BEYOND *GEIER:* FEDERALISM FACES AN UNCERTAIN FUTURE

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I. INTRODUCTION

The term "federalism" refers to "respect for the 'constitutional role of the States as sovereign entities.'"[1] It is a word that often finds its way into both political rhetoric and judicial opinions.[2] During the 1996 presidential campaign,

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[1] *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, (2000) (Stevens, J., dissenting) (quoting *Alden v. Maine*, 527 U.S. 706, 713, (1991). "Federalism" is defined by *Black's Law Dictionary* as a "[t]erm which includes interrelationships among the states and relationship between the states and the federal government." BLACK'S LAW DICTIONARY at 612 (6th ed. 1990).

[2] It should not be surprising that campaign issues find their way into judicial opinions. One of the most interesting areas of study for both legal scholars and political scientists is the

former Senate Majority Leader Bob Dole of Kansas passionately spoke of America's need to rediscover the Tenth Amendment to the United States Constitution.[3] While Senator Dole's stump speeches on the virtues of the Tenth Amendment did not sufficiently inspire the electorate to award him the United States Presidency, it did provide an insight into things to come. With the current makeup of the Supreme Court,[4] at least one writer has said, "If there is a favorite theme of the current U.S. Supreme Court, it is federalism."[5]

No area of the law is potentially as affected by the Supreme Court's rediscovery of federalism than the area of governmental preemption. During the winter of 2000, the United States Supreme Court heard oral arguments on the case of *Geier v. American Honda Motor Company*.[6] At first glance, *Geier* appears to be a simple case of statutory construction. The Court decided whether the Traffic and Motor Vehicle Safety Act[7] and its accompanying federal regulations[8] preempted a lawsuit in which the plaintiffs argued that the car should have been equipped with an air bag. However, product manufactures, consumer advocacy groups, trial lawyers, and a host of other interested parties throughout the country held their collective breaths as the Court considered the avenue of analysis it would use in determining whether the plaintiffs state law tort theory in *Geier* was preempted. The outcome of the case promised to have a significant

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intersection of law and politics. *See, e.g.*, Dyan Finguerra, *The Tenth Amendment Shoots Down the Brady Act*, 3 J.L. & Pol'y, 637 (1995). American University's Washington College of Law has recently launched a program of study that is designed to explore the intersection of these two related disciplines. *See WCL Masters in Law and Government*, http://www.wcl.american.edu/lawandgov (last visited Nov. 20, 2000). Such a program is long overdue.

[3] The Tenth Amendment states that the powers not delegated to the federal government are reserved to the states or to the people. *See* U.S. CONST. amend. X.

[4] Justices Thomas and Scalia are widely considered the most conservative of the Supreme Court justices. *See Hard Right Turn Would Threaten Nation's March Toward Justice, at* http://www.supremecourtvote.org/news/052500.phtml. It may be Justice Sandra Day O'Connor, however, that is most adamant about an emphasis on federalism and returning power to the states. *See generally* EDWARD D. LAZARUS, CLOSED CHAMBERS at 300 (1998).

[5] David G. Savage, *Sudden Impact: Air Bag Case Could Strike Blow to Federal Preemption*, A.B.A. J., Dec. 1999, at 42 (noting recent cases in which the United States Supreme Court has refused to find state law preempted by federal law).

[6] 529 U.S. 861 (2000).

[7] 15 U.S.C. § 3181 (2000) (repealed 1994).

[8] 49 C.F.R. § 571.208 (1997).

impact on the automobile industry.[9] More importantly, however, the outcome of *Geier* was anticipated for the potential impact that it would have on governmental preemption jurisprudence for years to come. This article will provide a general overview of the law as it relates to governmental preemption before the United States Supreme Court ruling in *Geier v. American Honda Motor Co.* The article will also discuss the cases which preceded Geier and how the National Safety Vehicle Act was construed.[10] This discussion will demonstrate that the law of governmental preemption was not well-settled and that federal and state courts often found themselves in so-called "turf wars" in determining whether state law was preempted by a federal standard. This article will also examine the Supreme Court's decision in *Geier* and how that decision has affected the analytical analysis that jurists, litigants, and scholars must use when approached with a question of governmental preemption.

