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The Pre-Emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule

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I. INTRODUCTION

In 1992, the United States Supreme Court decided *Cipollone v. Liggett Group, Inc.*,[1] and shook up pre-emption doctrine by a casual restatement of pre-emption principles that appeared to graft a significant change onto those seemingly settled rules. That change, this Article argues, would have afforded more protection to state law than previous pre-emption doctrine did. 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. The retreat from *Cipollone* restored the Court's earlier doctrine, which poses significant threats to federalism, state sovereignty, and, in particular, state common-law actions for damages. This Article seeks to clarify the doctrine, to restore respect for state sovereignty, and to give real meaning to the principles of federalism by proposing the adoption of a bright line approach to pre-emption questions, at least in cases involving state common-law damages actions.

To lay the groundwork for this proposal, Part II discusses and analyzes the major problems with pre-emption doctrine through an examination of the Supreme Court's historical approach to pre-emption. That approach has been to bottom the analysis ultimately on congressional purposes rather than strictly on any express statutory language provided by Congress regarding its pre-emptive intent.[2]

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1. 505 U.S. 504 (1992).

2. *See* 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, 45 (1996) ("Interpreting an express preemption provision..., I contend, does not differ dramatically from the task of interpreting the preemptive effect of a statute without an express preemption provision. In both cases, the courts must engage in a pragmatic process of determining when the enforcement of state law is consistent with the objectives of federal regulation."). Professor Fisk also observed that, at least in ERISA cases, the Court had at times also taken more of a textualist approach. *See id.* at 73.

This Article argues that such a broad-based inquiry permits courts to go to great lengths to find pre-emption of state-law claims, particularly state common-law claims, by simply finding some perceived obstruction of some amorphous congressional purpose in enacting legislation, despite what Congress may have stated in its legislation about its pre-emptive intent. In other words, courts have been allowed too much discretion in invoking pre-emption. The Article then identifies the perceived change by *Cipollone* as one that corrected much of the problem with the doctrine by requiring that courts end the pre-emption analysis at the language of the text if Congress had expressly addressed pre-emption in its legislation. Part II continues to trace the development of the doctrine through *Freightliner Corp. v. Myrick*,[3] in which the Court retreated[4] from the clearer and better approach articulated in *Cipollone*. In its most recent application in *Medtronic, Inc. v. Lohr*,[5] the Court continued to blur the principles, leaving the doctrine in a state of uncertainty, which itself threatens to undermine the principles of federalism by failing to guide lower courts in their decisions whether and when to intrude into state sovereignty. To give some meaning to federalism principles and respect for state sovereignty, this Article argues for the adoption of a bright line approach. That approach seeks to restrain or even prohibit courts from engaging in their free-wheeling implied pre-emption inquiries.

Because the bright line proposal bears primarily on state common-law actions for damages, Part II also details the special problem created by state common-law actions for damages in the pre-emption context. The Court's determination of whether the results of those actions constitute state "regulation" that could be pre-empted under a statute prohibiting state regulation puts those actions squarely within the pre-emption discussion. The doctrinal problem is starkly illustrated when courts can fairly easily pre-empt state common-law actions that have traditionally been within the states' domains.

Part III of this Article therefore proposes a framework for a more workable and sound pre-emption doctrine governed by a bright line regarding state common-law actions for damages. The bright line would require congressional language *explicitly addressing state common-law actions or liability*, or some language unequivocally encompassing *all* state law, before pre-emption doctrine would dictate a finding of pre-emption in those circumstances. Absent such clear and unambiguous directives from Congress, courts should look no further for implications that Congress intended to pre-empt common-law actions. Any lesser standard risks unacceptable intrusion into a domain traditionally occupied by the states and thus risks unacceptable transgressions against principles of federalism.

A paradigmatic illustration of the results of the Supreme Court's lenient doctrine and its lack of clarity can be found in the debris left by courts addressing the airbag controversy. Before the Supreme Court decided *Cipollone*, a debate arose concerning whether the absence of airbags rendered an automobile defective and whether federal regulations could preempt any such state court declaration

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3. 514 U.S. 280 (1995).
4. *See id.* at 288, discussed *infra* at notes 229–30.
5. 518 U.S. 470 (1996).

rendered by way of a common-law damage award. Part IV of the Article describes that controversy and courts' approaches to it, first pre- and post-*Cipollone* and then post-*Myrick*. The discussion illustrates the extent to which the Court's problematic pre-emption doctrine has led lower federal and state courts to varying conclusions on the pre-emption issue in this context. More striking is the demonstration that pre-emption doctrine has permitted the majority of courts to imply pre-emption of state tort claims, despite what those courts may have interpreted Congress's express statutory language to mean.

Part IV also applies the framework set out in Part III to resolve the airbag controversy. In the federal act at issue in the airbag cases, Congress failed to include common-law actions for damages within its express pre-emption clause; rather, Congress expressly provided that despite compliance with federal law, no one would be exempt from common-law liability. The Article therefore concludes with the assertion that absent the requisite clear and unambiguous pre-emptive language, courts cannot find Congress intended federal law to displace or pre-empt state common-law damages actions for defective design of an automobile or that plaintiffs be stripped of all state tort remedies against manufacturers. A significant number of courts addressing the question, however, have strained to imply pre-emption from a statute that does not clearly pre-empt these actions and in fact explicitly authorizes the retention of plaintiffs' state tort remedies. Under a bright-line pre-emption approach, such an anomalous result, and one offensive to federalism principles, could not occur.

II. GENERAL PRINCIPLES OF PRE-EMPTION

A. The Problem

The Supremacy Clause of the Constitution mandates that federal law pre-empts or overrides conflicting state law.[6] The United States Supreme Court

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6. U.S. CONST. art. VI, cl. 2 ("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."); *cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 479 (2d ed. 1988) (stating that the pre-emption power flows in part from the Supremacy Clause). *But see* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) (arguing that supremacy and pre-emption are distinct concepts and that Congress's pre-emption power derives not from the Supremacy Clause but from the Necessary and Proper Clause). Otherwise, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. For general discussions of pre-emption, see KENNETH STARR, *et al.*, AMERICAN BAR ASSOCIATION, THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE (1991); TRIBE, *supra*, §§ 6-25–6-27, at 479–501; Gardbaum, *supra*; S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991); William W. Schwarzer, *Federal Preemption—A Brief Analysis*, 1997 A.L.I.-A.B.A. 693; Susan J. Stabile, *Preemption of State Law By Federal Law: A Task for Congress or the*

recently stated that its "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole."[7] It noted also that "[t]he purpose of Congress is the ultimate touchstone."[8] These rather simple summaries of the Supremacy Clause and the approach to pre-emption questions belie the difficulty the Supreme Court has had in attempting to construct a workable doctrine for the identification of pre-emptable state law. In recognizing congressional purposes as the dominant consideration, the Court has remained consistent with traditional pre-emption doctrine. The doctrine, however, underwent various contortions until it settled into what appears to be a serviceable construct, focusing attention on "express" and "implied" categories. For example, the Court in *Hillsborough County v. Automated Medical Laboratories, Inc.*,[9] set forth the doctrine as follows:

> Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. Pre-emption of a whole field also will be inferred where the field is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[10]

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The apparent clarity of the rules so phrased, however, is deceptive[11] and tends to distract from the dominant consideration of "obstruction of purposes," since that item is enumerated as only one potential type of conflict. The construct thus obscures the root problem with the doctrine, which is precisely that a nebulous

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Courts?, 40 VILL. L. REV. 1 (1995); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69 (1988).

7. Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98 (1992).

8. *Id.* at 96 (internal quotations omitted) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985)).

9. 471 U.S. 707 (1985).

10. *Id.* at 713 (internal citations and quotations omitted). Actions of federal agencies may also pre-empt state law. *Id.*

11. *Cf.* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 567 (1997) (observing that despite the facial consistency of pre-emption doctrine, "[l]urking behind this apparent consistency...are very different judicial approaches to preemption cases"); Hoke, *supra* note 6, at 700 (asserting that the "facial consistency" of the oft-recited pre-emption formula "masks an array of logical, theoretical, and practical difficulties...").

"obstruction of purposes" analysis is the driving consideration. A brief historical discussion of the changes the rules have more recently undergone will serve to display both the distraction and the core problem.

B. The Historical Approach to Pre-emption

1. The Basic Rules

This examination of the United States Supreme Court's contemporary[12] pre-emption jurisprudence begins in the 1912 case of *Savage v. Jones*.[13] In addressing the question of whether the Federal Food and Drug Act of the time overrode a state statute requiring the publication of certain items on animal food labels,[14] the Court distinguished between express and implied pre-emption and set forth more general principles:

> If there be...denial [of the state's right to regulate in this case,] it is not to be found in any express declaration to that effect....
>
> ...Is, then, a denial to the state of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. *If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield* to the regulation of Congress within the sphere of its delegated power.[15]

Although acknowledging that federal law could impliedly pre-empt state law, without Congress expressly indicating its intent to do so, the Court nonetheless saw fit to issue a caution: it ordered that "such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."[16] It elaborated on that restriction: in cases when the state has enacted a law "'in execution of a reserved power of the state,'"[17] the Court required a finding that "'repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.'"[18] Later, it added, "'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the

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12. For a discussion of some of the earliest pre-emption decisions, see STARR, *supra* note 6, at 8–14.

13. 225 U.S. 501 (1912).

14. *See id.* at 521–24, 529.

15. *Id.* at 532–33 (emphasis added).

16. *Id.* at 533.

17. *Id.* at 535 (quoting Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U.S. 613, 623 (1898)).

18. *Id.* (quoting *Missouri, Kansas & Texas Ry. Co.*, 169 U.S. at 623).

police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.'"[19]

In *Savage*, the Court set forth the basis of the doctrine that this Article argues has come to be problematic. Pre-emption could be express or implied from the statutory scheme, pre-emption looked to an obstruction of the federal act's purposes, and yet pre-emption should only have been found when Congress's intent to pre-empt was clearly manifested. Although the requirement of clarity the Court appended to the rules would seem to place a high hurdle before allowing pre-emption of traditionally state law,[20] this Article argues that that hurdle would be easily overcome, in large measure because frustration of congressional purposes, and therefore implied preemption, could also easily be found.[21]

But perhaps the genesis of the current doctrine can be found more readily in *Hines v. Davidowitz*[22] and *Rice v. Santa Fe Elevator Corp.*[23] At issue in *Hines* was a 1939 Pennsylvania law that required aliens within the state to register.[24] Shortly thereafter, in 1940, Congress also enacted the Alien Registration Act.[25] State law required aliens to carry an identification card at all times; the federal law did not.[26] Challengers of the Pennsylvania law argued that the state law had to fall in the face of a comprehensive federal scheme to regulate alien registration in this country.[27]

In the federal act, there appeared to be no express provision governing displacement of state law for the Court to consider; rather, the Court was attempting to ascertain whether the entire scheme enacted by Congress pre-empted state action by implication.[28] That the case involved an area of peculiar national

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19. *Id.* at 537 (quoting Reid v. Colorado, 187 U.S. 137, 148 (1902)).

20. The erection of such a hurdle is consistent with the Court's earliest approaches to pre-emption: "the early cases strongly suggest a Court solicitous of state power; they contain a considerable body of comment to the effect that an actual, manifest collision between federal and state *statutes*...was required in order for the laws of the states to be displaced." STARR, *supra* note 6, at 13.

21. *See* STARR, *supra* note 6, at 18 (observing that "[a]lthough...implied preemption doctrines are well-settled, they nonetheless seem to stand in tension with the Court's oft-stated inquiry into whether there exists a 'clear and manifest' expression of congressional intent").

22. 312 U.S. 52 (1941).

23. 331 U.S. 218 (1947).

24. *Hines*, 312 U.S. at 59.

25. *Id.* at 60 (citing Act of June 28, 1940, c. 439, 54 Stat. 670).

26. *Id.* at 59–61.

27. *See id.* at 61. This argument was the only one of four made by the challengers that the Court addressed. *See id.* at 62. The Court first stated that it was clear that under the Constitution the federal government has supreme power in the field of foreign affairs, which includes immigration and naturalization, *id.*, but it did not determine whether federal power was exclusive in this area. *See id.*

28. *Id.* at 62 ("Obviously the answer to appellees' final question depends upon...a determination of whether Congress has, by its action, foreclosed enforcement of Pennsylvania's registration law.").

concern and authority—naturalization and, as a corollary, alien registration—was clearly significant to the case:

> [W]here the federal government, *in the exercise of its superior authority in this field*, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.[29]

Despite the peculiarly national interest, the Court continued with the following more general statements:

> There is not—and from the very nature of the [pre-emption] problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. *Our primary function is to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.*[30]

With these statements the Court again supplied the guiding principles but also captured the basic, inherent problem in pre-emption doctrine. These pre-emption questions arise because Congress has sought to regulate to some extent in some field in which the states also regulate or attempt to regulate. Once the federal legislature has acted, supremacy questions naturally arise because the Constitution's Supremacy Clause works to displace contrary state law. The first issue therefore is whether state law is contrary to federal law, which for its resolution requires a determination of what federal law *is*. Because imprecise and ambiguous statutory language is often at issue, in order to make the determination of what federal law *is*, the courts must determine what Congress *intended* the

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29. *Id.* at 66–67 (emphasis added).

30. *Id.* at 67 (emphasis added). For support for this last sentence, the Court quoted Savage v. Jones, 225 U.S. 501, 533 (1912):

> For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.

Hines, 312 U.S. at 67 n.20.

federal law to be or to do in relation to state law. Often, then, the core of the analysis must turn on Congress's purposes in enacting the relevant legislation,[31] as the *Hines* Court emphasized. Hence, it seems axiomatic that there could be no one formula, and the articulation of a "rule," the touchstone of which is legislative purpose, is likely a natural result.[32] The lack of a clear rule is precisely what continues to plague pre-emption questions, especially in cases involving state common-law actions for damages.

The problems go further than confusion generated by an indistinct rule grounded in legislative intent, perhaps because of the circumstances that precipitated the use of this language: the *Hines* Court's guiding principles were articulated in a case involving an area of peculiarly national authority. The words of the Court nonetheless purported to provide the basic template which would not be confined to application in like cases but would be used in all subsequent cases, even those involving areas of traditional *state* authority such as common-law actions for damages. That the template should be used with due regard for the context, however, was recognized by the Court:

> And in that determination [of the obstruction of congressional purposes], it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. *Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax.* And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.[33]

When applying its principles in this case, therefore, the Court not surprisingly determined that the Alien Registration Act provided an "integrated and all-embracing system" that "*plainly manifested a purpose*...to protect the personal liberties of law-abiding aliens through one uniform national registration system...."[34] The state law requiring registration disrupted that uniformity and therefore could not stand in the face of a comprehensive scheme affecting a basic national interest.[35]

It is much more questionable, however, whether something like state common law should be so easily dispatched under a broad "obstruction of purposes" approach, especially when the federal scheme does not expressly

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31. *Cf.* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 426 (1989) ("[A] natural and time honored response to the problems of textualism has been to look to the purpose, intent, and history of a statute.").

32. *See generally id.* at 414–41 (discussing the various tools at courts' disposal for interpreting statutes when the text is ambiguous).

33. *Hines*, 312 U.S. at 67–68 (emphasis added).

34. *Id.* at 74 (emphasis added).

35. *Id.*

provide for the override of that traditionally state domain.[36] One can argue that such an indistinct rule applied in such cases is dangerous to federalism principles.[37] The danger to federalism principles flows *a priori* from the "purposes" analysis: once courts delve into the murky realm of congressional purposes to ascertain whether Congress intended to displace state law, it naturally follows that courts may overstep the federalism line, pre-empt more state law, and thus allow federal intrusion into state concerns where the federal government should not lightly intrude. Common law is the paradigmatic state law,[38] and it should only be displaced by clear language and not by a court's stretched and strained analysis in the murky world of Congress's purposes.[39] The Court has not seen fit to limit the *Hines* principles to the circumstances of that case, however; articulation of the

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36. The argument is even stronger considering that the federal regulation typically does not purport to serve the same "purposes" as that state law, such as the redress of injury. *See infra* notes 262, 285–86, 303–06.

37. *See* Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C. L. REV. 187, 248 (1993) (arguing that "courts would violate the principle of federalism by abrogating a state's power to protect its citizens' health and safety absent a clear congressional expression to abrogate that power"). "Federalism principles" is used here to mean, in part, simply that "[i]n the system of American public law, the basic assumption is that states have authority to regulate their own citizens and territory." Sunstein, *supra* note 31, at 469. The Court has similarly recognized the "consistent understanding [that] 'The States unquestionably do retai[n] a significant measure of sovereign authority...to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'" New York v. United States, 505 U.S. 144, 156 (1992) (quoting Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 549 (1985)) (second alteration in original); *see also* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government."). This Article assumes general agreement that fidelity to these basic principles of federalism is desirable; a more searching inquiry into the current state of the federal system and the federal-state balance is beyond the scope of this Article.

38. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 79 (1938) (stating that "there is no federal general common law," but common law is solely within the province of the states); *see also* Ausness, *supra* note 37, at 248 (asserting that "the protection of consumers against injuries from defective products falls squarely within traditional areas of state responsibility"); Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 TOURO L. REV. 595, 601 (1997) (stating that state courts have a role unique from federal courts in that they craft the common law); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 11 (1996) (listing the common law among the "unique state considerations"); Nim Razook, *A Contract-Enhancing Norm Limiting Federal Preemption of Presumptively State Domains*, 11 B.Y.U. J. PUB. L. 163, 171 (1997) ("These common law areas and their statutory embellishments fall uniquely within the realm of state regulation.").

39. *See* Grey, *supra* note 11, at 624 (opining that the obstruction of purposes approach "invites the courts to hypothesize and analyze potential situations in which tort remedies might stand as an obstacle to or frustrate a congressional purpose. Thus, courts can find obstacles where none exist"); *cf.* Sunstein, *supra* note 31, at 427 ("The characterization of legislative purpose is an act of creation rather than discovery.").

doctrine, in cases that followed, continued to emphasize the overriding consideration of congressional purposes.

Rice v. Santa Fe Elevator Corp.[40] followed *Hines* chronologically but presented the Court with express pre-emptive statutory language. In setting out the pre-emption rules that governed the case, the Court also seemed to follow *Hines* doctrinally[41] when it stated, "*[t]he question in each case is what the purpose of Congress was.*"[42] But the Court did not stop there; it explained:

> Congress legislated here in a field which the States have traditionally occupied[, that field concerning warehousemen and warehousing]. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Such a purpose may be evidenced in several ways.* The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.... Or the state policy may produce a result *inconsistent with the objective* of the federal statute.[43]

Thus, the Court made it clear that Congress's purpose to displace state law could be "clear and manifest" even absent express language. Further, displacement of state law was Congress's "clear and manifest" intent not only if the legislation showed the area involved one of dominant federal interest, as in *Hines*;

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40. 331 U.S. 218 (1947).

41. The Court in Pennsylvania v. Nelson, 350 U.S. 497, 501–02 (1956), followed both the *Hines* and *Rice* Courts' description of the doctrine.

42. *Rice*, 331 U.S. at 230 (emphasis added). The Court's use of the word "purpose" here appears to do double duty, and it is not always clear in which of two ways the Court is employing the term. For example, the *Hines* Court had indicated that the nub of the analysis lay in ascertaining congressional purposes behind the enactment of the legislation, i.e., the substantive purpose sought to be achieved by the federal law. Here, however, the context of the Court's use of the word indicates that the first principle to be recognized is that Congress's purpose to *pre-empt* must be clear and manifest. *See id.* at 229–30. The Court went on to explain that that purpose to pre-empt may be demonstrated by a state law's obstruction of the purposes of Congress in enacting the legislation, presumably the substantive purposes sought to be achieved. *See id.* at 230; *cf.* Wolfson, *supra* note 6, at 98 (stating that "the courts usually analyze preemption cases in terms of the effect of the state law on the operation of the federal scheme rather than the intent of Congress to displace state authority").

There is likely also some overlap between the two uses of the word "purpose," for Congress's objective in enacting the legislation may be to displace state law. Nonetheless, the imprecision of word use in this context makes interpretation of precedent challenging.

43. *Rice*, 331 U.S. at 230 (emphasis added, citations omitted). *See also* Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (listing essentially the same types of pre-emption but omitting reference to the presumption against pre-emption and the requirement of clarity).

the principal restraint on congressional action vis-a-vis the states inheres in the political process:

> [T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress....
>
> ...State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Id. at 550, 552. Because state sovereignty is protected in no small part by state representatives' role in drafting federal legislation, judicial allowance of federal intrusion into state sovereignty on the basis of ambiguous legislation would thwart the structural and political protection afforded the states in the Constitution. A presumption against pre-emption when Congress has not been explicit is therefore necessary. *Cf.* Paul E. McGreal, *Some* Rice *With Your* Chevron*?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 840 (1995) (arguing that "by erecting a presumption against preemption, the Court pushes Congress to carefully consider the federal-state balance of power when making legislation"). Professor Tribe has articulated the relationship between the presumption and the *Garcia* Court's approach this way:

> By declining to infer preemption in the face of congressional ambiguity, the Court is not interposing a judicial barrier to Congress's will in order to protect state sovereignty—an interposition that would violate *Garcia*—but is instead furthering the spirit of *Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. The Court evidently envisions that the constitutional procedure for lawmaking will result in a sound balance between state sovereignty and national interests. But to give the state-displacing weight to congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.

TRIBE, *supra* note 6, § 6–25, at 480.

One commentator is of the view, however, that "the reason for this assumption [against pre-emption] is unclear, but presumably it comes from some generalized constitutional notion of the value of federalism." Fisk, *supra* note 2, at 43 n.33. In her view, the presumption is not constitutionally compelled, as by the federalist structure of our government. *See id.* Perhaps the presumption follows simply as a rule of statutory construction from "principles of federalism that constrain Congress' exercise of [some of] its...powers...." Gregory v. Ashcroft, 501 U.S. 452, 468 (1991); *cf.* Fisk, *supra* note 2, at 92.

Relatedly, the Supreme Court has stated that "[t]he Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States." *Gregory*, 501 U.S. at 460. As discussed, in cases involving traditionally state law areas, the advantage is only fully realized when Congress has *clearly* legislated to displace state law. *See id.* at 457–64, 467–70. If that is so, and otherwise Congress has no such advantage over a co-equal sovereign in our federal system, then absent clear legislation in a traditionally state-law area, the state law should get the benefit of Congress's *lack* of clarity. A presumption against pre-emption in the absence of clarity would assure the states of such a benefit.

The 1977 case of *Jones v. Rath Packing Co.*[53] further clarified the role of obstruction of purposes analysis in what was coming to be seen as two main types of pre-emption cases, express and implied.[54] It also further illustrated the lengths to which pre-emption doctrine permits a court to go to pre-empt traditional state-law regulation. The *Rath Packing* Court dealt with federal acts that regulated net-weight labeling and contained express pre-emption provisions. Because the state regulation of net-weight labeling[55] at issue was a "field...traditionally occupied by the States,"[56] the Court again began with the now-familiar "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[57] The Court stated that Congress's "clear and manifest" pre-emptive purpose could be either "*explicitly* stated in the statute's language or *implicitly* contained in its structure and purpose."[58] The Court proceeded to explain that conflict between state and federal law, in the sense of the two laws being inconsistent with each other, could cause federal law to override the conflicting state law.[59] Inconsistency could be seen in a court's determination that the state law obstructed the purposes of the federal law.[60] The Court then stated: "*This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.*"[61] That the Court gave this last explanation in the context of an express pre-emption case makes clear that for pre-emption purposes, it matters little whether Congress expressed its desires on the subject or not; the analyses are virtually identical.[62] Whether Congress expressed its pre-emption intentions in words or not, the Court would look beyond any words to the interpretation and application of the statute for obstruction of purposes.

Indeed, in *Rath Packing* the Court looked not only to the language of the federal statute but also to the more general obstruction of purposes analysis. In its express pre-emption analysis, the Court determined that the relevant federal statute

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53. 430 U.S. 519 (1977).

54. *See supra* note 10 and accompanying text; *infra* note 76 and accompanying text.

55. *Rath Packing*, 430 U.S. at 524.

56. *Rath Packing*, 430 U.S. at 525. The case involved procedures for determining proper weights and measures of foodstuffs and requirements of labeling regarding those weights and measures.

57. *Id.* at 525 (internal quotations omitted).

58. *Id.* (emphasis added).

59. *Id.* at 525–26.

60. *Id.* at 526.

61. *Id.* (emphasis added).

62. At first blush, the Court in *Rath Packing* said nothing different than it did in *Hines v. Davidowitz*, 312 U.S. 52 (1941). *See supra* note 30 and accompanying text. Although it is true that the *Hines* Court propounded the obstruction of purposes rule, it did so in an implied pre-emption case, where its use made some sense. *Hines* also involved an area of peculiarly national concern where federal interest and regulatory control was paramount, such that looking to the obstruction of federal purposes again made some sense. *Rath Packing*, on the other hand, involved an express pre-emption provision in a federal act and state regulation in an area traditionally regulated by state law.

had prohibited state laws that required information on labels that was "different from the [federal] requirements."[63] By resort to legislative history, the Court determined that Congress expressly meant to pre-empt inconsistent state laws. Because it was possible to comply with both the state and federal law at issue, the Court found the state law was not inconsistent and therefore not expressly pre-empted.[64]

Nonetheless, the Court in *Rath Packing* proceeded to determine whether the state law was an obstacle to congressional purposes. Because, in the Court's view, the state law obstructed the purposes of the federal law, it failed.[65] Thus, even though the Court found no actual inconsistency or actual conflict in the sense that one could not possibly comply with both laws, it still found pre-emption implicitly by determining that state regulation would obstruct the federal scheme. Pre-emption of the state law naturally followed.[66]

The approach taken by the *Rath Packing* Court, in a case concededly implicating an area of law traditionally occupied by the states, starkly highlights the core problem with the Court's pre-emption doctrine and its obstruction of purposes analysis. Despite that Congress undertook to make its intentions known by including express pre-emptive language in the statute, despite that the Court found no pre-emption of the relevant state law from that language, despite the presumption against pre-emption in cases such as this, and despite the concomitant applicability of the clarity requirement, the Court nonetheless strained further to find pre-emption by implication from some purpose purportedly being obstructed by the state regulation. Here, not only was the pre-emption presumption overcome by the obstruction of purposes analysis, but Congress's express words were overrun by the Court's pre-emption doctrine.

