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As has been widely discussed, and convincingly demonstrated elsewhere,[1] the Rehnquist Court is in the midst of a constitutional revolution in the area of federalism. By broadly interpreting the Tenth and Eleventh Amendments, the five-justice conservative bloc[2] has sharply limited federal authority and has resurrected the concepts of state "traditional functions" and "sovereign immunity." One notable exception to this revolution, however, has been the Court's preemption decisions.[3] Significantly, in this area the Rehnquist Court conservatives have been as likely, or more likely, than their

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1. *See, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429 (2002); Larry D. Kramer, *Forward: We the Court*, 115 HARV. L. REV. 4, 130-32 (2001); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 1-3 (2000); *see also* Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14 (labeling a series of recent Supreme Court decisions a "revolution" in federalism).

2. The Justices in the conservative bloc are Chief Justice William H. Rehnquist and Associate Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas.

3. It should also be noted that the Rehnquist Court has done more to tighten, rather than loosen, the restrictions that the so-called dormant Commerce Clause imposes on state and local governments—although in that area, at least, in contrast to the Court's preemption cases, the conservatives have not been the primary advocates of these restrictions. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 595 (1997) (Scalia, J., dissenting); *id.* at 609 (Thomas, J., dissenting).

liberal colleagues to rule in favor of the federal government.[4] This Article examines this discrepancy in voting behavior among the Rehnquist Court Justices, demonstrating that preemption is no longer a liberal issue. While there are many different substantive areas that fall under the Court's preemption doctrine (e.g., foreign affairs, labor issues, consumer protection, nuclear energy, and the environment), this article will focus on products liability cases. In this area, the conservatives have read federal statutes in such a way as to forbid states from imposing higher standards of conduct on manufacturers through traditional common law damages actions. By so doing, they have fulfilled the conservative political agenda of protecting "big business" from various forms of tort liability. In an age in which the federal courts are deciding more statutory cases,[5] this is an important development in judicial policymaking. Before examining the Rehnquist Court's products liability cases, a brief summary of its recent Tenth and Eleventh Amendment rulings will be provided.

I. THE REHNQUIST COURT'S FEDERALISM JURISPRUDENCE

A. *Tenth Amendment*

One of the chief vehicles used by the Rehnquist Court to resurrect states' rights has been the Tenth Amendment. In three significant rulings in the 1990s, the Court limited the ability of the federal government to regulate the states. In *Gregory v. Ashcroft*, four of the five conservatives, plus Justice David Souter, ruled that a "plain statement" was required before a federal statute could be interpreted to regulate the traditional functions of the states.[6] At issue in the case was whether the Age Discrimination in Employment Act of 1967 (ADEA), as amended, which forbids age discrimination in private and public employment, applied to state judges.[7] After determining that the selection of judges was a "traditional function" of the states, a mode of analysis previously repudiated in *Garcia v. San Antonio Metropolitan Transit Authority*,[8] the majority held that

4. *See infra* Appendix.
5. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1-7 (1982).
6. 501 U.S. 452, 470 (1991).
7. *Id.* at 457.
8. 469 U.S. 528, 543-44 (1985); *id.* at 544 n.9.

since there was no clear and manifest congressional intent to apply the ADEA's anti-discrimination protections to state judges, it would not do so.[9] Then, in *United States v. Lopez*, the Court's five conservatives struck down a federal law—the Gun-Free Zones Act of 1990—as going beyond Congress's authority to regulate commerce, the first such time the Court had done so in over 60 years.[10] Finally, in *Printz v. United States*, the same five conservatives imposed a limit on federal authority (the so-called "anti-commandeer" principle) that is not supported by constitutional text, original understanding, or historical practice.[11] At issue in *Printz* was the Brady Handgun Violence Prevention Act of 1993 (Brady Bill), which required a five-day waiting period and background check before an individual could purchase a handgun.[12] While acknowledging that the federal law in question was an attempt by Congress to regulate commerce, thus making the case readily distinguishable from *Lopez*, the five-justice conservative bloc viewed the requirement that local sheriffs perform the background checks as an unfunded mandate and thus violative of various constitutional principles of federalism.[13]

Taken together, one could argue that these decisions have not substantially impacted the division of power between the national and state governments.[14] Individually, the decisions are fairly narrow in scope and, despite urgings from Justice Clarence Thomas,[15] the Court has not revisited its earlier Commerce Clause

9. *Gregory*, 501 U.S. at 467.
10. 514 U.S. 549, 567 (1995).
11. 521 U.S. 898, 932-33 (1997).
12. *Id.* at 902.
13. *Id.* at 935. It should also be noted that the conservatives were one vote shy of another major victory in the federalism revolution of the 1990's. But for Justice Anthony Kennedy's concurring opinion in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995), the states would have the reserved authority under the Tenth Amendment to impose term limits on members of Congress. What is remarkable about Justice Clarence Thomas's *Thornton* dissent, which was joined by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and Antonin Scalia, is not so much his answer to the precise legal question involved—whether the Qualifications Clauses forbid the states from imposing eligibility requirements on members of Congress—but that his opinion takes as its grounding an anti-federalist understanding of the Constitution. *Id.* at 845.
14. *See* Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 369-71.
15. *See Lopez*, 514 U.S. at 584-602 (Thomas, J., concurring).

case law. Accordingly, the Court's Tenth Amendment decisions can be regarded as "cautious" or as a tempering of its prior Commerce Clause jurisprudence. However, while there is some validity in this assessment, it is also wide of the mark in some respects.

During the sixty-year period preceding *Lopez*, there was only one decision where a federal statute was struck down for exceeding Congress's commerce power, and that decision came in *National League of Cities v. Usery*.[16] There, the Court struck down the 1974 amendments to the Fair Labor Standards Act, which extended minimum wage and maximum hour coverage to state and local employees, on the grounds that they interfered with "traditional state" functions.[17] What came as a surprise to many was the Court's reading of the Tenth Amendment. According to then Associate Justice William H. Rehnquist, the author of the Court's opinion, the Tenth Amendment, like the other original amendments to the Constitution, places "an affirmative limitation" on the exercise of national power.[18] "We have repeatedly recognized," Rehnquist wrote, "that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[19] The Court's decision in *Usery* was short-lived, however. No subsequent case followed its reasoning, and only nine years later the decision was explicitly overturned.[20] In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court rejected the idea that the Tenth Amendment places a substantive limit on Congress's authority to regulate commerce. [21] Justice Harry A. Blackmun, who switched the position he had taken in *Usery*, found that attempts to draw boundaries of state regulatory immunity in terms of "traditional" governmental functions had proven "unworkable in practice," and that judicially-created limitations on national authority invited "an unelected federal judiciary to make decisions about which

16. 426 U.S. 833, 854-56 (1976).
17. *Id.* at 845.
18. *Id.* at 842.
19. *Id.* at 845.
20. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).
21. *Id.* at 537.

state policies it favors and which ones it dislikes."[22] Despite strong protests from the four dissenters in the case, including Justices William H. Rehnquist and Sandra Day O'Connor,[23] the Court ruled that "the 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."[24]

The insignificance of *Usery* is borne out by the fact that during the decade between that decision and *Garcia*, the Court did not strike down one statute on the grounds that the Tenth Amendment posed an affirmative limit on national power. By contrast, as a result of the three aforementioned 1990 federalism decisions, the Court has either struck down or limited the reach of several federal statutes.[25] Perhaps the most important example of the former came in *Morrison v. United States*, where the conservative bloc of the Rehnquist Court extended the *Lopez* reasoning to overturn a provision of the Violence Against Women Act of 1994, which allowed civil actions to be brought in federal court where the underlying crime is motivated by an animus based on the victim's gender.[26] In short, the conservative bloc of the Rehnquist Court has resurrected the Tenth Amendment, which was formerly regarded as a constitutional truism,[27] as a substantial limit on federal power. As Justice Sandra Day O'Connor wrote in her opinion for the Court in *New York v. United States*:

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22. *Id.* at 546.

23. *Id.* at 580 (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of principle that will, I am confident, in time again command the support of a majority of this Court."); *id.* at 589 (O'Connor, J., dissenting) ("I share JUSTICE REHNQUIST's belief that this Court will in time again assume its constitutional responsibility.").

24. *Id.* at 550.

25. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (invalidating a "take-title" provision of the Low-Level Radioactive Waste Policy Act on the grounds that Congress may not compel the states to assume liability); United States v. McCoy, 323 F.3d 1114, 1133 (2003) (ruling that Congress may not ban the mere possession of homemade non-commercial child pornography); United States v. Stewart, No. 02–10318, 2003 U.S. App. LEXIS 23128, *30 (9th Cir. Nov. 13, 2003) (holding that Congress lacks the power to ban possession of homemade machineguns).

26. 529 U.S. 598 (2000).

27. United States v. Darby, 312 U.S. 100, 124 (1941).

> [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.[28]

The next section examines how the Court has revitalized the Eleventh Amendment's sovereign immunity doctrine as a limit on federal power.

B. *The Eleventh Amendment*

The other major vehicle by which the Rehnquist Court has substantially limited federal authority is the Eleventh Amendment. Under our dual federal system, "the Framers split the atom of sovereignty" between the national and state governments.[29] One aspect of this dual sovereignty is that the states are immune from certain types of suits being brought against them in federal court without their consent. Sovereign immunity is based on the common law concept that "the king can do no wrong."[30] As applied to the United States, this means that if the states are truly sovereign entities, it would violate their dignity as sovereign powers to allow another sovereign entity, the United States government, to sit in judgment of their actions.[31] This idea is embedded in the Eleventh Amendment, which provides: "The Judicial Power of the United

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28. 505 U.S. at 157.

29. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

30. *See* Feather v. The Queen, 122 Eng. Rep. 1101, 1205 (Q.B. 1865).

31. The sovereign immunity doctrine has always been mired in controversy. While it is true that the states have certain attributes of sovereignty, they are not sovereign in the ultimate sense. The ultimate authority in the United States is the people of the nation as a whole, which is confirmed by the preamble to the Constitution, and which was given final validation (one hopes) by the victory of Union forces during the Civil War. The less-than-full sovereign nature of the states supports a modest interpretation of the Eleventh Amendment, which literally only prohibits the judicial power of the United States from extending to an action against a state if the basis for federal jurisdiction is the presence of a diverse or alien party. On this view, the Court's broad interpretation of the Eleventh Amendment is inconsistent with the text and original understanding of that provision. *See, e.g.*, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[32]

The Eleventh Amendment was ratified in response to the Supreme Court's decision in *Chisholm v. Georgia*, which determined that Article III, Section 2 of the Constitution stripped the states of sovereign immunity in actions brought in federal court by citizens from another state.[33] That decision proved controversial, however, and was overturned by the Eleventh Amendment in 1795.[34] Read literally, the Eleventh Amendment only forbids judicial power from extending to suits brought against a state by citizens of another state, or by citizens of foreign states, i.e., diversity jurisdiction cases. However, the scope of the Amendment was substantially enlarged by the Court in *Hans v. Louisiana*, where it was held that the Eleventh Amendment embodied a general principle of state sovereign immunity, which bars federal jurisdiction of suits by citizens against their own states, even when those suits are based on alleged violations of the Constitution and laws of the United States, i.e., federal question jurisdiction.[35] Even with the *Hans* decision, however, the Court has recognized various exceptions to the states' sovereign immunity from federal suits, includ-

32. U.S. CONST. amend. XI.

33. 2 U.S. (2 Dall.) 419, 420 (1793).

34. Even though the Eleventh Amendment's ratification date has traditionally been cited as January 8, 1798, the date when it was formally declared part of the Constitution by a presidential message to Congress, the more accurate (and now commonly accepted) date is February 7, 1795, the date when it was ratified by two-thirds of the states. *See* THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 42 n.c (Edward S. Corwin ed., 1953).

35. 134 U.S. 1, 10 (1890). For criticisms of the *Hans* decision as a judicially activist misreading of the language and original understanding of the Eleventh Amendment, see, for example, JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 74-80 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 *passim* (1983); Gibbons, *supra* note 31; Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1606-08 (2000); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 *passim* (1988).

ing (1) if the state is the plaintiff in the suit;[36] (2) where a state consents to be sued as a named defendant in the case;[37] (3) where the suit is brought by the federal government or another state pursuant to Article III, Section 2 of the Constitution;[38] (4) where the suit is brought against a political subdivision of the state, such as a city, county or town, which historically have not been protected by the Eleventh Amendment;[39] (5) where the suit is brought against state officials seeking prospective injunctive or declaratory relief for ongoing violations of federal law, sometimes referred to as the *Young* doctrine;[40] and (6) where federal lawsuits are brought pursuant to Congress's abrogation authority under either Article I of the Constitution or Section 5 of the Fourteenth Amendment.[41] In the 1990s, the Rehnquist Court, with the conservatives voting as a bloc in each case, actively limited or abandoned exceptions (5) and (6).

