Presumptuous Preemption:

How "Plain Meaning" Trumped Congressional Intent in *Engine Manufacturers Association v. South Coast Air Quality Management District*

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After discovering that diesel exhaust generated by mobile sources caused 70 percent of the airborne cancer risk in California's South Coast Air Basin, the South Coast Air Quality Management District promulgated a set of rules designed to reduce the output of these toxic emissions. The rules imposed purchase restrictions on certain fleet owners that prevented them from purchasing a diesel powered vehicle if a clean-fueled alternative vehicle was commercially available. In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, the Supreme Court held that such purchase restrictions were expressly preempted by the Clean Air Act. In contrast with the Court's traditional insistence that congressional intent is the critical inquiry in preemption cases, the majority based its decision solely on what it considered to be the "plain-meaning" of the text of the statute and abandoned the long-standing presumption against preemption.

This Note scrutinizes the reasoning of the Court's opinion and finds its holding unsupported by either the text or the history of the Clean Air Act. It argues not just that the Court erred in finding the terms of the statute unambiguous, but that the "plain meaning" approach to statutory interpretation, which presupposes a degree of verbal precision and stability...
our language has not attained, has no proper place in preemption analyses. Finally, as the decision has important implications for the future of federal preemption and the continued viability of local control, especially in the context of environmental law, this Note attempts to predict the circumstances under which the Court will fail to apply the presumption against preemption in the future.

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INTRODUCTION

The residents of California’s South Coast Air Basin (the Basin) are exposed to some of the most toxic air in the United States.\(^1\) The Basin, which includes Los Angeles, Orange, San Bernardino, and Riverside

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1. In 2002, the top three locations that exceeded the one-hour federal ozone standards for the greatest number of days were all located in the Basin. South Coast Air Quality Management District (SCAQMD), December 2002 and Summary Statistics for 2002, 15 AIR QUALITY STANDARDS COMPLIANCE REPORT, No. 12 3 (2003) [hereinafter SCAQMD, Summary Statistics for 2002]. The Basin was also the only area in the United States in extreme non-attainment for the eight-hour ozone standard and exceeded all particulate matter and carbon monoxide standards. Id.; see Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 158 F. Supp. 2d 1107, 1109 (C.D. Cal. 2001).
counties, is the only area the United States Environmental Protection Agency (EPA) has classified as in extreme non-attainment for ozone under the Clean Air Act (CAA). Exposure to such high levels of pollution is more than irritating and unhealthy; it is lethal. A recent study revealed it will cause an estimated 1,400 cases of cancer per million people in the Basin alone. The primary source of this deadly pollution is diesel exhaust; the “most significant individual toxic air pollutant in the Basin,” it accounts for 70 percent of the air-borne cancer risk.

After availing itself of nearly every tool in its regulatory arsenal to save the lives of Southern Californians, the South Coast Air Quality Management District (SCAQMD) promulgated a set of six Fleet Rules which mandated that certain businesses and government entities which managed fleets over a set size purchase clean-air vehicles when replacing older diesel cars and trucks if, and only if, the clean-air alternative vehicles were available and their purchase would be commercially practicable. By 2010, these simple purchase restrictions would have reduced emissions in the Basin by a rate of 9.74 million pounds per year.

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3. As defined in 42 U.S.C. § 7511(a) (2000), based on the eight-hour ozone standard. EPA, Ozone Attainment Designations in Region 9, at http://www.epa.gov/region9/air/maps/r9_o38hr.html (last modified Sept. 13, 2004). Until May 17, 2004, the Basin was also the only area in extreme non-attainment for the one-hour ozone standard. EPA Section 107 Attainment Status Designations, 40 CFR § 81.305 (2005). While it now shares this dubious honor with the San Joaquin Valley, the Basin’s ambient air continues to exceed the one-hour standard more often and with greater severity. Id.; California Air Resources Board, Preliminary One-Hour Ozone Data – San Joaquin Valley, at http://www.arb.ca.gov/airis2/display.php?report=AREA1YR&statistic=DMAX&co3pa8=SV&year=2005&param=OZONE_ppm&db=paqd (Sept. 9, 2005) (from January 1 to September 9, 2005, federal standards were exceeded in eight days and the maximum one-hour average ozone concentration was 0.134 parts per million); California Air Resources Board, Preliminary One-Hour Ozone Data – South Coast Air Basin, at http://www.arb.ca.gov/airis2/display.php?report=AREA1YR&statistic=DMAX&co3pa8=SC&year=2005&param=OZONE_ppm&db=paqd (Sept. 9, 2005) (in the same period federal standards were exceeded in twenty-nine days and the maximum one-hour average ozone concentration was 0.182 parts per million).


5. Engine Mfrs. Ass’n, 158 F. Supp. 2d at 1109.

6. SCAQMD, MATES-II, supra note 4, at 7-1.


In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District (Engine Manufacturers)*, the Supreme Court held that the Fleet Rules, despite not having a coercive effect on manufacturers themselves, included purchase restrictions that set a "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines."\(^9\) In an opinion conspicuously omitting discussion of the presumption against preemption, it held that at least certain aspects of the Fleet Rules were therefore preempted under CAA Section 209(a) and remanded the case for additional consideration.\(^10\)

This Note seeks to establish not just how the Court misinterpreted Section 209(a), but also why. It concludes that the "plain meaning" approach to statutory interpretation is an inadequate means by which to accurately derive congressional intent and thus should simply never be employed in preemption cases. The Note also explores the potential normative reasons the Court reached the outcome it did for clues as to when it will eschew application of the presumption against preemption in the future. Part I summarizes the pertinent portions of the CAA, provides a background on the Court's traditional approach to preemption, and describes the Fleet Rules. Part II examines the unique and dire situation SCAQMD confronted prior to creating the Fleet Rules and then traces its legal battle with the Engine Manufacturers Association (EMA) up through the ruling of the Supreme Court. Part III critiques the Court's reasoning on its own terms before stepping back to consider its method. It asserts that in preemption cases, where the dispositive question is the intent of Congress, there is no legitimate reason to intentionally ignore evidence of that intent by analyzing the text of a statute in a vacuum. After analyzing the legislative history, it concludes Congress intended to preempt only regulations that would force manufacturers to create a "third car" and not purchase restrictions of limited application like the Fleet Rules. Part IV attempts to ascertain why the Court reached the decision it did in order to predict when it will refrain from applying the presumption against preemption in the future. Finally, the Note considers the real world impact of the *Engine Manufacturers* decision on the continued viability of the Fleet Rules.

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10. Id. at 1764.
I. LEGAL BACKGROUND

A. The Clean Air Act

After studies performed by the California Air Resources Board confirmed the link between automobile exhaust and air pollution in the early 1950's, California led the nation by adopting the first regulations limiting emissions from mobile sources. In 1965, the federal government followed suit with the Motor Vehicle Air Pollution Control Act, setting a regulatory floor but leaving the States free to develop individualized prerequisites for vehicles sold within their borders. That policy was short-lived: the Air Quality Act of 1967 gave federal standards preemptive effect over any state that had yet to adopt standards of its own. This permitted California, the only state that qualified under the exception, to promulgate more stringent standards to meet "compelling and extraordinary conditions" subject to federal agency approval. This preemption provision was a compromise between California, which feared federal regulation would not adequately address its uniquely severe air quality and related health concerns, and the automobile industry, which worried that, absent preemption, meeting the conflicting standards of each state and the District of Columbia could force them to manufacture up to fifty-one different vehicles.

13. Pub. L. No. 90-148 § 202(a), 81 Stat. 485 (Nov. 21, 1967). The preemption provision, which was carried over verbatim into CAA § 209(a), stated:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

14. Pub. L. No. 90-148 § 202(b), now CAA § 209(b), 42 U.S.C. § 7543(b) (2000). The agency with approval authority at that time was the Department of Health, Education, and Welfare. Pub. L. No. 90-148 § 202(b). Today California may seek a waiver from EPA. CAA § 209(b), 42 U.S.C. § 7543(b) (2000). While the language of the provision implies that its application will be strictly limited, it has been interpreted more liberally by both EPA administrators, who rarely deny requests, and the courts. See Motor and Equipment Mfrs. Ass'n v. EPA, 142 F.3d 449, 453 (D.C. Cir. 1998) (holding, based on a review of the legislative history, that Congress intended the waiver provision of Section 209(b) "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.") (quoting H.R. REP. No. 95-294, at 301-02 (1977)).
15. Horowitz, supra note 11, at 324; Engine Mfrs. Ass'n, 124 S.Ct at 1766 (citing S. Rep. No. 403, 90th Cong., 1st Sess., 32 (1967) ("The auto industry . . . was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue
In 1970, Congress incorporated the preemption provision into the CAA as a narrow exception to the Act’s general policy “that air pollution prevention... and air pollution control at its source is the primary responsibility of States and local governments.” Later amendments to the CAA made it easier for California to obtain a waiver from the provision’s application and permitted states that contained non-attainment areas to adopt standards identical to California’s if they provided two years lead time before those standards took effect.

