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Hailing Progress: Regulatory Difficulties in Promulgating Hybrid Taxi Laws

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I. INTRODUCTION

In cities throughout the United States, taxicabs operate in concert with bus and rail systems to provide public transportation services. Given the number of people who depend on taxis as a means of public transportation,¹ it is both surprising and demoralizing that cities have had, at best, varied success in implementing fuel-efficient taxi fleets.² This is largely due to the legal status of taxis as a form of public transportation. Unlike busses or metropolitan-area trains, taxicabs are not actually owned by the municipalities in which they operate.³ Therefore, taxis fall into a narrow fissure in the regulatory system that governs emissions and fuel consumption. It is due to this legal scenario that municipalities are

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¹ According to The Atlantic, over 150,000 people use taxis to get to work every day. Derek Thompson, *How America Gets to Work – in 1 Very Long Graph*, THE ATLANTIC (Dec. 13, 2013) available at <http://perma.cc/ZH6A-8NCJ>.

² Dana Rubinstein, *Combusted: The Death of Hybrid Taxis in New York*, CAPITAL NEW YORK (Oct. 12, 2012) available at <http://perma.cc/9GF6-T2QK>.

³ Jonathan Skinner, *Who Killed the Hybrid Car? State and Local Green Incentive Programs after Metropolitan Taxicab Board of Trade v. City of New York in the Second Circuit*, 30 STAN. ENVTL. L.J. 311, 313 (2011).

hindered in their ability to promulgate regulations for the fuel consumption and emissions of taxis within their borders.

This article will examine the federal and municipal regulatory structures at work that have created this situation as well as case law to determine what future may exist for green taxi incorporation and how municipalities may overcome preemption problems. Part II will cover the regulatory systems at work while Part III will discuss the cases involving hybrid taxis as well as state and municipal promulgation of emissions and mileage standards. Finally, Part IV will assess the status of hybrid taxis and suggest solutions for current problems.

II. REGULATION OF TAXICABS, FUEL ECONOMY, AND EMISSIONS

The consternation surrounding, municipalities' difficulties seeking to build taxi fleets that consume less fuel and produce fewer emissions stems from the intersection of two regulatory regimes. The first regime at work is the regulatory structure of taxicabs in United States cities. The second regime is the federal regulation of fleet fuel consumption and emissions standards through the Clean Air Act (hereinafter "CAA")⁴ and the Energy Policy and Conservation Act (hereinafter "EPCA").⁵

A. Federal Preemption

While the EPCA and the CAA incorporate express preemption provisions, statutory preemption is rooted in the Supremacy Clause of the United States Constitution, which "invalidates state laws that 'interfere with, or are contrary to' federal law."⁶ There are three methods by which a state or local law may be preempted: (1) by "express language in a congressional enactment"; (2) by "implication from the depth and breadth of a congressional scheme that occupies the legislative field"; or (3) by "implication because of a conflict with a congressional enactment."⁷ Where a statute includes an express preemption provision, courts will first examine "the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs."⁸ While Congress' grant of supreme statutory power comes from the Supremacy Clause, its actual power does not, and must come from elsewhere in the Constitution.⁹

⁴ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

⁵ Energy Policy and Conservation Act, 42 U.S.C. §§ 6201–6422 (2012).

⁶ *Hillsborough County, Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (1824)).

⁷ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (citations omitted).

⁸ *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

⁹ See Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 101 (2003) (arguing that the Supremacy Clause conditions the supremacy of federal statutes on their constitutionality and provides courts with the authority to strike down federal law not made 'in pursuance' of the constitution).

Many commenters have noted that federal preemption should be construed narrowly so as to allow states and political subdivisions to regulate according to local conditions.¹⁰ Broad preemption implicates federalism to the degree that “the sheer amount of regulation and the complexity of the issues involved would place far too heavy a burden on Congress under an exclusive system without overlap, and requires at least some residual state regulatory powers.”¹¹ Federalism does have several virtues: first, it promotes the democratic ideal since state and local governments are better suited to respond to the needs of their constituents.¹² Second, it promotes competition amongst cities and states.¹³ Third, “decentralized decision-making allows more opportunities for innovation and experimentation with social and economic policy than does one centralized bureaucracy.”¹⁴ Regarding climate change, competition amongst U.S. municipalities has stimulated environmental action.¹⁵

B. The Energy Policy and Conservation Act

The Energy Policy and Conservation Act was passed in 1975 as a response to the Oil Crisis of 1973.¹⁶ Congress’s goal behind the EPCA was to create a comprehensive approach to federal energy policy.¹⁷ A chief component of the plan was setting a standard for fuel consumption. Accordingly, among the programs promulgated through the EPCA was the Corporate Average Fuel Economy Standards (hereinafter “CAFE” standards).¹⁸

The CAFE standards, established by Title III of the EPCA, establish minimum average fuel economy standards for passenger cars and light trucks that auto manufacturers have to achieve across their fleets in order to sell vehicles in the United States.¹⁹ That is, while individual vehicle models do not necessarily have to meet the CAFE standards for fuel economy, the average fuel economy reached across the model range of a particular class of vehicle offered by any particular manufacturer has to comport with the CAFE standards’ minimum requirements.²⁰ The Act vested the authority to develop and enforce the CAFE standards in the National Highway Traffic Safety Administration (hereinafter “NHTSA”).²¹

¹⁰ Skinner, *supra* note 3, at 315.

¹¹ Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 777, 780–81 (1994).

¹² Skinner, *supra* note 3, at 315.

¹³ *Id.* at 316.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 316–17.

¹⁷ 42 U.S.C. § 6201 (2012).

¹⁸ 49 U.S.C.A. § 32902 (2007).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 42 U.S.C. § 6384 (2004).

The NHTSA weighs four factors when setting new CAFE standards: “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.”²² The NHTSA analytical model includes a number of more specific factors, including: a forecast of the future vehicle market, estimates of the availability, applicability, effectiveness, and cost of fuel-saving technologies, mileage accumulation patterns, future fuel prices, and fuel characteristics and vehicle emission rates.²³ Chief among the provisions of the EPCA is a preemption clause that states:

When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.²⁴

This preemption provision was key to the success of the EPCA. Congress had two main concerns in implementing the EPCA and setting national energy policy that led to such a provision.²⁵ First, Congress sought to prevent states from implementing differing fuel economy standards, as this would impose a significant burden on auto manufacturers.²⁶ Since auto manufacturers produce both high volumes of vehicles and vehicles with consistent specifications, requiring that they tailor the fuel consumption of their vehicles to varying state regulations would require an impossible level of diversity among models and make national marketing and sales infeasible. Second, Congress aimed to prohibit states and municipalities from implementing less stringent fuel economy standards that would run afoul of the goals of the EPCA in the absence of such a preemption provision.²⁷

While it might seem that this would preclude *any* regulation of fuel economy standards by states or municipalities, the EPCA preemption clause does allow states and their political subdivisions to regulate the fuel economy standards for “vehicles obtained for [their] own use.”²⁸ As such, it would seem that vehicles purchased or owned by a city or state for that city or state’s purposes—such as police vehicles, busses, and other service

²² 49 U.S.C. § 32904 (2011).

²³ Nat’l Highway Traffic Safety Admin., *Final Rule, Average Fuel Economy Standards for Passenger Cars and Light Trucks, Model Year 2011* 37 (2009), available at http://www.nhtsa.gov/DOT/NHTSA.Rulemaking/Rules/Associated%20Files/CAFE_Updated_Final_Rule_MY2011.pdf.

²⁴ 49 U.S.C.A. § 32919(a).