The Supreme Court began its reexamination of its Eleventh Amendment jurisprudence in *Seminole Tribe of Florida v. Florida*.[42] There, the Court struck down (5-4) the Indian Gaming Regulatory Act of 1988, which allowed Indian tribes to bring federal lawsuits against states for failing to negotiate in good faith an Indian tribe's request to form a compact to operate gaming activities.[43] In reaching this result, the five-justice conservative bloc held that Congress could not abrogate state sovereign immunity under its Article I powers, thereby overturning the Court's 1989 decision in *Pennsylvania v. Union Gas Co.*,[44] which held precisely the opposite. In an opinion by Chief Justice William H. Rehnquist, the Court determined that the Eleventh Amendment prevents Congress from authorizing suits against states under the Indian

36. *Hans*, 134 U.S. at 3.
37. *Id.* at 17.
38. *Id.* at 9.
39. *Id.* at 16.
40. *Id.* The *Young* doctrine takes its name from the case in which it was established, *Ex parte Young*, 209 U.S. 123 (1908), which found that a suit can be brought against a state official, as opposed to the state government itself. Individual officers may also be sued for damages in their personal capacity, as long as the money obtained from a judgment does not come out of the state treasury. *See* Edelman v. Jordan, 415 U.S. 651, 663 (1974).
41. *Hans*, 134 U.S. at 3.
42. 517 U.S. 44 (1996).
43. *Id.* at 47.
44. 491 U.S. 1, 23 (1989).

Commerce Clause. Even though the majority conceded that the text of the Eleventh Amendment appeared "to restrict only the Article III diversity jurisdiction of the federal courts," it claimed that the Amendment must be understood "'not so much for what it says, but for the presupposition . . . which it confirms.'"[45] That presupposition, according to the Court, has two parts: "[F]irst, that each State is a sovereign entity in our federal system; and second, that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without the state's consent.'"[46] Applying that two-part presupposition to the statute at hand, the Court held that Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction under a proper understanding of the Eleventh Amendment. "Even when the Constitution vests in Congress complete law-making authority over a particular area," Rehnquist wrote, "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[47] All hope did not appear lost, however, since the Court left open the possibility that Congress could still abrogate state sovereign immunity pursuant to its enforcement power under Section 5 of the Fourteenth Amendment, which, since it was ratified after the Civil War and as part of the Reconstruction amendments, arguably represented a greater erosion of state power.

The following year, the Court ruled that the *Young* exception to sovereign immunity did not apply to a quiet title suit over lands located in the state of Idaho.[48] The Coeur d'Alene Tribe claimed a proprietary interest in the banks and submerged land of Lake Coeur d'Alene, which stretches twenty-four miles in length and one to three miles in width, and is regarded as one of the nation's most beautiful lakes. After an Eleventh Amendment bar was sustained in federal court, the Coeur d'Alene sought declaratory and injunctive relief against various state officials. In a five-to-four decision, the conservatives, this time with Justice Anthony Kennedy authoring the decision, ruled that the suit could not go forward

45. *Seminole Tribe*, 517 U.S. at 54 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).

46. *Id.* (quoting *Hans*, 134 U.S. at 13 (quoting THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

47. *Id.* at 72.

48. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 287-88 (1997).

against the state officials on the ground that it essentially amounted to an action against the state itself.[49] Importantly, Justice Kennedy's opinion sought to place even more limits on the *Young* doctrine, but seven of the Court's Justices refused to go along with that idea.[50]

In 1999, the Court heard a case involving whether the state sovereign immunity doctrine applies to a claim brought in state court that is based on federal law. In *Alden v. Maine*, state employees claimed that they were denied benefits under the Fair Labor Standards Act of 1938. [51] After an Eleventh Amendment bar was sustained in federal court, the petitioners sought relief in state court. The five-justice conservative bloc, with Justice Kennedy again writing the opinion, ruled that the Eleventh Amendment, properly understood, bars federal-jurisdiction claims from being heard in state court without the state's consent.[52] Rejecting a literal reading of the Eleventh Amendment, and relying upon the Court's earlier analysis in *Seminole Tribe of Florida*, the majority maintained that the Constitution's structure and history, congressional practice, and Court precedent supported such a state immunity bar.[53] In terms of the Court's interpretation of the Eleventh Amendment itself, this would have to be regarded as its most far-reaching decision in this area—a sort of modern-day *Hans*.

Finally, in two additional Eleventh Amendment cases the Court reexamined whether Congress could abrogate sovereign immunity under Section 5 of the Fourteenth Amendment—in each instance ruling that it could not. In *Kimel v. Florida Board of Regents*, the five-justice conservative bloc, with Justice Sandra Day O'Connor writing the opinion, ruled that suits brought under the Age Discrimination in Employment Act of 1967 could not be brought in federal court. [54] In that case, several state employees claimed age discrimination as a result of hiring and promotion policies at various state universities and governmental agencies in

49. *Id.*
50. Only Chief Justice Rehnquist joined that part of Justice Kennedy's opinion.
51. 527 U.S. 706, 712 (1999).
52. *Id.* at 713.
53. *Id.*
54. 528 U.S. 62, 91 (2000).

Florida and Alabama.[55] Then in *Board of Trustees of the University of Alabama v. Garrett*, the same five Justices, with Chief Justice William H. Rehnquist writing the opinion, ruled that federal suits based on the Americans with Disabilities Act of 1990 could not be brought against a state government without its consent.[56] In each of these cases, while acknowledging that some forms of discrimination did in fact exist, the Court reasoned that the type of discrimination was not serious enough for Congress to abrogate the states' sovereign immunity under Section 5 of the Fourteenth Amendment.[57]

In sum, since 1996, the conservatives have expansively interpreted the states' sovereign immunity under the Eleventh Amendment. Aside from what might turn out to be its narrow ruling in *Coeur d'Alene Tribe of Idaho*, the Rehnquist Court has stretched the Eleventh Amendment's sovereign immunity bar to suits claiming violations of federal rights brought in state court, and it has gutted Congress's ability to abrogate sovereign immunity under both Article I of the Constitution and Section 5 of the Fourteenth Amendment. While the individuals aggrieved under federal laws may have other avenues of redress (e.g., a suit asking to enjoin a state official from an ongoing violation of federal law, or a suit commenced with the state's consent), these avenues are not always available, and even when they are, might not provide full monetary relief to the person harmed. The Court's Eleventh Amendment decisions present a fundamental paradox: In earlier cases, the major battle was over whether Congress's commerce power extended to the states *qua* states. Now that the Court has concluded that Congress has the authority to regulate the states as governmental entities, its Eleventh Amendment decisions are denying individuals, claiming that their federal statutory rights have been violated, an adequate means of redress in either federal

55. *Id.* at 66.

56. 531 U.S. 356, 358, 374 (2001).

57. *Id.* at 374; *Kimel*, 528 U.S. at 91. During its 2002-03 term, the Court held that Congress, pursuant to its Fourteenth Amendment enforcement power, did abrogate state sovereign immunity under the Family and Medical Leave Act of 1993, since there was a clear statement to abrogate such immunity in the language of the statute and the Act was passed in order to redress gender discrimination in employment, a form of discrimination requiring heightened scrutiny. *See* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003).

or state court. By expansively interpreting the Eleventh Amendment, the Court is protecting the financial solvency of the states at the expense of harmed private individuals. In contrast to the Tenth Amendment, the Rehnquist Court's interpretation of the Eleventh Amendment has been quite bold and far-reaching, and it has not been particularly concerned about overturning its own precedents. Taken together, the Rehnquist Court (and, in particular, the five-justice conservative bloc) has substantially limited federal authority under the Tenth and Eleventh Amendments. This is not the case with respect to the Court's preemption doctrine. In that area, it is the conservatives who have been the principal supporters of the federal government.

II. FEDERAL PREEMPTION

Under our federal system, what happens when there is a conflict between national and state law? If there were no way to peacefully resolve these sorts of disputes, the United States would be in a constant state of civil war. The doctrine of preemption, which is derived from the Supremacy Clause,[58] provides the answer. According to this doctrine, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."[59] As Justice O'Connor has recognized, the doctrine of preemption gives the federal government "a decided advantage in [the] delicate balance" between the states and the federal government, because "[a]s long as [Congress] is acting within the powers granted it under the Constitution," it may reach areas traditionally regulated by the states.[60]

Alexander Hamilton assumed that some notion of preemption is inherent in a federal system of government.[61] In *Federalist No. 33*, he set forth how political power was to be divided in a republic.[62] According to him, the laws of the larger political entity—into which smaller political societies agree to join—are the supreme

58. 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.

59. Free v. Bland, 369 U.S. 663, 666 (1962).

60. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

61. *See* THE FEDERALIST NO. 33, at 224-25 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

62. *Id.* at 225.

law of the land.[63] If otherwise, the relationship would constitute "a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY."[64] As he explained:

> A Law, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.[65]

There are three major ways in which the federal government can preempt state law. The first is by expressly stating so. A federal law might simply say that it is preempting state law, either partially or entirely. The second and third ways are implied methods. One implied method is "field" preemption, "where Congress's legislation is so complete and the area is one requiring national uniformity of regulation, that Congress can be said to have intended to occupy the field."[66] For example, comprehensive and uniform federal regulations fully occupy the field of foreign affairs. The other implied method is "conflict" preemption, "where the federal and state regulations are in such conflict that state law must yield to the federal because either (a) there is an actual conflict in that it is impossible for a party to comply with both federal and state regulation, or (b) state law 'stands as an obstacle' to the accomplishment of federal objectives and, therefore, must yield."[67] This last-mentioned implied preemption doctrine known as "obstacle" preemption presents the most difficulty for the reviewing Court, because it must discern what Congress's objectives or purposes were when it passed the statute. The basic issue in all pre-

63. *Id.*
64. *Id.*
65. *Id.*
66. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 970 (2002).
67. *Id.*

emption cases is one of congressional intent. In contrast to Tenth Amendment cases, where the central question is whether Congress has the constitutional *authority* to regulate a particular activity, preemption cases ask whether Congress statutorily *intended* to regulate a particular area.

What should become obvious from the products liability cases discussed below is that the Rehnquist Court conservatives are not opposed to ruling in favor of the federal government in preemption cases, particularly where Congress's intent is not clearly expressed. The overall voting behavior of the Rehnquist Court Justices in preemption cases has already been mentioned.[68] Since 1986, the Rehnquist Court has decided seven preemption cases involving common law tort claims,[69] three of which will not be discussed here because they were unanimous decisions.[70] In the four non-unanimous cases, either a four- or five-justice conservative bloc ruled in favor of federal preemption, at least in part, while Justice Stevens[71] and Justice Breyer[72] broke ranks with the liberals by separately voting in favor of preemption in two of those cases. Interestingly, the Court's most strenuous defender of states' rights, Justice Clarence Thomas, who has the lowest voting percentage among the current conservatives in siding with the federal government in preemption cases, split with his conservative

68. *See infra* Appendix.

69. *See* Sprietsma v. Mercury Marine, 537 U.S. 51 (2002); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001); Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000); Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996); Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); Cipollone v. Liggett Group, 505 U.S. 504 (1992); Boyle v. United Tech. Corp., 487 U.S. 500 (1988).

70. *See Sprietsma*, 537 U.S. at 64 (holding that neither the Federal Boat Safety Act of 1971, nor the decision of the Coast Guard in 1990 not to promulgate a regulation requiring propeller guards on motorboats, preempts common law tort actions); *Buckman Co.*, 531 U.S. at 353 (ruling that a state "fraud-on-the-FDA" claim conflicted with the Food and Drug Administration's pre-market approval procedures); *Freightliner Corp.*, 514 U.S. at 286 (holding that state common law claims against manufacturers of tractor-trailers were not preempted under the National Traffic and Motor Vehicle Safety Act of 1996).

71. Justice Stevens wrote the majority opinion in *Cipollone*, 505 U.S. at 505, 507 (finding some common law actions preempted under the Public Health Cigarette Smoking Act of 1969).

72. Justice Breyer authored the majority opinion in *Geier*, 529 U.S. at 867 (holding that the National Traffic and Motor Vehicle Safety Act of 1966 and the 1984 version of the Federal Motor Vehicle Safety Standard 208 preempted state common law "no-airbag" tort actions).

colleagues in a prominent products liability case,[73] and may be an ally for the liberals in future preemption cases. Meanwhile, among the Court's liberals, Stephen G. Breyer, who has sided with the federal government more than any of his other liberal colleagues in federalism cases, has been an occasional ally of the conservatives in products liability cases.[74] Equally interesting, the Court's "Mr. Right," Antonin Scalia, has shown the most inclination among any of his colleagues (liberal or conservative) to favor the federal government in preemption cases, thereby revealing his Hamiltonian leanings and his pre-Court nationalist views concerning products liability cases: "[T]he federal government is not bad but good. The trick is to use it wisely."[75] In short, the conservative bloc of the Rehnquist Court is favorably disposed toward federal preemption in products liability cases. As one constitutional scholar of federal preemption has put it, the Rehnquist Court conservatives are no longer operating under the traditional presumption against preemption, but rather have substituted in its place a presumption in its favor.[76]

A. *Express Preemption*

1. *The Regulation of Cigarettes*

In one form or another, the regulation of tobacco products has been before the Court on several occasions.[77] In *Cipollone v. Lig-*

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73. That vote came in *Geier*, 529 U.S. at 885 (Thomas, J., dissenting) (joining the liberals in finding that neither the National Traffic and Motor Vehicle Safety Act of 1966 nor the 1984 version of the Federal Motor Vehicle Safety Standard 208 preempted state "no-airbag" suits).

