandatory trip reduction measures, land use restrictions, speed limit changes, fuel or vehicle taxes, or measures that attempt to reduce vehicle miles traveled.\textsuperscript{183} Given these limits, it is abundantly clear that

\begin{itemize}
  \item \textsuperscript{179} See Jeffrey Ball, Rocky Road: After Long Detente, GM, Green Group Are at Odds Again, WALL ST. J., July 30, 2002, at A1.
  \item \textsuperscript{180} Although methods of capturing CO\textsubscript{2} emissions from stationary sources are being investigated, no researchers seem to believe that such capture from relatively small motor vehicle engines would be possible, especially since there is nowhere to store such large quantities of gas. Such a method, if possible, would be analagous to the way a catalytic converter scrubs the relatively small proportion of emissions that contribute to smog from the rest of the emissions. See, e.g., E-mail from Roland Hwang, Senior Policy Analyst, Natural Resource Defense Council., to Christopher T. Giovinazzo (author) (Jan. 14, 2003) (on file with author).
  \item \textsuperscript{181} California Air Resources Board (CARB), Staff Presentation to Board Regarding AB 1493 Implementation, 21 (Sept. 26, 2002), available at http://www.arb.ca.gov/cc/092602board/092602bdpres.pdf. In its preliminary assessment, CARB's staff highlighted a number of possible vehicle technologies which reduce CO\textsubscript{2} emissions, including variable valve timing, hybrid electric drive, throttleless engines, better aerodynamics, improved transmissions, and others. \textit{Id}.
  \item \textsuperscript{183} CAL. HEALTH & SAFETY CODE § 43018.5(c-d) (2002).
\end{itemize}
AB-1493 intends to regulate the vehicles themselves, not the behavior of drivers. CARB has little or no room to construe AB-1493 as authorizing any attempt to reduce driving or alter driving behavior.

CARB might also encourage or require manufacturers to substitute alternative energy sources for gasoline. When burned, alcohol-based fuels (ethanol, methanol) and natural gas emit lower GHGs per unit of useful energy generated than does gasoline. Hydrogen fuel cells and electric engines emit no GHGs from the tailpipe at all. California might argue that alternative-fuel vehicles fall outside CAFE altogether and therefore have no effect on average fuel economy.

However, EPA does not use the common meaning of “fuel economy”—miles traveled per gallon of gasoline. Rather, EPCA defines the term as miles per gallon of gasoline “or equivalent amount of other fuel” (emphasis added), and mandates that the EPA decide on “the quantity of other fuel that is equivalent to one gallon of gasoline” for CAFE purposes. Statutory provisions explicitly specify how fuel economy should be calculated for vehicles powered by “alternative fuels.” Thus if California regulates to encourage or mandate fuel switching, the alternative-fueled vehicles produced will “count” for CAFE purposes, substantially altering the calculations for corporate average fuel economy. Since federal law promotes alternative fuel vehicles by allowing them a very favorable fuel economy calculus, that impact would likely be substantial.

Other possible regulations would target the roughly 5% of non-carbon dioxide vehicular GHG emissions. Nitrous oxide (N\textsubscript{2}O), created when catalytic converters remove standard air pollutants from exhaust, accounts for roughly 3.1% of vehicular GHGs. CARB could attempt to

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184. IPCC, supra note 182, at 25.
185. It is still somewhat inaccurate to consider these “zero emission vehicles,” since power plants emit GHGs as a byproduct of the synthesis of hydrogen for fuel cells or the charging of batteries for electric vehicles.
187. Id. § 32904(c).
188. Id. §§ 32905, 32904(a)(2)(B). “[A]lternative fuel” is defined to include alcohol-based and other fuels “derived from biological materials”, natural gas, hydrogen (the fuel used in fuel cells), electricity, and “any other fuel the Secretary of Transportation prescribes by regulation that is not substantially petroleum and that would yield substantial energy security and environmental benefits.” Id. § 32901(a)(1).
189. In fact, the fuel economy formulas codified by federal law make it highly beneficial for CAFE purposes for a manufacturer to switch fuels, granting manufacturers an 85% fuel economy benefit. Id. § 32905(a). This statutory benefit exceeds the scientific fuel economy benefit of alternative fuels in the sense that an energy-output comparison between gasoline and the alternative fuels would yield a less demonstrative difference between the two.
190. IPCC, supra note 182, at 25.
191. See EPA, Inventory, supra note 177, at 1-22.
force auto manufacturers to mitigate these emissions. However, changes to catalytic converters might impact fuel economy. Hydrofluorocarbons (HFCs), refrigerants which leak from the air conditioners of motor vehicles, account for another 1.3% of vehicular GHGs. CARB could conceivably regulate to reduce these emissions, but again, it is possible that such alterations would have a mild effect on fuel economy.

How the courts interpret EPCA preemption will determine the legality of these potential AB-1493 regulations. A view that EPCA preemption is broad and generally supersedes the CAA waiver would leave California very little room to combat vehicular GHGs. A mid-range solution to preemption might distinguish between California regulations with very high correlation to fuel economy and those that only affect fuel economy somewhat and are therefore permissible on account of the CAA waiver. A flexible solution, deferring to California and the spirit of the CAA waiver over the EPCA, might allow the state wide or complete latitude to regulate GHGs. The following sections pursue these possibilities.

B. EPCA's Preemption Clause Cannot Be Given the Scope Implied by its Plain Meaning

An attempt to define the scope of EPCA’s preemption clause must begin with the simple text of the statute. Yet because the text of EPCA's clause implies an incredibly broad preemptive reach, the text alone will not resolve the status of AB-1493.

1. A Literal Reading of “Related To” Preemption Would be very Broad and Would Kill AB-1493

Rather than preempting state laws that directly regulate fuel economy, EPCA preempts laws and regulations “related to fuel economy

192. By developing technological solutions that either capture these N,O emissions or clean exhaust of standard air pollutants without creating as much N,O. IPCC, supra note 182, at 25.
194. See EPA, Inventory, supra note 177, at 1-22.
195. IPCC, supra note 182, at 25.
196. The use of air conditioning in conditions of extreme heat causes an average decrease of over 20% in fuel economy. See EPA, Fuel Economy Impact Analysis of RFG, at http://www.epa.gov/oms/rfgcon.htm (last updated Apr. 15, 2003) [hereinafter EPA, Fuel]. Methane emissions, probably the result of evaporation from fuel tanks or a by-product of catalytic conversion, result in a final 0.3% of vehicular GHGs. See EPA, Inventory, supra note 177, at 1-22. The literature on GHGs is silent on potential methods for mitigating these emissions, probably due to their relative insignificance.
standards or average fuel economy standards." Focusing only on these words, EPCA's preemption clause seems to demonstrate a broad congressional intent to preempt, a reading consistent with the Court's interpretation of similarly worded preemption clauses in a number of cases. In *Morales v. Trans World Airlines, Inc.*, for example, the Court interpreted the Airline Deregulation Act of 1978, which expressly preempted state laws "relating to rates, routes, or services" of airlines. The Court began by explaining that

"For purposes of the present case, the key phrase, obviously, is "relating to." The ordinary meaning of these words is a broad one—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," Black's Law Dictionary 1158 (5th ed. 1979)—and the words thus express a broad pre-emptive purpose."

The Court went on to find state standards concerning airline fare advertisements, frequent flyer programs, and overbooking compensation preempted by this broad language.

In a more recent preemption case, *Barnett Bank of Marion County v. Nelson*, the Court interpreted a clause from a federal banking statute allowing any federal law which "specifically relates to the business of insurance" to preempt conflicting state law. There, the Court again focused on the meaning of the preemption statute in "ordinary English," explaining that "[t]he word 'relates' is highly general, and this Court has interpreted it broadly in other pre-emption contexts."