Then-Justice Rehnquist dissented to this part of the Court's opinion,[67] asserting that it "seriously misapprehends the carefully delimited nature of the doctrine of pre-emption...."[68] Justice Rehnquist objected to this use of the "obstruction of purposes" kind of implied pre-emption because the laws were consistent; therefore, there was no *explicit* pre-emptive provision that displaced the state law in this situation.[69] He stated more forcefully, "[t]he majority nowhere explains why its conclusion that the 'state requirement is not inconsistent with federal law' does not reflect on the fact that the state statutory scheme does not

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63. *Rath Packing*, 430 U.S. at 538 (quoting § 1461 of the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451–1461 (1994)).

64. *Id.* at 540. As regarded another party who was seeking relief from state statutory regulation under a different statute, the Court found express pre-emption from similar words in the relevant federal statute because there was clear conflict between the federal and state requirements. Therefore, the Court went no further than its express pre-emption analysis. *See id.* at 530–32.

65. *Id.* at 543.

66. *Id.* at 549 (Rehnquist, J., concurring in part and dissenting in part).

67. *Id.* at 543.

68. *Id.* at 549.

69. *See id.* at 543–44.

inevitably conflict with the federal."[70] He dissented also because in such a case involving the state's traditional police power, the "stringent standard" of the clarity requirement counseled against it.[71] Finally, he dissented because the Court's finding of "[implied] pre-emption is founded in unwarranted speculations that hardly rise to that clear demonstration of conflict that must exist before the mere existence of a federal law may be said to pre-empt state law operating in the same field."[72] Justice Rehnquist appeared to agree that in a situation such as this, the Court and not Congress pre-empted state law. This Article argues that cases such as *Rath Packing* continued to lay the groundwork for the threat to federalism principles, traditional areas of state law, and common-law damages actions in particular.

For the purposes of this Article, the significant aspect of the 1983 case of *Pacific Gas & Electric Co. v. State Energy Commission*[73] was its statement of the doctrine, in which the Court more clearly and coherently separated the distinct ways that pre-emption could be found:[74]

> It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a "'scheme of federal regulation...so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'...." Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[75]

The doctrine as stated in *Hines* and *Rice* was explicitly grounded in Congress's purposes. In *Pacific Gas*, though, "obstruction of purposes" analysis

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70. *Id.* at 547 n.4 (internal citations omitted).

71. *See id.* at 544–45.

72. *Id.* at 544.

73. 461 U.S. 190 (1983).

74. The Court in the 1984 case of *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 469 (1984), and the 1985 case of *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), described the rules in a similar fashion. *See also* California v. ARC Am. Corp., 490 U.S. 93, 100–01 (1989); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280–81 (1987).

75. *Pacific Gas*, 461 U.S. at 203–04 (1983) (quoting Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963), and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

was identified as a mere subset of "conflict" pre-emption and as such had apparently slipped from the preeminent place accorded it in *Hines*.[76]

In reality, however, "obstruction of purposes" is still the touchstone, even in cases where Congress has expressly spoken, in some fashion, to the pre-emption question.[77] The danger to federalism principles and state common law remains even though it appears that "purposes" analysis is a last resort and only the last of four possible ways that state law can be pre-empted. In some sense, though, placing it at the bottom of the list illustrates in a striking way precisely what this Article argues, that courts can go to extreme lengths to find pre-emption even when it is not clear from the express language, from some occupation of the field, or from impossibility of compliance with both laws, that Congress meant to displace state law. Thus, on one hand the construct as described in *Pacific Gas* would seem to insulate state law because the inquiry appears to be very searching and deliberate. However, this appearance is only a distraction from the actual process of deciding pre-emption questions, and it masks the reality that the overriding consideration remains the obstruction of purposes implied pre-emption analysis, as will be demonstrated by an examination of the Court's later pre-emption jurisprudence.[78] Although it is the last consideration listed in the description, it essentially swallows all the others and, in the process, the presumption against pre-emption. State common law is then at greatest pre-emption risk, and the core problem with the doctrine thus remains.

The case of *English v. General Electric Co.*[79] demonstrates that while the Supreme Court may sometimes correct lower court decisions that too easily have pre-empted a traditional state law, there will still be occasions when pre-emption doctrine, with the flaw pointed out in this Article, will lead lower courts and the Supreme Court to override state law when no clear and manifest intent of Congress exists.[80] In *English*, the plaintiff sought damages under state common law for intentional infliction of emotional distress after her employer, a nuclear-fuels production facility, allegedly retaliated against her for her complaints to a federal agency regarding safety violations at the facility.[81] "It [was] undisputed that Congress ha[d] not expressly pre-empted [the] state-law tort action by inserting specific pre-emptive language into any of its enactments governing the nuclear industry."[82] The employer nonetheless claimed that the federal statute[83] providing an administrative remedy for whistle-blower retaliations pre-empted all state law

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76. *See supra* note 30 and accompanying text.

77. *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992) (plurality opinion and opinion of Kennedy, J.), discussed *infra* notes 98–133 and accompanying text, is a good example of this phenomenon.

78. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992).

79. 496 U.S. 72 (1990).

80. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); *Gade*, 505 U.S. 88.

81. *English*, 496 U.S. at 74.

82. *Id.* at 80.

83. Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1994).

actions for relief regarding the retaliations.[84] A unanimous Supreme Court decided against pre-emption, reversing the lower courts' findings of implied pre-emption.[85]

In stating pre-emption doctrine, the Court listed the same categories identified by *Pacific Gas* by which pre-emption can be found[86] and made a revealing statement in footnote five:

> By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation. Nevertheless, because we previously have adverted to the three-category framework, we invoke and apply it here.[87]

This Article's assertions (1) that the demarcation of the categories distracts observers from what the Court is really doing in pre-emption cases, and (2) that the pre-emption decision ultimately turns on an "obstruction of purposes" analysis, find support in this statement. First, in acknowledging that the categories often blend together, the Court arguably conceded that the category framework is deceptive in its apparent perspicuity. Second, by suggesting that even field pre-emption can be recast as a form of obstruction of purposes conflict pre-emption, the Court acknowledged that the kind of "conflict" pre-emption that looks to obstruction of purposes is the bottom line. Nonetheless, the Court adhered to the category framework because it had previously done so.

Consistent with the category approach, the Court first addressed the field pre-emption argument.[88] Although agreeing that Congress intended to occupy the field of nuclear safety, the Court disagreed that Congress similarly intended to occupy the field covering all of an employer's outrageous conduct toward whistle-blowing employees, largely because it found no "clear and manifest"congressional intent to pre-empt state tort claims traditionally available for alleged employer misconduct.[89] Additionally, even though Congress clearly meant to pre-empt state regulation of nuclear safety, it did not intend "clearly and manifestly" to pre-empt state tort law that could have some tangential regulatory effect on nuclear operators; the tort action, therefore, was not within the pre-empted field of safety regulation.[90]

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84. *English*, 496 U.S. at 77.
85. *Id.* at 90.
86. *Id.* at 78–79.
87. *Id.* at 79–80 n.5.
88. *Id.* at 80.
89. *Id.* at 82–83.
90. *See id.* at 84–86. The Court cited *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) as support for its finding that state tort claims for whistle-blower retaliation were not within the pre-empted field. *English*, 496 U.S. at 85–86. The state tort claim at issue in *Silkwood* "stemm[ed] from radiation damage suffered as a result of actual safety violations." *Id.* at 86. The *English* Court observed that the *Silkwood* Court had nonetheless

Again, in keeping with the searching category approach, the Court addressed the conflict pre-emption question and examined whether a state tort action and imposition of damages would conflict with the purposes or objectives of the federal law in providing for relief from employer retaliation for employee whistle-blowing.[91] In fact, the two lower courts had grounded their decisions to preempt on "obstruction of purposes" type of conflict:[92]

> In the [district] court's view, Congress enacted this scheme to foreclose all remedies to whistle-blowers who themselves violate nuclear-safety requirements, to limit exemplary damages awards against the nuclear industry, and to guarantee speedy resolution of allegations of nuclear-safety violations—goals the [district] court found incompatible with the broader remedies petitioner sought under state tort law.[93]

But the Supreme Court found no conflict with the purposes of the federal act that would clearly evidence intent on the part of Congress to pre-empt state tort law.[94]

Ultimately, the Court was required by its doctrine to resort to this "obstruction of purposes" kind of conflict pre-emption and search for some possible way that state law could be pre-empted, to determine whether the lower courts were correct in their findings of pre-emption. Any argument that such exploration was necessary because the federal statute contained no express pre-emptive language is hardly relevant; under the doctrine, courts may explore all the ways federal law could pre-empt state law, even in the presence of express language,[95] and the lower courts here conducted the requisite exploration until they found implied pre-emption. In reversing the lower courts, the Supreme Court took care to note that "[t]he Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.' The 'teaching of this Court's decisions...enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'"[96] Thus, although the Supreme Court corrected the error

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found that claim not to be pre-empted even though it seemed to have an even greater, if still indirect, effect on the pre-empted field of safety regulation. *Id.* at 85–86.

91. *Id.* at 87–90 (discussing whether the statute "reflect[ed] a congressional desire to preclude *all* relief...," *id.* at 87, whether permitting a state-law claim would "frustrate [the] congressional objective," *id.* at 88, whether the statute "reflect[ed] 'an informed judgment...that in no circumstances should a nuclear whistle blower receive...damages...,'" *id.* at 89, and whether the statute "reflect[ed] a congressional decision that no whistle-blower should be able to recover under any other law...." *id.*).

92. *See id.* at 77–78.

93. *Id.* at 78.

94. *See id.* at 88–90.

95. *See supra* notes 59–67 and accompanying text.

96. *English*, 496 U.S. at 90 (quoting Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960)) (alteration in original) (citations omitted). The result the Court reached in this case is consistent with the thesis advanced here: when the pre-emption challenge is to the paradigm area traditionally dominated by state law, common law and its remedies, pre-emption should not be implied. If there is no explicit language, and if the only way a court can find pre-emption is by delving into murky, typically ill-defined (if defined

and appeared to upbraid the lower courts, the Court itself had previously done such seeking in *Rath Packing*. It had to reprimand those lower courts because the core problem with the doctrine, its amorphous, subjective, and overarching "obstruction of purposes" analysis, is that it permits the lower courts to do just what these lower courts did: seek out conflict.

2. *The* Gade *Opinions*

The various opinions in the 1992 case of *Gade v. National Solid Wastes Management Association*[97] put in sharp relief the doctrinal problem with pre-emption identified in this Article. Members of the Court clearly struggled with the doctrine and the way in which pre-emption questions should be approached. The issue in *Gade* was whether the federal Occupational Safety and Health Act of 1978[98] and regulations promulgated thereunder pre-empted the Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act[99] and Illinois Hazardous Waste Laborers Licensing Act[100] provisions. The Illinois laws attempted to regulate occupational safety and health and public safety[101] and essentially supplemented the federal OSHA requirements in that they, too, sought to regulate the training required of the workers covered by the relevant acts.[102]

a. The Opinions of the Plurality and Justice Kennedy

In setting out the governing pre-emption rules, a plurality of the Court[103] noted that the intent of Congress governs pre-emption questions, and that the Court must look to the "'explicit statutory language and the structure and purpose of the statute'" to discern that intent.[104] The plurality opinion further described the now-familiar ways a federal law can pre-empt state law: express, field, and the two types of conflict pre-emption, one being the "obstruction of purposes" type.[105] This

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at all) purposes and general statements in the legislative history, then Congress's intent to pre-empt traditional state tort law cannot be "clear and manifest," as it must be to be pre-empted.

97. 505 U.S. 88 (1992). Justice O'Connor wrote the opinion for the majority, which also consisted of Chief Justice Rehnquist and Justices White, Scalia, and Kennedy. *Id.* at 91. Justice Kennedy concurred in part and concurred in the judgment, *id.* at 109, while Justices Souter, Blackmun, Stevens, and Thomas dissented. *Id.* at 114.

98. 29 U.S.C. § 651 (1994), *cited in Gade*, 505 U.S. at 91.

99. 225 ILL. COMP. STAT. ANN. 220/1-17 (1998), *cited in Gade*, 505 U.S. at 91.

100. ILL. COMP. STAT. ANN. 221/1-15 (1998), *cited in Gade*, 505 U.S. at 91.

101. *Gade*, 505 U.S. at 91.

102. *See id.* at 92–93. "[F]or example, some of the [respondent national trade association's] members must ensure that their employees receive not only the 3 days of field experience required for certification under the OSHA regulations, but also the 500 days of experience (4,000 hours) required for licensing under the state statutes." *Id.* at 94.

103. The plurality on these points included Justice O'Connor, Chief Justice Rehnquist, and Justices White and Scalia. *See id.* at 91, 96–104.

104. *Id.* at 96 (quoting Ingersoll–Rand Co. v. McClendon, 498 U.S. 133, 138 (1990)).

105. *Id.* at 98.

detailed description, however, again merely masks what actually takes place, as the Court proceeded immediately to note that "[o]ur ultimate task in any pre-emption case is to determine whether state regulation is *consistent with the structure and purpose of the statute as a whole.*"[106] That quotation, focusing on consistency of state regulation with the federal law, clearly indicates once again that the obstruction of purpose analysis dominates pre-emption questions. Although the plurality opinion noted that in entering the field of occupational safety and health Congress had entered an area that traditionally had been regulated by the states,[107] nowhere did the plurality indicate that when Congress does that, the Court must presume that the area is not to be pre-empted absent the clear and manifest intent of Congress. Therefore, although it could appear that "obstruction of purposes" pre-emption has dropped to a mere subset of the whole, the Court's emphasis and actual application is dominated by this nebulous, subjective approach that overrides the presumption against pre-emption, if that presumption is even recognized or heeded. The plurality's resolution of the question in this case proves these charges to be correct.

The relevant sections of OSHA that the plurality identified for pre-emption purposes included section 18(a), which provided that "the Act does not 'prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect.'"[108] The plurality relied most, however, on section 18(b) of the Act:

> Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.
>
> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [by the Secretary of Labor under the OSH Act] shall submit a State plan for the development of such standards and their enforcement.[109]

Despite the existence of some express language from which the Court might find what Congress meant to pre-empt, if anything, the plurality did not view the case as an express pre-emption case but rather as one of implied pre-emption: it examined the "design"[110] of the statute, including the above-quoted clauses, and determined that the state regulation at issue was "impliedly pre-empted as in conflict with the full purposes and objectives" of the federal act.[111]

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106. *Id.* (emphasis added).
107. *Id.* at 96.
108. *Id.* at 96–97 (quoting 29 U.S.C. § 667(a) (1994)) (alteration in original).
109. *Id.* at 97 (quoting 29 U.S.C. § 667(b) (1994)) (alteration in original).
110. *Id.* at 99.
111. *Id.*

The statute's purpose, according to the plurality, was to "avoid subjecting workers and employers to duplicative regulation...."[112] Section 18(a), by implication, pre-empted state regulations covering the same issue as a federal standard; as the plurality saw it, if states were specifically allowed to promulgate standards on issues *not* covered by the federal act, then they must be disallowed from imposing regulations when a federal standard *was* in effect.[113] Section 18(b) also implied that the only way a state could promulgate regulations covering the same issues as federal standards was to obtain the Secretary of Labor's approval of its regulations, in the form of a plan.[114] The plurality concluded that the purpose of Congress was to subject employers and employees to state or federal regulation, but not both.[115] Clearly then, any state regulation supplementing existing federal regulation would obstruct the Act's purpose.

The plurality further relied on subsection 18(c), which provided that the Secretary would approve plans submitted under subsection 18(b) if the state regulations did not burden interstate commerce.[116] The plurality opined that this section evinced Congress's desire to prevent states from establishing supplementary standards that might burden interstate commerce; any state regulation would have to be approved by the Secretary and only then would it supplant federal regulation.[117] This congressional desire to protect interstate commerce bolstered the plurality's conclusion that the ultimate purpose of Congress was to have only one system of regulation: "[i]t would make little sense to impose such a condition on state programs intended to supplant federal regulation and not those that merely supplement it...."[118]

The plurality's immediate resort to the "obstruction of purposes" method of finding pre-emption despite the existence of some express language illustrates that the Court ultimately relies on "purposes" analysis even when it has first paid some deference to the "express/implied" construct.[119] It also illustrates the threatening nature of this kind of pre-emption approach to state law: a court can easily conjure up a federal statutory purpose with which a state law might interfere.[120]

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112. *Id.* at 100. The plurality elsewhere concluded that "Congress intended to subject employers and employees to only one set of regulations...." *Id.* at 99. Justice Kennedy criticized this conclusion of the plurality, opining that "[t]his is not an application of our pre-emption standards, it is but a conclusory statement of pre-emption...." *Id.* at 110.

113. *Id.* at 100 ("Although this is a saving clause, not a pre-emption clause, the natural implication of this provision is that state laws regulating the same issue as federal laws are not saved, even if they merely supplement the federal standard.").

114. *Id.* at 99 ("The unavoidable implication of this provision is that a State may not enforce its own occupational safety and health standards without obtaining the Secretary's approval....").

115. *Id.*

116. *Id.* at 100.

117. *Id.* at 100–01.

118. *Id.* at 101.

119. *See supra* notes 111–12 and accompanying text.

120. *See supra* note 39.

The failure of the plurality in this area of traditional state regulation to require the "clear and manifest intent" of Congress before it implied pre-emption based on an obstruction of congressional purposes apparently led Justice Kennedy to concur only in the judgment.[121] He disagreed with the plurality that this was an implied pre-emption case; "[t]he contrary view of the plurality is based on an undue expansion of our implied pre-emption jurisprudence.... "[122] Further,

> [t]he plurality's broad view of actual conflict pre-emption is contrary to two basic principles of our pre-emption jurisprudence. First, we begin with the assumption that the historic police powers of the States [are] not to be superseded...unless that was the clear and manifest purpose of Congress. Second, the purpose of Congress is the ultimate touchstone in all pre-emption cases. *A free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law.*[123]

Justice Kennedy clearly felt that the plurality had not remained true to pre-emption doctrine because it had not applied the presumption and required Congress's *clear and manifest* intent. Justice Kennedy nonetheless agreed with the *Gade* plurality that the state law was pre-empted, but based his concurrence on the express terms of the statute.[124] In his view, the existence of statutory text from which the Court could find pre-emption delimited the inquiry; in those situations, the pre-emption analysis "begin[s] and end[s] with the statutory framework itself."[125] As for the facts of this case, he elaborated, "[u]nartful though the language of § 18(b) may be, the structure and language of § 18 leave little doubt that in the OSH statute Congress intended to pre-empt supplementary state regulation of an occupational safety and health issue with respect to which a federal standard exists."[126] This conclusion followed directly from the statute, in Kennedy's view, because the state was required to submit a plan if it wanted to pre-empt *federal* law in regard to an issue for which there already existed a federal standard; "the most reasonable inference from this language is that when a State

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121. *See Gade*, 505 U.S. at 109 (Kennedy, J., concurring in part and concurring in the judgment).

122. *Id.*

123. *Id.* at 111 (internal quotation omitted) (alteration in original) (emphasis added). A dissenting justice in a much earlier case in which the Court had implied pre-emption stated his objections in a similar manner: "Mere fear by courts of possible difficulties [or conflicts] does not seem to us in these circumstances a valid reason for ousting a State from exercise of its police power. Those are matters for legislative determination." Pennsylvania v. Nelson, 350 U.S. 497, 519 (1956) (Reed, J., dissenting). For a discussion of the institutional concerns implicated by such broad-based judicial inquiries or interpretations, see STARR, *supra* note 6, at 47–50.

124. *Gade*, 505 U.S. at 111. *See also id.* at 109 ("I would find express pre-emption from the terms of the federal statute.").

125. *See id.* at 111.

126. *Id.* at 113.

does not submit and secure approval of a state plan, it may not enforce occupational safety and health standards in that area."[127]

Justice Kennedy's initial attempt to approach the pre-emption question narrowly is laudable. What is clear, however, is that Justice Kennedy, as did the plurality he criticized, resorted to the purposes of Congress to determine what Congress meant in its section 18(b). Justice Kennedy looked to the "statutory *framework*" and found that the statute left "little doubt that...Congress *intended* to pre-empt" because that conclusion was "the most reasonable *inference*."[128] His resort to purposes to interpret the express terms of the statute is perhaps also understandable, as conceded before in this Article.[129] The very need to resort to uncertain "purposes" and "inferences" in any event points out the problem concerning state common-law actions.

To illustrate, it is not surprising that although Justice Kennedy employed a different method of pre-emption, he nonetheless reached the same conclusion as the plurality.[130] His resort to purposes to construe what he thought was unclear language led to the *express* congressional purpose to pre-empt, just as the plurality's determination that Congress's somewhat different[131] purposes dictated the *implied* pre-emption of state law. If courts can always resort to whatever they determine to be some "purposes" of Congress,[132] then the presumption in favor of traditional state law domains is worthless and then courts, rather than Congress, say what is pre-empted. This Article argues that state common law, as the paradigmatic state law, is entitled to more protection than pre-emption doctrine currently provides.

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127. *Id.* at 112–13.

128. *See id.* at 111, 112–13. Indeed, Justice Kennedy readily recognized that

> Though most statutes creating express pre-emption contain an explicit statement to that effect,...we have never required any particular magic words in our express preemption cases. Our task in all pre-emption cases is to enforce the 'clear and manifest purpose of Congress.' We have held, in express pre-emption cases, that Congress' intent must be divined from the language, structure, and purposes of the statute as a whole. The language of the OSH statute sets forth a scheme in light of which the provisions of § [18] must be interpreted, and from which the express pre-emption which displaces state law follows.

Id. at 112 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal citations omitted).

129. *See supra* notes 31–32 and accompanying text.

130. *See Gade*, 505 U.S. at 111 (Kennedy, J., concurring in part and concurring in the judgment).

131. *See* 505 U.S. at 100 ("The OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation....").

132. Professor Sunstein has observed, "In some cases, the purpose might be characterized in many ways, all of which are faithful to the original enactment. The act of characterization is therefore one of invention rather than discovery." Sunstein, *supra* note 31, at 428.

b. Justice Souter's Dissent

Justice Souter's approach in dissent[133] corresponds closely with the position advanced in this Article, in light of the historical approach to pre-emption and general federalism concerns. He asserted, "[a]nalysis begins with the presumption that 'Congress did not intend to displace state law,'"[134] and reminded the plurality about the presumption against pre-emption, absent the clear and manifest intent of Congress, when the area involved was one traditionally occupied by the states.[135] In Justice Souter's view, "[i]f the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred."[136]

His analysis began with section 18(a) of the OSH Act, which provided that "'[n]othing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect....'"[137] The plurality had reasoned that Congress must have meant the converse, that when a federal standard *is* in effect, there is pre-emption, which would have pre-empted the supplementary state regulation here at issue.[138] To the contrary, Justice Souter, operating properly from the perspective of the presumption against pre-emption, concluded that section 18(a) simply meant that Congress did not intend to occupy the field with federal regulation, that the states were otherwise free to regulate where Congress had not.[139] And where Congress had regulated, it would be content with pre-empting state law when there occurred actual conflict, when it was impossible to comply with both state and federal law.[140] "*If, indeed, the presumption against pre-emption means anything, § 18(a) must be read in just this way.*"[141] Justice Souter demonstrated how the plurality and even Justice Kennedy strained to find pre-emption despite the presumption against it in these kinds of cases: "[i]ndeed, if Congress had meant to say that any state rule should be pre-empted if it deals with an issue as to which there is a federal regulation in effect, the text of subsection (a) would have been a very inept way of trying to make the point."[142] In other words, Congress did not clearly say in its statute what the plurality and Justice Kennedy

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133. *See Gade*, 505 U.S. at 114–22 (Souter, J., dissenting). Justice Souter was joined in dissent by Justices Blackmun, Stevens, and Thomas. *Id.* at 114.

134. *Id.* at 116 (internal citations omitted).

135. *Id.*

136. *Id.* at 116–17.

137. *Id.* at 117 (quoting 29 U.S.C. § 667(a)).

138. *Id.* at 100. *See also supra* note 114 and accompanying text.

139. *Gade*, 505 U.S. at 117.

140. *Id.* The Court in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), drew the same distinction. *See infra* notes 351–53 and accompanying text. Here, Justice Souter implicitly acknowledged that the presumption against pre-emption has no place in a case of actual conflict. Absent that type of case, however, the presumption should be triggered to protect state law from the too-easy override allowed by the obstruction of purposes analysis.

141. *Gade*, 505 U.S. at 118 (emphasis added).

142. *Id.* at 117–18.

ultimately read into it; their findings of pre-emption, therefore, were the results of strained interpretations of the statute and its purposes, rather than from the perspective of a presumption against pre-emption.

As for section 18(b) of the OSH Act, Justice Souter opined that the section is not indicative of anything except that the *state* scheme could pre-empt the federal one in its entirety if the state were willing to jump through the appropriate hoops.[143]

> The subsection simply does not say that unless a plan is approved, state law on an issue is pre-empted by the promulgation of a federal standard.... The provision does not in any way provide that absent such state pre-emption of federal rules, the State may not even supplement the federal standards with consistent regulations of its own.[144]

To be consistent with the presumption against pre-emption, the statute must show that Congress's intent to pre-empt is clear and manifest; these sections simply did not clearly evidence such intent.

