CALIFORNIA'S AUTHORITY TO REGULATE MOBILE SOURCE GREENHOUSE GAS EMISSIONS

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INTRODUCTION

In recent years, the pendulum has swung away from environmental regulation by the federal government towards a greater role for the states. In 1995, Robert V. Percival wrote, "the landscape of federalism appears to be shifting toward the states after decades of moving in the opposite direction. This could have profound implications for national environmental policy."[1] Nearly a decade later, this statement has even greater force. While the federal government "shies away" from environmental regulation, "state regulators are jumping in to tackle the job—and in the process taking over some of the federal government's traditional roles."[2]

This Note examines one state's recent passage of ambitious environmental regulation. On July 22, 2002, Governor Gray Davis signed into law unprecedented legislation that would make California the first state to regulate greenhouse gas emissions from motor vehicles.[3] The *New York Times* lauded the legislation as "unquestionably the most important step taken in this country to control greenhouse emissions since 1998, when the Clinton administration signed the Kyoto Protocol . . . ."[4] Arguably, preemption provisions

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1. Robert V. Percival, Symposium, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1142 (1995).

2. John J. Fialka, *States Are Stepping in to Reduce Levels of Carbon Dioxide*, WALL ST. J., Sept. 11, 2001, at A28.

3. *See, e.g.*, Gary Polakovic & Miguel Bustillo, *Davis Signs Bill To Cut Greenhouse Gases*, L.A. TIMES, July 23, 2002, at A1.

4. Editorial, *California Leads on Warming,* N.Y. TIMES, July 8, 2002, at A18; *see also* Dion Nissenbaum, *State Takes Aim at Auto Emissions,* San Jose Mercury News, July 2, 2002, at 1A (quoting Nancy Ryan, an economist with Environmental Defense (a nonprofit environmental advocacy organization), who called the bill "the biggest environmental legislation to pass in the last 20 years"), http://

in the Clean Air Act[5] and the Corporate Average Fuel Economy (CAFE) statute[6] preclude California from regulating such emissions. An examination of California's authority to regulate greenhouse gas emissions highlights the larger issue of how state efforts to establish environmental regulations may be constrained by federal statutes alleged to preempt state action.[7]

Part I of this Note discusses the rise in the state regulatory movement, particularly in the area of emissions regulation. Part II then outlines California's recently-enacted legislation to curb greenhouse gas emissions—California Assembly Bill 1493 (AB 1493). The Note then explores whether California's regulation is preempted: Part III provides a brief overview of general preemption law; Part IV analyzes preemption under the Clean Air Act, with Part V addressing the related issue of whether there is authority to regulate greenhouse gases under the Clean Air Act; and Part VI examines preemption under the CAFE statute. This Note concludes that California retains substantial authority to regulate greenhouse gas emissions from motor vehicles. While California is clearly prohibited by the CAFE statute from enacting a fuel economy standard, the state retains authority under the CAFE statute and the Clean Air Act to impose a supply-side emissions-per-mile standard on manufacturers. Furthermore, the CAFE statute does not preclude California from enacting demand-side programs that encourage consumers to purchase vehicles with lower greenhouse gas emissions.[8] Thus, California's AB 1493 represents an important opportunity for meaningful greenhouse gas emissions regulation, and illustrates the power of states to promulgate policies to fill the federal environmental regulatory void.

www.bayarea.com/mld/mercurynews/news/politics/3585236.htm (last visited Oct. 24, 2002).

5. 42 U.S.C. § 7543 (1994).

6. 49 U.S.C. § 32919 (1994).

7. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 557 (2001) (arguing that one "increasingly negative feature[ ] of federal regulation [is] the threat of federal preemption of more stringent state standards").

8. Throughout this paper I use the term "supply-side" to refer to regulations imposed on manufacturers who supply automobiles, and the term "demand-side" to refer to regulations and policies that encourage consumers to reduce their vehicle greenhouse gas production.

I.
THE RISING STATE REGULATORY MOVEMENT

The "growing deregulatory movement in Washington" has prompted state officials to "mov[e] swiftly to fill what they perceive as voids in areas like antitrust, environmental law, consumer safety, telecommunications, banking, health care, and energy."[9] The rise of state involvement is "reminiscent of . . . the Reagan administration, when the perception of lax enforcement prompted a core group of state prosecutors and lawmakers to form new alliances."[10] States have promulgated environmental regulations in a wide range of areas, including automobile emissions, hazardous waste, and municipal solid waste.[11] The increasing focus on promulgating regulation at the state, rather than federal, level has altered the strategies employed by advocates of more stringent regulation. Interest and consumer groups have turned their attention to achieving state and local reform,[12] in the face of what appears to be an insurmountable stalemate at the federal level.[13]

In the area of greenhouse gas emissions, the states have assumed a particularly active role. For example, in 2000 New Jersey became the first state to set its own target for cutting greenhouse gases through a mixture of voluntary state and corporate initiatives.[14] While New Jersey's plan achieves only modest emissions reductions, many interest groups applauded the State for "'at least engaging in action on an issue that is largely being ignored on the national level.'"[15] Similarly, in 2001 Massachusetts became "the first state in the nation to set a carbon dioxide emissions cap on

9. Stephen Labaton, *States Seek to Counter U.S. Deregulation*, N.Y. TIMES, Jan. 13, 2002, at 23.

10. *Id.*

11. *See* Revesz, *supra* note 7, at 583–626. R

12. *See* Labaton, *supra* note 9 ("Sensing that the new regulatory battles are shifting, consumer groups like AARP, which represents millions of older Americans, are moving with it."). R

13. "'In the past . . . it was easier to fix a problem at the federal level and you didn't have to go to the states. Now, when you have a problem, and you go to the federal government and don't get anywhere, you can go to the states and attract a critical mass.'" *Id.* (quoting Cheryl Martheis, director of state affairs for AARP).

14. Mark Jaffee, *N.J. Is First State to Set Greenhouse Gas Target*, PHILA. INQUIRER (South Jersey ed.), Apr. 18, 2000, at A1.

15. *Id.* (quoting Ashoka Gupta, senior energy analyst with the Natural Resources Defense Council). New Jersey's efforts have also extended to the international arena—New Jersey is currently in the process of negotiating with Canada and the Netherlands to establish a tradeable emissions credit program with New Jersey companies. *See* Fialka, *supra* note 2, at A28. R

power plants."[16] The regulation required the six largest and dirtiest power plants to cut 50-70% of sulfur dioxide (SO_2) and nitrogen oxide (NO_x) emissions, 10% of carbon dioxide (CO_2) emissions, and a currently unspecified amount of mercury releases.[17] CO_2 emissions programs are also being considered by legislatures in New York, New Hampshire, North Carolina and Florida, and the Illinois legislature has authorized the creation of a voluntary CO_2 reduction program.[18]

More specifically, with regard to mobile-source (vehicle) emissions, states have also attempted to go beyond the minimum regulatory requirements of the Clean Air Act. As elaborated below, the Clean Air Act permits states to opt into California's more stringent emissions regulation program.[19] Several states have chosen to implement some of California's rigorous programs in lieu of adhering to the more lax federal requirements.[20] Opt-in attempts have encountered significant legal resistance, with opponents often arguing that the Clean Air Act preempts states from adopting California's standards.[21] California's greenhouse gas emissions regulation—AB 1493—represents a major step forward in state regulation of motor vehicle emissions, and is therefore likely to encounter significant preemption challenges.

In contrast to these state regulatory efforts, the federal government has exhibited reluctance to regulate CO_2 emissions. The United States has pulled out of the Kyoto Protocol, an international treaty to reduce CO_2.[22] Furthermore, the Bush administration has reneged on a campaign promise to regulate CO_2, advocating mandatory limits only on NO_x, SO_2, and mercury.[23] Congress has similarly "refused to require any meaningful increase in fuel effi-

16. Chris Holly, *Massachusetts Becomes First State to Regulate Utility CO_2 Emission*, ENERGY DAILY, Apr. 24, 2001, at 1 [hereinafter Holly, *Massachusetts*].

17. *Id.*

18. Fialka, *supra* note 2, at A28. R

19. *See infra* Part IV.A.3.

20. *See* Revesz, *supra* note 7, at 588–91. R

21. *See id.* at 589–90, & n.215; *see also* Christina Caplan, *AAMA v. Massachusetts Department of Environmental Protection*, 27 ECOLOGY L.Q. 621 (2000); Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot., 163 F.3d 74 (1st Cir. 1998) (concerning Massachusetts' authority to adopt California's zero-emissions vehicle (ZEV) requirements); Am. Auto. Mfrs. Ass'n v. Cahill, 152 F.3d 196 (2d Cir. 1998) (concerning New York's authority to adopt California's ZEV requirements).

22. Fialka, *supra* note 2, at A28. R

23. Dan Balz & Dana Milbank, *On Earth Day, Bush v. Gore: Clash on Environmental Policy Evokes 2000 Battle*, WASH. POST, Apr. 23, 2002, at A1; *see also* Edwin Chen & Elizabeth Shogren, *Bush, Gore Poles Apart on Earth Day*, L.A. TIMES, Apr. 23, 2002, at A10.

ciency since the 1980s."[24] As a result, environmental groups have increasingly turned to state programs as "a way around the impasse on regulating emissions that has developed in Washington."[25] State emission control policies can function as "'reality therapy' for the utilities industry and officials in Washington who may think the climate-change issue has gone away."[26] Additionally, there may be a greater likelihood of succeeding at the state level, and particularly in California, because "[t]he auto industry doesn't have nearly as much clout in California as it does in other states or in Washington."[27] Furthermore, state regulatory policies may instigate industry support for federal environmental legislation because of concerns that decentralized regulation will require compliance with a diverse set of state standards.[28] The prospect of having to improve California fleet fuel efficiency may make a national policy more appealing to an auto industry that fears the consequences of being exposed to fifty different regulatory standards.[29]

California's AB 1493 is illustrative of the "growing effort by local, state and foreign governments to seize the initiative since President Bush has been reluctant to act."[30] Supporters of the bill have

24. *California Leads on Warming*, *supra* note 4. R

25. Fialka, *supra* note 2, at A28. R

26. *Id.* (quoting David Doniger, a climate change specialist at the Natural Resources Defense Council).

27. Gary Polakovic, *Assembly Bill Targets Global Warming Trend*, L.A. TIMES, Jan. 26, 2002, at B1 (quoting Dan Sperling, director of the Institute for Transportation Studies at University of California, Davis); *see also* Chris Holly, *California Assembly Approves Bill to Regulate Auto CO_2*, ENERGY DAILY, Feb. 1, 2002, at 1 [hereinafter Holly, *Assembly Approves*] (stating that "the industry's legendary lobbying clout may be least potent in California").

28. *See, e.g.*, Holly, *Massachusetts*, *supra* note 16 (In response to the Massachusetts regulation, "A utility industry official in Washington said the industry is concerned that if more states adopt multi-pollutant legislation, utilities will face a patchwork of regulations that could threaten competition. This is one reason why many utilities want federal multi-pollutant legislation . . . ."); Maureen Lorenzetti, *Small World,* OIL & GAS J., Nov. 12, 2001, at 28 ("Yet even more distressing to [energy executives] are states seeking mandatory carbon dioxide emission reductions in the absence of federal standards."). R

29. *See* Holly, *Assembly Approves*, *supra* note 27 ("The vote is significant because it raises the stakes in the U.S. Senate, where Republicans hope to turn back a Democratic bid to tighten nationwide corporate average fuel economy (CAFE) standards."). R

30. Polakovic, *supra* note 27; *see also* Editorial, *Calif. Steers Right Course*, USA TODAY, July 26, 2002, at A11 ("California has strong reasons to fight the pollution that threatens its resources, especially when it's getting so little help from the federal government. President Bush opposes the international treaty to reduce greenhouse gases that was signed in Kyoto, Japan, and hasn't offered effective domestic solutions for curbing the emissions."); William Booth, *California Takes the Lead in* R

openly acknowledged that the bill is a reaction to federal inaction. Winston Hickox, secretary of the California Environmental Protection Agency, remarked at the bill signing, "[t]he Gray Davis administration is leading the way for the country because Washington, D.C. has failed to lead."[31] Similarly, Assemblywoman Fran Pavley, author of AB 1493, remarked that, especially in light of the Bush administration's decision not to join with other nations to combat global warming, "[w]e need to do our fair share."[32] Both supporters and opponents have similarly recognized the significant implications of the legislation for national policy. Jon Rainwater, executive director of the California League of Conservation Voters, remarked, "[t]his enactment of this new law is a huge wake-up call for President Bush. . . . If the White House refuses to lead on critical environmental issues like global warming, we will continue to fight for these issues at the state level."[33] Similarly, the auto industry's recognition of the significance of the California legislation prompted a "multimillion-dollar advertising blitz and lobbying effort . . . ."[34] James Boyd, former executive director of the California Air Resources Board (CARB), remarked, "[s]ome members of the industries view these regulations in California as a cancer—if you don't kill it here, it will spread throughout the country. . . . That explains the viciousness of the campaign against the bill."[35]

The California program is particularly significant because of California's unique position under the Clean Air Act. As elaborated below, California may be the only state that retains the authority to

Auto Emissions Crackdown, WASH. POST, May 5, 2002, at A2 ("While Congress and the Bush administration debate what steps the nation may take to confront the specter of global warming, California appears ready to pass the first bill of its kind to control the carbon dioxide emissions of passenger automobiles and light trucks.").

31. Gina Keating, *California Governor Signs Landmark Auto Emissions Bill*, REUTERS, July 23, 2002, *at* http://enn.com/news/wire-stories/2002/07/07232002/s_47915.asp (last visited Dec. 31, 2002).

32. Carl Ingram, *Senate Panel Votes to Cut Auto Emissions*, L.A. TIMES, Apr. 2, 2002, at B6 (quoting Assemblywoman Fran Pavley); *see also* James P. Sweeney, *State on Track to Be First to Order Vehicle Emission Cuts*, SAN DIEGO UNION-TRIB., May 3, 2002, at A1 (quoting California Senator Debra Bowen, "California can and should take the lead when the federal government refuses to do what Californians support.").

33. *California Governor Gray Davis Signs Groundbreaking Global Warming Bill*, ASCRIBE NEWSWIRE, July 22, 2002, LEXIS, News Library, ASCRBE File.

34. *See* Jeff Plungis, *Ad Blitz Stalls Emissions Bill*, DETROIT NEWS, May 23, 2002, at 1B.

35. Chris Bowman, *State Hopes to Pave Way With Emissions Law*, SACRAMENTO BEE, July 22, 2002, at A1.

implement a vehicular greenhouse gas emissions policy; however, once California has acted, other states are permitted under the Clean Air Act to adopt identical programs. In signing the legislation, Governor Gray Davis specifically acknowledged that California's legislation is intended to provide leadership in the area of automotive greenhouse gas legislation, remarking, "[w]e are going to set an example for the rest of the country. . . . I am convinced that other states will follow."[36] Several states, including New York and Connecticut, have indicated that they will follow California's lead.[37] In addition, in a recent letter to President Bush, eleven state Attorneys General urged the President to enact greenhouse gas legislation, and indicated that in the absence of federal action they would continue "[t]o fill this regulatory void . . . [through] state-by-state regulations and litigation . . .,"[38] specifically referencing California's vehicle greenhouse gas legislation.[39] While the Attorneys General emphasized that "state-by-state action is not our preferred option," they also made clear that "[c]ontinued federal inaction will inevitably lead to a wider range of state regulatory efforts."[40] Thus, in the face of federal inaction, AB 1493 presents an important opportunity for meaningful greenhouse gas regulation, as well as "another reminder, if any were needed, of how sluggish the national government has been in addressing the threat of global climate change."[41]

II.
CALIFORNIA'S LEGISLATION

California's recent enactment of AB 1493 makes it the "first state to regulate exhaust emissions to reduce global warming."[42] The legislation requires that "[n]o later than January 1, 2005, the state board shall develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas

36. Polakovic & Bustillo, *supra* note 3 (quoting Governor Gray Davis). R

37. *California Governor Gray Davis Signs Groundbreaking Global Warming Bill*, *supra* note 33. R

38. Letter from State Attorneys General to President George W. Bush, July 17, 2002, at 1, http://www.energy.ca.gov/global_climate_change/documents/2002-07-17_AGs_letter.pdf (last visited Jan. 11, 2003).