Until recently, the Court had most consistently espoused a similarly broad reading of relatedness preemption in the context of the Employee Retirement Income Security Act of 1974 (ERISA). A large number of Court cases have grappled with ERISA's express preemption clause, which supersedes state laws which "relate to" employee benefit plans subject to ERISA. These cases acknowledge the breadth of ERISA's

197. 49 U.S.C. § 32919(a) (2003), discussed supra in Part I.B.
199. Id. at 383.
200. See id. at 388.
201. 517 U.S. 25 (1996). The federal law stipulated that federal acts unrelated to insurance were not to preempt state regulations. Id.
202. Id. at 38.
203. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981) (finding that ERISA's "relate to" provision broadly preempts "even indirect state action bearing on" benefit plans covered by ERISA); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983) ("The breadth of [ERISA's preemption clause's] pre-emptive reach is apparent from that section's language"); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) ("The broad scope of the pre-emption clause... was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45-46 (1987) ("the express pre-emption provisions of ERISA are deliberately expansive"); FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990) ("The pre-emption
preemption language and the "common-sense" meaning of "relate to." Through many cases, the Court adopted a straight-forward reading of that language as it stands, and concluded that "a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.' Applying this "reference or connection" interpretation of ERISA's broad preemption clause, the Court has struck a wide range of state laws related to employee benefits plans, even common law claims alleging that an employer wrongfully discharged its employee to prevent him from receiving benefits.

Moreover, conspicuously absent from nearly all of these cases is any citation to Rice or discussion of the presumption against preemption. Instead, the Court emphasizes that assessing congressional intent and purpose forms the heart of the Court's preemption analysis. The Court's analysis in these cases never asserts that preemption is only appropriate where preemptive intent was absolutely clear. As in Lorillard, these holdings suggest that the interpretation of "relates to" express preemption clauses is essentially an exercise in statutory construction, with preemption beginning and ending by reading the broad language of the statutory text.

In the process of interpreting ERISA, the Court devised and applied a "reference or connection" test for "related to" preemption. State laws that "refer to" or "connect to" ERISA benefit plans are considered

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204. See note 203, supra.
206. Ingersoll-Rand, 498 U.S. at 140; see also Show, 463 U.S. at 100 (striking state anti-discrimination laws as applied to employee benefit plans); Alessi, 451 U.S. at 524-25 (striking state formulas for the calculation of pension benefits); Metro Life, 471 U.S. at 739 (striking state requirements that health plans include mental health benefits).
207. See Edward A. Zelinsky, Travelers, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption, 21 CARDOZO L. REV. 807, 830 (1999). In Metro Life, the Court commented that "[w]e also must presume that Congress did not intend to pre-empt areas of traditional state regulation," 471 U.S. at 740; but this reference was made only after the Court interpreted the "relate to" provision without mentioning the presumption against preemption.
208. See, e.g., Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 30 (1996) (summarizing the question in preemption cases as "did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?"); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) ("The [preemption] question, at bottom, is one of statutory intent"); Shaw, 463 U.S. at 95, (Court's task in adjudicating extent of preemption is "to ascertain Congress' intent in enacting the federal statute"); Pilot Life, 481 U.S. at 45 (preemption is a question of Congressional intent); Holliday, 498 U.S. at 56 (same); Ingersoll-Rand, 498 U.S. at 137-38 (same). None of these cases cites Rice or mentions the presumption against preemption. Rice v. Santa Fe Elevator, 331 U.S. 218, 230 (1947).
209. As per Rice, 331 U.S. at 230; see supra Part II.B.
210. See supra Part II.D.
related to them and therefore preempted. As indicated by the result of most ERISA cases, courts employ this test in a broad manner, making preemption nearly automatic. The Court has articulated only one potential limit to ERISA preemption, namely that some state laws might “affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant” preemption. Yet the Court has not clarified or given effect to this phrase in subsequent ERISA cases.

A textual interpretation of EPCA would be relatively straightforward: EPCA preempts state laws that refer to fuel economy standards or connect to fuel economy, unless that connection or reference is tenuous, remote, or peripheral. In drafting EPCA’s preemption clause, Congress chose sweeping language and chose not to exempt California from preemption, suggesting that California is broadly preempted from promulgating regulations related to fuel economy standards regardless of the CAA waiver. Applying this construction to AB-1493, CARB could not hope to argue that direct regulation of fuel economy or regulations that promote alternatively fueled vehicles would be unrelated to fuel economy standards. CARB’s only conceivable option under EPCA preemption, then, would be to regulate non-CO GHG emissions, although even those regulations might have residual impacts on fuel economy. As discussed in the next section, however, the absurd implications of interpreting “related to” literally reveal the need for a more nuanced analysis.

2. The Court Eventually Rejected a Literal Reading Of ERISA’s Similar “Related To” Preemption Clause Because Those Words Imply Nearly Limitless Preemption

Despite the basic appeal of an interpretation that turns on the “common-sense” definition of “relate to,” the enormous breadth of such an interpretation renders the “connection or reference” test untenable without further refinement. That the Court has revisited ERISA preemption in over a dozen cases illustrates the nearly complete failure of this approach to define a rational limit to preemption. For one thing, a

211. Zelinsky, supra note 207, at 808; Metro Life, 471 U.S. at 739 (quoting Shaw, 463 U.S. at 97).
212. Zelinsky, supra note 207, at 808.
213. Shaw, 463 U.S. at 100 n.21.
215. See supra Part III.A. for a review of the emissions cutting technologies.
216. Id.
217. See Fisk, supra note 211 (arguing that the Court’s textualist approach to ERISA preemption has been both an interpretive and policy failure); Stuart H. Thomson and Horace W. Green, Recent Developments in ERISA Preemption, 32-FALL BRIEF 41, 42 (2002) (“The
test which asks whether a state law "refers or connects" to an ERISA benefits plan (or to fuel economy standards) is just as vague and unhelpful as simply asking to what the state law "relates." More importantly, the result of this supposedly straightforward approach is that delimiting the scope of preemption becomes nearly impossible. As one commentator wryly noted, "[p]resumably, a plan trustee double parked for a meeting with his fellow trustees cannot defend against a traffic ticket on the ground that he was engaged in the business of an ERISA-regulated plan." Yet from a purely semantic perspective, the parking ticket is indeed "connected to" an ERISA benefit plan, even if tangentially. As Justice Scalia mused in a recent concurrence, "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."

As suggested by Justice Scalia's reaction to many muddled ERISA preemption cases, lack of clarity and obvious overbreadth led the Court to alter its approach fundamentally. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.* ("Travelers"), the Court addressed whether ERISA preempted a New York law requiring hospitals to collect surcharges. The Court acknowledged that judging which laws have connections with ERISA plans was no easier than judging their relationships, and rejected the pure textualist approach it had adopted in the past:

For the same reasons that infinite relations cannot be the measure of preemption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

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statutory text provides an illusory test, unless the Court is willing to decree a degree of preemption that no sensible person could have intended.


219. Zelinsky, *supra* note 207, at 816; see also Fisk, *supra* note 211, at 67 ("a state law may 'relate to' an employee benefit plan to a very slight extent or to a very great extent, and the 'tenuous, remote, peripheral' exception neither provides clarity nor has been given any teeth by the Court").


221. 514 U.S. 645, 649 (1995). The New York law applied a surcharge to patients covered by commercial insurers but not to those covered by Blue Cross. As such, the law arguably related to employee benefit plans since about half of all health insurance plans are employee plans subject to ERISA. By assessing a surcharge on insurers other than Blue Cross, the New York law would affect employers' decisions as to which benefits plans to offer their employees, making Blue Cross relatively more attractive. See id.

222. *Id.* at 656.
The Court admitted that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course, for '[r]eally, universally, relations stop nowhere."\(^{223}\)

The specific dispute in *Travelers* made abundantly clear the need to circumscribe "relate to" preemption by extending the Court's analysis beyond the dictionary definition of that phrase. Since about half of all health plans are provided by employers and are subject to ERISA, an enormous swath of state health care regulation would be preempted if the Court had found New York unable to assess the hospital surcharges at issue in that case.\(^{224}\) At the very least such preemptive reach would probably invalidate all state health care cost measures. In *Travelers*, the Court resolved this problem by reading the reach of ERISA's preemption clause in light of the overall objectives of the statute.\(^{225}\) Reviewing ERISA's legislative history, the Court concluded that "[t]he basic thrust of the pre-emption clause ... was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."\(^{226}\) New York's law did not require anything of ERISA plans, and it only affected them secondarily, by altering the relative costs of different benefit plans.\(^{227}\) The Court therefore concluded that New York's law was not preempted because it was "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate."\(^{228}\)

Thus, in *Travelers* the Court moved from a purely textual approach, emphasizing the words of ERISA's preemption clause, to a pragmatic approach, focusing on the underlying goals of ERISA's express preemption clause.\(^{229}\) Two years later in *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc*, the Court reaffirmed its commitment to rejecting "uncritical literalism," focusing again on the objectives of preemption as compared with "the nature of the effect of the state law on ERISA plans."\(^{230}\) The Court rejected the preemption claim, finding no indication that Congress intended to preempt laws like the prevailing wage law at issue\(^{231}\) and pointing out

\(^{223}\) *Id.* at 655 (quoting HENRY JAMES, RODERICK HUDSON xli (New York ed., World’s Classics 1980)).


