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Recommended Citation
Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since* Cipollone, 92 Ky. L.J. 913 (2003-2004).

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Notes/Citation Information

Kentucky Law Journal, Vol. 92, No. 4 (2003-2004), pp. 913-977

This article is available at UKnowledge: https://uknowledge.uky.edu/law_facpub/147

Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since *Cipollone*

BY RICHARD C. AUSNESS*

INTRODUCTION

Under the American constitutional system, the states are treated as sovereign entities.[1] Regardless of separate sovereignty, the federal government can prevent the states from regulating in an area of law if federal legislation has occupied that area of the law.[2] The principle by which federal laws trump state laws is known as preemption.[3]

One of the most controversial issues in preemption law is whether federal safety statutes should preempt state tort law doctrines, particularly

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[1] *See* Parker v. Brown, 317 U.S. 341, 351 (1943) (describing the federal system as "a dual system of government in which, under the Constitution, the states are sovereign . . ."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting) ("The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved.").

[2] Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988) (holding that the Natural Gas Act preempts state statute purporting to regulate the issuance of securities by natural gas pipelines); Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 478 (1984) (concluding that the Agricultural Fair Practices Act preempts Michigan's agricultural marketing statute).

[3] BLACK'S LAW DICTIONARY 1197 (7th ed. 1999) ("The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.").

where defective products are involved.[4] Legal commentators have suggested a number of reasons why federal preemption of state tort law is often undesirable. For example, when the federal government preempts state tort law doctrines, it ousts states from an area where they have historically exercised their police powers.[5] Furthermore, if federal safety laws are inadequate, preemption of state tort law leaves the public exposed to the risk of injury from dangerous products and activities.[6] Finally, preemption of start tort law denies injured parties the right to compensation.[7]

The preemption controversy originated in the 1980s, when enterprises subject to federal regulatory standards first began raising federal preemption as a defense in tort cases. This produced a large body of inconsistent and confusing case law.[8] In 1992, the United States Supreme Court decided *Cipollone v. Liggett Group, Inc.*,[9] holding that the 1969 Federal Cigarette Labeling and Advertising Act expressly preempted common-law failure-to-warn claims.[10] Unfortunately, the *Cipollone* decision did not succeed in clarifying the law of federal preemption.[11] Although the Supreme Court has

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[4] *See generally* DAVID G. OWEN ET AL., 2 MADDEN & OWEN ON PRODUCTS LIABILITY § 28 (3d ed. 2000); Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C. L. REV. 187, 200–31 (1993); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 997–1028 (2002); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997); M. Stuart Madden, *Federal Preemption of Inconsistent State Safety Obligations*, 21 PACE L. REV. 103, 111–58 (2000); David G. Owen, *Federal Preemption of Products Liability Claims*, 55 S.C. L. REV. 411 (2004).

[5] Ausness, *supra* note 4, at 247–48.

[6] Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 904 (1996) (quoting Judge Jack Weinstein in *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1132 (E.D.N.Y. 1992)).

[7] Grey, *supra* note 4, at 562. The author notes that "[c]urrent federal legislation concerning product safety . . . typically does not provide a damages remedy, requiring instead only that manufacturers engage in certain affirmative conduct, such as . . . warnings . . . or meeting certain safety standards." *Id.*

[8] *See* Ausness, *supra* note 4, at 201–34 (discussing lower federal and state court preemption cases decided during the 1980s and early 1990s).

[9] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[10] *Id.* at 524.

[11] Robert B. Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After* Medtronic, 64 TENN. L. REV. 691, 696 (1997).

decided several preemption cases since *Cipollone*, and will likely decide even more in the near future,[12] confusion in this area has not abated.[13]

This article shall attempt to trace the twists and turns of Supreme Court preemption jurisprudence.[14] Part I provides a brief overview of federal

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[12] Davis, *supra* note 4, at 969.

[13] Susan Raeker-Jordan, *The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1380 (1998) [hereinafter Raeker-Jordan, *The Pre-emption Presumption*] ("Since *Cipollone*, however, the Supreme Court has not only backpeddled but also issued confusing and inconsistent opinions that further blur the law of pre-emption."); John A. Chatowski, Note, Cipollone *and the Clear Statement Rule: Doctrinal Anomaly or New Development in Federal Preemption?*, 44 SYRACUSE L. REV. 769, 770 (1993) ("Most legal commentators agree that the Supreme Court has failed to develop a uniform approach to preemption; their decisions 'take on an ad hoc, unprincipled quality, seemingly bereft of any consistent doctrinal basis.' ") (quoting William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624 (1975)); Trent Kirk, Comment, *Fraud-on-the-FDA &* Buckman*—The Evolving Law of Federal Preemption in Products Liability Litigation*, 53 S.C. L. REV. 673, 699 (2002) ("The Supreme Court has provided some insight and much confusion for analyzing preemption within the products liability context, beginning with *Cipollone* and continuing with its recent decision in *Buckman*.").

[14] This examination will be limited to cases involving federal preemption of state tort law. Since *Cipollone*, the Supreme Court has considered several preemption cases involving state statutes and administrative regulations that are beyond the scope of this Article. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550 (2001) (holding that the Federal Cigarette Labeling & Advertising Act preempts state regulation of cigarette advertising); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (concluding that federal law preempts state statute barring state entities from doing business with companies trading with Burma); United States v. Locke, 529 U.S. 89, 116 (2000) (ruling that federal law preempts state oil tanker regulations); AT&T Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 228 (1998) (finding that the Federal Communications Act of 1934 preempts telephone company's state law breach of contract claim); Barnett Bank v. Nelson, 517 U.S. 25, 37 (1996) (determining that federal banking statute preempts state law which prohibits banks from selling insurance in small towns); Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 232–34 (1995) (deciding that the Airline Deregulation Act of 1970, while preempting state regulation of air carriers, does not preempt state court enforcement of air carrier contracts); U.S. Dep't of the Treasury v. Fabe, 508 U.S. 491, 499–508 (1993) (stating that the McCarran-Ferguson Act does not preempt state statute regulating insurance to the extent that it protects policy holders).

Over the years, ERISA has been a particularly fertile source of preemption litigation. *See, e.g.*, Egelhoff v. Egelhoff, 532 U.S. 141, 150–51 (2001) (concluding

preemption law, considering the constitutional sources of preemption and the traditional preemption categories.[15] Part II analyzes *Cipollone v. Liggett Group, Inc.*,[16] the source of modern Supreme Court doctrine regarding preemption of state tort law by federal safety legislation.[17] Part III reviews seven post-*Cipollone* Supreme Court preemption cases: *CSX Transportation, Inc. v. Easterwood*,[18] *Freightliner Corp. v. Myrick*,[19] *Medtronic, Inc. v. Lohr*,[20] *Norfolk Southern Railway Co. v. Shanklin*,[21] *Geier v. American Honda Motor Co.*,[22] *Buckman Co. v. Plaintiffs' Legal Committee*,[23] and *Sprietsma v. Mercury Marine*.[24] An examination of these cases reveals how the Court's preemption jurisprudence appears to be bereft of any coherent theory or methodology.[25]

Part IV explores Supreme Court preemption jurisprudence and offers some suggestions for improving the quality of federal preemption law.[26]

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that ERISA preempts state statute which revoked a spouse's beneficial interest in ERISA employee benefit plans upon divorce); Boggs v. Boggs, 520 U.S. 833, 841–55 (1997) (finding that ERISA preempts state law allowing nonparticipant spouse to devise interest in undistributed pension plan benefits); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 378 (1999) (declaring that ERISA preempts state rule characterizing certain employee health plan administrators as insurer's agents), *overruled in part by* 538 U.S. 329 (2003); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316, 334 (1997) (holding that ERISA does not preempt California law mandating payment of prevailing wages); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995) (deciding that ERISA does not preempt state statute requiring hospitals to collect surcharges from commercial insurers and HMOs); Dist. of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 132–33 (1992) (ruling that ERISA preempts state law requiring employers to provide health insurance for injured employees who qualify for workers' compensation benefits).

[15] *See infra* notes 27–90 and accompanying text.

[16] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[17] *See infra* notes 91–241 and accompanying text.

[18] CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993), *superseded by statute as stated in* 87 F.3d 1188 (10th Cir. 1996).

[19] Freightliner Corp. v. Myrick, 514 U.S. 280 (1995), *appealed sub nom.* Lindsey v. Navistar Int'l Transp. Corp., 150 F.3d 1307 (11th Cir. 1998).

[20] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

[21] Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000).

[22] Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

[23] Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001).

[24] Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).

[25] *See infra* notes 242–536 and accompanying text.

[26] *See infra* notes 537–99 and accompanying text.

First, I recommend that the Court limit itself to an express preemption analysis when the statute in question contains preemptive language. Second, the presumption against preemption should be conceptualized in an explicit "clear statement" rule which would require the Court to uphold state tort law when Congress has not clearly expressed its intent to preempt state law. Third, saving clauses should be read *in pari materia* with express preemption provisions. Finally, the Court should allow administrative agencies to preempt common-law claims by regulation only if they formally and expressly exercise their preemptive authority.

I. A DOCTRINAL OVERVIEW OF FEDERAL PREEMPTION LAW

Preemption doctrine concerns the power of Congress to prohibit the states from regulating in certain areas and, where the states are allowed to regulate, to assert primacy in a conflict between state and federal regulatory schemes.[27] The power to preempt ensures that federal law prevails over conflicting state statutes,[28] local ordinances[29] and even state common-law doctrines.[30] Although no one questions the existence of federal preemptive

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[27] Professor Gardbaum argues that preemption applies to situations where Congress deprives states of their power to regulate in a given area, regardless of whether state law conflicts with federal law. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 771 (1994).

[28] *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98–99 (1992) (declaring that OSHA preempts state occupational and safety standards unless the state receives federal approval); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988) (ruling that the federal Natural Gas Act preempts state statute purporting to regulate issuance of long-term securities by natural gas pipeline companies); Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 478 (1984) (holding state agricultural marketing statute preempted by federal Agricultural Fair Practices Act).

[29] City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 640 (1973) (holding municipal airport curfew preempted by FAA regulations).

[30] *See, e.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481, 500 (1987) (holding that the Clean Water Act bars private nuisance actions against out-of-state polluters); Ark. La. Gas Co. v. Hall, 453 U.S. 571, 582–84 (1981) (holding Natural Gas Act preempts calculation of damages under state contract doctrines); Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 331 (1981) (ruling Interstate Commerce Act preempts state tort claim based on abandonment of service); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 272–73 (1974) (noting National Labor Relations Act preempts certain state-law libel claims); Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 385 (1963) (ruling that state may not enforce licensing requirements giving state board power to review federal determinations); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245–46 (1959) (ruling

power, legal scholars disagree about its exact constitutional source. Many legal scholars[31] and the Supreme Court itself,[32] have concluded that the Supremacy Clause of the United States Constitution[33] provides the basis for Congress's power to preempt state law. The Supremacy Clause declares that the laws of the United States shall be the supreme law of the land.[34] Some scholars, however, question whether it actually gives Congress the power to preempt state law.[35] They suggest that the Supremacy Clause

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National Labor Relations Act preempts state tort-law action against labor union for engaging in unfair labor practices).

[31] Valerie Watnick, *Federal Preemption of Tort Claims Under FIFRA: The Erosion of a Defense*, 36 U. MICH. J.L. REFORM 419, 427 (2003) (contending that "[t]he doctrine of federal preemption is grounded in the Supremacy Clause of the U.S. Constitution"); Mary Ann K. Bosack, Note, *Cigarette Act Preemption—Refining the Analysis*, 66 N.Y.U. L. REV. 756, 761 (1991) ("The roots of the preemption doctrine lie in the supremacy clause of the United States Constitution."); Sarah Butcher, Note, *Fraud-on-the-FDA and Genetically Modified Foods: Will the Action Stand?*, 22 REV. LITIG. 669, 671 (2003) ("The source of preemption is the Supremacy Clause of the United States Constitution."); Stephen D. Otero, Note, *The Case Against FIFRA Preemption: Reconciling* Cipollone's *Preemption Approach with Both the Supremacy Clause and Basic Notions of Federalism*, 36 WM. & MARY L. REV. 783, 788 (1995) ("The preemption doctrine derives from the Supremacy Clause of the Constitution"); Kara M. Turner, Recent Development, *The Great Train Robbery That Wasn't: Practical Implications of* CSX v. Easterwood, 72 WASH. U. L.Q. 1449, 1457 (1994) ("The doctrine of preemption derives its authority from the Supremacy Clause of the United States Constitution.").

[32] *See, e.g.*, Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (stating that the Supremacy Clause "is basic to this constitutional command that all conflicting state provisions be without effect"); *Chicago & N.W. Transp. Co.*, 450 U.S. at 317 (concluding that "[t]he underlying rationale of the preemption doctrine . . . is that the Supremacy Clause invalidates state laws that 'interfere with or are contrary to, the laws of congress' "); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("No state can add to or take from the force and effect of such treaty or statute, for Article VI of the Constitution provides that 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.' ").

[33] U.S. CONST. art. VI, cl. 2.

[34] *See id.* The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

[35] *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088 (2000) (declaring that "it is critically important to note [that] the Supremacy Clause itself does not authorize Congress to preempt state laws"); Gardbaum, *supra* note 27, at 768 ("In the American context, the most common and

operates like a "choice of law" provision, ensuring that federal law will prevail over state law in a conflict.[36] If this is the case, the power to exclude state regulation in an area must arise from another constitutional source. One possibility is that the power may arise from Congress's enumerated powers, such as the Commerce Clause.[37] It has also been suggested that the Necessary and Proper Clause[38] might authorize federal preemption of state law in some cases.[39]

Since the Supreme Court's opinion in *Savage v. Jones*,[40] courts and commentators have divided preemption into two categories, express and implied, and further subdivided the latter into field preemption and conflict preemption.[41] Express preemption occurs when Congress uses express language declaring its intention to preempt state law.[42] Congress may also impliedly preempt state law when a federal regulatory scheme effectively occupies a field, leaving no room for state regulation. Implied preemption may also occur when state law conflicts in some way with federal law.[43] Although some commentators question whether preemption can be compartmentalized into seemingly airtight categories,[44] this construct is still useful for analyzing preemption issues.

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consequential error is the belief that Congress's power of preemption is closely and essentially connected to the Supremacy Clause of the Constitution.").

[36] *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 303 (2000) ("The Supremacy Clause requires preemption only when the rules provided by state and federal law contradict each other, so that a court cannot simultaneously follow both.").

[37] U.S. CONST. art. I, § 8, cl. 3; *see* Grey, *supra* note 4, at 607 ("There is no question that the federal government has the power under the Commerce Clause to preempt state tort claims."); Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1155 (1998) ("Congress' capacity to preempt state laws flows from both the powers delegated to Congress through the Constitution and the Supremacy Clause.").

[38] U.S. CONST. art. I, § 8, cl. 18.

[39] *See* Gardbaum, *supra* note 27, at 782.

[40] Savage v. Jones, 225 U.S. 501, 533–40 (1912).

[41] Madden, *supra* note 4, at 105–10.

[42] *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983), *overruled in part by* Scheiding v. GMC, 993 P.2d 996 (2000); Madden, *supra* note 4, at 105–07.

[43] Jordan, *supra* note 37, at 1150–51.

[44] *See* Nelson, *supra* note 36, at 262 ("Once we recognize that all preemption cases are about contradiction between state and federal law, we should begin to question the usefulness of dividing them into the separate analytical categories of 'express' preemption, 'field' preemption, and 'conflict' preemption."); Raeker-Jordan, *The Pre-emption Presumption*, *supra* note 13, at 1397 (arguing that "the demarcation of the categories distracts observers from what the Court is really

A. *Express Preemption*

Express preemption occurs when a federal statute specifically excludes state regulation in a particular area.[45] For example, in *Rice v. Santa Fe Elevator Corp.*,[46] the Court concluded that the Federal Warehouse Act's[47] preemptive language manifested an intent to displace state jurisdiction over federally licensed warehouse operators.[48] This prompted the Court to enjoin state proceedings against a federal licensee for violating state rate discrimination laws, thus avoiding the problem of dual regulation.[49]

Federal agencies acting within the scope of their delegated authority may also expressly preempt state law.[50] *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*[51] provides a good illustration of this principle. This case involved a conflict between a Federal Home Loan Bank Board regulation concerning due-on-sale clauses in home mortgage contracts[52] and a state common-law doctrine that limited the use of due-on-sale

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doing in pre-emption cases"); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 70–71 (1988) ("Although the Supreme Court has referred to four categories of preemption in almost every one of its recent preemption cases, the categories are useless in difficult cases."); Ellen L. Theroff, Note, *Preemption of Airbag Litigation: Just a Lot of Hot Air?*, 76 VA. L. REV. 577, 581–82 (1990) ("These three categories of preemption are certainly not analytically airtight . . . .").