39. *Id.* at 3.

40. *Id.*

41. *California Leads on Warming*, *supra* note 4. R

42. Carl Ingram, *Senate Passes Alternate Exhaust Emissions Bill*, L.A. TIMES, June 30, 2002, at B8.

emissions from motor vehicles."[43] Any regulations adopted would not take effect until January 1, 2006, in order to provide sufficient time for legislative review, and would apply only to motor vehicles manufactured in the 2009 model year or later.[44]

AB 1493 is the result of a long and intense legislative battle. AB 1493 was originally proposed as AB 1058. AB 1058 passed the California Assembly on January 30, 2002 by the "razor-thin margin" of 42-24 votes.[45] On May 2, 2002, the California Senate approved the bill in a 22-13 vote.[46] The bill then headed back to the Assembly for agreement on Senate changes.[47] However, when AB 1058 stalled as a result of political opposition and an aggressive lobbying campaign by the auto industry, the Senate passed a slightly modified alternative to the original by a 23-16 vote on June 29, 2002.[48] On July 1, 2002, the California Assembly passed AB 1493 (reflecting the Senate's changes to the original bill), obtaining the minimum 41 votes required for passage, and the bill was sent to Governor Davis for signature.[49]

43. 2002 Cal. Legis. Serv. Ch. 200, §3(a) (West). While an earlier Assembly version of the bill regulated only carbon dioxide, A.B. 1058, § 2(a) , 2001–02 Leg., Reg. Sess. (Cal. 2001) (as amended May 31, 2001), WL 2001 CA A.B. 1058 (SN), the bill was amended in the Senate to include all greenhouse gases. This amendment increases the range of measures that can be taken to decrease emissions—for example, automakers may be able to reduce emissions by changing the chemicals used in vehicle air conditioners. *See* Timm Herdt, *Assemblywoman's Global-Warming Bill Draws Notice,* VENTURA COUNTY STAR, Feb. 12, 2002, at A1. As a result, the change may make the bill less susceptible to claims that it is an indirect means of regulating fuel economy, *see infra* note 56 and accompanying text. For the purpose of this Note, the distinction between the Assembly and Senate versions is not critical; rather, this Note evaluates the ability to regulate both CO_2 and greenhouse gases more generally. R

44. 2002 Cal. Legis. Serv. Ch. 200, §3(b)(1). AB 1493 provides that in developing regulations, CARB shall grant emissions reduction credits for any greenhouse gas emissions reductions prior to the regulations' operative date. 2002 Cal. Legis. Serv. Ch. 200, § 3(c)(5)(A).

45. *Environmental Entrepreneurs'* [sic] *Announce 42-24 Vote Passage of AB 1058*, PR NEWSWIRE, Jan. 30, 2002, LEXIS, News Library, PRNEWS File. The California Assembly consists of 80 members, *see* CAL. CONST. art. IV, § 2(a). A majority vote (i.e., 41 votes) is required for passage, *see* CAL. CONST. art. IV, § 8(b).

46. Jim Wasserman, *Senate OK's Bill to Limit Carbon Dioxide in Exhaust*, CONTRA COSTA TIMES, May 3, 2002, at 16, *at* 2002 WL 1739936.

47. *Id.*

48. Ingram, *supra* note 42, at B8. R

49. *See* Nissenbaum, *supra* note 4, at 1. Governor Davis signed AB 1493 on July 22, 2002. Press Release, Office of the Governor of the State of California, Governor Davis Signs Historic Global Warming Bill (July 22, 2002), *at* http://www.governor.ca.gov/state/govsite/gov_homepage.jsp (last visited Jan. 11, 2003). R

The modified bill responds to some of the criticisms of earlier versions by explicitly precluding the California Air Resources Board (CARB) from enacting a number of measures to reduce greenhouse gases, including fuel or vehicle taxes, a ban on the sale of any vehicle category, a reduction in vehicle weight, lower speed limits, or a limitation of vehicle miles traveled.[50] The law also enables CARB to elect not to adopt greenhouse gas regulations if the federal government adopts regulations of "equivalent or greater effectiveness" in a substantially similar time frame.[51]

AB 1493 is targeted at "control[ling] and reduc[ing] . . . emissions of greenhouse gases [which is] critical to slow the effects of global warming."[52] California motor vehicle emissions significantly contribute to global greenhouse gas emissions. As the world's fifth-largest economy, California is responsible for 7% of global CO_2 emissions, despite being home to only 0.5% of the world's population.[53] Transportation contributes 58% of the state's CO_2 emissions, with 40% of total emissions coming from passenger cars and light trucks.[54] AB 1493 will regulate these passenger car and light truck emissions.

Along with challenging the merits of AB 1493, opponents, largely comprised of automakers, argue that California has no authority to address greenhouse gas emissions. First, opponents contend CO_2 regulation is equivalent to fuel economy regulation, which is preempted by CAFE.[55] Opponents contend that AB 1493 is a "sneaky way" for the state to get around the federal prohibition of state fuel economy standards.[56] The auto industry has advanced a similar argument in a lawsuit challenging California's zero-emis-

50. 2002 Cal. Legis. Serv. Ch. 200 §3(d) (West).

51. *Id.* at § 3(h).

52. *Id.* at § 1(c).

53. *Vehicular Emissions: California Committee Analysis Before the Assembly Committee of Transportation,* Apr. 16, 2001, LEXIS, California Library, CACOMM File [hereinafter *Vehicular Emissions Analysis*]; Greg Lucas, *Push to Pass Greenhouse Gas Measures,* S.F. CHRON., Jan. 22, 2002, at A15, LEXIS, News Library, SFCHRON File.

54. Chris Holly, *California Assembly Taking Up Measure to Cut Vehicle CO_2*, ENERGY DAILY, Jan. 29, 2002, at 1 [hereinafter Holly, *Assembly Taking Up*].

55. *Vehicular Emissions Analysis*, *supra* note 53. R

56. Editorial, *Putting the Break on Greenhouse Gases*, SAN JOSE MERCURY NEWS, Jan. 25, 2002, LEXIS, News Library, SANJOS File; Holly, *Assembly Taking Up*, *supra* note 54 ("Automakers say the bill is a back-door effort to impose tighter vehicle fuel economy standards in the state . . . ."); *see also* Herdt, *supra* note 43 (quoting R Kris Kiser, vice president for state affairs of the Alliance of Automobile Manufacturers: "We call it the California CAFE. . . . We believe it's a back-door attempt at regulating mileage.").

sion vehicle (ZEV) mandate.[57] Second, opponents argue California is prohibited from regulating CO_2 under the Clean Air Act because the state's regulatory authority only extends to gases that create localized pollution problems[58] (which CO_2 does not because it is dispersed globally). The auto industry has already announced its intention to challenge the legislation in federal court.[59]

While as discussed above, AB 1493 prohibits certain regulations from being adopted, it does not outline specific policy measures to achieve emissions reductions. Rather, it merely directs CARB to adopt regulations by 2005.[60] A variety of regulations for attaining reductions in greenhouse gas emissions have been discussed, including variable valve timing (which controls greenhouse gases produced during fuel combustion by opening and closing piston valves), extra gears on automatic transmissions, improved seals on air-conditioners to prevent refrigerant leaks, smoother-rolling tires, an increase in natural gas fuels, increased sales of hybrid gasoline-electricity vehicles, improvements in fuel efficiency, lightweight materials to cut vehicle weight, and even credits for telecommuting.[61]

57. *See* Alan Ohnsman & Michael B. Marois, *California Passes Bill to Curb Vehicle Carbon Dioxide,* BLOOMBERG NEWS, Jan. 30, 2002, LEXIS, News Library, ALLBBN File. On June 11, 2002, the District Court for the Eastern District of California granted a preliminary injunction against the zero-emission vehicle program. *See* Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Board, No. CV-F-02-5017 (E.D. Cal. June 11, 2002) [on file with author]. California and environmental groups have appealed the injunction to the Court of Appeals for the Ninth Circuit. *See* Bob Egelko, *Bush Hits State's Emission Rules,* S.F. CHRON., Oct. 10, 2002, at A1. In a "marked departure from the federal government's long-held practice of supporting California's efforts to clean up its smoggy air," the Bush administration has filed an amicus brief in support of the auto industry's opposition to the ZEV regulations. Elizabeth Shogren, *Calif. Overstepped Authority on 'Clean' Cars,* L.A. TIMES, Oct. 10, 2002, at A25, 2002 WL 2509597; *see also* Katharine Q. Seelye, *White House Joins Fight Against Electric Cars*, N.Y. TIMES, Oct. 10, 2002, at A22, LEXIS, News Library, NYT File. The outcome of the litigation may have important implications for challenges to AB 1493. Furthermore, the federal government's unprecedented involvement suggests that it may also vigorously challenge California's efforts to regulate greenhouse gas emissions.

58. *Vehicular Emissions Analysis, supra* note 53. R

59. *See* Jim Wasserman, *Experts See Many Ways to Cut Contributions to Global Warming,* AP WIRE, July 6, 2002, LEXIS, News Library, AP File (explaining that the Alliance of Automobile Manufacturers, a consortium of 13 automakers, is "vowing to explore 'any option' to block the bill if it becomes law, including lawsuits. . ."); *see also* Polakovic & Bustillo, *supra* note 3. R

60. *See supra* notes 43–44 and accompanying text. R

61. *See* Polakovic & Bustillo, *supra* note 3; Wasserman, *supra* note 59. R

Greenhouse gas emissions reduction policies can be divided into two broad categories: (1) supply-side regulations that require manufacturers to produce cars that emit less greenhouse gas; and (2) demand-side regulations that provide financial incentives (e.g., taxes and credits) for individuals to purchase cars that emit less greenhouse gas. Demand-side regulations, such as tax incentives for more fuel-efficient vehicles, are largely precluded by the amended bill's restrictions.[62] As a result, this Note primarily focuses on the first category of greenhouse gas emissions policies—supply-side regulations. On the supply side, California is constrained both by the CAFE statute and the Clean Air Act's restrictions on state vehicle emissions control policies.[63] While, as discussed above, manufacturers could achieve reductions in greenhouse gas emissions through a number of measures, for the purposes of this Note it is not necessary to distinguish between these compliance paths. Rather, this Note examines whether it is permissible for California, under both CAFE and the Clean Air Act, to require automobiles to obtain an average CO_2 per mile standard for a given fleet year, allowing automakers the flexibility to choose between alternative compliance paths, and concludes that neither statute preempts California from implementing such a supply-side regulation.

In addition, this Note also examines the authority of California to implement demand-side measures. While as a result of a political compromise AB 1493 precludes CARB from adopting many demand-side regulations, such regulations could provide for significant reductions in greenhouse gas emissions and could be employed by California or other states in the future. On the demand side, California may also be constrained by the CAFE statute's prohibition on the promulgation of state regulations "related to fuel economy."[64] It seems clear that California retains ample authority under the statute to encourage the use of public transportation by investing more money in transportation systems, and/or encouraging consumers to drive less through measures such as tolls and gasoline taxes. These measures could not possibly be construed as a "backdoor" regulation on fuel economy. The more difficult question is raised by policies where there is a more significant nexus between the California regulation and the federal fuel economy standard. For example, whether California may impose a tax

62. *See supra* note 50 and accompanying text.

63. *See infra* Parts IV, V, and VI.

64. *See infra* Part VI.

based on a car's fuel economy level is less clear, although this paper ultimately concludes that California does retain this authority.

III.
OVERVIEW OF PREEMPTION LAW

While a full discussion of preemption law is beyond the scope of this paper, this section briefly outlines preemption law in order to provide a context for analyzing preemption under the Clean Air Act and CAFE statutes. "Preemption may be either express [the legislation contains a clause explicitly precluding state action] or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'"[65] There is a strict standard, however, for implying preemption.[66] Implied preemption can take three forms: (1) field preemption—"the Act of Congress may touch 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"[67]; (2) conflict preemption—"compliance with both federal and state regulations is a physical impossibility"[68]; and (3) obstacle preemption—the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[69]

The Court has "addressed claims of pre-emption from the starting presumption that Congress does not intend to supplant state law."[70] This presumption has even greater force where Congress is

65. Fid. Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–53 (1982) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

66. *See id.* at 153 ("Absent explicit preemptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . .'") (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

67. *Id.* at 153.

68. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

69. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Obstacle preemption is essentially a more broadly defined form of conflict preemption. For a discussion of the connection between "conflict" and "obstacle pre-emption," see *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) ("The Court has not previously driven a legal wedge—only a terminological one—between 'conflicts' that prevent or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are 'nullified' by the Supremacy Clause.").

70. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995).

legislating in an area of traditional state regulation.[71] Yet this "presumption can be overcome where . . . Congress has made clear its desire for pre-emption."[72] Furthermore, while stationary pollution sources have traditionally been the province of state governments, "regulations of motor vehicles [have] been a principally federal project" because of "the difficulty of subjecting motor vehicles, which readily move across state boundaries, to control by individual states" and "the possibility of 50 different state regulatory regimes . . . ."[73] Thus, regulation of vehicular emissions would probably not be considered a traditional area of state regulation for purposes of preemption analysis.

The Clean Air Act and CAFE statutes both contain preemption provisions prohibiting some state action. Arguably, these provisions can be interpreted as expressly prohibiting state action such as AB 1493. Yet neither statute explicitly speaks to the authority of states to implement vehicular greenhouse gas emissions policies. Even if a reviewing court interpreted these clauses as not *expressly* prohibiting such policies, the court might determine that Congress *implicitly* intended to preempt state action. Thus, in evaluating California's authority to regulate emissions under AB 1493, a court may scrutinize the legislative history of the Clean Air Act and CAFE statutes to determine the field Congress intended to occupy as well as the purpose and objectives of the federal legislation.

Despite the Supreme Court's growing emphasis on state rights,[74] the Court has increasingly found state laws preempted by federal statutes.[75] The trend toward finding preemption may in

71. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541–42 (2001) ("Because 'federal law is said to bar state action in [a] fiel[d] of traditional state regulation,' . . . we 'wor[k] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.'") (quoting California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997)); Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) ("There is indeed a presumption against preemption in areas of traditional state regulation . . . ."); California v. Arc America Corp., 490 U.S. 93, 101 (1989) ("When Congress legislates in a field traditionally occupied by the States, '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.'") (quoting *Rice*, 331 U.S. at 230).

72. *Egelhoff*, 532 U.S. at 151.

73. Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1079 (D.C. Cir. 1996).

74. *See, e.g.,* United States v. Lopez, 516 U.S. 549 (1995).

75. For an illustration of the Supreme Court's historical reluctance to preclude state action, see Pac. Gas & Elec. Co. v. State Energy Res. Conservation Comm'n, 461 U.S. 190, 203–05 (1983) (holding that provisions in the 1976 amendments to California's Warren-Alquist Act, imposing a moratorium on the

large part be explained by the subject matter of the state laws. Preemption disputes have arisen over the last three decades as a result of the "explosive growth in the number of federal environmental, health, and safety laws and regulations . . . ."[76] Using extensive statistical analysis, David Spence and Paula Murray conclude that there is a "strong predominance of decisions preempting state or local regulations" even though "[o]ne might expect to see just the opposite, given the growing public support for state and local police power regulation, and a largely conservative . . . federal judiciary."[77]

In sum, as a general matter the courts have been increasingly likely to find federal preemption of state laws and regulations, particularly in the environmental field. The remainder of this Note, however, analyzes the specific statutes—the Clean Air Act and CAFE—that arguably preempt AB 1493, and concludes that California is not preempted from implementing a variety of measures to reduce greenhouse gas emissions.