²⁵ Skinner, *supra* note 3, at 320.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 49 U.S.C.A. § 32919(c) (2012).

vehicles—can be subject to different fuel economy standards determined by that city or state.

C. *The Clean Air Act*

Another example of how Congress sought to reduce the environmental impact of automobiles was through regulation of tail pipe emissions in the Clean Air Act, passed in 1963.²⁹ As its title would suggest, the Clean Air Act was enacted to ensure a strategy to control air pollution on a national scale. Part A of title II of the Act is titled *Motor Vehicle Emission and Fuel Standards*.³⁰ This section covers a multitude of subjects relating to vehicle tailpipe emissions, including renewable fuels and standards for urban busses.³¹ Much like the EPCA, the CAA includes a preemption provision, which reads:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.³²

This provision prevents states from implementing standards for motor vehicle tailpipe emissions as a condition to their sale within that state. However, similar to the EPCA, the Clean Air Act includes an express exclusion to its preemption provision. The Clean Air Act's exception, which is broader than the EPCA's, reads as follows:

The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.³³

²⁹ *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 633 F.Supp.2d 83, 103–04 (S.D.N.Y. 2009).

³⁰ 44 U.S.C.A. Ch. 85, Subch. II.

³¹ *Id.*

³² 42 U.S.C.A. § 7543(a) (2012).

³³ 42 U.S.C.A. § 7543(b) (2012).

There are several exceptions to the safe harbor not relevant here.³⁴ Nonetheless, the breadth of this section, at least on its face, is noteworthy. It provides that so long as state standards satisfy the minimum requirements set out elsewhere in the CAA, the state will be permitted to set and enforce those standards after application and public hearing.³⁵ This last clause, stating that states may set standards only after application and public hearing, substantially limits the otherwise broad language of the provision. Thus far, only California has successfully established its own emissions standards.³⁶ Further, the Clean Air Act's preemption exclusion, unlike the EPCA's, makes no mention of "political subdivisions," leading to the conclusion that only states may set tailpipe emissions standards; municipalities are therefore excluded from this opportunity. Therefore, the CAA's preemption exclusion is quite narrow in practice.

Working in concert, the EPCA and the CAA occupy the field of motor vehicle fuel economy and tailpipe emissions standards, exclusively governing motor vehicle fuel consumption and expulsion standards. Given the breadth of both regulations, it would seem that states or municipalities seeking to implement greener taxicab fleets would be at a complete loss. This is, however, not necessarily the case.

D. The Legal Status of Taxicabs in the U.S.

Taxicabs—also known as taxis—occupy a unique legal status among forms of public transportation in the United States. Busses and rail transportation are generally city or state owned.³⁷ Conversely taxicabs, although heavily regulated by the municipalities in which they operate, are not actually owned by said municipalities.³⁸ It is because of this legal scenario that there has been such difficulty in incorporating fuel-efficient taxicab fleets.

Taxis are heavily regulated in U.S. cities. Municipalities impose regulations on necessary safety equipment and requirements, licensing requirements, cost-shifting procedures, monetary leasing and fare caps, and even limit the type and number of vehicles approved for use as taxicabs.³⁹ This limit on the type and number of vehicles approved for use as taxicabs has proved problematic.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Clean Air Act & State Authority*, CLEAN CARS CAMPAIGN, available at <http://perma.cc/G65R-3SB6>.

³⁷ See *Metro. Taxicab Bd. of Trade*, 633 F.Supp.2d at 90.

³⁸ See generally, *Guide To New TLC Rule*, N.Y.C. TAXI & LIMOUSINE COMMISSION (April 1, 2011) available at <http://perma.cc/TE58-E3G5>.

³⁹ *Id.*

At the root of most taxi regimes is the medallion system.⁴⁰ A taxi medallion is essentially a license granted by the city to operate taxis within the city limits.⁴¹ In cities such as New York, where taxis makeup a significant source of public transportation and the ability to own and license out taxis can be a highly lucrative opportunity,⁴² medallions can be very costly and difficult to attain.⁴³

Taxicab regulatory structures typically involve at least two of three possible parties;⁴⁴ the city in which the taxicab operates,⁴⁵ the individual or company who owns the taxicab, and the operator of the vehicle.⁴⁶ Under this scheme, there are essentially three variations in the owner-operator relationship. The distinctions between such relationships have had great impact on the success of incorporating fuel-efficient taxis. The first scenario involves taxi owners who own multiple vehicles and utilize a daily leasing regime with their drivers.⁴⁷ These companies are called taxicab fleet owners, as the company owns multiple vehicles that it leases out. In this situation, the taxi operators work essentially as independent contractors. A driver will lease out the taxi for a certain shift period for a flat fee and is responsible for all fuel costs during that period of operation.⁴⁸ In major cities the municipal department overseeing taxis sets the maximum shift license fees that the taxicab companies can charge.⁴⁹

In addition to fleet owners, there are two types of taxicab owner-operators. The first is called a “driver-owned vehicle,” or “DOV.” DOV’s own the vehicle they operate but lease their medallion.⁵⁰ This is a common arrangement since medallions are expensive and difficult to obtain. Much like with lease rates for vehicles, cities often set medallion lease caps to prevent extortive pricing.⁵¹ Complimenting DOV’s are single-vehicle owner-operators, referred to as “non-affiliation” owners.⁵² Non-affiliation

⁴⁰ Rohin Dahr, *The Tyranny of the Taxi Medallions*, PRICEONOMICS (Apr. 10, 2013) available at <http://perma.cc/7XK2-RFNA>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Most cities place caps on the number of medallions that are issued at any given time. In cities where medallions are in high demand, they can cost hundreds of thousands of dollars. *Id.*

⁴⁴ In some occasions the owners of the vehicle are the sole operators of the vehicle and so in such a scenario only two parties would be involved.

⁴⁵ Most larger cities have a department specifically designated to regulate taxis. For example, New York City has the New York City Taxicab and Limousine Commission.

⁴⁶ Dahr, *supra* note 40.

⁴⁷ *Id.*

⁴⁸ Essentially, the operator is renting the car for a flat fee for a certain period of time. In New York City, operators can usually license vehicles for eight, twelve, or twenty-four hour shifts. *Id.*

⁴⁹ This is done to prevent extortive licensing fees. This is a crucial component of the taxicab regimes in cities like New York, where the demand for taxis is so high by potential operators that taxicab companies could easily charge obscene licensing fees.

⁵⁰ *Taxicab DOV Driver’s Bill of Rights*, NYC TAXI & LIMOUSINE COMMISSION, <http://perma.cc/8AJN-CD2L> (last visited Apr. 10, 2015).

⁵¹ *Id.*

⁵² Dahr, *supra* note 40.

owners own both their vehicle and their medallion.⁵³ They may lease the vehicle out to other operators but they also drive several shifts per year.⁵⁴ In New York City this last arrangement is the most common in terms of percentage of medallion owners, although not necessarily in terms of the percentage of taxis on the road.⁵⁵

There are two aspects of taxicab regimes in the United States that have made implementing fuel-efficient taxicabs such a difficulty. First, taxicabs are not owned by the cities in which they operate. This is the single most determinative factor in municipal failure to directly regulate the fuel consumption and emissions of taxicabs. Second, the three potential owner-operator schemes vary vis-à-vis who pays for the cost of fuel.⁵⁶ While operators pay for the fuel used by taxis owned by fleet-owners, DOV's and non-affiliation owners largely pay for their vehicles' fuel.⁵⁷ Accordingly, cities with high numbers of fleet owners have encountered greater resistance on efforts to incorporate fuel-efficient taxis.⁵⁸ An understanding of the legal status of taxicabs in the U.S., and the relative interests of owners and operators is key to comprehending the conflict between efforts to implement fuel-efficient taxis fleets and the Clean Air Act and the Energy Policy and Conservation Act.