[45] *See, e.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (National Association of Attorneys General airline fare advertising guidelines); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 106–08 (1983) (employee benefit plans); Ry. Employees' Dep't v. Hanson, 351 U.S. 225, 232 (1956) (union shop agreements).

[46] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[47] United States Warehouse Act, ch. 313, 39 Stat. 486 (1916) (codified as amended at 7 U.S.C. §§ 241–256 (2000)).

[48] *Rice*, 331 U.S. at 233–34.

[49] *Id.* at 236–37.

[50] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700 (1984) (FCC cable television regulations); Free v. Bland, 369 U.S. 663, 667–68 (1962) (treasury regulations); Public Utils. Comm'n v. United States, 355 U.S. 534, 544–45 (1958) (government procurement regulations); Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 189–90 (1956) (government procurement regulations).

[51] Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982).

[52] *Id.* at 146 (citing the regulation governing due-on-sale clauses at 12 C.F.R. § 545.8-3(f) (1982)).

provisions.[53] The Court observed that the Home Owners' Loan Act of 1933[54] gave the Board broad authority over federal savings and loan associations.[55] Because the Board clearly indicated its intent to displace state law concerning due-on-sale clauses, an action within its delegated authority, the Court ruled that the Board's regulation expressly preempted state law.[56]

B. Field Preemption

Field preemption occurs when federal regulation in a particular area is so pervasive that the courts must assume that Congress intended to occupy the field entirely and exclude all state regulation.[57] *Schneidewind v. ANR Pipeline Co.*[58] provides an interesting example of this type of preemption. In *Schneidewind,* a public utility company challenged the validity of a Michigan statute requiring companies to obtain approval from the state public service commission before issuing long-term securities.[59] The utility company claimed that the federal Natural Gas Act[60] preempted the Michigan statute.[61] The Court observed that the Federal Energy Regulatory Commission ("FERC") exercised substantial authority over the financing activities of natural gas companies to ensure that pipelines and other facilities were "financed in accordance with the public interest."[62] Accordingly, the Court found that the Michigan statute constituted an attempt to regulate natural gas company rates and facilities, thus encroach-

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[53] The California Supreme Court recognized this common-law doctrine in *Wellenkamp v. Bank of America,* 582 P.2d 970 (Cal. 1978) (en banc). The *Wellenkamp* court held that due-on-sale clauses constituted an unreasonable restraint on alienation unless the lender could "demonstrate that enforcement [was] reasonably necessary to protect against impairment of its security or the risk of default." *Id.* at 976–77.

[54] Home Owners' Act of 1933, Ch. 64, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461–1470 (2000)).

[55] *Fid. Fed.*, 458 U.S. at 160–62.

[56] *Id.* at 170.

[57] *See, e.g.*, Susan D. Hall, Note, *Preemption Analysis After* Geier v. American Honda Motor Co., 90 KY. L.J. 251, 254 (2001).

[58] Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988).

[59] *Id.* at 296 (citing MICH. COMP. LAWS ANN. § 460.301–.303 (West 1967 & Supp. 1987) (repealed 1995)).

[60] Natural Gas Act, Ch. 556, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. §§ 717–717z (2000)).

[61] *Schneidewind*, 485 U.S. at 298.

[62] *Id.* at 302–03.

ing upon a regulatory area already occupied by the FERC.[63] Field preemption principles thus led the Court to hold that the Michigan statute was preempted.

C. *Conflict Preemption*

When federal statutes or regulations and state law actually conflict, the state law is overridden.[64] Actual conflict may occur in several scenarios. First, a conflict may exist because of impossibility when state law requires action that federal law forbids, or vice versa.[65] Second, a conflict may arise when state law frustrates federal regulatory goals by hindering conduct that federal law intends to encourage,[66] or by promoting conduct that federal law seeks to discourage.[67]

1. *Impossibility*

McDermott v. Wisconsin[68] exemplifies a situation in which compliance with both state and federal law is impossible. In *McDermott*, the Court ruled that the labeling provisions of the Federal Food and Drugs Act[69] preempted a Wisconsin labeling statute.[70] The defendant, who sold syrup imported from another state, showed that syrup which met the federal labeling standards would be considered mislabeled under the Wisconsin statute.[71] The defendant further asserted that compliance with the state

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[63] *Id.* at 310.

[64] *See, e.g.*, Hall, *supra* note 57, at 255.

[65] *See* Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 630 (1985) ("A conflict sufficient to invalidate a state regulatory requirement can exist . . . when it is impossible to comply with both federal and state law. . . ."); Bratton, *supra* note 13, at 626.

[66] *See* Xerox Corp. v. County of Harris, 459 U.S. 145, 150–54 (1982) (holding invalid a state tax on goods Congress exempted from customs duties to encourage use of American ports); Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 239 (1967) (holding invalid a state regulation that frustrated Congress's intent to allow people to take unfair labor charges to the NLRB).

[67] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973) (refusing to uphold a local ordinance regulating jet aircraft, in part because of fears about safety and regulatory issues if other municipalities followed suit).

[68] McDermott v. Wisconsin, 228 U.S. 115 (1913).

[69] *Id.* at 127 (citing the Food and Drugs Act, ch. 3915, 34 Stat. 768 (1914) (repealed 1938)).

[70] *Id.* at 137.

[71] *Id.* at 126–27.

statute would result in liability under the federal act.[72] The Court found that the defendant could not satisfy the requirements of both the state and federal statutes and, based on the conflict preemption doctrine of impossibility, invalidated the state statute.[73]

2. *Obstacle Preemption*

Even when federal and state law provisions do not openly conflict, state law may nevertheless be preempted because it interferes with federal regulatory objectives.[74] This is known as "obstacle preemption."[75] For example, in *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board*,[76] Michigan enacted a statute establishing a state-administered system under which growers' associations were organized and certified as exclusive bargaining agents for all producers of a particular agricultural commodity.[77] "The Michigan Agricultural Cooperative Marketing Association, Inc. (MACMA)" was "the sole sales and bargaining agent for asparagus producers in the state."[78] A group of asparagus farmers and processors challenged the Michigan statute because it required nonmember growers to pay service fees and adhere to contracts negotiated by MACMA.[79] The plaintiffs argued that these provisions conflicted with the Federal Agricultural Fair Practices Act of 1967 ("FAFPA")[80] and thus should be preempted.[81]

The Court noted that both the AFPA and the Michigan statute were intended to facilitate collective action among producers and to protect producers from coercive action by processors.[82] Unlike the state statute, however, the federal act also protected individual producers against

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[72] *See id.* at 132–33.

[73] *See id.* at 137.

[74] *See, e.g.*, Boggs v. Boggs, 520 U.S. 833, 843–44 (1997) (holding that state community property law interfered with provisions and objectives of ERISA); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (concluding private nuisance actions against out-of-state polluters were not compatible with the regulatory objectives of the Clean Water Act).

[75] Davis, *supra* note 4, at 970.

[76] Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461 (1984).

[77] MICH. COMP. LAWS ANN. §§ 290.701–290.726 (West 1984).

[78] *Mich. Canners & Freezers Ass'n*, 467 U.S. at 468.

[79] *Id.* at 467–68.

[80] 7 U.S.C. §§ 2301–2306 (2000).

[81] *Mich. Canners & Freezers Ass'n*, 467 U.S. at 468.

[82] *Id.* at 464–66.

coercive action by producers' associations.[83] According to the Court, Congress enacted the AFPA with the intent to safeguard the right of producers to choose the method of marketing their products.[84] On the other hand, "[t]he Michigan Act . . . empower[ed] producers' associations to do precisely what the federal Act forb[ade] them to do."[85] Consequently, the Court concluded that the Michigan statute stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and must give way under the doctrine of obstacle preemption.[86]

These basic preemption categories serve as an important foundation for analyzing the Supreme Court's preemption jurisprudence. One or more of the categories is present in each of the cases discussed in this Article. For example, the Court relied on an express preemption analysis in *Cipollone, Easterwood, Myrick, Medtronic, Shanklin, Geier*, and *Sprietsma*.[87] A brief field preemption analysis is evident in *Sprietsma*.[88] Obstacle preemption played a significant role in *Myrick, Geier, Buckman*, and *Sprietsma*.[89] However, none of the cases discussed in this Article involve impossibility because that form of preemption is not applicable to tort law.[90]

II. *CIPOLLONE* REVISITED

Cipollone v. Liggett Group, Inc.[91] was the first in a long series of cases in which the United States Supreme Court determined whether federal product safety laws preempted common-law tort claims for injuries from

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[83] *See id.* at 464–68.

[84] *See id.* at 470–74.

[85] *Id.* at 477–78.

[86] *Id.* at 478.

[87] *See infra* notes 91–449, 475–517 and accompanying text.

[88] *See infra* notes 508–13 and accompanying text.

[89] *See infra* notes 277–304, 396–517 and accompanying text.

[90] Those who are subject to criminal statutes or administrative regulations face a variety of coercive sanctions for violations, such as fines, imprisonment, or prohibitory injunctions. Individuals in this position thus have little choice but to comply. However, when they are subject to conflicting state and federal criminal statutes or regulations, compliance is truly impossible. Tort law is more flexible. Tortfeasors, at least in theory, are only subject to damage claims and, therefore, do not have to alter their behavior if they are willing to compensate their victims. Thus, it is "possible" to comply with conflicting state and federal requirements as long as at least one is enforced by only civil damage awards. Raeker-Jordan, *The Pre-emption Presumption*, *supra* note 13, at 1444.

[91] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

defective products.[92] It represents a well-intentioned, but unsuccessful, attempt by the Court to rationalize its preemption doctrine.[93]

A. *Precursors to* Cipollone

The first modern case to consider the effect of federal law on state tort claims was *San Diego Building Trades Council v. Garmon*,[94] decided in 1959. *Garmon* involved a labor dispute between a lumber supply company and a number of labor unions. A state court awarded damages against the unions for engaging in unfair labor practices.[95] On appeal, the Supreme Court held that Congress had vested the National Labor Relations Board ("NLRB") with the power to determine which union activities were protected and which activities constituted unfair labor practices.[96] The Court held that if the NLRB determined that a particular activity was either protected or prohibited, the states were ousted from any jurisdiction over that activity.[97] Moreover, state jurisdiction could be displaced even when the NLRB failed to make any determination concerning the legality of union activities.[98] Accordingly, the Court held that the state court was without authority to award damages to the company for injuries caused by the unions' activities.[99]

Twenty-five years after the *Garmon* decision, the Court decided in *Silkwood v. Kerr-McGee Corp.*[100] that state law punitive damages claims were not preempted by the Atomic Energy Act ("AEA").[101] The estate of Karen Silkwood brought suit against the manufacturer of plutonium fuel rods, alleging that the defendant's failure to comply with federal safety

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[92] For a discussion of the *Cipollone* decision, see 2 OWEN ET AL., *supra* note 4, § 28.3; Richard C. Ausness, *The Impact of the* Cipollone *Case on Federal Preemption Law*, 15 J. PRODS. & TOXICS LIAB. 1 (1993); Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075, 1116–34 (1996); Jeffrey R. Stern, Note, *Preemption Doctrine and the Failure of Textualism in* Cipollone v. Liggett Group, 80 VA. L. REV. 979 (1994).

[93] *See* Leflar & Adler, *supra* note 11, at 696.

[94] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

[95] *Id.* at 237–38.

[96] *Id.* at 244–45.

[97] *Id.* at 245.

[98] *Id.* at 245–46.

[99] *Id.* at 246–48.

[100] Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

[101] Atomic Energy Act, 42 U.S.C. §§ 2011–2296 (2000).

standards resulted in decedent's exposure to highly toxic plutonium.[102] The estate based its claims on state common-law negligence and strict liability theories.[103] A jury found in favor of the plaintiff and awarded punitive and compensatory damages.[104] However, the punitive award was reversed by a federal appeals court.[105] Although it had recently declared that the Atomic Energy Act "occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states,"[106] the Court reversed the appeals court and reinstated the trial court's punitive damages award.[107]

After reviewing the history of the Atomic Energy Act, the Court determined that Congress had intended for the operators of nuclear power plants and other facilities to remain subject to liability under state tort law even though the Act vested exclusive regulatory authority over nuclear power safety in the Nuclear Regulatory Commission.[108] The Court stated that "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted."[109] The Court based this conclusion on the fact that Congress did not mention state tort claims when it could have expressly preempted them.[110] The Court also found it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[111] Furthermore, the Court reasoned, Congress must have believed that nuclear power licensees would normally be subject to tort liability because it enacted the Price Anderson Act in 1957 to limit their liability when large-scale nuclear accidents occurred.[112]

Shortly after *Silkwood*, however, the Court preempted a state law tort claim in *International Paper Co. v. Ouellette*.[113] In *Ouellette*, property owners on the Vermont shore of Lake Champlain brought suit against a paper mill located on the New York side of the lake.[114] The plaintiffs sought damages and injunctive relief, alleging that the defendant's

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[102] *See Silkwood*, 464 U.S. at 243.

[103] *Id.* at 243–44.

[104] *Id.* at 245.

[105] Silkwood v. Kerr-McGee Corp., 667 F.2d 908, 922–23 (10th Cir. 1981).

[106] Pac. Gas & Elec. Co. v. State Energy Res. & Dev. Comm'n, 461 U.S. 190, 212 (1983).

[107] *Silkwood*, 464 U.S. at 258.

[108] *Id.* at 250–56.

[109] *Id.* at 255.

[110] *Id.* at 251.

[111] *Id.*

[112] *Id.* at 251–52.

[113] Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987).

[114] *Id.* at 483–84.

discharge of pollutants into Lake Champlain constituted a nuisance under Vermont common law.[115] The paper mill claimed that the plaintiffs' state-law nuisance action was preempted because the mill held a federally authorized permit that allowed it to discharge effluent into the lake.[116]

The Court declared that state law might be preempted, even if federal and state regulatory objectives were the same, "if it [interfered] with the methods by which the federal statute was designed to reach this goal."[117] According to the Court, if a New York permit holder were subject to damages under Vermont nuisance law, the law of Vermont would "effectively override both the permit requirements and the policy choices made by [New York]" with respect to economic and environmental issues.[118] Consequently, the Court concluded that the Clean Water Act preempted the plaintiffs' nuisance action.[119]

The last case involving federal preemption of state tort claims decided prior to *Cipollone* was *English v. General Electric Co.*[120] In *English*, the Court held that the Energy Reorganization Act of 1974 did not preempt a state tort law claim for intentional infliction of emotional distress.[121] The plaintiff in *English* was a laboratory technician at a nuclear fuel production plant who informed the Nuclear Regulatory Commission about various safety violations at the plant.[122] The plaintiff claimed that her employer, General Electric, retaliated against her for reporting these safety violations and eventually fired her.[123] General Electric responded that a provision in the Energy Reorganization Act providing an administrative remedy to protect whistle-blowers in nuclear facilities from retaliation by their employers preempted state law remedies.[124]

With no express preemption provision, the Court was forced to employ field and conflict preemption analysis.[125] The Court first considered field preemption and concluded that Congress meant to preempt the field of nuclear safety, but that it did not "clearly and manifestly" intend "to preempt all state tort laws that had traditionally been available to"

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[115] *Id.* at 484.
[116] *Id.*
[117] *Id.* at 494.
[118] *Id.* at 495.
[119] *Id.* at 500.
[120] English v. Gen. Elec. Co., 496 U.S. 72 (1990).
[121] *Id.* at 83, 86.
[122] *Id.* at 74–75.
[123] *Id.* at 75–76.
[124] *Id.* at 82.
[125] *Id.* at 78, 80.

wrongfully discharged employees.[126] Likewise, the Court concluded that state tort law would not obstruct or frustrate the regulatory purposes of the Atomic Energy Act or the whistle-blower provisions of the Energy Reorganization Act.[127]

With the exception of *Garmon*,[128] in the years prior to *Cipollone* the Court generally refused to preempt state tort claims, even where there was an important federal regulatory interest at stake.[129] During this period, the Court expressed a belief that Congress was willing to tolerate a certain amount of tension between federal regulatory objectives and state tort law.[130] Furthermore, the Court assumed that Congress would not want to deny compensation to accident victims who were injured by the wrongdoing of corporate employees, and that if Congress did wish to leave accident victims without a remedy in such cases, it would say so expressly.[131] However, this tolerance toward state tort law would change significantly in 1992 with the *Cipollone* decision.

B. Cipollone v. Liggett Group, Inc.

Cipollone v. Liggett Group, Inc.[132] involved the preemptive effect of federal warning requirements on state tort claims against cigarette manufacturers.[133] The 1965 Federal Cigarette Labeling and Advertising Act required all cigarette packages to contain the following language: "Caution: Cigarette Smoking May Be Hazardous to Your Health."[134] This language was strengthened in 1969.[135] In *Cipollone*, the United States Supreme Court held that the Federal Cigarette Labeling and Advertising Act, as amended

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[126] *Id.* at 83.

[127] *Id.* at 84–90.

