Granted 98-1811

~~No. 98-9811~~

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ALEXIS GEIER, ET AL.,

Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., ET AL.,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE OF ROBERT B LEFLAR, ROBERT S. ADLER, MICHAEL GREEN, AND JOSEPH A. PAGE IN SUPPORT OF PETITIONERS

ROBERT B LEFLAR
(COUNSEL OF RECORD)
UNIVERSITY OF ARKANSAS SCHOOL OF LAW
FAYETTEVILLE, AR 72701
(501) 575-2709

Attorney for Amici Robert B Leflar, Robert S. Adler, Michael Green, and Joseph A. Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

LEGISLATIVE MATERIALS

REGULATORY MATERIALS

MISCELLANEOUS

INTEREST OF *AMICI*[1]

Robert B Leflar, Robert S. Adler, Michael Green, and Joseph A. Page are legal scholars who have published articles on the products liability issues to be addressed in this case. They have all been advocates, in various public forums, of the rights of consumers to recover for injuries suffered as a result of the use of defective products. They all depend, in their professional work as teachers and authors and in their private capacity as participants in public debate, on information developed through state-law-based civil litigation. However, none of them has any pecuniary stake in the outcome of this action.

Mr. Leflar is Professor of Law at the University of Arkansas School of Law. Mr. Adler is Professor at Kenan-Flagler School of Business, University of North Carolina. Mr. Green is Professor of Law at the University of Iowa College of Law. Mr. Page is Professor of Law at Georgetown University Law Center.

Amici submit this brief for three reasons. (1) They are concerned that the judgment of the Court of Appeals, if affirmed, would result in a serious erosion of the rights of injured parties to obtain compensation, contrary to the intent of Congress, in enacting motor vehicle safety and other consumer protection laws, not to affect such rights. (2) They are concerned that the preclusion of state-law damage claims resulting from a broad preemption holding

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that counsel for neither party authored this brief in whole or in part, and that no person or entity, other than *amici*, made any monetary contribution to the preparation or submission of this brief.

would impoverish the public's store of important safety and health information, which has been significantly augmented by the products liability litigation process. (3) They hope to bring to the Court's attention lines of argument not well developed in preemption litigation to date: the noncongruence between state and federal interests in vehicle safety improvements, and the barriers to advocacy of the States' separate interests in the federal administrative rulemaking proceedings at issue here.

STATEMENT OF THE CASE

This case presents the question of whether the U.S. Department of Transportation's decision to proceed gradually in phasing in a *regulatory* requirement that motor vehicle manufacturers incorporate a cost-effective safety feature – automatic passive restraints – in their products forecloses state-law *damage claims* by seriously injured consumers that more rapid adoption by manufacturers of the safety feature would have prevented or mitigated their injuries. The Court of Appeals held that such state-law claims are impliedly preempted by conflict with the federal regulation. However, as the highest courts of six states have concluded, Congress has expressly preserved these state-law claims. To expand implied preemption doctrine to permit a federal regulation, adopted without notice or opportunity to comment on any prospective vitiating effect on state common law, to bar injured consumers from all remedy would undercut the nation's federalist structure and deprive the public of the chance to participate in what is a fundamentally political decision.

Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), to "reduce traffic accidents and deaths and injuries to persons

resulting from traffic accidents." *Id.* § 1381 (now codified at 49 U.S.C. § 30101).[2] The Safety Act charged the Department of Transportation and its component agency, the National Highway Traffic Safety Administration (NHTSA), with pursuing this goal, in part, by promulgating motor vehicle safety standards. These standards are defined in the Safety Act as "a minimum standard for motor vehicle performance or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." *Id.* § 1391(2).

The standard at issue in this case, Federal Motor Vehicle Safety Standard (FMVSS) 208, was promulgated by NHTSA in response to this Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). In *State Farm*, the Court overturned as arbitrary and capricious NHTSA's 1982 rescission of an automatic passive restraint standard. The Court concluded: "[G]iven the judgment made [by NHTSA] in 1977 that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive-restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement." 463 U.S. at 51.