III. NAVIGATING THE REGULATIONS

Several cities have attempted to implement fuel-efficient taxi programs with varying success. Based on the methods implemented by these cities and the relative success they have achieved, it seems that cities relying exclusively on a voluntary program are more successful than those who have attempted to implement a system of positive and negative incentives.⁵⁹ Success has been measured by the subscription levels of taxicab owners within those cities and by the legal challenges they have faced.

A. Manufacturer Challenges to the Clean Air Act and EPCA

In addition to the service industry challenges to state and local laws via CAA and EPCA preemption, manufacturers have tested the preemption provisions of both statutes against local and state regulations. Title II of the CAA was created by Congress to control new motor vehicle

⁵³ Bruce Schaller & Gorman Gilbert, *Villain or Bogeyman? New York's Taxi Medallion System*, 50 TRANSPORTATION QUARTERLY 1 (1996), available at <http://perma.cc/3VTV-BEDV>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Dahr, *supra* note 40.

⁵⁷ *Id.*

⁵⁸ See generally, e.g., *Metro. Taxicab Bd. of Trade*, 633 F.Supp.2d at 94–96.

⁵⁹ Compare *Metro. Taxicab Bd. of Trade*, 633 F.Supp.2d 88, with *Green Alliance Taxi Cab Ass'n, Inc. v. King County*, No. C08-1048RAJ, 2010 WL 2643369 (W.D. Wash. June 29, 2010).

emissions,⁶⁰ with the goal of “encourage[ing] or otherwise promot[ing] reasonable Federal, State and local governmental actions...for pollution prevention.”⁶¹ Title II was amended by Congress’ passage of the Air Quality Act of 1967, which preempted states from setting emissions standards for new vehicles. CAA preemption was first tested in 2004 in *Engine Manufacturers’ Association v. South Coast Air Quality Management District*.⁶²

In *Engine Manufacturers*, California imposed mandatory alternative fuel vehicle purchasing requirements for public use vehicles such as public transit vehicles, street sweepers, and airport passenger transportation vehicles.⁶³ Notably, hybrid and dual-fuel engines were not considered alternative fuel technologies for the purposes of the vehicles.⁶⁴ Justice Scalia, writing for the majority, found California’s rules preempted by the CAA, focusing on the meaning of “enforcement” within the CAA’s preemption provision and noting that mandatory rules fell within the scope of said provision.⁶⁵

Following the decision in *Engine Manufacturers*, the Alliance of Automobile Manufacturers and Central Valley Chrysler-Jeep concurrently brought similar cases in Vermont and California, challenging state regulations establishing greenhouse gas emissions standards for new vehicles by invoking the preemption provisions of the CAA and EPCA.⁶⁶ The Vermont standards were identical California’s AB 1493, which required the California Air Resources Board (“CARB”) to “develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles.”⁶⁷ The CAA provides a waiver for any state that can show it requires alternative standards to meet compelling and extraordinary conditions, so long as the standards are consistent with the federal emissions standards.⁶⁸ The courts noted that the EPCA preemption provision must be “construed as narrowly as the plain language of the law permits,”⁶⁹ finding the regulations unrelated to fuel economy standards are within the regulations permitted by the CAA.⁷⁰

⁶⁰ Motor Vehicle Air Pollution Control Act, 42 U.S.C. §§ 7521–25, 741–45, 7547–50, 7552–54, 7571–74, 7581–90 (2013).

⁶¹ 42 U.S.C. 7401(c) (2011).

⁶² *Mfrs’ Ass’n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004).

⁶³ *Id.* at 248–49.

⁶⁴ *Id.* at 249 n.1.

⁶⁵ *Id.* at 258.

⁶⁶ *Green Mtn. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295 (D. Vt. 2007); *Central Valley Chrysler-Jeep, Inc. v. Goldstone*, 529 F.Supp.2d 1151 (E.D. Cal. 2007).

⁶⁷ Cal. Health & Safety Code § 43018.5 (2010).

⁶⁸ 49 U.S.C. § 32919(a) (2013).

⁶⁹ *Cent. Valley*, 529 F.Supp.2d at 1175.

⁷⁰ *Green Mtn.*, 508 F.Supp.2d at 398.

Despite the early success achieved in *Engine Manufacturers*, courts interpreted the preemption provisions of the CAA and EPCA narrowly in a “manner that balanced the traditional role of states in regulating motor vehicles and air quality against the efficiency of national uniform fuel economy standards.”⁷¹ Following these decisions, it would seem that unless a state or municipality implemented mandatory standards that ran contrary to, or fell outside the scope of, the CAA and the EPCA, or interfered with EPA’s mission controls or NHTSA fuel economy standards, automobile manufacturers would be unsuccessful in challenging such state standards.

B. Green Taxi Initiatives: Bans and Penalties Preempted

Recent years have seen the “greening” of many U.S. cities.⁷² As information and awareness about climate change and the limited supply of natural resources like oil have spread, municipalities have sought out methods for reducing their environmental impact and resource consumption.⁷³ One such method many U.S. cities have incorporated is the implementation of fuel-efficient taxicab fleets also called “green” taxis.⁷⁴ In order to drive the incorporation of “green” taxis, some cities have attempted to impose mandatory changes to taxicab fleets.

1. New York City: Struggling Against Regulatory Language

This case has proved frustrating to environmentalists as well as state and local officials active in trying to address climate change.⁷⁵ It has also emerged as an additional cog in the confusing machinery of climate-related regulation, leaving state and local leaders wary of promulgating any form of aggressive measures to address climate change. While a state-level suit paralleled this federal case,⁷⁶ that case centered on the fitness of potential hybrid taxi vehicles for duty as New York City taxis, focusing concerns on safety, reliability, and repair cost.⁷⁷

With over 13,000 taxis operating in New York City, averaging roughly thirteen miles per gallon,⁷⁸ it became clear to New York City Mayor Michael Bloomberg that New York City taxis contributed significantly to local pollution, public health, global pollution, and climate change.⁷⁹ With

⁷¹ Skinner, *supra* note 3, at 324.

⁷² Elizabeth Svoboda, *America’s 50 Greenest Cities*, POPULAR SCIENCE (Feb. 08, 2008).

⁷³ *Id.*

⁷⁴ Kaid Benfield, *The Greening of America’s Taxis*, SWITCHBOARD: THE NATURAL RESOURCES DEFENSE COUNCIL STAFF BLOG (Dec. 7 2012), <http://perma.cc/3J3X-LCK5>; Patricia Sullivan, *All-Electric Taxi Firm May Serve Arlington*, THE WASHINGTON POST (Nov. 28, 2012).

⁷⁵ Rubinstein, *supra* note 2.

⁷⁶ Metro. Taxicab Bd. of Trade v. New York City Taxi & Limousine Comm., 891 N.Y.S.2d 249 (2009).

⁷⁷ *Id.*

⁷⁸ Metro. Taxicab Bd. of Trade v. City of New York, 633 F. Supp. 2d 83, 96 (S.D.N.Y. 2009).

