Making Taxis Green: Hybrid Cab Programs and the Debate over Preemption in Environmental Regulation

J.D. Holden
MAKING TAXIS GREEN: HYBRID CAB PROGRAMS AND THE DEBATE OVER PREEMPTION IN ENVIRONMENTAL REGULATION

J.D. HOLDEN*

Abstract: In the past few years, many cities have attempted to mandate the use of hybrid taxicabs. The taxi industry, arguing that the Energy Policy and Conservation Act and the Clean Air Act preempt such mandates, has successfully opposed them. Mandating hybrid cab use, however, is but one important aspect of a larger push by states and local governments to enact progressive environmental legislation and policies with greater breadth than those of the federal government. An example is California’s battle to enact greenhouse gas emissions regulations and its conflict with the Environmental Protection Agency. Though New York City and Boston lost on preemption grounds, their attempts are important in the context of the battle over environmental federalism. In the long term, the Energy Policy and Conservation Act should be amended to allow for more progressive environmental regulations at the state and local level.

Introduction

Recently, several state and local governments have taken a more progressive approach to combating climate change and other environmental problems through regulations at the state and local level.\(^1\) California’s Assembly Bill 1493 (AB-1493), which focused on the problem of vehicle emissions of greenhouse gases, was one prominent initiative of this kind.\(^2\) However, there were many smaller and more localized

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2 See Kevin Gaynor & Mara Zimmerman, \textit{Federal Approaches to Climate Change: Federal Preemption of State Climate Change Laws}, SN062 A.L.I-A.B.A. 813, 821–29 (2008); Parenteau, \textit{supra} note 1, at 1466–72; Giovinazzo, \textit{supra} note 1, at 895–904; see also Kate Galbraith, Cali-
programs of importance, such as many cities’ efforts to facilitate the transition to hybrid taxicabs.  

Multiple cities developed programs to encourage the use of hybrid taxis on their streets: most focused on incentives, but some cities used regulation and legislation to require taxi owners to transition to hybrid cabs. Examples include Boston and New York City. Resistance to these initiatives was apparent, and a suit to stop New York City’s hybrid cab regulations filed by the taxi industry was one of the more noticeable examples of such resistance. The taxi industry’s resistance to New York City’s mandate-style hybrid cab regulations was, in the end, successful, as was the resistance to Boston’s mandate.

Opponents to state and local regulations have challenged them on similar preemption grounds. Opponents challenged California’s AB-1493 on the grounds that it was preempted by federal statute. AB-1493


*See Metro. Taxicab Bd. of Trade I, 2008 WL 4866021, at *15 (granting an injunction preventing New York City’s hybrid cab regulations from taking effect).


*See Gaynor & Zimmerman, supra note 2, at 827.

*See id. See generally Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (plaintiffs claimed preemption of AB-1493 under the EPICA and the CAA).
became part of a larger debate over the nature of environmental federalism and the future of local environmental initiatives to combat climate change and other environmental problems.\(^\text{10}\)

This Note examines the conflict over New York City’s hybrid cab regulations, what New York City can do to alter them to meet its goals, and how the conflict fits into the larger debate over preemption and environmental federalism and its effects on other cities. This Note will discuss New York City’s regulations and AB-1493 as representative of the more general conflict discussed above. Part I examines the structure of hybrid cab programs and the difference between an incentive structure and mandate structure, using Boston as an example.\(^\text{11}\) Part II examines New York City’s hybrid cab regulations and their defeat in litigation under the preemption doctrine.\(^\text{12}\) Part III explores the larger debate over environmental federalism and the preemption doctrine using AB-1493 as an example, and then discusses the fate of Boston’s hybrid cab mandate after the U.S. District Court for the Southern District of New York struck down New York City’s program.\(^\text{13}\) Part IV analyzes New York City’s options, and then explores why initiatives such as New York City’s are important and why they should prompt a change in thinking about federal preemption.\(^\text{14}\)

I. HYBRID CAB PROGRAMS AND THE LEAD UP TO NEW YORK

A. Boston’s Hybrid Cab Program

1. The Incentive Approach

The City of Boston created the CleanAir Cabs program to promote the adoption of hybrid cabs.\(^\text{15}\) The CleanAir Cabs program defined itself as a “partnership of government agencies, private businesses, and community members dedicated to reducing fuel costs and air pollution through the introduction of hybrid and alternative fuel vehicles to Bos-


\(^{11}\) See *infra* Part I.

\(^{12}\) See *infra* Part II.

\(^{13}\) See *infra* Part III.

\(^{14}\) See *infra* Part IV.

ton’s taxi industry.” The goal was to promote hybrid cabs as more efficient vehicles with lower fuel costs.

The CleanAir Cabs Program contained several incentives to encourage hybrid cab use. As part of the program, hybrid taxis received special privileges when lining up at Logan International Airport, which were designed to shorten the waiting time for cab drivers. Less time spent in the taxi queue meant that drivers could make “an additional two airport trips per twelve hour shift with an average fare of $25.” In addition, on April 23, 2007, Boston Mayor Thomas Menino announced a $25,000 grant “awarded to . . . increase participation in the CleanAir Cab program by offsetting extra costs associated with purchasing a new hybrid or alternative fuel vehicle.”

Despite the incentives, Boston did not obtain the results it desired and drivers raised objections based on the cost of transitioning to the more efficient vehicles. After eighteen months, only thirty-two of Boston’s 1825 cabs were hybrids; the city had hoped for at least 100. The main problem limiting adoption of hybrid cabs seems to have been the price of the vehicles themselves. The hybrids “cost nearly $30,000 after [they were] customized to meet taxi regulations.” Most drivers used “Ford Crown Victorias from police department surpluses that usually cost less than $10,000.”

The preference system at Logan Airport and tax credits were not enough to encourage widespread hybrid cab adoption, though both were a large part of Boston’s attempts to encourage hybrid cab use by convincing drivers that they would save on fuel costs and receive federal tax credits. The Director of the Licensing Division of the Boston Police Department, Marc Cohen, called the lack of adoption a “momentum issue,” and said that the conversion to hybrid cabs “seemed to be

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16 CleanAir CABS Brochure, supra note 3.
17 See id.
19 See id.
20 Massport Press Release, supra note 3.
21 Id.
22 See Bierman & Collette, supra note 18.
23 Id.
24 See id.
25 Id.
26 Id.
27 See id.
28 See CleanAir CABS Brochure, supra note 3.
picking up steam.” 29 Cohen’s key point, however, was that Boston wanted to go with a perks and incentives approach to get companies and drivers to use hybrid cabs rather than simply mandate their use. 30 At the same time, Boston still expected results—more hybrid cabs on the streets. 31

2. The Mandate Approach

The CleanAir Cabs program was not as effective as city officials hoped. 32 As a result, Boston changed its approach from offering incentives for switching to simply mandating a switch to hybrid cabs. 33 The mayor’s office announced the change on August 29, 2008. 34 In addition to a fare hike and other rule changes, the new rules required the entire cab fleet to convert to hybrid vehicles by 2015, with the owners responsible for the costs. 35 The press release stated that the hybrid vehicles would be “phased in as the current vehicles reached their mandatory retirement age of six years.” 36 Boston anticipated that 50% of the fleet would become hybrid within two years. 37

Reactions to Boston’s decision were not all positive, especially amongst cab drivers. 38 The negative reaction to the new mandate—similar to the negative reaction to the CleanAir Cabs program—was primarily due to the high costs of converting to hybrids. 39 Owners, both companies and independent drivers, also complained about the cost of maintaining hybrid cabs, as the batteries allegedly wear out every few

29 Bierman & Collette, supra note 18.
30 Id.
31 See id.
32 Compare CLEANAIR CABS BROCHURE, supra note 3 (illustrating Boston’s original approach), with Menino Press Release, supra note 4 (illustrating Boston’s switch to a mandate because of the original approach’s ineffectiveness).
33 See Menino Press Release, supra note 4.
34 Id.
35 See id.; Meghna Chakrabarti, WBUR, Hybrid Mandate for Hub Cabbies, (2008) http://www.wbur.org/2008/09/17/hybrid-mandate-for-hub-cabbies. Police Commissioner Ed Davis said that the “announcement underscores our commitment to ensuring that Boston residents, members of the business community and our many tourists are provided with safe, clean and efficient taxi service. The implementation and strict enforcement of these improvements will significantly enhance our local taxi service and provide a more customer-friendly experience.” Menino Press Release, supra note 4.
37 Id.
39 See id.
years, costing owners an estimated $5000 per replacement battery. As Dave Demerjian pointed out in his piece for ABC News, “[r]equiring the Boston cab fleet to go all-hybrid is a great idea, but not if [it is] going to financially wipe out the people who drive th[e] fleet.”

