THE POLITICS OF PREEMPTION: AN APPLICATION OF PREEMPTION JURISPRUDENCE AND POLICY TO CALIFORNIA ASSEMBLY BILL 1493

BY

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The principle of preemption is a powerful federal medium for arbitrating discrepancies between federal and state statutes. Preemption challenges have recently arisen over California's various environmental and energy conservation initiatives, including Assembly Bill No. 1493 (Cal. 2002) (AB 1493), imposing automobile air emissions standards which are more strict than current federal standards. A related preemption matter regarding California's additional requirements for the energy efficiency of appliances has reached the Supreme Court. A petition for certiorari has been filed from a Ninth Circuit decision finding California's more stringent labeling and data submission standards for appliances not preempted by federal law.[1] The petition serves to highlight the current preemption issues related to progressive environmental efforts and the possibility of a simmering circuit conflict regarding judicial analysis in preemption cases.[2] Further contributing to the preemption debate are political voices, particularly those of state governors which strengthened and unified in 2005 and the early months of 2006.[3]

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1 Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492, 505 (9th Cir. 2005) (holding that state regulations concerning appliance testing data submission to the energy commission and additional labeling requirements were not preempted by the Energy Policy and Conservation Act).

2 The parties' briefs sharply disagree over whether or not a circuit conflict exists in the analysis used to evaluate preemption claims: specifically, whether or not courts are to employ a presumption against preemption in every case, or only cases touching upon areas traditionally regulated by state law. For the various briefs and filings, see Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 126 S. Ct. 646 (mem) (2005).

3 *See, e.g.*, Press Release, Natural Res. Def. Council, Northeast Governors Sign Landmark Global Warming Pollution Pact (Dec. 20, 2005), *available at* http://www.nrdc.org/media/pressreleases/051220.asp (seven northeast governors create a bipartisan plan to reduce global

This Comment examines the nature of AB 1493 and the potential application of modern preemption challenges. Further, this Comment explores whether a recent confluence of policy, politics, and science may serve to reframe or redefine the arguments related to preemption in this particular case. Last, this Comment discusses possible outcomes of the challenge to AB 1493 resulting from preemption analysis, the recent confluence, related court decisions, and the tension between statutes with intersecting federal authority over automobile regulations.

warming); David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 80 (2003) (detailing state achievement in climate protection in the face of federal inaction and lauding the innovation in state "laboratories"). Additionally, Governor Arnold Schwarzenegger recently wrote to President Bush formally requesting support in securing a waiver of federal preemption for AB 1493. Press Release, Arnold Schwarzenegger, Governor, Letter to President Bush Regarding Greenhouse Gas Emissions Waiver (Apr. 10, 2006), *available at* http://gov.ca.gov/index.php?/press-release/501/.

I. INTRODUCTION

Remarking on the difficulty of deciding questions of preemption, the Supreme Court has acknowledged that preemption lacks an "infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula."[4] Preemption jurisprudence illustrates a compromise between concerns for federalism and states' rights, and concerns for uniformity in matters of the national economy. The current debate over domestic energy policy and climate change initiatives highlights the challenge in allocating power between the federal government and the states. Energy, environmental, and automotive regulations typify such concerns because they encompass traditional state domains of health and safety, and federal domains of national and transnational industries. Thus, as states begin undertaking individual and collective action directed at the issue of climate change, questions of preemption surface to challenge the constitutionality of such action.

The legislature, judiciary, and the public lack consensus over the appropriate allocation of authority for climate change regulations. Lawmakers and agencies at the state and federal level vacillate between claims of coexistent or exclusive authority. Hence, now that previous issues of scientific uncertainty appear to be resolved with some finality and unanimity regarding human contribution to global warming, demarcating governmental authority over climate change initiatives has emerged as the latest roadblock for further action.

For years, much of the international community has expressed significant concern over the impacts of climate change.[5] Now, due to certain events in 2005, such as hurricanes Katrina and Rita, and after mounting evidence in the last few decades, U.S. citizens are also expressing a growing apprehension regarding climate change.[6] In particular, as a response to the concern of its constituents, California has led the United States since the 1980s in technology and strategy for mitigating this impending threat. Today, California appears poised to lead the nation in actions targeted at the transportation sector's impact on global climate change.

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[4] Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (expressing the difficulty in delineating a test for preemptive intent of Congress in an immigration case).

[5] For a treatment of political perspective in Europe influencing their strong support of environmental initiatives see Gunnar Sjöstedt, *Critical Attributes of International Negotiation*, *in* ENVIRONMENTAL COOPERATION IN EUROPE: THE POLITICAL DIMENSION 103, 107–21 (Otmar Holl ed., 1994).

[6] Approximately four in ten respondents in a September 2005 poll reported that they believed the "severity of recent hurricanes [was] most likely the result of global climate change." ABC News/Washington Post Poll, Sept. 23–27, 2005, http://www.pollingreport.com/enviro.htm (last visited Jan. 28, 2007). For related polls reporting Americans beliefs about climate change see PollingReport.com, Environment, http://www.pollingreport.com/enviro.htm (last visited Jan. 28, 2007); Americans & the World, Global Warming (2005), http://www.americans-world.org/digest/global_issues/global_warming/gw1.cfm (last visited Jan. 28, 2007).

A. Could the Events of 2005 Modify the Application of Preemption?

Modern U.S. history is replete with examples of a single event or period of time being labeled as the catalyst for significant changes in thinking and behavior. The stock market crash of 1929, events of the 1950s and 1960s giving rise to the environmental and civil rights movements,[7] and the tragedy of September eleventh are but a few examples. Retrospectively, various events, issues, and consequences manifested in 2005 will likely be viewed as such a catalyst, and may well be causal factors for rethinking a variety of political, economic, and legal precedents.

In 2005 a significant confluence occurred: evolving science, politics, a new federal energy act, and domestic disasters converged. On the issue of global climate change, NASA scientists "confirmed that 2005 was the hottest year ever recorded worldwide."[8] Such issues and events sparked public debate about the United States' energy policy with, arguably, an urgency not witnessed since the 1970s oil embargo. Policies for reducing dependence on foreign oil, for holding or reducing soaring gasoline prices, and for mitigating the effects of climate change now dominate energy policy discourse.[9]

Thus, the timeframe of 2005 appears to offer a newly polished lens for viewing the merits of preemption challenges to California's latest climate change regulation. The current political climate uniquely influences perceptions of power and of popular sentiment in the climate change debate. For example, although the summer months saw the passage of the Energy Policy Act of 2005,[10] by September critics labeled it as making "us more dependent on foreign oil," when hurricanes Katrina and Rita illuminated and amplified America's energy policy flaws.[11] Moreover, indicating growing concern for climate change on a local level, the bi-partisan United States Conference of Mayors publicly disagreed with the federal government's stand on climate change. In 2005 the group passed the Mayors Climate Protection Agreement aimed at reducing global warming through community action nationwide.[12]

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7 *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 47–67 (2004) (explaining the effect of events building throughout the 1950s, '60s, and '70s which concerned the national conscience and sparked federal legislation on environmental harms).

8 Tom Doggett, *Think Tank Urges US Action Now on Global Warming*, REUTERS NEWS SERVICE, Feb. 9, 2006, http://www.planetark.com/dailynewsstory.cfm/newsid/34987/story.htm (last visited Jan. 28, 2007).

9 In a national survey conducted in August 2005, over 80% of respondents reported that they were very or somewhat worried that "higher gas prices w[ould] seriously damage the nation's economy overall." ABC News Poll (Aug. 18–21, 2005), http://www.pollingreport.com/energy2.htm (last visited Jan. 28, 2007).

10 Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified in scattered sections of 15 U.S.C., 30 U.S.C., and 42 U.S.C.).

11 Kelley Beaucar Vlahos, *Special Interest Fight Forces out Key Energy Provision*, FOX NEWS, Aug. 23, 2005, http://www.apolloalliance.org/apollo_in_the_news/archived_news_articles/2005/8_23_05_foxnews.cfm?bSuppressLayout=1 (last visited Jan. 28, 2007).

