Preemption of State Law by Federal Law: A Task for Congress or the Courts

Susan J. Stabile

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PREEMPTION OF STATE LAW BY FEDERAL LAW:
A TASK FOR CONGRESS OR THE COURTS?

SUSAN J. STABILE*

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* Assistant Professor of Law, St. John’s University School of Law. B.A. Georgetown University (1979); J.D. New York University School of Law (1982). My thanks to my colleagues and friends, Claire Moore Dickerson, Jordan Glass, Berta Hernandez, Steve Johnson, Mary Lyndon, and my husband, David Drueding, for their helpful comments on earlier drafts of this Article. Thanks also to my research assistants, John Howard and Jeffrey Fahs.
I. Introduction

Congress' attempts to address expressly the extent to which its legislation preempts state law have created difficulties for private parties, their attorneys and the courts. Express preemption provisions have frequently led to results that are questionable on the merits and that give insufficient attention to federalism concerns. Additionally, despite the fact that Congress' often expressed goal in enacting such provisions is a desire to achieve uniformity, decisions regarding the preemptive effect of statutes with express preemption provisions are anything but consistent.

Is Congress the cause of these unfortunate results, for including express preemption provisions in the legislation it enacts; or are the courts the cause, for failing to interpret correctly such provisions? Is Congress incapable of writing precise and workable preemption provisions; or are the courts simply too timid in their task of statutory interpretation?

Admittedly, there are judicial decisions that are easily criticized as poor efforts at statutory interpretation. However, the larger cause of the state of disarray regarding the preemptive effect of statutes containing express preemption provisions may be Congress' decision to address preemption expressly in the first place.

Preemption ultimately involves a vertical allocation of power and decision-making between the federal government and state and local governments. The focus of this Article, however, is on the horizontal allocation of decision-making authority: who, as between Congress and the courts, should decide when state law is preempted by an act of Congress?

For reasons this Article will explore, it is difficult, if not impossible, for Congress to fashion satisfactory preemption provisions. Often, Congress' desire to achieve quite legitimate goals may result in preemption language that is overinclusive, operating to prevent the attainment of important state interests even when no federal goal is advanced by preemption. Moreover, particularly when enacting broad substantive statutes, Congress cannot, at the time of enactment, make a comprehensive and accurate determination regarding the appropriate breadth of a statute's preemptive reach. Finally, any express preemption provision is drafted with a particular set of problems and the then-existing social and legal landscape in mind. The problems and landscape change dramatically over time, yet the express preemption provision remains largely fixed.

In some cases, courts can ameliorate the worst effects of an
unsatisfactorily drafted preemption provision. However, it is also frequently the case that the presence of a preemption provision hinders efforts by the courts to analyze freely whether state law should be preempted in a particular case. Whether one views the latter as the fault of Congress for enacting the unsatisfactory provision or the fault of the courts for being too timid in their preemption analysis in the face of such a provision, no one disagrees that the result is a set of preemption decisions that is difficult to justify.

This Article suggests a solution to the disarray of current preemption doctrine — that Congress largely leave the determination of when federal law should preempt state law to the courts. It proposes that, except in rare circumstances, Congress refrain from including express preemption provisions in the legislation it enacts, suggesting that the courts, rather than Congress, are better able to make preemption determinations that give appropriate regard to federalism considerations. Moreover, judicial determination of

1. This approach differs from that frequently taken by other commentators, who have addressed the preemption doctrine within the existing framework of express and implied preemption analysis. For the most part, commentators have addressed preemption with respect to particular statutes or particular types of claims. For example, articles have addressed preemption in the Employee Retirement Income Security Act of 1974 (ERISA). For a discussion of ERISA and its preemption provision, see infra note 42 and accompanying text. Other general areas of law where preemption has been examined include labor and employment law. See, e.g., Archibald Cox & Marshall J. Seidman, Federalism and Labor Relations, 64 HARV. L. REV. 211 (1950) (analyzing judicial application of preemption doctrine to conflicting federal and state labor laws); Henry H. Drummonds, The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace, 62 FORDHAM L. REV. 469 (1993) (examining preemption doctrine’s application to employment law and workplace regulation). Similarly, preemption has been addressed with particular types of claims. See, e.g., Barbara L. Atwell, Products Liability and Preemption: A Judicial Framework, 39 BUFF. L. REV. 181 (1991) (considering role of federal preemption as defense in state products liability claims).

Notably, a few exceptions to this generally used approach exist. See, e.g., Harrop A. Freeman, Dynamic Federalism and the Concept of Preemption, 21 DEPAUL L. REV. 630 (1972) (arguing that principles of federalism demand that courts identify and weigh federal and state interests when determining preemptive scope of federal legislation rather than strict adherence to congressional intent); Stephen A. Gardbaum, The Nature of Preemption, 79 CORNELL L. REV. 767 (1994) (discussing inter-relation between federalism, supremacy and preemption principles); Kenneth L. Hirsch, Toward a New View of Federal Preemption, 1972 U. ILL. L.F. 515 (proposing alternative theory of preemption analysis where Supreme Court determines whether congressional intent to save or to preempt state law offends federalist doctrines).

In suggesting that the courts are better able than Congress to address preemption inquiries, this Article runs counter to the generally accepted notion that Congress should determine when federal legislation preempts state law. See, e.g., Drummonds, supra, at 477 (suggesting Congress and not courts should amend problems with ERISA preemption); Cox & Seidman, supra, at 212 (arguing that Congress should draw line between matters which are to be subject of exclusive
the preemptive effect of federal law will not sacrifice, and indeed, may enhance predictability in preemption decision-making. Even more radically, this Article suggests that the courts, in making the determination of whether federal law preempts state law, dispense with the notion that the determination they are making is whether or not Congress intended state law to be preempted.

Part II of this Article explicates the current approach used for analyzing express and implied preemption cases. Part III discusses the principles that should underlie preemption analysis, raising the question of whether Congress or the courts has the institutional competence to best apply those principles. Part IV turns to Congress' efforts to address preemption expressly and looks at a number of judicial interpretations of those provisions. It focuses first on the problems of drafting express preemption provisions and second on the impossibility of rectifying those problems through the process of judicial statutory interpretation. Finally, Part V addresses the justification for judicial determination of the appropriate scope of preemption of state law, analyzing why courts are better able than Congress to determine when preemption of state law is appropriate.

II. THE CURRENT STATE OF THE PREEMPTION DOCTRINE

Preemption is the power of the federal government to supplant state law with respect to matters the federal government has the power to regulate under the Constitution. Preemption of state

federal regulation and those which should be subject to concurrent federal and state or exclusive state regulation). Indeed, as part of its "Contract With America," the Republican Party introduced a bill that would require the committee reports on enacted legislation to address certain issues, including the preemptive effect of the legislation. See The Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong., 1st Sess. § 106 (1995).

2. U.S. CONST. art. VI, cl. 2. The preemption power is generally viewed as arising from the Supremacy Clause of the United States Constitution, which establishes that the Constitution and any federal law "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, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (noting established doctrine "that state law conflicting with federal law is without effect"); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 ("The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails . . . .") rev'd sub nom. Rice v. Board of Trade of Chicago, 331 U.S. 247 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941) (holding that where federal government has completely regulated area, state law cannot be inconsistent); see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824) ("[T]he laws of Congress, made in pursuance of the constitution . . . [are] supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316,
law by federal law may be either explicitly stated in the language of the federal statute or viewed by the courts to be implicitly contained in the statute's structure or purpose; that is, it may be express or implied. If a federal law expressly or impliedly preempts state law, the state law cannot be used by a plaintiff to impose liability on a defendant, regardless of whether the defendant's conduct in fact constituted a violation of state law and regardless of whether federal law provides the plaintiff with any remedy.

Express preemption occurs where a statute contains an explicit statement that addresses the preemptive effect of the statute on state law claims, rather than leaving it to the courts to decide in any given dispute whether the federal statute preempts state law. Although Congress has chosen to include an express preemption provision in at least fifty or sixty statutes, it is difficult to make generalizations about these statutes or about the way Congress has chosen to address preemption. This Article contends that in most of

427 (1819) (holding state law that conflicts with federal law is without effect). Some commentators, however, suggest that the Commerce Clause is the source of the preemption power. See Cox & Seidman, supra note 1, at 212 (stating that Commerce Clause is broad enough to permit Congress to make regulation of labor relations exclusive of federal government). It has also been suggested that the Necessary and Proper Clause may be the source of Congress' preemption power. Gardbaum, supra note 1, at 781-82; see also id. at 769 (claiming that "power of preemption has little, if anything, to do with the Supremacy Clause"); Freeman, supra note 1, at 634 (arguing that doctrine of preemption need not hinge on Supremacy Clause).

Although the term preemption is commonly understood today to have the meaning I have ascribed to it, the term has not always been so understood. "In English law, preemption was the right of the Crown to purchase its necessaries before all others. The term in [the United States] originally referred to the right of a settler on government land to purchase it at a fixed price in preference to all others." Id. at 690 n.1 (citations omitted). Professor Freeman has also used the term to refer to a citizen's right to obey his conscience in preference to the commands of the state. Id.


4. For example, § 514(a) of ERISA explicitly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1988).

these cases, the presence of an express preemption provision is, at best, unnecessary and, at worst, unfortunate.

In the absence of an express preemption provision, under current doctrine, preemption may be implied from a pervasive scheme of federal regulation, in which case federal law is said to "occupy the field," or from an actual conflict between state law and federal law. Such conflict can be physical, such as where it is impossible to satisfy both federal and state law simultaneously, or can exist when it is determined that state law stands as an obstacle to the accomplishment of the objectives of Congress. Furthermore, preemption may be implied from congressional inaction, whereby courts will imply "negative preemption" when they determine that Congress considered, but did not enact, detailed regulations in a spe-

See, e.g., 7 U.S.C. § 2910(a) (1994) ("Nothing in this chapter may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State.").

5. See, e.g., English v. General Elec. Co., 496 U.S. 72, 84 (1990) (stating that Energy Reorganization Act occupied field of nuclear safety; however, state court claim for intentional infliction of emotional distress did not fall within field because not motivated by safety concerns); City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981) (concluding that 1972 Amendments to the Federal Water Pollution Control Act "[o]ccup[y] the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency"); Rice, 331 U.S. at 230 (stating that federal regulatory scheme may be so pervasive or federal interest so dominant that enforcement of state laws on same subject is precluded).

7. See de la Cuesta, 458 U.S. at 153 (holding that state law is nullified to extent that it actually conflicts with federal law). Preemption of state law where an actual conflict exists between a federal enactment and state law is compelled by the Supremacy Clause. For further discussion of the Supremacy Clause, see supra note 2. See also Gardbaum, supra note 1, at 775, 808-10 (arguing for elimination of conflict preemption from preemption law on grounds that Supremacy Clause and not preemption renders conflicting state law invalid).

8. See Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 204 (1983) (noting that state law is preempted where it is physically impossible to comply with both federal and state law); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1961) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . . .").

9. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (striking down Pennsylvania alien registration statute as being obstacle to fulfillment of federal legislation). The federal law that impliedly preempts state law may be found in a regulation as well as in a statute. See, e.g., CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1792, 1737-38 (1993) (holding that state common law requirements are preempted to extent federal regulations covering same subject matter are adopted pursuant to Federal Railway and Safety Act); Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 369 (1986) (recognizing that federal agencies acting within scope of their delegated authority may preempt state regulations); Free v. Bland, 369 U.S. 663, 670 (1962) (holding that federal Treasury Regulations creating right to survivorship in United States Savings Bonds preempt state law). A conflict may also exist when state law interferes with the methods by which a federal statute was designed to reach Congress’ goals. International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987).
In both express and implied preemption situations, courts view congressional intent as "the ultimate touchstone" of the preemption analysis. Whether or not preemption is expressly addressed in a statute, courts ask the question: did Congress intend this law to preempt state law? In express preemption situations, such intent is sought primarily in the language of the preemption provision. That is, where a statute contains an express preemption provision, the issue of whether a state law or cause of action is preempted is viewed by the courts as a question of statutory interpretation of the preemption provision. In implied preemption situations, congres-

10. See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n, 461 U.S. 375, 384 (1983) (acknowledging that federal determination that given area is best left unregulated has as much preemptive force as decision to regulate); Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978) (recognizing that where failure of federal government to affirmatively exercise its full authority resembles decision that no such regulation is appropriate, states are not permitted to use their police power to enact regulations).

An example of "negative preemption" is the "Machinists preemption" principle that has developed under the National Labor Relations Act, named from the United States Supreme Court decision in Machinists v. Wisconsin Employment Relations Comm’n, 427 U.S. 132 (1975). Machinists preemption prohibits state and local regulation of areas that Congress has determined should be left "to be controlled by the free play of economic forces." Id. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)); see also Building & Constr. Trades Council v. Associated Builders & Contractors, 119 S. Ct. 1190, 1195 (1999) (further explaining Machinist preemption theory); Golden State Transp. Corp. v. Los Angeles, 475 U.S. 608, 614 (1986) (same).

11. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (citing Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)). There is a relationship between the preemption question and the issue of whether there is an implied federal cause of action under a federal statute, the latter of which is also now largely viewed as an exercise in determining congressional intent. See Central Bank of Denver v. First Interstate Bank of Denver, 114 S. Ct. 1439 (1994) (applying statutory interpretation to determine that private plaintiff may not maintain aiding and abetting suit under § 10(b) of Securities Exchange Act of 1934); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979) ("The question of whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction."); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979) (holding that inquiry into congressional intent to create private cause of action ends when court determines through use of legislative history and statutory language that Congress had no such intent). Both inquiries involve a determination of whether a federally established enforcement/remedial scheme is exclusive or if it can be supplemented. In the preemption context, the issue is supplementation of federal law by a state law cause of action, and in the implied cause of action context, supplementation of a federal statute by a federal private cause of action. Preemption and implied cause of action present different issues regarding the role of the courts and they raise different concerns, but there are parallel and intersecting points in the two doctrines.

12. As this Article will suggest, express preemption provisions would create problems regardless of the approach to statutory interpretation taken by courts. However, making the express preemption inquiry an exercise in statutory interpretation is particularly unfortunate at the present time, given the Supreme Court's
sional intent is sought more broadly in the substantive provisions of the federal law in question.\(^{13}\)

III. PRINCIPLES OF PREEMPTION ANALYSIS

Answering the question of whether preemption is best handled by Congress or the courts requires an understanding of what principles are important in deciding preemption questions, and a determination of whether Congress or the courts has the greater leaning toward a plain meaning interpretation of statutes. *See, e.g.*, Smith v. United States, 113 S. Ct. 2050, 2054 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); Patterson v. Shumate, 504 U.S. 753, 757 (1992) (finding plain meaning of Bankruptcy Code and ERISA as determinant); Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 646-47 (1990) (holding plain meaning of Migrant and Seasonal Agricultural Worker Protection Act unaffected by state worker compensation law); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 838 (1990) (concluding plain meaning of 28 U.S.C. § 1961 evidences congressional intent concerning statute’s application). This plain meaning approach risks making preemption questions turn on dictionary definitions of the terms used by Congress. Under a plain meaning analysis, statutory construction begins with "the assumption that the ordinary meaning of [the] language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). The plain meaning rule thus instructs a court to give the words of a statutory provision their "natural meaning," unless doing so would lead to a clearly unreasonable, absurd interpretation or there is otherwise clear evidence that Congress intended something other than the plain meaning of the statute. *Patterson*, 504 U.S. at 758-62 (noting that opponent of plain meaning bears exceptionally heavy burden of persuasion that Congress intended alternative reading); *Garcia v. United States*, 469 U.S. 70, 75 (1984) (stating that only extraordinary showing of contrary intentions from legislative history would justify limitation on unambiguous plain meaning of statute’s language).

In the preemption context, the Supreme Court has, for example, relied on plain meaning to interpret the preemption provision of ERISA. *See Shaw v. Delta Airlines*, 469 U.S. 85, 96-97 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.") (citing BLACK'S LAW DICTIONARY 1158 (5th ed. 1979))). A similar result has occurred in *Airline Deregulation Act* (hereinafter ADA) cases. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1988) (analogously applying BLACK'S LAW DICTIONARY "relates to" definition of interpretation of ADA). The Supreme Court has also taken a plain meaning approach in cases addressing the preemption effect of the Public Health Cigarette Smoking Act of 1969. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (finding that plain meaning of “[n]o requirement or prohibition” sweeps broadly enough to encompass common-law obligations, thus Court must give effect to plain meaning unless there is clear congressional intent otherwise (citing *Shaw*, 463 U.S. at 97)). As already noted, however, although a plain meaning approach to statutory interpretation aggravates the problems created by express preemption provisions, it is not the cause of the problem.

institutional competence to decide preemption cases in light of those principles.

A. Principles Underlying Preemption Analysis

There are at least three identifiable principles that should underlie preemption analysis: (1) appropriate regard for federalism, which involves consideration of both the federal interest in Congress' substantive regulation and the states' interest in enacting their legislation and in preserving their spheres of power; (2) predictability; and (3) ease of administration.

1. Federalism

The most important goal of preemption analysis is to strike a proper balance between federal and state interests. In Younger v. Harris,14 a case once described as "perhaps the central landmark of modern federalism,"15 Justice Black described federalism as representing:

a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.16

By definition, preemption disputes involve lawmaking in an area in which both the federal government and the states have the power to legislate. It is generally accepted that if the federal government chooses to do so, it has the power to displace state law altogether in those areas.17

16. Younger, 401 U.S. at 44. Throughout this Article, I use the term federalism in the sense in which Justice Black speaks of it. That is, I do not speak about federalism in the sense of a constitutional limit on Congress' power to act vis-a-vis the states, the sense in which it is used in New York v. United States, 505 U.S. 144 (1992). Rather, federalism refers to a prudential constraint on the exercise of power by the federal government.
17. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554-56 (1985) (holding that Commerce Clause permitted federal government to preempt state and afford wage and hour protection to transit employees even though state also had this ability), cert. denied, 488 U.S. 889 (1988). The power of the federal government to preempt state law in areas in which the federal government has the power to legislate is generally assumed to stem from the Supremacy Clause, although commentators have alternatively located the source of that power in the
However, it would be inappropriate for Congress to exercise the preemption power to its fullest extent because preemption involves a limitation on the legitimate exercise of state power. Specifically, preemption involves the federal government prohibiting the states from acting in an area in which the states would otherwise be free to act. From the perspective of the citizens of a state, if a federal law preempts state law, the state law cannot be used by injured individuals to provide a remedy against another's actions that otherwise would constitute a violation of the state law. As a result, federal legislative goals and purposes cannot be viewed as standing in a vacuum; instead, they must be weighed against the interests the state has in enacting its legislation.

When the preemption balance is struck incorrectly, negative consequences result. In some cases, there will be an improper interference with a state sphere of authority, preventing the state's attainment of its goals without appropriate justification.\textsuperscript{18} Also, preempting state law without adequate federal justification limits the ability of states to act as innovators of change. "Experiments" conducted at the state level may lead to solutions to social problems that may later be adopted at a national level.\textsuperscript{19} Finally, improper preemption decisions give insufficient regard to the purposes and goals of Congress in passing federal legislation.\textsuperscript{20}

Preemption analysis, therefore, must be cognizant both of the need to protect the states from overbroad preemption and of the goals of Congress. It must give adequate consideration to both relevant state and federal interests. This consideration has a twofold

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\textsuperscript{18} The interference with state authority is particularly troubling when the consequence is to prevent state law initiatives and leave a void not filled by federal regulation. For further discussion of this consequence in the context of ERISA preemption in the employee welfare benefit plan area, see infra text accompanying notes 102-15. \textit{But see} Edward L. Rubin & Marvin Feeley, \textit{Some Notes on a National Neurosis}, 41 UCLA L. REV. 903, 951 (1994) (arguing that "federalism should not be imposed as constraint on national policy").


\textsuperscript{20} The Airline Deregulation Act (ADA) and the Federal Railway and Safety Act (FRSA) are two examples of preemption provisions that frustrate the purposes and goals of Congress. For a discussion of how the ADA preemption provision frustrates the purposes and goals of Congress, see text accompanying infra notes 151-63. For a discussion of how the FRSA preemption provision frustrates the purposes and goals of Congress, see text accompanying infra notes 81-96.
meaning. First, there is a need to consider how preemption impacts the particular goals and purposes underlying the substantive state and federal law involved. An example is the state goal of providing compensation to its citizens injured by negligent or intentionally wrongful conduct that underlies state tort law, versus the federal goal of encouraging competition in the air transportation system that underlies the Airline Deregulation Act.\(^{21}\) Second, an evaluation must be made of the benefits of local autonomy and rulemaking achieved by allowing a state law cause of action versus the benefit of uniformity of regulation achieved by preemption state law.

2. Predictability

A subsidiary aim of preemption analysis should be to achieve a measure of predictability. Preemption contests generally involve situations in which there is some difference between federal and state law.\(^{22}\) In these situations, the result to the parties will be different depending on whether state or federal law is applicable to the parties, or whether state law standards must be satisfied in addition to the federal standards. Hence, the question of whether federal or state law applies is critical.

It is desirable that those subject to a law have the ability to know not only what the law means but whether or when that law is applicable to them. In the preemption context, this means that in-

\(^{21}\) For a further discussion of the purposes and goals of the ADA, see infra notes 132-48 and accompanying text. Congress and the states will each have various interests depending on the federal statute and the state law claim in question. In some cases, the federal interest and the state interest may be the same.


However, federal law may also preempt consistent state laws where a preemption provision so provides or where Congress has manifested an intent to occupy an entire area of regulation so as to foreclose any state regulation in that area. See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 386-87 (1992) (ruling that because nothing in actual language of ADA preemption provision suggests that it is limited to inconsistent state laws, consistent state laws may also be preempted); Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983) (stating that, in enacting Atomic Energy Act, Congress intended that federal government regulate radiological safety aspects associated with construction and operation of nuclear power plants without any state involvement). Even there, the decision to preempt state law or not has an effect on the parties, because the consistent state law may provide a remedy not available under federal law. For further discussion of the broader remedies for retaliatory discharge under state law than under ERISA, see infra note 79.
individuals should be able to order their primary behavior with knowledge of whether they will be subject to federal law, state law or both, and lawyers should be able, with at least some degree of certainty, to counsel their clients on that matter. 23 If one cannot predict which of two legal standards will apply, it is difficult to order one's behavior. This is undesirable for two reasons. First, it is simply unfair to penalize persons for failure to comply with a legal standard that they could not have known was applicable to their actions. 24 Second, inability to predict what law governs a given situation is undesirable from an economic standpoint, as it may prevent individuals from acting in the way that is most cost-beneficial for their business. 25 For example, several federal statutes impose labeling requirements on products. 26 A frequent question that arises under such statutes is whether compliance with the federal labeling requirement is sufficient to shield defendants from state common-law tort claims for injuries from the use of, or exposure to, such products. 27 Quite obviously, for example, it is useful for a manufacturer of an insecticide to know whether it has some legal obligation above that imposed by federal law. It is otherwise diffi-

23. The ability of parties to order their primary behavior has been referred to as "primary predictability" and the ability of lawyers to predict what law will be applied once a matter is brought to litigation as "secondary predictability." William F. Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 3 (1963). Alternatively, the former may be referred to as predictability and the latter as certainty. Joel P. Trachtman, Conflict of Laws and Accuracy in the Allocation of Government Responsibility, 26 Vand. J. Transnat'l L. 975, 995 (1994). For simplicity, I refer to both aspects as predictability.

24. This consideration for unfairly penalizing persons under a legal standard that they could not have known was applicable to their actions is not inconsistent with the time-honored maxim, "Ignorance of the law is no excuse." One may fault an individual for not being diligent enough to discover the applicable law. However, the same blame cannot be assigned where all due diligence will not provide an answer to the question of what law governs.

25. "Predictability . . . allows private actors to conform their conduct to the appropriate or accurate rule and thus to act efficiently." Trachtman, supra note 23, at 996. Particularly in the case of the preemption of state tort law, firms must be able to reasonably calculate their potential liability for not providing adequate warnings or operating in an unsafe manner, and the like, and measure that amount against the cost of undertaking additional warnings or safety measures in order to make an efficient cost-benefit decision. See Richard A. Posner, Economic Analysis of Law 163-67 (4th ed. 1992); see also United States v. Carroll Towing Co., 395 F.2d 104, 173 (2d Cir. 1967) (Hand, J.) (identifying negligence formula that holds potential tortfeasor negligent only if the cost of prevention was less than probable damage; in such case, due care would not have been exercised).


27. For further discussion of compliance with federal law as an effective shield against state tort law, see text accompanying infra notes 218-29 and 263-74.
cult for the manufacturer to assess the costs and benefits associated with taking steps above and beyond compliance with the federal statute.

