

COMMANDEERING, PREEMPTION, AND
VEHICLE EMISSIONS REGULATION
POST-*MURPHY V. NCAA*

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ABSTRACT—The Clean Air Act is often heralded as a paragon of cooperative federalism. The Act’s approach to vehicle emissions regulation in particular prescribes a unique partnership between the federal government and the state of California: while all states are bound by federally mandated vehicle emissions requirements, California may set more stringent standards in recognition of its historic role on the leading edge of environmental protection. However, in August 2018, the Environmental Protection Agency proposed not only to roll back the national emissions regulations, but also to revoke California’s ability to set more stringent standards, which include limits on greenhouse gas emissions and zero-emissions vehicle mandates. This revocation, finalized in September 2019, sparked legal challenges and debate on the role of states in environmental protection.

The Supreme Court’s recent expansion of the anticommandeering doctrine in *Murphy v. National Collegiate Athletic Association* may signal increased constraints on federal power over states, which in turn may shed light on the permissibility of the EPA’s action to revoke California’s enhanced regulatory ability. This Note assesses the impact of *Murphy* on the distinction between permissible preemption and impermissible commandeering of state regulation, then applies that distinction to the vehicle emissions context. Ultimately, this Note argues that Congress and the courts should recognize the value of state involvement in environmental regulation and be wary of discarding the current dual-regulator system for vehicle emissions, owing to both policy and federalism concerns.

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INTRODUCTION

In the midst of World War II, residents of Los Angeles awoke one morning in July 1943 to a thick, eye-watering, and nose-burning fog, and initially believed it to be a Japanese chemical attack.¹ It would take nearly a decade for scientists to discover that the culprit was actually automobile traffic, worsened by the heavy population influx to Los Angeles during the war.² Dr. Arie Haagen-Smit, a chemist and professor at the California Institute of Technology, published the first study linking vehicle emissions and smog in 1950, which prompted California to pass the first vehicle emissions standards in the nation in 1961.³

When Congress enacted the first federal legislation concerning vehicle emissions in 1967, it acknowledged California’s pioneering efforts and

¹ CHIP JACOBS & WILLIAM J. KELLY, *SMOGTOWN: THE LUNG-BURNING HISTORY OF POLLUTION IN LOS ANGELES* 13–14 (2008).

² *Id.* at 30–31, 86–87; David E. Adelman, *Environmental Federalism when Numbers Matter More than Size*, 32 *UCLA J. ENVTL. L. & POL’Y* 238, 252 (2014) (noting that by the end of the 1940s, Los Angeles had 50% more vehicles than New York City).

³ Adelman, *supra* note 2, at 252–53; see also A. J. Haagen-Smit, *Chemistry and Physiology of Los Angeles Smog*, 44 *INDUS. & ENG’G CHEMISTRY* 1342 (1952); A. J. Haagen-Smit, *The Air Pollution Problem in Los Angeles*, 14 *ENG’G & SCI.* 7 (1950).

established a waiver provision that could exempt California’s more stringent air pollution standards from otherwise being preempted by the federal regulations.⁴ Ever since then, the Environmental Protection Agency (EPA) has granted waivers to California that permit stronger state regulation.⁵ But in August 2018, the Trump Administration proposed to freeze federal emissions standards and revoke the preemption waiver, valid through 2025, that permits California, and other states derivatively,⁶ to set higher emissions standards than the federal requirement.⁷ In September 2019, the Administration published part one of this Rule in final form, which revokes California’s preemption waiver effective November 2019 and adds regulatory text making it explicit that California’s standards are henceforth preempted.⁸

This “Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule” has faced criticism along several fronts: environmental advocates have argued that the rollback threatens public health, air quality, and the environment;⁹

⁴ See Jeffrey Fromson, *A History of Federal Air Pollution Control*, 30 OHIO ST. L.J. 516, 535–36 (1969) (noting that California advocated to maintain its standards both because its smog problem warranted special attention and because strict federal preemption conflicted with the principle that states bore primary responsibility over air pollution). Much like the Clean Air Act does today, the Air Quality Act of 1967 permitted the implementing agency to waive the preemption of state regulation for any state that had adopted vehicle emissions limits prior to March 30, 1966—which only California had done, and thus, only California qualified for the waiver. Air Quality Act of 1967, Pub. L. No. 90-148, §§ 208(a)–(b), 81 Stat. 485, 500; Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 292–93 (2003); see also *infra* Part II.A.

⁵ ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 568 (7th ed. 2013). The EPA has never fully denied a waiver, but it has delayed a decision, occasionally partly denied a waiver, and once rejected a waiver, but later withdrew the rejection and granted the waiver. See Vicki Arroyo et al., *New Strategies for Reducing Transportation Emissions and Preparing for Climate Impacts*, 44 FORDHAM URB. L.J. 919, 924 n.21 (2017); Carlson, *supra* note 4, at 293.

⁶ Per a 1977 amendment to the Clean Air Act, any state is permitted to adopt California’s emissions limits in place of the federal standards. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 177, 91 Stat. 685, 750; see also *infra* notes 163–166 and accompanying text.

⁷ SAFE Rule, 83 Fed. Reg. 42986, 42999 (Aug. 24, 2018); see also *NHTSA and EPA Proposed SAFE Vehicle Rule Overview*, U.S. DEP’T OF TRANSP. & U.S. ENVTL. PROT. AGENCY (Aug. 2, 2018), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100V26O.pdf> [<https://perma.cc/ASW5-L4Y8>].

⁸ SAFE Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019) (to be codified at 49 C.F.R. pts. 531, 533). The Administration split the SAFE Rule into two parts: Part One, the One National Program, withdraws California’s waiver and adds regulatory text clarifying that state programs limiting vehicle emissions are preempted; as of October 2019, Part Two, which sets new federal emissions standards, will be published as a final rule “in the near future.” *Id.* at 51310. Specifically, this Final Rule revokes a waiver that EPA granted to California in 2013 which permitted California’s more stringent standards under the state’s greenhouse gas emissions program and zero-emissions vehicle mandate. *Id.*; see also *infra* notes 180, 190 and accompanying text.

⁹ See Kate Larsen et al., *Sizing Up a Potential Fuel Economy Standards Freeze*, RHODIUM GRP. (May 3, 2018), <https://rhg.com/research/sizing-up-a-potential-fuel-economy-standards-freeze/> [<https://perma.cc/4FKR-TJRU>].

economists have asserted that the Rule will be costly to consumers¹⁰ and that its cost–benefit analysis is flawed, with dubious calculations and unsupported assumptions;¹¹ and the automobile industry has cautioned that the SAFE Rule threatens jobs and increases regulatory uncertainty.¹² In addition, a coalition of states has brought two rounds of legal action to invalidate the SAFE Rule, first challenging the draft rule in May 2018¹³ and second challenging the Final Rule in September 2019.¹⁴ The U.S. Court of Appeals for the District of Columbia dismissed the first petitions for review of the draft rule, concluding that the EPA’s draft rule did not constitute judicially reviewable “final action.”¹⁵ The second suit, however, which alleges that part one of the Final Rule (revoking California’s waiver) violates rulemaking procedures and exceeds agency authority, has just begun.¹⁶

Beyond the legal and policy debate, the revocation of California’s preemption waiver forces a broader conversation about the role of states in environmental protection. Should the federal government deny California its ability to innovate and set standards that more closely match the desires of its constituency—a privilege the state has enjoyed for the last fifty years? Alternatively, should California be allowed to act on equal footing with the

¹⁰ Trevor Houser et al., *The Biggest Climate Rollback Yet?*, RHODIUM GRP. (Aug. 2, 2018), <https://rhg.com/research/the-biggest-climate-rollback-yet/> [<https://perma.cc/6UHQ-H2UU>] (projecting that freezing standards will cost consumers an additional \$193 billion to \$236 billion between now and 2035 in oil costs); see also TYLER COMINGS ET AL., SYNAPSE ENERGY ECON., INC., FUELING SAVINGS: HIGHER FUEL ECONOMY STANDARDS RESULT IN BIG SAVINGS FOR CONSUMERS 3 (2016), <https://advocacy.consumerreports.org/wp-content/uploads/2016/09/Fueling-Savings-Consumer-Savings-from-CAFE-2025-Final-1.pdf> [<https://perma.cc/PFW5-DLFL>] (estimating savings of at least \$3,200 per vehicle that complies with the heightened emissions standards the Administration proposes to revoke).

¹¹ See, e.g., BETHANY DAVIS NOLL ET AL., INST. FOR POLICY INTEGRITY, ANALYZING EPA’S VEHICLE-EMISSIONS DECISIONS: WHY WITHDRAWING THE 2022–2025 STANDARDS IS ECONOMICALLY FLAWED 5–6 (2018), https://policyintegrity.org/files/publications/Analyzing_EPAs_Fuel-Efficiency_Decisions_Policy_Brief.pdf [<https://perma.cc/27A3-MH8A>]; Antonio M. Bento et al., *Flawed Analyses of U.S. Auto Fuel Economy Standards*, 362 SCI. 1119, 1119–20 (2018).

¹² See, e.g., Timothy Cama, *Automakers Fight Trump’s Auto Emissions Rollback*, HILL (Oct. 29, 2018, 5:21 P.M.), <https://thehill.com/policy/transportation/automobiles/413729-automakers-fight-trumps-auto-emissions-rollback> [<https://perma.cc/TRR5-5JU7>] (describing how major automakers filed comments expressing concern that the Rule is detrimental to consumers, society and American competitiveness and invites litigation and regulatory uncertainty); Brian Palmer, *Fuel Efficiency Standards Don’t Just Help Curb Climate Change. They Also Create Jobs*, NRDC (Aug. 28, 2018), <https://www.nrdc.org/stories/fuel-efficiency-standards-dont-just-help-curb-climate-change-they-also-create-jobs> [<https://perma.cc/KA3M-BNNM>] (showing that by the Administration’s own estimates, the SAFE Rule will cost the economy nearly sixty thousand jobs by 2030).

¹³ *California v. EPA*, 940 F.3d 1342 (D.C. Cir. 2019).

¹⁴ Complaint, *California v. Chao*, No. 19-cv-02826 (D.D.C. Sept. 20, 2019).

¹⁵ *California*, 940 F.3d, at 1353. If an agency action is not “final,” federal courts lack jurisdiction to hear an administrative challenge. 42 U.S.C. § 7607(b)(1) (2012); see also *Sierra Club v. EPA*, 873 F.3d 946, 951 (D.C. Cir. 2017).

¹⁶ Complaint, *California v. Chao*, *supra* note 14.

EPA and require national manufacturers to comply with a more stringent state-specific requirement? Scholars have debated the normative arguments in favor of and against greater state autonomy in environmental regulation.¹⁷ But the withdrawal of California’s unique waiver also raises constitutional questions and federalism concerns, particularly in light of the Court’s recent anticommandeering jurisprudence. As of October 2019, however, no one has considered whether the revocation is an affront to federalism and to the anticommandeering principle in particular.¹⁸

The Clean Air Act directs the EPA to set national vehicle emissions standards and expressly prohibits any state regulation of vehicle emissions,¹⁹ thereby setting both a floor and a ceiling (a form of preemption dubbed “unitary federal choice”).²⁰ Yet the Act contains a waiver of preemption directed at California alone, which allows the state to set more stringent emissions standards, thereby imposing only a regulatory floor, and no ceiling, in that state.²¹

At the time of the Act’s passage in 1970, the inclusion of a waiver was driven by a recognition of California’s unique challenges and pioneering efforts on vehicular air pollution rather than by any constitutional or federalism concerns.²² Since then, however, the Supreme Court has increasingly recognized the Tenth Amendment as a check on federal power and has refined the anticommandeering doctrine, under which Congress may not commandeer state legislative or administrative functions.²³ While

¹⁷ See *infra* Part III.C.

¹⁸ Although the American Constitution Society has noted in a policy brief that the waiver revocation contradicts federalism principles, the authors did not discuss the Court’s federalism jurisprudence or the anticommandeering rule. ANN E. CARLSON ET AL., AM. CONSTITUTION SOC’Y, *SHIFTING GEARS: THE FEDERAL GOVERNMENT’S REVERSAL ON CALIFORNIA’S CLEAN AIR ACT WAIVER 7–11* (2019), <https://www.acslaw.org/wp-content/uploads/2019/02/CA-Car-Standards-IB-2019.pdf> [<https://perma.cc/7LTJ-HLGM>].

¹⁹ 42 U.S.C. §§ 7521(a)(1), 7543(a) (2012).

²⁰ Coined by Professor William Buzbee, “unitary federal choice” describes forms of ceiling preemption that completely displace any other regulatory actors. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1568–69 (2007) [hereinafter Buzbee, *Asymmetrical Regulation*]; William W. Buzbee, *Interaction’s Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 147 (2007) [hereinafter Buzbee, *Interaction’s Promise*]; see also *infra* Part I.B.

²¹ 42 U.S.C. § 7543(b). California is the only state that qualifies for a waiver. See *supra* note 4; see also *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. N.Y. State Dep’t Env’tl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994) (describing history of the Clean Air Act and how “California was excepted from preemption as the only state regulating auto emissions ‘prior to March 30, 1966’”).

²² Deborah Keeth, *The California Climate Law: A State’s Cutting-Edge Efforts to Achieve Clean Air*, 30 *ECOLOGY L.Q.* 715, 723 (2003); see also James R. May, *Of Happy Incidents, Climate, Federalism, and Preemption*, 17 *TEMP. POL. & C.R.L. REV.* 465, 482 (2008).

²³ See U.S. CONST. amend. X; *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

limiting Congress's ability to regulate state governments directly, the Court nonetheless recognized that Congress could accomplish similar ends through preemption, wherein Congress directly regulates private actors and preempts contrary state law.²⁴ Under this dichotomy, valid preemptive schemes merely instructed states to forbear from acting, while laws that affirmatively instructed states to act were invalid as forms of commandeering.²⁵

The division between preemption and commandeering continued undisturbed until the Supreme Court's ruling in *Murphy v. National Collegiate Athletic Association* in May 2018.²⁶ In *Murphy*, the Court clarified that the anticommandeering doctrine is implicated not only when Congress affirmatively commands that states enact legislation or adopt federal programs, but also when Congress prohibits states from enacting laws. "[I]n either event," wrote Justice Alito for the majority, "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies."²⁷ Thus, in its attempt to clarify the anticommandeering doctrine, *Murphy* may have blurred the line between valid federal preemption and unconstitutional commandeering.

Environmental regulations like the Clean Air Act involve complex cooperative federalism programs that reach deep into local policy and therefore must navigate through a maze of commandeering prohibitions and available preemption alternatives.²⁸ Depending on how *Murphy* shifts the line between preemption and commandeering, the case may bear on the

²⁴ See *New York*, 505 U.S. at 166–68.