12 US Conference of Mayors, 2005 Adopted Resolutions: Endorsing the US Mayors Climate Protection Agreement, http://www.mayors.org/uscm/resolutions/73rd_conference/en_01.asp (last visited Jan. 28, 2007).

II. AB 1493 AND POSSIBLE CONFLICTS WITH THE CLEAN AIR ACT AND THE ENERGY POLICY AND CONSERVATION ACT PREEMPTION PROVISIONS

California boasts a history of aggressive climate change and air pollution initiatives. In 1988, California expressed acute concern over climate change impacts on "energy supply and demand, water supply, the environment, agriculture, and the economy."[13] Thus, along with its smog mitigation regulations enacted prior to the Clean Air Act (CAA),[14] California was also among the first states to initiate studies on the trends and potential effects of global warming. The study's results, published in 1991, spurred further action. From creating a greenhouse gas emissions reduction registry subsequently adopted by many states, to developing methods for carbon sequestration, to establishing a Renewables Portfolio Standard Program, climate change mitigation remains enmeshed in the California economic and political agenda.[15]

A. Assembly Bill 1493: The California Climate Change Law

California assemblywoman Fran Pavley, sponsor of the most recent greenhouse gas emission legislation, asserts that California is especially "susceptible to some of the impacts of climate change" because of the warming temperatures' potential to exacerbate already dire state pollution problems and for rising sea levels to negatively affect the 1,100 miles of coastline.[16] Thus, AB 1493 passed in 2002, after a survey found that "81% of Californians supported a state law requiring automakers to reduce car greenhouse gas emissions by 2009."[17] Indicating a compromise between environmental and economic interests, the legislation and regulations aim to "achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions . . . [while] taking into account environmental, economic, social, and technological factors."[18]

The California Air Resources Board (CARB) was required to set forth by January 1, 2005, regulations to reduce greenhouse gas emissions, which would apply to 2009 model year cars and light trucks. Specifically, the reductions use 2000 as the baseline model year, allowing manufacturers who have previously reduced tailpipe emissions to receive credit for their early efforts.[19] Moreover, the climate initiative describes both broad mandates and specific restrictions for reaching its goal of a thirty percent reduction in greenhouse gases by 2016. The criteria for the new standards are: 1) the

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13 Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN. ST. ENVTL. L. REV. 15, 45 (2004).

14 42 U.S.C. §§ 7401–7671q (2000).

15 McKinstry, *supra* note 13, at 45–51.

16 Online NewsHour, Clearing the Air (Mar. 28, 2005), http://www.pbs.org/newshour/bb/environment/jan-june05/california_3-28.html (last visited Jan. 28, 2007).

17 PUBLIC POLICY INST., PPIC STATEWIDE SURVEY 9 (2002).

18 CAL. HEALTH & SAFETY CODE § 43018.5(b)(1), 43018.5(i)(2)(A) (West 2006).

19 McKinstry, *supra* note 13, at 50.

standards must be "capable of being successfully accomplished within the time provided . . . taking into account environmental, economic, social, and technological factors;" 2) the standards must be "economical to an owner or operator of a vehicle;" and 3) the legislature must consider "the impact the regulations may have on the economy of the state, including . . . automobile workers and affiliated businesses in the state."[20] These directives must be achieved notwithstanding regulatory restrictions imposed on CARB by the bill itself. Perhaps to weaken various preemption challenges or to circumvent other potential concerns including safety, the following prohibitions also apply. CARB cannot: 1) impose additional fees or taxes on "any motor vehicle, fuel, or vehicle miles traveled," 2) ban the sale of "any vehicle category" (such as sport utility vehicles), 3) require a "reduction in vehicle weight," 4) reduce speed limits, or 5) impose mandatory reductions on "vehicle miles traveled."[21]

As posited above, energy, economics, and the environment remain at the forefront of public policy discourse. The complementary and conflicting interactions among these arenas have resulted in commendations for and critiques of AB 1493. Both former Governor Davis and current Governor Schwarzenegger supported the bill, and Governor Schwarzenegger vowed to protect it from legal challenges.[22] Governors throughout the country have also lent support by declaring their intention to adopt the emissions standards through the CAA's allowance for states to choose either federal or California emission standards.[23] In addition, assemblywoman Pavley's "partial list" of bill supporters includes:

> over 100 environmental, public health and business groups, including Physicians for Social Responsibility, American Lung Association, . . . California Ski Industry Association, Environmental Entrepreneurs, Union of Concerned Scientists, Sierra Club California, Coalition for Clean Air, Natural Resources Defense Council, Latino Issues Forum, . . . Friends of the Earth, and regional air and water districts.[24]

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20 CAL. HEALTH & SAFETY CODE § 43018.5 (West 2006).

21 *Id.* § 43018.5(d)(1)–(5).

22 *See* Press Release, Natural Res. Def. Council, California Governor Gray Davis Signs Landmark CO2 Pollution Measure; New Law Uses Power of American Know-How to Tackle Global Warming (July 22, 2002), *available at* http://www.nrdc.org/media/pressreleases/020722.asp [hereinafter Natural res. Def. Council, Showdown] (Governor Davis signed the bill on July 22, 2002); Press Release, Natural Res. Def. Council, Showdown: Carmakers Sue California on Global Warming Emissions Rule, Choose Litigation Over Innovation (Dec. 7, 2004), *available at* http://www.nrdc.org/media/pressreleases/041207a.asp ("California Governor Arnold Schwarzenegger has promised to implement and defend the statute against outside legal interference.").

23 Currently eight states have adopted California's greenhouse gas rules and "two other states are in the process of adopting the rules." Sholnn Freeman, *States Adopt California's Greenhouse Gas Limits*, WASH. POST, Jan. 3, 2006, at D01. States may adopt either a "California" or "Federal" vehicle emission standard through Clean Air Act § 209(b)(3), codified at 42 U.S.C. § 7543(b)(3) (2000).

24 Kriss Perras Running Waters, *Pavley Makes a Run for Kuehl's Seat*, PCH PRESS, Oct. 20, 2003, http://www.pchpress.com/local/pavley10-20-06.html (last visited Jan. 28, 2007).

Notwithstanding this support, representatives from across the political spectrum have leveled criticism at the means and ends associated with the bill. For example, "Democratic Congressman John Dingell says the American auto industry, which is centered in his state of Michigan, would suffer under the $3,000 extra per car Detroit claims California's rules will cost."[25] Others argue that because "carbon dioxide . . . doesn't localize over California . . . Californians are not going to get any health benefits, emissions benefits, et cetera, from these regulations."[26] Regardless of the political debate surrounding California's effort to reduce greenhouse gas emissions, the most crucial question arises in a realm officially devoid of political considerations. Major auto manufacturers have filed suit against Catherine Witherspoon of CARB, alleging that AB 1493 is preempted by federal law. *Central Valley Chrysler-Jeep v. Witherspoon*[27] has currently survived a motion to dismiss and will stay in the Fresno Division, despite defendant's motion to transfer venue.

B. The Preemption Provision of the Clean Air Act and AB 1493

California not only outpaced the nation in terms of its air pollution abatement measures, but also forged advanced methods to control auto emissions through mobile source technology: "In 1960, the state established an emissions control board to oversee the development of emissions control equipment . . . . Installation was required on new and used cars, and . . . the registration requirements went into effect in 1965, over the vigorous opposition of the automobile manufacturers."[28] Although modest federal regulation of air pollution did occur in the 1960s, the CAA Amendments of 1970 gave rise to CAA's current form.[29] The CAA's goal is to "[achieve] air quality levels throughout the country that protect the public health and welfare."[30] The CAA adopted a cooperative federalism approach to attaining this goal, creating National Ambient Air Quality Standards (NAAQS) for a set of pollutants affecting public health,[31] while leaving states with the flexibility to decide how each standard could best be met in their state. Specifically, section 109 of the CAA charges the Environmental Protection Agency (EPA) Administrator with establishing NAAQS "allowing an adequate margin of safety . . . requisite to protect the public health,"[32] while section 110 charges each state with the responsibility of creating a state implementation plan (SIP) for achieving the NAAQS.[33]

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25 Online NewsHour, *supra* note 16.