II. New York City’s Hybrid Cab Regulations—Metropolitan Taxicab Board of Trade v. City of New York

New York City’s hybrid cab initiative took a different approach than Boston’s, by starting with a mandate instead of incentives. Whereas Boston began with an incentive-based approach in the form of the CleanAir Cabs program, New York City’s Taxi and Limousine Commission (the “TLC”) promulgated rules creating a de facto mandate for the adoption of hybrid cabs within a specified period of time. The taxi industry subsequently challenged the regulations in Metropolitan Taxicab Board of Trade v. City of New York.

A. The Regulations: Genesis and Challenge

1. The TLC’s Regulations

The TLC has the authority to “regulate[] essentially all aspects of taxi operations and licensing.” As a result, Judge Crotty noted that “the TLC may set ‘[r]equirements of standards of safety, and design, comfort, convenience, noise and air pollution control and efficiency in the operation of vehicles and auxiliary equipment.’”

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41 Demerjian, supra note 38. This negative reaction led to the taxi industry successfully challenging Boston’s mandate in court. See infra Part III.D.


44 See id.

45 Id. The TLC was created in 1971 and is “governed by §§ 2300 et seq. of the New York City Charter, as well as by local laws passed by the New York City Council.” Id.

46 Id.
Using their broad authority to regulate the taxicab industry in New York City, the TLC enacted new rules that affected the minimum mileage-per-gallon requirements of new taxicabs in New York City. The new rules did not mandate hybrid cab adoption per se; however, Judge Crotty’s opinion in *Metropolitan Taxicab Board of Trade I* noted that this was its true effect: “While the . . . Rules [did] not state that the new taxis must have hybrid engines, the effect of the minimum mpg standard is that only cars with hybrid engines or clean diesel engines can meet the mileage standard requirement.”

“Taxis have a mandatory retirement of three to five years, so, as a result of the new rule, essentially all taxis in the city would be hybrids by 2012.” Additionally, “[m]ore than 90% of all taxis were Crown Victoria non-hybrid vehicles, which do not meet the mpg requirements under the . . . Rules.” The effect of the TLC’s regulations as a de facto mandate indicates they would force owners to upgrade the vast majority of the taxi fleet to more expensive vehicles.

2. The Parties and the Challenge

The conflict over mandating hybrid cab use was the central issue in *Metropolitan Taxicab Board of Trade I* and a large group of interested parties were plaintiffs in the case. “[A] full spectrum of the taxicab

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47 Id.; *see* Taxi & Limousine Comm’n, Taxicab Specifications, New York, N.Y., R.C.N.Y. tit. 35, ch. 3, § 3-03(c)(10)–(11) (2009). The regulations state that:

beginning October 1, 2008, no taxicab shall be hacked up unless the taxicab meets either the requirements of an accessible taxicab pursuant to section 3-03.2 of this chapter or both of the following: (i) a minimum city rating of twenty-five (25) miles per gallon as labeled pursuant to title 49, section 32908 of the United States Code and regulations promulgated pursuant thereto, and (ii) the vehicle specifications provided in section 3-03.1(c) of this chapter, whether or not the taxicab is a hybrid electric vehicle.

Taxi & Limousine Comm’n, Taxicab Specifications, New York, N.Y., R.C.N.Y. tit. 35, ch. 3, § 3-03(c)(10) (2009). The miles-per-gallon requirement is then increased for new vehicles after October 1, 2009, from twenty five miles-per-gallon to thirty miles-per-gallon. *Id.*, § 3-03(c)(11).


49 *Id.*

50 *Id.*

51 *See id.*

52 *See id.* at *1.*
industry, from owner, to driver, to end user” came together to challenge New York City’s hybrid cab regulations.53

As a result of their worries over the cost and scale of the conversion, plaintiffs filed their complaint seeking an injunction against the regulations on September 8, 2008, alleging that the new rules were expressly and impliedly preempted by clauses in two federal laws: the Energy Policy and Conservation Act of 1975 (EPCA)54 and the Federal Clean Air Act (CAA).55 To obtain their preliminary injunction, plaintiffs had to show that they were likely to suffer irreparable harm without the requested relief as well as likelihood of success in proving the regulations were preempted.56 In other words, plaintiffs had to show that the TLC’s rules were likely preempted under either the EPCA or the CAA in order to be granted an injunction preventing the TLC’s rules from taking effect.57

B. The Preemption Question in Metropolitan Taxicab Board of Trade I

1. The Preemption Doctrine

The preemption doctrine was the true problem for the new rules promulgated by the TLC.58 The bulk of the court’s opinion focused on “the words of the TLC’s regulation and analyze[d] whether the regulation, as written, [was] preempted by federal law.”59 As the court noted, questions of federal preemption begin with the Supremacy Clause of the United States Constitution which “‘invalidates state laws that interfere with, or are contrary to, federal law.’”60

The preemption doctrine arises out of the Supremacy Clause of the Constitution, which concerns conflicts between state and federal laws.61 “In applying this doctrine, courts must determine Congressional intent in enacting the federal law and whether a state law actually con-

53 Id. Among the plaintiffs were the Metropolitan Taxicab Board of Trade, an association made up of several New York fleets, as well as Midtown Operating Corp., a private cab garage, an independent contractor, and a frequent cab passenger. Id.
57 See id. at *7.
58 See id. at *15.
59 Id. at *7.
60 Id. (quoting Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712 (1985)).
61 Gaynor & Zimmerman, supra note 2, at 816; Giovinazzo, supra note 1, at 911.
flicts with a federal law, and if so, to what extent is there a conflict.”

There are three general situations that give rise to federal preemption: (1) express preemption, (2) implied preemption, and (3) conflict preemption.

At issue in Metropolitan Taxicab Board of Trade I was express preemption, which applies where “Congress expressly states, in the legislation itself, that federal law trumps state laws.” “[B]oth the CAA and the EPCA contain express preemption clauses.” Christopher Giovinazzo notes, however, that “as with any statutory language, preemption clauses are not always clear in their purpose or scope.”

One of Giovinazzo’s relevant points is that “the [Supreme] Court’s move away from the presumption against preemption supports a broader reading of the EPCA’s preemption clause.” Without the presumption against preemption, the preemption clauses of the EPCA and CAA can be interpreted to cover more than a strict textual reading might suggest. Though Giovinazzo discussed extending the EPCA’s preemption clause to California’s greenhouse gas emissions regulations, the same analysis is relevant to the plaintiff’s claim in Metropolitan Taxicab Board of Trade I: the CAA’s preemption clause can be extended to the TLC’s fuel economy regulations because they are related to emissions. Because of the similarities, Giovinazzo’s analysis is valuable when examining the court’s findings in Metropolitan Taxicab Board of Trade I regarding preemption of the TLC’s rules under the EPCA and CAA.