In 1990, Congress created the Centrally Fueled Fleet Program, a program that, as detailed below, shared a number of important characteristics with the Fleet Rules. It required states to adopt plans that imposed purchase restrictions on owners of centrally fueled fleets of ten or more vehicles. Those plans required new purchases of vehicles by such owners to include a set percentage (between 30-70 percent) of clean-fuel powered vehicles. The program was initially tested in California and was to be phased in nationally, beginning with areas that met certain ozone and carbon monoxide criteria consistent with non-attainment of the National Ambient Air Quality Standards (NAAQS) and with vehicle model year 1998. However, because EPA promulgated nationwide...
standards that, by 2004, were more stringent than those imposed under the program, the life of the program effectively came to an end.\textsuperscript{24} None of the program's provisions or its legislative history made any reference to its potential conflict with or limited abrogation of the CAA's preemption provision, Section 209(a).\textsuperscript{25}

B. Preemption

Under the Supremacy Clause, state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution [sic]" are invalid.\textsuperscript{26} As Congress, bounded only by the limits of the Constitution, wields the power to preempt state law whenever it chooses, congressional intent is dispositive in questions of preemption.\textsuperscript{27} While expressed in many forms, this principle is ubiquitous in the Court's federalism jurisprudence. The Court has declared that "[p]re-emption\textsuperscript{28} fundamentally is a question of congressional intent,"\textsuperscript{29} that congressional purpose is the "'ultimate touchstone' of our inquiry" in preemption matters,\textsuperscript{30} and that, "[i]n deciding whether a federal law preempts a state statute, our task is to ascertain Congress' [sic] intent in enacting the federal statute at issue."\textsuperscript{31}

The Supreme Court has described three types of preemption – express, implied, and conflict – based on how explicit Congress has made its intent to preempt. In express preemption, state action is foreclosed by express language in a congressional enactment.\textsuperscript{32} Implied preemption exists where a "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," where "the Act of Congress... touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or where the

\begin{thebibliography}{9}
\bibitem{24} Horowitz, \textit{supra} note 11, at 340.
\bibitem{26} U.S. Const., Art. VI, cl. 2; Gibbons v. Ogden, 22 U.S. 1, 211 (1824).
\bibitem{28} This Note follows the predominant approach of this nation's law reviews by omitting the hyphen from "preemption." For accuracy, however, it has been included where used originally in quoted materials.
\bibitem{29} \textit{English}, 496 U.S. at 79.
\bibitem{30} Lorillard Tobacco Co., 533 U.S. at 541.
\bibitem{31} \textit{Shaw}, 463 U.S. at 95.
\end{thebibliography}
goals “sought to be obtained” and the “obligations imposed” reveal a purpose to preclude state authority. 33 Finally, under conflict preemption, federal law preempts state law to the extent the two conflict. This can occur when either “compliance with both federal and state regulations is a physical impossibility” 34 or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” 35

The Supreme Court has stated definitively that a presumption against preemption is omnipresent: “[i]n all pre-emption cases... 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.’” 36 This presumption against preemption has particular force where Congress has legislated in a field which the States have traditionally occupied. 37 The purposes of the presumption are the promotion of federalism, political accountability, and avoidance of the constitutional difficulties that would inhere if the federal legislation were interpreted to exceed the power available to Congress under the Commerce Clause. 38 In addition, there are two practical reasons for applying a presumption against preemption. 39 First, Congress theoretically has the power to state its intent that a federal


37. Medtronic, Inc., 518 U.S. at 485. Note that while originally, as stated in Rice, this presumption applied only where Congress had legislated in a field traditionally occupied by the States, in more recent cases the Court has either described it as either applying universally (as it did in both Medtronic, Inc. and Wisconsin Pub. Intervenor) or has failed to mention or apply the preemption at all (as in Engine Manufacturers).

38. See United States v. Morrison, 529 U.S. 598, 615 (2000) (striking down the Violence Against Women Act as exceeding Congress’ authority under the commerce clause in part because the reasoning used to show a substantial relationship to interstate commerce could “be applied equally as well to fa mily law and other areas of traditional state regulation.”); United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”); Medtronic, Inc., 518 U.S. at 485 (“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.”).

statute is to have preemptive force unambiguously.\textsuperscript{40} Second, while if a court erroneously finds no preemption Congress can subsequently make its contrary intent clear, if a court erroneously finds preemption the state is rendered powerless.\textsuperscript{41}

Of critical consequence to cases of express preemption such as \textit{Engine Manufacturers} is the Court's recent decision in \textit{Medtronic, Inc. v. Lohr}.\textsuperscript{42} In finding that common law remedies under strict liability and negligence theories were not preempted by the Medical Device Amendments of 1976, the Court made clear that congressional intent was central not only to the question of whether a statute was to have preemptive effect, but also as to the \textit{scope} of preemption.\textsuperscript{43} It held that "[a]ny understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of \textit{congressional purpose}'."\textsuperscript{44} The opinion also advocated looking beyond the text of the statute, finding relevant the structure and purpose of the statute as a whole as well as how Congress appeared to intend the regulatory scheme to affect business, consumers, and the law.\textsuperscript{45}

\textbf{C. The Fleet Rules}

In 1987, the State of California exercised its police powers to protect the health and safety of its citizens by expressly authorizing SCAQMD to adopt fleet rules in the Basin, specifically including purchase restrictions.\textsuperscript{46} Thirteen years later, prompted by the listing by the California Air Resources Board of "particulate emissions from diesel-fueled engines" as a "toxic air contaminant" and the discovery that 70 percent of the airborne cancer risk to residents of the Basin was attributable to diesel exhaust, SCAQMD finally took action.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Medtronic, Inc.}, 518 U.S. at 485.
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.} at 485–86 (quoting \textit{Cipollone v. Leggett Group, Inc.}, 505 U.S. 504, 530 n.27 (1992)).
\item \textsuperscript{45} \textit{Id.} at 486.
\item \textsuperscript{46} \textit{Cal. Health & Safety Code} § 4047.5 (2004). For example, the SCAQMD was permitted to

\begin{quote}
require operators of public and commercial fleet vehicles, consisting of 15 or more vehicles under a single owner or lessee and operating substantially in the south coast district, when adding vehicles to or replacing vehicles in an existing fleet or purchasing vehicles to form a new fleet, to purchase vehicles which are capable of operating on methanol or other equivalently clean burning alternative fuel and to require that these vehicles be operated, to the maximum extent feasible, on the alternative fuel when operating in the south coast district.
\end{quote}

\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Cal. Admin. Code} tit. 17, § 93000; SCAQMD, MATES-II, \textit{supra} note 4, at 7-1.
\end{itemize}
From June through October of 2000, SCAQMD adopted Fleet Rules 1186.1 and 1191-96. The rules were intended to reduce pollution from on-road vehicles, those powered by diesel engines in particular. The primary means used to achieve such reductions were purchase restrictions. For passenger cars and trucks, the Fleet Rules limited new purchases to vehicles meeting Low-Emission Vehicle standards. Diesel vehicles were to be replaced by substitutes powered by alternative fuels, which could include conventional gasoline.

The Fleet Rules’ critical attributes, when considering their compatibility with the CAA, were their limitations. Most importantly, the rules provided exceptions if the required types of vehicles were not readily available on the commercial market. In addition, the rules applied only to entities operating fleets of fifteen or more vehicles. Some of the Fleet Rules also featured phase-in periods or other provisions that mitigated their application. For example, local, state, and federal incentive programs provided over $100 million in funding for replacement vehicles and $24 million for clean-fueling infrastructure. The Fleet Rules applied most broadly to public entities, affecting fleets of passenger cars, trucks, and heavy-duty vehicles. They only applied to private entities that transported passengers to and from airports, operated waste collection fleets, or that were under contract to public entities in the fields of public transit or street sweeping.

The program enjoyed widespread early success. It led to the purchase of more than 3,400 low-emission passenger vehicles and 5,500 clean-fueled heavy-duty vehicles, including: 3,000 transit buses, 943 refuse collection trucks, 500 airport shuttles and taxis, 320 school buses, 665 heavy-duty public utility vehicles, and 151 street sweepers.

49. SCAQMD, Fleet Rules, supra note 7.
50. Id.
51. Id.
52. Id.
53. See Fleet Rule 1186.1 (permitting transitional use of diesel street sweepers) & Fleet Rule 1193 (permitting fleets of fewer than 50 refuse collection vehicles to acquire dual-fuel vehicles). Id.
54. SCAQMD, Fleet Rules Fact Sheet, supra note 8.
55. See Fleet Rules 1191, 1196. SCAQMD, Fleet Rules, supra note 7.
56. Id.
57. SCAQMD, Fleet Rules Fact Sheet, supra note 8.
II. THE ENGINE MANUFACTURERS DECISION

A. Factual Background

The promulgation of the Fleet Rules was an innovative solution by SCAQMD to address the seemingly incurable pollution that plagued the Basin. A solution that, while improving the health of residents, would also help thwart the imposition of federal controls that would effectively preclude new, economically beneficial, development. This section summarizes the situation faced by SCAQMD and the impact, both potential and realized, of the Fleet Rules.

