

CLIMATE, PREEMPTION, AND THE EXECUTIVE BRANCHES

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The federal government has grown very aggressive in asserting preemption of state laws. In the context of climate, this issue is playing out in the realm of mobile sources and could come to the fore in the regulation of stationary sources. In this Essay, I argue that the principles underlying Chevron—political accountability and technical expertise—counsel respectful attention to the role of state executive agencies in issuing rules alleged to be preempted by federal law.

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When a federal agency asserts that a statute under which it operates preempts state law, attention naturally turns to how much deference is due the federal agency's interpretation of its governing law.¹ In this Essay, I will suggest that two current controversies involving state regulation of greenhouse gases—one involving mobile sources, one involving power plants—would benefit from equal attention to the role of state executive agencies in asserting power to regulate even in the face of federal resistance.

Three recent developments have made the role of state and federal Executives in preemption particularly important with respect to climate change. The first is the increasing role of the states in addressing climate change. The second is the movement of the federal Executive from simple inaction on climate change to outright obstructionism. The third is the increasing aggressiveness of the federal Executive in asserting the power to preempt state law.

I will not say much more about the first of these developments because other contributors to this Symposium have covered this topic well. I would only point out that, as we heard from Ford Motor's General Counsel, David Leitch, at this Symposium, the automobile manufacturers have no intention of backing down from their claims of preemption with respect to state initiatives on climate change.

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1. See, e.g., *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008).

Thus I believe we will see steady and even increasing litigation on the topic of preemption with respect to all of the innovative state activities we discussed at this Conference.

On the federal Executive's position on climate change: we have moved from simple inaction to outright obstructionism, in the following two ways. First, for a long time, we had research on climate change but no federal regulation. EPA's decision at issue in *Massachusetts v. EPA*² is emblematic of this period: EPA refused to regulate, and wrongly fixated on what we do not know rather than on what we do know about greenhouse gases and climate change,³ but it did not actively block more evenhanded statements about the state of the science. Now, the research itself is being censored and stymied by the federal Executive.

Examples are numerous: strong references to the human health effects of climate change were cut from the congressional testimony of Julie Gerberding, the head of the Centers for Disease Control;⁴ the Council on Environmental Quality's Philip Cooney softened descriptions of climate change in an EPA report on climate change,⁵ then left government to work for ExxonMobil when his editing came to light;⁶ NASA officials tried to stop renowned climate scientist James Hansen from speaking out on the issue of climate change;⁷ the national climate assessment called for by the Global Change Research Act of 1990 simply shut down after November 2000.⁸ To similar effect, James Connaughton at the Council on Environmental Quality helped to draft the portion of EPA's position declining to regulate greenhouse gases; Mr. Connaughton apparently told EPA that it should downplay the certainty of the science on climate change because that would help the agency's legal position.⁹ I think he was wrong on the science and wrong on the law. Moreover, the position that we should downplay, censor, edit, or simply not talk about the science of climate change is obstructionist. It forestalls a meaningful and sensible discussion of the consequences we can expect from climate change and the actions we should undertake in response to them.

A second example of the new obstructionism comes from EPA's decision denying California permission to implement its law regulating greenhouse gas

2. 127 S. Ct. 1438 (2007).

3. Lisa Heinzerling, *Climate Change and the Clean Air Act*, 42 U.S.F. L. REV. 111, 145-48 (2007).

4. Andrew C. Revkin, *White House Cuts to Climate Testimony Raise Questions*, N.Y. TIMES, Oct. 25, 2007, at A16.

5. Andrew C. Revkin, *Bush Aide Softened Greenhouse Gas Links to Global Warming*, N.Y. TIMES, June 8, 2005, at A1.

6. Andrew C. Revkin, *Ex-Bush Aide Who Edited Climate Reports to Join ExxonMobil*, N.Y. TIMES, June 15, 2005, at A21.

7. Andrew C. Revkin, *Climate Expert Says NASA Tried to Silence Him*, N.Y. TIMES, Jan. 29, 2006, at A1.

8. Center for Biological Diversity v. Brennan, No. C 06-7062 SBA, 2007 U.S. Dist. LEXIS 65456, at *58-62 (N.D. Cal. 2007).