Another section relied on by the plurality was section 18(c), which required the Secretary of Labor to approve state plans that did not burden interstate commerce.[145] But Justice Souter's view of this section, again consistent with the presumption against pre-emption, was simply that Congress placed limits on the Secretary's ability to approve plans.[146] Had the statute not placed such limits, the statute could have been read to delegate to the Secretary the discretion to approve state plans that burdened commerce.[147] Justice Souter thus viewed section 18(c) as providing a simple, necessary restriction on the Secretary. He termed it a "non sequitur," however, to imply from that restriction on the Secretary's power a pre-emption of state law.[148] It was more consonant with pre-emption principles to read the section simply as it stood, without reading into it a congressional intent to displace state law.[149]

Because of the presumption against pre-emption in this area traditionally occupied by state law, Justice Souter would have required clear proof of Congress's intention to pre-empt the state law at issue in this case. He did not find the requisite proof in statute sections that failed to indicate that only federal law should govern these areas; had Congress wanted to pre-empt the state law, it could have and should have demonstrated that desire with more clarity than it did. Absent such clear intent, Justice Souter would only have found state law pre-empted in the event of actual "impossibility" conflict: "I can only conclude that, as long as compliance with federally promulgated standards does not render obedience to

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143. *Id.* at 119.
144. *Id.*
145. *See supra* notes 117–19 and accompanying text.
146. *Gade*, 505 U.S. at 120.
147. *Id.*
148. *Id.*
149. *See id.*

Illinois' regulations impossible, the enforcement of the state law is not prohibited by the Supremacy Clause."[150]

Justice Souter's approach best achieves the designs of pre-emption doctrine while respecting notions of federalism and state sovereignty. The presumption against pre-emption is in place because of federalism principles, but both the presumption and state law have been run roughshod over by courts, taking their lead from the Supreme Court, when they use the "obstruction of purposes" catch-all approach to the displacement of state law. Justice Souter's approach has not been fully heeded, however, and the Court's more recent pronouncements have made the doctrine even less coherent.

*C. Pre-emption Doctrine In and Post-*Cipollone

1. Cipollone v. Liggett Group, Inc.[151]

Petitioner Cipollone maintained a suit against three cigarette manufacturers on behalf of his mother, Rose Cipollone, who died of lung cancer allegedly caused by smoking respondents' cigarettes.[152] The suit involved the common-law tort theories of strict liability, negligence, fraudulent misrepresentation, and conspiracy to defraud, and the contract theory of express warranty.[153] Respondents contended that the claims were pre-empted by two federal acts, the 1965 Federal Cigarette Labeling and Advertising Act[154] and its successor, the 1969 Public Health Cigarette Smoking Act.[155]

Prior to ascertaining the pre-emptive effect of the two federal statutes, the Court set forth its pre-emption doctrine and in so doing appeared to work a

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150. *Id.* at 122.

151. 505 U.S. 504 (1992).

152. *Id.* at 508–09. Rose Cipollone sued initially in 1983 but died before trial. Her husband continued the suit after amending the complaint but following the trial, he also died. The couple's son, petitioner before the Court, maintained this action. *Id.* at 509. For other discussions of *Cipollone*, see Marlo A. Bakris, *Constitutional Law–Pre-emption–The Federal Cigarette Labeling and Advertising Act's Express Preemption Provision Defines the Pre-emptive Reach of the Act and Must be Construed Narrowly*, Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992), 70 U. DET. MERCY L. REV. 487 (1993); David E. Seidelson, *Express Federal Preemption Provisions, State Law Actions for Damages, Congress, and the Supreme Court: A Penitent Seeks Redemption*, 58 LA. L. REV. 145 (1997); Jeffrey R. Stern, *Preemption Doctrine and the Failure of Textualism in* Cipollone v. Ligget Group, 80 VA. L. REV. 979 (1994); 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 (1997); John F. McCauley, Note, Cipollone *&* Myrick*: Deflating the Airbag Preemption Defense*, 30 IND. L. REV. 827 (1997).

153. *Cipollone*, 505 U.S. at 509–10.

154. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–1340(1994)).

155. Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331–1340 (1994)).

significant change in the law of pre-emption as many had understood it up to that time.[156] The Court first repeated the settled and familiar principles, setting forth essentially textbook pre-emption doctrine.[157]

What so astounded both the dissent[158] and students of pre-emption,[159] however, was the further step the Court took in clarifying what had seemed to be settled pre-emption doctrine:

> In our opinion, the pre-emptive scope of [the statutes at issue] is governed entirely by the express language in...each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.... Therefore, we need only identify the domain expressly pre-empted by each of [the statute] sections [at issue].[160]

The dissenters interpreted this statement to mean that "[o]nce there is an express pre-emption provision,...all doctrines of implied pre-emption are eliminated."[161] According to these dissenters, the Court "ha[d] never expressed such a rule before, and [the Court's] prior cases [were] inconsistent with it."[162]

Were the pre-emption rules truly as announced by the majority and interpreted by the dissenters in *Cipollone*, a good deal of the pre-emption and federalism problems identified herein could be ameliorated. At least insofar as it pertains to state common-law damage actions, the *Cipollone* rule as stated was a sound one. If pre-emption turns at bottom on congressional intent and if Congress has seen fit to express its intent in express statutory language, then courts should be

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156. *See, e.g.*, *Cipollone*, 505 U.S. at 547 (Scalia, J., concurring in part and dissenting in part) ("To my knowledge, we have never expressed such a rule before...."); Bakris, *supra* note 152, at 500 (stating that *Cipollone* "represents a departure from both established principles of pre-emption analysis and prior case law" and "announces a revolutionary standard..."); Katerberg, *supra* note 152, at 1471 ("*Cipollone*...significantly changed the way courts approached...preemption questions."); McCauley, *supra* note 152, at 841 ("Federal preemption analysis changed dramatically with the Supreme Court's decision in *Cipollone*...."). *But see* Gills v. Ford Motor Co., 829 F. Supp. 894, 897 (W.D. Ky. 1993) (opining that "[t]he Supreme Court broke no new ground with [*Cipollone*]...").

157. *See Cipollone*, 505 U.S. at 516.

158. *See id.* at 547 (Scalia, J., concurring in the judgment in part and dissenting in part) ("To my knowledge, we have never expressed such a rule before...."). Justice Scalia was joined in dissent by Justice Thomas. *Id.* at 544.

159. *See* Bakris, *supra* note 152, at 500; Katerberg, *supra* note 152, at 1471; McCauley, *supra* note 152, at 841.

160. *Cipollone*, 505 U.S. at 517 (quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978) and California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987) (plurality opinion of Marshall, J.)).

161. *Id.* at 547 (Scalia, J., concurring in part and dissenting in part).

162. *Id.* at 547–48.

> "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[176]

The plurality did not read the Act to prohibit only positive enactments of legislatures and regulatory bodies because, specifically in the tort context, common-law actions seek to impose duties on defendants, and those duties should be seen as forms of "requirements or prohibitions."[177] Because the duties imposed by common law are not specific in the sense that they would require a particular statement on a label, those duties imposed through state common-law damages actions would not run afoul of the first act's language, which prohibited a state from requiring a different *statement* on cigarette packages.[178] A state imposition of liability would, however, run afoul of the much broader pre-emptive language of the second act.[179]

When it limited its analysis to the plain terms of the statute,[180] the plurality seemed to have attempted to comply with the majority's statement at the beginning of the case about the way to approach these questions, and thus to respect state law and the presumption against pre-emption. On closer reading, however, it seems unclear whether the plurality in fact heeded the presumption when interpreting the pre-emptive language broadly to include state common law.[181] Whether the plurality heeded the presumption or not, the plurality ultimately failed by its finding of clarity in the phrase "requirement or prohibition" such that it clearly encompassed state common-law actions for damages.[182] The phrase could not be considered anything but ambiguous when compared to phrases Congress could

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176. *Id.* at 521 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)).

177. *Id.* at 522.

178. *Id.*

179. *Id.*

180. Although the Court's majority had relied on the statement of congressional purpose in its analysis of the first statute section, see *supra* notes 170–71 and accompanying text, it did not do so this time, explaining that "we are not persuaded that the retention of [the statement of purposes from the 1965 Act in the 1969 Act] is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to [the pre-emption provision in the 1969 Act]." 505 U.S. at 521 n.19.

181. *See id.* at 522–23 (stating simultaneously that "[a]lthough the presumption against pre-emption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context, in this case such a construction is not appropriate" and that "we must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of [the pre-emption provision]....").

182. One commentator has observed in another context that the Court has recently begun a trend toward "finding linguistic precision where it does not exist," an interpretive method he calls "hypertextualism." Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995). Apparently, then, the Court has not confined this sort of interpretation to the pre-emption area.

have used, such as "all state law" or "any state law, including common law" or even "no exercise of jurisdiction by any state or local legislature, rulemaking body, or court."[183] Indeed, a plurality of the Court in a later case stated that "we cannot accept [petitioner's] argument that by using the term 'requirement,' Congress *clearly* signaled its intent to deprive States of any role in protecting consumers [through its tort law]."[184] So although the plurality was attempting to follow the majority's directive to confine itself to the express terms, it should have gone one step further to deny the existence of pre-emption in the absence of the clear and manifest intent on the part of Congress to pre-empt state common law. Only then would the presumption against pre-emption be of any effect or value in respecting and observing federalism principles and concerns.

c. Justice Blackmun's Opinion

Justice Blackmun's opinion[185] provided the best approach[186] and most closely comports with the arguments made in this Article. He wrote that when there existed express pre-emptive language, as here, "the Court's task is one of statutory interpretation—only to 'identify the domain expressly pre-empted' by the provision."[187] Further, "[w]e resort to principles of implied pre-emption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law—only when Congress has been silent with respect to pre-emption."[188] Explaining that the presumption against pre-emption has been observed in both express and implied pre-emption cases,[189] Justice Blackmun agreed with the Court's stated

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183. Justice Blackmun provided an example of language that Congress has used that made clear its intentions toward state common law: "ERISA statute defines 'any and all State laws' as used in pre-emption provision to mean 'all laws, *decisions*, rules, regulations, or *other State action* having the effect of law.'" *Cipollone*, 505 U.S. at 540 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part) (emphasis added) (quoting 29 U.S.C. §§ 1144(a), (c)(1) (1994)).

184. Medtronic, Inc. v. Lohr, 518 U.S. 470, 489 (1996) (emphasis added). In fact, the *Medtronic* plurality even went so far as to say that "Medtronic's sweeping interpretation of the statute would require far greater interference with state legal remedies, *producing a serious intrusion into state sovereignty* while simultaneously wiping out the possibility of remedy...." *Id.* at 488 (emphasis added).

185. *Cipollone*, 505 U.S. at 531 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justices Kennedy and Souter joined Justice Blackmun. *Id.*

186. *See also* Bakris, *supra* note 152, at 507 (stating that Justice Blackmun's opinion has the most precedential value and is "consistent with established pre-emption doctrine," as well as that his criticism is "based on sound rationale"); Seidelson, *supra* note 152, at 152 (stating that Justice Blackmun's opinion best analyzed pre-emption and his approach would avoid confusion).

187. *Cipollone*, 505 U.S. at 532.

188. *Id.* (internal citation omitted).

189. *See id.* at 533 ("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken

"unwillingness to conclude that the state common-law damages claims at issue in this case are pre-empted unless such result is the 'clear and manifest purpose of Congress.'"[190] Despite his agreement with the majority's statements of the governing principles, Justice Blackmun stated

> I...find the Court's divided holding with respect to the original and amended versions of the federal statute entirely unsatisfactory. Our precedents do not allow us to infer a scope of pre-emption beyond that which clearly is mandated by Congress' language. In my view, *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.[191]

He therefore agreed with the majority opinion,[192] which found no pre-emption of the state claims under the older version of the act at issue, but disagreed with the balance of the decision.[193]

More specifically, Justice Blackmun was of the opinion that the language in the second act pertaining to a "requirement or prohibition" "no more 'clearly' or 'manifestly' exhibits an intent to pre-empt state common-law damages actions than did the language of its predecessor...."[194] In his view, although the legislation used the words "state law," which could encompass *all* state law, that wording had to be read in context:[195] the statute prohibited any "'*requirement or prohibition*...imposed under State law...'"[196] and did not simply prohibit the application of state law in general.[197] The qualifier that Congress added made the pre-emptive language much more ambiguous.[198]

The plurality also gave short shrift to the idea that common-law damages actions can "regulate" or impose requirements or prohibitions in the same manner as true regulation. In Justice Blackmun's view, the question is much more complicated than the plurality would concede.[199] Tort law's regulatory effect is, if anything, only indirect.[200] In addition, the function of tort law is not primarily to

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directly to the issue apply with equal force where Congress has spoken, though ambiguously.").

190. *Id.* (citations omitted).

191. *Id.* at 531 (emphasis in original).

192. *See id.* at 533–34. He could discern only one meaning for the prohibition against "statements," which was that Congress could only have intended to pre-empt states' requiring of statements, not common-law actions. *See id.* at 534.

193. *See id.* (stating that "[m]y agreement with the Court ceases at this point").

194. *Id.*

195. *See id.* at 535.

196. *Id.* at 534 (quoting 15 U.S.C. § 1334(b)) (emphasis added).

197. *See id.* at 535. See *supra* note 184 for an example Justice Blackmun used to illustrate how clear Congress could be in regard to the pre-emption of common-law damages actions.

198. *Cipollone*, 505 U.S. at 535.

199. *Id.* at 536.

200. *Id.* at 536–37.

regulate but to compensate.[201] Justice Blackmun pointed out that the Court has itself previously noted the distinction between pure regulatory law and any indirect regulatory effect tort law may have and has at times saved the latter from pre-emption precisely because its effects are only indirect.[202] Therefore, Justice Blackmun stated, "[i]n light of the recognized distinction in this Court's jurisprudence between direct state regulation and the indirect regulatory effects of common-law damages actions, it cannot be said that damages claims are clearly or unambiguously 'requirements' or 'prohibitions' imposed under state law."[203] In the absence of clarity, the Court should have found no pre-emption.[204]

Justice Blackmun's approach remains true to the presumption against pre-emption and gives bite to the clarity requirement by insisting that the express pre-emptive words used by Congress be truly clear.[205] Only in that way should Congress be seen as indicating its manifest intent to pre-empt state common law. In this regard, Justice Blackmun acknowledged that state common-law claims for damages are different than pure regulatory law and implicitly suggested that they should be treated differently. His arguments support the criticism expressed in this Article: that courts are permitted to supersede state common law, in the absence of clarity and even in the presence of the presumption, because of an inherent flaw in the structure of the Court's doctrine.

d. Justice Scalia's Opinion

Justices Scalia dissented to a good portion of the Court's and plurality's opinions[206] because of what he perceived to be both a misstatement of law and an improper approach to these types of questions. The misstatement he identified[207] was that which proclaimed, in essence, "[o]nce there is an express pre-emption provision,...all doctrines of implied pre-emption are eliminated."[208] Justice Scalia is correct on this point; the Court has conducted implied pre-emption analysis and found implied pre-emption even in the face of express language that did not, by the Court's analysis, itself lead to pre-emption of the state law.[209]

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201. *Id.* at 537.

202. *See id.* at 537–38 (citing English v. General Elec. Co., 496 U.S. 72, 86 (1990); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984)).

203. *Id.* at 538.

204. *See id.* at 542, 544.

205. *Cf.* Grey, *supra* note 11, at 613 (stating that this approach insisted upon by Justice Blackmun "best fulfills the Court's duty to protect federalism principles").

206. *Cipollone*, 505 U.S. at 544 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Thomas joined Justice Scalia.

207. *See id.* at 547–48 ("To my knowledge, we have never expressed such a rule before, and our prior cases are inconsistent with it.") (citing Jones v. Rath Packing Co., 430 U.S. 519, 540–43 (1977)).

208. *Id.* at 547.

209. One notable example can be found in *Rath Packing Co.*, 430 U.S. 519, discussed *supra* at notes 54–73 and accompanying text.

The improper approach he identified was that which required the Court to give express pre-emption principles "the narrowest possible construction"[210] in accordance with the presumption against pre-emption. In Justice Scalia's view, that presumption has not been applied to express pre-emption provisions because it need not be:

> [I]t seems to me that assumption dissolves once there is 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. Thereupon, I think, our responsibility is to apply to the text ordinary principles of statutory construction.[211]

Justice Scalia disagreed on this point not only with the majority but also with Justice Blackmun, who had explained that the Court has, in its precedents, tossed around the presumption rather generally, irrespective of the type of pre-emption case involved.[212]

Justice Blackmun and the majority have the better interpretation of the Court's pre-emption jurisprudence in this regard because the Court has prefaced its analyses even in express pre-emption cases with the reminder about the presumption against pre-emption and the concomitant requirement that any intent to pre-empt must be "clear and manifest."[213] It appears, therefore, that the

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210. *Cipollone*, 505 U.S. at 545.

211. *Id.* (emphasis added).

212. *See id.* at 532 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Although many of the cases in which the Court has invoked such a presumption against displacement of state law have involved implied pre-emption, this Court often speaks in general terms without reference to the nature of the pre-emption at issue in the given statutory scheme." (citations omitted)).

213. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("'[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'.... [When it is clear, state law] must fall...whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.") (citations omitted); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citations omitted). ***But see*** Grey, *supra* note 11, at 611 ("Until *Cipollone* was decided, the Court never really addressed the application of the clear statement rule to express preemption (or express savings) clauses."). It would make sense that the Court would have prefaced its analyses that way; in the earlier cases, the entire pre-emption analysis focused on the obstruction of congressional purposes, (*see, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941)), whether the case was what we now call an express pre-emption case, (*see, e.g.*, *Rath Packing*, 430 U.S. 519 (1977)), or an implied pre-emption case in which there existed no express pre-emptive statutory language (*see, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)). Such prefatory remarks would be consistent with this Article's arguments that the presumption is triggered to protect state law and sovereignty and federalism principles against the nebulous, subjective, and overarching obstruction of purposes approach, which ultimately is infused into any analysis.

presumption applies even when Congress has expressed its intentions in the legislation. Its intent to pre-empt must be clear and manifest from the language of the statute before the Court can find express pre-emption.[214]

Interestingly, what Justice Scalia emphasized as the Court's usual approach to pre-emption is precisely what this Article identifies as the core problem with pre-emption doctrine. Justice Scalia criticized the Court's new, narrow approach to express pre-emption provisions by pointing out that courts can *imply* pre-emption without *any* express language indicating Congress's intent. Therefore, in his view, a rule requiring narrow construction of express language makes little sense: "the same result so prophylactically protected from careless explicit provision can be achieved *by sheer implication*, with no express statement of intent at all."[215] But this Article argues that this potentiality is precisely the problem: courts may too easily override state law, either when there exists clear statutory language or when there does not, by whatever they can justify as obstructing some purposes of Congress.

Indeed, if the Court heeded the principles of pre-emption according to Justice Scalia, it would undoubtedly pre-empt more if not all of the state common-law claims than did even the majority and plurality. He would have a pre-emption doctrine that did not apply the presumption against pre-emption and concomitant clarity requirement to express pre-emption cases. The result would be findings of pre-emption that were easier to make, since the statutory language would *not* have to *clearly* encompass state common law. Even if express pre-emption were not found, he would permit courts to go beyond the express language to seek to find pre-emption through any of the available approaches. Courts may thus more easily override state law through such searching approaches, despite the presumption against pre-emption and the clarity requirement.[216] The ruling Justice Scalia would have reached in *Cipollone* goes a long way toward proving that assertion: Justice Scalia indicated that he would have pre-empted almost all of the state common-law damages actions in this case.[217]

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214. As a practical matter, however, it may not matter which interpretation on this question is the correct one. Because the Court arguably has gone beyond the express words and used implied pre-emption principles of conflict and obstruction of purposes in express pre-emption analysis, see *supra* note 168 and accompanying text, the presumption of necessity should be applied in those situations anyway because of the danger of courts overreaching into states' domains. In addition, even if a court has not implicated implied pre-emption principles when interpreting express language, the Court, as Justice Scalia concedes, proceeds to conduct an implied pre-emption analysis if it has not found express pre-emption. *See supra* note 209 and accompanying text. The presumption thus should play a part in any case.

215. *Cipollone*, 505 U.S. at 547 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis in original).

216. *See, e.g.*, *Cipollone*, 505 U.S. 504; Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992); Jones v. Rath Packing Co., 430 U.S. 519 (1977).

217. *See Cipollone*, 505 U.S. at 548 ("I believe petitioner's failure-to-warn claims are pre-empted by the 1965 Act, and all his common-law claims by the 1969 Act.").

After *Cipollone*, it appeared (1) that the Court was at least voicing the rule that implied pre-emption principles did not belong in an express pre-emption case, and (2) that the presumption against pre-emption applied to require clarity of congressional intent irrespective of the type of pre-emption case involved. The reality seemed to be the opposite, however; the Court arguably did not confine itself to statutory language alone and did not require clarity in the express pre-emption provision before it would find pre-emption of state law.[218] Nonetheless, there was some hope that pre-emption doctrine was making significant strides toward respecting state sovereignty and observing federalism principles. Subsequent cases would dash that hope and further complicate the doctrine.

2. Freightliner Corp. v. Myrick *and* Medtronic, Inc. v. Lohr

In somewhat short order, it became clear that the dissent in *Cipollone*, which had understood that the *Cipollone* opinion seemed to change the rules,[219] had ignored what turned out to be crucial language. Three years after *Cipollone*, in *Freightliner Corporation v. Myrick*,[220] the Supreme Court addressed the pre-emptive effect of the National Traffic and Motor Vehicle Safety Act of 1966 ("the Safety Act")[221] and again took the opportunity to clarify the rules regarding pre-emption.[222]

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218. *See supra* notes 169–72, 183–85 and accompanying text.

219. *See supra* notes 162–63 and accompanying text.

220. 115 S. Ct. 1483 (1995).

221. 15 U.S.C. §§ 1381–1431 (1966).

222. In the intervening years, the Court decided *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). The Court's statement of the rules governing pre-emption issues was almost unnoteworthy and appeared to ignore *Cipollone*:

> Where a state statute conflicts with, or frustrates, federal law, the former must give way. In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is "the clear and manifest purpose of Congress." Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue. If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

Id. at 663-64 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (citations omitted). Here a unanimous Court set forth what it viewed as pre-emption doctrine with no hint of the disagreement seen in *Cipollone*. *See id.* at 659–60. The Court reaffirmed that the presumption and clarity requirement govern in any case, not just implied pre-emption cases, but did not say that implied pre-emption principles need play no role in express pre-emption cases. In fact, even though the federal statute at issue contained an express pre-emption provision, *see id.* at 662 & n.2 (quoting 45 U.S.C. § 434), the Court addressed and summarily rejected petitioner's implied pre-emption claim. *See id.* at 673 n.12; *see also* Freightliner Corp. v. Myrick, 115 S. Ct. 1483, 1488 (1995).

The plaintiffs in *Myrick* sued defendants for negligent design of their products. Defendants defended in part on the grounds that the Safety Act and regulations promulgated thereunder either expressly or impliedly pre-empted state tort law claims for damages.[223] Because the Safety Act at issue in *Myrick* contained an express pre-emption provision, however, respondent plaintiff argued that after *Cipollone*, the Court need not look beyond the express provision. The pertinent statutory language had forbidden states from "'establishing'" any motor vehicle "'safety standard...which is not identical to the Federal standard [promulgated by the federal agency].'"[224] In evaluating this express provision, the Court held that, whether or not common-law claims are considered "standards" under the act,[225] the state law claims were not expressly pre-empted because there was no applicable federal safety standard in effect at the time of the lawsuit.[226]

The most significant portion of the opinion, however, was the Court's explanation, in dicta, of the precise effect the *Cipollone* decision had on pre-emption doctrine. In answering the plaintiff's argument that in light of *Cipollone* the Court need not address defendant's implied pre-emption argument, Justice Thomas, writing for the Court, explained that the Court had not announced a "categorical rule precluding the coexistence of express and implied pre-emption...."[227] Rather,

> The fact that an express definition of the pre-emptive reach of a statute "implies"—*i.e.* supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption.... At best, *Cipollone* supports an *inference* that an express pre-emption clause forecloses implied pre-emption; *it does not establish a rule.*[228]

Otherwise, the opinion presented no significant problems from the standpoint of this Article. The express pre-emption provision in this case provided in pertinent part that "'[a] State may adopt or continue in force *any law*, rule, regulation, order, or standard relating to railroad safety *until such time* as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard *covering the subject matter* of such State requirement.'" 507 U.S. at 662 n.2 (quoting 45 U.S.C. § 434) (emphases added). This plain language correctly evidenced to the Court Congress's intent to pre-empt civil duties imposed under state common law when there existed a federal regulation covering the same subject matter, *see id.* at 664; the language was clear, included "any law," and thus demonstrated Congress's "clear and manifest purpose" to pre-empt state common-law actions for damages in the delineated situation.

223. *Myrick*, 115 S. Ct. at 1485.

224. *Id.* at 1486 (quoting the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392(d)).

225. The Court specifically did not address whether "the term 'standard' in [the statute] pre-empts only state statutes and regulations, but not common law." *Id.* at 1487 n.3.

226. *Id.* at 1487.

227. *Id.* at 1488.

228. *Id.* (emphases added). Justice Thomas pointed out that the *Cipollone* Court itself, despite its rhetoric, had gone beyond the terms of the statute and "engaged in a

Some courts have interpreted this portion of *Myrick* as supplying a rebuttable presumption that there existed no implied pre-emption when the statute contained express pre-emptive language.[229]

One of the problems with the *Myrick* Court's "clarification," however, is that *Cipollone* was read to establish the very rule *Myrick* purported to clarify: Justice Thomas himself, joining Justice Scalia in dissent in *Cipollone*, had read the case to establish a "new rule" of pre-emption that provided "[o]nce there is an express pre-emption provision,...all doctrines of implied pre-emption are eliminated."[230] Another and more significant substantive problem flowing from the Court's clarification was that in clarifying, the Court eviscerated the good rule stated, but not applied, in *Cipollone*.