2. Preemption Under the EPCA

After a detailed analysis of the EPCA and a comparison to the TLC’s rules, the court in Metropolitan Taxicab Board of Trade I found the

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62 Gaynor & Zimmerman, supra note 2, at 816.
63 Giovinazzo, supra note 1, at 911.
64 Gaynor & Zimmerman, supra note 2, at 816.
65 Giovinazzo, supra note 1, at 911.
66 Christopher Giovinazzo is an associate with the law firm of Bondurant, Mixon & Elmore L.L.P. BMELaw.com, Christopher Giovinazzo, http://www.bmelaw.com/attorneys/Giovinazzo_Christopher.pdf (last visited Jan. 25, 2010). He graduated cum laude from Harvard Law School in 2004 and was Editor-in-Chief of the Harvard Environmental Affairs Law Review. Id.
67 Giovinazzo, supra note 1, at 915.
68 Id. at 918.
69 See id. at 918, 920.
70 See id. at 936–37; see also Metro. Taxicab Bd. of Trade I, No. 08 Civ. 7837 (PAC), 2008 WL 4866021 (S.D.N.Y. Oct. 31, 2008) (holding EPCA preempts the TLC regulations).
rules to be “most likely expressly preempted by the EPCA.” The court found the purpose of the EPCA to be “to improve motor vehicle efficiency and to ‘decrease dependence on foreign [oil] imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford.’” The court then went on to refute New York City’s arguments against preemption under the EPCA, and then discussed the likely lack of preemption by the CAA.

a. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie* and the Purpose Behind the EPCA

In its preemption analysis, the court relied heavily on *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie* in interpreting the EPCA. The EPCA has an express preemption clause:

> When an average fuel economy standard prescribed under this chapter . . . is in effect, a State or 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.

The court in *Green Mountain Chrysler* noted that the term “related to” was problematic. “Related to” could encompass any regulation or law passed by a state that even touches upon fuel economy; therefore, in examining the meaning of the clause, the court must look at the objectives of the statute.

The court examined the intent behind the EPCA and made two precedential holdings about it. First, the court noted that “EPCA’s objectives [were] to conserve energy.” The court stated that “Title V was enacted to improve automotive efficiency by setting fuel economy

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73 Id. at *8 (quoting Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin., 538 F.3d 1172, 1182 (9th Cir. 2008)).
74 See id. at *10–12; infra Part II.B.2.b.
75 See Metro. Taxicab Bd. of Trade I, 2008 WL 4866021, at *12–14; infra Part II.B.3.
78 See 508 F. Supp. 2d at 353.
79 See id. at 353–54.
80 See id.
81 Id.
standards.”

That said, “[a] state law that controlled or superseded a core EPCA function—to set fuel economy standards for automobiles—would appear to be preempted.” Second, the court noted that “Congress’s undoubted intent was to make the setting of fuel economy standards exclusively a federal concern.”

Both of these observations were relevant to the decision in Metropolitan Taxicab Board of Trade I. The court in Green Mountain Chrysler held that the EPCA clearly preempts state regulations that set miles-per-gallon requirements on the grounds that they are fuel economy standards and covered by the language of the preemption clause. This analysis from Green Mountain Chrysler was the main reason the court in Metropolitan Taxicab Board of Trade I found the TLC’s new fuel economy rules to be likely preempted under the EPCA. The court noted that “[a] fair reading of the . . . Rules lead[] to but one conclusion: the rules set standards that relate to an average number of miles that New York City taxicabs must travel per gallon of gasoline.”

b. New York City’s Arguments Against Preemption

New York City asserted two primary reasons why the EPCA might not preempt the TLC’s rules. First, New York City argued that the rules do not “relate to” fuel economy standards because they “do not interfere with the objectives of the EPCA.” Second, the city argued that the rules are exempted by an “own use” savings clause and the fact that New York was a market participant under the “market participant doctrine” as opposed to a market regulator. The court did not accept either argument.

The court relied on the Supreme Court’s decision in Engine Manufacturers Ass’n v. Coast Air Quality Management District in refuting the de-

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82 Id.
83 Id.
84 Green Mountain Chrysler, 508 F. Supp. 2d at 354.
86 See 508 F. Supp. 2d at 354.
88 Id. at *9.
89 See id. at *10.
90 Id.
fendants’ first argument. In that case, the Supreme Court rejected an argument that under the CAA the term “standard” must be defined narrowly to prevent preemption from being overbroad. Instead, the Supreme Court held that “if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress’s carefully calibrated regulatory scheme.” The court in Metropolitan Taxicab Board of Trade I noted the reasoning from Engine Manufacturers Ass’n before refuting the city’s claim that “federal jurisprudence [was] moving toward an interpretation of the term ‘related to’ in preemption cases as meaning ‘actually interfering with’ the relevant federal regulation.” That conclusion, in turn, led the court to conclude that the defendants’ argument that ‘related to’ means actually ‘affecting’ or ‘interfering’” was erroneous.

The court in Metropolitan Taxicab Board of Trade I also refuted New York City’s second argument against preemption: that the new fuel economy rules were exempted under an “own use” savings clause in the EPCA and that New York City was a market participant. New York City claimed both that taxis were an integral part of the public transit system, and also that through regulation, New York City was a market participant. The court rejected these arguments as “tortur[ing] both language and logic.”

The court referred to Building & Construction Trades Council v. Associated Builders & Contractors, Inc. for an analysis of the market participant doctrine and why it was not applicable to New York City in Metropolitan Taxicab Board of Trade I. In addition, the court in Metropolitan Taxicab Board of Trade I noted that, likewise, in Engine Manufacturers Ass’n, “the Ninth Circuit held that the market participant doctrine allowed

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94 See Engine Mfrs. Ass’n, 541 U.S. at 254.
95 Id. at 255; Metro. Taxicab Bd. of Trade I, 2008 WL 4866021, at *10.
98 See id. The savings clause is found in § 32919(c) and states that “[a] State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use.” Energy Policy and Conservation Act of 1975, 49 U.S.C. § 32919(c) (2006).
100 Id.
state and local government entities ‘to use their own money to acquire or use vehicles that exceed the federal standards.’”

The court in Metropolitan Taxicab Board of Trade I decided that the market participant doctrine did not apply to New York City because of the nature of the city’s involvement in the taxi industry. The market participant doctrine applies to a state or agency acting directly in the market, which includes setting regulations for its own vehicles. However, a state is not a market participant where it is acting as a market regulator of an industry. The court noted that “[t]he TLC’s rules applied to all privately owned, licensed yellow taxicabs in New York City, while the fleet restrictions that the Ninth Circuit allowed in Engine Manufacturers Ass’n applied only to vehicles procured by state and local government entities for their own use.” Because the city Charter itself created the TLC as a market regulator, the court in Metropolitan Taxicab Board of Trade I also did not accept the argument that the city’s “role as gatekeeper into the taxicab business somehow [made] the TLC a market participant.” The court referred to the New York City Charter, which established the TLC, to show that the charter literally makes the TLC a regulator and not a participant.