Suppose, further, that state law imposes certain seemingly burdensome requirements on airlines as to the content and style of advertisements for airline fares and destinations.\(^{28}\) If such state law is determined to relate to "a price, route, or service of an air carrier that may provide air transportation service," it will be preempted by an express provision of the Airline Deregulation Act.\(^{29}\) In that instance, the airline need not incur the cost of compliance with the state law. However, if the law is not preempted, the airline must comply with it. The airline will understandably wish to know whether to comply or not, and will expect a reliable answer from its counsel.

Complete predictability is only obtainable at a very high cost. The only way to be absolutely certain which law governs is to impose a rigid set of black and white rules that will cover all situations without exception.\(^{30}\) Imposing such a set of rules gains predictability, but guarantees some inaccurate decision-making, because factual circumstances will invariably arise as to which application of a clearly applicable rule will produce inequitable or otherwise unacceptable results.\(^{31}\) In this context, that means either failing to preempt state law when it should be preempted or, as is far more likely the case, preempting state law when it should not be preempted, with the same negative consequences previously identified.

Thus, some measure of predictability must be ceded to the goal of developing principles for analyzing preemption aimed at "properly" deciding when state law should be preempted by federal law. The reality is that with any set of standards flexible enough to address the different preemption situations that will be presented to the courts, there will always be difficult, fringe cases in which lawyers and their clients will be unable to predict whether state or federal law will be applied. Still, preemption analysis should be

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28. This is similar to the issue that was addressed by the Supreme Court in Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992). For further discussion on the Morales decision, see text accompanying infra notes 151-63.


30. Even seemingly rigid rules may not guarantee complete predictability. See Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518 (1986) (suggesting that even rules of law that seem objective and clearly applicable may be manipulable).

31. Cf. Trachtman, supra note 23, at 995 ("[T]here is a tradeoff between simplicity and accuracy: the more we simplify, the less accurate we can be in conflicts of law determinations.").
aimed at allowing people to order their primary behavior with as certain a knowledge as possible of what laws will govern their actions. Not only is this true as a matter of fairness and economics from the point of view of the parties, but a separate consequence of an unpredictable standard is the creation of vast amounts of litigation over the scope of preemption, thus overburdening courts and litigants.

3. Ease of Administration

The predictability discussion focuses on the impact of preemption standards on individuals subject to federal and state law. Administrability is related to the concern for predictability. It is undesirable to have preemption rules that are difficult for lower courts to implement. The more difficult the administration, the more time and money involved in resolving disputes, and the less efficient the operation of the judicial system.

Preemption claims are largely fact-specific given the variety of state law claims — legislative and judicial — that may arguably be preempted by federal law. That means it is desirable that standards exist for determining whether state law is preempted, and that they be capable of being applied to the specific laws at hand in a consistent manner.

B. The Question of Institutional Competence

Who, as between Congress and the courts, has the greater competence to handle preemption questions? Which of the two should apply the principles that have just been identified?

The question of who is better equipped to handle the preemption inquiry is, in one sense, a subset of the larger question of when is the development of a legal doctrine appropriately left to the legislature versus the judiciary.\textsuperscript{32} Therefore, identifying the traditional

\textsuperscript{32} As the preemption inquiry is now generally viewed by the courts, it is not completely the same as the larger judicial versus legislative issue. Whether preemption analysis is express or implied, it is currently viewed as involving a determination of whether or not Congress intended state law to be preempted. For a further elaboration of the conclusion that preemption need not be viewed as an exercise in ascertaining congressional intent, see text accompanying supra notes 11-13. As so understood, courts engaging in implied preemption analysis are not substituting their own judgment for that of the legislature, but are attempting to give effect to the legislative judgment. However, neither the Constitution nor federalism requires that the preemption inquiry be viewed as an exercise in determining congressional intent. For a further elaboration of the conclusion that preemption need not be viewed as an exercise in ascertaining congressional intent, see text accompanying infra notes 333-39. Additionally, advocating judicial determination of preemption issues, which involves decisions as to the effect of
justifications for legislative and judicial lawmaking is a starting
point for framing the institutional competence question.

There are several traditional justifications for statutory lawmak-
ing. Perhaps the most important is uniformity, which includes both
the application of a uniform legal standard to similar situations and
the related desire to achieve consistency of results in such similar
situations. Uniformity is seen as desirable from the standpoint of
both efficiency and fairness. As an institutional matter, federal
statutory lawmaking is arguably more efficient than judicial lawmak-
ing in that it immediately establishes a single rule to be applied
countrywide. It is arguably also more efficient from the point of view
of an entity operating interstate, as it removes the financial and ad-
ministrative burden of complying with multiple, differing state
laws. Federal statutory lawmaking is also arguably more fair as it
subjects individuals in different states to the same law.

A second justification for statutory (or regulatory) rulemaking
is expertise. The expertise argument is generally advanced when
the subject matter in question is one that is highly technical or re-
quires some special knowledge to address. Even in non-technical
areas, the legislative process is thought to benefit from more com-
prehensive analytic and factfinding capacity than the courts. While
a court is limited to addressing the facts of the case before it, a
legislature can investigate more broadly to determine the implica-
tions of the rule it is adopting.

Legislatively-created substantive law, is not the same as advocating judicial creation
of substantive law.

33. See Drummonds, supra note 1, at 523-25 (describing need for preemption
provisions that promote uniformity and avoid parochialism). But see Cass R. Sun-
(proffering theory of judiciary's role in promoting consistency and coherence in
ambiguous and unintegrated statutory systems).

34. See Drummonds, supra note 1, at 523-25.

35. See Alan E. Garfield, State Competence to Regulate Corporate Takeovers: Lessons
from State Takeover Statutes, 17 HOFSTRA L. REV. 555, 593 n.292 (1989) (suggesting
exclusive federal regulation of securities would facilitate free transferability of
shares and efficiency in securities market) (citation omitted); David F. Welsh, Envi-
ronmental Marketing and Federal Preemption of State Law: Eliminating the "Gray"
Behind the "Green," 81 CAL. L. REV. 991, 1001-05 (1993) (arguing for federal standard to
regulate "green," or environmentally conscious, advertising because lack of un-
iformity and predictability in state deceptive advertising laws is highly inefficient,
requiring advertisers to comply with up to 50 different standards); see also JAMES
GREENE, REGULATORY PROBLEMS AND REGULATORY REFORM: THE PERCEPTIONS
OF BUSINESS 8 (1980) (citing complaints from business persons about extra costs stem-
ning from trying to understand and comply with varying state standards).

36. See James J. Brudney, Congressional Commentary on Judicial Interpretations of
expansion of Congress' policymaking authority through expertise of committees
and committee staffs); see also Marshall J. Berger, Administrative Law and Labor Law:
The question to be considered when looking at the examples of current express preemption analysis in Section IV is whether uniformity or expertise provide a persuasive reason for Congress to address preemption expressly. Do these considerations support a conclusion that Congress has greater competence than the courts to apply the principles of preemption analysis?

An important justification for the common-law tradition is the ability of judicial lawmaking to adjust to meet changing needs. "Continuity and change are essential attributes of a legal system. Although abrupt or frequent changes are often not desirable, laws must change to meet the needs of changing times . . . ." More so than the legislature, courts have the ability to adjust the law — and to adjust in a slow and careful manner — as it becomes desirable to do so.

A related justification is the ability of the courts to better achieve sensitive balances than the legislature. By definition, a legislature must balance at a generic level because it is attempting to enact a law that will operate in all situations (albeit with whatever exceptions the legislature may think appropriate at the time it passes a statute). In contrast, a court has the ability to analyze goals and principles in light of the specific case before it. Therefore, it has the ability to determine how competing goals may be impacted by the application of a law in that specific case.

How do these justifications for common law play out in the preemption context? The analysis of Congress' efforts to address

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38. See Mary L. Lyndon, Tort Law and Technology, 12 Yale J. on Reg. 137, 163 (1995) (arguing that case method allows gradual consideration of problems as knowledge develops); Richard Neely, Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look, 131 U. Pa. L. Rev. 271, 275 (1982) (reviewing Calabresi, supra note 37, and commenting on Calabresi's theory that inertia keeps obsolete statutes in effect and reasoning that no such inertia existed when law was being made primarily through common law because common law changed progressively, although slowly, in deference to reliance interests).
40. See Wachtler, supra note 39, at 16-17 (stating that because courts focus on one particular real-life dispute with one set of facts, they are better able to position their decisions in "the contextual, historical, and cultural dimensions making up the legal landscape").
preemption expressly contained in Section IV and the discussion of judicial decisionmaking in Section V explore whether these justifications suggest that courts have greater competence than Congress to apply the principles of preemption analysis.

IV. CONGRESSIONAL EFFORTS TO ADDRESS PREEMPTION EXPRESSLY

One way to attack the question of whether Congress or the courts has the greater institutional competence to apply the principles that should underlie preemption analysis is to evaluate Congress' efforts where it has addressed preemption expressly. Section A focuses on the difficulties of drafting satisfactory express preemption provisions and Section B suggests that the courts are unable to ameliorate those problems by their interpretations of the express provisions. The discussion in those Sections focuses on several types of statutes and preemption provisions, including the Employee Retirement Income Security Act of 1974, as amended (ERISA),41 which is given particular attention because its preemption provision has given rise to the most preemption litigation and to the most interpretive difficulties;42 the Airline Deregulation Act

42. 29 U.S.C. § 1144 (1988); see District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 586 n.3 (1992) (Stevens, J., dissenting) (noting that in December 1992, there were 2800 cases on LEXIS addressing ERISA preemption); HealthAmerica v. Menton, 555 So. 2d 295, 241 (Ala. 1989), cert. denied, 493 U.S. 1093 (1990) (White and O'Connor, dissenting to denial of certiorari) ("Courts nationwide continue to struggle with ERISA preemption issues occasioned by the 'relate to' language of § 514(a).") ERISA's preemptive effect on a wide variety of state statutory claims has been litigated. For example, ERISA's preemptive effect has involved litigation regarding state antidiscrimination laws. See, e.g., Champion Int'l Corp. v. Brown, 731 F.2d 1406 (9th Cir. 1984) (finding state law preempted by ERISA); Bucyrus-Erie Co. v. Department of Indus., Labor & Human Relations, 599 F.2d 205 (7th Cir. 1979) (finding state fair employment laws not preempted by ERISA), cert. denied, 444 U.S. 1031 (1980). ERISA also has been litigated with respect to state consumer protection. See, e.g., Providence v. Valley Clerks Trust Fund, 509 F. Supp. 388 (E.D. Cal. 1981) (finding state law claims of fraudulent misrepresentation and intentional infliction of emotional distress not preempted by ERISA). Similarly, ERISA preemption litigation involved state corporate law provisions. See, e.g., Sasso v. Vachris, 106 A.D.2d 132 (N.Y. App. Div. 1984) (finding state statute regarding shareholder liability due to non-contribution to employee benefit fund preempted by ERISA), rev'd, 484 N.E.2d 1359 (N.Y. 1985). As a final example, ERISA preemption litigation has concerned state tax laws. See, e.g., NYSA-ILA Medical and Clinical Serv. Fund v. Axelrod, 27 F.3d 823 (2d Cir. 1994) (holding state tax law preempted by ERISA); Morgan Guar. Trust Co. v. Tax Appeals Tribunal, 599 N.E.2d 656 (N.Y. 1992) (same). Preemption has also been frequently litigated in a variety of state common-law claims, such as fraud, misrepresentation and breach of contract. See, e.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 43 (1987) (holding state claim of bad faith and breach of contract preempted by ERISA); Olson v. General Dynamics
(ADA), a less broad substantive statute than ERISA, but one containing preemption language similar to that found in ERISA; statutes imposing labeling requirements, such as the Public Health Cigarette Smoking Act of 1969 (1969 Cigarette Act) and the Federal Insecticide, Fungicide and Rodenticide Act, as amended in 1972 (FIFRA); and statutes imposing substantive safety standards, such as the Federal Railway Safety Act (FRSA) and the National Traffic and Motor Vehicle Safety Act of 1966 (Vehicle Safety Act).

Section C then briefly examines statutes with express preemption provisions that either have not resulted in preemption litigation or have not given rise to any difficulties of interpretation or result, suggesting that such examples do not injure the thesis of this Article.


A. Inability to Draft Satisfactory Preemption Provisions

1. The Uniformity Goal

Section III discussed uniformity from the perspective of the federal interest justifying federal preemption of state law and as a frequently-given justification for statutory decisionmaking generally, both in its aspect of efficient, nationwide rulemaking and as a fairness issue. Uniformity also relates to the principles of predictability and administrability as a clear, uniform rule may promote those objectives. Congress frequently states uniformity to be both the goal of its substantive federal legislation and its purpose in enacting express preemption provisions, and the language of those provisions reflect the uniformity goal. The examples of ERISA, the FRSA and the Vehicle Safety Act are illustrative.

ERISA was enacted with the goal of providing pension protection to pension plan participants and their beneficiaries. To achieve that goal, the statute imposes stringent substantive regulation of pension plans, including rules relating to vesting and accrual of benefits, requirements for funding of pension plans and the creation of a system of pension insurance. The statute further imposes a series of disclosure and reporting requirements and standards for fiduciary behavior on both pension plans and plans providing for medical and other employee welfare benefits. The statute also contains one of the broadest preemption clauses in any federal legislation. Section 514 of ERISA preempts, with certain enumerated exceptions, "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" that is covered by ERISA.

48. 29 U.S.C. § 1001(b) (1988). The basic congressional policy "to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries" is set forth in § 1 of ERISA. Id.
51. 29 U.S.C. § 1144(a) (1988) (emphasis added). Section 514(b) of ERISA modifies the language of § 514(a) in several respects, most notably excepting from the broad reach of the "relating to" language state laws regulating insurance, banking or securities (the "savings clause"). 29 U.S.C. § 1144(b)(2)(A) (1988). Section 514(b)(2)(B) creates a caveat to the exception by clarifying that no employee benefit plan may be "deemed to be an insurance company or other insurer, bank, trust company or investment company . . . for purposes of any law of any state purporting to regulate insurance companies, insurance contracts, banks, trust companies or investment companies" (the "deemer clause"). 29 U.S.C. § 1144(b)(2)(B) (1988).

Employee benefit plans of governments, churches, plans maintained outside of the United States for the benefit of nonresident aliens, plans maintained solely for the purpose of complying with applicable workman compensation laws or unemployment compensation, or disability insurance laws are also expressly ex-
There is much legislative history indicating Congress intended section 514 to have the effect of reserving to the federal government complete authority to regulate the field of employee benefit plans. A significant reason for this was Congress’ decision that plans should be subject to a uniform body of law, so as to avoid imposing on employers operating interstate the administrative and financial burden of complying with different state laws.

The FRSA was enacted in 1970 to promote safety in railroad operations in order to reduce deaths and injuries resulting from railroad-related accidents. To achieve this goal, the FRSA gives


52. There is also, however, ample evidence that Congress thought the preemption question worthy of further analysis, recognizing the possibility that modifications to § 514 might be necessary. See 29 U.S.C. § 1222(a)(5) (1988) (establishing task force and charging it with making full study and review of number of issues, including "the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans"); 120 Cong. Rec. 29,942 (1974) (statement of Sen. Javits) (noting that "desirability of further regulation — at either the State or Federal level — undoubtedly warrants further attention . . . [and] if it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modification can be made"); see also ERISA Preemption Task Force, Report to House Education and Labor Subcommittee on Labor Standards, H.R. Rep. No. 1785, 94th Cong., 2d Sess. 38, 46-48 (1977) (recommending that ERISA’s broad preemptive sweep apply only to state laws that directly relate to employee benefit plans).


The breadth of § 514 also reflects Congress’ fear of “endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.” 120 Cong. Rec. 29,942 (1974) (statement of Sen. Javits). This fear is particularly ironic given the volume of litigation § 514 has spawned. For examples of § 514 cases, see supra note 42.

the Secretary of Transportation broad powers to prescribe rules and regulations addressing all aspects of railroad safety.55

Because Congress wished to avoid subjecting railroads to conflicting and inconsistent state laws,56 the FRSA contains an express preemption provision. Section 434 of the FRSA expresses Congress' decision that "laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable,"57 providing that once the Secretary of Transportation has adopted a regulation covering some aspect of railroad safety, states are prohibited from enacting regulation in that area.58

Thus, under the FRSA, when the Secretary has not adopted a regulation relating to railroad safety, the states are free to act. However, once the Secretary has enacted a rule covering the subject matter of a state requirement, that rule must be applied uniformly and the states may not regulate that aspect of railroad safety. This type of preemption is sometimes referred to as "contingent preemption," because it is contingent on the existence of a federal regulation or standard that covers the same subject matter as the state regulation.

As a final example, the Vehicle Safety Act was enacted in 1966 to address and respond to the "soaring rate of death and debilitation on the Nation's highways."59 The sole goal of the Vehicle Safety Act is the protection of individuals from death and injuries.60

58. Id. "A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirements." Id. The FRSA's preemption provision contains an exception for certain state laws that are necessary to "eliminate or reduce an essentially local safety hazard" if those laws are not incompatible with federal law and do not impose an undue burden on interstate commerce. Id. However, there is evidence that Congress intended this exception to be construed narrowly. See H.R. Rep. No. 1194, 91st Cong., 2d Sess. 2 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4117 (suggesting that although state may adopt "more stringent requirement[s]" to prevent local problems, Congress did not intend "to permit a State to establish Statewide standards" which would usurp similar national standards).
In fulfillment of that goal, the Vehicle Safety Act gives the Secretary of Transportation the authority to establish written mandatory standards applicable to all new motor vehicles.\(^61\)

Reflecting Congress' concern that the "centralized mass production, high-volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country,"\(^62\) the Vehicle Safety Act contains the same type of contingent preemption provision found in the FRSA. Specifically, it provides that where a federal motor vehicle safety standard established under the Vehicle Safety Act is in effect, any state law safety standards must be identical to the federal standard.\(^63\)

The problem with using uniformity to justify broadly drafted preemption provisions like the ones found in ERISA, the FRSA and the Vehicle Safety Act, is that the provisions then operate to pre-empt state law not only when doing so promotes a federal interest, but also when there is no benefit to uniformity and even in situations where harm is created thereby. Instead of uniformity being evaluated as a potential federal interest justifying preemption in a particular case, it becomes the source of overbroad language that trumps state law even when no federal interest is served thereby. Courts are then left to parrot the goal of uniformity in their decisions without having the ability to examine the goal in the context of the statute and the state law claim at issue.

ERISA provides a good example of this problem. In particular, there has been much litigation over ERISA's preemptive sweep with respect to plaintiffs who attempt to bring claims against employers

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63. 49 U.S.C.A. § 30103(b) (West 1995). Unlike the FRSA, however, the Vehicle Safety Act contains no exception for uniquely local hazards. It does, however, have a savings clause. The Vehicle Safety Act explicitly states that compliance with any federal motor vehicle safety standard issued under the Vehicle Safety Act does not exempt any person from any liability under common law. 49 U.S.C.A. § 30103(e) (West 1995); see also S. Rep. No. 1301, 89th Cong., 2d Sess. 1, reprinted in 1966 U.S.C.C.A.N. at 2720 ("[T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care.").
or plan administrators under state common law doctrines such as fraud, misrepresentation and tortious interference of contract.\textsuperscript{64} Some of those claims are fairly easy to resolve. For example, when a plaintiff brings a claim against an employee benefit plan or a plan fiduciary for failure to pay benefits promised under an ERISA plan, the plaintiff's sole remedy is an action under ERISA; a claim for ERISA benefits must be brought under ERISA's civil enforcement provisions.\textsuperscript{65} However, the proper resolution of other common law claims is not as clear.

In \textit{Ingersoll-Rand Co. v. McClendon},\textsuperscript{66} the United States Supreme Court addressed whether ERISA preempts a state common-law wrongful discharge claim when the petitioner alleged that the reason for his discharge was his employer's desire to prevent his attainment of benefits under an ERISA plan.\textsuperscript{67} The petitioner alleged that he was terminated by his employer four months before his pension benefits would have vested under the employer's plan.\textsuperscript{68} Because petitioner's pension benefits had in fact already vested at the time of termination under the applicable ERISA regulations for crediting service, the suit involved only a claim for lost wages, mental anguish and punitive damages as a result of the wrongful discharge, and not any claim that could have any impact on either

\textsuperscript{64} See, e.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (holding state common law claim asserting improper processing of claim for benefits under ERISA-regulated plan is preempted); Olson v. General Dynamics Corp., 960 F.2d 1418, 1423 (9th Cir. 1991) (same), cert. denied, 504 U.S. 986 (1992); Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1218 (5th Cir.) (same), cert. denied, 113 S. Ct. 68 (1992); Lee v. E.I. DuPont de Nemours & Co., 894 F.2d 755, 758 (5th Cir. 1990) (same).

\textsuperscript{65} In \textit{Pilot Life}, the Supreme Court addressed whether ERISA preempts state common-law tort and contract actions asserting improper processing of a claim for benefits under an insured employee benefit plan. \textit{Pilot Life}, 481 U.S. at 47. Starting from the premise that ERISA's "preemption clause is not limited to 'state laws specifically designed to affect employee benefit plans,'" the Supreme Court easily determined that a state common-law action seeking redress for denial of benefits relates to an employee benefit plan, and therefore arises under ERISA. \textit{Id.} at 47-48 (quoting Shaw v. Delta Airlines, 463 U.S. 85, 98 (1983)); see also Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1294 (5th Cir. 1989) (finding state law suit for payment of promised pension benefits preempted); Straub v. Western Union Tel. Co., 851 F.2d 1262, 1264 (10th Cir. 1988) (same); Anderson v. John Morrell Co., 830 F.2d 872, 875 (8th Cir. 1987) (finding state claim for non-payment of promised increase in fringe benefit plan preempted).

\textsuperscript{66} 498 U.S. 133 (1990).

\textsuperscript{67} \textit{Id.} at 135. If "the principal reason for [petitioner's] termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund," the termination would be in violation of Texas law, which imposes certain public policy limitations on an employer's power to discharge at-will employees. \textit{Id.} at 136 (citing \textit{Tex. Rev. Civ. Stat. Ann.} art. 110B (West 1988)).

\textsuperscript{68} \textit{Id.} at 135.
the employer's plan or petitioner's pension benefits.\(^{69}\) Notwithstanding that, the Supreme Court held the action related to an employee benefit plan because in order to prevail on the cause of action, the plaintiff must plead and the trial court must find that an ERISA plan existed and that the employer had a pension-defeating motive in terminating the employment.\(^{70}\) It held that a state law cause of action is preempted whenever the existence of an ERISA plan is a "critical factor in establishing liability under the State [cause of action]."\(^{71}\) The Court viewed this conclusion as supported by the objective of providing a uniform body of benefit plan law, as well as by the language of the statute.\(^{72}\)

Although courts generally agree that, under any reasonable construction of Congress' language, a cause of action such as the plaintiff's in \textit{Ingersoll-Rand} "relates to" an employee benefit plan\(^{73}\) — a conclusion with which it is difficult to disagree — preempting state law in this case advances no important federal goal. The action complained of has nothing to do with the terms of a plan and the state law imposes no substantive burden on an employer with regard to a plan.\(^{74}\) Further, the plaintiff was not seeking lost pension benefits, but rather, future lost commissions, compensation for mental anguish and punitive damages.\(^{75}\) Because employers are

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69. \textit{Id.} at 136.
70. \textit{Id.} at 140. The Court further stated that the cause of action related to an ERISA plan "[b]ecause the court's inquiry must be directed to the plan." \textit{Id.}
71. \textit{Id.} at 139-40.
72. \textit{Id.} at 142-43. The Court also reasoned that even if such a claim was not expressly preempted, it would be impliedly preempted under the \textit{Pilot Life} reasoning as conflicting with ERISA's civil enforcement scheme. \textit{Id.} at 143-44. For a discussion of \textit{Pilot Life}, see supra note 65. In the Court's view, preemption was appropriate because the state action purported to "provide a remedy for the violation of a right expressly guaranteed by \$ 510 and exclusively enforced by \$ 502(a)." \textit{Id.} at 145. This reasoning involves a form of implied preemption analysis which may now be foreclosed by the Supreme Court's subsequent decision in \textit{Cipollone} v. Liggett Group, Inc., 505 U.S. 504 (1992). For a discussion of \textit{Cipollone}, see infra notes 220-29 and accompanying text.
73. See Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994) (expressly preempting state common-law claim of misrepresentation relating to plan's existence because existence of plan was "inseparably connected to any determination of liability"); Ludwig v. NYNEX Serv. Co., 838 F. Supp. 769, 791-93 (S.D.N.Y. 1993) (preempting common-law cause of action for breach of contract to rescind agreement concerning participant's coverage under plan because cause of action required proof of existence of plan).
75. \textit{Ingersoll-Rand}, 757 S.W.2d at 817-18.
subject to varying state laws on wrongful discharge generally, why is there a federal interest in uniformity with regard to claims of wrongful discharge based on attempts to interfere with pension benefits? In the words of one court, "[t]he Congressional purpose underlying the breadth of ERISA's preemption provision — to secure uniform federal laws regulating employee benefit plans — is not advanced by preemption of state common law claims that are not premised on a violation of duties imposed by ERISA." 76

Indeed, results like *Ingersoll-Rand* are not rare. 77 The breadth of the "relate to" language and the resultant inability of courts to determine whether uniformity justifies preemption in a given case frequently allow courts to use ERISA's provisions governing breach of fiduciary duty and protections against interference with rights granted under ERISA to completely preempt state common law actions such as fraud, misrepresentation and tortious interference of contract. 78

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77. See Anderson v. Electric Data Sys. Corp., 11 F.3d 1911, 1314 (5th Cir. 1994) (preempting claims that former employee was demoted and discharged for refusing to commit illegal acts and for reporting another employee's activities, some of which involved pension plans), *cert. denied*, 115 S. Ct 55 (1994).