²⁵ See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1054 (1995) (stating that the commandeering analysis "rests on an action/inaction distinction," in which "Congress may compel state inaction by limiting the subject matters over which states can regulate, yet Congress may not compel any affirmative regulatory action within the remaining realm of state authority"); see also Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1639–40 (2006).

²⁶ 138 S. Ct. 1461 (2018).

²⁷ *Id.* at 1478.

²⁸ Cooperative federalism describes a "system of shared authority between the federal and state governments" to regulate private activity. David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1811 (2008); see also Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1532–33 (1995) ("Cooperative federalism holds the promise of allowing the states continued primacy and flexibility in their traditional realms of protecting public health and welfare, while ensuring that protections for all citizens meet minimum federal standards. In theory, the system allows states to experiment and innovate, but not to sacrifice public health and welfare in a bidding war to attract industry.").

validity of the EPA’s revocation of California’s ability to set more stringent emissions standards—a power that California insists on maintaining.²⁹

This Note analyzes the line between commandeering and preemption after *Murphy* and examines how the current caselaw affects the Clean Air Act’s ceiling preemption and the California waiver. Ultimately, this review concludes that the revocation of California’s waiver does not implicate the anticommandeering doctrine under the most straightforward reading of *Murphy*. However, this Note critiques *Murphy*’s clarified distinction between preemption and commandeering as overly formalistic and too imprecise an instrument to account for complex cooperative federalism schemes like the vehicle emissions program. In any case, there are strong normative arguments for maintaining state participation in vehicle emissions regulation, particularly at a time when reducing greenhouse gas emissions is critical³⁰ and the EPA has been unwilling and unable to act sufficiently to address the problem.³¹

²⁹ See CAL. AIR RES. BD., STAFF REPORT: INITIAL STATEMENT OF REASONS 2–3 (2018), <https://www.arb.ca.gov/regact/2018/leviii2018/leviiiisor.pdf> [<https://perma.cc/8W85-X95A>] (noting California’s pressing “responsibilities as an independent co-regulator” for one third of the domestic light-duty vehicle industry and proposing amendments that “will prevent any federal weakening” from impacting California through 2025).

³⁰ Greenhouse gases (GHGs), which include carbon dioxide, methane, nitrous oxide and fluorinated gases, trap heat in the atmosphere by absorbing outgoing thermal radiation that would otherwise escape back into space, warming the planet. *Overview of Greenhouse Gases*, U.S. EPA, <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> [<https://perma.cc/49X4-J5R6>]. These gases have increased significantly in concentration—by approximately 44%—since the Industrial Revolution as a result of fossil fuel combustion for energy. EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS, at ES-9–ES-10 (2018), https://www.epa.gov/sites/production/files/2018-01/documents/2018_complete_report.pdf [<https://perma.cc/2JDV-NQ5Q>]. Nearly one-fifth of the GHG emissions in the United States come from fueling passenger cars and light-duty trucks, which emit twenty-four pounds of GHGs for every gallon of gasoline. *Car Emissions & Global Warming*, UNION CONCERNED SCIENTISTS, <https://www.ucsusa.org/clean-vehicles/car-emissions-and-global-warming> [<https://perma.cc/N466-9R5B>]; see also *Vehicle Efficiency and Emissions Standards*, ENVTL. & ENERGY STUDY INST. (Aug. 2015), https://www.eesi.org/files/FactSheet_Vehicle_Emissions_081815.pdf [<https://perma.cc/B65X-AQ57>].

A recent report by the United Nations’ Intergovernmental Panel on Climate Change found that the globe will unavoidably warm 1.5 degrees Celsius by 2040, causing frightening and dangerous consequences for food security, the prevalence and intensity of natural disasters, and ecosystem integrity. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C, at 10–11 (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf [<https://perma.cc/4SYA-AFUL>]. To limit warming beyond 1.5 degrees will require global anthropogenic carbon dioxide emissions to fall 45% from 2010 levels by 2030 and achieve net zero by around 2050, which is unachievable without “rapid and far reaching transitions” in areas including transport, such as reducing vehicle emissions. See *id.* at 15, 17.

³¹ See Elizabeth Bomberg, *Environmental Politics in the Trump Era: An Early Assessment*, 26 ENVTL. POL. 956, 956–57 (2017) (discussing the Trump Administration’s efforts to dismantle environmental protection policies); Carlson, *supra* note 4, at 311 (noting California’s critical role in reducing emissions due to inaction at the federal level); Lisa Heinzerling, *Climate Change at EPA*, 64 FLA. L. REV. 1, 11–12 (2012) (concluding that the EPA delayed, cut back, and stagnated on its

This Note proceeds in three parts. Part I introduces the doctrines of anticommandeering and preemption, discusses the reasoning in *Murphy*, and analyzes how *Murphy* impacts the anticommandeering and preemption doctrines. Part II describes the regulatory landscape governing vehicle emissions, including the Clean Air Act, California's unique position, and the Trump Administration's SAFE Rule. With the preceding Parts as a foundation, Part III applies the principles from *Murphy* to the Clean Air Act's preemption of state regulation and the California waiver and uses the current federal and state struggle over vehicle emissions regulation to examine whether *Murphy*'s distinction between preemption and commandeering is coherent. Lastly, Part III concludes with an argument for preserving California's function as a laboratory of innovation.

I. ANTICOMMANDEERING, PREEMPTION, AND *MURPHY*

Both the anticommandeering and preemption doctrines shape the division of power between federal and state governments. Traditionally, the anticommandeering doctrine prevented Congress from requiring state legislatures or executives to affirmatively act according to federal instruction. Preemption, on the other hand, was Congress's permissible way of completely eliminating state legislative authority in areas where Congress had chosen to act exclusively. Then, in 2018, the Supreme Court in *Murphy* stated that both doctrines—anticommandeering and preemption—govern the boundaries of permissible laws when Congress prohibits states from legislating in certain areas. This Part will introduce the two doctrines, describe *Murphy*'s ruling, and assess how *Murphy* impacts the difference between preemption and commandeering.

A. *Anticommandeering: Federal Power May Not Compel State Action*

The Tenth Amendment of the Constitution reminds Congress that its powers are limited and serves as a textual basis to invalidate federal laws that invade “the province of state sovereignty.”³² The Articles of Confederation taught the Framers that “using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict,” and “[p]reservation of the States as independent political entities [became]

regulatory initiatives on greenhouse gases). See generally Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 301 (1999) (discussing agency failures to act in environmental regulation broadly).

³² *New York v. United States*, 505 U.S. 144, 155 (1992); see also U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

the price of union.”³³ In response, the Constitution established a system of dual sovereignty, where federal and state governments exercise concurrent authority to regulate individuals, but Congress may neither regulate states directly nor instruct states how to govern.³⁴ This system ensures that the federal and state political capacities are “each protected from incursion by the other,” and that each has “its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”³⁵

To monitor this careful balance, courts assess whether the enactment of federal laws exceeds Congress’s powers under Article I of the Constitution and encroaches on a protected area of state sovereignty.³⁶ While the prevalence of the Tenth Amendment as a limit has varied over time, the underlying aims of invoking it remain fairly consistent: protecting the structure of federalism, maintaining state sovereign rights and traditional functions, ensuring political accountability, safeguarding individual and political liberties, and permitting states to act as laboratories of democracy.³⁷

Judicial enforcement of the Tenth Amendment to constrain Congress has ebbed and flowed over time. In 1976, the Supreme Court broke forty years of upholding economic legislation against claims of encroachment into state sovereignty when it struck down provisions of the Fair Labor Standards Act in *National League of Cities v. Usery*.³⁸ The Court held that while Congress could set minimum wage and maximum hour limits for private employers, it could not regulate states as public employers, for this amounted to direct federal regulation of states as sovereign governments.³⁹ The Tenth Amendment, the Court ruled, protected states’ “traditional governmental functions” from federal encroachment, and prohibited federal regulations that addressed matters involving indisputable “attribute[s] of state sovereignty.”⁴⁰

³³ *Printz v. United States*, 521 U.S. 898, 919 (1997) (citing THE FEDERALIST NO. 15 (Alexander Hamilton)).

³⁴ See *New York*, 505 U.S. at 161–66 (discussing the history of the anticommandeering doctrine).

³⁵ *Printz*, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

³⁶ See, e.g., *U.S. v. Lopez*, 514 U.S. 549, 551 (1995) (finding that the Gun-Free School Zones Act exceeded Congress’s legislative authority). Article I of the Constitution grants Congress the authority to legislate for certain limited purposes. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 237–342 (4th ed. 2011).

³⁷ See Siegel, *supra* note 25, at 1642–45, 1649–50.

³⁸ *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

³⁹ *Id.* at 852.

⁴⁰ *Id.* at 845, 852.

The question of what this ruling meant for federal and state cooperation on environmental regulation arose immediately. Prior to the Court's pronouncement in *National League of Cities*, four states had filed lawsuits challenging EPA regulations promulgated under the Clean Air Act that required states to pass and enforce certain laws on pollution control when the states failed to submit adequate plans on their own.⁴¹ Various circuits struck down the regulations on statutory grounds for exceeding the EPA Administrator's mandate in the Clean Air Act, but also noted that if the Administrator did indeed have such power, it would contravene the Tenth Amendment by impermissibly infringing on state sovereignty.⁴² The Supreme Court granted certiorari and heard the consolidated cases in 1977 after *National League of Cities*, but by then, the EPA Administrator conceded that the regulations would be invalid unless they eliminated the mandate that states adopt certain laws.⁴³ Accordingly, the Court vacated the lower judgments but declined to prospectively rule on the constitutionality of the EPA's yet-to-be-promulgated revised regulations.⁴⁴ Thus, the Court did not answer whether the Tenth Amendment would be as protective of state sovereignty in environmental regulation as it was in labor regulation.

The Court backtracked in *Garcia v. San Antonio Metropolitan Transit Authority*, overruling *National League of Cities* after finding that it was too unworkable for courts to determine what constituted a "traditional governmental function" of state and local governments that the federal government could not touch.⁴⁵ Instead, the Court advised that state interests were better protected by procedural safeguards in the structure of the federal system itself than by judicially created limits.⁴⁶

While *Garcia* is still good law, the Court in the 1990s returned to federalism constraints in the Tenth Amendment via the anticommandeering

⁴¹ These cases were *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975), *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), and *Virginia ex rel. State Air Pollution Control Board v. Train*, 521 F.2d 971 (D.C. Cir. 1975), and were all vacated by *EPA v. Brown*, 431 U.S. 99 (1977). For further information on these cases and how scholars of the day predicted *National League of Cities* would impact them, see Arlan Gerald Wine, *Enforcement Controversy Under the Clean Air Act: State Sovereignty and the Commerce Clause*, 8 TRANSP. L.J. 383, 383–84, 397–400 (1976).

⁴² Wine, *supra* note 41, at 383, 387–88, 392–94 (citations omitted).

⁴³ *Brown*, 431 U.S. at 103.

⁴⁴ *Id.* at 103–04.

⁴⁵ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (“[T]he attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest.”).

⁴⁶ *Id.* at 552. The Court pointed to the equal representation of states in the Senate and states' influence over the Presidency and House of Representatives by controlling electoral qualifications as examples of how the federal structure itself protected state interests. *Id.* at 550–52.

doctrine in what has been called a “federalist revival.”⁴⁷ The anticommandeering doctrine represents the principle that the federal government may not command state legislatures to enact laws or regulations, nor may it command state executive officials to administer federal programs.⁴⁸

In *New York v. United States*, the Court invalidated a federal provision that required state governments to either take title to radioactive waste or regulate it pursuant to Congress’s instructions.⁴⁹ The Court reasoned that either option “would ‘commandeer’ state governments into the service of federal regulatory purposes,” and therefore, the provision impermissibly intruded across the “constitutional line separating state and federal authority.”⁵⁰ Importantly, however, the Court noted that the Constitution permitted Congress to achieve similar ends through preemption or by offering states incentives to encourage voluntary cooperation.⁵¹

If *New York* stood for the rule that Congress may not commandeer a state’s legislative process, the Court’s next anticommandeering case, *Printz v. United States*, ruled that Congress may not “circumvent that prohibition” by commandeering state officials directly.⁵² The provision of the act at issue required state law enforcement officials to conduct background checks for a federal handgun program. This amounted to federal conscription of state officials to administer a federal regulatory scheme, which violated state sovereignty and dual federalism.⁵³ As the Court stated, “[i]t is the very *principle* of separate state sovereignty that such a law offends.”⁵⁴

In sum, the anticommandeering doctrine grew to represent the principle that the Tenth Amendment protects some sphere of state sovereignty and

⁴⁷ Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2181 (1998) (citing *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995); and *New York v. United States*, 505 U.S. 144 (1992) as evidence that the “constitutional law of federalism-based constraints on the federal government has risen phoenix-like from the ashes of post-New Deal enthusiasm for the exercise of national power”).

⁴⁸ *Printz*, 521 U.S. at 935.

⁴⁹ *New York*, 505 U.S. at 175–76.

⁵⁰ *Id.* at 175, 177.

⁵¹ *Id.* at 188.

⁵² *Printz*, 521 U.S. at 935.

⁵³ *Id.* at 922–23. Dual federalism describes the theory that the federal government and state governments both have sovereign power over citizens, with separate and distinct spheres of authority. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005); see also CHEMERINSKY, *supra* note 36, at 252–53 (explaining dual federalism and the three doctrines it embodies). But see Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2133–35 (2006) (arguing that the U.S. government does not actually operate on the theory of dual federalism; rather, “overlap of national and state activities is ubiquitous”).

⁵⁴ *Printz*, 521 U.S. at 932.

prohibits the federal government from commanding affirmative action by state legislatures or executives.

B. Preemption: Federal Power May Prohibit Contrary State Policy

While Congress may not affirmatively commandeering states, it can pass federal statutes per Article I of the Constitution and include provisions that bar states from enacting conflicting laws—referred to as preemption of state legislation.⁵⁵ Thus far, the Court has treated preemption as an entirely permissible alternative to commandeering, allowing Congress to respond to invalidated commandeering legislation with broader preemptive schemes.⁵⁶ This Section introduces the constitutional basis for preemption and the various forms it can take.

