

SOUTER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 02–1343

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIA-
TION, PETITIONERS *v.* SOUTH COAST
AIR QUALITY MANAGEMENT
DISTRICT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[April 28, 2004]

JUSTICE SOUTER, dissenting.

The Court holds that preemption by the Clean Air Act, 77 Stat. 392, as amended, 42 U. S. C. §7401 *et seq.*, prohibits one of the most polluted regions in the United States¹ from requiring private fleet operators to buy clean engines that are readily available on the commercial market. I respectfully dissent and would hold that the South Coast Air Quality Management District Fleet Rules are not preempted by the Act.

I

So far as it concerns this case, §209(a) of the Act provides that “[n]o 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 [Title II of the Act].” 42

¹In its *amicus* brief, the United States notes that the Los Angeles South Coast Air Basin is the only region in the country that has been designated an ozone “‘extreme’ nonattainment” area as defined by the Act. Brief for United States as *Amicus Curiae* 7 (citing 40 CFR 81.305 (2004)).

U. S. C. §7543(a). The better reading of this provision rests on two interpretive principles the majority opinion does not address.

First, “[i]n all pre-emption cases, and particularly in those [where] Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996) (citation and internal quotation marks omitted); see also *Wisconsin Public Intervenor v. Mortier*, 501 U. S. 597, 605 (1991) (applying presumption against preemption to a local regulation). The pertinence of this presumption against federal preemption is clear enough from the terms of the Act itself: §101 states that “air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments.” 42 U. S. C. §7401(a)(3);² see *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440, 442 (1960) (“Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power”). The resulting presumption against displacing

²The original version of this provision specified that “the prevention and control of air pollution at its source is the primary responsibility of States and local governments.” §1(a)(3), 77 Stat. 393. It is irrelevant that the 1967 amendments to the Act (which separated the existing Act into separate titles) moved this finding to Title I rather than Title II (which regulates motor vehicle emissions). There is no doubt that §101 recognizes state primacy over efforts to control pollution from all sources. Indeed, §101 specifically notes that the “air pollution” to which it refers is “brought about by,” among other causes, “motor vehicles.” 42 U. S. C. §7401(a)(2).

SOUTER, J., dissenting

law enacted or authorized by a State applies both to the “question whether Congress intended any pre-emption at all” and to “questions concerning the *scope* of [§209(a)’s] intended invalidation of state law.” *Medtronic, supra*, at 485 (emphasis in original).

Second, legislative history should inform interpretive choice, and the legislative history of this preemption provision shows that Congress’s purpose in passing it was to stop States from imposing regulatory requirements that directly limited what manufacturers could sell. During the hearings leading up to the 1967 amendments, “[t]he auto industry . . . was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry.” S. Rep. No. 403, 90th Cong., 1st Sess., 32 (1967). Auto manufacturers sought to safeguard “[t]he ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls,” and to prevent “a chaotic situation from developing in interstate commerce in new motor vehicles.” H. R. Rep. No. 728, 90th Cong., 1st Sess., 20 (1967). Cf. Air Pollution Control, Hearings on S. 306 before a Special Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 89th Cong., 1st Sess., 91 (1965) (Sen. Muskie) (“Do you think a given manufacturer could produce automobiles meeting 50 standards?”). Congress was not responding to concerns about varying regional appetites for whatever vehicle models the manufacturers did produce; it was addressing the industry’s fear that States would bar manufacturers from selling engines that failed to meet specifications that might be different in each State.³

³In fact, Congress allowed California to adopt its own specification standards, 42 U. S. C. §7543(b) (§209(b) of the Act); see also S. Rep. No.

Section 209(a) can easily be read to give full effect to both principles. As amended in 1967, §202 of the Act authorized federal regulators to promulgate emissions standards for “any class or classes of new motor vehicles or new motor vehicle engines.” §202(a), 81 Stat. 499. The 1967 amendments in turn defined “new motor vehicle” as “a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser,” and a “new motor vehicle engine” as “an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser.” §212(3), 81 Stat. 503. Section 202 of the 1967 Act, in other words, is naturally understood as concerning itself with vehicles prior to sale and eligible to be sold. Section 203 further underscored this focus on what manufacturers could produce for sale: as incorporated in the 1967 amendments, §203 prohibited a variety of acts by manufacturers, but left vehicle purchasers and users entirely unregulated. 81 Stat. 499.

On this permissible reading of the 1967 amendments, §209(a) has no preemptive application to South Coast’s fleet purchase requirement. The National Government took over the direct regulation of manufacturers’ design specifications addressing tailpipe emissions, and disabled States (the California exception aside, see n. 3, *supra*) from engaging in the same project. The “standards” that §209(a) preempts, accordingly, are production mandates imposed directly on manufacturers as a condition of sale. Section 209(a) simply does not speak to regulations that govern a vehicle buyer’s choice between various commer-

403, 90th Cong., 1st Sess., 31–34 (1967), but only California was so indulged. Cf. 42 U. S. C. §7507 (§177 of the Act) (reiterating that States may not require the creation of “a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a ‘third vehicle’)”).

SOUTER, J., dissenting

cially available options.