[128] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). *Garmon* is arguably distinguishable from *Cipollone* because it was concerned with labor relations, an area traditionally subject to pervasive federal regulation. Moreover, *Garmon*'s tort claims involved economic losses, not physical injuries. *Id.*

[129] *See* Davis, *supra* note 4, at 1001.

[130] *English*, 496 U.S. at 85–86; Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984).

[131] *Silkwood*, 464 U.S. at 251.

[132] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[133] *Id.* at 508.

[134] Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282 (1965) (codified as amended in 15 U.S.C. § 1331–1341 (2000)).

[135] Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 4, 84 Stat. 87 (1970) (codified at 15 U.S.C. § 1334).

in 1969, expressly preempted tort claims against cigarette manufacturers for inadequate health warnings in the advertising or promotion of their products.[136] However, the Court also concluded that the 1969 Act did not preempt claims against cigarette manufacturers for breach of express warranty, misrepresentation, or conspiracy.[137]

The decedent, Rose Cipollone, a lifetime smoker, died of lung cancer in 1984.[138] The executor of her estate brought suit against the defendant tobacco companies, alleging that they failed to provide adequate warnings about the health risks of smoking, expressly warranted that their products were not dangerous to the health of consumers, attempted to neutralize the effects of statutory warnings, ignored medical evidence about the dangers of smoking, and conspired to prevent such medical evidence from reaching the general public.[139] The trial jury denied recovery to Ms. Cipollone under New Jersey's comparative fault statute, but awarded $400,000 to her husband.[140] The Court of Appeals held that the plaintiff's state law tort claims were preempted by the Cigarette Labeling and Advertising Act.[141]

When *Cipollone* came before the United States Supreme Court, the Justices divided into three groups. Justice Stevens, joined by Chief Justice Rehnquist and Justices White and O'Connor, wrote the plurality opinion.[142] The plurality decided that the 1965 Act did not preempt any of the plaintiff's tort claims.[143] However, these Justices did conclude that the 1969 Act expressly preempted state tort claims against cigarette manufacturers "insofar as [those] claims . . . require[d] a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings."[144] On the other hand, they determined that the 1969 Act did not preempt claims against cigarette manufacturers based on breach of express warranty, misrepresentation, or conspiracy.[145] Justice Blackmun, joined by Justices Kennedy and Souter, contended that neither the 1965 Act nor the 1969 Act preempted any of the plaintiff's state tort claims.[146] Finally, Justice Scalia, joined by Justice Thomas, argued that

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[136] *Cipollone*, 505 U.S. at 524.
[137] *Id.* at 525–30.
[138] *Id.* at 508.
[139] *Id.* at 508–09.
[140] *See* Cipollone v. Liggett Group, Inc., 893 F.2d 541, 546 (3d Cir. 1990).
[141] *Id.* at 582.
[142] *Cipollone*, 505 U.S. at 507.
[143] *Id.* at 519-20.
[144] *Id.* at 524.
[145] *Id.* at 525–30.
[146] *Id.* at 531–44.

plaintiff's failure-to-warn claims were preempted by the 1965 Act and that the 1969 Act expressly preempted all of the plaintiff's state tort claims.[147]

Justice Stevens, writing for the plurality, purported to employ two rules of statutory construction in *Cipollone*. First, he declared that the Court should not have relied on implied preemption theories when the statute in question contained an express preemption provision.[148] According to Justice Stevens, when Congress defined a specific area as preempted, it impliedly intended to exclude all other areas from the preemptive reach of the statute.[149] In this case, since cigarette labeling statutes contained express preemption provisions, and no other preemptive language, Justice Stevens only used an express preemption analysis. Second, Justice Stevens contended that express preemption provisions should be interpreted narrowly.[150] He based this narrow construction, or "clear meaning" approach, on the Court's longstanding presumption against the preemption of state regulations enacted to protect the health, safety, or welfare of its citizens.[151]

1. *Preemption Methodology in* Cipollone

a. The Focus on Express Preemption

Justice Stevens declared that "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act."[152] According to Justice Stevens, "[when a statute's express preemption] provision provides a 'reliable indicium of congressional intent with respect to state authority,'[153] 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation."[154] In other words, once Congress has expressly declared that some aspect of state law is preempted, the Court must determine the preemptive scope of the statute by examining the text of the statute itself, along with its structure, legislative history and historical context, but should not go beyond these factors in its analysis.[155] The rationale for this

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[147] *Id.* at 544–48.

[148] *Id.* at 517.

[149] *Id.*

[150] *Id.* at 518.

[151] *See id.*

[152] *Id.* at 517.

[153] *Id.* (quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978)).

[154] *Id.* (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987)).

[155] *See* Stacey Allan Carroll, Note, *Federal Preemption of State Products Liability Claims: Adding Clarity and Respect for State Sovereignty to the Analysis of Federal Preemption Defenses*, 36 GA. L. REV. 797, 812–13 (2002).

approach was similar to that of "expressio unius est exclusio alterius," namely that express demarcation of a statute's preemptive reach implies that Congress does not intend to reach beyond that point.[156] Unfortunately, two paragraphs later, Justice Stevens abandoned the rule he had just announced and slipped, perhaps inadvertently, into an implied preemption analysis.[157] Discussing the 1965 Act, Justice Stevens declared that "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions."[158]

In a concurring opinion, Justice Blackmun, joined by Justices Kennedy and Souter, agreed that the Court should not resort to implied preemption analysis when the federal statute in question contained a provision which expressly preempted state law.[159] Blackmun declared that the Court should "resort to principles of implied pre-emption . . . only when Congress has been silent with respect to pre-emption."[160]

Justice Scalia, joined by Justice Thomas, offered a very different view of the preemption doctrine. He would first look to the statutory language for evidence of express preemption, giving words their "ordinary meaning."[161] Applying this approach, Justice Scalia concluded that the plaintiff's failure-to-warn claim was expressly preempted by the 1965 Act and that all of her common-law tort claims were expressly preempted by the 1969 Act.[162] However, unlike Justices Stevens and Blackmun, Justice Scalia rejected the notion that the existence of an express preemption provision precluded the Court from considering whether state law might be impliedly preempted.[163] Justice Scalia conceded that the Court might logically refuse to find that field preemption existed when a statute contained an express preemption provision because the existence of such a provision "tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines."[164] In cases of implied conflict, however, Justice Scalia believed that "the Court's . . . new rule works mischief,"[165] particularly when combined with

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[156] *Cipollone*, 505 U.S. at 517.
[157] *Id.* at 518.
[158] *Id.*
[159] *Id.* at 531–32.
[160] *Id.* at 532.
[161] *Id.* at 548.
[162] *Id.*
[163] *Id.* at 547–48.
[164] *Id.* at 547.
[165] *Id.*

the Court's rule that preemption provisions should be narrowly construed.[166] According to Justice Scalia, if a statute said anything about preemption, it would have to say everything because any ambiguity concerning a statute's preemptive scope would be resolved in favor of preserving state power.[167]

Although Justice Scalia's position did not prevail in the *Cipollone* case, it eventually carried the day. The Court departed from *Cipollone*'s "no implied preemption" rule three years later in *Myrick*,[168] and subsequently employed implied preemption analysis in such cases as *Geier*,[169] *Buckman*,[170] and *Sprietsma*[171] after failing to find the existence of express preemption.

b. The Presumption Against Preemption

Although each of the three opinions in *Cipollone* acknowledged that a presumption against preemption existed,[172] the Justices disagreed about whether the presumption was applicable in express preemption cases, and they also disagreed about the role of such a presumption in statutory interpretation.

i. Use of the Presumption in Express Preemption Cases

Justice Stevens and other members of the Court who joined in the plurality opinion clearly thought that the presumption applied in express preemption cases. In his discussion of the preemption language of the 1965 Act, Justice Stevens stated that the Court "must construe these provisions in light of the presumption against the pre-emption of state police power regulations."[173] Justice Blackmun agreed that the presumption was applicable to express preemption analysis, declaring that "[t]he principles of federalism and respect for state sovereignty that underlie the Court's

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[166] *See id.* at 548.

[167] *Id.*

[168] Freightliner Corp. v. Myrick, 514 U.S. 280, 288–89 (1995).

[169] Geier v. Am. Honda Motor Co., 529 U.S. 861, 884–85 (2000).

[170] Buckman Co. v. Plaintiff's Legal Comm., 531 U.S. 341, 352 (2001).

[171] Sprietsma v. Mercury Marine, 537 U.S. 51, 64–69 (2002).

[172] Justice Stevens mentioned the presumption a number of times in his plurality opinion. *See Cipollone*, 505 U.S. at 516, 518, 522, 523, and 529 n.27. Justice Blackmun also referred to the presumption several times. *See id.* at 532, 542. Justice Scalia mentioned the presumption, though not favorably. *See id.* at 546.

[173] *Id.* at 518.

reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously."[174]

Justice Scalia, on the other hand, argued that the presumption against preemption should not be applied in express preemption cases.[175] According to Justice Scalia, the presumption might be useful in implied preemption cases where it was not clear that Congress intended to preempt state law at all, but he contended that the presumption was inappropriate when there was "conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the *scope* of that pre-emption is meant to be."[176] In Justice Scalia's view, the Court should dispense with presumptions and apply "ordinary principles of statutory construction" to determine how much state law Congress intended to displace.[177]

ii. Effect of the Presumption in Statutory Interpretation

The Justices took a different view of the effect of the presumption against preemption in their various opinions. Justice Blackmun treated the presumption as a "clear statement" rule which required Congress to clearly express its intent to preempt state law and which construed any ambiguity in the text of the statute in favor of the states.[178] For example, he stated that "*neither* version of the federal legislation at issue here provides the kind of unambiguous evidence of congressional intent necessary to displace state common-law damages claims."[179] Justice Blackmun also declared that "[o]ur obligation to infer pre-emption only where Congress' intent is clear and manifest mandates the conclusion that state common-law damages actions are not pre-empted by the 1969 Act."[180]

On the other hand, Justice Stevens seemed to think that the presumption against preemption required the Court to interpret preemptive language narrowly. He declared that the presumption "reinforces the appropriateness of a narrow reading of § 5."[181] He also argued for a narrow reading of the

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[174] *Id.* at 533.
[175] *Id.* at 545.
[176] *Id.*
[177] *Id.*
[178] *See id.* at 531–32.
[179] *Id.* at 531.
[180] *Id.* at 542.
[181] *Id.* at 518.

statutory text at several other places in the plurality opinion.[182] However, Justice Stevens also purported to look to the "plain meaning" of the statutory text, an approach that seems inconsistent with the "narrow" reading that he had previously endorsed. For example, he claimed that "the plain language of the pre-emption provision in the 1969 Act is much broader" than that of the 1965 Act.[183] Later in the opinion, Justice Stevens disagreed with Justice Blackmun's interpretation of the 1969 Act, arguing that "such an analysis is at odds both with the plain words of the 1969 Act and with the general understanding of common-law damages actions."[184] Elsewhere in the opinion, he declared that "[w]e must give effect to this plain language unless there is good reason to believe that Congress intended the language to have some more restrictive meaning."[185]

Justice Scalia, on the other hand, rejected the notion that the statutory text should be narrowly construed in express preemption cases.[186] Instead, he maintained that the Court should "interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."[187] Later in his opinion, Justice Scalia repeated this admonition, declaring that the Court should give statutory language "its ordinary meaning."[188] The "ordinary meaning" advocated by Justice Scalia seems remarkably similar to the "plain meaning" suggested earlier in *Cipollone* by Justice Stevens.

2. *The 1965 Act*

All three opinions in *Cipollone* focused largely on the 1965 Act's preemptive language. Section 5 of the Act was captioned "Preemption,"

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[182] *Id.* at 523 (declaring that the Court "must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b)"); *id.* at 529 (concluding that "the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements").

[183] *Id.* at 520.

[184] *Id.* at 521.

[185] *Id.* at 521–22 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)). Despite his support for a "plain meaning" approach, Justice Stevens seems to have interpreted the 1969 Act's preemption provision somewhat more broadly when he concluded that the phrase "[n]o requirement or prohibition . . . shall be imposed" preempted common-law tort claims based on failure to provide adequate warnings. *Id.* at 515, 521–22.

[186] *Id.* at 544.

[187] *Id.*

[188] *Id.* at 548.

and section 5(a) provided that "[n]o statement relating to smoking and health . . . shall be required on any cigarette package."[189] Section 5(b) declared that "[n]o statement . . . shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with [section 4 of the 1965 Act]."[190] In his plurality opinion, Justice Stevens found that the term "statement" was narrow and that section 5 merely prohibited state and federal authorities from requiring manufacturers to put particular warnings on cigarette labels or in cigarette advertisements.[191] According to Justice Stevens, this conclusion was reinforced by the 1965 Act's statement of purpose, which expressed a desire to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising *regulations* with respect to any relationship between smoking and health."[192] Finally, Justice Stevens relied upon the "regulatory context" of the 1965 Act to support his conclusion that section 5 preempted only affirmative regulations and not state law tort claims.[193] Citing portions of the 1965 Act's legislative history,[194] Justice Stevens determined that Congress added section 5 to the Act because it was concerned with "a multiplicity of State and local regulations pertaining to the labeling of cigarette packages."[195] Consequently, he concluded that the plaintiff's common-law claims were not preempted by the 1965 Act.[196]

Justice Blackmun agreed that section 5 of the 1965 Act preempted only state and local regulations and that this interpretation was consistent with the Act's "stated purpose of avoiding 'diverse, nonuniform, and confusing cigarette labeling and advertising *regulations*' relating to smoking and health."[197] On the other hand, Justice Scalia argued that the term "statement" was sufficiently broad to preempt state law tort claims as well as affirmative regulations.[198] First, he contended that Justice Stevens was mistaken when he interpreted the language of section 5 only to prohibit

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[189] *Id.* at 514 (quoting Federal Cigarette Labeling and Advertising Act, Pub. L. 89-92, § 5(a), 79 Stat. 282 (1965) (codified as amended in 15 U.S.C. §§ 1331–1341 (2000))).

[190] *Id.* (quoting Federal Cigarette Labeling and Advertising Act § 5(b)).

[191] *Id.* at 518.

[192] *Id.* at 519 (quoting Federal Cigarette Labeling and Advertising Act § 2) (alteration in original).

[193] *Id.*

[194] H.R. REP. NO. 89–449 (1965).

[195] *Cipollone*, 505 U.S. at 519 (quoting H.R. REP. NO. 89–499).

[196] *Id.* at 519–20.

[197] *Id.* at 534 (quoting Federal Cigarette Labeling and Advertising Act § 2) (alteration in original).

[198] *Id.* at 549–50.

states from requiring cigarette manufacturers to place *particular* statements on their products. He argued that section 5 should instead be read to prohibit states from requiring cigarette manufacturers to place any statement on their products.[199] Justice Scalia also observed that the plurality opinion's analysis of the particularity issue was difficult to reconcile with its treatment of the word "requirement" in the 1969 Act, particularly when the 1969 Act's statement of purpose was exactly the same as that of the 1965 Act.[200]

3. *The 1969 Act*

The Justices strongly disagreed about the preemptive scope of the 1969 Act. Section 5(a) of the 1969 Act declared that "[n]o statement relating to smoking and health, other than the statement required by [section 4 of the Act], shall be required on any cigarette package."[201] Section 5(b) of the 1969 Act provided that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."[202]

Justice Stevens took the position that this language was much broader than the preemptive language of the 1965 Act.[203] He argued that the phrase "requirement or prohibition[s] . . . imposed under State law" found in the 1969 Act was broader in scope than the term "statement" used in the 1965 Act.[204] To support this conclusion, Justice Stevens abandoned his earlier call for a "narrow interpretation" of preemptive language and looked instead to the "plain words" and "plain language" of section 5.[205] He also argued that because the petitioner's tort claims were predicated on the existence of a legal duty under state law, judicial recognition of such tort claims would impose "requirements or prohibitions" upon cigarette manufacturers.[206] Justice Stevens further concluded that the phrase "imposed under State law" was broad enough to include common-law damage awards against cigarette manufacturers.[207]

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[199] *Id.* at 549.

[200] *Id.* at 549–50.

[201] Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 5(a), 84 Stat. 87 (1970) (codified in 15 U.S.C. § 1334 (2000)).

[202] *Id.* § 5(b).

[203] *Cipollone*, 505 U.S. at 520.

[204] *Id.*

[205] *Id.* at 521.

[206] *Id.* at 522.