⁷⁹ Rubinstein, *supra* note 2.

these concerns in mind, Mayor Bloomberg announced PlanNYC in 2007,⁸⁰ a comprehensive city-wide strategy focused on curbing pollution by reducing the city's environmental impact.⁸¹ One core component of this plan was to switch to hybrid taxis.⁸² Specifically, the initial tagline was to convert to an all-hybrid taxi fleet by the year 2012.⁸³ The original version of the plan required that taxi owners replace current taxi vehicles with hybrid taxi vehicles after the mandatory retirement period.⁸⁴ Taxi fleet owners, however, launched a staunch opposition to this plan. In 2007, led by the Metropolitan Taxicab Board of Trade—a trade association consisting of taxi owners—they filed suit in the Southern District of New York against the City, the Mayor, and the New York City Taxicab and Limousine Commission.⁸⁵

a. Metropolitan I: Finding Preemption

The District Court actually heard this case twice.⁸⁶ First, the district court reviewed the “NYC Hybrid Taxi Plan” version that required fleet owners to replace outgoing Crown Victoria taxicabs with more fuel-efficient vehicles. The plan required all new taxicabs to be either wheelchair accessible or average twenty-five miles per gallon by October 1st, 2008 and thirty miles per gallon by the same date in 2009.⁸⁷ This was ruled a direct miles-per-gallon restriction and would have forced taxicab fleet owners to convert entirely to hybrid or clean diesel vehicles, since they were the only vehicles that could achieve said mileage.⁸⁸

The court ruled that this kind of regulation equated to setting fuel mileage standards and potentially tailpipe emissions standards.⁸⁹ The court further found that the EPCA and CAA exclusively governed these types of regulations.⁹⁰ The city's plan, according to the court, fell into the area governed by the preemption clauses of the CAA and EPCA and so, the first iteration of the “25/30 Rule” was enjoined.⁹¹ Notably, the court stated that the city's rule did not necessarily amount to a *de facto* regulation of emissions preempted under the CAA and so preemption rested on the EPCA.⁹²

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Metro. Taxicab Bd. of Trade*, 633 F. Supp. 2d at 92–94.

⁸³ Rubinstein, *supra* note 2.

⁸⁴ *Metro. Taxicab Board*, 2008 WL 4866021 at *1, *4.

⁸⁵ *See generally id.*

⁸⁶ *See Metro. Taxicab Board*, 2008 WL 4866021; *Metro. Taxicab Bd. of Trade*, 633 F. Supp. 2d at 88.

⁸⁷ *Id.*

⁸⁸ *Metro. Taxicab Board*, 2008 WL 4866021 at *1, *8.

⁸⁹ The court did, however, note that the case for CAA preemption was not as strong as that for EPCA preemption, since the 25/30 rule at no point specifically mentioned emissions.

⁹⁰ *Metro. Taxicab Board*, 2008 WL 4866021 at *1, *9.

⁹¹ *Id.*

⁹² *Id.* at *13.

Undeterred, Mayor Bloomberg remained vigilant about seeing the city's taxis go green, announcing that he would find a way around the decision.⁹³ The proposed solution offered an incentive to owners who switched to hybrid or clean diesel taxicabs and a deterrent to those who retained inefficient taxicabs.⁹⁴ This plan raised the lease cap for hybrid taxicabs by \$3 per shift⁹⁵ and would reduce the lease cap for traditional taxicabs vehicles by \$4, \$8, and \$12 per shift in 2009, 2010, and 2011, respectively.⁹⁶ Concurrently, the Taxicab and Limousine Commission (hereinafter "TLC") rescinded a rule prohibiting the reduction of lease caps unless related to changes in owner expenses and instituted a new rule that lease caps would be determined in light of policy considerations, thereby noting a shift from a cost-based approach for determining lease caps to a policy-based approach.⁹⁷ Among greenhouse gas, fuel consumption, and public health motivations, the City sought to shift the burden of fuel costs from the taxicab operators to the owners.⁹⁸ Since owners seek to maximize profits by purchasing and maintaining the cheapest available vehicles, this would encourage them to purchase hybrid taxicabs.⁹⁹ Following the institution of the new lease caps, the Metropolitan Taxicab Board of Trade again filed suit.¹⁰⁰

The court stated that the new rule required a two-part inquiry. First, were the TLC's new rules a mandate to taxicab owners to purchase only hybrid or clean-diesel vehicles? Second, does federal law preempt such mandates?¹⁰¹ Distilling these into a single issue, the court asked whether "the new lease regulations ha[d] the preempted effect of mandating that taxicab owners purchase only taxicabs with hybrid or clean-diesel engines."¹⁰²

The court reasoned that a local law will be preempted if it directly regulates in a certain field preempted by Congress or, contrarily, if it regulates in a preempted area in such a way to effectively mandate a specific and preempted outcome.¹⁰³ Applied to the lease caps, the issue

⁹³ Rubinstein, *supra* note 2.

⁹⁴ Rubinstein, *supra* note 2.

⁹⁵ This number was calculated by dividing the total additional cost of outfitting a hybrid vehicle for taxi duty over a Crown Victoria, approximately \$6,000, by the number of shifts that vehicle would serve in the statutory life of the taxicab, three years. This number came to \$2.75 per shift which was then rounded up. Therefore, this lease cap raise was intended to offset this cost. *Metro. Taxicab Bd. of Trade*, 633 F. Supp. 2d at 90.

⁹⁶ *Id.* at 89, 91 (The \$12 reduction was based on the daily differential in cost of gas between the Crown Victoria and the Ford Escape Hybrid, which at the time was the most popular hybrid taxicab in the city.).

⁹⁷ *Id.* at 89–90.

⁹⁸ *Id.* at 90.

⁹⁹ Rubinstein, *supra* note 2.

¹⁰⁰ *Id.*

¹⁰¹ *Metro. Taxicab Bd. of Trade*, 633 F. Supp. 2d at 87.

¹⁰² *Id.* at 87.

¹⁰³ *Id.* at 95.

became whether the specific economic incentives as applied created a mandate.¹⁰⁴ Some experts suggested that the new lease caps could reduce fleet owner profit margins by up to 76%.¹⁰⁵ Conversely, experts for the city argued that any rate structure yielding any profit is not a mandate.¹⁰⁶ The court was not persuaded and determined that the lease caps were a mandate.¹⁰⁷

Having found that the lease caps constituted a mandate, the court turned to the question of preemption.¹⁰⁸ The court determined that Congress's intent in enacting the EPCA was to "make the setting of fuel economy standards exclusively a federal concern."¹⁰⁹ Further, the court noted that the NHTSA was given the authority under the EPCA to set fuel economy standards and in doing so weighed four factors: "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."¹¹⁰

The court found that while the new rules didn't expressly set specific fuel economy standards, "the effect of the rules [was] to force taxicab owners to meet a mpg threshold determined by the mileage rating of the TLC's approved hybrid or clean-diesel vehicles."¹¹¹ It supported this finding by referencing evidence that the City's discussion of efficient vehicles concerned miles per gallon ratings and that a central purpose of the new lease cap strategy was to improve the fuel-efficiency of New York City taxicabs.¹¹² Thus, the new rules "related to" fuel economy standards and were preempted by the EPCA.¹¹³ The court then moved on to consider preemption under the Clean Air Act.¹¹⁴

The court found that Congress, in enacting the CAA, was concerned over the possibility of 50 differing state emissions standards.¹¹⁵ Although the rules made no express comment as to emissions, the court observed that one of the purposes of the new rules was to encourage taxicab owners to purchase cleaner vehicles.¹¹⁶ The court thus found that it was "common sense that a rule with the stated purpose of increasing the number of "cleaner vehicles" and with the effect of requiring the purchase of hybrid

¹⁰⁴ *Id.* at 96.

¹⁰⁵ *Id.* at 99.

¹⁰⁶ *Id.* at 100.

¹⁰⁷ *Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 100 (S.D.N.Y. 2009).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 101 (quoting *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 354 (D. Vt. 2007)).

¹¹⁰ *Id.* (quoting 49 U.S.C. § 32902(f)).

¹¹¹ *Id.* at 102.