74. *See, e.g.*, *Geier*, 529 U.S. at 861, 867 (authored majority opinion ruling that the National Traffic and Motor Vehicle Safety Act of 1966 and the 1984 version of the Federal Motor Vehicle Safety Standard 208 preempted common law "no-airbag" tort actions); Medtronic, Inc. v. Lohr, 518 U.S. 470, 508 (1996) (Breyer, J., concurring) (arguing that "future incidents of [Medical Device Amendments] pre-emption of common-law actions will [not] be 'few' or 'rare'").

75. Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19, 22 (1982).

76. Davis, *supra* note 66.

77. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (holding that the Food and Drug Administration went beyond its delegated authority in regulating cigarette advertising); Lorillard Tobacco Co., v. Reilly,

gett Group, Inc., the Court had to decide whether two federal laws regulating the labeling and advertisement of cigarette products preempted state common-law damages claims against three tobacco companies. [78] In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act (FCLAA), which mandated health warnings on cigarette packages, but did not require similar warnings in cigarette advertising. The stated purposes of the Act were to (1) "adequately inform[] the public that cigarette smoking may be hazardous to health, and to (2) protect[] the national economy from the burden imposed by diverse, non-uniform and confusing cigarette labeling and advertising regulations."[79] In furtherance of the second purpose, Section 5 of the Act (under the caption "Preemption") provided that:

> (a) No statement relating to smoking and health, other than the statement required by Section 4 of this Act [i.e., smoking may be hazardous to your health], shall be required on any cigarette package, and
>
> (b) No statement relating 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.[80]

In 1969, Congress passed the Public Health Cigarette Smoking Act, which amended the 1965 Act in several ways.[81] Under the 1969 Act the warning label was strengthened by requiring that the word "dangerous" be substituted for the word "hazardous," and following a recommendation by the Federal Communication Commission,[82] the Act prohibited cigarette commercials on the radio and television.[83] Finally, and most important for our purposes, the 1969 Act modified the preemption provision as follows: "No requirement or prohibition based on smoking and health shall be

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533 U.S. 525 (2001) (ruling that state cigarette advertising restrictions were preempted under the federal Cigarette Labeling and Advertising Act).

78. *Cipollone*, 505 U.S. 504.

79. *Id.* at 514 (quoting 15 U.S.C. § 1331).

80. *Id.* (quoting 15 U.S.C. § 1334).

81. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. § 1331–1338).

82. Advertisement of Cigarettes, 34 Fed. Reg. 1959 (Feb. 11, 1969) (to be codified at 47 C.F.R. pt. 73).

83. *See* Act cited *supra* note 81.

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."[84]

In 1983, Rose Cipollone and her husband brought suit against three tobacco companies, claiming that she developed lung cancer as a result of smoking cigarettes manufactured and sold by the companies.[85] Their complaint alleged several theories of recovery, including failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud, all of which were based on New Jersey common law.[86] The tobacco companies defended by arguing that these common-law damages claims were preempted by the federal laws.

The plurality, in an opinion by Justice John Paul Stevens, found *some*, but not all, of the common-law claims preempted. According to Stevens, the 1965 preemption provisions only "prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels," and, therefore, did not foreclose additional obligations imposed under state common law.[87] As for the 1969 preemption provision, however, Stevens found a broader purpose in mind: The later Act barred "not 'simply statements' but rather 'requirement[s] or prohibition[s] . . . imposed under State law,'" and it reached "beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes.'"[88] Thus, the later Act could be read to prohibit not only positive enactments concerning the health risks associated with smoking, but common-law damages actions which impose a "requirement or prohibition" under state law. Applying such an analysis to the claims in this case, the plurality found the failure-to-warn and fraudulent misrepresentation claims preempted "to the extent that those claims rel[ied] on omissions or inclusions in respondents' advertising or promotion . . . ."[89] However, other aspects of those claims, as well as the express

84. Pub. L. No. 91–222 (codified as amended at 15 U.S.C. § 1334(b)).
85. *Cipollone*, 505 U.S. at 509.
86. The Cipollones also raised a "design defect" claim, which was dismissed by the federal district court on other grounds. *Id.* at 512.
87. *Id.* at 518.
88. *Id.* at 520. (quoting 15 U.S.C. § 1334(b)).
89. *Id.* at 531.

warranty and conspiracy to defraud claims, were allowed to go forward.[90]

Significantly, in reaching its conclusion the plurality relied on two rules of statutory construction. First, it applied a plain statement rule. [91] According to Justice Stevens, under the Supremacy Clause "the historic police powers of the States [are] not to be superseded" by federal law unless there is a "clear and manifest purpose" to do so.[92] Second, the Court reasoned that "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue," the Court need not infer congressional intent to preempt state authority beyond the explicit language.[93] In other words, Congress's enactment of a provision defining the preemptive reach of a statute means that all doctrines of implied preemption are foreclosed.

Justice Antonin Scalia (who was joined by Justice Clarence Thomas) concurred in part and dissented in part.[94] Scalia would have found federal preemption of the failure-to-warn claims under the 1965 Act, and preemption of *all* the common-law actions under the 1969 Act.[95] Scalia strongly objected to the plurality's "novel" and "unprecedented" principles of statutory construction.[96] First, he questioned the Court's application of a plain statement rule in preemption cases.[97] According to Scalia, since the Court can find federal preemption in cases where there is no explicit statement of preemptive intent by Congress (i.e., implied "field" or "conflict" preemption), a requirement of a plain statement rule in cases where explicit statements do exist "is more than somewhat odd":

> To be sure, our jurisprudence abounds with rules of "plain statement," "clear statement," and "narrow construction" designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitu-

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90. *Id.* at 530.
91. *Id.* at 516 (citing Rice v. Santa Fe Elevator Corp., 531 U.S. 218, 230 (1947)).
92. *Id.*
93. *Id.* at 517.
94. *Id.* at 544-55 (Scalia, J., concurring in part and dissenting in part).
95. *Id.* at 544.
96. *Id.* at 544, 547.
97. *Id.* at 545-46.

> tional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. . . . But *none* of those rules exists alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved by *sheer implication*, with no express statement of intent at all. That is the novel regime the Court constructs today.[98]

Second, Scalia took aim at the Court's other rule of statutory construction—if there is an express preemption provision in a federal statute, then the Court will not infer congressional intent to preempt state authority beyond the scope of the explicit language. According to Scalia, this rule conflicts with the prior decisions of the Court and "works mischief" in the area of implied "conflict" preemption:

> If taken seriously, it would mean, for example, that if a federal consumer protection law provided that no state agency or court shall assert jurisdiction under state law over any workplace safety issue with respect to which a federal standard is in effect, then a state agency operating under a law dealing with a subject other than workplace safety (e.g., consumer protection) could impose requirements entirely contrary to federal law—forbidding, for example, the use of certain safety equipment that federal law requires.[99]

Taken together, Scalia found the plurality's canons of "narrow construction" to be "extraordinary," and argued that they would place a presumption against federal preemption in the Court's jurisprudence:

> The statute that says *anything* about pre-emption must say *everything*; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this be the law, surely only the most sporting of congresses will dare to say anything about pre-emption.[100]

98. *Id.* at 546, 547.
99. *Id.* at 547.
100. *Id.* at 548.

Justice Scalia's opinion in *Cipollone* strongly supports federal preemption of state law. Unlike the plurality, he was much more willing to assume federal preemption of the common-law damages claims. Although the determinative question in all preemption cases is one of congressional intent, there is wide latitude in these types of cases for judges to reach the results they want. Moreover, *Cipollone* was not crystal clear. In an opinion concurring in part and dissenting in part, Justice Harry A. Blackmun (who was joined by Justices David H. Souter and Anthony M. Kennedy) found *no* intent by Congress under either statute to preempt any of the common-law actions.[101] The types of lawsuits that Scalia would have preempted are also worth mentioning: those involving state court theories of liability. These are the same types of suits that he suggested should be preempted by the federal government in pre-Court remarks he gave before the Federalist Society.[102] We shall see that Justice Scalia's concern about reading preemptive statutes too narrowly will be heeded by a majority of the Justices in subsequent cases. While the conservative bloc was fractured in *Cipollone*, it won a major victory in another case involving the regulation of tobacco products, *Lorillard Tobacco Co. v. Reilly*.[103]

In January 1999, after the landmark settlement agreement between forty states and the major manufacturers in the cigarette industry, Massachusetts's Attorney General promulgated several regulations regarding the advertisement of cigarettes,[104] including

101. While he agreed with the plurality's application of the two rules of statutory construction in this case, Justice Blackmun argued that the plain meaning of the word "requirement," as well as the legislative history of both versions of the FCLAA, indicated that Congress did not want to preempt traditional common law damages claims. He also took issue with the plurality's assumption that tort liability will indirectly regulate how tobacco companies conduct business. According to Blackmun, even if a tobacco company is found liable in a tort suit, it might still continue the practice for which it was held responsible on the theory that the damage award is merely a cost of doing business. *Id.* at 531-544 (Blackmun, J., concurring in part and dissenting in part).

102. Scalia, *supra* note 75, at 21-22.

103. 533 U.S. 525 (2001).

104. The regulations also dealt with various forms of sales practices of tobacco products (e.g., samples, promotional give-aways, and self-service displays), as well as the advertisement of smokeless tobacco and cigars. MASS. REGS. CODE tit. 940, § 21.04 (2000). However, since the cigarette company petitioners did not challenge the sales practices under the Supremacy Clause,

point-of-sale and outdoor advertising restrictions.[105] The major purpose of these regulations was to "close holes" in the settlement agreement by eliminating deception and unfairness in the way tobacco products are marketed and sold to children under the legal age.[106] Before the regulations went into effect, several tobacco companies challenged the regulations under the Supremacy Clause and First Amendment of the Constitution. The federal preemption provision at issue was the same one as in *Cipollone*: "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]."[107]

The crucial interpretative question for the Court was whether the FCLAA, as amended, forbade state regulations concerning the placement of cigarette advertising. *Cipollone* held that some common law damages actions indirectly regulate the content of cigarette warnings and thus must be preempted under the FCLAA.[108] The question in *Lorillard* was whether the FCLAA superseded state regulations regarding the placement of cigarette advertising, and, if so, to what extent and in what form.[109] The District Court and the Court of Appeals agreed that the preemption issue was ambiguous, but concluded that, based on the Supreme Court's re-

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and the FCLAA regulates only cigarettes, as opposed to smokeless tobacco or cigars, these other regulations will not be discussed here.

105. The relevant portions of the regulations state that the following cigarette advertising practices are "unfair" or "deceptive":

> (a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
>
> (b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, which is located within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

Id. tit. 940, § 21.04(5)(a)–(b).

106. *Id.* § 21.01.

107. 15 U.S.C. § 1334 (2000).

108. 505 U.S. at 521.

109. 533 U.S. at 532.

quirement of a plain statement rule in preemption cases, as well as the traditional deference given to the states in the areas of land use zoning and public health, the state regulations should not be preempted.[110] That view was embraced almost universally by all of the circuit courts that had addressed the issue,[111] where the common thread of reasoning was that the FCLAA preempts regulations about the *content* of cigarette advertising, not the states' ability to regulate the *location* of cigarette advertisements, such as signs or billboards. In addition, the Massachusetts's Attorney General maintained that the cigarette advertising regulations were not preempted because they were not "based on smoking and health," but rather were aimed at strengthening compliance with laws prohibiting the sale or distribution of tobacco products to children by reducing their exposure to cigarette advertising.[112] In an opinion by Justice Sandra Day O'Connor, the five-justice conservative bloc rejected these arguments. Justice O'Connor rejected the state attorney general's interpretation of the "based on smoking and health" clause as too narrow.[113] According to Justice O'Connor, Congress, in enacting the 1969 preemption provision, was not concerned merely with health warnings for cigarettes, but was equally concerned about children being inundated with images of cigarette smoking and advertising.[114] "At bottom," she reasoned, "the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected."[115] Moreover, while O'Connor conceded that the "content versus location distinction has some surface appeal," she was not persuaded by that reasoning either.[116] According to Justice O'Connor, if the states are free

110. *Id.* at 537-40.

111. *See* Consol. Cigar Corp. v. Reilly, 218 F.3d 30, 41 (1st Cir. 2000); Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 109 (2d Cir. 1999); Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633, 639 (7th Cir. 1999); Penn Adver. of Balt., Inc. v. Mayor & City Council of Balt., 63 F.3d 1318, 1324 (4th Cir. 1995). *Contra* Lindsey v. Tacoma-Pierce County Health Dep't, 195 F.3d 1065, 1072-75 (9th Cir. 1999).

112. *Lorillard,* 533 U.S. at 546-47.

113. *Id.* at 547.

114. *Id.* at 547-48.

115. *Id.* at 548.

