CONSTITUTIONAL LAW—PREEMPTION AND PRODUCTS LIABILITY—FEDERAL CIGARETTE LABELING AND ADVERTISING ACT HELD NOT TO PREEMPT STATE COMMON LAW DAMAGE ACTIONS—*Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992)

The Supremacy Clause of Article VI of the United States Constitution provides that laws made under the authority of the United States are the paramount laws of the nation.[1] Accordingly, federal law will preempt any discordant state or local action provided that Congress has acted within its delegated powers.[2] Congress invokes the preemption doctrine by expressly decreeing, or impliedly manifesting, its intent to preempt.[3] De-

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[1] U.S. CONST. art. VI, cl. 2. Article VI states in full:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-23, at 377 (1978) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). Professor Tribe suggested that in accordance with the Supremacy Clause, laws made pursuant to federal legislative powers create a vacuum of federal authority within which states are powerless to act. *Id.* § 6-23, at 376.

[2] PETER HAY & RONALD D. ROTUNDA, THE UNITED STATES FEDERAL SYSTEM: LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE 117-18 (1982). The preemption doctrine is typified by a "holding that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws." BLACK'S LAW DICTIONARY 1177 (6th ed. 1990). The Supreme Court has proclaimed that the "relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Free v. Bland, 369 U.S. 663, 666 (1962). Numerous commentators have expounded on the preemption doctrine. *See, e.g.*, KENNETH STARR ET AL., THE LAW OF PREEMPTION 55 (1991) (observing courts' increasing expectations of heightened specificity regarding Congress's intent to preempt); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 224 (1959) [hereinafter Stanford Note] (criticizing courts' application of the preemption defense as contrary to sound statutory construction); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 71 (1988) (averring that Supreme Court's preemption jurisprudence has attenuated the link between the Constitution and preemption); Lee Gordon & Carol A. Granoff, *A Plaintiff's Guide To Reaching Tobacco Manufacturers: How To Get The Cigarette Industry Off Its Butt*, 22 SETON HALL L. REV. 851, 863-71 (1992) (applying preemption principles to cigarette manufacturer liability); Gary V. Weeks, *Preemption: Breathing New Life Into An Old Giant*, 11 U. ARK. LITTLE ROCK L.J. 669, 670 (1988-89) (exploring merits of preemption defense in tobacco liability cases).

[3] Palmer v. Liggett Group, Inc., 825 F.2d 620, 625-26 (1st Cir. 1987). *See, e.g.*, Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 144, 170 n.24 (1982) (Federal Home Loan Bank Board preempts conflicting state due-on-sale payment

spite these seemingly identifiable limits, courts have nonetheless experienced difficulty delineating the boundaries of the preemption doctrine.[4] Moreover, Congress's authority to supplant state

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regulations); Jones v. Rath Packing Co., 430 U.S. 519, 526, 528, 543 (1977) (California meat packing regulations impede congressional objective of facilitating value comparisons as espoused by Federal Meat Inspection Act); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973) (pervasive federal scheme of aircraft noise regulation, as evidenced by the Noise Control Act of 1972, preempts state and local ordinances requiring curfews on jet flights). *But see* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984) (finding no preemption of punitive damages despite Congress's occupation of the nuclear safety field). An affirmative act unambiguously manifesting Congress's intent to override state law is crucial to the constitutionality of the preemption doctrine. Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 AM. J. TRIAL ADVOC. 435, 443 (1992). Exemplifying express preemption, the *Jones* Court reconciled the discord between the California Business and Professions Code and the Federal Meat Inspections Act, construing the Act's preemption provision to explicitly "dictate[] the result in the controversy . . . ." *Jones*, 430 U.S. at 522, 525, 530-31. Preemption analysis is simplest, of course, when congressional preemptive intent is expressly stated. *English v. General Elec. Co.*, 110 S. Ct. 2270, 2275 (1990).

Supremacy Clause cases dealing with express preemption or actual conflict are the exception and not the rule. Most often, cases turn on Congress's preemptive intent. *See* Mary Ann K. Bosack, *Cigarette Act Preemption — Refining the Analysis*, 66 N.Y.U. L. REV. 756, 764 (1991) (asserting that courts are more concerned with discerning the degree to which a federal mandate impliedly preempts state law); STARR, et al., *supra* note 2, at 14 (observing that Supremacy Clause cases typically require courts to evaluate Congress's preemptive intent). In *Hayfield Northern Railroad Co. v. Chicago & Northwestern Transp. Co.*, a Minnesota condemnation statute was not preempted by the Staggers Rail Act amendment to the Interstate Commerce Act. Hayfield Northern Railroad Co. v. Chicago & Northwestern Transportation Co., 467 U.S. 622, 637 (1984). See *infra* notes 79-87 and accompanying text for a discussion of cases employing "actual conflict" analysis. See *infra* notes 112-26 and accompanying text for a discussion of cases involving implied preemption in a cigarette context.

In addition to finding a congressional intent to occupy the field or a finding of actual conflict with state law, the Court has sometimes based decisions to preempt state law on traditional concepts of fairness. Farmers Educ. & Cooperative Union of America v. WDAY, Inc., 360 U.S. 525, 526, 527, 533 (1959). In *Farmers Educational*, the Court applied this fairness policy to protect radio broadcasters from state libel laws under the Federal Communications Act's anti-censorship provision. *Id.* at 527, 533. The Court noted the unconscionable result of imposing civil or even criminal liability on a licensee for the very conduct demanded by the statute *Id.* at 531.

[4] JOSEPH F. ZIMMERMAN, FEDERAL PREEMPTION: THE SILENT REVOLUTION 113 (1991). Absent explicit language in a statute, there are no specific criteria to reveal Congress's intention to preempt. *Id. See* Wolfson, *supra* note 2, at 70 (observing that opportunities to clarify the preemption doctrine have failed to produce a consistent jurisprudence). Disagreement exists among commentators even as to the courts' current disposition. *Compare* Ronald D. Rotunda, *Sheathing The Sword Of Federal Preemption*, 5 CONST. COMMENTARY 311, 312 (1988) (noting that recent decisions reflect the Supreme Court's willingness to keep "the preemption blade in its sheath") *and* Corboy & Smith, *supra* note 3, at 445 (commenting that the Court is

law, and the process this imperium requires, further muddies the waters of the nebulous preemption puddle.[5] Because the Framers intended the Constitution to centralize political command in a federal system,[6] the Constitution empowered Congress with preemptive control primarily over the states' parallel and reserved powers.[7] These reserved powers[8] include the administration of common law damage actions.[9] One action traditionally

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reluctant to expand the preemption doctrine) *with* Wolfson, *supra* note 2, at 75 n.32 (quipping that "reports of preemption's demise, like those of Mark Twain's death, have been greatly exaggerated") *and* ZIMMERMAN, *supra*, at vii (regarding federal preemption as pervasive in twentieth century jurisprudence, resulting in complex nation-state-local relations) *and* Weeks, *supra* note 2, at 670 (asserting that tobacco companies' most potent defense against litigant's claims has been the "impenetrable breast-plate of preemption").

[5] HAY & ROTUNDA, *supra* note 2, at 118, 119. *See generally* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (cautioning that no "constitutional yardstick" exists to aid interpreting congressional action).

[6] ZIMMERMAN, *supra* note 4, at 3. *But see, e.g.*, THE FEDERALIST No. 45, at 296 (James Madison) (Isaac Kramnick ed., 1987): "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State government are numerous and indefinite." Alexander Hamilton cautioned that acts of Congress "which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities" of the States are "merely acts of usurpation". THE FEDERALIST No. 33, at 225 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Article I of the U.S. Constitution endows Congress with "[a]ll legislative powers herein granted . . . ." U.S. CONST. art. I, § 1.

[7] ZIMMERMAN, *supra* note 4, at 3. This initial allocation of political authority was expected to maintain symbiosis between the two planes of government. *Id.*

[8] A "reserved power" is a "power specifically withheld because not mentioned or reasonably implied in other powers conferred by a constitution or statute." BLACK'S LAW DICTIONARY 1308 (6th ed. 1990). Whereas Congress is a body of limited legislative powers, state action is presumptively valid unless prohibited by the Constitution. TRIBE, *supra* note 1, § 5-2, at 225; U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). The Supreme Court has held that the Tenth Amendment expressly affirms the constitutional policy that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system". Fry v. United States, 421 U.S. 542, 547 n.7 (1975). *See also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530, 557 (1985) (5-4 decision) (holding municipal transit authority not immune from minimum requirements of federal Fair Labor Standards Act).

[9] Corboy & Smith, *supra* note 3, at 451 n.75. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) (Supreme Court has historically "allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order"); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963) (states possess a legitimate interest in protecting their residents against sale of fraudulent and deceptive produce at retail markets); Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 719 (1985)(health and safety matters are traditionally subject to state regulation).

In *Hillsborough County*, the Supreme Court permitted local ordinances regulat-

within the area of compelling state interest is the products liability claim.[10]

Products liability law was intended to benefit the public by facilitating compensation for injuries resulting from defective products.[11] Although these suits are governed by state law, sev-

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ing the operation of plasma centers to stand despite pre-existing federal supervision of plasmapheresis. *Hillsborough County*, 471 U.S. at 712, 714. The Court reasoned that "[u]ndoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Id.* at 719. The Court took specific notice of health and safety matters, which were "primarily, and historically, a matter of local concern." *Id.* Those commentators who felt courts should reluctantly imply preemption where the federal agency has not clearly expressed preemptive intent lauded the *Hillsborough County* decision as crucial to state and local prerogatives. *See* Benjamin W. Heineman, Jr. & Carter G. Phillips, *Federal Preemption: A Comment on Regulatory Preemption after* Hillsborough County, 18 URB. LAW. 589, 605, 606 (1986).

[10] Corboy & Smith, *supra* note 3, at 451. *See generally* William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793-98 (1960) (charting the evolving adoption of a strict liability standard, without previously required privity of contract, for products liability actions in all fifty state courts); JAMES E. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT, pt. 2, chs. 5-10, at 95-339 (1981) (providing systematic survey of products liability law in all American jurisdictions).

BLACK'S LAW DICTIONARY defines "product liability" as

> [T]he legal liability of manufacturers and sellers to compensate buyers, users, and even bystanders, for damages or injuries suffered because of defects in goods purchased. A tort which makes a manufacturer liable if his product has a defective condition that makes it unreasonably dangerous to the user or consumer.

BLACK'S LAW DICTIONARY 1209 (6th ed. 1991) (citation omitted). For a further explanation of products liability law, see Page Keeton, *Manufacturer's Liability: The Meaning Of "Defect" In The Manufacture And Design Of Products*, 20 SYRACUSE L. REV. 559, 559-60 (1969) (noting that changing social and economic attitudes have removed impediments to recovery for defective products); Roger J. Traynor, *The Ways And Meanings Of Defective Products And Strict Liability*, 32 TENN. L. REV. 363, 363-65 (1965) (tracking courts' "great expansion" of manufacturers' liability in the twentieth century); Marc Z. Edell & Cynthia A. Walters, *The Doctrine Of Implied Preemption In Products Liability Cases — Federalism In The Balance*, 54 TENN. L. REV. 603, 605 (1987) (observing contradictions in courts' utilization of preemption doctrine in products liability cases).

[11] Dewey v. R.J. Reynolds, 121 N.J. 69, 90-91, 577 A.2d 1239, 1249 (1990); Barbara L. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 BUFF. L. REV. 181, 182 (1991). *See also* Paul G. Crist & John M. Majoras, *The "New" Wave In Smoking And Health Litigation — Is Anything Really So New?*, 54 TENN. L. REV. 551, 553 (1987) (determining that the rationale for products liability law was based on protection of consumers from product-inflicted injuries). Compensation for tortious injury is a right fundamental to Americans. Corboy & Smith, *supra* note 3, at 451 & n.76 (citing as authority Chief Justice John Marshall, who proclaimed in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."); *cf.* Feldman v. Lederle Lab., 97 N.J. 429, 461, 479 A.2d 374, 391

eral of the products involved—food,[12] automobiles[13] and cigarettes[14]—are subject to federal regulation.[15] The interplay between state judicial action and the federal government's legislative action tests the elasticity of the preemption doctrine.[16] Courts have faced the difficult question of whether the regulatory effect of state products liability litigation involves federal preemption when the litigation affects an area occupied by a federal regulatory scheme, but Congress has not explicitly manifested an intent to preempt state remedies.[17]

(1984) (recognizing compelling state interest in redressing parties for injuries sustained from manufacturer's defective product).

12 *See* Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1988).

13 *See* Traffic and Motor Vehicles Safety Act, 15 U.S.C. §§ 1381-1431 (1988).

14 Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (1988) [hereinafter Cigarette Act].

15 *See* Atwell, *supra* note 11, at 181. The past two decades in particular have seen enormous expansion in products-related government regulation. W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY, ch. 6, at 117 (1991). For instance, in the 1970's this initiative prompted the creation of agencies such as the U.S. Consumer Product Safety Commission (CPSC), the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), the Federal Aviation Administration (FAA) and the U.S. Environmental Protection Agency (EPA). *Id.* at 117-18.

16 Atwell, *supra* note 11, at 199-200. In tobacco liability cases, defendants' use of the preemption defense frustrates the underlying policies of products liability and the Cigarette Act in four general ways. *Id.* at 206-11. First, Professor Atwell suggests that courts applying preemption mistakenly eschew consideration of the Cigarette Act's legislative history. *Id.* at 206. Second, the courts frequently misconstrue the Cigarette Act's objectives. *Id.* at 207. Third, by preempting product liability failure to warn claims, the courts often fail to acknowledge the differences between direct state regulation (legislative or administrative body actions) and indirect state regulation (common law damage awards). *Id.* at 208. Fourth, decisions preempting products liability claims impede legitimate state interests in compensating victims of defective products. *Id.* at 210.

17 *See generally* Lawrence H. Tribe, *Anti-Cigarette Suits: Federalism With Smoke and Mirrors*, THE NATION, June 7, 1986, at 788-89 [hereinafter Tribe, *Anti-Cigarette Suits*] (disputing the notion that liability judgments compel the tobacco industry to exceed the federal warning law requirements). *Cf.* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241 (1959). In *Garmon*, a California state court had granted co-partners in a lumber business an injunction and $1000 in damages against a local union. *Id.* at 237-38. The union had picketed outside plaintiff's business in an effort to compel execution of an agreement to retain only union members in their employ. *Id.* at 237. On appeal from the California Supreme Court, the U.S. Supreme Court reversed. *Id.* at 238, 248. The *Garmon* Court, applying preemption principles to national labor laws, concluded that the National Labor Relations Board's primary jurisdiction displaced state jurisdiction over labor law and preempted state law remedies for damages resulting from unfair labor practices. *Id.* at 246-48. The Court acknowledged that in the labor arena "statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature . . . ." *Id.* at 241 (quoting International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958)). Justice Frankfurter tempered this ambiva-

Recently, the United States Supreme Court undertook to resolve this tension in *Cipollone v. Liggett Group, Inc.*[18] The *Cipollone* Court stemmed the tide of the lower courts by enabling a deceased smoker's estate to bring state damage claims based on theories of failure to warn,[19] fraudulent misrepresentation,[20]

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lence, however, by positing that no "compelling state interest" existed, and that state superintendence of these matters would "only accentuate[] the danger of conflict." *Id.* at 247, 248. *But see* Lewis B. Kaden, *Federal Labor Preemption: The Supreme Court Draws the Lines*, 18 URB. LAW. 607, 609-10 (1986) (asserting *Garmon* Court's involvement in labor law policy was violative of federal law principles).

The *Garmon* Court issued an oft-cited proclamation with respect to the relationship of state damage awards and regulations:

> Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. *The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.*

Garmon, 359 U.S. at 246-47 (emphasis added); *cf.* Corboy & Smith, *supra* note 3, at 452 (noting Supreme Court is disinclined to deduce preemption of state tort remedies).

[18] 112 S. Ct. 2608 (1992)(7-2 decision). For more insight on the Court's holding and impact, see JOHN VARGO & J.D. LEE, CIPOLLONE V. LIGGETT GROUP, INC.; U.S. SUPREME COURT OPENS THE DOOR TO TOBACCO LAWSUITS (1992) (providing immediate and brief recapitulation of Court's findings); Leading Cases, *Federal Preemption of State Law*, 106 HARV. L. REV. 347, 355-57 (1992) (assessing *Cipollone*'s precedential value to future products liability litigation); *Supreme Court Clears Way for Tobacco Companies*, FOR THE DEFENSE, September 1992, at s(1) (averring that Court's decision may increase number of tobacco liability lawsuits filed); *How* Cipollone *Affects Other Industries*, NAT'L L. J., Aug. 24, 1992, at 20 (surveying *Cipollone*'s impact upon industries subject to federal statutes).

[19] Dereliction in the duty to warn is grouped with design defect claims, due in part to the fact that a failure to provide adequate warning of danger affects an entire line of products rather than one individual item. BEASLEY, *supra* note 10, at 71. Relative to the other products liability areas, failure to warn cases present unique and serious doctrinal difficulties. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse In Products Liability: The Empty Shell Of Failure To Warn*, 65 N.Y.U. L. REV. 265, 267 (1990). Unsound theoretical underpinnings, leaving essential products liability concepts such as foreseeability, risk-utility balancing and proximate causation devoid of content, have given rise to frivolous failure to warn cases. *Id.* at 267-68, 270. The "atmosphere of lawlessness" fostered by the failure to warn doctrine could be tempered by "firmer, nontrivial guidelines" and more aggressive judicial activism. *Id.* at 267, 271, 326.