II . GOVERNMENTAL PREEMPTION: AN OVERVIEW BEFORE *GEIER*

Article VI, Clause 2 of the United States Constitution is generally known as the "Supremacy Clause."[11] The Supremacy Clause provides that:

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[9] Malcolm E. Wheeler, an attorney representing American Honda Motor Company in the *Geier* case, argued that "chaos" would ensue if the Court held that the automobile industry could be held to different standards in each of the fifty states. *See* Joan Biskupic, *Federal Supremacy Argued at Court; Air Bag, Oil Tanker Cases Test U.S. Laws' Reach Into* States, WASHINGTON POST, Dec. 8, 1999, at A12. Hundreds of personal injury lawsuits against automobile manufacturers were pending at the time *Geier* was argued. *Id.*

[10] It is interesting to note that federal courts, which addressed the issue presented in *Geier*, held that state common law was preempted by federal law. *See e.g. Montag v. Honda Motor Co.*, 75 F.3d 1414, 1417 (10th Cir. 1996) (holding that state law is impliedly preempted); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1126 (3d Cir. 1990) (holding that state law is impliedly preempted); *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989) (holding that state law is impliedly preempted); *Wood v. General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988) (holding that state law is impliedly preempted); *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1416 (9th Cir. 1997) (holding that state law is expressly preempted).

By contrast, a number of state supreme courts addressed the issue and held that state law was not preempted by the National Traffic and Motor Vehicle Act of 1996 and its accompanying regulations. *See e.g. Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376, 382-86 (N.Y. 1998) (construing the act as not preempting state law claims); *Munroe v. Galati*, 938 P.2d 1114, 1119-20 (Ariz. 1997) (construing the act as not preempting state law claims); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345, 347-48 (N.H. 1995) (construing the act as not preempting state law claims).

[11] CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW,

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[12]

Like so many other constitutional pronouncements, the application of this single sentence has prompted the development of an entire body of law. As this area of the law has evolved, courts have identified three "types" of preemption: express preemption[13], implied field preemption[14], and implied conflicts preemption[15]. A very general discussion of each type of preemption is provided below. It is well-settled law that the United States Congress may enact a federal law that preempts state law in certain areas where Congress is acting within its constitutional authority.[16] The appropriate question that courts were forced to answer in determining whether a state statute or regulation had been preempted by a United States Congressional or authorized federal regulatory pronouncement centered on legislative purpose. The United States Supreme Court has instructed inferior courts that "[t]he purpose of Congress is the ultimate touchstone."[17] State and federal courts are hesitant, however, to find federal preemption. Professors Antieau and Rich have observed, "At least when addressing issues which traditionally fall within state authority, express preemption will only be found when the language used by Congress demonstrates clear evidence of its intent."[18] In their three-volume treatise on Constitutional Law, Antieau and Rich go on to explain:

Attitudes towards preemption doctrine have changed over time, from historical presumptions that subject matters regulated by the federal government could not also be regulated by the states, to a more contemporary presumption that

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§43.17, at 34 (2d. ed. 1997)

[12] U.S. CONST. art. VI., cl. 2.

[13] *See infra* notes 20-23 and accompanying text.

[14] *See infra* notes 24-38 and accompanying text.

[15] *See infra* notes 39-44 and accompanying text.

[16] *See generally* Shaw v Delta Air Lines, Inc., 463 U.S. 85, 95 (1983) (discussing the scope of the ERISA preemption clause).

[17] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

[18] Antieau & Rich, *supra* note 11, at § 43.18, 36.

concurrent regulation by state and federal government is the norm rather than the exception. The general rule that in cases of ambiguity courts should presume that Congress did not intend to preempt, was built upon the same principle of federalism which the Supreme Court also identified and applied in other contexts. In order to promote the values of federalism, and to reinforce accountability, the Court generally expects Congress to express a clear intent to preempt; when Congress fails to do so, it should be with the understanding that state law will generally remain in effect.[19]

A. EXPRESS PREEMPTION

Any number of federal statutes provide an illustration of a so-called "preemption clause."[20] For example, the little-known Petroleum Marketing Practices Act contains the following language:

To the extent that any provision of this subchapter applies to the termination (or furnishing of notice with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notice with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce or continue in effect any provision of law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notice thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable regulation of this subchapter.[21]

Courts have held that this type of statute manifests a clear intention to expressly preempt a competing state law or regulation.[22] When asked to construe this provision, the Eighth Circuit stated that the language of the statute demonstrates that Congress "clearly intended to provide uniform minimum standards for the termination and nonrenewal of franchises and to bar state regulation of this area."[23] Therefore, this little-known statute provides some insight into the type of language that pre-*Geier* courts require in order to find express federal preemption.

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[19] *Id.* at 36-37.

[20] *See, e.g.*, 15 U.S.C. § 2806(a)(2000) (setting forth the preemption provision of the Petroleum Marketing Practices Act).

[21] *Id.*

[22] *See* Clark v. BP Oil Co., 137 F.3d 386, 396 (6th Cir. 1998) (holding that this provision expressly preempts state law); Continental Enters. Inc.. v. American Oil Co., 808 F.2d 24, 27 (8th Cir. 1986) (holding that this provision expressly preempts state law).