[207] *See id.*

Having made these general conclusions about the preemptive effect of the 1969 Act, Justice Stevens examined each of the plaintiff's tort claims to see if they qualified as "requirements or prohibitions."[208] He determined that the plaintiff's failure to warn claims were preempted to the extent that they penalized manufacturers for failing to provide additional or more specific warnings than those required by the federal cigarette labeling statute.[209] Justice Stevens found, however, that the Act did not preempt the plaintiff's express warranty claims because, under warranty law, the state did not impose a specific duty upon cigarette manufacturers regarding product safety or quality.[210] Rather, under warranty law, the manufacturers imposed an obligation upon themselves when they made express warranties to purchasers of their products.[211]

Justice Stevens upheld one of the plaintiff's claims for fraudulent misrepresentation, but determined that the other claim was preempted. He reasoned that the claim that cigarette manufacturers had neutralized the effect of federally-mandated warnings through their advertising would be preempted by section 5(b), because allowing such claims would impose a state-law prohibition regarding advertising and promotion on cigarette manufacturers.[212] On the other hand, Justice Stevens upheld the plaintiff's second claim, which alleged misrepresentation and concealment of material facts by cigarette companies.[213] He pointed out that the preemptive effect of section 5(b) did not include all state requirements or prohibitions against cigarette manufacturers, but only those "based on smoking and health."[214] In this case, according to Justice Stevens, the plaintiff's claims were not based on obligations relating specifically to smoking and health, but rather were based "on a more general obligation . . . not to deceive."[215] In reaching this conclusion, Justice Stevens stated that the Court should construe the phrase "based on smoking and health" "fairly but narrowly" in light of the presumption against preemption.[216] Justice Stevens used the same reasoning to uphold the plaintiff's claim of conspiracy to misrepresent or conceal material facts concerning the health risks of smoking.[217] Justice Stevens

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[208] *Id.* at 524.
[209] *Id.*
[210] *Id.* at 525–27.
[211] *Id.*
[212] *Id.* at 527–28.
[213] *Id.* at 528–29.
[214] *Id.* at 528–29 & n.26 (quoting S. REP. NO. 91-566, at 12 (1969)).
[215] *Id.* at 528–29.
[216] *Id.* at 523, 529.
[217] *Id.* at 530.

contended that this claim was based on a general duty "not to conspire to commit fraud," and not on a more specific state requirement based on smoking and health.[218]

Justice Blackmun maintained that none of the plaintiff's claims should be preempted by section 5(b) of the 1969 Act.[219] He contended that the phrase "no requirement or prohibition" was ambiguous and thus did not clearly indicate a Congressional intent to preempt state law.[220] Consequently, if it employed a clear statement rule based on the presumption against preemption, the Court would logically have no choice but to uphold state authority.[221] Furthermore, even the less rigorous "plain meaning" approach did not justify preempting state law. As Justice Blackmun pointed out, the dictionary definitions of "requirement" and "prohibition" were strong evidence of their plain meaning and were consistent with affirmative regulations, but not with common-law tort doctrines.[222] Justice Blackmun additionally distinguished *Garmon* by arguing that tort law normally exercised a much weaker regulatory effect on affected parties than state regulation and should therefore not be equated with it.[223] Finally, Justice Blackmun observed that nothing in the 1969 Act's legislative history indicated a Congressional intent to preempt state tort law and leave injured smokers without a remedy.[224]

Justice Scalia, however, asserted that the 1965 Act preempted the plaintiff's failure to warn claims and that the 1969 Act preempted all of the plaintiff's state-law tort claims.[225] He reached this conclusion in part because he rejected the notion that the statutory text should be interpreted narrowly; instead, he argued that the words in section 5 of the 1965 Act should be interpreted in accordance with their "ordinary meaning."[226] According to Justice Scalia, both statutes preempted failure to warn claims because they prohibited the states from imposing any liability upon cigarette manufacturers based on the health-related content of their labeling or advertising.[227] Additionally, Justice Scalia argued that the 1969 Act also preempted state-law express warranty and fraudulent misrepresentation

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[218] *Id.*
[219] *See id.* at 531.
[220] *Id.* at 535.
[221] *Id.* at 542.
[222] *See id.* at 535–36.
[223] *Id.* at 536–37.
[224] *Id.* at 541.
[225] *Id.* at 548.
[226] *Id.*
[227] *Id.* at 549–50.

claims.[228] He concluded that express warranty claims were preempted because state-law doctrines, not the cigarette manufacturers' voluntary conduct, established the underlying obligation not to breach an express warranty and provided the basis for imposing liability if such a breach occurred.[229] Finally, Justice Scalia determined that the fraudulent misrepresentation claims were preempted because there was no difference between an affirmative duty to warn about the health risks of smoking and a duty not to deceive the public about the nature of such risks.[230]

C. *The Impact of* Cipollone *on Preemption Jurisprudence*

The ground rules for preemption analysis set forth in *Cipollone* represented a significant departure from earlier methodologies employed by the Court.[231] First, the Court declared that if a federal statute contained express preemptive language, that language determined the preemptive scope of the statute.[232] Second, in light of the presumption against preemption, the Court acknowledged that it would interpret preemptive language narrowly.[233] Third, the Court demonstrated a willingness to apply its preemption analysis to state-law tort claims separately and individually.[234] Finally, the Court in *Cipollone* retreated somewhat from its *Garmon* holding and acknowledged that common-law tort doctrines do not always have the same regulatory effect as state legislative or administrative enactments.[235]

Interestingly, the *Cipollone* Court abandoned the approach that it had adopted eight years earlier in *Silkwood* when it held that Congress did not intend to preempt punitive damages claims. The *Silkwood* Court reasoned that Congress would not deprive injured parties of tort remedies without declaring its intent to do so explicitly.[236] In *Cipollone*, however, the Court concluded that tort remedies did not have to be mentioned specifically, but could be preempted by more general preemptive language.[237]

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[228] *Id.* at 552, 554.

[229] *Id.* at 551.

[230] *Id.* at 552–53.

[231] John F. McCauley, Note, Cipollone & Myrick: *Deflating the Airbag Preemption Defense*, 30 IND. L. REV. 827, 843 (1997).

[232] Jordan, *supra* note 37, at 1158.

[233] Carroll, *supra* note 155, at 812.

[234] Robert J. Katerberg, Note, *Patching the "Crazy Quilt" of* Cipollone: *A Divided Court Rethinks Federal Preemption of Products Liability in* Medtronic, Inc. v. Lohr, 75 N.C. L. REV. 1440, 1474 (1997).

[235] *See* Raeker-Jordan, *The Pre-emption Presumption*, *supra* note 13, at 1412.

[236] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984).

[237] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 520–24 (1992).

The preemption methodology adopted in *Cipollone* seems clear enough on its face and should have been relatively easy to apply.[238] This unfortunately did not prove to be the case. In *Cipollone*, Justices Stevens and Blackmun, ostensibly applying the same approach, reached diametrically opposite conclusions about whether the phrase "requirement or prohibition... imposed under State law"[239] included common-law tort doctrines.[240] Moreover, instead of providing the lower courts with a helpful roadmap to use in future preemption cases, *Cipollone* "marked the commencement of a number of vacillating and confusing decisions in which the Supreme Court was forced to balance federalism concerns with ambiguous congressional language to determine whether a plaintiff's products liability claim could proceed to trial."[241]

III. A SURVEY OF PREEMPTION LAW SINCE *CIPOLLONE*

This section reviews several preemption cases decided by the Court since *Cipollone*. It focuses on two aspects of the *Cipollone* opinion. First, it focuses on the rule, announced by Justice Stevens in the plurality opinion and accepted by Justice Blackmun in his concurring opinion, that the Court should rely only on express preemption analysis to determine the scope of a federal statute's preemptive effect when the statute contains preemptive language. The second issue is the role of the presumption against preemption in preemption litigation. Additionally, this section examines the interaction between preemption clauses and saving clauses in federal statutes. Finally, this section considers what weight the Court should give to agency interpretations of preemptive language in their statutes and regulations. While these latter two issues did not arise in *Cipollone*, they have arisen with some frequency in subsequent preemption cases.

A. CSX Transportation, Inc. v. Easterwood

One year after *Cipollone*, the Court decided *CSX Transportation, Inc. v. Easterwood*.[242] This case involved a collision between a truck and a train

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[238] Hall, *supra* note 57, at 252.

[239] *Cipollone*, 505 U.S. at 515 (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 5(a), 84 Stat. 87 (1970) (codified in 15 U.S.C. § 1334 (2000))).

[240] *See* Stern, *supra* note 92, at 1003.

[241] Carroll, *supra* note 155, at 809.

[242] CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993).

at a railroad crossing in Cartersville, Georgia.[243] The truck driver's widow alleged that the train company was negligent "for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed."[244] The defendant argued that both of these claims were preempted by the Federal Railroad Safety Act of 1970 ("FRSA")[245] and regulations promulgated by the Secretary of Transportation pursuant to the FRSA and the Federal Highway Safety Act of 1973.[246] On appeal, the Court held that the latter claim was preempted, but not the former.[247]

FRSA, as codified in 45 U.S.C. § 434, contained preemptive language as well as a saving clause. Section 434 began with a statement of purpose, which declared that "[l]aws, regulations, and orders relating to railroad safety . . . shall be nationally uniform to the extent practicable."[248] To achieve this objective, the statute provided that states could adopt railroad safety laws, rules, regulations, orders, or standards only when the Secretary had not "adopted a rule, regulation, order, or standard covering the subject matter of such State requirement."[249] The statute's saving clause, however, provided that "[e]ven [when] federal standards [had] been promulgated, the States [could] adopt more stringent safety requirements 'when necessary to eliminate or reduce an essentially local safety hazard'" as long as the state regulations were "'not incompatible with' federal laws or regulations and [did not impose] an undue burden on interstate commerce."[250]

The majority opinion, written by Justice White,[251] began with the admonition that since FRSA contained an express preemption clause, the Court must focus on this clause because it contained the best evidence of congressional intent on the preemption question.[252] The majority also mentioned that "pre-emption will not lie unless it is 'the clear and manifest purpose of Congress,'"[253] but declared a few sentences later that the Court

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[243] *Id.* at 661.

[244] *Id.*

[245] *Id.* at 663 (quoting Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 (repealed 1994)).

[246] *Id.* (quoting Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282 (1973) (codified as amended in 23 U.S.C. § 152 (2000)).

[247] *Id.* at 676.

[248] 45 U.S.C. § 434 (1970), *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (current version at 49 U.S.C. § 20, 106 (2002)).

[249] *Easterwood*, 507 U.S. at 662 (quoting 45 U.S.C. § 434 (1970)).

[250] *Id.* (quoting 45 U.S.C. § 434 (1970)).

[251] Justices Rehnquist, Blackmun, Stevens, O'Connor, Scalia, and Kennedy joined in the majority opinion. *Id.* at 659–60.

[252] *Id.* at 664.

[253] *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

should focus on "the plain wording" of the statute's preemption provision.[254] Additionally, citing the *Cipollone* case, Justice White reaffirmed that common-law rules could be preempted by statutory language that purported to preempt a state "law, rule, regulation, order, or standard."[255] Finally, Justice White observed that FRSA preempted state law only when the Secretary of Transportation adopted a rule, regulation, order, or standard covering the same subject matter as a state requirement.[256] According to the Court, "covering" was a relatively restrictive term that suggested that federal regulations would preempt only if they "substantially subsume the subject matter of relevant state law."[257]

The plaintiff's first claim involved the defendant's alleged failure to place adequate warning devices at the crossing. Justice White observed that the Secretary had promulgated several regulations applicable to states which accepted federal aid.[258] He concluded, however, that these regulations were too general in nature to preempt state common law.[259] According to Justice White, the presumption against preemption partly supported this finding.[260] Justice White also observed that the Secretary had required states to install grade crossing devices, including warning devices, that conformed to standards set out in the Federal Highway Administration's *Manual on Uniform Traffic Control Devices for Streets and Highways* ("MUTCD").[261] Justice White, however, determined that this requirement did "not cover the subject matter of the tort law of grade crossings."[262] Finally, the majority opinion examined two federal regulations requiring the installation of particular warning devices at grade crossings, but found those regulations inapplicable because the project in question had not been constructed with federal funds.[263]

The plaintiff's second claim was that the defendant failed to operate its train at a safe speed.[264] The Secretary had established a maximum speed limit of sixty miles per hour for a class four track, the type of track that was involved in the *Easterwood* case.[265] Although the defendant's train was not

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[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.* at 665–66.
[259] *Id.* at 667.
[260] *Id.* at 668.
[261] *Id.* at 665–66.
[262] *Id.* at 668.
[263] *Id.* at 670–73.
[264] *Id.* at 673.
[265] *Id.*

exceeding this speed limit when the accident occurred, the plaintiff argued that the train was nevertheless traveling too fast. The defendant maintained that the plaintiff's claim was preempted by the federal speed limit regulations.[266]

Justice White dismissed the argument that the speed limits merely established a ceiling, leaving the states free to establish lower speed limits for trains.[267] Instead, Justice White concluded that the speed limit regulations were connected with federal concerns about improving track and grade crossing safety.[268] He also rejected the argument that FRSA's saving clause protected common-law negligence claims from preemption.[269] The saving clause provided that a state could enact or continue in force "an additional or more stringent law . . . relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard."[270] Justice White determined that the saving clause did not apply because common-law negligence was concerned with risks and hazards in general and not merely limited to those caused by unique local conditions.[271] Accordingly, Justice White concluded that the plaintiff's excessive speed claim was preempted.[272]

Justice Thomas argued that neither claim should be preempted.[273] He maintained that the federal speed limits were not connected in any way with grade crossing safety and, therefore, the states were free to address this problem.[274] Justice Thomas also indicated that the presumption against preemption applied to actions by administrative agencies and suggested that the Secretary define more explicitly the subject matter to be covered in the speed limit regulation.[275]

The *Easterwood* Court adhered fairly closely to the approach it had adopted in *Cipollone*.[276] A novel issue in *Easterwood* was the effect of a saving clause on common-law claims. The Court merely took notice of the saving clause, however, and concluded that it did not apply to negligence claims based on excessive speed.

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[266] *Id.*
[267] *See id.* at 674.
[268] *Id.* at 674–75.
[269] *Id.* at 675.
[270] *Id.* (quoting 45 U.S.C. § 434 (1970)).
[271] *Id.*
[272] *Id.*
[273] *Id.* at 676.
[274] *Id.* at 677–78.
[275] *Id.* at 679.
[276] Noah, *supra* note 6, at 920.

B. Freightliner Corporation v. Myrick

In *Freightliner Corp. v. Myrick*,[277] decided in 1995, the Court held that the National Traffic and Motor Vehicle Safety Act ("NTMVSA") did not expressly[278] or impliedly preempt a common-law design defect claim against truck manufacturers who failed to equip their vehicles with antilock braking systems ("ABS").[279] In that case, one plaintiff was killed and another was injured in two separate but similar accidents when eighteen-wheel tractor-trailers struck their vehicles.[280] The plaintiffs alleged that the tractor-trailers were defectively designed because they were not equipped with ABS.[281] The truck manufacturers responded that the NTMVSA[282] and its implementing regulations preempted the plaintiffs' state-law tort claims.[283]

Justice Thomas, joined by seven other members of the Court,[284] rejected the manufacturers' preemption defense.[285] The Safety Act contained an express preemption clause prohibiting states and cities from enacting motor vehicle safety standards that were not identical to applicable federal standards.[286] This preemption provision, however, did not specifically mention common-law claims.[287] Additionally, the NTMVSA had a saving clause stating that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[288] The defendants argued that Standard 121, which "imposed stopping distances and vehicle stability requirements for trucks," but did not require the installation of ABS,

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[277] Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).

[278] *Id.* at 286–87 (no express preemption).

[279] *Id.* at 289–90 (no implied preemption).

[280] *Id.* at 282.

[281] *Id.* at 283.

[282] National Traffic & Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966) (repealed 1994) [hereinafter NTMVSA].

[283] *Myrick*, 514 U.S. at 283.

[284] Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined in the opinion. Justice Scalia did not join in the opinion, but concurred in the result. *Id.* at 281.

[285] *Id.* at 282.

[286] *Id.* at 284 (quoting NTMVSA § 103(d) (original version at 15 U.S.C. § 1392(d) (1988), current version at 49 U.S.C. § 30,103(b)(1) (2000))).

[287] *See* McCauley, *supra* note 231, at 831.