There have been "bad" (although arguably correct as a matter of statutory interpretation) ERISA preemption decisions in other contexts as well. See, e.g., Carpenter's Health & Welfare Trust Fund v. Tri Capital Corp., 25 F.3d 849, 853-55 (9th Cir.) (preempting contract claim brought against primary contractor by multi-employer benefits plans seeking recovery of subcontractor's unpaid plan contributions even though no cause of action under ERISA is maintainable to recover contributions because contractor is not employer), *cert. denied*, 115 S. Ct. 580 (1994); Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1329-30 (5th Cir.) (preempting claim for wrongful death of unborn child based on refusal to authorize hospitalization for high-risk pregnancy), *cert. denied*, 113 S. Ct. 812 (1992).

Such preemption places a tremendous burden on the federal courts to address, under ERISA, conduct that violates state law, and, in certain circumstances, completely denies plaintiffs any remedy. Yet, these negative results are not counterbalanced by any significant benefit. Often, preemption claims involve situations where state and federal law have the same aim. Such situations do not create the concern that state laws are imposing standards on employers that are different from those standards that are imposed by federal law. Equally important, there is no compelling claim that the administration of plans is burdened because the causes of action do not seek to regulate plan terms. The focus is not on the plan itself, but on the behavior of the employer or administrator regarding the plan. In the Ingersoll-Rand fact situation, the gravermen of the plaintiff’s complaint against the employer is the employer’s bad motivation in discharging him. That the reason for the discharge was to defeat the plaintiff’s vesting under an ERISA plan, as opposed to the plaintiff’s attempt to secure some non-ERISA right, is incidental to the fact of the employer’s wrongfull behavior. Therefore, the language of section 514 not only prevents courts from analyzing whether there really is any administrative burden arising from a particular state law claim, but means that courts never even get the chance to examine the significance of a single administrative scheme for ERISA plans in terms of how employers operate.

79. For a discussion of situations where ERISA preemption results in a complete denial of remedies, see infra notes 102-13 and accompanying text. Preempting the retaliatory discharge claim does not result in a complete denial of a remedy to the discharged employee, because ERISA has a broad anti-retaliation provision, and cases have allowed plaintiffs to prevail in Ingersoll-Rand situations. See, e.g., Folz v. Marriott Corp., 594 F. Supp. 1007, 1013, 1016-20 (W.D. Mo. 1984) (court awarding back pay, front pay and reinstatement of benefits based on jury determination that employer discharged plaintiff for purpose of depriving him of pension and medical plan benefits). But see Titsch v. Reliance Group, Inc., 548 F. Supp. 983, 985 (S.D.N.Y. 1982) (dismissing claim that defendant terminated plaintiff’s employment to prevent plaintiff’s pension rights from vesting), aff’d mem., 742 F.2d 1441 (2d. Cir. 1988) (Table). However, because § 502(a)(3) of ERISA only permits plan participants to obtain “appropriate equitable relief,” plaintiffs in such a situation may be limited to recovering back pay. In addition to the inadequacy of this remedy from the plaintiff’s point of view, it hardly serves as a deterrent to improper employer behavior. Cf. Jarmoc v. Consolidated Elec. Distrubs., 123 Lab. Cas. (CCH) 35,701, 48,457 (N.D. Ill. 1992) (recognizing that wrongful discharge claim under Fair Labor Standards Act is appropriate when remedies otherwise available to discharged employee would not likely deter future employer misconduct). For discussion of the denial of damages for emotional distress under ERISA, see infra note 115 and accompanying text.

80. There are numerous reasons why employers would operate differently in

The mischief of drafting a broad express preemption provision solely to achieve uniformity is also apparent in the Supreme Court's interpretation of the FRSA's preemption provision in *CSX Transportation, Inc. v. Easterwood.* This case involved a claim for the wrongful death of a truck driver who was killed when a train hit his truck at a railroad crossing. The action alleged negligence on the part of CSX Transportation for both failing to maintain adequate warning devices at the crossing and operating the train at an excessive speed.

With respect to the excessive speed claim, federal regulations issued pursuant to the FRSA establish maximum speeds for all trains for each specific class of track on which they travel. The track at the crossing in question in *Easterwood* was of a class for which the maximum speed limit was sixty miles per hour and both parties conceded that the train was traveling below this speed at the time of the accident. Therefore, if compliance with the federal maximum speed limit preempts a state law negligence claim, the plaintiff would have no cause of action.

In reaching its conclusion that the excessive speed claim was preempted, the Supreme Court focused on the language of section 434 of the FRSA, which requires that a prerequisite for preemption of plaintiff's state law claim is a federal regulation "covering" the same subject matter as the state law negligence claim, and determined that Congress intended preemption to occur "only if the federal regulations substantially subsume the subject matter of the relevant state law." In the context of the overall structure of the FRSA regulations, the Court concluded that the federal speed limits cover train speed and therefore, preclude addi-

81. 113 S. Ct. 1732 (1993).
82. Id. at 1736.
83. Id.
84. Id. at 1742 (citing 49 C.F.R. § 213.9 (1994)).
85. Id. at 1742 & n.13.
86. Id. at 1732. The Court did not find that the claim based on failure to maintain adequate grade crossings was preempted. Id. at 1742.
tional state regulation setting state speed limits.88

Although the Supreme Court's conclusion that the FRSA's express language preempts a state law cause of action based on excessive railroad speed is consistent with that of a number of courts that have previously considered the issue,89 preempting such a claim fails to address adequately both the concerns of Congress in enacting the FRSA and its reasons for including an express preemption provision in the first place. It is precisely the focus on the language of section 434 that prevents the Court from sufficiently analyzing whether a state law negligence claim based on excessive speed should be preempted in light of congressional concerns.90 Indeed, the Court emphasized that section 434 does not require an examination of the purposes behind the adoption of the speed restrictions, but rather only whether the various regulations in fact cover "the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings."91

Uniformity of certain types of railroad safety regulation is a desirable goal. The real concern is with differing regulations of a type where it would be impossible or inordinately costly for a railroad operating interstate to comply with the different regulations. For example, it clearly would be an impossible situation for trains operating along the eastern seaboard, if Georgia required that railroad cars be painted green and South Carolina required that they be painted red. Likewise, it would be impossible for such trains to operate if Pennsylvania and New Jersey required different sizes or

88. Id. at 1742 (finding support for concluding that speed restrictions were adopted with safety concerns of grade crossings already in mind as one of many track conditions taken into account).


90. Other decisions concerning the preemptive effect of the FRSA suffer from the same flaw. See, e.g., Norfolk & W. Ry. Co. v. Public Utils. Comm'n, 926 F.2d 567, 571 (6th Cir. 1991) (holding that FRSA explicit pronouncement that regulation requiring bridge walkways was inappropriate negatively preempted state regulation by covering subject matter of bridge walkways on railroad bridges); Marshall v. Burlington N., Inc., 720 F.2d 1149, 1153-54 (9th Cir. 1983) (finding FRSA negative preemption applicable where FRSA has explicitly concluded that certain lighting should not be required).

91. CSX Transp., Inc., v. Easterwood, 113 S. Ct. 1732, 1743 (1993). This resembles the Cipollone conclusion that implied preemption analysis is not to be employed where there exists an express preemption provision. For a discussion of Cipollone, see infra text accompanying notes 225-27.
types of lights on the front of trains. Congress was legitimately concerned with subjecting railroads to those kinds of differing regulations.92

However, Congress’ decision to address a legitimate concern by enacting section 434 of the FRSA inevitably results in overbreadth. Although enacted out of a concern for situations in which differing state regulations would cause real economic and practical difficulties, section 434 preempts in situations in which there is nothing to fear from differing state regulations and correspondingly, nothing to gain from uniformity. Beyond the need to be familiar with differing local laws — which is always necessary for any entity operating interstate — there is no great hardship to a railroad to be subject to one speed limit in New York and another in Connecticut.93 Additionally, while a railroad may be interested in the cost it incurs from the type of warning device required to be placed at railroad crossings, the type of device has no impact on the ability of the railroad to operate interstate effectively.

Not only is there no good aim to be achieved by uniformity in such cases, but there is potential for real harm by insisting on a uniform standard. That is obvious when the subject matter is train speed. There are a variety of factors that may affect whether a particular train speed is safe: weather, track conditions, population density and topography of the surrounding area. While it may be desirable to set a national maximum speed above which it will never be viewed acceptable for a train to operate, it is impossible to set a specific speed at a national level and say that is the safe speed for all local conditions.94

The conclusion is even more obvious when the subject matter is the type of warning device, the efficacy of which clearly must be judged at a local level. Although the Supreme Court came to the conclusion in Easterwood that the warning device claim was not preempted, it did so only because there was no federal regulation governing warning devices;95 had it found a federally applicable

93. Indeed, the plaintiff’s claim in Easterwood does not even require that. All state law requires in that instance is that a train operate at a safe speed in light of the circumstances. Easterwood 113 S. Ct. at 1742.
94. It may be theoretically possible to come up with a single formula, based on all relevant criteria, by which a uniform federal law could establish the means of determining a safe speed under all circumstances. However, the FRSA does not attempt to do so.
95. Easterwood, 113 S. Ct. at 1742-43.
regulation, it would have preempted the state law claim.96

Uniformity may be a legitimate federal goal; there assuredly will be situations where allowing differing state laws to operate will frustrate federal interests. However, using uniformity to justify broad express preemption language elevates uniformity to an unjustified degree. There must be some advantage or value to uniformity before it can be used as a basis to displace state law. Yet, the consequence of express language is to preempt state law even when there is no such federal benefit.97

2. The Difficulty of Making Preemption Determinations at the Time of a Statute’s Enactment

A second cause of problems created by express preemption provisions is that Congress cannot make a comprehensive and accurate determination at the time it enacts legislation regarding the appropriate breadth of that statute’s preemptive reach. Not only does Congress enact legislation in light of particular issues and

96. A final example of the uniformity problem is found in the copyright area. Fearing that the federal goal of uniformity could be thwarted by state non-copyright laws that were similar in effect to copyright laws, Congress has expressly preempted all state law that is “equivalent to” federal copyright law and that extends to the same subject matter covered within the scope of the federal law. 17 U.S.C. § 301(a) (1994); see also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5746 (noting Congress’ intent to have § 301 preempt any similar state law claim). The concern that led to the “equivalent to” language is legitimate, but the result of the broad language is confusion over exactly what state laws are preempted. In order to determine whether state law is equivalent to Federal copyright law, courts look to whether an “extra element” is required to establish the state law claim—an extra element that “changes the nature of the action so that it is qualitatively different from a copyright infringement claim.” Mayer v. Josiah Wedgwood & Sons, Ltd., 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985). Inconsistencies have developed in decisions regarding approaches for determining what elements establish a state law claim as qualitatively different from rights protected under the Copyright Act. See Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 717 (2d Cir. 1992) (“[M]any state law rights that can arise in connection with instances of copyright infringement satisfy the extra element test . . . .”); Mayer, 601 F. Supp. at 1534 (focusing on whether actual act constituting alleged violation corresponds specifically to act violating Federal copyright law).

97. Professor Gardbaum’s suggestion that the Necessary and Proper Clause of the Constitution is the source of the federal power of preemption is interesting in this context. See Gardbaum, supra note 1, at 781-83. If Professor Gardbaum is correct in stating that the power of preemption derives from Congress’ need to pass uniform national laws in order to exercise its express powers effectively, preemption is justified only if that need in fact exists. In that case, the inclusion in legislation of broad express language that operates to preempt state law even where no federal interest is advanced cannot be a valid exercise of Congress’ power pursuant to the Necessary and Proper Clause. But see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) (suggesting that Constitution does not limit Congress’ power to preempt state law).
problems, but it enacts such legislation against an existing social and legal landscape that can be expected to change over time.

Congress, for example, enacted ERISA in 1974, after a long period of study and concern over improper practices in connection with employer-sponsored pension plans.98 Congress' concern was with abuse in the administration of pension funds and inadequate funding of pension plans.99 The result was the passage of a statute that substantially regulates pension plans, but that does not provide any substantive regulation of employee welfare benefit plans, defined in ERISA to include plans that provide benefits for contingencies such as illness, accident, death, disability or unemployment.100 It does not appear that Congress gave much, if any, thought to the impact of what it was adopting on employee welfare benefit plans.101

The combination of the breadth of ERISA's preemption provision, which broadly preempts all state laws relating to both pension and welfare plans, with the lack of welfare plan regulation under

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98. Pension plans are plans that provide both employer sponsored retirement income and deferral of income by employees beyond retirement. 29 U.S.C. § 1002(2)(A) (1988). Welfare plans include any program that provides benefits for contingencies such as illness, accident, disability, death or unemployment. 29 U.S.C. § 1002(1) (1988). The term "employee benefit plan" as defined in § 3(3) of ERISA includes both pension plans and welfare plans. 29 U.S.C. § 1002(3) (1988).

99. Although the broader term "employee benefit plans" is used in § 2 of ERISA, which states the congressional findings and declaration of policy, the focus of that section is on pension plans—specifically people losing retirement benefits due to inadequate funding and inadequate vesting. 29 U.S.C. § 1001 (1988). According to the House Floor Explanation of § 2:

The Employee Benefit Security Act is designed (1) to establish minimum standards of fiduciary conduct for Trustees, Administrators and others dealing with retirement plans, to provide for their enforcement through civil and criminal sanctions, to require adequate public disclosure of the plans' administrative and financial affairs, and (2) to improve the equitable character and soundness of private pension plans by requiring them to: (a) vest the accrued benefits of employees with significant periods of service with an employer, (b) meet minimum standards of funding and (c) guarantee the adequacy of the plan's assets against the risk of plan termination prior to completion of the normal funding cycle by insuring the unfunded portion of the benefits promised.


101. Most of the discussion leading up to the adoption of the statute focused on pension issues, which is not surprising because it was the failure of some large pension plans that led to the adoption of ERISA. See generally H.R. Rep. No. 533, 93d Cong., 2d Sess. 9 (1973), reprinted in 1974 U.S.C.C.A.N. at 4640-43.
ERISA, often results in preemption of state law claims even where doing so leaves the plaintiff without any remedy. For example, courts frequently preempt estoppel or misrepresentation claims brought by health care providers against a plan to recover the cost of treating participants where treatment was given based on assurances of coverage made by the employer or another plan fiduciary. This preemption occurs despite the fact that the health care providers in such cases have no alternative remedy under ERISA. In the same vein, participants’ claims to enforce oral promises made to them regarding the terms of their plans generally are preempted.

102. See Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1333 (5th Cir.) (indicating that absence of remedy under ERISA’s civil enforcement scheme does not alter preemption analysis), cert. denied, 113 S. Ct. 812 (1992); Hansen v. Continental Ins. Co., 940 F.2d 971, 979 (5th Cir. 1991) (holding that ERISA’s preemption provision bars state law causes of action even though such preemption may leave victim without remedy).

103. See Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272, 1276 (6th Cir. 1991) (holding that claim of provider who provided benefits based on assurance of coverage was preempted because claim was “at the very heart of issues within the scope of ERISA’s exclusive regulation and, if allowed, would affect the relationship between plan principals by extending coverage beyond the terms of the plan”), cert. dismissed, 113 S. Ct. 2 (1992); Barnes Hosp. v. Sanus Passport/Preferred Serv., Inc., 809 F. Supp. 725, 727-28 (E.D. Mo. 1992). In Barnes, a hospital’s state law claim of negligent misrepresentation against an insurance company for denial of services, after the hospital had made a phone call to verify insurance coverage and was assured of coverage and the provision of services, was preempted because the claim was in excess of policy limits and thus necessarily impacted plan structure and plan payment schedule. Id.; see also Elsesser v. Hospital of the Phila. College of Osteopathic Medicine Parkway Div., 802 F. Supp. 1286, 1292 (E.D. Pa. 1992) (finding that misrepresentation and breach of contract claims against HMO were preempted even though ERISA offered no remedy). Similar to their decisions in the wrongful discharge context, courts generally reject arguments that the gravamen of the claims was misconduct rather than recovery of benefits, which is exclusively within the scope of ERISA regulation. See Cromwell, 944 F.2d at 1276 (“It is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit.”); Barnes, 809 F. Supp. at 727-28 (noting that although plaintiff’s claim arose out of verification of plan, determination of coverage economically impacts plan administration).

However, the denial of all remedies has sometimes prompted courts to deviate from this analysis and not preempt state law claims. See, e.g., Hospice of Metro Denver, Inc. v. Group Health Ins., Inc., 944 F.2d 752, 756 (10th Cir. 1991) (finding hospice’s state law claim for promissory estoppel based on assurance of coverage not preempted by ERISA); Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 244-46 (5th Cir. 1990) (finding no preemption of state law claim for deceptive practices when plan administrator inaccurately told hospital that patient was covered because of important state policy of providing remedies to hospitals). These courts focused on the fact that the health care provider was not a participant or beneficiary of an ERISA plan and preemption would not further the goal of protecting employees if the court concluded that the “relate to” standard was not satisfied. Hospice of Metro Denver, 944 F.2d at 754-55; Memorial Hosp., 904 F.2d at 245-49.
as well.\textsuperscript{104}

The problem with finding preemption in these misrepresentations

\textsuperscript{104} See, e.g., Perkins v. Time Ins. Co., 898 F.2d 470, 470 (5th Cir. 1990) (holding that ERISA preempts state law claim for unfair and deceptive trade practices against insurance company by individual whose benefit claim for daughter’s illness was determined to be outside coverage of policy, contrary to alleged representations of salesperson who procured policy); see also Olson v. General Dynamic Corp., 960 F.2d 1418, 1420 (9th Cir. 1991) (preempting claim of fraud regarding level of pension benefits), \textit{cert. denied}, 504 U.S. 986 (1992).

Some courts have allowed estoppel claims to be brought under ERISA in situations where plan terms are ambiguous, reasoning that in the case of ambiguity, the oral or written misrepresentation is an \textit{interpretation} not a \textit{modification} of the plan. Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 821-22 (9th Cir. 1992) (acknowledging that federal equitable estoppel claims can apply to some claims arising under ERISA without finding no such claim because plan language was unambiguous); Kane v. Aetna Life Ins., 893 F.2d 1283, 1286 (11th Cir.) (finding federal common law of equitable estoppel could be applied because ambiguous plan language involved oral interpretation of plan and not an amendment or modification), \textit{cert. denied}, 498 U.S. 890 (1990); cf., Russo v. Health, Welfare & Pension Fund, Local 705, Int’l Bhd. of Teamsters, 984 F.2d 762, 767 (7th Cir. 1993) (recognizing that federal equitable estoppel claims can apply to some claims under ERISA but declining to make determination whether such claim was appropriate in this case because plaintiff did not establish elements of estoppel).

Some courts have allowed estoppel claims even where plan terms are not ambiguous. See, e.g., Armistead v. Vernitron Corp., 944 F.2d 1287, 1297 (6th Cir. 1991) (finding estoppel principles applicable where issue is employer’s obligation to pay health and life insurance premiums to retired employees); Pitts v. American Sec. Life Ins. Co., 981 F.2d 351, 356-57 (5th Cir. 1991) (finding defendant waived right to assert defense by accepting premiums after learning policy requirements had been breached). Nonetheless, it has been more frequently the case that courts have refused to apply estoppel in that situation. See, e.g., Gordon v. Barnes Pumps, Inc., 999 F.2d 133, 137 (6th Cir. 1993) (rejecting plaintiff’s promissory estoppel claim involving new employer assurances regarding benefits because ERISA precludes modification of a plan by oral statements or other extrinsic evidence); Novak v. Irwin Yacht & Marine Corp., 986 F.2d 468, 472 (11th Cir. 1993) (finding that equitable estoppel not applicable because plan terms at issue were unambiguous); Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 60 (4th Cir. 1992) (same), \textit{cert. denied}, 113 S. Ct. 1051 (1993); Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1318-19 (3d Cir.) (finding that elements of equitable estoppel not met because plaintiff was not prejudiced or damaged by reliance on employer’s actions), \textit{cert. denied}, 501 U.S. 1232 (1991).

It is not clear whether estoppel claims under ERISA are still viable after the Supreme Court’s decision in \textit{Mertens} v. Hewitt Associates. 113 S. Ct. 2063 (1993). In \textit{Mertens}, the Court held that a plaintiff cannot recover damages under 29 U.S.C. § 1132(a)(3) against a nonfiduciary who knowingly participates in the breach of a fiduciary duty because such relief was not “affirmatively authorize\[d]” by ERISA. \textit{Id.} at 2068 n.5. Subsequently, at least one court has held that a claim for damages under § 1132(a)(3) based on estoppel is foreclosed by \textit{Mertens}. See Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1528 (9th Cir. 1993) (rejecting as “untenable” the district court’s finding that § 1132(a)(3) provides statutory authority for plaintiff’s equitable estoppel claim in light of \textit{Mertens}). \textit{But see} Sprague v. General Motors Corp., 857 F. Supp. 1182, 1186 (E.D. Mich. 1994) (finding \textit{Mertens} does not bar estoppel claims under ERISA). Even if \textit{Mertens} has some impact on estoppel claims where plan terms are clear, arguably it does not alter cases allowing estoppel claims based on the \textit{interpretation} of ambiguous plan terms.
tion cases is illustrated by Corcoran v. United Healthcare, Inc. Corcoran involved a malpractice claim based upon a utilization review firm's refusal to authorize hospitalization for a woman with a high-risk pregnancy. As a result, the woman's unborn child died. Plaintiffs argued that the defendant had been engaged in making a medical decision and should be accountable in malpractice in the same manner as any other medical provider. The defendant argued that it was simply part of the machinery for processing claims under the ERISA plan. The court held that ERISA preempts malpractice claims, including wrongful death claims, against utilization review of benefit allocation decisions. In the court’s view, the firm’s medical advice was given in the context of making a determination of the availability of benefits under an ERISA-covered plan, conduct that clearly related to the plan. Other cases have similarly found preemption on the analysis that such claims “relate to” employee benefit plans, a conclusion difficult to dispute.

What is most troubling about the Corcoran result is that the court agreed with the majority of courts that section 502(a)(3) of ERISA does not allow emotional distress damages. Although the court in Corcoran left open the issue of compensatory damages, the majority of courts have held that compensatory damages are not available under section 502(a)(3). Thus, in these misrepresenta-

106. Id. at 1324.
107. Id. at 1325.
108. Id. at 1325. They further argued that the relationship between the parties arose solely through the existence of the plan. Id.
109. Id. at 1332. Thus, the court found that the claim amounted to one of mishandled benefits and Pilot Life applied to preempt it. Id. For a discussion of Pilot Life, see supra note 65.
111. See, e.g., Spain v. Aetna Life Ins. Co., 11 F.3d 129, 131 (9th Cir. 1993) (holding claim for wrongful death based on administrator's negligence in withdrawing authorization for treatment for testicular cancer preempted because it sought damages for negligent administration of benefit claim), cert. denied, 114 S. Ct. 1612 (1994); Kuhl v. Lincoln Nat'l Health Plan, 999 F.2d 298, 302-05 (8th Cir. 1993) (finding malpractice claims against insurer of welfare benefit plan based on delay in pre-certification for heart surgery resulting participant's death preempted because refusal to pre-certify is inherently a denial of benefits under plan, and also noting that no monetary damages available under ERISA), cert. denied, 114 S. Ct. 694 (1994).
112. Corcoran, 965 F.2d at 1339. The court considered this an extra-contrac-
tual damage claim and concluded that damages for emotional distress in any case would not be an appropriate award under the trust and contract principles guiding the interpretation of ERISA's remedial scheme. Id.
113. See also McRae v. Seafarers' Welfare Plan, 990 F.2d 819, 821 (11th Cir. 1991) (holding extra-contrac-
tual damages not available under § 502(a)(3) of ER-
tion cases, preemption results in no recovery despite defendant's clearly wrongful behavior.