9. U.S. HOUSE OF REPRESENTATIVES COMM. ON OVERSIGHT AND GOV'T REFORM, POLITICAL INTERFERENCE WITH CLIMATE CHANGE SCIENCE UNDER THE BUSH ADMINISTRATION 28-31 (Dec. 2007), available at <http://oversight.house.gov/documents/20071210101633.pdf>.

emissions from automobiles. California is required to get permission—a “waiver,” in Clean Air Act parlance—from the federal government to have its own mobile source program.¹⁰ After California asked EPA to grant a waiver for the state’s regulations on greenhouse gases, EPA for the first time in the history of the Clean Air Act¹¹ denied California’s request in its entirety¹²—thus obstructing the efforts of California and a dozen other states to reduce greenhouse gas emissions from automobiles.

In addition, in recent years the federal Executive has grown increasingly aggressive in asserting the authority to push aside state legislation. And courts have shown an increased tendency, I believe, to defer to the Executive when the Executive asserts the authority to preempt.¹³ In this context, the fact that the Reagan-era executive order on federalism is still largely intact and requires the federal agencies to take special account of states’ prerogatives in thinking through their policies appears to have been forgotten.¹⁴

There are many examples,¹⁵ but I will suffice with two. On climate change, in addition to EPA’s denial of the California waiver, several years ago the National Highway Traffic and Safety Administration (NHTSA) asserted that any state law resembling a fuel efficiency standard was preempted—specifically citing California’s law regulating greenhouse gases from automobiles as an example of the kind of law the agency was displacing.¹⁶ NHTSA did this in the midst of ongoing litigation on the topic of whether the statute that they were dealing with—the Energy Policy and Conservation Act—actually preempted state law.¹⁷ In April 2008, while proposing new fuel economy standards under the recently enacted Energy Independence and Security Act (EISA), NHTSA reasserted its claim of preemption.¹⁸ Ironically, NHTSA chose to locate its discussion of preemption in the section of its preamble written pursuant to the executive order on federalism.¹⁹ In asserting that the case for preemption had become stronger with the passage of

10. 42 U.S.C. § 7543(b) (2006).

11. Anne E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 293 (2003).

12. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

13. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

14. Exec. Order 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999) (revoking and replacing, with minor adjustments, Reagan-era Executive Order 12612).

15. For details, see Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L.Q. 1147, 1153–54 (2007).

16. *Ctr. for Biological Diversity v. NHTSA*, 508 F.3d 508, 514 n.1 (9th Cir. 2007).

17. *See, e.g.*, *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (C.D. Cal. 2007).

18. Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011–2015, 73 Fed. Reg. 24,352–401 (proposed May 2, 2008) (to be codified at 49 C.F.R. pts. 523, 531, 533, 534, 536, 537).

19. *Id.*

EISA, NHTSA did not even bother to mention the provision of that statute that expressly preserves existing laws.²⁰

Outside of the environmental context, the federal Executive's increasing aggressiveness in asserting preemption has been especially evident in the Food and Drug Administration's (FDA) recent, full-scale about-face on this issue. In numerous cases, including several recent cases in the Supreme Court, the FDA has taken the position that state tort law is preempted by the federal Food, Drug and Cosmetic Act (FDCA).²¹ Most recently, in *Riegel v. MedTronic, Inc.*,²² the Court held that state tort claims based on defective design or inadequate warnings were preempted by the Medical Device Amendments (MDA) of 1976.²³ Although the Court based its ruling on the express preemption provision of the MDA,²⁴ the government itself had gone so far as to assert that the real basis for its claim of preemption ranged beyond the specific preemption provision at issue in that case. During a telling exchange at oral argument, the lawyer for the government stated that perhaps it was "best to conceptualize" the preemption in the case as "field preemption"²⁵—meaning that, regardless of the explicit language of the statute, all state rules would be preempted because the FDCA would be taken to have occupied the field of medical device safety.²⁶ Such an argument could have significant consequences for a case like *Levine v. Wyeth*, in which the Supreme Court will decide, next term, whether tort claims of inadequate labeling of drugs are preempted by the FDCA despite there being, with respect to drugs, no express preemption provision in that statute.²⁷ Conceptualizing preemption as field preemption rather than express preemption is a way of asserting even greater authority to displace state law, as it does not require an actual statutory provision on preemption.