[23] *Continental Enters.*, 808 F.2d at 27.

B. IMPLIED FIELD PREEMPTION

There are circumstances where, notwithstanding Congress' failure to include an express preemption provision in a piece of federal legislation, courts will hold that a state law has been impliedly preempted. As a general proposition, there are two types of implied preemption: field preemption and conflicts preemption. The former will be discussed presently. The latter will be discussed in the following section of this article.

The United States Supreme Court, in the years prior to *Geier*, gave courts and litigants the following guidance when faced with questions of implied field preemption:

'[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the State's to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.'[24]

As mentioned in the preceding discussion of express preemption, courts are hesitant to hold that a state's attempt at regulation has been preempted.[25] In fact, the U.S. Supreme Court has gone so far as to set forth a presumption against preemption in certain contexts.[26] In the 1947 case of *Rice v. Santa Fe Elevator Corporation*, the Court has said, "We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[27] This presumption against preemption, however, is not always appropriate.[28] Professors Rich and Antieau write, "In contrast [with situations where states are exercising their traditional police powers], if the subject matter is one which customarily falls within the bounds of Congress, or as to which uniform national standards are especially important, then the Court will be much more willing to find that there is

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[24] Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

[25] *See supra* notes 18-19 and accompanying text.

[26] *See* Rice v Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (setting forth a presumption against the preemption of state law where the individual state is exercising its traditional police powers).

[27] *Id.*

[28] *See* ANTIEAU & RICH, *supra* note 11, at § 43.20, 44.

no room for state regulation."[29]

A 1997 Sixth Circuit case provides a useful illustration of implied field preemption.[30] In *Springston v. Consolidate Rail Corporation*, the plaintiff drove his truck onto a railroad track in rural Ohio.[31] His truck was struck by a Conrail train.[32] Consequently, the plaintiff was left a quadriplegic.[33] Judge Batchelder, writing for the Sixth Circuit panel, described the facts of *Springston* as follows:

The crossing at which this collision occurred was equipped with a crossbuck and an advance warning sign as required by law; it did not have lights or mechanical crossing gates. Springston had never traversed this crossing before and was not familiar with the area. Conrail's engineer testified that Springston had his dome light on and appeared to be looking at the seat or the floor next to him when he drove over the tracks. Springston does not deny this allegation and in fact indicates that he had been looking at a map on the seat next to him sometime prior to the collision.[34]

The plaintiff sued both the owner of the train, Conrail, and the manufacturer of the train, General Motors ("GM").[35]

The federal district court "granted summary judgment to both defendants on plaintiff's claims of negligence based on the lack of extra-statutory warning signals on the train, holding that these claims were preempted by [the federal Boiler Inspection Act]."[36] The Sixth Circuit examined the applicable federal legislation and other cases that addressed analogous issues.[37] The *Springston* court then held that summary judgment was appropriate because Congress had occupied the

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[29] *See id.*

[30] Springston v. Consolidated Rail Corp., 130 F.3d 241 (6th Cir. 1997) (affirming the district court's grant of summary judgment where the plaintiff claimed injury due to the lack of "extra-warning signals" on a train).

[31] *Id.* at 243.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Springston*, 130 F.3d at 244. The plaintiff's theory of negligence in *Springston* was "based upon the lack of visual devices on the locomotive such as reflective tape, a strobe light, a ditch light, oscillating lights, and the color of the locomotive ." *Id.* at 243.

[37] *See id.* at 244-45.

field in passing the federal statutes at issue.[38]

C. IMPLIED CONFLICT PREEMPTION

Finally, a state statute or regulation is unconstitutional by virtue of the Supremacy Clause of the United States Constitution[39] where it conflicts with a valid federal law.[40] This principle is embedded in the pages of the early United States Reports. In the classic case of *Gibbons v. Ogden,*[41] the Court was faced with a situation where the State of New York was seeking to prevent a party from using a state waterway, notwithstanding the fact that the party had a federal license. *Gibbons* is recognized primarily for its construction of the Commerce Clause.[42] It is, however, also an early illustration of the fact that a state's attempt at regulation or legislation is void if it is in conflict with a valid federal enactment. In a 1987 book, Chief Justice William H. Rehnquist described *Gibbons* as follows:

> The most important case to reach the Marshall Court under [the Commerce Clause] was *Gibbons v. Ogden*, which involved steamboats traveling across the Hudson River between New York and New Jersey. A resident of New York by the name of Aaron Ogden took an assignment from Robert Fulton, one of the inventors of the steamboat, of the exclusive right granted to Fulton by the New York legislature to operate a steam ferry across the Hudson River between New York and Elizabethtown, New Jersey. Thomas Gibbons operated his steamboats on the same run, and he had obtained a license for plying the coastal trade under an act of Congress passed in 1793. Ogden sued in the New York courts to enjoin Gibbons from competing with him on the steam-ferry run from New York to Elizabethtown because the New York legislature's grant of the right to him was an exclusive monopoly. The New York courts ruled in favor of Ogden, and Gibbons appealed to the Supreme Court of the United States.
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> The Supreme Court, in an opinion written by Chief Justice Marshall, broadly defined the term "regulate" in the constitutional provision dealing with com-

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[38] *See id.* (citing *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 613 (1926) (holding that Congress intended to occupy the field of locomotive equipment when it enacted the Boiler Inspection Act); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983) (holding that state common law was preempted by the Boiler Inspection Act).