Clearly, courts are hampered by the language of section 514. Oddly, the cases do not address the appropriateness of a different preemption standard for welfare rather than pension plans, despite the fact that Congress' concern in passing ERISA was clearly with pension plans, not welfare plans, and that ERISA provides substantive regulation only of the former. What preemption in the welfare plan context really means is a regulatory vacuum that is either left unfilled, or is filled by ad hoc judicial creation of substantive rules.

Even if Congress had the ability to assess fully the impact of its preemption provision on the world as it existed at the time legislation is enacted, the world changes. The problems created by a changing social and legal landscape are illustrated by cases questioning whether ERISA preempts state tax laws. There is no question that ERISA preempts direct state efforts to tax plan benefits or plan assets. Where there has been some disagreement among courts is with respect to the more difficult question of whether taxes of general application are preempted.

For example, the New York Court of Appeals in Morgan Guar-

ISA); Reinking v. Philadelphia Am. Life Ins. Co., 910 F.2d 1210, 1220 (4th Cir. 1991) (finding extra-contractual damages for emotional distress not available in action under ERISA challenging denial of benefits); Pane v. RCA Corp., 868 F.2d 631, 635 (3d Cir. 1989) (holding damages for emotional distress arising out of administration of ERISA plan preempted).

114. Although it is possible to infer preemption from a lack of federal regulation, there is no evidence that Congress affirmatively gave any attention to welfare plans in passing ERISA. For cases inferring preemption from a lack of federal regulation, see supra note 10. For a discussion of Congress' lack of attention to welfare plans in passing ERISA, see supra notes 99 and 101.

115. There is some indirect regulation of insured employer welfare plans by virtue of the exception to ERISA's preemption provision for state laws regulating insurance. For a discussion of ERISA's exception for state laws regulating insurance, see infra notes 164-77 and accompanying text. However, as a result of that exception, preemption in the welfare plan area will not lead to nationwide uniform welfare plan administration; so long as some plans are insured and others are self-insured, certain plans will be subject to state regulation and others will not.

116. See, e.g., National Carriers' Conference Comm. v. Heffernan, 454 F. Supp. 914, 918 (D. Conn. 1978) (holding annual tax of 2.75% imposed on amounts paid as benefits to or on behalf of Connecticut residents by employee welfare benefit plans preempted).

117. Compare NYS-ILA Medical and Clinical Serv. Fund v. Axelrod, 27 F.3d 823, 825 (2d Cir. 1994) (preempting general state tax on gross receipts of medical centers as applied to those operated by fund) and Morgan Guaranty Trust v. Tax Appeals Tribunal, 599 N.E.2d 656, 659 (N.Y. 1992) (holding state tax of general application preempted by ERISA) with Retirement Fund Trust of Plumbing, Heating and Piping Indus. v. Franchise Tax Bd., 909 F.2d 1266, 1281 (9th Cir. 1991) (holding tax of general application not preempted because it only tangentially
anty Trust Co. v. Tax Appeals Tribunal\textsuperscript{118} held that ERISA's preemption provision prevents a generally applicable state tax on gains from real property transfers within the state from being imposed on income derived from the sale of a pension plan asset.\textsuperscript{119} The tax in question was a ten percent New York State tax on the difference between the consideration for transfer and the original purchase price of New York property.\textsuperscript{120} When a pension fund sold a piece of property in its investment portfolio, New York sought to recover taxes under the state statute.\textsuperscript{121} The court concluded that this tax of general application had more than a "tenuous, remote or peripheral" connection to pension plans; therefore, the state tax was preempted.\textsuperscript{122} The court reasoned that the tax affected the structure and administration of plans because it imposed certain record-keeping and reporting requirements on the plan, mandating "administrative procedures pertaining to asset disposition not required in other jurisdictions."\textsuperscript{123} Subsequently, according to the court, the tax had a significant economic impact on the plan, thereby affecting the plan's investment strategy.\textsuperscript{124}

Whatever one thinks of the court's conclusion about the plain meaning interpretation of the "relate to" language of section 514,\textsuperscript{125} it is clear that the Congress which passed ERISA did not have a view on the subject. At the time ERISA was enacted, the

\textsuperscript{118} 599 N.E.2d 656 (N.Y. 1992).
\textsuperscript{119} Id. at 658.
\textsuperscript{120} Id. at 657.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 660.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} It is difficult to understand the Morgan Guaranty Trust court's concern with the effect on the structure and administration of plans. The only relevant data required to compute the tax is the original purchase price of the property and the consideration for sale. A plan fiduciary would have to maintain such information in any event. Certainly, this information would be part of the portfolio reports the fiduciary presented to the plan sponsor. Additionally, outside plan asset managers are frequently compensated on the basis of these amounts. As to the second argument, that unlike other state regulations that only have an incidental effect on plan resources the gains tax "directly depletes the funds otherwise available for providing benefits," assuredly any tax will have an economic impact on a plan. However, the same can be said regarding any other transaction cost applicable to plans; for example, brokerage fees for stock transactions and fees to obtain licenses — neither of which anyone would argue are preempted by ERISA. The tax is just like any other cost of doing business that affects plans. The Morgan Guaranty Trust court asserted that the tax was not a "cost of doing business" like sales tax or zoning, but did not explain why it thought the gains tax were different from these other costs. Morgan Guarantee Trust, 599 N.E.2d at 661. In fact, other
world of employee benefit "plans" was a simple one. There were essentially tax-qualified pension plans and some welfare benefit plans. Further, there were significantly less assets in pension plans at the time ERISA was enacted than there have been in more recent years. Today, not only is there a tremendous variety of types of plans, but pension plans, which now represent perhaps the largest source of investment capital in the United States, hold a substantial percentage of publicly traded securities in the United States and are involved in all manner of investment enterprises both in this country and abroad. As a general matter the field in which plans operate — and, therefore, the field of things that may "relate to" an employee benefit plan — is much larger. Specifically, questions like those raised in the Morgan Guaranty Trust case, just like the plethora of issues that have arisen concerning preemption in the welfare plan area, were not contemplated in drafting the "relate to" language. Yet, the language passed in ERISA in 1974 must be applied to today's very different world.

B. Inability of the Courts to Rectify the Problems Created by Express Preemption Provisions

1. The Problem of Statutory Interpretation

The fact that express preemption analysis is viewed to be an exercise in statutory interpretation of the express preemption provision means that courts are limited in their ability to analyze freely whether federal law should preempt the particular state law claim with which the court is presented. While dynamic theories of statutory interpretation may give courts some leeway, there are limitations on the courts' ability to read around the language of an express preemption provision. Two examples of this problem are interpretations of the ADA and cases generated by ERISA's insurance savings clause.

courts have refused to find state taxes of general application to be preempted by ERISA. For a sampling of these courts, see supra note 117.


127. See Conison, supra note 42, at 621-22.
The Federal Aviation Act of 1958 (FAA)\textsuperscript{128} gave the Civil Aeronautics Board (CAB) authority to regulate interstate air fares and to take administrative action against certain deceptive trade practices.\textsuperscript{129} The FAA also gave the CAB the authority and duty to regulate aircraft safety, including the provision of minimum aircraft design standards.\textsuperscript{130} As originally enacted, the statute did not contain an express preemption provision. It did, however, contain a "savings clause," explicitly providing that the FAA did not in any way abridge or alter any remedies existing at common law or created by state statute.\textsuperscript{131}

In 1978, Congress enacted the ADA.\textsuperscript{132} With the purpose of encouraging, developing and attaining "an air transportation system which relies on competitive market forces to determine the quality, variety and price of air service,"\textsuperscript{133} the ADA eliminated the authority of the Department of Transportation (which had succeeded to the authority of the CAB when the latter was abolished in 1985) to regulate interstate air fares.\textsuperscript{134} The ADA, however, retained the Department of Transportation's authority regarding deceptive trade practices.\textsuperscript{135}

The structure of the ADA itself indicates that Congress' focus was primarily on creating a system of regulation that would increase competition in the airline industry. A considerable portion of the ADA is dedicated to provisions for new entry into the industry and the promotion of small commuter airline service.\textsuperscript{136} A second focus of the legislation was fare flexibility intended to promote price com-


\textsuperscript{131} 49 U.S.C.A. § 40120 (West 1995) (providing in subsection (c) that "[a] remedy under this part is in addition to any other remedies provided by law").


\textsuperscript{136} See generally ADA §§ 6-39, 92 Stat. at 1710-44 (codified as amended in
petition among the airlines, which in turn would benefit airline travelers through lower airfares.\textsuperscript{137} The general approach of the ADA was to create an environment of more competition and less regulation of the airline industry.\textsuperscript{138}

In its effort to promote competition, Congress focused on fares and routes because these were the areas that had been strictly regulated by the CAB.\textsuperscript{139} For example, federal law gave the CAB authority over routes and required that route changes be approved by the

\begin{footnotesize}
\begin{enumerate}
\item[137.] See ADA § 3(a), 92 Stat. at 1705-06 (1978) (codified as amended at 49 U.S.C. § 1302(a) (1988)) (repealed 1994) (current version at 49 U.S.C.A. §§ 40101-49105 (1995)). The House report accompanying the bill that became the ADA stated: The bill includes a revised policy statement requiring the Board to stress competition and to encourage low fare service and new entry into the industry. The bill also includes a fare flexibility provision permitting airlines to raise and lower fares by specified percentages without CAB approval. The bill also imposes procedural deadlines for CAB decisions and allows CAB to develop simplified procedures for less controversial cases.
\end{enumerate}
\end{footnotesize}
CAB.140 Prior to the ADA, the CAB would not even issue a decision on most route change applications.141 In response, the ADA imposed procedural deadlines for both CAB review and administrative law judge decisions.142 Likewise, changes in fares had to be submitted to the CAB for approval. However, if the CAB was not satisfied with the new fares, it had authority to prescribe the airline’s fares.143 In response, the ADA established a fare flexibility program under which a carrier could raise or lower its fares within specified parameters without getting CAB approval,144 with the goal of insuring “that future CAB’s will be unable to follow the anticompetitive policies which have sometimes been followed in the past.”145

In order to ensure that federal deregulation of the airlines would not be frustrated by the states, the ADA included an express preemption provision. Using the same troublesome “relate to” language as section 514(a) of ERISA, § 1305(a) preempted all state laws “relating to rates, routes, or services of any air carrier,”146 with the exception of state laws involving the exercise of proprietary powers and rights by a state as owner or operator of an airport.147

142. Id. (establishing 180-day requirement for administrative law judge to issue decision and Board decision 90 days thereafter).
143. Id. at 3744. In the early 1970s, the CAB went so far as to actually establish a formula for determining coach and first-class fares. Id. at 3745. The formula required that fares be uniform and were based generally on the average costs of all interstate carriers. Id.
[A] State, political subdivision of a State, or political authority of at least 2 states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation . . . .
147. Id. This proprietary exemption was actually a codification of a line of cases reading such an exemption into the Federal Aviation Act, as amended by the Aircraft Noise Abatement Act of 1968 (ANA) and the Noise Control Act of 1972 (NCA). See Skydiving Ctr. of Greater Washington, D.C., Inc. v. St. Mary’s County Airport Comm’n, 823 F. Supp. 1273, 1282-83 n.6 (D. Md. 1993) (“Shortly after the Burbank decision, Congress passed 49 U.S.C. App. § 1305 (repealed 1994) (current version at 49 U.S.C.A. § 41713), which clarified and codified Burbank”). In City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), the Supreme Court had held that a city ordinance placing a curfew on flights from a private airport was preempted by the ANA and NCA under the Supremacy Clause. The
The purpose of the preemption provision was to “prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier’s routes, rates or services.”

The ADA’s express preemption provision has spawned a significant amount of litigation. Most frequently, cases have addressed the reach of § 1305(a) — the question of whether a variety of Court concluded that the ANA and the NCA preempted the entire field of aircraft noise control. Id. at 637. However, it implied that the ANA’s and the NCA’s legislative history supported an exemption in a case such as the one before it for a state or local public agency acting in the capacity of an airport proprietor. Id. at 635-36 n.14. The decision was supported by a letter from the Secretary of Transportation that was quoted in approval in the Senate Report accompanying the ANA, which stated that the ANA would “not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport.” S. REP. NO. 1353, 90th Cong., 2d Sess. (1968), reprinted in 1969 U.S.C.C.A.N. 2688, 2693-94. Subsequent cases seized upon this initiative to develop an exemption for governments acting pursuant to their authority as airport proprietors. See, e.g., Western Air Lines, Inc. v. Port Auth. of New York and New Jersey, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988); Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir.), cert. denied, 479 U.S. 872 (1986); San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); British Airways Bd. v. Port Auth. of New York and New Jersey, 564 F.2d 1002 (2d Cir. 1977).

148. H.R. Rep. No. 1211, 95th Cong., 2d Sess. 4 (1978), reprinted in U.S.C.C.A.N. at 3752. Earlier versions of the preemption provision were phrased slightly differently from the final version of the legislation. The Senate version of the preemption provision stated that its intent was to “prohibit[ ] a State from enacting any law, establishing any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgating economic regulations for, any air carrier certified by the Board.” H.R. CONF. REP. NO. 1779, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S.C.C.A.N. at 3804. Similarly, the House version stated that its intent was that “[n]o State may regulate that carrier’s routes, rates or services.” Id. at 3805. The Conference Committee version was identical to that of the House. Id.


149. There are also a number of cases involving the question of whether state and local regulations that assure do relate to rates, routes and services are saved as being an exercise of proprietary rights. In this area, too, there have been inconsistent cases that are difficult to explain. One area of inconsistency involves common law nuisance actions seeking damages as the result of an airport’s
state law claims are preempted as relating to rates, routes or services. The questions that have arisen regarding the scope of interference with the use and enjoyment of property. For example, in San Diego Unified Port District v. Superior Court of California, a California court held that flights complying with federal regulations cannot form the basis of a negligence, nuisance or trespass action for damages. 136 Cal. Rptr. 557, 567 (Ct. App.), cert. denied, 434 U.S. 859 (1977). In contrast, another California case, Greater Westchester Homeowners Ass'n v. City of Los Angeles, held that a nuisance action based on excessive aircraft noise from a municipal airport is not preempted. 603 P.2d 1329, 1336 (Cal. 1979), cert. denied, 449 U.S. 820 (1980); see also Bryski v. City of Chicago, 499 N.E.2d 162, 167 (Ill. Ct. App. 1986) (holding nuisance and trespass claims against municipal airport proprietor based on excessive noise are preempted). But see Bieneman v. City of Chicago, 864 F.2d 463, 472 (7th Cir. 1988) (holding state nuisance action for damages not preempted based on differentiation between regulation and damages), cert. denied, 490 U.S. 1080 (1989); Illinois ex rel. Scott v. Butterfield, 396 F. Supp. 632, 645 (N.D. Ill. 1975) (holding nuisance action against City not preempted); Owen v. City of Atlanta, 277 S.E.2d 388, 541 (Ga. Ct. App. 1981) (noting airport operator conceded claim for inverse condemnation but holding challenge to nuisance claim on preemption grounds denied), cert. denied, 456 U.S. 972 (1982). Even more surprisingly, a similar conflict exists in cases involving nuisance actions seeking injunctions, despite the fact that an injunction, unlike a damages action, quite obviously affects the actual flight of the aircraft directly by proscribing it. See Krueger v. Mitchell, 392 N.W.2d 753, 740 (Wis. 1983) (holding private landowners nuisance suit against private airport preempted to extent it sought injunctive relief and to extent it sought damages in absence of unreasonable nuisance). But see Wood v. City of Huntsville, 584 So. 2d 1081, 1083 (Ala. 1980) (holding private nuisance action to enjoin neighbor's use of helicopter from his residence not preempted despite fact that FAA and state agency had approved such use; no Congressional intent to preempt local authority over ground operations).

150. See 49 U.S.C. § 1305(a) (1988) (repealed 1994) (current version at 49 U.S.C.A. § 41713(b) (West 1995)). One area that has not caused conflicting interpretations under the ADA is that of design defect claims. Courts have consistently held that federal law imposes minimum design standards and thus that state tort claims are not preempted. See Public Health Trust of Dade County v. Lake Aircraft, Inc., 992 F.2d 291, 295 & n.5 (11th Cir. 1993) (holding that ADA does not preempt design defect claim for failure to include energy absorbing seats despite FAA design option, but not mandated by statute); Cleveland v. Piper Aircraft Corp., 985 F.2d 1498, 1445 (10th Cir.) (holding that ADA does not preempt design defect claim based upon poor pre-flight visibility from rear pilot seat despite FAA approval of design), cert. denied, 114 S. Ct. 291 (1993); Holiday v. Bell Helicopters Textron, Inc., 747 F. Supp. 1396, 1401 (D. Haw. 1990) (holding that design defect claim based upon crashworthiness of helicopter not preempted by ADA). It would be difficult for a court to come to a different conclusion. First, the authority given to the Secretary of Transportation is the authority to promulgate "such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft . . . as may be required in the interest of safety." 49 U.S.C. app. § 1421(a) (1988) (emphasis added) (repealed 1994) (current version at 49 U.S.C.A. § 44701 (West 1995)); see Cleveland, 985 F.2d at 1445 ("By themselves, minimum standards such as these are not conclusive of Congress'[ ] preemptive intent."); Holiday, 747 F. Supp. at 1401 (concluding that "nothing in the FAA indicates that states may not require aircraft to be more safe or better designed"). But see Lance M. Harvey, Note, Cleveland v. Piper Aircraft Corp.: The Tenth Circuit Holds That the Federal Aviation Act of 1958 Does Not Preempt State Common Law Claims for Negligent Design, 46 BAYLOR L. REV. 485, 502-06 (1994) (arguing that "minimum standards" does not mean states may impose standards different from the federal ones). Second, the preemption language of § 1305(a), combined with
§ 1305(a) highlight the difficulty created by express preemption provisions. Illustrative is the Supreme Court's first decision interpreting the ADA, Morales v. Trans World Airlines, Inc., 151 which established a broad reading of the ADA's preemption clause to encompass any state regulations or laws that touch on rates, routes or services. 152

Morales arose from an attempt by several state attorneys general to enforce fare advertising guidelines adopted by the National Association of Attorneys General (NAAG). The NAAG guidelines contained standards regarding the content and format of airline advertisements, frequent flyer programs and compensation to passengers who voluntarily yielded their seat when a plane was overbooked. 153 When the Attorney General of Texas sent a notice of intent to sue to enforce the guidelines against the allegedly deceptive fare advertisements of several airlines, the airlines filed suit, alleging that the NAAG regulations were preempted by § 1305(a)(1). 154

The issue in Morales was whether the ADA preempted the states from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes. 155 Given the ADA's express preemption provision, the Court viewed the question as one of statutory interpretation and accordingly began with the language of § 1305(a) and the assumption that "the ordinary meaning of that language accurately expresses the legislative purpose." 156

the fact that the ADA left the original savings clause of the FAA unblemished, is a strong indication of Congress' intent not to preempt state law claims unrelated to rates, routes and services. See Cleveland, 985 F.2d at 1444 (concluding that under Cipollone air safety is not preempted because it is beyond scope of the express preemption provision); Holliday, 747 F. Supp. at 1400 n.3 (reasoning that absence of express preemption clause addressing aircraft safety supports conclusion that design defect claims are not preempted). But see Harvey, supra, at 494-98 (arguing that ADA's express preemption provision is not reliable indicium of congressional intent to preempt design defect claims and that such claims should be preempted under implied preemption analysis).

152. Id. at 383. The Court recently reaffirmed that broad view in American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 827 (1995).
153. See Morales, 504 U.S. at 378, 391-418 (appendix to opinion).
154. Id. at 379-80 ("The[e] respondents then filed suit in Federal District Court claiming that state regulation of fare advertisements is preempted by § 1305(a)(1); seeking a declaratory judgment . . . and requesting an injunction.")
155. Id. at 383 (observing that issue must be analyzed by reviewing the statutory intent employed in language used by Congress).
156. Id. (citing FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990); Park 'n Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985)).
Citing extensively from its precedent regarding the similarly worded preemption provision in ERISA, the Court emphasized the breadth of the language, determining that state causes of actions "having a connection with or reference to airline rates, routes or services are preempted under . . . § 1305(a)(1)." Once that standard is established, the resolution of the issue is foreor-

157. Arguably, the Court's reliance on its interpretations of ERISA's preemption provision is misplaced. Although one can see the temptation to rely on similar language in the preemption provision of another statute, that temptation should be resisted. As the Morales dissent notes, relying on the language of another statute runs the risk of giving a preemption provision "a construction that is neither compelled by its text nor supported by its legislative history." Morales, 504 U.S. at 419 (Stevens, J., dissenting). There are a number of important differences between ERISA and the ADA. First, unlike ERISA, as the legislative history discussed above suggests, the thrust of the ADA is economic; the ADA was enacted for the purpose of promoting a competitive market in the airline industry. Also, as the dissent notes, prohibitions against deceptive trade and unfair trade practices is consistent with a free market. Id. at 421-22 (Stevens, J., dissenting) (citing Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1988)).


Third, of course, as the state attorneys general argued, ERISA's substantive regulation is significantly broader than that of the ADA. Morales, 504 U.S. at 384. It may be the case, as the Supreme Court noted, that ERISA cases rely on the broad language of § 514 and not ERISA's substantive breadth in interpreting its preemptive reach. Id. at 387-90. However, one cannot ignore the difference in substantive breadth of the two statutes in determining if they do or should preempt state law. That the "relate to" language does not allow for an examination of those differences is indicative of the problem with express preemption provisions.

Finally, the majority's reliance on ERISA is troublesome for another reason: it assumes a consistency of usage of terms by Congress that is difficult to support in fact. It is one thing to interpret words in the same statute as having the same meaning. However, it is a very different matter to assume that the Congress that passed the ADA in 1978 meant the same thing that the Congress that passed ERISA in 1974 meant because the two used similar words. There is certainly nothing in the legislative history of the ADA that suggests that Congress had § 514 of ERISA in mind when it passed the ADA.

158. Morales, 504 U.S. at 383-84. The Court states, "[W]e have held that a state law 'relates to' an employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with or reference to such a plan' . . . [Therefore,] [s]ince the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here." Id. at 384 (citing Shaw v. Delta Airlines, Inc., 463 U.S. 85, 97 (1983)).
The NAAG guidelines make express reference to airfares and establish binding requirements as to how airline tickets may be marketed; therefore, the state regulations impact directly on the airline industry's ability to market its product. This, in tandem with the "significant" economic impact of regulating price advertising, caused the Court to conclude that the guidelines unavoidably "relate to" airline rates and are clearly preempted.

As a matter of interpreting the language of the ADA's preemption provision, it is hard to fault the analysis of the Morales majority,
particularly because the final statutory language replaced earlier versions of the proposed preemption provision that spoke in terms of preemption state efforts to "regulate" and to establish standards "determining" rates, routes or schedules and services.\textsuperscript{162} However, that is precisely the problem with § 1305(a). Going beyond the words of the preemption provision, the conclusion of the \textit{Morales} majority must give one pause. Clearly, in this case, the need to focus on the words Congress used in the preemption provision gets in the way of understanding what it is that ought to be preempted by the ADA, specifically, state attempts to interfere with federal deregulation of the airlines, and state laws that would foil the federal goal of increased competition.\textsuperscript{163}

The problem of statutory interpretation is even more graphically illustrated by ERISA's exception from preemption for state laws regulating insurance,\textsuperscript{164} an area which itself has been a source

\textsuperscript{162} For a discussion of earlier versions of proposed ADA preemption provisions, see \textit{supra} note 148 and accompanying text. The \textit{Morales} dissent disagreed with much of the majority's analysis, distinguishing between direct and indirect regulation. "By definition, a state law prohibiting deceptive or misleading advertising of a product 'relates,' 'pertains,' or 'refers' first and foremost to the advertising (and, in particular, to the deceptive or misleading aspect of the advertising) rather than to the product itself." \textit{Morales}, 504 U.S. at 420 (Stevens, J., dissenting). Assuredly, the law indirectly relates to the product being advertised because it is impossible to determine whether the advertising is deceptive without reference to the product itself. However, the prohibition fundamentally affects the nature of the advertising, not the nature of the product. \textit{Id.} (citing to New York v. Trans World Airlines, Inc., 728 F. Supp. 162, 176 (S.D.N.Y. 1989)). Courts have been inconsistent in their acceptance of this argument. It has generally been rejected in the ERISA context, where state law causes of action based on fraudulent misrepresentation are generally preempted. For a discussion of ERISA preemption of state law causes of action based on fraudulent misrepresentation, see \textit{supra} note 78 and accompanying text. In any event, while the dissent's argument that the state law in question should not be preempted because it only indirectly relates to rates may be consistent with the earlier versions of the preemption provision, which spoke in terms of determining and regulating rates, the majority's reading is more consistent with the language ultimately included in the statute.