\(^{225}\) *Travelers*, 514 U.S. at 657.

\(^{226}\) *Id.*.

\(^{227}\) *Id.* at 658-59.

\(^{228}\) *Id.* at 668.

\(^{229}\) Howard Shapiro et al., *ERISA Preemption: To Infinity and Beyond and Back Again?*, 58 LA. L. REV. 997, 1029 (1998).

\(^{230}\) 519 U.S. 316, 325 (1997).

\(^{231}\) *Id.* at 331-32.
that, as in *Travelers*, the wage law affected ERISA plans but did not impose binding requirements on them.232

A second shift in *Travelers*, its emphasis on the presumption against preemption, makes the Court's move away from a textual reading of "related to" preemption even more striking. Unlike all prior ERISA cases, *Travelers* began its discussion by citing *Rice* and the starting assumption that, in the interest of federalism, the Court will find state laws preempted only where congressional intent to preempt is clear and manifest.233 The Court also prominently discussed the presumption against preemption in *Dillingham* and other ERISA cases since *Travelers*.234 The reemergence of the presumption against preemption in the ERISA context strengthens the sense that the Court has embarked on a new, more practical reading of "related to" preemption.

Yet the Court has not explicitly disavowed its earlier ERISA preemption decisions, despite its recalibration of ERISA preemption. Perhaps somewhat dishonestly, the Court in both *Travelers* and *Dillingham* suggested that it was merely applying the preexisting "reference or connection" test.235 It may be that the broad textual view of "relate to" preemption still applies to EPCA's preemption clause after all. The Court's application of the broad, textual construction of "relate to" in the non-ERISA preemption cases such as *Barnett Bank* and *Morales*, without finding or even discussing any problems of overbreadth, bolsters that possibility. *Barnett Bank*'s broad reading of "relate to" is particularly significant since the Court decided that case after *Travelers* and yet ignored it, citing only the earlier ERISA cases as precedent for a broad, textual reading of "relate to" preemption.236 Moreover, a wider review of recent preemption decisions seems to show the Court generally moving away from the presumption against preemption, particularly in cases interpreting express preemption clauses.237

232. *Id.* at 332.
235. The *Travelers* Court suggested that its analysis was simply an application of the "reference and connection" test bearing in mind *Shaw*’s "tenuous, remote, or peripheral" exception to broad preemption. 514 U.S. at 661-62. The majority in *Dillingham* called the California law’s relation to ERISA “tenuous,” 519 U.S. at 334, thus implying that it was merely applying the *Shaw* exception. For a commentator who asserts that the Court has been reluctant to admit the extent to which its approach has changed, see Zelinsky, *supra* note 207, at 835.
237. *See supra* Part II.D.
3. **Enforcing the Plain Meaning of EPCA Would Entail An Absurd Result**

While considerable doubt remains as to whether the sweeping scope of “relate to” is entirely dead, a broad reading of EPCA's preemption clause is clearly unworkable and must be rejected. If EPCA preempts any state laws which bear upon or are in any way related to fuel economy standards, EPCA would become practically untenable for reasons not unlike those which drove the Court's decision in *Travelers*. Even apart from the complexities of EPCA preemption specific to California's CAA waiver, a literal inquiry into which state laws “relate to fuel economy standards” would implicate an absurd range of laws in every state. For example, as the response to the 1970s oil crisis made clear, speed limits have a substantial impact on fuel economy. Similarly, by increasing the cost of fuel, state gasoline taxes affect consumers' sensitivity to fuel economy in their vehicle purchase choices, thereby affecting the ease with which manufacturers can comply with CAFE. It is simply unreasonable that Congress intended federal fuel economy standards to trump state power to set speed limits or gasoline taxes, yet that is the logical result of a sweeping, purely textual understanding of what Congress intended by preemption state laws “related to fuel economy standards.”

A dedicated textualist might try to limit EPCA preemption by noting that EPCA preempts state laws related to fuel economy standards, not to fuel economy generally. The textualist could argue that this phrasing requires a stricter test for defining the reach of EPCA preemption without eschewing a fundamentally textual approach to interpreting the preemption clause. A state law which affects vehicles' fuel economy—say by requiring a safety standard with a marginal penalty on fuel economy—does not necessarily affect overall fuel economy standards, and thus the state regulation can arguably avoid preemption.

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238. I.e., that such an understanding would broadly preempt a huge range of state health and employment regulation.

239. Discussed in Part III.C., infra.

240. For a variety of technical reasons, a vehicle driven faster than about forty-five miles per hour over a given distance is progressively less efficient—i.e. burns more gasoline—than a car driven slower over the same distance. Thus, lowering highway speed limits increases vehicular fuel economy. See U.S. DEP'T. OF TRANSP., THINK FAST, available at www.nhtsa.dot.gov/people/outreach/safesobr/pub/think.pdf (last visited Aug. 30, 2003).

241. Compared to some of the state laws found preempted in the ERISA cases, these two categories of state laws seem not only to relate to fuel economy standards, but to do so in a way that is not even arguably “remote” or “peripheral.”


However, this interpretation fails for two reasons. First, it is not a textual solution; it does not resolve the breadth of "relate to." Under a truly literal understanding of "related to fuel economy standards," state laws which affect fuel economy relate to fuel economy standards just as they relate to fuel economy, since such laws make it harder or easier for manufacturers to meet CAFE. Focusing on "fuel economy standards" rather than "fuel economy" only helps reduce the breadth of preemption if the meaning of "relate to" is again limited by something other than its dictionary meaning.

Second, this line of reasoning proves too much because it would eviscerate EPCA preemption. EPCA's broadly worded preemption clause would be reduced to a nearly useless instrument, preventing only the adoption of explicit state fuel economy standards in conflict with CAFE. Without ever setting such standards, states could require manufacturers to install all sorts of fuel saving technologies in vehicles.

For example, imagine that Kentucky required manufacturers to sell only vehicles powered by hybrid fuel/electric engines. The auto industry could not argue that this law was itself a fuel economy standard, since that is a term of art defined by EPCA as a required level of fuel economy (miles per gallon) and clearly does not refer to specific technological standards. Further, the industry could not argue that this measure altered federal fuel economy standards themselves. The auto industry would thus be faced with the very patchwork of effective state fuel economy regulations the preemption clause was intended to preclude. Indeed, the desire to avoid this result probably explains Congress's use of the "related to" phrase in the first place. Clearly, Congress intended to create some limitation on states' ability to regulate in ways that, by altering the fuel economy of vehicles, made it more difficult for manufacturers to meet the federal CAFE standards, or in ways that effectively set a stricter fuel economy standard for manufacturers to meet.

244. Especially useless since standard conflict preemption would prevent states from adopting fuel economy standards in direct conflict with CAFE. See supra Part II.B.

245. EPCA defines "average fuel economy standard" as "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." 49 USCA § 32901(a)(6) (2003). "Fuel economy" is defined as "the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel)." Id. § 32901(a)(10). Although EPCA never defines just the phrase "fuel economy standard," it would be difficult to read these two definitions in a way that permitted a court to label a specific technological requirement, e.g. that manufacturers sell only hybrid-electric vehicles, a "fuel economy standard." Besides, if specific technological requirements were themselves "fuel economy standards," EPCA's preemption clause would have only needed to preempt "state fuel economy standards" rather than laws and regulations related to fuel economy standards to achieve the same result in terms of protecting the automotive industry.
Reading “related to” as a signal that Congress wished for normal field preemption to apply to the field of fuel economy standards might be another way to remain as true to the text as possible. This is consistent with the Court’s recent declaration that even where a statute includes an express preemption clause, implied preemption must still be considered. But even if this reading makes sense of the phrase “related to,” it does not get us very far in determining the reach of EPCA preemption, for we must still decide the boundaries of the “field” of fuel economy law. Although that might suggest a more limited reach of preemption, it is not clear why defining the beginning and ending of the fuel economy field is any easier than assessing the extent to which a state law relates to fuel economy standards.