116. *Id.*

to regulate the placement of cigarette advertising, then they could prohibit them altogether—a result, in her view, at odds with the plain language of the FCLAA.[117] As she put it, "Congress wished to ensure that 'a State could not do through negative mandate (e.g., banning all cigarette advertising) that which it was already forbidden to do through positive mandate (e.g., mandating particular cautionary statements).'"[118]

The dissent, written by Justice John Paul Stevens, and joined by Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer, rejected a literal reading of the FCLAA's preemption provision for its underlying purposes.[119] Justice Stevens reminded the majority that the basic purposes of the preemption provision were: (1) to inform the public that smoking may be hazardous, and (2) to ensure that commerce and the interstate economy not be impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations.[120] As he saw it, these purposes, which were not substantially modified by the 1969 amendments, indicated that Congress was mainly concerned about the administrative burdens and costs that tobacco companies would have to bear if they had to comply with different labeling and advertising requirements in sundry locales across the United States.[121] However, a similar line of reasoning would not apply to the placement of cigarette advertisements, such as billboards and signs, since tobacco companies (as well as all other advertisers) have to comply with various local zoning regulations anyway. According to this view, if the states want to take the extra-precautionary measure of protecting the health and safety of minors by limiting the advertisements directed at them, nothing under the FCLAA prohibits them from doing so. Although Stevens was convinced that the FCLAA was not intended to supersede the states' regulation of the placement of cigarette advertisements, he noted that even if the preemption provision could be regarded as ambiguous, under clearly established preemption jurisprudence the Court should defer to the states and their historic police powers unless there is a clear and manifest purpose by Congress to trump state law.

117. *Id.* at 546.
118. *Id.* at 549 (quoting Cipollone v. Liggett, 505 U.S. 504, 539 (1992)).
119. *Id.* at 595 (Stevens, J., dissenting).
120. *Id.* (citing 15 U.S.C. § 1331 (2000)).
121. *See generally id.* at 595-96.

Lorillard was an important victory for the conservatives. While the case did not involve a products liability claim, it did involve the states' ability to regulate land usage and public health, two traditional state functions. As in most statutory interpretation cases, the preemption question in *Lorillard* was ambiguous. On the one hand, the plain language of the statute could be read to eliminate the states' ability to regulate cigarette advertising altogether. However, such "uncritical literalism" yields results that Congress surely did not intend. For example, "it could divest the states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there," or "it could lead to the conclusion that 'states [are] without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard.'"[122] In order to avoid such absurd results, an examination of legislative intent is necessary, and, as Justice Stevens pointed out, FCLAA's legislative history does not suggest that Congress wanted to divest the states of all regulatory authority over cigarette advertising. Principled defenders of states' rights would not read the FCLAA in such a way that the states have no role in this area. Yet, that is what happened in *Lorillard*. There, in contrast to the Court's Tenth Amendment decisions, in which the conservatives have sought to preserve an enclave of state authority under the previously repudiated "traditional functions" analysis, little deference was given to two traditional state functions—land usage and public health. While *Lorillard* does raise some legitimate First Amendment issues,[123] the conservatives' literal reading of

122. Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 105 (2d Cir. 1999) (quoting Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633, 638 (7th Cir. 1999)).

123. All of the Justices agreed that the outdoor regulations prohibiting cigarette advertising "within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school," were constitutionally suspect. MASS. REGS. CODE tit. 940, § 22.06(5)(a)–(b) (2000). In commercial speech cases, the Court applies the *Central Hudson* test, which requires that in order for a regulation to survive a First Amendment challenge, it must satisfy a four-prong test: (1) whether the activity regulated is legal, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). All of the Justices agreed that the outdoor regulations

FCLAA's preemption provision cannot be explained simply as a matter of different interpretative philosophies, since in *Geier v. American Honda Motor Co.*, the conservatives relied upon administrative intent instead of the plain meaning of a federal statute to preclude common law tort claims.[124]

By the Court disallowing states the ability to regulate cigarette advertising, the tobacco industry reaps a substantial monetary windfall. The Food and Drug Administration (FDA) estimates that eighty-two percent of adult smokers begin to smoke before the age of eighteen.[125] If there is a cause and effect relationship between cigarette advertising and underage smoking (and both common sense and government and academic studies dictate that there is[126]), then the tobacco industry stands to profit from the Court's decision—which is why in 1999 the cigarette industry spent $8.24 billion on advertising and promotions, the largest expenditure ever.[127] *Lorillard* should not be read in isolation either. The Court has also ruled that the FDA does not have the authority under the Food, Drug, and Cosmetic Act of 1938 to regulate tobacco as a drug.[128] There is a certain irony to the Court's decision in *Lorillard*. In *United States v. Lopez*, the Court ruled that Con-

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were at best dubious in light of the fourth prong of the *Central Hudson* test, requiring that the regulations be narrowly tailored and that there be a reasonable fit between the means and ends of the regulatory scheme. At trial, the tobacco companies presented evidence that the regulations would prevent cigarette advertising in approximately ninety percent of the major metropolitan areas in Massachusetts, such as Boston, Worcester, and Springfield. In addition to this, the statute broadly defines "advertisement" to mean "any oral, written, graphic, or pictorial statement or representation, made by, or on behalf of, any person who manufactures, packages, imports for sale, distributes or sells within Massachusetts [tobacco products], the purpose of which is to promote the use or sale of the product." tit. 940, § 21.03. The major difference among the Justices was that the majority found the regulations unconstitutional at the summary judgment stage, while the dissenters would have sent the case back to trial for further development of the record as to whether the regulations were overbroad. *Id.* at 571-606.

124. *See* 529 U.S. 861 (2000).

125. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 128, 161 (2000).

126. *See* Lorillard Tobacco Co. v. Reilly, 84 F. Supp. 2d 180, 186-87 (Mass. Dist. Ct. 2000) (quoting Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion, which provides the studies substantiating such a link (Def.'s Mem. Supp. at 8)).

127. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 545 (2001).

128. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161.

gress was without power to regulate gun possession within one-thousand feet of a private or public school.[129] Here, by contrast, the same five Justices ruled that Congress intended to preempt state law regulating underage smoking within one-thousand feet of a public playground, park, or elementary or secondary school.[130]

2. *Pacemakers*

In another important express preemption case, the Court was sharply divided over whether the Medical Device Amendments (MDA or Act) of 1976[131] preempted state common-law negligence claims against the manufacturer of an allegedly defective pacemaker. [132] The MDA was enacted by Congress "to provide for the safety and effectiveness of medical devices intended for human use,"[133] and delegates to the FDA the responsibility of evaluating and approving, through a "premarket approval" (PMA) process, all new medical devices. The extent of the FDA's pre-market review depends largely on the degree of potential risk to human health presented by the medical device, and the Act classifies medical devices into three categories. Class I devices are noncritical products that pose no unreasonable risk of illness or injury and thus are governed by general manufacturing controls; Class II devices possess a greater potential for harm and therefore warrant more stringent performance controls; Class III devices present the greatest degree of risk to human health and (but for the exceptions noted below) undergo the strictest pre-market scrutiny.[134] Almost all life-sustaining devices, including pacemakers and heart valves, are Class III devices.

In order for a medical device to be introduced into the market, an applicant must demonstrate to the FDA with a "reasonable assurance" that the device is both safe and effective.[135] This PMA review is rigorous and the FDA spends an average of 1,200 hours on

129. 514 U.S. 549, 567-68 (1995).
130. *Id.* at 600-01.
131. Medical Device Amendments of 1976 (MDA), Pub. L. No. 94–295, 90 Stat. 539 (1976) (codified as 21 U.S.C. §§ 360c–360k (2002)).
132. Medtronic, Inc. v. Lohr, 518 U.S. 470, 470 (1996).
133. *Id.* at 474 (citing 90 Stat. 539).
134. *Id.* at 476-77 (citing 21 U.S.C. §§ 360c(a)(1)(A)–(C)).
135. *Id.* at 477.

each submission.[136] As part of a PMA request, for example, the applicant must provide full scientific reports of all information concerning investigations undertaken to show whether the device is safe and effective.[137] In addition, the FDA refers the approval question to a panel of outside experts, conducts its own, in-depth review, and the Act allows interested persons to file a petition to review the approval of a device. However, because of two major exceptions, not all Class III devices on the market today have received PMA review: (1) pre-market devices are "grandfathered" until the FDA has had time to complete the PMA, and (2) devices that are "substantially equivalent" to preexisting devices may avoid the process "until the FDA initiates the PMA process for the underlying pre-1976 device to which the new device is 'substantially equivalent.'"[138]

Even though "substantially equivalent" Class III devices do not have to go through the rigorous PMA review, a manufacturer attempting to market a new device must submit a "premarket notification" to the FDA—a process known as "Section 510(k)" review.[139] Significantly, however, the Section 510(k) review is a less demanding process. The applicant does not have to show that its device is safe and effective, but rather must show that it is "substantially equivalent" to a pre-1976 device. Moreover, the FDA spends much less time in reviewing Section 510(k) applications than it does in reviewing PMA requests. A House subcommittee determined that while PMA review takes approximately 1,200 hours to complete, the FDA spends on average only twenty hours in reviewing a "substantially equivalent" request.[140] Finally, Section 510(k) requests have a higher rate of approval. While as much as twenty-five percent of PMA devices are rejected each year, only two percent of Section 510(k) requests are declined annually.[141] In

136. *Id.* (citing *Hearings Before the Subcomm. on Health and the Env't of the House Comm. on Energy & Commerce*, 100th Cong., 1st Sess., 384 (1987) [hereinafter *1987 Hearings*]).

137. *Id.* at 491 n.12 (citing 21 U.S.C. § 360j(g)(3)(A)).

138. *Id.* at 478; 21 U.S.C. §§ 360e(b)(1)(A)–(B).

139. *Id.* (noting that the name for the process is derived from the number of the section from the original Act).

140. *Id.* at 479 (citing *1987 Hearings*, *supra* note 136, at 384).

141. Jonathan S. Kahan, *Premarket Approval Versus Premarket Notification: Different Routes to the Same Market*, 39 FOOD DRUG COSM. L.J. 510, 516-17 (1984).

short, because Section 510(k) review is the least costly, quickest, and most effective method of clearing the FDA's regulatory hurdles, it has become the option of choice for manufacturers. A 1983 House Report, for example, "concluded that nearly 1,000 of approximately 1,100 Class III devices that had been introduced to the market since 1976 were admitted as 'substantial equivalents' and without any PMA review."[142] And while the statistics have improved somewhat, another investigation performed by the House in 1990 found "that 80% of new Class III devices were being introduced to the market through the Section 510(k) process and without PMA review."[143]

Taking advantage of this expedited review process, Medtronic's pacemaker lead—the wire carrying electrical impulses from the pacemaker to the patient's heart—was approved by the FDA as a "substantial equivalent" in October 1982.[144] In 1987, Lora Lohr was implanted with a Medtronic pacemaker containing one of the company's leads, which then failed three years later, "allegedly resulting in a 'complete heart block' that required emergency surgery."[145] In the opinion of Lohr's physician, the lead was defective and the likely cause for the pacemaker's failure.[146] In 1993, Lohr and her husband filed suit against Medtronic in a Florida state court, claiming several different theories of liability, including: (1) negligent design, (2) non-compliance with federal standards, (3) negligent manufacture, and (4) negligent failure to warn.[147] Medtronic defended by claiming that all of the actions were preempted by Section 360k of the MDA, which prohibits any state requirement "which is different from, or in addition to" the requirements under the MDA, and which "relates to the safety and effectiveness of the device."[148]

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142. *Medtronic*, 518 U.S. at 479 (quoting SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, HOUSE COMM. ON ENERGY & COM., MEDICAL DEVICE REGULATION: THE FDA'S NEGLECTED CHILD 34 (Comm. Print 1983)).

143. *Id.* at 479-80 (citing H.R. REP. NO. 101–808, at 14 (1990)); *see also* David A. Kessler, Stuart M. Pape, & David N. Sundwall, *The Federal Regulation of Medical Devices*, 317 NEW ENG. J. MED. 357, 359 (1987) (§ 510(k) notifications are filed for each PMA application; average FDA response to § 510(k) notification is one-fifth the response time to a PMA).

144. *Medtronic*, 518 U.S. at 480.

145. *Id.* at 480-81.

146. *Id.* at 481.

147. *Id.*

148. *Id.* at 481-82 (citing 21 U.S.C. § 360(k)(a) (1995)).

The plurality, in an opinion written by Justice John Paul Stevens and joined by Justices Anthony Kennedy, David Souter, and Ruth Bader Ginsburg, rejected Medtronic's far-reaching claim.[149] In terms of the plain language of the statute, Stevens distinguished the MDA's use of the word "requirement" from the FCLAA's use of the same word, where in *Cipollone* six of the Justices (including himself) found that state "requirements" do include indirect regulations, such as common law liability.[150] For Stevens, the major distinction between the two statutes was in the preclusionary scope of such an interpretation.[151] While in *Cipollone* the plaintiff was not precluded from maintaining some common law causes of action, in the MDA context a similar interpretation of "requirement" would "require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the Lohrs' alleged injuries."[152] Citing the famous preemption case *Silkwood v. Kerr-McGee Corp*,[153] in which a personal injury claim was allowed to go forward under the Atomic Energy Act of 1954, Stevens noted that it is "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[154] Bearing in mind the presumption against preemption, the primary purpose and the legislative history of the MDA, as well as the intended meaning of "requirement" as used in other sections of the stat-

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Section 360k. 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.

