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Mason A. Barney

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NOTES

Not As Bad As We Thought

THE LEGACY OF *GEIER V. AMERICAN HONDA MOTOR COMPANY* IN PRODUCT LIABILITY PREEMPTION*

I. INTRODUCTION

[I]n federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to displace state law, including state tort law, with the federal statute or regulation. The question of preemption is thus a question of federal law, and a determination that there is preemption nullifies otherwise operational state law.¹

This statement cuts to the heart of why preemption² is such a powerful, confusing and controversial area of federal law. By declaring that federal law preempts state actions³ in a

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¹ RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 4, cmt. e (1998).

² There is a difference of opinion on how to spell “preemption.” The modern Supreme Court appears to prefer the “pre-emption” spelling. *E.g.*, *Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 867 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *Jones v. Rath Packing, Co.*, 430 U.S. 519, 525 (1976). In contrast, most scholars on the topic appear to prefer the “preemption” spelling. *E.g.*, Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994). Since it is a scholarly work, this Note shall use the “preemption” spelling.

³ The term “state action[s]” as used in this note refers to both state legislatures creation of legislation and state judicial consideration of tort cases based on either state common law or state legislation.

given field, a judge permanently displaces all state claims within the scope of the federal law.⁴ This is the powerful aspect of preemption.⁵ However, because preemption rests upon the intent of Congress, a difficult concept to pin down under the best of circumstances, it remains (and probably will always be) a confusing and sometimes unpredictable area of federal law.⁶

This Note will examine the impact one case, *Geier v. American Honda Motors Company*,⁷ has had on the preemption doctrine as it applies to all product liability cases. In *Geier*, the Supreme Court considered the question of whether the federal regulation⁸ concerning the need for passive restraint technology⁹ in new cars preempted the plaintiff's claim of defective design against Honda for not manufacturing the 1987 Honda Accord with a driver's side air bag.¹⁰ The Court found Geier's claim to be preempted because it "would stand as an obstacle" to the Department of Transportation's (DOT) objectives for FMVSS 208.¹¹ A number of authors, including Justice Stevens for the dissent in *Geier*, declared that the

⁴ Several authors have referred to this type of action as "jurispathic," because, through federal preemption, a court can "kill" an entire segment of state law. Robert M. Cover, *The Supreme Court 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983). See also S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 694 (1991) (noting how a preemption ruling is almost always "jurispathic" in result).

⁵ See Hoke *supra* note 4, at 690-99 (declaring how the power of preemption rests in its ability to remove topics from the reach of state law).

⁶ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001) (stating that the court has over the years found the Supremacy Clause, a relatively clear and simple statement, very difficult to interpret consistently).

⁷ 529 U.S. 861 (2000).

⁸ The regulation in question in *Geier* was Federal Motor Vehicle Safety Standard 208. 49 C.F.R. §571.208 (1984) [hereinafter FMVSS 208]. The *Geier* suit only dealt with the 1984 version of the FMVSS 208. See *Geier*, 529 U.S. at 864.

⁹ Passive restraint technology is an automotive industry term referring to devices that protect the car's occupants in the event of a crash without requiring the occupant to actively engage the technology. Air bags, for example, automatically deploy in a crash without the driver having to perform any action beyond the normal operation of the car. On the other hand, regular seatbelts require the passenger to buckle them in order for them to be effective. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34-35 (1983) (hereinafter "State Farm"). See also 49 C.F.R. § 571.208 (2003) (requiring cars to meet the requirements using technology "that require no action by vehicle occupants"). In 1987, when *Geier*'s Honda was manufactured, the only passive restraint systems that could satisfy the standard were airbags and automatic seatbelts. *State Farm*, 463 U.S. at 35 (1983).

¹⁰ *Geier*, 529 U.S. at 864-65 (stating that the plaintiff's suit arose from injuries sustained in 1992 when the plaintiff crashed her 1987 Honda Accord, equipped only with seat belts, into a tree).

¹¹ *Id.* at 886 (internal quotations omitted).

decision shifted the balance of the federal and state power,¹² further “muddled” the already confusing preemption doctrine¹³ and limited many individuals’ rights to recover damages.¹⁴

In contrast to this position, this Note will argue that these declarations of doom were premature and exaggerated. *Geier* provides an excellent example of the Court’s modern approach to implied preemption, the case represents a refinement of the current preemption methodology without adversely affecting the way lower courts evaluate the federal-state balance.

Section II of this Note examines the history of federal preemption that shaped the Court’s decision in *Geier*. Section II first examines why the framers of the Constitution thought it necessary to expressly declare federal law’s supremacy over state law. Next, Section II briefly reviews the important preemption principles that developed over the last century. Section III of this Note summarizes the Supreme Court’s decision in *Geier* and comments on Justice Breyer’s reasoning. Section IV reviews the important effects of the *Geier* decision, and argues that those effects are logical extensions of the existing preemption doctrine. Finally, Section V provides several examples of how lower courts, and subsequently the Supreme Court, have interpreted and utilized the *Geier* decision. This last section includes a detailed look at the Supreme Court’s decision in *Sprietsma v. Mercury Marine*,¹⁵ which provides some validation that the lower courts have been interpreting *Geier* correctly.

¹² See *id.* at 906-07 (Steven, J., dissenting) (discussing how the majority has ignored the presumption against preemption, and forced the state plaintiff to show instead that their action does not interfere with the federal government’s regulation).

¹³ Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1, 3 (2002) (“[t]he *Geier* Court, . . . further muddl[ed] long standing preemption doctrine”); Nelson, *supra* note 2, at 232 (“Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle.”).

¹⁴ Stacey Allen Carroll, *Federal Preemption of State Products Liability Claims: Adding Clarity and Respect for State Sovereignty to the Analysis of Federal Preemption Defenses*, 36 GA. L. REV. 797, 819 (2002) (declaring that among *Geier*’s many damaging potential effects, one was that the holding “eviscerated the possibility of recovery for many injured plaintiffs”).

¹⁵ 537 U.S. 51 (2002).

II. BACKGROUND AND HISTORY OF PREEMPTION

Since the founding of this nation the preemption of state actions has been a hotly debated topic. The Constitution's Supremacy Clause declares: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land"¹⁶ From this "relatively clear and simple mandate,"¹⁷ grew most of the complex federal preemption doctrine.¹⁸ The doctrine's evolution began at the inception of the nation and it has continued to be refined up to the present day.¹⁹ The modern doctrine that has developed out of this evaluation is a complex one, which attempts to maintain a balance between the federal government and the states and contains inherent safeguards to preserve this balance.

A. *The Origins of Federal Supremacy*

The modern preemption doctrine, as embodied in the Supremacy Clause, was originally considered necessary to remedy one of the major deficiencies of the Articles of Confederation. Before the Constitution, the Articles of Confederation declared: "[e]very State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them."²⁰ Under this Article, however, the state and federal

¹⁶ U.S. CONST. art. VI, cl. 2.

¹⁷ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001) (stating that the court has over the years found the Supremacy Clause, a relatively clear and simple statement, very difficult to consistently interpret).

¹⁸ It is important to note that not all federal preemption occurs strictly under the Supremacy Clause. For example preemption can also occur under the dormant commerce clause or the privileges and immunities clause. Additionally, in order for a federal action to have preemptive effect it must first be a valid exercise of federal power. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW*, 303 (2001) (summarizing the various ways Congress can limit state regulatory and taxing power). *But see* Gardbaum, *supra* note 2 (arguing that contrary to the mainstream opinion, supremacy of federal law and the preemption of state law are in fact two different legal concepts, and for the sake of clarity of the doctrine should not be viewed as the same). Gardbaum argues that a supremacy doctrine should be used on a case-by-case basis to determine which law, state or federal, should apply, whereas a preemption doctrine should be used when Congress has explicitly stripped a state of jurisdiction in a given area. *Id.*

¹⁹ See Gardbaum, *supra* note 2, at 785-807 (providing a detailed "Constitutional History of Preemption"); Davis, *supra* note 2 at 972-1005 (discussing the history of preemption in the 20th century).

²⁰ ARTICLES OF CONFEDERATION art. XIII. See generally Nelson, *supra* note 2, at 247 n.66 (providing a history of supremacy in the United States, including supremacy under the Articles of Confederation).

judicial systems operated completely independent of one another.²¹ This separate and equal existence meant that state judges were not bound to enforce the determinations of Congress unless the state legislature passed a law implementing the congressional act.²² This practice allowed states to sidestep federal legislation they considered to be against their interests. If an individual state did not agree with Congress on an issue, the state could simply not enact any enforcing legislation.²³ Consequently, the effectiveness of the central government under the Articles of Confederation was severely limited even over those areas where the Articles gave the central government control.²⁴ Having learned from the weaknesses of the Articles of Confederation,²⁵ the Constitution's framers not only required states to enforce federal law,²⁶ but made federal law the "highest in authority" in every state.²⁷

²¹ See THE FEDERALIST No. 44, at 236 (James Madison) (George W. Carey, James McClellan ed., 2001) (stating that, during the writing of the Constitution, many state constitutions did not even recognize the existence of the federal government).

²² Nelson, *supra* note 2, at 247; THE FEDERALIST No. 15, at 71 (Alexander Hamilton) (George W. Carey, James McClellan ed., 2001) (referring to the ineffectiveness of laws passed by Congress under the Articles of Confederation, Hamilton stated: "in practice they are mere recommendations which the States observe or disregard at their option."). See also Gerald Gunther, *The Supremacy Clause: The Central Element of the Constitutional Scheme*, in OUR PECULIAR SECURITY: THE WRITTEN CONSTITUTION AND LIMITED GOVERNMENT 133, 136-37 (Eugene W. Hickock Jr. et al. eds. 1993) (stating that under the Articles of Confederation there was an "absence of machinery to enforce national measures . . . against individuals").

²³ See Gunther, *supra* note 22, at 136 (arguing that the idea of supremacy of the federal government was not a new idea to the Constitution and that the problem with the supremacy of the Articles of Confederation arose from their implementation and not their underlying theory). See e.g., Nelson, *supra* note 2, at 248-250 (discussing how after the Treaty of Peace which ended the revolutionary war, the states and Congress disagreed over whether the Treaty automatically became part of every state's laws and therefore overrode previous or subsequent state acts that ran counter to it).

²⁴ See THE FEDERALIST No. 44, at 236 (James Madison) (George W. Carey, James McClellan ed., 2001) (arguing in favor of the need for the Supremacy Clause by comparing the powers of Congress under a Constitution without the Supremacy Clause to "the same impotent condition with [Congress under the Articles of Confederation]").

²⁵ See *id.* (giving four reasons why, in comparison to the government under the Articles of Confederation, the Supremacy Clause was necessary; 1) the federal Constitution made the state sovereign powers, and therefore as such they could potentially have annulled any act performed under a power beyond that granted the Congress under the Articles of Confederation; 2) many of the state constitutions did not recognize the federal government, and without the Supremacy Clause, in those states, the power of the federal government could be questioned; 3) since the constitutions of the states are different, a federal law or treaty might conflict with some and not with others, thereby making federal law applicable in some states and not in others; and 4) without the Supremacy Clause, the federal government would be at the mercy of every state government, creating "a monster, in which the head was under the direction of the members.").

²⁶ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall

Despite this apparent agreement about the necessity of the Supremacy Clause, even from the early history of the republic,²⁸ settling on where the federal law ends and state law begins has always been a contentious issue.²⁹ According to the Supreme Court, the question of where to draw this line is a matter of Congressional intent.³⁰ Framing the decision to preempt in terms of Congressional intent may have made the preemption doctrine more difficult to implement, but it was the correct approach.³¹ It is correct because as shown, the framers unquestioningly made congressional laws supreme over the

be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding.”)

²⁷ Nelson, *supra* note 2, at 250-252 (describing why the framers thought it important to include the Supremacy Clause). Additionally Nelson stated that both Samuel Johnson in his 1785 dictionary of the English language, and Chief Justice Marshall in his article in defense of *McCulloch v. Maryland*, defined supreme to mean “highest in authority.” *Id.* at 250.

²⁸ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 3 (1824) (declaring that New York’s grant of a monopoly over the water transportation in New York harbor “in collision with the acts of Congress regulating the coasting trade, which being made in pursuance of the Constitution, are supreme, and the State laws must yield to that supremacy. . . .”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). The Court stated:

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

Id. See also HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL 1801-1835*, at 140-47 (1997) (discussing *McCulloch’s* position as Marshall’s premier opinion defining the federal-state balance, but acknowledging that even after the opinion, there was still considerable debate over federal supremacy, to the point that Marshall later wrote anonymous essays replying to numerous attacks on the very concept of federal supremacy).

²⁹ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001) (“[The Supremacy Clause] has generated considerable discussion in cases where we have had to discern whether Congress has preempted state action in a particular area.”).

³⁰ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (“[p]re-emption fundamentally is a question of congressional intent.”).

³¹ See *Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 907-908 (2000) (Stevens, J., dissenting) (arguing that placing the power of preemption in Congress’s hands is correct as an inherent structural safeguard to the preemption principle). Justice Stevens declared that Congress, as the branch which most represents the interests of the states, would be the best branch to balance the power between the federal government and the state. *Id.* at 908. This is also not just Justice Stevens’ theory. In the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat 48 (codified in scattered sections of 2 U.S.C), Congress ordered the Congressional Budget Office to review all legislation coming out of committee for potential unfunded mandates that the legislation will place on the states, especially areas where the federal law will preempt state laws. CONGRESSIONAL BUDGET OFFICE, *PREEMPTIONS IN FEDERAL LEGISLATION IN THE 106TH CONGRESS* (JUNE 2001), available at <ftp://ftp.cbo.gov/28xx/doc2885/Preemptions.pdf>.

states.³² Additionally, as Justice Marshall in *McCulloch* phrased it, Congress may choose whatever means it deems “necessary and proper . . . for carrying its powers into execution.”³³ Therefore, the decision of whether it is “necessary and proper” to preempt state law is a decision Congress must make and determining its intent is the “ultimate touchstone” of every preemption analysis.³⁴

Determining whether Congress intended to preempt a given state action is, however, a difficult proposition.³⁵ It is impossible for Congress to articulate for every conceivable situation whether it intended to preempt the state law at issue.³⁶ Rather, courts are charged with determining on a case-by-case basis whether Congress intended to preempt the particular state action. Since Congress rarely speaks with one voice in giving its reasons for enacting a law, the Supreme Court has stated that, as an initial matter, “evidence of preemptive purpose [should be] sought in the text and structure of the statute at issue.”³⁷

However, a statute’s text often does not clearly evince Congress’s intent.³⁸ In these instances, courts must often resort

³² Yet, the federal government is inherently a government of limited power, and its laws are superior to state laws only when it acts within one of its enumerated powers. See CHEMERINSKY, *supra* note 18, at 304.