[20] Fraudulent misrepresentation, the Court would later construe, involved neutralizing the effect of the warning labels through the manufacturer's false or misleading statements. *Cipollone*, 112 S. Ct. at 2623. In New Jersey, the following elements are necessary to establish fraud: (1) material misrepresentation of a known fact; (2) the misrepesentor's knowledge of the falsity; (3) intent that the misrepresented statement will be relied upon; (4) justifiable reliance on that statement. B.F. Hirsch v. Enright Refining Co., Inc., 751 F.2d 628, 631 (3d Cir. 1984)(citation omitted).

breach of express warranty[21] and conspiracy to misrepresent or conceal material facts.[22] The Court focused on congressional intent,[23] as interpreted solely from the Act's express language,[24] to reverse tobacco manufacturers' longstanding reliance on the Cigarette Act as a shield against tort claims.[25]

Rose Cipollone began smoking cigarettes in 1942 at the age of sixteen; she died of lung cancer in October 1984.[26] Cipollone

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[21] With regard to a seller's express warranty, Dean Prosser stated:

> The public interest in human safety requires the maximum possible protection for the user of the product, and those best able to afford it are the suppliers of the chattel. By placing their goods upon the market, the suppliers represent to the market that they are suitable and safe for use; and by packaging, advertising and otherwise they do everything they can to induce that belief.

Prosser, *supra* note 10, at 799.

[22] *Cipollone*, 112 S. Ct. at 2621-25. Cipollone's claim alleged that a conspiracy to commit fraud existed among cigarette manufacturers, who allegedly prevented the dissemination of documents pertinent to the health hazards of smoking. *Id.* at 2624. Commentators alleged in the early 1960's that several tobacco companies knew that smoking caused lung cancer and other diseases, yet continued to deny these perilous consequences of smoking. VARGO & LEE, *supra* note 18, at 16-17.

[23] *Cipollone*, 112 S. Ct. at 2617 (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)). For a discussion of *Malone*, see *infra* note 139.

[24] *Id.* at 2618. The Court stated that "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' " *Id.* at 2617 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). The Court qualified this principle by excluding legislation with provisions explicitly addressing the preemption issue. *Id.* at 2618 (quotations omitted).

[25] *Id.* at 2613, 2617, 2625. *Cipollone*, 112 S. Ct. at 2613, 2625. Prior to *Cipollone*, tobacco plaintiffs had litigated 334 unsuccessful claims against cigarette manufacturers. Douglas N. Jacobson, *After* Cipollone v. Liggett Group, Inc.: *How Wide Will The Floodgates Of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021, 1022 n.7 (1989). See *infra* note 77 and accompanying text for a discussion of the Cigarette Act's preemptive effect; *see also* Peter F. Riley, Note, *The Product Liability Of The Tobacco Industry: Has* Cipollone v. Liggett Group *Finally Pierced The Cigarette Manufacturers' Aura Of Invincibility?*, 30 B. C. L. REV. 1103, 1141 (1989) (contending that tobacco companies typically relied upon preemption defenses to avoid tobacco product liability claims); Donald W. Garner, *Cigarette Dependency And Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1423 (1980) (noting unique immunity enjoyed by tobacco companies in civil litigation). The powerful preemptive effect of the Cigarette Act may have resulted in part from the disproportionate number of committee chairmanships held in the early 1960s by representatives from the southern tobacco-producing states. Gordon & Granoff, *supra* note 2, at 854. In the 1960s, North Carolina, Kentucky, Virginia, South Carolina and Tennessee produced five-sixths of the United States tobacco crop. A. A. White, *Strict Liability of Cigarette Manufacturers and Assumption of Risk*, 29 LA. L. REV. 589, 592 (1969).

[26] Riley, *supra* note 25, at 1140. Cipollone's smoking during these forty years was virtually unabated. *Cipollone v. Liggett, Inc.*, 893 F.2d 541, 549 (3rd Cir. 1990), *rev'd in part, aff'd in part*, 112 S. Ct. 2608 (1992). The record indicates that Cipollone smoked an entire pack of cigarettes while in labor with her first child. *Cipollone v. Liggett, Inc.*, 683 F. Supp. 1487, 1489 (D.N.J. 1988)(on motion for directed verdict), *aff'd in part, rev'd in part*, 893 F.2d 541 (3rd Cir. 1990), *rev'd in part, aff'd in part*,

smoked initially in response to magazine, radio and television advertisements that portrayed cigarettes as glamorous, safe and healthy.[27] She chose to smoke the *Chesterfield* brand, manufactured by the defendant Liggett Group, Inc. (Liggett), in part because of an aggressive advertisement campaign Liggett had earlier launched to establish that its brand, above all others, was the safest.[28] In 1955, Rose Cipollone's anxiety over smoking was

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112 S. Ct. 2608 (1992). In 1981, doctors detected a malignant tumor in Cipollone's right lung and were forced to remove its upper lobe in 1982. *Id.* at 1490. Jacobson, *supra* note 25, at 1043. Ignoring the advice of her doctor and family, Cipollone continued her incessant smoking, in hiding, until 1983, when the cancer metastasized and she became fatally ill. *Cipollone*, 683 F. Supp. at 1490; VARGO & LEE, *supra* note 18, at 7.

[27] *Cipollone*, 893 F.2d at 548. Cipollone wanted to emulate the movie stars and attractive women depicted in cigarette advertisements. *Id.* In the 1940s, cigarette manufacturers attempted to defuse concern about the health risks of smoking by extolling the medical advantages associated with their products. Jef I. Richards, *Clearing The Air About Cigarettes: Will Advertisers' Rights Go Up In Smoke?*, 19 PAC. L.J. 1, 5-7. *Kool* cigarettes claimed to combat the common cold; *Camel* advertisements noted that "More Doctors Smoke Camels, " and professed to aid digestion and relieve fatigue; *Philip Morris* ads vowed to clear up irritated noses and throats, boasting emphatically that "[t]his is *Known* by Medical Authorities about Philip Morris." *Id.* (reproducing actual magazine advertisements). In 1952, as concern regarding the promises made in cigarette advertising intensified, the Federal Trade Commission ordered Philip Morris to cease claiming a link between their product and benefits to the smoker's nose and throat. *Id.* at 8.

For a probe into the history of cigarette advertising, see Susan Wagner, Cigarette Country, 48-62 (1971) (providing overview of intense competition among cigarette makers which resulted in advertising gimmicks and absurd promotional campaigns); Crist & Majoras, *supra* note 11, at 554-59 (tracking dissemination of information in the 20th Century to consumers concerning the health risks inherent in smoking).

[28] *Cipollone*, 893 F.2d at 548-49. The circuit court reproduced a 1952 magazine advertisement typical of those to which Rose Cipollone had been exposed ten years earlier:

> PLAY SAFE Smoke Chesterfield.
> NOSE, THROAT, and Accessory Organs not Adversely Affected by Smoking Chesterfields. First such report ever published about any cigarette. A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes. A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields - 10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each. At the beginning and at the end of the six-months period each smoker was given a thorough examination, including X-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears and throat. The medical specialist, after a thorough examination of every member of the group, stated: 'It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by

evidenced by her switch to *L & M* cigarettes, also manufactured by Liggett.[29] This change reflected her growing concern for safety as well as a broader recognition of a shifting social trend.[30]

In 1983, Rose Cipollone and her family filed a fourteen-count complaint[31] in federal court against Liggett, Phillip Mor-

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me were not adversely affected in the six-month period by smoking the cigarettes provided.'

Id. at 548 (citation omitted). Particularly persuasive were radio advertisements that boasted the results of the same study, avowing:

> Now that ought to make you feel better if you've had any worries at all about it. I never did. I smoke two or three packs of these things every day. I feel pretty good. I don't know, I never did believe they did you any harm and now, we've got the proof. So - Chesterfields are the cigarettes for you to smoke, be they regular size or king-size.

Cipollone, 893 F.2d at 549-50 (citation omitted). Television commercials extolled the virtues of the *Chesterfield* brand in a similar fashion. *Id.* at 549. Among the other affirmations made by Chesterfield were: "If you smoke it will make you feel better, really". *Id.* at 549 (quoting an advertisement from the "Arthur Godfrey and His Friends" radio show, sponsored by *Chesterfield* cigarettes and read by Arthur Godfrey (citations omitted)). Chesterfield also depicted a striking, virile actor, Ronald Reagan, in front of a holiday wreath vowing to send cigarettes to all his friends, making it "the merriest Christmas any smoker can have." Richards, *supra* note 27, at 33 (reproducing actual portrayal of the future president flashing a bright smile while dexterously balancing a cigarette between his lips). For other representations by Chesterfield exalting the safety of cigarette smoking, see Michael J. Hannan, III, Note, *The Effect of Cipollone: Has the Tobacco Industry Lost Its Impenetrable Shield?*, 23 GA. L. REV. 763, 763 (1989) (quoting from actual Chesterfield advertisement). Liggett & Myers first put *Chesterfield* brand cigarettes on the market in 1912, and five years later created the brand's initial slogan: "They Satisfy." WAGNER, *supra* note 27, at 51-52.

[29] *Cipollone*, 893 F.2d at 550. The *L & M* brand offered new, filter-tip cigarettes, which Cipollone understood could sift out nicotine, tar, and tobacco. *Id.* Rose Cipollone vaguely recalled Liggett's billboard, newspaper and magazine advertisements introducing consumers to the *L & M* brand. *Id.*

[30] *Id.* Although publicity engineered by television and radio anti-smoking campaigns did not become persistent until after 1964, a smoking-health "scare" was first evidenced in the 1950's. See *infra* note 71 for a debate on the effectiveness of anti-smoking campaigns and an examination of the evolving awareness of cigarette smoking dangers.

Cipollone, however, claimed to have been influenced, and allegedly confounded, by marketing strategies once again—*L & M* claimed to be "just what the doctor ordered!". *Cipollone*, 893 F.2d at 550-51. *But see* U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH, REPORT OF THE SURGEON GENERAL, ch. 21, at 23 (1979) [hereinafter 1979 SURGEON GENERAL'S REPORT]. ("[t]he influence of mass media on smoking behavior remains relatively unclear at this point.").

[31] *Cipollone*, 593 F. Supp. 1146, 1149 (D.N.J. 1984), *rev'd* 789 F.2d 181 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 693 F. Supp. 208 (D.N.J. 1988), *rev'd in part, aff'd in part*, 893 F.2d 541 (3rd Cir. 1990), *rev'd in part, aff'd in part* 112 S. Ct. 2608 (1992).

The five theories of recovery were: (1) design defect, alleging that a safer alternative design existed which the defendants failed to use; (2) failure to warn, alleging that the cigarettes were defective due to the manufacturers' failure to

ris[32] and Lorillard,[33] alleging that these manufacturers were responsible for Rose's lung cancer.[34] The protracted litigation

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adequately warn of their dangers; (3) breach of express warranty, alleging that the manufacturers had warranted that their cigarettes did not present significant health consequences; (4) fraudulent misrepresentation, alleging that the manufacturers attempted to dilute the impact of the warning labels and failed to act on medical data implicating the dangers of cigarette smoking; and (5) conspiracy to defraud, alleging that the manufacturers concealed from the public certain medical and scientific data. VARGO & LEE, *supra* note 18, at 7-8. The defendants answered each of plaintiffs claims by asserting Cigarette Act preemption as an affirmative defense. *Cipollone*, 593 F. Supp. at 1149.

In addition to preemption, defenses generally available to defendants included contributory negligence and assumption of risk. Clara S. Ross, Comment, *Judicial And Legislative Control Of The Tobacco Industry: Toward A Smoke-Free Society?*, 56 U. CIN. L. REV. 317, 321 (1987). The Supreme Court of Louisiana has held that pursuant to state law, a factual issue of comparative fault arises where a plaintiff knowingly assumes the risk of cigarette smoking after being warned of the consequences. Gilboy v. American Tobacco Co., 582 So. 2d 1263, 1265 (La. 1991). In the tobacco context, argued one Note author, the plaintiff-conduct doctrine yields somewhat unexpected results. Note, *Plaintiffs' Conduct As A Defense To Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809, 818 (1986). The author indicated that courts are reluctant to base damages awards solely on the plaintiff-conduct doctrine because of the serious consequences of damages awards to plaintiffs. *Id. But see* Garner, *supra* note 25, at 1450 & n.188 (observing that contributory negligence and assumption of risk defenses, often used by courts interchangeably, are not respected by courts in strict products liability cases); *see generally* RESTATEMENT (SECOND) OF TORTS § 402A, cmt. n (1965) ("the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger . . . commonly passes under the name of assumption of risk").

[32] *Cipollone*, 683 F. Supp. at 1490. Rose Cipollone smoked Philip Morris products (*Virginia Slims* and *Parliament* cigarettes) between 1968 and 1974. *Id.* at 1489, 1490.

[33] *Id.* at 1490. Cipollone smoked *True* cigarettes, manufactured by Lorillard, from 1974 to 1981. *Id.* Loyalty to one brand of cigarettes for the duration of a smoker's life is rare. Garner, *supra* note 25, at 1455.

[34] *See Cipollone*, 789 F.2d at 183-84. Tobacco manufacturer liability cases have been divided by commentators into two eras; the Cipollones's lawsuit rode the "Second Wave" of tobacco litigation. *See* Marc Z. Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L. J. 90, 90, 99 (1986). Mr. Edell, a New Jersey attorney who represented the Cipollones throughout their legal odyssey, predicted that although cigarette manufacturers had enjoyed a unique immunity from liability, a smoker's victory was inevitable. *Id.* at 90, 103.

The "First Wave" of tobacco litigation began in the early 1950's, but the era's most famous case was brought in 1957 when a dying smoker brought suit against a cigarette manufacturer alleging the manufacturer was responsible for his lung cancer. Crist & Majoras, *supra* note 11, at 552; Riley, *supra* note 25, at 1120. The United States District Court for the Southern District of Florida rejected plaintiffs' claim and pronounced that unforeseeable product dangers were not included in a manufacturer's implied warranty. Green v. American Tobacco Co., 304 F.2d 70, 77 (5th Cir. 1962), *cert. on reh'g*, 154 So. 2d 169 (Fla. 1963), *rev'd and remanded*, 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969)(en banc), *cert. denied*, 397 U.S. 911 (1970). *See* Riley, *supra* note 25, 1117-26 (evaluating *Green* and other "First Wave" cases in terms of their importance to future tobacco litigation). In 1969, after protracted litigation, the Fifth Circuit affirmed *en banc* the jury verdict

included fourteen published opinions, which even now, nine years later, has not dispositively resolved the matter.[35] Nonethe-

in favor of the defendant. *Green*, 409 F.2d at 1166. This case helped set the pace for future cigarette liability cases; it involved two jury trials in addition to six appeals amassing over twelve years of litigation. Riley, *supra* note 25, at 1120 n.118. "First Wave" cases reflected the unwillingness of courts and juries to sympathize with smokers, whom they deemed ultimately responsible for their life-style choices. Crist & Majoras, *supra* note 11, at 552.

Implementation of the Cigarette Act galvanized a new wave of litigation, due in large part to the changes and sophistication in products liability law, scientific and medical evidence, public opinion regarding cigarette advertising and increased cooperation among plaintiffs' attorneys. Heather Cooper, Symposium Notes, *Tobacco Litigation: A Comparative Analysis Of The United States And European Community Approaches To Combatting The Hazards Associated With Tobacco Products*, 16 BROOK. J. INT'L L. 275, 282-83 (1990); Jacobson, *supra* note 25, at 1036.

"Second Wave" cases began emerging in the mid-1980's, brought on by the revolutionary changes in theories of liability, such as state of the art, strict liability and comparative negligence. Crist & Majoras, *supra* note 11, at 552; Edell, *supra*, at 92.

[35] *Cipollone*, 593 F. Supp. 1146, 1149 (D.N.J. 1984) (granting plaintiff's motion to strike defendants' preemption defenses), *later proceeding*, 106 F.R.D. 573 (D.N.J. 1985) (holding protective order prohibiting plaintiffs disseminating documents obtained from defendants in discovery not justified), *mandamus granted*, 785 F.2d 1108 (3d Cir. 1986) (reversing and remanding order in 106 F.R.D 573), *on remand*, 113 F.R.D. 86 (D.N.J. 1986)(reconsidering protective order under a good cause standard), *rev'd in part and remanded*, 789 F.2d 181 (3d Cir 1986) (vitiating holding in 593 F. Supp. 1146 by finding that state common law damage actions create sufficient obstacles to frustrate congressional objectives), *motion granted*, 644 F. Supp. 283 (D.N.J. 1986) (barring introduction of evidence indicating cigarette industry's collateral benefits to the American economy), *motion denied*, 802 F.2d 658 (3d Cir. 1986) (denying plaintiff's motion to vacate decision in 789 F.2d 181 on account of judge's failure to recuse himself), *on remand*, 649 F. Supp. 664 (D.N.J. 1986) (interpreting 789 F.2d 181 to determine which theories in plaintiff's complaint were preempted), *cert. denied*, 479 U.S. 1043 (1987), *mandamus denied*, 822 F.2d 335 (3d Cir. 1987) (upholding district court's ruling on protective order in 113 F.R.D. 86), *cert. denied*, 484 U.S. 976 (1987), *motion denied*, 668 F. Supp. 408 (D.N.J. 1987) (rejecting defendant's in limine motion to exclude evidence related to lobbying); *motion denied*, No. CIV.A.83-2864, 1987 WL 18451 (D.N.J. Oct. 14, 1987) (allowing doctor's expert testimony regarding tobacco), *motion granted*, No.CIV.A.83-2864, 1987 WL 14666 (D.N.J. Oct. 27, 1987) (dismissing plaintiff's risk-utility claim as a matter of law), No.CIV.A.83-2864, 1987 WL 31763 (D.N.J. Dec. 28, 1987) (reaffirming risk-utility ruling); *motions granted and denied*, 683 F. Supp. 1487 (D.N.J. 1988) (granting in part defendant's motions for directed verdict on plaintiff's legal claims), *motions denied*, 693 F. Supp. 208 (D.N.J. 1988) (disallowing both plaintiff's motion for a new trial and defendant's motion for judgment notwithstanding the verdict), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991), *aff'd in part, rev'd in part*, 112 S.Ct. 2608 (1992) (finding limited preemption of smoker's state common law claims).