§ 360(k)(a) (1995).

149. *Medtronic*, 518 U.S. at 487.

150. *Id.* at 486-91.

151. *See id.* at 487.

152. *Id.* at 488-89.

153. 464 U.S. 238 (1984).

154. *Medtronic*, 518 U.S. at 487 (quoting *Silkwood*, 464 U.S. at 251).

ute,[155] Stevens could find no legislative intent to support such an all-inclusive reach of the preemption clause. As he put it, such an interpretation would "have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation in order 'to provide for the safety and effectiveness of medical devices intended for human use.'"[156]

Medtronic argued that even if all common law actions were not preempted under the MDA, the specific ones alleged here should be.[157] The majority rejected that argument as well. With respect to the defective design claim, all of the Justices found that the pre-market notification process did not impose a "requirement" on the design of Medtronic's pacemaker.[158] The pacemaker was not subjected to any FDA design safety review, but was merely found by the FDA to be "substantially equivalent" to a pre-1976 grandfathered device.[159] Moreover, in granting Section 510(k) approval, the FDA emphasized that it did "not in any way denote official approval of [the] device," and that "any representation that creates an impression of official approval of this device because of compliance with the pre-market notification is misleading and constitutes misbranding."[160] Accordingly, under the MDA's preemption clause, no "requirement" as to the pacemaker's design had been established by the FDA, and the Lohrs, therefore, could not seek a requirement "different from, or in addition to" a requirement which did not exist.[161] In short, as the Court of Appeals below noted, "the 510(k) process is focused on equivalence, not safety."[162]

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155. After examining other sections of the MDA, Stevens concluded that the word "requirement" was intended to prohibit positive laws passed by state legislatures and executives, not common law damage claims awarded by juries or judges. *Id.* at 487.

156. *Id.* (quoting Act of May 28, 1976, Pub. L. No. 94–925, § 1(a), 1976 (90 Stat.) 359 (to be codified at 21 U.S.C. § 360)).

157. *Id.* at 492.

158. *Id.* at 493-94.

159. *Id.*

160. *Id.* at 493 (quoting FDA Substantial Equivalence Letter, 21 C.F.R. § 807.97 (1984)).

161. *Id.* at 500.

162. *Id.* at 493 (quoting Lohr v. Medtronic, 56 F.3d 1335, 1348 (11th Cir. 1995)).

As for the non-compliance with federal standards claim, the Lohrs argued that state requirements alleging that Medtronic did not comply with federal manufacturing and labeling requirements were not preempted if they merely duplicate some or all of the federal standards—another contention that all of the Justices agreed with.[163] To the extent the plaintiff merely sought to enforce federal law, she did not seek to impose requirements "different from, or in addition to," those imposed by the FDA.[164] "The presence of a damages remedy," wrote Justice Stevens, "does not amount to the additional or different 'requirement' that is necessary under the statute; rather, it merely provides another reason for manufacturers to comply with identical existing 'requirements' under federal law."[165] This view was aided by an FDA regulation, which stated that Section 360k "does not preempt State or local requirements that are equal to, or substantially identical to, requirements imposed under the Act."[166]

Finally, and where a difference of opinion did arise among the Justices, the majority allowed the negligent manufacture and failure-to-warn claims to go forward.[167] Here, the Lohrs argued that even if the state requirements are "different from, or in addition to," the federal standards they should still not be preempted, because the federal guidelines are not device-specific, and thus are not requirements "with respect to a device" under the statute.[168] For support of this view, the Lohrs relied upon an FDA regulation, which provides that state requirements are preempted "only" when the FDA has established "specific requirements applicable to a particular device."[169] The majority, following the two-part test established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, deferred to the FDA's construction of the MDA,

163. *Id.* at 497-502.
164. *Id.* at 500-02.
165. *Id.* at 495.
166. *Id.* at 496-97 (quoting 21 C.F.R. § 808.1(d)(2) (1995)).
167. *Id.* at 497.
168. *Id.* at 498-99.
169. *Id.* at 506. The FDA regulation states: "State . . . requirements are preempted only when . . . there are . . . *specific* [federal] requirements applicable to a particular device . . . thereby making any existing *divergent* State . . . requirements applicable to the device different from, or in addition to, the *specific* [federal] requirements." 21 C.F.R. § 808.1(d) (1995) (emphasis added).

since, in its view, the preemption provision was unclear.[170] While the FDA does have Good Manufacturing Practice (GMP) regulations, which establish general requirements for most steps in every device's manufacture, as well as labeling requirements, which require devices to bear various use and warning labels, the majority regarded these requirements as too general and not device-specific, as required by the FDA regulation.[171] Accordingly, the majority ruled that all of the Lohrs' claims could go forward.[172]

The scope of the word "requirement" under the MDA, as applied to the negligent manufacture and failure-to-warn claims, was the major point of disagreement between the majority and dissenting opinions. In an opinion concurring in part and dissenting in part, Justice Sandra Day O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, ruled that the negligent manufacture and failure-to-warn claims were preempted by the MDA.[173] The dissent differed with the majority in its application of the *Chevron* test. According to this test, if the legislative intent is clear, then deference should not be given to an administrative agency's construction of the statute.[174] Relying on the reasoning provided in *Cipollone*, the dissent argued that the MDA's use of the word "requirement" was not ambiguous, and thus some of the common law actions were preempted under the Act.[175] In Justice O'Connor's view, the FDA's GMP regulations impose comprehensive requirements relating to every aspect of the device-manufacturing process.[176] Accordingly, the dissenters argued that "the Lohrs' common-law claims regarding manufacture would, if successful, impose state requirements 'different from, or in addition to,' the GMP requirements, and are therefore preempted."[177] Moreover, the dissent argued that the Lohrs' failure-to-warn claim was preempted by the FDA's labeling requirements.[178]

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170. *See Medtronic*, 518 U.S. at 495-97 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).
171. *Id.* at 497-500.
172. *Id.* at 503.
173. *Id.* at 509-14.
174. *Chevron*, 467 U.S. at 844-45.
175. Cippollone v. Liggett Group, Inc., 505 U.S. 504, 571 (1992).
176. *Id.* at 513.
177. *Id.* at 514.
178. *Id.*

The two significant votes in *Lohr* were those of Justices Kennedy and Breyer. Justice Kennedy provided a pivotal vote allowing the Lohrs' common law claims to go forward—a position similar to the one he took in *Cipollone*.[179] Justice Breyer's concurring opinion, however, might turn out to be the more important. While Breyer agreed with the majority that all of the common law actions should not be preempted in this case, he disagreed with any language in the plurality decision suggesting that the MDA could not preempt common law suits.[180] He, like the dissenters, felt that the word "requirement" should be read to include conflicting theories of state common law.[181] Here, however, he could find no actual conflict between the federal requirements and the Lohrs' common law claims.[182] Accordingly, at least five of the *Lohr* Justices were of the view that Section 360k of the MDA does preempt some common law actions.[183] Indeed, Justice Breyer, in rejecting the plurality's reading of the preemption provision, maintained that "future incidents of MDA pre-emption of common-law actions will [not] be 'few' or 'rare.'" [184]

The conservatives cannot claim substantial victories in the aforementioned express preemption cases, but the decisions should not be read as conservative defeats either. In *Cipollone*, six of the Justices concluded that the word "requirement" should be read to include common law damages awards.[185] Although it was not a products liability case, the conservatives also won a major victory in *Lorillard*, where the five-justice conservative bloc ruled that the states did not have the ability to regulate cigarette advertising under the FCLAA.[186] The impact of *Lohr* will depend on how Justice Breyer votes in subsequent cases. Many new medical devices will go through the Section 510(k) pre-market notification process, and it is certainly possible that a majority of the Justices will find some common law actions preempted under the MDA. Moreover, in the aftermath of *Medtronic*, the federal courts of ap-

179. *Id.* at 485.
180. *Id.* at 503.
181. *Id.* at 504.
182. *Id.* at 508.
183. *See id.* at 503, 509, 511.
184. *Id.* at 508.
185. *Id.* at 521.
186. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

peal have reached inconsistent results with respect to the MDA's preemption of failure-to-warn claims,[187] and in the only case in which the Supreme Court has reexamined the scope of the MDA's preemption provision, the Justices ruled unanimously that a "fraud-on-the-FDA" claim conflicted with the FDA's pre-market approval procedures.[188] In the next section, we shall see that the conservatives have had more success in implied preemption cases, where there is substantially more discretion for the Justices to substitute their own policy views for those of Congress.

B. *Implied Preemption*

1. *Passive Restraints*

At issue in *Geier v. American Honda Motor Co.* was whether the 1984 version of the Federal Motor Vehicle Safety Standard 208 (FMVSS 208), dealing with occupant crash protection, preempts state "no-air bag" tort claims based on common law theories of negligence and design defect.[189] The National Traffic and Motor Vehicle Safety Act (NTMVSA or Safety Act) was enacted in 1966 to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents,"[190] and delegated the power to create federal motor vehicle safety standards to the Department of Transportation (DOT). Specifically, Congress authorized DOT to provide "minimum" safety standards for all automobiles to be sold in the United States.[191]

DOT's promulgation of FMVSS 208 has a long and convoluted history. Beginning in 1967, DOT simply required that all automobiles be equipped with manual seatbelts.[192] Upon discovering that people were not buckling up, however, DOT then required the in-

187. *Compare* Papike v. Tambrands, Inc., 107 F.3d 737, 742 (9th Cir. 1997) (finding state failure-to-warn claims preempted under FDA regulations), *with* Oja v. Howmedica, Inc., 111 F.3d 782, 789 (10th Cir. 1997) (holding state failure-to-warn claims not preempted by FDA regulations).

188. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 350 (2001).

189. 529 U.S. 861, 874 (2000).

190. 15 U.S.C. § 1381 (1988) (repealed 1994).

191. 15 U.S.C. § 1391(2) (1988) (repealed 1994) (defining "safety standard" as a "minimum standard for motor vehicle performance, or motor vehicle equipment performance").

192. Motor Vehicle Safety Standard No. 208, 32 Fed. Reg. 2415 (Feb. 3, 1967).

stallation of passive restraint devices, such as automatic seatbelts and airbags.[193] Administrative rulemaking involves political choices, and the regulation of passive restraints is certainly no exception. Immediately before leaving office, President Gerald Ford's administration adopted a version of FMVSS 208 that afforded automobile manufacturers a choice between installing manual seatbelts and passive restraints.[194] In July 1977, Jimmy Carter's administration reversed course by requiring the installation of passive restraint devices in all automobiles.[195] That rule was subsequently rescinded by Ronald Reagan's administration in October 1981, leading to a confrontation at the high court, where the Justices struck down the rescission order as arbitrary and capricious under the Administrative Procedure Act.[196] Finally, in July 1984, then-Secretary of Transportation Elizabeth Dole adopted a safety standard allowing for the gradual phase-in of passive restraints, which is the subject of this litigation.[197] According to this implementation plan, vehicle manufacturers were required to equip a minimum of ten percent of their new passenger cars with passive restraints by 1987, a percentage that would then grow in three annual stages until September 1989, when one hundred percent of all new cars had to be equipped with such devices.[198] Among the many reasons cited for the gradual implementation plan[199] were the needs to encourage public acceptance of airbag technology and to promote experimentation with better passive restraint systems.[200] Such a gradual plan, DOT believed, would give auto manufacturers a choice in the type of passive restraints to install in their cars, as well as flexibility in equipping their cars with passive restraints over a period of time.[201]

193. 35 Fed. Reg. 16927 (Oct. 21, 1970).
194. 42 Fed. Reg. 5071 (Jan. 27, 1977) (regulation issued on January 19, 1977).
195. 42 Fed. Reg. 34,289 (July 5, 1977).
196. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983).
197. 49 Fed. Reg. 28,962 (July 17, 1984).
198. *Id.*
199. Geier v. Am. Honda Motor Co., 529 U.S. 861, 877-84 (2000) (discussing the many factors considered by DOT in promulgating the 1984 version of the FMVSS).
200. *Id.* at 900 (citing Geier v. Am. Honda Motor Co., 166 F.3d 1236 (D.C. Cir. 1999)).
201. *Id.* at 900-01.