1. Diesel Exhaust

The "primary target" of the Fleet Rules was heavy-duty diesel engines. While in effect, 62 percent of the vehicles purchased pursuant to the Rules were clean-fueled replacements of heavy-duty diesel vehicles. Accordingly, to appreciate the importance and value of the Fleet Rules, a brief overview of the deleterious health effects of diesel exhaust may be helpful.

Diesel engines produce or lead to the production of significant quantities of pollutants EPA anticipates endanger public health and welfare including carbon monoxide, nitrogen dioxide, ozone, and particulate matter. Diesel engines also emit carbon dioxide (believed to contribute to global climate change), sulfur compounds, and hydrocarbons of varying toxicity. So far, the International Agency for Research on Cancer has classified three of these hydrocarbons as "probably carcinogenic" and at least sixteen others as "possibly carcinogenic." In all, California has listed forty-one constituents of

58. Id.
59. INTERNATIONAL PROGRAMME ON CHEMICAL SAFETY, DIESEL FUEL AND EXHAUST EMISSIONS 92 (1996). Each of these pollutants have been listed by the EPA Administrator because they "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 108, 42 U.S.C. § 7408 (2000). An example of a diesel emission that leads to the production of other pollutants is nitrogen oxide, which plays a major role in the formation of ozone, particulate matter, and even acid rain. EPA, Air Trends: Six Principal Pollutants, at http://www.epa.gov/airtrends/nitrogen.html (last modified Sept. 21, 2004) [hereinafter EPA, Air Trends]. Diesel engines are responsible for over thirty percent of nitrogen oxide emissions nationwide. EPA, HEALTH ASSESSMENT DOCUMENT FOR DIESEL ENGINE EXHAUST 2-21 (2002) [hereinafter EPA, DICESEL ENGINE EXHAUST].
60. EPA, DICESEL ENGINE EXHAUST, supra note 59, at 1-1.
61. IARC Classification 2A. OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT (OEHHA), CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, HEALTH RISK ASSESSMENT FOR DIESEL EXHAUST 1-6 (1998).
62. IARC Classification 2B. Id.
diesel exhaust as "toxic air contaminants."\(^{63}\) By definition, these contaminants are "air pollutant[s] which may cause or contribute to an increase in mortality or in serious illness, or which may pose a present or potential hazard to human health."\(^{64}\)

While the causal relationship between diesel exhaust and cancer has been debated in the past, the most recent studies have questioned only the rate at which such emissions cause the disease.\(^{65}\) Just prior to the promulgation of its Fleet Rules, SCAQMD published a groundbreaking study quantifying the health effects of pollution in the Basin. Three years in the making and guided by a panel of thirteen air toxics experts from academia, environmental groups, industry, and public agencies, it was one of the most comprehensive and ambitious studies on the toxic effects of pollution in an urban environment ever conducted.\(^{66}\) It determined that the pollution present in the Basin would cause an estimated 1,400 cases of cancer for every million people present.\(^{67}\) Diesel particulate emissions accounted for 70 percent of this risk and all mobile sources combined accounted for 90 percent.\(^{68}\) With stationary sources contributing only 10 percent towards this increased risk of cancer, the study made clear that SCAQMD needed to act fast to curb mobile source pollution, from diesel vehicles in particular, any way it could.\(^{69}\)

2. **Basin Air Quality, NAAQS, and the Fleet Rules’ Potential Impact**

It may come as no surprise that southern California is home to the dirtiest and most hazardous air in the nation. Despite making enormous progress in the last thirty years, the Basin continues to set records for...
ambient air pollution. The three-year average of the number of days the Basin exceeded the federal standards for one-hour ozone, eight-hour carbon monoxide or twenty-four-hour PM$_{10}$ has decreased by 84 percent since 1972. Nevertheless, in 2002, the sixteen locations that exceeded the one-hour federal ozone standards for the greatest number of days were all located within California; the top three were in the Basin.

In 2000, when SCAQMD was considering the promulgation of the Fleet Rules, the data was even more sobering, owing primarily to on-road vehicle emissions. The rules would have had the greatest direct impact on five of the seven criteria pollutants listed by EPA: carbon monoxide, nitrogen dioxide, ozone, and the two categories of particulates, PM$_{10}$ and PM$_{2.5}$. EPA establishes emissions limits on these pollutants which are “requisite to protect the public health.” At that time, the Basin exceeded these federal limits with respect to four of the five above pollutants.

The non-attainment status of the Basin for each of these pollutants is closely correlated to the contributions of vehicle emissions which the Fleet Rules sought to reduce. For example, the PM$_{10}$ standard was exceeded by 45 percent. In California, PM$_{10}$ comes more from mobile sources than any other category of sources. Diesel engines alone, a

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71. Particulate matter that is 10 micrometers in size or smaller.
73. Id. at 3.
74. See infra notes 78-87 and accompanying text. Vehicle emissions and air quality in the Basin have long been closely linked. See, e.g., David P. Currie, Motor Vehicle Air Pollution: State Authority and Federal Preemption, 68 MICH. L. REV. 1083, 1084 (1970) (concluding “[a]utomobiles have single-handedly ruined the atmosphere of Los Angeles”).
75. Particulate matter that is 2.5 micrometers in size or smaller, approximately 1/30 the size of a human hair. PHALEN, supra note 65, at 10; SCAQMD, Fleet Rules Fact Sheet, supra note 8.
78. SCAQMD, Fleet Rules Fact Sheet, supra note 8.
79. SCAQMD, 1999 Air Quality Report, supra note 77.
80. DAVID IPPS & MARCELLA NYSTROM, PROPOSED REPORT TO THE CALIFORNIA STATE LEGISLATURE: PROSPECTS FOR ATTAINING THE STATE AMBIENT AIR QUALITY STANDARDS
primary target of the Fleet Rules, account for an estimated 26 percent of the PM\textsubscript{10} created by fuel combustion in the state.\textsuperscript{81} The annual arithmetic mean presence of the even more hazardous PM\textsubscript{2.5} in the ambient air was over twice the national standard.\textsuperscript{82} More than 98 percent of the particles in diesel exhaust are PM\textsubscript{2.5}.\textsuperscript{83} While the Basin exceeded only the state standard for nitrogen dioxides, nitrogen oxides are precursors to both ozone and particulate matter creation.\textsuperscript{84} Nationwide, 53 percent of nitrogen oxide emissions come from mobile sources of which well over half is caused by diesel engines.\textsuperscript{85} Finally, ozone and carbon monoxide levels were 42 percent and 24 percent past their respective limits.\textsuperscript{86} On- and off-road vehicles are responsible for approximately 80 percent of the emissions that form ozone in the Basin.\textsuperscript{87}

Non-compliance with these federal emissions limits, part of the NAAQS, poses a significant risk to the lives and health of the Basin's residents. To take one example, EPA has stated that PM\textsubscript{2.5} is "scientifically linked to serious human health problems including premature death from heart and lung disease; aggravation of heart and lung diseases; chronic bronchitis and asthma; increased hospital admissions and doctor and emergency room visits; and absences from work and school."\textsuperscript{88} Furthermore, it has concluded that nationwide achievement of the NAAQS in PM\textsubscript{2.5} will prevent at least 15,000 premature deaths.\textsuperscript{89}

In addition to this substantial risk to human health, the Basin's non-compliance with the NAAQS can have enormous legal and practical consequences for all of California. For instance, before any major new source of emissions may be constructed in a non-attainment area, it must comply with strict permitting rules and its output is limited to the "lowest achievable emissions rate."\textsuperscript{90} Also, the EPA administrator is required to
impose sanctions on states that have failed to comply with, successfully implement, or propose State Implementation Plans (SIPs) that will lead to the timely achievement of the NAAQS. The sanctions include the imposition of a 2:1 offset requirement such that, for any new or modified source that will increase emissions, prior to permitting its construction, the state must ensure existing emissions by another source or sources are reduced by twice the amount the proposed source will create once operational. This sanction is non-discretionary and must be imposed eighteen months after EPA finds an unresolved deficiency in the state’s SIP. After twenty-four months, EPA is required to discontinue providing highway funds to non-attainment areas, with limited exceptions for safety and mass transit projects. If all else fails, the federal government may even unilaterally devise and enforce a Federal Implementation Plan, requiring whatever economic and other sacrifices it deems necessary to achieve the NAAQS.

How much would the Fleet Rules have helped in meeting the NAAQS and protecting human health? SCAQMD estimated that, by 2010, they would have reduced emissions by 4,870 tons annually. Specifically, it predicted a reduction of 75 tons per year of hydrocarbons, 2,699 tons per year of carbon monoxide, 1,931 tons per year of nitrogen oxides, and 165 tons per year of particulates. While the Fleet Rules’ real world impact has not been measured, it is worth noting that the Basin made substantial progress toward the four of five relevant NAAQS in the two years after their passage. Compared to the 1999 figures, in 2002 the annual arithmetic means of PM\(_{10}\) and PM\(_{2.5}\) emissions were down 16 percent and 11 percent, and the maximum emissions of nitrogen oxides and carbon monoxide were 16 percent and 14 percent lower.
respectively. The maximum recorded eight- and one-hour levels of Ozone remained relatively static.

