
David E. Seidelson

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When my grandfather was on his deathbed, he held out his big blacksmith's hand to me and said, "Doodel." He was the only one who ever called me Doodel. I placed my hand under his and said, "I'm here, Zayde." He said, "Doodel, I want you to promise me something." I said, "Anything, Zayde." He said, "First, never play cards with a stranger named Doc. Second, never get into a barroom fight with anybody named Monk. And, third, never read a Supreme Court decision dealing with federal preemption." I managed to keep only two of those three promises, so now I write as a penitent seeking at least partial redemption by attempting to resolve an enigma, and thus avoid becoming a piacular offering.1 I've never played cards with a stranger named Doc and, so far as I know, I never had a barroom fight with anyone named Monk. But, oh, those Supreme Court opinions on federal preemption . . . .

Let's focus on a particular kind of preemption problem, one in which the federal statute contains an express preemption provision, and the issue is whether

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1. I stand doubly in need of redemption. First, of course, because of the broken promise. Beyond that, I am a first-born son, hence, devoted to God until redeemed.

Under the law, in memory of the Exodus (when the first-born of the Egyptians were slain), the eldest son was regarded as devoted to God, and was in every case to be redeemed by an offering not exceeding five shekels, within one month from birth.

F.N. Peloubet, Peloubet's Bible Dictionary 198 (1925).

[And all the firstborn of man among thy children shalt thou redeem.

Exodus 14:13 (King James).

[The firstborn of thy sons shalt thou give unto me.

Exodus 22:29 (King James).

For all the firstborn of the children of Israel are mine, both man and beast: on the day that I smote every firstborn in the land of Egypt I sanctified them for myself.

Numbers 8:17 (King James).

Every thing that openeth the matrix in all flesh, which they bring unto the Lord, whether it be of men or beasts, shall be thine: nevertheless the firstborn of man shalt thou surely redeem, and the firstling of unclean beasts shalt thou redeem.

Numbers 18:15 (King James).

And those that are to be redeemed from a month old shalt thou redeem, according to thine estimation, for the money of five shekels, after the shekel of the sanctuary, which is twenty gerahs.

Numbers 18:16 (King James).

And if it be from a month old even unto five years old, then thy estimation shall be of the male five shekels of silver, and for the female thy estimation shall be three shekels of silver.

Leviticus 27:6 (King James).
that provision preempts state common law actions for damages. That sounds simple enough; it should create no enigma to apply an express preemption provision to a specific cause of action. But, remember, we're dealing with Congress and the Supreme Court. Let's direct our attention primarily to three relatively recent Supreme Court opinions: *Cipollone v. Liggett Group, Inc.*,2 *Medtronic, Inc. v. Lohr,* and *Freightliner Corp. v. Myrick.*4

In *Cipollone*, Rose Cipollone and her husband brought a diversity action against three tobacco companies,3 alleging that Mrs. Cipollone had suffered lung cancer as the result of smoking cigarettes manufactured and marketed by the defendants. Upon Mrs. Cipollone's death, her husband filed an amended complaint. Upon his death (after trial), Thomas Cipollone, son of the original plaintiffs and executor of both estates, prosecuted the action.

The final amended complaint asserted "several different bases of recovery, relying on theories of strict liability, negligence, express warranty, and intentional tort."6

These claims, all based on New Jersey law, divide into five categories. The "design defect claims" allege that [Defendants'] cigarettes were defective because [Defendants] failed to use a safer alternative design for their products and because the social value of their product was outweighed by the dangers it created. . . . The "failure to warn claims" allege both that the product was "defective as a result of [Defendants'] failure to provide adequate warnings of the health consequences of cigarette smoking" . . . and that [Defendants] "were negligent in the manner [in which] they tested, researched, sold, promoted, and advertised" their cigarettes . . . . The "express warranty claims" allege that [Defendants] had "expressly warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences" . . . . The "fraudulent misrepresentation claims" allege that [Defendants] had wilfully "through their advertising, attempted to neutralize the [federally mandated] warnin[g] labels . . . and that they had possessed, but had "ignored and failed to act upon" medical and scientific data indicating that "cigarettes were hazardous to the health of consumers" . . . . Finally, the "conspiracy to defraud claims" allege that [Defendants] conspired to deprive the public of such medical and scientific data . . . .7

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7. *Id.* at 509-10, 112 S. Ct. at 2614.
The defendants asserted that the Federal Cigarette Labeling and Advertising Act, enacted in 1965, and the Public Health Cigarette Smoking Act of 1969 preempted all state law theories of action based on the defendants’ conduct after 1965. More specifically, the defendants relied on their compliance with the warnings mandated in the two Acts and the preemption provisions of those Acts. The “preemption” section of the 1965 Act provided that:

(a) No statement related to smoking and health, other than the statement required by . . . this Act, shall be required on any cigarette package.
(b) No statement related to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.11

The preemption provision of the 1969 Act is as follows:

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.12

It was the defendants’ position that in light of the declaration of the Acts’ two purposes—“(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health”13—and the defendants’ compliance with the mandated warnings, the preemption sections immunized the defendants from liability under all of the theories asserted, with regard to the defendants’ post-1965 conduct.

The federal district court wasn’t having any.14 It concluded that the sole purpose of the preemption sections was to establish a uniform national warning that would shield cigarette manufacturers from potentially divergent state requirements; the Acts were not intended to preempt any common law actions.15 Consequently, the district court granted the plaintiffs’ motion to strike the

11. Id.
15. Id. at 1166, 1170.
preemption defense. However, on interlocutory appeal, the Third Circuit found that the Acts impliedly preempted "those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes." The Third Circuit "did not . . . identify the specific claims asserted . . . that were pre-empted by the Act." After the Supreme Court denied a petition for certiorari, the case was returned to the district court for trial.