IV.
PREEMPTION UNDER THE CLEAN AIR ACT

Section 209(a) of the Clean Air Act expressly preempts states from implementing "any standard relating to the control of emissions from new motor vehicles."[78] California alone, however, is granted a special waiver under § 209(b) to maintain a separate regulatory program that is "in the aggregate, at least as protective of public health and welfare."[79] The Administrator of the Environ-

certification of new nuclear plants until the state energy commission finds an adequate means for disposal, were not preempted by the Atomic Energy Act). For examples of recent decisions finding preemption see *Lorillard Tobacco Co.*, 533 U.S. at 551 (holding Federal Cigarette Labeling Advertising Act (FCLAA) preempted Massachusetts' cigarette advertising regulation); *Egelhoff*, 532 U.S. at 150 (holding that ERISA preempted a Washington statute revoking automatically upon divorce the designation of a spouse as beneficiary of a nonprobate asset); Geier v. Am. Honda Motor Co., 529 U.S. 861, 881 (2000) (holding that common-law "no airbag" tort action was preempted by Federal Motor Vehicle Safety Standard 208).

76. David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1135 (1999).

77. *Id.* at 1159–60.

78. 42 U.S.C. § 7543(a) (1994) ("No State or any political subdivisions 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.").

79. The applicable provision states:

> 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 emissions standards) for the control of emissions from

mental Protection Agency (EPA) may only deny such a waiver upon a finding the State's determination is "arbitrary and capricious," the program is not needed to "meet compelling and extraordinary conditions," or is not in compliance with other provisions of the Clean Air Act.[80] An examination of California's authority to implement a supply-side CO_2 per mile regulation on automobile manufacturers raises questions about the scope of this wavier provision. After an extensive examination of the Clean Air Act statutory enactments and legislative history, as well as regulatory policies that have been promulgated under the waiver provision, this Note concludes the waiver provision was intended to give California broad authority to implement a separate motor vehicle program. As a result, the Clean Air Act does not preempt a supply-side greenhouse gas or CO_2 standard. This Note rejects an alternative reading of the express preemption provision in § 209(a) as broadly prohibiting states from implementing motor vehicle emissions policies, with only a narrow exception given to California to address "compelling and extraordinary conditions" *within* the state, such as its unique smog problem. Such a narrow reading of the waiver provision would likely preclude the implementation of a program aimed at reducing greenhouse gas emissions since such emissions contribute to the *global* environmental problem of climate change, and not a "compelling and extraordinary" problem *within* California.

A. History of Clean Air Act Regulation on Motor Vehicles

1. California's Leadership and the Emergence of Federal Regulation

California has long been a pioneer in the area of automobile emissions regulation.[81] California adopted its first emissions control program in 1960.[82] Five years later, in recognition of the "in-

new motor vehicles or new motor 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 of this part.

42 U.S.C. § 7543(b) (1994). In other words, any state that has enacted emissions standards prior to March 30, 1966 may qualify for a waiver for future emissions policies. The waiver provision only governs California, since it was the only state to enact emissions standards prior to March 30, 1966.

80. *Id.*

81. Revesz, *supra* note 7, at 585. R

82. *Id.*

creasing frequency and severity" of automotive emissions, the federal government established the first federal emissions control regime for automobiles in the Clean Air Act Amendments of 1965.[83] In enacting the amendments, Congress acknowledged that a number of states, and particularly California, "have taken steps to control automotive air pollution. . . ."[84] Thus, at least part of the motivation for passing a uniform federal standard was a desire "to have national standards rather than for each State to have a variation in standards and requirements which could result in chaos insofar as manufacturers, dealers, and users are concerned."[85]

2. The 1967 Clean Air Act Amendments

Although the 1965 act provided for uniform standards, it did not explicitly preempt state action; rather, the heated issue of preemption emerged two years later as Congress debated the Air Quality Act of 1967, amending the Clean Air Act.[86] The Senate's original version of the Act established federal standards and preempted all state action.[87] Senator George Murphy of California subsequently offered an amendment ("Murphy Amendment"), which was accepted unanimously, permitting California to adopt stricter standards.[88] The Senate version provided that the burden of proof would fall on opponents of the waiver; that is, the Secretary of Health, Education, and Welfare (HEW) would be required to waive the application of preemption to California "*unless* he finds [California] does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions or that such State standards and accompanying

83. S. REP. NO. 89-192, at 5-6 (1965). For a comprehensive discussion of the history of federal and California motor vehicle air pollution programs, see JAMES E. KRIER & EDMUND URSIN, POLLUTION AND POLICY: A CASE ESSAY ON THE CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975, at 177-95 (1977).

84. S. REP. NO. 89-192, at 5-6.

85. *Id.* at 6; *see also* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 330 (1985) ("Unlike most other industries, the automobile industry has strong reasons to prefer national legislation over state and local regulation of air pollution.").

86. *See* H.R. REP. NO. 90-728, at 20 (1967) ("[The 1965] legislation contains no explicit statement concerning the preemption of State laws on this subject, and no statements concerning this problem were made on either the House or Senate floor when the bill was debated."); *see also* KRIER & URSIN, *supra* note 83, at 181. R

87. *See* 113 CONG. REC. 30,941 (1967) (statement of Rep. Smith).

88. *Id.*; *see also* KRIER & URSIN, *supra* note 83, at 181 (discussing the adoption of the Murphy Amendment). R

enforcement procedures are not consistent with section 202(a) of this title."[89]

Despite California's victory in the Senate, "a new battle began when the bill reached the House."[90] Congressman John Dingell (Detroit), under pressure from the auto industry, amended the bill ("Dingell Amendment") to provide that the Secretary of HEW was to grant a waiver only "*upon a showing by California* that it requires more stringent standards than the nationwide standards otherwise applicable. . . ."[91] Thus, the amended version placed "the entire State of California at the mercy of the decision of one appointed head of a Federal Department. . . ."[92]

89. The Senate version provided in full:

> (b) *The Secretary 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, *unless he finds that such State* does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions or that such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this title . . . .

113 CONG. REC. 30,975 (1967) (emphasis added); *see also* S. REP. NO. 90-403, at 33-34 (1967).

90. KRIER & URSIN, *supra* note 83, at 181. R

91. H.R. REP. NO. 90-728, at 22 (emphasis added). The text of the House version provided:

> (b) The Secretary may, after notice and opportunity for public hearing, upon application of any State which has adopted standards (other than crankcase emissions standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, prescribe standards limited to such State, which are more stringent than, or apply to emissions or substances not covered by the nationally applicable Federal standards prescribed pursuant to section 202, if he finds that such State requires such more stringent or other standards to meet compelling and extraordinary conditions and that such more stringent or other standards prescribed hereunder are consistent with this title; and such more stringent or other standards prescribed hereunder shall be regarded as if prescribed pursuant to section 202, with respect to new motor vehicles or new motor vehicle engines manufactured for sale, sold or offered for such sale in, or introduced or delivered for introduction into, such State.

113 CONG. REC. 30,973 (1967). For a discussion of the automotive industry's influence on Representative Dingell's decision to propose the amendment see KRIER & URSIN, *supra* note 83, at 181-82. R

92. 113 CONG. REC. 30,941 (1967) (statement of Rep. Smith); *see also id.* at 30,953 (statement of Rep. Moss) ("But under the language of the gentleman from Michigan, the entire burden is on my State, and the Secretary is vested with the power to veto the requests of the State."); *id.* at 30,950 (statement of Rep. Holifield) ("[Y]ou change certain vital words in the House bill, which disturbs us in California. The words that are changed in the Murphy amendment are that 'the

The Dingell Amendment, however, was ultimately unsuccessful as a result of unprecedented cooperation and lobbying by California's representatives.[93] Thus, the structure of the waiver provision irrefutably illustrates that it was intended to place the burden of proof on the party opposing the waiver; that is, in the absence of evidence to the contrary, the presumption is that California is entitled to a waiver.

The legislative history of the 1967 waiver provision suggests two distinct rationales for its enactment: (1) providing California with the authority to address the pressing problem of smog within the state; and (2) the broader intention of enabling California to use its developing expertise in vehicle pollution to develop innovative regulatory programs.

There is some evidence that the waiver provision was primarily enacted to give California flexibility to tackle its unique smog problem, resulting from special geographical characteristics and high population levels.[94] The auto industry and opponents of the Murphy version of the California waiver provision seemed particularly inclined to frame the need for an exception as narrowly tied to the smog problem. Congressional testimony by the President of the National Automobile Association conceded the need for a dual standard, but only to the extent it was warranted by the smog problem.[95] Furthermore, in defending the House's narrower version of the waiver provision, Representative Albert Herlong argued, "Cali-

Secretary shall approve more stringent standards' under certain situations. The wording in the so-called Dingell amendment says 'he may, if he finds,' certain things.").

93. *See* KRIER & URSIN, *supra* note 83, at 182 (quoting Representative Sokolow's statement that "Air pollution is a bigger issue than Vietnam in California . . . ."); *see also* SAN DIEGO UNION, Nov. 6, 1967, *quoted in* 113 CONG. REC. 32,478 (1967) ("In an almost unparalleled and certainly exemplary exhibition of unanimity the California members of the House of Representatives successfully fought for their state's right to cleaner air . . . ."); OAKLAND TRIB., Nov. 6, 1967, *quoted in* 113 CONG. REC. 32,479 (1967) ("The final 152 to 58 House vote to restore California's special exemption was a tribute to the California delegation . . . .").

94. *See, e.g.,* 113 CONG. REC. 30,942 (statement of Rep. Smith) ("Now, we in California have a unique problem, and that problem is caused by what we call an atmospheric inversion. It is also caused, to some extent, by the peculiar topography of the metropolitan area of Los Angeles County, and the adjoining counties. . . ."); S. REP. NO. 90-403, at 33 ("On the question of preemption, representatives of the State of California were clearly opposed to displacing that State's right to set more stringent standards to meet peculiar local conditions.").

95. 113 CONG. REC. 30,955 (1967) (statement of Rep. Clausen) (quoting Mr. Mann, President of the National Automobile Association) ("The one possible exception to national standards . . . has its roots in scientific considerations. The smog problem in southern California is unique in its intensity and the number of

fornia's particular problem is that of photochemical smog."[96] In his view, by authorizing the control of additional pollutants, "the State of California . . . is basically seeking an amendment which would give that State the right to establish a *separate program* without regard to the national program."[97]

There are strong indications, however, that Congress, in enacting the Senate's version, had the broader intention of giving California the authority to serve as a leader in the area of automobile emissions regulations. The Senate committee explained that it was ultimately persuaded to enact a broad preemption provision because "Senator Murphy convinced the committee that California's unique problems *and pioneering efforts* justified a waiver . . . ."[98] There is abundant evidence within the legislative history indicating the provision was intended to benefit the nation as a whole, not only California, by using California's special expertise in the area of pollution control as a laboratory for testing more stringent pollution control policies. For example, Representative Allen Smith remarked,

> The Nation will have the benefit of California's experience with lower standards which will require new control systems and design. In fact California will continue to be a testing area for such lower standards and should those efforts . . . be successful it is expected that the Secretary will, if required to assure protection of the national health and welfare, give serious consideration to strengthening Federal Standards. . . . In the interim periods, when California and the Federal Government have different standards, the general consumer of the Nation will not be confronted with increased costs associated with new control systems.[99]

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days it is present. Unlike other areas, it has a hot sun most of the year and a topography that impedes the free flow of air . . . .").

96. *Id.* at 30,951 (statement of Representative Herlong).

97. *Id.* (emphasis added).

98. S. Rep. No. 90-403 at 33 (emphasis added).

99. *Id.*; *see also* 113 CONG. REC. 30,941 (1967) (statement of Rep. Smith) ("[O]ther States that may later be faced with the problem will be years ahead in being able to base their decisions on the efforts and results which take place in California."); *id.* at 30,954 (statement of Rep. Moss) ("[T]here is offered to this Nation the ideal laboratory, where the demonstrated initiative exists and where the resources exist to solve this problem and contribute significantly to the entire nation. I believe we should take advantage of this unique opportunity."); *id.* at 30,975 (statement of Rep. Moss) ("[California] offers a unique laboratory, with all of the resources necessary, to develop effective control devices which can become a part of the resources of this Nation and contribute significantly to the lessening of the growing problems of air pollution throughout the Nation."). The waiver provi-

Furthermore, in the sole comment[100] regarding the waiver provision in the Senate Conference Report, Senator George Murphy stated,

> I am firmly convinced that the United States as a whole will benefit by allowing California to continue setting its own more advanced standards for control of motor vehicle emissions. In a sense, our State will act as a testing agent for various types of controls and the country as a whole will be the beneficiary of this research.[101]

Therefore, the legislative history suggests that Representative Albert Herlong's criticism[102] that the Senate provision authorized California to operate a wholly separate program, rather than one narrowly tailored to address the state's smog problem, was indeed accurate. Examinations of the legislative history reveal "[t]here is no intimation in the Senate Committee report that the waiver provision was designed to permit California to adopt only a portion of such a program,"[103] and the "debate on the floor of the House indicates that the members shared the Senate's conviction that the waiver provision was intended to permit California to adopt an *entire program* of emissions control."[104]

3. The 1977 Clean Air Act Amendments

California's role as a laboratory for innovation was "enhanced by the 1977 amendments [to the Clean Air Act]."[105] First, the amendments enacted § 177,[106] which "permit other states to 'piggy-

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sion could be viewed even more broadly as an extension of California's leadership role in the area of automobile safety, *see id.* at 30,976 (statement of Rep. Moss) ("It is not unusual for California to take leadership in the field of auto safety. As long as I can remember the Legislature of California has concerned itself with making automobiles safer . . . and was one of the pioneers in that field . . . .").

100. Motor and Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1110 (D.C. Cir. 1979) ("MEMA") ("only one comment was directed at the waiver provision").

101. 113 CONG. REC. 32,478 (statement of Sen. Murphy).

102. *See supra* note 97 and accompanying text. R

103. *See MEMA*, 627 F.2d at 1110; *see also id.* at 1109 ("[T]he Committee that formulated the waiver provision understood the costs involved in making an exception for California and decided to recommend that these costs be absorbed by allowing a waiver not of part of the preemption provision, but of the entire subsection (a).").

104. *Id.* at 1110, n.31 (emphasis added).

105. Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1080 (D.C. Cir. 1996).

106. Section 177 states:

> Notwithstanding section 7543(a) of this title [Clean Air Act § 209(a)], any State which has plan provisions approved under this part may adopt and enforce any model year standards relating to control of emissions from new mo-

back' onto California's standards,"[107] or adopt California's standard in lieu of federal regulations. Thus, once California's standards have been approved under the waiver provision, other States are permitted to adopt "identical" standards without having to apply for a waiver. In light of the 1977 amendments, a narrow reading of the waiver provision as only permitting policies that address California's unique smog problem, or more general pollution problems *within* California, seems unfounded. The only requirement on a state applying for a waiver is to demonstrate its program is identical to the California program—it does not need to establish the existence of "compelling and extraordinary conditions" within its own state. This statutory structure suggests the waiver provision is not intended to prevent California from enacting policies that are too stringent, i.e., regulations that are not truly needed to address "compelling and extraordinary conditions" within the state. If this was the intent of the provision, then other states should also be required to show the necessity of such a stringent standard. Rather, the statutory structure suggests a concern about subjecting auto manufacturers to more than two—California and federal—emissions standards. Once California has established the need for a separate program, however, there is no reason to require the state to make a showing of a "compelling and extraordinary" need for that particular standard; to oblige California to make such a showing would be inconsistent with a statutory structure that allows all other states to piggyback onto California's standard without demonstrating any need.