On remand from the *State Farm* case, NHTSA concluded that "the most effective [passenger restraint] system is an airbag plus a [manual] lap and shoulder belt." 49 Fed. Reg. 28962, 28986 (1984). However, in revising FMVSS 208 in 1984, the agency chose to phase in an automatic passive restraint requirement gradually, and to encourage but not mandate the use of airbags. For

---

[2] Congress recodified the Safety Act in 1994 "without substantive change." Pub. L. No. 103-272. Since most cases interpreting the Safety Act employ the older codification, this brief will do likewise.

the 1987 model year, the first for which the standard required compliance, each manufacturer had to provide automatic passive restraints (automatic seatbelts or airbags) in "a minimum of 10% of all cars." 49 Fed. Reg. 28999 (1984). Thus, a manufacturer's decision for model year 1987 to equip up to 90% of its fleet with manual seat belts alone, which NHTSA had long deemed inferior in safety performance to the airbag-belt combination, would have met federal minimum standards for the fleet as a whole. In subsequent years a greater percentage of the fleet was obliged to contain automatic restraints, until the restraints became obligatory for all cars made after September 1, 1989. (The standard was to be revoked if three-fourths of the nation's population came under qualified state mandatory-seatbelt laws, a condition that never materialized.)

Alexis Geier was driving her 1987 Honda Accord in the District of Columbia in 1992 when she ran into a tree. She was wearing the manual lap belt and shoulder harness with which the vehicle was equipped. However, she sustained serious injuries that petitioners claim would have been prevented or mitigated had Honda equipped the vehicle with an automatic passive restraint not required by federal law but nevertheless technologically feasible and cost-effective: an airbag.

Petitioners' claims, based on District of Columbia common-law theories of negligence, breach of warranty, and strict liability, are in the mold of a case in the pantheon of tort: *The T.J. Hooper*, 60 F.2d 737 (2d Cir.), cert. denied, 287 U.S. 662 (1932). In both cases, plaintiffs claimed that a feasible, cost-effective safety device, if incorporated into their means of conveyance, would have prevented harm. In both cases, trade custom had not yet generally adopted the safety device at issue, but a firm with foresight had

recognized its worth. (In *The T.J. Hooper*, Judge Hand noted that "[o]ne line alone" had placed radio receivers on its tugboats, 60 F.2d at 739; in this case, NHTSA observed in 1984 that "one manufacturer has already begun to offer airbags and three others have indicated plans to do so." 49 Fed. Reg. at 28997.) *The T.J. Hooper* established the principle that "a whole calling may have unduly lagged in the adoption of new and available devices," 60 F.2d at 740, subjecting its members to liability. Petitioners' claims are ensconced in the heartland of American tort law.

The district court, however, granted summary judgment for respondents on the ground that the Geier's claims were preempted by the Safety Act and FMVSS 208. The Court of Appeals affirmed. *Geier v. American Honda Motor Co.*, 166 F.3d 1236 (D.C. Cir. 1999). The Court of Appeals held that petitioners' claims were impliedly preempted by Standard 208, because "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department [of Transportation]'s policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." 166 F.3d at 1243.

SUMMARY OF ARGUMENT

The National Traffic and Motor Vehicle Safety Act does not expressly preempt design defect claims such as petitioners'. The express preemption provision of the Safety Act, 15 U.S.C. § 1392(d), when read together with the Act's claims preservation provision, § 1397(k), compels the conclusion that Congress intended to preempt only state safety standards established by statute or regulation and non-identical with corresponding federal standards, while preserving all common-law damage claims.

Sections 1392(d) and 1397(k) might reasonably be viewed as disposing of implied preemption arguments as well. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). However, the Court of Appeals in this case read *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), as permitting implied conflict preemption analysis. Assuming *arguendo* that such an inquiry is permitted after *Cipollone* and *Freightliner*, the Court should nevertheless find that FMVSS 208 does not impliedly preempt petitioners' claims.

First, the scope of implied conflict preemption in products liability cases should be narrowly circumscribed. Products liability, a field of law developed almost entirely by the states, is unquestionably a realm to which the presumption against preemption relied on in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), and many other cases should apply. No clear congressional statement in the Safety Act rebuts this presumption.

Historical and prudential considerations support a narrowly cabined implied preemption doctrine that allows for the coexistence of federal administrative regulation and state tort law. In enacting the consumer protection laws of the 1960s and 1970s, Congress assumed the continued existence of state tort law, including the traditional doctrine that compliance with government safety standards constitutes *nonconclusive* evidence of due care. Permitting this traditional tort regime to continue can partially ameliorate various limitations of administrative agencies, such as their susceptibility to political pressure, their limited resources and attention spans, and their limited ability to obtain information that regulated industries have an interest in suppressing.