The implications of pure textualism force us to reject plain meaning and consider Congress’s intent in drafting EPCA’s preemption clause. As the Court acknowledged long ago, the plain meaning of a statute’s text must be rejected where such construction would lead to absurd results in light of the legislation’s overall objective and Congress’s overall purpose. Quite clearly, the goal of EPCA preemption was not to nationalize state transportation or land use law, but rather to impose uniform production-related requirements on the auto industry. Analogizing to the state benefits laws upheld in Travelers and Dillingham, general state regulations of roadways and automobiles—speed limits, gas taxes, and the management of traffic—concededly relate to fuel economy and therefore fuel economy standards. However, these laws do not impose the type of binding requirements on manufacturers which EPCA’s preemption clause aims to prevent, and are therefore properly safe from preemption. Rather than relying on the meaning of the words “related to,” this interpretation derives from the legislative history of EPCA and the policy necessity of defining a rational limit to its preemptive reach.

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246. This is the way Justices Scalia and Ginsburg would have the Court interpret “relate to” preemption. Dillingham, 519 U.S. at 335 (Scalia, J., concurring).
247. See supra Part II.D.2.
248. See Gardbaum, supra note 103, at 812 ("ordinary statutory interpretation provides little support for any analysis suggesting that extensive occupation of a field automatically creates a presumption of intent to preempt"). At any rate, defining the reach of the “field” of fuel economy regulation would inevitably require considering the CAA and the California waiver, leading to many of the same line-drawing problems.
250. It might be argued that this outcome is really just an extension of the Supreme Court’s earlier ERISA cases, in that it essentially puts into practice the “remote, tenuous, or peripheral” exception to relatedness preemption. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983). But that argument misses the point. Neither the simple phrase “related to fuel economy standards” nor the corresponding legislative history calls for an exception protecting laws with “remote, tenuous, or peripheral” relationships to fuel economy. The “remote, tenuous, or
For forty-nine states, this construction of EPCA preemption is unremarkable and successfully averts major limitations on state autonomy while effectuating the objectives of EPCA preemption. Yet, as the next section reveals, this construction does not resolve the conflict between EPCA and AB-1493, or indeed between EPCA and virtually anything California might do under the CAA waiver.

C. There are no Satisfying Ways to Give EPCA Preemption and The CAA Waiver Simultaneous Effect

The previous section revealed the need to interpret EPCA's preemption clause in light of Congress's intent. Limiting EPCA preemption to state laws that directly regulate auto manufacturers eliminates the potential for an absurd scope of EPCA preemption, a scope that would force a huge range of state laws to be struck down and which Congress almost certainly did not intend. This section explains how even this retreat from textualism still fails to resolve the conflict between California's CAA waiver and EPCA. The section then describes possible compromises between the CAA waiver and EPCA. Unfortunately, these compromises are textually groundless and practically unsatisfying.

1. The Conflict Between the CAA Waiver and EPCA Preemption Remains Intractable Because Emissions and Fuel Economy Measures Closely Overlap

Aside from the special California CAA provisions, the CAA and EPCA preempt state laws in very consistent ways. Under the CAA, states are prevented from imposing emission standards on the auto industry. Under EPCA, states are further prevented from imposing fuel economy standards on the auto industry. Both preemption clauses prevent the states from forcing the auto industry to alter its products to meet a patchwork of inconsistent state-by-state requirements. Undoubtedly, many potential state laws are doubly preempted—for instance a Florida law requiring automakers to sell only solar cars would violate both CAA and EPCA preemption.

Therein lies the essential difficulty in interpreting EPCA preemption in light of the California waiver—regulations which address vehicular emissions almost always have some degree of impact on fuel economy. This is why, for example, EPCA allowed for the calculation of fuel economy to be modified to reflect the impact of catalytic converters on peripheral exception is just the Court's particular manner of articulating a policy-based limit on ERISA preemption, and is no more textually valid in the context of EPCA.

251. See supra Part I.A.
252. See supra Part I.B.
emissions standards at the time. Catalytic converters are not unique in this respect; indeed, there are many emissions control technologies with a measurable fuel economy impact. For example, installing an adsorber, a flow-through emissions control device used to reduce nitrogen oxide emissions, penalizes fuel economy up to 4%. Using oxygenated fuels or reformulated gasoline causes a 1-3% decrease in fuel economy. The fact that emissions controls almost inevitably affect fuel economy makes it very difficult to distinguish between California regulations that the CAA allows and those that EPCA forbids.

It cannot be that Congress meant to preempt most of California's emissions controls passed under the CAA waiver as "related to fuel economy standards." As the legislative history of the California waiver demonstrates, Congress repeatedly and forcefully voiced its desire to promote the widest innovation possible on the part of California. Congress made such declarations both before and after the passage of EPCA and said nothing explicit to the contrary during the passage of EPCA or the subsequent re-enactments of the CAA waiver. Yet even the more circumscribed construction of "relate to" preemption does not immediately clarify why such laws are not preempted. Unlike the state laws in Travelers and Dillingham, California's emissions regulations do impose binding requirements on auto manufacturers, requirements which directly and necessarily affect the fuel economy of vehicles. Once again, the need becomes clear for a non-literal understanding of EPCA preemption in the face of otherwise absurd results.

2. Compromise Between the CAA Waiver and EPCA Would Require Arbitrary Distinctions Between Permissibly Small and Impermissibly Large Effects on Fuel Economy

The most obvious resolution of the tension between the two laws would be to draw a line between regulations with only marginal impacts on (or relations to) fuel economy and regulations with impermissibly

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255. See EPA, Fuel, supra note 196.
256. For a detailed discussion of the overlap between potential AB-1493 regulations and fuel economy, see supra Part III.A.
257. Cf. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995) (finding state law not preempted because it was "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate").
258. See supra Part I.A.
259. Id.
260. Id.
large impacts on fuel economy. While California regulations with marginal impacts would be permitted under the CAA waiver, those with larger impacts would at some point be preempted by EPCA. This interpretation would leave some room for California to act under the waiver since the fuel economy ramifications of installing emissions controls are often fairly small. According to the EPA, the amount of standard air pollutants emitted by a vehicle depends mainly on the distance driven, the type of fuel burned and which pollution controls are installed.\textsuperscript{261} The emissions of these air pollutants do not closely track fuel economy.\textsuperscript{262} In contrast, since CO\textsubscript{2} emissions are the ultimate end product of burning gasoline, the quantity of CO\textsubscript{2} emissions always corresponds closely to fuel economy.\textsuperscript{263} Wherever the line was drawn, EPCA would almost certainly preempt any attempt to reduce CO\textsubscript{2}.

Yet neither the history of California’s emissions laws nor the text of EPCA suggests a distinction between permissibly minimal and impermissibly substantial impacts on fuel economy. California’s Zero Emission Vehicle (ZEV) program is a good example of how hard it is to draw this line, since ZEV is an emissions law California adopted pursuant to the CAA waiver despite its major impacts on fuel economy. The ZEV program, adopted in 1991, requires manufacturers to produce an increasing percentage of zero-emission vehicles over the next twenty years.\textsuperscript{264} Since a ZEV must emit absolutely no air pollution from its tailpipe, the only technologically feasible means of powering a ZEV is by electric drive,\textsuperscript{265} implying a very substantial fuel economy impact.\textsuperscript{266} These stringent requirements were meant to stimulate radical technological innovation in the auto industry.\textsuperscript{267} Yet California’s ZEV program has

\begin{footnotesize}
\begin{enumerate}
\item See EPA, Fuel, supra note 196.
\item Id.
\item Id.
\item The law mandates that ZEVs constitute 2\% of the vehicles sold by manufacturers in 1998, rising to 16\% by 2018. The law also includes mandates for an increasing number of low emission vehicles (LEVs). See Matthew Peak, Improper Incentives: Modifying the California Zero Emission Vehicles Mandate With Regards to Regulatory, Technological, and Market Forces, 1990-2001. 7 GEO. PUB. POL’Y REV. 137, 137. 140 (2002). California’s ZEV program requirements have been modified more than once, delaying the phase-in and altering the relative requirements between ZEVs and other LEVs. Id. at 138-39. These changes are unimportant for the preemption discussion since the original ZEV program was granted a CAA waiver and presumably not preempted by EPCA. See California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision, 58 Fed. Reg. 4166 (Jan. 13, 1993) (waiver for California’s ZEV and LEV program).
\item Id at 137; see also California Air Resources Bd. (CARB), Staff Report: Low-Emission Vehicle and Zero-Emission Vehicle Program Review 1 (Nov. 1996), available at www.arb.ca.gov/msprog/levprog/levsrev3.pdf (mentioning only electric and fuel cell vehicles as likely to meet the ZEV requirement).
\item See PEAK, supra note 264, at 140.
\end{enumerate}
\end{footnotesize}
never been found to run afoul of EPCA, nor have its central provisions even been challenged on such grounds.\textsuperscript{268}

If California emissions laws such as the ZEV program do not violate EPCA, the boundary between the California waiver and fuel economy preemption becomes very difficult to discern.\textsuperscript{269} Because the plain meaning of the phrase "related to fuel economy standards" is so broad, the text does not help distinguish between permissible and impermissible affects on fuel economy. Similarly, the legislative history of EPCA does not directly explain how preemption should apply to California. The next section reviews the problems presented by each of a number of possible criteria a court might use to distinguish what the waiver allows from what EPCA forbids.