Second, the 1977 amendments altered the § 209 waiver provision to give California greater flexibility to establish a comprehensive program of emissions regulations. The original waiver provision required the EPA Administrator to grant a waiver "unless he finds that such State does not require standards more stringent than applicable Federal standards . . . ."[108] In contrast, the amended version requires that the waiver be granted, "if the *State determines* that the State standards will be, *in the aggregate*, at least as

tor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) respecting such vehicles if — (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and (2) California and such State adopt such standards at least two years before the commencement of such model year.

42 U.S.C. § 7507 (1994). For a discussion of litigation surrounding the ability of states to opt into California's program see *supra* note 21. R

107. Motor Vehicle Mfrs. Ass'n v. N.Y. State Dept. of Envtl. Conservation, 17 F.3d 521, 525 (2d Cir. 1994) ("MVMA").

108. 113 CONG. REC. 30,975 (1967).

protective of public health and welfare as applicable Federal standards."[109] Thus, the amendment grants California greater authority both by permitting the state standards to be considered as a "package" ("in the aggregate"), rather than evaluating each standard individually, and by permitting the state rather than the Administrator to make the determination of whether they are "at least as protective."[110]

In sum, the 1977 amendment "confers broad discretion on the State of California,"[111] and affirms Congress' intent to grant California "the broadest possible discretion"[112] to develop an emissions control program.

4. The 1990 Amendments

The 1990 amendments preserved California's waiver authority and the ability of other states to opt into the California program. The amendments, however, clarified that the Clean Air Act was intended to permit only two—the Federal and California—vehicle emissions regulatory programs. The amendments added language explaining that states opting into the California program were prohibited from modifying the program such that manufacturers were required to create a "third vehicle"; that is, a vehicle different from that mandated by the California or Federal programs.[113]

109. Pub. L. No. 95-95, Title II, §§ 207, 221, 91 Stat. 755, 762 (codified as amended at 42 U.S.C. § 7543 (1994)) (emphasis added).

110. The House Report accompanying the amendment makes this clear:

> [The Amendment] permits the State to have its standards considered as a package that would require the Administrator in most instances to waive the preemption. . . . The Administrator would be authorized to deny such waiver only if (1) California's judgment that its standards, considered together, are at least as protective of health and welfare as Federal standards, considered together, was arbitrary or capricious; or (2) one of the findings under existing section 209(b) is made.

H.R. REP. NO. 95-294, at 23 (1977).

111. *Id.*

112. *See* MEMA, 627 F.2d 1095, 1110 (D.C. Cir. 1979); *see also id.* ("Congress had an opportunity to restrict the waiver provision in making the 1977 amendments, and it instead elected to expand California's flexibility to adopt a complete program of motor vehicle emissions control.").

113. The applicable provision states:

> Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take 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

5. Summary of Clean Air Act Structure

In sum, "[t]he history of Congressional consideration of the California waiver provision . . . indicates that Congress intended the State [California] to continue and expand its pioneering effort at adopting and enforcing motor vehicle emission standards," thereby serving as "a kind of laboratory for innovation."[114] In amending the Clean Air Act, Congress has never chosen to limit California's authority, despite the fact "it could have easily done so."[115] The result of the Clean Air Act statutory structure is to create a system in which "motor vehicles manufactured for sale in the United States must be either 'federal cars' . . . or 'California cars.'"[116] This two-standard system reflects a compromise between the competing considerations of protecting the auto industry from being overburdened by 50 different emissions standards and encouraging groundbreaking emissions policies by harnessing the expertise of California. Once manufacturers are already being subjected to a separate California regulatory system, however, there is no compelling reason to limit the scope of California's authority to regulate additional pollutants. Thus, the Clean Air Act does not seem to restrict the authority of California to promulgate a supply-side CO_2 per mile standard.

B. California Waiver Proceedings

Waiver proceedings are conducted before the Administrator of the EPA. Section 209(b)(1) of the Clean Air Act provides, "The Administrator shall, after notice and opportunity for public hearing" waive the application of the preemption provision.[117] While California has never requested a waiver to implement a greenhouse gas program, the waiver provision has been used on numerous occasions to justify emissions programs more generally. In the context of these requests, courts and administrative hearings have consistently construed the provision as allowing California broad discre-

under California standards (a "third vehicle") or otherwise create such a "third vehicle."

42 U.S.C. § 7507 (1994).

114. *MEMA*, 627 F.2d at 1110-11.

115. *Id.*

116. MVMA, 17 F.3d 521, 526–7 (2d Cir. 1994) *see also* Percival, *supra* note 1, at 1177-78 (explaining how the "hybrid approach" of the Clean Air Act mobile source provisions provides an alternative to contemporary models of environmental federalism by "givi[ng] states greater flexibility in tailoring standards to their environmental needs, while avoiding the creation of several different standards that would unduly increase costs to national manufacturers"). R

117. 42 U.S.C. § 7543(b)(1) (1994).

tion to implement a comprehensive mobile source emissions program.[118] For purposes of this Note's analysis of whether AB 1493 would be preempted, the most significant constraint imposed by the waiver provision is that the Administrator may reject California's waiver application if he concludes the State "does not need such State standards to meet compelling and extraordinary conditions . . . ."[119] Recall that opponents of AB 1493 argue regulation of greenhouse gas emissions is not needed to address a compelling and extraordinary need *within* California; rather, dispersion of these gases from California vehicles poses a threat to the global environment.[120] Such a narrow reading of "compelling and extraordinary," however, is inconsistent with Congress's desire to afford California the broadest possible discretion in the area of mobile source emissions policies. Furthermore, as this section illustrates, previous waiver proceedings suggest the "compelling and extraordinary" requirement is not intended to impose a strong constraint on California's authority to regulate emissions. The meaning of "compelling and extraordinary" is somewhat ambiguous; neither courts nor the EPA have provided an explicit definition of this key phrase or the constraints it places on California's authority to regulate greenhouse gas emissions. Furthermore, the 1977 amendments arguably nullified any real constraint the phrase placed on the state. As noted above, at the point where other states are permitted to "piggy-back" onto the California program without showing a compelling and extraordinary need, it seems inappropriate to require California to make such a showing. Therefore, "compelling and ex-

118. *See, e.g., MEMA*, 627 F.2d at 1128 (upholding the grant of a 1978 waiver decision, California State Motor Vehicle Pollution Control Standards, 43 Fed. Reg. 25,729 (June 14, 1978), and concluding, "Congress had decided to grant California the *broadest possible discretion* . . .") (emphasis added).

119. 42 U.S.C. § 7543(b)(1)(B) (1994). The other waiver requirements specified by 42 U.S.C. §7543(b)—standards required to be at least as protective, determination of the state not arbitrary and capricious, and consistency with 7521(a) [CAA § 202(a)]—do not impose significant impediments to greenhouse gas regulation. "Only once has the Agency found a [passenger car, light-duty-truck, or medium-duty vehicle] standard inconsistent with section 202(a) in a California waiver proceeding," California State Motor Vehicle Pollution Control Standards, 49 Fed. Reg. 18,887, 18,892 (May 3, 1984). In the 1973 proceeding, Motor Vehicle Pollution Control California State Standards, 38 Fed. Reg. 30,136 (Nov. 1, 1973), the EPA Administrator invalidated a California regulation for being inconsistent with § 202(a) of the Clean Air Act because "lack of adequate lead time would force their abandoning the California market for light duty trucks in the model year 1975." However, the Administrator determined that there was adequate lead time "to achieve those standards without excessive cost in 1976." *Id.*

120. *See supra* text accompanying note 58. R

traordinary," as interpreted in the waiver proceedings, imposes only a weak constraint on California's regulatory authority. Notably, the Administrator has never invalidated a waiver on the grounds that California did not demonstrate a "compelling and extraordinary" need. Rather, California may continue to operate its own emissions program so long as it can demonstrate that as a result of its geography, climate, and large vehicle population it has a "compelling and extraordinary" need to operate a separate program from the federal government. Once California has demonstrated the need for its own program, it may impose any regulation on greenhouse gases that is in compliance with the other § 209 criteria.

The seminal 1984 waiver decision provides the most comprehensive discussion of the standard for granting a waiver.[121] In 1984, the EPA granted a waiver to California for amendments establishing new standards and testing procedures for particulate exhaust emissions for diesel passenger cars (PC), light-duty trucks (LDT), and medium-duty vehicles (MDV).[122] This waiver decision emphasized that even in the areas reserved for Federal judgment—the existence of compelling and extraordinary conditions and the technological feasibility of standards—Congress intended only a narrow standard of EPA review.[123] The decision also emphasized that an evaluation of the relative costs and benefits of the California program was "not legally pertinent"[124] to a § 209 decision.

121. California State Motor Vehicle Pollution Control Standards, 49 Fed. Reg. 18,887 (May 3, 1984). Subsequent decisions have reaffirmed the 1984 proceeding's approach to evaluating the waiver provision. *See, e.g.*, California State Motor Vehicle Pollution Control Standards, 58 Fed. Reg. 4166 (Jan. 13, 1993) (granting California a waiver for its low emissions vehicle (LEV) program, and affirming the 1984 waiver decision conclusion that the "compelling and extraordinary" standard refers to "justifying the need for its own motor vehicle population control program . . . ," and not the need for a specific policy). For discussion of the LEV program, see Danielle F. Fern, Comment, *The Crafting of the National Low-Emission Vehicle Program: A Private Contract Theory of Rulemaking*, 16 UCLA J. ENVTL. L. & POL'Y 227, 233-38 (1997); Anya C. Musto, Comment, *California as a Model for a Federal Regulation of Automobile Emissions Pollution: Replacing Title II of the Clean Air Act of 1990*, 5 DICK. J. ENVTL. L. & POL'Y 151 (1996).

122. California State Motor Vehicle Pollution Control Standards, 49 Fed. Reg. at 18,887.

123. *Id.* at 18,888-89 (citing California State Motor Vehicle Pollution Control Standards, 40 Fed. Reg. 23,102, 23,103 (EPA May 28, 1975) (waiver of federal preemption)). The Administrator relied heavily on the court's decision in *MEMA*, 627 F.2d 1095 (reviewing a 1978 waiver proceeding, 43 Fed. Reg. 32,182) in defending this extreme deference. Although acknowledging that *MEMA* pertained to enforcement procedures, the Administrator argued the analysis was equally applicable to standards. *Id.* at 18,888.

124. *Id.* at 18,889 (citing 36 Fed. Reg. 17,458 (Aug. 31, 1971)).

The decision's analysis of the "compelling and extraordinary conditions" prong of federal review is particularly instructive in evaluating California's authority to regulate greenhouse gas emissions. Opponents of AB 1493 may argue that California is not permitted to regulate greenhouse gases because climate change does not constitute a "compelling and extraordinary" condition within California. While the 1984 decision did not present precisely the same issue, the Administrator was confronted with the question of whether the federal government was entitled to evaluate whether *each* standard was required to meet "compelling and extraordinary" conditions. The Administrator concluded that it was not; rather, it agreed with CARB that the inquiry into whether a policy meets the "compelling and extraordinary" test is confined to an analysis of whether the state needs its own *program*,[125] not a particular standard.[126] Thus, the Administrator concluded, "[g]iven that the manufacturers have not demonstrated that California no longer has a compelling and extraordinary need for its own program, . . . I cannot deny the waiver on this basis."[127]

An interpretation of the "compelling and extraordinary" prong as testing the need for an emissions program as a whole is supported in both the legislative history and the text of the statute. In reviewing the legislative history of the § 209 waiver provision, the Administrator noted, "Congress expressed particular concern with the potential problems of the automotive industry arising from the administration of two programs."[128] Thus, the waiver provision was designed to balance the interests of manufacturers with the benefits of utilizing California's unique resources and experience to allow the state to serve as a pioneer in the area of automotive emissions control. As a result, once California has its own *program* that re-

125. *Id.* at 18,890 ("I agree with California that my basic inquiry concerns whether 'compelling and extraordinary conditions' exist that justify California's continued need for its own mobile source emissions control program."); *id.* ("Congress took a broader approach consistent with its goal of allowing California to operate its own comprehensive program.").

126. *Id.* ("Therefore, as CARB points out, '[t]he "need" issue thus went to the question of standards in general, not the particular standard for which California sought [a] waiver in a given instance.'").

127. *Id.*

128. *Id.*; *see also* Engine Mfrs. Ass'n v. Southcoast Air Quality Mgmt. Dist., 158 F. Supp. 2d 1107, 1110 (C.D. Cal. 2001) (quoting Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972)) ("Both the history and text of the Clean Air Act show that the . . . preemption section was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if . . . every state and locality were free to impose different standards. . . .").

quires manufacturers to develop a separate "California line" of automobiles, there is not a strong justification for restricting the extent to which California may promulgate these separate regulations. The other requirements of § 209—that standards are not arbitrary and capricious and are consistent with the § 202 requirements, such as providing for adequate lead time[129]—adequately protect the manufacturers from regulations imposing an undue burden.

The "plain meaning" of the § 209 statute provides additional support for this interpretation.[130] First, the use of the plural "standards" indicates that Congress did not intend for the EPA to review each standard individually.[131] Second, the 1977 amendments to § 209, permitting California to select standards that are "in the aggregate" at least as protective, illustrates that the "compelling and extraordinary conditions" test was not intended to apply to each individual pollutant.[132] Rather, the 1977 amendment was intended to allow California flexibility to develop a program of standards, some of which individually are less stringent than federal standards.[133]

The Administrator's decision also emphasized that "compelling and extraordinary" conditions does not refer to a specific type or level of pollution. Rather, "a review of the legislative history of section 209 . . . reveals that the phrase 'compelling and extraordinary conditions' primarily refers to certain general circumstances, unique to California . . . ."[134] The decision specifically rejected an interpretation of the waiver provision as only encompassing California's unique smog problem.[135] Thus, the Administrator acknowledged that the provision provides California with authority to do

129. 42 U.S.C. § 7521(b)(2) (1994) ("Any regulation . . . shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.").

130. 49 Fed. Reg. at 18,890.

131. *Id.*

132. *Id.* The Administrator argues:

> if Congress had intended a review of the need for each individual standard under (b)(1)(B), it is unlikely that it would have used the phrase '. . . does not need such state standards,' which apparently refers back to the phrase 'State standards . . . in the aggregate,' as used in the first sentence of section 209(b)(1), rather than to the particular standard being considered.

Id.

133. *Id.* (citing H.R. REP. NO. 95-294, at 302 (1977)).

134. *Id.*

135. *Id.* ("If Congress had been concerned only with California's smog problem . . . it easily could have limited the ability of California to set more stringent

more than merely address the smog problem caused by thermal inversion that may have initially triggered the California exemption. The legislative history suggests "compelling and extraordinary" "does not refer to levels of pollution directly, but primarily to the factors that tend to produce them: geographical and climactic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems."[136] Furthermore, "there is no indication in the language of section 209 or the legislative history that California's pollution problem must be the worst in the country, for a waiver to be granted . . . ."[137] In the context of AB 1493, the Administrator's decision suggests California's contribution to greenhouse gases does not need to be the worst in the country, and the state does not have to demonstrate a certain level of emissions to justify regulation.

Finally, the Administrator emphasized that opponents of a waiver face a heavy burden in demonstrating the absence of compelling and extraordinary circumstances. The Administrator explained, "Congress has made it abundantly clear that the manufacturers would face a heavy burden in attempting to show 'compelling and extraordinary conditions' no longer exist. The Administrator, thus, is not to overturn California's judgment lightly. Nor is he to substitute his judgment for that of the State."[138] Thus, as long as opponents of AB 1493 cannot provide "clear and compelling evidence" that California is no longer justified in having a separate emissions *program*, regulation of greenhouse gas emissions (both on the demand and supply-side) would not be preempted. Such a reading of "compelling and extraordinary" is consistent with the intent of the original waiver clause and subsequent amendments to protect manufacturers from being exposed to more than two sets of regulations, while at the same time affording California the broadest possible discretion to regulate a mix of gases.