³³ 17 U.S. (4 Wheat.) at 324. See also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (declaring that since *McCulloch*, it has been clear that any “state law that conflicts with federal law is ‘without effect.’”); THE FEDERALIST No. 33 at 158-161 (Alexander Hamilton) (George W. Carey, James McClellan ed., 2001) (arguing that the Supremacy Clause and the Necessary and Proper Clause are merely truisms which cannot exist without each other).

³⁴ *Cipollone*, 505 U.S. at 516 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))).

³⁵ *Hines v. Davidowitz* 312 U.S. 52, 67 (1941) (“There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress.”).

³⁶ See *Malone*, 435 U.S. at 504 (stating that Congress rarely indicates its preemptive intent clearly). When courts talk about preempting state law, they sometimes will also include state common law. Compare *Cipollone*, 505 U.S. at 521 (discussing how the phrase chosen by Congress to discuss the state laws it intended to preempt was broad and included state common law as well as positive state enactments) with *Geier*, 529 U.S. at 868 (declaring that the express preemption clause in the Federal Motor Vehicles Safety Act does not automatically preempt state common law because of the saving clause).

³⁷ *CXS Transp. v. Easterwood*, 507 U.S. 658, 664 (1993) (evaluating the reach of the express preemption clause in the Federal Railroad Safety Act, Justice White first analyzed the words in the clause to see if the words provided any guidance as to Congress’s preemptive intent).

³⁸ See *Colon ex rel. Molina v. BIC USA, Inc.*, 136 F. Supp. 2d 196, 202-05 (S.D.N.Y. 2000) (discussing the difficulty of discerning Congress’s preemptive intent when the Consumer Product Safety Act contains both an express preemption clause,

to using circumstantial evidence, like the history surrounding the law or regulation,³⁹ or an implementing agency's post hoc opinion of the act,⁴⁰ to determine whether Congress intended to preempt the state action.⁴¹ One illustration of how problematic this determination can be is the fact that the Supreme Court has attempted to tackle preemption questions no fewer than 300 times in the past fifty years.⁴² Simply by virtue of this volume of decisions, it is easy to understand why the resulting doctrine is quite convoluted.⁴³

B. *How Congress Can Preempt State Actions*

The complexity of the preemption problem has created a doctrine where by Congress is said to have preempted state actions in a variety of different situations. Beginning in the early part of the 20th century,⁴⁴ the Court recognized that a state action could be preempted in two ways—either expressly or impliedly.⁴⁵ Express preemption occurs when Congress

and a saving clause that states that compliance with the Act does not exempt an individual from common law liability).

³⁹ *Geier* was by no means the first case where the Supreme Court used resources beyond the text of the statute to interpret Congress's intent. In what Professor Gardbaum believed was the genesis of modern implied preemption theory, Gardbaum, *supra* note 2, at 807, the Court in *Rice v. Santa Fe Elevator*, 331 U.S. 218 (1947), relied heavily on statutory history in holding that the Warehouse Act implicitly preempted state regulatory actions regarding Warehouse rates. *Id.* at 232.

⁴⁰ *See e.g.*, *Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 875-85 (2000) (using the Department of Transportation's evaluation of the preemptive effects of the regulation in making the Court's final determination); *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) (evaluating an action challenging the constitutionality of local ordinances governing blood donation, the Court placed a good deal of emphasis on the Food and Drug Administration's intention not to preempt state actions).

⁴¹ *See* S. Doc. No. 103-6, at 917-19 (1992) (Supp. S. Doc. No. 106-27 (2000)) at 918 (describing for U.S. Senators the role of the courts and the methods the courts employ when deciding a preemption case), available at <http://www.gpoaccess.gov/constitution/pdf/con009.pdf>.

⁴² *Davis*, *supra* note 2, at 969 n.9 (describing how there had been approximately 150 Supreme Court decisions concerning *preemption* between 1940 and 1980, and then approximately another 150 decisions on the subject between 1980 and 2000).

⁴³ *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that it is impossible to formulate a simple "yardstick" or "infallible" test; preemption inherently requires a complex analysis without a "clear distinctly marked formula").

⁴⁴ Professor Davis has argued that much of modern preemption doctrine was developed as a response to the expansion of congressional power during the New Deal. *Davis*, *supra* note 2, at 978.

⁴⁵ *See Jones v. Savage*, 225 U.S. 501, 533 (1912) ("For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed.").

declares within a statute its intention to preempt state laws governing the same issue as the federal law.⁴⁶ Conversely, implied preemption occurs when an act's "structure and purpose"⁴⁷ suggest that Congress intended federal law to supersede state actions governing the same field or issue.⁴⁸

The Supreme Court has accepted two different categories of implied preemption. One category of preemption, called "field preemption," is found where Congress legislates a field so completely that it is clear Congress intended the federal government to have exclusive jurisdiction in that field.⁴⁹ The second category of implied preemption is broadly referred to as "implied conflict preemption," or just "conflict preemption."⁵⁰ Conflict preemption can be found in two different situations. One instance of conflict preemption is when the state action is incompatible with the congressional law, such as when it is physically impossible for an individual to simultaneously comply with both the federal law and the state law.⁵¹ This is often referred to as "physical impossibility" conflict preemption.⁵² The other situation where conflict preemption occurs is where the state action will stand as an

⁴⁶ *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("[W]hen Congress has made its intent known through explicit statutory language, the court's task is an easy one."). *E.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding that the section of the Public Health Cigarette Smoking Act of 1969 which stated "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" expressly showed Congress's intent to preempt all state laws relating to the labeling of cigarette packages).

⁴⁷ *Jones v. Rath Packing* 430 U.S. 519, 529 (1976) ("[State law is preempted] whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.>").

⁴⁸ *E.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (dismissing plaintiff's state law "fraud on the FDA" claim, because such a claim would stand as an obstacle to the flexibility built into the Food and Drug Administration's regulatory process, and therefore was implicitly preempted by the Food, Drug, and Cosmetic Act).

⁴⁹ *E.g.*, *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926) (affirming the judgment of the Wisconsin Supreme Court that in delegating authority to the Interstate Commerce Commission over "the design, construction and material of every part of the locomotive," Congress had occupied the field of locomotive safety and had excluded all state actions on the topic); *Rice v. Santa Fe Elevator* 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.>").

⁵⁰ *See Gibbons v. Ogden* 22 U.S. (9 Wheat.) 1 (1824) (declaring that since the New York grant and the Federal license conflict, the New York grant can not be allowed to stand).

⁵¹ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) ("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 . . .").

⁵² *Carroll, supra* note 14, at 821.

obstacle to the federal law's objectives.⁵³ Commentators often refer to this latter form of conflict preemption as "obstacle preemption" or "frustration of purpose preemption."⁵⁴

The Supreme Court in *Geier* ultimately rested their decision on an obstacle preemption theory.⁵⁵ The Court's majority based this conclusion on the idea that the plaintiff's tort claim would frustrate the Department of Transportation's objectives for FMVSS 208.⁵⁶ Despite the Court's recent reliance on obstacle preemption in *Geier*, this type of preemption has long been the most contentious.⁵⁷ Most commentators have been concerned about the expansion of obstacle preemption due to its inherent ability for courts to manipulate a perceived congressional objective.⁵⁸ This issue of what were Congress's objectives was, in fact, the major disagreement between the majority and dissent in *Geier*. Justice Breyer, writing for the majority, declared the objective of FMVSS 208 to be the "gradual phase-in of passive restraints."⁵⁹ Conversely, Justice Stevens, writing for the dissent, stated the objective to be the

⁵³ *Hines v. Davidowitz* 312 U.S. 52, 67 (1941) ("Our primary function is to determine whether, under the circumstances of this particular case, [the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."). *E.g.*, *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169 (M.D. Pa. 2001) (finding that a "shoulder-only" automatic seat belt defective design claim would stand as an obstacle to FMVSS 208's objective of offering manufacturers a choice of restraint technologies). *See also* Nelson, *supra* note 2, at 265-70 (discussing how the Supreme Court in *Perez v. Campbell*, 402 U.S. 637, 650 (1971), traced the origins of obstacle preemption back to a quote from Chief Justice Marshall's decision in *Gibbons v. Ogden*, "'acts of the State Legislatures . . . [which] interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution,' are invalid under the Supremacy Clause").

⁵⁴ Stephen R. Bough & Lynn R. Johnson, *Crossing the Center Line: Preemption in Automobile Product Liability Cases*, 57 J. MO. B. 30, 31 (2001) ("Obstacle or frustration of purpose preemption is quite common, and is found where state laws frustrate the purpose behind the federal statutes regulating the same subject matter.").

⁵⁵ *Geier*, 529 U.S. at 881 (holding that the plaintiff's tort action creating a duty to install airbags on all 1987 cars would present an obstacle to the mix of passive restraint devices sought by the federal regulation).

⁵⁶ *See* discussion *infra* Part II.B.

⁵⁷ *Rice v. Santa Fe Elevator* 331 U.S. 218, 231 (1947) (Referring to obstacle preemption, the court stated, "[i]t is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the state undisturbed except as the state and federal regulations collide").

⁵⁸ *The Supreme Court 1999 Term—Leading Cases*, (pt. III A) 114 HARV. L. REV. 339, 345-46 (2000) [hereinafter *Supreme Court 1999, Leading Cases*] (quoting *Hines v. Davidowitz*, 312 U.S. at 67) ("Because obstacle preemption relies by definition on the 'full purposes and objectives of Congress,' its boundaries are somewhat indeterminate."). *See* Davis, *supra* note 2, at 1021 (discussing how obstacle preemption eradicated the presumption against preemption and ultimately leads to a presumption in favor of preemption).

⁵⁹ *Geier*, 529 U.S. at 879.

general reduction in automotive related injuries.⁶⁰ The majority's narrowly defined objective resulted in more state actions conflicting with it, whereas the dissent's more broadly defined objective was harmonious with more state actions, thereby preserving those actions.⁶¹ Despite all this, however, it is important to remember that the category distinctions for preemption (express preemption, physical impossibility preemption, field preemption, and obstacle preemption) are by no means rigid, and the lines between them are often unclear.⁶²

C. *The Presumption Against Preemption*

The presumption against preemption is an additional rule of interpretation that the Supreme Court and commentators have often cited as a limitation to federal preemption.⁶³ In an oft-cited passage,⁶⁴ the Supreme Court in *Rice v. Santa Fe Elevator Corp.*⁶⁵ explained that an analysis of a

⁶⁰ *Id.* at 889 (Stevens, J. dissenting). This disagreement was due in large measure to the fact that Justice Stevens was taking as the congressional objective only the objective stated in the Safety Act. *Id.* Justice Breyer however chose to say that the congressional objective was in fact the DOT's objective since the DOT was the rule making body as concerns FMVSS 208. *Id.* at 874-75 (Breyer, J. majority).

⁶¹ *Supreme Court 1999, Leading Cases, supra* note 58, at 345 (pointing out that the majority's narrower objective had a broader "preemptive scope" than the dissent's looser objective).

⁶² *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (discussing how this framework is not "rigidly distinct," but that since it had been previously recognized that the court believed it appropriate to invoke it generally). An excellent example of the vagueness of this line comes from *Cipollone v. Liggett Group Inc.*, 505 U.S. at 518. As Justice Thomas later explained it in *Freightliner Corp. v. Myrick*, the Court in *Cipollone* first stated that it must analyze the case using only the express preemption clause in the Federal Cigarette Labeling and Advertising Act, but then two paragraphs later engaged in a clear conflict preemption analysis. *Freightliner Corp. v. Myrick* 514 U.S. 208, 288-289 (1995) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)).

⁶³ *See English*, 496 U.S. at 79 (stating that the court has been hesitant to find field preemption in areas governed by the presumption against preemption); *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715-716 (1985) (describing how the presumption against preemption made the court less inclined to find the local ordinance implicitly preempted, because an ordinance regulating the safety of blood plasma dealt with the health of the state's citizens, a field traditionally occupied by the state).

⁶⁴ According to the Westlaw Online Custom Digest for the presumption KeyCite (KeyCite 360k18.3), *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) had been cited 781 times as of Feb. 2, 2005. This makes *Rice* the most frequently cited case for this proposition. *See also* Gardbaum, *supra* note 2, at 807 (stating that the *Rice* decision was the "*locus classicus*" of the modern preemption doctrine, and that it is the most cited statement of the presumption against preemption).

⁶⁵ 331 U.S. 218 (1947) (deciding, in light of the state's long standing interest in internal state commerce, if the Illinois Commerce Commission had been preempted from adjudicating complaints concerning unjust and excessive rates for the storage of grain).

preemption issue begins “with the assumption that the historic police powers of the state were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress.”⁶⁶ While the presumption has had a limited effect in the area of express preemption,⁶⁷ its effects have been far greater in the area of implied preemption.⁶⁸ According to the Court, the presumption against preemption is a counterweight against the judiciary’s tendency towards giving an expansive interpretation to ambiguous congressional intent.⁶⁹ As Justice Thurgood Marshall explained, the real purpose behind the presumption is to ensure that the carefully established balance between the federal government and the states is not “disturbed unintentionally by Congress or unnecessarily by the courts.”⁷⁰

While serving an important role in preserving the federal-state balance, the presumption against preemption is nevertheless only a tool of interpretation.⁷¹ Rather than stifling

⁶⁶ *Id.* at 230. While not an issue in *Geier*, it is important to note that a threshold inquiry to the presumption is its applicability only in areas of historic state control. In areas that have traditionally been regulated by the federal government, like the nuclear power industry, the presumption against preemption does not apply. *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248-249 (1984) (discussing the federal government’s long standing occupation of all regulations relating to the field of nuclear power). Additionally, the court in *Rice* also stated that the “clear and manifest purpose of Congress” could be established through either express or implied preemption theories. 331 U.S. at 230.

⁶⁷ *See Cipollone*, 505 U.S. at 518 (Stevens plurality opinion) (Discussing an express preemption clause, the plurality declared “we must construe these provisions in light of the presumption against the *preemption* of state police power relations. This presumption reinforces the appropriateness of a narrow reading of [the express preemption clause.]” (emphasis added). *But see* Nelson, *supra* note 2, at 293-94 (questioning the appropriateness of the application of the presumption against preemption to express preemption clauses, especially since Congress, in theory, has already taken into account state interests when it wrote the law, and therefore asserting that there is no need, as a rule of statutory interpretation, to give those same interests a preferable standing).