Complying with the Court of Appeals mandate, the District Court held that the failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud claims were barred to the extent that they relied on the [Defendants'] advertising, promotional, and public relations activities after January 1, 1966 (the effective date of the 1965 Act).

At trial, the jury awarded $400,000 to Rose Cipollone's husband based on one of the defendant's breach of its duty to warn and its express warranties before 1966. Finding, however, that Rose Cipollone had assumed the risk of smoking cigarettes and that 80% of the responsibility for her injuries was attributable to her, the jury awarded no damages to her estate. On cross-appeals, the Third Circuit affirmed the district court's preemption rulings, although remanding for a new trial on other grounds. Then the Supreme Court granted certiorari to review the preemption issues. Justice Stevens wrote what was in part a majority opinion and in part a plurality opinion. The majority opinion concluded that "the 1965 Act only preempted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state law damages actions." The

16. Id. at 1170-71.
19. Id.
20. Id.
21. Id.
22. Id.
23. Cipollone, 505 U.S. at 512, 112 S. Ct. at 2615.
25. Id.
27. Parts I, id. at 509, 112 S. Ct. at 2614; II, id. at 513, 112 S. Ct. at 2615; III, id. at 516, 112 S. Ct. at 2617; and IV, id. at 518, 112 S. Ct. at 2618, constitute the majority opinion. Parts V, id. at 520, 112 S. Ct. at 2619 and VI, id. at 530, 112 S. Ct. at 2625, constitute the plurality opinion. Chief Justice Rehnquist and Justices White and O'Connor joined in the plurality opinion. Justice Stevens' majority opinion contains an extensive history of the investigations into "a link between smoking and illness," the congressional and administrative reactions to that investigation, and the contexts within which the 1965 and 1969 Acts were enacted. Id. at 513-20, 112 S. Ct. at 2615-19.
plurality opinion concluded that the 1969 Act did preempt certain state common law actions. More precisely, that opinion found that the latter Act preempted failure-to-warn damage actions based on the defendants’ post-1969 advertising or promotions. The plurality opinion concluded that the 1969 Act did not preempt state law damage actions based on breach of express warranty, fraudulent misrepresentation, and conspiracy to misrepresent or conceal material facts.

Why the basic difference between Justice Stevens’ majority and plurality opinions that, while the 1965 Act preempted no state law damage actions, the 1969 Act was intended to preempt some, and in this particular case, one such common law action? Quite properly, Justice Stevens predicated both opinions on the Supremacy Clause of the Constitution: “Laws of the United States... 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.” Then, again quite properly, Justice Stevens emphasized the restraint to be exercised by courts in applying the Supremacy Clause: “[T]he historic police powers of the States [are] not to be superseded by... Federal Act unless that is the clear and manifest purpose of Congress.”

That congressional intent “may be ‘explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’” Such an implicit intent is to be inferred only if the state law “actually conflicts with federal law... or if the federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”

Given the preemption provisions of both the 1965 and 1969 Acts, Justice Stevens concluded that their “pre-emptive scope... is governed entirely by the express language in § 5 of each Act.”

The plurality opinion found the “plain language” of the 1969 Act’s preemption provision to be “much broader” than that of the 1965 Act: “First, the later Act bars not simply ‘statements’ but rather ‘requirements or prohibitions... imposed under State law.’ Second, the later Act reaches beyond statements ‘in the advertising’ to obligations ‘with respect to the advertising or

29. Id. at 530-31, 112 S. Ct. at 2625.
30. Id.
31. Id. at 516, 112 S. Ct. at 2617.
32. U.S. Const. art. VI, cl. 2.
34. Id. at 516, 112 S. Ct. at 2617 (quoting Jones v. Roth Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977)).
36. Cipollone, 505 U.S. at 517, 112 S. Ct. at 2618 (emphasis added).
37. Id. at 520, 112 S. Ct. at 2619.
38. Id.
promotion' of cigarettes." It's obvious, of course, that a preemption that is expressly applicable to "advertising or promotion" is broader than one applicable only to "advertising." But it hardly follows as a matter of course that the broader preemption applies to damage actions based on inadequate warnings. Presumably, inadequate warnings could occur in advertising alone, or in promotions alone, or in both. The fact that both are covered by the 1969 Act does not require or even imply the conclusion that that Act preempts actions seeking money damages on the basis of inadequate warnings. It is at least as likely that the 1969 Act was simply intended to preclude rulemaking applicable to advertising or promotion inconsistent with the rules fashioned by Congress.

Does the distinction between "statements" (the 1965 Act) and "requirements or prohibition[s]" (the 1969 Act) justify the difference in preemptive effect discerned by the plurality opinion? It seems that, if anything, the latter language more clearly suggests rule-making (and not damage actions) than the former. But the plurality concluded that state law actions for damages could have the effect of requiring certain conduct or prohibiting certain conduct. Still, it seems equally likely that state law actions could require or prohibit certain "statements." Where the language makes no express reference to such damage actions, and "the preemptive scope" of both Acts is to be "governed entirely by the express language" of their preemptive provisions, the more appropriate conclusion would be that Congress did not intend to preempt actions for damages.