Second, petitioners' claims are compatible with the letter and purposes of FMVSS 208; no conflict of a claim-preclusive

nature exists in this case. Respondents could have equipped petitioners' vehicle with an airbag and manual seatbelts, complied with the federal standard, and avoided liability. Or respondents could have opted, as they did, to meet the minimum federal standard for fleet safety and taken the business risk of later paying tort damages. There is no indication in this record that awards of damages would have the effect of seriously disrupting the federal regulatory program.

Third, the state interests underlying the bases for petitioners' state-law claims are not congruent with the federal interests underlying FMVSS 208. It is true that the injury-prevention function of state tort law largely overlaps the primary purpose of the Safety Act. But state tort law also encompasses other interests outside NHTSA's purview. Among these state interests that NHTSA determinations fail to safeguard are compensation for injury caused by socially unreasonable conduct; the spreading of risks created by such conduct; the protection of consumer expectations; the taking into account of intangibles such as pain and suffering in the determination of "benefits" for purposes of risk-benefit analysis; and the educative function of tort law.

Finally, the federal system tolerates the coexistence of these varying federal and state interests, and allows their expression in forums other than the federal administrative rulemaking process. This is particularly the case when that process, as here, gave no notice to the citizenry of the possibility that the federal standard under consideration might undermine a sizeable portion of traditional tort law – claims based on the intellectual heritage of *The T.J. Hooper*.

Proponents of a regulatory compliance defense in vehicle

design matters have the opportunity to make their case through the normal political process, in Congress and in state legislatures, as well as in courts interpreting state law. Opponents of claim-preclusive rules, however, did not have the opportunity to make their case in the sole forum respondents would allow them: the 1984 NHTSA rulemaking. No one conceived at the time that preclusion of state-law claims might even be at stake.

When Congress has not clearly authorized preemption of state-law damage claims outside federally occupied fields, and no agency dictate has rendered the basis of a state-law claim directly contradictory of the federal rule, courts should reject preemption arguments unless, at the least, the agency has concluded after notice and opportunity to comment that preemption is necessary to advance the regulatory program's goals. Any doctrine less respectful of state interests would skew the proper balance of power between Washington and the states, and would stifle the public's voice in matters critically affecting their rights.

ARGUMENT

I. The National Traffic and Motor Vehicle Safety Act Does Not Expressly Preempt Petitioners' Claims.

The Safety Act contains a preemption provision and a savings, or claims preservation, provision. They must be read together to determine the extent to which Congress intended that state law be displaced. The preemption provision states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The claims preservation provision states: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from *any common law liability.*" *Id.* § 1397(k) (emphasis added).

The clearest way of reconciling these two provisions is that Congress meant to preempt state safety standards established by statute or regulation, unless they are identical to corresponding federal standards, while preserving all common-law damage claims. Within the universe of claims preserved are those left viable under the general common-law principle that compliance with a relevant safety statute or regulation is evidence of due care, but not an absolute defense. *See Restatement (Second) of Torts* § 288C (1965).

The logic and legislative history supporting this conclusion are well explained in decisions of the highest courts of six states: *Hyundai Motor Co. v. Alvarado,* 974 S.W.2d 1, 6-8 (Tex. 1998); *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376, 379-82 (N.Y.1998); *Minton v. Honda of America Mfg., Inc.*, 684 N.E.2d 648, 655-57 (Ohio 1997); *Munroe v. Galati*, 938 P.2d 1114, 1117 (Ariz. 1997); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345, 347-48 (N.H.1995), cert. denied, 516 U.S. 1072 (1996); and *Wilson v. Pleasant*, 660 N.E.2d 327, 330 (Ind.1995). *See also* Ralph Nader & Joseph A. Page, *Automobile-Design Liability and*

Compliance with Federal Standards, 64 Geo. Wash. L. Rev. 415, 419-26 (1996). In this brief, rather than rehearsing the arguments further, we proceed on the assumption that express preemption does not apply.