\textsuperscript{163} For a discussion of court's attempts to limit the reach of the cases regarding ADA's preemption provision, see \textit{infra} notes 189-201 and accompanying text.

\textsuperscript{164} 29 U.S.C. § 1144(b)(2)(A) (1988). Section 514(b) does not define "insurance" for purposes of the savings clause. "[C]ourts have struggled to define which state laws regulate insurance for the purposes of ERISA." Smith v. Jefferson Pilot Life Ins. Co., 14 F.3d 562, 569 (11th Cir.), \textit{cert. denied}, 115 S. Ct. 57 (1994); see also Stuart v. Metropolitan Life Ins. Co., 664 F. Supp. 619, 625-26 (D. Me. 1987) (recognizing that standard for determining whether state law regulates insurance is still anything but clear), \textit{aff'd}, 849 F.2d 1534 (1st Cir.), \textit{cert. denied}, 488 U.S. 968 (1988). In general terms, for a state law to escape preemption under the insurance savings clause, it must regulate insurance within a common-sense view of the word "regulate." \textit{Pilot Life}, 481 U.S. at 50. It also must regulate the "business of insurance" as that term is defined by cases interpreting the scope of the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1988). \textit{Metropolitan Life}, 471 U.S. at 743. Among other things, this means that state insurance law must govern the substantive con-
of a tremendous volume of litigation. That exemption is limited by further statutory language that prevents a state from deeming employee benefit plans to be insurance for purposes of state law (the “deemer clause”), thus enabling the state to regulate the plans directly.

In interpreting that statutory language, Supreme Court decisions clearly establish two propositions. First, state insurance laws requiring mandated benefits may be applied to insurance policies that are used to provide benefits under employee benefits plans. Thus, these laws may have an indirect regulatory effect on such plans, even though such laws may not be applied directly to regulate a benefit plan. Second, ERISA preempts the application of state insurance laws to self-insured plans.

These propositions are first illustrated by Metropolitan Life Insurance Co. v. Massachusetts, which involved a challenge by two insurance companies to a Massachusetts statute. The statute required “that specified minimum mental-health-care benefits be provided [to] . . . Massachusetts resident[s] who [were] . . . insured under a general insurance policy, an accident or sickness insurance policy, or an employee health-care plan that cover[ed] hospital and surgical expenses.” The question addressed by the Court was whether
ERISA preempted application of the Massachusetts statute to an insurance policy that had been issued to an employee health care plan.\textsuperscript{169} The Court concluded that the state law clearly related to an employee health care plan and therefore fell within the scope of section 514(a).\textsuperscript{170} However, because a mandated benefits law is a law that regulates the "business of insurance," the state law was not preempted because it transfers risk, it is an integral part of the relationship between the insurer and insured, and it is limited to entities in the insurance industry.\textsuperscript{171} Further, the Court held that because the law was not being applied directly to a plan, but only indirectly through the application of the law to an insurance policy that had been issued to a plan, the statute did not violate the deemer clause.\textsuperscript{172} The Court recognized that its decision created a distinction between self-insured and fully insured plans, but concluded that it was merely applying a distinction created by Congress through the deemer clause.\textsuperscript{173}

The Supreme Court directly addressed the implications of its Metropolitan Life decision in \textit{FMC v. Holliday},\textsuperscript{174} which held that ERISA preempted the application of a Pennsylvania automobile insurance, anti-subrogation law to a fully self-funded medical plan.\textsuperscript{175} The Court concluded that the deemer clause exempted self-funded ERISA plans from state laws that regulate insurance.\textsuperscript{176} Although ERISA prevents preemption of state laws that regulate insurance, the Court held that state insurance laws may not reach self-insured

\textsuperscript{169} \textit{Id.} at 731-32. The third part of the statute was not at issue: Massachusetts had conceded that ERISA preempted application of mandatory benefits law directly to employee health care plans. \textit{Id.} at 735 n.14.

\textsuperscript{170} \textit{Id.} at 739.

\textsuperscript{171} \textit{Id.} at 743.

\textsuperscript{172} \textit{Id.} at 740-44.

\textsuperscript{173} \textit{Id.} at 747 & n.25. Lower courts deciding cases in the wake of Metropolitan Life have embraced that result. See, e.g., Insurance Bd. of Bethlehem Steel Corp. v. Muir, 819 F.2d 408, 413 (3d Cir. 1987) (finding employer's operating self-insured plans need not comply with state mandated benefit laws); Moore v. Provident Life and Accident Ins. Co., 786 F.2d 929 (9th Cir. 1986) (holding self-insured plan "falls squarely within the 'deemer' clause" and therefore ERISA preempts); Children's Hosp. v. Whitcomb, 778 F.2d 239, 242 (5th Cir. 1985) (finding that Louisiana statute mandating minimum level of benefits for medical expenses in connection with mental illness does not apply to employer's self-insured welfare benefit plan); Hutchinson v. Benton Casing Serv. Inc., 619 F. Supp. 831 (S.D. Miss. 1985) (holding common-law claims preempted when plan is self-insured).

\textsuperscript{174} 498 U.S. 52 (1990).

\textsuperscript{175} \textit{Id.} at 65.

\textsuperscript{176} \textit{Id.} at 61. The Court stated that such an interpretation of the deemer clause was consistent with the prior interpretation in Metropolitan Life and with the presumption against preemption of areas of traditional state regulation. \textit{Id.} at 61-62.
plans because ERISA forbids considering these plans to be insurance companies, other insurers or entities engaged in the business of insurance for purposes of such state laws.\textsuperscript{177}

The Supreme Court cases lead to the conclusion that, at least when state law regulates insurance, insured plans may be indirectly subject to state regulation, whereas self-insured plans are not subject to any state regulation.\textsuperscript{178} This distinction is problematic at best. In terms of ERISA's primary goal of protecting plan participants and beneficiaries, there is no justification for allowing state regulation of some plans while allowing other plans to be completely unregulated.

This dichotomy has also been criticized as interfering with an employer's choice between insured and self-insured plans.\textsuperscript{179} The

\textsuperscript{177} Id. at 63-64.


\textsuperscript{179} See Kilberg & Inman, supra note 42, at 1397. The argument is that the state's ability to mandate benefits of insured plans means that states are permitted to encourage or coerce plan sponsors to self-insure to avoid burdens of inconsistent state regulation. This both interferes with the discretion ERISA gives plan sponsors regarding how to fund their plans, and encourages plans to assume the risk of providing benefits alone rather than spreading the risk through the backing of insurance carriers' independent resources. \textit{Id.}
Court may be correct in holding that Congress created the distinction by including both the savings clause and the deemer clause in section 514. It is difficult, however, to believe that Congress intended the distinction. More likely, Congress' desire not to interfere with state insurance regulation (hence, the savings clause) was tempered by a concern that states be prevented from using their insurance laws to frustrate indirectly the goals of section 514 (hence, the deemer clause). Accordingly, it is hard to fault the Supreme Court for its decisions in this area: the Court must interpret section 514 so as to give effect to both the savings and the deemer clauses, and the FMC v. Holliday conclusion would appear to be the only appropriate and feasible way to achieve that aim.180

180. The Supreme Court's decision in Cipollone v. Liggett Group, Inc. presents an example of the difficulty of statutory interpretation in the context of the 1969 Cigarette Act's preemption of state laws that constitute a "requirement or prohibition" based on smoking and health with respect to advertising or promotion. Cipollone, 505 U.S. 504, 520-24 (1992). In Cipollone, the Court analyzed four categories of common law claims presented by plaintiffs to see if any of those claims constituted such a requirement or prohibition. Id. at 524-30. The Court's analysis (and in its decision, four Justices joined the Court's claim by claim analysis, three would not preempt any common law claims and two would preempt all common law claims) illustrates the difficulty in administration created by the focus on the statutory language. The Court decided that plaintiff's failure to warn claims, to the extent premised upon a failure to include additional or more clearly stated warnings, were preempted as imposing a requirement or prohibition with respect to advertising or promotion. Id. at 524-25. It likewise held that plaintiff's fraudulent misrepresentation and conspiracy claims, which alleged that the manufacturers' advertising neutralized the effect of federally mandated warning labels, were preempted as being equivalent to mandating additional advertising and warnings. Id. at 527-30. In contrast, the Court viewed fraudulent misrepresentation claims based on allegedly false statements of material facts not to be preempted, even if the false statements were made in advertisements, because such a claim was not predicated on a duty "based on smoking and health" but rather on a more general obligation not to deceive. Id. Likewise, the Court held a claim for conspiracy to misrepresent or conceal material facts not to be preempted because the predicate duty underlying that claim is a duty not to conspire to commit fraud. Id. at 530. In a slightly different vein, the Court held plaintiff's express warranty claims not preempted because such a claim relies on a duty that is voluntarily undertaken by the manufacturer rather than imposed by law. Id. at 525.

Examining together these different conclusions, the bases for the Court's distinctions are fine to say the least. Why is it that claims involving false statements of material fact in advertisements are based on a general duty not to deceive, versus a duty based on smoking and health, but failure-to-warn claims are not based on general obligations to inform consumers of known risks, but are based on smoking and health? Arguably the latter implies a legal obligation to include an additional warning in an advertisement — which would be inconsistent with the 1969 Cigarette Act — whereas the former only involves prohibiting saying something false in the same advertisement. Still, both involve what can and cannot be said regarding smoking and health in an advertisement. With respect to fraudulent misrepresentation, why is a claim that a manufacturer's advertising neutralized the effect of federally mandated warning labels preempted as equivalent to affecting advertising whereas a claim of false misrepresentation is not? The former does not mandate
Accordingly, like the preemption language found in the ADA, Congress’ preemption language in ERISA has hampered the efforts of courts to reach consistent and justifiable preemption decisions.

2. *Attempts to Limit the Language of Express Provisions*

In interpreting certain broad preemption provisions, some courts have struggled to find a way to avoid displacing state law where no federal interest is served. ERISA and the ADA are illustrative. As this Article has already illustrated, courts have interpreted the “relate to” language of ERISA’s preemption provision very broadly. Courts have held that state regulation relates to an employee benefit plan if: (1) the regulation makes an express reference to such plan or is specifically designed to affect a benefit plan;181 (2) the regulation would have a significant economic impact on such plan;182 (3) the existence of a plan is a critical factor in establishing liability under the state statute in question;183 or (4) state law would subject plan administration to conflicting state regulation.184 The Supreme Court has also made it quite clear that state law need not conflict with ERISA to be preempted; even state laws consistent with the federal statute are preempted if they relate to an employee benefit plan.185

Courts have, however, attempted to place certain limits on the

any additional advertisement or warning; it merely prevents misleading advertisement, which is no different in substance from the misrepresentation claim.

The Court’s attempt to discover what common-law claims constitute a “requirement or prohibition” highlight the difficulty lower courts will have in applying the Cipollone ruling. The point is not really whether the Court is right or wrong in its line-drawing. The problem is that the requirement or prohibition language forces the courts to engage in the line-drawing process.


"relate to" language. Particularly when confronted with a law of general application that does not specifically address employee benefits plans, the Supreme Court has recognized that some state laws affect plans in "too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."186 Although the Supreme Court has not articulated any principled means of ascertaining what state laws are so tenuous, remote or peripheral to avoid ERISA preemption, lower courts have relied upon the language by refusing to preempt state law claims that remotely impact the employee benefit plan.187 Furthermore, these courts also refuse to preempt state law claims that only remotely affect the relationship among the principals with whom ERISA is concerned: employers, fiduciaries and beneficiaries.188

The effort to read a rule of reason into the "relate to" language is laudatory. However, the focus of the remoteness notion is exclusively on the federal interest. Nothing addresses the lack of attention to the state interest in ERISA preemption cases. Indeed, it is difficult to conceive of a gloss on the language of section 514 that would allow a consideration of state interests and a balancing of those interests against federal interests.

Courts have also attempted to read a rule of reason into interpretations of the "relate to" language of the ADA. The courts' attempts to determine when state common-law claims relate to airline services have generated the most confusion regarding the effect of

186. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983) (stating also that case before Court did not present such borderline question).

187. For example, in a state common-law suit for wrongful discharge, a court held that ERISA did not preempt measuring damages in the form of lost future pension benefits because that was too tenuous or remote to "relate to" a plan. Teper v. Park West Galleries, Inc., 427 N.W.2d 535, 543 (Mich. 1988). The court concluded that the employer had not satisfied any of the three factors that could establish a preemptive relationship: altering the level of benefits; altering the terms of the plan; or subjecting plan fiduciaries to claims other than those of ERISA. Id. at 540-43; see also Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1984) (holding state's decision to regulate amount that hospitals charge does not "relate to" plan), cert. denied, 472 U.S. 1008 (1985); Lane v. Goren, 743 F.2d 1387 (9th Cir. 1984) (noting in relevant part that "[i]t simply cannot be said that state law which prohibits dismissal of an employee because of race 'relates to' . . . an employee benefit plan under these circumstances").

188. See Sommers Drug Store Co. Employee Profit Sharing Trust v. Corrigan Enter., Inc., 793 F.2d 1456, 1470 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987). In Sommers, an employee profit sharing trust brought a state common-law claim alleging that the employer had breached its fiduciary duty to the trust. Id. The court held that the claim was not preempted because of remoteness. Id. The Sommers court focused the statute's effect on relations among principal ERISA entities like the employer, fiduciaries and beneficiaries in establishing whether the statute "related to" insurance. Id. at 1467-69.
the ADA's preemption provision. Interpreting "relating to . . . services" broadly, courts have preempted state law claims based on death resulting from an airline's failure to meet, assist and provide medical care to a passenger at the culmination of a flight;\(^{189}\) wrongful eviction from a flight;\(^{190}\) failure to provide courteous service;\(^{191}\) and responsibility for physical injury based on unsafe conduct in airplanes.\(^{192}\) These cases interpret the "relate to" language very broadly and reject the notion that the FAA's savings clause, which is pre-ADA, protects state common-law claims.\(^{193}\) The broad interpretation is particularly troubling because the ADA itself does not provide for a private federal cause of action.\(^{194}\)

Some courts have attempted to limit the preemptive effects of the ADA, determining that certain types of claims are not preempted as relating to services. For example, courts have refused to preempt state law claims based on an airline's refusal to transport passengers or its detention of passengers,\(^{195}\) tort and contract


\(^{192}\) See, e.g., Smith v. America W. Airlines, Inc., 4 F.3d 356 (5th Cir. 1993) (preempting negligence claim relating to airline's failure to provide adequate safety procedures to prevent hijacking and resulting injuries).

\(^{193}\) The fact that the ADA, like ERISA, contained an earlier version with more restrictive language — in this case an earlier version said "determining" rather than "relate to" — is sometimes used to support a broad reading of "relate to." See O'Carroll, 863 F.2d at 13 (concluding language in preemption provision of ADA manifests Congress' intent to preempt state common-law claims); Von Anhalt v. Delta Air Lines, Inc., 735 F. Supp. 1030, 1031 (S.D. Fla. 1990) (same).

\(^{194}\) See Hodges v. Delta Air Lines, Inc., 4 F.3d 350, 354 n.8 (5th Cir. 1993) (comparing ADA to ERISA and concluding that lack of any private cause of action under ADA supports proposition that Congress did not consider preempting general tort law), aff'd on reh'g, 44 F.3d 334 (5th Cir. 1995); Lawal, 812 F. Supp. at 720-21 (finding that although claim of alleged mistreatment of airline employees was preempted, no cause of action under Federal Aviation Act existed); Howard v. Northwest Airlines, Inc., 793 F. Supp. 129 (S.D. Tex. 1992) (finding that, although wrongful death and survival actions were preempted, FAA provided no remedy). For a discussion of the differences between the ADA and ERISA, see supra note 157.

claims based on overbooking,196 tort claims based on deflation of the plane's nose wheel,197 and a variety of other negligent and intentional torts.198 Courts that have refused to find preemption in these cases, notwithstanding the fact that these claims literally "relate to . . . services," do so on a number of grounds. Some courts have said that "services" must be a distinctive airline service.199 Others have relied on the notion, expressed by the Supreme Court in Shaw v. Delta Airlines, Inc.,200 that certain claims "relate to" services in too tenuous, remote and peripheral a manner to be preempted.201

that claim of intentional infliction of emotional distress made by passenger forced to leave plane was not preempted); Abou-Jaoude v. British Airways, 281 Cal. Rptr. 150 (Ct. App. 1991) (holding that claim under state civil rights law for discrimination based on ancestry or national origin was not preempted).


198. See, e.g., Hodges, 4 F.3d 350 (holding that personal injury claim based on injury caused to passenger when fellow passenger opened overhead compartment and dislodged box was preempted because court bound by previous unpublished opinion and that absent such precedent, court would not have preempted claim); Butcher v. City of Houston, 813 F. Supp. 515 (S.D. Tex. 1993) (finding that personal injury claim based upon negligent maintenance of floors at airport gate not preempted); Martin v. Eastern Airlines, Inc., 630 So. 2d 1206 (Fla. Dist. Ct. App. 1994) (finding that negligence suit based on injury sustained when flight attendant opened overhead case and briefcase fell out not preempted); Ravreby v. United Airlines, Inc., 293 N.W.2d 260 (Iowa 1980) (holding that personal injury suit based upon discomfort suffered by passenger from other's smoking not preempted).

199. See, e.g., Hodges, 4 F.3d at 354-55 (developing distinction between economic bargain-baited for services, i.e., ticketing, boarding, baggage handling, transport, and services related to safety, i.e., protection from tortious personal injury); Penn, 839 F. Supp. at 1222 (limiting services to those included in contract of carriage); Chouest v. American Airlines, Inc., 839 F. Supp. 412, 417 (E.D. La. 1993) (finding that ground transportation was not "service" because it was not "integral" to air transportation services); Butcher, 813 F. Supp. at 517-18 (concluding that "services" of airline must pertain to distinctive airline services). It is questionable whether this argument may still serve as a basis to decide whether state law claims are preempted by the ADA in the wake of the Supreme Court's decision in American Airlines, Inc. v. Wolens, 115 S. Ct. 817 (1995). In Wolens, the Court suggested that Morales does not countenance a distinction based upon whether the subject matter in question is essential or unessential to airline operations. Id. at 819.


201. Id. at 100 n.21. See, e.g., Smith v. America W. Airlines, Inc., 4 F.3d 356 (5th Cir. 1993) (holding that negligence action based upon allowing hijacker to board plane was preempted, stating that such action may not have sufficiently significant regulatory effect on airline's services to "relate to"); Doricent, 1993 WL 437670, at *7 (finding that claims of intentional infliction of emotional distress, civil rights violations, and assault and battery were too tenuously related to "services" because significant impact on "services" was lacking) (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 389-90 (1992)); Stewart, 776 F. Supp. at 1198 (holding that claims for injuries incurred when nose wheel of aircraft deflated
Reconciling the fact situations and legal claims that have given rise to preemption rulings with those situations and claims that have not is extremely difficult. Why should wrongful eviction from a plane be preempted while overbooking claims should not? Certainly, the former involves neither a more distinctive airline claim nor a less tenuous or remote relationship to the ADA than the latter. Similarly, cases that preempt a claim based on failure to provide courteous service to passengers but that do not preempt a claim based on deflation of a plane’s nose wheel are equally confusing. It cannot be suggested that one result or the other is clearly superior as a matter of statutory interpretation. Rather, the variation in decisions reflect differing views of the courts regarding the freedom to decide cases in the face of the “relate to” language.

The Supreme Court’s most recent pronouncement on the preemptive effect of the ADA has not improved the situation. In American Airlines, Inc. v. Wolens, the Supreme Court addressed whether the ADA preempted a challenge to American Airlines’ retroactive modifications to its frequent flyer program based on both a violation of the Illinois consumer fraud statute and on breach of contract grounds. The Court held that the claim based on the state statute was preempted, but also held that the ADA did not preempt the contract claim. The Court attempted to distinguish the two claims by suggesting that the “relate to” language of the ADA preempts state attempts to impose their own public policies or theories of competition or regulation on the operations of an air carrier. However, the Court suggested that the language of the ADA does not preempt claims “seeking recovery solely for the airline’s alleged breach of its own, self-imposed undertakings.” Specifically, the Court drew a distinction between what the state dictates and to what the airline voluntarily subjects itself.

Although the Court arrived at what may be a reasonable policy judgment as to when the ADA should preempt state law, it is difficult, as a matter of statutory interpretation, to support the Court’s distinction in the treatment of consumer fraud claims versus con-

during landing were not preempted because claim did not seek to hold airline to different standard of care than that prescribed by FAA).

203. Id. at 823-27.
204. Id. at 824.
205. See id. at 824 (“[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a ‘requirement imposed under state law.’”) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 526 (1992)).
206. Id. at 826.
tract claims. A state law requiring an airline to honor its contract-
ual obligations "relates to" airline rates and services every bit as
much as a state law imposing a duty not to defraud consumers.
That is particularly evident in the facts of Wolens, where the "two
claims are grounded upon the exact same conduct and would pre-
sumably have an identical impact upon American's rates, routes,
and services."207

Nor is it persuasive to characterize the contract claim as a
purely self-imposed obligation. While the terms of the contract it-
self are not state laws, it is hard to argue that state (judicial) en-
forcement of those contract terms is not a state law relating to rates
and services. Specifically, the obligation to make good on a con-
tractual promise is an obligation imposed by and enforced under
state law. Thus, although the Court attempted to draw a distinction
that would allow preservation of a common-law claim that we
instinctively feel should not be preempted by the ADA, the Court's
effort is somewhat questionable as a matter of statutory inter-
pretation.208

Therefore, despite efforts by the courts, the "relate to" lan-
guage results in inconsistent interpretations of the reach of the
ADA's preemption provision and an inability to predict when state
causes of action will be preempted. In addition, despite the fact
that the ADA is primarily concerned with economics, the statute
has been held to preempt various causes of action that have little
relationship to the statute's basic concerns. Furthermore, similar to
the problem with ERISA, there is no avenue for analyzing state in-
erests when attempting to limit application of the "relate to"
language.

3. Supplementing Express Analysis with Implied Analysis

Prior to 1992, many courts had engaged in implied preemp-
tion analysis in situations where they were unhappy with the results
of express preemption analysis. Such courts would first analyze
whether the express preemption provision invalidated state law. If
the court found that the preemption provision did not invalidate

207. Id. at 827 (Stevens, J., concurring in part and dissenting in part). That
one claim is codified and the other is not should have no bearing on preemption
analysis.

208. The difficulty created by the ADA's preemption language is further illus-
trated by the fact that while the majority believed the ADA preempted the con-
sumer fraud claim but not the contract claim, Justice Stevens believed that the
language preempted neither claim and Justice O'Connor believed that the lan-
guage preempted both claims. Id. at 827-28.
state law, it would next consider whether the state law in question was impliedly preempted.\textsuperscript{209} One of the situations in which this supplemental implied preemption analysis has been employed involves cases addressing whether compliance with the 1969 Cigarette Act protects defendants from liability for state common-law claims.

Congress first addressed warnings related to the health hazards of smoking cigarettes in the Federal Cigarette Labeling and Advertising Act of 1965 (1965 Labeling Act).\textsuperscript{210} The 1965 Labeling Act was aimed at both adequately informing the public that cigarette smoking may be hazardous to health and protecting the national economy from the burdens imposed by diverse, non-uniform and confusing cigarette labeling and advertising regulations.\textsuperscript{211} Accordingly, the 1965 Labeling Act made it unlawful to sell or distribute any cigarettes in the United States unless the package contained a required warning label.\textsuperscript{212} The 1965 Labeling Act contained an express provision preempting any efforts to require alternative or additional warnings other than the specific warning required by the federal law.\textsuperscript{213}

Congress subsequently enacted the 1969 Cigarette Act which amended the 1965 Labeling Act in several respects.\textsuperscript{214} As a matter of substantive regulation, the 1969 Cigarette Act strengthened the

\textsuperscript{209} See, e.g., Taylor v. General Motors Corp., 875 F.2d 816, 825-27 (11th Cir. 1989) (holding that common-law tort action for failure to install air-bags was not expressly preempted by National Traffic and Motor Vehicle Safety Act, but was impliedly preempted by provisions of Act), cert. denied, 494 U.S. 1065 (1990); Pennington v. Vistron Corp., 876 F.2d 414, 420-21 (5th Cir. 1989) (holding claims impliedly preempted by Public Health Cigarette Smoking Act of 1969 but not expressly preempted).