C. Greenhouse Gas Emissions Are a "Compelling and Extraordinary" Problem Within California

As explained in the above section, California does not have to demonstrate that it has a "compelling and extraordinary" need for a particular regulation; rather, once the State has demonstrated the

standards. . . . Instead, Congress took a broader approach consistent with the goal of allowing California to operate its own comprehensive program.").

136. *Id.*

137. *Id.* at 18,891.

138. *Id.* at 18,890.

need for a program as a whole, it retains broad authority to regulate emissions. However, even assuming that California must demonstrate such a need, control of greenhouse gas emissions to slow climate change is targeted at a "compelling and extraordinary" problem *within* California. First, California probably has "more at stake than any other state in the country"[139] in mitigating the effects of climate change. California is uniquely vulnerable to climate change impacts because of its "unusually diverse, spectacular, and productive natural heritage."[140] Protection of this distinctive ecosystem is critical to California's economic vitality because of the importance of its agricultural and tourism industries.[141] Furthermore, a rise in temperature poses a major threat to California's water supply—there is already evidence that the increased temperature is threatening the Sierra snowpack, the single biggest surface water reservoir in California[142]—and "the state's 1,100 miles of coastline are vulnerable to sea level increases, a prospect that threatens insurance rates, property values and tourism . . . ."[143]

In addition, a rise in California's temperature may have feedback effects that augment pollution levels. Higher temperatures might increase the use of air conditioners, resulting in greater pollution levels within the state. Also, an increase in rain relative to snow levels (as a result of warming) is likely to increase deposits of nutrients and pollutants in California's lakes.[144] Thus, in many ways California's vulnerability to climate change impacts is tied to the unique topographic and geographic conditions of the state that motivated the initial passage of the waiver provision.

139. Ohnsman & Marois, *supra* note 57 (quoting Assemblywoman Fran Pavley); *see also* CHRISTOPHER B. FIELD ET AL., CONFRONTING CLIMATE CHANGE IN CALIFORNIA: ECOLOGICAL IMPACTS ON THE GOLDEN STATE 1, 5-10 (Union of Concerned Scientists ed., 1999); LAURIE KOTEEN ET AL., HOT PROSPECTS: THE POTENTIAL IMPACTS OF GLOBAL WARMING ON LOS ANGELES AND THE SOUTHLAND 6-12 (Janine Bloomfield ed., 2001). R

140. FIELD ET AL., *supra* note 139, at 11. R

141. *See id.* at 11 ("Agricultural fields, orchards, and vineyards cover 11% of California's landscape and produce nearly twice the farm income of any other state. The dramatic natural landscape itself provides the setting for California's unique lifestyle and lures tourists from around the world. California's state and national parks are key elements in its tourism business, a sector that employs 673,000 people and generates more than $60 billion in annual revenues.").

142. Polakovic, *supra* note 27; *see also* Holly, *Assembly Taking Up, supra* note 54 ("Pavley noted state reports chronicling the decline of snow pack over the last 15 years, a trend that bodes ill particularly for water-starved Southern California. . . ."). R

143. Holly, *Assembly Taking Up, supra* note 54. R

144. FIELD ET AL., *supra* note 139, at 19. R

The drafters of AB 1493 have acknowledged the importance of emphasizing the unique implications for global warming on California. The statute includes a legislative findings section outlining the ways in which "[g]lobal warming would impose on California, *in particular, compelling and extraordinary impacts*," including reductions in the state's water supply due to changes in snowpack levels, adverse health effects from increases in air pollution as a result of higher temperatures, adverse impacts on agriculture and food production, an increase in wildfires, damage to the state's extensive coastline and ocean ecosystems, and economic impacts of increased food, water, energy, and insurance costs.[145]

Opponents of AB 1493 may argue that even if California is uniquely vulnerable to climate change, because AB 1493 would only marginally reduce worldwide greenhouse gas emissions, there is no causal connection between the implementation of the program and minimizing California's exposure to these devastating impacts. Given the diverse sources of emissions, clearly no single measure can provide a solution to the problem of climate change. Yet California has the potential to make a significant contribution to CO_2 reductions. California's CO_2 vehicle emissions constitute 7% of worldwide emissions.[146] Furthermore, California's actions can have benefits beyond its borders by serving as "a bellwether for new attitudes and innovative practices . . . ."[147] In addition, in a waiver proceeding an evaluation of the costs and benefits of California's proposed policy is "not legally pertinent"[148]; that is, it is not within the domain of federal review to examine the effectiveness of California's program at reducing overall greenhouse gas levels.

V.
AUTHORITY TO REGULATE GREENHOUSE GASES UNDER THE CLEAN AIR ACT

In the past year, a heated debate has arisen about whether CO_2 constitutes a "pollutant" that is subject to regulation under the Clean Air Act. While a full discussion of this debate is beyond the

145. 2002 Cal. Legis. Serv. Ch. 200, §1(d) (West) (emphasis added).

146. *See supra* note 53 and accompanying text; *see also* FIELD ET AL., *supra* note 139, at 4 ("Although Californians cannot act alone to stabilize the state's climate, they have the opportunity to make a large contribution to worldwide efforts to minimize the pace and intensity of greenhouse warming. . . . [S]ince Californians are substantial contributors of global greenhouse gases . . . their individual actions as consumers and producers can be globally important."). R R

147. FIELD ET AL., *supra* note 139, at 4. R

148. *See supra* note 124 and accompanying text. R

scope of this Note, the question of whether CO_2 is a pollutant implicates the preemption debate. Opponents of AB 1493 may argue that CO_2 emissions policies are not within the scope of California's § 209(b) waiver authority because regulation of CO_2 emissions does not fall within the purview of the Clean Air Act. Regardless of whether CO_2 is subject to federal regulation under the Clean Air Act, California is not preempted from implementing a greenhouse gas emissions policy. If CO_2 is a pollutant within the meaning of § 209(a), then California is entitled to a waiver under § 209(b). Alternatively, even if the EPA determines that CO_2 and other greenhouse gases are not subject to regulation under the Clean Air Act, California may independently decide to regulate such gases.

A. EPA Has Authority to Regulate CO_2

Considerable controversy has surrounded the issue of whether CO_2 is a pollutant that should be subject to regulation. This controversy has come to full fruition in the debate over federal multi-pollutant legislation, with some proponents arguing for regulation of CO_2, while others contend regulation should be limited to mercury, NO_x, and SO_2.[149] President Bush has received extensive criticism for allegedly "flip-flopping" on his campaign promise to regulate CO_2.[150]

Under the Clean Air Act, "[the] EPA may regulate a substance if it is (a) an "air pollutant," and (b) the Administrator makes certain findings regarding such pollutant (usually related to danger to public health, welfare, or the environment) under one or more of the Act's regulatory provisions."[151] Section 302(g) of the Clean Air

149. *See, e.g.,* Darren Samuelsohn, *White House Delay Hurting GOP Chances in Emissions*, ENVIRONMENT AND ENERGY DAILY, Vol. 10, No. 9 (Jan. 30, 2002), LEXIS, News Library, ENGDLY File.

150. *See, e.g.,* Associated Press, *Bush Won't Regulate Carbon Dioxide,* (Mar. 14, 2001), http://www.enn.com/news/wire-stories/2001/03/03142001/ap_bush_42513.asp.

151. Memorandum from Jonathan Z. Cannon, General Counsel, to Carol M. Browner, Administrator, "EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources" (Apr. 10, 1998) [hereinafter *EPA Regulatory Authority Memo*] (on file with author); *see also* JANET HATHAWAY & ROLAND HWANG, NATURAL RESOURCES DEFENSE COUNCIL (NRDC) COMMENTS IN SUPPORT OF THE INTERNATIONAL CENTER FOR TECHNOLOGY ASSESSMENT PETITION TO UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (May 23, 2001), *at* http://www.nrdc.org/globalwarming/cjh0501.asp ("In order to be regulated under the federal Clean Air Act, a substance must be an 'air pollutant.' Additionally, EPA must find that the substance meets specific criteria for regulation relating to danger to public health or the environment as specified under one or more of the statutory schemes established in the Act.").

Act defines "air pollutant" as "any pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted or otherwise enters the ambient air."[152] CO_2 unmistakably fits within this broad definition—"carbon dioxide indisputably is a chemical, and it is emitted into ambient air."[153] Additionally, the EPA has already made a "legal determination" that CO_2 meets the § 302(g) definition.[154] Furthermore, there is ample support for the second requirement that CO_2 and other greenhouse gases meet the regulatory criteria established in the appropriate section of the Act, in this case § 202(a)(1). Section 202(a)(1) provides,

> The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[155]

There is strong support for the proposition that CO_2 and other greenhouse gases constitute such a danger. In a petition currently pending before the EPA Administrator, the International Center for Technology Assessment (ICTA) argues, "greenhouse gas emissions from new motor vehicles must be regulated" under the Clean Air Act.[156] In particular, the ICTA emphasizes that the Clean Air Act "does not require proof of actual harm," but instead permits the Administrator "to make a precautionary decision to regulate a pollutant."[157]

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152. 42 U.S.C. § 7602 (1994).

153. HATHAWAY & HWANG, *supra* note 151. R

154. Petition: International Center for Technology Assessment v. Carol Browner (EPA) (Oct. 20, 1999), at 10-11, *at* http://www.icta.org/legal/ghgpet.doc (last visited May 10, 2002) [hereinafter *ICTA Petition*] (citing *EPA Regulatory Authority Memo*, *supra* note 151, and *Is CO_2 a Pollutant and Does EPA Have the Power to Regulate It?*: Joint Hearing Before the Subcomm. on Nat'l Econ. Growth, Nat. Resources, and Reg. Affairs of the House Comm. on Gov't Reform and the Subcomm. on Energy and Env't of the House Comm. on Sci., 106th Cong. 14-20 (1999) (testimony of Gary S. Guzy, General Counsel, EPA)); *see also* HATHAWAY & HWANG, *supra* note 151, at 3-4 (citing General Counsel Cannon's memorandum). R R

155. 42 U.S.C. § 7521(a)(1) (1994).

156. *ICTA Petition*, *supra* note 154, at 13. R

157. *Id.*; *see also* HATHAWAY & HWANG, *supra* note 151 (arguing that carbon dioxide and other greenhouse gases are reasonably anticipated to endanger health). R

B. Even if the EPA Is Not Required to Regulate Carbon Dioxide Emissions, California is Not Preempted

Even if the EPA does not deem CO_2 or other greenhouse gases pollutants subject to regulation within the meaning of the Clean Air Act, California still retains the authority to regulate CO_2. First, California may make an independent determination that greenhouse gas emissions constitute a danger, and therefore should be regulated. Recall that both the plain language and legislative history of the Clean Air Act suggest that the waiver provision was intended to provide California with the authority to serve as a pioneer in the area of motor vehicle emission controls, and to independently determine that regulation of pollution is necessary to protect human health and the environment.[158]

Second, California is not preempted from regulating pollutants that fall outside the scope of the Clean Air Act. Section 116 of the Clean Air Act provides that state pollution laws are only preempted where specifically enumerated in the Act.[159] Therefore, if

158. *See supra* Part IV.

159. § 116 states:

> Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before Aug. 7, 1977 [the date of the enactment of the Clean Air Act Amendments of 1977]), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources), nothing in this act 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; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7416 (1994). Section 119 governs regulation of smelters. 42 U.S.C. § 7419 (1974). Section 211 explicitly preempts state regulation of fuel and fuel additives for the purpose of emissions control:

> Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for the purpose of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine . . . .

42 U.S.C. § 7545(c)(4)(A) (1994). As with section 209, however, California is explicitly granted a waiver: "Any State for which application of section 7543(a) has at any time been waived under section 7543(b) [i.e., 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." 42 U.S.C. § 7545(c)(4)(B) (1994). The § 211 California waiver is broader than § 209 in the sense that it does not require approval by the EPA. *See* Motor Vehicle Mfrs. Ass'n v. N.Y. State Dept. of Envtl. Conservation, 17 F.3d 521, 527 (2d Cir. 1994) ("Noteworthy is the fact

CO_2 is not a regulated pollutant under the Clean Air Act, California could not possibly be prohibited from implementing CO_2 regulation. That is, if CO_2 and other greenhouse gases do not constitute "emissions from new motor vehicles" within the meaning of the § 209(a) preemption provision, then the preemption provision is inapplicable to AB 1493 and California has ample authority to pursue such a program.[160] The scope of the § 209 preemption provision is coextensive with the waiver clause.[161] That is, everything that is preempted in section (a) is subject to waiver under section (b). Likewise, if a policy such as AB 1493 is not subject to waiver under section (b) because it regulates gases outside the scope of the provision, then the policy is not subject to section (a) federal preemption. The authority of states to regulate gases outside the scope of the Clean Air Act is well acknowledged. In response to the AB 1493 proposal, an EPA spokeswoman remarked that although CO_2 is not among the list of auto exhaust pollutants the agency

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that under the terms of the Act, EPA approval of California fuel regulations is not required."). States other than California must apply for a waiver:

> A state may prescribe and enforce, for the purposes of motor vehicle emissions control, a control or prohibition respecting the use of a fuel or a fuel additive in a motor vehicle. . . . The Administrator may approve such provision . . . only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard . . . .

42 U.S.C. §7545(c)(4)(C) (1994). For recent litigation on California's § 211 authority, see Oxygenated Fuels Ass'n v. Davis, 163 F. Supp. 2d 1182 (E.D. Cal. 2001) (upholding California's ban on methyl-tertiary-butyl ether ("MTBE"), an oxygenate used in gasoline). Finally, § 233 regulates aircraft emissions. 42 U.S.C. § 7573 (1994).

160. The waiver provision precludes California from obtaining a waiver if "such State standards and accompanying enforcement procedures are not consistent with section 7521(a) [Clean Air Act § 202(a)] . . . ." 42 U.S.C. § 7543(b) (1994). This provision, however, does not preclude California from regulating gases that are not subject to regulation under § 202(a). It would be a strain to argue that merely because CO_2 and other greenhouse gases are not subject to regulation under § 202(a), California regulation of such gases is "not consistent." Rather, consistency with § 202(a) refers to the requirement that states provide adequate lead time for technological development and give appropriate consideration to cost, and has only once been used to invalidate a waiver proceeding. *See supra* note <*CITE* _Ref18741823">.

161. Motor and Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1106 (D.C. Cir. 1979) ("[T]he only relevant preemption provision is the express terms of subsection (a) and whatever is preempted therein is subject to waiver under subsection (b)."); *id.* at 1100 ("[T]he legislative history of section 209 supports the Administrator's interpretation that the waiver provision is coextensive with the preemption provision . . . .").

regulates, "'[t]he states always have the flexibility to set a higher standard than we require.'"[162]

Thus, the contention that California has no authority to regulate greenhouse gases is extremely weak. Even if the EPA does not deem CO_2 and other greenhouse gases to be "pollutants" subject to regulation within the meaning of the Clean Air Act, California can still make an independent regulatory decision that such gases should be regulated. Clean Air Act § 116 specifically dictates that states have the authority to implement more stringent regulations. Alternatively (and more likely), there is ample authority under the Clean Air Act to regulate greenhouse gases, and California is entitled to a waiver under the coextensive waiver provision.

VI.
PREEMPTION UNDER THE CORPORATE AVERAGE FUEL ECONOMY STATUTE

The Corporate Average Fuel Economy (CAFE)[163] statute contains an express preemption clause prohibiting States from adopting or enforcing regulations "*related to* fuel economy standards or average fuel economy standards . . . ."[164] Thus, the federal government essentially maintains exclusive authority to determine and enforce the fuel economy standard, or miles per gallon (mpg), that manufacturers must achieve in a given year. As a result, opponents of AB 1493 may argue that the CAFE statute precludes states from regulating greenhouse gas emissions since improvements in fuel economy are one of the primary technological techniques for regu-

162. Alan Ohnsman, *California To Vote on Bill To Reduce Carbon Dioxide Emissions*, BLOOMBERG NEWS, Jan. 30, 2002, LEXIS, News Library, ALLBBN File (quoting EPA spokeswoman Cathy Milbourne).