II. Federal Motor Vehicle Safety Standard 208 Does Not Impliedly Preempt Petitioners' State Law Claims.

The express preemption and claims preservation provisions of 15 U.S.C. §§ 1392(d) and 1397(k), quoted above, might reasonably be viewed as disposing of implied preemption arguments as well. As this Court concluded in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992),

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," . . . "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

505 U.S. at 517 (citations omitted).

However, in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), this Court stated in dictum that a clause expressly defining the preemptive reach of a statute "supports a reasonable inference" that Congress did not intend to preempt other matters, but does not "entirely foreclose[] any possibility of implied pre-emption." *Id.* at 288-89. *Freightliner* did not address the effect of the statute's savings or claim preservation clause; taking that clause into account,

the "reasonable inference" that implied preemption arguments are invalid is all the stronger. Nevertheless, the Court of Appeals in this case read the passage from *Freightliner* quoted above to permit an implied conflict preemption analysis of petitioners' claims. 166 F.3d at 1241-42. Therefore, in the remainder of this brief, we address the implied conflict preemption issue.

A. The Scope of Conflict Preemption in Products Liability Cases Should Be Narrowly Circumscribed.

As this Court reiterated in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the nation's federal structure has long counselled the courts that absent a clear indication to the contrary, Congress does not intend to invade the sovereign states' "historic primacy" in the regulation of matters of health and safety. 518 U.S. at 485. The field of products liability, developed almost entirely by the states, is unquestionably a realm of law to which this presumption against preemption applies most strongly. But as noted by the state supreme courts listed above, nowhere does the Safety Act reveal the kind of "clear and manifest" congressional purpose to preempt, *Medtronic*, 518 U.S. at 485, that is necessary to overcome the inference that the States' carefully constructed jurisprudence of tort remains intact. Federalism concerns therefore counsel that the scope of implied preemption, if recognized at all, should be narrowly confined.

Historical considerations support this conclusion. The consumer protection laws of the 1960s and the 1970s regulating motor vehicles, drugs, medical devices, and consumer products were enacted against a backdrop of the imposition of serious hazards on the public by manufacturers of defective products. Although products liability law was coming into its own, *see*

Restatement (Second) of Torts § 402A (1965), Congress concluded that the discipline of the marketplace, backed by state-law civil remedies, provided insufficient protection for the public. Therefore Congress erected various regulatory structures to supplement private law, typically providing expressly for the preservation of existing civil remedies. *See* Robert B Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After* Medtronic, 64 Tenn. L. Rev. 691, 746-47 (1997).

The Safety Act is representative of these consumer protection laws that contemplated a dual role for administrative regulation and tort law. The Act's primary stated purpose is to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. Congress's charge to NHTSA was to pursue this goal by issuing and enforcing safety standards that are "reasonable, practicable, and appropriate." *Id.* § 1392(f)(3). But the pursuit of reasonable, practicable accident reduction measures through the operation of liability avoidance incentives is one, though by no means the only, goal of tort law as well. It would be an unusual logic that would readily interpret a law aimed at enhancing safety simultaneously to countenance the withdrawal of a chief incentive for achieving it.

Prudential considerations also counsel a narrow scope for implied preemption. Federal regulatory agencies such as NHTSA suffer from various limitations in carrying out their charges, limitations which the coexistence of tort litigation can partially ameliorate. One such limitation arises from agencies' susceptibility to political pressure, as the tortured history of airbag regulation demonstrates all too well. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 34-40 (1983);

see also Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 478 (Ga. App. 1984) (admissibility of White House tape of Ford executives asking President Nixon to "'cool it' as to safety requirements"). Agencies may issue and then withdraw safety standards depending on the political winds, but if the tort system is in place the steady pressure of potential liability will provide a constant background incentive for the achievement of reasonable safety.

Another set of regulatory agency limitations concerns limited agency resources and attention spans. Information about newly-discovered product risks or more effective safety designs may not come to an agency's attention at the particular juncture at which a regulatory decision has to be made, or the information may be shunted aside in favor of other, more compelling agency priorities. *Cf.* 16 C.F.R. § 1009.8 (Consumer Product Safety Commission policy recognizing that, because of limited resources, the agency cannot address all significant hazards). Moreover, the standard-setting process tends to be sufficiently protracted that technological advances may race ahead of the agency's often deliberate pace.

By contrast, there are some types of information that the tort process excels in unearthing. Manufacturers have been known to exaggerate, in submissions to the agency, the likely costs of proposed safety improvements, and the length of time within which they might feasibly be implemented. Other manufacturers, although regulated, have suppressed evidence of risks involved in their products. The discovery process of civil litigation serves as an accuracy check on this potential for distortion of information critical to public debate.