To summarize where we are so far: there has been much state activism, a new obstructionism on climate at the federal level, and increasing aggressiveness by the federal Executive in asserting authority to preempt state laws. This is a combustible situation, threatening to upend state initiatives on climate change even while the federal Executive refuses timely and aggressive action on the problem.

20. "Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation." Energy Independence and Security Act, 24 U.S.C. § 17001 (2006).

21. For general discussion, see David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95, 97–98 (2005); David C. Vladeck & David A. Kessler, *A Critical Examination of the FDA's Effort to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 462 (2008).

22. 128 S. Ct. 999 (2008).

23. 21 U.S.C. § 360c (2006).

24. *Id.* § 360k (2006).

25. Transcript of Oral Argument at 42, *Riegel v. Medtronic*, 128 S. Ct. 999 (2008) (No. 06-179), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-179.pdf.

26. See generally *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

27. *Riegel*, 128 S. Ct. at 1019 n.15 (Ginsburg, J., dissenting).

In this Essay, my modest suggestion is that when the federal Executive asserts the authority to displace state initiatives that are themselves the product of (state) executive action, sensible analysis requires attention to the comparative virtues of the state and federal Executives' undertakings. In *Chevron's* terms—terms which have framed debates over statutory interpretation by agencies for over two decades—the relevant question is whether, in the setting at hand, the federal Executive is, compared to the state executive, relatively more or less politically accountable and technically expert.²⁸

I want to examine this question using two important recent controversies, one involving mobile sources and the other involving power plants. Together, sources from the transportation and electric power sectors account for approximately 60% of the carbon dioxide emissions inventory in this country.²⁹ Thus the regulatory treatment of emissions from these sources is a matter of grave concern from the perspective of climate change.

First, let us return to EPA's decision on the California waiver. The California program was enacted by the California legislature.³⁰ The premier air pollution control agency in the world, the California Air Resources Board, then set about developing regulations to implement the standards.³¹ The standards have been adopted by seventeen states, applying to at least half of the new motor vehicles in the United States.³² In its waiver application, California described matters ranging from the miserable conditions that await it in a warming world to the technologies available for dealing with this problem and the costs of those technologies.³³ Thus we have a decision by an elected body, the California legislature, and a follow-on decision by an expert agency, based on its expertise. From the perspective of *Chevron*, California's collective decision to enact and implement greenhouse gas emission standards for mobile sources is the kind of decision that meets the criteria for deference. I am not arguing that *Chevron* itself literally applies to the decision of a California agency; I am arguing, however, that in considering California's decision we should be mindful of the consonance between California's decision and the Supreme Court's explanation of the reasons for deferring to agencies' interpretive decisions.

28. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 847 (1984).

29. ENERGY INFORMATION ADMINISTRATION, EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES 2004, at 22 (Dec. 2005) (describing carbon dioxide emissions of transportation and electric power sectors), available at <http://www.eia.doe.gov/oiaf/1605/ggrpt>.

30. A.B. 1493, 2002 Leg. Reg. Sess. (Cal. 2002).

31. Rulemaking on the Proposed Regulations to Control Greenhouse Gas Emissions from Motor Vehicles, <http://www.arb.ca.gov/regact/grnhs gas/grnhs gas.htm> (last visited Sept. 6, 2008).

32. John M. Broder & Felicity Barringer, *E.P.A. Says 17 States Can't Set Greenhouse Gas Rules for Cars*, N.Y. TIMES, Dec. 20, 2007, at A1.

33. See CAL. AIR RES. BD., REGULATIONS TO CONTROL GREENHOUSE GAS EMISSIONS FROM MOTOR VEHICLES; REQUEST FOR WAIVER OF PREEMPTION UNDER CLEAN AIR ACT SECTION 209(b) (Dec. 21, 2005).