26 *Id.*

27 No. CV-F-04-6663 REC., 2005 WL 2709508 (E.D. Cal. Oct. 20, 2005).

28 ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 554 (4th ed. 2003).

29 42 U.S.C §§ 7401–7671q (2000).

30 *See* PERCIVAL ET AL., *supra* note 28, at 501 (noting that "the goal that has been at the heart of the Clean Air Act since 1970 [is] achieving air quality levels throughout the country that protect the public health and welfare").

31 42 U.S.C. §§ 7408–09 (2000).

32 *Id.* § 7409.

33 *Id.* § 7410.

However, in reaching compliance with the NAAQS, "Congress preempted all states except California from setting independent motor vehicle emissions standards as part of their SIP. Congress thought this exception appropriate given California's 'unique problems and pioneering efforts' at controlling air pollution from motor vehicles."[34] The CAA's preemption clause specifically states: "No State . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles."[35] California received a waiver from the preemption clause because of its singular efforts prior to the enactment of the federal legislation. The CAA states that the EPA Administrator shall "waive application of the [preemption provision for] any State which has adopted standards . . . for the control of emissions from new motor vehicles . . . prior to March 30, 1966."[36]

California regulations attempting to utilize the emission standards preemption waiver must "be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards"[37] and must avoid three determinations in section 209(b) of the CAA. The act entitles California to such a waiver unless the administrator finds:

> (A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.[38]

However, as discussed in Part IV of this Comment, there exists a strong presumption in favor of granting the waiver.

C. The Preemption Provision of the Energy Policy and Conservation Act and AB 1493

Since Richard Nixon, U.S. presidents have repeatedly articulated the goal of reducing America's dependency on foreign oil. The Arab Oil Embargo of 1973–74 prompted congressional response, much as the perceived current energy problems may spur similar political and legislative action. In 1975, Congress passed the Energy Policy and Conservation Act (EPCA) to "enhance the supply of fossil fuels in the United States through increased production and energy conservation programs. The primary method envisioned for conserving energy was the regulation of motor vehicle fuel efficiency."[39] To enable auto manufacturers to meet these standards, Congress created a flexible compliance mechanism. The corporate average fuel economy (CAFE) standard established minimums for vehicle miles

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[34] Deborah Keeth, Comment, *The California Climate Law: A State's Cuting-Edge Efforts to Achieve Clean Air*, 30 ECOLOGY L.Q. 715, 723 (2003) (quoting Motor Vehicle Mfrs. Ass'n of U.S. v. N.Y. State Dep't of Envtl. Conservation, 17 F.3d 521, 525 (2d Cir. 1994)).

[35] 42 U.S.C. § 7543(a) (2000).

[36] *Id.* § 7543(b)(1).

[37] *Id.*

[38] *Id.*

[39] Keeth, *supra* note 34, at 724.

traveled per gallon of fuel for a manufacturer's entire fleet of cars per model year. This "encouraged car makers to sell lots of small fuel-efficient vehicles at sometimes unprofitable prices, so they could keep selling their more profitable gas guzzlers."[40]

Utilizing CAFE standards to increase automobile fuel economy proved ineffective. Standards have changed very little since 1975. For example, the standards for light trucks began at 17.7 and 20.8 miles per gallon (mpg) for domestic and foreign light trucks, respectively. The standard for these vehicles just recently increased to 21.0 mpg for model year 2005, 21.6 mpg for model year 2006, and 22.2 mpg for model year 2007.[41] In addition to the more flexible scheme of fuel economy averaging, Congress further allayed some industry concerns through the broad language of the express preemption provision in the EPCA. To prevent a chaotic compliance regime of varying standards, the act expressly preempts state fuel economy regulations. It declares that states "may not adopt or enforce a law or regulation related to fuel economy standards."[42]

The EPCA express preemption provision, unlike that in the CAA, does not provide a waiver for California. Because AB 1493 will face preemption challenges under both the EPCA and the CAA, it illuminates a tension between both statutes. The preemptory interests in not subjecting industry to fifty different state standards may clash with the congressional desire for California to be the nation's laboratory for air pollution control technology. Prior to discussing the likely arguments that CARB and industry will make regarding these challenges, and prior to analyzing the possibility of altering the application of preemption, a brief discussion of federal preemption law is in order.

III. PREEMPTION JURISPRUDENCE IN THE SUPREME COURT

In the domain of innovative state environmental regulation, lawmakers often anticipate federal preemption challenges. California recently battled three such contests on various initiatives, with opposing litigants raising legal arguments such as preemption under the CAA and California defending based on its privileged status under that act.[43] Thus a brief overview of

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40 Karen Lundegaard, *Crash Course: How U.S. Shifted Gears to Find Small Cars Can Be Safe, Too; Studies Discover Size, Quality Are As Important As Weight; Drafting Rules for SUVs; Honda Sticks up for Little Guy*, WALL ST. J., Sept. 26, 2005, at A1.

41 49 C.F.R. § 533.5(a) (2005); *see also* National Highway Safety Administration, Light Truck Fleet Average Characteristics, http://www.nhtsa.gov/cars/rules/CAFE/LightTruckFleet.htm (last visited Jan. 28, 2007) (showing that light trucks as a percentage of light duty fleets has dramatically increased, while fuel economy has increased more modestly); National Highway Safety Administration, Light Truck Fuel Economy Standard Rulemaking (Model Years 2008–2011), http://www.nhtsa.dot.gov/portal/site/nhtsa/menuitem.d0b5a45b55bfbe582f57529cdba046a0/ (last visited Jan. 28, 2007) (discussing CAFE standards and detailing the new rules regarding light trucks and minivans).

42 49 U.S.C. § 32919(a) (2000).

43 *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252–55 (2004) (vacating a judgment for California because the agency rules, requiring fleet carriers to buy cars

preemption law is critical to understanding the legislators' decisions in drafting AB 1493 as well as the legal challenges this climate law has and will likely face.[44]

A. Historical Development and Principles of Preemption Jurisprudence

The changing conception and complex history of preemption doctrine evolved from a deceptively simple phrase in the United States Constitution. The Supremacy Clause dictates that laws created by the federal government are "the supreme Law of the land."[45] The establishment of this constitutional principle is often attributed to landmark nineteenth century cases *McCullough v. Maryland*[46] and *Gibbons v. Ogden*,[47] requiring state laws that "interfere with, or are contrary to the laws of Congress . . . [to] yield."[48] Therefore, preemption cases turn on whether there exists actual interference or conflict between state and federal laws.

Three forms of preemption exist: express, implied, and conflict.[49] Express preemption occurs when Congress explicitly declares the preemptive status of a federal law over state laws.[50] Because both the EPCA and the CAA contain preemption provisions, express preemption doctrine will be dominant in the analysis in the following section. However, implied preemption may also present a barrier to climate regulations because of the broad "fields" of emissions and fuel economy regulated by the CAA and EPCA, respectively. Implied preemption occurs when a piece of legislation's preemptive effect is "implicitly contained in its structure and purpose" or when "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[51] Finally, conflict preemption arises in two situations: "when it is impossible to comply with

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that met the state's fuel standards, were preempted by the CAA); Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 666–67 (9th Cir. 2003) (holding California's ban on MTBE, an oxygenate used in gasoline, was not preempted under the CAA); Cent. Valley Chrysler-Plymouth, Inc. v. Cal. Air Res. Bd., No. 02-5017 (E.D. Cal. June 11, 2002) (granting a preliminary injunction for plaintiffs who demonstrated a strong likelihood of success on their EPCA preemption claim).

44 *See* Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon, No. CV-F-04-6663 REC., 2005 WL 2709508 (E.D. Cal. Oct. 20, 2005) (detailing manufacturers' allegations that AB 1493 is preempted by the EPCA, the CAA, the foreign policy of the United States, and the foreign affairs powers of the federal government).