These historical and prudential considerations counsel that

if implied conflict preemption arguments are to be countenanced at all in the face of express preemption and claim preservation provisions, preemption doctrine's encroachment on state sovereignty and the tort system should be tightly constrained. Two of the *amici* have offered a principle of "dictate preemption" to define the situations in which state-law products liability claims must be preempted by conflicting federal rules:

> If Congress, or a regulatory agency validly exercising delegated authority, dictates that a product must be made, labelled, or marketed in a particular fashion and no other, state-law damage claims alleging injury arising from a product feature complying with that federal dictate must be disallowed.

Leflar & Adler, *supra*, 64 Tenn. L. Rev. at 713. Under this restrained view of conflict preemption, mere federal acquiescence in a manufacturer's adoption of a particular product feature should not require preclusion, as a matter of federal law, of a state-law claim attacking the reasonableness of that feature. *Id.*

B. Petitioners' Claims Are Compatible with the Letter and Purposes of FMVSS 208.

This case does not present a situation where it is "impossible for a private party to comply with both state and federal requirements," *English v. General Electric Co.*, 496 U.S. 72, 79 (1990), so that the state-law claim must fail. There is no direct conflict between petitioners' claims and FMVSS 208. The standard is not a federal dictate that Honda cars must be designed, as

petitioners' was, without automatic passive restraints. Honda could have equipped petitioners' vehicle with an airbag and manual seatbelts, complied with the federal standard, and avoided liability.

Even viewing petitioners' claims as requiring Honda to avoid conduct (designing and selling their vehicle without an airbag) that federal law permitted, the case does not present a conflict of a claim-preclusive nature. Honda could comply with the minimum fleet safety level prescribed by FMVSS 208 as it did, foregoing for the great majority of its 1987 model year fleet the long-term cost-effective automatic passive restraint technology in favor of the short-term pursuit of revenue or market share, and take the risk of later paying tort damages as a business decision. As the Court recognized in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988), "the permission of incidental regulation [in the form of a state-law compensation award to the injured] is consistent with the preclusion of direct regulation" by a state in conflict with federal law. *See also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); *English v. General Electric Co.*, 496 U.S. 72, 85-86 (1990).

The Court of Appeals held, however, that recognition of petitioners' state-law damage claim was preempted not because simultaneous compliance with state and federal law was impossible, but because a state-law damage award "would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives." 166 F.3d at 1241. The "chosen method," a gradual phase-in of requirements for safety devices known to be cost-effective, aimed at "encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." *Id.* at 1243.

Reasonable minds may differ on the merits of NHTSA's choice of method. The question before the Court is not whether NHTSA's phase-in strategy was justified. It is whether state-law damage awards would seriously disrupt the federal regulatory program. The Court of Appeals failed to address this question.

In this case, the record suggests that any disruptive effect would be minimal. At least one "no-airbag" claim had been settled in 1984 for a sizeable sum, *see Burgess v. Ford Motor Co.*, No. DV79-355 (Ala. Cir. Ct. 1984) ($1.8 million settlement), yet that signal of potential future liability apparently did not impel the manufacturer to equip its fleet with airbags at a rate faster than the agency thought the public would accept. Moreover, by the time injuries involving 1987 model year cars resulted in litigation reaching the point of damage awards or even settlement negotiations, the three-year phase-in period would typically have already passed (as in this case), so that damage payouts would not likely impel manufacturers to take actions that were not already required by federal regulation. To the extent that the *prospect* of tort liability (and accompanying adverse publicity) *would* motivate auto makers to equip their vehicles with airbags sooner than federally required, that result would reinforce, not frustrate, a chief aim of FMVSS 208, which was to encourage wider use of airbags. *See* 49 Fed. Reg. at 29000-01 (giving "extra credit" toward manufacturers' fleet percentage requirements for choosing airbags).

C. The State Interests Underlying the State-Law Bases for Petitioners' Claims Are Not Congruent with the Federal Interests Underlying FMVSS 208.

If federal agency rulemaking fully protected not only the federal interests identified by Congress in the agency's organic statute, but also the state interests underlying applicable state law, then the argument for broad implied conflict preemption might be

strong. The injury-prevention, or deterrence, function of state tort law does largely overlap the primary purpose of the Safety Act. However, the purposes underlying state tort law encompass other interests outside NHTSA's purview in promulgating FMVSS 208 – interests worthy of respect in our federal system.