[39] *See supra* text accompanying notes 11-12.

[40] *See generally* ANTIEAU & RICH, *supra* note 11, at § 43.19, 38-44.

[41] 22 U.S. 1 (1824).

[42] *See* U.S. CONST. art. I., § 9.

merce as meaning the power "to prescribe the rule by which commerce is to be governed." Thus the activity of operating a ferry from New York to New Jersey was clearly subject the commerce power of Congress, and the Court held that by enacting the licensing statute Congress had exercised its power to permit Gibbons to compete with Ogden.[43]

While *Gibbons* is, as mentioned previously, a landmark case in the jurisprudence of the Commerce Clause, it also provided very early and useful insight into the area of implied conflict preemption. Chief Justice Marshall, writing for the Court, stated that if state laws "come into collision with an act of Congress," then those state laws "must yield to the law of Congress."[44]

III. PRE-*GEIER* CASES WHICH INTERPRET THE NATIONAL SAFETY VEHICLE ACT AND ITS ACCOMPANYING REGULATIONS.

Federal and state courts have consistently disagreed on whether the National Traffic and Motor Safety Vehicle Act of 1996 and its accompanying regulations preempt claims based on state tort law. This comes as little surprise. The Act is very ambiguous as to the issue of pre-emption. On one hand, there is an "express pre-emption clause" that states:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle of such vehicle or item of equipment which is not identical to the Federal standard.[45]

This would tend to lead one to the conclusion that state law claims are preempted. The statute is rendered ambiguous, however, by the so-called "savings clause" which provides that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."[46] Federal courts have routinely held that state tort law is preempted by the federal act.[47] Meanwhile, several state supreme courts have reached the opposite

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[43] WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS AND HOW IT IS 116 (1987).

[44] *Gibbons*, 22 U.S. at 210.

[45] 15 U.S.C. § 1392(d) (2000).

[46] 15 U.S.C. § 1397(k) (2000).

[47] *See e.g. Montag v. Honda Motor Company*, 7 F.3d 1414, 1417 (10th Cir. 1996); *Pokorny v. Ford Motor Company*, 902 F.2d 1116, 1126 (3rd Cir. 1990); *Taylor v. General*

conclusion. These state courts have held that the National Traffic and Motor Safety Vehicle Act and its accompanying regulations do not preempt state law claims.[48] The following is a brief discussion of these cases.

A. FEDERAL COURTS

In *Montag v. Honda Motor Corp.*,[49] the Tenth Circuit held that the National Traffic and Motor Safety Vehicle Act of 1996 impliedly preempted state law tort claims. [50] In *Montag*, the plaintiffs claimed that American Honda Motor Company and various related entities defectively designed the seatbelt in a 1988 Honda Prelude driven by the plaintiff's deceased wife.[51] The decedent in *Montag* was "thrown from her car [after a collision] despite the fact that she was wearing a seatbelt."[52] The jury returned a verdict in favor of the defendants and the plaintiff appealed.[53] Relying on *Freightliner Corp. v. Myrick*[54], the Tenth Circuit held: "Although not explicitly stated the [United States Supreme Court in *Myrick*] clearly believe[d] that the express preemption clause of the Safety Act did not preclude implied preemption analysis."[55] Therefore, the Tenth Circuit found that state law tort claims were preempted.[56]

In *Porkorny v. Ford Motor Company*,[57] the court described the relevant facts as follows:

Motors Corp., 875 F.2d 816, 827 (11th Cir. 1989); *Wood v. General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1998); *Harris v. Ford Motor Company*, 110 F.3d 1410, 1416 (9th Cir. 1997).

[48] See e.g. *Drattel v. Honda Motor Corp.*, 699 N.E.2d 376, 382-86 (N.Y. 1998); *Munroe v. Galati*, 938 P.2d 1114, 1119-20 (Ariz. 1997); *Tebbetts v. Ford Motor Company*, 665 A.2d 345, 347-48 (N.H. 1995).

[49] 75 F.3d 1414 (10th Cir. 1996).

[50] *Id.* at 1417.

[51] *Id.* at 1416.