3. Possible Standards for Distinguishing Acceptable From Preempted Impacts on Fuel Economy have no Legal or Practical Basis and Should be Rejected

Given the extensive overlap between fuel economy and emissions regulations, a court resolving the conflict might attempt to devise a standard that distinguishes regulations the CAA waiver allows from those EPCA forbids. Unfortunately, the most obvious possible approaches are neither grounded in the statutes nor practical to apply.

a. Percentage Fuel Economy Impact Test

A first approach would focus on the extent to which a given regulation alters fuel economy. Under this scheme, EPCA would preempt regulations with a certain degree of impact on fuel economy, while regulations with "minimal" effect on fuel economy would avoid preemption. Whether the courts should judge each California regulation independently or as part of a bundle poses an initial problem for such a rule. Lumping regulations into a package would be the only way to prevent California from skirting preemption simply by passing many separate, minor fuel economy laws or regulations, a result which would make very little practical sense. On the other hand, the all-or-nothing


\textsuperscript{269} It would be very surprising if the ZEV program, over ten years old, were suddenly declared preempted. See note 264, supra.
approach implied by bundling regulations for the purpose of preemption would risk striking entirely innocent California regulations simply because they have been bundled with truly problematic ones. Moreover, if all of California's existing emissions laws were bundled for an EPCA preemption analysis, together they would probably entail quite a substantial fuel economy impact. Should they all be struck in one fell swoop? In any case, EPCA itself says nothing on the topic of bundling, so even this initial question would require a court to invent a rule with no legislative guidance.

Creating the standard to determine what degree of impact on fuel economy triggers EPCA preemption poses an even larger difficulty. A court might hinge this decision upon the percentage by which a given regulatory requirement alters the average fuel economy of vehicles. Not only would such a standard be arbitrary, it would also imply that certain regulations addressing CO$_2$ emissions must be allowed. For example, CARB predicts that transmission design changes, a measure being considered by California under AB-1493, could improve fuel economy by 3-5%. That is a smaller effect than the fuel economy penalty caused by catalytic converters, and a much smaller impact than that of California's ZEV program. Assuming that a court would not preempt long-standing California emissions programs, the transmission regulation would have to be permitted under this approach. In sum, neither the text nor the legislative history of the statute suggests a clear line, and no obvious technological factors identify an easy boundary to draw given the very wide range of potential emissions controls and fuel economy regulations.

Even policy considerations, such as a preference for regulations targeting local air pollution rather than global warming, would not help a court select a particular percentage.

b. Purpose-based Test

A second approach would focus on California's purpose for adopting a given regulation. Under this scheme, regulations deemed to have been adopted for the purpose of regulating fuel economy would be preempted, while regulations targeting emissions would not. This interpretation would swing in California's favor, effectively granting California complete discretion under the CAA waiver. California's air pollution

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271. See note 268, supra.

272. I decline to suggest a possible value for the reasonable percentage relation to fuel economy that might be chosen as the trigger for preemption because selecting any particular value seems almost entirely arbitrary.
regulations, including AB-1493, always intend to reduce emissions. California cannot help that CO\textsubscript{2} emissions are directly proportional to fuel economy, and clearly California has not simply adopted CO\textsubscript{2} reduction measures as a cover for its real goal of regulating fuel economy. Still, like the "percentage fuel economy impact" test, the "purpose" test is textually groundless. EPCA's preemption clause does not even implicitly suggest that the purpose of a state regulation is relevant to the preemption analysis. Courts might also hesitate to adopt a test under which declaring an intent to eliminate emissions is the only requirement imposed upon California.

c. Emissions Targeted Test

That CO\textsubscript{2} emissions and fuel economy are so closely related makes AB-1493 seem more directly at odds with EPCA preemption than all of California's previous emissions controls. Perhaps, therefore, courts should draw the line between regulations that target types of emissions that can be controlled with marginal impact on fuel economy, and regulations that target emissions that can only be controlled by means closely connected to fuel economy. Or more succinctly, EPCA's preemption limits the CAA waiver solely with regard to carbon dioxide. Instead of focusing on the degree to which a particular regulation affected fuel economy, the "emissions targeted" test would focus on whether the regulation targeted a particular pollutant tied inextricably to fuel economy. The only such pollutant is carbon dioxide.

This solution conveniently protects all of California's previous CAA waiver regulations from preemption while preventing all CO\textsubscript{2} measures under AB-1493. Yet like the "percentage fuel economy impact" and "purpose-based" tests, this compromise is hardly satisfying. Neither the simple text "related to fuel economy standards" nor the legislative histories of either the CAA waiver or EPCA preemption reveal intent to prevent CO\textsubscript{2} regulation by California. The CAA waiver never speaks of any type of emissions controls excluded from Congress's broad grant of

273. AB-1493 makes abundantly clear that its purpose is to reduce greenhouse gas emissions. See 2002 Cal. Legis. Serv. Ch. 200 (West); codified at CAL. HEALTH & SAFETY CODE § 43018.5(a) (2002).

274. Critics might respond that AB-1493's purpose is both to reduce GHG emissions and to improve fuel economy; as such, it should be found preempted under a purpose test. However, if any California regulation is preempted if the state even considers its impact on fuel economy, the purpose test would be unworkably vague and overbroad, since preemption would reach many of California's emissions rules. The ZEV program or any alternative fuels laws provide examples. See Ford Motor Co. v. EPA, 606 F.2d 1293, 1304 (D.C. Cir. 1979) (citing California's claim that its 1977 emissions standards both substantially reduced emissions and improved fuel economy).

275. See, e.g., United States R.R. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("this Court has never insisted that a legislative body articulate its reasons for enacting a statute").
authority to California. On the contrary, Congress voiced its desire to permit California to pass emissions rules "more stringent than, or applicable to emissions or substances not covered by, the national standards."\(^{276}\) In approving a waiver of California's particulate emissions standards, the EPA Administrator under Ronald Reagan commented that "Congress was apparently aware that California might decide to control other non-smog-producing pollutants."\(^{277}\) Specific intent to prevent California from regulating CO\(_2\) is made even more doubtful by the fact that when Congress adopted EPCA, global warming and the environmental harm caused by CO\(_2\) emissions were barely known.\(^{278}\)

Theoretically, Congress might have believed that regulations related to fuel economy posed a greater burden on the auto industry than most emissions standards. Congress believed, this argument goes, that California's regulations "related to fuel economy standards" should be preempted because they would likely be much more harmful to the auto industry than its regulations "related to emissions standards." This story finds no basis in the historical record of the statutes. Moreover, the sweeping generalization that California's regulations concerning fuel economy would burden the auto industry demonstrably more than regulations concerning emissions is empirically unfounded. As discussed above,\(^{279}\) the two types of regulations overlap extensively, and many of the same exact technological requirements (for instance requiring alternative fuels) address both fuel economy and standard air pollution. And while the relative economic impacts of emissions controls is beyond the scope of this article, there is no practical reason Congress would have believed that regulating fuel economy is always more burdensome than regulating emissions. Requirements related to fuel economy are often far less difficult for the auto industry to meet than emissions standards. California's ZEV program, for instance, has cost the auto industry many times more than would almost all the fuel economy measures California is now considering under AB-1493.\(^{280}\)