45 U.S. CONST. art. VI, §2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

46 17 U.S. 316 (1819).

47 22 U.S. 1 (1824).

48 *Id.* at 211.

49 Some commentators categorize preemption arguments into two groups instead of three: express and implied preemption, merging field and conflict preemption into implied preemption. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 366–67 (2005).

50 *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95–96 (1983) (stating that express preemption occurs when "Congress' command is explicit in the statute's language").

51 Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–53 (1982).

both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[52]

In addition to the categories of preemption, principles have developed to guide courts in their analysis of preemption challenges. While their relative weight in courts' analysis have expanded and contracted with time, certain principles remain constant. First, and perhaps most critical to the California regulatory challenges, is the presumption against preemption: "Absent clear evidence to the contrary, there is a general presumption against preemption in areas traditionally regulated by the states."[53] This presumption transpired early in preemption jurisprudence, from the compromise between a growing national economy which generated "the perceived need for nationally uniform regulations," versus the "anti-state potential of preemption"[54] which sparked concerns about federalism. In 1947, *Rice v. Santa Fe Elevator Corp.*[55] firmly established both the first and second principles by which preemption challenges are examined. *Rice* held that courts must "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."[56] Furthermore, *Rice* articulated the second lasting principle in preemption doctrine, "[t]he question in each case is what the purpose of Congress was."[57]

Interestingly, the Supreme Court applied these principles of interpretation in ways which conflicted with its normal method of statutory interpretation. Rather than employing the presumption against preemption only in cases regarding implied or conflict preemption, the Court also utilized the presumption to narrowly interpret the reach of express preemption clauses. "[T]he presumption against preemption colored the Court's statutory interpretation, setting a high bar for finding preemption in the statute's words. Simultaneously, the Court went beyond the statute's language to consider whether the . . . Act implied preemption based on Congress's overall regulatory intent."[58]

The principles informing the decision in *Rice* were reaffirmed in *Cipollone v. Liggett Group, Inc.*,[59] in which the Federal Cigarette Labeling and Advertising Act was held not to preempt damages actions arising under

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[52] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[53] Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 27 ENVIRONS ENVTL. L. & POL'Y J. 281, 300 (2003) (citing Oxygenated Fuels Ass'n, Inc. v. Pataki, 158 F. Supp. 2d 248, 252 (N.D.N.Y. 2001)).

[54] Christopher T. Giovinazzo, *California's Global Warming Bill: Will Fuel Economy Preemption Curb California's Air Pollution Leadership?*, 30 ECOLOGY L.Q. 893, 912–14 (2003) (discussing, with approval, Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 783 (1994)).

[55] 331 U.S. 218 (1947).

[56] *Id.* at 230.

[57] *Id.*

[58] Giovinazzo, *supra* note 54, at 916.

[59] 505 U.S. 504, 508–09 (1992).

state law. Justice Stevens began his opinion by reiterating the traditional method of preemption analysis:

> Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Accordingly, "[t]he purpose of Congress is the ultimate touchstone" of pre-emption [sic] analysis.[60]

B. Related Doctrinal Trends Threatening AB 1493

In recent years, two trends have arisen in Supreme Court opinions which increase the threat to AB 1493 by expanding the scope of preemption. First, although the current Court often espouses states' rights doctrines, preemption cases throughout the mid to late 1990s and early 2000s consistently reduced the scope of state regulatory independence. Second, moving away from *Cipollone*, the Court began interpreting express preemption clauses to extend beyond their plain meaning, resulting in the preemption of state regulations through a broader, implied preemption. Although these trends present challenges to California's climate change legislation, Part IV discusses their merits and possible outcomes with regard to AB 1493.

Many commentators note the dichotomy between the Supreme Court's advocacy for federalism, and its willingness to find state regulations or statutes preempted by federal legislation.[61] Highlighting the possible intersection between preemption and politics, some critics speculate that the Court is influenced by a "substantive conservatism," when favoring advocates for federal preemption.[62] Furthermore, the Court's decisions supporting states' rights in cases involving the Commerce Clause or state sovereign immunity have prompted the warning that, "[p]reemption law is on a collision course with the conservative justices' celebrated project to re-establish structural constitutional principles on federalism."[63] Regardless of any posited political basis for such findings, the Supreme Court's position on interpreting preemption challenges will be critical to legal battles involving AB 1493. However, the trend may not be dispositive for AB 1493. Recent

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[60] *Id.* at 516 (internal citations omitted) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) and Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

[61] *See, e.g.*, Rachel L. Chanin, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 711 (2003) ("Despite the Supreme Court's growing emphasis on state rights, the Court has increasingly found state laws preempted by federal statutes."); Carlson, *supra* note 53, at 305 ("The 1990s and 2000s have seen intense preemption activity in the Court across a wide number of subject areas. . . . The Court is, of course, known for its pro-states' rights agenda . . . . Yet the Rehnquist Court's position on preemption has been a different story.").

[62] *See* Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 434, 462 (2002).

[63] Michael Greves, *Upcoming Clash Between Federalism and Pre-emption Is Foretold in the* Geier v. American Honda *Opinions*, LEGAL TIMES, June 12, 2000, at 74.

Supreme Court decisions suggest the Justices have avoided a "collision course" with federalism, particularly in construing the phrase "related to."

In addition to the data suggesting an increase in the Court's willingness to classify state statutes as preempted by federal action, the approach used to reach such decisions contrasts sharply with the holding in *Cipollone*. The Court has shifted from the presumption against preemption by giving broader meaning to express federal clauses. "[R]ecent Court decisions suggest that field and obstacle preemption, and the related methodology for determining congressional intent and the scope of preemption, apply even where the federal law in question contains an *express* preemption clause."[64]

Many commentators believe that growing federal regulations in areas concerning the environment, health, safety, and crime have prompted this expansive preemption jurisprudence.[65] In fact, a case often cited to best illustrate this doctrinal shift concerned negligence claims pertaining to auto safety. The state tort suits at issue in *Geier v. American Honda Motor Co.*[66] were held not to be expressly preempted by the Motor Vehicle Safety Act's preemption provision. Instead, the Court, going beyond the express language, declined to note the presumption against preemption and found the suits to conflict with the objectives of the federal act.[67] Despite the presence of a savings clause "that '[c]ompliance with' a federal safety standard 'does not exempt any person from any liability under common law,'" and a finding that the preemption provision and the saving provision, "read together, reflect a neutral policy, . . . towards the application of ordinary conflict pre-emption [sic]," the claims were held to conflict with the broader objectives of the federal regulation.[68]

Federal courts or perhaps the Supreme Court may face a similar dilemma if called upon to analyze the preemption claims regarding AB 1493. Both the CAA and the EPCA contain express preemption provisions, preventing states from creating a patchwork of regulatory requirements. Yet, there exists a savings clause of sorts for California. Here, the express provisions will be read against the CAA's waiver for California and the congressional affirmation of this privileged status as the nation's laboratory for progressive air pollution mitigation. Each of these historical and modern principles of preemption jurisprudence will affect the outcome of

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64 Giovinazzo, *supra* note 54, at 911–12 (emphasis added).

65 For example:

> [T]he Court has found that Massachusetts regulations governing cigarette advertising were preempted by federal law; that a state-law tort claim was preempted as contrary to the purposes of the Motor Vehicle Safety Act; and that federal law preempted a state-law claim against a manufacturer of medical screws who committed fraud against the Food and Drug Administration.

Carlson, *supra* note 53, at 306; Chanin, *supra* note 61, at 711–12 (citing David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1135 (1999)).

66 529 U.S. 861 (2000).

67 *Id.* at 886.

68 *Id.* at 868 (quoting 15 U.S.C. § 1397(k) (1966)).

Witherspoon and any additional challenges to carbon dioxide regulation. The discord between the varying trends remains palpable in Court opinions.[69] The historical presumption against preemption and the recent, broader reading of preemption provisions will continue to play conflicting roles in future examinations of AB 1493.