For an analysis of the legal issues arising in limine, see Alan M. Darnell & Meryl G. Nadler, *Important Rulings Emanating from the* Cipollone *Tobacco Trial*, 25 CAL. W. L. REV. 323, 323 (1989) (observing that preemption was not the only significant legacy of the case); *see also* Jacobson, *supra* note 25, at 1044-1051 (evaluating pretrial issues such as preemption and protective orders).

less, the parties' vigilance would not be in vain, because the implications of the courts' rulings were far-reaching.[36]

Invoking federal court diversity jurisdictions,[37] plaintiffs filed their complaint at the United States District Court for the District of New Jersey which denied defendants' motion for judgment on the pleadings[38] and struck defendants' preemption defenses.[39] The court distinguished products liability actions from state regulation, and, as a result, provided room for compensating victims

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[36] Jacobson, *supra* note 25, at 1046. The practical import of the *Cipollone* decision can be understood as follows: Were plaintiff to prevail, a floodgate of lawsuits would be opened against cigarette manufacturers claiming failure to warn; however, were defendants to assert preemption successfully, all state court claims arising after 1965 would be barred. *Id.* Professor Tribe posited that the *Cipollone* courts had an opportunity to advance a social good: if cigarette manufacturers were found liable, the manufacturers would be forced to raise cigarette prices significantly, thereby decreasing demand for cigarettes and drastically decreasing health problems associated with smoking. Tribe, *Anti-Cigarette Suits*, *supra* note 17, at 788. Professor Tribe would later represent the estate of Rose Cipollone before the United States Supreme Court. Tracy Schroth, *Tribe To Argue* Cipollone *Before U.S. Justices*, 129 N.J. L. J. 884, 884 (1991).

[37] 28 U.S.C. § 1332. Section 1332 states, in pertinent part: "(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000 . . . and is between—

(1) citizens of different States . . . ." *Id.*

[38] FED. R. CIV. P. 12(c). Rule 12(c) ("Motion for Judgment on the Pleadings") states in full:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Id.

[39] *Cipollone*, 112 S. Ct. at 2613-14; *Cipollone*, 593 F. Supp. at 1171. Judge Sarokin reasoned that the legislative history of the Cigarette Act did not demonstrate a clear congressional intent to preempt state tort claims. *Cipollone*, 593 F. Supp. at 1163. Critical to the court's conclusion was whether Congress intended to "occupy the field." *Id.* at 1164. Considered a "hybrid" of preemption, this inquiry does not involve an exclusive federal power but rather explores whether a pervasive scheme of federal regulation "occupies" a certain area. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 479 (2d ed. 1988). "[I]f Congress has validly decided to 'occupy the field' for the federal government, state regulations will be invalidated no matter how well they comport with substantive federal policies." TRIBE, *supra* note 1, § 6-25, at 384. Congress's interest in occupying a field is indicated by the comprehensiveness of a federal regulatory scheme. *Id.* Thus, "where a multiplicity of federal regulations govern a given field, the pervasiveness of the federal regulations will help to sustain a conclusion that Congress intended to exercise exclusive control over the subject matter." *Id.* In *Cipollone*, the district court decided that Congress had not occupied the entire field of cigarette regulation but instead had limited itself to the regulation of cigarette labeling and advertising. *Cipollone*, 593 F. Supp. at 1164.

of smoking injuries regardless of cigarette manufacturers' compliance with cigarette labeling requirements.[40] The district court employed a novel approach in construing the Cigarette Act and found that the lack of express language specifically foreclosing tort liability was a manifestation of Congress's intent to allow the state remedy.[41] By carefully scrutinizing the Cigarette Act's statement of purpose, which, in short, aimed to inform the public, protect commerce and maintain uniformity in cigarette labeling and advertising regulation,[42] the court posited that Congress would have eliminated state causes of action if that had been its intent.[43]

In April 1986, on interlocutory appeal,[44] the United States

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[40] *Id.* The court opined that Congress did not address the issue of providing relief to victims of cigarette smoking because these issues were within the products liability field, an area of law traditionally reserved to the states. *Id.* The court added that it would not casually infer that Congress occupied a field. *Id.* (citing TRIBE, *supra* note 39, § 6-25, at 384). The court reasoned that "injuries to persons, property and the environment were wrong even before government declared that they were wrong." *Id.* at 1170.

[41] *Id.* at 1148, 1153. Judge Sarokin dismissed defendant's contention that the Act precluded tort liability claims provided that manufacturers incorporated the Surgeon General's warning on their products. *Id.* The court admonished the "cavalier[] reject[ion of] fundamental principles of the common law" without a "much more definitive statement from Congress." *Id.*

[42] *Id.* at 1149. The "Congressional declaration of policy and purpose" reads as follows:

> It is the policy of the Congress, and the purpose of this [Act], to establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Id. (quoting 1969 Act, § 4 (codified as amended at 15 U.S.C. § 1331)).

[43] *Cipollone*, 593 F. Supp. at 1148, 1153. *Cf.* Taylor E. Ewell, Comment, *Preemption Of Recovery In Cigarette Litigation: Can Manufacturers Be Sued For Failure To Warn Even Though They Have Complied With Federal Warning Requirements?*, 20 LOY. L.A. L. REV. 867, 914 (1987) (alleging that potential tort recovery will advance Congress's interest in warning the public of cigarettes' health hazards).

[44] An interlocutory appeal is governed by 28 U.S.C. 1292. Subsection (b) of § 1292 ("Interlocutory decisions") provides in full:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate ap-

Court of Appeals for the Third Circuit reversed and remanded.[45] The court combined the Cigarette Act's preemption provision and statement of purpose to preempt claims related to smoking and health that challenged: (1) the adequacy of the warnings; or (2) the propriety of manufacturers' advertising or promotion of cigarettes.[46] The appellate court explained that the district court's failure to find these claims preempted by the Cigarette Act obscured the relationship between damage actions and requirements that contravened congressional objectives.[47] Despite this finding, and consistent with the presumption against federal preemption of state law,[48] the court of appeals ratified the district court's finding that the preemption provision did not expressly override state common law claims.[49] Nonetheless, the appellate court reproved the lower court's conclusion that no implied pre-

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> peal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.

[45] *Cipollone*, 789 F.2d at 183, 188, *cert. denied*, 479 U.S. 1043 (1987), *on remand*, 693 F. Supp. 208 (D.N.J. 1988), *rev'd in part, aff'd in part*, 893 F.2d 541 (3rd Cir. 1990), *rev'd in part, aff'd in part* 112 S. Ct. 2608 (1992). The court declined to make rulings on specific claims, reasoning that if only a potential conflict between state and federal law exists then a reviewing court should refrain from preempting any state law. *Id.* at 188 (citing Rice v. Norman Williams Co., 458 U.S. 654, 664 (1982)).

[46] *Id.* at 184, 186-87.

[47] *Id.* at 187. The court opined that the Act would be contravened if cigarette manufacturers' liability extended to areas not explicitly provided for by the Act. *Id.*

[48] Maryland v. Louisiana, 451 U.S. 725, 746 (1981). The Court in *Maryland* averred that "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Id.* (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). *Rice* and the presumption against preemption is discussed *infra* at notes 94-103 and accompanying text.

[49] *Cipollone*, 789 F.2d at 185. This concession was in accord with the findings of other circuits, making the existence of implied preemption the pervasive issue. *See, e.g.*, Palmer v. Liggett Group, Inc., 825 F.2d 620, 625 (1st Cir. 1987) ("it is unnecessary to disturb the court's conclusion that there is no express preemption present"); Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987) (per curiam) (adopting the decision of the Third Circuit in *Cipollone*); Roysdon v. R.J. Reynolds Tobacco Co., 894 F.2d 230, 234 (6th Cir. 1988) ("we agree with the other circuits that § 1334 of the Act does not expressly preempt state law claims"); Pennington v. Vistron Corp., 876 F.2d 414, 418 n.4 (5th Cir. 1989) (observing concurrence of all other circuits that Cigarette Act fails to expressly preempt product liability claims).

emption existed.[50]

On remand, the district court extracted plaintiffs' claims related to cigarette manufacturers' advertising or promotion and claims that necessarily depended upon a showing that a greater duty to warn existed than the one imposed by the Cigarette Act.[51] The court determined that the Cigarette Act preempted plaintiff's claim that cigarette manufacturers' advertising willfully attempted to neutralize warnings contained on cigarette packages.[52] Also preempted were post-1965 claims based on ex-

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[50] *Cipollone*, 789 F.2d at 188. The court was particularly concerned with how tort liability would upset the statutory balance between the interests of public health and the economic welfare of the tobacco industry. *Id.* at 187. Subsequent cases have definitively resolved that the Cigarette Act's purpose is to carefully balance trade protection with health protection. *See, e.g.*, *Palmer*, 825 F.2d at 622; *Pennington*, 876 F.2d at 417; Kotler v. American Tobacco Co., 926 F.2d 1217, 1222 (1st. Cir. 1990), *vacated and remanded in light of Cipollone*, 112 S. Ct. 3019-20 (1992) (mem.).

The Third Circuit's opinion was criticized as "a major departure from established principles of federalism . . . ." Tribe, *Anti-Cigarette Suits*, *supra* note 17, at 788. Professor Tribe contended that the Third Circuit's view of preemption was particularly difficult to discern, contending:

> It is the broader ramifications of the Third Circuit's ruling that are most ominous. That court's view of preemption has the burning force of a prairie fire, and it is hard to see what structures of state compensation would survive the ensuing conflagration. Food, drugs, cosmetics and toxic substances are all governed in some manner by Federal warning laws. If innocent people are injured because of inadequate warnings, or because advertisements downplay the product's dangers, are all of them barred by Federal law from pursuing tort claims in state court? If so, the circuit court's ruling is cause for a knowing snicker in corporate board rooms across the country.

Id. at 790. The Texas Court of Appeals also criticized the decision, charging that the Third Circuit "disregarded legislative history, ignored the fact that preemption would leave the plaintiff without a remedy, and gave little weight to the heightened presumption against preemption." Carlisle v. Philip Morris, Inc., 805 S.W.2d 498, 515 (Tex. App. 1991).

[51] *Cipollone*, 649 F. Supp. at 668, *aff'g jury verdict*, 693 F. Supp. 208 (D.N.J. 1988), *rev'd in part, aff'd in part*, 893 F.2d 541 (3rd Cir. 1990), *rev'd in part, aff'd in part* 112 S. Ct. 2608 (1992). The district court's decision was a response to the circuit court's mandate. *Cipollone*, 789 F.2d at 188. On remand, the district court was faced with the "unenviable task" of interpreting the Third Circuit's fiat. *Cipollone*, 649 F. Supp. at 667. The court did not conceal its "vehement disagreement" with the appellate court, which it claimed gave cigarette manufacturers carte blanche to distort the hazardous nature of smoking provided that the manufacturers meet the Cigarette Act's labeling requirement. *Id.* Judge Sarokin forewarned that tobacco manufacturers would disavow the perils of cigarette smoking "with impunity and immunity so long as the little rectangle" containing the warning appeared on cigarette advertising and packages. *Id.*

[52] *Cipollone*, 649 F.2d at 667, 674.

press warranty and, by the parties' agreement, failure to warn.[53] Surviving the appellate court's directive were plaintiff's counts alleging negligent research and testing of defendants' cigarettes, and a claim that the manufacturers conspired and took affirmative steps to prevent third parties from releasing data evidencing the health hazards of smoking.[54] The court also allowed the Cipollones to proceed on their alternatively grounded strict liability theory which asserted that: (1) defendants could have manufactured a safer cigarette (design defect);[55] and/or, (2) the cigarettes

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[53] *Id.* at 668, 675. The parties stipulated 1966 as the effective date of the Cigarette Act. *Id.* at 668.

[54] *Id.* at 673, 674. The Cipollones contended that cigarette manufacturers conducted tobacco testing merely to further the manufacturers' own public images, and in the process, negligently shunned that research that could have revealed the true dangers of smoking. *Id.* at 673.

Pursuant to New Jersey case law, independent of their duty to warn, manufacturers are required to use reasonable care when developing a product, assuring that the product is safe and suited for its intended use. *Id.* For example, in Feldman v. Lederle Laboratories, the New Jersey Supreme Court considered the claim of a woman who suffered tooth discoloration from an antibiotic prescribed and administered to her as a child by her father, who at the time was a pharmacist and doctor. Feldman v. Lederle Laboratories, 97 N.J. 429, 434-35, 479 A.2d 374, 376-77 (1984). The medical community was then largely unaware of the side effects of Declomycin, the tetracycline drug intended to control plaintiff's secondary infections. *Id.* at 436, 479 A.2d at 377. The *Feldman* court held, *inter alia*, that sufficient information existed to create an affirmative duty on the defendant-manufacturer to warn of possible tooth discoloration effects. *Id.* at 463, 479 A.2d at 392. With regard to a manufacturer's responsibility to test for defects, the court charged that manufacturers had the burden of proving the level of knowledge in a particular field at the time of distribution. *Id.* at 456, 479 A.2d at 388. To support this position, the court noted public policy considerations and the fact that manufacturers were in a superior position to comprehend the technological materials that formulate their products. *Id.*

[55] *Cipollone*, 649 F. Supp. at 669. The First Circuit Court of Appeals has noted that in a "design defect case premised on negligence, the existence of a safer alternative design is a *sine qua non* for the imposition of liability." Kotler v. American Tobacco Co., 926 F.2d 1217, 1225 (1st. Cir. 1990) (applying Massachusetts law), *vacated and remanded in light of Cipollone*, 112 S. Ct. 3019-20 (1992) (mem.).

Roger J. Traynor, Chief Justice of the Supreme Court of California, attacked the issue of what constituted defect in products liability cases. Traynor, *supra* note 10, at 367. Chief Justice Traynor declared:

> A defect may be variously defined; as yet no definition has been formulated that would resolve all cases. A defective product may be defined as one that fails to match the average quality of like products, and the manufacturer is then liable for injuries resulting from deviations from the norm. . . . If a normal sample of defendant's product would not have injured plaintiff, but the peculiarities of the particular product did cause harm, the manufacturer is liable for injuries caused by this deviation.

Id. Page Keeton cautioned that injuries that occur while using a product for its intended purpose are not, in itself, sufficient to establish a per se defect. Keeton,

were unreasonably dangerous under a risk-utility theory.[56] The district court later struck plaintiff's risk-utility claim as a matter of New Jersey law.[57]

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supra note 10, at 563. For a thorough exegesis of the design defect test, including risk-utility analysis, see VISCUSI, *supra* note 15, at 62-86.

Deviating from conventional design defect claims, the Cipollones' assertion that defendants were liable failed to establish that a technologically feasible, alternative design existed. Mary Griffin, Note, *The Smoldering Issue In* Cipollone v. Liggett Group, Inc.*: Process Concerns In Determining Whether Cigarettes Are A Defectively Designed Product*, 73 CORNELL L. REV. 606, 607 (1988). It is generally difficult to apply the "safer alternative design" argument to cigarettes because the carcinogenic properties are inherent rather than the result of a conscious design choice. Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, And Alternative Compensation Systems*, 39 SYRACUSE L. REV. 897, 900-01 (1988).

[56] *Cipollone*, 649 F. Supp. at 669, 671. A risk-utility analysis compares a product's utility to the risk of injury the product presents to the public. Griffin, *supra* note 55, at 607. This determination is sensitive to the product's desirability, its safety, and the availability of alternatives. *Id.* at 610.

The *Cipollone* court, applying New Jersey law, examined risk-utility in light of the seven "Wade-Keeton" factors, as pronounced by the New Jersey Supreme Court in Cepeda v. Cumberland Engineering Co. *Cipollone*, 649 F. Supp. at 670 & n.1 (citing *Cepeda*, 76 N.J. 152, 173-74, 386 A.2d 816, 826-27 (1978)). *See* John W. Wade, *On The Nature Of Tort Liability For Products*, 44 MISS. L.J. 825, 837-38 (1973). Professor Wade enumerated seven factors significant in the determination of whether a product is duly safe:

> (1) The usefulness and desirability of the product — its utility to the user and to he public as a whole.
> (2) The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury.
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. New Jersey, as a "negligence per se" jurisdiction, is viewed as extremely consumer-oriented in that claims of strict liability in tort are easily accessible. BEASLEY, *supra* note 10, at 211, 244.

[57] *Cipollone*, No. CIV.A. 83-2864, 1987 WL 14666, at *2 (D.N.J. Oct. 27, 1987). The parties conceded that plaintiff's risk-utility claim was barred by the New Jersey Products Liability Act. *Id.* This Act states, in pertinent part:

> In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:. . . . (2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that

At trial, a six-person jury[58] decided for the defendants on the fraudulent misrepresentation and conspiracy to defraud claims, but the failure to warn and express warranty claims were decided against Liggett alone.[59] The jury resolved that, prior to 1966, defendant Liggett had breached an express warranty,[60] and determined that Liggett's failure to adequately warn smokers of the health risks associated with smoking proximately caused Rose Cipollone's death.[61]

> is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended . . . .

N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987).

[58] One of the jurors was a smoker, two were former smokers, and three were nonsmokers. Jacobson, *supra* note 25, at 1052. The six jurors chosen to deliberate the 72-page charge and answer the twenty interrogatories were drawn by lottery from an eleven juror pool, who themselves were extracted from 233 prospective jurors. Amy Singer, *They Didn't Really Blame The Cigarette Makers*, AM. LAW, Sept. 1988, at 32, 34. Among the final six were three women: a 57-year old plastics factory employee who was later chosen forewoman, a 64-year old housewife, and a 52-year old food researcher; and three men: a 35-year old financial marketing employee, a 64-year old loan adviser, and a 52-year old engineer. *Id.* at 34. The last two men mentioned, one a nonsmoker and the other a former smoker, were the lone jurors who consistently sided with plaintiff throughout the deliberation. *Id.* at 34, 35, 36. For a detailed probe into the dynamics of the jurors' reasoning, see *id.* at 31-37.