The majority opinion compared the different contexts in which the 1965 and 1969 Acts were fashioned. Prior to enactment of the 1965 Act, the Federal Trade Commission (FTC) and several states were moving toward regulation of cigarette labeling and advertising. Prior to the enactment of the 1969 Act, the FTC was considering "a proposed rule which would ban the broadcast of cigarette commercials by radio and television stations" as well as a warning

39. Id.
40. Id.
41. Id.
42. Cipollone, 505 U.S. at 517, 112 S. Ct. at 2618.
43. Id. The plurality's conclusion that state law actions for compensatory damages could have the effect of requiring or prohibiting certain conduct seems at odds with the conclusion achieved in Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S. Ct. 615 (1984). There, the Court:
   reject[ed] Kerr-McGee's submission that the punitive damages award in this case conflicts with Congress' express intent to preclude dual regulation of radiation hazards. . . . Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.
   Id. at 257-58, 104 S. Ct. at 626 (emphasis added). If punitive damages, traditionally viewed as a means of deterring undesirable conduct, do not constitute regulation, it would seem that the award of compensatory damages should not be equated with prohibiting certain conduct for preemption purposes. See Cipollone, 505 U.S. at 538 n.4, 112 S. Ct. at 2628-29 (Justice Blackmun's opinion).
44. Cipollone, 505 U.S. at 513, 112 S. Ct. at 2616.
45. Id. at 515, 112 S. Ct. at 2616.
requirement for cigarette advertising. Do those differing contexts justify the plurality conclusion that the 1969 Act preempted damage actions based on inadequate warnings? I think not, for a couple of reasons. First, the two contexts don't seem to be dramatically different, certainly not different enough to explain the dramatically different preemptive effect attributed to the 1969 Act by the plurality. Second, it was the majority that concluded that "the preemptive scope . . . of the 1965 Act and the 1969 Act is governed entirely by the express language of each Act." In light of that language of the majority, it would be inordinately awkward if the plurality's conclusion as to the preemptive effect of the 1969 Act were influenced in any way by the contexts in which the two acts were enacted, especially since the majority and plurality opinions were authored by the same Justice.

Justice Blackmun wrote a separate opinion concurring in part and dissenting in part. The gist of his conclusion is set forth in this language:

I . . . find the Court's divided holding [presumably that of the majority and that of the plurality] 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 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.

Justice Blackmun found the plurality's dramatically different readings of "statement" in the 1965 Act and "requirement or prohibition" in the 1969 Act inappropriate since Congress' preclusion went to requirements or prohibitions "imposed under" state law, thus suggesting state rule-making rather than state damage actions. Beyond such "specifics," Justice Blackmun was "further disturbed" by the "crazy quilt of pre-emption from among the common law claims implicated in [the] case" fashioned by the plurality. Of the various damage actions asserted, only that based on inadequate warning was found

46. Id.
47. Id. (footnote omitted).
48. Id. at 517, 112 S. Ct. at 2618.
50. Id. at 535, 112 S. Ct. at 2627.
51. Id.
52. Id.
53. Id. at 542, 112 S. Ct. at 2631.
54. Cipollone, 505 U.S. at 542, 112 S. Ct. at 2631.
55. Id. at 542-43, 112 S. Ct. at 2631.
preempted as a consequence of the 1969 Act by the plurality; damage actions based on express warranty, fraudulent misrepresentation, and conspiracy to misrepresent or conceal material facts were deemed by the plurality to be not preempted. Justice Blackmun could not "believe that Congress intended to create such a hodge-podge of allowed and disallowed claims when it amended the pre-emption provision." In addition to disbelieving that Congress had intended to fashion "such a hodge-podge," Justice Blackmun could "only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision."

Justice Scalia wrote a separate opinion, concurring in part and dissenting in part. He concluded that, "[a]pplying ordinary principles of statutory construction, . . . [plaintiff's] failure-to-warn claims are pre-empted by the 1965 Act, and all his common-law claims by the 1969 Act." Justice Scalia's conclusion was a product of his view that there was no merit in the majority's "principle of statutory construction" that express federal preemption provisions should be construed narrowly "in light of the presumption against the pre-emption of state police power regulations." On the contrary, Justice Scalia believed that, "[w]hen [the ordinary meaning of a pre-emption provision] suggests that [it] was intended to sweep broadly, our construction must sweep broadly as well." It was his determination that the preemption language before the Court was so intended that led to his broad sweep of statutory construction. Like Justice Blackmun, who found none of the common law actions preempted by either of the two Acts, Justice Scalia believed that the majority and plurality opinions resulted in a combination of conclusions beyond rational comprehension. He wrote, "[t]he . . . questions raised by today's decision will fill the law-books for years to come. A disposition that raises more questions than it answers does not serve the country well."

As among the four opinions in Cipollone (majority, plurality, Justice Blackmun's and Justice Scalia's), I find Justice Blackmun's the most appropriate. I believe it is his opinion that achieves the most credible reading of the preemption provisions before the Court and is best calculated to achieve the least confusing authority for courts and litigants to follow. That diminution of confusion is no minor matter, as Cipollone clearly, even painfully, demonstrates. The district court found that none of the state common law actions were

56. Id. at 530-31, 112 S. Ct. at 2625.
57. Id. at 531, 112 S. Ct. at 2625.
58. Cipollone, 505 U.S. at 543, 112 S. Ct. at 2631.
59. Id.
60. Id. at 543-44, 112 S. Ct. at 2631.
61. Id. at 548, 112 S. Ct. at 2634. Justice Thomas joined in Justice Scalia's opinion.
62. Cipollone, 505 U.S. at 544, 112 S. Ct. at 2632.
63. Id.
64. Id. at 548, 112 S. Ct. at 2634.
65. Id. at 556, 112 S. Ct. at 2638.
The Third Circuit concluded that some were and some were not. And the majority opinion of the Supreme Court found that none of the state actions were precluded by the 1965 Act, thereby reversing in part and affirming in part. The plurality opinion concluded that the 1969 Act preempted the failure-to-warn claims; the Court was incapable of fashioning a majority opinion with regard to the 1969 Act. One separate opinion found that none of the state claims was preempted by either Act and another separate opinion concluded that together the two Acts preempted all of the state law actions.

To me, all of that suggests two things: (1) there must be something very wrong with the work of Congress in drafting the preemption provisions; and (2) there must be something equally wrong with the Court's construction of preemption provisions in failing to deter Congress from such faulty draftsmanship and in failing to provide clear guidance to courts and litigants in such basic questions as whether or not, or to what extent, express preemption provisions preempt state law actions for money damages. Is the problem—or problems—unique to Cipollone or endemic to the issue?