IV. PREEMPTION PROVISIONS OF THE ENERGY POLICY AND CONSERVATION ACT AND THE CLEAN AIR ACT: POLITICS AND PREEMPTION APPLIED

As implied in the review of preemption jurisprudence, this constitutional doctrine refuses to remain static. As the nation's priorities regarding environmental legislation have evolved, so too have the complexities underlying preemption analysis. Both legal and political considerations may very well influence the future of AB 1493. Perhaps it is most appropriate that initial legal decisions regarding *Witherspoon* were argued and published at the close of 2005: the year proved tumultuous for energy policy and politics. An important consideration arises as to whether the changing political dynamic surrounding energy policy, or even recent Supreme Court decisions, will influence decisions on AB 1493. Or, perhaps preemption jurisprudence will remain immune to such considerations.

A. Preemption Can Be Political: Agencies, Administration Policy, and Congress

Although the preemption of a state statute by federal legislation is a strictly legal question, politics arguably exist at the foundation of this legal argument. Furthermore, the issue of preemption, involving state regulatory power vis-à-vis federal power, has prompted specific assertions of political influence. Some commentators suggest, "'the actual allocation of regulatory authority between federal and state governments depends on legislative and bureaucratic politics,' with federalism contracting or expanding 'in response to pragmatic concerns of political actors in legislatures and bureaucracies.'"[70]

EPA administers the CAA and presides over two issues critical to the AB 1493 preemption discussion. First, EPA's Administrator possesses some discretion in categorizing certain airborne compounds as "air pollutants" for the purposes of the CAA.[71] Second, EPA also must approve a preemption

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[69] *See id.* at 888 (Stevens, J., dissenting) ("I submit that the Court is quite wrong to characterize its rejection of the presumption against pre-emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text, as 'ordinary experience-proved principles of conflict pre-emption.'"); *id.* at 895 (stating that "[w]hen a federal statute contains an express pre-emption provision, 'the task of statutory construction must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress' pre-emptive intent.'" (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993))).

[70] Keeth, *supra* note 34, at 738 (2003) (quoting Symposium, *Environmental Federalism: The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1185–90 (1995)).

[71] 42 U.S.C. § 7408(1) (2000).

waiver before California can mandate emission standards of a stricter level than those specified by federal law.[72] Yet agencies such as EPA also serve under the executive branch of government and are necessarily affected by each presidential administration's overarching policies regarding their particular area of expertise:

> The President as the chief executive has almost plenary control over executive branch agencies. . . . He has almost total control over departmental policy, and . . . [while] constraints on the appointment and removal process in theory make the commission[er]s 'independent,' . . . over time a President, simply by filling vacancies on the commission, can have a substantial effect on that agency's policymaking.[73]

Though EPA focuses exclusively on environmental issues, its policies, similar to all agencies, have fluctuated with various administrations.[74] Whether or not it was a politically motivated decision, EPA's choice, in 2003, to forego classifying carbon dioxide as an air pollutant, under section 202(a)(1) of the CAA, has been perceived as such because of contrary findings from the Clinton Administration. Critics of the "Fabricant Memorandum" of 2003, wherein EPA denied regulatory authority over carbon dioxide, often contrast it to a memorandum by two Clinton EPA counsels who asserted that EPA did indeed have the authority to regulate carbon dioxide.[75] Currently, EPA's decision stands affirmed by the Court of Appeals for the District of Columbia in *Massachusetts v. EPA*.[76]

Carbon dioxide remaining absent as a criteria or motor vehicle pollutant under the CAA raises two challenges for AB 1493 in the preemption arena. Generally, if carbon dioxide is not a criteria pollutant, it becomes more difficult for California to assert state authority to regulate it: "[i]f CARB cannot argue that the Climate Law falls under its traditional health and welfare regulation, it cannot take advantage of the judicial

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72 *Id.* § 7473(c)(3).

73 WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 9–10 (4th ed. 2000).

74 "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983) (declaring invalid a Department of Transportation rescission of Standard 208, which permitted manufacturers to chose between safety devices in cars). Additionally, agencies have remarkable discretion to modify or rescind rules and policies, although they must articulate a "reasoned analysis" for such change. Much deference is afforded to their expertise, determinations, and legislative interpretations, provided they are not "arbitrary or capricious." *See* Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984) (holding that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth).

75 *See* Massachusetts v. EPA, 415 F.3d 50, 54 (D.C. Cir. 2005). *See generally* Nicholle Winters, *Carbon Dioxide: A Pollutant in the Air, but Is the EPA Correct that It Is Not an "Air Pollutant"?*, 104 COLUM. L. REV. 1996, 2000–01(2004) (detailing and comparing the memos, their conclusions, and EPA's decision not to regulate carbon dioxide).

76 415 F.3d at 58. A divided court affirmed the agency's decision, with one judge stating that EPA appropriately exercised its discretion and a second stating that the state of Massachusetts did not have standing to bring the suit. *Id.*

presumption that Congress does not intend to preempt an area of traditional state authority without express evidence to the contrary."[77]

However, because of the myriad of evidence supporting the health, economic, and social impacts of climate change as well as the previous administration's contrary findings regarding EPA authority to regulate carbon dioxide nationwide, California's federalism argument may still prevail.[78]

More specifically, to adopt a standard relating to the control of automobile emissions, California must receive a waiver from the EPA. Yet EPA could theoretically deny the waiver on the grounds that carbon dioxide is not classified as an air pollutant. History, though, militates against this possibility. "The EPA has never denied California an emissions waiver in its entirety, although it has sometimes denied part of a waiver or delayed implementation of California emissions standards. . . . [Yet], all other Section 209(b) waiver requests have involved air pollution emissions controls aimed at smog."[79] If EPA denied the preemption waiver, California retains the right to challenge EPA's decision. However, as stated, agencies maintain discretion in their areas of expertise.

An agency's decision to file in support of a party in a preemption case demonstrates additional political overtones regarding greenhouse gas emissions control initiatives. Amicus briefs filed by agencies represent opinions of the executive branch, giving weight to federalism or preemption arguments. Moreover, conflicting theories on the causes and effects of climate change remain highly politicized and likely affect policy decisions. The Bush Administration's distrust of global warming science and lack of support for climate change mitigation initiatives are well documented and impact these decisions within the Executive Branch.[80]

Finally, politics at the congressional level also influence the preemption debate. Senators John McCain (R-Ariz.) and John Kerry (D-Mass.) proposed to increase the national CAFE standard in 2002.[81] Although the proposal was defeated, signs of change are emerging. As discussed in Part I, politics seem to be shifting towards widespread acknowledgment of the human impact on climate change. The Senate did pass a non-binding resolution which

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77 Keeth, *supra* note 34, at 737.

78 *See* California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption; Decision, 58 Fed. Reg. 4166, 4166 (Jan. 13, 1993) (explaining the reasons why EPA has supported such initiatives in California including, for example, the fact that the EPA did not find that California acted arbitrarily and capriciously in determining that its standards were "less protective to public health and welfare than the applicable 'Federal' standards").

79 Carlson, *supra* note 53, at 293.

80 *See, e.g.*, Armin Rosencranz, *U.S. Climate Change Policy Under G.W. Bush*, 32 GOLDEN GATE U. L. REV. 479, 479–91 (2002) (providing a summary of George W. Bush's action and inaction regarding the issue of climate change); CNN, Now How Do We Save the Earth?, http://www.cnn.com/2001/WORLD/europe/07/04/climate.analysis/ (last visited Jan. 28, 2007) (providing Bush's reasons for not signing the Kyoto Protocol).

81 *See* Press Release, Envtl. Def., Kerry-McCain Proposal Is Breakthrough in CAFE Debate (Mar. 8, 2002), *available at* http://www.environmentaldefense.org/pressrelease.cfm?ContentID=1794 (discussing proposal to raise CAFE standard and establish carbon trading program).

recognized the reality and harmful effects of global warming in 2005.[82] Additionally, in 2004, the National Resources Defense Council released data showing "strong public support for measures to bring us cleaner cars with better technology. In a survey of over 1,300 voters nationwide by the leading polling firm Greenberg, Quinlan, Rosner, the poll found nearly three quarters (73%) of Election Day voters support California's emissions law."[83] Hurricanes Katrina and Rita also spurred discussion of amending the CAFE standards to reduce dependence on foreign oil and stave off severe weather effects from global warming. As public awareness and concern increases, grassroots efforts to mobilize a national strategy to address climate change may force legislative branch environmental and energy policy action.