B. Procedural History

On November 21, 2000, just over a month after SCAQMD adopted the last of the Fleet Rules, EMA filed suit in the federal district court of Los Angeles challenging their constitutionality. EMA alleged that the rules violated Sections 209 and 177 of the CAA and the Supremacy Clause of the Constitution. Both parties filed motions for summary judgment and stipulated to adjudication on the pleadings.

On August 22, 2001, the district court granted summary judgment in favor of SCAQMD. It dismissed EMA's assertion that the Fleet Rules violated CAA Section 177 and held that the section applied only to non-California "opt-in" states. Furthermore, the court held that, even if Section 177 did apply, it would not have been violated because the Fleet Rules did not require the creation of a "third car" by manufacturers, they simply required "purchasers to choose from among a subset of previously certified vehicles."

Similarly, the court held that the Fleet Rules did not contravene CAA Section 209(a) since they did not set a "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines" prohibited by the Act. In support of its position the court

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99. Id. (one-hour levels of 0.17 ppm in 1999 v. 0.169 ppm in 2002, eight-hour levels of 0.14 ppm v. 0.145 ppm).
100. The six fleet rules at issue in this case were adopted in June 16, August 18, and October 20 of 2000. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 158 F. Supp. 2d 1107, 1114 (C.D. Cal. 2001).
101. Id. at 1116.
102. CAA § 177 precludes states from taking “any action of any kind to create, or have the effect of creating a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a ‘third vehicle’) or otherwise create such a ‘third vehicle’.” CAA § 177, 42 U.S.C. § 7507 (2000).
103. U.S. Const. art. VI, cl. 2. The text of the clause states, in full: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
105. Id. at 1120.
106. Id. at 1119.
107. Id. at 1120.
noted that, even in the cases relied upon by the plaintiffs, the CAA had been previously interpreted to preempt only state and local authorities' attempts at limiting the sale of vehicles. Drawing a bright-line rule from this distinction, the court went on to state that "[w]here a state regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard." 

The court reasoned that its interpretation permitting purchase restrictions was entirely consistent with Congress's purpose in enacting the preemption proviso of the CAA, "the protection of manufacturers against having to build engines in compliance with a multiplicity of standards," as the Fleet Rules imposed no emission requirements on manufacturers whatsoever. In addition, the court noted that another portion of the CAA, Section 246, requires a state that contains certain specified ozone or carbon monoxide non-attainment areas to establish a "clean-fuel vehicle program" that includes specified purchase restrictions. It concluded that it would be irrational to interpret Section 209(a) as precluding the adoption of purchase restrictions on fleet owners where they were expressly authorized by another provision of the same statute. Finally, the court cited the presumption against preemption, finding that state regulations are presumed to be valid and that the Fleet Rules were adopted pursuant to the mandate of the California legislature through the passage of Health and Safety Code Section 40447.5.

In its two-sentence order, the Ninth Circuit unanimously affirmed the decision of the district court "for the reasons stated in its well-reasoned opinion." 

C. The Supreme Court Decision

In an 8–1 decision authored by Justice Scalia, the Supreme Court reversed, holding that the preemptive effect of CAA Section 209(a) was not confined to sales restrictions and production mandates. Instead, it relied on the 1945 edition of Webster's Second New International Dictionary to determine that the plain meaning of the word "standard"
also encompassed the purchase limitations imposed by the Fleet Rules.\textsuperscript{118} It declared a "standard" to be that which "is established by authority, custom, or general consent, as a model or example; criterion; test."\textsuperscript{119} Thus, the Court reasoned, a "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines," prohibited under Section 209(a), was a criterion restricting vehicle emissions such that it could be met only if an engine (1) did "not emit more than a certain amount of a given pollutant," (2) was "equipped with a certain type of pollution-control device," or (3) had "some other design feature related to the control of emissions."\textsuperscript{120} While the standard itself related to production, the Court supported its conclusion that the Fleet Rules' purchase restrictions set such a standard by reasoning that the contrary interpretation was unsupported by the text or structure of the statute and that the proscribed enforcement of a standard could take place in the absence of a direct production mandate.\textsuperscript{121}

The Court began by noting the lack of textual support for the district court's interpretation.\textsuperscript{122} It discerned nothing on the face of the text of Section 209(a), as understood by reference to the Webster's definitions it chose, that provided grounds for the lower courts' distinguishing between sales restrictions and purchase restrictions.\textsuperscript{123} Drawing such a distinction, the Court found, "confuse[d] standards with the means of enforcing standards."\textsuperscript{124} The Court held that standards were separate from enforcement techniques and Section 209(a) proscribed the enforcement of standards regardless of how that enforcement was accomplished.\textsuperscript{125}

The Court found the district court's interpretation of the word "standard" similarly unsupported by the structure of the CAA.\textsuperscript{126} It read Section 202 as setting a standard and subsequent provisions, namely Sections 203-06, as setting out the means of enforcing that standard.\textsuperscript{127} The Court implied this separation was evidence that Congress understood standards to be distinct from enforcement.\textsuperscript{128} It accused the district court of "lump[ing] together Section 202 and these other distinct statutory provisions" to read the CAA as only preempting state and local

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118. & \textit{Id.} at 252-53. \\
119. & \textit{Id.} (citing WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 2455 (1945)). \\
120. & CAA § 209(a), 42 U.S.C. 7543(a) (2000); \textit{Engine Mfrs. Ass'n}, 541 U.S. at 253. \\
121. & \textit{Engine Mfrs. Ass'n}, 541 U.S. at 252-55. \\
122. & \textit{Id.} at 252. \\
123. & \textit{Id.} at 253. \\
124. & \textit{Id.} \\
125. & \textit{Id.} at 253. \\
126. & \textit{Id.} at 253-54. \\
127. & \textit{Id.} The Court admitted that, at least in CAA §§ 203-206, enforcement focused exclusively on manufacturers, taking the form of explicit prohibitions and the imposition of fines and other penalties. \textit{Id.} \\
128. & \textit{Id.} at 254. \\
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imposition of these types of manufacturer and dealer oriented standard enforcement mechanisms. The Court reasoned that Congress intended a standard to be considered a "standard" for preemption purposes under the CAA even when it was not enforced through manufacturer-directed regulation because Section 246 imposed restrictions on purchasers and the purpose of Section 246 was "to meet clean-air standards." From this, it concluded, "Congress contemplated the enforcement of emission standards through purchase requirements" and not just prohibitions on the manufacture or sale of vehicles.

Finally, the Court explained that failing to preempt purchase restrictions would have the practical effect of undoing Congress's carefully calibrated regulatory scheme.

It reasoned that, although the Fleet Rules covered only particular purchasers and thus did not eliminate all demand for any vehicle, to interpret the CAA to permit states and political subdivisions to enact whatever purchase restrictions they chose without judicial review could lead to the effective enforcement of jurisdiction-specific emissions requirements. In effect, purchase restrictions would force manufacturers to produce myriad new vehicles in order to maintain their market share by making compliant vehicles that could be lawfully purchased in each air basin within the United States. Hence, the enforcement of standards was not limited to production limitations imposed directly on manufacturers because "[t]he manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them."

While, at a minimum, the Court held that the district court's interpretation of Section 209(a) of the CAA was incorrect and that the Fleet Rules unlawfully set a "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines," it made a point of indicating just how carefully circumscribed its ruling was. It did not reach, for instance, the issue of whether its interpretation would cause voluntary incentive programs to be preempted, nor did it determine which portions of which Fleet Rules were, in actuality, preempted. It

129. Id.
130. Id. (quoting Engine Mfrs. Ass'n, 158 F. Supp. 2d at 1118) (emphasis added by the Court).
131. Id.
132. Id. at 255.
133. Id.
134. Id. at 256 (finding that, where the Rules exceptions did not apply, "the need to sell vehicles to persons governed by the Rule would effectively coerce manufacturers into meeting the artificially created demand. . . . which in turn effectively compels production").
135. Id. at 255.
136. Id. at 258-59.
137. Id.
likewise left to lower court determination whether some rules or their application could be characterized as internal state purchase decisions, what standard of preemption would apply in such cases, and whether Section 209(a) could be construed as to preempt restrictions outside of the purchase of new vehicles, such as leasing activities or the purchase of used vehicles.\textsuperscript{138}

\textbf{D. Dissent}

Justice Souter, the lone dissenter, took the majority to task for abandoning the presumption against preemption and ignoring the legislative history and purpose of the CAA.\textsuperscript{139} As if to highlight the balance struck by the majority between industry and human health, he began by noting the practical consequence of the Court's ruling: it "prohibits one of the most polluted regions in the United States from requiring private fleet operators to buy clean engines that are readily available on the commercial market."\textsuperscript{140} He concluded that, because of their limited application, the Fleet Rules did not set an emissions standard for new vehicles.\textsuperscript{141}