The prime goal of tort law is compensation for injury caused by socially unreasonable conduct. W. Page Keeton et al., Prosser & Keeton on Torts 6 (5th ed. 1984). But compensation forms no part of NHTSA's charge or concern. And the determination of what is "socially unreasonable" (in this context, what constitutes a defective design) *for purposes of compensating the injured* is a task that Congress has never placed in NHTSA's hands.

Related to tort law's compensation function is its risk-spreading function. *See, e.g., Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring). There is debate about the extent to which risk-spreading policy ought to animate tort law. *See, e.g., Otte v. Dayton Power & Light Co.*, 523 N.E.2d 835, 841-42 (Ohio 1988). But for those states in which risk spreading is a proper goal of tort, it is a goal that NHTSA does not consider in its deliberations.

The state-law determination of whether a motor vehicle is defectively designed has an objective very similar to NHTSA's goal in determining to issue a motor vehicle safety standard that is "reasonable, practicable and appropriate" for the particular type of motor vehicle. 15 U.S.C. § 1392(f)(3). NHTSA employs cost-benefit or risk-benefit analysis in these determinations, and most factfinders in state-law civil actions do the same. *See Restatement (Third) of Torts: Products Liability* § 2(b) & Reporters' Note to comment d (1998). In this respect, it is argued that since NHTSA

does essentially the same thing that juries do, and does it more expertly, the agency's conclusions should displace contrary state-law findings.

The contention is a plausible one, and is often advanced (in the form of advocacy of a regulatory compliance defense) in Congress and in state legislatures and courts. Those are the proper forums in which the contention should be raised. For purposes of this case, however, the significant point is that a number of states employ a method of determining design defect that protects a somewhat different interest than that protected by risk-benefit balancing: the interest in upholding consumer expectations. *See, e.g., Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979); *French v. Grove Mfg. Co.*, 656 F.2d 295 (8th Cir. 1981) (applying Arkansas law); *Potter v. Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997); *Ontai v. Straub Clinic & Hosp., Inc.*, 659 P.2d 734 (Haw. 1983); *Kudlacek v. Fiat S.p.A.*, 509 N.W.2d 603 (Neb. 1994); *Lee v. Volkswagen of America*, 688 P.2d 1283, 1285 (Okla. 1984); *Sumnicht v. Toyota Motor Sales*, 360 N.W.2d 2, 16-17 (Wisc. 1984).

Grounded in the law of warranty, the consumer expectations test for design defect focuses attention on manufacturers' representations about product performance. Advertising may lead consumers to believe a product has qualities of safety beyond those that would be required by NHTSA's risk-benefit analysis. States have a justifiable interest in protecting these consumer expectations, and a determination that a NHTSA standard displaces state law could invade that state interest.

Even in states that use risk-benefit analysis in their state-law determinations of design defect, the method of conducting that risk-

benefit analysis may protect interests that NHTSA overlooks. States may assert an interest, for example, in employing a conception of "benefit" that encompasses all factors of value to the state's citizens, including intangibles. The agency in justifying FMVSS 208 conceded that its calculations "would not represent the full benefits of reducing fatalities and injuries because the Department cannot measure the intangible value of a human life or a reduced injury. It cannot adequately measure, for example, the value of pain and suffering or loss of consortium." 49 Fed. Reg. at 28996. But state damage law would allow these intangibles as items of compensable damage, and would implicitly allow factfinders to weigh them in the prior determination of whether the design is defective.

A final state interest that would be undercut by a broad implied preemption doctrine is the interest in the educative function of tort law. The history of modern American public health is strewn with examples of health hazards whose existence or magnitude came to light not chiefly because of federal agency action, but because of tort litigation as an engine of discovery. Illustrations include the Ford Pinto litigation, *see, e.g., Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. App. 1981); asbestos, *see, e.g., Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), and Paul A. Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial (1985); tobacco, *see Cipollone, supra,* and its progeny; and the Dalkon Shield IUD, *see* Robert S. Adler & Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok,* 59 Mo. L. Rev. 895, 943-45 (1994). Information developed through tort litigation has enriched the marketplace of ideas and the democratic process, and courts should pause before employing implied preemption doctrine to dam its flow.