Most recently, in the 1995-96 term, the Court was presented with another pre-emption case in *Medtronic, Inc. v. Lohr*.[231] *Medtronic* involved the pre-emptive reach of the Medical Device Amendments to the Federal Food, Drug and Cosmetics Act, which contained an express pre-emption provision:

> [N]o State...may establish or continue in effect with respect to a device intended for human use any requirement (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.[232]

In the course of setting out the general rules governing pre-emption questions, Justice Stevens, writing for the Court, cryptically commented on the proper approach to be applied in this case:

> As in *Cipollone*..., we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of [the statute] means that *we need not go beyond that language* to determine whether Congress intended the [statute] to pre-empt at least some state law, we must nonetheless 'identify the domain expressly pre-empted' by that language.[233]

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conflict pre-emption analysis...." *Id.* The Court in *Myrick* then proceeded to address the implied pre-emption issue and found that plaintiff's state common-law actions did not conflict with federal law, because it was not impossible to comply with both state and federal law (no federal standard existed), and because state lawsuits did not obstruct the purposes of the federal law (again, no federal standard existed to evince the purposes of federal law with regard to the device at issue). *Id.*

229. *See, e.g.*, Hernandez-Gomez v. Leonardo (Hernandez-Gomez II), 185 Ariz. 509, 917 P.2d 238, 241 (Ariz. 1996); Sofamor Danek Group, Inc. v. Gaus, 61 F.3d 929, 935 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 910 (1996).

230. *Cipollone*, 505 U.S. 504, 547 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

231. 116 S. Ct. 2240 (1996).

232. *Id.* at 2248 (quoting 21 U.S.C. § 360k(a)).

233. *Id.* at 2250 (emphasis added) (internal citations omitted).

The Court thereby seemed to completely ignore *Myrick* and its cautionary directive that the mere existence of express pre-emption provisions does not foreclose the possibility that federal law impliedly pre-empts state law.

To complicate matters further, however, the *Medtronic* Court seemed to intersperse its express pre-emption analysis with implied pre-emption considerations even more clearly than it did in *Cipollone*.[234] It first did so in its long statement of the principles guiding the Court in these cases. After the Court stated that "*we need not go beyond that language to determine whether Congress intended the [statute] to pre-empt at least some state law*,"[235] it added that "our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption."[236] The first presumption is the one against pre-emption when the case involves the historic police powers of the states; that presumption also requires that the state law not be overridden unless such result was the "clear and manifest purpose of Congress."[237] The presumption applies even in an express pre-emption case.[238]

The second presumption identified by the Court is the most troubling in the extent to which it goes "beyond the language" of the statute. The Court repeated the oft-quoted phrase that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case."[239] The Court explained: "As a result, any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.' Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it."[240] These statements flow from rules of statutory construction and were somewhat less troubling than what the Court next asserted: "Also relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."[241]

With this approach, the Court was straying far from the express language of the statute. If the Court must go to such lengths to ascertain Congress's intent, then that intent cannot be "clear and manifest," and any finding of pre-emptive intent can only be inferred. Even more striking is the fact that because courts are *permitted* to go to such lengths, perhaps even required to do so, the clarity

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234. *See infra* notes 240–54 and accompanying text.

235. *Medtronic*, 116 S. Ct. at 2250 (emphasis added).

236. *Id.*

237. *Id.* (internal quotations omitted).

238. *See id.*

239. *Id.* (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)) (alteration in original).

240. *Id.* at 2250–51 (quoting *Cipollone*, 505 U.S. at 530 n.27, and Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

241. *Id.* at 2251 (quoting *Gade*, 505 U.S. at 98 (plurality opinion of O'Connor, J.) (emphasis in original)).

requirement, mandated by the presumption against pre-emption, is effectively a sham in pre-emption jurisprudence.

The assertion that the Court is permitting or requiring courts to go beyond the language of the statute, in essence to *infer* pre-emption from the statutory "purposes" and "framework" in express pre-emption cases, is supported by a close reading of what the Court said in the above-quoted passage. It is significant that the majority opinion quoted the opinions of Justices Kennedy and O'Connor in *Gade v. National Solid Wastes Management Ass'n*[242] for the "statutory framework" and "structure and purpose of the statute as a whole" language.[243] This Article has previously shown how those justices ultimately relied on the nebulous, subjective "obstruction of purposes" determination to find either implied or express pre-emption.[244] Despite its lip service to the notion of a distinction between express and implied pre-emption, the Court purposely referenced approaches that do not stand for that proposition.[245]

It is also not surprising that Justice Stevens, who wrote this portion of the opinion for the Court,[246] became much more explicit than he had been in *Cipollone*[247] about what goes into express pre-emption analysis. For although his opinion and analysis in *Cipollone* purported to confine itself to the express pre-

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242. 505 U.S. 88 (1992).

243. *See supra* notes 241–42 and accompanying text.

244. *See supra* notes 107–21, 125–32 and accompanying text. Justice Breyer, writing separately in this case, was more blunt than was the majority about resort to these principles. He stated that the "basic principles [of 'conflict' and 'field' pre-emption, including the obstruction of purposes analysis] inform a court's interpretation of the [pre-emption] statute and regulation, [and] support the conclusion that there is no pre-emption here. I can find no actual conflict between any federal requirement and any of the liability-creating-premises of the plaintiffs' state law tort suit...." *Medtronic*, 116 S. Ct. at 2261 (Breyer, J., concurring in part and concurring in the judgment).

245. At one point, the Court even stated that "it is impossible to ignore [the] overarching concern [of the statutory and regulatory language] that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest." *Medtronic*, 116 S. Ct. at 2257. This language sounds amazingly like obstruction of purposes conflict pre-emption. After quoting this language of the Court, Justice O'Connor in a separate opinion wrote that "[t]his decision is bewildering and seemingly without guiding principle." *Id.* at 2262 (O'Connor, J., concurring in part and dissenting in part). This Article argues in similar words that a lack of guiding principles is precisely the problem with the Court's pre-emption jurisprudence.

246. *See id.* at 2245.

247. Justice Stevens's opinion on this point in *Cipollone* was much more circumspect about relying on the purposes of the substantive provisions of the statute. *See Cipollone*, 505 U.S. at 516–17 (1992). In fact, his opinion purported to disclaim any reliance on the substantive provisions of the statute to *infer* pre-emptive intent, as long as the express pre-emption provision provided a reliable indicator of Congress's intent. *See id.* at 517.

emption provision, he too had used implied pre-emption conflict principles in portions of the *Cipollone* analysis.[248]

One need not rely solely on closer examination of the Court's explanation, however, to charge that the Court is engaging in a certain sleight of judicial hand. The Court's application of these principles to the problem presented in *Medtronic* also shows how implied pre-emption or obstruction of purposes analysis becomes folded in, even in this purportedly express pre-emption case. The plurality[249] initially and laudably found that the word "requirement" used by Congress in the statute was not broad or plain enough to suggest that Congress intended to pre-empt all state common-law claims for damages.[250] Had it stopped there, the plurality would have shown that the Court's presumption and clarity requirement were meaningful. The plurality, however, proceeded to buttress its conclusion with "[a]n examination of the basic purpose of the legislation...."[251] Because the purpose of the act was "'to provide for the safety and effectiveness of medical devices intended for human use,'"[252] the plurality felt additionally justified in finding no intent to pre-empt state common-law claims.[253]

The question remains regarding what the plurality would have done had it found more merit to Medtronic's argument about the purpose behind the legislation: "Medtronic asserts that the Act was also intended, however, to protect innovations in device technology from being stifled by unnecessary restrictions, and that this interest extended to the pre-emption of common-law claims."[254] The plurality acknowledged that "the Act certainly reflects some of these concerns,"[255] but did not find those concerns to outweigh the interest in protecting those who use medical devices.[256] The very fact that the plurality entertained the argument about the general purposes of the legislation shows that it certainly could have found some purposes of the statute to outweigh or overcome ambiguous express pre-emptive language. It thereby could have ignored the presumption against pre-emption, and the requirement that any intent to pre-empt be "clear and manifest," and found implied pre-emption to exist. It should be axiomatic, however, that once *express* pre-emptive language is deemed ambiguous as to its inclusion of a certain

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248. *See supra* notes 169–73 and accompanying text.

249. This plurality was comprised of Justices Stevens, Kennedy, Souter, and Ginsburg. *See Medtronic*, 116 S. Ct. at 2245.

250. *See id.* at 2251–52. A majority of the Court, however, determined in separate opinions that "requirement" easily encompassed state common-law claims for damages. *See id.* at 2259–60 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 2262–63 (O'Connor, J., concurring in part and dissenting in part).

251. *Id.* at 2252.

252. *Id.* at 2253 (quoting 90 Stat. 539).

253. *See id.* at 2252–53 ("An examination of the basic purpose of the legislation...entirely supports our rejection of Medtronic's extreme position.").

254. *Id.* at 2253 (internal quotations omitted).

255. *Id.*

256. *See id.*

type of state law, clarity of intent could not magically be conjured up on some other front.[257]

Nonetheless, the plurality indicated on a related issue that implied pre-emption could be found even if a court did not find certain claims expressly pre-empted: "we see no need to determine whether the statute explicitly pre-empts...a [hypothetical] claim [such as that advanced by petitioner]. Even then, the issue may not need to be resolved *if the claim would also be pre-empted under conflict pre-emption analysis*."[258] The plurality had thus come full circle, from stating that there was no need to go beyond the express language to implied pre-emption principles, to importing implied pre-emption principles into its express pre-emption analysis, and finally to acknowledging that courts can venture beyond the express language to find implied pre-emption even in the face of express language and a failure under that language to find pre-emption. The plurality essentially made the point this Article has been arguing: there is no significant difference between express and implied pre-emption and that courts may go to all the lengths available to impliedly pre-empt state law. This potential follows naturally from the core problem with the Court's pre-emption doctrine and permits the undermining of the presumption against pre-emption and the nullification of the clarity requirement.

The danger to state sovereignty and federalism principles from this emasculation of the presumption and clarity requirement is perhaps most acute in the case of common-law tort actions for damages. These actions have historically been firmly rooted in state law[259] and serve different purposes than do typical state regulatory laws: the primary function of state common law, tort law in particular, is to resolve private disputes between private persons over alleged injuries and to require wrongdoers to compensate injured parties for the harm done.[260] The danger

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257. Another commentator has also suggested that if express pre-emption language fails to supply the requisite certainty, implied pre-emption should not replace it. Seidelson, *supra* note 152, at 165.

258. *Medtronic*, 116 S. Ct. at 2259 (emphasis added) (citing Freightliner Corp. v. Myrick, 115 S. Ct. 1483, 1488 (1995)).

259. *See supra* note 38.

260. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS 15 (5th ed. 1984) ("[Tort law's] primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties."); *id.* at 5–6 ("There remains a body of law which is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally,...where the law considers that compensation is required. This is the law of torts."); *see also* Eric London, Buckley v. Metro-North Commuter Railroad*: Expansion of Employer Liability Under FELA*, 8 MD. J. CONTEMP. LEGAL ISSUES 297, 303 (1997) (quoting Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 942 (3d Cir. 1985) (identifying compensation for victims as the underlying purpose for tort law)); Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944) (stating that "[t]he purpose of tort law is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another"). *But cf.* FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 11.5, at 98–99 (2d ed. 1986) (including as "possible objectives of tort law" both compensation and deterrence). A more searching inquiry into the *proper* objectives of tort law and the goals

is more acute, therefore, because what is at issue is not simply the state's right or power to regulate its citizens or the activities within its borders; what is also at stake is the state's traditional right to provide some forum and mechanism to ensure citizens' rights to recover and be compensated for harms done to them by others. To be sure, state tort law has been justified as fostering some deterrence of future behavior,[261] but that justification for tort law cannot be said to be the dominant goal to be achieved through the law;[262] its primary *raison d'être* is to compensate the injured and resolve private disputes. Easy displacement of these state "laws" thus threatens more than does the displacement of purely regulatory laws.[263] Discussion of the regulatory nature of common-law damages actions, and their pre-emptability as such, is therefore warranted.

D. The Special Problem of Common-Law Actions for Damages

Pertinent to the pre-emption issue in cases involving state common-law claims is whether state common-law damage awards are considered "regulation" or the setting of state "standards" or "requirements" such that those state regulations or standards would be pre-empted by federal law, even in the absence of express language employing the words "common law." To determine the pre-emptability of

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tort law *should* be directed at achieving is beyond the scope of this Article. For a listing of sources of such other inquiries, see generally *id.* § 11.5, at 97–101 & nn.2–3, 8–9.

261. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959); *infra* note 267 and accompanying text; *see also* Grey, *supra* note 11, at 605 n.273 (stating that "[t]he *Cipollone-Garmon* view that tort remedies have a regulatory effect has substantial merit. Aside from compensating the victim, tort law also seeks to influence (i.e., regulate) future behavior by discouraging dangerous conduct").

262. *See* KEETON ET AL., *supra* note 260, at 25–26 (recognizing that "[t]he 'prophylactic' factor of preventing future harm has been quite important in the field of torts" and that "it very often has weight as a reason for holding the defendant responsible," yet noting that "the idea of prevention is seldom controlling"); *see also* James Shaw O'Shaughnessy, *Judicial Implication of Contribution Under Section 10(b) of the Securities Exchange Act: Is the New Branch on the Judicial Oak Threatened by Strict Statutory Construction?*, 16 SUFFOLK U. L. REV. 983, 986 (1982) (stating that although deterrence was once the primary purpose of tort law, it has decreased in importance); Linda M. Roubik, *Recovery for 'Loss-of-Chance' in a Wrongful Death Action:* Herskovits v. Group Health, 664 P.2d 474 (1983), 59 WASH. L. REV. 981, 983 n.16 (1984) (identifying deterrence as a goal of the common law, but labeling it as "secondary").

263. Two commentators have explained it another way: "Preemption is concerned with the allocation of governmental power in a federalist system. The proper inquiry, then, is whether a tort award is equivalent to regulation as an exercise of state governmental power which collides with federal regulation. From this perspective, state tort awards and state regulatory activities are polar opposites." Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 AM. J. TRIAL ADVOC. 435, 455–56 (1992).

these actions, therefore, courts must assess the regulatory effects that common-law damages actions have on the behavior of defendants and potential defendants.[264]

San Diego Building Trades Council v. Garmon[265] is illustrative of a case that addressed these actions' regulatory effects. In *Garmon*, the Supreme Court stated that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[266] This passage has been quoted to support a finding of pre-emption of state common-law claims under less-than-clear statutory language.[267] The *Garmon* Court's statement was not categorical, however, as the Court proceeded to note, "[i]t may be that an award of damages in a particular situation *will not*, in fact, conflict with active assertion of federal authority."[268] In *Garmon*, the Court found that the damages claim for an arguably unfair labor practice was pre-empted because the National Labor Relations Board had "exclusive competence" over unfair labor practices and disputes.[269] More specifically, the Court noted,

> the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience: "Congress...went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order."[270]

Therefore, in this case, "to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."[271] The Court cited no express pre-emption provision and thus apparently implied pre-emption of the state law claim for damages, finding a "potential frustration of national purpose."[272]

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264. *See, e.g.*, English v. General Elec. Co., 496 U.S. 72 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

265. 359 U.S. 236 (1959).

266. *Id.* at 247.

267. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992).

268. *Garmon*, 359 U.S. at 247 (emphasis added).

269. *Id.* at 245, 246.

270. *Id.* at 242 (quoting Garner v. Teamsters Union, 346 U.S. 485, 490–91 (1953)).

271. *Id.* at 246.

272. *Id.* at 244. A similar case regarding damage awards that were found to constitute pre-empted state regulation is Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). The Court in *Sears* held that the federal patent system precluded a state's imposition of damages for the copying of an unpatented article. *Id.* at 232–33. The Court implied pre-emption because "[j]ust as a State cannot encroach upon the federal patent laws *directly*, it cannot, under some other law, such as that forbidding unfair competition, give protection of

The *Garmon* Court, however, failed to apply the presumption against pre-emption and the concomitant clarity requirement. Instead, it saw some frustration of "national purpose" and readily pre-empted a traditional state method of compensating parties and resolving private disputes. The Court did pay some heed to the clarity requirement in another context, however; it recognized that

> [W]e have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order.... State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of *clearly expressed congressional direction.*[273]

Because *Garmon* involved only peaceful conduct, the Court discerned no compelling state interest[274] and no reason to apply the clarity requirement. Therefore, the Court overrode state tort law by finding what it perceived to be an obstruction of federal purposes.

In a subsequent series of cases, the Supreme Court took a view different from that espoused in *Garmon*. In *Silkwood v. Kerr-McGee Corp.*,[275] though the Court believed that Congress had "'occupied the entire field of nuclear safety concerns'"[276] and delegated authority exclusively to the Nuclear Regulatory Commission to comprehensively regulate the safety aspects of nuclear materials

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a kind that clashes with objectives of the federal patent laws." *Id.* at 231 (emphasis added). The damage award at issue in *Sears* frustrated the goals of the patent laws because it would have hampered competition by prohibiting the copying of an unpatented item, which federal patent law permitted. *See id.* at 231 ("An unpatentable article...is in the public domain and may be made and sold by whoever chooses to do so."). Because "the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition," *id.* at 230–31, state law that obstructed that purpose was displaced. The Court in this case failed to apply the presumption against pre-emption and the clarity requirement.

Significantly, however, the Supreme Court in *Sears* was dealing with a law passed pursuant to a power which was explicitly given to the federal government in the Constitution, *see id.* at 228; U.S. CONST. art. I, § 8, cl. 8, and a law which has, since 1790, strictly fixed the conditions on which a copyright or patent will be granted. *Sears*, 376 U.S. at 229. The federal interest in patents is therefore a special one, and principles used to analyze the pre-emptive effect of those laws should be extended to consideration of other federal laws with caution. Tort injury, by contrast, has typically been a matter for state law and thus states have extensive common-law systems of recovery. Since there is no similar comprehensive and special federal tort system, the *Sears* holding should not be extended to such cases.

273. *Garmon*, 359 U.S. at 247 (emphasis added) (internal citations omitted).

274. *See id.* at 237, 248.

275. 464 U.S. 238 (1984).

276. *Id.* at 249 (quoting Pacific Gas and Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 212 (1983)).

under the Atomic Energy Act,[277] the Court found that plaintiff's common-law tort claim for punitive damages was not pre-empted.[278]

The *Silkwood* Court did not rely on the presumption against pre-emption or the clarity requirement in reaching its result, but resorted to legislative history to find that Congress assumed and intended that state law remedies would be available to injured third parties.[279] According to the Court, its determination that Congress had occupied the field of regulation was not as significant as its conclusion that state imposition of tort damages did not conflict with federal standards or obstruct the objectives of the federal law:[280] "[p]aying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme."[281] Although the result in this case favored the retention of state common-law actions, and thus comported with the presumption against pre-emption, it is the contention of this Article that state common-law damages actions should not be at the mercy of, and therefore subject to, the vagaries of courts' amorphous "conflict" and "obstruction of purposes" analyses.

Clearly, state attempts to directly regulate the field of nuclear safety would have been pre-empted, since Congress had occupied the field of nuclear safety regulation. The Court nonetheless reached a contrary result as to a common-law damages action *because of the primary function and purpose of that action.* The Court described the nub of the problem this way: "[the issue] affects both the States' *traditional authority* to provide *tort remedies* to their citizens and the Federal Government's express desire to maintain exclusive *regulatory authority* over the *safety aspects* of nuclear power."[282] Thus, the Court recognized that the primary function of state tort law is to supply a remedy for injury, while the function of direct regulation is to *regulate.*[283] Congress's failure in its act to

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277. *Id.* at 250.

278. *Id.* at 258; *see also id.* at 256 ("In sum, it is clear that...Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters.").

279. *See id.* at 251–55.

280. *See id.* at 256.

281. *Id.* at 257.

282. *Id.* at 248 (emphases added).

283. The Court stated:

> It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

Id. at 256. The Court thereby gave a nod to the argument that tort law is somewhat regulatory in nature, but apparently believed any incidental regulatory result was inconsequential in the pre-emption context at issue. Nonetheless, as the Court in *Garmon* had limited its pronouncement about the pre-emptability of state actions for damages, the

indicate an intent to pre-empt state tort remedies was significant to the Court's pre-emption analysis particularly "in light of Congress' failure to provide any federal remedy for persons injured by [conduct prohibited under the act]. It is difficult to believe that Congress would, *without comment, remove all means of judicial recourse for those injured* by illegal conduct."[284] The Court clearly viewed common-law tort actions as distinct from state and federal regulatory law and as standing on a different footing. That assertion is further supported by the opinions of the dissenters; although four dissenters would have found the punitive damages claim pre-empted as more purely "regulatory,"[285] they agreed that state common-law claims for *compensatory* damages would not be pre-empted.[286] Thus, the entire Court would have saved from pre-emption state claims for compensatory damages because they are not primarily or directly regulatory in nature. The claims would not be pre-empted even under a federal scheme whereby Congress has entirely occupied the field of safety regulation.

A unanimous Court in *English v. General Electric Co.*[287] recently reaffirmed this crucial difference in function between the common law and direct state regulation.[288] However, a majority of the Court in *Cipollone v. Liggett Group,*

Court in *Silkwood* added this caveat: "We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law." *Id.* There could be times, therefore, when even the incidental regulatory effects of tort law are contrary to federal law.

284. *Id.* at 251 (emphasis added).

285. *See id.* at 260–61 (Blackmun, J., dissenting, joined by Marshall, J.); *id.* at 274–75 (Powell, J., dissenting, joined by Burger, C.J., and Marshall J. and Blackmun, J.).

286. The dissent asserted:

> [T]he same pre-emption analysis produces the opposite conclusion when applied to an award of compensatory damages. It is true that the prospect of compensating victims of nuclear accidents will affect a licensee's safety calculus. Compensatory damages therefore have an *indirect* impact on daily operations of a nuclear facility.... *The crucial distinction* between compensatory and punitive damages is that the purpose of punitive damages is to regulate safety, whereas *the purpose of compensatory damages is to compensate victims.* Because the Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intended to leave victims with no remedy at all, the pre-emption analysis...comfortably accommodates—indeed it compels—the conclusion that compensatory damages are not pre-empted whereas punitive damages are.

Id. at 263–64 (Blackmun, J., dissenting) (emphases added). *See also id.* at 275 (Powell, J., dissenting) ("Where injury is sustained as a result of the operation of a nuclear facility, it is not contested that *compensatory* damages under state law properly may be awarded.").

287. 496 U.S. 72, 73 (1990).

288. *See id.* at 85 ("We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these [radiological safety] decisions.... Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field."); *see also* Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185–86 (1988) ("Congress' reluctance to allow direct state regulation of federal projects says little about whether Congress was likewise concerned with the

Inc.[289] agreed with the *Garmon* Court's statement regarding the regulatory effect of state common-law damage awards.[290] The justices so agreed even though "[t]he Court has explained that *Garmon*...involved a special 'presumption of federal pre-emption' relating to the primary jurisdiction of the National Labor Relations Board."[291] Because of the presumption against pre-emption accorded to state common-law actions for damages, however, the better view is that such actions are means by which states permit their citizens to seek redress for grievances, and that they are not the primary way that the state seeks to regulate behavior in a manner that might conflict with pure, direct federal regulation.[292]

This difference between the common law and purely regulatory law is critical in the pre-emption context, whether the case be one of express or implied pre-emption, and that difference counsels for the adoption of a bright line rule. As pre-emption doctrine has dictated, courts must presume Congress intended no pre-emption of common-law actions for damages and may only pre-empt when Congress's intent is clearly manifested so as to overcome that presumption. Additionally, the *Silkwood* Court recognized that common-law actions for damages are not primarily regulatory in nature, but serve predominantly a compensation and dispute resolution function. These premises lead to the logical conclusion that courts should not find these actions pre-empted either impliedly or with ambiguous express language, because in neither situation can Congress's intent to pre-empt non-regulatory, traditional state compensation law be considered clear and manifest.

III. A WORKABLE FRAMEWORK FOR PRE-EMPTION OF COMMON-LAW ACTIONS: A SIMPLIFICATION AND A BRIGHT LINE

A. The Bright Line

The paradigmatic state law, the common law,[293] is at risk from the Court's pre-emption doctrine. Because common-law actions for damages have traditionally been firmly within states' domains, this Article argues that the presumption against pre-emption and the clarity requirement dictate that state common-law actions for damages get the highest order of protection against pre-emption. In regard to the question of common-law actions' regulatory effect, such a protection would require that these actions not be viewed as a form of direct regulation, but be seen only as

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incidental regulatory effects arising from the enforcement of a workers' compensation law.... [T]he permission of [such] incidental regulation is consistent with the preclusion of direct regulation....").

289. 505 U.S. 504 (1992).

290. *See id.* at 521 (opinion of Stevens, J., joined by Rehnquist, C.J., White and O'Connor, JJ.); *id.* at 548–49 (Scalia, J., dissenting, joined by Thomas, J.).

291. *Id.* at 537 n.3 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

292. *See supra* notes 263–64 and accompanying text.