\textsuperscript{211} 1965 Labeling Act § 2, 79 Stat. 282 (prior to amendment).

\textsuperscript{212} Each cigarette package was required to contain a conspicuous label stating: “Caution: Cigarette Smoking May Be Hazardous to Your Health.” 1965 Labeling Act § 4, 79 Stat. at 283 (prior to amendment).

\textsuperscript{213} 1965 Labeling Act § 5, 79 Stat. at 283. Section 5, captioned “Preemption,” provided in part:

(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 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.

\textsuperscript{214} 1969 Cigarette Act, Pub. L. No. 91-222, 84 Stat. 88 (1969) (codified as amended at 15 U.S.C. §§ 1331-1340 (1994)). The 1965 Labeling Act had provided that its provisions affecting the regulation of cigarette advertising would terminate on July 1, 1969. 1965 Labeling Act § 10, 79 Stat. at 284. As that date approached, the FTC announced that it intended to take steps to institute a warning require-
warning label required on all cigarette packages and banned cigarette advertising in any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission. Additionally, the 1969 Cigarette Act modified the preemption provision of the 1965 Labeling Act by providing that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

Diseases and deaths associated with cigarette smoking have led to numerous lawsuits in which plaintiffs have sought to hold cigarette manufacturers liable under various remedial state law theories. The question obviously arises whether compliance with the federal labeling requirement sufficiently shields defendants from state common-law tort claims. Notwithstanding the fact that the preemption provision of the 1969 Cigarette Act is silent with respect to common-law tort claims, are such claims preempted by the federal statute?

215. Rather than stating that cigarette smoking "may be" hazardous to health, the 1969 Cigarette Act required that packages warn that cigarette smoking "is" hazardous to health. 1969 Cigarette Act § 4, 84 Stat. at 88. In 1984, Congress enacted the Comprehensive Smoking Education Act which further amended the labeling requirements, requiring the alternating use of one of four more explicit warnings. Pub. L. No. 98-474, § 4(a), 98 Stat. 2201, 2201-02 (1984).

216. 1969 Cigarette Act § 6, 84 Stat. at 89.


218. For examples of cases alleging manufacturer liability under state law theories, see infra notes 221 & 222.

Prior to the 1992 Supreme Court decision in *Cipollone v. Liggett Group, Inc.*, although lower courts were fairly consistent in holding that the 1969 Cigarette Act did not expressly preempt common-law claims, there was less consistency as to whether the 1969 Cigarette Act impliedly preempted common-law claims. A number of courts held, for example, that failure-to-warn claims were impliedly preempted by federal law on the grounds that such a claim conflicted with the purpose of the federal law. These courts asserted that failure-to-warn claims would inexorably lead to further labeling requirements that would conflict with the federal goal of uniformity in labeling. In contrast, another court held that allowing com-

220. 505 U.S. 504 (1992). *Cipollone* actually reached the Supreme Court on its second attempt. After the complaint was initially filed, the cigarette manufacturers asserted preemption as an affirmative defense. Before trial, plaintiffs moved to strike the defense. The United States District Court for the District of New Jersey granted plaintiffs' motion, ruling that the federal labeling requirement did not prevent an individual from claiming that the warning was inadequate. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984); rev'd, 789 F.2d 181 (3d Cir. 1988), cert. denied, 479 U.S. 1043 (1987). The United States Court of Appeals for the Third Circuit, on interlocutory appeal, remanded the decision. The Third Circuit held that the 1966 Labeling Act and the 1969 Cigarette Act preempted claims arising after the effective date of the 1965 Labeling Act, based upon the cigarette manufacturers' advertisement or promotion of cigarettes or upon the adequacy of their warnings as to the risks of smoking. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987). The Third Circuit did not, however, identify which of *Cipollone*’s claims the 1969 Act preempted. *Id.* at 188. On remand, the district court held that nearly all of plaintiffs’ common-law claims were preempted, however, those claims based upon express warranty were not preempted. *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664 (D.N.J. 1986), aff’d in part and rev’d in part, 893 F.2d 541 (3d Cir. 1990), and aff’d in part and rev’d in part, 505 U.S. 504 (1992). After a jury found for the plaintiff on the express warranty claim, both sides appealed. The Third Circuit affirmed the preemption rulings of the district court. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), aff’d in part and rev’d in part, 505 U.S. 504 (1992). Subsequently, the Supreme Court granted certiorari. 499 U.S. 935 (1991).

221. See, e.g., Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 250 (6th Cir. 1988) (holding that claims were impliedly preempted); Gianitis v. American Brands, Inc., 685 F. Supp. 853 (D.N.H. 1988) (finding that claims were implicitly preempted); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989) (determining that claims were implicitly preempted); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990) (holding that state law claims not preempted either impliedly or explicitly).


223. See, e.g., Roysdon, 849 F.2d at 235 ("'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.'") (quoting Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987))); cf.
mon-law remedies would further the federal purpose of informing the public of the hazards of cigarette smoking and would not obstruct the federal goal of uniform labeling.²²⁴

In *Cipollone*, the Supreme Court resolved the conflict that existed in the lower courts, effectively rejecting the approach taken, not only by a number of lower courts in analyzing the 1969 Cigarette Act, but also by courts interpreting the preemptive reach of other federal statutes with express preemption provisions.²²⁵ The Court held that the preemptive scope of the 1969 Cigarette Act must be governed entirely by the express language of the statute. The Court noted that there is no need to examine further the substantive provisions of the legislation to infer congressional intent to preempt state law when Congress had included in the legislation a provision explicitly addressing preemption, and when that provision provided a "reliable indicium of congressional intent with respect to state authority."²²⁶ Essentially, the Court reasoned that Congress' enactment of an express preemption provision implies that matters beyond the reach of such provision are not preempted.²²⁷

The Supreme Court's conclusion highlights one of the problems created when Congress deals with preemption expressly. Arguably, the Supreme Court's conclusion is compelled by both the language of the statute — as a matter of statutory interpretation — and by the normal presumptions applied by courts in preemption cases. It is almost axiomatic to find, as the Supreme Court did, in *Cipollone*, that a statement by Congress defining the preemptive reach of a statute implies that matters beyond that reach are not preempted. Where a statute addresses preemption expressly, it is fair to conclude, as the *Cipollone* Court did, that a statute preempts those matters (and only those matters) that the statute says it

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²²⁴ *Reeves v. AcroMed Corp.*, 44 F.3d 300 (5th Cir.) (finding that express preemption provision of Medical Devices Amendments to Food, Drug and Cosmetic Act preempts failure-to-warn claim because claim, if successful, would impose labeling requirements in addition to requirements imposed by federal legislation), *cert. denied*, 115 S. Ct. 2251 (1995).

²²⁵ For example, FIFRA requires that all pesticides sold in the United States be registered with the Environmental Protection Agency before being distributed and sold. 7 U.S.C. § 136(a) (1994). FIFRA also governs the labeling of such pesticides and contains an express preemption provision similar to the one found in the 1969 Cigarette Act. *Id.* § 156v(b); *see also Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1533-35 (D.C. Cir.) (finding that state failure-to-warn claims were neither expressly nor impliedly preempted), *cert. denied*, 469 U.S. 1062 (1984).


²²⁷ *Id.*
preempts. Otherwise, why would the provision be included?

This ability to defend the Supreme Court's conclusion is precisely the problem. Such an apparently correct conclusion, as a matter of statutory interpretation, creates an artificial distinction between express and implied preemption analysis that will cause mischief. Even if "[t]he existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines," disallowing an implied preemption analysis when a statute creates an express preemption provision may result in decisions that will not adequately address Congress' purpose in enacting its substantive legislation. For example, Congress had two goals in passing the 1969 Cigarette Act: to warn the public of the hazards of cigarette smoking and to protect the economy. Of the two, the primary goal of the legislature was to adequately warn the public. Protection of the economy was a subsidiary purpose. Supplementing the analysis of whether the 1969 Cigarette Act expressly preempts state law with an implied preemption analysis would allow

228. See id. ("Such reasoning is a variant of the familiar principle of expression unius est exclusio alterius.").

229. The Supreme Court's conclusion in Cipollone regarding preemption analysis does not necessarily mean that any particular approach must be applied to the statutory interpretation of express preemption provisions. However, it is significant that the Cipollone majority, applying a presumption against preemption, argued for a narrow interpretation of the provision. Id. This result was sharply criticized by the dissent. Id. at 544-50 (Scalia, J., dissenting).

230. Id. at 547.

231. Justice Scalia saw an additional problem resulting from this dichotomous approach. He suggested that:

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

Id. at 547-48 (Scalia, J., dissenting). Taking Justice Scalia's view literally, the Supreme Court's decision means that neither express nor implied preemption would occur when there is an actual conflict between state and federal law, if the express preemption provision did not operate to preempt state law. However, this result would seem to be precluded by the Supremacy Clause.


a greater balance of both the competing federal goals and of the state interests. The Court’s analysis, however, would prohibit such an approach.

Does *Cipollone* really create an artificial and rigid distinction between express and implied analysis? By its terms, *Cipollone* forecloses implied preemption analysis when the express preemption language provides a reliable indicium of congressional intent. The Court, however, did not discuss what it meant by a “reliable indicium” of congressional intent. Indeed, the Court completely failed to state why it believed that the 1969 Cigarette Act constituted a reliable indicium. Its failure to do so raises some question about how serious a hurdle the Supreme Court viewed the requirement of a reliable indicium of congressional intent.285

The Supreme Court has recently addressed this issue in the context of the Vehicle Safety Act.286 The Vehicle Safety Act provides that, where federal vehicle safety standards under the Act are in effect, states may not enact safety standards that are not identical to the federal standards.287 The Vehicle Safety Act explicitly states that compliance with any federal motor vehicle safety standard issued under the Vehicle Safety Act does not exempt any person from any liability under common law.288

Although the language of the Vehicle Safety Act, stating that compliance with a federal standard does not exempt a person from common-law preemption, and the lack of competing goals of the type seen in the 1969 Cigarette Act would appear to lead to the conclusion that the Vehicle Safety Act does not preempt common-law claims, prior to the Supreme Court’s decision in *Cipollone*, a significant majority of courts held that the Vehicle Safety Act did, in fact, preempt common-law actions.289 Notably, such courts gener-

285. Subsequent cases suggest that at least some lower courts do not believe the Supreme Court viewed the requirement seriously. See Vango Media, Inc. v. City of New York, 34 F.3d 68, 72 (2d Cir. 1994) (stating that court’s only task was to determine whether local law was within domain expressly preempted by 1969 Cigarette Act); Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 823 (1st Cir. 1992) (“In recent days, the High Court has made it pellucidly clear that, whenever Congress includes an express preemption clause in a statute, judges ought to limit themselves to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption.”), cert. denied, 113 S. Ct. 974 (1993).


288. For further discussion of the savings clause of the Vehicle Safety Act, see *supra* note 68.

289. See, e.g., Pokorny v. Ford Motor Co., 902 F.2d 1116, 1123 (3d Cir.) (holding that products liability claim against manufacturer was impliedly preempted by Vehicle Safety Act), cert. denied, 498 U.S. 853 (1990); Kitts v. General Motors Corp.,
ally did not find common-law claims to be expressively preempted by the Vehicle Safety Act, a conclusion which is contrary to the language that saves common-law claims from preemption.240

However, after failing to find express preemption, these same courts would find that the claim was preempted by utilizing an implied preemption analysis.241 Most commonly, these courts would find implied preemption stating that allowing common-law tort actions would interfere with and frustrate the methods by which the federal regulations sought to accomplish the legislature's goals.242

What is the effect of the Supreme Court's decision in Cipollone on this analysis? Not surprisingly, courts that have interpreted the Vehicle Safety Act in the wake of Cipollone — all of whom tacitly accept the application of the Cipollone principle to the interpretation of the Vehicle Safety Act — have held that the Supreme Court’s decision does not affect their analysis of express preemp-


However, a minority of courts refused to preempt such claims. See, e.g., Garrett v. Ford Motor Co., 684 F. Supp. 407 (D. Md. 1987); Murphy v. Nissan Motor Corp., 650 F. Supp. 922 (E.D.N.Y. 1987); Gingold v. Audi-NSU-Auto Union, A.G., 567 A.2d 312 (Pa. Super. Ct. 1989). Cases generating inconsistent results generally involve a manufacturer's failure to install airbags or other passive restraint systems. In contrast, courts consistently refuse to preempt claims alleging that a device was actually installed. See, e.g., Ferry v. Mercedes Benz of N. Am., Inc., 957 F.2d 1257 (5th Cir. 1992) (holding that state law claim based on defective design of airbag not preempted because federal regulations only establish minimum standards for equipment performance); see also Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777, 783 (3d Cir. 1992) (holding that state common law tort claim against manufacture for inadequate illumination of flatbed truck trailer not preempted by minimum federal standard for illumination).

240. See Pokorny, 902 F.2d at 1120-21 (holding that products liability claim that van was defectively designed was not preempted by Vehicle Safety Act); Taylor, 875 F.2d at 824-25 (holding that Vehicle Safety Act does not expressly preempt state common-law claim against manufacturer of automobile for failing to equip automobile with airbag); Wood, 865 F.2d at 398, 401 (same). Nevertheless, several courts have held such common-law claims to be expressly preempted after narrowly construing the savings clause to preserve only those matters not covered by the federal standards. See Cox v. Baltimore County, 646 F. Supp. 761, 764 (D. Md. 1986) (holding that claim of uncrashworthiness based on failure to install airbags was preempted by Vehicle Safety Act); Vanover v. Ford Motor Co., 632 F. Supp. 1095, 1096 (E.D. Mo. 1986) (same); Wickstrom v. Maplewood Toyota, Inc., 416 N.W.2d 838, 840 (Minn. Ct. App. 1987) (same), cert. denied, 487 U.S. 1236 (1988).

241. Pokorny, 902 F.2d at 1123-25; Taylor, 875 F.2d at 827; Wood, 865 F.2d at 402.

242. See, e.g., Taylor, 875 F.2d at 827 (finding that claim would frustrate regulatory scheme by removing manufacturer's choice among three different passenger restraint options).
However, the courts have been inconsistent in determining what effect *Cipollone* should have on their analysis of the implied preemption issue.

Illustrative of this inconsistency are *Myrick v. Freuhauf Corp.* and *Gills v. Ford Motor Co.* Both cases involved claims of design defect. *Myrick* involved an action against a manufacturer of a truck that was not equipped with antilock braking devices. *Gills* involved a claim where the plaintiff challenged the failure of an automobile to be equipped with an airbag. The cases are identical with respect to relevant federal legislation. Federal regulations in effect at the time of *Myrick* gave manufacturers the choice of whether to install anti-lock brakes. Similarily, in *Gills*, Federal Motor Vehicle Safety Standard 208 permitted automobile manufacturers to select any one of three approved options for shielding passengers, one of which was airbags. Thus, in theory, either both claims or neither claim should have been preempted. However, in *Myrick*, the United States Court of Appeals for the Eleventh Circuit refused to impliedly preempt a claim based on the failure to install anti-lock brakes. In contrast, using an implied preemption analysis, the district court in *Gills* preempted a claim based upon the failure to install airbags.

In *Gills*, the court emphasized that “[t]he mere presence of express preemption language does not necessarily prohibit an im-


249. *Gills*, 829 F. Supp. at 896; accord Marrs v. Ford Motor Co., 852 S.W.2d 570 (Tex. Ct. App. 1993) (holding that products liability action based upon manufacturer’s failure to install passenger-side airbag was not expressly preempted by Vehicle Safety Act but was nonetheless impliedly preempted because it conflicted with national uniform standards); Boyle v. Chrysler Corp., 501 N.W.2d 865 (Wis. Ct. App. 1993) (holding that design defect claim for failure to install airbag was expressly and impliedly preempted).
implied preemption analysis under the *Cipollone* rule,"\(^{250}\) reasoning that a court may search for implied preemptive intent if a statute's express preemption language fails to provide a reliable indicium of Congress' preemptive intent.\(^{251}\) In determining whether the Vehicle Safety Act's preemption provision provides a reliable indicium of congressional intent, *Gills* and similarly concluding courts, have applied a stringent standard. In essence, these courts have followed the pre-*Cipollone*, Vehicle Safety Act preemption decisions, concluding that the preemption provision was ambiguous and reasoned that ambiguity is equivalent to a lack of a reliable indicium of congressional intent.\(^{252}\) After reaching this conclusion, these courts then employed an implied preemption analysis and concluded that claims such as the failure to equip automobiles with airbags are preempted by the Vehicle Safety Act because they present an obstacle to the purposes of the statutory scheme.\(^{253}\)

The *Myrick* court approached the issue of whether the Vehicle

\(^{250}\) *Gills*, 829 F. Supp. at 897.

\(^{251}\) *Id.* at 898 (citing Toy Mfrs. of Am. Inc. v. Blumenthal, 986 F.2d 615, 623 (2d Cir. 1992)); cf. American Agric. Movement v. Board of Trade, 977 F.2d 1147, 1154 (7th Cir. 1992) (stating that *Cipollone* prohibits implied preemption analysis unless statute at issue has no preemptive language).

The Texas Court of Appeals in *Marris v. Ford Motor Co.*, which reached the same result as the *Gills* court, attempted to distinguish *Cipollone* altogether by reasoning that, unlike the statutes in issue in *Cipollone*, the Vehicle Safety Act contains both a preemption clause and a savings clause, both of which had to be considered in determining Congress's preemptive intent. *Marris*, 852 S.W.2d at 575-76. The court stated:

*Cipollone* encourages courts not to look at substantive provisions of the statute when Congress has specifically considered the pre-emption issue and included a pre-emption provision . . . . However, the savings clause is not a substantive provision but a provision dealing with the very issue of state authority. *Cipollone* encourages this Court to consider both the pre-emption provision, section 1392(d), and the savings clause, section 1397(k), together to determine congressional intent about state authority.

*Id.; see also* *Boyle*, 501 N.W.2d at 870-71 (stating that *Cipollone* does not limit courts to consider only whether the Vehicle Safety Act explicitly preempts state claim involving manufacturer's failure to equip car with passive restraints).

\(^{252}\) See *Gills*, 829 F. Supp. at 898 (reasoning that because other decisions, which impliedly preempted claims challenging manufacturer's use of airbags in design, concluded that preemption provision was ambiguous prior to employing implied preemption analysis, those decisions, therefore, do not contradict *Cipollone* because ambiguity in preemption provision indicates that provision lacks "reliable indicium of congressional intent"); *Marris*, 852 S.W.2d at 575 (same); *Boyle*, 501 N.W.2d at 871 ("Because the explicit preemption clause and the savings clause appear to conflict, neither clause 'provides a reliable indicium of congressional intent with respect to state authority.' . . . Therefore, *Cipollone* does not limit us to consider only whether the Federal Motor Vehicle Safety Act explicitly preempts Boyle's lack of passive restraints claim.").

\(^{253}\) *Gills*, 829 F. Supp. at 898-99; *Marris*, 852 S.W.2d at 577; *Boyle*, 501 N.W.2d at 871.
Safety Act preemption provision constituted a reliable indicium of congressional intent very differently, starting with a presumption that a preemption clause satisfies the reliable indicium standard. Even without the presumption, the court found that the legislative history of the preemption provision and the savings clause also provided a reliable indicium of congressional intent. The court rejected the Gills court's conclusion that ambiguity in a preemption provision necessarily leads to the conclusion that the provision lacks the necessary reliable indicium of congressional intent to foreclose an implied preemption analysis under Cipollone. The Myrick court believed that the Gills court's conclusion, that the preemption provisions were too ambiguous to preempt expressly yet nonetheless provided a reliable indicium of congressional intent, was too contradictory.

The Supreme Court recently affirmed the Eleventh Circuit's decision in Myrick that a plaintiff's claims were neither expressly nor impliedly preempted by the Vehicle Safety Act. However, the Court emphasized that Cipollone did not foreclose an implied preemption inquiry where a statute contained an express preemption provision. Rather, citing Cipollone's reliable indicium language, the Court expressed the view that the presence of an express preemption provision merely supported a reasonable inference that Congress did not intend to preempt matters not within the reach of the provision. Like the Cipollone decision, the Court did not discuss what constituted a reliable indicium of congressional intent or why the express provision in the Vehicle Safety Act did not foreclose an implied preemption inquiry. Thus, application of Cipollone in the context of the Vehicle Safety Act will lead to results

254. Myrick, 13 F.3d at 1525 ("At the very least, the treatment of the requirement in Cipollone, and in decisions that have applied the rule of Cipollone, establishes that there is a presumption that a pre-emption clause is a reliable indicium of congressional intent. Such a presumption is in keeping with the general rule of assuming that Congress intended what it said.").

255. Id. at 1525-26 ("[T]he reported bill provides that compliance with any Federal motor vehicle safety standard does not exempt a person from any liability under common law. It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contracts, and tort liability." (quoting H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966))).

256. Id. at 1526-27.

257. Id. at 1527.


259. Id. at 1488.
that often will depend on the court's view of the difficulty of the reliable indicium of congressional intent hurdle.

Even more troubling, because of the need to interpret the express provisions at hand, no cases, before or after Cipollone, which analyze the preemptive effect of the 1969 Cigarette Act and the Vehicle Safety Act, address the larger question of whether compliance with federal safety standards should shield a defendant from state common-law liability. For example, there is a difference between common-law liability and statutory regulation. The effect of common-law liability is indirect and non-mandatory. Unlike state statutory regulation, common-law claims never compel a defendant to act in any particular way. Significantly, the courts' inability to use an implied preemption analysis means that courts cannot consider either these differences or the Restatement (Second) of Torts'...260. As noted by Justice Blackmun in his separate opinion in Cipollone: The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages by its very nature attaches additional consequences to the manufacturer's continued unlawful conduct, no particular course of action (e.g., the adoption of a new warning label) is required. A manufacturer found liable on, for example, a failure-to-warn claim may respond in a number of ways. It may decide to accept damages awards as a cost of doing business and not alter its behavior in any way... Or, by contrast, it may choose to avoid future awards by dispensing warnings through a variety of alternative mechanisms, such as package inserts, public service advertisements, or general educational programs. The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations.

261. Common-law actions such as those presented by the plaintiffs in Cipollone simply force the defendant to pay damages if certain results flow from choices the defendant makes. The fear of damages to a plaintiff in a Cipollone-type suit may cause a manufacturer to provide additional warnings; however, this is a choice to be made by the manufacturer, not a legally compelled action. Regulation and tort remedies are simply not equivalent. See Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 186 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984) (allowing award of common-law damages and noting that, although juxtaposition of award of punitive damages with exclusive power of federal government to regulate safety aspects of nuclear development created certain tension, it was tension Congress intended to permit); Ferrabee v. Chevron Chem. Co., 736 F.2d 1529, 1541 (D.C. Cir.) ("[A common-law damage award may] impose a burden on [defendant], but it is not equivalent to a direct regulatory command."); cert. denied, 469 U.S. 1062 (1984); Gingold v. Audi-NSU-Auto Union, A.G., 567 A.2d 312, 321 (Pa. Super. Ct. 1989) ("While we do not dispute that common law damage awards can have a regulatory impact, common law claims and regulation by state agencies or legislatures are not identical." (citation omitted)). But see San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (preempting common-law claim on ground of regulatory effect of award of damages).
recognition that compliance with legislative or administrative enactments should not necessarily shield a defendant from tort liability.\textsuperscript{262} Furthermore, the courts cannot consider the political compromises that may have produced the federal regulatory standard. In \textit{Myrick}, the court did not discuss how the decision on preemption would impact the federal and state interests involved. Whether or not one agrees with the \textit{Myrick} result, these issues at least deserve recognition.