⁶⁸ *See* Nelson, *supra* note 2, at 293 (stating that that the courts have always required “persuasive reasons” when declaring a state law to be preempted by implication of federal law); *Florida Lime & Avocado Growers, Inc v. Paul*, 373 U.S. 132, 142 (1964) (“[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons.”).

⁶⁹ *Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (“[T]he presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless . . . doctrine of implied conflict preemption . . .”).

⁷⁰ *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *See United States v. Bass* 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”).

⁷¹ *See* Gardbaum, *supra* note 2, at 805-07 (describing the history behind the presumption, and clearly stating that it was a creation of the court to help it in divining Congress’s intent in implied preemption situations).

in any way Congress's ability to preempt state law, the presumption is intended merely to aid the judiciary in discerning Congressional intent—the “ultimate touchstone” of every preemption case.⁷² In recent years, many commentators have noted that the presumption has somewhat fallen into disfavor with the Court.⁷³ However, as a tool of interpretation the presumption has been re-interpreted and applied in diverse ways by the Court over time.⁷⁴ While it is true that, in recent years, the Supreme Court appears to have invoked the presumption by name less frequently,⁷⁵ it is a mistake to conclude that the Court therefore ignored the presumption entirely in implied preemption cases.⁷⁶ Rather, it is more accurate to say that the Court simply has found reasons to say that the given legislation or regulation overcame the presumption against preemption.⁷⁷

III. *GEIER V. AMERICAN HONDA MOTOR COMPANY*

In 1992, Alexis Geier hit a tree while driving her 1987 Honda Accord.⁷⁸ At the time, she was wearing a manual shoulder and lap seat belt—the only passive restraint technology the car possessed.⁷⁹ The car was not equipped with a driver's side air bag.⁸⁰ After the accident, Ms. Geier and her

⁷² Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963).

⁷³ See, e.g., *Supreme Court 1999, Leading Cases*, *supra* note 58, at 339-40; Raeker-Jordan, *supra* note 13, at 1-3.

⁷⁴ See generally Davis, *supra* note 2, at 972-97 (providing a detailed history of the evolution of the preemption doctrine and specifically the presumption against preemption).

⁷⁵ See *id.* at 990-97 (detailing the use of the presumption against preemption in the 1980's and 1990's).

⁷⁶ *Contra* Geier v. Am. Honda Motors Co., 529 U.S. 861, 906-907 (2000) (Stevens, J., dissenting) (stating that the majority ignored the presumption and “put the burden on petitioners to show that their tort claim would not frustrate the Secretary's purposes”); Raeker-Jordan, *supra* note 13, at 43-44 (declaring that the Geier court departed from its established preemption doctrine and ignored the presumption against preemption).

⁷⁷ See discussion *infra* Part III.B. See also Ernest A. Young, *State Sovereign immunity and the Future of Federalism*, 1999 SUP. CT. REV 1, 40 (1999) (“[O]ne critical characteristic of the presumption against preemption is that it can be overcome by an adequate showing of Congressional intent”). Professor Young notes that there are very few meaningful limits that can be placed on the preemption doctrine while remaining true to the Supremacy Clause. *Id.* at 40 n.181. As a result, he suggests that the Court's reluctance in recent years to interpret preemption too narrowly stems from the Court's inherently limited political capital and its desire not to enter into direct conflict with Congress over the issue. *Id.* at 38.

⁷⁸ *Geier*, 529 U.S. at 865.

⁷⁹ *Id.*

⁸⁰ *Id.*

parents filed a common law claim in the District of Columbia against American Honda Motor Company Inc. (Honda), alleging that Ms. Geier's Accord had been negligently and defectively designed because it lacked a driver's side air bag.⁸¹ Honda, however, responded by arguing that the 1984 version⁸² of Federal Motor Vehicle Safety Standard 208 (FMVSS 208), promulgated under the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act),⁸³ both expressly and impliedly preempted any state action against Honda for not installing a passive restraint system.⁸⁴

A. *The Express Preemption and Saving Clauses*

Justice Breyer, writing for a five-member majority,⁸⁵ started his analysis by examining whether the Safety Act's express preemption clause affected Ms. Geier's action.⁸⁶ Contrary to the approach advocated by Honda,⁸⁷ Justice Breyer did not solely look to the text of the Act's express preemption clause,⁸⁸ stating instead that the express preemption provision

⁸¹ *Id.*

⁸² Geier's Honda had been manufactured in 1987 under the 1984 version of FMVSS 208. *Id.* at 864. As a result, the Court only examined the 1984 version of FMVSS 208. *Id.* at 864-65.

⁸³ Pub. L. No. 89-563, 80 Stat. 718 (codified as amended at 15 U.S.C. §§ 1381-1431 (1988)).

⁸⁴ Brief for Respondent at 9, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (No. 98-1811). In its brief Honda clearly stated that it was worried about "massive, repeated, tort liability for having installed seat belts, and not airbags." *Id.* at 7. With that as its primary concern, Honda's position was that the express preemption clause of the Safety Act preempted any attempt by the state to establish any safety standard, which Honda argued included the creation of a standard through tort actions. *Id.* Honda contended that the saving clause did not preserve any liability, but instead simply precluded a defendant from asserting a defense of compliance with a federal standard. *Id.* at 7-8. While the Court did eventually find that the plaintiff's claims were preempted, it rejected most of Honda's reasoning for doing so. *Geier*, 529 U.S. at 867-68.

⁸⁵ The five member majority consisted of Chief Justice Rehnquist, and Associate Justices Breyer, O'Connor, Scalia, and Kennedy. *Geier*, 529 U.S. at 863.

⁸⁶ *Id.* at 867.

⁸⁷ Brief for Respondent at 10-14, *Geier* (advocating that the plain language of the express preemption clause showed that it was meant to encompass common law actions).

⁸⁸ The Safety Act's express preemption clause read:

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.

Geier, 529 U.S. at 867 (quoting 15 U.S.C. § 1392(d) (repealed 1994)) (internal quotations omitted).

must be interpreted along with the Safety Act's "saving clause."⁸⁹ The saving clause stated, "[c]ompliance with' a federal safety standard 'does not exempt any person from any liability under common law.'"⁹⁰

In holding that "[t]he saving clause assumes that there are some significant number of common-law liability cases to save,"⁹¹ Justice Breyer argued that if the express preemption clause applied to common law actions, then there would be little, if any, common law liability remaining.⁹² Yet if Congress had intended little or no liability to remain, Justice Breyer questioned why the Act would include a saving clause, which had no meaning other than to exclude a type of defense to a common law tort claim.⁹³ Consequently, he held that a broad reading of the express preemption clause could not be correct. In order to harmonize the two clauses,⁹⁴ Justice Breyer declared that, read in the "presence of the saving clause," the express preemption clause inherently preempted positive state actions,

⁸⁹ *Geier*, 529 U.S. at 868. Justice Breyer did concede that a broad reading of the express preemption clause, without the saving clause, would probably preempt common law tort actions as well as positive state legislative enactments. *Id.* However, he points out that such a reading would eliminate all potential liability at common law, and he said there was no convincing evidence that Congress sought to do this. *Id.*

⁹⁰ *Id.* The full text of the saving clause reads: "[C]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k) (repealed 1994). Justice Breyer chose to refer to this clause as the "saving clause" because, in his analysis, it preserved, or saved, the common law from being totally preempted by the express preemption clause. The term "savings clause" was the term favored in the brief for the Solicitor General when referring to §1397(k). Brief for the United States as Amicus Curiae Supporting Affirmance at 8, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (No. 98-1811). To the contrary, *Geier*, who was advocating that the saving clause preserved all tort actions, preferred the term "anti-preemption provision" to refer to § 1397(k). Brief for Petitioner at 14, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (No. 98-1811).

⁹¹ *Geier*, 529 U.S. at 868. This statement is probably the single most fundamental building block upon which the Court's interpretation of the express and saving clauses rests.

⁹² *Id.*

⁹³ *Id.* This holding can be understood as a response to the position held by Honda and several lower courts that the saving clause merely prohibited a defendant from defending an action by asserting compliance with a federal standard. See Brief for Respondent at 21-26, *Geier*; *Sprietsma v. Mercury Marine*, 729 N.E.2d 45, 49-50 (Ill. App. Ct. 2000), *aff'd*, 757 N.E.2d 75 (Ill. 2001), *rev'd*, 537 U.S. 51 (2002) (holding, before *Geier* was decided, that the Federal Boating Act's saving clause, which was worded very similarly to the Safety Act's saving clause, was merely meant to preclude a defense of compliance).

⁹⁴ *Supreme Court 1999, Leading Cases, supra* note 58, at 340-41 (characterizing Justice Breyer's decision as harmonizing the preemption and saving clauses).

such as a legislative enactment, but did not necessarily preempt state common law tort actions.⁹⁵

Having determined that the saving clause preserved some common law actions, Justice Breyer next examined whether the clause went further, preserving absolutely all tort actions from ever being preempted under the Safety Act.⁹⁶ He concluded, “that the savings clause . . . does *not* bar the ordinary working of conflict preemption principles.”⁹⁷ Justice Breyer reasoned that Congress would not enact legislation that required “compliance-with-federal-regulation” as a precondition, and then allow states to carve away the regulation through common law actions that conflicted with it.⁹⁸ It was more likely, in his opinion, that the saving clause was designed as a buffer to the express preemption clause to allow for some common law liability while still preserving implied preemption principles to protect the overall objectives of the regulation.⁹⁹ Justice Breyer stated that, in the past, the Court had refused to read a saving clause broadly when such a

⁹⁵ *Geier*, 529 U.S. at 868. See also *Rogers v. Cosco* 737 N.E.2d 1158 (Ind. Ct. App. 2000) (interpreting the Safety Act’s having both a preemption and a saving clause as a “congressional compromise” between a national interest in uniformity and a local interest in compensating accident victims based upon common law tort standards). According to the Indiana Court of Appeals in *Rogers*, the dichotomy between legislative actions versus common law actions should not be taken too literally. *Id.* at 1164-1165. There the defendants argued that the saving clause was inapplicable because the Indiana state legislature had included product liability common law negligence actions within the framework of its product liability statute. *Id.* at 1164. The Court of Appeals however said that this distinction was without merit because the underlying purpose behind the express preemption clause was to bar state courts from enacting motor vehicle safety regulations that were different from the national standard. *Id.* at 1165. The appellate court held that it was not Congress’s intent to render inapplicable a state’s general common law standards simply because the state chose to codify those standards. *Id.*

⁹⁶ *Geier*, 529 U.S. at 869. The petitioner (*Geier*) advocated in her brief that the Safety Act’s saving clause exempted all common law actions from the effects of the express preemption clause. Brief for Petitioner at 35-41, *Geier v. Am. Honda Motor Co.*, 519 U.S. 861 (2000) (No. 98-1811). Then she took this argument a step further. Ms. *Geier* asserted that, according to Supreme Court precedent, the inclusion of an express preemption clause did not specifically preclude common law actions from being impliedly preempted. *Id.*

⁹⁷ *Geier*, 529 U.S. at 869. (emphasis added).

⁹⁸ *Id.* at 869-70. This reading complied with Justice Scalia’s comments in *Cipollone*, where he expressed concern over what he perceived as the Court’s declaration that when express preemption exists, implied preemption cannot also exist. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 547-548 (1992) (Scalia, J. concurring in the judgment in part and dissenting in part). In this comment he stated that it would be inconsistent with precedent to hold that a state “could impose requirements entirely contrary to federal law” so long as they were outside the prescribed scope express preemption clause. *Id.* at 547.

⁹⁹ *Geier*, 529 U.S. at 870.

reading would unbalance an established federal regulatory scheme.¹⁰⁰ This determination, that in statutes containing both an express preemption clause and a saving clause, the “ordinary workings of [implied] preemption” still apply,¹⁰¹ has proven to be one of *Geier*’s most important contributions to the preemption doctrine.¹⁰²

B. Did Geier’s Action Conflict with FMVSS 208?

Applying this analysis to the facts at hand, the Court identified the major question posed as whether a common law “no airbag” action would conflict with FMVSS 208.¹⁰³ Since FMVSS 208 was a regulation promulgated under a congressional act, the regulation’s preemptive reach became a question of departmental intent.¹⁰⁴ To determine whether the Department of Transportation (DOT) intended to preempt state law, Justice Breyer looked to the history of the regulation, the DOT’s comments at the time of FMVSS 208’s promulgation, and the department’s current stance on the issue.¹⁰⁵ The regulation’s history, as presented in the Court’s opinion, showed how the DOT had struggled since 1970 to implement a passive restraint requirement that would be economical for the manufacturers to implement and which the public would embrace.¹⁰⁶ The Department’s contemporaneous explanation of the regulation made clear that there were seven “significant considerations” that were taken into account when creating the

¹⁰⁰ *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 106-07 (2000)).

¹⁰¹ *Id.* at 869. This was the interpretation advocated by the Solicitor General in his brief *Amicus Curiae* and on behalf of the DOT. Brief for the United States as *Amicus Curiae* Supporting Affirmance at 8-9, *Geier*. He argued, when Congress legislates it always does so “against the background of the Supremacy Clause.” *Id.* at 17. Implicit in this background is the understanding that the federal law will always prevail when there is a conflict between state and federal law. *Id.* As a result, unless Congress expressly excludes it from implied preemption, common law claims preserved by a saving clause, must still be subject to the limitations of implied preemption. *Id.* 17-18. If common law actions were allowed to operate outside of implied preemption principles, the Solicitor General reasoned that the actions could then undermine the congressional objectives for a given regulation. *Id.*

¹⁰² See discussion *infra* Part V.A.

¹⁰³ *Geier*, 529 U.S. at 874.

¹⁰⁴ In this situation Justice Breyer stated that “[t]he agency is likely to have a thorough understanding of its own regulations and its objective and is ‘uniquely qualified’ to comprehend the likely impact of state requirements.” *Id.* at 883. Therefore, he declared that the Agency’s own views should make a difference in the interpretation of its own regulation. *Id.*

¹⁰⁵ *Id.* at 874-75, 881.