[52] *Id.*

[53] *Id.*

[54] 514 U.S. 280 (1995).

[55] *Montag*, 75 F.3d at 1417.

[56] *Id.*

[57] 902 F.2d 1116 (3rd Cir. 1990).

[The plaintiff] was a twenty-two year old Philadelphia Police Officer. He was killed in December of 1983 when the 1981 model Ford Econoline police van in which he was riding collided with another police patrol car while responding to an emergency call. [The plaintiff], a passenger in the van, was partially ejected through the passenger side window and crushed by the van when it turned over after the collision. At the time, he was not wearing the seatbelt Ford had installed in the van in compliance with Standard 208.[58]

The United States District Court accepted the defendant's argument that the Safety Act and Standard 208 impliedly preempted the plaintiff's claim.[59] Therefore, it granted Ford's motion for summary judgment on all counts.[60] The plaintiff subsequently appealed.[61] After a detailed analysis, the Third Circuit wrote: "We believe that [the plaintiff's] action does present an actual conflict with the Safety Act and Standard 208 to the extent that it alleges liability for Ford's failure to include air bags or automatic seatbelts on the passenger side of the 1981 van in which Duffy was killed."[62] Therefore, the United States Court of Appeals for the Third Circuit held that a product liability claim against Ford Motor Company was impliedly preempted to the extent that the theory of recovery was defective design for not being equipped with passenger air bags or automatic seatbelts.[63] However, the Third Circuit held that the plaintiff's action for recovery based on the theory that Ford negligently failed to provide protective netting over the van's window was not preempted.[64] The court reasoned that there was no actual conflict with such a requirement and Standard 208's regulatory framework.[65] The court explained:

A state's common law, imposing liability because the absence of protective window netting is a design defect, would not, to our mind, frustrate the purpose of the federal regulatory scheme. The options set forth in Standard 208 would not be undermined in such a situation, and manual safety belts in particular

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[58] *Id.* at 1118.

[59] *Id.* at 1119.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1123.

[63] *Pokorny*, 902 F.2d at 1125.

[64] *Id.* at 1125-26.

[65] *Id.*

would remain a viable option.[66]

In *Taylor v. General Motors Corp.*,[67] two plaintiffs were killed in separate automobile accidents while driving automobiles manufactured by General Motors and American Honda Motor Company.[68] The plaintiffs sued the respective defendants and the manufacturers moved to dismiss on the grounds that the plaintiffs' tort claims, founded on Florida common law, were preempted.[69] The United States District Court granted the defendant's Motion to Dismiss without reaching the preemption issue.[70] The plaintiffs subsequently appealed.[71] After examining federal preemption law and Florida common law, the Eleventh Circuit held that the plaintiff's claim was preempted. [72] The *Taylor* court reasoned that Florida common law, to the extent that it allowed plaintiffs to recover in this action, conflicted with the federal statutory and regulatory scheme and was therefore impliedly preempted.[73]

In *Wood v. General Motors Corp*,[74] the plaintiff was riding in the front passenger seat of a 1976 Chevrolet Blazer.[75] The Blazer was manufactured by General Motors and complied with all applicable federal standards.[76] However, the plaintiff was not wearing her seatbelt.[77] The automobile veered off the road and hit a tree.[78] As a result, the plaintiff became a quadriplegic.[79] The plaintiff then

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[66] *Id.* at 1126.

[67] 875 F.2d 816 (11th Cir. 1989).

[68] *Id.* at 817.

[69] *Id.* at 817-18.

[70] *Id.* at 818.

[71] *Id.*

[72] *Id.* at 827.

[73] *Taylor*, 875 F.2d at 827.

[74] 865 F.2d 395 (1st Cir. 1988).

[75] *Id.* at 396.

[76] *Id.*

[77] *Id.*

[78] *Id.*

sued General Motors in the United States District Court for the District of Massachusetts.[80] Her theories of recovery were negligent design, negligent manufacture, and breach of warranty, both expressed and implied.[81] The gravamen of the plaintiff's claim appears to be the following paragraph in her Complaint: "Defendant negligently failed to provide reasonably safe and adequate safety devices, which include but are not limited to 'airbag' devices, to protect passengers and minimize the seriousness of injuries in reasonably foreseeable circumstances . . . ."[82] The defendant moved for summary judgment which was denied.[83] The defendant then sought an interlocutory appeal to the United States Court of Appeals for the First Circuit.[84] On appeal, the First Circuit held that the National Traffic and Motor Vehicle Safety Act and its accompanying regulations preempted the plaintiff's claim.[85] The First Circuit noted that the Safety Act was "facially ambiguous as to Congress's intent in the present situation."[86] Nevertheless, the First Circuit held:

While we, therefore, do not find express preemption, we are convinced that Congress's purposes, as revealed in the Safety Act and in the legislative history, plainly *imply* a preemptive intent. The instant product liability claim alleging that the absence of an air bag rendered the vehicle's design faulty would, if upheld, clearly "stand as an obstacle" to the regulatory scheme of the Safety Act.[87]

The cases discussed above demonstrate that a number of circuits have held that the Safety Act and accompanying regulations impliedly preempt state common law. The Ninth Circuit, however, in *Harris v. Ford Motor Company*, held that state tort claims were *expressly* preempted by the National Traffic and Motor Safety Act of 1996.[88] In *Harris*, a sixteen year old California resident was

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[79] *Id.*

[80] *Wood*, 865 F.2d at 396.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 397.

[85] *Id.* at 401.

[86] *Wood*, 865 F.2d at 401.

[87] *Id.* at 402 (emphasis in original).

[88] *Harris v. Ford Motor Company*, 110 F.3d 1410, 1415 (9th Cir. 1997).

driving a rented 1992 Mercury Topaz in New York when she lost control of the vehicle and struck a tree.[89] The plaintiff sued Ford Motor Company and argued, *inter alia,* that "the vehicle was defectively designed and that Ford was negligent because it failed 'to provide a driver side air bag.'"[90] The defendant was granted partial summary judgment on the ground that certain of the plaintiff's state law claims were preempted by the Safety Act and Standard 208.[91] The Ninth Circuit noted that, "Section 1392(d) prohibits States from establishing or continuing in effect 'any safety standard' not identical to the Federal standard."[92] The court reasoned that the phrase "any safety standard" was inclusive language that "sweeps broadly and suggests no distinction between positive [legislative or regulatory] enactments and common law."[93] Therefore, the Ninth Circuit reasoned that the plaintiffs's claims were expressly preempted.[94] However, the Ninth Circuit did not end their analysis there. They also explored the so-called savings clause of the National Traffic and Motor Safety Vehicle Act of 1996.[95] The Ninth Circuit read this provision to mean that "[l]iabilty still exists under common law for a variety of claims dealing with automobile safety. For example, where no Federal safety standard exists, manufacturers may be liable under common law for design defects."[96] However, the court reasoned that this was not such a case.[97] Therefore, the court reversed the ruling of the United States District Court and remanded the matter.[98]

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[89] *Id.* at 1411.

[90] *Id.*

[91] *Id.* at 1411-12.

[92] *Id.* at 1413.

[93] *Id.* at 1414.

[94] *Harris*, 110 F.3d at 1415.

[95] *See* 49 U.S.C. § 30103(e) 1994 (stating that "compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.")

[96] *Harris*, 110 F.3d at 1415 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995)).

[97] *Id.* at 1415-16

[98] *Id.* at 1416.

B. STATE COURT DECISIONS

As previously mentioned, a number of state supreme courts have held that the National Traffic and Motor Safety Vehicle Act of 1996 does not preempt state common law claims.[99] In *Drattel v. Toyota Motor Corp.*,[100] the plaintiff was injured in her 1991 Toyota Tercel.[101] She was involved in an accident, but was wearing both her shoulder harness and lap seatbelt.[102] The plaintiff sued the manufacturer arguing that Toyota Motor Corporation was liable for failure to install a driver's side air bag.[103] In holding that the safety act did not preempt state court claims, the Court of Appeals of New York stated:

In sum, the 1966 Safety Act does not preclude the plaintiffs' common law claims. Congress amended Safety Standard 208 in 1984 to require passive restraints, but did not otherwise amend the Safety Act. Until Congress speaks more definitively and differently, we are satisfied that its express language in the Act itself provides sufficient guidance against preemptive features in these circumstances.[104]

Therefore, the *Drattel* court refused to find federal preemption.

In *Munroe v. Galati*,[105] the plaintiff was rendered a quadriplegic as a result of a low speed accident that he suffered while driving his 1990 Chevrolet Corsica through an intersection in Tempe, Arizona.[106] The plaintiff sued on a variety of theories, including strict liability.[107] "In their strict liability claim, Plaintiffs contend that Mr. Munroe's injuries occurred because the combination of inadequacies in the seatbelt design and the failure to equip or offer to equip the automobile with a supplemental drivers' side air bag system made the vehicle defec-

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[99] *See supra* note 48 and accompanying text.

[100] 699 N.E.2d 376 (N.Y. 1998).

[101] *Id.* at 377.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 385.

[105] 938 P.2d 1114 (Ariz. 1997).

[106] *Id.* at 1115.