This is not to say that every conceivable purchase restriction would be categorically free from preemption. A state law prohibiting any purchase by any buyer of any vehicle that failed to meet novel, state-specified emissions criteria would have the same effect as direct regulation of car manufacturers, and would be preempted by §209(a) as an “attempt to enforce [a] standard relating to the control of emissions from new motor vehicles.” 42 U. S. C. §7543(a). But that fantasy is of no concern here, owing to a third central point that the majority passes over: South Coast’s Fleet Rules require the purchase of cleaner engines only if cleaner engines are commercially available. *E.g.*, App. 69 (Fleet Rule 1196(e)(1)(C) (exempting fleets from rule if no complying engine “is commercially available from any manufacturer . . . or could be used in a specific application”)); see also App. 21, 30, 50, 55, 63 (Fleet Rules 1186.1(e), 1191(f)(8), 1192(e)(2), 1193(e)(3), and 1194(e)(2)). If no one is selling cleaner engines, fleet owners are free to buy any vehicles they desire. The manufacturers would, of course, understand that a market existed for cleaner engines, and if one auto maker began producing them, others might well be induced to do the same; but that would not matter under the Act, which was not adopted to exempt producers from market demand and free competition. So long as a purchase requirement is subject to a commercial availability proviso, there is no basis to condemn that kind of market-based limitation along with the state command-and-control regulation of production specifications that prompted the passage of §209.

In sum, I am reading “standard” in a practical way that keeps the Act’s preemption of standards in tune with Congress’s object in providing for preemption, which was to prevent the States from forcing manufacturers to produce engines with particular characteristics as a legal

condition of sale. The majority's approach eliminates this consideration of legislative purposes, as well as the presumption against preemption, by acting as though anything that could possibly be described as a standard must necessarily be a "standard" for the purposes of the Act: a standard is a standard is a standard.⁴ The majority reveals its misalliance with Gertrude Stein throughout its response to this dissent. See *ante*, at 9, 10, 11.

II

Reading the statute this way not only does a better job of honoring preemption principles consistently with congressional intent, but avoids some difficulties on the majority's contrary interpretation. To begin with, the Court's broad definition of an "attempt to enforce any standard relating to the control of emissions," *ante*, at 5–6, renders superfluous the second sentence of §209(a), which provides that "[n]o State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle." 42 U. S. C. §7543(a). At the very least, on the majority's view, it is hard to imagine any state inspection requirement going to the control of emissions from a new motor vehicle that would not be struck down anyway as an attempt to enforce an emissions standard.

Next, on the majority's broad interpretation of "standard," Congress would seem to have been careless in drafting a critical section of the Act. In the one clear instance of which we are aware in which the Act author-

⁴This same hypersimplification allows the majority to mischaracterize my narrower definition of "standard" as the illegitimate creation of a nontextual exception to §209(a)'s categorical preemption of standards. *Ante*, at 9.

SOUTER, J., dissenting

izes States to enact laws that would otherwise be preempted by §209, Congress expressly provided that the authorization is effective notwithstanding that preemption section. See 42 U. S. C. §7507 (authorizing States to adopt California production mandates “[n]otwithstanding section 7543(a) of this title”). The natural negative implication is that, if a statutory authorization does not include such a “notwithstanding” clause or something similar, its subject matter would not otherwise be preempted by §209(a). Given that, the majority’s interpretation of the scope of §209(a) is difficult to square with §246, which requires States to establish fleet purchasing requirements for “covered fleet operator[s]” in ozone and carbon monoxide “nonattainment areas” (that is, regions struggling with especially intractable pollution), 42 U. S. C. §7586. Section 246 thus requires States, in some cases, to establish precisely the kind of purchaser regulations (adopted here by a lower level governmental authority) that the majority claims have been preempted by §209(a). But §246 gives no indication that its subject matter would otherwise be preempted; there is certainly no “notwithstanding” clause. This silence suggests that Congress never thought §209(a) would have any preemptive effect on fleet purchasing requirements like the ones at issue.

Finally, the Court suggests that both voluntary incentive programs, *ante*, at 7–8, and internal state purchasing decisions, *ante*, at 9, may well be permissible on its reading of §209(a). These suggestions are important in avoiding apparent implausibility in the majority’s position; if a State were said to be barred even from deciding to run a cleaner fleet than the National Government required, it would take an airtight argument to convince anyone that Congress could have meant such a thing. But it is difficult, when actually applying the majority’s expansive sense of forbidden “standard,” to explain how the specification of emissions characteristics in a State’s internal

procurement guidelines could escape being considered an impermissible “adopt[ion of a] standard,” 42 U. S. C. §7543(a), even if the standard only guided local purchasing decisions. By the same token, it is not obvious how, without some legal sleight of hand, the majority can avoid preempting voluntary incentive programs aimed at the private sector; the benefit proffered by such schemes hinges on the recipient’s willingness to buy a vehicle or engine that complies with an emissions standard (*i.e.*, a vehicle or engine that, in the words of the majority, “must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions,” *ante*, at 6). Such a program clearly “adopt[s]” an emissions standard as the majority defines it. Cf. *ibid.* (cautioning respondents not to “confus[e] standards with the means of enforcing standards”). The Court should, then, admit to preemption of state programs that even petitioners concede are not barred by §209(a). See Reply Brief for Petitioners 7 (acknowledging that §209(a) does not preempt voluntary incentive programs). That is not a strong recommendation for the majority’s reading.

III

These objections to the Court’s interpretation are not, to be sure, dispositive, standing alone. They call attention to untidy details, and rightly understood legislation can be untidy: statutes can be unsystematic, redundant, and fuzzy about drawing lines. As a purely textual matter, both the majority’s reading and mine have strengths and weaknesses. The point is that the tiebreakers cut in favor of sustaining the South Coast Fleet Rules. My reading adheres more closely to the legislative history of §209(a). It takes proper account of the fact that the Fleet Rules with this commercial availability condition do not require

SOUTER, J., dissenting

manufacturers, even indirectly, to produce a new kind of engine. And, most importantly, my reading adheres to the well-established presumption against preemption.