The preemption doctrine is rooted in the Supremacy Clause,⁵⁷ which instructs that when courts are faced with a conflict between a valid federal law and a contrary state or local law, federal law shall prevail.⁵⁸ The preemption power is a derivative of the supremacy of federal law, permitting Congress to anticipatorily prohibit state or local laws that would be at odds with valid exercises of federal power.⁵⁹

In a preemption analysis, the primary question is whether Congress in fact intended to exercise its preemptive power.⁶⁰ The Court has recognized three primary ways in which Congress can demonstrate its intent to preempt—express, conflict, and field preemption—but all three involve incompatibility between state and federal law.⁶¹

“Express preemption” occurs when a federal law contains an explicit provision that withdraws certain authority from states.⁶² The Court has noted

⁵⁵ U.S. CONST. art. I; see Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 771 (1994); see also CHEMERINSKY, *supra* note 36, at 237–342 (providing a primer on Congress’s legislative powers under Article I).

⁵⁶ Siegel, *supra* note 25, at 1646–47.

⁵⁷ See U.S. CONST. art. VI, cl. 2; *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152 (1982).

⁵⁸ See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 260 (2000).

⁵⁹ See *id.* at 251–52 (“Under the Supremacy Clause, any obligation to disregard state law flows entirely from the obligation to follow federal law.”); see also Gardbaum, *supra* note 55, at 771 (“Whereas supremacy resolves a conflict resulting from the exercise by two or more entities of their concurrent powers, preemption implies that one entity (the federal) has attained exclusive power on the issue.”).

⁶⁰ See Gardbaum, *supra* note 55, at 767.

⁶¹ The Court has, at times, defined these categories with rigidity, see, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990), but scholars have critiqued the Court as being unable to maintain clear distinctions. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1177 (3d ed. 2000); Nelson, *supra* note 58, at 262. Recently the Court has agreed. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1480 (2018) (“Our cases have identified three different types of preemption—‘conflict,’ ‘express,’ and ‘field’ []—but all of them work in the same way.”).

⁶² Nelson, *supra* note 58, at 226.

that Congress need not use special words when drafting a preemption provision—all that matters is Congress’s intent to preempt.⁶³ But the Court has also articulated a broad presumption against preemption and favored a narrow reading of express preemption provisions, particularly those that involve the states’ traditional powers over health, safety, and welfare.⁶⁴ When applying a statute’s express preemption provision, courts consider (a) the statutory meaning and whether it covers the state action at issue and (b) whether the Constitution permits Congress to preempt states in such a manner.⁶⁵

Even in the absence of an express preemption provision, state law is preempted if it actually conflicts with a federal law; this is labeled “conflict preemption.” Conflict preemption can arise when it is impossible to comply with both federal and state laws, or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁶⁶

Finally, courts find “field preemption” in two situations: first, when a scheme of federal regulation is so pervasive that courts reasonably infer that Congress left “no room for supplementary state legislation”;⁶⁷ and second, when the federal law addresses “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.”⁶⁸ Even in field and conflict preemption, courts must still consider (a) the scope of the implicit preemption and (b) whether Congress may constitutionally exercise such power.⁶⁹

Not all preemption schemes completely displace state action; some forms permit state regulatory participation. First, under “conditional preemption,” states are given a choice to either pass state regulations according to federal directives (a clear case of commandeering on its own) or to be preempted outright by federal laws.⁷⁰ While Congress may not directly commandeer the states, it can condition its decision to not fully preempt state laws upon securing the states’ agreement to be

⁶³ *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1199 (2017).

⁶⁴ *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992).

⁶⁵ Nelson, *supra* note 58, at 226–27.

⁶⁶ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁶⁷ *R.J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 140 (1986).

⁶⁸ *Pac. Gas & Elec. Co.*, 461 U.S. at 204 (quoting *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

⁶⁹ Nelson, *supra* note 58, at 227.

⁷⁰ Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668 (2001).

commandeered.⁷¹ By offering states a choice between preemption or commandeering as part of a program of cooperative federalism, Congress escapes the commandeering prohibition.⁷²

Alternatively, many preemption schemes in the regulatory context set only a floor or a ceiling, permitting states to regulate so long as the state regulation fits within that federally mandated range.⁷³ In “floor preemption,” Congress sets a federal minimum, and preempts state regulations that fall below it.⁷⁴ Many environmental laws follow this model of cooperative federalism by permitting states to tailor their environmental standards to local needs with more stringent requirements, as long as the federal minimum is met.⁷⁵ For example, the Clean Water Act directs the EPA to establish federal standards for acceptable levels of pollution, but sets only the minimum level of stringency.⁷⁶ States may adopt additional pollution standards that are not “less stringent” than the federal standards.⁷⁷

Conversely, when Congress sets a standard and prohibits states from applying more stringent regulation, it imposes “ceiling preemption.”⁷⁸ This often takes the form of a unitary federal choice, which sets both a floor and ceiling and traditionally was used primarily in product design and engineering standards.⁷⁹ For example, the Federal Insecticide, Fungicide, and Rodenticide Act sets federal product labeling requirements and prohibits states from imposing any additional label requirements that go beyond the federal mandate.⁸⁰ As another example, the Court has struck down state laws

⁷¹ Siegel, *supra* note 25, at 1676.

⁷² See *New York v. United States*, 505 U.S. 144, 167 (1992) (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”).

⁷³ Siegel, *supra* note 25, at 1630 n.2.

⁷⁴ *Id.* at 1678.

⁷⁵ Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 384 (2005); see also Babich, *supra* note 28, at 1534 (“The essence of cooperative federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards.”).

⁷⁶ 33 U.S.C. § 1342(o)(3) (2012); see also Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1567.

⁷⁷ 33 U.S.C. § 1370; see also Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1567. Similar provisions exist in the Clean Air Act, 42 U.S.C. § 7416 (2012), and the Resource Conservation and Recovery Act, *id.* §§ 6926(b), 6929.

⁷⁸ Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1569.

⁷⁹ See *id.* at 1568; Buzbee, *Interaction’s Promise*, *supra* note 20, at 148. Professor Buzbee notes that pure ceiling preemption would involve a federal law that merely permits state regulation up to a certain point, allowing states to choose how much to regulate as long as they regulate below a threshold of maximum regulation. This would allow some regulatory choices for states, unlike in a unitary federal choice form of ceiling preemption. This “true ceiling” would be the converse of a regulatory floor, but, per Buzbee, no such true ceilings exist in U.S. law. See *id.* at 147.

⁸⁰ 7 U.S.C. § 136v(b); see also Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1562.

that impose supplemental warning label requirements on pharmaceuticals that go beyond the Food and Drug Administration’s requirements.⁸¹ In the last several decades, the prevalence of ceiling preemption has grown significantly in environmental statutes, including the Clean Air Act.⁸²

C. *Murphy v. National Collegiate Athletic Association:
Anticommandeering and Preemption Doctrines Intersect?*

In *Murphy v. National Collegiate Athletic Association*, the Court struck down another method⁸³ of circumventing the commandeering prohibition. *Murphy* clarified that the Tenth Amendment’s anticommandeering rule applies not only when Congress compels states to *affirmatively enact* federal programs but also when Congress mandates that states *forbear* from enacting state regulation.⁸⁴ In other words, the Court stated that the Tenth Amendment limits Congress’s ability to command what states *may not* do, in addition to constraining Congress’s direction of what states *must* do.

At issue in *Murphy* was the Professional and Amateur Sports Protection Act (PASPA), a law enacted in 1992 which made it “unlawful for a governmental entity”⁸⁵ to “authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme” based on “competitive games in which amateur or professional athletes participate” (the anti-authorization provision).⁸⁶ A second provision made it unlawful for “a person to sponsor, operate, advertise, or promote” such sports gambling schemes “pursuant to the law or compact of a governmental entity.”⁸⁷ PASPA did not make sports gambling a federal crime, but it did permit civil actions to enjoin individuals or government entities that violated either provision.⁸⁸

In 2011, New Jersey constituents approved a state constitutional amendment that permitted the legislature to authorize sports gambling at casinos and racetracks, revising an 1897 constitutional amendment that

⁸¹ See, e.g., *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 476 (2013).

⁸² See Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1568; Brian T. Burgess, Note, *Limiting Preemption in Environmental Law: An Analysis of the Cost-Externalization Argument and California Assembly Bill 1493*, 84 N.Y.U. L. REV. 258, 266 (2009).

⁸³ Two decades earlier, the Court clarified that Congress cannot circumvent *New York’s* prohibition on commandeering state legislatures by directly commandeering state executive officers instead. See *Printz v. United States*, 521 U.S. 898, 935 (1997); see also *supra* notes 54–56 and accompanying text.

⁸⁴ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018).

⁸⁵ 28 U.S.C. §§ 3701–3704 (2000), *invalidated by Murphy*, 138 S. Ct. at 1485. PASPA defines a “governmental entity” to include a State or any of its political subdivisions. 28 U.S.C. § 3701(2).

⁸⁶ *Id.* § 3702(1). This provision shall be referred to as the anti-authorization provision, which is the term used by the Court.

⁸⁷ *Id.* § 3702(2).

⁸⁸ *Id.* § 3703.

prohibited all forms of gambling.⁸⁹ The state legislature responded with the Sports Wagering Law of 2012, which permitted state-licensed sports gambling at casinos and racetracks.⁹⁰ The National Collegiate Athletic Association (NCAA) and various professional sports leagues then sued to enjoin New Jersey's new law on the grounds that it violated PASPA.⁹¹ In response, New Jersey argued that PASPA itself violated the anticommandeering principle by prohibiting the state from enacting any law legalizing sports gambling.⁹²

The district court agreed with the NCAA's contention that the Tenth Amendment was only implicated when the federal government issued an affirmative command to act, rather than a prohibition on action, and found that PASPA's anti-authorization provision was more akin to a "larger Congressional scheme controlling the area of sports wagering" that preempted state action.⁹³ The Third Circuit affirmed on similar grounds, but did not interpret PASPA to prohibit New Jersey from merely repealing its ban on sports wagering,⁹⁴ and the Supreme Court denied review.⁹⁵

The New Jersey legislature tried once more, this time taking the Third Circuit's hint and only repealing provisions of state law that prohibited betting on sporting events at casinos and racetracks, rather than formally authorizing sports betting, as the prior law had attempted.⁹⁶ The same plaintiffs challenged the new law, and the district court and Third Circuit again held that New Jersey's law violated PASPA and denied New Jersey's argument that PASPA impermissibly commandeered state legislatures.⁹⁷ Critical to the court's assessment of the commandeering argument was the distinction between federally commanded action and inaction, and a finding that PASPA required only state inaction.⁹⁸ The Third Circuit, sitting en banc, observed that "PASPA does not command states to take affirmative actions,"

⁸⁹ N.J. CONST. art. IV, §§ VII(2)(D), (F); *see also* *Murphy*, 138 S. Ct. at 1469.

⁹⁰ N.J. STAT. ANN. § 5:12A-2 (West 2012) (repealed 2014).

⁹¹ *See* Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 556 (D.N.J. 2013), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013).

⁹² *Id.* at 561.

⁹³ *Id.* at 562, 570-71.

⁹⁴ Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 232 (3d Cir. 2013), *abrogated* by *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

⁹⁵ *Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014) (denying certiorari).

⁹⁶ N.J. STAT. ANN. §§ 5:12A-7 (West 2014) (repealed 2018).

⁹⁷ Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 402 (3d Cir. 2016), *rev'd sub nom.* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

⁹⁸ *Id.* (distinguishing PASPA from the facts in *New York* because PASPA "does not require states to take any action").

and thus, the court’s prior reasoning “that PASPA does not commandeer the states remains unshaken.”⁹⁹

The Supreme Court granted review and reversed the Third Circuit, holding that PASPA’s anti-authorization provision did indeed violate the anticommandeering doctrine and could not be saved from unconstitutionality as a valid preemption provision.¹⁰⁰ Writing for the 7-2 majority, Justice Alito described the anticommandeering doctrine as a simple recognition that Congress’s enumerated powers do not include the ability to issue direct orders to state governments.¹⁰¹

Beginning with *New York* and *Printz* as foundations, the Court ruled that there is no difference between Congress compelling a state to enact legislation and prohibiting a state from enacting new laws—such a “distinction is empty,” and “[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.”¹⁰² PASPA’s anti-authorization provision “unequivocally dictates what a state legislature may and may not do[,] . . . as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”¹⁰³

The Court next considered the argument that PASPA’s anti-authorization provision constituted a valid preemption scheme and so was not invalidated by the anticommandeering principle.¹⁰⁴ Here, the Court articulated that preemption is valid only where “Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.”¹⁰⁵ PASPA’s anti-authorization provision, the Court concluded, neither conferred federal rights on private actors to engage in sports gambling, nor imposed federal restrictions on private actors—it only made it unlawful for states to authorize sports gambling regimes.¹⁰⁶ Thus, the preemption analysis as set by *Murphy* hinges on the subject of the federal regulation: private actors or the state

⁹⁹ *Id.* at 401.

¹⁰⁰ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478, 1479, 1485 (2018).

¹⁰¹ *Id.* at 1476. Justice Breyer joined the majority opinion except for Part VI-B, on severability, because he disagreed with the majority’s conclusion that PASPA was inseverable. *Id.* at 1488 (Breyer, J., concurring in part and dissenting in part).

¹⁰² *Id.* at 1478.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1479.

¹⁰⁵ *Id.* at 1480.

¹⁰⁶ *Id.* at 1481.

itself. While PASPA's second provision did regulate individuals directly,¹⁰⁷ the Court found PASPA to be inseverable and invalidated the Act.¹⁰⁸

In sum, *Murphy* expanded the Court's anticommandeering jurisprudence to areas in which Congress instructs states to forbear from legislating—leaving scholars questioning how this impacts preemption.

D. *Murphy's Impact on the Commandeering and Preemption Doctrines*

There is some doctrinal line between prohibitions of state regulation via preemption, which are permitted, and commandeering mandates, which are not, but this line is not always clear. As Professor Bulman-Pozen noted, “[t]he prohibition on commandeering follows from structural and normative considerations that also attend federal preemption of state law.”¹⁰⁹ She continues that “distinct framings may make a given federal law appear merely to be prohibiting a conflicting state action (preemption) or instead to be coercing a state to undertake a certain activity (commandeering).”¹¹⁰

Prior to *Murphy*, the Court's opinions in *New York* and *Printz* suggested that the difference turns on whether Congress affirmatively compels state action (impermissible) versus merely requires that states refrain from enacting particular laws and regulations (permissible).¹¹¹ Indeed, many scholars agreed with this distinction, and there has been little written to challenge the validity of such a bright line or argue normatively that the line is misplaced.¹¹² In short, the dividing line separating commandeering and preemption was a distinction between compelled action and compelled inaction.

The Court in *Murphy* obliterated this line by stating that such a “distinction is empty” and rejected the contention that “commandeering

¹⁰⁷ 28 U.S.C. § 3702(2) (2000); see *supra* note 88 and accompanying text.

