If a tree falls in the forest but no one hears it, does it still make a sound? If a law hasn't been formally repealed but can be violated with complete impunity, is it still in effect? I'll leave the first question to philosophers, but the second one could have major legal implications. Here's why.

For decades, the government has set fuel efficiency standards for new vehicles. But in the big reconciliation bill it recently passed, Congress decided to embrace gas guzzlers and repealed all the penalties for violating the standards applying to light vehicles. What used to be legally meaningful standards are now at most a voluntary program.

This raises the question of whether they're still in effect. That matters because it determines whether states can adopt their own fuel efficiency standards. The preemption provision applying to fuel efficiency standards reads as follows:

> ***When an average fuel economy standard 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.

There's a reasonable argument that the the repeal of all penalties means that the CAFE standards are no longer in effect, so neither is the prohibition on state regulation. A similar question came up with Obamacare after Congress repealed the penalty for violating the individual mandate. The Supreme Court thought it was obvious that no one could have standing to challenge the constitutionality of the mandate because it had become meaningless: "The provision is unenforceable. There is no one, and nothing, to enjoin." The Court was also somewhat incredulous about the idea that people would feel compelled to comply with the mandate after the penalty was zeroed out.

In fact, CAFE standards may not even legally qualify as regulations anymore. The Administrative Procedure Act defines a rule as "an agency statement of general or particular applicability and future effect." But the CAFE standards no longer have *any* effect on anyone, present or future. They're not rules; they're just idle talk.

Since we have a textualist Supreme Court, we might also ask about the ordinary meaning of the phrase "in effect." In some settings, it means "as a practical matter." It would certainly be accurate to say, "in effect Congress repealed the CAFÉ standards for light vehicles." More specifically, in application to a law or a rule, the common synonyms for "in effect"

seem to be "operative" or "in force." None of these various meanings seem to apply to a regulation that has been stripped of any legal consequences. As a matter of common sense, such a regulation is as insubstantial as a ghost.

Also note that the whole first clause of the provision — the one requiring a standard to be "in effect" — would be meaningless if this only required that a regulation be on the books. Stripped of the opening "in effect" clause, the preemption provision would read:

> "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."

When it added a separate requirement that a standard be "in effect," Congress must have meant the opening clause to add something to merely being "covered by" a standard. After all, without the opening "in effect" clause, the rest of the preemption provision would prohibit state regulations if cars were "covered by" a federal standard. Presumably, Congress expected "in effect" to add something beyond that.

The reading that I'm suggesting is also plausible in terms of congressional intent. The import of the preemption clause is that Congress preferred to have federal regulation to state regulation. But the clause, no matter how you read it, clearly shows that Congress preferred state regulation to no regulation at all. Otherwise, it would simply have preempted all state regulation from the day the statute was passed, rather than conditioning preemption on federal standards. Allowing states to step in when federal regulation has been deprived of all possible practical effect is consistent with those congressional priorities.

I'm not arguing that this is the only possible reading of the preemption provision, but I don't think it can be dismissed out of hand either, not in an era when the Supreme Court views statutory wording as the crux of interpretation. If a similar legal argument favored a policy they liked, the Trump Administration would certainly run with the argument. Why shouldn't we?