¹⁰⁶ *Id.* at 875-77.

regulation.¹⁰⁷ The DOT made clear that seatbelts were a critical part of overall passenger safety.¹⁰⁸ In 1984, less than 20% of front seat passengers used manual seatbelts.¹⁰⁹ Airbags and other passive restraint systems could bridge the safety gap created by the lack of individuals using seat belts.¹¹⁰ Yet the DOT also had to take into account the fact that passive restraint systems had their own problems.¹¹¹ Non-detachable automatic safety belts had their own shortcomings and were disliked by the public.¹¹² Moreover, airbags could be hazardous, and were significantly more expensive to install and maintain than automatic safety belts.¹¹³

The DOT believed that FMVSS 208 had two important components that would balance these varying and somewhat conflicting considerations.¹¹⁴ The DOT allowed manufacturers to choose between several different passive restraint systems.¹¹⁵ By not mandating a single type of passive restraint system, it was thought that manufactures would have more of an incentive to explore alternative passive restraint systems in the hopes that they could improve the automobile's safety and reduce the passive restraint system's cost.¹¹⁶ In addition to offering a choice, FMVSS 208 also allowed the passive restraint systems to be phased in gradually between 1986 and 1989.¹¹⁷ The reason for this was that manufacturers needed time to develop improved airbags and alternative passive restraint systems.¹¹⁸ The phase-in program was also designed to increase public awareness and acceptance of passive restraint systems.¹¹⁹ To encourage the manufacturers to have a mix of systems that would include air bags, FMVSS 208 allowed manufacturers to count each vehicle designed with an airbag as 1.5 vehicles for purposes of achieving the percentages required by the

¹⁰⁷ *Id.* at 877-78.

¹⁰⁸ *Geier*, 529 U.S. at 877-78.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 877.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Geier*, 529 U.S. at 878.

¹¹⁴ *See id.* at 878-79.

¹¹⁵ *Id.* at 878.

¹¹⁶ *Id.* at 879. The Department specifically rejected an "all airbag" standard out of safety concerns and a desire to gather more data about the effectiveness of alternative passive restraint systems. *Id.* at 879.

¹¹⁷ *Id.*

¹¹⁸ *Geier*, 529 U.S. at 879.

¹¹⁹ *Id.* at 879.

regulation.¹²⁰ Through the Solicitor General, the DOT informed the Court that FMVSS 208 “embodies the Secretary’s policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.”¹²¹

Considering FMVSS 208’s long and complex history, Justice Breyer stated that the DOT’s opinion that Ms. Geier’s action “stands as an obstacle to the accomplishment [of the Department’s objectives],”¹²² must hold “some weight.”¹²³ He declared that since Congress had delegated the regulatory authority to the Department, and because the subject was a technical one which required a great deal of familiarity with the automobile industry, the DOT was “uniquely qualified” to determine the impact of a state requirement.¹²⁴ Justice Breyer explained that the factors that DOT weighed when promulgating FMVSS 208 were identified over many years of experience forming policy around passenger safety.¹²⁵ It is unlikely that a jury or a judge, in a common law situation, could have adequately assimilated the technical complexities and the public acceptance factors in forming a common law judgment that would have satisfied the six factors mentioned by the Court.

An intrinsic part of Geier's claim was that Honda had breached its duty to design a safe car by not installing an airbag in her Accord.¹²⁶ Justice Breyer stated that if Geier were to win her case, then all new cars sold in 1987 in the District of Columbia would have been required to have an air bag.¹²⁷ Justice Breyer declared that such a ruling would have prevented the “gradual passive restraint phase-in the federal regulation deliberately imposed,” and thus stood as “an obstacle to the variety and mix of devices” Congress had intended.¹²⁸ For that reason, Justice Breyer held that Geier’s

¹²⁰ *Id.* at 879-80. In previous iterations of FMVSS 208, the DOT had found it difficult to get manufacturers to voluntarily install air bags because of the cost of air bags was significantly higher than that of automatic seat belts. *Id.* at 878-879. The air bag cost was one of the considerations behind the gradual phase-in program. *Id.* at 879-80.

¹²¹ *Id.* at 881 (emphasis in original).

¹²² Brief for the United States as Amicus Curiae Supporting Affirmance at 25-26, *Geier*.

¹²³ *Geier*, 508 U.S. at 883.

¹²⁴ *Id.*

¹²⁵ *Id.* at 877-78.

¹²⁶ *Id.* at 865, 881.

¹²⁷ *Id.* at 881.

¹²⁸ *Geier*, 508 U.S. at 881.

state action must be preempted in order to allow the federal regulation to achieve the purpose for which it was enacted.¹²⁹

IV. *GEIER'S LEGACY*

At the time, *Geier* embodied the result of more than a decade's worth of case law concerning the preemption of common law product liability actions. The *Geier* holding combined the analysis of several leading cases into a single approach to examining preemption questions. The holding clarified the important question of how express preemption and saving clauses are to be interpreted together and provided a limited solution under which the needs of both the federal government and the states were met.¹³⁰ Furthermore, contrary to the opinion of several commentators,¹³¹ the *Geier* decision did take into account the presumption against preemption. Lastly, the holding made clear the importance of agency opinions in determining the preemptive reach of complex federal regulations.

A. *The Express Preemption Clause and the Saving Clause*

Among its other distinctions, the *Geier* decision will probably be most remembered for its reading of the express preemption clause in conjunction with the saving clause.¹³² Specifically, the majority held that state actions can be preempted under "ordinary preemption principles" even where a Congressional act contains both an express preemption and a savings clause.¹³³

¹²⁹ *Id.* at 881-82. Justice Breyer continued by saying that because this case dealt with conflict preemption, the dissent's insistence upon a clear statement of preemptive intent was not required. Actual conflict preemption does not require the intent to preempt the state law, but rather a federal objective that would be hindered by the state action. *Id.* at 884-85.

¹³⁰ See Bough & Johnson, *supra* note 54, at 34 (citing the attorneys for Alexis Geier as saying that the preemption holding was a very narrow one, and was a victory for consumers).

¹³¹ *E.g.*, Raeker-Jordan, *supra* note 13, at 2 (arguing that *Geier* "removed any protections the presumption provided to federalism principles"); Davis, *supra* note 2, at 971 (stating that *Geier* along with other recent court holdings has effectively erased the presumption against preemption, and instead created a presumption in favor of preemption).

¹³² See *Geier*, 529 U.S. at 869 (recognizing that when it had previously dealt with the same statute it had left open the question of how the saving clause affected the express preemption clause).

¹³³ *Id.* at 867-69. The *Geier* holding has been criticized for not defining, "ordinary preemption principles." See Raeker-Jordan, *supra* note 13, at 12. While such

This holding should be viewed as an extension of the Court's relatively recent interpretations of express preemption clauses. In 1992, the Supreme Court decided in *Cipollone v. Liggett Group*, that the express preemption clause in the federal law dealing with labeling on cigarette packs preempted any claim for failure to warn about the dangers of cigarette smoking.¹³⁴ In the *Cipollone* holding, Justice Stevens, writing for the plurality, advocated a narrow reading of any express preemption clause.¹³⁵ Although *Cipollone* generated some doubt as to whether an express preemption clause prohibited an implied preemption analysis,¹³⁶ Justice Thomas made clear in *Freightliner Corp. v. Myrick*¹³⁷ that *Cipollone* did not hold that the existence of an express preemption clause categorically foreclosed an implied preemption analysis.¹³⁸

Based on *Cipollone*, Justice Thomas's conclusion in *Freightliner* is entirely logical. For example, suppose Congress had enacted an express preemption clause as part of the Agricultural Adjustment Act,¹³⁹ and the clause was narrowly interpreted by a court not to preempt all common law actions.¹⁴⁰

a definition might have been useful from a completeness standpoint, the lack thereof should not be viewed as a fatal flaw in Justice Breyer's reasoning. In stating that "ordinary preemption principles apply," he was simply referring to the Court's long history of preemption holdings, which have been previously summarized by several courts and did not necessarily need to be repeated. *E.g.*, *English v. Gen. Elec. Co.*, 496 U.S. 71, 78-79 (1990) (describing the three circumstances under which Congress can be said to have preempted state law, express preemption, field preemption, and conflict preemption); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986) (providing a brief synopsis of the preemption doctrine); *Jones v. Rath Packing*, 430 U.S. 519, 525-526 (1976) (providing a summary of the presumption against preemption and the ways federal law can preempt state law).

¹³⁴ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530-531 (1992) (summarizing the Court's holding).

¹³⁵ *See id.* at 529 (explaining how the express preemption clause should be "fairly but narrowly construed").

¹³⁶ *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) ("According to respondents and the Court of Appeals, *Cipollone v. Liggett Group*, held that implied preemption cannot exist when Congress has chosen to include an express preemption clause in a statute.").

¹³⁷ *Id.* Like *Geier*, *Freightliner* also dealt with the National Traffic and Motor Vehicle Safety Act, however in that case, Justice Thomas chose to reach the holding without addressing the saving clause. *See Geier*, 529 U.S. at 869 (interpreting *Freightliner* as not addressing the saving clause).

¹³⁸ *Freightliner*, 514 U.S. at 288-89.

¹³⁹ 7 U.S.C. § 602 (2000).

¹⁴⁰ The plaintiff in *Geier*, as well as several commentators, have advocated this type of narrow reading of preemption clauses. *See* Brief for Petitioner at 18-25, *Geier* (arguing that the wording of the Safety Act's express preemption clause shows that it does not preempt state common law actions, this position was rejected by the Court in its holding); Michael L. Russell, *Beyond Geier: Federalism Faces an Uncertain Future*, 11 SETON HALL CONST. L.J. 69, 83-85 (2000) (reviewing how many state

Pursuant to the Act, the Department of Agriculture promulgated a regulation stating that all avocados sold in interstate commerce must contain no more than 7% oil. However, suppose a California court, interpreting a California state regulation, declared that an avocado had to contain between 8% and 10% oil in order for it to be considered ripe. In this scenario, it would be impossible to obey both federal and state requirements.¹⁴¹ Therefore, in accordance with the Supremacy Clause, the Department of Agriculture's regulation must be allowed to implicitly preempt the California regulation. Otherwise, no out-of-state avocados could be brought into California.¹⁴² This same concern applies to Justice Breyer's interpretation of the saving clause. If the saving clause were interpreted to foreclose all preemption, then a situation could arise where the states, through common law, could achieve what they could not through positive enactments—the nullification of a federal act.¹⁴³

Thus, in deciding *Geier*, the Court preserved Congress's power to regulate uniformly across the nation. In a situation such as *Geier*, if the District of Columbia, through common law, declared that a manufacturer was negligent for not installing airbags in cars made in 1984, that decision would have ripple effects throughout the nation.¹⁴⁴ Due to the mobile nature of the

supreme courts, before *Geier*, had held that the Safety Act's dual express preemption and saving clauses acted to preserve almost all state common law actions); Carroll, *supra* note 14, at 820-823 (arguing that an express preemption clause, along with a saving clause and the presumption against preemption, should be interpreted together to indicate that Congress had not intended to preempt any state tort claims, and that the majority in *Geier* had held incorrectly). However, just such a narrow interpretation was what Justice Scalia was concerned about in his concurrence/dissent from the *Cipollone* holding. See *Cipollone*, 505 U.S. at 547-48 (Scalia, J. concurring in the judgment in part and dissenting in part). In addition to advocating a narrow reading of the express preemption clause, Justice Stevens in *Cipollone* had also declared that when an act contains an express preemption clause, no implied preemption analysis should be undertaken. *Id.* at 517. However, Justice Scalia rightly pointed out that these two holdings would produce a result whereby states could be allowed to impose regulations entirely contrary to the federal law. *Id.* at 547-548 (Scalia, J. concurring in the judgment in part and dissenting in part).

¹⁴¹ See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (asserting that in a situation where it is impossible to meet both the federal and state regulation, that implied preemption dictated that the state regulation could not stand).

¹⁴² Cf. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1964) (giving a hypothetical similar to this one, however not considering the express preemption clause).

¹⁴³ See *Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 870 (2000) (discussing the effects of the saving clause).

¹⁴⁴ Cf. *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (arguing, in relation to the Commerce Clause, that even a small individual farmer's actions can have an effect on the national economy).

nation's economy, in which cars can be bought and sold in many different states, such a holding would force all car manufacturers to meet the standards of the strictest state on a given issue.¹⁴⁵ This rule would allow a small group of states, or even a single state, to frustrate congressional objectives of uniformity and potentially unilaterally establish the safety standards for the entire nation.¹⁴⁶ By declaring that "ordinary preemption" principles still apply in the presence of a saving clause, the Court in *Geier* was trying to establish a functional standard that other courts could use, rather than a formalistic approach which would have truly represented a "seismic shift"¹⁴⁷ in the preemption doctrine.

While this holding may appear to be at odds with the presumption against preemption, the federalism arguments in favor of allowing implied preemption are similar to those used to justify the presumption against preemption.¹⁴⁸ Although it is true, as commentators and Justices alike have agreed, that the presumption against preemption is in place to protect the federalist structure of our government,¹⁴⁹ it should not be forgotten that the Framers of the Constitution also believed the federal government should, when appropriate, regulate the entire nation uniformly.¹⁵⁰ Justice Stevens argued for the dissent in *Geier* that the presumption against preemption acts as a safeguard to maintain the federal-state balance.¹⁵¹ A true

¹⁴⁵ See *United States v. Locke*, 529 U.S. 89, 113-116 (2000) (noting, in its preemption discussion, the out-of-state effects of four Washington State maritime laws, and holding that each law was preempted, in part, because of the laws out-of-state effects); *Supreme Court 1999, Leading Cases*, *supra* note 60, at 346-47.

¹⁴⁶ *Supreme Court 1999, Leading Cases*, *supra* note 60, at 346-47; *Geier*, 529 U.S. at 872 (arguing in favor of allowing ordinary preemption principles to apply by noting that if ordinary preemption principles did not apply, then Congress would have created a law, which by design would have been self-defeating).

¹⁴⁷ *Davis*, *supra* note 2, at 1012 ("Geier represents a seismic shift in the Court's preemption doctrine.).

¹⁴⁸ See discussion *supra* Part II.B (describing how the Articles of Confederation were too weak because they lacked an appropriate enforcement measure, and how the Framers believed that the Supremacy Clause would provide this enforcement mechanism).

¹⁴⁹ *Carroll*, *supra* note 14, at 805-08 (discussing how the evolution of the presumption against preemption was an attempt by the court to regulate the federal structure and in the 1980's was a response to growing federal power); *Geier*, 529 U.S. at 907 (Stevens, J., dissenting) ("Our presumption against preemption is rooted in the concept of federalism.").