Let's examine Medtronic, Inc. v. Lohr. Mrs. Lohr, having been implanted with a Medtronic cardiac pacemaker, suffered severe injuries allegedly resulting from a defect in the pacemaker's lead. Plaintiffs, Mrs. Lohr and her husband, sued defendant, Medtronic, in a Florida state court. Medtronic removed the case to a federal district court on diversity grounds. The plaintiffs' complaint asserted a negligence and a strict liability count pursuant to Florida law.

The negligence count alleged a breach of Medtronic's "duty to use reasonable care in the design, manufacture, assembly, and sale of the subject pacemaker" in several respects, including the use of defective materials in the lead and a failure to warn or properly instruct the plaintiff or her physicians of the tendency of the pacemaker to fail, despite knowledge of other earlier failures. The strict liability count alleged that the device was in a defective condition and unreasonably dangerous to foreseeable users at the time of its sale.

69. Id. at 530-31, 112 S. Ct. at 2625.
70. Id. at 544, 112 S. Ct. at 2631-32.
71. Id. at 548, 112 S. Ct. at 2634.
72. 116 S. Ct. 2240 (1996). Justice Stevens' majority opinion contains an extensive history of the Medical Device Amendments Act (MDA), the divisions of Class I, Class II, and Class III devices, premarket approval (PMA) of Class III devices, and substantially equivalent Class III claims which may be marketed without PMA. Id. at 2245-48.
73. Id. at 2248.
74. Id.
75. Id.
76. Id.
Medtronic moved for summary judgment based on the assertion that the negligence and strict liability claims were preempted by section 360k(a) of the Medical Devices Amendments (MDA) which states:

State and local requirements respecting devices
(A) General rule
   Except as provided in subsection (b) of this section, no State or political subdivision of a 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.

Influenced by an Eleventh Circuit opinion, the district court dismissed the Lohrs' complaint. The Eleventh Circuit reversed in part and affirmed in part, finding that the plaintiffs' negligent design claims were not preempted but that the negligent manufacturing and failure-to-warn claims were preempted. "The Court made a parallel disposition of the strict liability claims, holding that there was no pre-emption insofar as plaintiffs alleged an unreasonably dangerous design, but they could not revive the negligent manufacturing or failure to warn claim under a strict liability theory." Medtronic sought certiorari as to those portions of the Eleventh Circuit's decision negating preemption and the Lohrs sought certiorari with regard to those portions of the decision upholding preemption. "Because the Courts of Appeals [were] divided over the extent to which state common-law claims [were] pre-empted by the MDA," the Supreme Court granted both sides' petitions.

Once again, Justice Stevens wrote what was in part a majority opinion and in part a plurality opinion. The majority opinion concluded that the MDA did not preempt any of the common law claims asserted. The plurality opinion

77. 21 U.S.C. § 360k(a) (1994). Subsection (b) of Section 360k, setting forth the methods available to a state or political subdivision thereof for securing an exemption, was not applicable to the case. See Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2249 n.5 (1996).
80. Medtronic, 116 S. Ct. at 2249.
81. Id. and 56 F.3d 1335 (11th Cir. 1995).
83. Id. at 2250.
84. Id.
86. The majority portions of the opinion consist of parts I, Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2245 (1996); II, id. at 2248; III, id. at 2250; V, id. at 2253; and VII, id. at 2259. The plurality portions are IV, id. at 2251 and VI, id. at 2258.
87. Id. at 2259.
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found that § 360k could preempt certain common law actions but declined to identify such claims since no such claim had been asserted by the plaintiffs and the Court "need not resolve hypothetical cases that may arise in the future." The majority noted that, "[a]s in Cipollone v. Liggett Group, Inc., . . . we are presented with the task of interpreting a statutory provision that expressly pre-empts state law." Yet, in that same paragraph, the majority stated, "[O]ur interpretation of that language does not occur in a contextual vacuum." The majority found, rather, "that interpretation is informed by two presumptions about the nature of pre-emption."

First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.

Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that "[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case.

The first "presumption" (as in Cipollone) is entirely appropriate. It says that an express provision preemptioning state law should be read no more broadly than the express language requires. To the extent that that admonition may be somewhat redundant, its redundancy at least errs on the safe side. The second "presumption," no matter how often repeated, is, I believe, inappropriate. If "the purpose of Congress" is discerned from something other than the express preemption language, the court is likely to read that language either too broadly or too narrowly, with the former alternative being the more likely, given the propriety of the first presumption. An express preemption provision inherently states Congress' purpose. To go beyond the express language is to substitute judicial preference for the decision of Congress. Indeed, the majority opinion itself states that:

Congress' intent, of course, primarily is discerned from the language of the preemption statute and the "statutory framework" surrounding it. . . . 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

88. Id.
89. Id. at 2250.
90. Id.
91. Id.
92. Id. (quoting Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96, 103, 84 S. Ct. 219, 222 (1963)).
93. Medtronic, 116 S. Ct. at 2250.
intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law. 94

Express preemption my foot; that's judicial preference.

Justice Breyer wrote a separate opinion, concurring in part and dissenting in part and concurring in the judgment. In his view, "[t]his case raises two questions. First, do the Medical Device Amendments (MDA) to the Food, Drug, and Cosmetics Act ever pre-empt a state law tort action? Second, if so, does the MDA pre-empt the particular state law tort claims at issue here?" He answered the first question, "yes"96 and the second, "no."97

Why yes to the first? Because, in Justice Breyer's view, "[o]ne can reasonably read the word "requirement" as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law."98 In other words, damage awards may result in a "requirement" as effectively as rule-making. But the statutory language is directed toward "State and local requirements"99 and precludes a "State or political subdivision"100 thereof from "establish[ing] or continu[ing] in effect . . . any requirement"101 inconsistent with the chapter and "relate[d] to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter."102 When was the last time you heard of a political subdivision of a state awarding damages in a tort action or creating any common law cause of action awarding such damages?103 I am inclined rather strongly toward the view that the word "requirement" cannot reasonably be read as including state actions for money damages.