Finally, the court in Metropolitan Taxicab Board of Trade I rejected New York City’s “own use” argument for similar reasons, noting that “[t]he rules regulating private taxicab acquisition and use [were] materially and substantially different than the city’s conduct when it [bought] the tens of thousands of police cars or other vehicles for the wide variety of fleets that the city owns, operates, and maintains.” When the city buys vehicles for its own use, it takes title to them and pays for them. In contrast, while the court notes that taxis are part of

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102 Metro. Taxicab Bd. of Trade I, 2008 WL 4866021, at *10 (quoting Engine Mfrs. Ass’n v. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1043 (9th Cir. 2007)).
103 See id. at *10–11.
108 See Metro. Taxicab Bd. of Trade I, 2008 WL 4866021, at *11. Section 2303(a) of the Charter states: “[t]he jurisdiction, powers and duties of the commission shall include the regulation and supervision of the business and industry of transportation of persons by licensed vehicles for hire in the city, pursuant to the provisions of this chapter.” N.Y.C. CHARTER, § 2303(a) (2004).
110 Id.
the public transit system, it makes clear that they are intended for private ownership and are not the city’s property.\textsuperscript{111}

The court found that the new TLC rules effectively mandating hybrid cab use in NYC were likely to be expressly preempted under Section 32919(a) of the EPCA, declaring that the “Defendants’ counter-arguments . . . [were] unconvincing. . . . [And] plaintiffs [had] shown a likelihood of success on the merits.”\textsuperscript{112}

3. Preemption Under the CAA

The plaintiffs in \textit{Metropolitan Taxicab Board of Trade I} also made the argument that the CAA preempted TLC’s new miles-per-gallon rules for New York City taxicabs.\textsuperscript{113} The preemption provision itself reads as follows:

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 . . . . 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 . . . or registration of such motor vehicle, motor vehicle engine, or equipment.\textsuperscript{114}

The preemption clause would not seem to apply to the TLC regulations because they only regulated fuel economy and not emissions.\textsuperscript{115} However, the court noted that the plaintiffs argued the “Rules—which govern fuel economy—[were] a de facto regulation of emissions and that the purpose [was] to regulate emissions.”\textsuperscript{116} Phrasing the argument that way made the issue one of “whether plaintiffs ha[d] a likelihood of success in demonstrating that TLC regulations imposing fuel economy standards [were] preempted by the CAA when the regulations at issue do not mention or target emissions.”\textsuperscript{117} The court ruled that the plaintiffs did not have a likelihood of success and that there was likely no

\textsuperscript{111} Id.
\textsuperscript{112} See id. at *12.
\textsuperscript{113} See id. at *12–14.
\textsuperscript{114} Id. at *12 (quoting 42 U.S.C. § 7543(a) (2006)).
\textsuperscript{116} Metro. Taxicab Bd. of Trade I, 2008 WL 4866021, at *13.
\textsuperscript{117} Id.
chance of preemption under the CAA.\footnote{See id. at *14.} The court quickly acknowledged that “[a] state or municipal law that clearly targets emissions in new vehicles is generally preempted under the CAA.”\footnote{Id. at *13.} The court noted two cases that dealt with an issue very similar to the plaintiffs’ assertion of preemption under the CAA: \textit{Green Mountain Chrysler} and \textit{Central Valley Chrysler-Jeep, Inc. v. Goldstene.}\footnote{Id. at *13; see \textit{Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151, 1175 (E.D. Cal. 2007); Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 344, 352-55 (D. Vt. 2007).}}

\textit{Green Mountain Chrysler} dealt with the possibility that regulation of greenhouse gas emissions from vehicles under a state’s regulation based on the CAA would be preempted by the EPCA.\footnote{See \textit{Green Mountain Chrysler}, 508 F. Supp. 2d at 343–56; \textit{Metro. Taxicab Bd. of Trade I, 2008 WL 4866021, at *13.}} In other words, there might be an actual conflict between the EPCA and the CAA where preemption is concerned, due to overlap.\footnote{See \textit{Metro. Taxicab Bd. of Trade I, 2008 WL 4866021, at *13.}} In that case, the court stated that “[t]he legislative history of EPCA and the CAA, and the agencies’ practices, demonstrate[d] that there [was] no inherent conflict between the mandate of the CAA to regulate air pollution and the mandate of EPCA to regulate fuel economy.”\footnote{\textit{Green Mountain Chrysler}, 508 F. Supp. 2d at 356.}

The court in \textit{Metropolitan Taxicab Board of Trade I} noted the finding in \textit{Green Mountain Chrysler} of no inherent conflict due to the fact there was no evidence that the “emissions rule was a \textit{de facto} fuel economy standard because the evidence in that case showed that ‘compliance with the regulation [was] not achieved solely by improving a fleet’s fuel economy.’”\footnote{\textit{Id.}; \textit{see Cent. Valley Chrysler-Jeep, Inc.}} The court also noted that in \textit{Central Valley Chrysler-Jeep, Inc.}, the EPCA preempted “only those state regulations that [were] explicitly aimed at the establishment of fuel economy standards, or that [were] the \textit{de facto} equivalent of mileage regulation . . . .”\footnote{Id. (quoting \textit{Cent. Valley Chrysler-Jeep, Inc.}, 529 F. Supp. 2d at 1175).}

Both \textit{Green Mountain Chrysler} and \textit{Central Valley Chrysler-Jeep, Inc.} dealt with the possibility of EPCA preempting emissions regulations because they related to fuel economy,\footnote{See \textit{Cent. Valley Chrysler-Jeep, Inc.}, 529 F. Supp. 2d at 1165–79; \textit{Green Mountain Chrysler Plymouth Dodge}, 508 F. Supp. 2d at 343–58.} but the court in \textit{Metropolitan Taxicab Board of Trade I} applied these two cases to a different set of
facts. Plaintiff’s argument here stated that the TLC’s regulations governing fuel-economy standards were preempted under the CAA because they related to emissions. “[B]oth Green Mountain and Central Valley make clear that the preemption provisions of the EPCA and the CAA relate specifically to their defined categories—fuel economy and emission regulation, respectively—and while they may overlap, they do not conflict.” Given this lack of inherent conflict between the EPCA and CAA, the court found it unlikely that the TLC’s rules were preempted under the CAA because they did not relate to the control of emissions. The court relied on New York City’s stated purpose for the regulations in reaching this conclusion.

Even without finding a likelihood of preemption under the CAA, the court’s finding of a likelihood of preemption under the EPCA satisfied the likelihood of success on the merits standard, and the court awarded plaintiffs the preliminary injunction to prevent the TLC’s regulations from going into effect. The end result derailed New York City’s attempt to force the city’s taxicab industry to transition to hybrid cabs.

C. New York City’s Response: A Switch to Incentives and a Push Against the EPCA

1. New York City Chooses Incentives

As a result of the decision in Metropolitan Taxicab Board of Trade I, New York City changed its tactics to an incentive-based approach to get its taxi fleets to use hybrid vehicles. Boston tried this approach already, and it failed to accomplish the city’s goals of speeding up the adoption of hybrid cabs. In a press release on November 14, 2008, New York City announced it would not appeal the decision in Metropolitan Taxicab Board of Trade I, 2008 WL 4866021, at *14. See id. at *1, *15. See William Neuman & Sewell Chan, Judge Kills Mayor’s Try at Greening Taxi Fleets, N.Y. Times, Nov. 1, 2008, at A17.

tan Taxicab Board of Trade I. Instead, Mayor Bloomberg “announced a series of initiatives to increase the use of fuel efficient and environmentally friendly taxicabs, through new financial incentives and legislative incentives.”

New York City thinks

[t]he incentive program will allow fleet owners to increase the lease cap fee charged to drivers in fuel efficient vehicles by $3 per shift, which will offset the increased cost of purchasing a fuel efficient vehicle. The driver, while paying the increased lease cap fee, will still see significant savings due to the reduced fuel costs, which he or she pays. Taxicab drivers in fuel efficient vehicles achieve an average fuel savings of at least $15 per shift, which adds up to about $5,000 a year.

In addition, to “further incentivize the use of fuel efficient taxicabs, the TLC [would] propose to decrease the lease cap fee an owner can charge a driver by $12 per shift if the vehicle is a Crown Victoria or another non-fuel efficient vehicle, costing fleet owners approximately $8,500 per year, per vehicle.”