293. *See supra* note 38.

having some incidental regulatory effect.[294] If the actions only had incidental regulatory effect but were not considered to be primarily "regulatory" in nature, then ambiguous pre-emptive language attempting to pre-empt some state regulation should not be viewed as embracing, and thus as displacing, those actions. The presumption and clarity requirement must mean at least that much in regard to common-law tort actions if those pre-emption standards are to have any meaning at all. Therefore, if the Court truly wanted to respect federalism principles and state sovereignty, and accord the "assumption" or "presumption" any weight, it would insist that Congress's purpose to pre-empt state common law be *unmistakable* from the language of the statute.[295] The Court therefore should not permit pre-emption of state common law when there exists no express statutory language specifically addressing the question, in other words, no language *specifically using the words common law*. Only when those words were used, or a phrase such as "all other state law" or "any and all state law," could Congress's intent be clear and manifest and thereby overcome the presumption against pre-emption.[296] This approach would

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294. *See supra* notes 284–85, 289 and accompanying text.

295. Indeed, the argument is even stronger when considered in the light of "the fundamental purpose served by our Government's federal structure.... [T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" New York v. United States, 505 U.S. 144, 181 (1992) (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *cf.* Grey, *supra* note 11, at 615 (stating that "states' efforts to protect their citizenry [is] the core concern of federalism"). The syllogism plays out this way: if the presumption against pre-emption is mandated by principles of federalism and respect for state sovereignty, and the primary purpose of the federal structure is to protect individuals and individual liberties, then the rights of individuals to seek redress for injuries should receive the highest order of protection and therefore a strict presumption. *Cf.* STARR, *supra* note 6, at 40 (advocating for some sort of clear statement rule and stating that "if in close or uncertain cases a court proceeds to preempt state laws where that result was not clearly the product of Congress's considered judgment, the court has eroded the dual system of government that ensures our liberties, representation, diversity, and effective governance"); Hoke, *supra* note 6, at 733 (asserting that "invocation and application of the preemption presumptions should assist in the structuring of a decisional approach that is more supportive of federalist and republican aims").

296. Commentators Corboy and Smith advocated for a similar "clear statement" rule in pre-emption, which would make conclusive the presumption against implied pre-emption. *See* Corboy & Smith, *supra* note 263, at 477–81. In their view, such a rule springs from a confluence of several factors: "the Framers and the Court denied a...broad scope of preemption under the Supremacy Clause," *id.* at 441; "the Constitution provides no judicially enforceable safeguards of federalism or states' rights," *id.* at 442; and the only protection afforded state sovereignty is the states' abilities to assert their interests in the national legislature. *See id.* at 443–44. Federal courts' proclivities in implying pre-emption in the absence of clear statements threaten the only safeguard for sovereignty that the states possess. *See id.* Although other commentators have similarly argued for some clear statement before state law will be pre-empted, see, e.g., STARR, *supra* note 6, at 40; Grey, *supra* note 11, at 606–07; Seidelson, *supra* note 152, at 165; Wolfson, *supra* note 6, at 112–14, the Supreme Court has yet to heed the suggestions.

essentially be one of a strict textualist[297] and would ensure that Congress rather than the courts are overriding state common law.[298]

In other contexts, however, the Supreme Court has announced the applicability of similar "plain statement" rules: "'[I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'" Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985))). Although some commentators have posited that "entire bodies of preemption doctrine might be called into question" if such a rule were applied in the pre-emption context, Fisk, *supra* note 2, at 44 n.38 (apparently referring to implied pre-emption principles), it is clear that the *Gregory* court considered pre-emption doctrine's clarity requirement to be an equivalent "plain statement" rule. The *Gregory* Court quoted more from *Will* than just the above-quoted portion; what followed was this statement: "'*Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States.'" *Gregory*, 501 U.S. at 461 (quoting *Will*, 491 U.S. at 65 (1989) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))). There appears then to be no significant difference between *Gregory*'s "plain statement" rule, *see id.*, and the requirement in the pre-emption context that Congress's intent to pre-empt be "clear and manifest" before a court finds express or implied pre-emption. The problem is, as this Article seeks to show, that pre-emption doctrine's clarity requirement has no teeth to it and thus permits the easy override of state law. For examples of adoptions of clear statement rules in other contexts, see STARR, *supra* note 6, at 50–53; Grey, *supra* note 11, at 609 n.286.

297. "Strict textualism" is used here to mean something akin to plain meaning, in the sense that statutory interpretation would start and end with the ordinary meaning of the language of the provision at issue, and would not consider either legislative history, the structure of the statute as a whole, or the purpose underlying the statutory scheme. *But see* Stern, *supra* note 152, at 981 (stating that strict textualism also contemplates resort to the structure and stated purpose of the act). For discussion of textualist versus contextualist approaches to statutory interpretation, see Sunstein, *supra* note 31, at 415–34. For an argument that clear statement rules do not fall within a strict textualist approach, see Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959–60 (1994) (stating that the goal of a clear statement rule is not primarily to ascertain legislative intent but to "enforc[e] constitutional principles through statutory interpretation").

Professor Sunstein has criticized reliance on textualism as a sole method of statutory interpretation. *See* Sunstein, *supra* note 31, at 415–24. Its use in this limited context, however, provides one of the major benefits he has associated with it: "an emphasis on the primacy of the text serves as a salutary warning about the potential abuses of judicial use of statutory 'purpose' and of legislative history." *Id.* at 416.

Another commentator has criticized what she views as the Court's "slavish devotion to literalist textualism," Fisk, *supra* note 2, at 39, at least in the context of ERISA pre-emption. *See id.* at 39–40, 58–82. Professor Fisk argues for the adoption of a more pragmatic approach, which would inquire "whether preemption makes sense as a matter of ERISA policy." *Id.* at 42; *see generally id.* at 90–102. Because, under her theory, Congress cannot draw precise pre-emption lines *ex ante*, *see infra* note 311, she concedes that "[a]s a practical matter, [adoption of her proposed approach would] mean[] that the courts, rather than Congress, will have the leading role in defining the scope of ERISA preemption." *Id.*

The general, more lax rules of pre-emption applied to state regulatory law should not be applied in cases of pre-emption of state common law. When states seek to regulate behavior and activities directly, the regulation is much more likely to come into conflict with regulation of the same subject matter at the federal level, because ultimately the two types of legislation are aimed at the same goal: to regulate future behavior and activities in a certain way for certain purposes.[299] It would be sensible, then, for pre-emption doctrine, even though somewhat restrained by the presumption and clarity requirement, to permit either the express or the implied pre-emption of state regulatory law by determining a conflict by the obstruction of federal purposes, if express language were either absent or ambiguous.

A special rule is necessary when the pre-emption of state common law is at issue, however, not only because it is it the paradigmatic state law,[300] but also because it is unlike the kind of direct, legislative regulation otherwise undertaken

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Such an approach is at odds with the one advanced in this Article, in that her approach could give courts more leeway to pre-empt state common law. In fact, she conceded that she was "not advocating that courts necessarily strive to save state law from preemption, which is what the usual federalist presumption is supposed to do." *Id.* at 91. This Article argues that Congress and not the courts should define the pre-empted field; only in that way will state common law survive when it is meant to survive. *But see id.* at 98 (arguing that the plain meaning approach most recently has generated a "new brand of judicial activism" whereby the Court has "overturn[ed] long-settled construction of statutes,...reject[ed] interpretations preferred by politically accountable administrative agencies, and...disregard[ed] clearly contrary legislative intent").

298. Professor Grey, in similarly arguing for a rule requiring Congress to have used the words "state tort remedies" or "state tort law" before a finding of pre-emption can be made, see Grey, *supra* note 11, at 617 n.319, argues that Congress is let off the hook from making the hard choices if the courts are left to do the weighing of competing state and federal interests. *See id.* at 617–18 (stating that "failure to require a clear and manifest statement before displacing state tort remedies encourages Congress to avoid resolving the potentially difficult question of whether such remedies can coexist with a federal regulatory scheme"). In her view, the balancing "is best decided through the democratic process. If Congress is not required to speak clearly on the issue, it is likely to avoid its responsibility and leave it to the courts to decide—a result that disserves the separation of powers principle." *Id.* at 618. That result also disserves the Supremacy Clause, which anticipates that federal law, enacted by the Congress, is what overrides conflicting state law. *See* U.S. CONST. art. VI, cl. 2. A bright-line rule such as the one proposed in this Article would hold Congress and the courts to the terms of the Supremacy Clause.

For an argument that the courts and not Congress are better suited to make pre-emption decisions, see Stabile, *supra* note 6.

299. The Court itself has noted the *direct* nature of "regulation": "A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate [a matter], a law must not just have an impact..., but must be *specifically directed toward* that [matter]." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50 (1987). It would follow, then, that if the law, such as state common law, simply had an "impact" on the matter but was not directed toward the matter, it would not be considered to be "regulating" the matter.

300. *See supra* note 38 and accompanying text.

when the state seeks to regulate behavior and activities within its borders.[301] The primary purpose of the common law is to permit compensation of the injured and provide a forum for the redress of grievances;[302] it does not seek to encroach directly upon the regulatory role of the federal government when Congress has legislated and regulated[303] because it does not direct a defendant to *do* anything except pay damages for a plaintiff's injuries.[304] There is less likelihood of conflict by obstruction of purposes because the two types of law seek to achieve different ends: one seeks to regulate and the other to compensate. Conflict by impossibility will not occur because defendants can always pay damages and at the same time comply with the federal law. In addition, as the Court has noted, it is difficult to believe that Congress would have removed all recourse to state tort remedies for injured plaintiffs without explicitly saying so in its legislation.[305]

Therefore, in this instance an additional hurdle must be erected, which may be seen as a barrier: added to the presumption and clarity requirement in these cases should be the assumption that Congress viewed conflict by obstruction of purposes as nonexistent.[306] If we assume that Congress viewed such conflict or

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301. *See* Grey, *supra* note 11, at 572 n.80 ("Although a common law damages award requires a defendant to pay a sum of money to a plaintiff, it is not a direct state-wide mandate for a defendant to engage in certain behavior."). *See also id.* at 605 n.273 (stating that "the safety incentives [provided by state tort remedies] are indirect, in the sense that when common law courts judge prior misconduct and require defendants to pay a monetary sum for injury, this may involve a judgment about the level of performance, but it does not specify a precise manner of conduct").

302. *See supra* note 261 and accompanying text.

303. *See* Corboy & Smith, *supra* note 263, at 455–56 (arguing that the awarding of state tort damages is not the sort of "exercise of state governmental power which [would] collide[] with federal regulation.... [S]tate tort awards and state regulatory activities are polar opposites"); Grey, *supra* note 11, at 563 (observing that the Court has "reasoned that state tort remedies that addressed past behavior and did not necessarily require potential defendants to change their future conduct typically did not unduly interfere with the purpose of federal law to change future behavior").

304. *See* Barbara L. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 BUFF. L. REV. 181, 209 (1991); Stabile, *supra* note 6, at 67 & n.261.

305. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984).

306. The approach outlined here extends a significantly greater protection to state common law than does the *Myrick* rebuttable presumption approach. *See supra* notes 228–30 and accompanying text. That approach still arguably permits courts to roam beyond the statutory language to unstated congressional purposes to rebut the intent not to expressly pre-empt that a court may have gleaned from express statutory language. The court need only find some ambiguity in the statutory text, which is not very difficult to do in many cases. The *Myrick* approach by its very nature eviscerates the presumption against pre-emption and ignores the clarity requirement. The approach proposed here, by contrast, would retain the presumption and clarity requirement as essential threshold tests. It would provide fortification to the general presumption against pre-emption and give real meaning to the clarity requirement by precluding a finding of implied pre-emption by conflict or obstruction absent unambiguous express statutory language.

An argument could be made that despite what Congress intends or has done in its legislation, federal law can pre-empt state law because of some inherent conflict between

obstruction as nonexistent, then courts would be precluded from roaming about a statute in search of nebulous congressional purposes that might be obstructed by state common-law actions. To negate the additional assumption that state common law posed no obstacle, the clarity requirement would demand some affirmative statement by Congress specifically addressing the common law or employing sweeping, unambiguously all-encompassing language such as "any and all state law." Only then would Congress's intent to pre-empt be demonstrated by the requisite clarity. The effect of the rule would be to require express and unambiguous language before courts could pre-empt state common law; implied pre-emption analysis would, as a practical matter, be unavailable.[307]

Congress has shown its ability to use all-encompassing language or specific language referring to state common law. Some statutes have contained the following language in their express provisions to delimit the extent of pre-emption:

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the two. In such a situation, the Constitution and not Congress's legislation would be what indicates what is pre-empted. On its face, that argument would appear to have some validity. The weakness in the argument, however, may be found in the Supremacy Clause itself and in the Supreme Court's jurisprudence.

The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;...shall be the supreme Law of the Land;...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. It is clear from this clause that when a law of the United States is at issue, the Constitution does not automatically strike down a state law; that law must be *contrary* to the relevant federal law. One determines whether state law is contrary to federal law by determining what the federal law is and does, as well as by determining what the state law is and does. Those determinations are made in large part by examinations of existing text and legislative intent. The Supreme Court has repeatedly stressed, prior to its beginning any pre-emption analysis, whether express or implied, that "the question in each case is what the purpose of Congress was." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Therefore, in order for a state law to be contrary to federal law, there must be some indication in legislative language or intent to evidence a legislative assessment that such conflict exists. In other words, state law cannot conflict in a vacuum, despite what can be gleaned from legislative language and intent. If, then, it is clear that Congress intended that state law of some sort survive, there can be no conflict as a matter of law.

One exception to this principle has been recognized in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). There the Court appeared to recognize that a straight route to the Supremacy Clause existed in the cases of physical impossibility of compliance with state and federal law. *See id.* at 141–42; *infra* notes 352–58 and accompanying text. However, that exception should not apply in pre-emption cases involving state common law. *See infra* note 368 and accompanying text.

307. Pre-emption by "impossibility," though remaining available, would be inapplicable in cases involving common-law actions. *See infra* notes 352–58, 368. For advocacy of a similar approach, see Grey, *supra* note 11, at 621 (arguing that implied pre-emption of state tort claims should "rarely" be found in the absence of a pre-emption provision or of an unambiguous one); Seidelson, *supra* note 152, at 165–66 (stating that unambiguous language by Congress should be required to establish express preemption and that implied preemption should be eliminated).

"'all other law, including state and municipal law...,'"[308] or "'any law, rule, regulation, standard, or other provision having the force and effect of law...,'"[309] or "'any and all State laws....'"[310] These descriptions of the respective pre-empted fields are comprehensive and admit of no ambiguity.[311] This statutory pre-emptive language, under the proposal outlined in this Article, would suffice to overcome the presumption that Congress did not intend to pre-empt state law, would meet the requirement that Congress's intent to pre-empt state common law be clear and manifest, and would overcome the presumption that Congress viewed any conflict or obstruction by state common law as nonexistent.

Although one could argue that subsequent language appended to such phrases have created ambiguity, such additional language should not be so viewed, at least for the purposes of pre-emption analysis. For example, the Court addressed the pre-emption language of the Interstate Commerce Act[312] in *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n.*[313] The case involved a provision that gave the ICC the authority to approve rail carrier mergers and consolidations.[314] The law additionally provided that a carrier in such an approved consolidation "'is exempt from the antitrust laws and from all other law, including state and municipal law, as necessary to let [it] carry out the transaction.'"[315] The Court held that "from all other law" clearly meant that the ICC could then exempt a carrier from its obligations under a collective bargaining agreement, which would be governed by state contract law.[316] The Court said that "[b]y itself, the phrase 'all other law' indicates no limitation"[317] to types of laws, but was "clear, broad, and unqualified";[318] "[i]t does not admit of [a] distinction...between positive enactments and common-law rules of liability."[319]

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308. *See* Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 119 (1991) (quoting Interstate Commerce Act, 49 U.S.C. § 11341(a)).

309. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (quoting Airline Deregulation Act of 1978, 49 U.S.C. § 1305 (a)(1)).

310. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (quoting Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a)). ERISA further more explicitly defines "any and all State laws" to include "'all laws, decisions, rules, regulations, or other State action having the effect of law.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 540 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part) (quoting 29 U.S.C. § 1144(c)(1)). For more examples of such congressional clarity of expression in regard to state common law, see Grey, *supra* note 11, at 617 n.321.

311. *But see* Fisk, *supra* note 2, at 40 (arguing that "Congress cannot readily define the scope of preemption *ex ante* with sufficient specificity to relieve the courts of the obligation to accommodate state and federal law in each case").

312. 49 U.S.C. § 11301.

313. 499 U.S. 117 (1991).

314. *Id.* at 119.

315. *Id.* (quoting 49 U.S.C. § 11341(a)) (alteration in original).

316. *Id.*

317. *Id.* at 129.

318. *Id.* at 128.

319. *Id.*

Justice Stevens in dissent, however, argued that this apparently clear language was ambiguous: the statute did not exempt a carrier from all law, but only *all law as necessary to let it carry out the transaction.* Justice Stevens opined:

> [G]iven the respect that our legal system has always paid to the enforceability of private contracts—a respect that is evidenced by express language in the Constitution itself—there should be a powerful presumption against finding an implied authority to impair contracts in a statute that was enacted to alleviate a legitimate concern about the anti-trust laws. Had Congress intended to convey the message the Court finds in [the statute], it surely would have said expressly that the *exemption was from all restraints imposed by law or by private contract.*[320]

Apparently then, to pre-empt these private ordering kinds of laws, Justice Stevens would require Congress to be even more explicit and say, "including state common law or laws relating to contract."

The Court examined the Airline Deregulation Act of 1978[321] ("ADA") pre-emption language in *Morales v. Trans World Airlines, Inc.*[322] The ADA included an express pre-emption provision which prohibited the states from "'enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law *relating to* rates, routes, or services of any air carrier...'"[323] The State of Texas had attempted to regulate airlines' deceptive fare advertising, and the Court was required to determine whether the pre-emption provision of the ADA prohibited enforcement of that regulation.[324]

The Court recognized that "[t]he question, at bottom, is one of statutory intent, and we accordingly begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[325] The Court did not even address the sweep of the phrase "any law,"[326] but instead focused on the potentially limiting phrase "relating to."[327] Consulting the dictionary definition, the Court found that the phrase in its "ordinary

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320. *Id.* at 139 (Stevens, J., dissenting) (emphasis added) (internal footnote omitted).

321. Pub. L. No. 95-504, 92 Stat. 1705 (1978).

322. 504 U.S. 374 (1992).

323. *Id.* at 383 (quoting 49 U.S.C. § 1305 (a)(1)) (alterations in original) (emphasis added).

324. *See id.* at 379–80.

325. *Id.* at 383 (internal quotations omitted) (alteration in original).

326. *See id.*

327. For cases discussing the same phrase, as contained in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), see Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138–39 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44–47 (1987). In both cases, the Court found that state common-law actions for damages fell within ERISA's pre-emption provision. *See Ingersoll-Rand*, 498 U.S. at 135, 140; *Pilot Life*, 481 U.S. at 43, 47–48. For an argument that under ERISA Congress did not clearly define the pre-empted field, see Fisk, *supra* note 2, at 40.

meaning" expressed Congress's "broad pre-emptive purpose"[328] to pre-empt state law "having a connection with or reference to airline 'rates, routes, or services....'"[329] The Court did not apply any presumption against pre-emption or refer to any requirement that intent to pre-empt these laws be clear and manifest; it simply engaged in statutory construction to determine whether the state law at issue "related to" the federally regulated field.

Justice Stevens again in dissent "agree[d] that the plain language of [the statute] pre-empts any state law that relates directly to rates, routes, or services...."[330] Nonetheless, he counseled that the presumption against pre-emption of the traditional state regulation involved here required that the Court not pre-empt every state law that had some "indirect connection with, or relationship to," the federally regulated field.[331] Instead, he believed that the statutory language needed to be examined in light of legislative history and the statute's structure, to find Congress's true pre-emptive intent.[332]

Justice Stevens therefore would have resorted to legislative history to save the state law, whereas in many instances the Court has resorted to history and statutory structure and purpose to find an obstruction of federal purposes. His attempt to maintain fidelity to the presumption and clarity requirement is admirable. Because, however, his approach requires the Court again to delve into the murky world of congressional purposes in any case, the approach suffers from the same uncertainty and subjectivity identified in this Article as the core problem with pre-emption doctrine.

The Court took a different approach in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*[333] In the case, the Court was interpreting the "relate to" phrase in the pre-emption provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), which in context provides that "'*all state laws* [are pre-empted] insofar as they...relate to any employee benefit plan' covered by ERISA...."[334] The question in the case was whether ERISA pre-empted a state statutory provision levying surcharges on certain patients covered by plans that fell within ERISA.[335]

In attempting to determine whether the state law at issue "related to" a covered plan, a unanimous Court first questioned whether the words did much limiting:

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328. *Morales*, 504 U.S. at 383. The Court indicated that it would have reached the same result even if the state and federal laws were consistent. *See id.* at 386–87.

329. *Id.* at 384.

330. *Id.* at 421 (Stevens, J., dissenting).

331. *Id.*

332. *Id.*

333. 514 U.S. 645 (1995).

334. *Id.* at 655 (quoting Employee Retirement Income Security Act of 1974, 29 U.S.C. § 514(a) (1988 ed. & Supp. V)) (emphasis added).

335. *See id.* at 649.

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere." But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.[336]

The Court found that it needed to do more than limit its analysis to the words of the statute: "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive."[337]

At first blush, it appears that the result of using this Article's proposed approach in cases involving all-encompassing language to which is appended a limiting phrase is no different from that employed by the Court in *New York State Conference*: the Court ultimately resorted to the usual interpretive tools to ascertain the meaning of the limiting phrase "relate to." However, closer examination reveals that the *New York State Conference* approach is different from the proposed approach in a significant way. The former does not differ from, and in fact suffers from the same deficiencies as, the Court's typical pre-emption approach.

This Article argues that *once Congress has used unambiguous language* in its pre-emption provision, words such as "all state law" or "including the common law," *then* the presumption against pre-emption no longer protects state law, even state common law, because Congress's intent to pre-empt it is "clear and manifest." Once the presumption has fallen, a court may construe any limiting language using all the tools of statutory construction at its disposal, including looking to the objectives of the federal law to determine the intended scope of pre-emption. In essence, once all state law is within the pre-emptive ambit, construction of the statute, not the presumption against pre-emption, determines what then may be excised from the pre-empted sphere.

The Court's typical approach, by contrast, seeks to find Congress's clear and manifest pre-emptive intent not from the words themselves but from the entire structure and purposes of the federal act at issue, and indeed the Court took this very approach in *New York State Conference*.[338] Because of the broad-ranging nature of the inquiry, the Court in *New York State Conference* indicated its understanding that the presumption against pre-emption would apply throughout the analysis.[339] However, it should only have needed to observe that presumption if

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336. *Id.* at 655 (citation omitted) (alteration in original). The Court then canvassed some of its previous interpretations of this provision and concluded that those interpretations were not of much assistance in this case. *See id.*

337. *Id.* at 656. Professor Fisk has argued that this approach of the *New York State Conference* Court was a pragmatic one that best serves the objectives of ERISA regulation. *See* Fisk, *supra* note 2, at 39–40, 42. She would adopt the approach as the proper one. *Id.* at 92–93.

338. *See supra* text accompanying note 337.

339. *See supra* text accompanying note 336.

it had not *yet* found clear and manifest intent on the part of Congress to pre-empt *all* state law that fell within the pre-emptable sphere. It clearly had not found such intent, even though there was no ambiguity that Congress intended to pre-empt all state law. It should have been clear from the statute that any state law was at least *pre-emptable*. In that case, the presumption should have fallen and the Court simply should have engaged in statutory construction of the words "relate to," to ascertain which of the already *pre-emptable* laws were not covered in this situation. Because the Court applied the presumption throughout, it obviously viewed the case as one like any other and employed all the interpretive pre-emption tools at its disposal.

The proposal advanced in this Article differs regarding *the time at which* the courts may resort to all the interpretive tools at their disposal to ascertain the intended breadth of the pre-empted field, and the difference is a critical one. Under *New York State Conference*, those tools could be used at the outset; the entire thrust of this Article, however, is that such an approach is unduly offensive to federalism principles and state sovereignty concerns and nullifies the presumption against pre-emption. Under the approach advanced herein, by contrast, all of the interpretive tools would only be available *after* a threshold finding that common-law actions were pre-emptable at all. In this way, the federalism-dictated presumption against pre-emption would retain some force and state common-law actions, when appropriate, would be shielded from nebulous interpretive methods.

Because Congress used sweeping language in the ICC, the ADA, and ERISA, one cannot ignore that Congress made clear and manifest its intent to pre-empt *all* state law, as long as it fell within the specified relationship with the federally regulated field. State common law necessarily falls within the sweep of the pre-emption language, despite that Congress added the limiting words; the pre-emption language "does not admit of [a] distinction...between positive enactments and common-law rules of liability."[340] As a practical matter, Congress must add some words of limitation because it cannot in every statute pre-empt "all state law," period. There must be a designation of *some* state law, and Congress has no other way of indicating that relation. Therefore, once Congress has clearly indicated its intention to pre-empt all state law, including common law, the clarity requirement has been met, the presumption against pre-emption has been overcome, and the assumption that Congress did not view state common law as conflicting is no longer valid. Also no longer necessary is the strict textualist approach advocated for the initial, threshold stage of interpretation.[341] The sole remaining question is one of pure statutory interpretation, with all of the interpretive difficulties and choices of interpretive method that accompany that process: whether the common-

340. Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 128 (1991).