[59] Jacobson, *supra* note 25, at 1052; *Cipollone*, 693 F. Supp. at 210, *rev'd in part, aff'd in part*, 893 F.2d 541 (3rd Cir. 1990), *rev'd in part, aff'd in part* 112 S. Ct. 2608 (1992). Because Rose Cipollone had not smoked their products before January 1, 1966, the date the Cigarette Labeling Act became effective, the district court granted Philip Morris and Lorillard directed verdicts on the failure to warn and express warranty claims. *Cipollone*, 683 F. Supp. at 1495, 1499. In the interim between the district court's preemption finding and the trial, the court granted defendants' directed verdict motion with respect to the design-defect claim, reasoning that plaintiff failed to meet its evidentiary burden of establishing a causative link between defendant's product and Rose Cipollone's death. *Id.* at 1495. The four-month trial was followed by four and one-half days of jury deliberation. *Cipollone*, 893 F.2d at 553.

[60] *Cipollone*, 693 F. Supp. at 210. The express consumer warranties breached by Liggett were the affirmations that cigarettes were not harmful. There advertisements were replete with the phrases "Play Safe" and "Just What the Doctor Ordered." Singer, *supra* note 58, at 31.

[61] *Cipollone*, 693 F. Supp. at 210. Specific interrogatories that the jury considered in reaching its verdict were as follows:

> 1. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation or concealment by defendant Liggett, prior to 1966, of material facts concerning significant health risks associated with cigarette smoking? [NO]
>
> 2. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation or concealment by defendant Philip Morris, prior to 1966, of material facts concerning significant health risks associated with cigarette smoking? [NO]

The jury awarded Antonio Cipollone, Rose's widower, $400,000 to compensate him for injuries sustained as a result of Liggett's breach of express warranty.[62] The remainder of the jury's determination amounted to a Pyrrhic victory for the Cipollones[63]—the jury broke new ground finding the cigarette manu-

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3. Has plaintiff proven all of the elements necessary to establish fraudulent misrepresentation by defendant Lorillard, prior to 1966, of material facts concerning significant health risks associated with cigarette smoking? [NO]

4. Was there a conspiracy prior to 1966 to fraudulently misrepresent and/or conceal material facts concerning significant health risks associated with cigarette smoking? [NO]

[Questions #5 and #6, concerning elements of plaintiff's conspiracy claim, were pretermitted by the negative response in question #4.]

7. Should Liggett, prior to 1966, have warned consumers regarding health risks of smoking? [YES]

8. [If "yes"], was that failure to warn prior to 1966 a proximate cause of all or some of Mrs. Cipollone's smoking? [YES]

9. [If "yes"], was such smoking a proximate cause of Mrs. Cipollone's lung cancer and death? [YES]

10. [If "yes"], did Mrs. Cipollone voluntarily and unreasonably encounter a known danger by smoking cigarettes? [YES]

11. [If "yes"], was this conduct by Mrs. Cipollone a proximate cause of her lung cancer and death? [YES]

12. [If "yes"], what is the percentage of responsibility for Mrs. Cipollone's injuries attributable to each of the following parties: MRS. CIPOLLONE 80%; LIGGETT GROUP, INC. 20%

13. Did Liggett make express warranties to consumers regarding the health aspects of its cigarettes? [YES]

14. [If "yes"], did any Liggett products used by Mrs. Cipollone breach that warranty? [YES]

15. [If "yes"], was Mrs. Cipollone's use of these products a proximate cause of her lung cancer and death? [YES]

16. If you answered "yes" to any of the following questions: 1, 2, 3, 6, 9 or 15, what damages did Mrs. Cipollone sustain? [NONE]

17. If you answered "yes" to any of the following questions: 1, 2, 3, 6, 9 or 15, what damages did Mr. Cipollone sustain? $400,000

18. If you answered "yes" to any of the following questions: 1, 2, 3, 6 or 9, is plaintiff entitled to punitive damages against one or more of the defendants? [NO]

[Questions #19 and #20, concerning the apportionment of punitive damages, were pretermitted by the negative response in question #18.]

Cipollone, 893 F.2d at 553-54.

62 *Id.* at 554. The jury majority believed that Rose Cipollone's volitional smoking should have vitiated any recovery. Singer, *supra* note 58, at 31. Four members of the jury were willing, however, to placate the two jurors who adamantly refused to allow the cigarette companies to get off scot-free. *Id.* One juror commented that "[the jury] thought it was a small amount to the tobacco company and not too small to Mr. Cipollone, and it would more or less get across a message." *Id.* at 37 (quoting an unidentified juror).

63 *See generally* Jacobson, *supra* note 25, at 1053 (offering four reasons why this verdict may not generally serve plaintiffs well in future litigation). One commentator suggests that the *Cipollone* verdict will not benefit future plaintiffs because: (1)

facturer liable to Cipollone's estate for failing to warn of the health risks associated with smoking and breaching an express warranty, but precluded any recovery for Cipollone's family by attributing to Mrs. Cipollone eighty percent of the responsibility for her injuries.[64] Both parties challenged the jury's findings, but the district court steadfastly denied all motions seeking to overturn or amend the verdict.[65] On cross-appeals from the final judgment, the Court of Appeals affirmed most of the district court's earlier preemption rulings but overruled on some post-trial motions.[66]

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the preemption issue will always have great impact; (2) obstacles in products liability law remain; (3) the tobacco industry's significant economic clout will effectively combat plaintiffs' claims; and (4) ultimately an individual plaintiff is responsible for smoking's consequences. *Id.*

64 *Id.*; *Cipollone*, 693 F. Supp. at 210. Under New Jersey's comparative fault law, adopted by the district court, a plaintiff is barred from recovery if found to be more than 50% responsible for the injury. *Cipollone*, 893 F.2d 541. Focussing the jury's attention on a plaintiff's awareness of the risks of smoking, the tried and true defense strategy in tobacco manufacturer liability cases, was effective once again. Singer, *supra* note 58, at 32. Critical to the defense's successful strategy was its closing argument, which excerpted passages from Rose Cipollone's deposition. *Id.* at 33. The questions and answers inexorably led to the conclusion that Cipollone thoroughly enjoyed smoking and, though advised to quit in 1965, wilfully continued to smoke. One juror concluded: "[t]he lady knew what she was doing. She was an intelligent woman. . . . She was a well-read woman. She was strong. . . . She did it because she wanted to do it." *Id.* (quoting juror Gloria Gooden). This sentiment echoed Liggett's counsel's closing argument:

> She was intelligent. She was strong-minded. She was well-read. She had a mind of her own. She was used to making decisions for herself and her family. This is a woman who was in control of her life. She wanted to do what she wanted to do. She wanted to smoke. She smoked.

Id. (quoting attorney Donald Cohn). Two jurors actually thought Cipollone was 100% responsible for her injuries, but the 80% figure was arrived at as a compromise between the 100% responsibility faction and the other four jurors. *Id.* at 35.

65 *Cipollone*, 693 F. Supp. at 222. Liggett had unsuccessfully moved for judgment notwithstanding the verdict or, alternatively, a new trial. *Id.* Plaintiffs sought to augment damages by: (1) obtaining a partial new trial to determine the amount of damages sustained; (2) adding prejudgment interest; and, (3) modifying the judgment to include damages under the New Jersey Consumer Fraud Act. *Id.* at 222-23 (citing N.J. STAT. ANN. §§ 56.8 -1 to -38 (West 1989)).

66 *Cipollone*, 893 F.2d at 583. Among other matters, the Third Circuit's lengthy opinion differed in issues involving the viability of plaintiff's risk-utility claim, and the jury instructions for the failure to warn and express warranty claims. *Id.* The court of appeals gave new life to plaintiff's risk-utility claim, broadening plaintiff's rights to sue beyond the bounds delineated by the district court. *Id.* at 578. In doing so, the appellate court cited federalism concerns and the fact that the risk-utility claim involved "the basic decision to market the product" as opposed to bearing on the cigarette companies' advertising and promotion. *Id.* at 582 n.52.

The Third Circuit decided that the 72-page jury charge should have excluded consideration of Rose Cipollone's post-1965 conduct when factoring her compara-

The United States Supreme Court granted the Cipollone's petition for certiorari in March 1991[67] to examine the 1965 and 1969 Cigarette Acts' effect on state common law actions.[68] Applying a strict reading to the Acts' preemption provisions, the Court found that the 1969 Act preempted plaintiff's failure to warn and neutralization theories to the extent that the claims depended upon the manufacturers' advertisements or promotions.[69] The Court added, however, that claims based on express warranty, intentional fraud and misrepresentation, or conspiracy were not preempted.[70]

The perils of cigarette smoking were well-documented by 1965.[71] In that year, Congress enacted the Cigarette Act[72] in or-

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tive fault on the failure to warn claim. *Id.* at 558-59. Post-1965 conduct would be relevant to the issue of avoidable consequences, possibly impacting upon her damages, but would not foreclose recovery altogether (as had occurred at trial). *Id.* at 558. The court of appeals reversed and remanded on the breach of express warranty issue, vacating the jury's verdict because the jury had not been instructed that Rose Cipollone's nonreliance on arguably false or misleading advertisements, if proven, would preclude the ads from being "part of the basis of the bargain." *Id.* at 563-64. The appellate court did not require proof of Cipollone's reliance on defendant's ads, but rather a showing of some subjective inducement. *Id.* at 567 (speculating as to probable disposition of the New Jersey Supreme Court). On remand, the jury would need to be convinced Cipollone had read, seen or heard the advertisements, and, if this exposure was proven, defendant must be afforded the opportunity to establish that she did not believe their message. *Id.* at 569.

The other issues involved were tangential, concerning the denial of prejudgment interest and the statute of limitations defense. *Id.* at 546, 583. In his concurrence, Chief Judge Gibbons reflected with regret upon the court's initial decision in 1986 to grant an interlocutory appeal (*Cipollone*, 789 F.2d 181) addressing the preemption matter. *Id.* at 583 (Gibbons, C.J., concurring). The court's pronouncement, Judge Gibbons explained, was premature, confusing, and, in hindsight, wrong, because it failed to "materially advance anything but the lawyers' time meter." *Id.*

67 *Cipollone*, 111 S. Ct. 1386 (1991) (mem.).

68 *Cipollone*, 112 S. Ct. at 2613. The Court sought to harmonize the differences in interpreting the Cigarette Act's preemptive effect existing among federal courts, including the Third Circuit, and the New Jersey and Minnesota Supreme Courts. *Id.* *See* Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 100, 577 A.2d 1239, 1255 (N.J. 1990) (citing public policy concerns as critical to the court's refusal to shield cigarette manufacturers from liability); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 661-63 (Minn. 1989) (barring claims for failure to warn, but finding no preemption of smoker's design defect, misrepresentation, or breach of warranty claims).

69 *Id.* at 2625.

70 *Id.*

71 Crist & Majoras, *supra* note 11, at 554-55. As early as 1604, England's King James I published an admonition against smoking, describing the habit as "lothsome," "hateful," "harmful" and "dangerous." White, *supra* note 25, at 596-97. King James decried the "blacke stinking fume thereof, neerest resembling the horrible Stygian smoake of the pit that is bottomlesse." *Id.* (quoting King James I,

der to, *inter alia*, keep the public informed of the hazards of smok-

1604, as quoted in the HOUSTON CHRONICLE, January 10, 1964). In America, written efforts recognizing the potential perils of smoking date back to 1883, when an anecdotal account described the effects of smoking by children. Editorial, *Tobacco: For Consenting Adults in Private Only*, 225 JAMA 1051 (1986). In 1900, the Supreme Court observed that knowledge of the hazardous effects of cigarettes on young people had become commonplace, but that "while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value." Austin v. Tennessee, 179 U.S. 343, 348, 345 (1900). Awareness of specific health risks inherent in cigarettes escalated in 1954, when the Tobacco Industry Research Committee was formed to conduct research programs involving tobacco use and its health consequences. 1979 SURGEON GENERAL'S REPORT, *supra* note 30, ch. 1, at 6. In July, 1957, a group commissioned by then Surgeon General Dr. Leroy Burney assessed smoking hazards and suggested that a causal relationship may exist between smoking and lung cancer. *Id.*

As a result of this heightened awareness, private and public sector agencies coordinated anti-smoking campaigns to emphasize the health risks of tobacco and induce the smoking public to give up cigarettes. M. Timothy O'Keefe, *The Anti-Smoking Commercials: A Study of Television's Impact on Behavior*, 35 PUB. OPINION Q. 242, 242 (1971). Toward that end, organizations aired television and radio advertisements to accelerate the anti-smoking dynamic. Kenneth E. Warner, *The Effects of the Anti-Smoking Campaign on Cigarette Consumption*, AM. J. PUB. HEALTH 645, 645, 646-47 (1977). Commentators disagree over the effects of this crusade on cigarette consumption. *Compare* O'Keefe, *supra*, at 248 (arguing that advertisements have little effect in helping to reduce cigarette consumption) *with* Warner, *supra*, at 649 (noting that empirical evidence supports the finding that anti-smoking campaigns compel a significant reduction in cigarette consumption).

[72] Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) [hereinafter 1965 Cigarette Act] (codified as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) at 15 U.S.C. §§ 1331-1338 (1982) [hereinafter 1969 Cigarette Act]). In 1984, Congress amended the Act by enacting the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 220 (1984) (codified at 15 U.S.C. §§ 1331-1341 (1988) [hereinafter 1984 Cigarette Act]).

A 1964 Advisory Committee's Report to the Surgeon General concluded emphatically: "*Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.*" U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 33 (1964) [hereinafter 1964 SURGEON GENERAL'S REPORT]. The Surgeon General's report was the impetus behind the 1965 Cigarette Act. Lee G. Dunst, *Federal Preemption: The Federal Cigarette Labeling And Advertising Act And Tort Claims Challenging The Adequacy Of Cigarette Warnings*, ANN. SURV. AM. L. 459, 461 (1990); *see* discussion in 111 CONG. REC. 13,9000-02 (1965) (statement of Sen. Moss) (arguing that the 1964 report's tremendous impact in the United States made passage of Cigarette Act imperative). The resultant Federal Trade Commission (FTC) proposal that cigarette packaging and advertisement be strictly regulated was also influential. *See* WAGNER, *supra* note 27, at 135-42 (chronicling involvement of tobacco industry, lobbyists, legislators, and American Tobacco Association before FTC's proposed rules).

For further inquiry into the legislative history and congressional purpose of the 1965 Cigarette Act, see Robert C. Carlsen, Comment, *Common Law Claims Challenging Adequacy Of Cigarette Warnings Preempted Under The Federal Cigarette Labeling And Advertising Act Of 1965:* Cipollone v. Liggett Group, Inc., 60 ST. JOHN'S L. REV. 754, 759-62 (1986); Dunst, *supra*, at 461-66.

ing by requiring the placement of warning labels on cigarette packages.[73] Initially, the warning labels were required to state: "Caution: Cigarette Smoking May Be Hazardous to Your Health."[74] Later, however, in 1970, Congress responded to a 1967 Federal Trade Commission report that found the prescribed label lacking in significant effect and amending the warning requirement.[75] Thereafter cigarette labels were required to caution: "Warning: The Surgeon General Has Determined That Cigarette Smoking *Is* Dangerous To Your Health."[76] Indeed, the

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[73] 1965 Cigarette Act, *supra* note 72, § 2. This "Declaration of Policy" implemented federal regulation of all cigarette labeling and advertising having to do with the relationship between cigarette smoking and health, through which:

> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Id.

[74] 1965 Cigarette Act, *supra* note 72, § 4.

[75] H.R. REP. No. 805, 98th Cong., 1st Sess. 8-9 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3718, 3721-22 (quotation omitted). In 1967, Congress interpreted the FTC reports—a mandate of the 1965 Cigarette Act—to recommend an educational campaign design to negate the notion that cigarette smoking was harmless, and in 1968 sought to ban all television and radio cigarette advertising. 1965 Cigarette Act, *supra* note 72, § 5; H.R. REP. No. 805, at 9, *reprinted in* 1984 U.S.C.C.A.N. at 3722 (quotation omitted). As a result, § 6 of the 1969 Cigarette Act, entitled "Unlawful Advertisements," dictated that "[a]fter January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 1969 Cigarette Act, *supra* note 72, § 6.

The United States District Court for the District of Columbia upheld the ban on television and radio cigarette advertising, citing the protection of young people from the perils of smoking as a rational basis upon which the Legislation could be predicated. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585-86 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972) (mem.). *But see* Matthew L. Miller, Note, *The First Amendment And Legislative Bans Of Liquor And Cigarette Advertising*, 85 COLUM. L. REV. 632, 633 (1985) (suggesting such a ban should be held unconstitutional as violative of First Amendment free speech protection).

[76] H.R. REP. No. 805, at 9-10, *reprinted in* 1984 U.S.C.C.A.N. at 3722; 1969 Cigarette Act, *supra* note 72, § 4 (emphasis added). This amendment was intended to provide strengthened cautionary labeling of smoking's hazardous effects. S. REP. No. 566, 91st Cong., 1st Sess. 93 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2652, 2652.

In 1984, Congress revised the labeling requirement, adopting four different packaging and advertising labels to be alternated by the manufacturers quarterly:

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema And May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

1969 Cigarette Act revision provided a more emphatic warning; vital to future litigants, however, was the expansion of the Act's preemptive scope.[77] By extending the Cigarette Act's protective umbrella, Congress sheltered tobacco manufacturers from a storm of litigation, creating the only modern American industry completely immune from products liability litigation.[78]

The Supreme Court's initial pronouncement concerning preemption was made in 1824 by Chief Justice John Marshall in

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> SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.
>
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

1984 Cigarette Act, *supra* note 72, § 4 (codified as amended at 15 U.S.C. § 1333 (1988)). The purpose of the 1984 amendment was to "increase public awareness of any adverse health effects of smoking." H.R. REP. No. 805, at 5, *reprinted in* 1984 U.S.C.C.A.N. 3718.

77 *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2619-20 (1992). Section 5 of the 1969 Cigarette Act, entitled "Preemption," provided in full:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

1969 Cigarette Act, *supra* note 72, § 5 (codified as amended at 15 U.S.C. § 1334 (1988)).

The "Preemption" section of the 1965 Cigarette Act was distinguishable by its more myopic effect on state regulation. *Cipollone*, 112 S. Ct. at 2619. The 1965 Cigarette Act's preemption provision provided in part: "(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." 1965 Cigarette Act, *supra* note 72, § 5(b)(emphasis added).

