

SUPREME COURT OF THE UNITED STATES

No. 90–1038

THOMAS CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF
THE ESTATE OF ROSE D. CIPOLLONE, PETITIONER V.
LIGGETT GROUP, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT
[June 24, 1992]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins,
concurring in the judgment in part and dissenting in part.

Today's decision announces what, on its face, is an extraordinary and unprecedented principle of federal statutory construction: that express pre-emption provisions must be construed narrowly, "in light of the presumption against the pre-emption of state police power regulations." *Ante*, at 12. The life-span of this new rule may have been blessedly brief, inasmuch as the opinion that gives it birth in Part I proceeds to ignore it in Part V, by adjudging at least some of the common-law tort claims at issue here pre-empted. In my view, there is no merit to this newly crafted doctrine of narrow construction. Under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning. If we did that job in the present case, we would find, under the 1965 Act, pre-emption of the petitioner's failure-to-warn claims; and under the 1969 Act, we would find pre-emption of the petitioner's claims complete.

The Court's threshold description of the law of pre-emption is accurate enough: Though we generally "assum[e] that the historic police powers of the States [are] not to be superseded by .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," *ante*, at 9 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)), we have traditionally not thought that to require express statutory text. Where state law is in actual conflict with federal law, see, e.g., *Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 204

(1983), or where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941), or even where the nature of Congress’s regulation, or its scope, convinces us that “Congress left no room for the States to supplement it,” *Rice, supra*, at 230, we have had no difficulty declaring that state law must yield. The ultimate question in each case, as we have framed the inquiry, is one of Congress’s intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved. See, e.g., *English v. General Elec. Co.*, 496 U. S. 72, 78–79 (1990); *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85, 95 (1983).

The Court goes beyond these traditional principles, however, to announce two new ones. First, it says that express pre-emption provisions must be given the narrowest possible construction. This is in its view the consequence of our oft-repeated assumption that, absent convincing evidence of statutory intent to pre-empt, “the historic police powers of the States [are] not to be superseded,” see *ante*, at 11–12. But it seems to me that assumption dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the scope of that pre-emption is meant to be. Thereupon, I think, our responsibility is to apply to the text ordinary principles of statutory construction.

That is precisely what our express pre-emption cases have done. Less than a month ago, in *Morales v. Trans World Airlines, Inc.*, 504 U. S. ____ (1992), we held that the Airline Deregulation Act’s provision pre-empting state laws “relating to [airline] rates, routes, or services,” 49 U. S. C. App. §1305(a)(1), was broad enough to reach state fare advertising regulations despite the availability of plausible limiting constructions. We made no mention of any “plain statement” rule, or rule of narrow construction, but applied the usual “`assumption that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose.’” *Morales, supra*, at ____ (slip op., at 6) (quoting *FMC Corp. v. Holliday*, 498 U. S. ____, ____ (1990) (slip op., at 4)) (emphasis added). And last Term, in *Norfolk & Western R. Co. v. American Train Dispatchers Ass’n*, 499 U. S. ____ (1991), we interpreted an express preemption provision

broadly despite the fact that a well-respected canon of statutory construction supported a narrower reading. See *id.*, at ____ (slip op., at 11); *id.*, at ____ (slip op., at 3–4) (STEVENS, J., dissenting). We said not a word about a “presumption against . . . preemption,” *ante*, at 11, that was to be applied to construction of the text.

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In light of our willingness to find pre-emption in the absence of *any* explicit statement of pre-emptive intent, the notion that such explicit statements, where they exist, are subject to a “plain-statement” rule is more than somewhat odd. To be sure, our jurisprudence abounds with rules of “plain statement,” “clear statement,” and “narrow construction” designed variously to ensure that, absent unambiguous evidence of Congress’s intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. See, e.g., *United States v. Mitchell*, 445 U. S. 535, 538 (1980) (waivers of federal sovereign immunity must be “unequivocally expressed”); *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989) (clear statement required to compel States to entertain damages suits against themselves in state courts); *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 243 (1985) (abrogation of state sovereign immunity must be expressed “in unmistakable language”). But *none* of those rules exists alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved *by sheer implication*, with no express statement of intent at all. That is the novel regime the Court constructs today.