Justice Souter reminded the majority that its recent decision in \textit{Medtronic, Inc. v. Lohr}\textsuperscript{142} held that the presumption against preemption applies not only to the question of whether Congress intended preemption at all, but also as to the intended scope of federal preemption.\textsuperscript{143} He argued that this presumption against preemption, which the Court employs with particular force when examining congressional regulation of a field of traditional state or local concern, clearly applied here because the CAA itself recognized "air pollution prevention... and air pollution control at its source is the primary responsibility of States and local governments."\textsuperscript{144}

When interpreting a statute, Justice Souter reasoned, legislative history should inform interpretive choice.\textsuperscript{145} After reviewing the pertinent record leading up to the passage of the CAA's preemption provision, he

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\textsuperscript{138} \textit{Id.} at 259. On May 5, 2005, in an unpublished opinion, the district court resolved the question of whether Section 209(a) applied to state purchases in favor of SCAQMD and rejected what it construed as a facial challenge to the Fleet Rules' constitutionality by EMA. \textit{Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.}, No. CV00-09065FMC(BQRX), 2005 WL 1163437, at *1, *12 (C.D. Cal. May 5, 2005) (holding that the Fleet Rules, as applied to state and local government actors, fell within the market participant doctrine and were therefore outside the preemptive scope of Section 209).

\textsuperscript{139} \textit{Id.} at 259-66.

\textsuperscript{140} \textit{Id.} at 259.

\textsuperscript{141} \textit{Id.} at 262.


\textsuperscript{143} \textit{Engine Mfrs. Ass'n}, 541 U.S. at 260-61.

\textsuperscript{144} \textit{Id.} at 260 (quoting CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3) (2000)).

\textsuperscript{145} \textit{Id.} at 261.
\end{flushright}
declared, "Congress's purpose in passing it was to stop States from imposing regulatory requirements that directly limited what manufacturers could sell." Taking this purpose into account, Justice Souter read Section 209(a) as having no preemptive effect on the Fleet Rules. While a draconian policy that categorically prohibited the purchase of any vehicle that failed to meet strict new state specific emissions requirements would be preempted, as the consequences of such a policy would be identical to those of mandates imposed directly on manufacturers, the Fleet Rules applied only where clean-air alternative vehicles were both commercially available and suited to the specific application for which they were required. The Rules changed only the relative demand for vehicles already commercially available; they did not mandate the creation of specific vehicles for specific regions and were thus not preempted under the CAA.

Having laid out the reasoning behind and support for his own position, Justice Souter continued by surveying the difficulties engendered by the majority's interpretation. First, it rendered superfluous the second sentence of Section 209(a), which bars states from requiring inspections related to the control of emissions as conditions precedent to the initial sale of a vehicle, because, under the majority's reading, any such inspection scheme would be preempted as the unlawful enforcement of a "standard." Second, Congress was careful to state in the one instance where another provision of the CAA would otherwise be preempted by Section 209(a) that its authorization was effective "[n]otwithstanding section 7543(a) of this title." Since Section 246, which requires the imposition of purchase restrictions on fleet owners, does not contain this language, it follows that Congress never imagined Section 209(a) would have preemptive effect over such purchase restrictions. Indeed, Justice Souter commented that it was difficult to harmonize the majority's interpretation of Section 209(a) with its insistence in the continued validity of Section 246. Finally, Justice Souter asserted that the majority's determination of the meaning of "standard" was similarly inconsistent with its assertions that voluntary incentive programs and internal state purchasing decisions may not be preempted. Justice Souter argued that the majority left these questions

146. Id.
147. Id. at 262.
148. Id. at 262-63.
149. Id. at 263.
150. Id. at 264.
152. Engine Mfrs. Ass'n, 541 U.S. at 265.
153. Id.
154. Id.
open only to mask the clear implausibility of its position, since Congress surely could not have meant to have made the CAA’s preemption provision so severely disabling.155

Justice Souter concluded by admitting both that his critiques were not dispositive and that the two interpretations each had strengths and weaknesses.156 On balance, however, he found his reading superior as it “adhere[d] more closely to the legislative history” and “most importantly... adhere[d] to the well-established presumption against preemption.”157

III. ANALYSIS

The Court’s decision in Engine Manufacturers suffers from a number of infirmities. Its interpretation of the meaning of the word “standard” in Section 209(a) rests on provisions of the CAA that, when carefully examined, serve only to undermine its position. Furthermore, its conclusions rely on a mischaracterization of the Fleet Rules’ restrictions on buyers as standards enforced against manufacturers. Finally, the opinion is founded on the untenable proposition that the word “standard” could have a single, definitive, “plain meaning.”

This Part begins, in Section A, by criticizing the textual premises relied upon by the Court. Next, Section B argues that the “plain meaning” approach to statutory interpretation should never be employed in preemption analyses. Lastly, Section C discusses why the meaning of the word “standard” is ambiguous and concludes, after a consideration of the legislative history and congressional intent, that the Fleet Rules were not preempted by CAA Section 209(a).

A. Critique of the Court’s Reasoning

While the Court asserted that the structure of the CAA, specifically Sections 202-206 and 246, supported its interpretation of the meaning of the word “standard” as used in Section 209(a), a closer look at those sections reveals that they actually cut in favor of a contrary interpretation. Namely, that when Congress referred to a “standard relating to the control of emissions from new motor vehicles or new motor vehicle engines,” it meant a standard enforced directly against manufacturers.

One of the foundations of the Court’s interpretation is that Section 202 speaks about standards and not about who those standards would be enforced against or how they would be applied.158 The Court alleged that

155. Id.
156. Id. at 266.
157. Id.
158. Id. at 253-54.
Congress described the application of standards only in Sections 203-206. The Court’s reliance on Section 202 to demonstrate this dichotomy was misplaced, however, as the section is rife with references to both whom its standards apply to and how those parties can seek exemptions from enforcement. For example, Section 202(b)(3) sets out criteria under which a waiver from the described enforcement may be granted “if the manufacturer demonstrates that such waiver is necessary to permit the use of an innovative power train technology, or innovative emission control device or system.” Consequently, the line between Sections 202 and 203-206 with respect to discussions of the means of enforcement is simply nonexistent.

Even more significant is the lack of distinction between standards and the parties against whom they would be enforced. In Section 202, where the Court admitted the standards that have preemptive effect are defined, Congress spoke explicitly and exclusively of standards imposed directly on manufacturers. Indeed, Section 202 mentions “manufacturers” or “manufacturing” forty-six times. In contrast, purchasing is mentioned only once – in a provision permitting the Administrator to enforce lower, ad hoc standards where a manufacturer is “primarily dependent upon technology developed by other manufacturers and purchased from such manufacturers; and such manufacturer lacks the financial resources and technological ability to develop such technology” itself. Even in the sections that follow, Congress continued to speak solely in terms of enforcement against manufacturers and never mentioned means even remotely analogous to purchase restrictions. When Congress spoke of “standards” in the CAA, where federal law would reach and have preemptive effect, it envisioned them as intrinsically linked to their enforcement against manufacturers. It never manifested an intent to divest the States of control over purchasers.

With respect to Section 246, the Court relied entirely on the district court’s unfortunate choice of words describing the statute as placing “restrictions on the purchase of fleet vehicles to meet clean-air standards” to support its assertion that “[c]learly, Congress contemplated the enforcement of emission standards through purchase requirements.” In reality, other than this dicta in the district court’s opinion, there is no evidence whatsoever that Congress’s purpose in creating the Centrally Fueled Fleet Program was to enforce any “clean-air standards.”

159. Id.
so-called "standards" enforced by the program are presumably the levels of pollution that form the prerequisites for its application. However, Congress's choice of how to phase in a new program, selecting who must implement the program based on a set of criteria which correlate to who would benefit the most from its implementation, does not transform those criteria into a standard and the program into a means of enforcing that standard. This is especially true with respect to Section 246 as there is no indication that the program would cease if the air quality changed to such an extent that the criteria that triggered the program's initiation were no longer satisfied.

In fact, Section 246 is among the clearest of evidence regarding congressional intent. As the district court explained, it would be irrational to conclude that Congress would explicitly authorize purchase restrictions in Section 246 that would be preempted under Section 209(a), especially considering Congress failed to include the "notwithstanding [Section 209(a)]" language present in the one provision that did contravene its application. In a footnote, the Court countered, "it is not irrational to view Congress's prescription of numerous detailed requirements for such programs as inconsistent with unconstrained state authority to enact programs that ignore those requirements.' This argument confuses whether the Fleet Rules met the requirements of Section 246, which is irrelevant, with whether Congress authorized the implementation of purchase restrictions, which reveals how Congress understood the scope of Section 209(a)'s preemptive effect. Under the majority's interpretation of Section 209(a), even regulations that states would be required to pass pursuant to Section 246 that did meet its "detailed requirements" would be preempted. Since Congress unequivocally authorized such purchase restrictions, the district court's critique of the approach later adopted by the Court as irrational remains valid irrespective of whether the Fleet Rules at issue comply with Section 246.