In 1992, Alexis Geier was seriously injured when the 1987 Honda Accord she was driving collided with a tree.[202] The car was equipped with manual shoulder and lap belts, which Geier had buckled up at the time.[203] However, the car was not equipped with airbags or other passive restraint devices.[204] It is undisputed that American Honda Motor Company (Honda) was in full compliance with DOT's minimum standard at the time; ten percent of its vehicles were equipped with passive restraints.[205] Geier and her parents brought suit under District of Columbia tort law, alleging that Honda was negligent in not equipping the Accord with a driver's side airbag.[206] Honda defended by arguing that the suit was expressly and impliedly preempted under the NTMVSA and, in particular, the 1984 version of FMVSS 208.[207] The NTMVSA's express preemption provision states in pertinent part:

> 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.[208]

Relying upon the Court's decision in *Cipollone*, Honda claimed that the NTMVSA's prohibition of different automobile "safety standards" by the states, like the FCLAA's prohibition of different state "requirements" for the labeling and advertisement of cigarettes, should be read to preclude common law tort actions against automobile manufacturers that are in compliance with the minimum standards of FMVSS 208.[209] However, unlike the statute in *Cipollone*, the NTMVSA also contained a saving clause, explicitly exempting common law actions from the preemption provision: "Compliance with any Federal motor vehicle safety standard is-

202. *Id.* at 865.
203. *Id.*
204. *Id.*
205. *Id.* at 879.
206. *Id.* at 865.
207. *Id.* at 867-68.
208. 15 U.S.C. § 1392(d) (1988) (repealed 1994).
209. *Geier*, 529 U.S. at 867.

sued under this subchapter does not exempt any person from any liability under common law."[210]

The central question for the Court was how to square NTMVSA's express preemption provision with its saving clause. In an opinion by Justice Stephen G. Breyer, who was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy, the majority ruled that Geier's common law suit was preempted by the NTMVSA and the 1984 version of the FMVSS 208.[211] According to Breyer, while the NTMVSA did not expressly preempt the common law actions, it, along with FMVSS 208, did impliedly preempt them under the Court's conflict preemption jurisprudence.[212] As for the express preemption claim, the Court found that the saving clause did preserve some common law actions.[213] Without making fine distinctions between the word "requirement" under the FCLAA and the phrase "safety standard" under the NTMVSA, the majority found that the express preemption provision must be read in conjunction with the saving clause, and that that clause clearly contemplates the ability to bring some common law actions under state law.[214] As a matter of statutory interpretation, Justice Breyer argued that a statute's inclusion of a saving clause requires that a preemption provision be read narrowly.[215] To read the preemption provision as an absolute ban on common law actions, he reasoned, would be to ignore the express language of the saving clause.[216]

At the same time, the majority found that the saving clause did not bar the Court from applying its conflict preemption jurisprudence to determine whether common law actions would frustrate FMVSS 208's purpose of having a gradual implementation of passive restraint devices—a conclusion seemingly at odds with the rules of construction announced by the Court in *Cipollone*.[217] After

210. 15 U.S.C. § 1397(k) (1988) (repealed 1994).
211. *Geier*, 529 U.S. at 874-75.
212. *Id.* at 867-69.
213. *Id.* at 869-74.
214. *Id.* at 870-74.
215. *Id.* at 869-70.
216. *Id.* at 870.
217. *Id.* at 874-82. Recall that in *Cipollone,* seven Justices agreed that if Congress enacted a provision defining the preemptive reach of a statute, then all doctrines of implied preemption were not to be considered. 505 U.S. 504, 517 (1992).

considering various sources of administrative intent—including DOT's litigation strategy since 1989 concerning the federal safety standard, the regulatory history of passive restraint devices, and DOT's commentary on the 1984 version of FMVSS 208—the majority determined that "no-air bag" lawsuits would frustrate the overall purpose of FMVSS 208 by penalizing automobile manufacturers for not doing something they were not required to do.[218] The duties imposed under common law, Justice Breyer reasoned, would require that all 1987 passenger cars be equipped with an airbag, which is an outcome at odds with the basic purposes of DOT's gradual phase-in program.[219] Justice Breyer also stressed Congress's goal of uniformity in automobile safety standards when it passed NTMVSA, and that such an objective would be frustrated by multiple and varied common law actions:

> [T]he pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create.... This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.[220]

The dissent, written by Justice John Paul Stevens, and joined by Justices David Souter, Clarence Thomas, and Ruth Bader Ginsburg, accused the majority of judicial legislating.[221] At the outset of his opinion, Justice Stevens ironically proclaimed: "This is a case about federalism," [222] and about "respect for 'the constitutional role of the States as sovereign entities.'"[223] In response to Honda's claim that the Geiers' common law actions were expressly

218. *Geier*, 529 U.S. at 885-86.
219. *Id.*
220. *Id.* at 871.
221. *Id.* at 888.
222. *Id.* at 887 (quoting Coleman v. Thompson, 501 U.S. 722, 726 (1991)).
223. *Id.* at 887 (quoting Alden v. Maine, 527 U.S. 706, 713 (1999)).

preempted, Justice Stevens distinguished Congress's use of "requirement" under the FCLAA from "safety standard" under the NTMVSA.[224] According to Stevens, unlike "requirement," the ordinary meaning of "safety standard," as well as its usage in other sections of the NTMVSA, indicates that Congress intended to preclude positive enactments by legislatures and administrative agencies, not "case specific decisions by judges and juries that resolve common-law claims."[225] Second, in other cases in which the Court has found some common law actions superseded by broad preemptive language such as "requirement," the statute did not include a saving clause.[226] The saving clause here explicitly exempts common law liability from the scope of the preemption provision.[227] As a result, the text of the statute itself establishes that the NTMVSA did not intend to expressly preempt common law tort claims.[228]

Justice Stevens, however, saved his most biting criticism of the majority's analysis for his discussion of implied conflict preemption principles. As an initial matter, Justice Stevens did not believe that the application of such principles was appropriate in this case.[229] Because the statute included a saving clause explicitly exempting common law claims from the scope of the preemption provision, he argued that Honda had to satisfy a "special burden" before the Court would apply its implied conflict preemption analysis.[230] Honda rested its implied preemption argument on conflict "obstacle" grounds (i.e., that "no-air bag" suits would frustrate the basic purposes of FMVSS 208).[231] For support of this contention, Honda relied upon various forms of administrative intent, including DOT's litigation strategy involving FMVSS 208, the history of passive restraint regulation generally, and DOT's commentary on the final version of the federal safety standard.[232] Justice Stevens argued that these sources of law were not sufficient to overcome the presumption against preemption when a statute

224. *Id.* at 896.
225. *Id.*
226. *Id.* at 897- 898.
227. *Id.* at 898.
228. *Id.*
229. *Id.* at 887-88.
230. *Id.* at 898.
231. *Id.* at 899.
232. *Id.* at 896.

contains a saving clause.[233] He could find no prior case where the Court had applied implied conflict analysis solely on the basis of administrative intent.[234] In contrast to congressional statutes or administrative regulations, where the Court had previously applied conflict "obstacle" analysis, administrative intent is not subject to the formal rules and procedures of the democratic process. None of the sources of law relied upon by Honda, for example, were ever promulgated in the *Federal Register*, and thus the public and the states did not have an opportunity to respond to them through a formal notice-and-comment period. In addition, Stevens pointed out that the sources of administrative intent relied upon by Honda were inconsistent.[235] For example, in the government's brief it conceded that "[a] claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car . . . would not necessarily frustrate Standard 208's purposes."[236] In light of such weak evidence for federal preemption, Stevens rejected the Court's reliance on conflict "obstacle" preemption analysis.[237]

Even if conflict preemption principles were to apply in this case, however, Stevens contested Honda's and the majority's claim that common law tort actions would frustrate the national purpose of a gradual phase-in of airbags.[238] First, prior to the adoption of the 1984 version of the FMVSS, when auto manufacturers were not required to install passive restraint devices, he could find no case raising a "no-air bag" claim.[239] Accordingly, since the likelihood of such suits would now be even less for those automobile manufacturers that are in compliance with the minimum federal safety standard, Stevens argued that automobile manufacturers would not feel a significant liability inducement to install more airbags than required *after* the adoption of the 1984 federal standard.[240] Second, due to the protracted nature of tort litigation, the

233. *Id.* at 910.
234. *Id.*
235. *Id.* at 911.
236. *Id.* at 904-05 (citing Brief for United States as *Amicus Curiae* at 26 n.23).
237. *Id.* at 905-06.
238. *Id.* at 905.
239. *Id.* at 901.
240. *Id.*

phase-in period for the installation of passive restraints will have ended before the purpose of FMVSS 208 could be frustrated by tort liability suits, and even if a "no-air bag" lawsuit could be brought before the phase-in period ended, under the 1984 version of FMVSS 208 auto manufacturers still had the choice to go with a passive restraint device other than an airbag.[241] Accordingly, "tort liability would not frustrate the Secretary [of Transportation's] desire to encourage both experimentation with better passive restraint systems and public acceptance of airbags."[242] Third, Justice Stevens contended that the majority overlooked the basic fact that FMVSS 208 was only a minimum standard and that the Secretary of Transportation favored a more rapid increase of passive restraints.[243] For support of this view, he noted that DOT did not place a ceiling as well as a floor on the annual increase in the required percentage of passive restraints.[244] Consequently, he contended that "[t]he possibility that exposure to potential tort liability might accelerate the rate of increase would actually further the only goal explicitly mentioned in the standard itself: reducing the number of deaths and severity of injuries of vehicle occupants."[245] As Stevens saw it, Congress has done nothing to prevent the imposition of higher standards of care on automobile manufacturers through traditional common law actions.[246] Without expressing a view on whether or not the parties in this case should prevail on the merits, he contended that the Geiers should have their day in court.[247] "The presumption [against preemption]," wrote Stevens:

> [S]erves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes—i.e., that state law is pre-empted if it "stands as an obsta-

241. *Id.* at 901-02.
242. *Id.* at 903.
243. *Id.*
244. *Id.* at 903-04.
245. *Id.*
246. *Id.* at 904.
247. *Id.* at 913.

> cle to the accomplishment and execution of the full purposes and objectives of Congress."[248]

The majority's decision in *Geier* is unsatisfying for several reasons. First, it conducts absolutely no textual analysis of the statute's language. If the Court engaged in such an analysis, it would have discovered that the saving clause preserves "liability under the common law." The ordinary meaning of "safety standard" under the NTMVSA, as well as its usage in other sections of the statute, is different from what Congress intended by "requirement" under the FCLAA, and the statute defines "standard" as a "minimum."[249] Not only, then, can it be said that "safety standard" differs from "requirement" in limiting the preemption provision to positive regulations passed by legislatures and administrative agencies, but the saving clause would also mean that even if an auto manufacturer complied with the "minimum" federal standard, it could still be held liable under the common law. Auto manufacturers would only have a preemption defense in a tort action brought against them if the car in which a person was injured was equipped with a passive restraint. The NTMVSA, in short, establishes minimum (not maximum) standards of safety compliance, and the saving clause preserves common law liability. By immediately shifting its analysis from an examination of NTMVSA's express language to the Court's implied conflict preemption principles, the majority does an end-run around the plain meaning of the saving clause. In essence, the saving clause is read out of the statute altogether. The failure to conduct a serious examination of the text of the statute is particularly curious in that several of the Justices in the majority (most notably, Justice Scalia[250]) claim to be textualists or adherents of the plain meaning of statutes.[251]

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248. *Id.* at 907-08 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

249. *Id.* at 889 (quoting 15 U.S.C. § 1391(2) (2000)).

250. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (defending a plain meaning approach to statutory interpretation).

251. Justice Scalia's and Justice Breyer's votes in *Geier* are interesting in another respect. These Justices, both former administrative law professors, participated together in a conference before their appointments to the Supreme Court, during which the Court's decision in *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), was extensively discussed. Both disapproved of the Court's decision in that case,

The Court's inadequate examination of the plain language of the statute is only exacerbated by its reliance on administrative intent to find the common law claims preempted under an implied conflict "obstacle" theory. Aside from the fact that such administrative intent is often ambiguous and conflicting—sources of law, in Justice Stevens' words, that "are even more malleable than legislative history"[252]—the majority's use of administrative intent to preempt common law actions raises serious questions about democratic accountability. Neither the public nor the states had an opportunity to respond to the sources of intent relied upon by Honda and the majority. Moreover, as is well known, administrative agencies can be captured by pressure groups that are seeking to serve the interests of their clients. The car industry, for example, had much to gain if it was not required to install airbags in all of its cars by 1987, and it is safe to assume that its views were made known to DOT representatives in 1984 when proposed changes to the FMVSS 208 were under consideration. In fact, one of the major reasons why DOT went along with the gradual implementation plan was a concern about the costs of installing airbags in all passenger vehicles.[253] When seen in this light, administrative intent should not be made to override the clear language of a congressional statute. The presumption against preemption requires that a formalized agency rule, after a notice-and-comment period has taken place, be promulgated before a court can apply conflict "obstacle" preemption principles. One of the major consequences of *Geier* will be the increasing importance of administrative agencies to deprive people of traditional common law

which struck down the Reagan administration's rescission of the FMVSS 208 passed under the Carter administration, and each supported a broad scope of administrative discretion in rulemaking. *Proceedings of the Forty-Fifth Judicial Conference of the District of Columbia Circuit,* 105 F.R.D. 251, 323-46 (1984); *see also* Antonin Scalia, *Rulemaking as Politics,* 34 (No. 3) ADMIN. L. REV. v, v-xi (1982); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 363-98 (1986). One wonders if these two Justices' intimate knowledge of and familiarity with the administrative background of FMVSS 208 shaped their views on how to decide the conflict preemption issue in *Geier.*

252. *Geier*, 529 U.S. at 911.