In fact, the Clean Air Act reflects respect for California's decisions on air pollution control for motor vehicles. Although the Act generally preempts state regulation of emissions from new motor vehicles, section 209(b) allows California to regulate such emissions if it obtains a waiver from EPA.³⁴ Section 209(b) provides that EPA must grant this waiver unless it finds that any of three conditions is not met.³⁵ These conditions are: that the state's determination that its standards are "at least as protective of public health and welfare as applicable Federal standards" is not arbitrary or capricious; that the state needs its standards to meet "compelling and extraordinary conditions"; and that the standards are consistent with the Act's provision on regulation of motor vehicle emissions.³⁶ EPA has long held that the burden of proof to show California does not merit a waiver is on those who oppose the waiver.³⁷ In 1984, for example, the Agency observed:

The burden of proof in a section 209 waiver proceeding is squarely upon the opponents of the waiver: "The language of the statute and its legislative history indicate that California's regulations and California's determination that they comply with the statute . . . are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them."³⁸

The interesting question for present purposes is: what happens when the opponent of a waiver is EPA itself? Does EPA bear the burden of showing that California does not deserve a waiver, or does EPA's own judgment to that effect merit deference? In its decision denying California's waiver, EPA made glancing but telling reference to this question, stating simply that the Administrator's burden in denying a waiver request "is to act 'reasonably.'"³⁹ As authority for this point, EPA cited a Second Circuit decision upholding EPA's grant of a waiver for a previous California emissions program for new motor vehicles.⁴⁰ EPA's statement, however, begs the question whether acting "reasonably" means

34. 42 U.S.C. § 7543(b)(1) (2006).

35. *Id.*

36. *Id.* § 7543(b)(1)(A)–(C).

37. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,158-59 (Mar. 6, 2008). On the history of the waiver provision, see Rachel L. Chanin, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 NYU ANN. SURV. AM. L. 699, 713–22 (2003).

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

39. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. at 12,159.

40. *Id.* (citing *Motor & Equip. Mfrs. Assoc. v. EPA*, 627 F.2d 1095, 1126 (D.C. Cir. 1979)). The page cited by EPA does not support the proposition for which EPA cites it. Other parts of the opinion, however, suggest that a court reviewing EPA's decision to grant a waiver to California looks to whether EPA's actions were reasonable. See *Motor & Equip.*, 627 F.2d at 1123, 1123–24.

different things when EPA denies a waiver than when it grants a waiver. There is considerable authority for the proposition that EPA's power to deny a waiver is more constrained than its ability to grant one. As the Second Circuit noted in the same decision on which EPA relied in denying California's waiver:

Here [in the waiver context] the Administrator has no broad mandate to assure that California's emissions control program conforms to the Administrator's perceptions of the public interest. Absent the contingency that he is able to make contrary findings, his role with respect to the California program is largely ministerial.⁴¹

EPA itself has recognized as much. In a decision in 1975, EPA said of section 209:

Congress meant to ensure by the language it adopted that the Federal government would not second-guess the wisdom of state policy here. . . . Sponsors of the language eventually adopted referred repeatedly to their intent to make sure that no "Federal bureaucrat" would be able to tell the people of California what auto emission standards were good for them, as long as they were stricter than Federal standards. . . . (Senate language says "You may go beyond the Federal statutes unless we find that there is no justification for your progress").⁴²

This passage indicates that a "Federal bureaucrat" may no more tell California what air pollution program it should have than private opponents of a waiver for California's program may. Yet this is just what EPA Administrator Stephen Johnson has done in denying a waiver for California's greenhouse gas program.

Properly read, the Clean Air Act's waiver provision embodies the kind of deference I am suggesting for judgments made by accountable and expert state regulators. EPA erred in disrespecting California's judgment in denying the state its waiver. EPA's decision on California's waiver is flawed in numerous other ways as well. For example, without any basis in the statutory text, EPA concluded that waiver decisions involving global pollutants should be subject to a different standard of review than decisions involving local or regional pollutants.⁴³ EPA also nonsensically concluded that because the United States as a whole faces adverse consequences as a result of climate change, California itself does not confront "compelling and extraordinary conditions."⁴⁴ Here, I am not attempting to canvas all of the ways in which EPA erred in denying California's waiver, but only to point out that one of the mistakes EPA made was in giving insufficient attention

41. *Id.* at 1123 n.56.