78 Bosack, *supra* note 3, at 756; Corboy & Smith, *supra* note 3, at 462-63. The Restatement (Second) of Torts provides an obstacle to strict liability, explicitly excluding any product known by the ordinary consumer to be inherently dangerous. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i (1965). The Restatement created a specific exception for tobacco, however, which it deemed not to be "unreasonably dangerous." *Id.* This affirmance came shortly after the 1964 Surgeon General's report was issued. Crist & Majoras, *supra* note 11, at 558 (regarding timeliness of tobacco exemption from strict liability as noteworthy). *See also* Jean L. Dusinski, Note, *Federal Cigarette Labeling and Advertising Act Does Not Preempt State Tort Law Claims and New Jersey Products Liability Law Does Not Apply Retroactively*, 22 SETON HALL L. REV. 193, 212 (1991) (discussing judicial interpretation of the Restatement in light of consumer expectation test and risk-utility test); James C. Thornton, Comment, *The Liability of Cigarette Manufacturers For Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers*, 76 KY. L.J. 569, 573-74 (1987-88) (addressing viability of inadequate warning and design defect theories to establish cigarettes as unreasonably dangerous).

Gibbons v. Ogden.[79] In *Gibbons*, petitioner, a federal licensee under the United States Coasting Act of 1793,[80] sought to operate his commercial ferry across the New York/New Jersey waters.[81] The Court decided that a state monopoly on ferrying conferred upon New Jersey Governor Aaron Ogden could not prevent Gibbons from offering his ferry service.[82] The *Gibbons* opinion reflected the Court's burgeoning mindfulness of federal-state relations and superintendence.[83] When state and federal regulations col-

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79 22 U.S. (9 Wheat.) 1 (1824). For an in-depth explanation of *Gibbons*, see MAURICE G. BAXTER, THE STEAMBOAT MONOPOLY (1972). *See generally* Thomas P. Campbell, Jr., *Chancellor Kent, Chief Justice Marshall And The Steamboat Cases*, 25 SYRACUSE L. REV. 497 (1974) (detailing judicial methods of Chancellor James Kent and Chief Justice John Marshall as evidenced by their roles in *Gibbons*).

80 BAXTER, *supra* note 79, at 34. *See* United States Coasting Act of 1793, ch. 8, 1 Stat. 305 (1793) (requiring registration of vessels in order to engage in coasting trade).

81 *Gibbons*, 22 U.S. (9 Wheat.) at 2.

82 *Id.*; STARR et al., *supra* note 2, at 9. *See* BAXTER, *supra* note 79, at 25-36 (detailing the events preceding the Court's decision). Before their relationship soured, Ogden and Gibbons were partners in a ferry service between the ports of Elizabethtown, New Jersey and New York City, New York. Campbell, *supra* note 79, at 507. The monopoly Gibbons challenged was assigned from the original state grantees and passed in the New Jersey Legislature on November 3, 1813. BAXTER, *supra* note 79, at 25-26. The charter granted Ogden an exclusive right to operate steamboats between the two ports for up to two years. *Id.* at 26. To secure his monopoly, Ogden patented refinements of steamboat construction and obtained a coasting license from the United States government. *Id.*

The *Gibbons* case is also of paramount importance to the definition of Congress's commerce powers, especially in view of the *Gibbons* court's recognition of the "continuous journey" of commerce from one state to another. ZIMMERMAN, *supra* note 4, at 111. Chief Justice Marshall illustrated this axiom in *Brown v. Maryland*, drawing on the principles advanced in *Gibbons*. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 446 (1827) (Congress's power to regulate commerce is "coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior").

83 STARR et al., *supra* note 2, at 8. The *Gibbons* Court's classic proclamation of the preemption doctrine was articulated by Chief Justice Marshall:

> [Because] States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will [determine] whether the laws . . . as expounded by the highest tribunal of that State . . . come into collision with an act of Congress. . . . Should this collision exist . . . the acts of [the State] must yield to the law of Congress.

Gibbons, 22 U.S. (9 Wheat.) at 210. Chief Justice Marshall applied the *Gibbons* rule of exclusive congressional power in a later case, declaring:

> [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).

lide, the Court emphasized, state actions are subordinated to their federal counterparts.[84]

Although *Gibbons* superficially gave meaning to the hierarchy of the federal system, Chief Justice Marshall reserved the ultimate resolution of federal-state statutory interaction for a later date.[85] The *Gibbons* decision cogently expressed the fundamental exclusivity of federal powers, however,[86] but the underpinnings of preemption impelled by the *Gibbons* Court have since undergone refinements.[87]

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[84] *Gibbons*, 22 U.S. (9 Wheat.) at 210-11. The Supreme Court later determined that the "collision" referred to in *Gibbons* implicated acts of state regulation the adherence to which would render compliance with a federal mandate "a physical impossibility." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963). See *infra* note 90 for a discussion of *Florida Lime*. *See generally* STARR et al., *supra* note 2, at 14 (calling for a "straightforward application of the Supremacy Clause" in cases involving "physical impossibility").

[85] BAXTER, *supra* note 79, at 119. Baxter contended that *Gibbons*'s long-term effect was to reserve for the Supreme Court the decision of whether the state or federal government could regulate an item of commerce. *Id.* Despite Chief Justice Marshall's penchant for extending Congressional power, the Court maintained the authority to determine the distinction between state and federal jurisdiction. *Id.*

Pursuant to *Gibbons*, Congress is vested with complete authority to define federal and state regulatory powers where interstate commerce is involved. TRIBE, *supra* note 1, § 6-23, at 377. Furthermore, courts must assess the validity of state action where Congress has not regulated. *Id.* Moreover, Chief Justice Taney wrote that it is incumbent upon the federal courts to give the Supremacy Clause its bite:

> [T]he supremacy . . . conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from . . . local influences . . . .

Ableman v. Booth, 62 U.S. (21 How.) 506, 517-18 (1858).

[86] The collision theme was first suggested in Houston v. Moore, 18 U.S. (5 Wheat.) 1, 49-50 (1820) (Story, J., dissenting). *See generally* THE FEDERALIST No. 32, at 220 (Alexander Hamilton) (Isaac Kramnick, ed., 1987). Hamilton listed three areas of power exclusively delegated to the United States:

> [W]here the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

Id.

The Supreme Court's resolution of "actual conflict" cases did not end with *Gibbons*. *See, e.g.*, Free v. Bland, 369 U.S. 663, 666 (1962) ("[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law"); Rose v. Arkansas State Police, 479 U.S. 1, 3-4 (1986) (per curiam) (state statute allowing federal benefits package to reduce recovery otherwise available under Arkansas Workers' Compensation Act presents actual conflict).

[87] THE FEDERALIST No. 32, at 220 (Alexander Hamilton) (Isaac Kramnick, ed.,

In *Hines v. Davidowitz*,[88] the Supreme Court brought the *Gibbons* conflict principle into focus by vitiating any law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[89] The Court implemented this oft-cited standard[90] to preempt a Pennsylvania law demanding additional state-imposed registration for aliens.[91] The Court, according special deference to the goals of federal

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1987); ZIMMERMAN, *supra* note 4, at 111; STARR, et al., *supra* note 2, at 14-15. These refinements are discussed *infra* notes 88-120.

88 312 U.S. 52 (1941). For more insight into the *Hines* decision, see Lewis R. Donelson III, Note, *Federal Supremacy And The* Davidowitz *Case*, 29 GEO. L.J. 755, 758 (1941) (discussing different ways Court could have resolved the matter and considering the decision's possible precedential value); Recent Decision, 18 N.Y.U. L. REV. 584 (1941) (providing brief recount of the case's salient facts and holding); *see also* Wolfson, *supra* note 2, at 75-76 (weighing *Hines*'s importance in preemption jurisprudence).

89 *Hines*, 312 U.S. at 67. Justice Black, writing for the majority, prefaced this new approach by observing:

> This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

Id. The "stands as an obstacle" modification was necessary because the Act ruled on in *Hines* did not actually conflict with the federal statute. *Id.* at 61. *Cf.* Wolfson, *supra* note 2, at 75 (pointing out that compliance with state law would not lead to transgression of federal law and vice versa); Donelson, *supra* note 88, at 755 (noting that Court found the act invalid despite the lack of direct conflict with federal law).

90 *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963). The issue in *Florida Lime* was whether § 792 of the California Agricultural Code was displaced by the provisions of the Federal Marketing Agreement Act of 1937. *Id.* at 134 & n.2. The California act prohibited the import of avocadoes into California with less than the requisite oil content, whereas the federal law certified avocadoes as mature without reference to oil content. *Id.* at 133-34. Applying the *Hines* "obstacle" test, the *Florida Lime* Court enforced the state requirement, holding that "there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field." *Id.* at 141.

Although frequently cited, some claim that the "stands-as-an-obstacle" formula is an anomaly. *See* Wolfson, *supra* note 2, at 75-76 (opining that this rule created a "lofty level of generality," and was not meant to promote a new preemption standard). Mr. Wolfson takes the position that *Florida Lime* Court, as it had in *Hines*, used the "obstacle" test as a catchall embodying existing preemption principles, fusing "actual conflict" and "occupying the field" analysis into a restated but more workable variant. *Id.*

91 *Hines*, 312 U.S. at 74. Pursuant to the Pennsylvania law, all aliens had to pay an additional $1.00 fee, register yearly, and carry a registration card at all times. *Id.* at 59. Furthermore, the registration card had to be produced on demand to a police officer or agent of the Department of Labor and Industry. *Id.*

laws regulating alien registration,[92] concluded that Pennsylvania's more onerous requirements infringed on historically federal turf.[93]

The Supreme Court introduced the notion of "implied preemption"[94] in *Rice v. Santa Fe Elevator Corp.*[95] In *Rice*, a federal licensee was charged with violating an Illinois state statute regulating grain warehouse storage rates.[96] The *Rice* Court looked to the nature and extent of Congress's involvement in the grain warehouse arena to reveal its intent to occupy the field.[97] Utilizing statutory construction as the litmus test for congressional intent,[98] the Court found that Congress's pervasive regulatory

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92 These aims included uniformity and lessened undue intrusion through a comprehensive, integrated registration procedure. *Id.* at 74.

93 *Id.* at 65-66, 73-74. The Court decreed that "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government" that it has become part of a "single, integrated and all-embracing system . . . ." *Id.* at 66, 74. The Court noted that, having established a federal scheme of regulation, the states were prohibited not only from interfering with the federal act but from complementing them as well. *Id.* at 66-67. *Cf.* Stanford Note, *supra* note 2, at 218 (averring that the *Hines* Court looked more to Congress's traditional powers than to the text or background of the federal statute). *See generally* STARR, et al., *supra* note 2, at 22 (explaining that immigration and foreign policy are peculiarly federal interests).

94 Most frequently, preemption cases arise where Congress has demonstrated its intention to occupy a given field through comprehensive legislation. Wolfson, *supra* note 2, at 72, 74. "Occupying the field" analysis is somewhat quixotic, at times raising more questions than it answers; elusive issues include what the field is and what constitutes being occupied. *Id.* at 72. It should be noted that the "stands as an obstacle" test espoused in *Hines* also requires some examination of congressional intent. Bosack, *supra* note 3, at 767. The Court promulgated the notion of Congress having implied powers, in addition to those expressly delegated, as early as 1819. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 353, 369 (1819).

95 331 U.S. 218 (1947). For a compendious recount of the *Rice* decision, see Robert L. Roland, III, Note, 8 LA. L. REV. 132 (1947); Note, *Commerce Clause State Regulation Of Federal Warehouses*, 23 IND. L.J. 187 (1948).

96 *Rice*, 331 U.S. at 220-21 (citation omitted).

97 *Rice*, 331 U.S. at 229, 234. *See generally* Motor Coach Employees v. Lockridge, 403 U.S. 274, 281-82, 285 (1971)(holding that wrongful discharge action brought in state court was precluded by pervasive federal regulation in that area); Fidelity Federal Savings & Loan v. De la Cuesta, 458 U.S. 141, 153 (1982) (listing pervasive federal regulatory schemes, dominance of federal interest, and goals and obligations imposed by federal action as indicia of Congress's intent to occupy a field); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988) (preempting Michigan statute regulating issuance of securities by natural gas companies because federal government occupied field).

98 City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638 (1973) ("Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question."). *See* TRIBE, *supra* note 1, § 6-23, at 377. Professor Tribe proffers that in lieu of a more definitive statement from Congress, federal preemption of state action is wholly reliant upon statutory construction. *Id.*

scheme, as evidenced by the United States Warehouse Act's express language and legislative history,[99] left no room for state regulation of warehouses licensed under federal law.[100] In addition, the Court posited that federal law, in the absence of conflict, should not supersede areas of traditional state concern unless "that was the clear and manifest purpose of Congress."[101] The *Rice* holding was also significant for engendering the concept of a presumption against preemption.[102] By requiring a showing that the federal scheme was "so pervasive," or represented a federal interest "so dominant," as to preempt state action, the Court ostensibly left the remainder of state action unimpeded.[103]

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99 7 U.S.C. § 241-273 (1988). The Act as amended in 1931 states:

> [T]he Secretary of Agriculture . . . is authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, [and] warehousemen, . . . but the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this chapter shall be exclusive with respect to all persons securing a license hereunder . . . .

7 U.S.C. § 269. The Act also vested the power to revoke licenses at will in the Secretary of Agriculture. 7 U.S.C. § 246. The Court recognized the need for federal regulation, maintaining that the aim of the 1931 amendment was "to make the Federal warehouse act independent of any state legislation on the subject." *Rice*, 331 U.S. at 223 n.4 (citation omitted).

100 *Id.* at 232-34. The Court recognized that Congress's aim in amending the federal Warehouse Act was to achieve a fair and uniform system of business practices, a purpose frustrated by additional state requirements. *Id.* at 236. *Cf.* Note, *supra* note 95, at 189 (suggesting that the main purpose of the Act was to standardize warehousing methods by issuing uniform receipts). As a result, where any form of federal control existed, state regulation of those activities was precluded because Congress did more than make the Federal Act paramount over state law in the event of conflict. *Rice*, 331 U.S. at 234, 236.

101 *Id.* at 230. *See generally* English v. General Electric Co., 110 S. Ct. 2270, 2275 (1990)("[p]re-emption is fundamentally a question of congressional intent").

102 *Rice*, 331 U.S. at 230. This presumption is important to "provide assurances that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)). *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 157, 180 (1978) (evaluating federal government's interest in harmonizing international regulation of tanker design in light of presumption against preemption); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (averring that a state law will be preempted where implementation of state regulations would impair "federal superintendence of the field"). *Cf.* Tribe, *Anti-Cigarette Suits*, *supra* note 17, at 789 ("the benefit of the doubt in our Federal system is tilted against Federal pre-emption of state law: the symphonic tie normally goes to the plaintiffs"). *But cf.* Milwaukee v. Illinois, 451 U.S. 304, 316-17 (1981) (observing that presumption against preemption is applied differently where the issue is whether federal statutory or federal common law controls, "and accordingly the same sort of evidence of a clear and manifest purpose is not required").

103 *Rice*, 331 U.S. at 230. The presumption against preemption is heightened where state common law is involved, because of its strong roots in generations of judicial developments. Iconco v. Jensen Construction Co., 622 F.2d 1291, 1296

Relying on *Hines* and *Rice*,[104] the Court in *Silkwood v. Kerr-McGee*[105] found no preemption of state damage awards in a field of unquestionable federal occupation, atomic energy.[106] The Atomic Energy Act[107] was held not to bar a ten million dollar punitive damages award despite the Act's explicit intent to preclude dual regulation of radiation hazards.[108] The *Silkwood* hold-

(8th Cir. 1980). The *Iconco* court stressed that "overriding state interest[s] . . . historically and deeply rooted in its common-law tradition," are presumed not to have been denied absent a showing of Congress's " 'clear and manifest purpose.' " *Id.* (quoting *Rice*, 331 U.S. at 230). The Supreme Court has stated that this presumption is rebuttable by a showing of "persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime*, 373 U.S. at 142.

104 Taken together, the *Hines* and *Rice* holdings greatly expanded the permissible scope of the Court's inquiry into congressional intent. *See* William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives On Federalism And The Burger Court*, 75 COLUM. L. REV. 623, 630-34 (1975) (discussing precedential value of Court's preemption decisions in *Hines* and *Rice*).

105 464 U.S. 238 (1984) (5-4 decision). For more insight into the *Silkwood* holding, see Mark King, Note, *Federal Preemption Of The State Regulation Of Nuclear Power: State Law Strikes Back*, 60 CHI.-KENT L. REV. 989, 1018 (1984) (concluding that *Silkwood* reflected the Supreme Court's predilection toward finding no federal preemption); Tribe, *Anti-Cigarette Suits*, *supra* note 17, at 789 (noting that the *Silkwood* opinion supports settled principle that Federal courts are unlikely to use the "slippery" implied preemption doctrine as a defense to state action); Guy V. Amoresano, Casenote, 26 B.C. L. REV. 727, 743-44 (1985) (suggesting uncertainty generated by Court's opinion may deter investment in nuclear industry, a consequence Congress clearly did not intend); Leslie V.F. Silvestrini, Note, Silkwood v. Kerr-McGee Corp.: *Unpredicted Fallout*, 6 J. ENERGY L. & POL'Y 281, 294-95 (1985) (arguing that the Court drew an arbitrary line to define exceptions to federal preemption of nuclear safety).

106 *Silkwood*, 464 U.S. at 248, 249. The *Silkwood* Court made clear the congressional objective that the Federal government build and operate nuclear power plants. *Id.* at 249 (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation Comm'n, 461 U.S. 190, 205 (1983)). In *Pacific Gas & Elec.*, the Supreme Court held that the Atomic Energy Act did not preempt state powers to regulate utilities. *Pacific Gas & Elec.*, 461 U.S. at 204, 222-23. *But cf.* English v. General Elec. Co., 110 S. Ct. 2270, 2278 (1990) (limiting federal preemption of nuclear industry exclusively to matters inexorably linked to radiological safety levels).