Why no to the second question? Because, in Justice Breyer's view, the answer to that question "turns on Congress' intent."104 I would have thought it more appropriate to say that it turned on Congress' intent as manifested in the express preemption provision. Why didn't Justice Breyer? I guess, in part, because he found "the MDA's pre-emption provision . . . highly ambiguous."105

94. Id. at 2250-51 (quoting Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98, 111, 112 S. Ct. 2374, 2383, 2389-90 (1992)).
95. Medtronic, 116 S. Ct. at 2259.
96. Id.
97. Id. at 2260.
100. Id.
101. Id.
103. It's true, of course, that state trial courts are geographically divided by counties, but the common law applied by all of those courts is state common law as fashioned by the state appellate courts.
105. Id.
Because of that ambiguity, Justice Breyer concluded that: "Congress must have intended that courts look elsewhere for help as to just which federal requirements pre-empt just which state requirements, as well as just how they might do so." That strikes me as being a strange way to go about applying an express preemption provision; indeed, a way far more likely to reveal judicial preference than congressional intent. I would think it more appropriate to say that any state law not clearly preempted by an express preemption provision just ain't preempted. Perhaps not surprisingly, Justice Breyer's approach led him into "conflict" and "field" preemption. That would seem to be the "logical" extension of determining Congress' intent from the express preemptive provision. Happily though, Justice Breyer could "find no actual conflict between any federal requirement and any of the liability-creating premises of the plaintiffs' state law tort suit; nor... [could he find] that either Congress or the FDA intended the relevant FDA regulations to occupy entirely any relevant field." Justice O'Connor, too, wrote a separate opinion, concurring in part and dissenting in part. Justice O'Connor agreed with the majority opinion that, "because Congress has expressly provided a pre-emption provision, we need not go beyond that language to determine whether Congress intended the MDA to pre-empt state law. We agree, then, on the task before us: to interpret Congress' intent by reading the statute in accordance with its terms." However, unlike the majority, Justice O'Connor concluded that "state common-law damages actions do impose 'requirements' and are therefore pre-empted where such requirements would differ from those imposed by the FDCA." That conclusion and her concomitant finding that the statutory language does not indicate that a "requirement" must be "specific," either to pre-empt or be pre-empted, led Justice O'Connor to conclude that a state common-law claim is preempted if it would impose "any requirement" "which is different from, or in addition to," any requirement applicable to the device under the FDCA. Thus, Justice O'Connor found preempted the plaintiffs' "manufacture and failure to warn claims."

So, once again, as in Cipollone, the question of whether an express federal preemption provision served to preempt state law actions for damages generated four opinions: the majority opinion, the plurality opinion, Justice Breyer's opinion, and Justice O'Connor's opinion. And en route to the Supreme Court,
the district court found all of the plaintiffs' state law actions preempted and the Eleventh Circuit affirmed in part and reversed in part. In turn, the Supreme Court affirmed in part and reversed in part. Apparently, it must still be concluded that Congress isn't doing something right in the wording of its express preemption provisions and, just maybe, the Members of the Court aren't doing something right in their reading of those provisions. Lower courts and litigants seem to lack adequate guidance. Can anything be done to remedy the situation?

After Cipollone and before Medtronic, the Court decided Freightliner Corp. v. Myrick,\textsuperscript{115} which involved two cases that were consolidated for decision.\textsuperscript{116} "In both . . . , 18-wheel tractor-trailers attempted to brake suddenly and ended up jackknifing into oncoming traffic. Neither vehicle was equipped with an anti-lock braking system (ABS)."\textsuperscript{117} In one of the cases, the plaintiff, Mr. Myrick, the driver of an oncoming vehicle was injured when the rig, manufactured by Freightliner,\textsuperscript{118} collided with his vehicle. Plaintiff's injuries left him permanently paraplegic and brain damaged. In the second case, the driver of an oncoming car, Grace Lindsey, was killed in a collision between the rig, manufactured by Navistar,\textsuperscript{119} and her vehicle. Both collisions occurred in Georgia.\textsuperscript{120} Myrick brought a personal injury action against Freightliner, and the personal representative of the estate of Lindsey brought a wrongful death action against Navistar. Both actions were brought in Georgia state courts.\textsuperscript{121} Defendants removed both to federal court on the basis of diversity jurisdiction.\textsuperscript{122} In both actions, Plaintiffs alleged "negligent design defects"\textsuperscript{123} pursuant to Georgia common law. In both, Defendants moved for summary judgments, asserting that the state law actions had been preempted by federal law.

The federal law asserted by Defendants was Standard 121,\textsuperscript{124} issued pursuant to authority delegated by the Secretary of Transportation under the National Traffic and Motor Vehicle Safety Act (NTMVSA or Safety Act).\textsuperscript{125} "[Standard 121] imposed stopping distances and vehicle stability requirements for trucks [and tractor-trailers equipped with air brakes]."\textsuperscript{126} At the behest of "[s]everal manufacturers and trade associations,"\textsuperscript{127} the Ninth

\textsuperscript{115} 115 S. Ct. 1483 (1995).
\textsuperscript{116} Id. at 1485.
\textsuperscript{117} Id. (footnote omitted).
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Freightliner Corp., 115 S. Ct. at 1485.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} 49 C.F.R. 571.121 S5.3.1 (1972).
\textsuperscript{126} Freightliner Corp., 115 S. Ct. at 1486.
\textsuperscript{127} Id.
Circuit suspended Standard 121 "until the [National Highway Traffic Safety Administration (NHTSA)] compiled sufficient evidence to show that ABS would not create the possibility of greater danger." Although NHTSA left Standard 121 in the Code of Federal Regulations, NHTSA "to this day . . . has not taken final action to reinstate a safety standard governing the stopping distance of trucks and trailers." Defendants argued that the state actions for damages asserted by Plaintiffs were preempted by a suspended federal regulation. The federal district court accepted defendants' argument and granted their motions for summary judgment. The Eleventh Circuit, which consolidated the two cases, reversed, holding that "the state-law tort claims were not expressly pre-empted . . . and reject[ing] [Defendants'] alternative argument that the claims were pre-empted due to a conflict between state law and the federal regulatory scheme." The Supreme Court affirmed, and what d'ya think, it required only one opinion.