The results seem odder still when one takes into account the second new rule that the Court announces: “When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, . . . we need only identify the domain expressly pre-empted by [that provision].” *Ante*, at 11. Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are eliminated. This proposition may be correct insofar as implied “field” pre-emption is concerned: The existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute’s express language defines. However, with regard to implied “conflict” pre-emption—*i. e.*, where state regulation actually conflicts with federal law, or where state regulation “stands as an obstacle to the accomplishment and execution”

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of Congress's purposes, *Hines*, *supra*, at 67—the Court's second new rule works mischief. If taken seriously, it would mean, for example, that if a federal consumer protection law provided that no state agency or court shall assert jurisdiction under state law over any workplace safety issue with respect to which a federal standard is in effect, then a state agency operating under a law dealing with a subject other than workplace safety (e.g., consumer protection) could impose requirements entirely contrary to federal law—prohibiting, for example, the use of certain safety equipment that federal law requires. To my knowledge, we have never expressed such a rule before, and our prior cases are inconsistent with it, see, e.g., *Jones v. Rath Packing Co.*, 430 U. S. 519, 540–543 (1977). When this second novelty is combined with the first, the result is extraordinary: The statute that says *anything* about pre-emption must say *everything*; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of congresses will dare to say anything about pre-emption.

The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning. *FMC Corp. v. Holliday*, *supra*, at ____ (slip op., at 4); *Shaw v. Delta Air Lines*, 463 U. S., at 97. When this suggests that the pre-emption provision was intended to sweep broadly, our construction must sweep broadly as well. See, e.g., *id.*, at 96–97. And when it bespeaks a narrow scope of pre-emption, so must our judgment. See, e.g., *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U. S. 1, 7–8 (1987). Applying its niggardly rule of construction, the Court finds (not surprisingly) that none of petitioner's claims—common-law failure to warn, breach of express warranty, and intentional fraud and misrepresentation—is pre-empted under §5(b) of the 1965 Act. And save for the failure-to-warn claims, the Court reaches the same result under §5(b) of the 1969 Act. I think most of that is error. Applying ordinary principles of statutory construction, I believe petitioner's failure-to-warn claims are pre-empted by

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the 1965 Act, and all his common-law claims by the 1969 Act.

With much of what the plurality says in Part V of its opinion I agree—that “the language of the [1969] Act plainly reaches beyond [positive] enactments,” *ante*, at 15; that the general tort-law duties petitioner invokes against the cigarette companies can, as a general matter, impose “requirement[s] or prohibition[s]” within the meaning of §5(b) of the 1969 Act, *ibid.*; and that the phrase “State law” as used in that provision embraces state common law, *ante*, at 16. I take issue with the plurality, however, on its application of these general principles to the present case. Its finding that they produce only partial pre-emption of petitioner’s common-law claims rests upon three misperceptions that I shall discuss in turn, under headings indicating the erroneously permitted claims to which they apply.

Pre-1969 Failure-to-Warn Claims

According to the Court,¹ §5(b) of the 1965 Act “is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate *particular* warning labels,” *ante*, at 12 (emphasis added). In essence, the Court reads §5(b)’s critical language “No *statement* relating to smoking and health shall be required” to mean “No *particular statement* relating to smoking and health shall be required.” The Court reasons that because common-law duties do not require cigarette manufacturers to include any *particular* statement in their advertising, but only *some* statement warning of health risks, those duties survive the 1965 Act. I see no basis for this element of “particularity.” To require a warning about cigarette health risks is to require a “statement relating to smoking and health.” If the “presumption against . . . pre-emption,” *ante*, at 12, requires us to import limiting language into the 1965 Act, I do not see why it does not require us to import similarly limiting language into the 1969 Act—so that a “requirement . . . based on

¹The plurality is joined by JUSTICES BLACKMUN, KENNEDY, AND SOUTER in its analysis of the 1965 Act.

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smoking and health . . . with respect to advertising” means only a *specific* requirement, and not just general, noncigarette-specific duties imposed by tort law. The divergent treatment of the 1965 Act cannot be justified by the Act’s statement of purposes, which, as the Court notes, expresses concern with “diverse, nonuniform, and confusing cigarette labeling and advertising *regulations*,” 15 U. S. C. §1331(2) (emphasis added). That statement of purposes was left untouched by Congress in 1969, and thus should be as restrictive of the scope of the later §5(b) as the Court believes it is of the scope of the earlier one.²

To the extent petitioner’s claims are premised specifically on respondents’ failure (during the period in which the 1965 Act was in force) to include in their *advertising* any statement relating to smoking and health, I would find those claims, no less than the similar post-1969 claims, pre-empted. In addition, for reasons I shall later explain, see *infra*, Part III, I would find pre-emption even of those claims based on respondents’ failure to make health-related statements to

²The Court apparently thinks that because §4 of the Act, imposing the federal package-labeling requirement, “itself sets forth a *particular* statement,” *ante*, at 13, n. 16, §5(b), the advertising pre-emption provision must be read to proscribe only those state laws that compel the use of *particular* statements in advertising. Besides being a complete *non sequitur*, this reasoning proves too much: The similar prescription of a *particular* warning in the 1969 Act would likewise require us to confine the pre-emptive scope of that later statute to specific, prescriptive “requirement[s] or prohibition[s]” (which, I presume, would not include tort-law obligations to warn consumers about product dangers). And under both the 1965 and 1969 versions of the Act, the package-labeling pre-emption provision of §5(a), no less than the advertising pre-emption provision of §5(b), would have to be limited to the prescription of *particular* language, leaving the states free to impose general health-labeling requirements. These results are obviously contrary to the Act’s stated purposes.