B. The EPCA Preemption Provision: The Strongest Challenge to AB 1493

The EPCA presents a stronger challenge to the California climate law than the CAA. The EPCA provides that once the National Highway Traffic Safety Administration (NHTSA) establishes fuel economy standards, no state may "adopt or enforce a law or regulation related to fuel economy standards."[84] Express preemption arguments hinge on whether or not AB 1493 relates to fuel economy standards. A recent statement by the EPA, positing that "the only practical way to reduce tailpipe emissions of CO_2 is to improve fuel economy," bolsters the automobile industry's argument.[85] This may undercut CARB's assertion that the law targets emissions reductions, not fuel economy. Automotive industry lawyers utilize EPA's observation to assert that "California's CO_2 regulations are not only 'related to' fuel economy standards—they *are* fuel economy standards."[86]

Moreover, Supreme Court precedent emanating from the era wherein express preemption clauses were ascribed broader meaning lends further support to the industry's position. For example, *Morales v. Trans World Airlines, Inc.*[87] prompted the recent contention that use of the terms "related to" in a preemption clause illustrates "one of the strongest and most expansive statements of preemptive intent."[88] In fact, if courts read "related to" broadly, as in *Morales*, then California's law may indeed be preempted by the plain meaning of the EPCA. The Court in *Morales* defined the phrase using *Black's Law Dictionary*: "The ordinary meaning of these words is a broad one—to stand in some relation; to have bearing or concern; to pertain;

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82 Living on Earth, Senate Takes on Climate Change, http://www.loe.org/shows/segments.htm?programID=05-P13-00025&segmentID=1 (last visited Oct. 13, 2006).

83 Natural Res. Def. Council, Showdown, *supra* note 22.

84 49 U.S.C. § 32919 (2000).

85 Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003).

86 Erika Z. Jones & Adam C. Sloane, *United States: Federal Law Preempts California's Attempt to Regulate Global Warming*, WASH. LEGAL FOUND., Mar. 11, 2005, *available at* http://www.mondaq.com/i_article.asp?articleid=32257&print=1.

87 504 U.S. 374 (1992).

88 Jones & Sloane, *supra* note 86; *see Morales*, 504 U.S. at 384 (citing examples of the Supreme Court broadly interpreting "relates to").

refer; to bring into association with or connection with . . . and the words thus express a broad pre-emptive purpose."[89] The use of this textualist approach for defining statutory terms increased markedly in the last fifteen years, attributed primarily to Justices Scalia and Thomas.[90] In the 1960s, only sixteen Supreme Court opinions cited dictionaries, whereas in the 1990s, two hundred opinions referenced dictionaries to define terms.[91] Recently, the Court once more employed a textualist approach in construing the phrase "relates to the business of insurance" in *Barnett Bank of Marion County v. Nelson*.[92] "There, the Court again focused on the meaning of the preemption statute in 'ordinary English,' explaining that '[t]he word "relates" is highly general, and this Court has interpreted it broadly in other pre-emption contexts.'"[93] If lower courts adopt this strict textual approach, without regard for issues of states' rights or congressional intent, AB 1493 may fail.[94]

Thus, the principles used by the Supreme Court for analyzing preemption decisions become paramount. Whether or not a court employs the presumption against preemption, for instance, could determine the preemptive scope of "related to." CARB possesses a strong argument here because the presumption applies in areas traditionally under state control, such as health and air pollution regulation.[95] Moreover, the presumption is rebutted only by "clear and manifest" intent to override state authority, [96] which is arguably absent from the EPCA congressional history.

However, CARB does not have to depend entirely on older principles of preemption jurisprudence; namely the presumption against preemption and the Court's finding that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."[97] Even under a purely textualist analysis, the climate law may survive. In fact, the fatal flaw in the auto manufacturers' argument may stem from the meaning of "related to" which they advocate. If that phrase may

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89 *Morales*, 504 U.S. at 383 (internal quotations and citations omitted).

90 Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 262 (1999).

91 Roy Mersky, *The Evolution and Impact of Legal Dictionaries*, 15 EXPERIENCE 32, 32 (Fall 2004); *see also* Jason Weinstein, *Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism*, 38 U. MICH. J.L. REFORM 649, 652 (2005) (describing historical trends in the Supreme Court's use of dictionaries).

92 517 U.S. 25, 38–39 (1996).

93 Giovinazzo, *supra* note 54, at 927.

94 *See generally* Lolliard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (analyzing a preemption clause regarding cigarette advertising and finding a Massachusetts law preempted largely by a broad reading of the plain meaning of the preemption clause).

95 *See, e.g.*, Barbara L. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 BUFF. L. REV. 181, 188 (1991) (explaining that "the Supreme Court has been particularly reluctant to preempt state law" in "areas of traditional state regulation such as health and safety"); Allen R. Ferguson, Jr., Comment, *Federal Supremacy Versus Legitimate State Interests in Nuclear Regulation:* Pacific Gas & Electric *and* Silkwood, 33 CATH. U. L. REV. 899, 919–20 (1984) (stressing the deference courts generally give in matters implicating traditional state police powers, especially health and safety issues, including environmental impacts and harms).

96 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

97 Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

encompass "connections" and "relations" then in actuality "those words imply nearly limitless preemption."[98]

The Supreme Court altered its preemption analysis because of this overbreadth and confusion in the context of the Employee Retirement Income Security Act of 1974[99] (ERISA). This statute also utilizes the "relates to" employee benefit plans under ERISA standard in its express preemption provision.[100] After years of invalidating state statutes held to "refer or connect" to an ERISA benefits plan, the Court recognized that "the result of this supposedly straightforward approach is that delimiting the scope of preemption becomes nearly impossible."[101] The Court thus altered its approach in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.* (*Travelers*)[102] to focus instead on the objectives of the statute and its preemption provision. The Court found persuasive that the state law at issue in *Travelers* was "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate."[103] Similarly, because CARB focused its regulation on air pollution from emissions, an area traditionally subject to local regulation, rather than on fuel economy standards, it may take advantage of this analogous precedent.

The Court has since employed a narrower interpretation of the preemption provision "related to," demonstrating a more permanent retreat from the former broad interpretation, at least in the ERISA context. This reasoning received support from even the lead textualist on the Court. As Justice Scalia opined in *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.* (*Dillingham*)[104] "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."[105]

Furthermore, in *Travelers*,[106] *Dillingham*,[107] and subsequently in *Egelhoff v. Egelhoff*,[108] the Court considered the effect that state law had on ERISA plans but focused its inquiry on whether or not the state laws would bind ERISA plan administrators to "a particular choice of rules."[109] In *Egelhoff*, the Court invalidated a "statute providing for the automatic revocation of the designation of a spouse as a beneficiary upon divorce" as preempted by ERISA, cautioning that such a rule "[r]equire[s] ERISA

98 Giovinazzo, *supra* note 54, at 929.

99 Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as 29 U.S.C. §§ 1001–1461 and in scattered sections of 26 U.S.C.).

100 29 U.S.C. § 1144(a) (2000) (ERISA preemption clause).

101 Giovinazzo, *supra* note 54, at 930.

102 514 U.S. 645 (1995).

103 *Id.* at 668.

104 519 U.S. 316 (1997).

105 *Id.* at 335 (Scalia, J., concurring).

106 514 U.S. at 659.

107 519 U.S. at 332.

108 532 U.S. 141 (2001).