The Court's next contention, that the Fleet Rules' purchase restrictions were the equivalent of manufacturer-directed standards, was not only inconsistent with its holding, but also meritless. Without acknowledging that it was attempting to align its decision with the purpose of the CAA and despite its assertion that a standard is a standard

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165. In this case, those criteria relate to current levels of two airborne pollutants. CAA § 246(b), 42 U.S.C. § 7586(b) (2000).
166. CAA § 246(b), 42 U.S.C. § 7586(b) (2000).
169. The question before the Court was whether Section 209(a) expressly preempted the Fleet Rules, not whether they complied with Section 246. The potential for Section 246 to have preemptive effect over the Fleet Rules through field preemption was raised neither by EMA nor sua sponte by the Court.
regardless of who it applies to, the Court repeatedly tried to establish that purchase restrictions are, in effect, "standards" being enforced against manufacturers, albeit indirectly. It stated that "the manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them" and that, if "a vehicle of the mandated type were commercially available, thus eliminating application of the [exemption] proviso, the need to sell vehicles to persons governed by the Rule would effectively coerce manufacturers into meeting the artificially created demand." If true, the CAA's purpose of saving manufacturers from the burden of producing different cars for different markets would support the majority's interpretation. However, the salient feature of the Fleet Rules is that they apply only when the vehicle is already commercially available. Manufacturers cannot possibly be coerced to design and produce a vehicle they themselves have already created. The only argument that could be made, and what likely motivated EMA to sue, is that certain manufacturers reliant on their domination of the diesel market might be motivated by the desire to maintain their sales figures to follow the lead of more technologically progressive companies and create cleaner vehicles to fulfill the increased demand. Fluctuations in demand are inherent in even unregulated sectors of our economy, however, and the CAA should not be interpreted to insulate manufacturers from their impact, regardless of whether such fluctuations are natural or artificially created. Section 209(a) sought to prevent the creation of a "third-car," not competition.

Moreover, the Court's concern over "artificially created demand" was not a concern shared by Congress. In passing Section 246, Congress created the federal Centrally Fueled Fleet Program, which, as it applied far more broadly than the Fleet Rules, generated far more "artificial demand." Nevertheless, as detailed above, Congress did not see the purchase restrictions of Section 246 as the setting or enforcement of a standard nor did they envision them as preempted under Section 209(a).

Finally, since all nine members of the Court agreed that the Fleet Rules, as applied, do not compel manufacturers the way the majority believed some purchase restrictions could, the majority criticized the dissent as "feel[ing] free to read into the unconditional words of the statute a requirement for the courts to determine which purchase restrictions in fact coerce manufacture and which do not." This critique goes to the core of why the majority and the dissent reached different conclusions in the case: they employed different methods of statutory construction. As is often the case, the choice of methods was determinative.

171. Id. at 256.
172. Id.
of the outcome, prompting two interrelated questions: (1) did the method employed in *Engine Manufacturers* lead to the best interpretation, that which was most faithful to the will and intent of Congress, and (2) what method has the greatest potential to lead to accurate results in future cases? The sections that follow attempt to answer the first question and contribute to the continuing debate over the second.

**B. The Legal Fiction of “Plain Meaning”**

Justice Scalia led the majority along his favorite path of strict construction, interpreting the section at issue according to the “plain meaning” of the text itself. In so doing, he found the meaning of “standard” unambiguous and the preemptive effect of Section 209(a) categorical. This led the Court to strike down the Fleet Rules despite the beneficial effect they would have had on society, despite their harmony with the purpose of the preemption provision of Section 209(a), and despite their accord with the primary goal of the CAA itself: cleaner air.\(^{173}\) The Court adopted a reading that made the CAA internally inconsistent,\(^{174}\) reduced a portion of the statute to surplusage,\(^{175}\) and jeopardized the health of millions in order to eliminate an “artificial market” that would favor some engine manufacturers (those that had already produced clean-air alternative vehicles) over others (those whose all-diesel lineups persisted).

To avoid future rulings that supplant the intent and will of the Court for that of Congress, the Court should make a simple but effective change in its method of statutory interpretation. Volumes have been written on determining whether a given term is ambiguous and when to look to outside sources for guidance when interpreting a statute. In cases of preemption, however, where “[c]ongressional purpose is the ‘ultimate touchstone’ of [the Court’s] inquiry” in determining whether and to what precise extent a statute has preemptive effect, a categorical rule is appropriate.\(^{176}\) When striking this delicate balance between state and federal power, the Court should never analyze the text in a vacuum.

That words have a single “plain meaning” is an anachronistic legal fiction that has no proper place in the realm of preemption analysis. As

\(^{173}\) CAA § 101, 42 U.S.C. § 7401 (2000) (declaring that the purpose of the CAA is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”).

\(^{174}\) See discussion of CAA §§ 246 and 209(a) supra text accompanying notes 163-169 (finding Congress expressly allowed purchase restrictions on one hand and prohibited them, as the enforcement of proscribed standards, on the other); discussion of §§ 202-206 and 209(a) supra text accompanying notes 158-162 (§§ 202-206 set standards enforced exclusively against manufacturers and § 209(a) now proscribes standards enforced by any means against any party).

\(^{175}\) The second sentence of § 209(a), see supra text accompanying note 150.

Justice Traynor explained in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging*:

A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.\(^\text{177}\)

Words have no absolute and constant referents; rather, they vary based on verbal context, surrounding circumstances, the purposes of their use, and the linguistic education and experience of the parties who both read and write them.\(^\text{178}\) Thus, the exclusion of outside information that reveals these surrounding circumstances, context, and purpose could "easily lead to the attribution to a written instrument of a meaning that was never intended."\(^\text{179}\) It may be fair for courts to bind contracting parties to the judicially interpreted and assigned meanings of particular terms, as ignorance of the law, including the legal effect of using a particular term, is no excuse. In the case of preemption, however, there exist no such reasonable grounds for ignoring the drafters' intent. As congressional intent is dispositive of the existence and scope of preemption, the Court should never derive that intent from the words of the statute alone when relevant extrinsic evidence is available.

If the legislative history is silent, then the Court may more safely judge the term unambiguous and construe it according to its ordinary meaning, as no evidence would exist to show that Congress intended the term to have a more nuanced definition than that contained in a standard dictionary.\(^\text{180}\) If the legislative history affirmatively indicated either that the term was or was not intended to be understood by its common and plain meaning, then the Court, in making a determination consistent with that expression of intent, would stand on surer ground still. Once it

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\(^\text{179}\) *Pacific Gas & Elec. Co.*, 442 P.2d at 645.

\(^\text{180}\) However, in cases where such a finding would cause federal law to intrude into an area of traditional state concern, the presumption against preemption applies and could be construed as to require a finding of no preemption. Thus, it may be appropriate for congressional silence to permit preemption only where no reasonable interpretation of the statute's relevant terms would lead to a construction that would save the state statute, i.e., in cases where Congress could not have reasonably intended the statute *not* to have preclusive effect. To carry the approach this far may be a mistake, however, as it would practically necessitate lengthy congressional debates and findings over the precise scope of preemption in order for a given statute to have preclusive effect. This would be inefficient, an unreasonable demand of the co-ordinate elected branches, and could even prompt the collusive creation of biased legislative history directed at the courts.
decided whether the plain meaning of a given term was proper, the Court could continue in its traditional course: applying the plain meaning or interpreting the word in light of the legislative history and through the application of the canons of construction. The Court would still be free, in its discretion, to hold that Congress intended a term to have a meaning inconsistent with the legislative history, especially where the history itself was ambivalent, but only where it was able to provide a persuasive justification for its contrary interpretation.

This interpretive method would have a number of advantages over the "plain meaning" approach. It would obviate the need for Congress to rely on the inclusion of innumerable terms in definition sections where the meaning of those terms would be plain when interpreted in light of the purpose of the statute in which they are found, saving the use of such explicit definitions for words used in truly novel ways. Even more importantly, though, it would assist the Court in giving effect to the true will of Congress, the ultimate goal of statutory construction. Moreover, this approach would enhance the legitimacy of the Court's final determination because the decision would be based on all relevant and available information.

C. Why "Standard" is Ambiguous in the Context of CAA Section 209(a)

The multiplicity of reasonable interpretations of the word "standard" in the context of Section 209(a) makes "plain" only that the word has no definitive meaning. Thus, the "plain meaning" approach was an inadequate means to determine which construction was intended by Congress and the Court should have instead construed the term in light of the purpose, structure, and legislative history of the CAA.