107 42 U.S.C. §§ 2011-2296 (1982). The Act was passed to maximize atomic energy development. 42 U.S.C. § 2013.

108 *Silkwood*, 464 U.S. at 245, 250, 257. The award was in favor of the estate of Karen Silkwood, a laboratory analyst for Kerr-McGee. *Id.* at 241. Kerr-McGee was a plutonium plant subject to licensing and regulation under the Nuclear Regulatory Commission. *Id. See* 42 U.S.C. § 2073 (authorizing NRC to license and regulate plants handling nuclear elements such as plutonium). Silkwood's death in November of 1974 was actually caused by an unrelated automobile accident. Eight days before her death, however, her body showed high levels of radiation contamination. *Id.* at 241-42. The ten million dollar figure was based on the finding that the defendant had acted in reckless disregard of Silkwood's rights. *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 603 (W.D. Okla. 1979), *aff'd in part, rev'd in part*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 464 U.S. 238 (1984). The punitive damages did not

ing was notable for its rejection of the notion that punitive damage awards are preemptable due to the conflict between such awards and the federal regulatory scheme.[109] Thus, in the absence of express preemptive language, the burden falls upon the defendant to prove Congress's intent to preclude damage awards.[110] Accordingly, whether by accident or design, *Silkwood* significantly extended the scope of state involvement in federally-regulated industries.[111]

In 1987, the First Circuit applied these preemption principles to the Federal Cigarette Labeling and Advertising Act in *Palmer v. Liggett Group, Inc.*[112] In *Palmer*, a deceased smoker's

include a $505,000 actual damages award. 464 U.S. at 245. For a deeper probe into the facts and background of the *Silkwood* case, see King, *supra* note 105, at 1002-04.

[109] *Silkwood*, 464 U.S. at 257. Punitive damages were not part of the field occupied by Congress and did not conflict because payments for both federal and state fines or awards was "physically impossible." *Id.* at 251, 257. In *San Diego Bldg. Trades Council v. Garmon*, however, the Supreme Court likened state law damage awards to state regulation. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959). The *Garmon* Court carved out a narrow exception, allowing damages awards redressing injuries suffered as a result of violence or threats to public peace, respecting the states' compelling interest in maintaining domestic order. *Id.* at 247 (citations omitted).

Some commentators have concurred with the *Silkwood* Court's premise. *See, e.g.*, Corboy & Smith, *supra* note 3, at 448 (averring that there is, at most, a hypothetical tension between federal legislation and state tort law); Carlsen, *supra* note 72, at 765 (noting that manufacturer's exposure to common law tort liability might serve as incentive for change, but such change is wholly reliant upon manufacturer's discretion). Note, however, that the First Circuit stated that the *Silkwood* Court did not indicate whether *Garmon* was modified or overruled. Palmer v. Liggett Group, Inc., 825 F.2d 620, 628 (1st. Cir. 1987). A claim of federal preemption is weakened where Congress exhibits a willingness to allow the tension of state law operation where federal interest exists. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166-67 (1989)(quoting *Silkwood*, 464 U.S. at 256).

[110] *Silkwood*, 464 U.S. at 255. The Court recognized the importance of punitive damages and state tort actions. *Id.* The Court added that Kerr-McGee had the burden of demonstrating that Congress supplanted state tort law and precluded recovery. *Id.*

[111] King, *supra* note 105, at 1018. For example, the *English* Court allowed a discharged whistleblower to bring a state-based intentional infliction of emotional distress claim against the operators of a nuclear-fuels production facility. *English*, 110 S. Ct. at 2273, 2281 (1990). The Court permitted this action despite the existence of a federal remedy. *Id.* at 2273. The Court found "no evidence of a 'clear and manifest' intent on the part of Congress to pre-empt tort claims" that did not bear "some direct and substantial effect on the decisions . . . concerning radiological safety levels." *Id.* at 2278-79.

[112] 825 F.2d 620 (1st Cir. 1987), *rev'g* 633 F. Supp. 1171 (D. Mass. 1986). Many commentators have written on *Palmer*'s impact upon tobacco litigation. *See* Lora B. Greene, Note, 10 CAMPBELL L. REV. 467, 470 (1988) (characterizing the *Palmer* result as "driving another nail in the preemption coffin"); *see also* John D. Titus, Case Note, *Federal Pre-emption and the Cigarette Act - The Smoke Gets In Your Eyes*, Palmer v. Liggett Group, Inc., *825 F.2d 620 (1st Cir. 1987)*, 20 ARIZ. ST. L.J. 897, 922 (1988)

widow sued a tobacco manufacturer alleging that the manufacturer was responsible for her husband's lung cancer and subsequent death.[113] The *Palmer* court denied plaintiff's common law claims on actual conflict grounds.[114] The court's conclusion, entitled "The Last Puff,"[115] found plaintiff's argument against preemption meritless.[116] The First Circuit considered the "occupying the field"/"actual conflict" distinction vacuous,[117] looking instead to the effect of plaintiff's suit on the federal regulatory scheme.[118] This departure and ultimate resolution was at odds with the *Silkwood* Court's holdings, but the First Circuit distinguished the case by contrasting the underlying federal actions.[119]

(predicting that the *Palmer* decision will be of limited precedential value); Cheryl M. Kornick, Casenote, *Inadequate Warning Claims Preempted by Cigarette Labeling Act:* Palmer v. Liggett Group, Inc., 34 LOY. L. REV. 419 (1988) (observing that *Palmer* ignored Supreme Court's preemption jurisprudence).

113 *Palmer*, 825 F.2d at 622.

114 *Id.* at 626. In *Palmer*, plaintiff was the widow of Joseph Palmer, a three to four pack-a-day smoker who died of lung cancer in 1980. *Id.* at 622. Liggett was accused of common law negligence (failure to warn), and breach of warranty. *Id.* The First Circuit held that permitting common-law failure to warn claims would frustrate congressional purpose. *Id.* at 626. Although Liggett claimed preemption as a defense, the court only entertained the implied preemption argument and perfunctorily disposed of express preemption in the following manner:

> Rather than wade into the bog of doublespeaking legislative history to divine congressional intent from words *not* used, we simply acknowledge that the preemption section reads 'no requirement . . . shall be imposed under State law,' not 'State-based tort claims are hereby preempted.'

Id. at 625.

115 *Id.* at 629.

116 *Id.* The court's interpretation of Congress's intent relative to state common law actions was equally unequivocal. *Id.* at 626. Senior Circuit Judge Brown imparted:

> Congress ran a hard-fought, bitterly partisan battle in striking the compromise that became the [Cigarette] Act. It is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state.

Id.

117 *Id.* at 626. The court avoided "trying to fit the [Cigarette] Act into some precast mold of 'impossibility' or 'frustration' . . . ." *Id.* The court inferred, however, that any other examination would yield potential rather than actual harm. *Id.* at 626 n.11.

118 *Id.* at 626. The First Circuit was reluctant to embrace legislative history in its interpretation of the Act, noting that such reliance was to be approached carefully. *Id.* (quotation omitted). The court considered the Act's statement of purpose and preemption provision to be dispositive of congressional purpose. *Id.* The court rejected as disingenuous plaintiff's claim that compensatory damages would not serve a regulatory effect. *Id.* at 627.

119 *Id.* at 628. The First Circuit asserted three material differences in the Atomic

Contemporaneous cases emerging from other courts echoed the *Palmer* court's conclusion.[120] For instance, the Sixth Circuit's decision in *Roysdon v. R.J. Reynolds Tobacco, Co.*[121] relied upon *Palmer*, in addition to the *Cipollone* lower court decisions, to affirm the Cigarette Act's extensive preemptive breadth.[122] In *Roysdon*, a Tennessee smoker sued defendant under a failure to warn and design defect theory, alleging that plaintiff's addiction to cigarettes eventually necessitated the amputation of his left leg.[123] The *Roysdon* court, pursuant to Tennessee law,[124] determined that cigarettes were not defective according to a design defect

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Energy Act and Cigarette Act: (1) the former lacked an express preemption provision; (2) the former reserved certain authority to the states; and (3) the former's legislative history reflected an interest in maintaining state common law actions. *Id.* Unlike *Palmer*, the Texas Court of Appeals has held that federal standards are minimum standards and that the states can supplement them through tort litigation. Carlisle v. Philip Morris, Inc., 805 S.W.2d 498, 516 n.9 (Tex. App. 1991). The *Carlisle* court criticized the *Palmer* holding as "flawed," primarily for dismissing plaintiff's "no remedy" argument. *Id.* at 515. The court chastised the First Circuit for referring to smoking as a "voluntary activity" and ignoring its addictive effect. *Id.* The court also asserted that *Palmer* obscured preemption analysis by considering the voluntariness of the smoker's actions and its impact on defendant's liability, matters more appropriately reserved for resolution of the merits of the case than used in a preemption decision. *Id.* at 516.

120 *See, e.g.*, Pennington v. Vistron Corp., 876 F.2d 414, 423 (5th Cir. 1989) (finding preemption on failure to warn claim, but allowing plaintiff's claim that under Louisiana law cigarettes were unreasonably dangerous per se); Hite v. R.J. Reynolds Tobacco Co., 578 A.2d 417, 420 (Pa. Super. 1990) (finding preemption for plaintiff's failure to warn claim and dismissing design defect claim on substantive law grounds); Phillips v. R.J. Reynolds Indus., Inc., 769 S.W.2d 488, 489-91 (Tenn. Ct. App. 1988)(relying on *Palmer*, Tennessee Court of Appeals affirmed summary judgment for cigarette company against plaintiff who had contracted Buerger's disease from smoking).

121 849 F.2d 230 (6th Cir. 1988), *aff'g* 623 F. Supp. 1189 (E.D. Tenn. 1985). For abstracts describing the *Roysdon* holding, see Bosack, *supra* note 3, at 780; Jacobson, *supra* note 25, at 1037-38; Weeks, *supra* note 2, at 677-78; Cooper, *supra* note 34, at 288-89; Riley, *supra* note 25, at 1142-43.

122 *Id.* at 235; Bosack, *supra* note 3, at 780. As a preliminary matter, the *Roysdon* court agreed with the *Cipollone* district court conclusion that Congress had no intention to occupy the tobacco field. *Id.* at 234 n.5. The court relied solely on the findings of *Palmer* and *Cipollone* to conclude that R.J. Reynolds's compliance with the Cigarette Act's labeling requirement barred plaintiff's failure to warn claim. *Id.* at 234-35. In *Stephen v. American Brands, Inc.*, the Eleventh Circuit drew only from the Third Circuit in *Cipollone* to affirm the lower court's denial of an injured smoker's motion to strike the cigarette manufacturer's preemption defenses. Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987) (per curiam).

123 *Roysdon*, 849 F.2d at 232. Plaintiff's doctors testified that years of smoking defendant's cigarettes had caused peripheral atherosclerotic vascular disease of Roysdon's left foot. *Id.* Surgical incisions failed to heal the disease, which required doctors to amputate below Roysdon's left knee. *Id.*

124 The Sixth Circuit was responding to an appeal from a directed verdict dismissing the design defect claim. *Id.* at 236. The court noted that a federal court

analysis because cigarettes' grave health risks were common knowledge.[125] Furthermore, the *Roysdon* court found that tobacco products were not unreasonably dangerous because tobacco use spanned several centuries and its characteristics were well-known.[126]

Against this historical backdrop of Supreme Court interpretations of the preemption doctrine, and a Federal court penchant to implement it, the Supreme Court synthesized the litany of assorted dogma to resolve *Cipollone v. Liggett Group, Inc.*[127] Finding that the Third Circuit unduly expanded the preemption doctrine beyond its constitutional boundaries,[128] the Court held, *inter alia*, that Rose Cipollone's estate could base a tort claim on express warranty, conspiracy to defraud, fraudulent misrepresentation and certain failure to warn theories.[129]

Writing for the majority, Justice Stevens, joined by Chief Justice Rehnquist, and Justices White and O'Connor, prefaced the Court's legal analysis by recapitulating the salient facts and examining briefly the social and political climate that forged passage of the 1965 Cigarette Act.[130] Justice Stevens scrutinized petitioner's complaint[131] by recounting seriatim each basis of potential recovery.[132] The majority's attendant probe revisited Liggett's preemption defense as construed by the lower courts'

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sitting in diversity must apply state substantive law. *Id.* (citing Arms v. State Farm Fire & Casualty Co., 731 F.2d 1245, 1248 (6th Cir. 1984)).

125 *Id.* at 236.

126 *Id.* The *Roysdon* court analogized the common knowledge of perils inherent in tobacco use to those inherent in alcohol. *Id.* Specifically, the Tennessee Supreme Court had taken judicial notice of the widespread public understanding of alcohol's dangers, which were determined by the objective knowledge of an ordinary consumer. Pemberton v. American Distilled Spirits, 664 S.W.2d 690, 693 (1984). The court disposed cursorily of plaintiff's claim that his ailment (vascular disease) was not the one most associated with smoking (lung cancer). *Id. But see* VISCUSI, *supra* note 15, at 64 (countering that consumers are rarely aware of the hazards posed by various products, an assumption that underlies products liability law).

127 112 S. Ct. 2608, 2613 (1992)(7-2 decision). For more insight on the Court's holding, see VARGO & LEE, *supra* note 18, at 8-11 (providing brief recapitulation of majority's findings); Leading Cases, *supra* note 18, at 355-57 (assessing *Cipollone*'s precedential value to future products liability litigation).

128 *Cipollone*, 112 S. Ct. at 2625. For analysis of the Third Circuit's ruling, see *supra* notes 44-50 and accompanying text.

129 *Cipollone*, 112 S. Ct. at 2614, 2625 (summarizing Court's findings). For a discussion of the different bases of recovery in the Cipollone complaint, see *supra* notes 19-25, 31, 45-50 and accompanying text.

130 *Id.* at 2613-17.

131 *Id.* at 2614. Antonio Cipollone, Rose's widower, died after trial. *Id.* Their son, Thomas, maintained the action as executor of both estates. *Id.*

132 *Id.* at 2614, 2621.

rulings.[133]

Justice Stevens reiterated the hazards of tobacco as evinced by yearly Surgeon General publications documenting the health consequence of cigarette smoking.[134] The majority then recon-

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[133] *Id.* at 2614-15. For analysis of the lower courts' rulings, see *supra* notes 37-66 and accompanying text. For an abstract of the eight-year procedural history of the litigation, see *supra* note 35.

[134] *Cipollone*, 112 S. Ct. at 2615. The 1969 Cigarette Act required annual reports to Congress from the Secretary of Health and Human Services concerning "(A) current information in the health consequences of smoking, and (B) such recommendations for legislation as he may deem appropriate." 1969 Cigarette Act, *supra* note 72, § 8. The Federal Trade Commission (FTC) was required to report annually on "(A) the effectiveness of Cigarette Labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate." *Id.* The legislative history of this Act reveals the interest in "keep[ing] Congress fully informed in these areas." S. REP. No. 566, *supra* note 76, at 2663. These voluminous Surgeon General reports document, among other things, adverse effects of cigarette smoking on pregnancy, cardiovascular disease, lung disease, and the work environment. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING, THE CHANGING CIGARETTE (1981) [hereinafter 1981 SURGEON GENERAL'S REPORT]; U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING, CARDIOVASCULAR DISEASE (1983) [hereinafter 1983 SURGEON GENERAL'S REPORT]; U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING, CHRONIC OBSTRUCTIVE LUNG DISEASE (1984) [hereinafter 1984 SURGEON GENERAL'S REPORT]; U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING, CANCER AND CHRONIC LUNG DISEASE IN THE WORKPLACE (1985) [hereinafter 1985 SURGEON GENERAL'S REPORT].

In 1981, the Surgeon General Report evaluated, among other things, the effects of cigarette smoking upon pregnancy and infant health. 1981 SURGEON GENERAL'S REPORT, *supra*, at 153-72. The report concluded that "[c]igarette smoking during pregnancy has been shown to have adverse effects on the mother, the fetus, the placenta, the newborn infant, and the child in later years." *Id.* at 21.

In 1983, the Surgeon General's Report examined the effects of cigarette smoking on cardiovascular disease. 1983 SURGEON GENERAL'S REPORT, *supra*, at iii. The report warned that "[c]igarette smoking should be considered the most important of the known modifiable risk factors for coronary heart disease in the United States." *Id.* at iv. It remarked optimistically, however, that "changes in smoking habits [specifically a decline in the percentage of regular smokers] have contributed to substantial improvement in mortality rates from the cardiovascular diseases in the United States." *Id.* at 10.

The 1984 Surgeon General's Report surveyed the effects of cigarette smoking upon lung disease. 1984 SURGEON GENERAL'S REPORT, *supra*, at 5. It was determined that "[c]igarette smoking is the major cause of COLD [chronic obstructive lung disease] morbidity in the United States; 80 to 90 percent of COLD in the United States is attributable to cigarette smoking." *Id.* at 9.

The 1985 Surgeon General's Report demonstrated that cigarette smoking had an adverse effect within the work environment. 1985 SURGEON GENERAL'S REPORT, *supra*, at 10. It was observed that "[f]or the majority of American workers who smoke, cigarette smoking represents a greater cause of death and disability than their workplace environment." *Id.* at 11. This report also evaluated the effects of occupational exposure in the workplace. *Id.* at 19-96.

It should be noted that despite this research, the tobacco industry stubbornly

ciled the dual purposes of the 1965 Cigarette Act, informing the public and protecting the economy from the burden of diverse regulations, with the concomitant labeling requirement and preemption provision.[135] The majority recognized that the 1969 revision of the Act effectuated change in three ways: strengthening the warning label, banning cigarette advertising in all mediums subject to Federal Communications Commission jurisdiction[136] and broadening the prior Act's preemptive reach.[137] This last feature presented a pervasive theme recurring throughout the majority opinion.[138]

Departing from the analysis of the lower courts, the Court eschewed both the Act's legislative history and socio-political trends, noting instead that an express provision encapsulating the issue of preemption provided a "reliable indicium" of congressional intent toward state authority.[139] The Court buttressed

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resists conceding that a causal link exists between smoking and disease. Ross, *supra* note 31, at 333.