¹⁵⁰ See discussion *supra* Part II.A. See also *Supreme Court 1999, Leading Cases*, *supra* note 58, at 347 (stating that the problem of different states present disparate regulatory schemes was among those that the Framers intended to prevent when they gave the federal government the power to regulate the nation uniformly).

¹⁵¹ *Geier*, 529 U.S. at 907-09 (Stevens, J., dissenting) (arguing that the presumption against preemption acts to ensure that Congress and not the Judiciary

balance, however, should require a *quid pro quo* between the federal and state governments: just as the federal government should not be allowed to usurp the state's power,¹⁵² the Court should not be too quick to allow the states to usurp the federal government's duly apportioned powers.¹⁵³ Allowing all state common law actions to be preserved by the saving clause would be just as dangerous to the federal-state balance as ignoring the presumption against preemption and allowing the express preemption clause to trump all state common law actions.¹⁵⁴

In keeping with this need for balance, Justice Breyer's reading of the express preemption clause in light of the saving clause should not be seen as a one-sided ruling in favor of the powers of the federal government.¹⁵⁵ This interpretation may appear to create some "tension"¹⁵⁶ between the "polar magnetic field[s]" of the express preemption clause and the saving clause.¹⁵⁷ Justice Stevens in *Cipollone*¹⁵⁸ stated that a conjoined

strikes the appropriate federal-state balance). Justice Stevens wrote that it is the structural safeguards "inherent in the normal operation of the legislative process" that will guarantee that the balance is maintained between the power of the federal government and that of the state. *Id.* at 907.

¹⁵² See *Hillsborough County, Fla. v. Automated Med. Labs., Inc.* 471 U.S. 707, 707 (1985) (stating that to assume all state regulations are preempted simply because a federal agency has produced a complex set of regulations in a given area would be "inconsistent with the federal-state balance" the court has strived to maintain in its Supremacy Clause decisions).

¹⁵³ It is interesting to note that four of the five justices who voted in the majority in *Geier* have in the past two decades been the most active champions of "states rights." Those justices are Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Kennedy. See Russell, *supra* note 142, at 89 (2000) (speculating as to reasons why Justices O'Connor and Scalia, traditionally conservative "states rights" justices, voted in the majority). See also Herman Schwartz, *The States' Rights Assault on Federal Authority*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 155, 155-67 (Herman Schwartz ed., 2002) (arguing that these four justices, along with Justice Thomas, have combined to form a solid conservative majority that strongly favors states rights).

¹⁵⁴ See *United States v. Bass*, 404 U.S. 336, 349 (1971) (holding that, as a rule of statutory interpretation, Congressional intent must be clear before a court can hold that Congress has "significantly changed the federal-state balance").

¹⁵⁵ See *Geier*, 529 U.S. at 871 (discussing how Congress had inserted the saving clause in order to indicate that it still intended to allow for the compensation of victims).

¹⁵⁶ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (discussing Congress's occupation of the field of nuclear energy and its desire to maintain common law liability).

¹⁵⁷ M. Stuart Madden, *Federal Preemption of Inconsistent State Safety Obligations*, 21 PACE L. REV. 103, 158 (2000) (lamenting what he perceived to be the Court's failure to reconcile *Cipollone's* favoring of the express preemption clause and *Geier's* favoring of the saving clause).

¹⁵⁸ This argument is based on a statement the Court made in *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 517 (1992). Justice Stevens, writing for the Court in *Cipollone*, held that congressional enactment of an express preemption provision precludes further preemption analysis. *Id.* Justice Stevens based this opinion on the

reading of the express and implied preemption clause, as found in *Geier*, violated the interpretive maxim of *expressio unius est exclusio alterius*.¹⁵⁹ However, the Court pointed out in *Geier*, as well as in *Silkwood v. Kerr-McGee Corp.*,¹⁶⁰ that this interpretive tension is a reflection of a “congressional compromise”¹⁶¹ between tort law’s traditional compensatory role in our system and the Federal government’s need to establish uniform standards.¹⁶²

Under the *Geier* opinion, Congress and the DOT’s strong desire to aid interstate commerce by creating uniform standards¹⁶³ is recognized in the express preemption of all

“familiar principle of *expressio unius est exclusio alterius*,” that Congress’s enactment of a preemption provision foreclosed preemption being found (or not found) on a different basis. *Id.* However, this position was later interpreted and modified by the Court in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-89 (1995). In *Freightliner*, Justice Thomas held that, at most, a Court could infer from an express preemption clause that Congress did not intend to preempt beyond the stated express preemptive reach. *Id.* at 288. As a result, he held that preemption was not explicitly foreclosed for those issues beyond the express preemption clause’s scope. *Id.* This interpretation laid the basis for Justice Breyer’s declaration that the express preemption clause must be read in light of the saving clause. *Geier*, 529 U.S. at 869, 872. In addition to the basis created by *Freightliner*, Justice Breyer’s interpretation was also consistent with *Cipollone* in that he was not stating that the further preemptive scope provided by implied preemption was in addition to the express preemption. *Id.* at 870-71. Instead, he was holding that the saving clause, by preserving common law actions, had created an additional need to examine implied preemption to ensure that common law actions did not defeat the congressional objectives for the act. *Id.* at 871-72.

¹⁵⁹ BLACK’S LAW DICTIONARY 602 (7th ed. 1999) (“A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.”).

¹⁶⁰ See *Silkwood*, 464 U.S. at 256 (stating that the Court recognized that some tension existed between Congress’s occupation of the field of nuclear energy, and the Court’s interpretation that common law liability still exists, but explaining that the Court could not have held any other way because the tension was created by Congress, and may have been intended as off-setting factors to maintain some local accountability for nuclear plants).

¹⁶¹ See *Geier*, 529 U.S. at 871 (observing that the Court recognized that two policies existed, national uniformity and victim compensation, but that it could find “nothing in any natural reading of the two” that would indicate a preference of one policy over the other). See also Brief for the United States as Amicus Curiae Supporting Affirmance at 15, *Geier* (dismissing any tension within the Safety Act as being a product of Congress’s intentional compromise between the “interests in uniformity and [the need to allow] States to compensate accident victims” as represented in the inclusion of both an express preemption and a saving clause).

¹⁶² *Geier*, 529 U.S. at 870-71 (interpreting the language in the express preemption and saving clauses to be a neutral reflection of Congress’s dual goals of national uniformity and victim compensation). See also *Rogers v. Cosco, Inc.*, 737 N.E.2d 1158, 1165 (Ind. App. Ct. 2000) (interpreting the Safety Act’s having both a preemption and a saving clause as a “congressional compromise” between a national interest in uniformity and a local interest in compensating accident victims based upon common law tort standards).

¹⁶³ *Geier*, 529 U.S. at 871 (“[T]he preemption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards.”).

positive state legislative enactment.¹⁶⁴ At the same time, the *Geier* holding preserves the important role the states play in compensating victims so long as this compensation system does not obstruct Congress's objectives for the federal regulation.¹⁶⁵ While the tension created by this holding makes it impossible to create a single bright-line-rule,¹⁶⁶ it strikes the appropriate balance between Congress's desire to enact uniform legislation and the states' need to compensate victims.

B. *Geier and the Presumption Against Preemption*

As has been alluded to above, *Geier* did not "eradicate the presumption against preemption."¹⁶⁷ Instead, the Court found that an appropriate examination of the traditional preemption factors showed that the regulation in question overcame the presumption.¹⁶⁸ The presumption has never been interpreted to mean that the federal government should never preempt state law.¹⁶⁹ Rather, it is important that the Court should not inhibit Congress's attempts to regulate an industry.¹⁷⁰

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (stating that "occasional nonuniformity is a small price to pay for a system" that allows juries to establish standards and thereby compensate victims); Brief for the United States as Amicus Curiae Supporting Affirmance at 15, *Geier* (arguing that so long as implied preemption is preserved there is no reason to think that "tort liability will impair the purpose of the [Safety] Act").

¹⁶⁶ See Russell, *supra* note 142, at 91 (stating with dismay that "[t]he Court passed on an . . . opportunity to clarify the law of federal pre-emption," and ended up just raising more questions); Carroll, *supra* note 13, at 800 (expressing a concern that the preemption doctrine after *Cipollone*, including *Geier*, has been "vague and overlapping," and has created a situation where lower courts have had a very hard time consistently applying the rules).

¹⁶⁷ Raeker-Jordan, *supra* note 12, at 1 (quoting from the title of the article).

¹⁶⁸ *Geier*, 529 U.S. at 885 ("While we certainly accept the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict, for the reasons set out above we find such evidence here.") (internal citations omitted). *Contra Geier*, 529 U.S. at 906-907 (Stevens, J., dissenting) (arguing that the majority simply ignored the presumption against preemption).

¹⁶⁹ See *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993) ("[A] court interpreting a federal statute pertaining to a subject traditionally governed by state law will be *reluctant* to find preemption.") (emphasis added). *Contra* Raeker-Jordan, *supra* note 12, at 31 (arguing that the presumption against preemption forces the Court in deciding *Geier* to assume that Congress did not see any conflict between federal and state law, and therefore the presumption mandates the Court not to find a conflict).

¹⁷⁰ *Supreme Court 1999 Term, Leading Cases*, *supra* note 60, at 347.

Justice Stevens and several commentators¹⁷¹ have criticized the Court's narrow application of the presumption because it granted too much power to the federal government to govern an issue that the states had traditionally occupied.¹⁷² Justice Stevens even went so far as to imply that the majority had ignored the presumption against preemption entirely.¹⁷³ Most of these critics would have preferred that physical impossibility conflict preemption be the only form of implied conflict preemption.¹⁷⁴ However, if the Court had taken such a narrow approach to implied preemption it would have overly limited Congress's constitutional powers.¹⁷⁵ Since early in the presumption's history, it has been clear that implied and obstacle preemption both provide sufficient justification for overcoming the presumption.¹⁷⁶ If the Court insisted on physical

¹⁷¹ *Geier*, 529 U.S. at 907-08 (Stevens, J., dissenting). See also *id.* at 885 (Breyer, J., majority) (interpreting the dissent's position as stating that in "frustration-of-purpos[e]" cases where the agency does not declare its preemptive intent, the dissent would prefer the state action be clearly an obstacle to the congressional purpose than have the state action be preempted); Nelson, *supra* note 2, at 231-32 ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law. . . ."), Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 622-27 (1997) (proposing that only situations where state law and federal law can not both be satisfied, are the only situations where preemption should occur). But see *Geier*, 529 U.S. at 908 n.22 (Stevens, J., dissenting) (responding to Professor Nelson's proposition by saying that the presumption protects against an over reaching federal judiciary, and dismissing Nelson's request to limit all of preemption).

¹⁷² See Russell, *supra* note 142, at 91 (arguing that there was an ambiguity as to Congress's preemptive intent in the Safety Act and that the presumption against preemption would dictate that there was no preemption, ultimately concluding that the presumption may no longer exist); Davis, *supra* note 2, at 1012-1013 (proposing that *Geier* represents a "seismic shift" in the Court's interpretation of preemption cases, that the Court has re-written the presumption, and in fact created an assumption in favor of preemption).

¹⁷³ *Geier*, 529 U.S. at 907-08 (Stevens, J., dissenting).

¹⁷⁴ Carroll, *supra* note 13, at 820-822 (stating that "physical impossibility" should functionally be the only form of preemption the court recognizes absent a clear statement by Congress as to their preemptive intent); Davis, *supra* note 2, at 1014 (asserting that in a "perfect world of preemption doctrine" implied preemption would only be based on occupation of the field and physical impossibility conflict).

¹⁷⁵ Even Justice Stevens, writing for the dissent in *Geier*, argued that it should be Congress's role to maintain the proper federal-state balance. *Geier*, 529 U.S. at 907 (Stevens, J., dissenting) ("The signal virtues of this presumption [against preemption] are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance"). If that were the case, then limiting implied conflict preemption only to physical impossibility conflict preemption would constrain Congress's ability to regulate that balance.

¹⁷⁶ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (saying after its famous interpretation of the presumption, that Congress's "clear and manifest purpose" could be "evidenced in several ways," including that "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal

impossibility before declaring implied preemption, then Congress would never be able to mandate anything more than minimum standards.¹⁷⁷ A “physical impossibility only” rule like the one proposed would create a “one-way ratchet” that would limit the federal government’s effectiveness.¹⁷⁸ Congress could establish one standard, and then any state could establish overlapping stricter standards that merely make it physically possible to comply with both the federal and state laws.¹⁷⁹ Such a ruling could in effect eviscerate the purpose behind any federal law.¹⁸⁰ Unless Congress went out of its way to detail the entire possible preemptive scope of every law and regulation,¹⁸¹ Congress would never be able to “expand industry discretion or to lower tort standards.”¹⁸²

In *Geier*, there were numerous indications of the DOT’s intent behind FMVSS 208, and it was clear that if the Court allowed Geier’s claim to continue, it would have greatly interfered with the DOT’s objectives.¹⁸³ This is why the Court found substantial weight to overcome the presumption against preemption, and did not, as suggested, ignore the presumption altogether.¹⁸⁴ In *Geier*, the Court was interpreting a regulation passed by an agency under the authority granted it by Congress.¹⁸⁵ By combining the DOT’s long-held explanation of

the same purpose Or the state policy may produce a result inconsistent with the objective of the federal statute”).

¹⁷⁷ *Geier*, 529 U.S. at 908 n.22 (Stevens, J., dissenting) (refuting commentator’s calls for the elimination of all frustration-of-purpose preemption, by arguing that the presumption against preemption can eliminate the dangers of judicial overreaching).

¹⁷⁸ *Supreme Court 1999, Leading Cases, supra* note 60, at 344.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (declaring that a pure physical impossibility conflict preemption only doctrine would be “intractable” as a functional solution because it would “allow state courts to frustrate congressional will by setting countervailing tort standards”).

¹⁸¹ *See Geier*, 529 U.S. at 884 (rejecting the dissent’s proposal that the Court require an “agency statement of preemptive intent as a prerequisite to” finding conflict preemption). Justice Breyer pointed out that, unlike express preemption conflict preemption, physical impossibility preemption turns on the existence of an actual conflict that would inhibit the federal law. *Id.* He continued by stating that it is safe to assume that the federal government would not take the time to write a law or regulation only to have it superceded by state law. *Id.* at 885.

¹⁸² *Supreme Court 1999, Leading Cases, supra* note 60, at 344.

¹⁸³ *Geier*, 529 U.S. at 877-82 (stating the reasons provided by the DOT for implementing FMVSS 208).