Similar problems will arise when courts interpret other statutes containing express preemption provisions.\textsuperscript{263} For example, FIFRA

\begin{footnote}{262} \textit{RESTATEMENT (SECOND) OF TORTS} § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."). \end{footnote}

\begin{footnote}{263} Courts interpreting other statutes post-\textit{Cipollone} have also had difficulty determining the extent to which express preemption rules out an implied preemption analysis. For example, in \textit{Toy Manufacturers of America, Inc. v. Blumenthal}, 986 F.2d 615 (2d Cir. 1992), the United States Court of Appeals for the Second Circuit had to determine the extent to which the Federal Hazardous Substances Act (FHSA) and small parts regulations promulgated pursuant thereto, preempted a state statute requiring small parts warning labels on toys intended to be used by children between the ages of three and seven. \textit{Blumenthal}, 986 F.2d at 615. The court concluded that, while the mere existence of an express preemption provision does not foreclose implied preemption, the FHSA's express preemption provision provided a reliable indicium of congressional intent not to preempt the state requirement, thus foreclosing an implied preemption analysis. \textit{Id.} at 623-24. However, in \textit{American Agriculture Movement, Inc. v. Board of Trade}, 977 F.2d 1147 (7th Cir. 1992), the United States Court of Appeals for the Seventh Circuit faced the issue of the extent to which the Commodity Exchange Act (CEA) preempted state law claims against a commodities contract market self regulatory agency. \textit{American Agriculture Movement}, 977 F.2d at 1147. The Seventh Circuit stated that "[o]nly if a statute is devoid of explicit preemptive language [such as the CEA] may we resort to either variant of implied preemption." \textit{Id.} at 1154; see also \textit{Weber v. Heaney}, 995 F.2d 872, 875 (8th Cir. 1993) (citing \textit{Cipollone} and holding preemptive scope of Federal Election Campaign Act governed entirely by its express language); \textit{Duplin v. Whink Prods. Co.}, No. CIV.93-0527951, 1994 WL 197612 (Conn. Super. Ct. May 2, 1994) (finding that failure-to-warn claim not preempted by Federal Hazardous Substances Act).

Other statutes in which the same question can be expected to arise are the Federal Boat Safety Act of 1971 (FBSA), 46 U.S.C. §§ 4301-4311 (1988), and the National Manufactured Housing Construction and Safety Standards Act of 1974 (Housing Safety Act), 42 U.S.C. §§ 5401-5426 (1988). The FBSA prohibits states from establishing or enforcing any law relating to boat safety not identical to the federal standard, provided that states may regulate the carrying or use of marine safety articles to meet "uniquely hazardous conditions or circumstances within the State." 46 U.S.C. § 4306. The Housing Safety Act provides that where a federal safety standard under the Act is in effect, states may not enact any standard "regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical" to the federal standard. 42 U.S.C. § 5403(d). The preemption provisions of the FBSA have been subject to conflicting interpretations. \textit{Compare Shields v. Outboard Marine Corp.}, 776 F. Supp. 1579 (M.D. Ga. 1991) (holding that defective design claim based upon failure to equip boat with propeller guard was expressly preempted) \textit{with State v. Turner}, 855 P.2d 442 (Ariz. Ct. App. 1993) (holding that state law requiring that

\end{footnote}
has created preemption difficulties both prior to and subsequent to Cipollone. FIFRA, which requires that all pesticides sold in the United States be registered with the Environmental Protection Agency (EPA) before being distributed and sold and which governs the labeling of such pesticides, contains an express preemption provision similar to the preemption provision found in the 1969 Cigarette Act. Pursuant to FIFRA, the EPA has adopted labeling requirements that specify the background color, placement and prominence required of warnings on registered pesticides, as well as requirements that include standards applicable to the content of the warnings. In 1972, Congress enacted a number of amendments to FIFRA that strengthened its regulatory structure, thereby reflecting Congress' shift in policy from the promotion of efficient agricultural use of pesticides to the protection of human health and the environment. Simultaneously, Congress inserted an express preemption provision preventing the states from imposing any requirements for labeling or packaging in addition to or different from those required under federal law. The legislative history of the preemption provision indicates Congress' intent to preempt state authority with respect to labeling and packaging. There is,

children under age 12 wear lifejackets was not expressly preempted by federal requirement that jackets only be stowed on board because of lack of clear intent to preempt. The preemption provisions of the Housing Safety Act have also been subject to conflicting interpretations. Compare Macmillan v. Redman Homes, Inc., 818 S.W.2d 87 (Tex. Ct. App. 1991) (holding that state claim based on unsafe level of formaldehyde in mobile home was expressly preempted because federal standards established acceptable formaldehyde levels and because savings clause was limited to claims not covered by federal standards) with Shorter v. Champion Home Builders Co., 776 F. Supp. 333 (N.D. Ohio 1991) (holding that state claim based on unsafe level of formaldehyde in mobile home was not preempted because of Lack of evidence that allowing state law claim would frustrate intent of Congress).

264. 7 U.S.C. 136v(b) (Supp. 1995). Section 136v(b) provides in relevant part: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." Id.

265. 40 C.F.R. § 156.10 (1991). In contrast to the 1969 Cigarette Act which mandates a particular warning, the FIFRA regulations merely establish standards that pesticide warnings must meet.


267. 7 U.S.C. § 136v(b). For the relevant part of the provision, see supra note 264.

268. See H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971) (stating that Committee intended to preempt state authority completely with respect to labeling and packaging).
however, nothing in the statute or the legislative history that indicates Congress' intent regarding state common-law claims and remedies.

Courts have consistently held that FIFRA does not manifest Congress' intent to preempt the entire field of pesticide regulation, but rather, FIFRA provides the states with expansive powers to internally regulate the sale and use of pesticides. Decisions consistently hold that local ordinances are not preempted unless there is an actual conflict with a federal regulation promulgated pursuant to FIFRA.269

FIFRA has not been viewed as preemitting state common-law tort claims as a whole.270 However, prior to Cipollone, the decisions varied regarding whether FIFRA preempted certain state common-law claims, particularly failure-to-warn claims. This division among the courts was analogous to the pre-Cipollone conflicting interpretations of the 1969 Cigarette Act.271

The conflict in decisions remains following Cipollone. A number of courts have refused to preempt common-law claims.272 These courts focus either on FIFRA's savings clause or on the closeness of the language between FIFRA's preemption clause and the 1965 Labeling Act's preemption clause, which was held not to preempt state law claims in Cipollone. However, a number of courts have decided, based on a Cipollone analysis, that FIFRA expressly

269. See Long Island Pest Control Assoc. v. Town of Huntington, 341 N.Y.S.2d 93 (Sup. Ct. 1973) (holding that ordinance creating pesticide control board to register and control all pesticide transport into city was preempted), aff'd, 351 N.Y.S.2d 945 (App. Div. 1974). But see Coparr, Ltd. v. City of Boulder, 942 F.2d 724 (10th Cir. 1991) (holding that ordinance imposing notification requirement on commercial pesticide applicators was not preempted).

270. For example, FIFRA does not preempt common-law tort claims based on negligence in product design, manufacture or testing. See Worn v. American Cymanicid Co., 970 F.2d 1301, 1304-06 (4th Cir. 1992) (holding that damages to corn crop as result of application of herbicide 11 months prior was contrary to manufacturer's representations and was not preempted), aff'd, 5 F.3d 744 (1993), cert. denied, 113 S. Ct. 1846 (1995).


preempts at least some state common-law claims. For example, courts have held that FIFRA preempts failure-to-warn claims to the extent these claims require a showing that the defendant's labeling and packaging should have included additional or different warnings from those required under FIFRA.\textsuperscript{273} Certainly, defendants in such actions will argue that FIFRA's preemption of state laws imposing "requirements" for labeling or packaging should be interpreted analogously to the interpretation of the word "requirement" in the Cigarette Labeling Act. In fact, at least one post-\textit{Cipollone} circuit court has accepted this argument.\textsuperscript{274}

In the context of FIFRA, interpreting "requirement" in this way fails to distinguish between positive regulatory enactments and the indirect effects of common law. The resulting harm from over-preemption in the FIFRA context is significant. Specifically, if there is no state law claim, private plaintiffs lack a meaningful remedy because FIFRA does not provide for private damage remedies and courts have not read FIFRA to contain an implied private right of action to recover damages.\textsuperscript{275}

Thus, the Court's seemingly correct exercise in statutory interpretation in \textit{Cipollone} largely removes from the courts one of the means of ameliorating, at least to a limited degree, the problems

\textsuperscript{273} Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177, 1179 (10th Cir.) (noting that Supreme Court had previously remanded decision back to court of appeals with specific instructions to consider in light of Court's decision in \textit{Cipollone}, cert. denied, 114 S. Ct. 60 (1993); see also Shaw v. Dow Brands, Inc., 994 F.2d 364, 371 (7th Cir. 1993) (noting that \textit{Cipollone} destroyed whatever argument plaintiff might have had about pre-emption and affirming district court's decision that FIFRA bars state common-law strict liability and negligence claims for failure to warn); Yowell v. Chevron Chem. Co., 836 S.W.2d 62, 63 (Mo. Ct. App. 1992) (holding that plaintiff's cause of action based on alleged defective labelling is banned by FIFRA preemption provision); Davidson v. Velsicol Chem. Corp., 834 F.2d 931, 937-38 (Nev. 1992) (holding that FIFRA implicitly preempts state tort claims based on inadequate labeling), cert. denied, 113 S. Ct. 1944 (1993).

\textsuperscript{274} In Papas v. Upjohn Co., the United States Court of Appeals for the Eleventh Circuit held that "FIFRA contains a provision explicitly addressing, and providing a reliable indicium of, state authority. . . . \textit{Cipollone} convinces us that the term 'requirements' in section 136v(b) 'sweeps broadly and suggests no distinction between positive enactments and the common law.' " \textit{Papas}, 985 F.2d 516, 517-18 (11th Cir.), cert. denied, 114 S. Ct. 300 (1993) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992)).

\textsuperscript{275} See, e.g., \textit{In re Agent Orange Prod. Liab. Litig.}, 635 F.2d 987, 991-92 n.9 (2d Cir. 1980) (holding that no implied private cause of action exists to recover damages under FIFRA), cert. denied, 454 U.S. 1128 (1981). Under FIFRA, private parties can challenge the safety of a FIFRA-covered product and this challenge may result in the product being taken off the market. 7 U.S.C. 136d(b) (1988). However, that ability offers little to an individual who has been harmed as a result of a company's failure-to-warn and who may not seek damages as compensation.
created by the presence of express preemption provisions. Cipollone means that, generally, express preemption analysis is limited to an interpretation of the words of the preemption provision, with whatever unfortunate consequences that flow from that interpretation.

4. The Presumption Against Preemption

The concern with displacing state law in traditional spheres of state authority has resulted in a canon of interpretation that Congress' intention to preempt must be clearly manifested before the exercise of a state's power will be preempted. This view has sometimes been expressed by the Supreme Court as a presumption against the preemption of state law. Typically, this presumption has been expressed by courts when engaging in implied preemption analysis. However, the Supreme Court in Cipollone, an express preemption case, also suggested that there is a presumption

276. See, e.g., Cipollone, 505 U.S. at 516 (“Consideration of issues arising under the Supremacy Clause ‘start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.’”) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942) (recognizing longstanding principle that congressional intent to preempt exercise of state’s police power must be clearly manifested); Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611 (1926) (same). The power to supplant state law is “an extraordinary power in a federalist system.” Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). Because this power is capable of upsetting the usual balance of federal and state powers, the Supreme Court assumes that Congress does not exercise that power lightly. Id. This thought is sometimes expressed in the notion that the basis for federalism is more political than legal. See Charles L. Black, Jr., Perspectives in Constitutional Law 25, 29 (rev. ed. 1970); H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 Va. L. Rev. 633, 634 (1993).

277. See Building & Constr. Trades Council v. Associated Builders & Contractors, 113 S. Ct. 1190, 1194 (1993) (“We are reluctant to infer pre-emption.”); Gade v. National Solid Wastes Management Assoc., 505 U.S. 88, 116-17 (1992) (Souter, J., dissenting) (“If the statute’s terms can be read sensibly not to have a pre-emptive effect, the presumption [against pre-emption] controls and no pre-emption may be inferred.”); Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 716, 719 (1985) (stating that there is a presumption “that state and local regulation of health and safety matters can constitutionally coexist with federal regulation . . . . [T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.”); Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”). But see International Paper Co. v. Ouelette, 479 U.S. 481, 491 (1987) (“Although courts should not lightly infer pre-emption, it may be presumed when the federal legislation is ‘sufficiently comprehensive to make reasonable the inference that Congress “left no room” for supplementary state regulation.’” (quoting Rice, 331 U.S. at 230)).

278. For cases expressing a presumption against the preemption of state law in implied preemption analysis, see cases cited in supra note 277.
against the preemption of state law.279

Although such a presumption may be a helpful interpretative aid in implied preemption cases, there is a real question about its applicability when Congress has expressly addressed preemption. Once Congress has spoken, the Supremacy Clause does not require a narrow or broad construction, but rather, an interpretation in accordance with the express terms of the preemption provision.280

Even if the validity of applying a presumption against preemption is accepted, the problems with Congress addressing preemption expressly are not completely solved. The presumption will only operate in one way: it may prevent overbroad preemption of state law. The presumption will not prevent, however, the failure to preempt in instances where preemption of state law is warranted. Such a failure can occur because the presumption still focuses on intent and does not allow for any attention to, or balancing of, the federal and state interests involved in a particular situation. Therefore, while the presumption may be a useful tool for the courts in addressing certain problems created by express preemption provisions, the value of that tool is limited.

C. When Express Preemption Provisions Do No Harm Nor Good

In a significant number of the statutes in which Congress has chosen to address preemption expressly, its choice has had a benign effect. In many instances there are no preemption cases, and, in others, there are no surprising, bothersome, or inconsistent results. When these statutes are categorized,281 it is easy to see why their respective preemption provisions have not created difficulties in interpretation. In most of those instances, there is also very little

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279. Cipollone, 505 U.S. at 517-18; see also American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 828 (1995) (Stevens, J., concurring in part and dissenting in part) (finding that “[t]he majority’s extension of Morales was particularly untenable in light of the interpretive presumption against pre-emption”); CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732, 1737 (1993) (“In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.”); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 420 (1992) (Stevens, J., dissenting) (asserting “presumption that Congress did not intend to preempt areas of traditional state regulation”).

280. Cipollone, 505 U.S. at 544 (Scalia, J., concurring in judgment in part and dissenting in part); see also Edward L. Rubin & Marvin Feely, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 951 (1994) (“When some branch of the national government decides to act in a way that displaces state authority, there is no basis for restricting such action.”).

281. These categories are not intended to be mutually exclusive. Several of the statutes may be viewed as falling into more than one of the categories.
benefit to be gained from the inclusion of the preemption provision in the statute. For the most part, in those cases in which Congress is able to deal effectively with preemption expressly, there is little reason for it to do so.282

The first category of cases in which Congress has not created problems by including an express preemption provision in a statute occurs when federal law preempts state law only when the state law conflicts with or is inconsistent with the federal law. Such provisions may be expressed in different ways. A number of statutes, such as the Cable Communications Policy Act of 1984,288 simply preempt state law inconsistent with the federal act.284 Others are more elaborate. The Truth in Lending Act,285 for example, preempts state laws "inconsistent with federal law and only to the extent of the inconsistency."286 The Horse Protection Act287 preempts state law only when there is a direct and positive conflict between federal and state law such that the two cannot be reconciled or cannot consistently stand together.288 The Hazardous Materials Transportation Act289 preempts state law "where compliance with both federal and state law is physically impossible or

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282. I state "for the most part" because there is one category of statutes in which there arguably is value in Congress addressing preemption expressly. Specifically, that category of statutes where Congress is attempting to prohibit a very specific state act. The statutes discussed in the text accompanying infra notes 300-05 are examples.

Also, it would be an overstatement to say that there is no value in Congress addressing preemption expressly in those cases where it can do so effectively. If Congress could enact a statute with a clear and workable preemption provision that would not give rise to the problems suggested in this Article, such a provision would serve as some guidance to the courts. However, for the reasons discussed earlier, express preemption provisions in fact lead to more harm than benefit. Hence, my suggestion that Congress err on the side of avoiding preemption completely (unless it has a very good specific reason to include an express preemption provision in its legislation), rather than saying that Congress should include preemption provisions in its legislation only if it determines that it can do so effectively and harmlessly.

where enforcement of state law creates an obstacle to accomplishment of federal aims.²⁹⁰

Not surprisingly, there are no conflicting interpretations of such preemption provisions — the only possible source of disagreement concerns whether, in fact, the state law in question poses a conflict. Even that source of disagreement is unlikely to produce any significant amount of litigation over those statutes that accentuate the conflict notion by speaking of actual and positive conflict that cannot be reconciled, or those statutes preempting state law only "to the extent" of its inconsistency with federal law.

Although there may be no harm in Congress including these conflict preemption provisions in its legislation, what are the benefits of doing so? In the absence of such a provision, there is no danger that courts would fail to preempt state laws that actually conflict with federal law. This result is compelled by the Supremacy Clause.

The only possible reason for including such a provision is a concern for over-preemption, a fear on the part of Congress that courts will preempt in too many cases — a fear that courts will choose to preempt state law even when there is no actual conflict between state and federal law. There is, however, no evidence that solicitude for the states is what motivates this type of preemption provision. Additionally, if courts are adequately attuned to federalism concerns, and if courts understand that their role in preemption cases involves consideration of both state and federal interests, they will not preempt in too many cases.

The second category of "no problem" preemption provisions is a variant of the first category. In these cases, federal law imposes some minimum standard for performance or behavior and expressly allows states to impose more stringent standards. The federal law preempts only state enactments of standards that are inconsistent with the federal standards. For example, the Surface Mining Control and Reclamation Act of 1977²⁹¹ was passed with the purpose of providing for the implementation of nationwide, minimum environmental protection standards. Its preemption provision, which preempts inconsistent state law, expressly provides that "any State law or regulation . . . which provides for more stringent . . . [controls] shall not be construed to be inconsistent."²⁹²

²⁹² 30 U.S.C. § 1255 (1988). Another example falling into this category is
Again, it is understandable that such a preemption provision would create no mischief. The provision is a clear directive as to what is preempted. Furthermore, such a preemption provision is of no real value. So long as the substantive provisions of the federal law are clearly denominated as imposing minimum standards, unquestionably, under an implied preemption analysis, a court should not preempt a state law imposing a more stringent standard. Additionally, because of the Supremacy Clause, there is never any reason for a federal law to spell out that an inconsistent state law is preempted.

The third category of "no problem" preemption provisions is the obverse of provisions preempting only inconsistent state laws. A number of federal statutes provide that states may not enact standards in an area of federal regulation unless those standards are identical to the existing federal standards. This is often the case with statutes that impose standards for safety or pollution levels. For example, the Consumer Product Safety Act provides that where a consumer product safety standard under federal law applies to a risk of injury associated with a consumer product, states cannot establish any standard for that product unless it is identical to the federal standard. Likewise, the Noise Control Act of prohibits states from adopting or enforcing any standard applicable to noise emissions resulting from the operation of certain carriers engaged in interstate commerce unless such standard

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is identical to that prescribed under federal law.\textsuperscript{297}

It is obvious that this third category of preemption provisions would rarely produce difficulties in interpretation. They clearly provide that states may act only in a specified way. Therefore, it is difficult to imagine any conflict over whether, in fact, a state law is "identical" to a federal enactment.

Where state law is inconsistent with its federal counterpart, determining the value of such a preemption provision is more complex. The question is whether in the absence of such a provision, would the courts clearly strike down a state law that imposed a standard different from the federal one. Under the current framework for implied preemption analysis, because this sort of preemption provision is generally found in areas in which federal regulation is so pervasive as to completely "occupy the field,"\textsuperscript{298} courts would likely preempt state laws at variance with the federal law.\textsuperscript{299}

The fourth category of "no problem" preemption provisions is found in federal laws that have very particular aims and that include provisions preemping very specific state law enactments. For example, the Regional Rail Reorganization Act of 1973\textsuperscript{300} preempts state laws that require railroads to employ specified numbers of persons to perform particular tasks or that require payments of protective benefits to employees.\textsuperscript{301} The Thrift Institutions Restructuring Act\textsuperscript{302} includes a provision preempting state law prohibitions of due-on-sale clauses.\textsuperscript{303} The Farm Credit Act of 1971\textsuperscript{304} preempts states from imposing interest rate limitations on loans from institutions of the Farm Credit System established under federal law.\textsuperscript{305}


\textsuperscript{298} For a further discussion of preemption resulting from field occupation, see \textit{supra} note 6 and accompanying text.

\textsuperscript{299} If courts fully embrace the approach I suggest in Section V, it is questionable whether courts would reach the same result. Sometimes, preempting a state law claim in this category of cases will result in the plaintiff having no effective remedy and that may impel courts to refuse to preempt.


\textsuperscript{301} 45 U.S.C. 797j (1988).


\textsuperscript{305} 12 U.S.C. § 2205 (1994). There are other examples of preemption provisions that fall into this category. \textit{See}, e.g., The Pork Promotion, Research and Consumer Information Act of 1985, 7 U.S.C. § 4817 (1994) (preempting states
Obviously, difficulties in interpretation of this fourth category of preemption provisions would not be expected. Arguably, however, this is the one category where an express preemption provision serves some real value. In situations where Congress has a very particular goal in mind and a preemption provision can be drafted so as to achieve that narrow goal, including the provision avoids any uncertainty regarding the attainment of Congress’ goals, but does not create any of the problems associated with broader preemption provisions.

The final category of preemption provisions creating no interpretational difficulties are those found in statutes that are unlikely candidates for affirmative state regulations and that involve subjects that are unlikely candidates for common-law claims. For example, the Export Administration Act of 1979 preempts state laws “pertaining to participation in, compliance with, implementation of, or furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.” The Taiwan Relations Act prevents the District of Columbia or any state in which the American Institute in Taiwan does business from enacting any law which impedes or interferes with the function of the Institute pursuant to federal law. These preemption provisions do not cause any difficulty, nor do they provide any value because their substantive provisions do not lend themselves to common law claims.

V. Judicial Determination of the Preemptive Effect of Federal Legislation

Section IV of this Article suggested that, generally, Congress should not attempt to address preemption expressly. For a number of statutes with express preemption provisions, the result of Congress becoming involved in promotions and consumer education involving pork and pork products; The Tandem Truck Safety Act of 1984, 49 U.S.C. app. § 2312 (1988) (preempting any state law from denying reasonable access to commercial vehicles between national interstate highway and terminal or facility for refueling, loading); The Legislative Branch Appropriations Act, 2 U.S.C. § 30a (1994) (exempting Congressional officials from serving on grand or petit juries regardless of any other provisions of federal, state or local law).

gress' inability to draft satisfactory preemption provisions and the court's inability to rectify the problems created thereby, has been unfortunate decisions and conflicting interpretations of the scope of statutory preemption provisions. In a large number of statutes in which express preemption provisions have not resulted in any of this mischief, the inclusion of such provisions provides little value. Situations where Congress desires to prevent the occurrence of a very particular state action may be an exception. The question is: Can courts do a better job? This Article suggests that they can.\footnote{311}

It has already been noted that the most important of the traditional justifications for statutory lawmakers is uniformity. The discussion in section IV makes it clear that the uniformity justification is not a persuasive reason for Congress to address preemption expressly. First, uniformity, insofar as it refers to the application of a uniform national legal rule, is not universally desirable. Although there are certain circumstances in which uniformity is valuable, there are often equally compelling reasons for allowing different law to address local needs or individual circumstances. An express preemption provision cannot easily allow for a distinction between the two circumstances. A danger of over-preemption results whereby state law is preempted even when no good is served — and, indeed, mischief is created — by insisting on uniformity. While a federal interest in uniformity should be evaluated when determining whether a particular state law claim should be preempted, it should not be the driving force behind including express preemption language in legislation.