¹⁰⁸ *Murphy*, 138 S. Ct. at 1482–84.

¹⁰⁹ Jessica Bulman-Pozen, Essay, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2042 (2018).

¹¹⁰ *Id.*

¹¹¹ See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

¹¹² See, e.g., Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and *Yeskey*, 1998 SUP. CT. REV. 71, 94–95 (“A requirement that state legislators enact a particular statute seems, somehow, to be more of an interference with state autonomy than a requirement that they refrain from enacting a particular statute. . . . In short, we believe that there is a good conceptual, interpretive, and normative case for construing the preemption/commandeering distinction as a distinction between inaction and action.”); Jackson, *supra* note 47, at 2201–02 (discussing the difference between preemption and commandeering as a difference of compelled inaction versus compelled action); R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPCAct*, 108 COLUM. L. REV. 404, 418 (2008) (describing courts' commandeering analyses assuming that suspect laws include commands that require action by the state).

occurs ‘only when Congress goes beyond precluding state action and affirmatively commands it.’”¹¹³ Going forward, it matters not whether Congress commands affirmative state action or prohibits a state from legislating—in both cases, the anticommandeering rule applies.¹¹⁴ *Murphy*’s first doctrinal impact, thus, is its new definition of the anticommandeering doctrine as the “basic principle[] that Congress cannot issue direct orders to state legislatures,” which includes “laws that direct[] the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders.”¹¹⁵

Scholars were scattered on what *Murphy* means for the dividing line between preemption and commandeering, and what impact that has on various federal laws. The Court’s decision puzzled many who saw a direct conflict between its clarified rule against commandeering (that Congress cannot issue direct orders to state governments)¹¹⁶ and the traditional understanding of preemption.¹¹⁷ As Dean Vikram Amar remarked, “every congressional enactment that properly accomplishes federal preemption either explicitly or implicitly ‘direct[s] the States [] to . . . refrain from . . . regulation’ of some kind.”¹¹⁸ But Dean Amar went on to predict a tempered impact, suggesting that *Murphy* was neither a blundered one-off ruling nor an erosion of the long-standing doctrine of preemption.¹¹⁹ Rather, Dean Amar concluded that *Murphy*’s primary impact is on conditional preemption, requiring that the conditions placed upon states to avoid preemption be laid out explicitly and clearly.¹²⁰

Others were more troubled about *Murphy*’s impact. Several scholars contended that the same concerns of commandeering are likewise implicated in preemption, and warned that *Murphy*’s definition of “valid preemption

¹¹³ *Murphy*, 138 S. Ct. at 1478 (quoting Brief for Respondents at 19).

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 1478–79.

¹¹⁶ *Id.* at 1476.

¹¹⁷ *See, e.g.*, Vikram David Amar, “Clarifying” *Murphy*’s Law: Did Something Go Wrong in Reconciling Commandeering and Conditional Preemption Doctrines?, 2018 SUP. CT. REV. 299; Daniel Hemel, *Justice Alito, State Tax Hero?*, MEDIUM (May 15, 2018), <https://medium.com/whatever-source-derived/justice-alito-state-tax-hero-333830d097ab> [<https://perma.cc/8EJL-FF48>]; Jeff Schmitt, *Murphy v. NCAA: Anti-Commandeering, Prigg v. Pennsylvania, and the Dormant Commerce Clause*, FAC. LOUNGE (May 15, 2018, 09:32 AM), <https://www.thefacultylounge.org/2018/05/murphy-v-ncaa-anti-commandeering-prigg-v-pennsylvania-and-the-dormant-commerce-clause.html> [<https://perma.cc/J94N-BWVZ>].

¹¹⁸ Amar, *supra* note 117, at 300 (quoting *Murphy*, 138 S. Ct. at 1479).

¹¹⁹ *See id.* at 301.

¹²⁰ *See id.* For background on conditional preemption, see *supra* notes 70–72 and accompanying text.

provisions”¹²¹ might be too narrow and lead to invalidation of numerous preemption provisions.¹²² In the tax context, Professors Brian Galle and Daniel Hemel argued that *Murphy* threatens the constitutionality of upwards of 100 federal provisions that limit the states’ power to tax.¹²³ Professor Matthew Melone also argued that *Murphy*’s outcome prohibits Congress’s ability to streamline state sales tax and use tax regimes for remote and digital sellers.¹²⁴ In the immigration context, Professor Ilya Somin concurred with the Court’s conclusion that there is no difference between commandeering and prohibiting affirmative state laws, and argued that *Murphy* bolsters his argument that federal immigration legislation targeting sanctuary cities violates the anticommandeering rule.¹²⁵ Professor Josh Blackman agreed, arguing that a provision of the Immigration Code which forbids states from enacting sanctuary laws that restrict any state official from sharing information with federal immigration authorities is facially unconstitutional after *Murphy*.¹²⁶ Finally, Professor Sam Kamin added that *Murphy* likely limits federal power to restrict state marijuana legalization.¹²⁷

¹²¹ Under *Murphy*, for a legal provision to qualify as a valid form of preemption, it must be “best read as one that regulates private actors,” meaning that it “imposes restrictions or confers rights on private actors.” *Murphy*, 138 S. Ct. at 1479–80.

¹²² See, e.g., Matthew A. Melone, *Murphy v. NCAA & South Dakota v. Wayfair, Inc.: The Court’s Anticommandeering Jurisprudence May Preclude Congressional Action with Respect to Sales Taxes on Internet Sales*, 67 DRAKE L. REV. 413, 445 (2019) (“[T]he Court’s rather opaque reasoning with respect to the preemption versus anticommandeering issue casts doubt on the federal government’s ability to prohibit state action in a number of circumstances.”); Daniel Hemel, *More on Murphy—And a Response to Critics*, MEDIUM (May 16, 2018), <https://medium.com/whatever-source-derived/more-on-murphy-and-a-response-to-critics-471b35c75ecb> [<http://perma.cc/UP4N-H3MN>]; see also Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sports Gambling*, 2017–2018 CATO SUP. CT. REV. 247, 259–63 (2018) (discussing *Murphy*’s impacts on state taxation and immigration).

¹²³ See Brian Galle, *Murphy’s (Misguided) Law*, MEDIUM (May 15, 2018), <https://medium.com/whatever-source-derived/murphys-misguided-law-8c22889918e4> [<http://perma.cc/4PJS-9TZ5>] (noting that *Murphy* jeopardizes the constitutionality of approximately 110 federal provisions that limit state authority to tax); Hemel, *supra* note 117 (focusing on *Murphy*’s implications for immigration law and tax law); Hemel, *supra* note 122.

¹²⁴ See Melone, *supra* note 122.

¹²⁵ See Ilya Somin, *Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1274, 1277, 1279 (2019); see also Ilya Somin, *Broader Implications of the Supreme Court’s Sports Gambling Decision*, REASON: VOLOKH CONSPIRACY (May 16, 2018), <https://reason.com/volokh/2018/05/16/broader-implications-of-the-supreme-cour> [<http://perma.cc/SYX5-QTXZ>] [hereinafter Somin, *Broader Implications*] (suggesting that *Murphy* is “good news for sanctuary cities”).

¹²⁶ See Josh Blackman, *Improper Commandeering*, 21 U. PA. J. CONST. L. 959, 982 (2019) (discussing 8 U.S.C. § 1373(a) (2012), which proscribes any federal, state, or local governmental entity from prohibiting another government entity from exchanging information with the Immigration and Naturalization Service regarding the immigration status of any individual).

¹²⁷ Sam Kamin, Opinion, *Murphy v. NCAA: It’s About Much More than Gambling on Sports*, HILL (May 15, 2018, 8:00 AM), <https://thehill.com/opinion/judiciary/387653-murphy-v-ncaa-its-about-much-more-than-gambling-on-sports> [<http://perma.cc/DF22-H9K3>].

But the most straightforward reading of *Murphy*, as advocated by Professors Rick Hills and Ilya Somin,¹²⁸ shows that the Court’s opinion does not threaten all preemptive federal laws under the banner of anti-commandeering, at least as it pertains to environmental legislation. Long-standing theory of preemption, pioneering cases on commandeering, and even the approach in *Murphy* itself all demonstrate that Congress’s broad preemption power remains untouched by *Murphy*’s reformulation of the anticommandeering rule, as long as Congress correctly preempts.

Preemption has consistently been recognized as an alternative way for Congress to regulate intrastate activities while avoiding the anticommandeering problem.¹²⁹ As Professor Andrew Ayers described, “Congress does not impermissibly commandeer the states when it uses its preemption power, even when it regulates individuals directly in an area where states have traditionally been the primary regulators.”¹³⁰ The foundational anticommandeering cases explicitly stated that preemption was not limited by the Tenth Amendment,¹³¹ and offered preemption, conditional preemption, and conditional spending as alternatives to unconstitutional commandeering.¹³² Moreover, the analysis in *Murphy* is consistent with these earlier cases: the Court first asked whether PASPA’s anti-authorization provision violated the anticommandeering principle and then considered whether it could be saved from unconstitutionality as a valid preemption provision.¹³³ Thus, as long as a law meets the requirements to constitute a

¹²⁸ See Rick Hills, *Murphy v. NCAA’s Escape from Baseline Hell*, PRAWFSBLAWG (May 16, 2018, 7:11 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2018/05/murphy-v-ncaas-escape-from-baseline-hell.html> [http://perma.cc/U9NN-JD32] (arguing that *Murphy*’s new framework for commandeering does not threaten traditional preemption); Somin, *Broader Implications*, *supra* note 125 (doubting that *Murphy* undermines federal preemption power).

¹²⁹ See, e.g., Siegel, *supra* note 25, at 1673 (“[T]he Rehnquist Court left preemption wide open as an alternative to commandeering.”).

¹³⁰ Andrew B. Ayers, *Federalism and the Right to Decide Who Decides*, 63 VILL. L. REV. 567, 590 (2018).

¹³¹ See *Printz v. United States*, 521 U.S. 898, 913 (1997) (stating that issues of commandeering are avoided if the Brady Act’s questionable provisions “are taken to refer to nothing more (or less) than the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law”); *New York v. United States*, 505 U.S. 144, 178 (1992) (“[T]he Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation.”); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 290–91 (1981) (“A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law[.]” and “nothing in *National League of Cities* suggests that the Tenth Amendment shields the States from pre-emptive federal regulation of *private* activities affecting interstate commerce.”).

¹³² See *New York*, 505 U.S. at 166–67.

¹³³ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478–79 (2018).

valid exercise of preemption, as discussed below, anticommandeering concerns fall by the wayside.

Murphy's second doctrinal impact is its test for determining whether a regulatory scheme is a valid form of preemption altogether. According to *Murphy*, a valid preemption provision (a) "represent[s] the exercise of a power conferred on Congress by the Constitution," and (b) is "best read as [a law] that regulates private actors."¹³⁴ More specifically, the Court instructed that all valid preemption schemes involve a federal law that "imposes restrictions or confers rights on private actors" and a state law that "confers rights or imposes restrictions that conflict with the federal law," leading the federal law to take precedence and preempt the state law.¹³⁵ In sum, under this refined test for preemption, federal laws that primarily direct regulation at states by prohibiting them from acting (such as PASPA) are no longer valid forms of preemption, and instead, constitute commandeering.

While pivoting away from the action versus inaction division that previously distinguished commandeering from preemption,¹³⁶ the *Murphy* Court supplanted that line with a reframed one that focuses on the identity of the regulated party: whether the law is best read to regulate private actors, or to act upon the state directly.¹³⁷ Applying that test, the Court found that PASPA's anti-authorization provision did not grant individuals a federal right to engage in sports gambling, nor did it prohibit private actors from doing so.¹³⁸ Instead, PASPA issued a direct command prohibiting state authorization.¹³⁹ Thus, the anti-authorization provision was not a valid form of preemption, and anticommandeering principles doomed the law.¹⁴⁰

In sum, the Court in *Murphy* may have expanded the anticommandeering doctrine and eliminated the easy test between commandeering and preemption that prohibited affirmative directives to states (as unlawful commandeering) but permitted mere instructions to forbear (as valid preemption). But in its place, *Murphy* substituted another formalist distinction that turns on the target of regulation—whether Congress is regulating the state directly or regulating private actors, and if the latter,

¹³⁴ *Id.* at 1479.

¹³⁵ *Id.* at 1480.

¹³⁶ See *supra* notes 102–103 and accompanying text; *supra* notes 113–114 and accompanying text.

¹³⁷ *Id.* at 1479.

¹³⁸ *Id.* at 1481. Strangely, the Court declined to consider the fact that PASPA's second provision directly prohibited private actors from engaging in sports gambling. Melone, *supra* note 122, at 446 ("Although the Court noted the existence of this provision, it did not discuss the provision in the context of preemption, but instead, it discussed this provision only in the context of its severability from the operative provision at issue."); see also *Murphy*, 138 S. Ct. at 1484.

¹³⁹ 28 U.S.C. § 3702(1) (2000), *invalidated by Murphy*, 138 S. Ct. 1461.

¹⁴⁰ *Murphy*, 138 S. Ct. at 1481.

whether Congress is only indirectly precluding the states from acting. *Murphy* also left preemption as a clear alternative means of achieving the same end as commandeering: eliminating state regulatory discretion.

Using the Clean Air Act to test *Murphy*'s application, the remainder of this Note demonstrates that *Murphy*'s formalist approach is flawed in two respects: (a) it problematically fails to account for certain cooperative federalism schemes where Congress is in dialogue with state legislatures with the joint goal of regulating third parties, and (b) it fails to apply a consistent standard of protecting federalism values to preemption and commandeering.

II. VEHICLE EMISSIONS REGULATION UNDER THE CLEAN AIR ACT

Environmental regulation is fraught with tension between federal and state control, which is at an apex with the Clean Air Act.¹⁴¹ States have long played a critical role in environmental regulation, since responsibility for environmental protection originally fell exclusively to state governments.¹⁴² California broke ground in 1960, enacting the first vehicle emissions control program in the nation to address serious smog problems in Los Angeles.¹⁴³ Five years later, Congress followed California's lead by passing a precursor to the Clean Air Act that imposed federal automobile emissions standards which were then rolled into the Clean Air Act of 1970.¹⁴⁴

Noting that environmental policy efforts at the state level preceded federal programs in many respects, it is no surprise that drafters of the Clean Air Act envisioned a continued role for states like California in controlling air pollution, and the Act is now heralded as a model of cooperative federalism.¹⁴⁵ This Part details the Act's unique preemptive structure for vehicle emissions regulation, chronicles the leading role that states have played to spur greater pollution control, and describes the effects of the EPA's SAFE Rule.