¹⁸⁴ *Id.* at 883 (asserting that the majority was not placing the burden on the plaintiffs to show there was not preemption, but rather holding that the DOT’s arguments in favor of conflict were more persuasive than *Geier*’s arguments against preemption).

¹⁸⁵ *Id.* (noting that Congress had delegated to the DOT the needed authority to implement the Safety Act).

the purposes behind FMVSS 208 and the history of the Act as interpreted in prior Supreme Court cases the Court was able to accurately determine Department's intentions for FMVSS 208.¹⁸⁶ The Court made clear that the DOT interpreted the regulation's objective to be the gradual phase-in of multiple passive restraint devices.¹⁸⁷ This determination was not a formulaic, statutory approach to discerning the department's intent,¹⁸⁸ but rather a functional approach that took into account the real-life factors the Department was evaluating.¹⁸⁹ This method of analysis provides lower court judges enough flexibility to interpret a statute's preemptive effect in a pragmatic manner while curtailing their ability to stray from the intention of the rule maker.

C. *The Opinion of the Department of Transportation*

One of *Geier's* final clarifications of the preemption doctrine is Justice Breyer's deference to the opinion of the DOT throughout the holding.¹⁹⁰ In fact, the Court's ultimate holding that *Geier's* claim was implicitly preempted was not the position advocated by either *Geier*¹⁹¹ or *Honda*¹⁹² in their briefs to the Court. Instead, Justice Breyer's written decision followed the line of reasoning advocated by the Solicitor General on behalf of the DOT.¹⁹³ This use of a federal agency to inform the

¹⁸⁶ *Id.* at 878-880.

¹⁸⁷ *Id.* at 879.

¹⁸⁸ In dissent, Justice Stevens argued that even when implied preemption is the issue, all regulations must declare their preemptive intent with some specificity. *Geier*, 529 U.S. at 908 (Stevens, J., dissenting). In response, Justice Breyer rightly pointed out that to require such a statement in conflict preemption situations would simply be too rigid an approach, and would lead to a nullification of the regulation which the "agency, and therefore Congress, is most unlikely to have intended." *Id.* at 885.

¹⁸⁹ See *Supreme Court 1999, Leading Cases*, *supra* note 60, at 343 ("The Court's implied preemption analysis in *Geier* reflects a victory of function over form."). This more functional approach is also in line with prior cases' approaches to the interpretation of Congress's intent. In *Jones v. Rath Packing*, Justice Thurgood Marshall declared that an inquiry into Congress's intent must take into account "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." 430 U.S. 519, 526 (1976).

¹⁹⁰ *Geier*, 529 U.S. at 883-884 (explaining why the majority was relying on the opinion of the DOT).

¹⁹¹ See discussion *supra* note 98 (discussing the argument *Geier* presented in her brief).

¹⁹² See discussion *supra* note 86 (discussing the argument *Honda* presented in its brief).

¹⁹³ See discussion *supra* note 103 (discussing the argument the Solicitor General presented in its brief on behalf of the DOT). See also *Bough & Johnson*, *supra* note 56, at 34 (noting that Justice Breyer in *Geier* "adopted almost verbatim" the

Court is both appropriate and beneficial to future courts dealing with complex federal regulations preempting state actions.¹⁹⁴

Justice Breyer's conclusions about the role the DOT should play in the preemption analysis are in line with the Supreme Court's holding in several previous cases. As far back as *Bowles v. Seminole Rock & Sand Co.*¹⁹⁵ in 1945, the Court has held that an administrative interpretation of a regulation is controlling unless it is "plainly erroneous or inconsistent with the regulation."¹⁹⁶ In addition, so long as an agency is acting within its congressionally-delegated power, that agency may independently preempt a state action.¹⁹⁷ Thus, in *City of New York v. F.C.C.*,¹⁹⁸ the Court combined its previous holdings and made clear that both the intent of Congress and the intent of the agency should be considered when determining the preemptive reach of a regulation.¹⁹⁹ More recently, in *Medtronic, Inc. v. Lohr*,²⁰⁰ the Court examined whether the Food and Drug Administration's (FDA) approval of a medical device preempted a state action for negligence and strict liability.²⁰¹ In *Medtronic*,

opinion of the Solicitor General). Bough & Johnson argued that the majority's adoption of the Solicitor General's opinion in fact helped to limit the scope of the preemption holding. *Id.* They noted that the Solicitor General and the Court both left open the door for suits against manufacturers for specific defects in the design of the restraints; a door that may not have been open had the Court found express preemption. *Id.*

¹⁹⁴ See *Geier*, 529 U.S. at 883 (commenting on the complex nature of the issues surrounding FMVSS 208 and asserting that the agency is "likely to have a thorough understanding of its own regulation").

¹⁹⁵ 325 U.S. 410 (1945) (dealing with an interpretation of the General Maximum Price Regulation by the Office of Price Administration, the Court held that when considering an administrative regulation the ultimate criterion should be the administrative interpretation).

¹⁹⁶ *Id.* at 414.

¹⁹⁷ *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369 (1986) (describing how the F.C.C. could preempt state depreciation charges, though ultimately holding that the F.C.C. lacked the jurisdiction to do so).

¹⁹⁸ 486 U.S. 57 (1988) (holding that the F.C.C. clearly had intended to displace all technical standards governing the quality of cable TV signals, and that such a decision was within the agency's congressionally delegated authority).

¹⁹⁹ *Id.* at 64. In *City of New York*, the Court first drew upon precedent to make clear that a regulation created by a federal agency, acting within its appropriately delegated authority, will have just as much preemptive force as a law passed by Congress. *Id.* Next, the Court stated that in such situations a narrow focus on just the preemptive intent of Congress would be misdirected. *Id.* Rather that focus should be placed on the powers and intent of the agency to which the authority was delegated. *Id.*

²⁰⁰ 518 U.S. 470, 495-496 (1996).

²⁰¹ *Id.* at 474. The issue was over a grandfather clause under which certain medical devices could be approved by the Food and Drug Administration (FDA) without having to undergo the rigorous pre-market approval process. *Id.* at 477. The Medical Device Amendments of 1976 (MDA) allowed certain medical devices that were "substantially similar" to those in existence before 1976 to be approved without

as in *Geier*, the primary question was not whether the federal statute had preempted the state action, but rather whether the FDA requirements for approval preempted the action.²⁰² By determining that the FDA was in a unique position because it had originally promulgated the regulation; the Court in *MedTronic* gave “substantial weight to the agency’s view of the statute.”²⁰³ Ultimately, the Supreme Court agreed with the conclusion reached by the FDA, holding that its approval requirements do not preempt state action.

In light of this history, it is not surprising that Justice Breyer would defer to the opinion advocated by the DOT in *Geier*. If Congress’s intent is the “touchstone” of any preemption analysis of a congressional statute,²⁰⁴ then the position of an agency should hold the same position in the preemption analysis of a regulation. Unlike Congress, however, an agency is normally required to speak in a single voice as to the reasons underlying its regulations²⁰⁵ and can even file briefs as *amicus curiae* to the Court expressing its opinion about the regulation.²⁰⁶ The agency’s single voice means that its preemptive intent is normally much simpler to discern. It is important to note that in both *Medtronic* and *Geier* (and as will be seen later in *Sprietsma v. Mercury Marine*²⁰⁷) the agency opinion the Court referred to was not one that the agency had adopted in preparation for litigation, but rather one that had been either part of the original regulations as they were promulgated,²⁰⁸ or were a long expressed opinion of the agency.²⁰⁹ This distinction is important; it provides a level of

undergoing the approval process. *Id.* at 477-478. The question before the Supreme Court was whether a state action for negligent design was preempted by the MDA when the device in question had not undergone the pre-market approval process. *Id.* at 478.

²⁰² *Id.* at 496.

²⁰³ *Id.*

²⁰⁴ *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

²⁰⁵ *See, e.g., Medtronic v. Lohr*, 518 U.S. 470, 496 (1996) (referring to the FDA regulations implementing the process to request an advisory opinion from the FDA about whether a state requirement is preempted by the statute).

²⁰⁶ *See, e.g., Brief for the United States as Amicus Curiae Supporting Affirmance* at 15-30, *Geier* (explaining the DOT’s opinion that FMVSS 208 implicitly preempted *Geier*’s claim).

²⁰⁷ *See discussion infra* Part V.B.

²⁰⁸ *See Medtronic*, 518 U.S. at 496-497.

²⁰⁹ *See Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 883-884 (2000) (noting that the opinion of the DOT was one they had advocated “consistently over time”). In fact, Justice Breyer, made a point to note that the Court had no reason to suspect the DOT’s position to be anything other than its “fair and considered judgment on the matter.” *Id.* at 884 (quoting *Auer v. Robbins*, 519 U.S. 452, 461-462 (1997)). He also

reliability to the agency's opinion.²¹⁰ This combination of efficiency and reliability in the use of agency opinions should and has guided courts in their preemption holdings.²¹¹

V. PRODUCT LIABILITY PREEMPTION SINCE *GEIER*

As a statement of recent Supreme Court thinking on preemption, *Geier* has been referenced as a model for how to approach a preemption case, especially cases involving both an express preemption clause and a saving clause. Except for areas where lower courts have interpreted a federal regulation as offering the defendant a choice, most of these courts have approvingly cited *Geier's* interpretation of the express preemption and saving clause, but have shown restraint in following *Geier* in preempting state law actions.²¹² Several of these cases have preserved the presumption against preemption by distinguishing those statutes that offer defendants a choice and those that represent a minimum standard.²¹³ The Supreme Court in *Sprietsma v. Mercury Marine* recently supported many of the lower courts' interpretations that *Geier* did not indicate a shift to more preemption, but rather showed a flexible approach to the complex problem of interpreting an express preemption and saving clause together.²¹⁴

distinguished the Court's opinion in *Hillsborough County v. Automated Med. Lab., Inc.* where the F.C.C. had not, at any time, concluded that a conflict existed between the federal and state regulations. *Id.* (citing *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 721 (1985)).

²¹⁰ *See id.*

²¹¹ *See* *Oxygenated Fuels Assoc. Inc. v. Davis*, 331 F.3d 665, 672 (9th Cir. 2003) (distinguishing *Geier* on the grounds that the Supreme Court's opinion was consistent with that of the DOT, whereas in *Oxygenated Fuels* the EPA had not expressed an opinion concerning preemption, and therefore any comparison between the two cases must be viewed in that light).

²¹² *See, e.g.,* *Colon v. BIC USA Inc.*, 136 F. Supp. 2d 196 (S.D.N.Y. 2000) (interpreting the Consumer Product Safety Act's express preemption and saving clauses to allow implied preemption, but ultimately holding that the plaintiff's action was not preempted).

²¹³ *See, e.g.,* *Stone v. Frontier Airlines, Inc.*, 256 F. Supp. 2d 28 (D. Mass. 2002) (drawing a distinction between regulations that offered a choice and those simply requiring an action be taken, holding that the regulation in question fell into the latter category and therefore did not preempt the state action).

²¹⁴ *See* *Sprietsma v. Mercury Marine*, 729 N.E.2d 45, 49-50, 63 (2002) (finding that the Federal Boat Safety Act's express preemption and saving clauses should be read together to allow implied preemption, but ultimately holding that the Coast Guard's decision not to regulate propeller guards did not preempt a state action which required propeller guards).

A. *Geier's Influence Interpreting Express Preemption and Saving Clauses*

Justice Breyer's interpretation of the saving and express preemption clauses has clearly been the most recognized holding to result from the *Geier* decision.²¹⁵ Nevertheless, contrary to the opinion expressed by several commentators,²¹⁶ the decision has not lead to a vast number of courts using implied preemption to expand federal powers and usurp state's actions.²¹⁷ In fact, several circuits have overruled pre-*Geier* district court rulings of express preemption and reinstated previously preempted cases.²¹⁸ These holdings have shown that Justice Breyer's interpretation of the preemption and saving clauses has had the result that he had anticipated—it has preserved what he saw as Congress's intent to encourage

²¹⁵ The Supreme Court has referenced *Geier* for this point at least two times since the case was handed down. First, in 2001 Chief Justice Rehnquist referenced *Geier* for the idea that neither an express preemption nor a saving clause will bar the ordinary working of preemption. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001). In late 2002, Justice Stevens expressly referred to *Geier* in his interpretation of Federal Boating Safety Act's express preemption and saving clauses. *Sprietsma*, 537 U.S. at 52. Additionally, lower courts have referenced *Geier* for this point in numerous diverse cases. *See, e.g.*, *Russell v. Sprint Corp.*, 264 F. Supp. 2d 955, 961 (D. Kan. 2003) (holding that because of its saving clause, the Federal Communications Act does not preempt all state and local regulations regarding market entry, or rate changes by a cell phone service company); *Secured Env'tl. Mgmt., Inc. v. Tex. Natural Res. Conservation Comm'n*, 97 S.W.3d 246 (Tex. Ct. App. 2002) (referencing *Geier* in declaring that because of the Federal Resource Conservation and Recovery Act's saving clause, a particular state's hazardous waste statute is only preempted if it conflicts with the goals of the federal act).

²¹⁶ *See e.g.*, Alexander K. Haas, Casenote, *Chipping Away at State Tort Remedies Through Pre-emption Jurisprudence: Geier v. American Honda Motor Co.*, 89 CAL. L. REV. 1927 (2001) (declaring that *Geier* strengthens the power of the federal government to preempt state laws, and implying that the holding will lead to fewer individuals being able to sue); Davis, *supra* note 2, at 1015 (declaring that the Supreme Court's preemption doctrine provides a preference for preemption that would lead to more preemption); Jack B. Weinstein, *The Restatement of Torts and the Courts*, 54 VAND. L. REV. 1439, 1442 (2001) (stating that the modern preemption doctrine makes him nervous for the "bottom-up" protection of jury-decided cases).

²¹⁷ *See Bough & Johnson, supra* note 56, at 34 (noting that the attorneys for Alexis Geier believed that the holding was a victory for plaintiffs and consumers because it flat out rejected Honda's express preemption argument, and narrowly construed implied preemption based on choice).