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278. See Daniel Sarewitz & Roger Pielke, Jr., Breaking the Global Warming Gridlock, ATL. MONTHLY, at 55 (July, 1, 2000) ("In the early 1980s [global warming] received its first sustained attention in Congress").
279. See supra notes 264-268, 270-272 and accompanying text.
280. Although such a comparison is difficult to make, industry representatives have maintained that the ZEV program is potentially one hundred times more costly than any other California clean air mandate. See John Stoll, CARB Forces Issue of Zero Emissions, AUTO. NEWS, Sept. 18, 2000, at 8 (ZEV could cost the industry a billion dollars). CARB has not yet estimated the costs of the measures it is assessing as possible regulations under AB-1493. See CARB, supra note 181. Still, it seems hard to imagine that the requirements CARB is currently considering would be nearly as costly.
In sum, there are a number of possible resolutions to the tension between EPCA and California's CAA waiver, but none is particularly satisfying. Because of the inherent vagueness and overbreadth of the phrase "related to fuel economy standards," interpreting EPCA's preemption clause makes pure textualism impossible and requires an assessment of the objectives of EPCA and the role of its preemption clause. Reviewing EPCA in this manner leads to a fairly satisfactory understanding of preemption as applied to forty-nine states, but the clear tension between California's autonomy under the CAA and the restriction under EPCA creates even greater difficulty. Untangling the CAA waiver and EPCA preemption requires an even less textually-based attempt to draw an adequate line, defining where emission regulation ends and fuel economy regulation begins. The solutions suggested in this section make some pragmatic sense, but do not leave one feeling that the plain meaning of the laws' text, the purposes of Congress or the best balance of state and federal power have been adequately implemented.

D. Completely Favoring California's CAA Waiver Comports with the Language and Legislative Histories of the Conflicting Statutes and with Sound Policy

This section proposes a different understanding of EPCA preemption which resolves the statutory conflict. California's CAA waiver should always take precedence over EPCA preemption, with EPCA's preemption clause posing no limit to California. Such a solution finds support in both mainstream canons of statutory construction and in the congressional intent of both EPCA and the CAA. Moreover, such a construction is preferable in two important policy respects. First, freeing California from preemption upholds the principles of federalism and the presumption against preemption. This is especially important where Congress itself has explicitly affirmed its interest in promoting this particular exercise of state autonomy. Second, the two preemption clauses would be best implemented by acknowledging that, on account of the CAA waiver, California already forces the auto industry to design an entirely different California vehicle.

1. Canons of Statutory Construction: The CAA Waiver Should Control Because it is Specific to California and Because Congress Passed it Both Before and After EPCA

Instead of focusing on the plain meaning of EPCA's preemption clause or on textually groundless distinctions, additional tools of statutory construction can help give the clause a reasonable meaning. The unclear text of EPCA is ultimately not the main reason we must look beyond plain meaning to resolve the conflict. Here, we are seeking to resolve a
conflict between two different federal acts, not simply to understand the meaning of a single law. The plain meaning of the CAA waiver and its legislative history trumpets California's broad authority and defines few limits to California's autonomy, limits unrelated to fuel economy. The plain meaning of EPCA broadly prevents California from adopting regulations even "related to" fuel economy, which taken literally would preclude almost all emissions standards. This conflict calls for creative interpretation, and a number of statutory construction canons strongly suggest an outcome in favor of the CAA waiver.

First, Congress's passage of the sweeping grant of power to California in every iteration of the CAA, both before and after passing EPCA, provides the strongest support for favoring the waiver. Since EPCA never mentions the CAA waiver directly, applying EPCA preemption to California's emissions laws would construe EPCA as an implied repeal of California's waiver authority, a repeal Congress acknowledged neither in EPCA itself nor in subsequent CAA amendments. This is a dubious reading of EPCA given courts' common distaste for implied repeals. Even where a later law impliedly repeals only part of an earlier law, such "implied partial repeal[s]" are also disfavored. To whatever extent EPCA's preemption clause constricts California's flexibility under the CAA waiver, the preemption clause has impliedly repealed the essentially boundless grant of authority captured by the waiver. In such circumstances, the Court looks at the "totality of the legislative history" of the second Act to determine whether the intent to repeal part of the earlier law was "clear and manifest."

EPCA and its history are silent on the scope of preemption as applied to California. The application of EPCA preemption to every "State" without exempting California provides the only indication that Congress intended to restrict California's autonomy. It is debatable at best that this constitutes "clear and manifest" intent to repeal any part of the CAA waiver. More significantly, Congress re-enacted the CAA

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281. EPA may deny California's waiver application only if EPA finds that (1) California's finding that its regulations are at least as protective as federal standards, is arbitrary and capricious; (2) California does not need separate standards to meet "compelling and extraordinary conditions," or (3) California's standards are not consistent with CAA §202(a), the section under which EPA prescribes standards for vehicular air pollutants. See supra Part I.A. As discussed there, these limits on California's authority have nothing to do with fuel economy standards and are almost never invoked to prevent California from regulating emissions as it sees fit.

282. See supra Part I.A.

283. Such revocations of settled areas of law might thwart Congress's intent and disrupt continuity in a given area of law. See, e.g., Rodriguez v. United States, 480 U.S. 522, 524 (1987) ("It is well settled . . . that repeals by implication are not favored, and will not be found unless an intent to repeal is clear and manifest.") (internal citations omitted).

284. See id.

285. See id. at 525.
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waiver after EPCA, actually expanding California's waiver authority.\textsuperscript{286} It would be especially difficult to imagine that as Congress re-passed the waiver without remarking on EPCA, it still intended EPCA to substantially restrict the scope of the CAA waiver.

Second, the specificity of the California CAA waiver also suggests preferring the waiver to EPCA's universal preemption. The Court has stated numerous times that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling."\textsuperscript{287} EPCA's preemption clause is general to all states and does not clarify specifically how its terms should apply to California.\textsuperscript{288} The extensive legislative history of the CAA waiver, on the other hand, outlines in detail Congress's intent to ensure California the widest possible latitude.\textsuperscript{289} A court should prefer to effectuate the specific authority under the California waiver rather than the general preemption of EPCA.

\textit{Watt v. Kenai Peninsula Borough} provides an excellent example of how the Supreme Court has applied these canons to resolve a statutory conflict analogous to that between CAA and EPCA,\textsuperscript{290} and provides strong support for a finding of complete preeminence of the CAA waiver. \textit{Watt} resolved the question of which of two federal statutes controlled the dispensation of revenues from oil and gas leases on federal land in Alaska.\textsuperscript{291} One law, the Mineral Leasing Act (MLA) of 1920, had for many years controlled the allocation of such revenues.\textsuperscript{292} But 1964 revisions to the Wildlife Refuge Revenue Sharing Act (WRRSA) added the term "minerals" to a list of refuge resources for which the WRRSA defined a completely different formula for revenue sharing.\textsuperscript{293} Since the term "minerals" includes oil and gas,\textsuperscript{294} the Court asked whether the amendment to the WRRSA should be read to substitute the WRRSA's formula for that in the MLA when apportioning oil and gas lease revenues.

The Court began its analysis by reviewing the text of the WRRSA amendment, aware that its plain meaning suggested that it now controlled

\textsuperscript{286} See supra Part I.A.
\textsuperscript{287} See D. Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932); see also Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule").
\textsuperscript{288} See supra Part I.B.
\textsuperscript{289} See supra Part I.A.
\textsuperscript{290} 451 U.S. 259 (1981).
\textsuperscript{291} Id. at 260.
\textsuperscript{292} Id. at 261. Under the MLA, 90% of lease revenues went to Alaska and 10% went to the U.S. Treasury.
\textsuperscript{293} Id. at 262. Under the WRRSA 25% of revenues went to the counties wherein the refuge lies, the rest to the U.S. Dept. of Interior.
\textsuperscript{294} See id. at 261, n.3.
the revenue distribution. However, the Court then explained that the plain-meaning rule was insufficient for resolving the dispute, since such a rule simply assumed an answer to the question in favor of the WRRSA. Quoting Judge Learned Hand, the Court remarked that under such circumstances the judiciary should not make "a fortress out of the dictionary." Rather than accepting this simple solution, the Court analyzed both laws and their legislative histories, emphasizing that implied repeals are disfavored.