2. The Push to Alter the EPCA

Several politicians expressed frustration with the decision and status of the law, and suggested other solutions besides a change in the regulations. Mayor Bloomberg called the law “archaic,” claiming that “we hit a speed bump in our efforts to turn New York City’s yellow cabs green[,] . . . preventing us from reducing greenhouse gases and improving air quality.” Meanwhile, Congressman Jerrold Nadler stated that

[t]he recent federal court decision to block the greening of New York City’s taxis [was] not in keeping with the original spirit of federal environmental legislation. . . . Fuel efficient taxis don’t simply represent a pie-in-the-sky futuristic luxury
for New Yorkers but a present-day necessity which will produce a meaningful reduction in our city’s carbon emissions.\textsuperscript{142}

In addition, Richard Kassel of the Natural Resources Defense Council argued that “[it was] time for Washington to update its rules so that the city’s hybrid taxi program [could] move forward.”\textsuperscript{143} Because of the frustration, the city will also pursue a campaign to amend the EPCA, spearheaded by Congressman Nadler.\textsuperscript{144}

III. NEW YORK CITY’S PROGRAM IN THE LARGER CONTEXT OF THE DEBATE OVER ENVIRONMENTAL FEDERALISM AND REPERCUSSIONS FOR BOSTON

A. STATE AND LOCAL LEADERSHIP IN INNOVATIVE ENVIRONMENTAL POLICY

The decision in Metropolitan Taxicab Board of Trade I and New York City’s response are part of a larger debate over who should take the initiative in regulation of environmental concerns such as fuel economy and greenhouse gas (GHG) emissions: the federal government or state and local governments.\textsuperscript{145} The need for preemption and federal regulation of environmental concerns is often expressed as an argument that “absent national standards, states will engage in a ‘race to the bottom.’”\textsuperscript{146} However, Giovinazzo argues that since the 1990s, “state and local governments, not Congress and the President, have led the nation in innovative environmental policy.”\textsuperscript{147} Giovinazzo and others think that the increasing numbers of state and local government initiatives are the result of “glaring inaction at the federal level.”\textsuperscript{148} Giovinazzo notes that “[s]ince vehicular . . . emissions are directly related to fuel economy, mobile GHGs are particularly intractable so long as fuel economy remains on the decline.”\textsuperscript{149} Giovinazzo examines several state and local government initiatives in the area of GHG regulation, and argues that willingness to deal with the issues of fuel economy and

\begin{footnotes}
\item[142] Id.
\item[143] Id.
\item[144] Id.
\item[145] See generally Adelman & Engel, \textit{supra} note 1 (proposing a system of adaptive federalism to facilitate state and local regulation); Gaynor & Zimmerman, \textit{supra} note 2 (discussing federal preemption of state climate change laws); Parenteau, \textit{supra} note 1 (discussing state vs. federal climate change initiatives).
\item[146] Giovinazzo, \textit{supra} note 1, at 907.
\item[147] Id.
\item[148] Id.; see Parenteau, \textit{supra} note 1, at 1455.
\item[149] Giovinazzo, \textit{supra} note 1, at 908–09.
\end{footnotes}
GHG emissions in the face of inaction by the federal government results in preemption issues such as those in *Metropolitan Taxicab Board of Trade I*.150

**B. California’s Attempt to Control Vehicle GHG Emissions: AB-1493**

The conflict over New York City’s hybrid cab regulations was one of the more recent and one of the more high profile examples of pre-emption arising in the context of state and local regulation of fuel economy and emissions issues, but there are several others.151 Another example was California’s attempt to regulate GHG emissions through Assembly Bill 1493 (AB-1493).152

Whereas *Metropolitan Taxicab Board of Trade I* dealt with federal pre-emption of local miles-per-gallon rules, California’s AB-1493 attempted to control tailpipe GHG emissions through motor vehicle regulations, leading to some of the same preemption issues argued in *Metropolitan Taxicab Board of Trade I*.153 In fact, the court in *Metropolitan Taxicab Board of Trade I* discussed in detail the two major cases relating to AB-1493: *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie* and *Central Valley Chrysler-Jeep, Inc. v. Goldstene*.154

AB-1493, passed in 2002, “aim[ed] to reduce GHG emissions from the tailpipes of passenger cars and light-duty trucks by 30% by 2016, beginning in the model year car 2009.”155 The California Air Resources Board (CARB) adopted the regulations in September of 2004.156 By 2007, sixteen other states had either taken steps to implement California’s regulations or “indicated an attempt to do the same.”157 California is the only state allowed to set stricter emissions standards than the federal government under the CAA, but other states are allowed to adopt California’s standards once the EPA has approved them.158

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153 See Gaynor & Zimmerman, *supra* note 2, at 821–22; *supra* Part II.B.


156 Id.

157 Id.

1. Challenges to AB-1493 in Vermont and California

Green Mountain Chrysler and Central Valley Chrysler-Jeep, Inc. were both the result of CAA and EPCA preemption challenges to implementations of California’s regulations. Green Mountain Chrysler arose when automakers and dealers challenged the implementation of California’s regulations in Vermont. In challenging the regulations, opponents asserted that the regulations were preempted not only by the CAA, but by the EPCA even though the laws regulated emissions and not fuel economy directly. The same issues arose again when opponents brought similar challenges in California. The decision in Central Valley Chrysler-Jeep, Inc. was “handed down . . . two months after the decision in Vermont.”

Both Green Mountain Chrysler and Central Valley Chrysler-Jeep, Inc., resulted in favorable decisions for states following California’s lead in non-federal regulation of vehicle economy and emissions. However, the issue was originally unresolved because California—and the states attempting to adopt its standards—had to wait on approval from the EPA. This need for EPA approval was due to the fact that “under the Clean Air Act, which generally preempts an individual state’s regulation of motor vehicle emissions, California [was] required to seek a waiver from the EPA to set standards stricter than national emissions levels.” EPA’s denial of California’s waiver request on December 19, 2007 originally stalled both California’s plan and its adoption by other states. However, President Obama directed the EPA to reconsider the waiver, which was rejected at the end of the previous administration. On July 30, 2009, after reconsideration of California’s request, EPA announced it was granting California’s waiver, allowing the state to move forward.

159 See Parenteau, supra note 1, at 1468.
160 See Gaynor & Zimmerman, supra note 2, at 823–27.
161 See id.
162 See id. at 827.
163 Id.
164 See id. at 828.
165 Id.
166 Gaynor & Zimmerman, supra note 2, at 828.
167 Id.
C. Context: The Future of Environmental Preemption Issues

California’s AB-1493 and the resulting litigation are relevant to the decision in Metropolitan Taxicab Board of Trade I for two reasons. First, they provide much of the precedent used in the decision’s preemption analysis. Second, they help put Metropolitan Taxicab Board of Trade I and hybrid cab programs in the context of the greater debate over who should take the lead in environmental regulation—the states and local governments or the federal government.

Several authors have analyzed AB-1493 in light of its relevance to environmental federalism. Gaynor and Zimmerman believe that existing preemption issues are likely to become more noticeable in the future. They argue that “[w]ith so many state climate change programs already in existence, any future federal climate change legislation will most likely cause preemption issues.” While they are primarily concerned about programs like AB-1493, the court made clear in Metropolitan Taxicab Board of Trade I that the same preemption issues that apply to attempts to control GHG emissions also apply to attempts to set fuel-economy standards.

Parenteau lauds attempts by states and local governments to be more progressive than the federal government, but thinks that the federal government will have to take final responsibility. In his analysis, plans such as California’s and New York City’s are good ideas, but they are not enough.

Giovinazzo argues that the preemption doctrine should be clarified and adapted in such a way that makes cases like California’s possible. Giovinazzo argues for a very loose interpretation of the EPCA regarding AB-1493 because congressional intent with regard to the scope of preemption is unclear. Giovinazzo feels that preemption

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171 See Adelman & Engel, supra note 1, at 1846–49; Parenteau, supra note 1, at 1466–69; Giovinazzo, supra note 1, at 907–09.
172 See Adelman & Engel, supra note 1, at 1846–49; Parenteau, supra note 1, at 1466–69; Giovinazzo, supra note 1, at 907–09.
174 Id. at 830.
176 See Parenteau, supra note 1, at 1455, 1474.
177 See generally id. (discussing the importance of local initiatives but noting the need for strong federal action).
178 See Giovinazzo, supra note 1, at 952–54.
179 See id. at 953.
should be constrained when “the purpose behind preemption would be poorly served, and where the history of state innovation is both successful and important.” Thus, he sympathizes with state and local attempts to handle pressing environmental issues progressively.