¹¹² *Id.* at 102–03.

¹¹³ *Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 103 (S.D.N.Y. 2009).

¹¹⁴ *Id.* at 103–05.

¹¹⁵ *Id.* at 104.

¹¹⁶ *Id.* at 104–05.

taxicabs is a rule relating to the control of emissions.”¹¹⁷ Therefore they were also found preempted by the CAA.¹¹⁸

Having resolved that the taxicab owners had shown both irreparable harm in the face of the new lease cap rules and a likelihood of success in proving preemption under the EPCA and the CAA, the district court granted the taxicab owners’ motion for a preliminary injunction, enjoining the implementation of the rule.¹¹⁹ The City appealed to the Second Circuit Court of Appeals.¹²⁰

b. Metropolitan II: Deciding Not to Decide

Roughly one year after the district court found the lease cap rules preempted by the EPCA and the CAA, the Second Circuit addressed the issue.¹²¹ The court reviewed the lower court’s decision for abuse of discretion.¹²² On appeal, the Second Circuit focused its discussion on the question of preemption under the EPCA and CAA.¹²³ The Court reasoned that whether a state law relates to a preempted subject matter depends on an examination of whether the challenged law contains a reference to the preempted subject matter or, alternatively, makes the existence of the preempted subject matter “essential to the law’s operation.”¹²⁴ The court then turned to the issue of preemption under the EPCA.

Consistent with the district court’s decision, the court concluded that the new lease cap rules were preempted by the EPCA.¹²⁵ It reasoned that the new rules relied expressly on the fuel economy distinction between hybrids and clean diesels on the one hand and traditional taxicab vehicles on the other.¹²⁶ It found the terms “hybrid” and “fuel-efficient” to be “obviously equivalent”.¹²⁷ Further, the court remarked that the imposition of lease cap reductions solely on the basis of the vehicle’s implementation of hybrid technology could only relate to an aim to improve taxicab fuel economy in the City.¹²⁸ The court went a step further than the District Court by stating that no economic impact analysis was necessary as the new lease cap rules directly regulated the relevant preempted subject

¹¹⁷ *Id.* at 105 (quoting 42 U.S.C. § 7543(a)).

¹¹⁸ *Id.*

¹¹⁹ *Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 106 (S.D.N.Y. 2009)..

¹²⁰ Rubinstein, *supra* note 2.

¹²¹ *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010).

¹²² *Id.* at 156.

¹²³ *Id.* at 158.

¹²⁴ *Id.* at 156.

¹²⁵ *Id.* at 158.

¹²⁶ *Id.* at 157.

¹²⁷ *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 157 (2d Cir. 2010).

¹²⁸ *Id.*

matter—fuel economy standards.¹²⁹ Therefore, according to the court, whether the lease caps constituted a mandate was irrelevant.¹³⁰

Finding preemption, the Second Circuit held that the preliminary injunction was appropriate.¹³¹ Having concluded that EPCA preemption was sufficient to warrant affirmation of the preliminary injunction, the court chose not to address the question of preemption under the CAA.¹³² New York City sought to appeal the decision to the United States Supreme Court; the Court however, denied certiorari.¹³³

2. *Ophir v. Boston: Mandatory Conversion Struck Down*

Boston, like many other cities, sought to improve the fuel efficiency and reduce the emissions of its taxi fleets through legislation.¹³⁴ Its initial program offered several financial incentives to encourage the use of hybrid taxicabs.¹³⁵ However, the rate of subscription was low, with only thirty-two hybrid taxicabs purchased eighteen months into the program.¹³⁶ Shortly thereafter the plan was abandoned and Boston imposed a mandatory purchasing scheme.¹³⁷ The new rule required retired taxis to be replaced with a hybrid model.¹³⁸ Rule 403 would thus accomplish the goal of complete conversion to a hybrid taxi fleet by 2015.¹³⁹

The Boston Taxi Owners Association wasted no time in challenging the clean taxi mandate, which was similar to the first iteration of New York's 25/30 rule.¹⁴⁰ Referencing the economic practicability factor of the NHTSA fuel economy standards, the court found that this rule unduly restricted consumer choice.¹⁴¹

The NHTSA economic practicability—in the context of setting fuel economy standards—requires that “standards should not be so stringent as to create ‘adverse economic consequences, such as a significant loss of jobs or the unreasonable elimination of consumer choice.’”¹⁴² The court stated that allowing a state or municipality to dictate such consumer choice

¹²⁹ *Id.* at 158.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *City of New York v. Metropolitan Taxicab Board of Trade*, 131 S. Ct. 1569, 1569 (cert. denied).

¹³⁴ *Skinner*, *supra* note 3, at 330.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Press Release, City of Boston, Mayor Menino Announces Taxi Fleet to be Fully Hybrid by 2015 (Aug. 29, 2008), available at <http://perma.cc/PJ9E-7FV3>.

¹³⁹ In Boston, fleet owners are required to replace taxis every six years while single-taxi owners are required to replace their cars every seven years. *Ophir v. City of Boston*, 647 F. Supp. 2d 86, 88 (D. Mass. 2009).

¹⁴⁰ *Skinner*, *supra* note 3, at 330.

¹⁴¹ *Ophir*, 647 F. Supp. 2d at 93–94.

¹⁴² *Id.* (quoting Nat'l Highway Traffic Safety Admin. Proposed Rules, 67 Fed. Reg. 77015-01, 77021 (proposed Dec. 16, 2002)).

would “undo Congress’s carefully calibrated regulatory scheme.”¹⁴³ Using this logic, the court believed that any state or local regulation that restricts consumer choice too heavily must be preempted.¹⁴⁴

Although deciding this case on slightly different legal grounds than in *Metropolitan II*, the court utilized this earlier decision as persuasive authority.¹⁴⁵ Boston’s Rule 403 and New York first 25/30 rule were both mandatory programs that unequivocally restricted consumer choice.¹⁴⁶ Several factors, including the ownership status of the taxis and reliance on an incentive-only program, might well have had a significant impact on the decisions in both cases.

C. Voluntary Green Taxi Incentives: No Preemption Problem

Several cities—unlike Boston and New York—relied on voluntary systems for incorporation of green taxis. Contrary to the schemes in the aforementioned cases, the legislation in the cases that follow relied exclusively on monetary incentives instead of either mandatory conscription or a dual system of monetary incentives and penalties. For this reason, it seems, they have been more successful at withstanding legal challenges.

1. Green Alliance v. King County

The district court in *Green Alliance v. King County* faced a different regulatory system than the New York and Boston plans. King County capped the total number of taxicab licenses available in the county but allowed new licenses to be issued by recycling previously issued licenses, unless the county determined that there was a “demand for additional taxi service.”¹⁴⁷ If the county determined that there was a need for additional taxi service, it could issue additional licenses through a request for proposals (“RFP”) process designed to test alternative taxi structuring methods.¹⁴⁸ One such RFP was issued in March, 2008 that required the selected taxicab association to agree to use hybrid-electric vehicles that achieved a minimum rating of 40 miles per gallon in the city.¹⁴⁹ Green Cab was chosen among several taxicab associations that had expressed interest in the test program.¹⁵⁰

The court distinguished this plan from those preempted in New York and Boston, stating that the county had “implemented a voluntary incentive

¹⁴³ *Id.* at 94.

¹⁴⁴ *Id.* at 93.

¹⁴⁵ *Id.* at 90–93.

¹⁴⁶ *Skinner*, *supra* note 3, at 331.

¹⁴⁷ *Green Alliance Taxi Cab Ass’n, Inc. v. King County*, No. C08-1048RAJ, 2010 WL 2643369, at *1 (W.D. Wash. June 29, 2010).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at *2.

