the requirement of any "statement" relating to smoking health, other than what the federal law imposed, and the 1969 provision barred the imposition of any "requirement or prohibition based on smoking and health" by any "State law." It was, thus, a fair question whether common-law claims, based on design defect, failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud, were preempted or whether only positive state enactments came within the scope of the clauses. Two groups of Justices concluded that the 1965 section reached only positive state law and did not preempt common-law actions;[36] different alignments of Justices concluded that the 1969 provisions did reach common-law claims, as well as positive enactments, and did preempt some of the claims insofar as they in fact constituted a requirement or prohibition based on smoking health.[37]

Little clarification of the confusing *Cipollone* decision and opinions resulted in the cases following, although it does seem evident that the attempted distinction limiting courts to the particular language of preemption when Congress has spoken has not prevailed. At issue in *Medtronic, Inc. v. Lohr*[38] was the Medical Device Amendments (MDA) of 1976, which prohibited states from adopting or continuing in effect "with respect to a [medical] device" any "requirement" that is "different from, or in addition to" the applicable federal requirement and that relates to the safety or effectiveness of the device.[39] The issue was whether a common-law tort obligation imposed a "requirement" that was different from or in addition to any federal requirement. The device, a pacemaker lead, had come on the market not pursuant to the rigorous FDA test but rather as

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Id. at 517; and id. at 532–33 (Justice Blackmun concurring and dissenting). Both parts of this canon are departures from established law. Narrow construction when state police powers are involved has hitherto related to *implied* preemption, not *express* preemption, and courts generally have applied ordinary-meaning construction to such statutory language; further, courts have not precluded the finding of conflict preemption, though perhaps field preemption, because of the existence of some express preemptive language. *See* id. at 546–48 (Justice Scalia concurring and dissenting).

[36] 505 U.S. at 518–19 (opinion of the court), 533–34 (Justice Blackmun concurring).

[37] 505 U.S. at 520–30 (plurality opinion), 535–43 (Justice Blackmun concurring and dissenting), 548–50 (Justice Scalia concurring and dissenting).

[38] 518 U.S. 470 (1996). *See also* CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) (under Federal Railroad Safety Act, a state common-law claim alleging negligence for operating a train at excessive speed is preempted, but a second claim alleging negligence for failure to maintain adequate warning devices at a grade crossing is not preempted); Norfolk So. Ry. v. Shanklin, 529 U.S. 344 (2000) (applying *Easterwood*).

[39] 21 U.S.C. § 350k(a).