David E. Adelman and Kirsten H. Engel decry what they see as the rising tide of preemptive federal environmental legislation. They support the idea of a dynamic, interwoven system of federal and state environmental jurisdiction. Specifically, they favor an “adaptive model . . . premised on the parallel development of environmental policies at multiple levels of government.” Such a model would allow for diversity in regulation based on the interests of individual states, such as California, and individual local governments, such as New York City. The goal of such a model is to limit the ability of federal dominance to crush local diversity in policy and innovation. Adelman and Engel make the point that “[t]he single most important means of fostering adaptive federalism is restricting federal regulatory preemption.”

D. The Failure of Boston’s Mandate Approach and Further Problems for New York City

New York City was not the only metropolitan area to have its hybrid cab mandate struck down based on preemption under the EPCA; Boston faced a similar fate. As discussed previously, Boston adopted a mandate approach to transition cabs over to hybrids after the city’s incentive-based approach failed to meet expectations. Boston’s new mandate required vehicles put into service as a taxi after August 29, 2008 to be a new Clean Taxi vehicle. The mandate defined Clean Taxi as coming from a list of approved vehicles, which contained only current model year hybrid vehicles.

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180 See id.
181 See id. at 952–54.
182 See Adelman & Engel, supra note 1, at 1849–50.
183 See id. at 1796–98.
184 Id. at 1849.
185 See id. at 1822–23.
186 Id. at 1832.
187 Id. at 1833.
188 See Saltzman, supra note 7.
189 See supra Part I.A.2.
191 Id.
Subsequently, cab owners and the Boston Taxi Owners Association filed suit to prevent the enforcement of the hybrid cab mandate. U.S. District Judge William G. Young granted a request for a temporary injunction to halt implementation of the plan after Boston declined to do so voluntarily.\(^{192}\)

On August 14, 2009, Judge Young ruled that Boston’s hybrid cab mandate, contained in Boston Police Department Rule 403, was expressly preempted by the EPCA, and he permanently enjoined Boston from enforcing it.\(^{193}\) In deciding the case, Judge Young relied heavily on a discussion of Metropolitan Taxicab Board of Trade I.\(^{194}\) He discussed that decision’s reliance on Engine Manufacturer’s Ass’n and noted the problem of many cities following New York’s example, including the creation of an unwanted aggregate effect.\(^{195}\) Judge Young clearly indicated that he found Metropolitan Taxicab Board of Trade I “persuasive and well-reasoned.”\(^{196}\)

Judge Young also relied on a second New York case challenging the city of New York’s regulatory response to Metropolitan Taxicab Board of Trade I.\(^{197}\) In the wake of its loss, New York City “pursued an alternate strategy: it promulgated a second set of regulations promoting the purchase of hybrid taxis by reducing the rates at which taxicab owners could lease non-hybrid vehicles to drivers.”\(^{198}\) Essentially, under New York City’s new incentives approach, if an owner purchase[d] a taxicab with a hybrid or clean-diesel engine . . . the rate at which the vehicle [could] be leased to a driver for a 12-hour shift [was] increased by $3. By contrast, if an owner lease[d] out a non-hybrid, non-wheelchair accessible vehicle (i.e., a Crown Victoria), the maximum lease rate an owner may charge a driver [was] reduced by $4 immediately . . . .\(^{199}\)

Metropolitan Taxicab Board of Trade II concerned the plaintiffs’ claims that these new regulations were in fact a de facto mandate on the plain-


\(^{194}\) See id.

\(^{195}\) See id. at *3.

\(^{196}\) See id. at *4.

\(^{197}\) See id.

\(^{198}\) Id.

tiffs to purchase hybrid cabs, just like the previous regulations based on fuel economy. The court agreed. The court also held that the plaintiffs showed a likelihood of success in demonstrating that the EPCA preempted the new incentives. The court noted that “[i]n this case, while it is true that the Lease Cap Rules do not require a specific mpg rating, the effect of the rules is to force taxicab owners to meet an mpg threshold determined by the mileage rating of the TLC’s approved hybrid or clean diesel vehicles.” Because of this, the court held that the rules related to fuel economy even though they were not mpg specific like the previous mandate: “The 25/30 Rules specifically referred to mpg standards, but creative drafting and the absence of specific reference to mileage [did] not make the effect—or the purpose—of the Lease Cab Rules any different than the prior preempted regulations.” Therefore, the court held that the rules were “related to” fuel economy standards within the meaning of the EPCA and were likely preempted.

Metropolitan Taxicab Board of Trade I and Metropolitan Taxicab Board of Trade II were not the only authorities that Judge Young relied on in his decision regarding Boston’s hybrid cab mandate. He also considered an article in the Harvard Law Review on Metropolitan Taxicab Board of Trade I, that agreed with Judge Crotty’s opinion that “related to” does not require “actual interference with” to be correct. Because of this, Boston’s hybrid cab mandate ended in the same manner as did New York’s, and Judge Young’s decision built upon Judge Crotty’s two decisions from both New York cases. However, it is worth noting that Judge Young actually cited Adelman and Engel’s critique of the sweeping expanse of federal preemption; however, despite

200 See id. at *21.
201 See id.
202 See id.
203 See id. at *18.
204 Id.
this statement of sympathy, he felt that “in this case, it is a local government that has overstepped its bounds.”

IV. MOVING FORWARD: NEW YORK CITY’S HYBRID CAB PROGRAM AND PROGRESSIVE LOCAL ENVIRONMENTAL REGULATION IN THE WAKE OF THE METROPOLITAN TAXICAB BOARD OF TRADE CASES

Hybrid cab programs appear to be very important to the metropolitan areas that have attempted to implement them. The frustration of New York City’s officials with the decision in Metropolitan Taxicab Board of Trade I is both palpable and understandable because there are benefits tied to New York and other cities’ attempts to mandate hybrid cabs. These benefits include reduced fuel costs and more efficient vehicles. In addition to the environmental benefits, regulations like New York City’s serve a similar purpose to those concerning GHG emissions in California, and are an example of state and local governments reacting to what they consider to be inadequate federal law.

As a result of the decision, New York City focused on an incentive-based plan instead, as well as a campaign to amend the EPCA, but perhaps a stronger statement is needed. This is especially true given that the district court rejected the disincentives in New York City’s new regulations enacted after Metropolitan Taxicab Board of Trade I. New York City should (1) take into account problems with other incentive plans and examine other options in structuring its hybrid cab program in order to identify the most effective method that will not run afoul of the EPCA in its current form; and (2) push harder to have the EPCA amended because changing it is an important element in the context of environmental federalism.

A. New York’s Response to the Decision: Why Incentives Are Not Enough

New York City decided to adopt an incentives approach to encourage hybrid cab use in the wake of Metropolitan Taxicab Board of Trade I,

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208 See Ophir, 2009 WL 2606341, at *1; Adelman & Engel, supra note 1, at 1796.
209 See supra Part II.C.2.
210 See supra Part II.C.2.
211 See supra Part I.A.
212 See supra Parts I.A–II.A.1, III.A–B.
213 See supra Part II.C.
214 See Metro. Taxicab Bd. of Trade II, No. 08 Civ. 7837 (PAC), 2008 WL 4866021, at *21 (S.D.N.Y. Oct. 31, 2008); supra Part III.D.
215 See infra Part IV.A–B.
216 See infra Part IV.B.3.
but there are problems with this approach and it is not likely to encourage the widespread adoption of hybrid cabs, especially given the failure of the first incentive/disincentive structure adopted after the mandate was struck down.\textsuperscript{217} For one, Boston encountered problems with a similar approach.\textsuperscript{218} Boston tried the incentives approach with its CleanAir Cabs program and the program was unsuccessful.\textsuperscript{219} Boston’s series of grants to offset costs and special privileges at Logan Airport were designed to induce owners to replace Crown Victorias with hybrid vehicles by reducing the costs of the transition to the cleaner vehicles.\textsuperscript{220} After not seeing the results they wanted, Boston decided to simply force the change.\textsuperscript{221}