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consumers *outside* their advertising. However, since §5(b) of the 1965 Act enjoins only those laws that *require* “statement[s]” in cigarette advertising, those of petitioner’s claims that, if accepted, would penalize statements *voluntarily* made by the cigarette companies must be deemed to survive. As these would appear to include petitioner’s breach-of-express-warranty and intentional fraud and misrepresentation claims, I concur in the Court’s judgment in this respect.

Post-1969 Breach-of-Express-Warranty Claims

In the context of this case, petitioner’s breach-of-express-warranty claim necessarily embodies an assertion that respondents’ advertising and promotional materials made statements to the effect that cigarette smoking is not unhealthy. Making such statements civilly actionable certainly constitutes an advertising “requirement or prohibition . . . based on smoking and health.” The plurality appears to accept this, but finds that liability for breach of express warranty is not “imposed under State law” within the meaning of §5(b) of the 1969 Act. “[R]ather,” it says, the duty “is best understood as undertaken by the manufacturer itself.” *Ante*, at 19. I cannot agree.

When liability attaches to a particular promise or representation, it attaches *by law*. For the making of a voluntary promise or representation, no less than for the commission of an intentional tort, it is the background law against which the act occurs, and not the act itself, that supplies the element of legal obligation. See *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 429 (1934); N.J. Stat. Ann. §§12A:2–313(1), 12A:2–714, and 12A:2–715 (West 1962) (providing for enforcement of express warranties). Of course, New Jersey’s law of express warranty attaches legal consequences to the cigarette manufacturer’s voluntary conduct in making the warranty, and in that narrow sense, I suppose, the warranty obligation can be said to be “undertaken by the manufacturer.” But on that logic it could also be said that the duty to warn about the dangers of cigarettes is undertaken voluntarily by manufacturers when

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they choose to sell in New Jersey; or, more generally, that *any* legal duty imposed on volitional behavior is not one imposed by law.

The plurality cites no authority for its curious view, which is reason enough to doubt it. In addition, however, we rejected this very argument last Term in *Norfolk & Western R. v. American Train Dispatchers Assn.*, where we construed a federal exemption “from the antitrust laws and from all other law,” 49 U. S. C. §11341(a), to include an exemption from contract obligations. We observed, in a passage flatly inconsistent with the plurality’s analysis today, that “[a] contract has no legal force *apart from the law that acknowledges its binding character.*” 499 U. S., at ____ (slip op., at 12). Compare *id.*, at ____ (slip op., at 5–6) (STEVENS, J., dissenting). I would find petitioner’s claim for breach of express warranty pre-empted by §5(b) of the 1969 Act.

Post-1969 Fraud and Misrepresentation Claims

According to the plurality, at least one of petitioner’s intentional fraud and misrepresentation claims survives §5(b) of the 1969 Act because the common-law duty underlying that claim is not “based on smoking and health” within the meaning of the Act. See *ante*, at 22. If I understand the plurality’s reasoning, it proceeds from the implicit assumption that only duties deriving from laws that are specifically directed to “smoking and health,” or that are uniquely crafted to address the relationship between cigarette companies and their putative victims, fall within §5(b) of the Act, as amended. Given that New Jersey’s tort-law “duty not to deceive,” *ibid.*, is a general one, applicable to all commercial actors and all kinds of commerce, it follows from this assumption that §5(b) does not pre-empt claims based on breaches of that duty.

This analysis is suspect, to begin with, because the plurality is unwilling to apply it consistently. As JUSTICE BLACKMUN cogently explains, see *ante*, at 13 (opinion concurring in part and dissenting in part), if New Jersey’s common-law duty to avoid false statements of material fact—as applied to the cigarette companies’ behavior—is not “based on smoking and health,” the same must be said of

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New Jersey's common-law duty to warn about a product's dangers. *Each* duty transcends the relationship between the cigarette companies and cigarette smokers; *neither* duty was specifically crafted with an eye toward "smoking and health." None of the arguments the plurality advances to support its distinction between the two is persuasive. That Congress specifically preserved, in both the 1965 and 1969 Acts, the Federal Trade Commission's authority to police deceptive advertising practices, see §5(c) of the 1965 Act; §7(b) of the 1969 Act; *ante*, at 22–23, does not suggest that Congress intended comparable state authority to survive §5(b). In fact, at least in the 1965 Act (which generally excluded federal as well as state regulation), the exemption suggested that §5(b) was broad enough to reach laws governing fraud and misrepresentation. And it is not true that the States' laws governing fraud and misrepresentation in advertising impose identical legal standards, whereas their laws "concerning the warning necessary to render a product 'reasonably safe'" are quite diverse, *ante*, at 23. The question whether an ad featuring a glamorous, youthful smoker with pearly-white teeth is "misrepresentative" would almost certainly be answered differently from State to State. See *ante*, at 21 (discussing FTC's initial cigarette advertising rules).