First, the Court rejected Defendants' argument that, "[d]espite the fact that Standard 121 remains suspended, [the plaintiffs'] lawsuits are expressly pre-empted." The Safety Act's express preemption provision read as follows:

> 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. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

And, as noted by the Court, "[t]he Act also contains a savings clause, which states: 'Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.'" It would seem to follow, a fortiori, that a standard not in effect would not expressly preempt state common law damage actions.

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129. Freightliner Corp., 115 S. Ct. at 1486.
130. Id.
133. Id. at 1520.
135. Freightliner Corp., 115 S. Ct. at 1487 (emphasis added).
Defendants, however, argued that "the absence of regulation itself constitutes regulation." Justice Thomas, finding that the lack of regulation in the cases before the Court was not the product of any affirmative decision of agency officials "to refrain from regulating air brakes[,]" but rather a result of the "decision of a federal court" suspending the regulation, concluded that the absence of regulation did not constitute regulation.

Failing in their efforts to secure a ruling of express preemption, Defendants sought to persuade the Court that Plaintiffs' "lawsuits are pre-empted by implication because the state-law principle they seek to vindicate would conflict with federal law." Justice Thomas wrote, "[w]e have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively . . . or when state law is in actual conflict with federal law." But how can a federal statute containing an express preemption provision have the effect of implicitly preempting state common law beyond the express preemption, especially a federal statute complemented by a "savings clause" providing that compliance with the federal law does not exempt anyone from any liability under common law?

The Court addressed that very problem, noting that, according to Plaintiffs (and the Eleventh Circuit), "implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute." But the Court found that "this argument is without merit." How can that be?

Quoting from Cipollone, the Court noted that, "Congress' enactment of a provision defining the pre-emption reach of a statute implies that matters beyond that reach are not pre-empted." Seizing on the word "implies" in that excerpt, the Court concluded that "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." To corroborate that conclusion, the Court noted:

Indeed, just two paragraphs after the quoted passage in Cipollone, we engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act . . . and found "no general, inherent

139. Id.
140. Id.
141. Id. (emphasis added).
142. Id.
143. Freightliner Corp., 115 S. Ct. at 1487.
144. Id.
145. Id. at 1488 (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517, 112 S. Ct. 2608, 2618 (1992)).
146. Id. at 1488.
conflict between federal pre-emption of state warning requirements and
the continued vitality of state common law damages actions.

Consequently, the Court concluded that, "[a]t best, Cipollone supports an
inference that an express pre-emption clause forecloses implied pre-emption; it
does not establish a rule." Ultimately, however, the Court found that the
defendants' implied preemption argument was "futile" because the plaintiffs'
common law actions for damages did not conflict with federal law.

What's going on here? In Cipollone, the Court, confronted with two express
preemption provisions and the question of whether either preempted any of the
plaintiff's state law actions for money damages, generated four different opinions
and was unable to produce a majority opinion with regard to the second
preemption provision. In Medtronic, the Court, confronted with one express
preemption provision and the question of whether it preempted any of the
plaintiffs' state law actions for money damages, once again generated four
different opinions. And in Freightliner, confronted with a judicially-suspended
federal safety standard, one express preemption provision complemented by a
savings clause, and the question of whether any of the plaintiffs' state law
actions for damages were preempted, the Court, although able to dispose of the
issue with one opinion, devoted a significant portion of that opinion to preserving
the Court's prerogative of finding an implied preemption beyond the congressio-
nally-enacted express preemption. All of this leads me to conclude that perhaps
several things are going on.

For one, Congress seems to have been guilty of using language with
sufficient ambiguity to compel or at least invite the Court to make the ultimate
determination of the scope of preemption intended. I have heard, as have others
I'm sure, that legislative bodies including Congress sometimes intentionally
utilize ambiguity as a means of mustering sufficient votes to pass a bill. It's a
sort of compromise by ambiguity. A legislator may be induced to vote for a bill,
some earlier provisions of which may have been offensive to him, if those
provisions, though not deleted, are made sufficiently ambiguous to invite a
judicial interpretation that may be tolerable to the legislator. In addition, and
rather closely related, a legislator unwilling or at least reluctant to support a bill
for fear of offending a valued portion of the electorate or a valued political
contributor may be induced to vote for the bill if the language likely to offend
is sufficiently amended to become ambiguous enough to compel judicial
interpretation. This diminishes the concerns of the interested electorate or the
interested contributor, and, not just incidentally, provides the legislator, in the
event of a "disappointing" judicial interpretation, the opportunity to express
shock or surprise to the interested electorate or contributor. Thus, for example,
a legislator—or several legislators—confronted with a bill regulating cigarette warnings and advertisements may well be concerned about an adverse reaction from those interested in protecting public health if the bill isn't "strong" enough, and, at the same time, be concerned about an adverse reaction from those engaged in the tobacco industry if the bill is too "strong." The solution? Ambiguity. Use language regulating warnings and advertising and additional language affording preemption of some state law, but language sufficiently ambiguous to leave the scope of preemption not entirely clear. And, presto, the bill passes and, ultimately, it will be unelected life-tenured federal judges, including the Members of the Supreme Court, who are required to spell out the scope of preemption.

For another thing, the Supreme Court has displayed what might be characterized as an unseemly willingness, or even eagerness, to perform that function. In *Cipollone*, Justice Stevens was willing to have his opinion bifurcated into majority and plurality portions for the sake of preserving the plurality view that the 1969 Act preempted the plaintiff's "claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in [the Defendants'] advertising or promotions. . . ."