163. 49 U.S.C. §§ 32901-32919 (1994).

164. The CAFE statute's express preemption provisions are as follows:

> (a) GENERAL. – When an average fuel economy standards prescribed under this chapter 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. (b) REQUIREMENTS MUST BE IDENTICAL. — When a requirement under section 32908 of this title is in effect, a State or a political subdivision of a State may adopt or enforce a law or regulation on disclosure of fuel economy or fuel operating costs for an automobile covered by section 32908 only if the law or regulation is identical to that requirement. (c) STATE AND POLITICAL SUBDIVISION AUTOMOBILES. — A State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use.

49 U.S.C. § 32919 (1994) (emphasis added).

lating greenhouse gas emissions.[165] The statute clearly prohibits states from promulgating a fuel economy standard, i.e., California cannot specify under AB 1493 that cars must get an average of 40 mpg. Whether the preemption clause would extend to other regulations, however, is less clear. This section analyzes the constraints the CAFE statute may impose on the ability of California to regulate CO_2 under AB 1493 through supply- and demand-side measures.

A. The CAFE Statute

Average fuel economy standards were first authorized under Subchapter V of the Motor Vehicle Information and Cost Savings Act (MVICSA), part of the Energy Policy and Conservation Act (EPCA).[166] EPCA was passed in the midst of the 1970s oil crisis, and therefore not surprisingly its stated objective is "the attainment of 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."[167] While the CAFE statute has been renumbered twice and the phrasing has been changed, these changes have not been substantive.[168] The statute is explicit about the factors to be considered in setting the fuel economy standard: "when deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need

165. *See ICTA Petition*, *supra* note 154, at 25 ("The fuel economy of a vehicle is directly related to its emissions of carbon dioxide, the most important greenhouse gas.") (quoting U.S. Dep't of Energy, Model Year 1999 Fuel Economy Guide (DOE/EE-0178, 1998), at 2). R

166. Pub. L. No. 94-163, § 301, 89 Stat. 871, 902 (1975) (current version at 49 U.S.C. § 32902 (2000)).

167. H.R. REP. NO. 94-340, at 1 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1763. The Senate report similarly states:

> In the short term, the Act is designed to reduce the vulnerability of the domestic economy to increases in import prices, and to ensure that available supplies will be distributed equitably in the event of a disruption in petroleum imports. For the long run, the Act will decrease dependence upon foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford.

S. CONF. REP. No 94-516, at 117 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957.

168. *See* Appellant's Opening Brief at 30-31, Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd. (9th Cir. filed Aug. 21, 2002) (No. 02-16395) (on file with author) (citing Pub. L. No. 103-272, § 1(d), 108 Stat. 745, 1075 (1994) and Pub. L. No. 103-429, § 6(43)(A), 108 Stat. 4377, 4382 (1994)).

of the United States to conserve energy."[169] Neither reductions in greenhouse gases, nor environmental protection more generally, are mentioned as relevant factors in establishing the fuel economy standard. Furthermore, the legislative history appears devoid of any reference to environmental considerations; rather, there is a strong argument that the legislation was solely motivated by a desire to decrease the United States' oil dependency and resulting economic vulnerability. In other words, state measures taken to protect the environment may not be deemed to fall within the field of regulation that Congress intended to occupy in passing the CAFE statute.

Some analyses of the CAFE statute suggest Congress intended to broadly preempt state action: "While the Senate bill would have preempted State laws only if they were 'inconsistent'. . . and the House bill . . . would have preempted State laws only if they were not 'identical to' a Federal requirement, [the statute] as enacted preempts all state laws that relate to fuel economy . . . ."[170] This alteration may indicate Congress intended to preempt more than "inconsistent" laws. Yet the final choice of language seems merely to beg the question of the scope of the "related to" clause.[171] In addition, notably different portions of the CAFE preemption provision regulate average fuel economy standards[172] and disclosure requirements.[173] The latter preemption clause is written more restrictively—Congress preempted the entire field of labeling and disclosure except where the State regulation is "identical."[174]

The relationship between emissions regulations and fuel economy was extensively considered and taken into account in drafting the CAFE statute. As originally enacted, the CAFE statute provided for an adjustment in the fuel economy standard for the model years 1978-80 if a manufacturer demonstrated to the Secretary of Trans-

169. 49 U.S.C. § 32902(f) (1994).

170. Letter from Paul Jackson Rice, Chief Counsel of the NHTSA, to Joseph T. Curran, Jr., Attorney General of the State of Maryland 2 (June 8, 1992) (on file with author) (citations omitted) [hereinafter *NHTSA Opinion*].

171. Unfortunately, "[t]he legislative history provides little or no comment on this preemption provision." *See* Appellant's Opening Brief, *Cent. Valley Chrysler-Plymouth* at 31 (No. 02-16395) (citing *e.g.,* H.R. REP. NO. 94-340, at 86-94 (1975) as not even mentioning the provision). Only one explicit reference to the preemption provision in the legislative history could be located: the Conference Report notes, "the House amendment preempted State and local laws and regulations in this area . . . ." S. CONF. REP. NO. 94-516, at 151.

172. 49 U.S.C. § 32919(a) (1994).

173. 49 U.S.C. § 32919(b) (1994).

174. *Id.*

portation that "a Federal standards fuel economy reduction is likely to exist for such manufacturer . . . ."[175] A "Federal standards fuel economy reduction" is defined as "the reduction in a manufacturer's average fuel economy in a model year which results from the application of a category of Federal standards," minus .5 miles per gallon.[176] Federal standards include "[e]missions standards under section 202 of the Clean Air Act, and emissions standards applicable by reason of section 209(b) of such Act."[177] Thus, there was an explicit recognition of the effects of emissions control programs on fuel economy. California's more stringent emissions control policies were particularly acknowledged as imposing a "fuel penalty relative to automobiles subject to the 49-State standards."[178] The original language was ultimately repealed in 1994[179] "when Congress reorganized the transportation laws . . . ."[180] These organizational changes, however, were not intended to create any substantive changes to the statute.[181] Furthermore, the current version of the CAFE statute still includes "a more general, but consistent, concept"[182] to the original provision mandating the Secretary

175. Energy Policy and Conservation Act, Pub. L. No. 94-163, § 301, 89 Stat. 871, 904 (1975) (repealed 1994); *see also* H.R. REP. NO. 94-340, at 87 ("The one substantive change consists of a modification of the procedure for adjusting fuel economy standards to reflect more stringent emissions standards."); *see also* S. CONF. REP. NO. 94-516, at 155.

176. Pub. L. No. 94-163, § 301; *see also* S. CONF. REP. NO. 94-516, at 156.

177. The Senate Conference Report provides the following example:

> a manufacturer applies . . . for a reduction of the model year 1980 standard, claiming the following applicable fuel economy reductions: 0.7 mpg due to noise emission standards; 0.6 mpg due to emissions standards under Section 202 of the Clean Air Act; and 0.8 mpg due to property loss reduction standards. If the [Secretary of Transportation] finds that the . . . claims are valid, he is directed to reduce the average fuel economy standard applicable to such manufacturer model year 1980 by (0.7-0.5)+(0.6-0.1)+(0.8-0.5)=0.6 mpg.

S. CONF. REP. NO. 94-516, at 156.

178. H.R. REP. NO. 94-340, at 87. In other words, Congress acknowledged that California might impose emissions restrictions that would reduce fuel efficiency.

179. Pub. L. No. 103-272, § 7(b), 108 Stat. 745, 1388 (1994).

180. *See* Appellant's Opening Brief at 32 n.5, Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd. (9th Cir. filed Aug. 21, 2002) (No. 02-16395) (citing H.R. REP. NO. 103-180, at 584 (1993)).

181. *See* S. REP. NO. 103-265, at 1 (1993) (explaining that the revisions in Pub. L. 103-272 were intended to "restate in comprehensive form, without substantive change, certain general and permanent laws related to transportation," and that "[i]n making changes in the language, precautions have been taken against making substantive changes in the law."); *see also* H.R. REP. NO. 103-180, at 1 (1993).

182. *See* Appellant's Opening Brief at 32 n.5, *Cent. Valley Chrysler-Plymouth* (No. 02-16395).

consider Clean Air Act regulations. The statute now explicitly mentions "the effect of other motor vehicle standards of the Government" as one of the factors to be considered in setting the fuel economy standard.[183] The term "other motor vehicle standards" clearly extends to California, given that the 1994 alteration was not intended to make any substantive changes, and Congress was well aware of the existence of California's independent vehicle standards.[184] This provision indicates Congress could not possibly have intended to occupy the entire field of emissions regulations; rather, other federal and state regulation of emissions could still be promulgated even though they would have an effect on fuel economy.

The inclusion of downward adjustments in the fuel economy standard illustrates that even though Congress recognized the relationship between emissions and fuel economy policies, its objective was not to preempt the entire field of automobile regulations; that is, it did not intend to preempt California's authority under § 209(b) merely because the policies peripherally affected or "related to" fuel economy. An interpretation of the "related to" clause as encompassing all emissions reductions policies would render provisions of the CAFE statute meaningless. If emissions programs were preempted by CAFE, there would be no reason for the statute to permit the Secretary of Transportation to make adjustments in the fuel economy standard in response to such emissions standards. This suggests that the CAFE statute does not preempt mobile source emissions regulations that are authorized under the Clean Air Act, and as demonstrated above there is substantial evidence that CO_2 is a "pollutant" within the meaning of the Clean Air Act.[185]

Furthermore, in administering the federal CAFE program, the National Highway Transportation and Safety Administration (NHTSA) and the EPA have consistently acknowledged the need to

183. 49 U.S.C. § 32902(f) (1994).

184. Pub. L. No. 103-272 mandated that "'United States Government' is substituted for 'United States,' . . . 'Federal Government', and other terms identifying the Government the first time the reference appears in the section. Thereafter, in the same section, 'Government' is used unless the context requires the complete term to be used to avoid confusion with other governments." S. REP. NO. 103-265, at 4 (1994). While in this case only "Government" is used, it seems clear that the context requires a consideration of all automotive government standards. Had Congress intended to limit the original provision's inclusion of California programs to only federal programs, it could have specified such a change—in the absence of such an explicit delineation one can assume no substantive changes were intended.

185. *See supra* Part V.A.

"take into account California emissions standards, which they acknowledge can affect fuel economy."[186] "Time and time again, NHTSA in setting CAFE standards has commented on the fuel economy effects of California's emissions regulations, and not once has it even been suggested that these were preempted."[187] Furthermore, the EPA's CAFE regulations require the EPA to take into account the effects of California's regulations on fuel economy.[188] Thus, the explicit text of the CAFE statute, legislative history, and interpretation by implementing agencies all suggest that the statute was not intended to undermine California's authority to regulate emissions from motor vehicles.

B. The Relationship Between the Clean Air Act and CAFE Statutes

While the connection between the Clean Air Act and CAFE statutes has not been extensively examined, an analysis of the relationship between the two statutes provides valuable insights into the breadth of the CAFE preemption provision. Unlike under the Clean Air Act, California enjoys no special exemption under the CAFE statute. Yet because of the intimate relationship between emissions regulations (especially greenhouse gas emissions) and fuel economy, California's Clean Air Act waiver tests the interplay between the two statutory schemes. A broad construction of the CAFE preemption provision would prohibit California from implementing any greenhouse gas emissions regulation, or even more general pollution regulation, because of the effect such policies may have on fuel economy. Such an interpretation would effectively take away with one hand what is granted with the other—broad authority under § 209 of the Clean Air Act for California to develop its own emissions regulation program. On the other hand, giving California expansive authority to regulate greenhouse gas emissions could essentially undermine any limitations imposed by CAFE. This section proposes an interpretation of the two statutory schemes resolving this tension.

186. *See* Appellant's Opening Brief at 34, *Cent. Valley Chrysler-Plymouth* (No. 02-16395).

187. *Id.* (citing, e.g., Light Truck Average Fuel Economy Standard, Model Year 2004, 67 Fed. Reg. 16,052, 16,057 (Apr. 4, 2002) (to be codified at 49 C.F.R. pt. 533)).

188. *Id.* at 33-34 (citing, e.g., 40 C.F.R. §§ 600.207-86(a)(1), (b)(1), 600.207-93(a)(1), (b)(1) (2001); Fuel Economy of Motor Vehicles: Revisions to Improve Fuel Economy Labeling and the Fuel Economy Data Base, 49 Fed. Reg. 13,832, 13,838 (1984) (to be codified at 40 C.F.R. pt. 600)).

In determining whether California is precluded from enacting a greenhouse gas emissions policy, the Clean Air Act and CAFE statutes should be interpreted as creating a structure in which regulations that are deemed permissible state emissions standards (e.g., California programs under the § 209 waiver provision) do not present a CAFE preemption problem. In other words, if a policy falls within the § 209 waiver provision, then there is no CAFE preemption problem since Congress enacted the CAFE preemption clause against the backdrop of existing regulation authorizing motor vehicle emissions regulations. Thus, the mere fact that emissions standards result in a fuel penalty or enhancement does not mean that such standards are preempted. Rather, if the new emissions standards have an effect on fuel economy, such an effect may be taken into consideration in establishing federal fuel economy standards.[189]

Several canons of statutory construction support this interpretation. First, where there are two conflicting statutes, the more specific statute is controlling.[190] Here the Clean Air Act contains an express California waiver provision. In constrast, the CAFE statute contains a general preemption clause precluding policies that "relate to" fuel economy. Thus, in construing the two statutes, the preemption analysis should begin by examining whether the regulation is within the scope of the specific Clean Air Act § 209(b) California emissions waiver; if it is, the policy should not be deemed to fall within the general amorphous "related to" field of the CAFE statute.[191] Only if the policy does not fall within the Clean Air Act field, should CAFE preemption even be considered.

Second, it is assumed that when enacting a provision, the legislature had in mind previous statutes, and the new provision is presumed to accord with the legislative intent of these prior

189. *See supra* note 183 and accompanying text. Furthermore, if California cars have to be more fuel-efficient, automakers could produce cars that were less fuel-efficient in other states and still comply with the nationwide average fuel economy standard mandated under the CAFE statute. **R**

190. *See* NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 51.02, 187 (6th ed. 2000) (citing Ohio Power Co. v. F.E.R.C., 954 F.2d 779, 784–85 (D.C. Cir. 1992), and Thompson v. Calderon, 151 F.3d 918, 929 (9th Cir. 1998) (Kleinfeld, J., concurring)).

191. *But see* Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd., No. CV-F-02-5017, at 8 (E.D. Cal. June 11, 2002) (concluding that California's 2001 zero emissions vehicle (ZEV) regulation was preempted under the CAFE statute, and rejecting defendant's reliance on the Clean Air Act because "[p]reemption cannot be avoided by intertwining preempted requirements with nonpreempted requirements").

enactments.[192] In the CAFE statute and legislative history, there is no suggestion that Congress intended to constrict the previously enacted California waiver provision, despite the fact that Congress expressly recognized the relationship between emissions policies and fuel economy.[193]

Third, the 1977 Clean Air Act Amendments, passed after the 1975 CAFE statute, reaffirmed Congress' intention to grant California broad authority to develop a comprehensive emissions *program*.[194] Subsequent enactments and amendments can assist in the interpretation of related statutes.[195] Here the 1977 Amendments reaffirmed Congress' intent to provide California with broad authority to develop a comprehensive emissions program. There is no indication that Congress conceived that CAFE would impose any limitation on this authority.