[107] *Id.*

tive and unreasonably dangerous."[108] The trial court granted defendant partial summary judgment and the plaintiff appealed.[109] The Arizona Supreme Court in *Munroe found* that federal law provided only *minimum* standards which automobile manufacturers were required to meet.[110] The court relied on the so-called savings clause of the federal statute to preserve any state law tort claims that the plaintiff might have.[111] Therefore, the Arizona Supreme Court held that federal law neither expressly nor impliedly preempted the plaintiff's claim.[112]

The Supreme Court of New Hampshire reached a similar conclusion in 1995.[113] In *Tebbetts*, the decedent was killed in a 1991 accident involving a 1988 Ford Escort.[114] The plaintiff, the decedent's mother, sued Ford Motor Company on behalf of her late daughter's estate.[115] The plaintiff claimed that the car was defective because "it did not contain an air bag on the driver's side."[116] The defendant was granted summary judgment and the plaintiff appealed.[117] The New Hampshire Supreme Court held that the federal statute and accompanying regulation was "supplementary" to state common law.[118] Like the Arizona Supreme Court, the *Tebbetts* court reasoned that the so-called savings clause preserved the plaintiff's common law tort action and the claim was thus not preempted.[119]

In summary, state and federal appellate courts have reached differing conclusions when faced with the question of whether state law is preempted by the fed-

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[108] *Id.*

[109] *Id.* at 1115-16.

[110] *Id.* at 1120.

[111] *Munroe*, 938 P.2d at 1120.

[112] *Id.*

[113] *See Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995).

[114] *Id.* at 346.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 348 (quoting Larsen v. Gen. Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968).

[119] *Tebbetts*, 665 A.2d at 348.

eral statute and regulations that were at issue in *Geier*. These cases have developed into nothing more than "turf wars" in which state and federal courts engage in an intellectual competition to determine who can develop the most effective arguments to retain jurisdiction in their respective courts. Guidance from the United States Supreme Court was sorely needed. The remainder of this article will be devoted to examining the facts that underlie Geier and the analysis used by the Supreme Court in reaching its decision. Finally, this article will evaluate the *Geier* decision and discuss whether the Court has provided any long-term guidance to litigants, jurists, and scholars who are faced with questions of governmental preemption.

IV. GEIER: FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Geier v. American Honda Motor Co.[120] arose out of a product liability case. Alexis Geier, the plaintiff, was involved in a 1992 automobile accident.[121] In that accident Ms. Geier struck a tree in her 1987 Honda Accord and was seriously injured.[122] Ms. Geier subsequently sued American Honda Motor Co. and claimed that "American Honda had designed its car negligently and defectively because it lacked a driver's side airbag."[123] The United States District Court dismissed the suit. The lower court determined that "petitioners' lawsuit, because it sought to establish a different safety standard — *i.e.*, an airbag requirement — was expressly pre-empted by a provision of the Act which pre-empts 'any safety standard' that is not identical to a federal safety standard applicable to the same aspect of performance."[124]

The United States Court of Appeals for the D.C. Circuit affirmed the trial court.[125] They did so, however, on different grounds.[126] The D.C. Circuit concluded that the plaintiff's common law tort theory conflicted with the federal regulations.[127] Consequently, the plaintiff's lawsuit was preempted by the doc-

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[120] 120 S.Ct.1930 (2000).

[121] *Id.* at 1917.

[122] *Id.*

[123] *Id.*

[124] *Id.* (internal citations omitted).

[125] *Id.*

[126] *Geier*, 120 S.Ct. 1930 (2000).

trine of implied conflicts pre-emption.[128]

V. THE SUPREME COURT'S ANALYSIS AND BEYOND

In a holding similar to that of the D.C. Circuit, the United States Supreme Court held that the plaintiff's lawsuit "conflicts with the objectives of [Standard 208], a standard authorized by the Act, and is therefore pre-empted by the Act."[129] In reaching its decision, the Supreme Court chose a bizarre theory of statutory construction. The Court ignored the language of the statute and a well-settled presumption against pre-emption and relied on regulatory comments and U.S. Department of Transportation history.

The Court's 5-4 majority in *Geier* purported to answer three questions in its opinion: (1) "does the Act's express pre-emption provision pre-empt this lawsuit?" (2) "do ordinary pre-emption principles nonetheless apply?" and (3) "does this lawsuit actually conflict with" Standard 208?[130] This article will address each of these questions presently.

First, the Supreme Court correctly held that the Act's pre-emption clause did not pre-empt this lawsuit.[131] The Court noted that it could read the express pre-emption provision broadly.[132] As the Court explained, a broad reading, however, would have pre-empted all lawsuits founded on a state tort law.[133] The Court determined that such a result could not possibly be correct in light of the Act's savings clause which provided that compliance with a federal safety standard "'does not exempt any person from liability under common law.'"[134] The Supreme Court recognized that this result could not have been intended by Congress.[135] Justice Breyer, writing for the majority of the Court, stated:

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[127] *Id.*

[128] *Id.*

[129] *Id.* at 1917.