42. *See* James E. McCarthy, Congressional Research Service Report for Congress: California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act 11 (updated Oct. 1, 2007) (quoting 40 Fed. Reg. 23,102, 23,103 (May 28, 1975)).

43. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. at 12,160–62.

44. *Id.* at 12,163.

to the carefully considered views of California's own legislative and executive branches.

The second example I want to give, implicating the relationship between preemption and state and federal executive power, involves power plants. All over the country, lawsuits have sprung up concerning the extent to which the Clean Air Act requires new or modified power plants to control their carbon dioxide emissions. The Clean Air Act's "Prevention of Significant Deterioration" (PSD) program requires certain new and modified sources of air pollution to obtain permits from either the EPA or a state, depending on the circumstances. The statute states that each covered source must install the best available control technology "for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility."⁴⁵ A question that has arisen in numerous proceedings is whether carbon dioxide and other greenhouse gases are pollutants "subject to regulation" under the Clean Air Act.

EPA has answered no. In approving a permit for a coal-fired power plant in Utah, the agency explained that carbon dioxide was not yet regulated under the Clean Air Act and that, until it was, it was not subject to control requirements under the PSD program.⁴⁶ EPA stated that only pollutants "presently subject to a statutory or regulatory provision that requires *actual control* of emissions of that pollutant" are subject to control under the PSD program.⁴⁷ As EPA has made clear in a challenge to its decision pending before its Environmental Appeals Board, the agency's use of the phrase "actual control" signifies that the requirements the statute imposes on electric utilities to monitor and report their carbon dioxide emissions do not count as "regulation" under the PSD program.⁴⁸

Meanwhile, not all states have toed EPA's line on this issue. In the fall of 2007, the Secretary of the Kansas Department of Health and Environment, Roderick Bremby, denied a permit for two new coal-fired power plants, explaining that it would be "irresponsible," in light of the science of climate change and the Court's decision in *Massachusetts v. EPA*, to site new coal-fired power plants without any controls for carbon dioxide.⁴⁹ Secretary Bremby came to this decision after receiving an opinion from the Kansas Attorney General concluding that Kansas law gave him the authority to deny an air quality permit based on a finding

45. 42 U.S.C. § 7475(a)(4) (2006).

46. U.S. EPA Region 8, Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct, Permit No. PSD-OU-0002-04.00, at 5–6 (Aug. 30, 2007), available at www.epa.gov/region8/air/permitting/ResponseToComments.pdf.

47. *Id.* at 6 (emphasis added).

48. Response of EPA Office of Air and Radiation and Region VIII to Briefs of Petitioner and Supporting Amici, *In re* Deseret Power Elec. Coop., PSD Appeal No. 07-03, at 12–26 (March 21, 2008). EPA also takes the position that the provision creating the monitoring and reporting requirements, section 821 of the Clean Air Act Amendments of 1990, is not part of the Clean Air Act because it was not formally codified as part of the Act. *Id.* at 45–53.

49. Kansas Department of Health and Environment Secretary Roderick Bremby, Announcement of Decision on the Sunflower Electric Air Quality Permit (Oct. 18, 2007) (video available at http://www.kdheks.gov/press_room.htm) (last visited Sept. 6, 2008).

that the emission of air pollution from the proposed facility presented “a substantial endangerment to the health or persons or to the environment”⁵⁰—even if the pollution was not regulated by the federal government.⁵¹ Of particular interest in light of the topic of this symposium, Secretary Bremby also reached his decision after eight attorneys general from other states wrote a letter to him, imploring him to follow their example in mitigating greenhouse gas emissions—thus adding a state-on-state dynamic to the more typical federal–state dynamic of federalism.⁵²