The amendment's legislative history was sparse and did not explain the addition of the term "minerals." On the other hand, the dispensation of oil and gas lease revenues was clearly codified in prior law and had been implemented under the old MLA formula for many years. The Court expressed great skepticism that Congress, without mentioning the change in the legislative history, would have adopted such a substantial change to the revenue formula. The Court explained that "[t]he silence of Congress may provide a treacherous guide to its intent. Here, however, it is almost inconceivable that Congress knowingly would have changed substantially a long-standing formula for distribution of substantial funds without a word of comment." Accordingly, the Court held that the older MLA formula controlled the revenue dispensation, despite the obvious contradiction of this finding with the text of WRRSA.

The conflict between EPCA preemption and the California CAA waiver is analogous to Watt. As in Watt, the plain language of a new law, EPCA, appears to replace a long-standing element of an earlier law, California's blanket waiver flexibility under the CAA. This apparent repeal of the CAA waiver—or at least a substantial portion of the waiver—was made impliedly and without explanation or discussion in the legislative history. Courts should follow the Watt solution and prefer not to assume the substitution of EPCA preemption for the CAA waiver. In practice, this would mean that whenever California acts pursuant to the waiver's grant of authority, EPCA preemption would not limit is

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295. See id. at 265.
296. Id. at 266.
297. Id. at 266 n.9 (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.), aff'd, 326 U.S. 404 (1945)).
298. Id. at 266-67 ("ascertainment of the meaning apparent on the face of a single statute need not end the inquiry" (emphasis added)).
299. Id. at 267.
300. Id. at 269-70.
301. Id. at 271 ("Congress might be expected to have mentioned a change wrought through the amendments which would increase refuge revenues by amounts exceeding total existing refuge revenues").
302. Id. at 271 n.13.
303. Id. at 273.
flexibility. Given the correlation between CO₂ emissions and fuel economy, this means that EPCA preemption should not reach California.³⁰⁴

Four dissenters in Watt chided the majority for brushing aside the plain meaning of WRRSA and for not effectuating its "unambiguous" language.³⁰⁵ But the dissent's specific criticisms in Watt also tilt in favor of upholding the full breadth of the CAA waiver against EPCA. For one, applying the EPCA's preemption clause to California would be highly ambiguous. Even if it is conceded that "State" unambiguously includes California, the scope of preemption as applied to California remains painfully unclear.³⁰⁶ In contrast, the addition of the term "minerals" and the application of WRRSA's simple revenue formula would have been entirely clear—literally, formulaic.³⁰⁷ In addition, a key factor for the dissent was that the majority ignored the canon of construction that "where two laws are inconsistent, the one passed later controls."³⁰⁸ As described above, since the California CAA waiver was passed both before and after the EPCA and with no reference to limitations to California's flexibility implied by EPCA,³⁰⁹ this canon of construction cited by the dissent would further suggest a finding in favor of the CAA waiver.

2. Legislative History: Congress Viewed California's Emissions Laws Under the CAA Waiver as Federal Regulations Untouched by EPCA Preemption

The above statutory construction might be criticized as insufficiently deferential to congressional intent. The Court's finding in Watt essentially relied on an assessment that Congress was unaware that by adding the term "minerals" to the WRRSA, it was effectively superseding the revenue formula in the MLA.³¹⁰ Finding no indication that Congress knew what it was doing, the Court felt free to override the plain meaning of the new law to avoid an undesired result.³¹¹ But in the case of EPCA,
evidence suggests that Congress did know what it was doing. Congress had not simply forgotten about the CAA waiver when it passed EPCA, as Congress made specific allowances for the fuel economy impact of California's stricter emissions laws. That Congress knowingly chose not to exempt California from EPCA preemption might suggest an intent to include California in the statute's preemptive reach, rendering the Watt rationale untenable.

This argument is sound in one respect—at some point in the drafting of EPCA and its CAFE standards, Congress accounted for the impact of emissions policies under the CAA waiver. Yet that fact hardly supports applying EPCA preemption to California. Had Congress recognized the fuel economy ramifications of California's emissions laws—laws which Congress in no way suggested it meant to repeal through EPCA preemption—it would have been very strange to write such a broad preemption clause, one which conflicted with existing California emissions standards. It makes even less sense to think that Congress would have entertained no discussion of how the two should be interpreted together. EPCA's allowance for the fuel economy impact of California's emissions laws does not provide incontrovertible evidence that Congress was also aware of the restrictions on California implied by EPCA's preemption clause. In fact, the extreme breadth of the preemption clause calls into doubt Congress's awareness of or intent to effect that change.

More importantly, additional evidence from the CAA and EPCA legislative histories affirmatively demonstrates that Congress did not intend to restrict the waiver by preemting fuel economy laws. This evidence gives reason to believe that Congress understood the CAA waiver process to ratify California's emissions standards as a category of federal emissions standards. For legal purposes, then, California's

312. See supra Part I.B.
313. Cf. Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal citations omitted)). Of course, EPCA and the Clean Air Act are different statutes, but the legislative history shows that Congress was at least aware of the California waiver when it passed EPCA. See H.R. REP. NO. 94-340, at 87, supra note 65 (acknowledging the interplay between EPCA and California's emissions standards).
314. The same silence plagues the CAA, since neither the 1977 nor 1990 versions of the Act says anything about fuel economy or the EPCA, even though in both instances Congress reaffirmed the waiver and reiterated its desire to grant California the broadest flexibility possible. See supra Part I.A.
315. See Stabile, supra note 110, at 2 ("it is difficult, if not impossible, for Congress to fashion [a] satisfactory preemption provision.... Congress cannot, at the time of enactment, make a comprehensive and accurate determination regarding the appropriate breadth of a statute's preemptive reach").
emissions regulations are federal regulations, and EPCA's preemption clause does not reach them at all.

Recall that when enacting EPCA, Congress allowed fuel economy standards to be adjusted on account of the fuel economy impact of both national and California emissions regulations. More specifically, EPCA allowed CAFE standards to be relaxed where "a Federal standards fuel economy reduction is likely to exist for such manufacturer." EPCA went on to define a "fuel economy standards reduction" as the reduction in average fuel economy of a manufacturer's vehicles caused by the "application of...Federal standards." Elsewhere, EPCA also instructed the Secretary to consider "the effects of other Federal motor vehicle standards on fuel economy" when determining maximum feasible fuel economy.

As the above language indicates, EPCA only adjusted CAFE standards to account for the fuel economy penalty imposed by federal emissions standards. However, EPCA defined "Federal standards" to include both national motor vehicle standards as well as "[e]missions standards applicable by reason of section 209(b)," the waiver provision of the CAA. In other words, California's vehicular emissions regulations, for which the EPA had granted a waiver of CAA preemption, were considered federal standards for purposes of the EPCA. If they had not been considered federal, EPCA would have provided no mechanism for adjusting CAFE standards to account for the penalty imposed by California's emissions laws.

When Congress first adopted California's waiver in the 1967 Air Quality Act, it similarly revealed its view that California's emissions

316. See supra Part I.B.
318. Id. § 502(d)(3)(C)(i).
319. Id. § 502(e). The other factors the Secretary was instructed to consider in setting CAFE standards were "technological feasibility," "economic practicability," and "the need of the Nation to conserve energy." Id. As amended in 1994, EPCA now instructs the Secretary of Transportation to consider "the effect of other motor vehicle standards of the Government on fuel economy" when setting fuel economy standards. Pub. L. No. 103-272 § 502(f), 108 Stat. 745, 905 (1994).
321. EPCA's preemption clause was recodified, with no major changes, when Congress amended and recodified the EPCA in 1994. See H.R. Rep. No. 103-180, 230 (1994). At that time, the reference to the California waiver was deleted. H.R. Rep. No. 103-180 at 584 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 1401. According to the 1994 legislative history, the EPCA provision acknowledging the California waiver was omitted in 1994 because it had been "executed," as it provided for the modification of average fuel economy standards for model years 1978, 1979 and 1980. Id. The 1994 explanation for the change is extremely brief and unclear, appearing among brief explanations of hundreds of minor textual changes made by the 1994 Act. The point remains the same: the understanding of Congress at the time it adopted the original EPCA preemption clause was that California emissions standards were a subset of federal standards.
under the waiver were a category of federal standards. The House report explained the waiver process in terms that make clear Congress's understanding that the EPA, not California, ultimately enacts California's emissions standards:

The Committee has provided that upon a showing by California that it requires more stringent standards than the nationwide standards otherwise applicable, the Secretary may prescribe standards with respect to such State more stringent than, or applicable to emissions or substances not covered by, the national standards.\footnote{322}

The waiver process thus works as follows: California adopts its own emissions standards and then asks the federal government to waive CAA preemption. When the federal government does so, the standard proposed by California has been "prescribed" by the federal Secretary as a federal standard for California. Thus under the AQA and presumably later versions of the waiver, the federal government does not merely approve California's standards through the waiver process. Rather, the granting of the waiver codifies California's regulations as a category of federal emissions standards.