¹⁴¹ Adler, *supra* note 75, at 447 ("Among all federal environmental statutes, the Clean Air Act [] is the source of the greatest state-federal conflict.").

¹⁴² Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1147 (1995).

¹⁴³ PERCIVAL, *supra* note 5, at 527; Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 585 (2001). California promulgated the first vehicle emissions standards in 1961. See Adelman, *supra* note 2, at 252–53.

¹⁴⁴ Revesz, *supra* note 143, at 585–86.

¹⁴⁵ See Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1550 n.7; Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 800 (2008); 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 PA. ST. ENVTL. L. REV. 15, 16 (2004).

A. The Clean Air Act's Preemptive Structure

Most of the Clean Air Act imposes floor preemption, setting federal standards for air pollutants but permitting more stringent state regulations.¹⁴⁶ But in the case of air pollutants resulting from vehicles, the Act requires national uniformity, expressly stating that “[n]o state . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles.”¹⁴⁷ However, Congress qualified this preemption provision with a mechanism for California alone to seek a waiver of preemption.¹⁴⁸ Using this waiver provision, California successfully obtained more than fifty waivers since 1967.¹⁴⁹

Importantly, the Act does not grant the EPA, the agency tasked with carrying out the Clean Air Act, complete discretion in denying or granting California a waiver. Instead, the Act states that the EPA Administrator “shall” grant a waiver if California “determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”¹⁵⁰ It also permits the Administrator to deny a waiver application if she finds the presence of one of three conditions: (a) California’s determination that its standards are at least as protective as the federal standards is arbitrary and capricious; (b) California’s standards are not needed to meet compelling and extraordinary conditions;¹⁵¹ or (c) the

¹⁴⁶ See 42 U.S.C. § 7416 (2012) (stating that, except in the case of vehicle emissions, nothing in the Clean Air Act precludes any state from adopting or enforcing emissions standards that are at least as stringent as the federal requirements); see also Revesz, *supra* note 143, at 586.

¹⁴⁷ 42 U.S.C. § 7543(a). This particular provision was motivated by Congress’s fear that automobile manufacturers might face up to fifty different standards if states could independently regulate emissions. See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1195 (1995).

¹⁴⁸ 42 U.S.C. § 7543(b); Carlson, *supra* note 4, at 292–93 (describing how California is the only state that is eligible to receive a waiver); see also *supra* note 4.

¹⁴⁹ Memorandum from John B. Stephenson, Dir., Nat. Res. & Env’t, U.S. GAO, to Congressional Requesters (Jan. 16, 2009), <https://www.gao.gov/new.items/d09249r.pdf> [<https://perma.cc/KM6H-4TR4>].

¹⁵⁰ 42 U.S.C. § 7543(b).

¹⁵¹ The EPA’s well-established practice is to review California’s vehicle emissions program holistically when analyzing whether it is needed to meet “compelling and extraordinary conditions.” See CARLSON ET AL., *supra* note 18, at 14. The EPA has interpreted the query to refer to whether there are general circumstances unique to California that are primarily responsible for causing its air pollution problem. *Id.* at 15; see also Notice of Decision Denying a Waiver, 73 Fed. Reg. 12156, 12159–60 (Mar. 6, 2008). Each time it has applied for a waiver, California has successfully demonstrated that its unique geography and weather pattern exacerbate the effects of climate change and that vehicle emissions limits are linked to a reduction in smog and the impacts of climate change, and these underlying circumstances remain the case today. CARLSON ET AL., *supra* note 18, at 15–16, n.77.

state standards are inconsistent with the requirements for federal emissions standards under the Clean Air Act.¹⁵²

The history of the Clean Air Act's enactment also indicates that Congress intended the presumption that California is entitled to a waiver, with the goal of preserving California's regulatory authority.¹⁵³ As to the presumption, the House of Representatives considered an amendment to the Act in 1967 that would shift the burden to California to show that it required more stringent standards but rejected the change, leaving the presumption in place.¹⁵⁴ Regarding the driving purpose behind the waiver, legislative history also provides evidence that Congress included the waiver provision not because California had a particularly bad smog problem, but to enable California's continued experimentation in vehicle emissions regulation for the benefit of the nation.¹⁵⁵ The D.C. Circuit has used this history to uphold the EPA Administrator's grant of a waiver against challenges from the automobile industry, reasoning that

The history of congressional consideration of the California waiver provision . . . indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation.¹⁵⁶

¹⁵² 42 U.S.C. § 7543(b). The third condition, (c), requires that the rules governing the EPA's determination of national standards also apply to California's setting of standards. For example, both the national and California standards must provide four years of lead time before enforcing a revised standard for heavy-duty vehicles. *See id.* § 7521(a)(3)(C).

¹⁵³ *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1110–11 (D.C. Cir. 1979); Rachel L. Chanin, Note, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 716–19 (2003). For deeper background on the rich history of the Clean Air Act and California's pioneering role in the area of vehicle emissions regulation, see, for example, JAMES E. KRIER & EDMUND URSIN, *POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION 1940–1975*, at 177–95 (1977); Chanin, *supra*, at 713–21.

¹⁵⁴ Chanin, *supra* note 153, at 714–16; see H.R. REP. NO. 90-728, at 22 (1967), as reprinted in 1967 U.S.C.C.A.N. 1938, 1958.

¹⁵⁵ *See* Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18887, 18890 (May 3, 1984) (granting California a preemption waiver and stating that “[i]f Congress had been concerned only with California's smog problem, however, it easily could have limited the ability of California to set more stringent standards Instead, Congress took a broader approach consistent with its goal of allowing California to operate its own comprehensive program.”); Chanin, *supra* note 153, at 717–19 (quoting several legislators' statements on the rationale for Congress's inclusion of the California waiver).

¹⁵⁶ *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1110–11. The court quoted the House Committee Report for the 1977 Amendment to the Act, which permitted other states to adopt California's standards, as stating that “[t]he Committee amendment is intended to *ratify and strengthen* the California waiver provision and to affirm the underlying intent of that provision, i.e., to *afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.*”

Further solidifying California's position as a leader in environmental regulation, Congress amended the Clean Air Act in 1977 to permit any other state to adopt California's emissions standards in lieu of the federal standards.¹⁵⁷ Other states were still preempted from establishing independent regulatory systems but could enforce standards that were "identical" to California's preemption-waived standards.¹⁵⁸ As Professor Jody Freeman remarked, the Act "thus essentially authorize[d] a 'two-car' country [in which] the auto industry must meet EPA emissions standards nationally, and may also need to meet even more stringent standards in California (and the so-called 'section 177 states' that adopt California's standards)."¹⁵⁹ Thirteen states and the District of Columbia currently follow California's standards, in total representing over 35% of new vehicles sold in the United States.¹⁶⁰

B. *The Role of States in Greenhouse Gas Regulation*

As bureaucracy and partisanship stymie federal lawmaking and as Presidential administration turnovers make agency rules impermanent,¹⁶¹ states can be a source of administrative regularity and adapt policies more

Id. at 1110 (quoting H. R. REP. NO. 95-294, at 301–02 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1380–81).

¹⁵⁷ 42 U.S.C. § 7507 (2012); see also May, *supra* note 22, at 474.

¹⁵⁸ 42 U.S.C. § 7507.

¹⁵⁹ Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 HARV. ENVTL. L. REV. 343, 350 n.42 (2011). "Section 177 states" refers to the states that choose, under Section 177 of the Clean Air Act, to adopt California's standards in lieu of the federal standards. See 42 U.S.C. § 7507.

¹⁶⁰ *A Brief History of US Fuel Efficiency Standards*, UNION OF CONCERNED SCIENTISTS, <https://www.ucsusa.org/clean-vehicles/fuel-efficiency/fuel-economy-basics.html> [https://perma.cc/HT2T-52UY]. These states are Colorado, Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *States that Have Adopted California's Vehicle Standards Under Section 177 of the Federal Clean Air Act*, CAL. AIR RES. BD. (Sept. 27, 2019), <https://ww2.arb.ca.gov/resources/documents/states-have-adopted-californias-vehicle-standards-under-section-177-federal> [https://perma.cc/R7SQ-W3AY]; *U.S.: Section 177 States*, TRANSPORTPOLICY.NET, <https://www.transportpolicy.net/standard/us-section-177-states/> [https://perma.cc/8GCH-2YCZ]. Additionally, in September 2019, the governors of Minnesota and New Mexico both announced plans to adopt the California standards under Section 177. David Shepardson, *Minnesota, New Mexico to Adopt California Vehicle Emissions Rules*, REUTERS (Sept. 25, 2019, 3:53 PM), <https://www.reuters.com/article/us-autos-emissions-california-minnesota/minnesota-new-mexico-to-adopt-california-vehicle-emissions-rules-idUSKBN1WA2SJ> [https://perma.cc/WTU8-TLLQ].

¹⁶¹ See, e.g., Nadja Popovich et al., *85 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html> [https://perma.cc/8LFL-Q3VF]; Connor Raso, *Where and Why Has Agency Rulemaking Declined Under Trump?*, BROOKINGS (June 29, 2018), <https://www.brookings.edu/research/where-and-why-has-agency-rulemaking-declined-under-trump/> [https://perma.cc/5M4J-SDHP].

quickly, driving innovation.¹⁶² Policies addressing climate change are a prime example, as states have played a leading role in securing federal regulation of greenhouse gases (GHGs) under the Clean Air Act.¹⁶³ The Act delegates authority to the EPA to identify which air pollutants are anticipated to “endanger public health or welfare” and thus must be subject to emissions standards.¹⁶⁴ For decades, the EPA passed regulations setting standards for hydrocarbons, carbon monoxide, nitrogen oxide, and other hazardous air pollutants, achieving more than 90% reductions in those tailpipe emissions.¹⁶⁵ Notably, GHGs were not deemed to have an adverse impact on public health or welfare and, thus, were not subject to the Clean Air Act until significant efforts by states along two fronts.

First, several states petitioned the EPA in the 1990s to regulate GHGs on the grounds that GHG emissions “endanger public health or welfare.”¹⁶⁶ The EPA rejected the suggestion, but Massachusetts challenged this denial in court in 2005.¹⁶⁷ In *Massachusetts v. EPA*, the Supreme Court held that GHGs do constitute “air pollutants” and must be regulated under the Clean Air Act if they endanger public health or welfare.¹⁶⁸ In December 2009, the EPA complied with the Court’s instruction and found that GHG emissions pollute the air and “may reasonably be anticipated to endanger public health or welfare,” thus requiring the EPA to set GHG emissions standards.¹⁶⁹

Second, states took it upon themselves to regulate GHG emissions. In 2002, California passed the first legislation requiring automobile manufacturers to reduce GHG emissions, which would apply to model year 2009 vehicles.¹⁷⁰ Other states followed suit, adopting California’s GHG

¹⁶² See David L. Markell, *States as Innovators: It’s Time for a New Look to Our “Laboratories of Democracy” in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 355–57 (1994); Revesz, *supra* note 143, at 631.

¹⁶³ May, *supra* note 22, at 470–72. For background on greenhouse gases, see *supra* note 30.

¹⁶⁴ 42 U.S.C. § 7521(a)(1) (2012).

¹⁶⁵ *History of Reducing Air Pollution from Transportation in the United States*, U.S. EPA, <https://www.epa.gov/transportation-air-pollution-and-climate-change/accomplishments-and-success-air-pollution-transportation> [<https://perma.cc/MFV7-ZHYU>].

¹⁶⁶ See May, *supra* note 22, at 472.

¹⁶⁷ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922–23 (Sept. 8, 2003); *Massachusetts v. E.P.A.*, 415 F.3d 50 (D.C. Cir. 2005), *rev’d*, 549 U.S. 497 (2007).

¹⁶⁸ 549 U.S. 497, 528, 532 (2007).

¹⁶⁹ Freeman, *supra* note 159, at 351; see also Endangerment Findings, 74 Fed. Reg. 66496, 66496 (Dec. 15, 2009) (“[G]reenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations.”).

¹⁷⁰ CAL. HEALTH & SAFETY CODE § 43018.5 (West 2002); see also Keeth, *supra* note 22, at 719 (explaining that the California law is “the first law of its kind in the nation requiring automakers to reduce emissions of greenhouse gases”).

emissions limits pending the EPA's approval of California's waiver.¹⁷¹ California petitioned the EPA in 2005 for a preemption waiver to implement its new GHG emissions standards, but despite the Supreme Court's ruling in *Massachusetts v. EPA*, the agency denied California's waiver request in December 2007—the first denial in thirty-seven years.¹⁷² EPA Administrator Stephen Johnson explained that “greenhouse gases are fundamentally global in nature,” and therefore, California failed to show a “need to meet compelling and extraordinary conditions” as required by the Clean Air Act.¹⁷³ But soon thereafter in 2008, after political pressure and a change in executive administration, the EPA reconsidered the denial and granted the waiver for California's GHG standards,¹⁷⁴ determining that “it makes no difference whether California seeks a waiver to implement separate standards in response to its own specific, local air pollution problems, or whether California seeks a waiver to implement separate standards designed to address a global air pollution problem.”¹⁷⁵

*C. The SAFE Rule: Withdrawing California's
Preemption Waiver*

In 2009, the Obama Administration proposed a bold increase in federal standards for vehicle emissions and fuel economy, and secured agreement from American automakers on the condition that the national standards were harmonized with California's regulations to avoid the two-car country.¹⁷⁶ California agreed to revise its emissions requirements for vehicles sold in the state such that cars that met the new federal standards would be deemed to

¹⁷¹ May, *supra* note 22, at 475; *see also* PEW CTR. ON GLOB. CLIMATE CHANGE, LEARNING FROM STATE ACTION ON CLIMATE CHANGE 7 (2005), https://www.climatechange.ca.gov/climate_action_team/reports/2006report/2005-12-08_PEW_CENTER_REPORT.PDF [<https://perma.cc/J37H-SZT7>] (listing ten states that planned to follow California's vehicle standards for GHG emissions).

¹⁷² *See* JAMES E. MCCARTHY & ROBERT MELTZ, CONG. RES. SERV., CALIFORNIA'S WAIVER REQUEST UNDER THE CLEAN AIR ACT TO CONTROL GREENHOUSE GASES FROM MOTOR VEHICLES 5, 10–11 (2009), https://digital.library.unt.edu/ark:/67531/metadc87329/m1/1/high_res_d/RL34099_2009Feb10.pdf [<https://perma.cc/NPX4-YG22>]; May, *supra* note 22, at 475–76; Stephenson, *supra* note 149, at 2.

¹⁷³ Letter from Stephen L. Johnson, EPA Adm'r, to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007), <https://www.epa.gov/sites/production/files/2016-10/documents/20071219-slj.pdf> [<https://perma.cc/H46D-4Y48>].