It is possible that New York City is not going to succeed in its goals by using an incentive-based approach, given Boston’s disappointing experience with an incentive-based program.\textsuperscript{222} New York City’s program of incentives to get owners to switch voluntarily is slightly different from Boston’s, in that it focuses more on the owners of cabs and less on the drivers.\textsuperscript{223}

The rhetoric of the Metropolitan Taxicab Board of Trade suggests that New York City’s incentives approach will not be effective.\textsuperscript{224} The Metropolitan Taxicab Board of Trade does not like New York City’s new incentives and disincentives plan.\textsuperscript{225} In addition to claiming that hybrid vehicles have not been sufficiently time-tested to show that they are viable for use as cabs, the board “dismissed the new financial incentives as an ‘end run’” around the ruling in \textit{Metropolitan Taxicab Board of Trade I}.\textsuperscript{226} Ron Sherman, the Metropolitan Taxicab Board of Trade’s president, claimed that the “attempt to buy off taxi operators and to use backdoor methods to force safe, proven commercial vehicles off the road [was] wrong and highly challengeable.”\textsuperscript{227}

\begin{footnotes}
\item[217] See supra Parts II.C, III.D.
\item[218] See supra Part I.A.
\item[219] See supra Part I.A.1.
\item[220] See supra Part I.A.1.
\item[221] See supra Part I.A.2.
\item[222] See supra Part I.A.
\item[223] See supra Parts I.A, II.C.1.
\item[225] Id.
\item[226] Id.
\item[227] Id. This dislike resulted in the legal challenge to the new incentives structure, as the Metropolitan Taxicab Board of Trade again used the EPCA to strike down what it considered a still-unacceptable mandate. See \textit{Metro. Taxicab Bd. of Trade II}, No. 08 Civ. 7837 (PAC), 2008 WL 4866021, at *1 (S.D.N.Y. Oct. 31, 2008); supra Part III.D.
\end{footnotes}
If New York City is serious about an incentive-based approach to getting hybrid cabs on the streets, then it should consider more comprehensive options in order to overcome the taxi industry’s reluctance. Rather than crafting a program so strict it is a de facto mandate, New York City could cover more of the cost of the switch by providing grants, which is an idea Boston tried. New York City could direct those grants towards reducing the cost associated with outfitting new hybrids for use as cabs. More comprehensive incentives would help overcome the resistance of cab owners who are the parties that must ultimately be convinced if New York City’s plan is to be successful. The point is that since Boston’s approach was not a success, and neither was New York City’s first attempt after Metropolitan Taxicab Board of Trade I, New York City must go farther to convince owners to switch by using incentives, which may not be the best option.

B. Away from Incentives: Looking at Other Options

1. The Possibility of Appeal

New York City has other options that may be better than an incentive-based approach. Appealing the case was a possibility, but New York City decided against this course of action. The reason for this is sound: the court’s reasoning in Metropolitan Taxicab Board of Trade I regarding preemption under the EPCA came from the Supreme Court’s decision in Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie. In Green Mountain Chrysler, the Supreme Court clearly stated that a state law or regulation superseding a core EPCA function—setting fuel economy standards—is most likely preempted. The Court also held that regulations that set miles-per-gallon requirements would be preempted under the EPCA because they are fuel economy standards and covered by the language of the preemption clause. Given the clarity

228 See infra Part IV.B.
229 See supra Part I.A.1.
230 See supra Part I.A.1.
231 See supra Parts II.C, IV.A.
232 See supra Part I.A.
233 See supra Part II.C.1.
234 See supra Part II.B.2.
235 See supra Part II.B.2.a.
236 See supra Part II.B.2.a.
of the Supreme Court’s analysis, an appeal would not survive unless the Supreme Court changes its stance on preemption under the EPCA.\(^\text{239}\)

The failure of Boston’s hybrid cab mandate and the failure of New York City’s subsequent regulations also indicate that appeal would not have been the best option, as Judge Young adopted the reasoning of *Metropolitan Taxicab Board of Trade I* in *Ophir*, reinforcing its reasoning.\(^\text{240}\) Both *Ophir* and *Metropolitan Taxicab Board of Trade II* seem to indicate that any attempt to mandate hybrid cab use will be unsuccessful, and an appeal on New York’s part would probably have failed.\(^\text{241}\)

2. Restructuring the TLC Regulations

New York City could also try to restructure its regulations to mandate hybrid cab use without running afoul of the preemption clauses of the CAA and the EPCA.\(^\text{242}\) The decisions in *Ophir* and *Metropolitan Taxicab Board of Trade II*, however, indicate that this might be impossible.\(^\text{243}\) Boston’s mandate did not mention miles-per-gallon requirements at all, and yet was found likely to be preempted.\(^\text{244}\) Even New York City’s new incentive approach, which they chose instead of appealing, was struck down as likely preempted and a de facto mandate in *Metropolitan Taxicab Board of Trade II*.\(^\text{245}\) Given the decision in *Metropolitan Taxicab Board of Trade I*, and the subsequent cases, Boston and New York City cannot word their regulations by directly setting miles-per-gallon requirements.\(^\text{246}\) Any regulations that set miles-per-gallon requirements are clearly preempted by the EPCA, because they are fuel economy standards and covered by the language of its preemption clause.\(^\text{247}\) New York City and Boston have already attempted this and failed.\(^\text{248}\)

New York City could also reword a mandate to control vehicle emissions for cabs rather than fuel economy standards, but this is likely to result in a preemption challenge under the CAA of the kind raised against AB-1493.\(^\text{249}\) As opposed to the form of the regulation in TLC

\(^{239}\) See *supra* Part II.B.2–3.

\(^{240}\) See *supra* Part III.D.

\(^{241}\) See *supra* Part III.D.


\(^{243}\) See *supra* Part III.D.

\(^{244}\) See *supra* Part III.D.

\(^{245}\) See *supra* Part III.D.

\(^{246}\) See *supra* Part II.B.2.

\(^{247}\) See *supra* Part II.B.2.

\(^{248}\) See *supra* Parts II, III.D.

\(^{249}\) See *supra* Part III.B.1.
Rule § 3-03(c)(10)–(11), the regulation could require a lower level of GHG emissions or other gas emissions in such a way as to mandate a switch to hybrid cabs. However, such an approach would likely raise a preemption challenge under the CAA’s preemption clause because it would directly affect emissions. Both Metropolitan Taxicab Board of Trade I and Green Mountain Chrysler indicate that just as a regulation directly affecting fuel economy is preempted by the EPCA, a regulation directly affecting emissions is preempted by the CAA. As the preemption challenge would likely be successful, New York City might want to choose a different approach, such as simply ordering the use of certain approved vehicles.

The failure of New York City’s mandate—as well as its subsequent mandate-like incentives approach—and the failure of Boston’s mandate, together indicate that any attempt to mandate hybrid cab use without changing the EPCA is most likely impossible. Furthermore, the loose incentive approach Boston tried originally did not achieve the desired results. This makes New York City’s push to amend the EPCA in the wake of Metropolitan Taxicab Board of Trade I all the more important.

3. The Importance of New York City’s Push to Alter the EPCA in the Context of the Debate over Environmental Federalism

New York City is also pushing to have the EPCA amended to allow cities to set fuel economy for their taxi fleets. This is one of the city’s most important responses to Metropolitan Taxicab Board of Trade I because it establishes it as a leader in the push towards progressive environmental policy at the local level. One can argue that cities such as New York and Boston are “[leading] the nation in innovative environmental policy.” The TLC regulations found unworkable in Metropolitan Taxicab Board of Trade I appear to be part of a trend toward local progressiveness in environmental regulation.