Secretary Bremby’s decision has been appealed to the Kansas Supreme Court, which has put the challenge on hold indefinitely in order to allow lower-court and administrative challenges to wind their way to a conclusion.⁵³ Kansas Governor Kathleen Sebelius has vetoed two bills that would have undone Secretary Bremby’s decision, and so far the legislature has failed to override the latest bill.⁵⁴ Similar disputes are brewing in other states.⁵⁵ The federal government, in the meantime, has made its concern that sources might be subject to carbon dioxide controls under the PSD program the centerpiece of its argument why nothing should be done to regulate greenhouse gases under the Clean Air Act at this time.⁵⁶

Given the economic importance of the sources potentially subject to controls under the PSD program, and given the penchant, of late, of the federal Executive to assert preemption, it is not crazy to ask whether a decision like the one reached by Kansas—to deny an air quality permit in the face of the federal government’s position that the pollutants in question are not regulated under the Clean Air Act—might be preempted by the federal statute.

One answer seems easy, but perhaps too much so. Section 116 of the Clean Air Act provides that, outside of a very few limited contexts, states are allowed to adopt stricter standards for air pollution than the federal government has adopted.⁵⁷ One could argue, based on this provision, that a state taking a

50. Op. Att’y Gen. No. 2007-31, 2 (Kan. Sept. 24, 2007), quoting KAN. STAT. ANN. § 65-3012(a) (2007), available at http://www.kdheks.gov/download/KS_Atty_General_Opinion_10.17.07.pdf.

51. *Id.* at 3.

52. *Kansas Regulator Says Court Crucial in Coal Decision*, ASSOCIATED PRESS, Apr. 11, 2008, available at http://www.canadianbusiness.com/markets/market_news/article.jsp?content=D8VVO6IO0.

53. *Kansas Supreme Court Puts Coal-plant Cases on Hold*, ASSOCIATED PRESS, Apr. 25, 2008, http://www2.ljworld.com/news/2008/apr/26/kansas_supreme_court_puts_coalplant_cases_hold/.

54. *Id.*

55. See, e.g., Tony Bartelme, *Attorneys General Oppose Coal Plant*, THE POST & COURIER, Jan. 29, 2008, at A1 (describing controversy over proposed new coal-fired power plant in South Carolina).

56. Hearing Before the Select Comm. on Energy Independence and Global Warming, U.S. House of Representatives 4–5 (Mar. 13, 2008) (statement of Stephen L. Johnson, administrator, U.S. Environmental Protection Agency), available at <http://globalwarming.house.gov/tools/assets/files/0425.pdf>.

57. 42 U.S.C. § 7416 (2006).

position like Kansas has taken is on safe ground, given section 116's specific reservation of power to the states.

However, the Supreme Court has become willing, even in the face of savings provisions expressly preserving state autonomy, to hold that state laws are preempted because the Court concludes that they conflict with the federal regulatory scheme. In *Geier v. American Honda Motor Co.*,⁵⁸ the Court held that "ordinary pre-emption principles" applied despite the existence of an explicit savings provision apparently preserving the very kind of state law claim the Court held preempted.⁵⁹ There, the Court found that state tort law claims predicated on the absence of an airbag in an automobile were in conflict with the NHTSA's decision to phase in airbag requirements gradually and incrementally, rather than quickly and across-the-board.⁶⁰

One can imagine a similar argument in the power plant context: state efforts to regulate greenhouse gases from power plants and other sources conflict with the federal government's continuing go-slow (or not at all) policy on climate change. State initiatives to mitigate greenhouse gases present an obstacle to the federal government's policy because the federal government is seeking to balance economic concerns against environmental commitments (just as NHTSA sought to balance economic concerns against automobile safety in *Geier*).

I raise this possible argument only to highlight the likely continuing importance of preemption to climate policy. My statement of such a possible argument should not be taken to suggest my agreement with it; on the contrary, I believe it has many flaws. Most important for present purposes, one reason why the argument should fail is that it gives insufficient attention—as EPA's decision on California's waiver did—to the existence of an accountable and expert decision maker at the state level. Where the controversy is between dueling federal and state executives, due consideration and regard should be given to the prerogatives of the state-level counterpart of the federal Executive who is asserting preemption.

58. 529 U.S. 861 (2000).

59. *Id.* at 869.

60. *Id.* at 875–84.