[288] *Myrick*, 514 U.S. at 284 (quoting NTMVSA (original version at 15 U.S.C. § 1397(k) (1988), current version at 49 U.S.C. § 30,103(e) (2000))).

expressly preempted the plaintiffs' claims.[289] Justice Thomas, however, pointed out that truck manufacturers had successfully challenged the validity of the original Standard 121 in the mid-1970s[290] but that the National Highway Traffic Safety Administration ("NHTSA") had failed to promulgate a new regulation.[291] According to Justice Thomas, since Standard 121 had no legal force or preemptive effect, the Act's saving clause freely permitted states to impose their own safety standards.[292]

The defendant maintained that NHTSA's failure to adopt a standard for stopping distances meant that regulation by state or federal entities was inappropriate.[293] However, the Court rejected this argument, pointing out that NHTSA's failure to regulate in this area was not due to an affirmative decision, but rather from a successful lawsuit brought against the agency by the automobile industry.[294]

Undoubtedly, the most significant aspect of the majority opinion in *Myrick* was its apparent retreat from the rule in *Cipollone* that excluded implied preemption analysis when a statute contained express preemptive language.[295] The defendants argued that the plaintiffs' lawsuits were impliedly preempted due to an actual conflict between design defect claims and federal regulatory objectives in this area.[296] The Court of Appeals followed the Court's directions in *Cipollone* and held that there could be no implied preemption when Congress placed an express preemption provision in a statute.[297] The *Myrick* Court, however, declared that *Cipollone* had not proclaimed a "categorical rule precluding the coexistence of express and implied pre-emption."[298] The Court, instead, did nothing more than suggest that the existence of an express preemption clause "supports a reasonable inference . . . that Congress did not intend to pre-empt other matters."[299] Justice Thomas determined that the Safety Act did not impliedly preempt the plaintiffs common-law claims.[300] Absent any federal safety standard regarding stopping distances or braking systems for

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[289] *Id.* at 284–86.
[290] Paccar, Inc. v. NHTSA, 573 F.2d 632 (9th Cir. 1978).
[291] *Myrick*, 514 U.S. at 285–86.
[292] *Id.* at 286.
[293] *See id.*
[294] *Id.* at 286–87.
[295] Carroll, *supra* note 155, at 813–14.
[296] *Myrick*, 514 U.S. at 287.
[297] Myrick v. Freuhauf Corp., 13 F.3d 1516, 1524 (11th Cir. 1994).
[298] *Myrick*, 514 U.S. at 288.
[299] *Id.* at 288.
[300] *Id.* at 289–90.

trucks, there could be no discernible federal regulatory objectives undermined in this area.[301] Consequently, there could be no conflict between design defect claims and these nonexistent federal objectives.[302]

Myrick did not break any new ground conceptually. The Court did not pay attention to the Safety Act's saving clause,[303] and its analysis of the statute's preemption provision was relatively conventional. *Myrick's* primary significance was its repudiation of *Cipollone*'s "no implied preemption" rule.[304]

C. Medtronic, Inc. v. Lohr

Medtronic, Inc. v. Lohr,[305] decided in 1996, held that common-law negligence claims against the manufacturer of an allegedly defective pacemaker were not preempted by the Medical Device Amendments of 1976 ("MDA")[306] to the Federal Food, Drug and Cosmetic Act ("FDCA").[307] The plaintiff in *Medtronic*, a heart patient, required emergency surgery when her cardiac pacemaker failed.[308] She brought suit against the manufacturer for defective manufacture and design, as well as failure to warn.[309] According to the plaintiff's physician, a defect in the pacemaker's Model 4011 lead caused it to malfunction.[310] In response, the manufacturer claimed that section 360k(a) of the MDA[311] expressly preempted all of the plaintiff's claims.[312] Section 360k(a) declared that no state could

> establish or continue in effect with respect to a device intended for human use any requirement—

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[301] *Id.*

[302] Noah, *supra* note 6, at 924.

[303] *See* Hall, *supra* note 57, at 262.

[304] Raeker-Jordan, *The Pre-emption Presumption*, *supra* note 13, at 1463.

[305] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

[306] Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (codified as amended in 21 U.S.C. § 360 (2000)).

[307] *Medtronic*, 518 U.S. at 503 (citing the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360 (2000)). The Federal Food, Drug and Cosmetic Act does not expressly preempt product liability claims because it does not have a preemption provision. *See* Owen, *supra* note 4, at 428.

[308] *Medtronic*, 518 U.S. at 480–81.

[309] *Id.* at 481.

[310] *Id.* at 480–81. "The lead is the portion of [the] pacemaker that transmits [an] electrical signal from the 'pulse generator' to the heart." *Id.* at 480.

[311] 21 U.S.C. § 360k(a) (1995).

[312] *Medtronic*, 518 U.S. at 481–82.

> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.[313]

The MDA required approval by the Food and Drug Administration ("FDA") before medical devices, such as catheters, artificial heart valves, defibrillators, and pacemakers, could be marketed.[314] The MDA classified medical devices into three categories based on their capacity to cause harm. Class III encompassed the most dangerous medical devices,[315] including pacemakers.[316] Before a Class III device manufacturer could market its product, it had to provide the FDA with a "reasonable assurance" that the device was safe and effective.[317] This involved submitting the product to the FDA's premarket approval ("PMA") procedure.[318] This process was lengthy and expensive.[319] MDA, however, exempted existing or "predicate" medical devices from being withdrawn from the market during the PMA process.[320] Additionally, devices that were substantially equivalent to predicate devices[321] were exempted from having to go through the PMA process.[322] Instead, the manufacturer of an exempted device merely had to submit a "premarket notification" to the FDA.[323] This process, also known as a "section 510(k) process," typically took less than 20 hours for the FDA to complete, as opposed to the 1200 hours that could be required for a PMA review.[324] Medtronic successfully claimed that its Model 4011 lead was "substantially equivalent" to a pre-existing device, and it was approved for marketing by the FDA after a section 510(k) review.[325]

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[313] 21 U.S.C. § 360k(a).

[314] *Id.* § 360c (1995).

[315] *Medtronic*, 518 U.S. at 477 (citing 21 U.S.C. § 360c(a)(1) (1995)).

[316] *Id.* (citing 21 C.F.R. § 870.3610).

[317] *Id.* (citing 21 U.S.C. § 360e(d)(2)).

[318] *Id.*

[319] For a discussion of the FDA approval process see Jonathan Kahan, *Premarket Approval versus Premarket Notification: Different Routes to the Same Market*, 39 FOOD DRUG COSM. L.J. 510, 514–15 (1984); Kirk, *supra* note 13, at 679–81.

[320] *Medtronic*, 518 U.S. at 477–48 (citing 21 U.S.C. § 360e(b)(1)(A)).

[321] *Id.* at 478 (citing 21 U.S.C. § 360e(b)(1)(B)).

[322] *Id.*

[323] *Id.*

[324] *Id.* at 478–79.

[325] *Id.* at 480.

Justice Stevens, joined by Justices Kennedy, Souter and Ginsburg, wrote the plurality opinion and Justice Breyer wrote a concurring opinion.[326] Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, wrote an opinion which concurred and dissented.[327] Justice Stevens began by citing *Cipollone* for the proposition that the Court could determine the MDA's preemptive scope by examining the language of § 360k(a).[328] Justice Stevens also invoked *Cipollone* to support his conclusion that the Court's interpretation of the statutory text should take account of the presumption against preemption and reflect a "fair understanding of *congressional purpose*."[329]

With this in mind, Justice Stevens considered Medtronic's contention that *any* common-law claim constituted a "requirement" within the meaning of § 360k(a) because it would impose duties upon the manufacturer that were "different from, or in addition to" those imposed by the FDA.[330] Justice Stevens characterized this argument as "unpersuasive" and "implausible" because it would leave consumers without any remedy if they were injured by a defective medical device.[331] Quoting from the *Silkwood* case, Justice Stevens declared that if Congress wished to take away state-law remedies, it would have to express itself more clearly.[332] Ironically, in light of *Cipollone*, Justice Stevens opined that "requirement" was a "singularly odd word" for Congress to use if it wanted "to preclude common-law claims."[333] Justice Stevens, nevertheless, tried to reconcile this with the Court's *Cipollone* holding. He argued that it was appropriate to conclude in *Cipollone* that the term "requirement" included common-law tort actions because the 1969 Cigarette Labeling Act preempted only a narrow class of claims and, therefore, would not have seriously interfered with important state interests.[334] Finally, Justice Stevens relied on the MDA's legislative history to support his conclusion that it did not preempt all common-law claims.[335]

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[326] *Id.* at 474, 503.

[327] *Id.* at 509.

[328] *Id.* at 484.

[329] *Id.* at 485–86 (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530 (1992)) (emphasis in original).

[330] *Id.* at 486.

[331] *Id.* at 487.

[332] *See id.*

[333] *Id.*

[334] *Id.* at 488.

[335] *Id.* at 490–91.

Justice Stevens then considered whether § 360k(a) of the MDA[336] preempted any specific claims.[337] Regarding the plaintiff's defective design claim, he concluded that the FDA focused more on equivalence than safety in its 510(k) process; since the agency's requirements were not related to the safety of the product's design, there was no overlap between them and the standards applicable to manufacturers under state tort law.[338] Accordingly, Justice Stevens found that the plaintiff's design defect claim was not expressly preempted.

Next, Justice Stevens determined whether § 360k(a) preempted the plaintiff's claims based on defective manufacturing or inadequate labeling.[339] This portion of the plurality opinion considered three issues: (1) whether § 360k(a) preempted the manufacturing or labeling claims based on a manufacturer's conduct that violated FDA regulations; (2) whether § 360k(a) preempted manufacturing or labeling claims because tort law incorporated liability standards not identical to applicable federal requirements; and (3) whether § 360k(a) preempted common-law tort claims in cases where manufacturers had complied with FDA requirements of general applicability which established federal standards regarding manufacturing and labeling.

The defendant argued that § 360k(a) preempted manufacturing and labeling claims based on conduct that violated an applicable FDA regulation.[340] The defendant reasoned that the states created a parallel enforcement regime that relied on damage awards rather than administrative sanctions for violations of FDA regulations.[341] Justice Stevens, however, disagreed with the defendant, concluding instead that the availability of a damages remedy under state law did not impose any additional substantive requirement upon product manufacturers who violated FDA regulations, but merely subjected violators to additional liability.[342] Justice Stevens also rejected the notion that § 360k(a) preempted state tort law because injured parties who brought tort claims often had to prove additional elements, such as negligence, in order to recover against those who violated FDA regulations. He concluded that "such

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[336] 21 U.S.C. § 360(k)(a) (1995).

[337] *Medtronic*, 518 U.S. at 492.

[338] *Id.* at 492–94.

[339] *Id.* at 495.

[340] *See id.*

[341] *Id.*

[342] *Id.*

additional elements of the state-law cause of action would make the state requirements narrower, not broader, than the federal requirement."[343]

Justice Stevens acknowledged that his interpretation was "substantially informed" by FDA regulations which interpreted the scope of § 360k(a)'s preemptive scope.[344] The applicable regulations stated that § 360k(a) "does not preempt State or local requirements that are equal to, or substantially identical to, requirements imposed by or under the act."[345] According to Justice Stevens, the FDA was "uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . and, therefore, whether it should be preempted."[346]

Justice Stevens then turned to the question of whether FDA regulations of general applicability were sufficient to preempt common-law claims. One set of regulations required manufacturers of medical devices to include a label with each device that contained "information for use . . . and any relevant hazards, contraindications, side effects, and precautions . . . ."[347] Another set of regulations required manufacturers to comply with "good manufacturing practices," which are described by the FDA in considerable detail.[348] The Court of Appeals ruled that all of the plaintiff's manufacturing and labeling claims were preempted because they would interfere with the consistent application of these regulations.[349] Justice Stevens, relying on the text of § 360k(a) and 21 C.F.R. § 808.1(d), concluded that these claims would not be preempted unless certain conditions were met.

Based on the language of the statute, Justice Stevens found that the federal requirement must be applicable to the device in question to preempt state law.[350] Furthermore, in 21 C.F.R. § 808.1(d) this meant that preemption would not occur unless the FDA established "specific counterpart regulations or . . . other specific requirements applicable to a particular device."[351] Section 808.1(d)(1) indicated that Congress did not intend for § 360k(a) "to preempt 'State or local requirements of general applicability

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[343] *Id.*

[344] *Id.*

[345] 21 C.F.R. § 808.1(d)(2) (1995).

[346] *Medtronic*, 518 U.S. at 496 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[347] 21 C.F.R. § 801.109(b), (c).

[348] *See id.* § 820.

[349] Medtronic, Inc. v. Lohr, 56 F.3d 1335, 1350 (11th Cir. 1995).

[350] *Medtronic*, 518 U.S. at 499.

[351] *Id.* at 498 (quoting 21 C.F.R. § 808.1(d) (1995)).

where the purpose of the requirement relates . . . to other products in addition to devices . . . .'"[352] This suggested to Justice Stevens that the FDA's manufacturing and labeling requirements reflected "important but entirely generic concerns about device regulation generally, not the sort of concerns regarding a specific device or field of device regulation that the statute or regulations were designed to protect from potentially contradictory state requirements."[353] Consequently, Justice Stevens concluded that the MDA did not expressly preempt any of the plaintiff's claims based on "defective manufacturing or labeling . . . ."[354]

In a concurring opinion, Justice Breyer expressed his support for *Cipollone*'s finding that the term "requirement" could refer to a duty imposed upon product manufacturers by principles of state tort law.[355] He also endorsed the proposition that the Court should defer to a federal agency's determination of the preemptive effect of a statute or regulation.[356] Justice Breyer agreed that the FDA could exercise its preemptive power in a narrow manner if it wished.[357] Finally, he engaged in an implied preemption analysis and concluded that (1) the FDA had not occupied the entire field of medical device regulation and (2) state tort law did not threaten to conflict with the FDA's regulatory objectives in this area.[358]

Justice O'Connor also embraced the *Cipollone* Court's finding that common-law tort actions could impose "requirements" on product manufacturers.[359] While she agreed that § 360k(a) did not preempt the plaintiff's design defect claims or any claims based on conduct that violated FDA regulations,[360] Justice O'Connor concluded that some of the plaintiff's common-law claims imposed state requirements upon the defendant that were "different from, or in addition to" FDA requirements.[361] Moreover, she expressed considerable skepticism about the practice of relying on agency interpretations of statutory preemption provisions and exclaimed that "[w]here the language of the statute is clear, resort to the agency's

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[352] *Id.* at 499.

[353] *Id.* at 501.

[354] *Id.* at 502.

[355] *Id.* at 504 (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)).

[356] *Id.* at 505–06.

[357] *Id.* at 506–07.

[358] *Id.* at 507–08.

[359] *Id.* at 510. Justice O'Connor was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.

[360] *Id.* at 513.

[361] *Id.* at 514.

interpretation is improper."[362] Justice O'Connor objected to the FDA's attempt to limit the preemptive scope of § 360k(a) by adopting regulations that preempted state law only when a conflict existed between a specific state requirement and a specific federal requirement.[363]

In some respects, the *Medtronic* decision represents a return to the principles set forth in *Cipollone*. First, most of the Justices focused primarily on the language of § 360k(a) and avoided an implied preemption analysis.[364] Additionally, Justice Stevens referred to the presumption against preemption, although he did not rely on this principle to narrowly interpret the statutory language.[365] Finally, a majority of the Court endorsed the notion that common-law tort actions could impose requirements on affected parties that were different from requirements imposed by federal law.[366]

D. Norfolk Southern Railway Co. v. Shanklin

Norfolk Southern Railway Co. v. Shanklin[367] involved the same federal statute as *Easterwood*.[368] The Court in *Shanklin*, however, concluded that the FRSA preempted the plaintiff's common-law tort claim.[369] In *Shanklin*, the plaintiff's husband was killed at a railroad crossing at Oakwood Church Road in western Tennessee.[370] The plaintiff alleged that the warning signs installed at the crossing did not provide an adequate warning to motorists.[371] "At the time of the accident, the Oakwood Church Road crossing was equipped with advance warning signs and . . . [the] black-and-white, X-shaped signs that read 'RAILROAD CROSSING.'"[372] Federal regulations required that some crossings, but not the one at Oakwood Church Road, be equipped with "'automatic gates with flashing lights.'"[373]

The railroad argued that the plaintiff's claim was preempted by FRSA.[374] As mentioned earlier,[375] FRSA contained an express preemption

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[362] *Id.* at 512.
[363] *Id.* at 511–12.
[364] Madden, *supra* note 4, at 147–48.
[365] Davis, *supra* note 4, at 1003; *see also* Carroll, *supra* note 155, at 814.
[366] Davis, *supra* note 4, at 1003.
[367] Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000).
[368] CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993).
[369] *Shanklin*, 529 U.S. at 347.
[370] *Id.* at 347, 350.
[371] *Id.* at 347.
[372] *Id.* at 350.
[373] *Id.* at 349 (quoting 23 C.F.R. § 646.214(b) (1999)).
[374] *Id.* at 350–51.
[375] *See supra* text accompanying notes 248–52.

provision declaring that regulations and orders promulgated by the Secretary of Transportation would displace state law if they covered the same subject matter as the state requirement.[376] As Justice O'Connor observed, the Federal Highway Administration had issued regulations pursuant to the Crossings Program which established design standards for grade crossings and set forth requirements for warning devices installed under the program.[377] In *Easterwood*, the Court had ruled that common-law tort claims based on the inadequacy of crossing signals would not be preempted by this statutory provision when the federal government had not provided funding for the project.[378] The warning devices in *Shanklin* were installed with federal funds and complied with applicable federal standards.[379] Affirming the Court's *Easterwood* ruling, Justice O'Connor concluded that these regulations established requirements regarding the installation of particular warning devices and thus preempted tort actions that challenged the adequacy of these devices.[380]