341. Professor Fisk has criticized the textualist approach to the "relates to" language of the ERISA statute, *see* Fisk, *supra* note 2, at 58–59, 64–67, and that criticism may be warranted. This Article does not argue for a textualist approach or any particular method of statutory interpretation after the initial stage.

law claim at issue has some statutorily-designated relation to the federally regulated field.[342]

The presumption against pre-emption of areas of law traditionally within the states' domains, the requirement that Congress's intent to pre-empt those areas of state law be "clear and manifest," and the very nature of state common-law damages action urge the adoption of a special rule regarding the pre-emption of those actions. To remain faithful to federalism principles and the concomitant respect for state sovereignty, that rule should demand that Congress be unequivocally clear in its language before a court will find that state common-law remedies were intended to be stripped from injured plaintiffs. Therefore, courts should only pre-empt those common-law actions when Congress has used the words "state common law,"[343] "all state law," "any and all state law," or a similar formulation in an express pre-emption provision.[344]

B. An Exception?

There may be situations in which state common law and federal regulatory law appear clearly to clash. For example, a federal regulation may dictate that manufacturers install only one type of safety device and no other. It may also be that the federal statute enabling the promulgation of that regulation has not expressly indicated that state common law is pre-empted, but has only provided that nonidentical state "standards" will not survive the federal legislation and regulation. The question arises whether a state common-law damage award for

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342. To state that "the remaining question is one of pure statutory interpretation" is not to underestimate the difficulties inherent in that endeavor; significant interpretation questions would likely remain, but they should not be additionally saddled with the presumption against pre-emption and overlaid with federalism concerns.

343. Congress can be so explicit in savings clauses when it sees fit. *See* Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4), quoted in Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) ("the Act does not '...enlarge or diminish or affect in any other manner *the common law or statutory rights, duties, or liabilities of employers and employees under any law* with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.'") (emphasis added).

344. An additional advantage to such a simplified rule is that it would result in significant savings of judicial resources. The Supreme Court would not be burdened with so many pre-emption cases that needed correcting if courts could only pre-empt state common law when there existed such clear statutory language as proposed herein. Other commentators have observed that a clear statement rule in this context would have the advantages of "increas[ing] certainty and predictability in the law, foster[ing] federalism values that the Supreme Court itself has repeatedly emphasized, and further[ing] democratic theory concerns by ensuring that fundamental policy choices are made by the politically accountable branches." STARR, *supra* note 6, at 4. For arguments against a rule requiring unambiguous clarity, see Grey, *supra* note 11, at 618–20 (citing restriction of judicial flexibility and the possible evisceration of implied pre-emption as possible criticisms of a clear statement rule).

failing to install a device different than that mandated by the federal law would be pre-empted, and if so, in what manner.[345]

In the case of *Florida Lime & Avocado Growers, Inc. v. Paul*,[346] the Supreme Court drew what may be an important distinction relevant to the posed question. The Court seemed to create an exception to the nebulous "obstruction of purposes" analysis, along with its concomitant presumption against pre-emption and clarity requirement. This exception would not require a court to examine congressional purposes to find pre-emption, and thus would not overlay the analysis with the presumption and clarity requirement, but would permit pre-emption from one simple finding.[347] If that finding was made, then state common law in the above hypothetical could be overridden with that one simple judicial finding; the court would not be saddled with the presumption against pre-emption and clarity requirement and presumably would not be concerned with the arguably unclear pre-emptive statutory language. The implications for the proposal outlined in this Article would be serious. If the court could pre-empt state common law without being restricted by the presumption and clarity requirement, the proposed rule requiring that Congress use the words "common law" would be easily circumvented because the rule would simply be inapplicable. Closer examintion of the *Florida Lime* exception is therefore warranted.

In *Florida Lime*, the Court cited no express statutory language indicating the extent to which the federal law displaced state law. The Court therefore conducted implied pre-emption analysis, which required it to rely on other tools to ascertain congressional pre-emptive intent. The California statute at issue in the case set forth a test for avocado maturity and would not allow the transportation or sale in California of Florida avocados that did not meet this standard.[348] The relevant federal rule prescribed a different test for maturity that could have deemed mature a Florida avocado that was not "mature" under the California test. The Court formulated the pre-emption question in the case as follows: "Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

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345. Two commentators have argued that "[i]f Congress, or a regulatory agency validly exercising delegated authority, dictates that a product must be made, labelled, or marketed in a particular fashion and no other, state-law damage claims alleging injury arising from a product feature complying with that federal dictate must be disallowed." Robert B. Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After* Medtronic, 64 TENN. L. REV. 691, 713 (1997). The authors advocated a "restrained view of implied preemption," *id.*, in part because of the presumption against pre-emption and the traditional role of the states in product liability law. *See id.* at 711–12.

346. 373 U.S. 132 (1963).

347. That finding would be of physical impossibility of compliance with the state and federal law. *See infra* notes 352–53 and accompanying text.

348. *See Florida Lime*, 373 U.S. at 133–34 (citing section 792 of California's Agricultural Code).

Congress.'"[349] In holding that the California statutory rule was not pre-empted because it did not pose an obstacle to the accomplishment of the federal purposes, the Court elaborated that "there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field."[350]

By this statement, the Court identified ways in which state law could stand as an obstacle such that it should be displaced. One such way occurred when the state law created an actual conflict with federal law. The Court then went further and added, "[a] holding of federal exclusion of state law is inescapable *and requires no inquiry into congressional design* where compliance with both federal and state regulations is a *physical impossibility* for one engaged in interstate commerce."[351] Here, the Court seemed to carve out an area in which the existence of conflict is so clear that pre-emption takes a direct route to the Supremacy Clause: if an actor could not physically comply with both state and federal law, obviously state law would fall, without any more analysis into the nebulous world of congressional intent.[352]

The Court confused the law[353] by identifying the basic pre-emption question as one involving "obstruction of purposes"[354] and then listing actual conflict as one such method of obstruction.[355] Despite the Court's apparent suggestion that the existence of this type of actual conflict could show an obstruction of congressional *purposes*, it is clear that it felt resort to the "purposes" or "design" of Congress to find some vague "obstruction," and hence conflict, was unnecessary.[356] For that reason, actual "physical impossibility" conflict pre-emption should not be implicated in an "obstruction of purposes" approach to pre-

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349. *Id.* at 141 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

350. *Id.* Although the Court placed actual conflict and field pre-emption under the "obstruction of purposes" umbrella, it distinguished between the two types and the employment of congressional "purposes" analysis to determine their existence. *See infra* notes 352–65 and accompanying text.

351. *Florida Lime*, 373 U.S. at 142–43 (emphasis added).

352. *See* Wolfson, *supra* note 6, at 88 ("If the laws actually conflict, the state law must fall. The state law would fall, however, not because of a congressional intent to preempt, but because of the Supremacy Clause itself."); *see also infra* note 366.

353. *See infra* note 357.

354. *See supra* note 349 and accompanying text.

355. *See supra* note 350 and accompanying text.

356. Indeed, shortly before undertaking its actual conflict analysis, the Court rather plainly stated:

> [I]t is suggested that the coexistence of federal and state regulatory legislation should depend upon whether the *purposes* of the two laws are parallel or divergent.... The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, *not whether they are aimed at similar or different objectives.*

Florida Lime, 373 U.S. at 142 (second emphasis added).

emption but should stand on its own; in other words, if actual conflict of the "physical impossibility" type is shown, courts need not resort to the vague "purposes" analysis.[357]

By contrast, the other way a state law could obstruct the purposes of federal law, as shown by the *Florida Lime* Court's analysis, occurred when even absent actual conflict Congress's design indicated an intention that state law should fall.[358] In attempting to find that design, the Court sought an indication that Congress had, in today's parlance, occupied the field of regulation.[359] If it had, then any state regulation would obstruct the purposes of Congress to occupy the field with *federal* regulation. When discussing this aspect of the pre-emption analysis, though, the Court acknowledged that the case involved an exercise of the "historic police powers of the States"[360] such that the "settled mandate" required the Court to find no displacement "'unless that was the clear and manifest purpose of Congress.'"[361] The Court therefore searched for "an unambiguous congressional mandate to that effect."[362] It is significant that it sought that mandate only in its discussion of whether Congress had occupied the field of regulation to such an extent that it worked an ouster of the state regulation;[363] the Court had already considered whether the state law actually impermissibly conflicted with federal law and did not similarly emphasize the presumption in favor of traditional state law and the requirement that Congress's purposes there be clear and manifest.[364]

That the Court only applied the presumption and concomitant clarity requirement when addressing the "occupation of the field" aspect of the case supports an argument that "physical impossibility" conflict pre-emption is traced directly to the Supremacy Clause with no intervening "obstruction of purposes" analysis. If a court need not resort to the vague purposes analysis to *infer* congressional intent to pre-empt, there is no need for the presumption against pre-emption and the clarity requirement because there is less of a threat to federalism principles occasioned by courts' overreaching into state law domains. The pre-emption finding that the court must make is therefore a simple one in the "physical impossibility" cases: if a party can only physically comply with one law, the Supremacy Clause would dictate that that law be federal law and that state law must fall.

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357. That the Court casually conflated the two approaches illustrates the unartful evolution of the doctrine and the concomitant confusion perpetuated by the Court's pre-emption decisions. This lack of precision in the application of the "obstruction of purposes" approach also argues, as does this Article, for a retreat from its employment as the overarching construct in pre-emption analysis.

358. *See Florida Lime*, 373 U.S. at 146.

359. *See id.* at 146–52.

360. *Id.* at 146 (internal quotation marks omitted).

361. *Id.* at 146 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

362. *Id.* at 147.

363. *See id.* at 146.

364. *See id.* at 142–43.

The *Florida Lime* Court's approach to the two types of pre-emption lends support to the argument made previously in this Article that the core problem with the doctrine is its allowance of easy resort to implied pre-emption principles and the obstruction of purposes analysis.[365] First, if clear conflict exists in the sense of physical impossibility of compliance with the two laws, traditional state laws get no protection from the presumption and clarity requirement because the Supremacy Clause itself dictates the pre-emption answer.[366] When, however, the Court must resort to the vague "obstruction of purposes" analysis, as it must when it assesses whether Congress has meant to occupy the field, the presumption and clarity requirement are triggered to observe federalism principles by insulating those areas of traditional state hegemony. The Court thus implicitly acknowledged the problem posed by the allowance of courts' reliance on obstruction of purposes analysis; otherwise, it need not have drawn the distinction between actual "physical impossibility" conflict and more general obstruction of purposes pre-emption. The distinction between these types of pre-emption is therefore an important one: the very problematic nature of the obstruction of purposes analysis, a free-wheeling inquiry into congressional purposes where few if any standards exist to guide courts, necessitates that a presumption against pre-emption be accorded to traditional areas of state law, where no such presumption need be accorded in actual "physical impossibility" conflict cases. By extension, in cases of "physical impossibility" conflict, there would also be no need for the additional protection for state law under the proposal advanced in this Article.

Assuming that there is good reason for the presumption and clarity requirement in most cases involving conflict pre-emption, and assuming that those safeguards are not necessary in those cases involving "physical impossibility" conflict, the question remains: into which category do state common-law actions for damages fall? In the hypothetical posed above, federal law mandated the installation of only one device and no other. A state court awarded damages for failure to install what the jury determined to be a safer device. There appears to be a clear clash between state and federal law. The issue is, what type of clash is it? If the case is one involving a general type of conflict, implicating an obstruction of purposes approach to pre-emption, then state common law would get the full benefit of the presumption and other protection argued for in this Article. If, however, the case is seen as one of physical impossibility conflict, then pre-emption is readily assured.

The case should not properly be viewed as one of physical impossibility. Manufacturers in the hypothetical situation could comply with federal law and could also pay a tort damage award to an injured plaintiff. To find otherwise, to find that state common-law damages actions would force manufacturers to violate

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365. *See, e.g.*, *supra* notes 36–39 and accompanying text.

366. *Cf.* STARR, *supra* note 6, at 14 & n.50 (stating that "the paradigmatic preemption case involves an *actual conflict* between state and federal law. This situation exists where it is physically impossible for a party to comply with both state and federal requirements. In such cases, preemption analysis requires a straightforward application of the Supremacy Clause") (citing *Florida Lime*).

federal law by requiring them to install federally-prohibited safety devices, would accord too much weight to any regulatory effect of state common-law damage awards.[367]

Because it is not physically impossible to comply with state and federal laws in this hypothetical situation, the case is more properly seen as one implicating a general obstruction of purposes type of conflict. That being the case, state tort law should get the benefit of the presumption against pre-emption, the clarity requirement, and the proposal advanced in this Article. The result would be no finding of pre-emption unless Congress had explicitly used the words "common law" or "all state law" in an express pre-emption provision. No exception should be made in these cases.[368]

Although that result may seem unfair to defendants who are made to pay damages for conduct that they were required to engaged in under federal law,[369] the result is ultimately justified both by the purposes served by state common law and by the greater concerns of federalism and respect for state sovereignty.[370] The rule advanced in this Article would prohibit the elimination of plaintiffs' state tort remedies except when Congress has been explicit in its desire to override this paradigmatic traditionally state law. Congress has been so explicit regarding state

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367. *See* Grey, *supra* note 11, at 626 (stating that under this type of pre-emption, "it will be the rare case that results in preemption. Tort claims usually have at most indirect effects on federal legislation").

368. Professor Leflar and Adler argue for a different result, despite the presumption against pre-emption and a lack of clear congressional intent to pre-empt. *See* Leflar & Adler, *supra* note 346, at 713. They conclude that the common-law claim should be pre-empted in these circumstances because of conflict by obstruction of purposes. *See id.* However, the discussion herein has demonstrated that pre-emption should not be automatic when it is based on obstruction of purposes conflict; the presumption and clarity requirement should apply to preclude pre-emption, *unless* it is based on "physical impossibility." Any other rule would leave a gaping hole in their approach, which seeks to be "restrained" as regards implied pre-emption, *see id.*, and permit the easy override of state common-law actions. Because the authors themselves concede that this situation involves obstruction of purposes conflict, a court should not pre-empt unless Congress's intent to do so is clear.

369. One could make a similar, although less strong, unfairness argument in cases of tort liability in the face of a defendant's compliance with federal law in an average tort case, when pre-emption is not an issue. However, it is accepted that compliance with statutes or regulations is evidence but not determinative of a defendant's common-law tort liability. *See, e.g.*, HARPER, *supra* note 260, § 17.6, at 646–47 & n.71; KEETON, *supra* note 262, at 233. The unfairness result also should not rise to the level of absurdity so as to require the recognition of the potential exception discussed herein.

370. Such considerable policy reasons have supported the Court's adoption of "clear statement" rules in the past. *See supra* note 298. Policy reasons have justified the adoption of an analogous strict rule in another area of law: in the antitrust context, the Supreme Court has determined that for ease of administration a "per se" rule is needed, despite that the rule may work injustices in very narrow and infrequent situations. *See* 1 A.B.A. SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 43–51 (4th ed. 1997).

common law in the past and should be required to do so in every case if that is its intent.

IV. THE AIRBAG CONTROVERSY

The flaws in pre-emption doctrine reveal themselves in the results of courts addressing the pre-emptability of state common-law actions for damages for defective design due to the absence of an airbag. The "airbag controversy," therefore, presents an excellent example for study. The combination of statutory language and the method by which the administrative agency has regulated motor vehicle manufacturers is involved in the debate over the pre-emptive effect of federal law in the context of airbag litigation. A discussion of the pertinent federal act and the regulations promulgated by the administrative agency pursuant to that act is therefore necessary to a proper analysis of the airbag pre-emption controversy.[371]

A. National Traffic and Motor Vehicle Safety Act of 1966

1. Purpose of the Statute

In 1966, Congress enacted the National Traffic and Motor Vehicle Safety Act[372] (the "Safety Act" or "Act") for the stated purpose of "reduc[ing] traffic

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371. This Article in no way attempts to fully analyze the relevant act and its legislative history. The purpose of the citation to and quotation of certain portions of the Safety Act and legislative history is to provide enough background for an understanding of courts' treatments of the relevant pre-emption issues as they apply to this act and common-law damages actions. Further, discussion of various courts' approaches to the pre-emption question in regard to this act and regulatory scheme are only to serve as examples of the confusion wreaked by the Court's pre-emption jurisprudence and the danger it poses to state common-law claims for damages. For thorough discussion and analysis of the federal act and cases construing it in the pre-emption context, see Ralph Nader and Joseph A. Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415 (1996); Kurt B. Chadwell, Comment, *Automobile Passive Restraint Claims Post-*Cipollone*: An End to the Federal Preemption Defense*, 46 BAYLOR L. REV. 141 (1994); Rudy Fabian, Comment, *Federal Preemption: Car-Makers' Cushion Against Air Bag Claims?*, 27 DUQ. L. REV. 299 (1989); Ellen L. Theroff, Note, *Preemption of Airbag Litigation: Just a Lot of Hot Air?*, 76 VA. L. REV. 577 (1990).

372. Pub. L. No. 89–563, 80 Stat. 718 (codified as amended at 15 U.S.C. §§ 1381–1431 (1988 and Supp. III 1991)). The statute is now codified at 49 U.S.C. §§ 30101–30169 (1994). Because most if not all of the case law refers to the prior codification, including the 1995 United States Supreme Court case of *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), for clarity this Article will also use the previous citation references. In addition, although Congress made some changes to the statute when it enacted the new version at Title 49 of the United States Code, "the stated purpose of the statute was to revise, codify, and enact the[] law[] 'without substantive change.'" Nader & Page, *supra* note 371, at 416 n.2 (quoting Pub. L. No. 103–272, 108 Stat. 745 § 1 (1994)). This Article will therefore also refer to the previous statutory text.

accidents and deaths and injuries to persons resulting from traffic accidents."[373] Because of this purpose, Congress deemed it "necessary to establish motor vehicle safety standards for motor vehicles...."[374] Significantly, those safety standards are defined as "*minimum* standard[s] for motor vehicle performance, or motor vehicle equipment performance...."[375] Although the purpose of the Safety Act is to protect the motoring public from the risks of motoring and thus provides for the establishment of minimum standards, one court has held that Congress nevertheless intended no private right of action under the Safety Act for injured plaintiffs.[376]

2. Supremacy of the Federal Standards

In section 1392, dealing with safety standards to be established by the Secretary of Transportation, Congress provided:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment *any safety standard* applicable to the same aspect of performance of such vehicle or item of equipment *which is not identical to the Federal standard.*[377]

Under this language, states may not regulate automobile safety as long as there already exists a federal standard covering a particular item. From this express pre-emption provision, the question naturally arises whether the imposition of common-law liability for a product defect that causes injury amounts to the "regulation" or the setting of nonidentical "standards" prescribed by this section of the Safety Act.

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373. 15 U.S.C. § 1381 (now recodified at 49 U.S.C. § 30101 (1994)).

374. *Id.* As an example of the nonsubstantive amendments made by the recodification, this section now indicates that Congress deemed it "necessary to *prescribe* motor vehicle safety standards for motor vehicles...." 49 U.S.C. § 30101 (1994) (emphasis added).

375. 15 U.S.C. § 1391(2) (1966) (emphasis added). It now provides that these are "minimum standard[s] for motor vehicle or motor vehicle equipment performance...." 49 U.S.C. § 30102(a)(9) (1994).

376. Handy v. General Motors Corp., 518 F.2d 786, 788 (9th Cir. 1975). Regulation is to be administered by the National Highway Traffic Safety Administration and is not to be enforced by individual purchasers. This lack of a private remedy is significant to the pre-emption analysis, however; if injured consumers can only get redress through common-law damages actions, the argument against pre-emption is strengthened.

377. 15 U.S.C. 1392(d) (1966) (emphases added). That section now provides:

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter....

49 U.S.C. § 30103(b)(1) (1994).

3. Continuation of Common-law Liability

The question concerning the meaning of the word "standard" in the Safety Act would appear to be answered in the Act's section 1397(k). That section provides 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."[378] Standing alone, this section appears unequivocally[379] to save all common-law claims from a federal pre-emption challenge and to indicate that the word "standard" does not include common-law claims for damages. At the very least, the presence of this section in the Act renders the term "standard" ambiguous and unclear.

4. Legislative History

A survey of the legislative history is useful to an understanding of the various parties' and state courts' approaches to the airbag pre-emption question. Because congressional purposes is the key to pre-emption questions and because courts may impliedly pre-empt state common-law actions based on an obstruction of purposes, the parties and courts look to Congress's purposes as evinced by the legislative history of the Safety Act.

Senator Magnuson, chairman of the Committee on Commerce, introduced the bill[380] and outlined what were perceived to be the basic objectives of the legislation.[381] Among them was a recognition that "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government."[382] He proceeded to explain:

> Some states have more stringent laws than others, but concerning the car itself, we must have uniformity. This is why the bill suggests to States that if we set a minimum standard, a car complying with such standard should be admitted to all states. Otherwise, the manufacturers would have to make at least 30 different models to comply.... Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The common law on product liability still remains as it was.[383]

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378. 15 U.S.C. § 1397(k). That section now provides, "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt any person from liability at common law." 49 U.S.C. § 30103(e) (1994).

379. Elsewhere, the Supreme Court has found Congress's use of the word "any" to modify "without qualification." John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 96 (1993).

380. S. 3005, 89th Cong., 2d Sess. (1966).

381. *Id.* at 14,221.

382. *Id.* at 14,221–22.

383. *Id.* at 14,230. At the time of Senator Magnuson's statements, the House of Representatives had not yet acted on the Senate bill. After consideration by the House, 112 CONG. REC. 14,355 (1966), proposed amendments, *id.* at 19,670, and a joint conference, *id.* at 21,486, the bill emerged as existed in the codification at Title 15. Specifically added to

It seems that Senator Magnuson and the committee were concerned with uniformity to the extent that it was necessary to insure the free flow of interstate commerce. Congress desired also to set minimum standards that would assure at least a uniform minimum level of safety to combat the ever-increasing number and severity of accidents.[384] But it is far from clear, especially in light of the explicit statutory statement of purpose being safety, that uniformity was the ultimate congressional objective.

The final Senate report is significant in its explanation of the Safety Act's meaning and its effect on state law. The report first recognized the need for uniformity throughout the country because of the mass production and high volume nature of automobile manufacturing and then noted that state standards are pre-empted only if they differ from the applicable federal standard.[385] More importantly, though, the report proceeded to qualify the pre-emption. It stated: "[m]oreover, the Federal minimum safety standards need not be interpreted as restricting State common-law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law."[386] The intent of Congress, as seen in this passage, was to achieve regulatory uniformity as a subsidiary objective; once a minimum level of safety was established under the federal scheme, the states were free to impose liability on a manufacturer for defective products that caused injuries.

Also important is the Safety Act's implicit distinction between state statutes or regulations, forms of direct regulation promulgated by state machinery, and common-law damage actions; in the Senate report passage, Congress discussed the two types of regulation and the pre-emption of only one of them, state "standards."[387] The evidence from legislative history confirms what appears to be the plain language of the statute.

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the original Senate bill was the provision dealing with the continuation of common law liability. Senator Magnuson acknowledged:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. The provision makes explicit, in the bill, a principle developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards.

Id. at 21,487. Senator Cotton added, "proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it." *Id.* at 21,490.

384. *See* S. REP. NO. 1301, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S.C.C.A.N. 2709, 2709.

385. *See* 112 CONG. REC. 14,234, *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720.

386. *Id.*

387. Congress may not have unequivocally distinguished between pre-empted nonidentical "standards" and common law liability because it saw no need to; the explicit continuation of the applicability of common law sufficed to demonstrate Congress's intent.

B. Standard 208[388]

After extensive hearings concerning passive restraint requirements[389] conducted pursuant to its authority under the Safety Act, the National Highway Traffic Safety Administration ("NHTSA") settled on a phased-in approach to the mandatory installation of airbags: the rule required auto manufacturers to phase-in passive restraint systems, either automatic seat belts or airbags, over time.[390] In the meantime, manufacturers could comply with Standard 208 in one of three ways: they could install either full airbag protection, frontal-only airbag protection, or a lap and shoulder belt system.[391] The standard[392] required that cars manufactured on or after September 1, 1989, but before September 1, 1996, be equipped with a passive restraint system for both front seating positions (driver and right passenger).[393] Between September 1, 1996, and August 31, 1997, manufacturers were still required to install passive restraint systems for both front seating positions, but now the standard required that ninety-five percent of each manufacturer's total production of cars be equipped with airbags.[394] Finally, Standard 208 required that *all* cars manufactured on or after September 1, 1997, be equipped with air bags at both the driver's and front right passenger's seating positions.[395]

As a result of this phased-in approach, there are many cars now on the road that fall under the older requirements and were not required to be and are currently not equipped with airbags. The pre-emption question is thus still a live one in these cases, when consumers seek to bring product liability claims against automobile manufacturers for defect due to the absence of an airbag.

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388. Occupant Crash Protection, 49 C.F.R. § 571.208 (1996).

389. A concise summary of the early history of passive restraint rulemaking can be found at Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34–40 (1983).

390. *See* 49 C.F.R. § 571.208 (1996).

391. *See id.*

392. 49 C.F.R. § 571.208, S4.1.4.

393. *See id.* § 571.208, S4.1.2.1.

394. *See id.* § 571.208, S4.1.5.2.1; *see also* 49 U.S.C. § 30127(b)(1)(A) (1994) (mandating the amendment to Standard 208).

395. *See id.* § 571.208, S4.1.5.3. *See also* 49 U.S.C. § 30127(b)(1)(C) (1994) (mandating the amendment to Standard 208). Although Congress mandated the amendments to Standard 208, it also provided: "This section and amendments to Standard 208 made under this section may *not* be construed as indicating an intention by Congress to affect any liability of a motor vehicle manufacturer under applicable law related to vehicles with or without inflatable restraints." *Id.* § 30127(B)(2) (emphasis added).

C. The Airbag Controversy in the Courts

1. Pre-Cipollone v. Liggett Group, Inc.[396]

Although most courts faced generally with the Safety Act's pre-emption problem before the institution of airbag suits found no pre-emption,[397] courts began to split when the liability issue was one involving airbags.[398] One court that found no pre-emption of airbag claims in this period addressed primarily the purposes of the Safety Act, the meaning of "standards" as used in section 1392(d), the savings clause in section 1397(k), and the effect of common-law damage awards on the federal scheme.[399] In *Murphy v. Nissan Motor Corp.*,[400] the court found that there was no express pre-emption in part because the pre-emption provision did not

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396. 505 U.S. 504 (1992).