Second, uniformity, in the context pertaining to consistency of results, is generally not achieved by application of an express preemption provision. Uniformity and consistency are not synony-

\footnote{311. This is not to suggest that there are no inconsistent decisions in implied preemption cases. Nor am I suggesting that the framework for analysis currently used in implied preemption cases is perfect and that courts always reach "correct" decisions. In fact, courts' handling of implied preemption cases can be improved, as courts and commentators have suggested. See Palmer v. Liggett Group, Inc., 825 F.2d 620, 625 (1st Cir. 1987) ("[W]e do not find [the implied preemption categories] . . . necessarily helpful, and certainly do not deem them determinative in ascertaining preemption."); cert. denied, 488 U.S. 1030 (1989); Atwell, supra note 1, at 182 (arguing that products liability claims should be preempted only if mandated by federal law or if there is conflict between federal and state law making compliance with both impossible). This Article suggests that implied preemption analysis would be improved by courts analyzing whether the balance of competing federal and state interests is better served by preemption or not, without regard to an analysis of congressional intent. Accordingly, my primary point is that as a matter of maintaining institutional competence and upholding the principles that should underlie preemption analysis, courts are better able than Congress to decide when state law should be preempted by federal law.}
mous; the express preemption provisions examined in this Article have given rise to voluminous litigation and conflicting results. Likewise, the lack of a uniform rule does not preclude consistency of result. The point is not that all cases should be treated the same, which is what an express preemption provision does, but rather that like cases should be treated consistently. Some inconsistency in result is inevitable, whether preemption is express or implied. However, an administrable standard for deciding cases would lead to greater consistency than presently exists.312

As compared to the lack of value of express preemption provisions in promoting uniformity, the cases discussed in section IV highlight that the ability of judicial lawmaking to adjust to meet changing needs has real meaning in the preemption context. This justification for common law is no less persuasive in the preemption context than it is in the context of the development of primary legal standards. At one level, judicial resolution of preemption issues benefits from the ability of courts to reflect in their analyses the changing views regarding the balance between the interests of the federal government and the states,313 the changing views regarding the importance of the policies underlying one law or the other, or the changing views in the policies themselves. At another level, a statute is written with a particular landscape in mind. An express preemption provision written with one set of conditions in mind may not work well when the conditions to which it is being applied change. Static statutory language can not easily adapt to such a change.314

312. It was also noted earlier in this Article that a second justification for statutory (or regulatory) rulemaking is expertise. See supra text accompanying note 36. Expertise is an argument that may persuade at the level of creation of substantive law. However, it is difficult to argue that the same level of expertise is required in choosing which of federal or state law should govern a particular situation. For further discussion of this justification, see text accompanying note supra 36.

313. Less charitably, it might be countered that judicial determination of when federal law preempts state law means that preemption analysis will be subject to the Supreme Court's "vacillating perspective on federalism." William W. Bratton, Jr., Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 COLUM. L. REV. 623, 626 (1975). There will be — as there have been — periods where the courts will be more solicitous of federal interests and periods where the courts will be more solicitous of state interests. See id. at 626 (stating that doctrinal inconsistency manifests itself in the Court's shifting perspectives on Federalism). However, so long as the Court's vacillations reflect broader political and societal shifting views on the respective balances to be made, the result is a positive one.

314. Of course, Congress is always free to amend express preemption provisions as problems arise. ERISA's preemption provision, for example, was amended to exempt from preemption qualified domestic relations orders to accommodate the desire to provide spousal protection in domestic relations matters. 29 U.S.C.
Another justification for judicial decisionmaking, which was set forth earlier in this Article, is the ability of the courts to achieve more sensitive balances than can the legislature. In the preemption context, this means two things: the ability to determine whether preemption a particular state law from being applied to a concrete set of facts furthers Congress' goals and the ability to consider the effect of preemption or not preemption state law on the policies underlying the state law. Implied preemption analysis allows consideration of the policies underlying state law, as well as a consideration of the federal interests underlying federal law. No express preemption provision, no matter how carefully conceived or worded, can achieve that.

By definition, express preemption analysis does not address any state interests, unless one makes the assumption that Congress considered relevant state interests in striking a balance by enacting an express preemption provision. However, there is no evidence that Congress does consider state interests. Furthermore, it would be impossible for Congress to give adequate consideration to the various policies and interests behind all of the state statutory and common-law claims that could conceivably raise preemption issues under a given federal statute. Even as to the federal interest, the Supreme Court made clear in CSX Transportation, Inc. v. Easterwood that the Court does not view the purpose of federal regulations as relevant to its preemption inquiry. The Supreme Court established in Cipollone that, in the presence of an express preemption provision, the Court's job is solely one of interpreting the meaning of the provision. To make matters worse, preemption provisions

§ 514(b)(7) (1988). Additionally, Congress can act if it does not like how courts are addressing preemption issues. For example, in 1986, Congress amended the Ocean Dumping Act, Pub. L. No. 99-592, 86 Stat. 1052 (1972) (codified as amended at 33 U.S.C. §§ 1401-1445 (1988 & Supp. V 1993)), to add a savings clause, providing that nothing in this Act restricted the ability of any person to seek damages or enforcement of any standard or limitation under state law, including state common law. 33 U.S.C. § 1416(g) (1988). The legislative history of the amendment is quite explicit that the clause was added because of congressional displeasure with the courts' interpretation of the preemptive scope of the Act. 132 Cong. Rec. H9561-03 (daily ed. Oct. 6, 1986) (statement of Sen. Studds). However, because the legislative process is slow, it may not be possible to garner sufficient support to pass a preemption amendment to legislation and, absent repeated amendments, problems will still continue to arise over time.


316. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992). The Court's determination in Cipollone does not mean that express preemption analysis entails only looking at the actual words of the preemption provision. Even Justice Scalia, a staunch advocate of the plain meaning approach to statutory interpretation, suggests it is broader than that:

The meaning of terms on the statute books ought to be determined, not
generally are interpreted with a bias toward plain meaning, with “the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” 317

In contrast, courts making the preemption analysis in the absence of an express preemption provision have more freedom to consider the purposes and objectives of the federal statute at issue.318 Contrast the result in Ingersoll-Rand Co. v. McClendon, where the Supreme Court preempted a wrongful discharge claim as relating to a plan because the Court had to find that an ERISA plan existed for the plaintiff to prevail, with the implied preemption analysis employed by courts in federal labor law cases. Section 301(a) of the Labor Management Relations Act,319 which allows suits for violation of contracts between an employer and a labor organization to be brought in federal court, has been used as a basis to imply preemption of state law for claims for breach of collect-

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on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind.

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment). However, there is less room for flexibility than an implied approach allows, as evidenced by the Court’s holdings in Morales and Easterwood. For a discussion of the Court’s holding in Morales, see text accompanying supra notes 151-63. For a discussion of the Court’s holding in Easterwood, see supra text accompanying notes 81-96.


There are at least some instances where courts have decided express preemption questions with a view toward the state interest. For example, the exception to ERISA’s preemption provision for state qualified domestic relations orders, 29 U.S.C. § 1144(b)(7), was added to the statute to ratify the position of courts that had implied an exception to § 514(a) of ERISA so as not to preempt state domestic relations orders because of the strength of the state interest involved. See, e.g., American Telephone & Telegraph Co. v. Merry, 592 F.2d 118, 122 (2d Cir. 1979) (finding state interest of family support sufficiently strong to avoid preemption of state law); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978) (finding state law properly used in domestic relations areas), aff’d, 632 F.2d 740 (9th Cir. 1980), and cert. denied, 453 U.S. 922 (1981).

318. See Livadas v. Bradshaw, 114 S. Ct. 2068, 2078 (1994) (“[T]he preemption rule has been applied only to assure that the purposes animating § 301 will be frustrated neither by state law purporting to determine questions relating to what the parties to a labor agreement agreed . . . nor by parties’ efforts to renegotiate their arbitration promises.”).

tive bargaining agreements.320 The Supreme Court has made it clear that the test of section 301 preemption is whether determination of the state law claim would require interpretation of the collective bargaining agreement; the mere fact that a court might have to consider the agreement to, for example, compute the amount owing to a plaintiff, is not enough to bar the claim.321 The "relate to" language in ERISA, however, does not allow the courts to make that kind of distinction, resulting in preemption in the Ingersoll-Rand context.

Not only do courts have more freedom to consider the purpose of federal legislation in making implied preemption inquiries, but they may consider the relationship between the federal law and its purpose and the state law in question. In contrast to express preemption analysis, which only looks to whether the state law claim fits within the four corners of a federal preemption provision, implied analysis can consider whether state law conflicts with, interferes with, is consistent with, or is irrelevant to the federal law; thus, courts can make a preemption determination with these considerations in mind.322

Related to the ability to consider the relationship between federal and state law in terms of their level of conflict is the ability to consider the relationship between the remedies provided by federal and state law. Courts engaging in implied preemption analysis can consider whether federal law provides an adequate remedy in making their preemption decisions. While it is true that the law no longer accepts the old common-law maxim, ubi jus, ibi remedium,323 the decision to provide no relief or only inadequate relief to a plaintiff injured by a defendant who violated federal law is not one to be made lightly.

Consider the three possibilities with which a court is con-

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320. See, e.g., Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557, 560 (1968) (holding that federal law controls over any claim arising from § 301).


322. See Hirsch, supra note 1, at 533-38 (1972) (generally stating that court's role in context of implied preemption is very broad because courts are allowed freedom to construe federal and state statutes).

323. BLACK'S LAW DICTIONARY 1520 (6th ed. 1990). "Where there is a right, there is a remedy." Id.
fronted in a preemption situation. First, state law and the federal statute in question may provide the same or substantially equivalent remedies. Second, the federal statute may provide some remedy, but one that is inferior in some way to the state remedy. Third, the federal statute may not provide for a private cause of action at all, and, therefore, not provide any express remedy to injured individuals. Both the second and third situations are complicated by the related question of whether federal courts will imply a federal cause of action or a different federal remedy than that expressly provided by the federal statute. A decision to preempt in cases where state and federal law provide the same remedy to an injured plaintiff is easier than a decision to preempt a state cause of action where there is neither an express federal statutory cause of action nor a federally implied cause of action to compensate the plaintiff. Courts engaging in implied preemption analysis can and should factor the remedy issue into their evaluation of whether to preempt plaintiff’s cause of action. It is difficult to find room for such analysis in the express preemption context.

Most importantly, implied preemption analysis gives courts the freedom to consider the existence and importance of legitimate state interests, and to balance those interests against Congress’ purposes and objectives. The recognition and balancing of federal and state interests undertaken by the courts in implied preemption analysis has been particularly evidenced in decisions interpreting the preemptive effect of federal labor laws. Even in non-labor

324. For example, ERISA provides some remedy for participants discharged for attempting to exercise their rights under ERISA, but that remedy is inadequate compared to state law remedies for wrongful discharge. For a discussion of the inadequacy of ERISA on remedies in the wrongful discharge context, see supra note 79 and accompanying text.


326. See, e.g., Belknap, Inc. v. Hale, 463 U.S. 491, 509-10 (1983) (recognizing that terms of employment contract and liability of company for misrepresenting contract terms raise distinct state law questions that are not preempted because of strong state interest in defining scope of obligation and also because state claims did not interfere with federal policy); Local 926, Int’l Union of Operating Eng’rs v. Jones, 460 U.S. 669, 676 (1983) (“The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board’s exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the State as a protection to its citizens.”); Sears, Roebuck & Co. v. San Diego County
cases, however, courts have undertaken such balancing and have refrained from preempting state law in order to advance state interests in controlling disbursement of welfare funds, protecting against infringement of trade secrets and protecting state citizens from tort injuries.\textsuperscript{927} Thus, implied preemption analysis is better able to give appropriate regard to federalism considerations.\textsuperscript{928}

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Dist. Council of Carpenters, 436 U.S. 180, 188 (1978) (stating that “the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected’’); Campbell v. McLean Trucking Co., 592 F. Supp. 1560, 1564 (E.D.N.Y. 1984) (“While listing concerns to examine and claims not to be preempted, the major cases in this area provide no discernible point at which there is preemption on one side and no preemption on the other . . . . However, the lack of a mechanically applied standard appears to be by design. The determination of whether a court has jurisdiction requires a ‘sensitive balancing’ between the harm to the federal scheme of regulation and the importance of the plaintiff’s cause of action to the State.”).
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\textsuperscript{927} See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (upholding state trade secret protection laws as not preempted by federal patent system); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973) (not preempting state law voiding employee forfeiture of pension benefits in face of federal securities regulation requiring arbitration, stating that although federal and state requirements were technically in conflict, proper approach in preemption cases is to attempt to reconcile operation of both state and federal laws rather than completely invalidating state law); New York State Dep’t of Social Servs. v. Dublino, 413 U.S. 405, 413-15 (1973) (focusing on state interest in ensuring that limited welfare funds be spent on behalf of those genuinely incapacitated and most in need in determining whether federal Work Incentive Program of Aid to Families with Dependant Children preempted New York state welfare rules); Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1039 (1st Cir. 1982) (explaining that leeway is to be accorded to state’s choice of remedy, even when it conflicts to some degree with federal policy); cf. Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm’n, 461 U.S. 375, 395-96 (1983) (balancing federal and state interests in determining whether state regulation is unconstitutional pursuant to Commerce Clause), cert. denied, 488 U.S. 889 (1988).

\textsuperscript{928} Justice Kennedy rejects this ability to balance competing interests as undercutting the principle that it is for Congress and not courts to preempt state law, and believes that implied preemption analysis should be restricted. See Gade v. National Solid Wastes Management Assoc., 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment). However, there is no inherent reason why it must be Congress and not the courts that determine when federal law should preempt state law. A suggested reason why Congress must determine preemption questions is that “affirmative congressional action to displace state power provides a political safeguard for federalism.” Drummonds, supra note 1, at 526 (citing Paul Wolfson, Preemption and Federalism: The Missing Link, 16 HASTINGS CONST. L.Q. 69, 102 (1988), which states “in areas where the states may legislate, the Constitution intends that Congress weigh and consider carefully any displacement of state authority’’); cf. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) (stating that “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power”). Taken to its logical extreme, that argument would disallow implied preemption analysis entirely. More importantly, that argument assumes that Congress is capable of carefully considering each instance in which state law could be preempted by federal law and then
Similarly, implied analysis allows courts to consider not just a particular statute, but also related regulation of the field at issue. Generally, an area of law is governed by several statutes, often some federal and some state. For example, the corporate area is addressed by several federal securities laws as well as by state corporations laws and other laws affecting the operations of a corporation, such as corporate tax and bankruptcy laws. Similarly, the employment area is governed by numerous laws such as federal labor laws, ERISA, the Occupational Safety and Health Act of 1970 and various state employment laws. The flexibility of an implied preemption analysis allows courts to consider whether their preemption decision is appropriate not only in terms of the statute in question but in the context of the regulation of that field as a whole.

Thus, courts engaging in implied preemption analysis can analyze and balance the competing federal and state interests with appropriate regard for the existing social, political and legal landscape, as well as for the regulation of the relevant field as a whole. They can consider the level of the conflict between federal and state law and the remedies provided by state versus federal law. To the extent courts are not now engaging fully in this kind of analysis in implied preemption cases, this Article advocates that they do so.

That implied preemption analysis has the flexibility to balance competing federal and state interests and to broaden the scope of review beyond the statute in question does not mean that it must fail to achieve predictability. It is clear that express preemption making an appropriate determination regarding preemption. However, Congress simply does not have that capability. In contrast, the courts, because they deal with particular cases, are capable of determining in each particular instance the appropriateness of displacing state law. See Freeman, supra note 1, at 638 (stating that "[t]he framers intended the Supreme Court, not the Congress, to determine where the demands of federalism should require the [preemption] line to be drawn"). Thus, it cannot be said that federalism requires that Congress address preemption expressly.

Even if one accepts the notion that preemption should be an exercise in determining congressional intent, that would not compel the conclusion that preemption must be dealt with expressly. That argument assumes that the final version of a statute reflects some coherent notion of the intent of the body of Congress. Some commentators would argue that it does not, suggesting that legislation is a product of public choice theory. See William N. Eskridge, Jr. & Philip P. Frickey, Legislation: Statutes and the Creation of Public Policy 49-56 (1988) (claiming that "legislation simply reflects the conflicting interactions of interest groups; the resulting law sometimes reflects their private, selfish interests, and sometimes serves no purpose at all") (quoting Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 864 (1992)).

does not yield predictable results, except in the easiest of circumstances in which the presence of the provision does not appear necessary to the attainment of the predictable results. Moreover, conflicting opinions often exist in circumstances in which some courts feel constrained by the language of a preemption provision to come to a result they would otherwise not reach.  

This suggests that substituting implied preemption analysis for express provisions in some of the statutes examined would result in greater consistency of opinions. Additionally, a clearly articulated implied preemption standard is easier for the courts to administer than the current patchwork analysis of express preemption provisions.

The argument for judicial decisionmaking in the preemption context is analogous to dynamic theories of statutory interpretation. Specifically, the same source that impels the suggestion that courts are better able than Congress to define the scope of the preemptive reach of federal legislation is the source that motivates dynamic interpretation: both contemplate that as the societal, legal and constitutional context of the statute changes, our interpretation of the statute may change.

Accordingly, why not propose that courts engage in a dynamic interpretation of express preemption provisions rather than advocate implied preemption analysis? One answer to this query is that it would place proper interpretation of the scope of preemption of federal legislation at the whim of what is the prevailing view of statutory interpretation. Given the current Supreme Court’s plain meaning emphasis, it is unlikely that one can rely on a dynamic or reconstructive imagination approach to statutory interpretation to

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330. See, e.g., Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir. 1994) (explaining that final decision not to preempt design defect claim was constrained by Cipollone analysis and language of preemption provision in Vehicle Safety Act, although formerly preempted under implied analysis by same court), aff’d sub nom. Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995); Corcoran v. United Healthcare, Inc., 985 F.2d 1321 (5th Cir. 1992) (denying remedy to woman whose unborn child died because claim challenging health care plan decision to deny hospitalization constrained by language of ERISA), cert. denied, 113 S. Ct 812 (1992).

331. See T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 21 (1988) ("Congress builds a ship and charts its initial course, but the ship’s ports-of-call, safe harbors and ultimate destination may be a product of the ship’s captain, the weather, and other factors not identified at the time the ship sets sail."); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987) (arguing for interpretation that takes into account existing societal, political and legal context). See generally William N. Eskridge, Jr., Dynamic Statutory Interpretation 10 (Harvard University Press 1994) ("Statutory interpretation around the world is dynamic.").
get desired results in the preemption area.\textsuperscript{332}

More importantly, regardless of how active a view of statutory interpretation one has, courts cannot ignore the words of the express preemption provision; their interpretation must be at least consistent with the words Congress used. For example, a court may decide that the FRSA should be interpreted in a manner that will promote safety in railroad operations. Although allowing a state law claim may work to promote safety, if the Secretary of Transportation has adopted a rule pursuant to the FRSA that covers the subject matter of the state law claim, no amount of dynamic statutory interpretation of the FRSA's preemption provision can result in a decision other than a decision to preempt the state law claim. Likewise, it is difficult under any reasonable interpretation of the phrase "relate to" in ERISA's preemption provision to conclude that a decision determining the availability of certain benefits under an employee benefits plan, such as hospitalization during a difficult pregnancy, does not relate to the plan. Even under dynamic theories of statutory interpretation, a state law claim for injury resulting from that benefit coverage decision must be preempted. Finally, the distinction in the treatment of insured and self-insured plans — allowing the former to be subject to indirect regulation by state insurance laws but not the latter — is compelled by the language of section 514 of ERISA, despite the fact that it is unjustifiable on any other grounds.

Of course, implied preemption analysis still is an exercise in statutory interpretation to some extent. Courts are attempting to determine whether the substantive provisions of a statute do or should preempt state law, and this determination involves an interpretation of those substantive provisions. That means that courts will still be involved in an attempt to ascertain what Congress' goals and purposes were in enacting its legislation. Still, as suggested earlier, courts have more freedom in implied preemption analysis than they do when engaged in interpreting the words of a preemption provision.

It does not necessarily follow from saying that preemption analysis is an exercise in statutory interpretation, that implied preemption analysis must be viewed, as it universally is,\textsuperscript{333} as focusing

\textsuperscript{332} But see Jeffrey R. Stern, Note, Preemption Doctrine & the Failure of Textualism in Cipollone v. Liggett Group, 80 Va. L. Rev. 979 (1994) (arguing for adoption of "transparent methodology" in interpreting express preemption provisions).

\textsuperscript{333} See also Gardbaum, supra note 1, at 773 ("Whether or not to preempt state law . . . is a matter within the discretion of Congress. The court's role is limited to discovering Congress' intent."). For a further discussion on the role of
on whether it was the intent of Congress to preempt state law. Just as many modern theories of statutory interpretation reject the notion that what courts should be doing in interpreting statutes generally is striving to follow legislative intent,\textsuperscript{334} legislative intent should not be determinative of the issue of whether federal law should preempt state law.\textsuperscript{335}

The focus on congressional intent suffers from many of the same problems of having an express preemption provision in legislation. Specifically, focusing on intent fixes the point of reference at the time Congress was enacting legislation, thus limiting the inquiry to the problems Congress was then addressing and the times in which it was acting. Even assuming Congress' intent about the general contours of a preemption provision can be accurately and

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\textsuperscript{334} See, e.g., Ronald Dworkin, \textit{Law's Empire} 937-98 (1986) (stating that judges should interpret statutes in "the best light overall"); Posner, supra note 25, at 165 (asserting that statutes should be read in order to promote most efficient outcome).

\textsuperscript{335} One commentator has asserted that the Supreme Court and not Congress should decide preemption issues:

It is submitted that the Supreme Court abdicates its duty as arbiter of the federal system when it makes the test of preemption the intent of Congress . . . . First, it is questionable whether the action of Congress should be allowed to conclusively preclude state action in any given area, unless that preclusion is justified in terms of modern federalism. It is equally doubtful whether Congress should have the sole power to decide to preclude or not preclude. The framers intended the Supreme Court, not the Congress, to determine where the demands of federalism should require the line to be drawn.

Freeman, supra note 1, at 698 (citing \textit{The Federalist No.} 99, at 245-46 (James Madison) (Mentor Book ed., 1961)). It is useful to keep in mind in this context that, although the Constitution is over 200 years old, only in the last 80 or so years has the American legal system shifted from one dominated by the common law to one in which statutes are the primary source of law. See Calabresi, supra note 37, at 1, 183-84 n.1 (1982) (stating that shift caused by judges who "creatively manipulated and changed common law rules"); L. Friedman, A History of American Law 17, 99-100 (1979) (stating that shift caused because common law was too "shapeless" and "complex"); Grant Gilmore, The Ages of American Law 35-36 (1977) (stating that United States parted from English tradition and "set out to create a rationally organized system of law"). Accordingly, it would be surprising if the framers of the Constitution viewed preemption as solely, or even largely, a legislative domain. But see Drummond, supra note 1, at 527 (stating that "absent congressional action pursuant to its powers under the Supremacy Clause to divest the states of their constitutionally retained powers, the constitutional predicate for divesting the dual sovereign's authority simply is not present"); Stern, supra note 332, at 1010-11 (stating that Supremacy Clause and preemption doctrine do not infringe on state sovereignty because "all states participate in the political process by which federal preemption legislation is passed and are accorded the special structural safeguard of equal representation in the Senate").
reliably ascertained, it is clear that Congress did not and could not have anticipated the circumstances in which preemption claims have arisen under many of the statutes containing express preemption provisions. It is folly to suggest that Congress did or did not intend to preempt many of the specific state law claims that have arisen. Just as Congress’ express preemption provisions suffer from this inability to make a comprehensive determination of what the preemptive breadth of its legislation should be, an analysis of intent would suffer from the same inability.

Likewise, while congressional intent may be an element for courts to consider in balancing federal and state interests in making a preemption determination, to allow such intent to be the ultimate determinant of preemption risks an overbroad encroachment on state interests. Thus, the interests of federalism support allowing courts to make the preemption determination without viewing themselves as constrained merely to determine congressional intent.

VI. CONCLUSION

The power of the federal government to displace state law in those areas in which Congress has the ability to legislate is a potent one; it divests states of the ability to regulate in an area within the state’s domain. Thus, the decision whether to exercise that power is important as well as difficult. Despite the fact that Congress enacts substantive legislation, preemption is a matter that is generally

336. Realistically, Congress sometimes gives preemption some attention during the lawmaking process and sometimes it does not. In some cases, congressional intent will be noticeably absent. See Lyndon, supra note 38, at 170-71 (stating that Congress is only slightly concerned with preemption distinction). Even if the issue is not ignored completely, there is always the question of how much to credit stray remarks of individual Congress-persons that may make their way into the record. See Eskridge, supra note 331, at 16-18 (commenting that actual legislative intent is “rarely revealed in the historical record”).

337. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 296, 240 (1959) (stating that intent standard is not helpful in labor cases because many of problems faced by courts could not have been foreseen by Congress).

338. See Hirsch, supra note 1, at 542-44 (stating that Congress must expressly intend to preempt state law, otherwise courts must determine congressional intent regarding preemption).

339. However, congressional intent is not completely irrelevant. While such intent should not be the determinative factor in deciding preemption issues, it could be used as one of the factors courts consider when balancing federal and state interests. In that context, it is interesting that the Republican Contract with America may allow such a balancing by suggesting that the legislative history to congressional enactments indicate Congress’ preemptive intent. For a further discussion of the Republican Contract with America, see supra note 1.
best left to the courts. Although there may be limited instances in which an express preemption provision is desirable to prevent the states from taking some particular action that Congress does not want taken, overall, Congress' express pronouncements have done more mischief than good.