D. The Federal System Tolerates the Coexistence of These Varying State and Federal Interests, and Allows Their Expression in Forums Other Than the Administrative Rulemaking Process, Particularly When That Process Gives No Notice of the Possibility of a Preemptive Effect on State Law.

This case essentially presents the question of the proper forum or forums in which decisions about the reasonableness, *for purposes of compensating the injured*, of the timing of automobile safety improvements should be made. The Court of Appeals' approach would confine the decision to a single national forum, the NHTSA rulemaking process (supplemented as it is by congressional oversight). However, the federal structure of the nation suggests that the issues should be thrashed out in other forums as well: in the judiciary, state and federal, applying state law; and to a limited extent, in the state legislatures. This multicentered approach comports best with the "American idea of protecting liberty by fragmenting power." Laurence H. Tribe, American Constitutional Law 20 (2d ed. 1988); *see also Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991).

Proponents of claim-preclusive rules, such as respondents, have full and fair access to both the political and the judicial processes at the federal and state levels. They may seek (and have sought) explicit adoption of regulatory compliance defenses before Congress, state legislatures, and state courts of last resort. No such measure has passed both houses of Congress. *See, e.g.*, H.R. 956, 104th Cong., 1st Sess., § 201(f) (1995) (passed by the House but not the Senate). Some states have adopted modified versions of the regulatory compliance defense, for example to raise a presumption of nondefectiveness, *e.g.*, Kan. Stat. Ann. § 60-3304(a), Tenn.

Code Ann. § 13-21-403(1)(b); to preclude liability for drugs meeting FDA standards, *e.g.*, Mich. Comp. Laws § 600.2946(5), *see also Carlin v. Superior Court*, 920 P.2d 1347, 1352-53 & n.4 (Cal. 1996) (no liability for failure to provide drug warning that FDA had expressly rejected); or to preclude punitive damages for such drugs, *e.g.*, Ariz. Rev. Stat. Ann. § 12-701; Or. Rev. Stat. § 30.927. This political history is a model of the creative role of the federal structure. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (states as laboratories of experimentation).

Opponents of claim-preclusive rules, however, lacked the opportunity to make their case in the single national forum upon whose decision the implied preemption argument in this case is based. In all the extensive rulemaking process by which FMVSS 208 was developed over the years, not once was notice given that the standard might have the effect of undermining a sizeable portion of traditional tort law – claims based on the intellectual heritage of *The T.J. Hooper*. Advocates and beneficiaries of the various state interests identified above – state attorneys general, media, consumer representatives – had no chance to respond to defend those interests.

The lack of notice of FMVSS 208's possible claim-preclusive effect on state law is unsurprising: before the *Silkwood* litigation, the notion that federal safety rules might entirely displace aspects of state tort law had scarcely been broached. NHTSA itself in 1984 appears to have assumed the continued availability of tort remedies against manufacturers of defective restraint systems. *See* 49 Fed. Reg. at 29000 ("[the agency] believes that competition, potential liability for any deficient systems and pride in one's product would prevent [manufacturers from only using the cheapest

restraint systems]").

We do not suggest that the lack of notice in the FMVSS 208 rulemaking process of the standard's possible preemptive effect in any way tainted that process, for administrative law purposes. Nor do we suggest that an agency rule cannot have claim-preclusive effect on state law, even absent notice regarding such effect during the rulemaking process, in federally occupied fields of law, or when Congress has authorized preemption if the federal rule entirely "cover[s] the subject matter" addressed by a state-law damage claim. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 675 (1993).

Our contention, rather, is this. When Congress has not clearly authorized preemption of state-law damage claims outside federally occupied fields, and no agency dictate has rendered the basis of a state-law claim directly contradictory of the federal rule, courts should reject preemption arguments unless, at the least, the agency has concluded after notice and opportunity to comment that preemption is necessary to advance the regulatory program's goals. Any doctrine less respectful of state interests would skew the proper balance of power between Washington and the states, and would stifle the public's voice in matters critically affecting their rights. The proposition that federal regulations are to deprive Americans of their common-law remedies ought in principle to be tested by public debate in the political process, rather than imposed on the nation by the federal judiciary.

CONCLUSION

The Court of Appeals' decision finding that petitioners' claims are preempted should be reversed.

Respectfully submitted,

Robert B Leflar
(Counsel of Record)
University of Arkansas School of Law
Fayetteville, Ark. 72701
(501) 575-2709

Date: October 22, 1999