¹⁷⁴ Notice of Decision Granting a Waiver, 74 Fed. Reg. 32744 (July 8, 2009); Freeman, *supra* note 159, at 352; Laura Hall, Note, *The Evolution of CAFE Standards: Fuel Economy Regulation Enters Its Second Act*, 39 TRANSP. L.J. 1, 19–20 (2011).

¹⁷⁵ SAFE Rule, 83 Fed. Reg. 42986, 43241 (Aug. 24, 2018).

¹⁷⁶ Hall, *supra* note 174, at 20–23. The “two-car country” describes how manufacturers may need to develop two separate vehicle fleets, one to meet the national standard and another to meet the higher California standard. *See supra* note 159 and accompanying text.

be in compliance with California’s standards¹⁷⁷—but maintained its more stringent standards on the books.¹⁷⁸ Thus, if the federal standards became more lenient, California could revoke the reciprocity with federal standards and once again require manufacturers to meet the state standards.¹⁷⁹

The EPA granted California’s latest request for a waiver of preemption for its Advanced Clean Cars program, Zero Emissions Vehicle mandate, and more stringent GHG standards in January 2013, a waiver that extended through model year 2025 vehicles.¹⁸⁰ Meanwhile, the EPA continued to increase the standards annually, and in the waning days of President Obama’s tenure, the EPA published a Final Determination in January 2017 that locked emissions standards through 2025.¹⁸¹

However, just two months later and after a change in administration, new EPA Administrator Scott Pruitt announced an intention to reconsider the 2017 Final Determination and assess whether the standards through 2025 were appropriate.¹⁸² Then, in April 2018, the EPA formally withdrew the 2017 Final Determination and reopened the rulemaking process to set new standards for 2022 to 2025 in light of “recent data” that the Obama Administration purportedly failed to consider.¹⁸³

On August 24, 2018, the EPA proposed a new plan, the Safer Affordable Fuel-Efficient (SAFE) Rule, which would freeze standards at 2020 levels through 2026.¹⁸⁴ The SAFE Rule also proposed to withdraw the preemption waivers previously granted to California through 2025, eliminating California’s ability to set emissions standards that deviate whatsoever from the now-frozen federal standards.¹⁸⁵ The EPA cited two primary justifications under the Clean Air Act’s waiver denial provisions for

¹⁷⁷ 2010 Final Rule: Light-Duty Vehicle Standards, 75 Fed. Reg. 25324, 25328 (May 7, 2010).

¹⁷⁸ See Letter from Mary D. Nichols, Chairman, CARB, to Lisa P. Jackson, Adm’r, EPA, & Ray LaHood, Sec’y, U.S. Dep’t of Transp. (May 18, 2009), <https://www.epa.gov/sites/production/files/2016-10/documents/air-resources-board.pdf> [<https://perma.cc/DJK5-WTEN>].

¹⁷⁹ *Id.*

¹⁸⁰ Notice of Decision Granting a Waiver, 78 Fed. Reg. 2112 (Jan. 9, 2013).

¹⁸¹ See U.S. EPA, FINAL DETERMINATION ON THE APPROPRIATENESS OF THE MODEL YEAR 2022–2025 LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSIONS STANDARDS UNDER THE MIDTERM EVALUATION (2017), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf> [<https://perma.cc/59SV-B2UU>].

¹⁸² Notice of Intention to Reconsider Midterm Determination, 82 Fed. Reg. 14671 (Mar. 22, 2017).

¹⁸³ Press Release, U.S. EPA, GHG Emissions Standards for Cars and Light Trucks Should Be Revised (Apr. 2, 2018), <https://www.epa.gov/newsreleases/epa-administrator-pruitt-ghg-emissions-standards-cars-and-light-trucks-should-be> [<https://perma.cc/2PHU-8DQ6>].

¹⁸⁴ SAFE Rule, 83 Fed. Reg. 42986, 42988 (Aug. 24, 2018).

¹⁸⁵ *Id.* at 43232; see also U.S. EPA, PROPOSED CALIFORNIA WAIVER WITHDRAWAL (2018), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100V26M.pdf> [<https://perma.cc/4X4H-2QH6>].

withdrawing California's waiver.¹⁸⁶ First, the EPA asserted that California does not need its more stringent standards to meet "compelling and extraordinary conditions" because the standards (a) address environmental problems not unique to California, (b) are not necessitated by emissions unique to California, and (c) will not provide a remedy unique to California.¹⁸⁷ Second, the EPA claimed that California's emissions standards are technologically infeasible for car manufacturers to meet without additional time to develop new technology and, therefore, are inconsistent with the Clean Air Act's national emissions requirements.¹⁸⁸ Additionally, the EPA claimed that California's entire ability to set these vehicle emissions standards is preempted by the Energy Policy and Conservation Act of 1975, which grants the National Highway Traffic Safety Administration the power to set fuel economy guidelines.¹⁸⁹ Therefore, the EPA concluded, any waivers granted to California are moot.

In September 2019, the EPA published the first part of the final SAFE Rule, the One National Program, which finalizes the revocation of California's waiver and makes clear that the state is preempted from setting vehicle GHG emissions limits or mandating zero-emissions vehicles.¹⁹⁰ This is the first instance in history where the EPA has attempted to revoke a preemption waiver; the proper procedure for doing so, and indeed the very

¹⁸⁶ Whether or not the statutory justifications for denying a waiver apply to a revocation of an already-granted waiver is a central issue in the current legal arguments against the SAFE Rule. *See, e.g.,* DENISE A. GRAB ET AL., INST. FOR POLICY INTEGRITY, NO TURNING BACK 1–16 (2018).

¹⁸⁷ U.S. EPA, *supra* note 185. Under President Bush, the EPA used similar reasoning to initially deny a preemption waiver that would allow California to regulate vehicle GHG emissions, which the EPA later granted under President Obama. *See supra* notes 176–181 and accompanying text.

¹⁸⁸ *Id.* Recall that the Clean Air Act's waiver provision states that no waiver shall be issued if California's standards are "not consistent" with the Act's requirements for the national standard. *See* 42 U.S.C. § 7543(b)(1)(C) (2012). Here, the EPA invoked Section 202(a)(2), which provides that any emissions 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." *Id.* § 7521(a)(2). Accordingly, the EPA argued that California's standards take effect too early. For a helpful economic argument about why this lead time concern is unfounded, see generally NOLL ET AL., *supra* note 11.

¹⁸⁹ Keith Goldberg, *Auto Emissions Plan Hearing Sparks Regulator War of Words*, LAW360 (June 20, 2019, 7:39 PM), <https://www.law360.com/articles/1171231/auto-emissions-plan-hearing-sparks-regulator-war-of-words> [<https://perma.cc/YE4R-VEE9>]. For further information on this argument, see *CAFE Standards and the California Preemption Plan*, HARV. L. SCH. ENVTL. & ENERGY L. PROGRAM (Aug. 24, 2018), <https://eelp.law.harvard.edu/2018/08/cale-standards-and-the-california-preemption-plan/> [<https://perma.cc/P3ZY-NA8R>]. For responses to this specific argument, see CARLSON ET AL., *supra* note 18, at 17–19, and GRAB ET AL., *supra* note 186, at 17–18.

¹⁹⁰ SAFE Rule Part One: One National Program, 84 Fed. Reg. 51310, 51310 (Sept. 27, 2019) (to be codified at 49 C.F.R. pts. 531, 533). The Administration anticipates issuing the complementary final rule rolling back national emissions standards in the near future. *Id.*

legality of a revocation, is currently the topic of debate.¹⁹¹ No matter the result of that procedural dispute, the revocation has reinvigorated discussion about the role of states in environmental protection.

III. FEDERAL AND STATE AUTHORITY OVER VEHICLE EMISSIONS REGULATION AFTER *MURPHY*

Murphy fractured the preexisting line separating impermissible commandeering from permissible preemption, which caused concern over what impact the broadened commandeering prohibition has on the availability of preemption as an alternative.¹⁹² In fact, this issue arose in oral arguments in *Murphy* itself.¹⁹³ But as legal precedent, *Murphy* has little impact on Congress's broad power over state regulation. Rather than providing clarity or guiding principles for the bounds of federal control of state policy, the Court swapped one formalist distinction in favor of another: from an action versus inaction division to a test hinging on whether the party most directly regulated is the state or private actors.¹⁹⁴

The result of this formalism is a nod toward tightening commandeering restrictions, but the unbounded availability of preemption as an alternative approach to the same ends means that the anticommandeering doctrine is mostly toothless to protect the states' abilities to control private activities. Congress can merely replace a commandeering scheme with a preemptive one, and the impact is the same: in both cases, it disarms the states from acting, yet one method is constitutional while the other is not. With PASPA deemed unconstitutional commandeering, for example, states may now legalize sports gambling,¹⁹⁵ but Congress could enact federal legislation prohibiting individuals from engaging in sports gambling and preempt all related state regulation, achieving the same outcome as PASPA sought.

California is in the midst of a battle with the EPA to retain its fifty-year-long ability to set more stringent vehicle emissions standards than the

¹⁹¹ See, e.g., GRAB ET AL., *supra* note 186, at i.

¹⁹² See *supra* Section I.D; see, e.g., Melone, *supra* note 122, at 442 (“The Court’s clarification that the federal government can no more order a state to do nothing than it can order a state to do something begs the question of how the anticommandeering principle coexists with preemption.”).

¹⁹³ See Transcript of Oral Argument at 52, *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018) (Nos. 16-476, 16-477) (where Justice Kagan asked Paul Clement, representing the NCAA, “what’s the line you would draw as between preemption and commandeering?”); *id.* at 9 (where Justice Kagan asked Ted Olson, representing the state of New Jersey, “[w]hen do we know that [the federal government has] enacted a sufficiently comprehensive regulatory scheme in order to allow preemption of state rules?”).

¹⁹⁴ See *supra* Section I.D.

¹⁹⁵ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484–85 (2018).

national requirement.¹⁹⁶ While the Court's decision in *Murphy* reinvigorated the conversation about the mechanics of federalism and expanded the anticommandeering doctrine, it does little to protect California against the revocation of its preemption waiver. The revocation would translate to a federal command that California forbear from regulating—ostensibly an action now subject to a commandeering analysis according to *Murphy*. Yet even with *Murphy*'s stricter commandeering prohibition, the broad preemption power allows the Act to escape all Tenth Amendment concerns.

This Part begins by applying *Murphy* to the Clean Air Act and determining that while the EPA's revocation of California's waiver may raise federalism concerns, *Murphy* is of no help to California's case because preemption remains available as a trump card to any commandeering challenge. Using the revocation of California's waiver as an illustration, this Part then argues that *Murphy*'s clarified distinction between preemption and commandeering is too imprecise and formalist to account for modern cooperative federalism programs. Finally, it concludes by counseling hesitation before Congress or the courts throw out the delicate balance of the existing system.

A. *Applying Murphy to the California Waiver Revocation*

As noted above, a majority of the Clean Air Act only conditionally preempts state air pollution regulation.¹⁹⁷ For example, the EPA sets national standards for stationary sources of pollution such as factories, power plants, and oil refineries, but invites states to prepare individual state implementation plans that meet the federal criteria.¹⁹⁸ States are free to impose more stringent pollution limitations on certain polluters, and only if a state fails to submit a sufficient plan of its own may the EPA require the state to adopt the federal implementation plan.¹⁹⁹ This conditional preemption scheme avoids a commandeering problem by giving states a choice between enacting state plans that conform to the federal program or having state air pollution regulation preempted by federal law.²⁰⁰

¹⁹⁶ See Complaint, *California v. Chao*, *supra* note 14 (challenging the Trump Administration's rescission of California's waiver as unlawful); see also Press Release, Attorney General Becerra Files Lawsuit Challenging Trump Administration's Attempt to Trample California's Authority to Maintain Longstanding Clean Car Standards (Sept. 20, 2019), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-files-lawsuit-challenging-trump-administration%E2%80%99s> [<https://perma.cc/N3EV-ESYK>].

¹⁹⁷ See *supra* note 146.

¹⁹⁸ See 42 U.S.C. § 7410(a) (2012).

¹⁹⁹ See *id.* §§ 7410(c)(1), 7416.

²⁰⁰ Siegel, *supra* note 25, at 1676.

Vehicle emissions are treated differently, however, with the Act imposing unitary federal choice ceiling preemption on all states and providing a presumed waiver for California. This particular provision explicitly prohibits any state from adopting “any standard relating to the control of emissions from new motor vehicles.”²⁰¹ Under *Murphy*’s refined definition of commandeering—violation of the principle that Congress cannot issue direct orders to state legislatures—the Clean Air Act’s proscription of any state regulation is an express federal prohibition of state action that, under *Murphy*, is now subject to the anticommandeering doctrine.²⁰²

The analysis in *Murphy* did not stop at this first step, however. The Court progressed to consider whether PASPA could be saved as a valid form of preemption.²⁰³ Under the Court’s preemption test, judges must consider whether a law is “best read” to primarily regulate states or private parties.²⁰⁴ In *Murphy*, the Court concluded that PASPA’s anti-authorization provision²⁰⁵ primarily regulated states by prohibiting the legalization of sports gambling²⁰⁶—notwithstanding that PASPA ultimately regulated individuals by prohibiting the act of sports wagering, albeit indirectly. In asking whether PASPA primarily regulated states or private parties, the Court only looked at PASPA’s anti-authorization provision but did not discuss how PASPA’s second, parallel provision²⁰⁷ directly prohibited private actors from operating or promoting sports gambling schemes.²⁰⁸ Therefore, one could take *Murphy*’s application of the preemption test to instruct courts to evaluate provisions independently and not within the broader context of the statute.

Under that approach, courts could review the Clean Air Act’s preemption provision—which directs that “[n]o State . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles” and “[n]o State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle”—and conclude that it is best read to regulate states, not private

²⁰¹ 42 U.S.C. § 7543(a).

²⁰² *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1467 (2018).

²⁰³ See *supra* note 105 and accompanying text.

²⁰⁴ See *Murphy*, 138 S. Ct. at 1479; see *supra* notes 137–138 and accompanying text.

²⁰⁵ 28 U.S.C. § 3702(1) (2000), *invalidated by Murphy*, 138 S. Ct. 1461; see also *supra* notes 86–87 and accompanying text.

²⁰⁶ *Murphy*, 138 S. Ct. at 1481.

²⁰⁷ 28 U.S.C. § 3702(2) (2000), *invalidated by Murphy*, 138 S. Ct. 1461; see also *supra* note 87 and accompanying text.