¹⁵⁰ *Id.*

program.”¹⁵¹ Drawing on language from *Metropolitan II*, the court reasoned that “If a regulation ‘alters the incentives, but does not dictate the choices’ facing regulated parties, then the regulation is not a mandate preempted by the EPCA.”¹⁵² Since LIC 8-3 did not require any taxicab owner, other than those who volunteered, to do anything, there was no preemption issue.¹⁵³ The court went on to find that at most the county’s plan amounted to “an indirect regulation, and even if that is true, the program does not amount to a mandate and thus is not comparable to [*Metropolitan II*],”¹⁵⁴ since “only a mandate can be a legal regulation ‘related to’ fuel economy standards and thus preempted by the EPCA.”¹⁵⁵ Contrastingly, a voluntary incentive program will avoid preemption. Moreover, the court suggested that the King County program had a de minimis impact, involving the issuance of only 50 licenses, or slightly less than ten percent of the licenses in the county.¹⁵⁶

2. San Francisco: The Greenest City in the U.S.

San Francisco has had widely-praised success in its efforts to switch to a “green” taxicab fleet¹⁵⁷ and has received such accolades as the “Greenest Taxi City in America.”¹⁵⁸ The conversion to hybrid taxis in San Francisco has been facilitated by a regulatory incentive similar in kind to that at issue in *Metropolitan II*. San Francisco, led by a taxi driver, implemented a regulation that raised the maximum shift lease cap for hybrid taxis by \$7.50 over traditional taxicabs such as the Crown Victoria.¹⁵⁹ This amount allows taxicab fleet owners to recoup the additional cost of purchasing and outfitting hybrids taxis over the course of their use as taxis,¹⁶⁰ and allows taxi fleet owners to purchase the fuel-efficient vehicles at no real additional costs.¹⁶¹ While drivers must pay the higher rate for the hybrid taxicabs, they save roughly \$20-40 per shift in gasoline expenses, which more than offsets the additional rental cost which creates a win-win for owners and operators.¹⁶² The key difference between this system and the system in *Metropolitan II* is that San Francisco imposes no penalty for opting not to convert.

¹⁵¹ *Id.* at *5.

¹⁵² *Id.* at *4 (quoting *Metropolitan II*, 633 F.Supp.2d at 95).

¹⁵³ *Green Alliance Taxi Cab*, 2010 WL 2643369, at *5.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Brad Berman, *SF Taxi Driver Wages 10-Year Battle to Reduce Fleet Emissions, and Wins*, HYBRIDCARS (Oct. 20, 2010), <http://perma.cc/VTM3-8PD2>.

¹⁵⁸ Huw Evans, *San Francisco is the ‘Greenest Taxi City in America,’* HYBRIDCARS (Feb. 10, 2012), <http://perma.cc/AWC7-GSB8>.

¹⁵⁹ Jonas Dalidd, *San Francisco’s Green Taxi Fleet and How it Got There*, AUTOBLOG (Oct. 25, 2010), <http://perma.cc/4FB4-KJT2>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

The driving force behind San Francisco's green taxi program has been a "rank-and-file" taxi driver by the name of Paul Gillespie who was chosen to sit on a task force to look at all issues facing San Francisco's taxi drivers.¹⁶³ In 2004, Gillespie convinced two taxicab companies to put a total of fifteen hybrid taxis into service, marking the first hybrid fleet in the country.¹⁶⁴ After observing the issues faced by New York in *Metropolitan I*, San Francisco, aligned with taxi companies, passed a carefully crafted ordinance ensuring that all new taxis would average about thirty miles per gallon.¹⁶⁵ The crux of the plan was the \$7.50 permitted rise in the rental fee for hybrid and other low-emissions vehicles. As of 2010, San Francisco's taxi fleet had reduced its carbon footprint by 35,000 tons per year.¹⁶⁶ As more taxis have converted to hybrid or other low-emissions vehicles, that number had likely increased since then.

The San Francisco program does, however, have certain limitations, although these may stand out more in form than in substance. San Francisco's green taxi program, as noted above, offers incentives to taxi fleet owners that allow them to recoup the additional cost of purchasing hybrid taxicabs.¹⁶⁷ This program does not, however, offer a disincentive as the New York City program did. For this reason the San Francisco regulation has been able to avoid a challenge in court because it simply offers taxicab owners a viable option rather than mandating a particular purchase. One might conclude from this that San Francisco can never guarantee a 100% hybrid taxi fleet. While this may be true, as of February 2012, over 90% of taxicabs operating in San Francisco were "clean vehicles."¹⁶⁸ So while an enforcement measure for conversion to a hybrid, electric, or clean diesel vehicle may be lacking in the San Francisco plan, the marked success of the program suggests that this might be more a problem in form, than in substance.

D. CARB Standards

California has long been a leader in environmental regulation.¹⁶⁹ Of the many facets of California's aggressive environmentally-focused regulatory network, one of the more prominent forms of regulation has been the success of the California Air Resources Board ("CARB") to set increasingly stringent emissions standards for vehicles operating within its

¹⁶³ Berman, *supra* note 157.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Berman, *supra* note 157.

¹⁶⁷ Dalidd, *supra* note 159.

¹⁶⁸ February 2, 2012 *Percentage of Clean Vehicles in Taxi Fleet*, SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, <http://perma.cc/2KGH-4SVU>.

¹⁶⁹ Dalidd, *supra* note 159.

borders.¹⁷⁰ The CARB standards have not only served as legally enforceable regulations on emissions, but have colored national discussion on available measures to reduce state and municipal carbon footprints via rigid emissions control.¹⁷¹

Despite the federal preemption clauses of the EPCA and CAA, California has been able to set its own standards for motor vehicles emissions for a number of years.¹⁷² California has been successful setting its own standards because it followed the statutory process under the CAA by applying for a waiver from the Act's preemption clause.¹⁷³ The Bush administration initially denied the waiver, ensuring that California's emissions standards were preempted.¹⁷⁴ Later, however, the Obama administration reversed this decision and approved the waiver.¹⁷⁵ Additionally, the Obama administration has sought to bring together the California standard and the Federal Corporate Average Fuel Economy Standards to create a single standard.¹⁷⁶ The effort to consolidate the two standards is not an attempt to restrict state action but rather an attempt at cooperative action. California's success in this instance is noteworthy.

IV. THE PRESENT SITUATION FOR GREEN TAXIS

The statutes, regulations, case law, and trends discussed herein point to the fact that the future of green taxis remains somewhat uncertain. While there has been growing awareness of climate change and the environmental impacts of fuel consumption and emissions, and while cities around the country have begun to incorporate various measures to address climate and environmental concerns,¹⁷⁷ there are still social and legal hurdles that must be overcome.

Any city lawmakers looking to implement a green taxicab fleet must walk a fairly thin line if they hope to fully and aggressively switch to hybrid or other fuel-efficient taxis without encountering problems with preemption. Precedent suggests any city that imposes a mandate requiring a switch to fuel-efficient taxicabs should expect to encounter legal

¹⁷⁰ California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles for Environmental Protection Agency, 74 Fed. Reg. 129 (July 8, 2009).

¹⁷¹ Kaid Benfield, *Cleaning the Air with Smart Growth*, SWITCHBOARD: NATURAL RESOURCES DEFENSE COUNCIL STAFF BLOG (Sept. 16, 2010), <http://perma.cc/EE2R-G6JZ>.

¹⁷² Skinner, *supra* note 3, at 331–35.