135 *Cipollone*, 112 S. Ct. at 2616. This deduction is consistent with the 1965 Cigarette Act's legislative history:

> [I]t is desirable that the Federal Government — upon which persons have come to rely for cautionary labeling of hazardous substances — should take affirmative action which would manifest its concern. Moreover, while the committee believes that the individual must be safeguarded in his freedom of choice — that he has the right to choose to smoke or not to smoke — we believe equally that the individual has the right to know that smoking may be hazardous to his health.

H. R. REP. No. 449, 89th Cong., 1st Sess., 2350, 2352 (1965). The preemption section, disallowing additional state-imposed requirements, was in furtherance of the House of Representative's objective to avoid "a multiplicity of State and local regulations pertaining to labeling of cigarette packages [which] could create chaotic marketing conditions and consumer confusion." *Id.*

136 *Cipollone* 112 S. Ct. at 2617. The 1969 Act made it "unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 1969 Cigarette Act, *supra* note 72, § 6. This amendment "represented a reasonable determination of the problems presented." S. REP. No. 566, *supra* note 76, at 2662. The Court impliedly viewed this addition as a manifestation of the FTC's interest in continuing its long history of regulating unfair and deceptive tobacco industry advertising procedures. *Cipollone*, 112 S. Ct. 2616.

137 *Cipollone*, 112 S. Ct. at 2617. *See* Kotler v. American Tobacco Co., 926 F.2d 1217, 1222 (1st. Cir. 1990), *vacated and remanded in light of Cipollone*, 112 S. Ct. 3019-20 (1992)(mem.) (observing Cigarette Act's carefully balanced purpose). For an understanding of this revision's impact, see *supra* notes 75-78 and accompanying text.

138 *See Cipollone*, 112 S. Ct. at 2619-2625.

139 *Id.* at 2618 (quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978)). The majority asserted that the preemptive scope of both the 1965 and 1969 Cigarette Acts was controlled entirely by the express preemption language of the Acts. *Id.* The Court has been reluctant to interpret the statements of individual legisla-

this position[140] by proffering that, because Congress had presumed to define the scope of preemption, the courts had no license to infer that the congressional delimitation was deficient.[141] The Court limited analysis of Cipollone's common law claims by limiting the scope of its evaluation to the Cigarette Acts' precise preemptive statements.[142]

Justice Stevens, having settled that the preemption provision was the sole litmus test for congressional intent and that there were material differences in the 1965 and 1969 Cigarette Acts, implemented a bifurcated approach to resolving the preemption issue.[143] First, the majority noted that in enacting the preemp-

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tors as a credible badge of congressional intent. Pacific Gas & Elec. Co. v. State Energy Resources Comm., 461 U.S. 190, 216 (1983)

The *Malone* Court construed the Welfare and Pension Plans Disclosure Act (Disclosure Act) to reveal congressional intent while deciding on the preemptive effect of another federal statute. *Malone*, 453 U.S. at 505. As a result, the Court reversed the Eighth Circuit, finding no federal preemption of the Minnesota Pension Act. *Id.* at 515. The federal statute in question, the National Labor Relations Act (NLRA) (forerunner to the Employee Retirement Income Security Act of 1974 (ERISA)), did not explicitly displace state regulation of pension plans. *Id.* at 499, 504-05. Furthermore, the Disclosure Act left state laws unaffected despite an express provision protecting employers from dual state and federal filing specifications. *Id.* at 505. The Court's analysis in *Malone* has been criticized by some commentators. *See, e.g.*, Patrick J. Maher, Note, *Private Preemption of State Labor Laws: A Constitutional Objection*, 58 TEX. L. REV. 1099, 1100 (1980) (asserting *Malone* Court's analysis was misguided because it failed to integrate the statutory language); James P. Hollihan, Recent Decision, 17 DUQ. L. REV. 189, 200 (1978-79) (suggesting Court's decision would have been clearer if based on safety and health grounds instead of on Pension Disclosure Act). The Disclosure Act was later specifically repealed by ERISA. *Malone*, 453 U.S. at 505 n.7.

140 *Cipollone*, 112 S. Ct. at 2618.

141 *Id.* The Court referred to the legal maxim *expressio unius est exclusio alterius*, which means that "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

142 *Id.* In considering the validity of Cipollone's individual bases of recovery, the text of Justice Stevens's analysis cited no prior case law, only references to the relevant legislative history, lower courts' rulings and, where necessary, New Jersey statutory law. *Id.* at 2621-25. In his dissent, Justice Scalia warned that the majority approach constituted a new canon of construction. *Id.* at 2634 (Scalia, J., dissenting). The dissent added that such an approach stood on shaky ground, evincing a novel yet undesirable result:

> 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 is to be the law, surely only the most sporting of congresses will dare to say anything about pre-emption.

Id.

143 *Id.* at 2618. Justice Stevens determined "[i]n this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections. As the 1965 and 1969 provisions differ substantially, we consider each in turn." *Id.*

tion section of the 1965 Cigarette Act Congress "spoke precisely and narrowly."[144] The Court placed emphasis on use of the word "statement," which the Court perceived to prohibit only additional federal or state labeling requirements.[145] This finding was underscored by the presumption against preemption, which, Justice Stevens stressed, reinforced a strict construction of the preemption provision.[146] The majority opinion pointed out that congressional action calling for a uniform warning label did not automatically trigger preemption of a regulatory field.[147] Furthermore, Justice Stevens observed that there is no inherent conflict between federal displacement of individual state warning requirements and the existence of damage actions brought under state common law.[148] These findings supported Justice Stevens's

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144 *Id.* The 1965 Cigarette Act section entitled "Preemption" states in pertinent part:

> Sec. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act ["Labeling"], shall be required on any cigarette package.
>
> (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.
>
> (c) Except as is otherwise provided in subsections (a) and (b), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or require an affirmative statement in any cigarette advertisement.

1965 Cigarette Act, *supra* note 72, § 5.

145 *Cipollone*, 112 S. Ct. at 2618.

146 *Id.*

147 *Id.* (citing McDermott v. Wisconsin, 228 U.S. 115, 131-32 (1913)). In *McDermott*, the Court reversed the conviction of two maple syrup distributors accused of violating a Wisconsin statute which required, when necessary, a distinct label indicating the presence of glucose in any syrup compound sold in the state. *McDermott*, 228 U.S. at 125, 137. The Court conceded that even where Congress has regulated, "it by no means follows that the State is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs." *Id.* at 131. The convictions were overturned because the Wisconsin law was found to thwart the congressional means as espoused in the Federal Pure Food and Drugs Act. *Id.* at 137.

148 *Cipollone*, 112 S. Ct. at 2618. Justice Stevens asserted that federal preemption of state warnings did not necessarily conflict with the continued vitality of state-based damage actions. *Id.* As an example, the Court cited the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401-4408 (1988). *Id.* This Act contained a labeling proviso and preemption section prohibiting additional state enactments similar to those of the Cigarette Act, but stipulated that "[n]othing in this chapter shall relieve any person from liability at common law or under State statutory laws to any other person." 15 U.S.C § 4406(c). Justice Stevens's assertion was buttressed by the concurring opinion of Justice Blackmun,

perception of the 1965 Act, when read in light of its regulatory context and statement of purpose, as superseding only alternate and supplemental labeling requirements, but not state law damage actions.[149]

This conclusion did not end the Court's inquiry; the majority had yet to measure the impact of the 1969 Cigarette Act's preemptive muscle.[150] Critical to the Court's inquiry was the modification of the Cigarette Act's preemption provision (section 5(b)),[151] which substituted "statement" for "requirement[s] or prohibition[s] . . . imposed under State law," and extended preemption beyond statements "in the advertising" to obligations "with respect to the advertising or promotion" of cigarettes.[152] Although this revision was characterized in a 1969 Committee Report as a clarification[153] the majority steadfastly maintained that its effect was to extend considerably the Cigarette Act's preemptive scope.[154] As a result, Justice Stevens refuted Cipollone's contention that section 5(b), in either form, did not bar common law claims.[155] Whereas common law claims and section 5(b) of the 1965 Cigarette Act were coterminous, there could be no peaceful coexistence for Supremacy Clause purposes between common law claims and the 1969 Act.[156]

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which, when speaking of the Tobacco Act, added that congressional preemption of direct state regulation did not include state common law tort claims. *Cipollone*, 112 S. Ct. 2628 n.2 (Blackmun, J., concurring).

149 *Id.* at 2618-19. Essential to this conclusion was the relationship of and common law actions regulation, the simultaneousness of which the majority had premised their holding upon. *Id.* at 2619.

150 *Id.* at 2619. The majority's close scrutiny of both preemption provisions was a novel approach not contemplated by the lower courts nor argued by the parties. *Id.* Justice Blackmun, who authored the concurrence, agreed with the majority's analysis only in part. *Id.* at 2625 (Blackmun, J., concurring). Thus, the majority opinion from this point on reflected the views of only a minority of the Supreme Court. *Id.* at 2625, 2632.

151 See *supra* note 77and accompanying text for a discussion of § 5(b).

152 *See Cipollone*, 112 S. Ct. at 2620, 2621.

153 *See* S. REP. No. 566, *supra* note 76, at 2663 ("Preemption of State or local regulation of cigarette advertising based on smoking and health has now been moved to section 5(b) and *clarified*.") (emphasis added).

154 *Cipollone*, 112 S. Ct. at 2619. In consideration of the reforms effectuated by the 1969 Cigarette Act, the Court declared that the 1969 Act substantially altered the scope of the Cigarette Act's preemptive reach. *Id.* at 2619-20.

155 *Id.* at 2620.

156 *Id.* at 2619, 2620. The Court reasoned that the "no requirement or prohibition" phrase was misleading because it failed to distinguish between actual regulation and common law tort actions. *Id.* at 2620. The majority reminded that damage awards, ancillary to preventive relief, can take on a regulatory effect, because "[t]he obligation to pay compensation can be, indeed is designed to be, a

Justice Stevens averred that the narrow construction of the 1965 Cigarette Act's language compelled a literal reading of the 1969 revision.[157] Accordingly, Justice Stevens reasoned that Cipollone's claims were "premised on the existence of a legal duty," and imposed on cigarette manufacturers "requirements and prohibitions."[158] Thus, the Justice posited, the requirements of the common law violations mandated preemption of those claims.[159] Justice Stevens also rejected, as violative of the *Erie* doctrine, Cipollone's contention that the phrase "imposed under State law" did not preempt common law actions.[160] Justice Stevens further implied that such a construction would unduly expand the presumption against preemption beyond its intended purpose.[161]

The majority opinion noted, however, as a partial reprieve to Cipollone's claims, that not all actions would be barred.[162] The bright line test as espoused by Justice Stevens considered the essence of plaintiff's claim and the duty it triggered.[163] The major-

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potent method of governing conduct and controlling policy." *Id.* (quoting *Garmon*, 359 U.S. 236, 247 (1959)).

157 *Cipollone*, 112 S. Ct. at 2620. Justice Stevens posited that there was no evidence, in light of the narrowness of its predecessor, to support the contention that Congress intended the 1969 Cigarette Act revision to mean less than what Congress expressly stated. *Id.*

158 *Id.*

159 *Id.* By distinguishing the 1965 and 1969 Cigarette Acts, Justice Stevens illustrated this anomaly: "Whereas the common law would not normally require a vendor to use any specific *statement* on its packages or in its advertisements, it is the essence of the common law to enforce duties that are either affirmative *requirements* or negative *prohibitions*." *Id.*

160 *Id.* The *Erie* doctrine refers to the holding of the Supreme Court in *Erie R.R. Co. v. Tompkins* that "state law" embraces common law in addition to state statutes and regulations. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938). *See* FRIEDENTHAL ET AL., CIVIL PROCEDURE § 4.2 at 194-98 (1985) (discussing *Erie*). The *Cipollone* Court supported this principle by quoting from the *Norfolk & Western Railway* case, which held that the statutory language above "all other law, including State and municipal law" "does not admit of [a] distinction . . . between positive enactments and common-law rules of liability." Norfolk & Western Railway Co. v. American Train Dispatchers Assoc., 111 S. Ct. 1156, 1163 (1991).

161 *Cipollone*, 112 S. Ct. at 2620-21. The Court noted that a narrow interpretation of state law would be inappropriate in this instance. *Id.*

162 *Id.* at 2621. The Court demonstrated the nature of its partial exclusion determination by maintaining that "[f]or purposes of § 5(b), the common law is not of a piece." *Id.*

163 *Id.* The critical determinant in evaluating a smoker's claim, the Court instructed, was whether the legal duty underlying the damage action "constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion'. . . ." *Id.* The Court added that this language was to be read fairly but narrowly. *Id.* (quoting the 1969 Cigarette Act, § 5).

ity, sidestepping application of New Jersey substantive law, would not rule on the persuasiveness of Cipollone's claims, only on their viability for Supremacy Clause purposes.[164]

The Court first considered Cipollone's failure to warn claims alleging negligent testing and inadequate warnings.[165] The majority declared those claims preempted to the extent that they required proof that Liggett should have provided additional, or more precise, warnings in their post-1969 advertising or promotions.[166] Cipollone's express warranty claims, which rested largely on statements made in Liggett's advertising, were not preempted, according to the majority, because the claims did not rely on a state-based requirement.[167] Focusing on the nature of a seller's warranty,[168] Justice Stevens drew a distinction between a manufacturer's general duty to honor warranties, which arises

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164 *Id.* The Court shunned analysis of the merits of plaintiff's claim by expressing no opinion concerning viability under state law. *Id.* Rather, the Court assumed *arguendo* that plaintiff's claims would pass muster under New Jersey law. *Id.*

165 *Id.* Generally, to establish a failure to warn cause of action, the injured party must show that a product requires a warning to make it reasonably safe and that the failure of the manufacturer to provide such a warning proximately caused the injury. *Id.*

166 *Id.* at 2621-22. The Court specifically allowed claims based upon "testing or research practices or other actions unrelated to advertising or promotion." *Id.* at 2622.

This conclusion rides roughshod over Professor Garner's proclamation, which disputes a finding of any preemption:

> Courts adjudicate prior conduct and require payment for injury. When a court imposes liability for failure to adequately warn, no 'specific statement relating to smoking and health' is being required. The practical effect of this may be that cigarette companies will choose to add an addiction warning so as to avoid future liability. A damages award, however, requires only payment —it is not an injunction requiring the defendant to incorporate into its advertising a fixed legend different from the federally required label. The labeling acts do not prohibit a manufacturer from warning of undisclosed health risks. The only prohibition is against a state agency passing a law requiring cigarette companies to use a different label. The labeling acts manifest neither a congressional intention to preempt courts from granting money judgments nor a conflict between such judicially imposed liability and federal law.

Garner, *supra* note 25, at 1454. *See Cipollone*, 112 S. Ct. at 2628 (Blackmun, J., concurring) (averring that whether defendant may or must alter behavior reflects difference between common law's indirect regulatory effect and direct regulatory force of positive enactments).

167 *Id.* at 2622, 2623.

168 The Court looked to New Jersey, whose jurisprudence controlled the substantive law aspects of the case, to ascertain the applicable standard for a seller's warranty. *Id.* The statute cited maintains that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain and creates an express warranty that the goods shall conform

under state law, and the manufacturer's obligation to the consumer, which is defined by the terms of the warranty.[169] Although the advertisements brandished the terms of the warranty and the breach was committed "with respect to advertising," these matters were incidental to the preemption issue because the claims did not implicate a state-imposed duty.[170]

The Court also found that Cipollone's fraudulent misrepresentation claim was preempted to the extent that it alleged Liggett used its advertisements to neutralize the effect of the 1969 Cigarette Act's warning labels.[171] Justice Stevens posited that federal preemption of state regulation cuts both ways, excluding additional state substantive requirements as well as actions based on state-law prohibitions.[172] Nonetheless, Justice Stevens allowed Cipollone's second fraudulent misrepresentation theory, alleging false representation and concealment of material facts, because the underlying obligation was predicated not on "smoking and health," but rather on the seller's general duty to refrain

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to the affirmation or promise." *Id.* (quoting N.J. STAT. ANN. § 12A:2-313(1)(a) (West 1992)).

169 *Id.* The Court posited that a manufacturer's express warranty terms are self-defining. *Id.* Moreover, the Court suggested that the liability for a breach of the warranty arises from a breach of the terms rather than from a violation of state regulations. *Id.* This principle was bolstered by the treatment of express warranty claims as a matter of contract law rather than tort law. *Id.* at 2622 n.23. Justice Stevens illustrated this point by analogy, hypothesizing that had a manufacturer promised to pay the medical expenses for a sick smoker, honoring that obligation would not be a duty imposed under state law, but rather a duty independently undertaken by the promisor. *Id.* at 2622.

170 *Id.* at 2622-23. The Court volunteered, however, that this intricacy may create problems with the state law question of the warranty's enforceability. *Id.* at 2622.

171 *Id.* at 2623. As a result of the holding, even though an advertisement may portray healthy, vibrant young people enjoying cigarette smoking in a carefree manner, plaintiffs generally could not claim that this depiction reinforces the viewpoint that smoking and health are indistinguishable. VARGO & LEE, *supra* note 18, at 16.