²⁰⁸ *Murphy*, 138 S. Ct. at 1484; see also Melone, *supra* note 122, at 446.

actors.²⁰⁹ This result would compel a court to strike down the Clean Air Act’s prohibition of state regulation altogether as a form of commandeering and not a valid form of preemption, making it unconstitutional for Congress to prevent fifty different standards for vehicle emissions. But it is inconceivable that Congress could lack the ability to prohibit states from contradicting a federal law regulating national commerce, a power vested in the Constitution, critical to the federal system, and which the Supreme Court has recognized since the early days of the nation.²¹⁰

Looking instead at the Clean Air Act’s vehicle emissions regulation comprehensively, courts would likely view the regulatory scheme as crafted to primarily impose requirements on vehicle manufacturers (private actors),²¹¹ and only secondarily crafted to prohibit states from imposing an entirely different set of requirements.²¹² Section 202 of the Clean Air Act, which directs the EPA to set emissions standards for new motor vehicles, represents a valid exercise of Congress’s Commerce power,²¹³ and directly regulates manufacturers as private actors.²¹⁴ It both imposes a restriction on private actors and also confers the right to be free of state regulation in excess of the federal requirements.²¹⁵ Thus, even if the Act does commandeer state legislatures by instructing that they forbear from any vehicle emissions regulation, that its focus is regulating private actors renders it a valid exercise of Congress’s preemption power and therefore exempt from the commandeering prohibition.

Under this formalist approach to the Tenth Amendment set out in *Murphy*, the fact that environmental protection originally fell within state

²⁰⁹ 42 U.S.C. § 7543(a) (2012).

²¹⁰ U.S. CONST. art. I, § 8 (“The Congress shall have [p]ower . . . [t]o regulate Commerce with foreign Nations, and among the several States”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210–11 (1824) (“[T]he framers of our constitution . . . declar[ed] the supremacy not only of itself, but of the laws made in pursuance of it. . . . In every such case [where laws enacted by states interfere with laws of Congress], the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”). The Commerce Clause provides the constitutional basis for a wide range of Congressional acts. CHEMERINSKY, *supra* note 36, at 247.

²¹¹ 42 U.S.C. § 7521(a).

²¹² *Id.* § 7543.

²¹³ See Sidney Edelman, *Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 GEO. WASH. L. REV. 1067, 1067–78 (1965).

²¹⁴ See 42 U.S.C. § 7522 (enumerating the prohibitions under the Act, which fall on manufacturers or individual persons); see also *id.* § 7524 (imposing civil penalties on persons that violate these standards).

²¹⁵ See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1481 (2018) (contrasting PASPA from the federal alien registration standards at issue in *Arizona v. United States*, 567 U.S. 387 (2012), which “not only impose[d] federal registration obligations on aliens but also confer[red] a federal right to be free from any other registration requirements”).

police power²¹⁶ and that states have long taken the lead in air pollution regulation²¹⁷ is irrelevant. The procedure involved in the revocation is similarly irrelevant—the fact that California has set independent standards for the past fifty years, and was granted a waiver of preemption which is now being revoked, does not make it any more of a case of commandeering.

B. *Critiquing the Revised Distinction*

The foregoing application demonstrates that *Murphy* does nothing to disarm the EPA from revoking California’s waiver. While there may be procedural issues with the revocation process itself,²¹⁸ Congress has the authority to fully preempt California’s vehicle standards and can therefore delegate to the EPA an ability to withhold a preemption waiver, subjecting California to the same preemption rule that applies to other states. This withdrawal of California’s authority to set emissions standards and a zero-emissions vehicle mandate, while perhaps uncomfortable from a states-rights perspective, creates no legal Tenth Amendment issue under the Court’s current precedent.

However, applying *Murphy*’s distinction between preemption and commandeering to the vehicle emissions regulatory regime highlights two reasons to critique *Murphy*’s formalism: first, it poorly accounts for certain cooperative federalism schemes, and second, leaving preemption unbounded as a legal alternative to commandeering renders these federalism protections a matter of form, not substance.

1. *Complex Cooperative Federalism Programs*

Murphy’s formalist distinction between preemption and commandeering fails to address a matter at the core of the Tenth Amendment: how to effectively manage complex cooperative federalism regimes that bring the federal and state governments together to control private conduct. The sections of the Clean Air Act with which this Note is concerned primarily direct regulation at vehicle manufacturers, permissibly preempting contrary state regulations.²¹⁹ But these provisions also command the EPA to grant California a waiver of preemption if California meets certain requirements.²²⁰ In this sense, Congress is speaking directly to California, inviting the state to participate in the regulatory process.

²¹⁶ See Percival, *supra* note 142, at 1147.

²¹⁷ See Revesz, *supra* note 143, at 592–93.

²¹⁸ See GRAB ET AL., *supra* note 186, at i.

²¹⁹ 42 U.S.C. § 7521 (2012).

²²⁰ *Id.* § 7543(b).

The structure of the Clean Air Act's waiver provision assumes that California is entitled to a waiver unless proven otherwise.²²¹ It explicitly instructs that the EPA "shall . . . waive application" of the preemption provision if California determines that its standards are, in the aggregate, at least as stringent as the federal standards.²²² In order to deny the waiver on these grounds, the EPA cannot merely disagree with California's assessment; it must show that California's determination is arbitrary and capricious.²²³ The Act identifies two other grounds on which the EPA can withhold a waiver: if California does not need the standards to meet compelling conditions,²²⁴ or if California's standards are inconsistent with the Act's procedural and substantive requirements for federal standard-setting.²²⁵ Legislative history also shows that Congress intended California to enjoy the presumption of entitlement to a waiver of preemption.²²⁶ Thus, the Clean Air Act invites California to act as a second, technology-forcing regulator as long as the state meets the above-listed requirements to avoid the three possible grounds for denial of a waiver.

In this type of system, where Congress engages in a dialogue with state legislatures and explicitly envisions a cooperative program to regulate third parties, *Murphy*'s preemption test of whether a law is "best read" to apply to states or private actors may return a fuzzy result, since these regulatory laws are directed at both. For example, both PASPA and the Clean Air Act constrain both private actors (by proscribing private operation of sports betting and by imposing emissions limits on manufacturers, respectively) and states (by prohibiting legalization of sports gambling and prohibiting independent state emissions standards).²²⁷ The nuance lies in whether a law more directly regulates states or private actors.²²⁸

The Court in *Murphy* concluded that PASPA was more accurately described as a law restraining states from allowing private activity that Congress found censurable.²²⁹ But at its core, Congress's aim was not to

²²¹ See *supra* notes 152–154 and accompanying text.

²²² *Id.* §§ 7543(b)(1)–(2).

²²³ *Id.* § 7543(b)(1)(A).

²²⁴ *Id.* § 7543(b)(1)(B).

²²⁵ *Id.* §§ 7543(b)(1)(C), 7521(a). For further detail on the grounds for withholding a waiver, see *supra* note 152 and accompanying text.

²²⁶ See *supra* note 156 and accompanying text.

²²⁷ 28 U.S.C. § 3702 (2000) (PASPA), *invalidated by* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018); 42 U.S.C. §§ 7521(a)(1), 7543(a) (2012) (Clean Air Act).

²²⁸ *Murphy*, 138 S. Ct. at 1479–80.

²²⁹ *Id.* at 1481.

control states *per se*—it was to prohibit individuals from betting on sports.²³⁰ If *Murphy*'s preemption rule considered the ultimate goal of the federal regulation, the Court may have found PASPA to primarily regulate private behavior (sports gambling), and thus be an appropriate form of preemption. Instead, the Court found the opposite, focusing on the form of the regulation (directed at state legislatures) rather than the purpose.

Turning to the Clean Air Act, the analysis is murkier. The Act regulates vehicle manufacturers with the goal of addressing air pollution.²³¹ But it also regulates state legislatures with the goal of avoiding a fifty-state approach to vehicle emissions regulation.²³² In both form and purpose, therefore, the Act directs regulation at both states and private parties—and applying *Murphy*'s preemption test provides little insight on whether the law is an appropriate form of preemption or not. As this example shows, complex regulatory programs that involve both the federal government and states regulating third parties will prove difficult to analyze under the Court's "best read" preemption analysis.

2. *Misaligned Federalism Concerns*

In the case of federal instructions for states to forbear from legislating, permitting unbounded preemption while strengthening the anticommandeering doctrine is questionable: preemption has the same impact and similar concerns as commandeering, and the unbounded availability of preemption as an alternative neutralizes the commandeering limit.

First, even though *Murphy*'s clarified preemption test turns on the identity of the primarily regulated party, the impacts of preemptive and commandeering laws are the same: in both cases, the federal government forbids states from independently acting on private parties. In *Printz*, the Court recognized that laws directing state executive officials' actions infringe upon a state legislature's ability to manage state policy in the same way that federal commands directly to state legislatures did in *New York*.²³³ Likewise, the Clean Air Act's ceiling preemption infringes on the California legislature's ability to control state environmental policy in much the same way. Despite *Murphy*'s attempts to clarify the line between preemption and commandeering, the results of both appear the same from the ground-level.

²³⁰ *Id.* at 1468–70 (chronicling the history of sports gambling prohibitions and the enactment of PASPA).

²³¹ 42 U.S.C. § 7521(a)(1).

²³² *Id.* § 7543(a).

²³³ *Printz v. United States*, 521 U.S. 898, 928, 935 (1997); *New York v. United States*, 505 U.S. 144, 175–76, 188 (1992); Adler, *supra* note 75, at 398.

Second, preemption may actually be more harmful to federalism principles than commandeering.²³⁴ Revoking California's preemption waiver completely eliminates California's ability to participate in any kind of cooperative scheme with Congress or federal regulators—it removes California's seat at the table. Commandeering, at the very least, requires state involvement and some discretion in implementation of federal programs.²³⁵ In that vein, Professor Neil Siegel cautions that the anticommandeering prohibition may actually harm state autonomy because when courts strike down commandeering laws, the federal government often responds with even broader preemption, shrinking state regulatory power even further.²³⁶ More broadly, preemption leaves a state with no meaningful way to “prevent federal tyranny, advance political participation, encourage political responsiveness and accountability through interjurisdictional and intrajurisdictional competition, express the distinctive value commitments of the majority of their populations” or “serve as laboratories of experimentation”—all values at the core of the Tenth Amendment.²³⁷

In sum, *Murphy's* modified line between preemption and commandeering, which turns on the identity of the party primarily being regulated, is too rigid to account for certain cooperative federalism regimes that, as the next Section argues, may be normatively preferable to absolute preemption. Moreover, many scholars have urged that the commandeering doctrine must be strengthened against preemption if it is to mean anything at all.²³⁸ Instead, while expanding the anticommandeering doctrine in name,

²³⁴ Siegel, *supra* note 25, at 1646.

²³⁵ Caminker, *supra* note 25, 1002–03.

²³⁶ Siegel, *supra* note 25, at 1646 (footnote omitted) (“[P]reemption, an obvious and constitutional alternative to commandeering, may impede the vindication of federalism values not only by raising accountability problems of its own, but also by reducing the regulatory roles of the states at the level of policy implementation.”).

²³⁷ *Id.* at 1651.

²³⁸ See Adler & Kreimer, *supra* note 112, at 106 (“[T]he constitutional permissibility of conditional spending and conditional preemption threatens to make the anticommandeering rule of *Printz* and *New York* a practical nullity.”); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 426 (1998) (“The Court [in *New York*] essentially assumes that the greater power to deny funds or preempt entirely includes the lesser power to fund or preempt conditionally. The Court likewise notes and appears prepared to tolerate more subtle insults to the states’ [sovereignty]. . . . To the extent that the Court’s federalism doctrine is not a mere formality, it appears that the Court is at once overly protective of, and callously indifferent to, the states’ freedom of action. But if the Supreme Court’s anticommandeering principle does not actually protect states’ rights to set and execute their own agendas, what is it designed to do?”); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 921 (1998) (“If there are no limits on Congress’s power to use conditional preemption, then *New York* is a meaningless formality, because the national government could always require that state and local governments either make policy according to federal standards or disband themselves.”); Siegel, *supra* note 25, at 1673 (“The Rehnquist Court’s apparent lack of concern for the impact of broad federal

Murphy leaves preemption untouched and therefore should not be read to herald protection of state sovereignty.

C. *Cautioning Against Broad Preemption in Vehicle Emissions Regulation*

This Note does not purport to advocate for a watershed reading of the Tenth Amendment that removes preemption as an alternative and returns to protect some core area of traditional state activities (a concept rejected in *Garcia*).²³⁹ That debate is a much larger topic involving serious consequences beyond the scope of this discussion.²⁴⁰ It suffices to acknowledge that California should take no comfort from the idea that *Murphy* signals that the Court is more sensitive to protecting a state's ability to control state policy. As long as the validity of a preemptive law turns solely on whether the broader scheme is best read to primarily regulate private conduct, the Tenth Amendment is inapplicable to protect California against the waiver revocation.

But even if federalism arguments about the EPA's revocation of California's waiver are unlikely to persuade a court under current precedent, there are strong normative reasons to counsel against broad ceiling preemption in environmental regulation. The Clean Air Act's ceiling preemption strips states of the ability to drive innovation and respond to local needs, and it eliminates the national benefits that come from decentralized policy experimentation. Moreover, the traditional justifications for ceiling preemption are weaker in the context of vehicle emissions regulation.

1. *Benefits of Joint Federal–State Approaches to Environmental Policy*

There are compelling reasons to allow state participation in environmental regulation. As discussed earlier, states took the lead in air pollution regulation decades before the federal government stepped in, and even after implementation of the Clean Air Act, states continued to drive technological innovation ahead of the federal government.²⁴¹ Studies have

preemption on state regulatory control in the commandeering context is hardly *sui generis*. It is one of the puzzles of that Court's legacy that the same Justices who wrote passionately about the virtues of federalism seemed somewhat tone deaf to the implications of broad federal preemption for the vindication of a substantive vision of state autonomy.”).

²³⁹ See *supra* note 45.

²⁴⁰ As Professor Siegel notes, if the Court were to “remove preemption as a constitutional alternative,” it would “radically transform[] the constitutional regime in which we live.” Siegel, *supra* note 25, at 1673, 1675.

²⁴¹ See *supra* Section II.B; see also Revesz, *supra* note 143, at 579, 592 (discussing the early history of municipality regulation of air pollution in the 1880s and pioneering state initiatives to increase stringency that far outpaced federal efforts). As Professor Revesz notes, “the states, not the federal government, produced the most innovation in pollution control legislation in the 1990s.” *Id.* at 636.

also shown that state regulations were more effective than their federal counterparts,²⁴² perhaps because states may be less susceptible to industry pressure.²⁴³ Aside from this historic role, state-driven policy change is more responsive to citizens.²⁴⁴ The leading role of federal agencies like the EPA in managing environmental policy means that it is all the more difficult for individuals to petition for policy changes through traditional political channels of elected officials. Professor Bulman-Pozen has commended how states can productively intervene in national policymaking by setting domestic state policy to challenge federal agency decisions.²⁴⁵ In that vein, California can productively intervene in national environmental regulation by serving as a check on the federal agencies, drawing a productive contrast in approaches and encouraging those agencies to either adopt a similar position or explain to the public why they have not done so.