253. *Id.* at 891.

remedies.[254] If manufacturers comply with the minimum safety standards promulgated by administrative agencies, they will be shielded from tort liability. The majority's use of conflict "obstacle" preemption analysis in the face of a saving clause is unprecedented, and the Justices revisited the same issue during its 2002-03 term, this time ruling against preemption when the administrative agency decided not to promulgate a regulation requiring a particular safety device.[255]

2. *Government Contractor Defense*[256]

Another important implied preemption decision came in *Boyle v. United Technologies Corp.*,[257] where the issue before the Court was whether government contractors could share the federal government's sovereign immunity when they execute design specifications developed or approved by the federal government.[258] Traditionally, government contractors who have strictly complied with government design specifications have been able to plead two types of defenses for any damages resulting from such specifications: (1) the government agency defense, and (2) the contract specification defense. Under the former, courts have applied prin-

254. *See* Alexander K. Haas, *Chipping Away at State Tort Remedies Through Pre-emption Jurisprudence:* Geier v. American Honda Motor Co., 89 CAL. L. REV. 1927 (2001).

255. *See* Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (holding that neither the Federal Boat Safety Act of 1971 nor the decision of the Coast Guard in 1990 not to promulgate a regulation requiring propeller guards on motorboats preempts a state "no-propeller guard" lawsuit).

256. This section has been substantially reproduced, with permission, from James B. Staab, *The Tenth Amendment and Justice Scalia's "Split Personality,"* 16 J.L. & POL. 231, 305-14 (2000).

257. 487 U.S. 500 (1988).

258. Sovereign immunity is the common law concept that "the king can do no wrong," and was first recognized by the Supreme Court in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821), where Chief Justice John Marshall claimed that no suit could be commenced against the United States without its consent. While much of this immunity has been taken away by the Federal Tort Claims Act of 1946, federal officials are still immune from lawsuits where the cause of action is based on the exercise of, or the failure to exercise, a discretionary function or duty. In its capacity as contractor, the United States can thus escape from liability in state products liability suits by asserting sovereign immunity as an affirmative defense. The extent to which this defense immunizes independent contractors who perform work for the federal government from similar types of claims is the central issue concerning the government contractor defense.

ciples of agency to shield government contractors from liability when the contractor acts pursuant to the authority and direction of the federal government.[259] This defense is rarely invoked and has been applied only in public works cases.[260] It also suffers from a severe limitation: it does not cover government contractors that are not employees of the federal government.

The contract specification defense shields government contractors from ordinary negligence claims. If a contractor (private or public) manufactures products to the order of another party, it will not be liable for any damages caused by the product's design unless the specifications provided were so clearly defective and dangerous that a reasonably prudent contractor should have realized that the product was unsafe.[261] This defense has been invoked mostly in public works cases,[262] but also (with limited success) in products liability suits.[263] The problem in the latter types of cases has been the advent of strict liability, which allows plaintiffs to recover from government contractors even if they are not responsible for the defectively designed equipment that caused their injuries.

In response to the limitations of these two defenses, the federal courts fashioned a new defense: the government contractor defense.[264] Under this defense, courts have recognized that if a

259. The effect of this defense is to impute the negligence of the contractor to the government, which is immune from suit. *See, e.g.*, Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18 (1940) (holding a construction contractor that built dikes along the Missouri River pursuant to the orders of the federal government was shielded from liability for negligently eroding ninety-five acres of private property).

260. *See, e.g.*, Merritt, Chapman, & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 15-16 (9th Cir. 1961); Ryan v. Feeney & Sheehan Bldg. Co., 145 N.E. 321, 321-22 (N.Y. 1924).

261. The effect of this defense is to avoid shifting the government's liability to the contractor. *See, e.g.*, Bynum v. FMC Corp., 770 F.2d 556, 560 (5th Cir. 1985) (discussing contractor specification defense).

262. *See, e.g.*, *Merritt, Chapman, & Scott Corp.*, 295 F.2d at 14, 15-16; *Ryan*, 145 N.E. at 321, 321-22.

263. *See, e.g.*, Challoner v. Day & Zimmerman, Inc., 512 F.2d 77, 82 (5th Cir. 1975); Garrison v. Rohm & Haas Co., 492 F.2d 346, 351, 353 (6th Cir. 1974); Spangler v. Kranco, Inc., 481 F.2d 373, 375 (4th Cir. 1973); Johnston v. United States, 568 F. Supp. 351, 353-54 (D. Kan. 1983).

264. *See, e.g.*, Tozer v. LTV Corp., 792 F.2d 403, 405, 408-09 (4th Cir. 1986); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985); Koutsoubos v. Boeing Vertol, 755 F.2d 352, 355 (3d Cir. 1985); Tillet v. J.I. Case Co., 756 F.2d 591, 596 (7th Cir. 1985); Bynum v. FMC Corp., 770

contractor manufactures a product according to the government's specifications, that contractor should be entitled to share in the government's sovereign immunity defense and thus be protected to the same extent that the government would have been protected had it manufactured the product itself.[265] Significantly, government contractors can plead this defense even if they are not employees of the government, and since the defense is based on a shared sovereign immunity concept, they will be immune from all theories of tort liability.[266] In recent years, this defense has been applied almost exclusively to the area of military procurement contracts, and thus is sometimes referred to as the "military contractor defense."[267] Despite a flurry of lower federal court decisions on the subject, the Supreme Court had not weighed in on the government contractor defense. Since there was a split in the circuits over which test to apply in such cases, the Court took the opportunity to do so by granting certiorari in *Boyle v. United Technologies Corp.*[268]

On April 27, 1983, a United States Marine helicopter crashed off the coast of Virginia Beach, Virginia, carrying four crew members.[269] Three of the crew members were able to escape from the helicopter without serious injury, but the co-pilot, Lieutenant David A. Boyle, could not open his escape hatch and drowned.[270]

F.2d 556, 574 (5th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983); *In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1054-55 (E.D.N.Y. 1982).

265. Besides an argument based on what might be called a fairness principle, there have been a number of other rationales given for the government contractor defense: (1) to hold military contractors liable for design defects would subvert the government's immunity—i.e., the costs of design defect suits will be passed along to the government; (2) holding military contractors liable for design defects "would thrust the judiciary into the making of military decisions" in violation of the doctrine of separation of powers; (3) that military contractors are often unable to negotiate over specifications which, due to defense requirements, involve risks that would be deemed unreasonable for ordinary consumer goods; and (4) that the defense encourages government contractors to work closely with government officials in the development of equipment. *McKay*, 704 F.2d at 449-50.

266. *See id.* at 451 (holding a contractor immune even where the government only approved design specifications developed by the contractor).

267. Wayne Lindsey Robbins, Jr., *The Government Contract Defense After* Boyle v. United Technologies Corporation, 41 BAYLOR L. REV. 291, 309 (1989).

268. 487 U.S. 500, 504, 512-13 (1988).

269. Boyle v. United Techs. Corp., 792 F.2d 413, 414 (4th Cir. 1986).

270. *Id.*

Boyle's father brought suit against the manufacturer of the helicopter, the Sikorsky Division of United Technologies Corporation (Sikorsky), alleging two theories of liability under Virginia tort law.[271] First, he claimed that Sikorsky negligently repaired the helicopter's automatic flight control system, resulting in the pilot's losing control of the helicopter and its eventual crash into the ocean.[272] Second, he claimed that Sikorsky defectively designed the co-pilot's emergency escape system: "the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch handle was obstructed by other equipment."[273] A federal district court jury returned a general verdict in favor of Mr. Boyle and awarded him $725,000. The Fourth Circuit Court of Appeals, however, reversed.[274] It found, in part, that Sikorsky was immune from the state tort claims because it satisfied the "military contractor defense," which that court recognized the same day in *Tozer v. LTV Corp.*[275] Mr. Boyle appealed this ruling.

In a five-to-four decision, Justice Scalia, who was joined by Chief Justice Rehnquist, and Justices White, O'Connor, and Kennedy, affirmed the lower court's judgment.[276] As framed by the Court, there were two issues for it to decide. First, and most important, was whether there was a basis in law for the federal courts to create a government contractor defense. As pointed out by Justice Brennan in dissent, despite repeated requests for it to do so, Congress had refused to legislate such a defense.[277] Justice Scalia, however, held that the federal courts had the authority to fashion such a defense under federal common law.[278] Even "in the absence of legislation specifically immunizing Government contractors from liability for design defects,"[279] he ruled that there are

271. *Id.* at 413-14.
272. *Boyle*, 487 U.S. at 503.
273. *Id.*
274. *Id.*
275. 792 F.2d 403, 408-09 (4th Cir. 1986).
276. The Court did not, however, agree with some of the court of appeals' analysis, and thus remanded the case for clarification of its ruling. *Boyle*, 487 U.S. at 514.
277. *Id.* at 515 n.1 (Brennan, J., dissenting).
278. *Id.* at 504.
279. *Id.*

a few areas of "uniquely federal interest"[280] where the federal courts have preempted state law under federal common law.[281] Scalia mentioned two such areas of uniquely federal interest: (1) obligations to, and rights of, the United States under its contracts, and (2) civil liability of federal officials for actions taken in the course of their duty.[282] Scalia had to concede, however, that neither of these two examples of uniquely federal interest were at issue here, since neither the federal government, nor one of its officials, was a party to this lawsuit. Nevertheless, Scalia extended these two earlier examples of "peculiarly federal concern" to cover government contractors. According to Scalia, "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."[283] It is also apparent that the Court was concerned about the ability of the federal government to procure military contracts in the future if suits like this one were permitted to go forward. "The imposition of liability on Government contractors," Scalia reasoned, "will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected."[284]

Significantly, Justice Scalia tied the justification for the government contractor defense to the discretionary function exception of the Federal Tort Claims Act (FTCA) of 1946—a point not even argued by counsel in the case.[285] This exception immunizes federal

280. *Id.* (quoting Texas Instruments, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 640 (1981)).

281. *Id.*

282. *Id.* at 504-05.

283. *Id.* at 512.

284. *Id.* at 507.

285. Scalia raised this issue several times during oral argument, but counsel for Sikorsky (as well as for the government) explicitly disclaimed reliance on the discretionary function exception of the FTCA. See Reargument in Boyle v. United Techs. Corp., 487 U.S. 500 (1988) (No. 86–492). In making this point, Scalia may have relied upon a recent law review article contending that the government contractor defense was more soundly based on the FTCA discretionary function exception than on the *Feres* doctrine. *See* Richard Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 47 OHIO ST. L.J. 985 (1986). In any event, resting the de-

officials from liability arising from the exercise of, or the failure to exercise, a discretionary function or duty. The purpose of the defense is to prevent litigants from bringing suits against the government in order to challenge the correctness of policy decisions by members of the executive branch. Interestingly, all of the federal courts that had previously recognized the government contractor defense had based it not on the discretionary function exception of the FTCA, but on the *Feres* doctrine.[286] This doctrine, which originated in *Feres v. United States,* immunizes the federal government from suits brought by servicemen who are injured in the line of duty. [287] Unlike the discretionary function exception of the FTCA, where the courts must determine whether the activity in question involved a policy choice by a government official in order for the sovereign immunity defense to apply, the *Feres* doctrine provides blanket immunity in the narrow area of service-related suits.[288] Although several sketchy rationales have been given for this doctrine, the most common construction of the decision is that such immunity will preserve military discipline.[289]

Justice Scalia explicitly rejected grounding the government contractor defense on the *Feres* doctrine, finding that such a rationale would make the defense both too broad and too narrow.[290]

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fense on the discretionary function exception of the FTCA does substantially expand the scope of the government contractor defense. *See infra* note 310 and accompanying text.

286. *See, e.g.*, Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983).

287. 340 U.S. 135 (1950).

288. This immunity has since been expanded to suits brought by servicemen against government contractors in which the United States is named as a third-party defendant. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977) (holding that the rights of a third party to recover in an indemnity action against the United States must be limited).

289. *See* United States v. Johnson, 481 U.S. 681, 691 (1987).

> Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.

Id.

290. *Boyle*, 487 U.S. at 510. Justice Scalia might have also avoided basing the government contractor defense on the *Feres* doctrine because, only one year earlier, he had sharply criticized the Court's decision recognizing such

It would be too broad because it would absolve government contractors from suits by military personnel even when no policy judgment has been made by the federal government.[291] It would be too narrow because it arbitrarily limits immunity to suits brought by servicemen and not by civilians that might be the incidental victims of poorly designed equipment.[292] In Scalia's view, the discretionary function exception of the FTCA conforms better with the central purpose of the government contractor defense: it prevents injured parties from indirectly questioning the wisdom of governmental decisions by bringing tort suits against the contractors that implement those decisions.[293]

The second issue for the Court was the proper test to apply in government contractor cases.[294] On this question, there was a split among the circuits. Most circuits followed the three-part test of *McKay v. Rockwell International Corp.*, which absolves government contractors from liability for design defects in military equipment under state law if: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[295] Because this test only requires that the government approve, not formulate, the design feature in question, it is fairly easy to satisfy. In modern practice, where considerable discretion is given to private contractors that design equipment for the federal government, this test basically requires a rubber stamp from some federal official.[296]

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an immunity. *See Johnson*, 481 U.S. at 692-93 (Scalia, J., dissenting) (arguing that the *Feres* doctrine runs afoul of the plain language of the Federal Tort Claims Act of 1946).