Finally, the purpose of the preemption provisions is to ensure that manufacturers are protected from having to comply with fifty different state standards in producing motor vehicles. In the context of California, given that manufacturers are already being required to develop a different line of "California cars" under § 209 of the Clean Air Act, the burden of additional regulation on greenhouse gas emissions does not seem onerous.

C. Current Supreme Court Jurisprudence on the Meaning of "Related To"

Against this backdrop of the relationship between the Clean Air Act and the CAFE statute, an examination of whether the CAFE statute precludes either supply- or demand-side regulations under AB 1493 will largely hinge on an evaluation of the scope of the "related to" clause. That is, does the prohibition on "regulation *related to* fuel economy standards" encompass some or all regulations on CO_2 or other greenhouse gases? Although CAFE preemption has not been specifically litigated, the scope of a "related to" preemption clause has been extensively litigated at the Supreme Court level in the context of the Employee Retirement Income Security Act (ERISA).[196] Recent decisions suggest the Supreme Court has retreated from a broad construction of "related to."

192. SINGER, *supra* note 190, at § 51.02, 176-78.

193. *See supra* Part VI.A.

194. *See supra* Part IV.A.3.

195. SINGER, *supra* note 190, at § 51.02, 189-91.

196. The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) (1994 & Supp. 2000) (providing that "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as

Early cases broadly interpreted the phrase "related to"; federal preemption was found to extend to a host of policies falling within the general domain of ERISA. In *Ingersoll-Rand Co. v. McClendon*,[197] the Court emphasized the breadth of "relate to":

> "A law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan." Under this "broad common-sense meaning," a state law may "relate to" a benefit plan . . . even if the law is not specifically designed to affect such plans, or the effect is only indirect.[198]

Two years later, in *Morales v. Transworld Airlines, Inc.*[199] the Court broadly construed the "related to" language in the Airline Deregulation Act (ADA) preemption clause.[200] *Morales* provided a strikingly expansive definition of this key phrase:

> 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[ ]"—and the words thus express a broad pre-emptive purpose . . . . We have said . . . that the "breadth of [that provision's] pre-emptive reach is apparent from [its] language," that it has a "broad scope," and an "expansive sweep," "deliberately expansive," and "conspicuous for its breadth." True to our word, we have held that a state law "relates to" an employee benefit plan, and is preempted by ERISA, "if it has a connection with, or reference to, such a plan."[201]

Furthermore, the decision evinces no hesitation in extending the analysis in its ERISA jurisprudence to the ADA.[202] Rather, the

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they may now or hereafter *relate to* any employee benefit plan . . . ") (emphasis added).

197. 498 U.S. 133 (1990) (holding that ERISA preempted a state common law claim that an employee was unlawfully discharged to prevent attainment of benefits under a plan covered by ERISA).

198. *Id.* at 139 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983) and Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987)).

199. 504 U.S. 374 (1992) (holding that guidelines regarding airline fare advertising were expressly preempted by the Airline Deregulation Act).

200. 49 U.S.C. app. § 1305(a)(1) (1989) (preempting states from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law *relating to* rates, routes, or services of any air carrier . . . ") (emphasis added) (current version at 49 U.S.C. § 41713(b)(1)).

201. 504 U.S. at 383-84 (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979), *Shaw*, 463 U.S. at 96 (1983), Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985), *Pilot*, 481 U.S. at 46 (1987), and FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990)).

202. *See id.* at 384 ("Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions

Court explicitly rejects petitioner's suggestion that "the sweeping nature of ERISA preemption derives not from the 'relates to' language, but from the 'wide and inclusive sweep of the comprehensive ERISA scheme.'"[203] Thus, courts would almost certainly reject arguments that the ERISA "relates to" clause precedent is inapposite to an analysis of the CAFE preemption provision.

As explained below, the *Morales* decision heavily influenced NHTSA's conclusion that CAFE preempted a Maryland program providing for credits and penalties to encourage the purchase of more fuel-efficient vehicles.[204] Furthermore, in issuing its recent injunction against the 2001 Zero Emission Vehicle (ZEV) regulations, the District Court for the Eastern District of California seems to have been heavily influenced by the *Morales* decision's emphasis on the breadth of the "related to" clause.[205] However, *Morales* appears to be the high watermark of an expansive interpretation of the "related to" language. More recently, the Court has retreated from such a broad interpretation. While these recent decisions suggest that the scope of preemption may be narrower than suggested by earlier jurisprudence, to a large extent they have left the precise legal standard for "related to" ambiguous.

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.[206] reversed the Court of Appeals for the Second Circuit and held that a New York statute, requiring hospitals to collect surcharges from patients covered by a commercial insurer (other than Blue Cross/ Blue Shield) and imposing surcharges on HMO's, was not preempted by ERISA.[207] The appellate court had relied heavily on statements in previous Supreme Court decisions about the breadth of the preemption clause,[208] and concluded the surcharges "'relate to' ERISA because they impose a significant eco-

having a connection with, or reference to, airline 'rates, routes, or services' are preempted . . . .").

203. *Id.*

204. *See infra* VI.D.2.

205. *See* Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd., No. CV-F-02-5017, at 8 (E.D. Cal. June 11, 2002).

206. 514 U.S. 645 (1995).

207. *Id.* at 649.

208. The Supreme Court explained the appellate court's approach:

> Rejecting that narrower approach to ERISA preemption, it relied on our statement in *Ingersoll-Rand* that under the applicable "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect.

See id. at 653 (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990)).

nomic burden on commercial insurers and HMO's [and therefore] have an impermissible impact on ERISA plan structure and administration."[209] In reversing, the Supreme Court cautioned that an overly expansive interpretation of "related to" would undermine Congress' intent to create a presumption against preemption.[210] Furthermore, the Court acknowledged the unhelpfulness of past attempts to provide a precise definition of the phrase "relate to," and instead emphasized, "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 . . . ."[211] Thus, *Travelers* suggests the Court is more likely to scrutinize the legislative history to determine the scope of the preemption clause than to rely heavily on semantic definitions of the "related to" clause.

The *Travelers* decision also analyzed the extent to which *indirect* effects on the federal scheme are sufficient to find preemption. In *Travelers*, the Court concluded the statute's "indirect economic effect" of making certain insurance alternatives more attractive was insufficient to preempt it, because the state program did "not bind plan administrators to any particular choice . . . [n]or [did] the indirect influence of the surcharge preclude uniform administrative practice . . . ."[212] The Court determined that an expansive definition of "relate to" as covering all laws "affecting costs and charges" "would effectively read the limiting language. . . out of the statute, a conclusion that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that '[p]re-emption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection . . . .'"[213]

This analysis strongly suggests that programs that provide incentives for consumers to purchase more fuel-efficient vehicles (e.g., the Maryland program) are not preempted by CAFE; although such a program may make cars achieving a higher level of fuel efficiency more attractive, it neither binds consumers to a particular choice nor requires automobile manufacturers to produce a certain type of vehicle. While the *Travelers* Court concluded that indirect effects were insufficient based on the facts of the case, the Court cautioned against reading the decision as suggesting that in-

209. Travelers Ins. Corp. v. Cuomo, 14 F.3d 708, 721 (2d Cir. 1993), *quoted in Travelers*, 514 U.S. at 654.

210. *See* 514 U.S. at 655.

211. *Id.* at 656.

212. *Id.* at 659-60.

213. *Id.* at 661 (quoting District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 130 n.1 (1992)).

direct effects can *never* be a basis for finding preemption.[214] Rather, "there might be a point at which an exorbitant tax leaving consumers a Hobson's choice would be treated as imposing a substantive mandate . . . ."[215]

Subsequent decisions have endorsed *Travelers'* narrower interpretation of the preemption provision. First, *California Division of Labor Standards Enforcement v. Dillingham*[216] followed *Travelers* in emphasizing the importance of the object and purpose of the statute,[217] and rejecting most indirect economic influences as an inadequate basis for preemption.[218] Like the Court's opinion in *Travelers*, the majority opinion in *California Division of Labor Standards Enforcement* never purports to be overturning prior decisions' broad interpretation of the "relate to" clause. Justice Scalia's concurrence (with Justice Ginsberg joining) acknowledges, however, the tension with the Court's prior decisions and the ambiguity created by the Court's unwillingness to explicitly overturn these decisions.[219] The concurring Justices contend that "[a]pplying the 'relate to' provision according to its terms was a project doomed to failure. . . . The statutory text provides an illusory test . . . ."[220] Instead, the Justices argue the "relate to" clause should be read "not to set forth a *test* for pre-emption, but rather to identify the field in which ordinarily *field pre-emption* applies . . . ."[221]

Second, in *Egelhoff*, the Court found a Washington statute providing for the automatic revocation of the designation of a spouse

214. *See id.* at 668 ("[W]e do not hold today that ERISA pre-empts only direct regulation of ERISA plans, nor could we do that with the fidelity of the views expressed in our prior opinions on the matter.").

215. *Id.* at 664.

216. 519 U.S. 316 (1997) (holding that a California wage law requiring contractor to pay workers prevailing wage in the project's locale is not preempted by ERISA); *see also* DuBuno v. NYSA-ILA Med. and Clinical Servs., 520 U.S. 806 (1997) (holding New York state tax on gross receipts of health care not preempted by ERISA).

217. The Court explains:

> Two Terms ago, we recognized that an "uncritical literalism" in applying this standard offered scant utility in determining Congress' intent . . . . Rather, to determine whether a state law has the forbidden connection, we must look . . . 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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> . . . .

519 U.S. at 325 (quoting *Travelers*, 514 U.S. at 656).

218. *See Dillingham*, 519 U.S. at 329.

219. *Id.* at 335-36 (Scalia, J. concurring).

220. *Id.* at 335.

221. *Id.* at 336.

as a beneficiary upon divorce preempted by ERISA.[222] Although the case found preemption, it is consistent with the line of authority since *Travelers* construing the "related to" clause more narrowly. The Court applied the *Travelers* approach in concluding the statute was preempted because it "binds ERISA plan administrators to a particular *choice* of rules for determining a beneficiary status,"[223] and "interferes with nationally uniform plan administration."[224] The Court expressed particular concern that "[r]equiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators . . . ."[225] ERISA's desire to minimize the imposition on plan administrators is analogous to the CAFE statute's aim of reducing the burden on automakers of 50 different state regulatory standards. As a result, greenhouse gas emissions reductions policies that require manufacturers to "master the relevant laws of 50 States" would likely be invalid.

In *Egelhoff*, the Court again refused to acknowledge the dramatic departure from its earlier preemption jurisprudence and again, Scalia and Ginsburg argued in a concurrence that the Court should abandon its prior approach and use "ordinary pre-emption jurisprudence."[226] This time, however, Justices Breyer and Stevens joined this approach in their dissent,[227] cautioning, "I fear that our failure to endorse this 'new approach' explicitly will continue to produce an 'avalanche of litigation,'. . . threatening results that Congress could not have intended."[228] Thus, both *Dillingham* and *Egelhoff* suggest the Court is moving away from a textual test of preemption, and towards an approach that places more emphasis on the legislative history in determining the scope of state action Congress intended to preempt.

222. Egelhoff v. Egelhoff, 532 U.S. 141, 143 (2001).

223. *Id.* at 147 (emphasis added).

224. *Id.* at 148.

225. *Id.* at 149-50 (quoting *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990)).

226. *Id.* at 153 (Scalia, J., concurring).

227. *Id.* at 153 (Breyer, J., dissenting) ("Like Justice Scalia, I believe that we should apply normal conflict pre-emption and field pre-emption principles. . . . Our more recent ERISA cases are consistent with this approach. . . .").

228. *Id.* at 153-54 (Breyer, J., dissenting) (internal citations omitted) (quoting California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 336 (1997) (Scalia, J., concurring) and DeBuono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806, 809 n.1 (1997)).

Finally, several lower court decisions also illustrate this departure from a broad construction of the "related to" clause. In *Air Transport Association of America v. City and County of San Francisco*,[229] the Northern District of California proclaimed, "More recently, the Supreme Court has retreated from such an expansive interpretation of the ERISA preemption provision, although it has reaffirmed the specific holdings of these earlier cases."[230] Similarly, in perhaps the most honest statement of the Court's departure from its previous jurisprudence, the Court of Appeals for the Ninth Circuit proclaimed in *Dishman v. Unum Life Insurance Co. of America*, "[i]n 1983, the Court announced that '[a] law "relates to" an employee benefit plan . . . if it has a connection with or reference to such a plan.' Twelve years' experience with that standard, however, convinced the Court that it created as many problems as it solved."[231]

In sum, *Ingersoll-Rand*'s and *Morales*'s broad interpretation of the "related to" preemption clause has been substantially retracted by more recent jurisprudence. These recent cases have several implications for considering the extent to which the CAFE statute preempts California's authority to regulate greenhouse gases under AB 1493. First, the decisions strongly suggest that California has the authority to implement a "Maryland-style" consumer incentive program, providing tax incentives to purchase more fuel-efficient vehicles. Policies that merely alter consumer incentives, rather than mandating the industry take certain actions are probably not preempted; rather, the Court has emphasized that such an expansive definition of "related to" as covering all laws "affecting costs and charges. . . would effectively read the limiting language out of the statute . . . ."[232]

Second, the narrower construction of the "related to" phrase also suggests that a supply-side CO_2 per mile standard may not be preempted by CAFE. A supply-side CO_2 per mile regulation is certainly more problematic than demand-side incentives because it imposes direct obligations on manufacturers. Yet recent Supreme Court "related to" decisions suggest that rather than relying on an expansive interpretation of the term "related to," the Court is likely

229. 992 F. Supp. 1149, 1155 (N.D. Cal. 1998) (holding ordinance prohibiting city from contracting with companies whose provision of employee benefits discriminates was preempted by ERISA "insofar as it affects ERISA plans providing ERISA-covered benefits and insofar as the Ordinance is applied to Airport contracts").

230. *Id.* at 1166.

231. 250 F.3d 1272, 1277-78 (9th Cir. 2001) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983)).

232. *See supra* notes 213-14 and accompanying text. **R**

to examine the legislative history of an act to determine whether Congress intended to restrict the particular state action. In this case, the legislative history and statutory structure of the CAFE statute indicate that its sole function was to improve energy efficiency in the midst of the 1970s energy crisis, and not to achieve environmental objectives through emissions reduction.[233] This strongly suggests that emissions regulations, such as a CO_2 per mile standard, would not be preempted. California's authority to implement such a regulation is further bolstered by the existence of a separate statutory structure—the Clean Air Act—that specifically authorizes the state to enact a broad range of emissions policies.[234]

D. Preemption of Demand-side Carbon Dioxide Policies Under CAFE: The Maryland Case Study

The above section strongly suggests the CAFE statute does not preempt supply-side regulations such as a CO_2 per mile standard. As previously explained, the final version of AB 1493 largely precludes CARB from adopting demand-side regulations such as taxes for more fuel-efficient vehicles, or gasoline taxes.[235] However, such measures could provide an effective strategy for California and other states to pursue future greenhouse gas reductions. Furthermore, AB 1493 still provides California with the authority to implement some demand-side regulations, including credits for telecommuting or perhaps even credits for more fuel-efficient vehicles (since only taxes are explicitly precluded). As a result, this section examines the authority of states to implement demand-side programs under the CAFE statute, focusing on Maryland's attempt to implement demand regulations a decade ago.

1. Maryland's Program

The CAFE statute has not been extensively litigated. Prior to the recent ZEV challenge,[236] the legal implications of the preemption provision have been considered most extensively in the context of advisory legal opinions on a 1992 Maryland program providing for surcharges and rebates to encourage the purchase of more fuel-efficient vehicles.[237] Under the Maryland legislation, new and used passenger cars with a model year of 1993 or 1994 obtaining fewer

233. *See supra* Part VI.A.

234. *See supra* Part IV.