397. *See, e.g.*, Shipp v. General Motors Corp., 750 F.2d 418 (5th Cir. 1985); Sours v. General Motors Corp., 717 F.2d 1511 (6th Cir. 1983); Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981); Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980); General Motors Corp. v. Edwards, 482 So.2d 1176 (Ala. 1985); Roberts v. May, 583 P.2d 305 (Colo. App. 1978); H.P. Hood & Sons, Inc. v. Ford Motor Co., 345 N.E.2d 683 (Mass. 1976); Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App. 1974); Arbet v. Gussarson, 225 N.W.2d 431 (Wis. 1975). *See also* Leflar & Adler, *supra* note 345, at 736. Litigation generally over the meaning of the pre-emption and the savings clauses in the Safety Act arguably began with the seminal crashworthiness case of *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). In that case, the court specifically stated that the savings clause in section 1397(k)

> expressly negatives any intention of Congress to acquire exclusive jurisdiction in this field and leaves the common law liability intact.... It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability.... The common law standard of a duty to use reasonable care in light of all the circumstances can at least serve the needs of our society until the legislature imposes higher standards or the courts expand the doctrine of strict liability for tort. The Act is a salutary step in this direction and not an exemption from common law liability.

Id. at 506. The Sixth Circuit reaffirmed this view in *Sours v. General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983) (applying Ohio law). In *Sours*, the defendant had complied with the federal standard governing roof structure and hence asserted that the roof could not, as a matter of law, be defective or negligently designed. The court, however, unequivocally stated that the standard "did no more than establish a minimum standard; it did not presume to lay down a template for proper roof design." *Id.* at 1517. Also, citing the savings clause, the court noted that "the very federal safety statute upon which GM relies makes it abundantly clear that compliance with the regulations promulgated thereunder does not immunize a manufacturer from common law liability." *Id.* The court went on to state that compliance is only a factor to be considered by the jury and does not resolve the question of negligent design or defect. *Id.* at 1518.

398. *See* Leflar & Adler, *supra* note 345, at 736.

399. *See* Murphy v. Nissan Motor Corp., 650 F. Supp. 922 (E.D.N.Y. 1987).

400. 650 F. Supp. at 922.

expressly include state common law within its scope.[401] "Given the presumption against preemption, there is no basis for inferring that Congress intended section 1392(d), in the absence of such reference, to preempt state common law."[402] The court reasoned further that, even if the court could have read the pre-emption provision to include common-law claims, the savings clause specifically saved those claims.[403] Finally, because "Congress' primary goal was to improve and promote automotive safety,"[404] the court implied that common-law claims would not conflict with the Act but would further the purposes underlying it.[405]

In addressing defendant's implied pre-emption arguments, the court merely stated that defendant's arguments here were as faulty as those regarding express pre-emption; the assertion of the state common-law claims "does not bring [state] law into conflict with the policies underlying standard 208, [or] the Act...merely because one of the allegedly safer design alternatives is the subject of a federal motor vehicle safety standard."[406] Plaintiff's common-law claims for damages were not expressly or impliedly pre-empted by the Safety Act.[407]

In contrast, more courts in this period determined that Congress did intend to pre-empt common-law claims based on the lack of airbags.[408] Some of these

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401. *See id.* at 925–26. Another reason that there was no express pre-emption here flowed from the way that the court viewed the plaintiff's claims. The court characterized the plaintiff's claims more broadly than a simple claim of defectiveness for failure to install airbags; rather, the court stated that the plaintiff's claim was merely that the defendant did not design a safe enough car, and one way to make the car safer would have been to install airbags. *See id.* at 925. As a result of this construction of the plaintiff's claim, the court could say that there was no express pre-emption as the plaintiff was not attempting to regulate the defendant's behavior or set a standard by forcing the defendant to install airbags just to make the car safer in some way. *See id.* The distinction ultimately did not matter, however, because the court considered whether or not there would be express pre-emption had the plaintiff alleged defective design due to absence of an airbag: "even if plaintiff's claim and standard 208 regulate the same aspect of performance..., section 1392(d) does not expressly preempt plaintiff's claim." *Id.* at 926.

402. *Id.* at 926 (internal citations omitted). The court criticized another court's finding of express pre-emption on the grounds that the latter court considered neither legislative history nor the presumption against pre-emption. *See id.* at 927 (criticizing Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D. Mo. 1986)).

403. *See id.* at 926.

404. *Id.* at 926.

405. *See id.*

406. *Id.* at 928.

407. *See id.* at 929 (denying defendant's motion for partial summary judgment based on pre-emption).

408. *See, e.g.*, Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990); Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989); Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988); Wattelet v. Toyota Motor Corp., 676 F. Supp. 1039 (D. Mont. 1987); Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987); Cox v. Baltimore County, 646 F. Supp. 761 (D. Md. 1986); Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D. Mo. 1986); Baird

courts concluded that common-law liability awards constitute "regulation" of the kind that is expressly prohibited under section 1392(d)'s prohibition on nonidentical state "standards."[409]

Most courts, however, found pre-emption to be implied because of an obstruction of federal purposes that would result from state tort damage awards.[410] The case of *Wood v. General Motors Corp.*[411] is illustrative of one approach. The *Wood* court first determined that the pre-emption provision in combination with the savings clause rendered "the Safety Act facially ambiguous as to Congress's intent in the present situation."[412] Because the "statute lack[ed] clear and express direction..."[413] the court did not find express pre-emption from the statute's provisions.[414]

The court, however, did find implied pre-emptive intent in the statute.[415] It opined that state common-law damage awards would effectively require manufacturers to install airbags; such state "regulation" would be different from the federal standards, which did not require airbags.[416] Once the court equated a tort damage award with state regulation, it naturally followed that "[plaintiff's] air bag suit...is impliedly preempted because it presents an 'actual conflict' with the Safety Act—specifically because it 'stands as an obstacle' to Congress's determination that safety is best served by having uniform national standards."[417] The court considered uniformity, a goal articulated in the legislative history but not in the legislation itself, to be substantial enough to override state law. The court reached that result despite the presence of a savings clause that specifically and very clearly preserves a manufacturer's tort liability, even when that manufacturer has complied with federal regulations. Despite the presence of express language, then, the court

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v. General Motors Corp., 654 F. Supp. 28 (N.D. Ohio 1986); Wickstrom v. Maplewood Toyota, Inc., 416 N.W.2d 838 (Minn. App. 1987).

409. *See, e.g.*, *Wattelet*, 676 F. Supp. at 1040; *Cox*, 632 F. Supp. at 1096; *Vanover*, 646 F. Supp. at 763; *Wickstrom*, 416 N.W.2d at 840. *But see Wood*, 865 F.2d at 402, 403 (stating that "we are not persuaded that section 1392(d) can be construed to manifest an *express* intention to preempt state design lawsuits having the present effect," despite that the court viewed design defect claims as "having the same effect as a forbidden state regulation" (emphasis added)).

410. *See Pokorny*, 902 F.2d 1116; Wood, 865 F.2d 395; Heath v. General Motors Corp., 756 F. Supp. 1144, 1147 (S.D. Ind. 1991); Staggs v. Chrysler Corp., 678 F. Supp. 270 (N.D. Ga. 1988); Kelly v. General Motors Corp., 705 F. Supp. 303 (W.D. La. 1988); Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987); Baird, 654 F. Supp. 28; Leflar & Adler, *supra* note 345, at 736–37.

411. 865 F.2d 395.

412. *Id.* at 401.

413. *Id.* at 402.

414. *Id.*

415. *Id.*

416. *Id.* at 410–12. Once a determination is made that state common-law damages actions would have the effect of regulation, there is but a short step to finding pre-emption, even in the face of a crystal-clear savings clause.

417. *Id.* at 412.

in *Wood* was able to displace state tort law through an obstruction of purposes kind of implied pre-emption because pre-emption doctrine permitted that approach.

Other courts found a similar frustration of purpose, but of a different purpose: because Standard 208 gave manufacturers a choice of restraint systems, any rule that attempted to limit manufacturers to one device would frustrate the federal goal of providing manufacturers with flexibility and choice.[418] In a well-considered examination of the implied pre-emption issue, the court in *Pokorny v. Ford Motor Co.*[419] focused on the obstruction of purposes type of implied pre-emption.[420] The court stated that because of the presumption against pre-emption, "state law must create an actual conflict with the federal regulatory scheme before it is impliedly pre-empted."[421] In addition, the court noted as a preliminary matter that it did not view uniformity as a primary goal of Congress in enacting this legislation; rather, the primary goal was the reduction of traffic accidents and deaths, which Congress evidently thought would be furthered by the preservation of common-law liability.[422] The court therefore thoughtfully stated,

> In the face of this clear declaration of congressional purpose, we are unwilling to accept an overly broad notion of pre-emption based on uniformity that could have the effect of undercutting Congress's concern for safety. We prefer to analyze the pre-emption issue in a more cautious and precise manner, allowing pre-emption of [plaintiff's] action only where it presents an actual, clear conflict with federal regulation.[423]

Nonetheless, the court proceeded to find state common-law actions for damages impliedly pre-empted.[424] Plaintiff's common-law damages claim for defective design for failure to install airbags would actually conflict with federal law: it would

> frustrate[] the goals of the federal regulatory framework and undermine[] the flexibility that Congress and the Department of Transportation intended to give to automobile manufacturers in this area. Because potential common law liability interferes with the regulatory methods chosen by the federal government to achieve the

418. *See, e.g.*, Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990); Heath v. General Motors Corp., 756 F. Supp. 1144 (S.D. Ind. 1991); Staggs v. Chrysler Corp., 678 F. Supp. 270 (N.D. Ga. 1988); Kelly v. General Motors Corp., 705 F. Supp. 303 (W.D. La. 1988); Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987); Baird v. General Motors Corp., 654 F. Supp. 28 (N.D. Ohio 1986).

419. 902 F.2d 1116.

420. *See id.* at 1122.

421. *Id.*

422. *See id.*

423. *Id.* at 1122–23 (internal citation omitted).

424. *See id.* at 1123.

> Safety Act's stated goals, we think [plaintiff's] action is pre-empted....[425]

Such a result is surprising considering that the court had just determined that Congress, in the Safety Act, had chosen to achieve its clearly-stated safety goals by combining federal standards with common-law liability.[426] On the other hand, the result is hardly surprising given the very nature of the Supreme Court's pre-emption doctrine as outlined in this Article, which permits a court to search for whatever obstruction of purposes it can find to impliedly pre-empt state common law.

That a court could go to these lengths to imply pre-emption is even more striking, however, when that effort is seen in light of the court's own *express* pre-emption analysis. The court had first noted that the savings provision could not be read narrowly to extend only to those items not already the subjects of the federal standards because that section "specifically recognizes that compliance with a particular federal safety standard...does not exempt [the defendant] from common law liability."[427] In addition, the court found it significant that in its pre-emption provision, Congress had not used the words "common law actions," which it had used in other statutes when it intended to pre-empt those actions.[428] Recognizing that common-law actions may exert a similar regulatory effect on manufacturers as do traditional kinds of state regulation, the court nonetheless also recognized that "common law liability and state regulation have important differences."[429] For these reasons, the court concluded that "[a]s we construe th[e Safety] Act, common-law liability survives federal regulation, even in those areas where federal safety standards have actually been established. [Plaintiff's] common law action is not expressly pre-empted...."[430] More directly, the court opined, "Congress did not intend all common-law actions for design defects...to be expressly pre-empted by federal regulations like Standard 208."[431] Despite this clear statement that Congress

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425. *Id.* The court additionally opined that "[t]he Safety Act's savings clause does not change our resolution of the pre-emption issue, since it is well-established that a savings clause like § 1397(k) does not 'save' common law actions that would subvert a federal statutory or regulatory scheme." *Id.* at 1125. The proposal advanced in this Article includes an assumption that Congress saw no conflict between state common law and federal law if it did not clearly pre-empt state common law. A corollary to this proposal necessarily would be that where Congress has specifically saved state common law claims from pre-emption, Congress (1) must not have intended to pre-empt them at all, and (2) must have seen no conflict between what it was trying to achieve and the continuation of common-law liability. Congress's intent to achieve its goals in part through the continuation of common-law liability can mean nothing except that as a matter of law those common-law claims do not conflict or obstruct congressional purposes. In that light, the *Pokorny* court's statement here loses its force and sense.

426. *See supra* note 423 and accompanying text.

427. *Pokorny*, 902 F.2d at 1121.

428. *See id.*

429. *Id.*

430. *Id.*

431. *Id.*

did not intend to pre-empt all state common law, and the court's own recognition that "'[a] pre-emption question requires an examination of congressional intent,'"[432] the court implied pre-emption because of conflict by obstruction of purposes.

The core problem with pre-emption doctrine is clearly at work in these decisions. Perhaps most disturbing was the approach taken by the *Pokorny* court, which appeared to find no ambiguity in the express provisions of the legislation; it clearly stated that the Safety Act showed that there was *no congressional intent to pre-empt* state common-law actions. That the court could nonetheless imply pre-emption in the face of a finding of no congressional intent to pre-empt, shows that courts and not Congress are pre-empting state common law in these situations. The pre-emption touchstone of congressional intent and the presumption against pre-emption are tossed aside in favor of courts' adherence to pre-emption doctrine that permits them to imply pre-emption wherever they unearth some federal purpose that may be obstructed.

A more subtle circumvention of congressional intent permitted by pre-emption doctrine is found in *Wood*. What it saw as statutory ambiguity obscuring the determination of congressional intent did not prevent it from nonetheless finding some "plain" congressional intent to pre-empt state tort law. In one section of the opinion, the court indicated, "[w]e find the Safety Act facially ambiguous as to Congress's intent in the present situation."[433] Shortly thereafter, the court stated, "we are convinced that Congress's purposes, as revealed in the Safety Act and legislative history, *plainly imply* a preemptive intent."[434] By such processes, courts ignore the presumption against pre-emption and the directive that Congress's purpose to pre-empt be "clear and manifest" before state law is displaced. If Congress has not made plain and manifest its intent to pre-empt state law, especially state *common law* and especially when it *has* used some express language evidencing a pre-emptive intent, then courts should go no further and purport to discover some "plain" pre-emptive intent by scouring the legislative history.

The Supreme Court's pre-emption jurisprudence, with its ultimate focus on an obstruction of purposes analysis, has permitted the courts to do what they did here: attribute undue weight to goals of the legislation that were referred to in legislative history but completely omitted from the legislation finally enacted. Admittedly, uniformity was among the goals Congress sought to further, but the stated and primary statutory purpose was to reduce accidents and injuries. Although the courts noted the primary purpose, they relied on a subsidiary,

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432. *Id.* at 1120 (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299–300 (1988).

433. *Wood*, 865 F.2d at 401. The *Heath* court also indicated that "many...courts" have found "ambiguous Congress's intent with respect to pre-emption of state common law claims." 756 F. Supp. at 1147.

434. *Wood*, 865 F.2d at 402 (emphasis added to word "plainly" only).

unstated statutory goal to override state common law.[435] Despite the presumption against pre-emption, the requirement of clarity before pre-emption of state law may be found, and the admitted ambiguity within the Act itself,[436] state law was rather handily and easily displaced. Courts could search until they found *some* purpose that could be obstructed by state common law, a purpose *other than* that found in the clear language of statutory purpose within the legislation itself.[437] The core pre-emption problem thus demonstrates its effect in the context of the airbag controversy during this period.

2. *Post*-Cipollone v. Liggett Group, Inc.[438] *and Pre*-Freightliner Corp. v. Myrick[439]

Although the Supreme Court in *Cipollone* had been thought to change pre-emption law by disallowing implied pre-emption when the federal statute at issue contained express pre-emptive language,[440] the decision did not significantly affect many lower courts' approaches to and ultimate conclusion on the airbag controversy. Several lower courts interpreted *Cipollone* as requiring them to rely on the express language of the statute for Congress's pre-emptive intent.[441] Despite the Supreme Court's longstanding emphasis on the presumption against pre-

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435. One commentator has observed that courts' determined search for some evidence of a congressional desire for uniformity is a not uncommon and an effective way to override state law under pre-emption doctrine. Wolfson, *supra* note 6, at 107–08.

436. *See, e.g.*, *Wood*, 865 F.2d at 401 ("We find the Safety Act facially ambiguous as to Congress's intent in the present situation.").

437. *See supra* note 373 and accompanying text. In so doing, the courts potentially obliterated the overriding objective: if manufacturers may sell cars that, under state tort principles, are unreasonably dangerous even while they remain in compliance with the minimum standards set by NHTSA, then the federal safety objective is in danger of being completely lost.

438. 505 U.S. 504 (1992).

439. 514 U.S. 280 (1995).

440. *See supra* notes 156, 161–62 and accompanying text.

441. *See, e.g.*, Johnson v. General Motors Corp., 889 F. Supp. 451, 458 (W.D. Okla. 1995) ("Looking only to the plain language of the Pre-emption and Savings Clauses, and the legislative history of the Safety Act, it seems clear that Congress intended for such claims as Plaintiff's 'air bag' claim to be pre-empted."); Montag v. Honda Motor Co., 856 F. Supp. 574, 576–77 (D. Colo. 1994) ("In compliance with *Cipollone*, the court need not and does not consider an implied pre-emption analysis because the statute contains an express indicium of congressional intent regarding pre-emption."); Miranda v. Fridman, 647 A.2d 167 (N.J. Super. 1994); Dykema v. Volkwagenwerk AG, 525 N.W.2d 754, 758 (Wis. Ct. App. 1994) (addressing only express pre-emption but never mentioning *Cipollone*). Not surprisingly, the *Montag* court found the plaintiff's common-law claims to be expressly pre-empted because common law damages actions could set "standards" within the meaning of section 1392(d). *See* 856 F. Supp. at 577. The court tautologically read the broad savings clause to mean that "[p]laintiffs are able to sue on their *non-preempted* state law tort claims." *Id.* (emphasis added). The *Dykema* court, without addressing the savings clause, found that plaintiff's claims "would establish a different safety standard from that required by federal law." 525 N.W.2d at 758. They were thus expressly pre-empted.

emption and the arguable ambiguity in the phrase "state standards," however, these courts found state common-law claims to be expressly pre-empted.[442]

One such court in *Miranda v. Fridman*[443] circumvented what it viewed as *Cipollone's* apparent preclusion of implied pre-emption analysis by infusing its express pre-emption analysis with implied pre-emption "obstruction of purposes" principles.[444] Although that approach was itself consistent with what Justice Stevens actually did in *Cipollone*,[445] the court's bold proclamations of the details of its approach and of other courts' approaches support the charge that the Supreme Court's pre-emption jurisprudence permits courts to reach the pre-emption results they desire through whatever means they find at their disposal. For example, in surveying the results in cases that had addressed these issues before, the court observed, "[t]he [federal] courts of appeals chose varying routes, but they all reached the same [implied pre-emption] result, one which shielded auto manufacturers from state law liability claims for choosing a federally sanctioned system. It was the common sense result...."[446] When discussing two decisions in which courts found express pre-emption, the court noted that these courts "took a different tack to the same mark."[447] For its part, the *Miranda* court boldly opined:

> We emphasize the centrality of Congress's intent to insulate auto makers from state safety standards not identical to federal standards, and we recognize the incompatibility of permitting juries across the country to reject the federally approved choices on the say-so of a single expert witness who disagrees with them. *The resulting conflict is so destructive of federal goals that almost every court finds preemption in one way or another.* Before *Cipollone*, the *easy route* was to reject express pre-emption in the face of conflicting statutory clauses and to imply pre-emption from the context. Then, *Cipollone* seemed...to invalidate that solution.[448]

The court displayed in a blatant way what this Article asserts is wrong with pre-emption doctrine. First, the court failed to identify the federal goals that are destroyed by the continuation of common-law liability; it merely stated that permitting common-law claims is "so destructive" of some goals that this court determined to be predominant. The court next plainly stated that courts could reach their desired results by an "easy route." Finally, the court implied that because *Cipollone* "seemed to invalidate" that easy route, another route to the "common-sense result" of pre-emption had to be found.

The *Miranda* court found that route in express pre-emption: "We reject the view that the Safety Act does not explicitly preempt state damage claims

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442. *See supra* note 441.

443. 647 A.2d 167 (N.J. Super. 1994).

444. *See id.* at 174; *infra* note 451 and accompanying text.

445. *See supra* notes 171–72 and accompanying text.

446. *Miranda*, 647 A.2d at 172.

447. *Id.* at 173 (citing Gills v. Ford Motor Co., 829 F. Supp. 894 (W.D. Ky. 1993) and Boyle v. Chrysler Corp., 501 N.W.2d 865 (Wis. Ct. App. 1993)).

448. *Id.* at 174 (emphasis added).

targeting federally-approved choices of restraint systems."[449] More specifically, the court concluded:

> [T]he actual-conflict analysis, used by the [federal] circuit courts to support a conclusion of implied pre-emption, provides a sound basis for holding that Congress expressly preempted these state law liabilities. In our view, Congress wrote the savings clause to preserve only the right to sue for products defects not involving the same aspects of performance as addressed by a [federal safety standard]. Admittedly, adopting such a reading renders the savings clause partially redundant. However, that is a lesser offense than adopting a reading that renders the clause contrary to a principal purpose of Congress.[450]

Again, without identifying the "principal purpose of Congress" that was obstructed, the court sought a way that would allow it to pre-empt state common-law claims, and in so doing it read the savings clause entirely out of the Safety Act. The basic problem remains that pre-emption doctrine permitted the court to tell Congress that Congress could not have meant what it said in the Act,[451] and thus it permitted the court to override state common law by any available means.

At least one lower court read *Cipollone* as requiring it to avoid implied pre-emption *only* if any express pre-emption provisions provided "'a reliable indicium of congressional intent with respect to state authority.'"[452] The court in

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449. *Id.*

450. *Id.*

451. The court, however, viewed the situation another way. It said, "[i]t demeans Congress to conclude either that it did not appreciate the consequences of permitting state liability claims, or that Congress purposely wrote the savings clause to tear down the barrier against inconsistent state regulation that the preemption clause was written to erect." *Id.* The first portion of the statement suggests that implying pre-emption through a finding of conflict insults Congress in that it implies Congress did not realize that common law claims, as saved by the savings clause it wrote, conflict with what the Act is trying to do. The arrogance evidenced by the court here is clear; it appears never to occur to the court that perhaps *the court* has it wrong about what Congress meant the Act to accomplish. One cannot be sure because the court never shares with readers what it deems to be the primary purposes of the Act. In any event, it seems clear that the court was the one pre-empting state common law in this instance and that statutory text had little bearing on the question of congressional intent or on the ultimate question of pre-emption.

The second half of the statement is equally as arrogant. Because the court could not conceive of Congress using the word "standard" to mean simply and commonly a regulation issued by a governmental agency, it could not conceive of Congress also allowing the continuation of common-law liability. Because it did not take Congress at its words and instead generated its own conception of what the legislation should do, it could not reconcile the pre-emption provision with the savings clause. All of these interpretive gyrations and the substitution of judicial wisdom for Congress's express words is permitted by pre-emption doctrine, and that is precisely what is wrong with the doctrine.

452. *See, e.g.*, Gills v. Ford Motor Co, 829 F. Supp. 894, 897–98 (W.D. Ky. 1993) (quoting *Cipollone*, 505 U.S. at 517).

Gills v. Ford Motor Co.[453] opined, for example, that "[t]he mere presence of express pre-emption language does not necessarily prohibit an implied pre-emption analysis under the *Cipollone* rule.... A court may therefore *search a statute for implied pre-emptive intent* if that statute's express language fails to provide a 'reliable indicium' of the legislature's pre-emptive wishes."[454] The core problem with pre-emption doctrine was clearly at work here as well, as evidenced by this court's language.

The *Gills* case presents a perhaps more subtle but nonetheless striking example of lower courts' abilities to pre-empt on their own, by searching for some purposes that could be obstructed despite what Congress expressed as its pre-emptive intent. The court first surveyed some pre-*Cipollone* airbag cases and discussed with apparent approval[455] their conclusions that while the pre-emption provision in section 1392(d) of the Safety Act may have encompassed common-law actions, the savings clause in section 1397(k) "left little doubt that Congress intended to preserve common law liability; to hold otherwise...would reduce the saving clause to a 'mere redundancy.'"[456] Nonetheless, the *Gills* court noted, those courts found state law claims impliedly pre-empted by obstruction of purposes "even though [the Safety Act's] *express* preemption clause may be insufficient to accomplish the task."[457] Because the courts found the express language in the Safety Act to be ambiguous, *Cipollone* did not constrain the courts' abilities to imply pre-emption beyond that indicated by the express statutory provisions, particularly the savings clause.[458]

In an attempt to justify its finding of implied pre-emption in this case, the *Gills* court engaged in telling and mind-boggling interpretive contortions of the statutory text. For example, in construing the pre-emption provision, the court stated:

> [I]t seems quite plausible that Congress intended § 1392(d)'s language pre-empting "any safety standard" to apply not only to statutes and regulations but to conflicting common law standards as well.... Congress' failure to include the words "common law" in its express preemption clause...does not necessarily mean that Congress intended to permit common law causes of action. Since a state may "establish...[a] safety standard" by common law just as effectively as by statute, it seems more logically consistent to interpret § 1392(d) to reach both modes of regulation.[459]

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453. *Id.*

454. *Id.* at 897–98 (emphasis added) (quoting Toy Mfrs. Of Am. Inc. v. Blumenthal, 986 F.2d 816, 623 (2d Cir. 1992).

455. *See id.* at 896–97.

456. *Id.* at 896 (quoting Taylor v. General Motors Corp., 875 F.2d 816, 824 (11th Cir. 1989).

457. *Id.* (emphasis added).

458. *See id.* at 898.

459. *Id.* at 898 (alteration in original).