Justice Ginsburg argued that federal regulations provided only minimum, rather than adequate, standards for warning devices at railroad grade crossings and, therefore, left the states free to make their own decisions about the adequacy of such devices.[381] According to Justice Ginsburg, the Court's decision in *Easterwood* merely held that federal funding for a project was a necessary prerequisite to preemption, but that it did not automatically result in preemption of state law.[382]

The Court's *Shanklin* decision was largely consistent with its earlier holding in *Easterwood*. The majority confined itself to an express preemption analysis.[383] The *Shanklin* Court, in contrast to *Easterwood*, made no reference to the presumption against preemption. Justice O'Connor instead pointed out that the "[s]tates [concerned about the adequacy of existing devices] are free to install more protective devices . . . with their own funds."[384] Additionally, Justice O'Connor made it clear that Congress had the power to confer a "windfall" on railroads, by paying for safety devices at grade crossings while simultaneously exempting railroads from tort liability.[385]

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[376] 49 U.S.C. § 20,106 (2000).
[377] *Shanklin*, 529 U.S. at 348–49.
[378] CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 673 (1993).
[379] *Shanklin*, 529 U.S. at 350.
[380] *Id.* at 359.
[381] *Id.* at 360 (Ginsburg, J., dissenting).
[382] *Id.* at 361 (Ginsburg, J., dissenting).
[383] Davis, *supra* note 4, at 1004.
[384] *Shanklin*, 529 U.S. at 358.
[385] *Id.*

The most significant aspect of the opinion in *Shanklin* is its rather unsympathetic response to FHWA's interpretation of its own regulations. In *Easterwood*, FHWA had argued in an *amicus curiae* brief that C.F.R. §§ 646.214(b)(3) and 646.214(b)(4) " 'establishe[d] substantive standards for what constitutes adequate safety devices [at] grade crossing improvement projects financed with federal funds.' "[386] FHWA also declared that "warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary."[387] Furthermore, the agency unequivocally stated that "[a]ny state rule that more or different crossing devices were necessary at a federally funded crossing is therefore preempted."[388]

However, FHWA changed its position when *Shanklin* reached the Supreme Court. The agency contended in its *amicus curiae* brief that the Crossings Program was divided into a "minimum protection" program and a "priority" or "hazard" program.[389] The disbursement of federal funds in connection with the "minimum protection" program did not involve any judgment on the agency's part about whether the warning devices were adequate.[390] "Under the 'priority' or 'hazard' program, in contrast, diagnostic teams conduct individualized assessments of particular crossings, and state or FHWA officials make specific judgments about the adequacy of the warning devices using the criteria set out in § 646.214(b)(3)."[391] Under this interpretation, state law would be preempted only in "priority" or "hazard" programs where a diagnostic team had actually determined that particular warning devices were needed.[392]

While acknowledging that an administrative agency's interpretation of its own regulations is generally "'entitled to substantial deference,'"[393] Justice O'Connor declared that "no such deference is appropriate here."[394]

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[386] *Id.* at 354 (quoting Brief of Amici Curiae United States at 23, CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) (Nos. 91-790 and 91-1206)).

[387] *Id.* (quoting Brief of Amici Curiae United States at 24, *Easterwood*, 507 U.S. 658 (1993)).

[388] *Id.* at 354–55 (quoting Brief of Amici Curiae United States at 24, *Easterwood*, 507 U.S. 658).

[389] *Id.* at 355 (quoting Brief of Amici Curiae United States at 15–21, Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000) (No. 99-312)).

[390] *Id.* (citing Brief of Amici Curiae United States at 15–21, *Shanklin*, 529 U.S. 344 (2000) (No. 99-312)).

[391] *Id.* (citing Brief of Amici Curiae United States at 34–35, *Shanklin*, 529 U.S. 344 (2000) (No. 99-312)).

[392] *Id.*

[393] *Id.* at 356 (quoting Lyne v. Payne, 476 U.S. 926, 939 (1986)).

[394] *Id.*

She also explained that "'[o]nce [the Court] determined a statute's clear meaning, [it would] adhere to that determination under the doctrine of *stare decisis*,'" even though the agency subsequently offered a different interpretation.[395] Accordingly, the Court stood by its earlier interpretation of §§ 646.214(b)(3) and 646.214(b)(4), notwithstanding FHWA's change of heart.

E. Geier v. American Honda Motor Co.

The Court decided *Geier v. American Honda Motor Co.* in the same year as *Shanklin*.[396] Resolving a longstanding controversy,[397] the *Geier* Court held that Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"),[398] promulgated under the authority of the NTMVSA,[399] preempted design defect claims against automobile manufacturers who failed to equip their vehicles with airbags.[400] Justice Breyer, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy, wrote the majority opinion.[401] Justice Stevens, joined by Justices Souter, Thomas, and Ginsburg, issued a dissenting opinion.[402]

The plaintiff in *Geier* struck a tree while driving her 1987 Honda Accord.[403] Even though she used lap and shoulder seatbelts, the plaintiff

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[395] *Id.* (quoting Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990)).

[396] Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

[397] *See* Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997); Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir. 1996); Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990); Taylor v. Gen. Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); Kitts v. Gen. Motors Corp., 875 F.2d 787 (10th Cir. 1989); Wood v. Gen. Motors Corp., 865 F.2d 395 (1st Cir. 1988); Munroe v. Galati, 938 P.2d 1114 (Ariz. 1997); Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995); Wickstrom v. Maplewood Toyota, Inc., 416 N.W.2d 838 (Minn. Ct. App. 1987); Tebbetts v. Ford Motor Co., 665 A.2d 345 (N.H. 1995); Drattel v. Toyota Motor Corp., 699 N.E.2d 376 (N.Y. 1998); Minton v. Honda of Am. Mfg., Inc., 684 N.E.2d 648 (Ohio 1997); *see also* Keith C. Miller, *Deflating the Airbag Preemption Controversy*, 37 EMORY L.J. 897 (1988); Theroff, *supra* note 44, at 577.

[398] 49 Fed. Reg. 28,962 (July 17, 1984).

[399] NTMVSA, 80 Stat. 718 (1966) (current version in scattered sections of 49 U.S.C.).

[400] *Geier*, 529 U.S. at 865.

[401] *Id.* at 863.

[402] *Id.*

[403] *Id.* at 865.

was seriously injured.[404] The automobile "was not equipped with airbags or other passive restraint devices,"[405] and the plaintiff claimed that the manufacturer's failure to provide a driver's side airbag constituted a design defect.[406] Both the trial court and the intermediate appellate court concluded that the plaintiff's design defect claim was preempted.[407]

The NTMVSA expressly preempted "any safety standard" established by a state which was "applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment" unless it was identical to the federal standard.[408] The NTMVSA also contained a saving clause which declared that compliance with a federal safety standard would not "exempt a person from liability [under] common law."[409] In 1984, the Department of Transportation ("DOT") had promulgated a safety standard, FMVSS 208,[410] which "required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints."[411] The defendant had installed the passive restraints in at least ten percent of its 1987 models, thus complying with FMVSS 208.[412]

Justice Breyer first examined the text of the Safety Act's express preemption clause. He acknowledged that the preemptive language in 15 U.S.C. § 1392(d), standing alone, could be interpreted to include common-law tort actions.[413] However, he suggested that the existence of a saving clause might require the Court to interpret § 1392(d) more narrowly.[414] Reading the two provisions together, Justice Breyer reasoned that a federal safety standard would not expressly preempt state tort law because that standard established only automobile safety minimum requirements.[415] Consequently, he concluded that the plaintiff's design defect claim was not preempted.[416]

Justice Breyer then discussed whether the plaintiff's tort claims were impliedly preempted on actual conflict grounds. First, he considered

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[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] Geier v. Am. Honda Motor Co., 166 F.3d 1236 (D.C. Cir. 1999).

[408] 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30,103(b) (2003)).

[409] *Id.* § 1397(k) (current version at 49 U.S.C. § 30,103(e) (2003)).

[410] 49 Fed. Reg. 28,962 (July 17, 1984).

[411] *Geier*, 529 U.S. at 864–65.

[412] *Id.* at 890 (Stevens, J., dissenting).

[413] *Id.* at 868.

[414] *Id.*

[415] *Id.*

[416] *Id.*

whether the existence of a saving clause prevented the Court from considering the possibility of conflict preemption.[417] Justice Breyer declared that the Court had repeatedly refused to interpret saving clauses broadly "where doing so would upset the careful regulatory scheme established by federal law."[418] The express preemption provision and the saving provision, "read together, reflect[ed] a neutral policy . . . toward . . . conflict preemption."[419]

Justice Breyer reviewed the complex history of FMVSS 208 and concluded that design defect claims based on failure to install airbags would conflict with the DOT's regulatory objectives.[420] FMVSS 208 was designed to provide automobile manufacturers with "a range of choices among different passive restraint devices."[421] The DOT believed that it was desirable to phase in passive restraint devices gradually over time in order to "lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance . . . ."[422]

Justice Breyer showed considerable deference to the DOT's interpretation of FMVSS 208's objectives and its conclusion that common-law tort actions constituted an obstacle "to the accomplishment and execution" of the safety standard's regulatory objectives.[423] He pointed out that the "subject matter [was] technical; and the relevant history and background [were] complex . . . the [DOT] [w]as likely to have a thorough understanding of its own regulations and their objectives and [was] 'uniquely qualified' to comprehend the likely impact of state requirements" on its regulatory scheme.[424] For these reasons, Justice Breyer declared, "the agency's own views should make a difference."[425] Justice Breyer rejected the dissent's suggestion that the Court should not allow an administrative regulation to preempt state law on conflict preemption grounds unless the agency issued a formal statement that a conflict existed.[426]

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[417] *Id.* at 869.

[418] *Id.* at 870 (quoting United States v. Locke, 529 U.S. 89, 106–07 (2000)).

[419] *Id.* at 870–71.

[420] *Id.* at 874–75.

[421] *Id.* at 875.

[422] *Id.*

[423] *Id.* at 883 (quoting Brief of Amicus Curiae United States at 25–26, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (No. 98-1811)).

[424] *Id.* (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996)).

[425] *Id.*

[426] *Id.* at 885 ("To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency . . . is most unlikely to have intended.")

Justice Stevens, joined by three other members of the Court, wrote a vigorous dissent. He agreed that the Safety Act did not "expressly preempt common-law claims."[427] While conceding that the Court had preempted common-law claims in *Cipollone*,[428] *Easterwood*,[429] and *Medtronic*,[430] Justice Stevens argued that those statutes' preemptive language was broader than that of § 1392(d), and the statutes involved in these other cases did not contain saving provisions.[431] Furthermore, since "the term, 'safety standard,' as used [elsewhere in the statute] . . . refers to an objective rule prescribed by a legislature or an administrative agency,"[432] Justice Stevens maintained that it must have the same meaning in § 1392(d).[433] This interpretation was bolstered by the presumption against preemption,[434] a concept that the majority opinion ignored.[435]

Justice Stevens also concluded that the common-law claims did not frustrate the regulatory objectives of FMVSS 208.[436] First, he expressed doubt that automobile manufacturers would be pressured by "no airbag" design defect claims to install airbags instead of other passive restraints in their vehicles.[437] Second, the phase-in period contemplated by FMVSS would have passed by the time manufacturers actually equipped all of their vehicles with airbags.[438] Finally, FMVSS 208, like all other regulations promulgated under the auspices of the Safety Act, established "minimum, rather than fixed or maximum, requirements."[439]

Justice Stevens proposed that the Court refrain from allowing administrative agencies to preempt common-law tort claims unless they openly discussed the preemptive effect of proposed orders and regulations during the rulemaking process.[440] According to Justice Stevens:

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[427] *Id.* at 899.

[428] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[429] CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993).

[430] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

[431] *Geier*, 529 U.S. at 897–98.

[432] *Id.* at 896.

[433] *Id.*

[434] *Id.* at 894.

[435] Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did* Geier v. American Honda Motor Co. *Eradicate the Presumption Against Preemption?*, 17 B.Y.U. J. PUB. L. 1, 8–9 (2002) [hereinafter Raeker-Jordan, *A Study in Judicial Sleight of Hand*].

[436] *Geier*, 529 U.S. at 900–03.

[437] *Id.* at 901.

[438] *Id.* at 901–02.

[439] *Id.* at 903.

[440] *Id.* at 912.

> Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking—whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent—respects both the federalism and nondelegation principles that underlie the presumption against preemption in the regulatory context and the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation.[441]

The majority rejected this proposal.[442]

The *Geier* case prompts several observations. First, the majority opinion failed to mention the presumption against preemption and instead relied heavily on elusive "ordinary pre-emption principles" to interpret the statutory text.[443] Second, the majority opinion suggested that the saving clause militated against a broad reading of the Safety Act's preemption provision and supported instead a narrow interpretation.[444] Curiously, the majority did not allow the saving clause to prevent it from engaging in a conflict preemption analysis once it concluded that the Act did not expressly preempt state law.[445] Instead, the court concluded that the saving clause and the express preemption clause neutralized each other, leaving the Court free to search for preemption outside the statutory text.[446] Third, the majority opinion seems to have followed the *Myrick*[447] approach by engaging in an implied preemption analysis even though it had earlier determined that the Safety Act did not expressly preempt common-law claims.[448] Finally, the majority opinion showed considerable respect for the DOT's opinion about the FMVSS's regulatory objectives, dismissing the notion that administrative agencies might have a greater responsibility than Congress to speak clearly when they wished to trump state law.[449]

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[441] *Id.*

[442] *Id.* at 884. *See also supra* notes 423–426 and accompanying text.

[443] Raeker-Jordan, *A Study in Judicial Sleight of Hand*, *supra* note 435, at 8–9.

[444] Kirk, *supra* note 13, at 678.

[445] Hall, *supra* note 57, at 269 (observing that *Geier* "presents a logical difficulty in understanding why the saving clause would save the common-law action from the express preemption provision but not from implied preemption analysis").

[446] Carroll, *supra* note 155, at 817.

[447] Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).

[448] Carroll, *supra* note 155, at 816–17.

[449] Alexander Haas, *Chipping Away at State Tort Remedies Through Preemption Jurisprudence:* Geier v. American Honda Motor Co., 89 CAL. L. REV. 1927, 1947 (2001).

F. Buckman Co. v. Plaintiffs' Legal Committee

Buckman Co. v. Plaintiffs' Legal Committee was decided by the Court in 2001.[450] The plaintiffs in that case were injured by surgical bone screws manufactured by AcroMed Corporation.[451] They alleged that the manufacturer and its consultant, the Buckman Company, made fraudulent representations to the FDA to obtain FDA permission to market its product, a Class III medical device.[452] According to the plaintiffs, AcroMed utilized the § 510(k) process[453] to obtain FDA approval to market the screws as "substantially equivalent" devices by claiming that they would be used in the long bones of the arms and legs when, in reality, the company intended to market them principally for use in spinal fusion surgery.[454]

The *Buckman* Court held that Medical Device Amendments to the FDCA impliedly preempted the plaintiffs' fraud-on-the-agency claims.[455] Contrasting its approach in *Geier*, the *Buckman* Court acknowledged the existence of a presumption against preemption.[456] It ultimately concluded, however, that the issue involved in *Buckman* was inherently federal in character and that states had no interest in protecting the FDA against fraudulent representations by license applicants.[457]

Curiously, the Court did not explicitly consider whether the plaintiffs' fraud-on-the-agency claim was expressly preempted, but instead focused exclusively on implied preemption.[458] Writing for the majority, Chief Justice Rehnquist affirmed the position adopted in *Geier* "that neither an express preemption provision nor a saving clause 'bars the ordinary

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[450] Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001). *Buckman* resolved the circuit split on the issue of fraud-on-the agency claims. *See, e.g.*, Kemp v. Medtronic, Inc., 231 F.3d 216, 233–36 (6th Cir. 2000) (holding that MDA expressly preempted fraud-on-the-agency claims); *In re* Orthopedic Bone Screw Prod. Liab. Litig., 159 F.3d 817, 820 (3d Cir. 1998) (declaring that fraud-on-the-agency claims were not expressly or impliedly preempted), *rev'd sub. nom.* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001); Reeves v. AcroMed Corp., 44 F.3d 300, 302 (5th Cir. 1995) (ruling that fraud-on-the-agency claims were preempted).

[451] *Buckman*, 531 U.S. at 343.

[452] *Id.*

[453] *Id.* at 345. *See supra* notes 317–25 and accompanying text for a description of the § 510(k) process.

[454] *Buckman*, 531 U.S. at 346.

[455] *Id.* at 348.

[456] *Id.* at 347–48 ("[N]o presumption against pre-emption obtains in this case.").