The unique structure of the Clean Air Act's waiver provision, which allows at most one additional standard (set by California) beyond the federal minimum,²⁴⁶ provides the preceding benefits without imposing the unwieldy problem of permitting each state to set its own standard.²⁴⁷ Professor Ann Carlson describes such a system as a form of "modified federalism," where "the federal government establishes innovative relationships with one or several states, rather than relying on the standard cooperative federalism arrangement" with all states.²⁴⁸ As argued below, ceiling preemption is often not appropriate or necessary in environmental regulation, which might lead to a conclusion that all states should have the authority to establish emissions requirements that comply with a federal minimum but better meet the economic and environmental needs of the state.²⁴⁹ The practical realities, however, make this politically and economically infeasible—to require

²⁴² See *id.* at 580–81. Specifically, three studies found that pollution levels dropped significantly more under state regulations in the 1960s than under the subsequent federal Clean Air Act. *Id.* Professor Revesz notes that this outcome may be misleading because "the first reduction in pollutant levels may have been easier to achieve than subsequent reductions," but remarks that at the very least, these studies show that state regulations were highly effective at reducing pollution levels even in the absence of federal regulation. *Id.* at 581.

²⁴³ See Carlson, *supra* note 4, at 310 ("[S]everal scholars have noted that environmental issues often become 'federalized' in part at the behest of industry. Industry representatives want national standards not only when they fear they will face multiple standards from the fifty states, but also, scholars contend, when they fear more progressive state legislation.").

²⁴⁴ Bulman-Pozen, *supra* note 109, at 2051.

²⁴⁵ *Id.*

²⁴⁶ 42 U.S.C. § 7543(b) (2012); *supra* notes 21, 159 and accompanying text.

²⁴⁷ Dwyer, *supra* note 147, at 1195 (describing Congress's fears that automobile manufacturers might face up to fifty different standards).

²⁴⁸ Carlson, *supra* note 4, at 285, 313.

²⁴⁹ See *infra* Section III.C.2.

national manufacturers to meet up to fifty separate standards would significantly increase the cost of production and likely result in manufacturers building cars to meet the most stringent of state requirements.²⁵⁰ Balancing benefits against costs, the current system with two regulators, rather than fifty or the singular federal government, might be the best structure for the time being.²⁵¹ Compared to a “scattershot approach” where all states could impose more stringent regulations, the two-regulator system concentrates research efforts, centralizes technological innovation, spurs the bureaucratic expertise of state agencies, and leads to more ambitious environmental regulation, while still providing regulatory certainty to vehicle manufacturers.²⁵²

California has used its “superregulator” status to drive climate policy at the federal level, a prime example of the values of iterative federalism where the superregulator state and the federal government spur one another toward progress that likely would not occur otherwise.²⁵³ Given the benefits of the existing dual-regulator system, Congress and the courts should be wary of discarding this delicate balance.

2. *Unsuitability of Absolute Ceiling Preemption*

Regulatory ceiling preemption is of particular concern and should require stronger justification in the environmental context. There certainly are good reasons for setting national standards,²⁵⁴ but the arguments that support floor preemption do not necessarily extend to ceiling preemption schemes like the vehicle emissions regime.

²⁵⁰ Carlson, *supra* note 4, at 314, 317 (“The prospect of fifty separate standards for automobiles is untenable.”); Raymond B. Ludwizewski & Charles H. Haake, *Cars, Carbon, and Climate Change*, 102 NW. U. L. REV. 665, 682 n.101 (2008) (noting that designing and manufacturing vehicles for specific state requirements “entails considerable sunk costs in the form of research and development, and it is therefore inefficient for manufacturers to produce such vehicles only for discrete markets”). Indeed, one primary justification for enacting the Clean Air Act was to avoid creating inefficiencies in vehicle markets if every state was responsible for setting its own emissions limits. COMM. ON STATE PRACTICES IN SETTING MOBILE SOURCE EMISSIONS STANDARDS, NAT’L RESEARCH COUNCIL, STATE AND FEDERAL STANDARDS FOR MOBILE-SOURCE EMISSIONS 2 (2006); *see also* Ludwizewski & Haake, *supra*, at 676.

²⁵¹ As Professor Carlson notes, “[t]he debates about federalism tend to view each of the fifty states as identical—either all fifty states are regulating on their own, or they are enlisted as a group to assist the federal government in implementing federal law. Yet the fifty states obviously differ in significant respects. Only a few possess the economic size, population, and regulatory sophistication of California, and only a few, therefore, have the capacity to participate in modified federalism.” Carlson, *supra* note 4, at 318.

²⁵² *See id.* at 315–16.

²⁵³ *See* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1107, 1134 (2009) (deeming California a “superregulator”).

²⁵⁴ *See* Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1590–91 (describing the arguments for a unitary federal standard). For an argument that the regulation of greenhouse gases specifically should remain exclusively with the federal government, *see* Ludwizewski & Haake, *supra* note 250, at 679–85.

As Professors Glicksman and Levy note, in environmental regulation, floor preemption commonly prohibits states from setting lower standards than the federal requirements, which would clearly constitute a conflict under the Supremacy Clause.²⁵⁵ But in the case of state standards that are more stringent than the federal requirement, “the more protective state law would not hinder the enforcement of the federal standard and would appear to further the environmental goals of the federal law.”²⁵⁶ Environmental protection goals, however, are not the sole consideration when setting federal standards,²⁵⁷ and significantly stricter state laws could indeed frustrate the federal scheme because a unitary federal standard is itself part of the policy approach.²⁵⁸

Moreover, courts have been generally deferential to Congress’s determination to preempt, and when Congress includes an express preemption provision, courts have not been keen to question whether such a provision is really justified under the Supremacy Clause.²⁵⁹ Thus, an argument that ceiling preemption of state vehicle emissions regulation is not justified under the Supremacy Clause is unlikely to succeed. Yet, as noted above, there is value in permitting policy and technological experimentation by one state as a matter of Congress’s discretion to not apply ceiling preemption.²⁶⁰ As Justice Brandeis cautioned in his oft-quoted dissent from *New State Ice Company v. Liebmann*:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.²⁶¹

²⁵⁵ Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 583 (2008).

²⁵⁶ *Id.*

²⁵⁷ The EPA, for example, must also consider what is technologically feasible, and Congress, of course, must consider what is politically palatable. 42 U.S.C. § 7521(a)(5)(B) (2012).

²⁵⁸ A critical component of the 2009 compromise between the Obama Administration, the state of California, and the major American automakers was that there be a single regulator and a harmonized national standard. Mary Beth Houlihan, et al., Commentary, *2009: A Year of Significant CAA Developments on All Fronts*, 40 ENVTL. L. REP. 10250, 10252 (2010).

²⁵⁹ See Gregory M. Dickinson, *Calibrating Chevron for Preemption*, 63 ADMIN. L. REV. 667, 699 (2011) (“Where Congress has spoken through an express preemption clause, concerns of federalism, expertise, and self-aggrandizement are outweighed by Congress’s expressed intent and *Chevron*’s rationale of agency delegation.”).

²⁶⁰ See Carlson, *supra* note 4, at 311.

²⁶¹ 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Several scholars have written thoughtful analyses of the traditional justifications for uniform federal standards and why these justifications do not support ceiling preemption in environmental regulation. Specifically, they have critiqued four primary arguments for uniform federal standards as they apply to environmental regulation: capitalizing on economies of scale, avoiding a states' race to the bottom, reducing interstate externalities, and providing regulatory certainty to industry.²⁶²

The first argument is that it is cheaper and more efficient for one unitary actor to conduct scientific analyses, determine the optimal level of regulation, and administer one uniform set of standards, rather than having fifty separate agencies conducting research and setting unique standards.²⁶³ The structure of the Clean Air Act, however, makes the latter outcome impossible, as it at most allows two regulators: the federal government and the state of California.²⁶⁴

Second, proponents of unitary federal standards worry that states will otherwise engage in a race to the bottom, in which states lower their environmental standards to lure businesses and cut costs, causing other states to do the same.²⁶⁵ This concern is alleviated by a federal floor, which limits the bottom to which states may race. However, the race to the bottom concern lends no support for federal *ceilings* in environmental regulation—states can set more stringent environmental standards if they so choose, fully aware that it might cause economic costs in the form of lost business within the state.²⁶⁶

A third justification for centralized federal regulation is that it protects interstate relations and trade by prohibiting protectionist state policies and cost externalization.²⁶⁷ The concern is that a state may adopt regulatory approaches that provide environmental benefits for its own citizens or give a competitive advantage to in-state industry while externalizing costs to other states. But similar to the foregoing concerns, protectionism is less of a problem in the Act's dual-regulator system.²⁶⁸ California's vehicle emissions standards do not benefit in-state manufacturers or externalize all regulatory

²⁶² See, e.g., Carlson, *supra* note 4, at 317. See generally Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1600–13 (explaining factors that influence the decision to adopt a uniform federal standard through federal preemption).

²⁶³ See James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System—And Why It Matters*, 54 MD. L. REV. 1226, 1230 (1995); Revesz, *supra* note 143, at 578, 582.

²⁶⁴ See Carlson, *supra* note 4, at 311.

²⁶⁵ See Jonathan Remy Nash, *The Illusion of Devolution in Environmental Law*, 38 URB. LAW. 1003, 1005 (2006).

²⁶⁶ See *id.*; Glicksman & Levy, *supra* note 255, at 604, 606.

²⁶⁷ See Glicksman & Levy, *supra* note 255, at 603–04.

²⁶⁸ See Burgess, *supra* note 82 (arguing that cost externalization is not a legitimate or sufficient justification for ceiling preemption in environmental laws).

costs—rather, they evenhandedly impose costs on both in-state and out-of-state manufacturers and consumers who purchase cars in California. There undoubtedly are some externalized costs to consumers outside of California in the marginal increase in vehicle cost that results from reduced economies of scale in vehicle production (when manufacturers must meet two standards rather than one), but California consumers bear the greatest brunt of these costs as they must purchase lower-emissions, higher-cost cars than the national market, indicating that it is not a protectionist policy.²⁶⁹

The last argument for a unitary federal standard—providing regulatory certainty to industry—does apply to vehicle emissions, as the automotive industry unsurprisingly prefers to abide by one, lower national standard.²⁷⁰ But, as Professor Buzbee notes, “the actual federal track record has been one of backpedaling and half measures,” and for “high-volume, widely marketed products like cars, allowing at least the limited diversity of two approaches could serve as an incentive for innovation and an antidote to inertia and outdated or lax regulation.”²⁷¹ Moreover, California’s separate standard may itself be a source of regulatory certainty when the federal standards oscillate with presidential administrations,²⁷² perhaps evidenced by the fact that some vehicle manufacturers are now voluntarily adhering to California’s requirements while the enforceability of the SAFE Rule remains uncertain.²⁷³

Thus, the traditional justifications for unitary federal standards do not sufficiently necessitate a ceiling for vehicle emissions regulations. As Professor Buzbee summarized, “the GHG and climate-change problem is one particularly well suited to federal floors and not to unitary federal choice ceilings,” and “floor preemption’s institutional diversity may create a better chance of success.”²⁷⁴

CONCLUSION

California will continue fighting for the ability to maintain its more stringent vehicle emissions standards, particularly as the federal standards roll back. With the EPA’s issuance of part one of the SAFE Rule in final form,²⁷⁵ litigation is moving forward to challenge the revocation California’s

²⁶⁹ See Revesz, *supra* note 143, at 593.

²⁷⁰ Carlson, *supra* note 4, at 310.

²⁷¹ Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1617–19.

²⁷² See *supra* Sections II.B–II.C.

²⁷³ David Shepardson, *U.S. Moving to Block California Vehicle Emissions Rule*, REUTERS (Sept. 5, 2019, 11:07 A.M.), <https://www.reuters.com/article/us-autos-emissions-california/us-moving-to-block-california-vehicle-emissions-rules-idUSKCN1VQ24M> [<https://perma.cc/XCR2-PPC8>].

²⁷⁴ Buzbee, *Asymmetrical Regulation*, *supra* note 20, at 1592, 1618.

²⁷⁵ The SAFE Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019) (to be codified at 49 C.F.R. pts. 531, 533).

waiver.²⁷⁶ Car manufacturers are also choosing sides: Ford, BMW, Honda, and Volkswagen agreed to a deal with California to comply with the more stringent, pre-rollback standards with a one year delay extending to 2026,²⁷⁷ while General Motors, Fiat Chrysler, and Toyota agreed to intervene on behalf of the Trump Administration.²⁷⁸ While most of the legal battle going forward will likely focus on the procedural sufficiency and substantive merits of the standards freeze and waiver revocation, there is also an important opportunity to consider this conflict as a study in federalism.

Under the Court's current Tenth Amendment jurisprudence post-*Murphy*, which leaves preemption as an exception to the anticommandeering prohibition, it is unlikely that California can invoke federalism arguments to challenge the loss of its ability to set more stringent standards. But *Murphy*'s dividing line between permissible preemption and unconstitutional commandeering may not be satisfactory for complex cooperative federalism regimes like the Clean Air Act, where Congress deliberately offers states a role to participate in jointly regulating private actors.

Aside from constitutional limits, the system of having two regulators has worked well for the last fifty years, spurring immense technological innovation and significantly reducing pollution and GHG emissions.²⁷⁹ Recognizing the traditional role that California has played as a laboratory of democracy driving environmental protection, vehicle emissions regulation may be the very area where inviting dual, cooperative regulation, not ceiling preemption, makes sense.

²⁷⁶ Complaint, *California v. Chao*, *supra* note 14.

²⁷⁷ Tom Krisher & Ellen Knickmeyer, *Calif. Skirts Trump, Signs Mileage Deal with 4 Automakers*, ASSOCIATED PRESS (July 25, 2019), <https://www.apnews.com/38cd5233db384285adb6a38bd3b58de0> [<https://perma.cc/BMS7-9DDU>].

²⁷⁸ Hiroko Tabuchi, *General Motors Sides with Trump in Emissions Fight, Splitting the Industry*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/climate/general-motors-california-emissions-trump.html> [<https://perma.cc/79RF-SNYM>].

²⁷⁹ See May, *supra* note 22, at 472.