109 *Id.* at 147.

administrators to master the relevant laws of 50 States and . . . would undermine the congressional goal of minimiz[ing] the administrative and financial burden[s] on plan administrators."[110] An appropriate analogy can be made to the EPCA, which seeks to prevent automobile manufacturers from being subject to fifty different state regulatory standards for fuel economy. Manufacturer plaintiffs suing CARB will likely assert that AB 1493 requires them to "master the relevant laws of 50 states." However, upon closer examination, AB 1493's inherent flexibility may preclude this analogy to the requirements found to be binding in *Egelhoff*.[111]

Beyond analogizing to existing case law, CARB may also argue that industry's broad reading of the "related to" provision in EPCA would lead to absurd results by implicating too wide a range of state laws. As with the ambiguity and overbreadth found in ERISA cases, the EPCA's preemption provision must be given a logical limit:

> For example, as the response to the 1970s oil crisis made clear, speed limits have a substantial impact on fuel economy. Similarly, by increasing the cost of fuel, state gasoline taxes affect consumers' sensitivity to fuel economy in their vehicle purchase choices, thereby affecting the ease with which manufacturers can comply with CAFE.[112]

An assertion that Congress intended to preempt such diverse categories of state law in using the phrase "related to fuel economy" seems untenable. In fact, even if opponents of AB 1493 tried to limit the reach of this provision by noting that the law must specifically conflict with fuel economy *standards* rather than with fuel economy generally, their argument fails.[113] Using that argument, opponents would inadvertently lend support to CARB's contention that it is not preempted by the EPCA because their law does not regulate fuel economy, but emissions.

C. The CAA Preemption Provision: Allowance for California Dreamin'

As discussed in Part II, per section 209(b) of the CAA, California may receive a waiver from the federal preemption provision on motor vehicle emissions standards from EPA. Due to the broad deference given to agency decision making, the high threshold for overturning an agency's statutory interpretation, and the stringent burden of proof for demonstrating existence of a section 209(b) exception, industry advocates would likely fail if forced to challenge the validity of an EPA preemption waiver. For example, industry could cite the lack of "compelling and extraordinary conditions" exception under section 209(b) to argue that AB 1493 should not

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110 Chanin, *supra* note 61, at 744–45 (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 149–50 (2001)).

111 *See* discussion *supra* Part II.A.

112 Giovinazzo, *supra* note 54, at 933.

113 *See id.* at 933–34 (explaining that a strict textualist interpretation of EPCA ultimately "proves too much" because it "eviscerate[s] EPCA preemption").

receive a waiver. Yet not only do the likely epidemiological, social, and economic consequences of climate change refute that position, but also the presumption in favor of granting a waiver would likely trump such an argument. EPA has maintained that:

> [T]he burden of proof in a section 209 waiver proceeding is squarely upon the opponents of the waiver: 'The language of the statute and its legislative history indicate that California's regulations and California's determination that they comply with the statute . . . are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them.'[114]

Thus, the more viable threat to AB 1493 under the CAA stems from the possibility that EPA could deny California the preemption waiver. In 1979, the Court of Appeals of the District of Columbia held that the CAA's plain language "indicates that Congress intended to make the waiver power coextensive with the preemption provision."[115] If California's regulatory powers under the waiver provision are coextensive with EPA's, then EPA could argue the following:

> Because the federal government does not, and under the Bush Administration's analysis cannot, regulate greenhouse gas emissions . . . [then] California cannot regulate such emissions (because there are no applicable federal standards), and therefore . . . the California regulations are subject to the broad CAA preemption provision.[116]

However, California's response may stress that EPA interpreted the term "air pollutant" not to include carbon dioxide. Specifically, California may argue that: "1) the EPA is given authority to control 'emissions of air pollutants,' 2) the term 'air pollutants' does not include greenhouse gas emissions, and 3) the preemption section therefore does not apply to greenhouse gas emissions."[117] An additional consideration regarding the plain meaning of the CAA preemption waiver concerns the language of section 209 itself. The waiver provision requires California emission standards to be "at least as protective . . . as applicable Federal standards."[118] This statutory language may support the argument that California's regulations can only go beyond a standard which EPA has the authority to promulgate. Alternatively, it could demonstrate a congressional mandate for California to be more progressive in emissions regulations, going beyond federal regulations on emission limitations in general.

Finally, another type of argument, based on precedent rather than plain meaning, will likely be raised regarding CAA preemption. Again demonstrating

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114 California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18,887, 18,889 (May 3, 1984) (quoting Motor and Equip. Mfrs Ass'n v. EPA, 627 F.2d 1095, 1121 (D.C. Cir. 1979)).

115 *Motor and Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1107 (D.C. Cir. 1979).

116 Carlson, *supra* note 53, at 295.

117 *Id.* at 296.

118 42 U.S.C. § 7543(a)–(b)(1) (2000).

the influence of recent events on the preemption analysis of the California bill, in 2004 the Supreme Court decided *Engine Manufacturers Association v. South Coastal Air Quality Management* (*South Coastal*).[119] In *South Coastal* the Court held that the CAA preempted some, but not all of six vehicle "Fleet Rules" enacted in California.[120] In authoring the majority opinion, Justice Scalia emphasized that the "Fleet Rules . . . generally prohibit the purchase or lease by various public and private fleet operators of vehicles that do not comply with stringent emission requirements."[121] Although the Fleet Rules affected purchasers rather than manufacturers, the Court held them to be preempted as motor vehicle "standards" within the meaning of the CAA.[122] The Court discredited the Ninth Circuit's interpretation of the word "standard," which "included only regulations that compel manufacturers to meet specified emission limits."[123] Instead, the Supreme Court abolished the distinction between regulations targeting consumers or sellers, reasoning that "a manufacturer's right to sell federally approved vehicles is meaningless absent a purchaser's right to buy them."[124]

It remains unclear which party in *Witherspoon* will successfully invoke this precedent.[125] CARB will attempt to distinguish AB 1493 from the Fleet Rules at issue in *South Coastal*. While those regulations required operators of public and private fleets larger than fifteen vehicles to purchase exclusively low-emission or alternative fuel vehicles, arguably AB 1493 provides more flexibility in its mandate and the means of achieving its goals. *South Coastal* could be interpreted narrowly: that only regulations constraining consumer vehicle choices to the point of becoming the functional equivalent of regulations on the manufacturing process, become "standards" within the meaning of the CAA. Alternatively, *South Coastal* could be read more broadly, favoring industry's preemption challenge to AB 1493. If instead the decision is read to encompass all regulations with a significant impact on consumer choices for motor vehicles, then despite AB 1493's options for compliance by 2016, it may still be preempted because of its indirect effects on the manufacturing process. Notwithstanding this argument, the law could still be valid if California then received a preemption waiver from EPA.

D. Congressional Intent Behind the EPCA and the CAA: Reconciling Conflicting Statutory Schemes

Statutory interpretation frequently requires inquiry into congressional intent and legislative history in addition to plain meaning, especially if a

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119 541 U.S. 246 (2004).

120 *Id.* at 258–59.

121 *Id.* at 248–49.

122 *Id.* at 253.

123 *Id.* at 252.

124 *Id.* at 247.

125 Thus far, the plaintiff manufacturers have only raised it during initial litigation concerning the "primary jurisdiction" doctrine, but the point was dismissed by the court as irrelevant because *South Coastal* did not address that issue. Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon, No. CV-F-04-6663 REC., 2005 WL 2709508 (E.D. Cal. Oct. 20, 2005).

literal reading yields results seemingly contrary to the statute's purpose.[126] The goals and purposes of a federal law are particularly important in the preemption context because a statute inapposite with those goals can be invalidated by field or conflict preemption. For example, circumventing Congress's vesting of exclusive authority in the NHTSA for fuel economy standards presents a challenge to AB 1493: "NHTSA must establish the [fuel economy] standard[s] at the 'maximum feasible' level," considering "technological feasibility, economic practicability, the need of the nation to conserve energy and the effect of other federal standards."[127] If CARB's regulation is viewed as conflicting with the specific considerations Congress mandated for the NHTSA, industry may argue that CARB "seek[s] to substitute the state's judgment for the federal government's choice of how to balance these competing goals."[128] More generally, and as stated in Part II, the EPCA's legislative intent behind its preemption provision demonstrates a compromise between concepts of conservation and national industry. The provision creates a barrier to each state enacting different fuel economy standards, allowing manufacturers to meet CAFE standards more easily.