172 *Cipollone*, 112 S. Ct. at 2623. Cipollone asserted that Liggett's advertisements diluted the effect of the warnings, a claim involving a state law prohibition concerning statements in advertising. *Id.* In response, Justice Stevens clarified that this sort of prohibition was comparable to a state law warning requirement, and that the 1969 Cigarette Act preempts both prohibitions and requirements. *Id.* The majority supported this principle by stressing the similarity between advertising that discourages "postulate A," and advertising that encourages the corollary of "postulate A." *Id.* The majority observed the long recognized relationship between advertisements downplaying smoking dangers and warning requirements on advertisements. *Id.* The Court noted that the reasons for preempting the neutralization claims were "inextricably related" to the reasons for barring Cipollone's failure to warn claims. *Id.*

from deceiving the buyer.[173] This allowance, the Court opined, comported with the Act's stated purpose of maintaining uniform standards.[174] Justice Stevens concluded the Court's opinion with a cursory pronouncement that Cipollone's conspiracy claim was not preempted for the same reasons given with respect to the intentional fraud claim. The Justice explained that conspiracy did not implicate a duty "based on smoking and health."[175]

Justice Stevens's opinion balanced the polar positions espoused by Justice Blackmun and Justice Scalia, the latter recommending complete preemption of all claims[176] and the former

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173 *Id.* at 2623-24. Congress, in both the 1965 and 1969 Cigarette Acts, delegated to the Federal Trade Commission responsibility for regulating "deceptive advertising practices." *Id.* at 2624. *See* 1965 Cigarette Act, § 5(c) ("nothing in this act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes"); 1969 Cigarette Act, § 7(b) (same). Justice Stevens used this provision to indicate Congress's proclivity to divorce regulation "relating to smoking and health" from the disparate field of deceptive advertising. *Cipollone*, 112 S. Ct. at 2624.

174 *Id.* The Court reasoned that prohibitions on intentional fraud by false or misleading statements "rely on only a single, uniform standard: falsity." *Id.* According to some commentators, actions based on fraud, misrepresentation and conspiracy present golden opportunities for plaintiffs to sue, because such claims may result in the greatest number of plaintiff victories and lucrative awards. VARGO & LEE, *supra* note 18, at 16. Some contend that these expose the tobacco manufacturer's greatest vulnerability. *Id.*

Despite this prophecy, however, in an action brought subsequent to *Cipollone*, a jury in the St. Clair (Illinois) Circuit Court ruled that R.J. Reynolds, makers of Winston cigarettes, were not responsible for the lung cancer of a 51-year old cigarette smoker. *Jury Clears Tobacco Company in Ex-Smoker's Suit*, N. Y. TIMES, Jan. 31, 1993, at A27. Charles Kueper, who doctors expect will die within the next few months, alleged that a conspiracy existed among tobacco companies to conceal the truth about the relationship between smoking and health. *Id.* The jury verdict, the first since the *Cipollone* pronouncement, was prompted in large part by the victim's acknowledgement that he had been warned by his family and doctors several times to give up his smoking habit. *Id.* The defense attorney lauded the jury verdict as recognizing the consequences of a smoker's free choice, but was criticized by Mr. Kueper's attorney as emblematic of the futility of fighting the large multinational tobacco industry, which he contended were akin to Colombian drug lords. *Id.*

175 *Cipollone*, 112 S. Ct. at 2624-25. The majority holding, reversing in part and affirming in part the Third Circuit Court of Appeals, concluded by stating that:

> The 1965 Act did not preempt state law damages actions; the 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

Id. at 2625.

176 *Cipollone*, 112 S. Ct. at 2632 (Scalia, J., dissenting).

advocating none at all.[177] In a concurring opinion, Justice Blackmun, joined by Justices Kennedy and Souter, agreed with the Court that: (1) preemption was governed completely by an express preemptive provision, where applicable;[178] (2) courts should be reluctant to find preemption absent "clear and unambiguous evidence that Congress intended that result;"[179] and, (3) the 1965 Cigarette Act did not preempt any state common law claims.[180] Beyond these decrees, Justice Blackmun departed from the majority's holding, specifically challenging their *explication de texte* of the 1969 Cigarette Act.[181]

The concurrence viewed the effect of tort actions on the tobacco manufacturer's conduct as "necessarily indirect,"[182] a conclusion also drawn by prior Courts,[183] warranting a narrower reading of the 1969 Cigarette Act's "requirement or prohibition" statement.[184] Justice Blackmun chided the majority for being overly dismissive of the congressional reports underlying the 1969 revision, which referred to the new preemption provision as a clarification, and which the concurrence believed deserved

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177 *Id.* at 2625 (Blackmun, J., concurring).

178 *Id.*

179 *Id.* The concurrence emphasized that the federalism and state sovereignty concerns that bespeak this presumption apply even where Congress has addressed preemption, but has done so ambiguously. *Id.* at 2626 (Blackmun, J., concurring).

180 *Id.*

181 *Id.* at 2627 (Blackmun, J., concurring). Justice Blackmun referred to the majority's construction of the 1969 Cigarette Act as "little short of baffling," averring that the modified language of the later Act made Congress's intent no more certain than its predecessor. *Id.* Justice Blackmun's opinion relied largely upon Black's Law Dictionary and Webster's Third New International Dictionary to interpret the statutory language of the Cigarette Act. *Id.* In addition to disputing the scope of "state law" as used in the Cigarette Acts, Justice Blackmun offered dictionary definitions to suggest that the words "requirements and prohibitions" have a different meaning than that interpreted by the majority. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1929 (1981) and BLACK'S LAW DICTIONARY 1212 (6th ed. 1990)).

182 *Id.* Tort law, Justice Blackmun observed, serves a unique and separate purpose—compensating victims—that distinguishes it from traditional forms of regulation. *Id.* at 2628 (Blackmun, J., concurring).

183 *Id.* Justice Blackmun determined that the *Garmon* Court's proclamation of the intrinsic relationship between tort law and regulation had been sufficiently diluted by later Courts. *Id.* at 2628-29 (Blackmun, J., concurring). *See, e.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984) (arguing that Congress was willing to regulate consequences caused by allowance of state law damage awards); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988) ("[t]he effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects" of state damage awards); English v. General Electric Co., 110 S. Ct. 2270, 2273, 2281 (1990) (denying that plaintiff's emotional distress claim was preempted by Energy Reorganization Act).

184 *Cipollone*, 112 S. Ct. at 2629 (Blackmun, J., concurring).

greater attention.[185] Furthermore, the concurring opinion noted with interest that although the preemption provision was altered from 1965 to 1969, the Cigarette Acts' statements of purpose were unchanged, a significant consideration that the majority mistakenly "relegate[d] . . . to a footnote."[186]

Justice Blackmun disputed Justice Stevens's holding as counter to the Court's traditional aversion to finding preemption where no comparable remedy was provided by the federal action.[187] Noting that the Cigarette Act was bereft of a civil enforcement scheme, the concurrence rejected the argument that Congress did not consider any accommodations for an injured party.[188] As a final point of observation, Justice Blackmun criticized the majority opinion for "creat[ing] a crazy quilt of preemption" with "frequent shift[s] in the level of generality."[189]

Justice Scalia, joined by Justice Thomas, authored a stirring

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185 *Id.* By extending "requirement or prohibition" to the field of common law damage actions, the majority "err[ed] in placing so much weight on this fragile textual hook." *Id.* at 2630 (Blackmun, J., concurring).

186 *Id.* The majority was "not persuaded that the retention of that portion of the 1965 Act is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to § 5(b)." *Id.* at 2620 n.19. Justice Blackmun believed that the Court should have extrapolated the analysis of the 1965 Cigarette Act's statement of purpose upon the latter Act, implying that this may have yielded a different perspective of the preemptive effect of the 1969 Cigarette Act. *Id.* at 2630 (Blackmun, J., concurring).

187 *Id.* (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)). Although not mentioned in the concurrence, a classic illustration of the Court's antipathy towards leaving victims uncompensated is found in United Constr. Workers v. Laburnum Constr. Corp.:

> Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result.

United Constr. Workers, 347 U.S. 656, 663-64 (1954). *See* Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1542 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) (affirming disdain in federal courts for preempting state compensation schemes). *See* Corboy & Smith, *supra* note 3, at 452 (pointing out that absent an alternative remedy, Court has never preempted state damage awards); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 869 (1992) (there exists a "rather strong tradition of federal deference to competing state interests in compensating injury victims").

188 *Id.* at 2630 (Blackmun, J., concurring). Justice Blackmun did not accept the notion that Congress intended to preclude the only remedy available for plaintiffs injured as a result of a tobacco manufacturers' unlawful conduct. *Id.*

189 *Id.* at 2631 (Blackmun, J., concurring). As an example, Justice Blackmun questioned the elusive distinctions between Cipollone's fraudulent misrepresentation

dissent.[190] As an answer to Justice Stevens's constricted view of the Cigarette Act's preemption provision, Justice Scalia stressed that the majority's narrow construction doctrine was both novel and meritless.[191] By evaluating the Cigarette Acts "in accordance with their apparent meaning," as Justice Scalia proposed, the 1965 Cigarette Act preempted Cipollone's failure to warn claim and the 1969 Act preempted that claim and all others.[192] The dissent charged that the majority opinion took preemption analysis in an oblique new direction by requiring the "narrowest possible construction" of an explicit preemption statement.[193] Because the Court had recently found preemption of state damage actions in the absence of express preemption provisions,[194] the critical issue for the dissent was not the existence, but rather the scope, of preemption.[195]

Justice Scalia took issue with the majority's elimination of implied preemption where an Act possesses an express preemption provision.[196] The aggregate effect of these new preemption

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(involving false statements) and failure to warn claims, from which the Court emerged with contrasting preemption rulings. *Id.*

Irreconcilable results reached by the majority engendered a "hodge-podge of allowed and disallowed claims," which would undoubtedly bewilder subsequent courts seeking to implement them. *Id.* Variably, Justice Blackmun viewed the omission of an express statement addressing the impact of common law claims within the preemption provision not as a congressional intention to "displace state common-law damages claims, much less to cull through them in the manner the Court does today." *Id.*

190 *Id.* at 2632 (Scalia, J., dissenting).

191 *Id.* (quoting *Cipollone*, 112 S. Ct. at 2618).

192 *Id.*

193 *Id.* As a result of this faulty pretense, the dissent observed, Justice Stevens gave too much deference to the presumption against preemption; Justice Scalia posited that this "assumption dissolves once there is conclusive evidence of intent to preempt in the express words of the statute itself . . . ." *Id.*

194 *Id.* at 2632-33 (Scalia, J., dissenting) (quoting Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992)). In *Morales*, the Court interpreted the federal Airline Deregulation Act to preempt state laws concerning airline routes or services without applying rules of narrow construction but rather by utilizing the " 'assumption that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose.' " *Morales*, 112 S. Ct. at 2036, 2041 (quoting FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990)).

195 *Cipollone*, 112 S. Ct. at 2632-33 (Scalia, J., dissenting).

196 *Id.* at 2633 (Scalia, J., dissenting). Justice Scalia's spin on the majority's emphasis concerning the domain covered by an express preemption provision was unequivocal:

> Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are eliminated. This proposition may be correct insofar as implied "field" pre-emption is concerned: The existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than

constructs, according to Justice Scalia, was to obfuscate the preemption doctrine virtually beyond recognition.[197] As an alternative to Justice Stevens's "narrow construction" rule, Justice Scalia suggested an "ordinary meaning" approach to the Cigarette Act's construction.[198] Applying this approach to Cipollone's claims, Justice Scalia unearthed additional misperceptions afflicting the majority's analysis.[199] As a result, Justice Scalia chastised the majority for issuing an opinion that raised more questions than answers.[200]

The Supreme Court in *Cipollone v. Liggett Group, Inc.* ostensibly settled whether or not the Cigarette Act's preemptive provision was intended to paint with a broad brush. The conjecture that ensued, however, established only that preemption is as often misunderstood as it is misspelled. It will be interesting to see how much precedential water the majority's (a misnomer insofar as the opinion reflected only four of the Justices) melange resolution will hold. The majority opinion was soundly assailed by a different "majority" of the Court: Justice Blackmun referred to it as "baffling"[201] and Justice Scalia described the rule set forth

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> the statute's express language defines. However, with regard to implied "conflict" pre-emption . . . the Court's second new rule works mischief.

Id.

197 *Id.* at 2634 (Scalia, J., dissenting).

198 *Id.* (citing FMC Corp. v. Holliday, 112 S. Ct. 403, 407 (1990)). Generally, Justice Scalia stated that, where an express preemption provision exists, if the Act's ordinary meaning intends for this provision to sweep broadly, then the Court's construction must be equally expansive. *Id. See, e.g.*, American Tobacco Co. v. Patterson, 456 U.S. 63, 64, 68 (1982) (interpreting the "plain language" of Title VII of the 1964 Civil Rights Act); Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985) (construing Lanham Act in light of its "ordinary meaning"); *FMC Corp.*, 112 S. Ct. at 407 (suggesting that an Act's "ordinary meaning" accurately reflects Congress's purpose in passing it).

199 *Id.* at 2634 (Scalia, J., dissenting). Justice Scalia differed with the majority in primarily three respects: the heightened level of particularity used by the majority in reading the preemption provision of the Cigarette Act; the majority's conclusion that Cipollone's breach of express warranty claim did not constitute a "requirement or prohibition . . . based on smoking and health;" and, the majority created an unworkable method for states to consistently apply the failure to warn, express warranty, and misrepresentation directives. *Id.* at 2634-38 (Scalia, J., dissenting). The dissent recommended a "proximate application" methodology to determine whether or not a smoker's claims invoke duties "based on smoking and health." *Id.* at 2637 (Scalia, J., dissenting). Accordingly, the fact that the plaintiff's claim imposes a duty or obligation based upon the effects of smoking upon health is dispositive of a duty "based on smoking and health." *Id.*

200 *Id.* at 2638 (Scalia, J., dissenting).

201 *Id.* at 2627 (Blackmun, J., concurring).

as "niggardly."[202]

Proof positive of the confusion generated by the Court's edict is that both sides hailed the decision as a victory.[203] The consuetudinary law has undoubtedly transformed: the Court's mandate has effectively turned the tables by preempting the cigarette manufacturer's *modus operandi* rather than the smoker's claims.[204] In over sixty cigarette liability lawsuits pending in courts throughout the United States today,[205] the tobacco manufacturers can no longer rest on the preemption defense as an absolute bar, but can still successfully wage a war of attrition by outspending their adversaries.[206] On November 5, 1992, four and a half months after the Supreme Court's pronouncement, the Cipollone claims were dropped, overcome by the cost of pursuing their well-financed opponent.[207] It is a lamentable irony that an industry that spends vast sums of money promoting its

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202 *Id.* at 2634 (Scalia, J., dissenting).

203 VARGO & LEE, *supra* note 18, at 5. Tobacco manufacturing giant Philip Morris proclaimed "a significant victory," to which Harvard Law Professor Laurence Tribe, who argued the case for the Cipollones, replied that "if this is a victory for the smoking industry, I wonder what kind of nuclear meltdown it would take to make them admit defeat." *Id.*

204 *See id.* at 13. "It is clear that the Supreme Court has opened the door to damage suits by smokers against the tobacco industry, but the issue for plaintiffs and defense attorneys is how far it has been opened." *Id. See generally* David Margolick, *'Tobacco' Its Middle Name, Law Firm Thrives, for Now*, N.Y. TIMES, Nov. 20, 1992, A1 (describing the growth of Shook, Hardy & Bacon, a Kansas City law firm renowned for successfully defending large tobacco manufacturers against smoker's claims).

205 Fred Pieretti, *Tobacco Industry Not Out of Woods*, BERGEN RECORD, Nov. 7, 1992, at A11.

206 *See More Tobacco Suits Dismissed by Court*, N.Y. TIMES, Nov. 8, 1992, at L47 (citing three New Jersey state court cases dismissed due to lack of necessary finances). Plaintiffs in cigarette liability cases have also charged the tobacco manufacturers with other forms of unscrupulous behavior. *Plaintiff in Tobacco Lawsuit Says Industry Tactics Delaying Trial*, BERGEN RECORD, Jan. 26, 1993, at A7 (alleging abusive pretrial practices routinely used by tobacco industry to delay and eventually cause plaintiffs to drop lawsuits).

207 Charles Strum, *Major Lawsuit On Smoking Is Dropped*, N. Y. TIMES, Nov. 6, 1992, at B1. Liggett's reaction was subdued and smug, and certainly intended to daunt potential future litigants:

> The decision to dismiss the Cipollone case does not surprise us. For four decades the cigarette industry has been successful in defending itself in these cases, never settling nor paying any damages or compensation.
>
> Juries have consistently recognized in these cases that smokers are not forced to smoke and are not uninformed of the risks that have been claimed to be associated with smoking. Liggett believes that juries will continue to find that every person is responsible for his or her own life style decisions. Liggett will continue to defend vigorously the actions which remain pending against it.

Id. at B5.

dangerous product[208]—as well as unheard of legal expenses defending the propriety of its advertisements—has never had to pay damages for its perilous consequences.[209]

The success, if it can be called that, of the Cipollones' claim is an aberration, not an inevitable conclusion whose time had come. Their complaint may likely have been dismissed years prior to reaching the Supreme Court were it not for a renegade district court judge whose disdain for the tobacco industry was plainly conveyed through remarks referring to it as "the king of concealment and disinformation."[210] Contempt for the tobacco industry, whose social utility and impact on health—as well as health care[211]—are inimical to a majority of the population, may have elicited an indulgent contraction of the preemption doctrine solely to advance a public good, an idea hostile to the notion of separation of powers.

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[208] Board of Trustees Report, *Media Advertising for Tobacco Products*, 225 JAMA 1033 (1986). As of 1986, approximately two billion dollars were spent annually by domestic cigarette advertisers, and, since the ban on television and radio advertising in 1971, cigarettes are the most frequently advertised product in newspapers, magazines, and outdoor media. *Id.*

[209] For a discussion of the tobacco industry's success defending lawsuits, see *supra* notes 50, 112-27 and accompanying text.

[210] Strum, *supra* note 207, at B5. At the *Cipollone* trial, during a break in the questioning, Judge Sarokin asked a cigarette advertising and public relations expert: "If a cigarette manufacturer put out an ad showing an attractive young woman in a tennis outfit in a nice setting, or put an ad showing a funeral for that woman and said, smoking kills, you mean that second ad would not have an impact upon the information environment?" Singer, *supra* note 58, at 32. Judge Sarokin rephrased the question twice before defense counsel objected. *Id.* In response to this line of questioning by the judge, one juror commented: "I thought that was terrible of the judge. [The questions were] stupid [and failed] to sway how the jurors felt, that's for sure." *Id.*

[211] *See* Garner, *supra* note 25, at 1462 (explaining that the lion's share of cigarette smoking costs are absorbed by the public through welfare and private insurance).