¹⁷³ *The California Application for a Waiver of Preemption Under the Clean Air Act to Enforce Greenhouse Gas Standards on New Vehicles*, THE FEDERALIST SOC'Y (March 19, 2009), <http://perma.cc/LK6A-ERUD>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Mike Matthews, *Top 10 Most Eco-Friendly U.S. Cities*, SF GATE, <http://perma.cc/23DY-D5E4>.

challenges and should further expect any such regulation to be held preempted by the EPCA, CAA, or both.¹⁷⁸ Therefore, the only viable option for cities seeking to change to green taxis while also avoiding preemption is to offer an incentive-based program—like in San Francisco or King County—Washington¹⁷⁹— and avoid stick-and-carrot programs — such as in New York City and Boston.¹⁸⁰

Such a scenario is problematic for broader incorporation of hybrid taxi fleets in U.S. cities. Even though San Francisco has successfully transitioned to a taxi fleet comprised almost exclusively of hybrid vehicles,¹⁸¹ their success has largely hinged on the environmental consciousness of the city and the tenacity of certain individuals.¹⁸² As a model, such a program is precarious. Cities without the environmental issues or social consciousness of San Francisco might well lack the motivation necessary to spur a conversion to fuel-efficient taxi programs. If a country-wide shift towards greener taxis—which is necessary for reducing the carbon footprint of the nation’s transportation industry—is to be successful in the coming years, municipalities must be able to test innovative strategies for incorporating hybrid taxis unencumbered by federal preemption.

V. PAVING THE WAY: SOLUTIONS FOR THE PREEMPTION PROBLEM

As noted, if the U.S. hopes to thoroughly utilize green taxis across the country, something must be done to circumvent the preemption problem highlighted in *Metropolitan I & II* and *Ophir*. In order to do so, either the statutory language or judicial interpretation of such language must change. Or perhaps a compelling argument could force courts and lawmakers to consider how the interests of U.S. citizens, especially those in dense cities where taxicabs are prevalent, are best served by conversion to green taxi fleets.

A. Arguments Against Preemption

While the decisions in *Metropolitan I*, *Metropolitan II*, and *Ophir* certainly come across as well-reasoned, there are a number of reasons that the courts’ preemption analysis are inaccurate.

1. Formulaic Textualism

One would be forgiven for believing that the Second Circuit “got it right” in *Metropolitan II*. The court’s brief opinion affirmed the district

¹⁷⁸ Skinner, *supra* note 3, at 332.

¹⁷⁹ *Metropolitan II*, 615 F.3d at 154; *Ophir*, 647 F. Supp. 2d 86.

¹⁸⁰ *Green Alliance*, 2010 WL 2643369.

¹⁸¹ SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, *supra* note 169.

¹⁸² Matthews, *supra* note 178; Berman, *supra* note 157.

court's ruling but departed from the district court's reasoning.¹⁸³ Unlike Judge Grotty in *Metropolitan I*, who found that the economic impact of the 25/30 rule lead to the conclusion that the regulation was a mandate related to the subject matter governed by the EPCA and CAA, the reviewing judge found that the distinction between hybrid and non-hybrid taxis targeted fuel economy standards and was thus plainly "within the scope of the EPCA preemption provision."¹⁸⁴ The court found that the city used "hybrid" as a proxy for improved fuel economy and therefore was preempted under the EPCA and did not reach the question of CAA preemption.¹⁸⁵

There are several reasons this may not be accurate. First, it has been argued that *Metropolitan II*'s invocation of whether the state law "related to" preempted subject matter was stretched too far.¹⁸⁶ This argument relies on the supposition that dual engine technology, otherwise known as hybrid technology, does not necessarily equate to improved fuel economy.¹⁸⁷ Even though there are some hybrid vehicles that achieve less than stellar fuel economy, hybrids almost always outperform their conventionally powered counterparts in terms of fuel economy and emission production.

Second, the EPCA's preemption provision has been read to preempt legislating fuel economy standards, not fuel efficiency itself.¹⁸⁸ An average fuel economy standard is defined as the "performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year."¹⁸⁹ Therefore, the argument goes, in order for a state or local regulation to relate to fuel economy standards, it must relate to the testing and calculation procedures involved in setting standards for current model automobile fleets.¹⁹⁰ As such, a state or local regulation that distinguishes between more and less fuel-efficient vehicles in a consumer market, unless it also bears on the NHTSA's process for setting fuel economy standards, should not be preempted.¹⁹¹

Further, not all stick-and-carrot regulatory schemes are per se mandatory based on economic impact. The United States filed an amicus with the Second Circuit on behalf of the Department of Transportation and the Environmental Protection Agency, which stated that the lease cap rules were "not likely to have a significant impact on the overall federal regulation of the average fuel economy of automobile manufacturers."¹⁹²

¹⁸³ Skinner, *supra* note 3, at 332.

¹⁸⁴ *Metropolitan II*, 615 F.3d at 158.

¹⁸⁵ *Id.*

¹⁸⁶ Skinner, *supra* note 3, at 333.

¹⁸⁷ *Id.* at 335.

¹⁸⁸ *Id.* at 333.

¹⁸⁹ 49 U.S.C. § 32901(a)(6) (2013).

¹⁹⁰ Skinner, *supra* note 3, at 333–34.

¹⁹¹ *Id.* at 334.

¹⁹² See Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees and Affirmance at 14, *Metropolitan II*, 615 F.3d 152 (2d. Cir. 2010).

Even if some regulatory schemes could, aggregated nationally, impact the NHTSA's economic analysis, under certain conditions a stick-and-carrot system, such as that in *Metropolitan II*, may be a voluntary incentive. To accomplish this schemes would need to mitigate the penalty for failure to utilize hybrid vehicles so as to reduce the profitability of the fleet ownership enterprise to as significant a degree as in *Metropolitan II*. Although all courts that have addressed the issue have ruled that a mandate or penalty issued to encourage transition to green taxis are preempted by either the EPCA or CAA, courts should be skeptical of accepting such prior reasoning blindly, and should read the both statutes with extreme care.

2. Legislative History and Forbidden Connections

In its petition to the Supreme Court, NYC argued that the Second Circuit "erred by failing to consider the structure, purpose and history of the statute in order to determine what Congress intended the reach of the EPCA preemption provision to be."¹⁹³ The City read the EPCA's preemption provision to permit regulations that do not set fuel economy standards and pose no interference with federal regulation of the average fuel economy required of automobile manufacturers.¹⁹⁴ This reading of the EPCA is consistent with the statute's intent to "preempt state regulation of fuel economy standards so that automobile manufacturers would not be required to comply with myriad differing standards."¹⁹⁵

The courts' reading of the EPCA provision is thus problematic for three reasons. First, it "casts too wide a net into a field which the states have long occupied: the regulation of lease rates for taxicab vehicles."¹⁹⁶ Second, the crux of the court's preemption analysis is inconsistent with the stated purpose of that very provision. Neither the 25/30 rule nor Boston's Rule 403 forced vehicle manufacturers to comply with differing standards for either New York or Massachusetts. Third, the aims of both preempted programs were otherwise consistent with the aims of the EPCA and CAA. That is, they sought to increase the fuel economy and decrease of the emissions of taxis within New York and Boston, respectively. The EPCA and CAA share such goals.¹⁹⁷ Courts should place greater emphasis on the scope and purpose behind both statutes before striking down laws and regulations promulgated in the same vein.

¹⁹³ Brief for Petitioner-Appellant at 10, *Metropolitan II*, 615 F.3d 152 (2d. Cir. 2010) (cert denied).

¹⁹⁴ *Id.* at 53.

¹⁹⁵ *Id.* at 8–9.

¹⁹⁶ Skinner, *supra* note 3, at 336.