And once again in *Medtronic*, Justice Stevens was willing to present a bifurcated opinion for the sake of preserving the plurality view that the MDA could preempt some common law actions, even though it preempted none of the actions actually asserted by the plaintiffs. In *Freightliner*, although only one opinion was generated, and that opinion found no preemption of any of the claims asserted, Justice Thomas saw fit to devote a significant portion of that opinion to preserving the Court's capacity to find an implied preemption beyond the express preemption enacted by Congress. Apparently, the Court, or at least a significant number of its Members, relishes the opportunity of being the final arbiter of the scope of preemption, implied or otherwise, even in the face of an express preemption provision enacted by Congress.

Do I think Congress and the Court are engaged in a conspiracy? Of course not. I'm not inclined to see a conspirator behind every tree or to credit those who do. However, I do think Congress' intentional or inadvertent ambiguity, to the extent that it exists, is unfortunate. I know that legislative compromise is the lubricant of a democratic society, but I don't think ambiguity is an appropriate means of effecting compromise. In the more common (and, to me, acceptable) form of congressional compromise, members of both Houses may engage in a significant give-and-take effort to secure passage of a bill. That kind of compromise truly serves a democratic society, in a couple of ways. First, it secures passage of a bill perceived to be desirable. Second, it will usually be feasible for the electorate to determine which representatives and senators gave and which took and what it was they gave or took, thereby permitting an.

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informed decision about those legislators at the next election. On the other hand, compromise by ambiguity is much less likely to serve that second end. Moreover, ambiguity as to a preemption provision assures that the critical decision as to which, if any, state law actions for damages were intended to be preempted will be made by a court rather than Congress and, in all likelihood, ultimately by the Supreme Court. In addition to willingness, perhaps even eagerness, to perform that function, the Court has displayed a marked inability to perform the function in any given case with unanimity or clarity. The "crazy quilt," "hodge-podge" results achieved by the Court are indeed likely to "fill the law-books for years to come." "A disposition that raises more questions than it answers does not serve the country well."

Even a cursory reading of the three cases considered herein suggests the tortuous path imposed on injured litigants seeking compensatory damages and the defendants from whom such damages are sought, a path fashioned by legislative ambiguities and judicial interpretation, the latter seeming at times to be more a reflection of individual preferences of Members of the Court than of congressional intent. In Cipollone, the federal district court found that the express preemption provisions in the 1965 and 1969 Acts were not intended to preempt any common law actions. The Third Circuit reversed. And, in turn, the Supreme Court reversed in part and affirmed in part, producing four separate opinions. In Medtronic, the federal district court (influenced by an Eleventh Circuit opinion) found that the MDA preemption provision had been intended to preempt all of the plaintiffs' state law actions. The Eleventh Circuit reversed in part and affirmed in part. In turn, the Supreme Court affirmed in part and reversed in part, once again generating four opinions. Finally, in Freightliner, the federal district court granted defendants' motions for summary judgment on the basis of a judicially suspended federal regulation. The Eleventh Circuit reversed. This time the Supreme Court affirmed and required only one opinion to do so. But a significant portion of that opinion was directed toward preserving the Court's capacity to find an implied preemption beyond an express preemption provision, thus virtually assuring repeat performances of the kind manifested in Cipollone and Medtronic.  

151. Id. at 542, 112 S. Ct. at 2631.
152. Id. at 543, 112 S. Ct. at 2631.
153. Id. at 556, 112 S. Ct. at 2638.
154. Id.
155. The three cases examined herein are not unique in suggesting a lack of certainty on the part of the Court. In American Airlines, Inc. v. Wolens, 115 S. Ct. 817 (1995), Plaintiffs sued Defendant airline seeking injunctive relief and damages under Illinois common law and Illinois statutory law, the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. § 505/2 (1992) (formerly codified at Ill. Rev. Stat., ch. 121/1/2 · 262 (1991)), because of Defendant's retroactive changes in the benefits available to members of the airline's frequent flyers club. Defendant argued that both common law and statutory theories and both the injunctive relief and damages sought were preempted by the Airline Deregulation Act (ADA), 92 Stat. 1705 and its preemption clause:

After the Supreme Court of Illinois denied the injunctive relief sought, finding it preempted, but permitted both the common law and statutory actions for damages, finding them not preempted, 157 Ill.2d 466 (1993), the Supreme Court of the United States granted certiorari, 114 S. Ct. 1396 (1994).

Justice Ginsburg wrote the Court’s opinion in which it was concluded that the common law action for damages was not preempted but that the statutory action for damages was preempted. “The middle course we adopt seems to us best calculated to carry out the congressional design; it also bears the approval of the statute’s experienced administrator, the [Department of Transportation].” American Airlines, 115 S. Ct. at 827 (emphasis added). The italicized language implies to me more judicial preference than congressional intent.

Justice Stevens wrote a separate opinion, concurring in part and dissenting in part. Id. at 827. He wrote, “[i]n my opinion, private tort actions based on common law negligence or fraud, or on a statutory prohibition against fraud, are not pre-empted.” Id.

Justice O’Connor, too, wrote a separate opinion, concurring in part and dissenting in part. Id. at 828. Justice Thomas joined in all but one section of that opinion. Justice O’Connor wrote:

In permitting [the Plaintiffs'] contract action to go forward, the Court arrives at what might be a reasonable policy judgment as to when state law actions against airlines should be preempted if we were free to legislate it. It is not, however, consistent with our controlling precedents, and it requires some questionable assumptions about the nature of contract law. I would hold that none of [the Plaintiffs'] actions may proceed.

Id. (emphasis added). The italicized language suggests a conclusion by a Member of the Court that some of her colleagues may have lapsed from determining congressional intent to asserting judicial preference. Justice Scalia took no part in the consideration or decision in Wolens. Id. at 827.

In Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S. Ct. 2031 (1992), the same preemption clause involved in Wolens was at issue. The National Association of Attorneys General (NAAG) adopted guidelines “governing the content and format of airline advertising, the awarding of premiums to regular customers (so-called ‘frequent flyers’), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights.” Id. at 379, 112 S. Ct. at 2034. The guidelines were based on existing state laws. The guidelines were sent to major airlines along with a memorandum warning that noncompliance with the guidelines would lead to “enforcement actions.” Id. at 379, 112 S. Ct. at 2035. The airlines, “claiming that state regulation of fare advertisement [was] preempted by § 1305(a)(1),[,] [sought] a declaratory judgment . . . and . . . an injunction restraining . . . any action under . . . the guidelines.” Id. at 380, 112 S. Ct. at 2035. The federal district court, “in an unreported order,” id., granted the injunction, and the Fifth Circuit affirmed. Trans World Airlines, Inc. v. Morales, 949 F.2d 141 (5th Cir. 1991).

With regard to all the fare advertising provisions of the NAAG guidelines,” the Supreme Court affirmed by majority opinion, finding those provisions to be preempted by the preemption clause. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 391, 112 S. Ct. 2031, 2041 (1992). Justice Scalia wrote the majority opinion, in which Justices White, O’Connor, Kennedy, and Thomas joined.

Id. Justice Stevens wrote a dissenting opinion, concluding that the preemption provision preempted only those state laws relating “directly to rates, routes, or services.” Id. at 421, 112 S. Ct. at 2055. It did not preempt “every traditional state regulation that might have some indirect connection with, or relationship to, airline rates, routes, or services . . . .” Id. at 421, 112 S. Ct. at 2055-56. Chief Justice Rehnquist and Justice Blackmun joined in that dissenting opinion. Id. at 375, 112 S. Ct. at 2033. Justice Souter took no part in the consideration or decision of the case. Id.

Wolens and Morales rather dramatically demonstrate the disparity of views among the Members of the Court, since the Court divided in both cases despite the fact that both dealt with the same
Can anything be done to achieve an acceptable level of certainty with regard to so basic a question as whether an express preemption provision preempts state law actions for damages, a level of certainty that will permit litigants or would-be litigants and lower courts to make intelligent, informed decisions with regard to that basic question? I think the answer is "yes," and I believe the solution is an easy one; at least, easy to propose. Whether Congress and the Court will find it sufficiently tolerable to accept depends, I think, on the former's willingness to forsake compromise by ambiguity and the latter's willingness to surrender this question of congressional intent to Congress. Let's suggest to Congress and the Court that an express preemption provision will not be deemed to preempt state law actions for damages unless the following (or equivalent) language appears in the provision:

Any state law action for damages arising out of the design, manufacture, labeling, marketing, sale, or use of such a product or device, or the provision of such service is preempted.

That should eliminate the problem of legislative ambiguity, whether intentional or inadvertent. It should also eliminate the problem of divergent views among Members of the Court as to whether an express preemption provision preempts state law actions for damages. And let's fashion this corollary to the basic proposal: If the express preemption provision does not contain the proposed language (or its equivalent), the Court should not find such a preemption to have been intended impliedly either on the basis of a conflict between federal and state law or on the basis that the federal law has occupied the field. There are two rationales for this corollary. First, it seems necessary to achieve the certainty desired, given the Court's propensity to preserve its power to find an implied preemption even beyond the terms of an express preemption. Second, this corollary assumes the legislative competence of Congress: if the congressionally enacted express preemption provision does not include the proposed language, Congress does not intend a preemption of state law actions for damages, notwithstanding any judicial determination of "conflict" or "occupation."

Obviously, the proposal and its corollary should be deemed applicable to federal statutes enacted in the future and containing express preemption provisions. In those circumstances, the proposal and its corollary would be applicable both to Congress in the enactment process and to the Court in the interpretation process. In addition, the proposal and its corollary should be deemed applicable to federal statutes containing express preemption provisions already enacted but not yet interpreted by the Court. In those circumstances, the proposal and its corollary would be applicable to the Court and its process of interpretation.

express preemption provision. Apparently, the Members have had little success in persuading each other.
How about the three statutes involved in the cases considered herein: Should the proposal and its corollary be considered applicable to them, notwithstanding the Court's completed interpretation? I think the answer may be yes. In *Cipollone*, the majority opinion concluded that the 1965 Act preempted none of the plaintiff's claims. The proposal and its corollary would produce the same result but with a different rationale in a future case addressing the preemptive scope of the Act, thus creating no serious disparity in result. The minority opinion concluded that the 1969 Act did preempt a portion of the plaintiff's claims, but that was only a plurality opinion. Application of the proposal and its corollary would produce a contrary result—no preemption—but one that would disturb no opinion of the Court. In *Medtronic*, the majority opinion concluded that the MDA preempted none of the plaintiffs' claims. The proposal and its corollary would produce the same result but with a different rationale, thus once again creating no serious disparity in result. The plurality opinion found that the MDA could preempt certain claims but left those claims unidentified. The proposal and its corollary would produce a different result—no preemption—but again one that would disturb no opinion of the Court. In *Freightliner*, the Court's opinion concluded that the suspended standard preempted none of the plaintiffs' claims but preserved the Court's right to find an implied preemption beyond the terms of an express statutory preemption.

The proposal and its corollary would produce the same result—no preemption—but would eliminate the Court's capacity to find an implied preemption beyond an express preemption provision. While that would eliminate the dictum in *Freightliner*, it would do so for the purpose of preserving the intention and competence of Congress and precluding that intent from being overridden by judicial preference. That, of course, goes to the core purpose of the proposal and its corollary. That simple proposal and its corollary should eliminate from the resolution of the basic issue considered any trepidation on the part of litigants and courts akin to the prospect of being skinned by a cardsharp or of suffering a split head inflicted by an ardent barroom brawler. I think even Zayde would approve.