251 See supra Part II.B.3.
252 See supra Part II.B.3.
253 See supra Part II.B.3.
254 See supra Part IV.B.2.
255 See supra Part I.A.1–2.
256 See supra Part I.A.2.
257 See supra Part II.C.2.
258 See supra Part III.A.
259 See Giovinazzo, supra note 1, at 907.
260 See supra Part III.A.
a. Similarities Between AB-1493 and New York City’s Hybrid Cab Mandate

AB-1493 and New York City’s TLC regulations are in some ways similar and the challenges against both are the results of preemption clauses of federal statutes that block state and local governments from enacting regulations that are stronger than those enacted by the federal government. Granted, there are differences: AB-1493 was challenged for its setting of emissions requirements, not fuel-economy standards. In contrast, New York City’s TLC regulations were challenged for setting miles-per-gallon requirements, which were found likely preempted under the EPCA. The preemption challenges to AB-1493 failed, whereas the challenge to the TLC regulations succeeded. Both efforts—California’s and New York City’s—are illustrative of some of the problems with preemption that Giovinazzo and others have discussed.

The views of several commentators discussed previously support New York City’s push to have the EPCA amended. Most of the commentators have focused on AB-1493 when analyzing the problems posed by federal preemption. New York City’s TLC regulations and Metropolitan Taxicab Board of Trade I may also illustrate the trend towards progressive state and local regulation, providing yet another context for the intensifying debate over federal preemption of such state and local policies.

b. Away from the Race to the Bottom

Both AB-1493 in California and New York City’s TLC regulations represent a trend opposite of what Christopher Giovinazzo referred to as the race to the bottom, which is the supposed phenomenon that absent federal standards the states will lower environmental regulations instead of tighten them. AB-1493 was the strongest example he of-

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262 See supra Part III.B.
263 See supra Part III.B.
264 See supra Part II.B.2.
265 See supra Parts II.B.2, III.B.
266 See supra Part III.A–C.
267 See supra Part III.A, C.
268 See supra Part III.A, C.
269 See supra Part III.A, C.
270 See supra Part III.A.
ferred to dispute the race to the bottom argument.\textsuperscript{271} However, New York City’s TLC regulations are an example that one can put forward to dispute the existence of a race to the bottom. The TLC designed the regulations to mandate hybrid cabs to institute more stringent standards than federal law.\textsuperscript{272} The two sets of regulations indicate a trend that is the opposite of the race to the bottom in that state and local governments are implementing more stringent, rather than less stringent, regulations.\textsuperscript{273} New York City’s desire to amend the EPCA in the wake of \textit{Metropolitan Taxicab Board of Trade I} also represents a trend opposite of the race to the bottom.\textsuperscript{274} New York City makes an argument similar to Giovinazzo’s in support of its push to amend the EPCA: that the purpose behind preemption is poorly served in this case, and that they are pushing for local innovation that would be both successful and important.\textsuperscript{275}


Gaynor and Zimmerman argue that preemption issues are likely to get worse as time goes on, but the conflict in \textit{Metropolitan Taxicab Board of Trade I} is a slightly different phenomenon.\textsuperscript{276} Gaynor and Zimmerman discuss programs like AB-1493 in the context of the passage of new federal environmental laws, and they are worried that those laws may conflict with existing state laws and local ordinances.\textsuperscript{277} In \textit{Metropolitan Taxicab Board of Trade I}, the problem did not arise because of new federal law but because of new, innovative local laws. Local laws raised preemption issues because they attempted to supersede federal law by enacting more stringent regulations.\textsuperscript{278}

Patrick Parenteau lauds state and local initiatives that are progressive in ways federal law is not, but argues that there is a need for a strong federal policy to take their place eventually.\textsuperscript{279} Strong federal initiative might work best in the context of countrywide GHG emis-

\textsuperscript{271} See Giovinazzo, \textit{supra} note 1, at 895–98.
\textsuperscript{272} See \textit{supra} Part III.A–B.
\textsuperscript{273} See \textit{supra} Part III.A–B.
\textsuperscript{274} See \textit{supra} Part II.C.
\textsuperscript{275} See \textit{supra} Parts II.C.2, III.C.
\textsuperscript{276} See \textit{supra} Part III.C.
\textsuperscript{277} See \textit{supra} Part III.C.
\textsuperscript{278} See Gaynor & Zimmerman, \textit{supra} note 2, at 830–32; \textit{supra} Parts II.C, III.A–C.
\textsuperscript{279} See \textit{supra} Part III.C.
sions, and might be more effective than states like California setting their own, especially if the federal program is sufficiently strict. However, such a strategy seems to leave out situations like New York City’s. Certainly New York City is interested in reducing GHG emissions, but its attempt is highly localized and is not on the same scale as California’s efforts.

Looking at all the commentators, one might conclude that the EPCA should either be changed or reinterpreted so it no longer preempts small scale programs such as New York City’s. Giovinazzo would likely condone such an option. He argues that preemption should be constrained in situations where “the purpose behind preemption would be poorly served, and where the history of state innovation is both successful and important.” While New York City’s hybrid taxi program is not a state program on the scale of California’s, it is important to the city’s residents. The express language of the EPCA’s preemption clause barred New York City’s regulations because they set miles-per-gallon requirements. Congress intended the EPCA to apply on a large scale to prevent states from setting different miles-per-gallon requirements for all vehicles, thereby forcing manufacturers to meet different standards in each state. Because New York City’s hybrid cab requirements involved existing vehicles and did not require manufacturers to satisfy a wide array of miles-per-gallon requirements, it may not fall within the scope of congressional intent.

David E. Adelman and Kristen H. Engel provide a model for amending the EPCA that would allow local initiatives such as New York City’s. Adelman and Engel’s model of adaptive federalism—the goal of which is to limit the ability of federal dominance to crush local diversity in policy and innovation—may be applicable in this scenario. Through this model, the EPCA would fulfill its primary purpose of setting miles-per-gallon requirements for new vehicles nationwide.

280 See Hybrid Cab Press Release, supra note 134.
281 See supra Part III.B.
282 See supra Part III.A–B.
283 Giovinazzo, supra note 1, at 953; see supra Part III.C.
284 See supra Part II.C.
285 See supra Part II.B.2.
286 See supra Part II.B.2.a.
288 See supra Part III.C.
289 See Adelman & Engel, supra note 1 at 1832.
290 See Green Mountain Chrysler, 508 F. Supp. 2d at 354; supra Part II.B.2.a.
the same time, programs such as New York City’s that do not frustrate that purpose can go forward and continue to be innovative. This is precisely situation that Adelman and Engel’s model seeks to foster.291

New York City’s and California’s regulations and programs have similarities and differences, but both appear to be examples of the kinds of environmental progressivism that these commentators laud.292 It seems unwise to allow the ever-growing reach of the preemption doctrine293 and the breadth of the EPCA’s preemption clause to challenge these progressive environmental initiatives.294 The best option for New York City appears to be a combination of creating new regulations to implement its hybrid cab program in a manner that will be successful, as well as continuing its efforts to amend the EPCA to allow for more creative environmental policies as discussed in the scholarship.

Conclusion

There are efforts in many cities to mandate the use of hybrid vehicles as taxicabs as part of a push for a healthier environment. These attempts are part of a larger trend of states and local governments enacting progressive environmental legislation, such as California’s large scale attempt to regulate greenhouse gas emissions. Several of these attempts, such as New York City’s attempt to mandate hybrid cabs, have faced preemption challenges under existing federal laws such as the EPCA and CAA.

New York City, Boston, and other cities should, in the short term, alter their regulations to make hybrid cab goals possible and serve as an example to other cities attempting similar cab programs. In the long term, they should lobby Congress to amend the EPCA and join the push by states, local governments, and commentators to alter the debate on federal preemption and make way for progressive environmental policies on the state and local level.

291 See supra Part III.C.
292 See supra Part III.A, C.
293 See supra Part II.C.1.
294 See supra Part III.C.