[457] *Id.*

[458] Kirk, *supra* note 13, at 687.

working of conflict pre-emption principles.' "[459] According to Chief Justice Rehnquist, a conflict existed between common-law tort claims like the plaintiffs' and the FDA's need to balance a number of regulatory objectives.[460] Section 510(k)'s disclosure requirements and the wide range of enforcement options available to the FDA to detect and punish fraudulent applications helped achieve the objective of protecting the integrity of the licensing process.[461] However, the FDA had to balance this protection with the objectives of not slowing down the introduction of new medical products into the market and not interfering with the judgment of health care professionals.[462] Chief Justice Rehnquist expressed concern that allowing private persons to bring fraud-on-the-agency claims against manufacturers of medical devices would greatly increase licensing costs for both applicants and the FDA.[463] He also emphasized that the claims involved were not ordinary tort claims, as in *Medtronic*, but instead were based entirely on noncompliance with FDA disclosure requirements.[464] He therefore rejected the *Medtronic* argument that any violation of the FDCA would support a common-law tort claim.[465]

In his concurrence, Justice Stevens concluded that the plaintiffs' case should be dismissed on causation grounds.[466] The plaintiffs claimed that the FDA would not have approved the bone screw if the manufacturer had made a full disclosure on its license application and, consequently, "plaintiffs would not have been injured."[467] In fact, the FDA had allowed the product to stay on the market after the manufacturer's fraud was revealed, suggesting that the product would have reached the market even if there had been no fraud.[468] As far as preemption was concerned, Justice Stevens argued that there was no conflict between fraud-on-the-agency claims and the FDA's regulatory objectives.[469] In his view, tort claims "would not encroach upon, but rather would supplement and facilitate, the federal enforcement scheme."[470] Justice Stevens observed that preempting

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[459] *Buckman*, 531 U.S. at 352 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000)).

[460] *Id.* at 348.

[461] *Id.* at 348–49.

[462] *Id.* at 349–50.

[463] *Id.* at 350–51.

[464] *Id.* at 352–53.

[465] *Id.* at 353.

[466] *Id.*

[467] *Id.* at 343.

[468] *Id.* at 353–54.

[469] *Id.* at 354.

[470] *Id.*

such claims would leave victims of fraud without a remedy.[471] Echoing the Court's language in *Silkwood*, Justice Stevens expressed doubt "that Congress intended such a harsh result."[472]

The *Buckman* case is interesting in two respects. First, the Court eschewed express preemption analysis despite the existence of preemptive language in the statute, and proceeded directly to a conflict preemption analysis.[473] Second, in contrast to *Geier*, the Court in *Buckman* found it necessary to discuss the presumption against preemption, even though it eventually concluded that the presumption was inapplicable.[474]

G. Sprietsma v. Mercury Marine

The last of the post-*Cipollone* preemption cases was *Sprietsma v. Mercury Marine*, decided by the Court in December, 2002.[475] In *Sprietsma*, Justice Stevens, writing for a unanimous Court, concluded that the Federal Boat Safety Act of 1971 ("FBSA")[476] did not preempt a common-law design defect action.[477] The decision in *Sprietsma* resolved a long-standing split of authority on this issue.[478]

The FBSA declared that it was enacted "to improve boating safety by . . . authorizing the establishment of national construction and performance standards for boats and associated equipment . . . [and] to encourage greater . . . uniformity of boating laws and regulations as among the several States and the Federal Government."[479] To further these objectives, the FBSA authorized the Secretary of Transportation to establish "minimum safety

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[471] *Id.* at 355.

[472] *Id.*

[473] Kirk, *supra* note 13, at 687.

[474] Raeker-Jordan, *A Study in Judicial Sleight of Hand*, *supra* note 435, at 35.

[475] Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).

[476] 46 U.S.C. §§ 4301–4311 (2003).

[477] *Sprietsma*, 537 U.S. at 69.

[478] *Cf.* Lewis v. Brunswick Corp., 107 F.3d 1494 (11th Cir. 1997) (holding that FBSA implicitly preempted design defect claims); Carstensen v. Brunswick Corp., 49 F.3d 430 (8th Cir. 1995) (concluding that FBSA expressly preempted design defect claims), *cert. denied*, 516 U.S. 866; Ryan v. Brunswick Corp., 557 N.W.2d 541 (Mich. 1997) (finding that FBSA expressly preempted design defect claims), *with* Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246 (Tex. 1994) (ruling that FBSA did not preempt common-law claims), *cert. denied sub nom.* Vivian Indus. Plastics, Inc. v. Moore, 513 U.S. 1057 (1994).

[479] Federal Boat Safety Act of 1971, Pub. L. No. 92-75, § 2, 85 Stat. 213–14 § (1971) (codified as amended in scattered sections of 46 U.S.C.)

standards for recreational vessels and associated equipment."[480] The Secretary delegated this power to the United States Coast Guard.[481] Before promulgating boat safety regulations under the FBSA, the Coast Guard was required to "consult with a . . . National Boating Safety Advisory Council."[482] The Coast Guard was also authorized to "issue exemptions from its regulation if it determine[d] that boating safety '[would] not be adversely affected.'"[483] Immediately after the FBSA's enactment, the Secretary exempted all existing state laws from preemption under the Act with the intent of keeping these laws in force until new federal regulations could be promulgated.[484] After the Secretary issued federal regulations, however, this wholesale exemption was modified to permit only "state laws that regulated matters not covered by federal regulations"[485] to remain in force.[486]

FBSA contained a preemption provision that provided that "a State or political subdivision . . . may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard . . . that [wa]s not identical to a regulation" promulgated under the federal act.[487] At the same time, however, another provision of the FBSA contained a saving provision which declared that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."[488]

In 1988, the Coast Guard requested that the Advisory Council appoint a subcommittee to study the feasibility of placing shrouds or guards around propellers to reduce the number of injuries caused by boat propellers striking persons in the water.[489] After studying this issue for eighteen months, the subcommittee concluded that the Coast Guard should not require propeller guards, finding that they would be expensive to install, that they would adversely affect the performance of recreational boats, and that they would increase blunt trauma injuries when victims were struck by

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[480] 46 U.S.C. § 4302(a)(1) (2003).
[481] *Sprietsma*, 537 U.S. at 57 (citing 49 C.F.R. § 1.46(n)(1) (2002)).
[482] *Id.* at 58 (citing 46 U.S.C. § 13,110 (2000)).
[483] *Id.* (citing 46 U.S.C. § 4305).
[484] *Id.* at 59.
[485] *Id.* at 60.
[486] *Id.* at 59–60.
[487] 46 U.S.C. § 4306 (2003).
[488] *Id.* § 4311(g).
[489] *Sprietsma*, 537 U.S. at 60–61.

propeller guards.[490] Both the Advisory Council and the Coast Guard accepted the subcommittee's findings.[491]

Justice Stevens identified three issues raised by the *Sprietsma* case: (1) Did the FBSA expressly preempt common-law tort claims? (2) Did the Coast Guard's decision not to require manufacturers to equip boat motors with propeller guards preempt common-law claims? (3) Did the FBSA create a uniform regulatory scheme that impliedly preempted any form of state regulation?[492]

Observing that the FBSA's express preemption provision "appli[ed] to 'a [state or local] law or regulation,'"[493] Justice Stevens concluded that this term referred only to positive enactments and not to common-law tort doctrines.[494] Justice Stevens maintained, "the article 'a' before 'law or regulation,'" suggested that Congress was concerned with discrete directives, such as those associated with statutes or administrative regulations, and not the more generalized provisions of common-law tort doctrines.[495] Additionally, the words "'law' and 'regulation' were used together . . . [i]f 'law' were read . . . to include common law, it might also be interpreted to include regulations," thereby making the statutory reference to "regulation" redundant.[496] Therefore, a narrower reading of "law" to include only statutes and similar legislative enactments would be more consistent with the internal structure of the preemption provision.[497]

Justice Stevens argued that the saving clause also supported a narrow reading of "law and regulation" because it assumed that there must be a significant number of common-law actions to save; this would not be the case if all of them were preempted.[498] Additionally, according to Justice Stevens, the saving clause broadly covered "liability at common law,"[499] while the preemption provision was more specific and detailed.[500] Finally, Justice Stevens pointed out that it made sense for Congress to distinguish between administrative regulations, legislative regulations and common-

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[490] *Id.* at 61.

[491] *Id.*

[492] *Id.* at 55–56. The Court's later discussion of this issue treated it as an example of field preemption. *Id.* at 68.

[493] *Id.* at 63.

[494] *Id.*

[495] *Id.*

[496] *Id.*

[497] *Id.*

[498] *Id.*

[499] 46 U.S.C. § 4311(g) (2003).

[500] *Sprietsma*, 537 U.S. at 63.

law tort actions because the latter performed an important compensatory and remedial function distinct from the purely regulatory function of positive enactments.[501] Therefore, Justice Stevens concluded that the FBSA did not expressly preempt the plaintiff's design defect claims.[502]

Next, Justice Stevens rejected the defendant's argument that the Coast Guard's failure to adopt a regulation requiring propeller guards impliedly preempted the states from regulating in the areas of propeller safety.[503] Justice Stevens reasoned that Coast Guard's acceptance of the subcommittee's recommendation to take no action left the law applicable to propeller guards unchanged.[504] The Secretary's 1971 decision to preserve state regulations until federal regulations were adopted indicated that the DOT believed the FBSA left room for the states to regulate boating safety.[505] Moreover, the Coast Guard never claimed that common-law tort actions would conflict with its regulatory objectives.[506] The Coast Guard also made it clear that its decision not to regulate in 1990 did not reflect a policy determination that propeller guards were inappropriate or that propeller guards could not be regulated by the states.[507]

Finally, Justice Stevens considered whether the FBSA occupied the field, and whether allowing common-law actions would conflict with a federal policy of promoting uniform manufacturing standards for recreational boats. Justice Stevens acknowledged that the FBSA might have amounted to an occupation of the field as far as "positive laws and regulations but its structure and framework d[id] not convey a 'clear and manifest intent' to . . . pre-empt . . . common law relating to boat manufacture."[508] Regarding conflict preemption, Justice Stevens conceded that uniformity was an important statutory objective but, based on the Coast Guard's willingness to tolerate common-law claims, this objective was not paramount.[509] He accordingly declared that the FBSA did not impliedly preempt the plaintiff's common-law claims.[510]

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[501] *Id.* at 64.

[502] *Id.*

[503] *Id.* at 65 (citing Geier v. Am. Honda Motor Co., 539 U.S. 861, 869 (2000) to support the proposition that the existence of an express preemption provision did not foreclose the application of conflict preemption principles).

[504] *Id.*

[505] *Id.*

[506] *Id.* at 65–66.

[507] *Id.* at 66–68.

[508] *Id.* at 69 (quoting English v. Gen. Elec. Co., 496 U.S. 72 (1990)).

[509] *Id.* at 70.

[510] *Id.*

The *Sprietsma* decision is remarkable because every member of the Court joined in Justice Stevens's opinion. The Court adhered to its holdings in *Myrick* [511] and *Geier* [512] that implied preemption could be found even though the statute in question contained an express preemption provision.[513] While the court did not refer to the presumption against preemption,[514] it did require some clear indication of preemptive intent to find the existence of field or conflict preemption.[515] The FBSA's saving clause did not play a major role in *Sprietsma*, but the Court relied on it to support the narrower of two possible interpretations of the Act's preemption clause.[516] Finally, the Court gave considerable weight to the fact that the Coast Guard had never taken the position that its decision not to require propeller guards preempted state common-law claims.[517]

*H. An Assessment of the Supreme Court's Post-*Cipollone *Preemption Jurisprudence*

The United States Supreme Court has decided seven cases involving the preemption of state tort law since the *Cipollone* decision. This Article has examined these cases and considered four issues: (1) the rule that the Court should rely on express preemption analysis to determine the scope of a federal statute's preemptive effect when the statute contains preemptive language; (2) the effect of the presumption against preemption on the Court's interpretation of preemptive statutory language; (3) the effect of a saving clause when a statute contains preemptive language; and (4) the deference that the Court gives to an agency interpretation of preemptive language in statutes and regulations. Although "the Supreme Court's numerous preemption cases follow no predictable jurisdictional or analytical pattern,"[518] I will try to summarize the current state of the law with respect to each of these issues.

The *Cipollone* Court first declared that it would not engage in implied preemption analysis when the statute in question contained an express preemption provision, at least when the statute's preemptive language "provide[d] a 'reliable indicium of congressional intent with respect to state

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[511] Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).
[512] Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).
[513] *Sprietsma*, 537 U.S. at 64–65.
[514] Raeker-Jordan, *A Study in Judicial Sleight of Hand*, *supra* note 435, at 39.
[515] *Sprietsma*, 537 U.S. at 69–70.
[516] *Id.* at 63.
[517] *Id.* at 65–66.
[518] Dinh, *supra* note 35, at 2085.

authority.'"[519] The Court departed from this rule in *Myrick*,[520] but seemingly returned to it in *Medtronic*[521] and *Shanklin*.[522] Since then, however, the Court has engaged in implied preemption analysis in every case surveyed, and it appears that this aspect of *Cipollone* has been abandoned for good.

During the past decade, the Court has referred to the presumption against preemption in some cases and ignored it completely in others. The Court purported to apply the presumption in *Easterwood*[523] and *Medtronic*,[524] but failed to even mention it in *Shanklin* [525] or *Geier*.[526] The *Buckman* Court acknowledged the presumption's existence, but concluded that it did not apply.[527] The *Sprietsma* Court largely ignored the presumption, though it did seem to employ a weak clear statement rule in connection with its implied preemption analysis.[528]

Although the statutes involved in *Easterwood*, *Myrick* and *Shanklin* had saving clauses, they did not figure prominently in the Court's preemption analysis in those cases.[529] The Court did address the saving clause issue in *Geier* and *Sprietsma*, but failed to adopt any clear-cut rule.[530] In *Geier*, however, the Court suggested that a saving clause's existence might cause it to interpret the language of the preemption clause more narrowly than it otherwise would and the Court in *Sprietsma* seems to have followed this approach as well.[531]

The Court has, for the most part, paid close attention to an agency's views on the preemptive scope of a statute or regulations. In *Medtronic*, for example, Justice Stevens stated that his interpretation of § 360k(a) of the MDA was "substantially informed" by the FDA regulations.[532] The *Geier* Court also gave considerable deference to the DOT's interpretation of FMVSS 208, as well as the position the agency took in its *amicus curiae*

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[519] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978)).

[520] Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).

[521] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

[522] Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000).

[523] CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 668 (1993).

[524] *Medtronic*, 518 U.S. at 485.

[525] *Shanklin*, 529 U.S. at 344.

[526] Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

[527] Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348 (2001).

[528] Sprietsma v. Mercury Marine, 537 U.S. 51, 69 (2002).

[529] *See supra* notes 242–304, 367–95 and accompanying text.

[530] *See supra* notes 396–449, 475–517 and accompanying text.

[531] *See supra* notes 396–449, 475–517 and accompanying text.

[532] Medtronic, Inc. v. Lohr, 518 U.S. 470, 495 (1996).

brief.[533] Additionally, the majority of the Justices in *Geier* rejected the suggestion that federal agencies must be required to initiate formal rulemaking proceedings when they wish to preempt state law by administrative regulation.[534] The *Sprietsma* Court also deferred to the Coast Guard's position regarding state regulation of propeller guards.[535] The Court's *Shanklin* holding seems to be the only departure from its policy of agency deference. The *Shanklin* Court chided the agency for changing its position and declared that the agency's interpretation was not entitled to substantial deference when it not only contradicted the regulation's plain text, but also the Court's prior interpretation.[536]

IV. FEDERAL PREEMPTION JURISPRUDENCE IN THE FUTURE

Supreme Court preemption jurisprudence is in a terrible state.[537] Lower courts are both confused and frustrated because the Court's recent preemption decisions have been neither clear nor consistent.[538] Additionally, many of these decisions have encroached upon the historic police powers of the states[539] and swept away remedies which were traditionally available to accident victims under settled principles of state tort law.

There is probably no set of bright line rules that will completely prevent confusion, inconsistency, or encroachment upon states' rights in the future. I believe, however, that the following suggestions would help. First, the Court should limit itself to an express preemption analysis when a statute contains an express preemption clause. Second, the Court should refuse to expressly preempt state tort law when the statutory language is ambiguous. Third, the Court should read saving clauses *in pari materia*

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[533] Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000).

[534] *Id.* at 885.

[535] Sprietsma v. Mercury Marine, 537 U.S. 51, 66–68 (2002).

[536] Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 356 (2000).

[537] Nelson, *supra* note 36, at 232 ("Most commentators who write about preemption agree on one thing: Modern preemption jurisprudence is a muddle.").

[538] Grey, *supra* note 4, at 588 ("The changing climate within the Supreme Court as to federal preemption of state tort claims has left lower court decisions in disarray."); Carroll, *supra* note 155, at 798–99 ("Some of these lower courts have expressly noted their difficulty and confusion in applying the somewhat inconsistent and abstruse precedent handed down by the high Court.").

[539] Carroll, *supra* note 155, at 819 ("The Supreme Court's recent jurisprudence . . . has demonstrated an increasing tendency to allow federal regulation to encroach upon state sovereignty in an unpredictable and analytically inconsistent manner.").

with express preemption provisions. Finally, the Court should refuse to allow administrative agencies to preempt state tort law unless they explicitly consider the preemption issue when formulating orders and regulations.