The court had no difficulty reading into the word "standard" the words "common law," even though common-law actions are not primarily, but are only indirectly, regulatory. Because other courts have construed ambiguous preemptive wording in the past to include common-law damages actions,[460] this reading was not altogether surprising. But the court still had to grapple with the thorny problem of the explicit savings clause, which argued against a broad reading of the pre-emption provision.

The savings clause provided 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*."[461] About this provision, the court in *Gills* stated, "[n]or does finding an express or implied preemption reduce the Safety Act's saving clause to a mere redundancy. This Court reads the saving clause as the reasonable attempt by Congress to preserve all *other* liability claims *except those otherwise abolished by the preemption clause and covered by the regulation.*"[462]

Clearly, the court interpreted the savings and pre-emption clauses tautologically and in a way that permitted it to imply pre-emption. The court *added* to the savings clause language that contradicted the plain, clear language of the section itself. The statute provides that *no* person is exempt from *any* common-law liability; it does *not* say "no person is exempt from any common law liability that is not pre-empted by section 1392(d)." Certainly Congress would have no need to save those claims that were not pre-empted anyway. Thus, although the court determined that the broad and unequivocal[463] phrase "does not exempt any person from any liability under common law" was *not broad enough* to include *any liability under common law*, it determined that the narrow term "standards" *was broad enough* to include the common law. A finding of implied pre-emption was certain to follow from this tortuous analysis.

Such interpretive liberties with statutory text and legislative purpose again illustrate the core problem with pre-emption doctrine. That core problem was not cured with the decision in *Cipollone*. Because courts may still roam beyond the statutory text to ascertain whatever they believe to be the purposes of Congress and may imply pre-emption to the extent that they envision some sort of obstruction of those purposes, state common law is at risk of easy pre-emption. The principles of federalism and respect for state sovereignty that counsel courts to presume no pre-emption unless Congress's intent is clear and manifest are suffering and being pushed aside by the remainder of the Supreme Court's pre-emption jurisprudence. The *Gills* court's approach and findings demonstrate the court's ability, under pre-emption doctrine, to delve into what is deemed ambiguous language to ascertain congressional intent and effectively turn the presumption against pre-emption on its

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460. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992) (plurality opinion) (reading the words "requirement or prohibition" to encompass the awarding of damages under state common law).

461. 15 U.S.C. § 1397(k) (emphasis added). That section now provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt any person from liability at common law." 49 U.S.C. § 30103(e) (1994).

462. *Gills*, 829 F. Supp. at 898–99 (emphasis added).

463. *See supra* note 379.

head. Rather than requiring clear and manifest intent on Congress's part because it was to presume Congress did not intend to pre-empt state common law, the court instead appeared to presume the converse: that Congress intended to pre-empt state common law.[464] The court then interpreted the statute according to that presumption. The *Miranda* court appeared to do the same even though it found *express* pre-emption. Only a skewed sort of presumption could explain the interpretive gymnastics engaged in by both of these courts. As argued in this Article, pre-emption doctrine itself encourages this type of approach and eviscerates the presumption and clarity requirement, resulting in the denial of state citizens' rights to remedies under state common law.

Taking a different and better approach, the court in *Hernandez-Gomez v. Leonardo (Hernandez-Gomez I)*[465] weighed in on the airbag[466] controversy. According to this court,

> the text seems quite clear. Obviously, the preemption and savings clauses must be construed together. State regulatory action that conflicts with the Safety Act is prohibited, but state common-law tort claims are saved and survive. Textually, the two provisions have a clear and unambiguous meaning. Further, we presume against preemption of state common-law [*sic*] and refuse to find preemption absent explicit textual statement of legislative intent.[467]

The court also found it significant that it was addressing this question after the Supreme Court decided *Cipollone v. Liggett Group, Inc.* It read *Cipollone* as "chang[ing] federal preemption analysis by limiting the preemptive reach of a federal statute to its express terms.... In short, courts should avoid debating implied preemption if the text of the statute addresses preemption and thus reliably identifies congressional intent."[468]

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464. In fact, the court appeared to state just such a presumption:

> Unless Congress itself specifically and affirmatively limits the reach of its legislation, courts should presume that Congress is exercising its natural and supreme constitutional powers. It is the Court's job to determine the intended reach of Congress by enactment of the [Safety Act]. It should not begin this process by assuming that Congress intended its statute to have no reach at all.

Gills, 829 F.Supp. at 899.

465. 884 P.2d 183 (Ariz. 1994) (*Hernandez-Gomez I*). The Supreme Court later vacated the case and remanded for reconsideration in light of *Freightliner Corp. v. Myrick*, 514 U.S. 1094 (1995). *See* Volkswagen of Am., Inc. v. Hernandez-Gomez, 514 U.S. 280 (1995).

466. Although plaintiff in *Hernandez-Gomez I* did not argue that the car at issue was defective because it lacked an airbag, the same Standard 208 was involved in the case because plaintiff claimed her vehicle should have been equipped with a manual lap belt. *See Hernandez-Gomez I*, 884 P.2d at 184–85. The case concerns passive restraint systems and is therefore relevant to the present discussion.

467. *Id.* at 187.

468. *Id.* at 188.

For these reasons, and for reasons such as those articulated in this Article, the *Hernandez-Gomez* court took issue with the rulings of such courts as that which decided *Gills*. The court explained:

> Like those pre-*Cipollone* opinions that ignored the explicit language of federal statutes while *searching for unarticulated congressional motives*, we believe the district court analyses in *Gills* and *Montag* are incorrect. *Cipollone* commands courts to follow a textual path in ascertaining a statute's meaning, making it unnecessary either to search for unarticulated legislative intent or engage in a balancing process that may result in a conclusion of implied preemption.[469]

The *Hernandez-Gomez I* court failed to realize that although the Court in *Cipollone* appeared to limit the analysis to existing express language, if any, in actual practice the Court had blended implied pre-emption principles into its express pre-emption analysis. Nonetheless, the significant point of the case is that the court attempted to remain true to its interpretation of *Cipollone*, to the text of the Safety Act, and to the presumption against pre-emption, in no small part because it saw that approach as the "best policy."[470] Citing to several statutes in which Congress had indicated its intent to pre-empt state common law by stating so explicitly in the statute by using the words "common law,"[471] the court recognized that "a rule [limiting pre-emption analyses to existing statutory text] transfers the decision about preemption and its reach from the post-hoc speculation of lawyers to the forum where it should be argued: the legislature, where the competing interests may be reconciled before the statute is passed."[472]

Therefore, interpreting the pre-emption rules as it understood them, the court found no pre-emption of common-law claims in this context.[473] Its analysis focused solely on the two pertinent clauses in the statute[474] and found no express pre-emption for two reasons. First, the clear words of the pre-emption provision indicated that only state regulation was pre-empted.[475] Even if the court were to attempt to read common law into the words "state standards," the presumption against pre-emption would counsel against that reading.[476] Second, any ambiguity in the pre-emption provision regarding the inclusion therein of state common law was expressly and unambiguously removed by the savings clause.[477] Finding the

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469. *Id.* at 189 (emphasis added).

470. *Id.* at 190.

471. *See id.* n.15.

472. *Id.* at 190. This assertion echoed that of Justice Kennedy in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J, concurring in part and concurring in the judgment); *see also supra* note 123 and accompanying text.

473. *Hernandez-Gomez I*, 884 P. 2d at 191.

474. *See id.* ("[O]ur analysis of preemption by the Safety Act ends with a reading of the text of the preemption clause and its companion, the savings clause.").

475. *Id.* at 190.

476. *Id.* at 191 n.17.

477. *See id.* at 190 ("Arguably, [the pre-emption provision] could have been construed to prohibit any form of state authority from interfering with the options permitted

language of the statute to provide "a reliably clear congressional mandate,"[478] the court stated that "this case does not tempt us to speculate on unstated congressional intent or the Safety Act's implied preemptive reach."[479] The court therefore did not even conduct implied pre-emption analysis.

The *Hernandez-Gomez I* court addressed the Safety Act's pre-emptive effect in the manner that this Article argues correctly respects the presumption against pre-emption, the clarity requirement, federalism principles, and state sovereignty concerns. It did not venture beyond the express words of the statute, into the uncertain world of congressional intent to search for some purpose that could be obstructed and impliedly pre-empted; rather, it properly took Congress at its words and, in the process, ensured observance of the proper balance in federal-state relations. It avoided the core problem within the Supreme Court's jurisprudence by hewing to the line that *Cipollone* appeared to establish. This Article argues that the stated, rather than the applied, rule of *Cipollone* is the proper rule; it would restore Congress's role in pre-emption of state law, divest the courts of authority to run roughshod over state common law, and ensure that states retain their power to provide their citizens redress for private grievances when Congress has not unambiguously displaced that power.

3. Post-Freightliner Corp. v. Myrick[480]

The *Myrick* Court attempted to clarify pre-emption doctrine by indicating that *Cipollone* had not established a rule prohibiting courts from engaging in implied pre-emption when there existed express statutory pre-emption language.[481] Rather, it stated, the existence of an express pre-emption provision did not foreclose the possibility of implied pre-emption but merely raised an inference that implied pre-emption was foreclosed.[482] In the context of the airbag controversy, the question became whether this clarification changed the pre-emption analysis in cases construing the Safety Act. After deciding *Myrick*, the Supreme Court vacated and remanded the Arizona Supreme Court's opinion in the first *Hernandez-Gomez* case (*Hernandez-Gomez I*),[483] so that the state court was required to take up the pre-emption question once again in *Hernandez-Gomez v. Leonardo* (*Hernandez-Gomez II*).[484]

The *Hernandez-Gomez II* court read the Supreme Court's decision in *Myrick* as signalling that a finding of express pre-emption raised a rebuttable presumption that implied pre-emption did not exist.[485] According to the

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by federal law. Congress' inclusion of the savings clause unquestionably removes any doubt.") (internal footnote omitted).

478. *Id.*
479. *Id.* at 190–91.
480. 514 U.S. 280 (1995).
481. *Id.* at 1488.
482. *Id.*
483. *See supra* note 465.
484. 917 P.2d 238 (Ariz. 1996).
485. *Id.* at 241.

Hernandez-Gomez II court, the decision essentially required courts to conduct implied pre-emption analysis even if they had previously determined from express statutory language that the state law at issue was not expressly pre-empted.[486] On that basis, the court proceeded to conduct an implied pre-emption analysis and found no implied pre-emption, on very narrow grounds.[487]

A concurring member of the court criticized the majority for jumping into implied pre-emption analysis too quickly.[488] The concurring justice correctly observed that the *Myrick* Court did not address the savings clause present there but only examined the pre-emption provision; the *Myrick* Court, therefore, only said that implied pre-emption analysis was not foreclosed because the express pre-emption provision did not extinguish state tort law.[489] By contrast, "[*Myrick*] does not address whether one must engage in implied preemption analysis where there is a savings clause that expressly addresses the issue."[490] In this justice's view, because the Safety Act contained a savings clause explicitly addressing common-law liability, resort to implied pre-emption analysis was unnecessary, even under *Myrick*:[491] "Congress could not have chosen words more calculated to express its intent that compliance with standards does not preempt state tort liability than the words it chose in § 1397(k)."[492] Apparently, the justice believed that no implied pre-emption analysis could rebut the clear language of the savings clause.

Another state supreme court had the opportunity post-*Myrick* to address the pre-emptive effect of the Safety Act on state common law. In *Tebbetts v. Ford Motor Co.* the Supreme Court of New Hampshire read the savings clause together with the pre-emption provision and found that Congress did not intend to pre-empt state common-law claims.[493] Relying on the Supreme Court's *Cipollone* decision,[494] the court found no need to conduct implied pre-emption analysis because the clauses in the statute provided a reliable indication of Congress's pre-emptive intent.[495] The court found it "'difficult to imagine broader language'" than that contained in the savings clause, explicitly saving common law.[496]

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486. *Id.* at 243.

487. *Id.* at 243–48. The pivotal point for the majority was that the claim did not implicate standards of safety in *frontal* crashes, which is primarily the situation with which Standard 208 deals; rather, plaintiff was claiming the system was defective in *roll-over* crashes due to the lack of a manual lap belt, situations with which the standard does not generally deal. *See, e.g., id.* at 245–46, 247–48.

488. *See id.* at 248–49 (Martone, J., concurring in the judgment).

489. *Id.* at 249.

490. *Id.*

491. *Id.* at 249–50.

492. *Id.*

493. 665 A.2d 345, 348 (N.H. 1995).

494. The court apparently saw no significant change in the law worked by *Myrick*; it simply quoted the language indicating that *Cipollone* did not establish a rule, see *id.* at 347, and proceeded to determine whether the express provisions provided "a reliable indicium of congressional intent." *Id.* at 347 (internal quotations omitted).

495. *Id.* at 348.

496. *Id.* at 347 (quoting United States v. James, 478 U.S. 597, 604 (1986)).

In *Wilson v. Pleasant*,[497] the Supreme Court of Indiana found no express pre-emption for the same reasons articulated in the *Tebbetts* case. The court closely examined the *Cipollone* and *Myrick* decisions and determined, just as had the *Tebbetts* court, that the pre-emption and savings clauses together provided the requisite reliable indication of legislative intent.[498] Therefore, the court found, implied pre-emption analysis was "inapplicable."[499]

The presumption against pre-emption was a key factor in the *Wilson* court's interpretation of the clauses in the statute.[500] In this regard, the court indicated that "the strongest argument against this view that the plain language of the § 1397(k) savings clause precludes implied pre-emption analysis was advanced in *Wood* [*v. General Motors Corp.*]."[501] The *Wood* court conducted implied pre-emption analysis after first finding ambiguity in the express provisions of the Safety Act.[502] But, the *Wilson* court stressed, the *Wood* court "ignored the presumption against pre-emption. Had it visited this subject following *Cipollone's* [*sic*]...reaffirmation of this important principle, *we do not believe it would have embarked on its extensive [implied pre-emption] effort to find that Congress did not mean what it said.*"[503] By contrast, because the *Wilson* court found that the savings clause clearly exempted state common-law claims from pre-emption by the federal act, it held that plaintiff's claims were not pre-empted by the Safety Act.[504]

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497. 660 N.E.2d 327, 330 (Ind. 1995).

498. *Id.* at 330–35.

499. *Id.* at 335.

500. *Id. See also id.* at 331 n.6.

501. *Id.* at 335 (citing *Wood*, 865 F.2d 395 (1st Cir. 1988)).

502. *Id.* at 335–36.

503. *Id.* at 336 (emphasis added) (citations omitted). With this statement, the *Wilson* court supports one of the arguments in this Article: that courts *search* for ways in which state common law may be pre-empted, despite what Congress may have explicitly provided in its legislation and despite the presumption against pre-emption.

504. *See id.* Out of the utmost caution, however, "recogniz[ing] that the law is not settled in this area," *id.*, the court proceeded to conduct an implied pre-emption analysis. *See id.* at 336–39. It ultimately found that state common-law claims for damages were not impliedly pre-empted, either. *Id.* at 339.

First, there was no conflict because of impossibility of compliance with state and federal law. *Id.* at 337. Second, even assuming that a state common-law claim for damages would force a manufacturer to install airbags, the common law would not actually conflict with the federal regulation unless the regulation prohibited the installation of airbags, which it did not do. *Id.* Finally, state common law did not obstruct the purposes of the federal law, which was to foster traffic safety. *See id.* at 337, 339. Congress sought to achieve this objective with the passage of minimum safety standards and the clear continuation of common law liability, to further encourage manufacturers "to choose the best safety system for the particular car they are manufacturing." *Id.* at 337. Legislative history supported the court's reading of the Act, its purposes, and Congress's desired methods of achieving those purposes. *See id.* at 338.

In countering the arguments advanced by other courts that had implied pre-emption under these circumstances, the court began:

Very recently the Court of Appeals of New York in *Drattel v. Toyota Motor Corp.*[505] joined the *Tebbetts* and *Wilson* courts in finding neither express nor implied pre-emption under the Safety Act. In finding no express pre-emption,[506] the court observed that the pre-emption provision did not explicitly mention common-law actions and that, in reading the provision, it should give weight to the presumption against pre-emption.[507] In addition, any doubt about the meaning of the pre-emption provision was removed by the savings clause, which the court found to be utterly free from ambiguity in its purpose to shield state common-law actions from pre-emption: "[i]t is hard to imagine how Congress could have been plainer in its intended meaning in this regard and it takes tortured syntax and law to propose a newly fashioned version of what it actually said."[508] This rather exasperated statement of the court mirrors some of the criticism levied in this Article in that it recognizes that other courts have indeed engaged in tortuous interpretations of pre-emption provisions to reach a positive conclusion on pre-emption.

The court further supported the arguments made in this Article when it rejected an argument that the savings clause should be read narrowly to save only those claims not covered by a federal standard: "[i]t strains reason and common sense to suggest that Congress used sweeping language to create a constricted universe [of saved claims]."[509] The court seems to recognize that courts have gone out of their way to find pre-emption, and this Article argues that they have done so, and have been permitted or even urged to do so, by pre-emption doctrine itself and in spite of the presumption against pre-emption.

> In order to find implied pre-emption in the face of the Safety Act's statement of purpose, the presence of the savings clause, and the legislative history, the pre-*Cipollone* cases focussed instead on several "underlying purposes" behind the Safety Act and Rule 208 advanced by the auto industry, particularly (i) establishing uniform national safety standards and (ii) encouraging flexibility and choice among manual and passive restraints.... [W]e find neither of these sufficiently persuasive....

Id. The court agreed that uniformity was not a primary goal of Congress; it had not even included that goal in the purposes clause of the Act. *Id.* The court also found that encouraging flexibility and choice was not a primary purpose. *Id.* at 339. The court more pointedly stated, "[e]xcising the effect of [the savings clause] from the Act in the name of providing manufacturers flexibility and choice in our view contradicts the primary purpose of the Act," which is to reduce traffic accidents and deaths. *Id.* For all of these reasons, the court "conclude[d] that it would be improper to imply pre-emption here." *Id.*

505. 699 N.E. 2d 376, 380 (N.Y. 1998).

506. *See id.* at 381. Other state courts recently agreeing with the *Wilson*, *Tebbetts*, and *Drattel* courts on the express pre-emption question include those deciding *Munroe v. Galati*, 938 P.2d 1114, 1117–18 (Ariz. 1997) and *Minton v. Honda of American Manufacturing, Inc.*, 684 N.E.2d 648, 655 (Ohio 1997).

507. *Drattel*, 699 N.E. 2d at 381–82.

508. *Id.* at 382.

509. *Id.*

As for implied pre-emption, the court went the way of the *Wilson* court when it found reliable evidence of Congress's intent not to pre-empt common-law actions in the pre-emption and savings clauses themselves and in legislative history.[510] Implied pre-emption analysis, therefore, was unwarranted.[511]

Five months prior to the New York Court of Appeals's decision in *Drattel*, however, the Pennsylvania Supreme Court in *Cellucci v. General Motors Corp.* had found state common-law claims for damages impliedly pre-empted.[512] The reasoning in this case was virtually identical to that of the court in *Pokorny v. Ford Motor Co.*,[513] a pre-*Cipollone* decision. After recognizing the Supreme Court's directive concerning the requirement of clarity, the court determined that the explicit language in the Safety Act was too ambiguous to reach a conclusion about express pre-emption.[514] The *Cellucci* court did not skip a beat before it proceeded to implied pre-emption analysis: "Since we concluded that the Safety Act does not explicitly preempt the state common law tort claims at issue, this Court must determine if Congress intended to impliedly preempt such claims."[515] The court at this juncture made no further mention of the presumption against pre-emption and the clarity requirement. It did ultimately conclude, however, that the allowance of common-law claims for damages would conflict with federal law because it would frustrate the objectives of the federal scheme by interfering with Congress's and NHTSA's chosen methods for achieving Congress's goals under the Act.[516]

D. The New Framework Applied in the Airbag Context

The problems evident in the disparate outcomes and seemingly anomalous results in the airbag cases are easily eradicated by application of the bright line rule proposed in this Article. The special characteristics of state common law, not to mention its traditional and historical place within state law, mandate that it be accorded the full protection of the presumption against pre-emption. This Article would add the additional protection of an essentially per se rule that prevents the

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510. *See id.* at 383–84. Because the court examined legislative history to support its interpretation of legislative intent, and did not rely solely on the plain language of the statutory text to find that Congress did not intend to displace state common law, the court's approach in that way differs from the one advanced in this Article. Other state courts recently agreeing with the *Wilson*, *Tebbetts*, and *Drattel* courts on the implied pre-emption question include those in *Munroe*, 938 P.2d at 1120 and *Minton*, 684 N.E.2d at 658.

511. *Drattel*, 699 N.E. 2d at 383–84. Again like the *Wilson* court, *see supra* note 507, however, the New York Court of Appeals conducted implied pre-emption analysis anyway "out of a desire for comprehensive thoroughness...." *Id.* It found neither impossibility nor "obstruction of purposes" implied pre-emption. *See id.*

512. 706 A.2d 806, 811–12 (Pa. 1998). Another state court has found implied pre-emption of plaintiffs' state common-law claims in *Cooper v. General Motors Corp.*, 702 So. 2d 428, 434 (Miss. 1997).

513. 902 F.2d 1116 (3d Cir. 1990), *cert. denied*, 498 U.S. 853 (1990).

514. *Cellucci*, 706 A.2d at 809.

515. *Id.*

516. *Id.* at 811 (citing *Pokorny*, 902 F.2d at 1123).

use of "obstruction of purposes" pre-emption unless Congress has used the unambiguous words "common law" or "all state law." Because Congress used the words "state standards" in its express pre-emption provision in the Safety Act, courts could not find that Congress's intent to pre-empt state common-law claims was "clear and manifest." Additionally, the courts would not be permitted to resort to implied pre-emption principles to pre-empt state common law in this situation. The conclusion reached by application of the bright-line rule is only bolstered in the airbag context by the presence of the unambiguous savings clause, wherein Congress has made it plain that it did not view as problematic the continuation of state common-law liability.

V. CONCLUSION

As a discussion of the airbag controversy glaringly illustrates, courts have been free to disregard Congress's express pre-emptive language and instead roam about a federal statute in a free-wheeling search for federal purposes that may be obstructed by state common law. Areas of traditional state law, such as the ultimate traditional state law, state common law, are supposed to be protected in these situations by a presumption against pre-emption. The presumption is effectuated by a standard that purports to be a high one: that the intent to pre-empt be "clear and manifest." This Article argues, however, that the design of the presumption and the safeguard of the clarity requirement fail. Although the presumption against pre-emption is necessitated by the free-wheeling approach, it is precisely that free-wheeling approach that overcomes the presumption, undermines the clarity requirement, and permits a relatively easy override of state law.

Not just *Cellucci*, one of the most recent of the airbag cases, but all of the cases illustrate that the Supreme Court's attempts at formulating a workable pre-emption doctrine have been utter failures. As demonstrated by a survey of the airbag cases, state and lower federal courts continue to render decisions that are at odds, with some courts finding that the presumption against pre-emption prohibits them from implying pre-emption or from even conducting implied pre-emption analysis in the face of a savings clause that explicitly and clearly saves common-law claims. Other courts, by contrast, appear to ignore the presumption and find implied pre-emption because they see inherent ambiguity in Congress's inclusion of a pre-emption clause and a savings clause. The latter courts may imply pre-emption even in the face of an explicit savings clause because the Supreme Court's doctrine permits it. Still others have found express pre-emption by either ignoring the savings provision or so limiting its reach that its effect is nullified.

Although the Supreme Court has cautioned against too-easy pre-emption of state law that has traditionally been solely within the states' domains, and although the Court has erected a presumption against pre-emption that dictates that courts not pre-empt traditional state law unless Congress's intent was "clear and manifest," the safeguards the court has erected are chimerical. Those safeguards should protect from pre-emption state common law, as the paradigmatic traditional state law, except when Congress has clearly and unequivocally meant to supersede it. But the safeguards have not worked for three reasons: at the same time that the

Court has confirmed the applicability of the safeguards, it has also (1) refused to erect a bar to implied pre-emption even in cases in which Congress has explicitly spoken to the pre-emption question; (2) infused its express pre-emption analysis with implied pre-emption principles such that there appears to be little distinction between the two "types" of pre-emption; and, most importantly, (3) seemingly placed no limits on "obstruction of purposes" implied pre-emption. The confluence of these three trends in Supreme Court pre-emption jurisprudence allows lower courts to roam at will in search of purposes of Congress that could be obstructed by state common law. Because they are permitted, and in some cases appear to feel compelled, to go to any lengths to determine whether federal law pre-empts state law, the presumption against pre-emption necessarily falls by the wayside, having been overcome by the seemingly contrary command to *find* some pre-emption. The clarity requirement loses all force when the very courts that are not to pre-empt without "clear and manifest" congressional intent are encouraged to ferret out some federal purposes that might be obstructed by the state common-law claims. The varying outcomes in the airbag cases bear witness to the core pre-emption problem identified in this Article and demonstrate the need for a bright line rule.

If the presumption against pre-emption and the clarity requirement are to mean anything at all, in a case where the language used by Congress does not clearly pre-empt state common law, the Court should find that pre-emption be limited to that which Congress did clearly pre-empt. In a case where the statute expressly pre-empts, for example, state "requirements," pre-emption should clearly extend to regulations, which in the usual meaning impose requirements. Outside that clear pre-emptive scope, courts should not search for amorphous purposes that could be obstructed; if Congress chooses to exercise its constitutional power to supersede state common law, it must do so clearly. This Article therefore argues for the adoption of a bright line that would prevent the casual override of state common law, abide by the presumption against pre-emption, enforce the clarity requirement, and respect federalism principles and state sovereignty. Otherwise, when courts go searching for some pre-emption that Congress did not see fit to include in its pre-emption provision, *they* are pre-empting state law, not Congress, and principles of state sovereignty and federalism suffer.