With this understanding, the laws finally appear consistent: both suggest that the CAA waiver process represents an alternative procedure for adopting federal emission standards. The mutual silence of EPCA and CAA on how EPCA preemption affects the waiver now makes sense, since preemption only applies to state laws. The canons of statutory construction provide added support for this approach,\footnote{323} since this result favors the more recent law, avoids an implied repeal, and avoids allowing a general law to supersede a specific one. Reading the waiver to be untouched by EPCA preemption also avoids a result that thwarts the congressional objectives voiced quite clearly in the legislative history of the waiver, without contrary evidence in the history of EPCA. Moreover, this solution obviates the need for a court to invent mostly arbitrary distinctions in order to effectuate the plain meaning of the two statutes together.

3. Sound Policy: Favoring the CAA Waiver Preserves California's Authority To Innovate While Imposing Minimal Burdens on the Auto Industry

A construction that allows the CAA waiver to trump EPCA preemption only gains momentum when we step back to consider broader policy. Until now, preemption doctrine has really played only a small part in the analysis of this statutory conflict. Yet it deserves a final

\footnote{323}{Discussed in Part III.D.1., \textit{supra}.}
look. After all, this conflict is both a statutory conflict between two federal laws, and a preemption conflict between state and federal law. As such, there must be some place for considering California's interests in the whole affair—and, indeed, for considering the nation's interest in California.

California's vehicular emission standards are more than just an average example of state action in a field of traditional state power. They are the realization of a very specific Congressional interest in encouraging state experimentation and flexibility. California's emission controls have been successful for both California and the nation at large. California's success testifies to the advantages states'-rights proponents often attribute to state autonomy—namely that locally driven policy can focus on issues the state deems important, and that states can lead the nation through innovation and experimentation. Though the problem remains serious, California's air quality has markedly improved, thanks in large part to its strict vehicular emissions laws. At the same time, the federal government repeatedly draws from California's playbook in adopting its own emissions standards. When California required catalytic converters, a few years later their effectiveness was clear and the federal government required them as well. When California banned lead in gasoline, the federal government followed suit. When California adopted a groundbreaking clean vehicles program, the federal government followed, explicitly adopting CARB's standards and initiating a clean vehicles pilot program—in California. Acknowledging these and other successes, Congress has reiterated and strengthened the California waiver provision of the CAA—making it easier for California's regulations to qualify and allowing other states to adopt California's standards.

On the other side of the scale rests the interest in national uniformity and protecting the auto industry from excessive burdens. The CAA waiver weakens this interest, however, having already authorized California to regulate vehicular emissions at its pleasure. The CAA goes

324. See, e.g., Musto, supra note 30, at 158-61 (1996) (arguing that California's standards have outperformed and corrected problems in the federal standards, and that Congress should adopt California's regulations nationally).
326. See Hertsgaard, supra note 2; see also supra Part 1.A.
327. Hertsgaard, supra note 2.
328. Id.
329. 42 U.S.C. § 7584 (2003) (Establishing federal clean-fuel vehicle standards that shall be "administered and enforced . . . in the same manner and with the same flexibility as the State of California administers and enforces corresponding standards under the Low-Emission Vehicle and Clean Fuels Regulations of the California Air Resources Board").
331. See supra Part I.A.
so far as to discuss two totally different designs—"California" and "federal" vehicles—in recognition of the fact that manufacturers already view the two as different vehicles and technologies for two separate markets.\textsuperscript{332} Even if EPCA preemption were found to reach AB-1493, the state would continue commanding the auto industry to change its engines, fuels, and designs. The auto industry, which never met an emissions regulation it liked and opposed laws requiring seat belts as economically burdensome,\textsuperscript{333} will surely devise a story for why Californian emissions standards related to fuel economy cause unique economic hardship. But these arguments should be viewed skeptically, especially given the lack of clear congressional concurrence and the fact that the auto industry would still be broadly protected from varying standards in all but one state.

CONCLUSION

California's groundbreaking global warming bill highlights a seemingly intractable conflict between two federal statutes, the Clean Air Act (CAA) and the Energy Policy and Conservation Act (EPCA). Under the CAA, California is explicitly permitted to impose emission standards on the auto industry.\textsuperscript{334} Under EPCA, all states are preempted from imposing fuel economy standards on the auto industry, with no exception for California.\textsuperscript{335}

There are no satisfying ways to read these two laws together in the context of AB-1493 or any of California's prior efforts to combat vehicular emissions.\textsuperscript{336} By requiring technical alterations to vehicle designs, all of California's emissions regulations pursuant to the CAA waiver have some impact on fuel economy.\textsuperscript{337} If courts were to read EPCA's broad preemption clause literally, California's congressionally approved flexibility under the CAA would be largely revoked.\textsuperscript{338} While distinctions might be drawn between measures enacted to reduce carbon dioxide emissions (implying substantial fuel economy impacts) and measures taken to address standard air pollution (with less significant effects on fuel economy), such distinctions would be both artificial and arbitrary. This kind of court-driven line drawing would not be supported

\textsuperscript{332} Clean Air Act Amendments of 1990, Pub.L. No. 101-549, § 232, 104 Stat. 2399, 2529; see also MVMA, supra note 37, at 526-27 ("The effect of the Clean Air Act is that motor vehicles manufactured for sale in the United States must be either 'federal cars'—certified to meet federal vehicle emission standards as set by the EPA—or 'California cars'—certified to meet that state’s standards").

\textsuperscript{333} See Ralph Nader, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1972).

\textsuperscript{334} See supra Part I.A.

\textsuperscript{335} See supra Part I.B.

\textsuperscript{336} See supra Part III.C.

\textsuperscript{337} Id.

\textsuperscript{338} Id.
by the text of the two federal laws, by their legislative histories, or by common sense.

A better solution—one that comports with sound policy and congressional intent to promote innovation in California—would grant California complete flexibility to act under the CAA waiver without limitation by EPCA’s preemption clause. This result would also best implement the goals and purposes of preemption. We are faced with a preemption conflict where the reach of a federal preemption clause is muddled and textually unclear, where the purpose behind preemption would be poorly served, and where the history of state innovation is both successful and important. Where clear congressional intent to grant California broad authority meets unclear congressional intent to displace California, the grant of power to the state should carry the day.

An interpretive approach to questions of preemption that is committed to literal textualism fails if it leaves no room for addressing the underlying costs and benefits of centralized versus decentralized regulation. More onerously, an overzealous willingness to find preemption risks substituting the broad Commerce Clause power for nearly all state sovereignty, a result the Court so clearly rejected in its much-touted federalism decisions. Although the Court’s efforts to bolster federalism have gained much attention, the limitations it has placed on the Commerce Clause hardly reverse the wide latitude of federal power begun during the New Deal. Constraining the Commerce power at the edges will do little to protect state sovereignty if courts simultaneously read broad preemption clauses in a text-only vacuum and find implied preemption even when congressional intent to preempt is unclear.

AB-1493 has the capacity to be a major development in the United States’ glacial efforts to address global warming. Californians overwhelmingly supported AB-1493, with polls showing 81% in favor of its passage. Other states are already hoping that, through the CAA’s piggyback provision, they can join California in spurring the auto industry to achieve significant reductions of GHGs. In his recent State of the State address, Governor George Pataki encouraged New York by saying, “let’s work to reduce greenhouse gases by adopting the carbon dioxide emission standards for motor vehicles which were recently proposed by

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339. See supra Part III.D.
340. See supra Part III.D.3.
342. See Fallon, supra note 17, at 452-53.
343. Hertsgaard, supra note 2.
the State of California.  AB-1493 has already proven itself a creative, locally popular law with the potential to lead the nation in addressing an intractable problem. But that quintessentially federalist outcome will be thwarted if the subtle shift in favor of preemption continues to quietly undo the more heralded “federalism revolution.”