Once one is forced to select a *consistent* methodology for evaluating whether a given legal duty is "based on smoking and health," it becomes obvious that the methodology must focus not upon the ultimate source of the duty (*e.g.*, the common law) but upon its proximate application. Use of the "ultimate source" approach (*i. e.*, a legal duty is not "based on smoking and health" unless the law from which it derives is directed only to smoking and health) would gut the statute, inviting the very "diverse, nonuniform, and confusing cigarette . . . advertising regulations" Congress sought to avoid. 15 U. S. C. §1331(2). And the problem is not simply the common law: Requirements could be imposed by state executive agencies as well, so long as they were operating under a *general* statute authorizing their supervision of "commercial advertising" or "unfair trade practices." New Jersey and many other States have such statutes already on

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the books. *E.g.*, N. J. Stat. Ann. §56:8-1 *et seq.* (West 1989); N. Y. Gen. Bus. Law §349 *et seq.* (McKinney 1988 and Supp. 1992); Texas Bus. & Com. Code Ann. §17.01 *et seq.* (1987 and Supp. 1992).

I would apply to all petitioner's claims what I have called a "proximate application" methodology for determining whether they invoke duties "based on smoking and health"—I would ask, that is, whether, whatever the source of the duty, it imposes an obligation in this case because of the effect of smoking upon health. On that basis, I would find petitioner's failure-to-warn and misrepresentation claims both pre-empted.

Finally, there is an additional flaw in the plurality's opinion, a systemic one that infects even its otherwise correct disposition of petitioner's post-1969 failure-to-warn claims. The opinion states that, since §5(b) proscribes only "requirement[s] or prohibition[s] . . . *with respect to . . . advertising or promotion,*" state-law claims premised on the failure to warn consumers "through channels of communication other than advertising or promotion" are not covered. *Ante*, at 22 (emphasis added); see *ante*, at 18. This preserves not only the (somewhat fanciful) claims based on duties having no relation to the advertising and promotion (one could imagine a law requiring manufacturers to disclose the health hazards of their products to a state public-health agency), but also claims based on duties that can be complied with by taking action *either* within the advertising and promotional realm *or elsewhere*. Thus, if—as appears to be the case in New Jersey—a State's common law requires manufacturers to advise consumers of their products' dangers, but the law is indifferent as to *how* that requirement is met (*i.e.*, through "advertising or promotion" or otherwise), the plurality would apparently be unprepared to find pre-emption as long as the jury were instructed not to zero in on deficiencies in the manufacturers' advertising or promotion.

I think that is inconsistent with the law of pre-emption. Advertising and promotion are the normal means by which a manufacturer communicates required product warnings to

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prospective customers, and by far the most economical means. It is implausible that Congress meant to save cigarette companies from being compelled to convey such data to consumers through that means, only to allow them to be compelled to do so through means more onerous still. As a practical matter, such a “tell-the-consumers-any-way-you-wish” law compels manufacturers to relinquish the advertising and promotion immunity accorded them by the Act. The test for pre-emption in this setting should be one of practical compulsion, *i.e.*, whether the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly. Cf., *e.g.*, *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 173, n. 25 (1978). Though the hypothetical law requiring disclosure to a state regulatory agency would seem to survive this test, I would have no difficulty finding that test met with respect to state laws that require the cigarette companies to meet general standards of “fair warning” regarding smoking and health.

* * *

Like JUSTICE BLACKMUN, “I can only speculate as to the difficulty lower courts will encounter in attempting to implement [today's] decision.” *Ante*, at 14 (opinion concurring in part and dissenting in part). Must express pre-emption provisions really be given their narrowest reasonable construction (as the Court says in Part III), or need they not (as the plurality does in Part V)? Are courts to ignore all doctrines of implied pre-emption whenever the statute at issue contains an express pre-emption provision, as the Court says today, or are they to continue to apply them, as we have in the past? For pre-emption purposes, does “state law” include legal duties imposed on voluntary acts (as we held last Term in *Norfolk & Western R. Co.*), or does it not (as the plurality says today)? These and other questions raised by today's decision will fill the law-books for years to come. A disposition that raises more questions than it answers does not serve the country well.