A. Return to Cipollone*'s "No Implied Preemption" Rule*

The Court should refuse to preempt state tort law on implied preemption grounds once it has concluded that the statute in question has not expressly preempted state law.[540] The *Cipollone* Court declared that it would determine the preemptive scope of a statute solely by examining its express terms.[541] In other words, if a federal statute contained an express preemption clause, the Court would not displace state law based on field or conflict preemption.[542] The rationale for the *Cipollone* Court's new rule was similar to the maxim "*expressio unius est exclusio alterius*."[543] If Congress expressly preempted positive state regulations but did not expressly preempt state tort law damage claims, the Court may reasonably conclude that Congress did not want to impliedly preempt such claims on occupation of the field or actual conflict grounds.[544]

There are, to be sure, some problems with a "no implied preemption" rule. One concern is that such a rule, particularly if coupled with a clear statement requirement, would require Congress to set forth the exact parameters of a statute's preemptive scope when it enacts legislation.[545] If Congress felt, however, that it could not draft clear and detailed preemption provisions,[546] it might refuse to draft any express preemption clause and

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[540] *Id.* at 824.

[541] McCauley, *supra* note 231, at 843.

[542] *See* Carroll, *supra* note 155, at 811–12.

[543] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

[544] Geier v. Am. Honda Motor Co., 529 U.S. 861, 906 (2000) (Stevens, J., dissenting).

[545] *See* Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for the Courts?*, 40 VILL. L. REV. 1, 30 (1995).

[546] *See, e.g.*, Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 96 (1996).

> It may be that when Congress passes a statute covering a relatively narrow subject, it can decide in advance all the preemption issues that are likely to arise and resolve them itself. But when it enacts a lengthy and complex statute that displaces state law . . . Congress simply cannot anticipate all the preemption problems that are likely to arise.

Id.

leave it to the Court to define a statute's preemptive scope by means of implied preemption analysis.[547] This would defeat the whole purpose of the "no preemption analysis" rule.

One can also argue that a "no implied preemption" rule is impossible for the Court to apply because express and implied preemption issues cannot be so easily pigeonholed.[548] Members of the Court have certainly injected implied preemption concepts into their express preemption analysis. In *Cipollone*, for example, Justice Stevens justified his conclusion that the 1965 Act did not expressly preempt the plaintiff's claims by declaring that "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions."[549] He also slipped into field preemption analysis in *Sprietsma* while purporting to examine the preemptive language of the FBSA.[550] These occasional lapses, however, do not mean that a "no implied preemption" rule is unworkable. They simply indicate that the Justices will have to be more careful when they engage in express preemption analysis.

Some commentators believe it unwise to limit the Court's ability to use implied preemption analysis because doing so would prevent the Court from recognizing Congress' broader regulatory objectives, focusing consideration on a single statute.[551] Furthermore, implied preemption analysis enables the Court to preempt state law when changing circumstances produce conflicts that Congress did not anticipate when it enacted a statute.

I do not believe any of these objections are serious enough to reject a "no implied preemption" rule. Congress is unlikely to deliberately refrain from drafting express preemption clauses simply to avoid the effects of a "no implied preemption" rule. Nor is Congress really unable to draft effective express preemption clauses. Congress has shown, on the contrary, that it can draft clear and comprehensive preemptive language when it chooses to do so.[552] While it may be impossible for the Court to segregate its consideration of express and implied preemption issues, a "no implied preemption" rule will hopefully encourage the Court to make a better effort

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[547] *Cipollone*, 505 U.S. at 548 ("If this is to be the law, surely only the most sporting of Congresses will dare say anything about pre-emption.").

[548] *See, e.g.*, Raeker-Jordan, *The Pre-emption Presumption*, *supra* note 13, at 1419.

[549] *Cipollone*, 505 U.S. at 518.

[550] Sprietsma v. Mercury Marine, 537 U.S. 51, 69 (2002).

[551] Stabile, *supra* note 545, at 85–86.

[552] Raeker-Jordan, *The Pre-emption Presumption*, *supra* note 13, at 1433.

to observe this distinction when it decides preemption cases. The third objection rests on the premise that the Court should apply the preemption doctrine aggressively in order to maximize the scope of federal regulatory power. Since I disagree with that premise, I am not concerned that a "no implied preemption" rule might limit the Court's ability to displace state common law when it cannot do so using express preemption analysis. Finally, as far as unforeseen conflicts are concerned, if they are serious enough, Congress can amend the statute in question to preempt state law.

On the other hand, there are advantages to employing a "no implied preemption" rule. First, such a rule protects traditional state police power interests. Implied preemption analysis, particularly obstacle preemption analysis, is so open-ended that courts can easily find that preemption exists in cases where Congress did not actually intend to displace state law.[553] If the Court is required to limit itself to an express preemption analysis, however, it is less likely to encroach upon state police power interests by displacing state law by means of field preemption or obstacle preemption analysis.[554] Additionally, by forcing the Court to focus on the statutory text and discouraging a "freewheeling judicial inquiry"[555] into real and imaginary conflicts and obstacles, a "no implied preemption" rule may produce greater consistency in preemption cases.[556]

B. Enforce the Presumption Against Preemption

The Court should consistently apply the presumption against preemption and refuse to preempt common-law tort claims unless Congress's intent to preempt such claims is truly "clear and unambiguous."[557] The *Cipollone* plurality purported to follow the presumption against preemption,[558] but it largely ignored the presumption against preemption dictated by *Rice v. Santa Fe Elevator Corp.*[559]

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[553] Grey, *supra* note 4, at 623–24.

[554] *See* Hall, *supra* note 57, at 268–69.

[555] Carroll, *supra* note 155, at 824 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 894 (2000) (Stevens, J., dissenting)).

[556] *Id.*

[557] *Id.* at 822.

[558] Grey, *supra* note 4, at 611–12 ("In *Cipollone*, although the Court gave lip service to the presumption against preemption, it made no search for any statement of congressional intent to preempt, and did not even mention the clear statement rule.").

[559] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Professor Mary Davis contends that in recent years the Supreme Court has not only abandoned the presumption against preemption, but has quietly applied what amounts to a presumption *in favor of* preemption. *See* Davis, *supra* note 4, at 1013–14.

The precise legal effect of the presumption against preemption is hard to pin down. In theory, the presumption should act like an evidentiary presumption which would compel the Court to find that state law is not preempted unless the presumption has been rebutted by clear evidence of Congressional intent to preempt. None of the Justices in *Cipollone* employed this approach. Justice Scalia came closest when he suggested that the "assumption [in favor of preemption] dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself . . . ."[560]

The presumption is more widely viewed as an interpretive rule directing the Court to construe ambiguous statutory language narrowly.[561] Justice Stevens advocated such an approach in *Cipollone* when he declared that the "presumption [against preemption] reinforces the appropriateness of a narrow reading of [the statute]."[562] He argued for a narrow reading of the statutory text in several other places of the plurality opinion.[563] Justice Stevens also, however, purported to look to the "plain meaning" of the statutory text in a manner seemingly inconsistent with the "narrow" reading he had previously endorsed. Justice Stevens thus declared that "[w]e must give effect to this plain language unless there is good reason to believe that Congress intended the language to have some more restrictive meaning."[564] Justice Scalia rejected the notion that the statutory text should be narrowly construed in express preemption cases.[565] Instead, he maintained that the Court should "interpret Congress's decrees . . . neither narrowly nor broadly, but in accordance with their apparent meaning."[566] The apparent or ordinary meaning advocated by Justice Scalia seems remarkably similar to the plain meaning suggested by Justice Stevens earlier in *Cipollone*.

One might also treat the presumption against preemption as the reflection of a background norm in favor of federalism.[567] Professor

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[560] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 545 (1992) (quoting Rice, 331 U.S. at 230).

[561] Madden, *supra* note 4, at 107–08.

[562] *Cipollone*, 505 U.S. at 518.

[563] *See, e.g.*, *id.* at 523 (declaring that the Court "must fairly—but in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b)"); *id.* at 529 (concluding that "the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements").

[564] *Id.* at 522 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)).

[565] *Id.* at 545.

[566] *Id.* at 544.

[567] *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989). A background norm is an extra-textual moral or political norm that supports a particular interpretation when the statutory text is

Sunstein, for example, argues for a norm favoring disadvantaged groups.[568] According to Sunstein, "[i]n the face of ambiguity, courts should resolve interpretive doubts in favor of disadvantaged groups so as to ensure that regulatory statutes are not defeated in the implementation process."[569] The presumption against preemption, when viewed in this manner, could be used to support a finding of no preemption of common-law claims in cases where statutory language is unclear.

Finally, the presumption could function as a "clear statement" rule.[570] Under this approach, Congress would be required to clearly express its intent to preempt state law and any ambiguity in the text of the statute would be construed in favor of the states.[571] Justice Blackmun advocated this approach at certain points in his opinion in *Cipollone*.[572] For example, he concluded that "*neither* version of the federal legislation at issue here provides the kind of unambiguous evidence of congressional intent necessary to displace state common-law damage claims."[573] Justice Blackmun also declared that "[o]ur obligation to infer pre-emption only where Congress' intent is clear and manifest mandates the conclusion that state common-law damages actions are not pre-empted by the 1969 Act."[574]

I believe that the Court should apply the presumption as a formal clear statement rule. If the statutory language is clear, the Court would not have to go any further. If the language is ambiguous, however, the presumption would foreclose any express preemption of state tort law. Under this approach, the Court would give the words in a preemption clause their ordinary meaning. Furthermore, unless a word was used as a term of art, the Court would look to its dictionary definition to determine its ordinary meaning. Thus, if Congress wished to preempt common-law tort actions, it would have to use the term "common-law tort actions," "state tort law," or something similar, instead of using ambiguous terms like "standards," "prohibitions," or "requirements." Although such a clear statement requirement is controversial,[575] and could possibly be manipulated by

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unclear. *Id.* at 411–12.

[568] *Id.* at 483.

[569] *Id.*

[570] *See* Raeker-Jordan, *The Pre-emption Presumption*, *supra* note 13, at 1429.

[571] Stern, *supra* note 92, at 1004.

[572] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[573] *Id.* at 531.

[574] *Id.* at 542.

[575] *See, e.g.*, Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 23–29 (2001) (discussing the advantages and disadvantages of a clear statement requirement).

members of the Court,[576] it would be the best way to protect state interests from unwarranted or unintended encroachment.

C. *Pay Attention to Saving Clauses*

The Court should construe express preemption clauses and saving clauses together. The Court considered the effect of saving clauses in *Geier v. American Honda Motor Co.*[577] Justice Breyer treated the saving clause as an instruction from Congress to interpret the language of the express preemption clause narrowly rather than broadly.[578] The effect of this narrow reading was to exclude common-law tort claims from preemption.[579] The Court, however, promptly undercut this approach by holding that common-law claims could be preempted on actual conflict grounds.[580] The Court thus restricted the scope of express preemption, while making it easier to displace state tort law on implied preemption grounds. The *Geier* Court also rejected Justice Stevens's argument that the combination of an express preemption provision and a saving clause created a "special burden" on a defendant claiming that state law was preempted on actual conflict grounds.[581]

I believe that an express preemption clause and a saving clause should be read *in pari materia*.[582] There is no need to interpret either provision narrowly. The Court instead should give the statute's words their ordinary or plain meaning.[583] Thus, if the saving clause declares that "compliance with a federal safety standard does not exempt any person from any liability under common law,"[584] the Court should find that the statute does not expressly preempt any common-law claim.

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[576] Stern, *supra* note 92, at 1012 (discussing how the *Cipollone* Court found ambiguous statutory language to be "clear," thereby defeating the operation of the presumption against preemption).

[577] Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

[578] *Id.* at 868.

[579] Davis, *supra* note 4, at 1021.

[580] Haas, *supra* note 449, at 1936.

[581] *Geier*, 529 U.S. at 872–73. The "special burden" theory can be found in Justice Stevens's dissent. *Id.* at 898–99.

[582] *See* McCauley, *supra* note 231, at 846.

[583] Dinh, *supra* note 35, at 2113 ("Both are words in the same statute and thus each should be given full meaning under ordinary interpretive principles.").

[584] *See, e.g.*, 46 U.S.C. § 4311(g) (2003) (Federal Boat Safety Act's saving clause).

D. Impose Requirements for Administrative Preemption

Finally, the Court should not defer excessively to agency interpretations of statutes or regulations. This involves two related issues: First, should the Court defer to agency interpretations of the statutes under which it operates? Second, should the court defer to an agency when it interprets its own administrative regulations?

The issue of agency interpretation of statutes came up in *Medtronic*.[585] Justice Stevens, writing for the majority, placed considerable weight on the FDA's interpretation of § 360k(a),[586] while Justice O'Connor in her dissenting opinion firmly rejected the FDA's interpretation of that statutory provision, declaring that "[w]here the language of the statute is clear, resort to the agency's interpretation is improper."[587] The leading case on this issue is *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*,[588] where the Supreme Court held that courts should defer to agency interpretations of law unless "Congress has directly spoken to the precise question at issue."[589]

Despite the Court's *Chevron* holding, commentators disagree about whether courts should defer to interpretations of law by administrative agencies.[590] A strong argument against deferring to agency interpretations of their statutes was made by Professor Sunstein, who declared that "[t]hose who are limited by a legal restriction should not be permitted to determine the nature of the limitation, or to decide its scope."[591] In other words, the scope of power delegated to an agency by statute should be determined by an independent entity, such as a court, and not by the agency itself.[592] This argument is even more compelling when an unelected agency

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[585] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

[586] *Id.* at 495.

[587] *Id.* at 512 (O'Connor, J., dissenting).

[588] Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

[589] *Id.* at 842–43.

[590] *Cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 ("[I]n the long run *Chevron* will endure and be given its full scope–not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs."), *with* Sunstein, *supra* note 567, at 445 ("For several reasons, however, a general rule of judicial deference to all agency interpretations of law would be unsound.").

[591] Sunstein, *supra* note 567, at 446.

[592] *Id.*

is seeking to diminish the historic police powers of the states. In my view, the Court should not give undue weight to agency interpretations of statutory provisions in preemption cases. In such cases, agency interpretations might be useful, but should not be treated as a substitute for a clear expression of congressional intent.

Agency regulations may also preempt state law.[593] When a regulation is ambiguous, however, should a court defer to the agency's interpretation? The answer would seemingly be positive, but the Court has been inconsistent about this issue. In *Geier*, Justice Breyer placed considerable weight on the DOT's interpretation of FMVSS 208 and the agency's conclusion in its *amicus curiae* brief that at common law no airbag damage claims should be preempted.[594] In *Shanklin*, however, Justice O'Connor showed no deference to FHWA's claim that its regulations did not preempt negligence claims based on inadequate safety devices for grade crossings that had been constructed with federal funds.[595]

Instead of focusing on an agency's *ex post* interpretations of its regulations, I would apply the same clear statement rule to agencies that was suggested earlier in connection with statutes.[596] Like Congress, if an agency intends to preempt state law, it should make its intentions clear. If a regulation is ambiguous, the Court should assume that no preemption was intended. If an agency believes that the Court's interpretation is mistaken, it can amend its regulation or make its position clear in some other fashion. Justice Stevens proposed in *Geier* that the agency be disallowed from preempting state tort law by order or regulation unless it openly addressed the matter through formal notice-and-comment rulemaking when the rule or order was first promulgated, or later if a need for preemption later arose.[597] In his *Easterbrook* dissent, Justice Thomas also suggested that federal agencies be required to clearly define the preemptive scope of their regulations.[598] Although this might be burdensome for the agency, it would create an opportunity for state and local officials to protect their interests.[599] For this reason, the Court should seriously consider such a requirement.

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[593] Dinh, *supra* note 35, at 2113.

[594] Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000).

[595] Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 356 (2000).

[596] *Supra* notes 557–59, 570–76 and accompanying text.

[597] *Geier*, 529 U.S. at 884 (Stevens, J., dissenting).

[598] CSX Transp., Inc. v. Easterbrook, 507 U.S. 658, 679 (1993) (Thomas, J., dissenting).

[599] Benjamin W. Heineman, Jr. & Carter G. Phillips, *Federal Preemption: A Comment on Regulatory Preemption After Hillsborough County*, 18 URB. LAW. 589, 601–02 (1986).

CONCLUSION

In 1992, the Supreme Court tried to clarify federal preemption law in *Cipollone v. Liggett Group, Inc.* but failed to follow its own guidelines in subsequent cases. This Article has examined the *Cipollone* case and attempted to trace the twisted path of the Court's post-*Cipollone* jurisprudence in some detail. In addition, I have made a number of suggestions that would give more protection to state police power interests against preemption in cases where statutory language is ambiguous. I believe that the Court's preemption decisions would be more consistent, predictable, and protective of state interests if it took these suggestions to heart.