Possible tensions between Congress's intent for the scope of the EPCA preemption provision and the CAA provision and waiver, have been hinted at throughout this discussion. In fact, legislative intent to provide California with exceptional latitude is pervasive in the statutory structure of the CAA, as well as congressional statements on emission control issues.[129] California boasts exemptions from preemption provisions for motor vehicle emissions controls, for regulations of "any characteristic or component of a fuel," and for regulations of nonroad vehicles.[130] Congress reaffirmed California's unique status in 1977 and in 1990 during CAA amendments, again allowing states to choose between a federal and California emissions standard.[131] The committee report states that the waiver provision allows California to . . . establish 'standards applicable to emissions not covered by Federal standards.'"[132] This specific piece of legislative history arguably endows California with power to regulate carbon dioxide emissions.

In examining such consistent congressional support for California's aggressive air pollution control efforts, particularly regarding motor vehicles, it remains unclear how courts will reconcile this intent with that presented in the EPCA. The decision as to which statute's congressional intent is given primary effect may prove determinative for CARB's preemption issue. Indeed, if the congressional desire to support California's unique role dominates, this creates

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126 *See* Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) (refusing to rule in favor of appellee even though he is technically correct under the language of the statute because to rule otherwise would drastically alter the intent of the statute).

127 Jones & Sloane, *supra* note 86.

128 *Id.*

129 *See* Nat'l Res. Def. Council, Legal Opinion on AB 1058: Legal Issues and Analysis (Oct. 1, 2001) (on file with author).

130 42 U.S.C. §§ 7545(c)(4)(A)–(B), 7543(e)(1) (2000).

131 *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 177, 91 Stat. 685, 750 (1977); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 222(b), 104 Stat. 2399, 2502 (1990).

132 Carlson, *supra* note 53, at 301–02.

consequentially an even stronger analogy to the AB 1493-friendly ERISA precedent, whereby courts primarily consider legislative history in construing the range of state regulations to be preempted.

Moreover, where federal statutory authority overlaps, yet conflicts with, state statutes and the plain meaning of the preemption provision "related to fuel economy standards" does not define adequately the scope of intended preemption, further interpretive methods become necessary to properly analyze state regulatory authority. After acknowledging this tension between the two statutes, and the path a court may take to resolve such tension, it becomes increasingly clear that AB 1493 should not be preempted by federal law. Cannons of statutory construction, legislative history and intent, and policy rationale all favor the application of the CAA preemption provision for motor vehicle emissions standards, likely insulating AB 1493 from a successful preemption challenge under EPCA.

Various devices for statutory construction and resolving statutory conflicts may be used to harmonize preemptive intent between the EPCA and CAA. As noted above, Congress granted California wide creative license as the nation's laboratory for progressive air pollution controls before passing the EPCA. Further, the EPCA did not address California's preemption waiver regarding emissions despite its presumed impact on fuel efficiency.[133] Thus,

> applying EPCA preemption to California's emissions laws would construe EPCA as an implied repeal of California's waiver authority . . . . To whatever extent EPCA's preemption clause constricts California's flexibility under the CAA waiver . . . the Court looks at the "totality of the legislative history" of the second Act to determine whether the intent to repeal part of the earlier law was "clear and manifest."[134]

However, after enacting the EPCA, Congress not only reauthorized, but also extended the preemption waiver. Therefore, because Congress passed the California waiver both prior to and subsequent to the enactment of the EPCA, it becomes exceedingly difficult to meet the Court's threshold for federal preemption: "clear and manifest purpose of Congress."[135]

In addition, another canon of statutory construction favors effectuating the CAA waiver. When detangling possibly conflicting statutory terms or

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[133] Deborah Keeth notes:

> CARB argued that the purpose and legislative history of EPCA and the CAA reflect Congress' intent to allow California to regulate emissions, despite potential impacts on fuel efficiency. In the CAA, Congress explicitly allowed California to adopt motor vehicle emissions regulations more stringent than the national standard. Congress recognized in EPCA the potential relationship between emissions reductions and fuel efficiency. CARB argued that incidental effects on fuel efficiency were therefore within the contemplation of Congress . . . .

Keeth, *supra* note 34, at 731–32.

[134] Giovinazzo, *supra* note 54, at 944.

[135] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (setting forth in detail the constitutional test for federal statutory preemption).

provisions, "'specific terms prevail over the general in the same or another statute which otherwise might be controlling.' EPCA's preemption clause is general to all states and does not clarify how its terms should apply to California."[136] Yet, the CAA's provisions and history are replete with specific indications of California's unique status among the states, particularly with respect to the preemption waiver.

Finally, Parts I and II discussed the applicable policy arguments regarding AB 1493. California maintains its status as a national leader in air pollution control from mobile sources. In fact, other states may opt to enact California's emissions standards rather than federal standards, thereby furthering national implementation of pollution abatement. A series of events in 2005 spawned pervasive discussion and criticism of U.S. energy policy and helped crystallize a new national consciousness with regard to climate change. Individual states and cities are becoming far more active in taking steps to mitigate climate change, and the transportation sector is a target as the main source of national greenhouse gas emissions.

V. CONCLUSION

As states begin to enact or join more aggressive initiatives and campaigns to restrict emissions of greenhouse gases, preemption challenges will inevitably arise. Economic concerns coupled with the desire to avoid a costly and confusing patchwork of regulations for the auto industry continue to animate a preemption argument under the EPCA and the CAA. However, events building prior to and culminating in 2005 have highlighted the need to reconceptualize U.S. national energy policy in a way that accounts for anthropogenic effects on the global climate. AB 1493 provides a particularly interesting lens through which to view how these evolving social and political values interact with legal precedent and statutory provisions. To determine the likelihood that AB 1493 will be upheld or invalidated by a preemption challenge requires a consideration of the bill itself and the preemption provisions of the CAA and EPCA. Furthermore, how courts employ preemption analysis and what principles they chose to emphasize can become dispositive.

Unless AB 1493 is blocked by an EPA waiver denial under the CAA or a preemption decision based solely upon the plain meaning of "related to" under the EPCA, the court examining the bill will be forced to consider the interplay between the EPCA and CAA in this context. While both federal statutes contain express preemption provisions, California receives a special exemption from one, yet not the other. Plain meaning may be of less value in reconciling the scope of these statutes' provisions because of the difficulties in demarcating the limits of the "related to" standard. Instead, additional canons of statutory construction must be employed to resolve the tension

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[136] Giovinazzo, *supra* note 54, at 945 (Giovinazzo also provides a thorough treatment of this cannon of statutory construction by analogizing the CAA and EPCA conflict to the process of resolution in Watt v. Alaska, 451 U.S. 259, 945–48 (1981)).

AB 1493 evokes between the EPCA and CAA. The lengths to which Congress has gone to guarantee California's regulatory authority under the CAA has been documented throughout this discussion. Furthermore, the specificity with which Congress created the CAA waiver provision as compared with the general nature of EPCA preemption and the passage of the waiver for California both prior to and following the EPCA, favor giving primary effect to the CAA preemption waiver when analyzing a challenge to AB 1493.

Though logic may lead to the conclusion that AB 1493 will stand, questions persist. The influence on preemption arguments of politics, of a new national energy policy, and of very recent Supreme Court precedent on point, has yet to be determined. Being so proximate to 2005, yet considering it a watershed year and evaluating its possible impacts is challenging; the clarity of hindsight tends to improve with time. Even if the American public has arrived at a new consciousness regarding potential impact of climate change and the need for active involvement on a political, economic, and social level, there is no guarantee that courts will recognize this phenomenon as an additional input to their decisions. Finally, the political considerations infiltrating the principles of preemption remain a wild-card. The political landscape may shift to meet the new realities of 2005, or politics may trump California's greenhouse gas initiative until another day.