235. *See supra* note 50 and accompanying text. R

236. *See supra* note 57. R

237. MD. CODE. ANN., Transp. § 13-818 (1999) (restrained from enforcement 1992).

than 21 mpg were taxed $100. After 1995, cars obtaining less than 27 mpg were to be taxed $50 for every mpg they fell below the 27 mpg threshold. In contrast, cars obtaining more than 35 mpg were to be given a credit of $50 per mpg above the threshold.[238] The Maryland policy also contained a vehicle labeling requirement: "[a] motor vehicle dealer shall prominently display on a vehicle offered for sale a notice on a form prescribed by the Administration to inform consumers of the fuel efficiency surcharge and fuel efficiency credit program."[239]

2. National Highway Transportation and Safety Administration Opinion on the Maryland Program

The National Highway Transportation and Safety Administration (NHTSA) issued an opinion ("NHTSA Opinion") arguing that the CAFE statute preempted the Maryland program.[240] The NHTSA's Chief Counsel interprets, in the form of letters responding to questions from the motor vehicle industry and larger public, the statutes and regulations of the agency. These interpretations "represent the definitive view of the agency."[241] Unlike formal agency adjudication or notice-and-comment rulemaking, however, an opinion letter expressing an agency's interpretation of a statute is not entitled to *Chevron* deference, requiring the court to give effect to an agency's reasonable interpretation of a statute.[242] Yet the opinion may be "'entitled to respect' under. . . *Skidmore*, but only to the extent that those interpretations have the 'power to persuade[.]'"[243]

238. *Id.* at § 13-818(c).

239. *Id.* at § 13-818(f).

240. *NHTSA Opinion*, *supra* note 170, at 1 ("It is the position of the [NHTSA] that this provision is preempted . . . and that therefore Maryland may not enforce the amendment."). R

241. NHTSA, *Welcome to NHTSA's Interpretations Files*, *at* http://www.nhtsa.dot.gov/cars/rules/interps/welcome.html (last visited Jan. 11, 2003).

242. Christensen v. Harris County, 529 U.S. 576, 586-87 (2000) (citations omitted); *see* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984) (granting a high level of deference to the EPA's interpretation of a statute).

243. *Christensen*, 529 U.S. at 587; *see* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that while the interpretation of the Fair Labor Standards Act by the Administrator of the Wage & Hour Division of the U.S. Department of Labor was not controlling, it should be given weight in proportion to its persuasive force); *see also* United States v. Mead Corp., 533 U.S. 218, 221 (2001) ("[A] tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore v. Swift & Co.*, the ruling is eligible to claim respect according to its persuasiveness.") (internal citation omitted).

In concluding that the Maryland statute was preempted, NHTSA relied on a broad interpretation of the phrase "related to" in the CAFE statute. In particular, NHTSA was heavily influenced by the Supreme Court's decision in *Morales v. Transworld Airlines, Inc.*,[244] issued earlier that week, broadly construing the "related to" clause in the context of the ERISA statute.[245] The *Morales* Court found that the language preempting policies that "relate to any employee benefit plan" extends to a broad range of policies that have a peripheral effect or relationship to federal benefit plans.[246] In particular, NHTSA gave significant credence to the Court's suggestion that "related to" broadly encompasses indirect effects on a policy:

> While [the Maryland program] does not purport to require automobile manufacturers to achieve any particular average fuel economy level, it clearly "has a connection with" and a "reference to" fuel economy standards. Indeed, the Supreme Court has held that State laws are preempted by the "relate to" language of ERISA "even if the law is not specifically designed to affect such [benefit] plans, or the effect is only indirect."[247]

Furthermore, the NHTSA Opinion did not include an extensive analysis of the "related to" standard with respect to the surcharge and credit provisions. Rather, a substantial portion of the decision focused on the invalidity of the labeling requirements,[248] which as previously noted is governed by the more stringent preemption standard that state regulation must be "identical" to that of the federal government.[249]

3. The Maryland Attorney General's Response

In response to the NHTSA Opinion, the Attorney General of Maryland issued an opinion defending, at least in part, the Maryland legislation ("Maryland Opinion").[250] While the Attorney Gen-

244. 504 U.S. 374 (1992). *See supra* notes 199-203 and accompanying text. **R**

245. *See NHTSA Opinion*, *supra* note 170, at 2 ("Earlier this week the Supreme Court confirmed the words 'relating to' in a preemption provision 'express a broad preemptive purpose.'") **R**

246. *Morales*, 504 U.S. at 383-84.

247. *NHTSA Opinion*, *supra* note 170, at 2 (quoting *Morales*, 504 U.S. at 383-84). **R**

248. *Id.* at 3. The NHTSA Opinion concluded that the Maryland program was preempted both because it used a different definition of fuel economy and because it made reference to a fuel efficiency surcharge or credit.

249. *See supra* note <*CITE* _Ref8789309"> and accompanying text.

250. Validity of "Gas Guzzler Law," 77 Md. Op. Atty. Gen. 222 (1992) [hereinafter *Maryland Opinion*].

eral concluded the disclosure requirements were preempted, he refused to "concede that the tax surcharge-tax credit aspect of the Maryland law is likewise preempted. In our view, Maryland and other states are not barred from enacting important environmental legislation merely because the State law uses fuel economy numbers as a point of reference."[251] Nevertheless, the Maryland Opinion advised against enforcement of the tax surcharge-tax credit provision because under Maryland law these provisions are "not severable from the invalid notice requirement."[252] Yet the decision noted, "If the legal defect in the notice requirement is corrected in the future, the surcharge and credit provisions could then be applied, and we will defend the statute if it is challenged in court."[253]

With respect to the tax and surcharge provisions, the Maryland Attorney General was more vigorous in his defense. The Attorney General contended, "some state laws, although they might literally 'refer to' a matter within the zone of federal preemption, have so little actual impact on those subject to federal regulation as to avoid preemption."[254] The tax and surcharge program, with its de minimis effect on fuel economy standards, constituted such a program:

> Unlike the NAAG Guidelines at issue in *Morales*, [the Maryland plan] does not impose any obligations or restrictions on the federally regulated industry. Automobile manufacturers may continue to market their cars in Maryland whatever the cars' fuel economy. *The tax program affects only consumers, not manufacturers or dealers.* And if the Maryland law succeeds in its objective of shifting consumer demand incrementally away from the most environmentally harmful cars to more fuel-efficient

251. *Id.* at 222.

252. *Id.*

253. *Id.* While the Attorney General agreed that the Maryland notice requirement was illegal, he did not dismiss the possibility that some state disclosure programs may be permissible under CAFE. Rather, the Maryland Decision specifically outlined revisions to the policy that it believed would enable the policy to withstand a preemption challenge, including framing the notice in terms of environmental protection and excluding any reference to the car's miles per gallon rating. *Id.* at 226–27. In other words, if the CAFE statute is understood narrowly to only address issues of fuel economy and the need to prevent "consumer confusion" as the result of differing information on fuel economy, *see id.*, then state policies that frame fuel consumption in terms of the "environmental" consequences would not be subject to preemption. Initially, such a narrow reading of the CAFE statute's intent may seem implausible. Yet an examination of the legislative history reveals that passage of the statute was motivated by the 1970s energy crisis, and there is not a single reference to environmental considerations, *see supra* Part VI.A.

254. *Maryland Opinion, supra* note 250, at 229. R

> ones, that change in demand will have no effect on the operation of the federal fuel economy program (except to make it marginally easier for manufacturers to achieve their minimum corporate average standard, if they produce more fuel-efficient cars to meet the incremental demand).[255]

Despite suggestions that a revised Maryland program could withstand a preemption challenge, the Maryland policy was never implemented and the issue of preemption under the CAFE statute was never adjudicated. The Maryland program raised questions about the "role states should play in shaping national energy policy."[256] Many environmentalists viewed state policies as the "best recourse in the face of Bush administration hostility toward efforts to improve automobile fuel economy."[257] The NHTSA Opinion prompted accusations of federal intrusion into state autonomy. Maryland Delegate Chris Van Hollen Jr., author of the Maryland program, proclaimed, "This administration professes to be trying to put together an energy policy and environmental policy, yet it has nothing better to do than challenge state statutes designed to save energy and protect the environment."[258] Yet rather than vigorously challenging this federal assertion of power in the field of automobile regulations, states seemed to have acquiesced in the aftermath of the NHTSA Opinion. At the time of the Maryland policy, several states, including California, were considering adopting similar "feebate" programs.[259] Ironically, many states were being driven to implement such policies by another federal statute—the 1990 Clean Air Act—that "put them at risk of federal penalties if they fail to improve local air quality."[260] Yet after the Maryland program, these efforts seemed to have been halted.

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255. *Id.* (emphasis added).

256. Margaret E. Kriz, *States Step in Where Feds Fear to Tread*, 24 NAT'L J. 1782 (1992).

257. *Union of Concerned Scientists Applauds Maryland Decision on Fuel Economy Feebate Law,* PR NEWSWIRE, June 24, 1992, LEXIS, News Library, PRNEWS File (quoting Deborah Gordon, Union of Concerned Scientists Transportation Analyst).

258. Richard Tapscott, *U.S. Orders Md. to Kill New 'Gas Guzzler' Tax*, WASH. POST, June 17, 1992, at C1.

> Janet S. Hathaway, a senior attorney at the Natural Resources Defense Council, said the letter to Maryland [bore] the earmarks of the Competitiveness Council, headed by Vice President Dan Quayle. "It fit the pattern of other fuel-economy actions that have been stopped or interfered with by the Office of Management and Budget and the Competitiveness Council."

Id.

259. *Id.*

260. Kriz*, supra* note 256, at 1782.

4. Lessons from the Maryland Program

The Maryland policy brought to the forefront the issue of whether the CAFE statute precludes states from implementing a demand-side regulation in the form of a tax and surcharge provision encouraging the purchase of more fuel-efficient vehicles. Despite the NHTSA Opinion's conclusion that the Maryland policy was preempted, there are strong suggestions such a policy could withstand a preemption challenge.

First, NHTSA's sweeping assertion that any policy with a peripheral connection to fuel economy is preempted is inconsistent with the fact that states clearly retain authority to implement a variety of policies that have a connection with fuel economy. As discussed above, the CAFE statute expressly recognizes the authority of California to regulate emissions despite the fact that such regulations may affect fuel economy.[261] Furthermore, variation in state gasoline prices (because of supply and demand factors and state taxes) creates different incentives across states to purchase more fuel-efficient vehicles. Gasoline taxes range considerably between states. For example, while the Georgia gasoline tax is about 7.5 cents per gallon, Connecticut imposes a tax of 32 cents per gallon.[262] The Court has been reluctant to preempt state fuel taxes in the absence of clear congressional intent.[263] Given the well-recognized authority of states to tax fuel, the NHTSA Opinion's contention that CAFE broadly precludes any policy that may affect consumer incentives to purchase more fuel-efficient vehicles is without merit. Rather than offering a well-reasoned approach to under-

261. *See supra* Part VI.A.

262. *State Motor Fuel Taxation and Regulation,* OXY-FUEL NEWS, Feb. 21, 2000, at 6 (listing all states' motor vehicle fuel taxes); *see also One Way to Lower Gas Costs,* INVESTOR'S BUS. DAILY, Feb. 23, 2000, at 24, LEXIS, News Library, INVDLY File (Connecticut has the highest gasoline tax in the nation). All gasoline prices are subject to a federal tax of 18.4 cents per gallon, with states tacking on additional taxes. *See* Margie Hyslop & Gerald Mizejewski, *Maryland's Surplus Won't Be Used to Cut Gas Prices*, WASH. TIMES, Mar. 1, 2000, at A24.

263. *See* Julie Long, *Ratcheting Up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreements*, 80 MINN. L. REV. 231, 244 (1995) (citing Wardiar Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986) (refusing to preempt a state tax of aviation fuel) and Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (declining to preempt a state coal tax because of insufficient evidence that Congress intended to preempt this type of action)). However, state motor vehicle taxes have been challenged in the context of their application to Indian tribes. *See, e.g.,* Oklahoma Tax Comm'n v. Chicksaw Nation, 515 U.S. 450, 453 (1995) (holding that Oklahoma may not apply its motor fuels tax to fuel sold by the Chicksaw Nation in Indian country).

standing the "related to" clause, NHTSA reverts to sweeping generalizations that do not withstand closer scrutiny.

Second, a modified version of the Maryland program would be even more likely to survive preemption if the policy were drafted to emphasize the objectives of environmental protection, rather than the achievement of improved fuel economy. Also, a policy that did not use fuel economy as a point of reference, but instead framed the policy in terms of the level of CO_2 emissions or the weight of a vehicle[264] would be less susceptible to claims that it was "related to" fuel economy.

Finally, as elaborated in the previous section, recent Supreme Court jurisprudence has retreated from a broad interpretation of "related to." Rather, recent decisions suggest that policies that only change incentives on the demand side (i.e., encourage the purchasing of certain products), but do not dictate a particular choice or impose obligations on the producer are not preempted.[265] Thus, the recent cases draw a distinction, suggested in the Maryland Opinion, between policies that "impose . . . obligations or restrictions on the federally regulated industry" and those that alter "consumer demand . . . away from the most environmentally harmful cars . . . ."[266]

CONCLUSION

As the federal government retreats from playing a dominant role in environmental regulation, states have stepped in to fill in the regulatory void. This Note examines one such state action—California's regulation of greenhouse gas emissions from motor vehicles. Opponents argue AB 1493 is preempted by the Clean Air Act and CAFE statutes. This Note, however, concludes that California has substantial flexibility under both statutory schemes to implement such regulations. First, on the supply side (see Table 1), California is constrained by two statutory structures—CAFE and the Clean Air Act. The CAFE statute clearly precludes states from enacting a miles per gallon standard. However, this Note argues that California is permitted under the Clean Air Act (and other states may opt in under the § 177 provision) to establish a CO_2 or greenhouse gas emissions-per-mile standard. Second, on the demand

264. *See Morning Edition: Gas Guzzler Tax Illegal, Says Bush Administration* (National Public Radio radio broadcast, June 18, 1992), LEXIS, News Library, NPR File ("Curran says another option would be to base the law's taxes and credits on something else besides fuel economy, such as how heavy a car is.").

265. *See supra* Part VI.C.

266. *Maryland Opinion, supra* note 250, at 229. R

side (see Table 2), California is only constrained by the CAFE statute. Recent Supreme Court jurisprudence on the "related to" clause, however, suggests that virtually no demand-side regulations are preempted since they do not bind consumers to a particular choice nor require automobile manufacturers to produce a certain vehicle.[267] Only an "exorbitant tax" that functionally provides consumers with no choice would be preempted.[268]

While motor vehicle emissions are predominately within the jurisdiction of the federal government under the Clean Air Act, California is in a unique position because it retains independent authority to regulate vehicle emissions. Once California has adopted a program, other states are permitted to opt into California's regulations.[269] Additionally, California's regulation can place "enormous collateral pressure"[270] on the federal government to implement more progressive environmental policies. Thus, AB 1493 represents an important opportunity for California, the nation, and the world, to begin to develop policies to control the effects of global warming by regulating greenhouse gas emissions.

TABLE 1: SUPPLY-SIDE REGULATIONS

	Miles Per Gallon Standard	**Carbon Dioxide/ Greenhouse Gas Per Mile Standard**
CAFE	Preempted	OK
CAA	OK	OK

TABLE 2: DEMAND-SIDE REGULATIONS

	"Exorbitant" Tax	**Surcharge/ Credit Provision and Other Taxes**	**Public Transportation (building and incentives to use)**
CAFE	Preempted	OK	OK

267. *See supra* note 212. R

268. *See supra* note 215. R

269. *See supra* Part IV.A.3.

270. Holly, *Assembly Approves, supra* note 27 (quoting Dan Becker, Director of the Global Warming and Energy Program for the Sierra Club). R