²¹⁸ *See, e.g.*, *Leipart v. Guardian Indus., Inc.*, 234 F.3d 1063 (9th Cir. 2000) (using *Geier's* interpretation of the Safety Act's preemption and saving clauses as an analogy, the Circuit Court overruled a pre-*Geier* district court holding which said that the Consumer Product Safety Act preempted a plaintiff's common law product liability and tort claims); *Choate v. Champion Home Builders*, 222 F.3d 788, 793 (10th Cir. 2000) (following the Supreme Court's holding in *Geier* to declare that the plaintiff's claims were neither expressly or implicitly preempted by the Manufactured Housing Act).

uniform standards across the country while preserving the “necessary compensation to victims.”²¹⁹

The effect of Justice Breyer’s interpretation is fundamental to any preemption decision involving similar preemption clauses. Several lower courts, when interpreting similar clauses, have first declared that the express preemption and saving clauses preserve the “ordinary working” of the preemption doctrine,²²⁰ and then have examined whether the federal law or regulation conflicts with the state action.²²¹ Just a few months after the Supreme Court handed down *Geier*, the Tenth Circuit decided *Choate v. Champion Home Builders*.²²² In *Choate*, the manufacturers of a home were defending against a product liability action for not installing a battery powered back up smoke detector in the plaintiff’s home.²²³ Before the *Geier* decision had been released, the District Court in *Choate* held that the National Manufactured Housing Construction and Safety Standards Act of 1974 (Housing Construction Act) expressly and implicitly preempted the plaintiff’s suit.²²⁴ Following *Geier*, the Tenth Circuit reversed the District Court, holding that the Housing Construction Act could implicitly preempt a common law suit even though there was no express preemption.²²⁵

The Tenth Circuit next examined whether the plaintiff’s claims would conflict with the objectives of the Housing Construction Act and thereby be implicitly preempted.²²⁶ The Circuit looked at the language of the act, stating that Congress had made clear that its objective was to supervise the manufactured housing industry.²²⁷ Additionally, the Circuit

²¹⁹ *Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 871 (2000) (stating that one reason for his allowing implied preemption to persist was Congress’s dual goals of uniformity and victim compensation).

²²⁰ *See id.* at 869.

²²¹ *See, e.g., Choate*, 222 F.3d at 793 (discussing the effects the Manufactured Housing Act’s saving clause had on the act’s express preemption clause, referring approvingly to *Geier*’s interpretation of similar clauses); *Stone v. Frontier Airlines Inc.*, 256 F. Supp. 2d 28, 40 (D. Mass. 2002) (citing both *Geier* and *Sprietsma* for the proposition that a saving clause and an express preemption clause should be read to allow some cases to not be preempted).

²²² 222 F.3d at 788. *Choate* was decided in July of 2000, and *Geier* was decided in May of 2000.

²²³ *Id.* at 790.

²²⁴ *Id.* The lower court decision is unpublished.

²²⁵ *Id.* at 792-94. (finding that the language for the express and saving clauses in the Manufactured Housing Construction Act was similar to the language at issue in *Geier*).

²²⁶ *Id.* at 794.

²²⁷ *Choate*, 222 F.3d at 795.

Court held that the language of the regulation in question established a minimum standard.²²⁸ The Circuit Court distinguished the holding in *Geier* on the grounds that FMVSS 208 gave the auto manufacturers a choice whereas the regulation at issue in *Choate* set a minimum safety standard for all housing construction.²²⁹ The Tenth Circuit's decision demonstrates how the *Geier* preemption analysis is a highly functional approach, but does not demand the outcome of preemption in every case.²³⁰

Choate stands as an example of how a number of cases have applied *Geier* without finding implied preemption.²³¹ In *Colon ex rel. Molina v. BIC USA Inc.*,²³² the defendants relied heavily on *Cipollone* in arguing that the express preemption clause of the Consumer Product Safety Act (CPSA) preempted the plaintiff's common law product liability action.²³³ The Southern District of New York, however, declared that because the CPSA contained a saving clause, *Geier* and not *Cipollone* should control.²³⁴ The Southern District also held that the CPSA's regulations concerning disposable butane lighters

²²⁸ *Id.* The circuit court held that the federal regulation was a minimum standard because the regulation simply required that a house have a hardwired smoke detector installed. *Id.* The regulation did not provide alternatives (e.g. a hardwired smoke detector or a battery operated smoke detector) and it did not require that hardwiring be the only form of power to the smoke detector. *Id.* Therefore, since the federal law, and the proposed state requirement of a battery back up for a hardwired smoke detector were not mutually exclusive, and since the federal regulation did not prohibit additional regulation of smoke detectors, the Tenth Circuit held that the federal regulation was a minimum standard. *Id.* See also *Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 870 (2000) (stating that the express preemption clause read in light of the saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor").

²²⁹ *Choate*, 222 F.3d at 796.

²³⁰ See *Bough & Johnson*, *supra* note 56, at 33 (arguing that *Geier* does not mandate preemption in every situation, citing *Choate* as an example, where the same analysis as *Geier* was used, but where no preemption was found, because the state common law action in question could be seen to improve or support the federal objectives).

²³¹ So far, however, most courts have held that *Geier*'s interpretation is most applicable to express preemption and saving clauses that are similarly worded to those in the Safety Act. See, e.g., *Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003) (holding that the Federal Insecticide, Fungicide and Rodenticide Act's "savings clause," which only preserves a state's regulating authority over federally registered pesticides, and does not mention common law actions, does not alter the Act's express preemption clause's preemption of a common law failure to warn action).

²³² 136 F. Supp. 2d 196 (S.D.N.Y. 2000).

²³³ *Id.* at 203.

²³⁴ *Id.* at 204 & n.7 (stating that "unlike the CPSA, the Public Health and Cigarette Safety Act [the act at issue in *Cipollone*] does not contain a saving clause[;]" also noting that all the cases cited by the defense were decided before *Geier*, and so did not take that holding into account).

established a minimum standard.²³⁵ Consequently, in accordance with *Geier*, the court held that the regulations did not implicitly preempt the plaintiff's action.²³⁶ The Ninth Circuit also came to the same conclusion when it examined the CPSA in *Leipart v. Guardian Industries, Inc.*²³⁷

In addition to *Geier*'s influence on the court's interpretation of the CPSA, the District of Massachusetts held in *Stone v. Frontier Airlines, Inc.*,²³⁸ that in accordance with the Supreme Court's holdings in *Geier* and in *Sprietsma*, the Airline Deregulation Act's saving clause should be read to preserve some measure of airline related common law actions.²³⁹ The court held that Massachusetts' interest in preserving the health and safety of its citizens through tort law remedies overrode the federal interest in uniformity.²⁴⁰

B. *Choice Versus Minimum Standards and the Presumption Against Preemption*

Although *Geier* may have had an important effect on how lower courts interpret express preemption clauses,²⁴¹ lower courts have not taken the decision as *carte blanche* to "[run] amok with our potentially boundless . . . doctrine of implied conflict pre-emption"²⁴² In what could be referred to as a triumph of the presumption against preemption, many courts have applied Justice Breyer's approach in *Geier* without finding the state action to have been impliedly preempted.²⁴³ Those

²³⁵ *Id.* at 207 ("The CPSC regulations establish general, rudimentary and minimal requirements . . . [that] do not specify design alternatives or production methods from which manufacturers may choose"). This interpretation as a minimum requirement due to the lack of alternatives was cited by the court as a major distinction between *Colon* and *Geier*. *Id.* at n. 14.

²³⁶ *Id.* at 207-209 (holding that the plaintiff's claims would not obstruct Congress's objectives for the CPSC and would in fact be consistent with those objectives).

²³⁷ 234 F.3d 1063 (9th Cir. 2000) (holding that in light of the Court's decision in *Geier*, the CPSA did not expressly or implicitly preempt the plaintiff's action, because the saving clause preserved some common law actions, and the CPSA's regulations represented minimum standards as opposed to the choices represented in *Geier*).

²³⁸ 256 F. Supp. 2d 28 (D. Mass. 2002).

²³⁹ *Id.* at 40.

²⁴⁰ *Id.* at 47.

²⁴¹ See Haas, *supra* note 219, at 1949 (asserting that *Geier* "provides clear guidelines to lower courts" in handling preemption cases).

²⁴² *Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 907 (2000) (Stevens, J. dissenting).

²⁴³ See, e.g., *Great Dane v. Wells*, 52 S.W.3d 737, 749 (Tex. 2001) (stating that the plaintiff's claim that the defendant's car trailer had been defectively designed with

courts have often done so based on Justice Breyer's central observation that FMVSS 208 offered manufacturers a choice,²⁴⁴ without which the regulation would have represented a minimum standard above which the states were free to regulate.²⁴⁵

This principle of choice versus minimum standards has most clearly been displayed in recent cases involving a variety of Federal Motor Vehicle Safety Standards (FMVSSs). Since all the FMVSSs are propagated under the Safety Act, the arguments in these cases have not been over the preemptive reach of the express preemption clause,²⁴⁶ but rather whether the regulation was intended to offer the manufacturer a choice or only set a minimum standard.²⁴⁷ If the regulation was not intended to provide a choice, courts have often decided that the state action is not preempted.²⁴⁸

The diverging outcome of two Eighth Circuit cases, *Harris v. Great Dane*²⁴⁹ and *Griffith v. General Motors*,²⁵⁰ is just

too little reflective tape was not implicitly preempted by FMVSS 108, which regulated the amount of tape that should appear on car trailers, because that regulation was only a minimum standard); *Rogers v. Cosco, Inc.*, 737 N.E.2d 1158, 1166 (Ind. Ct. App. 2000) (holding that FMVSS 213's allowance of the use of a booster seat, but not requiring its use, represented only a minimum standard, and the plaintiff's action to prohibit the use of booster seats for children under forty pounds represented a permissible attempt to impose a greater safety standard than that advocated by the DOT).

²⁴⁴ *Geier*, 529 U.S. at 881 (holding that the plaintiff's claim would have established a duty on the part of all manufacturers to install airbags in their 1987 cars, thereby conflicting with the DOT's intended mix of restraint devices, in effect taking away from the manufacturers their choice in what restraint system to use).

²⁴⁵ *Id.* at 868 (arguing that the express preemption clause, without the saving clause, would preempt all state actions except those that sought to regulate a matter for which the federal regulation represented only a "minimum safety standard").

²⁴⁶ Every court that has examined this question has so far ruled that *Geier* is controlling over the Safety Act's express preemption clause as it applied to all FMVSSs. *See e.g.*, *Harris v. Great Dane Trailers*, 234 F.3d 398, 399 (8th Cir. 2000) ("Great Dane concedes that *Geier* thereby overruled the district court's decision that Harris' claim against Great Dane is expressly preempted.").

²⁴⁷ *E.g.*, *Rogers*, 737 N.E.2d at 1165-66 (discussing only this issue of choice versus minimum standards in its analysis of the regulations implied preemption scope).

²⁴⁸ *Stone v. Frontier Airlines Inc.*, 256 F. Supp. 2d 28, 43-44 (D. Mass. 2002) (stating that the FAA's regulations represented only a minimum standard, and that in light of the Act's saving clause, and in line with the holding in *Geier*, a minimum standard was not sufficient to find that the state action would actually conflict with the federal standard).

²⁴⁹ 234 F.3d 398 (8th Cir. 2000). The plaintiff in this case claimed that the defendant had defectively designed their car trailer with too little reflective tape, which ultimately caused her husband's fatal crash. *Id.* at 399. The defendant responded that it had complied with the DOT's regulations regarding reflective devices on car trailers, and that those regulations implicitly preempted the plaintiff's claim. *Id.*

²⁵⁰ 303 F.3d 1276 (8th Cir. 2002). The plaintiff claimed that defendant had

one example of the principle of choice versus minimum standards. In *Harris*, the Circuit Court was interpreting the preemptive effects of FMVSS 108, a DOT safety standard governing lamps and reflective devices.²⁵¹ While following *Geier*'s interpretation of the Safety Act's express preemption and saving clauses,²⁵² the Eighth Circuit distinguished *Geier* on the grounds that, unlike FMVSS 208 in *Geier*, the regulation at issue in *Harris* only established a minimum standard, and was not intended to provide manufacturers with a choice.²⁵³ The Circuit Court held that FMVSS 108 did not prohibit the addition of more reflective tape than the minimum amount required.²⁵⁴ The court found that defendant could have been negligent under state law for designing its trailer with only the minimum amount of federally required reflective devices.²⁵⁵

In contrast to *Harris*, the Eighth Circuit in *Griffith* was asked to examine different aspect of FMVSS 208—namely, the requirement that some seats in trucks have either a two-point or three-point seat belt.²⁵⁶ As in *Harris*, the Eighth Circuit Court in *Griffith* held that the state action might be implicitly preempted despite the fact that no express preemption was found.²⁵⁷ The Eighth Circuit framed its decision as a simple question of whether the regulation was intended as a minimum standard or whether the regulation established a choice that the state was forbidden from precluding.²⁵⁸ With this as its ideological framework the court drew a comparison between the part of the regulation in *Geier* and the part in this case.²⁵⁹ The Eighth Circuit found that the DOT had intended the

defectively designed their 1990 Chevrolet Silverado pickup truck because they had chosen a two-point seat belt for the middle front passenger seat. *Id.* at 1278. The defendant countered by saying that FMVSS 208 had specifically allowed them to select a two-point seat belt for that seat, and therefore the plaintiff's claim was preempted. *Id.*

²⁵¹ *Harris*, 234 F.3d at 399.

²⁵² *Id.*

²⁵³ *Id.* at 403 (rejecting the defendant's argument that during the period the DOT was studying the effectiveness of FMVSS 108, that all common law standards were implicitly preempted; instead holding that the standard required only a minimum amount of reflective tape, and that any state could, through common law action, require a greater amount or different configuration of the tape without interfering with the DOT objectives for the standard).

²⁵⁴ *Id.* at 401.

²⁵⁵ *Id.*

²⁵⁶ *Griffith v. General Motors*, 303 F.3d 1276, 1279 (8th Cir. 2002).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1280-81 (declaring that the issue in the case is one of intent).