Even before looking outside of the text of the CAA itself, there are indications that the meaning of the word "standard," as used in Section 209(a), is not unambiguous. That the word is susceptible to multifarious interpretations is made obvious by the fact that even a common household dictionary lists eleven definitions of "standard."181 In addition, when the CAA speaks of standards, it does so with reference to the enforcement of those standards against engine manufacturers.182 This indicates that "standards" as used in the CAA may be intrinsically linked to enforcement and thus understood as existing solely where enforced against manufacturers. Furthermore, as detailed above, using the "plain meaning" chosen by the Court results in inconsistencies between various sections of the CAA and reduces a substantial portion of the preemption provision to surplusage. Yet additional support for a construction

181. WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 3d Ed. 1306 (1997).
PRESUMPTUOUS PREEMPTION

contrary to the Court’s is that adherence to its “plain meaning” interpretation would logically result in the preemption of voluntary incentive programs and local government purchasing decisions. Thus, even the text itself indicates there is more than one potential interpretation of “standard.” When the CAA’s purpose and legislative history is brought to bear on the question, though, the Court’s position that the term is unambiguous becomes simply untenable.

Congress has codified its belief that “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.” Section 209(a) is an exception to this underlying framework intended to ensure that Section 202 is the exclusive means by which standards relating to new vehicle emissions will be set. Thus, to achieve this objective, the meaning of “standard” in Sections 202 and 209 should be identical. As explained above, Section 202 is concerned solely with production oriented mandates. The dictionary definition provided by the Court gives Section 209 a far broader reach, suggesting it was not the construction intended by Congress.

The purpose of setting a single standard relating to production of new vehicles was to prevent “a chaotic situation from developing in interstate commerce in new motor vehicles” in which manufacturers would be forced to comply with multifarious standards. Since the Fleet Rules, as they apply only to vehicles already on the market, will not cause the chaos feared by Congress, it is at the very least questionable as to whether Congress intended for them to be preempted. That the Court’s interpretation of “standard” is inconsistent with the purpose of Section 209(a) likewise suggests that another meaning may have been intended and, thus, that the term is ambiguous.

CAA Section 246 permits precisely the kind of purchase restrictions imposed by SCAQMD, yet nowhere in its text or legislative history did Congress give any indication that it might be preempted by Section 209(a). To the contrary, the legislative history indicates that Congress not only understood but also accepted the impact the purchasing restrictions could have on production. Whereas Justice Scalia found the creation of an artificial demand impermissible in Engine Manufacturers, Senator Carl Levin noted that, despite the fact that Section 246’s purchasing restrictions would “create a substantial demand” that would give “motor vehicle manufacturers a real incentive to bring them into

production," the restrictions were "carefully designed to avoid... mandated production and sales," the real harm to be avoided.\textsuperscript{186} Since the Fleet Rules have the same purpose and effect as Section 246, it is illogical to presume that Congress intended them to be preempted while expressly authorizing Section 246. While a colorable argument might be made for conflict preemption under these circumstances, it was not raised by EMA.

In sum, even if one finds the Court's reading of the term more convincing in light of all the evidence available, it is difficult to argue that the term "standard" is not susceptible to at least two reasonable interpretations. Since the term is ambiguous, the Court should have forthrightly confronted the inconsistencies between its interpretive choice and the legislative history. At a minimum, it should have offered a persuasive justification for why, in spite of those inconsistencies, its choice was the most faithful expression of the intent of Congress. Instead, it all but ignored the indicators of congressional intent and relied on the specious assumption that the decision to use a categorical construction of a term is an unassailably objective one.

When Justice Scalia said Justice Souter "read into the unconditional words of the statute a requirement for the courts to determine which purchase restrictions \textit{in fact} coerce manufacture and which do not\textsuperscript{187}" he was right, of course; Justice Souter's conclusions are not supported by the text of Section 209(a), standing alone. He was wrong, however, to assert that Justice Souter's conclusions were erroneous. They were better informed, having taken all of the legislative history into account, and therefore not only stood on surer ground, thereby enhancing their legitimacy, but also gave effect to the will of Congress by properly limiting the achievement of the goals of the CAA only by application of the preemptive restrictions that were intended, not those that can be read into ambiguous drafting. While the district court went too far in finding that purchase restrictions could never be a standard, the appropriate reading would be to interpret regulations as being preempted where they set a standard that coerces manufacturers to produce a "third car." As the Fleet Rules were carefully drafted to avoid having such a coercive effect, they are not preempted by CAA Section 209(a).\textsuperscript{188}

\textsuperscript{186} A Legislative History of the Clean Air Act Amendments of 1990, S. Comm. on Public Works, 103d Cong., 1st Sess. 7209 (1993).
\textsuperscript{188} An additional consideration that might support this outcome, a full discussion of which is beyond the scope of this Note, is the balance between the costs and benefits of preemption. As a matter of general policy, it may be beneficial for judges to weigh the gravity of the potential harm against the salutary effects of preemption in a particular case to inform their understanding of congressional intent. It is not infeasible that Congress would not have intended its federal program to go forward unfettered where the relative value of that program was outweighed by interests a particular state sought to protect.
IV. IMPLICATIONS

A. The Uncertain Future of the Presumption Against Preemption

Based on the potential reasons why the Court reached the conclusion it did in the instant case, as well as a review of its environmental and federalism decisions of the last three decades, the best prediction that can be made is that where a state statute has implemented a substantively liberal position, particularly one concerning the protection of the environment, it is unlikely to be afforded the increased protection and deference of the presumption against preemption by the Supreme Court.

The first court to squarely address the issue after considering the holding in Engine Manufacturers, a California Court of Appeal, held that the presumption against preemption persists, at least in cases of implied preemption and at least until the Supreme Court issues a clearer mandate to the contrary.\textsuperscript{189} The distinction between express and implied preemption central to the Court's reading of Engine Manufacturers, that

\textsuperscript{189} Bronco Wine Co. v. Jolly, 95 P.3d 422, 430 n.12 (Cal. 2004). In Bronco, the plaintiff, relying on, \textit{inter alia}, the recent Engine Manufacturers decision, asserted that the presumption against preemption is categorically inapplicable in implied preemption cases, in which the question is whether state law would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The court responded in Engine Manufacturers the court simply found it unnecessary, because of its conclusion that the federal legislation \textit{expressly} preempted the relevant state law, to address the presumption against preemption or even the legislative history of the federal statute. We discern no persuasive reason why the traditional presumption against preemption should be categorically inapplicable in the present circumstances, and until the high court directs otherwise, we reject Bronco's view on this point.
where preemption is express the presumption against preemption does not apply, is worth considering, but it is important to note that the Court itself made no such distinction. The majority in *Engine Manufacturers* made no attempt to justify its choice to forego the presumption save its stating that the presumption, like the use of legislative history, was a "method[, on which not all Members of this Court agree." In fact, the critical question in *Engine Manufacturers* was not so much whether the presumption would apply to determine whether the express preemption proviso of Section 209(a) would be given any effect, but rather to determine what the scope of that preemption would be. In addition, the Court evidenced its clear willingness to apply the presumption in a case of express preemption in *Medtronic, Inc* and it is unlikely it intended to overrule such a significant, oft-cited case *sub silentio*. Thus, it appears that the relevant question is not whether the presumption still exists, but when and under what circumstances it will be employed in the future.

Drawing clear lines to predict when the Court will and will not invoke the presumption is tempting, but, at least on the basis of the record so far, it appears unlikely that such lines could be drawn accurately based on analysis of its opinions alone. Nevertheless, examining the possible motives for why the Court reached the outcome it did in *Engine Manufacturers*, which necessitated abandoning the presumption against preemption to tip the balance in favor of the majority’s interpretation, may shed some light on the circumstances under which the Court may choose not to employ the doctrine in the future. The Court’s decision may be explained by a combination of the following: (1) its perception that the *Engine Manufacturers* decision was relatively inconsequential, (2) its increased willingness to abandon its traditional approach to federalism in order to reach a substantively conservative outcome, and (3) its lack of appreciation, interest, and understanding of (or even antipathy towards) environmental law.

First, the Court may have thought there was little at stake in the litigation or that its ruling, hemmed in by the number of questions it left to resolution on remand, would have a minimal impact. For example, the district court devoted nine pages to placing the decision it was about to make in context. It focused on the reality of the situation in California, that particulate matter from diesel exhaust was “the most significant individual toxic air pollutant in the Basin, accounting for fully seventy-one percent (71 percent) of the air-borne cancer risk” and that “[m]ore than ninety-percent (90 percent) of the particles emitted from diesel engines are fine particles... shown to lead to higher mortality rates,

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greater occurrences and severity of asthma, cardiovascular disease, and potentially to a higher incidence of cancer.” While the inclusion of such statistics would have undermined the majority’s opinion and their absence is therefore unsurprising, even the dissent referred only generally to the abstract issue of pollution and did not focus on or appear to consider or comprehend the deadly impact diesel emissions have on the people of the Basin. The only reference cited by Justice Souter relating to the region’s air quality was that, per the United States’ amicus brief, it was the only ozone “extreme non-attainment” area as defined by the CAA. Discussion of the consequences of the presence of such an extreme quantity of ozone, the presence of other lethal airborne pollutants, and the causal relationship between diesel exhaust and this persistent problem was conspicuously absent. That the Court believed its ruling would have reduced significance in the wake of the lower court’s ruling on the questions it left for remand and, thus, that its ruling was more palatable, is suggested by an excerpt from oral arguments. There, one Justice said “we’re talking about some garbage trucks, I think, and some airport vehicles because I think all the rest of it did just involve the State.” Balanced against the creation of an “artificial market” and the specter of manufacturer coercion, to permit the purchase of a few more diesel garbage trucks and airport vehicles surely must have seemed to the Court an acceptable compromise, making it far easier to side with the forceful command of Justice Scalia’s plain language argument rather than wading into the murky depths of legislative history.