¹⁹⁷ 42 U.S.C. §§ 7401 *et seq.* (2013); 49 U.S.C. §§ 32901 *et seq.* (2013).

3. “Municipal Use”

Despite thorough consideration of the EPCA’s and CAA’s preemption provisions in all the aforementioned cases, no court has yet to discuss the exemptions to said provisions in any detail. While both the EPCA and the CAA articulate exemptions to their preemption provisions,¹⁹⁸ these exemptions apply only in limited circumstances.¹⁹⁹ It was the courts’ opinions that New York City and Boston taxicabs fall outside the scope of these limited exceptions that sealed the coffin on the cities’ proposed plan.

Currently the EPCA allows states and political subdivisions to set fuel economy standards for vehicles “purchased for [their] own use.”²⁰⁰ This allows cities to set such standards for police vehicles, public buses, firefighting vehicles, and other vehicles the city or state purchases and retains for some municipal use. This does not cover vehicles that, although being used for a municipal purpose—public transportation—are not purchased or owned by the city.²⁰¹ Courts have refused to read this clause as relating to such vehicles, requiring purchase or possession by the city to qualify for a “municipal use” exemption.²⁰²

In so construing the EPCA’s preemption exception, courts have failed to focus on the purpose of the vehicle, instead focusing too greatly on the ownership of the vehicle. That is, courts have erred in “equating ‘use’ with ‘ownership.’”²⁰³ Courts have interpreted this provision to exclude only vehicles purchased *and* owned by the city for the city’s own use. Instead, courts should read this provision to cover vehicles used. Courts should instead interpret this clause broadly to include automobiles obtained as part of a city’s public transportation network. So, a taxicab, which is obtained exclusively for use as part of a city’s public transportation network, and so for the city’s “own use,” would be covered under the preemption provision.²⁰⁴ By incorporating this usage of the EPCA’s preemption exclusion, courts could avoid stymying municipal environmental innovation in terms of taxi structuring and usage.

B. Public Health and Liability

In addition to combating the language of the EPCA and CAA or judicial interpretation thereof, there is possibly another avenue available

¹⁹⁸ 49 U.S.C. § 32919(c); 42 U.S.C. § 7543(a).

¹⁹⁹ *Id.*

²⁰⁰ 49 U.S.C. § 32919(c).

²⁰¹ *Id.*

²⁰² Recent Cases, *Local Government Law – Preemption – Southern District of New York Holds That New York City Hybrid Taxi Regulations are Likely Preempted by the EPCA – Metropolitan Taxicab Board of Trade v. City of New York*, No. 08 CIV. 7837 (PAC), 2008 WL 4866021 (S.D.N.Y. Oct. 21, 2008), 122 HARV. L. REV. 2275, 2279 (2009).

²⁰³ *Id.*

²⁰⁴ *Id.*

for circumventing the preemption problem. Several studies have noted the deleterious public health effects of exhaust fumes.²⁰⁵ An aerial photo of cities such as New York, Los Angeles, or even San Francisco will show the distressing density of smog polluting those areas. Air pollution varies momentarily by region and city; therefore, the most effective way to address such pollution is on a local level. As such, local regulation of taxicab fuel economy and emissions is essential to curbing the negative public health impact that results from such pollution.

In the seminal environmental law case, *Massachusetts v. EPA*, the Supreme Court considered whether the public health effects caused by pollution could sustain a case to compel federal regulation of greenhouse gas emissions.²⁰⁶ In *Mass v. EPA*, the Supreme Court first held that Massachusetts had standing to sue.²⁰⁷ The Court noted that much like a private party, Massachusetts had a procedural right and an interest in the health of its citizens to have proper standing to sue for injunctive relief.²⁰⁸ Second, the Court noted that the CAA gives the EPA the authority to regulate tailpipe emissions and subsequently that EPA was compelled to so regulate.²⁰⁹

Given the precedent of *Mass v. EPA* regarding municipal standing as it relates to public health, a municipality may challenge the EPA to amend current regulatory practice concerning fuel economy and emissions. Since municipalities are in the best position to determine their needs vis-à-vis emissions and fuel economy regulation, a suit compelled the allowance would have substantial value and likelihood of success. Further, per the EPCA and CAA, municipal regulation would have to be at least as stringent as federal standards; consequently, there would be no concern about backward movement.

C. Congressional Support and Change in the Taxi Arena: The "Green Taxis Act"

Following the defeat of the 25/30 rule and the lease cap rules, Mayor Bloomberg developed, along with U.S. Senator Kirsten Gillibrand and U.S. Congressman Jerrold Nadler, the Green Taxis Act.²¹⁰ The Green Taxis Act, first introduced in 2011 and not yet passed by either house, would

²⁰⁵ See generally, JOHN WARGO & DAVID BROW, ENV'T AND HUM. HEALTH, CHILDREN'S EXPOSURE TO DIESEL EXHAUST ON SCHOOL BUSES, (Mark Cullen M.D. et al eds., 2002); *Costs of Childhood Asthma Due to Traffic-Related Pollution in Two California Communities*, 40 EUR. RESPIR. J. 363 (2012).

²⁰⁶ *Massachusetts v. Environmental Protection Agency*, et al., 549 U.S. 497 (2007).

²⁰⁷ *Id.* at 508.

²⁰⁸ *Id.* at 516–20.

²⁰⁹ *Id.* at 526–29.

²¹⁰ *Mayor Bloomberg and Taxi Commission Yassky Join Senator Gillibrand and Congressman Nadler to Introduce Green Taxis Act, News from the Blue Room*, NYC.GOV, <http://home.nyc.gov/cgi-bin/misc/pfprinter.cgi?action=print&sitename=OM&p=1427840415000> (last visited Mar. 28, 2015).

effectuate the addition of specific exclusions to the EPCA and CAA preemption provisions for taxicabs.²¹¹ The Act would allow states or political subdivisions thereof to regulate emissions and fuel economy standards for taxicabs so long as those regulations would be at least as protective of public health and welfare as their comparable applicable federal regulatory standard.²¹² This of course would be in keeping with the goals of both statutes. While not yet passed, the proposal of the Green Taxis Act marks the national attention being paid to the issue of taxicabs and their impact on climate change and the environment. Several cities have supported the Act's creation and enactment.²¹³ It represents a growing awareness of cities' need to be able to control—to a reasonable degree—greenhouse gas emissions on a local scale. Despite still being in preliminary stages, it is the most viable option, on a national level, for improving the fuel economy and emissions regulatory regime.

V. CONCLUSION

Taxicabs are an integral part of the public transportation networks of most major cities in the U.S. and have historically been within the regulatory purview of local authorities. Judicial interpretation of the EPCA and CAA has robbed cities of their ability to regulate certain aspects of their taxicab systems, and have thereby stymied innovation in the incorporation of fuel-efficient taxi fleets. These developments run counter to Congress's stated aims in passing the EPCA and CAA, namely to reduce the nation's emissions and increase its fuel economy. Given the importance of taxicabs as means of public transportation and as polluters, this problem is not one to be taken lightly.

While some cities have achieved success in incorporating fuel-efficient taxi fleets despite federal preemption concerns, those cities have done so in the absence of any enforcement mechanism. Such results, then, are precarious and highly localized. In order to more fully incorporate hybrid or other fuel-efficient, low-emission taxis into American cities, a change must take place. There must either be a shift in judicial interpretation, a change in statutory language, or a viable alternative legal method for allowing enforcement of hybrid taxi laws if the U.S. is to realize the "greening" of one of our most important modes of transportation.

²¹¹ Green Taxis Act, H.R. 1243, 112th Cong. (2011).

²¹² *Id.*

²¹³ NYC.GOV, *supra* note 210.