²⁵⁹ *Id.* at 1281-82 (citing *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir.2000) (supporting the Eighth Circuit's current holding)).

sections of FMVSS 208 at issue in *Griffith* to have given auto manufacturers a choice of what type of seat belt to use.²⁶⁰ Consequently, the Circuit Court held that if the plaintiff's action were allowed to proceed, the state would effectively be eliminating the manufacturer's ability to choose by declaring that only one type of seat belt was appropriate.²⁶¹ As a result, the court declared that *Geier* did apply and that the state action was implicitly preempted.²⁶²

Outside of the confines of the Safety Act, this doctrine of choice versus minimum standard has been used by courts to limit the implied preemptive effects of several other federal regulations. As has been shown above, the Tenth Circuit in *Choate v. Champion Home Builders*²⁶³ found that the federal regulation requiring hard-wired smoke detectors set only a minimum standard and did not present homebuilders with a choice.²⁶⁴ Consequently, the Circuit Court held that the Housing Construction Act did not preempt the plaintiff's common law action.²⁶⁵

Another example comes from *Stone v. Frontier Airlines, Inc.*²⁶⁶ In *Stone*, the District Court of Massachusetts ruled that the Federal Aviation Administration's (FAA) regulation requiring defibrillators on all airplanes did not preempt the plaintiff's state common law action.²⁶⁷ The District Court examined the regulation and stated that the regulation was a minimum safety standard.²⁶⁸ The court specifically distinguished *Geier* by noting that the FAA's regulation did not give the airlines a choice of safety devices.²⁶⁹ Rather, the District Court ruled that the regulation merely required the airlines to carry defibrillators by a certain date, and the history

²⁶⁰ *Id.* at 1282 (holding that the DOT had intended to offer manufacturers a choice of what restraint system they used, and since the plaintiff's action would mandate the choice of one option over another, such action would conflict with the DOT's intent for the regulation).

²⁶¹ *Griffith*, 303 F.3d at 1282. In so holding, the Eighth Circuit rejected the plaintiff's argument that *Geier* should not apply because in this case the DOT had not explicitly said that its goal was the gradual phase-in of one particular type of restraint system. *Id.* at 1280. Instead, the Circuit Court held that, in accordance with the holding in *Geier*, so long as there was a choice offered that was what was controlling, and no analysis as to why that choice was offered was required. *Id.* at 1282.

²⁶² *Id.* at 1282.

²⁶³ 222 F.3d 788 (10th Cir. 2000).

²⁶⁴ See discussion *supra* Part V.A.

²⁶⁵ *Choate v. Champion House Builders*, 222 F.3d 788, 790 (10th Cir. 2000).

²⁶⁶ 256 F. Supp. 2d 28 (D. Mass. 2002).

²⁶⁷ *Id.* at 43.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 44.

of the regulation showed that a tort law requiring an earlier adoption date would not conflict with this objective.²⁷⁰

These cases may not all mention the presumption against preemption by name, but their eventual outcomes adhere to the basic concepts that underlie the presumption. The cases show a proper, limited interpretation of the *Geier* precedent.²⁷¹ This interpretation preserves the federal desire to regulate uniformly while still allowing the states to compensate their victims.²⁷² By asserting that minimum federal standards alone do not preempt state actions, cases like *Choate* and *Harris* have properly circumscribed the power of federal agencies to preempt state common law actions.²⁷³ At the same time, by recognizing that agencies can still preempt state laws when its objective is to offer a choice, or both a minimum and maximum, cases like *Griffith* and others have permitted agencies to promulgate and administer regulations in a uniform manner.²⁷⁴

C. *Sprietsma v. Mercury Marine*

In 2002, just two years after *Geier* was decided, the Supreme Court granted certiorari in the case, *Sprietsma v. Mercury Marine*.²⁷⁵ The Court's unanimous holding in *Sprietsma*²⁷⁶ showed how the interpretation of the express preemption and implied preemption clauses established in *Geier* is both appropriate and flexible when interpreted correctly.

²⁷⁰ *Id.*

²⁷¹ Robert M. N. Palmer, *The Auto-Safety Preemption War Since Geier*, TRIAL, Nov. 2001, at 48, 50-51 (citing *Harris v. Great Dane*, *Griffith v. Gen. Motors Corp.*, and *Rogers v. Cosco* as all correctly interpreting *Geier* as standing for preemption in a limited set of circumstances).

²⁷² See Bough & Johnson, *supra* note 56, at 34 (declaring that *Geier* stands as an example of a limited application of the implied preemption doctrine). The major victory in *Geier*, from a state and victims rights standpoint, was that the majority rejected Honda's argument of express preemption. *Id.* At the same time the holding also still allowed the federal government to mandate options and phase-in programs. *Id.*

²⁷³ See Palmer, *supra* note 274, at 50.

²⁷⁴ See Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 930 (1996) (arguing that the vast differences that have developed between the states in the area of product liability means that it is time the federal government step in and apply more uniform "mature and experienced decision making").

²⁷⁵ 534 U.S. 1112 (2002), *cert. granted*.

²⁷⁶ *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

Mrs. Jeanne Sprietsma died in 1995 when she fell off a small ski boat and was struck by the outboard motor's propeller, which had been manufactured by Mercury Marine (Mercury).²⁷⁷ Mrs. Sprietsma's husband filed a product liability tort claim alleging that the motor had been defectively designed because it lacked a propeller guard.²⁷⁸ Mercury responded to the charges by claiming that the Federal Boat Safety Act of 1971 (FBSA) preempted Sprietsma's claims.²⁷⁹ Before *Geier* had been decided, the Illinois trial court and the Illinois intermediate appellate court had agreed with Mercury's interpretation of the FBSA's express preemption clause and dismissed Sprietsma's claim.²⁸⁰ However, after *Geier* was decided, the Illinois Supreme Court, interpreting *Geier*, overturned the appellate court and declared that Sprietsma's claims were implicitly preempted.²⁸¹ The Supreme Court subsequently granted certiorari.²⁸²

Justice Stevens, the author of the dissent in *Geier*, delivered the unanimous opinion in *Sprietsma*.²⁸³ According to him, three issues had to be resolved. The first issue was whether the FBSA expressly preempted common law tort claims.²⁸⁴ The second issue was whether the Coast Guard's decision not to regulate propeller guards implicitly preempted the common law claims.²⁸⁵ The last issue was whether the potential conflict between state and federal regulation of propeller guards would be significant enough to overcome the presumption against preemption.²⁸⁶

Similar to *Geier*, Justice Stevens began his analysis in *Sprietsma* by looking at the language of the FBSA, its history, and that of the regulation in question. In relevant part, the

²⁷⁷ *Id.* at 54.

²⁷⁸ *Id.* at 55. A propeller guard is one of a set of "propeller injury avoidance devices." The purpose of these devices is to reduce the risk that boat propellers pose to individuals in the water. There are at least four different types of propeller guards, most of which are designed to deflect large objects away from the spinning propellers. See United States Coast Guard, *Boating Articles: Propeller Injury Risk Reduction*, available at <http://www.uscgboating.org/articles/boatingview.aspx?id=67> (describing the various types of propeller guards and listing each type's advantages and disadvantages) (last visited Feb. 10, 2005).

²⁷⁹ 46 U.S.C. §§ 4301-4311 (2000) [hereinafter FBSA].

²⁸⁰ *Sprietsma*, 537 U.S. at 55.

²⁸¹ *Id.*

²⁸² *Sprietsma v. Mercury Marine*, 534 U.S. 1112 (2002).

²⁸³ *Sprietsma*, 537 U.S. at 53.

²⁸⁴ *Id.* at 56.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

FBSA created an advisory council which provided recommendations to the Coast Guard on all proposed regulations under the act.²⁸⁷ The council was charged with considering several factors, such as the “extent to which [a] proposed regulation will contribute to boating safety”²⁸⁸ and whether the proposed regulation will “compel substantial alteration of recreational vessel[s]”²⁸⁹ The process that led to the Coast Guard’s ultimate decision not to issue a requirement for propeller guards began in 1988. At that time, due to the perceived high number of individuals injured in propeller-related accidents, the Coast Guard initiated an inquiry into whether it should require the installation of guards.²⁹⁰ After a long study of the propeller guard issue, a subcommittee of the advisory council recommended that the Coast Guard “take no regulatory action to require propeller guards.”²⁹¹ The Coast Guard followed this recommendation.²⁹²

After examining this history, Justice Stevens next looked at the FBSA’s preemptive power. He began by examining the act’s construction.²⁹³ Like the Safety Act in *Geier*, the FBSA had both an express preemption clause and a saving clause.²⁹⁴ He declared that the phrasing of the preemption clause indicated that it was not intended to preempt common law actions.²⁹⁵ Justice Stevens stated further that, in accordance with *Geier*, the determination not to preempt common law actions was “buttressed[d]” by the FBSA’s saving clause.²⁹⁶ As a

²⁸⁷ *Id.* at 58.

²⁸⁸ *Sprietsma*, 537 U.S. at 58.

²⁸⁹ *Id.* at 58 n.7.

²⁹⁰ *Id.* at 60. In the opinion Justice Stevens noted that there were conflicting figures given for the number of persons injured by propeller accidents each year. The number ranging from around 100 accidents per year to more than 2,000. *Id.* at 60 n.8.

²⁹¹ *Id.* at 61 (quoting Brief for Appellant at 43).

²⁹² *Id.* at 61-62. In 2001 the advisory council recommended changes to this policy as it pertains to “planing vessels 12 feet to 26 feet in length.” However as of the time of the opinion the Coast Guard had not acted on this recommendation. *Id.* at 62 (quoting 66 Fed. Reg. 63645, 63647).

²⁹³ *Sprietsma*, 537 U.S. at 56.

²⁹⁴ *Id.* at 58-59.

²⁹⁵ *Id.* at 62-63. This declaration that the express preemption clause would not have preempted common law actions is different than the interpretation Justice Breyer had of the Safety Act’s express preemption clause. *See Geier v. Am. Honda Motors Co.*, 529 U.S. 861, 868 (2000) (stating that without the saving clause the express preemption clause would have preempted all common law actions). This discrepancy arises from the different terms used in each preemption clause. The FBSA refers to preempting “law[s] or regulation[s],” *Sprietsma*, 537 U.S. at 63, whereas the Safety Act referred to preempting “safety standard[s].” *Geier*, 529 U.S. at 868.

²⁹⁶ *Sprietsma*, 537 U.S. at 63.

result, Justice Stevens wrote that the FBSA does not expressly preempt state common law actions.²⁹⁷

Justice Stevens then proceeded to examine whether *Sprietsma's* action was implicitly preempted. He stated that “[i]t is quite wrong to view [the Coast Guard’s] decision [not to require propeller guards] as the functional equivalent of a regulation prohibiting all States . . . from adopting such a regulation.”²⁹⁸ An examination of the history of the act suggests that when the Coast Guard chose not to regulate in an area they presumed that the state could still do so.²⁹⁹ In addition, the Coast Guard cited as a major reason for rejecting the propeller guard regulation, the fact that not enough data was available to justify what would be a technically difficult and expensive regulation to impose.³⁰⁰ This was not an indication that the Coast Guard believed it was a bad idea to have propeller guards, but rather, under the current agency regulatory scheme there was not sufficient evidence to indicate that a national mandate was required.³⁰¹

Justice Stevens wrote that the Coast Guard’s decision in *Sprietsma* stood in “sharp contrast to the decision . . . given pre-emptive effect in *Geier*”³⁰² In *Sprietsma*, the Coast Guard had written an amicus curiae brief, informing the Justices that the agency did not view the decision as having any preemptive effect.³⁰³ The Coast Guard’s position on the FBSA’s preemptive effect was thus opposite the DOT’s position on the preemptive effect of FMVSS 208.³⁰⁴ Justice Stevens therefore held that, in accordance with *Geier*, there would be no conflict between the Coast Guard’s intent in not regulating propeller guards and *Sprietsma's* common law state action, which might mandate such a device.³⁰⁵

²⁹⁷ *Id.* at 63-65 (using *Geier's* assertion that “an express preemption clause ‘does not bar the ordinary working of conflict preemption principles.’”).

²⁹⁸ *Id.* at 65.

²⁹⁹ *Id.* at 65-66. Shortly after the FBSA took effect the Secretary of Transportation issued a statement that all then-existing state laws were exempt from being preempted by the FBSA. *Id.* at 59. Every time that the Coast Guard has issued new regulations since they have limited the scope of this blanket exemption to those “[s]tate statutes and regulations” that are not otherwise covered by a federal regulation. *Id.* (citing 38 Fed. Reg. 6914-6915).

³⁰⁰ *Sprietsma*, 537 U.S. at 66.

³⁰¹ *Id.* at 66-67. (stating that the decision was made within the “FBSA’s ‘stringent’ criteria for federal regulation”).

³⁰² *Id.* at 67.

³⁰³ *Id.* at 68.

³⁰⁴ See discussion *supra* Part III.B.

³⁰⁵ *Sprietsma*, 537 U.S. at 68.

The Court's holding in *Sprietsma* confirms the suggestion that the *Geier* decision is a somewhat limited decision which represents a balancing of federal and state needs, and an approach that other courts should use in evaluating the preemptive effects of laws containing both an express preemption clause and a saving clause.³⁰⁶ *Sprietsma* highlights how implied preemption, combined with the implicit use of the presumption against preemption, will allow courts to balance the needs of both the federal government in uniformity, and the states in protecting their citizens.³⁰⁷ Finally, the decision also demonstrates how the Court has chosen to defer to the opinion of various agencies regarding the preemptive effects of their regulations.³⁰⁸ In the end, *Sprietsma* is a strong indication that *Geier* allows, but does not require, a finding of implied preemption.³⁰⁹

VI. CONCLUSION

The Supreme Court's decision in *Geier* was an important but limited holding. While *Geier* is most likely to be remembered for its interpretation of the express preemption and saving clauses, the precedent *Geier* established has not greatly changed the balance between federal and state regulations. The decision did not eradicate the presumption against preemption, nor did it create a situation where the federal regulation will more frequently preempt the state. The

³⁰⁶ See *id.* at 63-64 (referencing *Geier* in discussing how the FBSA's saving clause supports the Court's reading of the express preemption clause to not include common law actions).

³⁰⁷ See *id.* at 65-66 (holding that, in light of the FBSA's stringent criteria for federal regulation, the Coast Guard's decision to not regulate propeller guards should not be viewed as the equivalent of a decision to not allow propeller guards). This conclusion was fully consistent with the FBSA's history of preserving state regulatory authority in areas where the federal government had not yet regulated. *Id.* at 65.

³⁰⁸ See *id.* at 68 (declaring that because the Court's reasoning in *Sprietsma* centrally revolved around the opinion of the Coast Guard, that the holding was strongly supported by its reasoning in *Geier*).

³⁰⁹ See discussion *supra* Part V.

Supreme Court's decision that FSVMM 208 preempted state action represents one point on the preemption spectrum, a spectrum that is beginning to be filled in by the lower courts.

Mason A. Barney[†]

[†] Candidate for Jurist Doctorate, expected June 2005, graduate Bowdoin College, 1999. The author would like to thank his mother and father, Jim and Bonnie Barney for their support, Professors Edward Cheng and Aaron Twerski for their learned opinions, and his wife, Jaclyn Okin Barney, without whose love, support and guidance this note would never have been published.