291. *Boyle*, 487 U.S. at 510. For example, the *Feres* rationale for the defense would immunize government contractors from liability when the federal government buys a helicopter from stock that is already equipped with a defective escape hatch. *Id.*

292. *Id.* at 510-11.

293. *Id.* at 511-12.

294. *Id.* at 509-13.

295. 704 F.2d 444, 451 (9th Cir. 1983); *see also* Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986); Koutsoubos v. Boeing Vertol, 755 F.2d 352, 354-55 (3d Cir. 1985); Bynum v. FMC Corp., 770 F.2d 556, 574 (5th Cir. 1985); Tillet v. J.I. Case Co., 756 F.2d 591, 598-99 (7th Cir. 1985).

296. *See* Harry A. Austin, Boyle v. United Technologies Corporation: *A Questionable Expansion of the Government Contract Defense*, 23 GA. L. REV. 227, 243 (1988) ("Modern weapons procurement commonly proceeds with the

The second test derives from the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, which precludes suits against government contractors if: (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; or (2) the contractor warned the government in a timely fashion about the risks of the design and notified it of alternative designs reasonably known by it, and the government, although forewarned, authorized the contractor to proceed with the dangerous design anyway.[297] Because the contractor must prove that it did not participate (or participated only minimally) in the design of the product, the *Shaw* test is more difficult to satisfy.

Justice Scalia ruled in favor of the *McKay* test, because the *Shaw* test "is not a rule designed to protect the federal interest embodied in the 'discretionary function' exemption [of the FTCA]."[298] Even if the contractor ultimately develops the design, Scalia argued that it may still "reflect a significant policy judgment by government officials."[299] Moreover, because he believed that the *Shaw* test penalizes contractors who do not identify all known design defects to the government, it would deter "active contractor participation in the design process."[300]

In dissent, Justice William J. Brennan, who was joined by Justices Thurgood Marshall, Harry Blackmun and John Paul Stevens, accused the majority of reinventing federal common law.[301] Brennan pointed out that Congress had been asked on several occasions to legislate a government contractor defense, but had refused to do so.[302] In the absence of such authorization, he claimed that the Court lacked the authority to fashion such an immunity:

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government informing the contractor of its needs, after which the government either works with the contractor to develop a design or merely lets the contractor design the equipment.").

297. 778 F.2d 736, 745-46 (11th Cir. 1985).

298. Boyle v. United Techs. Corp., 487 U.S. 500, 513 (1988).

299. *Id.*

300. *Id.*

301. *Id.* at 518-19.

302. *Id.* at 515 n.1. Brennan accused the majority of the worst form of judicial legislating: "The Court—unelected and unaccountable to the people—has unabashedly stepped into the breach to legislate a rule denying Lt. Boyle's family the compensation that state law assures them. This time the injustice is the Court's own making." *Id.* at 515-16.

> Were I a legislator, I would probably vote against any law absolving multibillion dollar private enterprises from answering for their tragic mistakes, at least if that law were justified by no more than the unsupported speculation that their liability might ultimately burden the United States Treasury. Some of my colleagues here would evidently vote otherwise (as they have here), but that should not matter here. We are judges not legislators, and the vote is not ours to cast.[303]

Brennan also challenged the leading rationale behind the government contractor defense: that the cost of products liability suits will be passed along to the government, thereby affecting its ability to administer public programs.[304] Brennan doubted that this actually happens in the real world, but noted that, in any event, the Court had rejected such reasoning for immunizing government contractors in previous cases.[305] He also argued that even if it could be assumed that the federal government will indirectly pay the cost of successful suits brought against government contractors, the marginal benefit of such a defense should not override the central purpose of the tort system in the United States: that the quality of products will be ensured if manufacturers are held responsible for the injuries resulting from their defectively designed products.[306] As Brennan saw it, this novel, judicially created, sovereign immunity defense, represents a substantial windfall to government contractors.[307] "If the system is working as it should," he reasoned, "Government contractors will design equipment to avoid certain injuries (like the deaths of soldiers or Government employees), which would be certain to burden the Government."[308] Thus, tort liability will not "result in a net burden on the Government (let alone a clearly excessive net burden)"; rather, it will result in "a net gain."[309]

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303. *Id.* at 531.
304. *Id.* at 522.
305. *Id.* at 522-26.
306. *Id.* at 530.
307. *Id.* at 530-31.
308. *Id.* at 530.
309. *Id.*

Finally, Brennan raised concerns about the scope of the majority's government contractor defense.[310] Since the defense was grounded on the discretionary function exception of the FTCA, Brennan noted that the majority expanded the defense beyond what the lower federal courts had previously recognized in two ways. First, the defense now covers defectively designed *commercial* equipment produced for the government.[311] Second, it shields government contractors from civilian claimants who are injured by defectively designed products.[312] As Brennan put it:

> It applies not only to military equipment like the CH–53D helicopter, but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans – from NASA's Challenger space shuttle to the Postal Service's old mail cars. The contractor may invoke the defense in suits brought not only by military personnel like Lt. Boyle, or Government employees, but by anyone injured by a Government contractor's negligent design, including, for example, the children who might have died had respondent's helicopter crashed on the beach.[313]

The majority's decision in *Boyle* illustrates the extent to which the conservatives will go to find federal preemption of state law. Since there was no governing statute in the case, the Court was, by any objective analysis, on shaky ground in fashioning a government contractor defense. Justice Scalia's willingness to invoke

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310. *Id.* at 516.

311. *Id.* Although many courts have rejected applying the government contractor defense to cases involving nonmilitary equipment produced for the federal government, not all courts have. *Compare In re* Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810-12 (9th Cir. 1992) (holding that the government contractor defense was not available to manufacturers of asbestos insulation products which exposed sailors to asbestos dust), *with* Carley v. Wheeled Coach, 991 F.2d 1117, 1125 (3d Cir. 1993) (recognizing government contractor defense in a suit by an emergency medical technician alleging that the ambulance in which she was injured was defectively designed). This is an important expansion of the defense, since military equipment comprises only about ten percent of the contracts entered into between private contractors and the federal government. *See also* Steven Brian Loy, *The Government Contractor Defense: Is it a Weapon only for the Military?*, 83 KY. L.J. 505 (1994).

312. Boyle v. United Techs. Corp., 487 U.S. 514, 516 (1988).

313. *Id.*

federal common law in a preemption case also contradicts his sharp criticism of "judicial legislating" in other areas of the law.[314] *Geier* and *Boyle* suggest that the conservatives are favorably disposed toward federal preemption in products liability cases. In addition to these types of cases, they have also voted in favor of federal preemption in cases involving foreign affairs,[315] occupational safety,[316] consumer protection,[317] environmental regulation,[318] and bankruptcy.[319] This is not meant to suggest that the conservatives have supported preemption in every case. They have

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314. *See, e.g.*, Webster v. Reprod. Health Serv., 492 U.S. 490 (1989).

> The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field [abortion] where it has little proper business since the answers to most of the cruel questions posed are political and not juridical . . . .

Id. at 532 (Scalia, J., concurring); Cruzan v. Dir. of Mo. Dep't of Health, 497 U.S. 261 (1990).

> While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life . . . .

Id. at 293 (Scalia, J., concurring).

315. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (holding that a Massachusetts provision restricting state agencies from conducting business with Burma (Myanmar) was preempted by federal law).

316. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) (ruling that state law requirements concerning job safety were preempted by Occupational Safety and Health Administration regulations).

317. *See, e.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) (holding that the enforcement of the National Association of Attorneys General fare advertising guidelines through a state general consumer protection law was preempted under the Airline Deregulation Act of 1978).

318. *See, e.g.*, U.S. v. Locke, 529 U.S. 89 (2000) (holding the state of Washington's rules regarding oil tanker ship crew training and English language skills, navigation watch, and marine casualty reporting preempted by federal law); Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) (ruling that the Clean Water Act preempts state law to the extent that it seeks to impose liability on a point source in another state).

319. *See, e.g.*, Owen v. Owen, 500 U.S. 305 (1991) (holding that the federal Bankruptcy Act preempted a Florida law exempting property that was under a judicially-imposed state lien from seizure by the federal bankruptcy court).

not.[320] But their opinions strongly demonstrate a predisposition in favor of preemption, rather than the traditional presumption against it.

III. CONCLUSION

The inconsistencies between the Rehnquist Court's Tenth and Eleventh Amendment decisions, on the one hand, and its preemption decisions, on the other, are interesting and beg important questions. As noted at the outset, from 1986-2002 the ranking of the Rehnquist Court Justices in terms of the percentage of cases in which the Justices supported the federal government in preemption cases is almost the exact opposite of the individual voting behavior of the Justices in all types of federalism cases, including the Tenth and Eleventh Amendments. While the conservative bloc of the Rehnquist Court has made substantial strides in protecting the sovereign interests of the states under the Tenth and Eleventh Amendments, it has been the chief defender of the national government in preemption cases. If one considers the types of cases in which the Rehnquist Court conservatives have favored preemption (admittedly not always as a unified bloc), it is easy to see how they fit within a conservative political agenda. In *Cipollone v. Liggett Group, Inc.*, five of the then conservatives[321] plus Justice Stevens argued that at least some common law tort actions should be preempted under the 1969 amendments to the FCLAA.[322] In *Lorillard Tobacco Co. v. Reilly*,[323] the current five-justice conservative bloc ruled that the FCLAA preempted state restrictions on cigarette advertising directed toward children. In *Medtronic v. Lohr*,[324] four of the current conservatives, concurring in part and dissenting in part, argued that the MDA's pre-market clearance procedures preempted several common law tort theories claiming injuries as a result of a

320. *E.g.*, Lukhard v. Reed, 481 U.S. 368, 383 (1987) (holding that a Virginia regulation limiting a person's eligibility for benefits under the Aid to Families with Dependent Children program was not preempted); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 606 (1987) (ruling that the Federal Insecticide, Fungicide, and Rodenticide Act did not preempt a local ordinance governing the aerial spraying of pesticides).

321. Chief Justice Rehnquist and Justices White, O'Connor, Scalia and Thomas.

322. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530-31 (1992).

323. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551 (2001).

324. 518 U.S. 470, 509 (1996). *See* discussion *supra* p. 154.

defective pacemaker. In *Geier v. American Honda Motor Company*,[325] four of the five current conservatives, plus Justice Stephen G. Breyer, ruled that the FMVSS 208 impliedly preempts state common law suits against car manufacturers for failing to install airbags as passive restraint devices. And in *Boyle v. United Technologies Corp.*,[326] four of the current conservatives, plus then-Associate Justice Byron White, resurrected federal common law by finding a novel sovereign immunity defense protecting government contractors from lawsuits when they defectively design products for the national government. Perhaps emblematic of the new conservative attitude toward preemption is the partial dissent filed by Justice Antonin Scalia (and joined by Justice Clarence Thomas) in *Cipollone,* where he chided the majority for creating novel limitations on federal authority and predicted that as a result of the Court's decision only "the most sporting of congresses will dare to say anything about pre-emption."[327]

The aforementioned products liability decisions by the Rehnquist Court conservatives will inure to the benefit of "big business." By absolving corporations from state common law liability under the Court's preemption doctrine these companies will become less accountable to the public for their actions. In an area in which there is considerable discretion to determine whether Congress intended to preempt state law, the Rehnquist Court has not been hesitant to rule in favor of the federal government when, in so doing, it will achieve conservative purposes. The Rehnquist Court's preemption decisions reveal that the conservatives' overall approach to federalism cases is unprincipled and politically driven. In light of the Court's Tenth and Eleventh Amendment decisions, one would expect that the conservatives would be more deferential toward the traditional functions of the states in preemption cases. However, this is simply not the case.

325. 529 U.S. 861 (2000). *See* discussion *supra* p. 162.
326. 487 U.S. 500 (1988). *See* discussion *supra* p. 174.
327. 505 U.S. 504, 548 (1992). *See* discussion *supra* p. 143.

APPENDIX

U.S. Supreme Court Justices' Support for the Federal Government in Federalism and Preemption Cases, 1986-2002

FEDERALISM
(Including Tenth and Eleventh Amendment Cases)

Stephen Breyer	65.2%
Ruth Bader Ginsburg	60.8
David Souter	59.1
John Paul Stevens	54.6
Antonin Scalia	52.3
Anthony Kennedy	50.5
Sandra Day O'Connor	47.6
William H. Rehnquist	45.9
Clarence Thomas	43.5

PREEMPTION

Antonin Scalia	66.7%
Sandra Day O'Connor	60.5
Anthony Kennedy	60.5
William H. Rehnquist	57.4
Clarence Thomas	53.6
David Souter	50.0
Stephen Breyer	47.6
Ruth Bader Ginsburg	45.8
John Paul Stevens	41.3

Data Source: United States Supreme Court Judicial Database, 1953-2002 Terms, www.usscplus.com, (Harold J. Spaeth, Principal Investigator) Michigan State University, 2002.