Second, the Engine Manufacturers decision can be seen as part of the continuing shift in the Court’s federalism jurisprudence. A recent article by prominent constitutional scholar and Harvard law professor Richard Fallon concludes that “although the Court has moved aggressively to advance federalism through well-known doctrines, it frequently proves more substantively conservative than it does pro-federalism when deference to state processes would shield liberal outcomes from federal reversal.” In the context of preemption cases in particular, Fallon notes “the unwillingness of the Rehnquist Court consistently to enforce a robust presumption against preemption,” a position supported by the fact that the Court found state statutes or causes of action preempted in twenty-two out of the thirty-five cases where the issue arose since Justice

192. Id. at 1109.
193. Calling the Los Angeles South Coast Air Basin “one of the most polluted regions in the United States.” Engine Mfrs. Ass’n, 541 U.S. at 259 (Souter, J., dissenting).
194. Id. at 259, n.1.
Thomas joined the Court to create the “pro-federalism five-member majority.” The *Engine Manufacturers* decision, with its federal reversal of what is most easily characterized as a liberal policy that protected the environment by regulating businesses, fits perfectly into the Fallon paradigm.

Finally, the decision may be explained by what Richard Lazarus has described as the Supreme Court’s “apathy and possible antipathy towards environmental protection.” Lazarus has conducted extensive empirical research into the Supreme Court’s jurisprudence in natural resources and environmental law, examining all relevant opinions from 1969 forward. He notes, as a preliminary matter, that the Court rarely grants certiorari when review is sought by environmental public interest organizations and usually reviews only lower court decisions favorable to environmentalists. This results in a skewed docket in which the Court hears only those cases “that present an opportunity to say that lower courts erred in taking environmental protection too far.” The central theme to Lazarus’s work is not necessarily that the justices of the Court are openly hostile to environmental law but that they fail to sufficiently account for its unique attributes as well as its status as a distinct and independently evolving area of the law, leading to increasingly poorly reasoned decisions. That is except in the case of the author of *Engine Manufacturers*, Justice Scalia, whose decisions lend themselves to another, less benign, explanation. Lazarus has assigned each of the Court’s justices a score based on the percentage of pro-environmental votes cast, with the highest scores indicating the most environmentally friendly justices. Writes Lazarus:

197. *Id.* at 462. “Indeed,” Fallon writes, “during the Court’s 1999 and 2000 Terms, the Court decided seven preemption cases and held that federal law preempted state law in all of them.” *Id.* at 462-63.


199. *Id.* at 3.

200. Doing so on “only two or three occasions” out of 89 cases the twenty year period surveyed. Richard J. Lazarus, *United States Supreme Court Roundup*, American Law Institute - American Bar Association Continuing Legal Education, ALI-ABA Course of Study 47, 49 (Feb. 11-13, 2004).

201. “More than three fourths of those cases reviewed decisions favorable to environmentalists.” *Id.*

202. *Id.*

203. Lazarus, *supra* note 198, at 2 (finding that the Court’s “decisions and votes increasingly suggest a lack of appreciation of environmental law as a distinct area of law.”); Richard J. Lazarus, *Environmental Law and the Supreme Court: Three Years Later*, 19 PACE ENVT'L. L. REV. 653, 655 (2002) (describing the purpose of his earlier work as revealing that “there is something distinctively ‘environmental’ about environmental law and that the Court’s increasing inability to appreciate that dimension was leading to more poorly-reasoned decisions and results.”).

The low score goes to Justice Scalia with a score just below fourteen, which is strikingly low. It is a score so low that one can fairly posit that Justice Scalia perceives environmental protection concerns as promoting a set of legal rules antithetical to that which he favors. Indeed, the kind of legal system promoted by environmental law seems to be of sufficient concern that it even prompts Justice Scalia sometimes to abandon his views on core matters involving constitutional and statutory interpretation.205

Thus, in light of the above, it appears more likely than not that where a state statute has implemented a substantively liberal position, particularly if it concerns the protection of the environment, it will not be afforded the increased protection and deference of the presumption against preemption by the Supreme Court.

B. The Fleet Rules After Engine Manufacturers

Following the Engine Manufacturers decision, SCAQMD moved aggressively on two fronts to mitigate the effects of the ruling and ensure the continued success of its program: it informed fleet operators of its continued intent to enforce the Fleet Rules and began the process to obtain a formal waiver of preemption from EPA.

On May 26, 2004, less than a month after the Supreme Court issued its opinion in Engine Manufacturers, SCAQMD responded with an advisory notice to fleet owners subject to the Rules.206 It stated that the Fleet Rules would remain in full force and effect as applied to state and local public entities, but that they would not be affirmatively enforced against private entities, even those under public contracts.207 It nevertheless appealed to fleet operators to "continue purchasing clean-fuel vehicles to benefit the environment" and to consider, when making purchase decisions, that SCAQMD was actively pursuing administrative means to make the Rules universally enforceable once more.208

On June 6, 2004, SCAQMD's Governing Board took the first step in seeking a formal federal waiver of preemption from the EPA Administrator in order to fully reinstate the Fleet Rules. It concluded that the Fleet Rules were at least as protective as the federal standards and that vehicles purchased pursuant to the Rules would be as clean or cleaner than federally certified vehicles.209 It next requested that the California Air Resources Board make similar findings so that the Rules
could be presented to EPA.\textsuperscript{210} EPA would then be required to issue the waiver unless it found that (1) the determination of the State was arbitrary and capricious, (2) the standards were not required to meet compelling and extraordinary conditions, or (3) the standards were inconsistent with 42 U.S.C. Section 7521(a).\textsuperscript{211} Only the second requirement would pose any difficulties and, given the findings of SCAQMD's MATES-II study, they should be overcome.

If EPA were to grant California a waiver permitting the implementation of the Fleet Rules, CAA Section 177 would permit other states to piggyback onto this innovative approach to reducing hazardous pollution. Section 177 permits any state to adopt standards identical to California's provided they are adopted at least two years before the beginning of the automobile model year to which they apply.\textsuperscript{212} This requirement highlights the unintended consequences and difficulty in adopting the Court's tortured interpretation of what constitutes a "standard." The requirement is intended to provide engine manufacturers time to develop compliant vehicles. However, because vehicles that comply with the Fleet Rules are already in existence, it creates an unnecessary additional delay in the implementation of the Fleet Rules. This is especially significant considering the pace of technological innovation, the fact that the Fleet Rules are already five years old, and that, in the forty-two months Congress provided states to implement the more pervasive federally fueled fleet program of Section 246, its requirements became so obsolete as to make the program irrelevant.\textsuperscript{213}

\textbf{CONCLUSION}

In the end, EMA may have won a Pyrrhic victory. Given SCAQMD's finding that 90 percent of the airborne cancer risk to residents of the Basin results from mobile sources, the agency should have little difficulty in establishing the special need required to obtain a waiver from preemption. The Fleet Rules will then not only apply statewide but may also be adopted by opt-in states around the country.

\begin{footnotesize}
\textsuperscript{210} As recently as January 28, 2004, the California Air Resources Board had failed to act despite persistent requests by SCAQMD. Letter from Barry R. Wallerstein, Executive Officer, SCAQMD, to Catherine Witherspoon, Executive Officer, California Air Resources Board, \textit{supra} note 2.


\textsuperscript{212} CAA § 177, 42 U.S.C. § 7507 (2000). Note, too, besides the fact that the standards must be identical, California must, in fact, enforce those standards for them to be available for implementation by other states. American Auto. Mfrs. Ass'n v. Cahill, 152 F.3d 196, 201 (2d Cir. 1998) (holding that, because California ceased to enforce its Zero Emissions Vehicle requirements, it was no longer a "California standard" under the meaning of the CAA, and New York could not piggyback).

\textsuperscript{213} See \textit{supra} text accompanying notes 19–25, 48.
\end{footnotesize}
Unfortunately, environmentalists may have similarly little to celebrate in the wake of the Supreme Court's evincing a clear predilection for permitting preemption, and abandoning the presumption to the contrary, in environmental cases where preemption advances a substantively conservative position. Conservative politicians are now in control of both elected branches of the federal government and the Court has effectively eliminated the last remaining means by which any federal efforts to weaken environmental protection could have been mitigated: local control.