[130] *Id.* at 1917-18.

[131] *Id.* at 1918.

[132] *Geier*, 120 S.Ct. at 1918.

[133] *Id.*

[134] *Id.* (citing 15 U.S.C. § 1397(k) (2000) (repealed 1994)).

[135] *Id.* at 1918.

We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence the broad reading cannot be correct. The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read.[136]

Second, the Court purported to hold that ordinary pre-emption principles do apply.[137] The Court stated, "We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles."[138] The Court, however, engaged in a questionable treatment of the doctrine of stare decisis. The dissent argued that Honda should bear a "special burden" in establishing federal pre-emption under the facts of this case.[139] This seems to be a reasonable and well-grounded position in light of the previous cases which stated that courts should be hesitant to invade the providence of state courts by finding federal pre-emption.[140] The Court stated:

It is true that, in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), the Court said, in the context of interpreting the Safety Act, that "[*a*]*t best*" there is an "inference that an express pre-emption clause forecloses implied pre-emption." Id., at 289, 115 S.Ct. 1483. . .The statement, headed with the qualifier "[a]t best," and made in a case where, without any need for inferences or "special burdens," state law obviously would survive, see id., at 289-290, 115 S.Ct. 1483, simply preserves a legal possibility. This Court did not hold that the Safety Act *does* create a "special burden," or still less that such a burden necessarily arises from the limits of an express pre-emption provision. And considerations of language, purpose, and administrative workability, together with the principles underlying this Court's pre-emption doctrine discussed above, make clear that the express pre-emption imposes no unusual, "special burden" against pre-emption.[141]

While it may be true that the Court in *Myrick* did not expressly hold that there was a special burden in such cases, this case was still decided against the background of jurisprudence which stood for the proposition that federal pre-emption

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[136] *Id.*

[137] *Id.* at 1919-22.

[138] *Geier*, 120 S.Ct. at 1919.

[139] *Id.* at 1934-35.

[140] *See supra* text accompanying notes 18-19.

[141] *Geier*, 120 S.Ct. at 1921.

faces an adverse presumption that must be overcome.[142]

Third, the Court held that the *Geier* suit actually conflicted with federal regulations and was thus pre-empted.[143] The analytical analysis the Court employed in reaching its decision is troubling at best. The Court virtually ignored the language of the statute.[144] Instead, it recited what amounted to a history lesson on the United States Department of Transportation between 1967 and the time that Secretary Elizabeth Dole headed the agency.[145] After reviewing, *inter alia*, a history of the Transportation Department and regulatory commentary, the Court concluded that a state law tort claim in *Geier* actually conflicted with the federal statutes and regulations and was thus pre-empted.[146]

The dissenting opinion, authored by Justice Stevens, points out the questionable reasoning and troubling ramifications that underlie the opinion of the Court. Justice Stevens writes:

The Court holds that an interim regulation motivated by the Secretary of Transportation's desire to foster gradual development of a variety of passive restraint devices deprives state courts of jurisdiction to answer that question. *I respectfully dissent from that holding, and especially from the Court's unprecedented extension of the doctrine of pre-emption.* As a preface to an explanation of my understanding of the statute and the regulation, these preliminary observations seem appropriate.

"This is a case about federalism," that is, about respect for the constitutional role of the States as sovereign entities." It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions. The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: it is the product of the Court's interpretation of the final commentary accompanying an interim administrative regulation and the history of airbag regulation generally. Like many other judge-made rules, its contours are not precisely defined.[147]

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[142] *See supra* text accompanying note 19.

[143] *Geier*, 120 S.Ct. at 1922-27.

[144] *Id.* at 1922-27.

[145] *Id.* It was the Department of Transportation, of course, that was charged with implementing the regulations that became the subject of controversy in *Geier*.

[146] *Id.* at 1928.

[147] *Id.* at 1928. (Stevens, J., dissenting) (emphasis added) (internal citations omitted).

VI. CONCLUSION

There are several points that should be made in conclusion. First, the majority opinion in *Geier* constituted a rather bizarre coalition. Both Justice O'Connor and Justice Scalia came down in favor of pre-emption. Justice O'Connor's decision is interesting for political reasons; Justice Scalia's decision is interesting for intellectual reasons. Justice O'Connor seemingly turned her back on her firmly held political belief in states rights.[148] As noted earlier, a former United States Supreme Court law clerk has written:

In the annals of the modern Court, no Justice, with the possible exception of [Chief Justice] Rehnquist, has been more steadfastly devoted to states' rights — to their autonomy, to the breadth of their powers, to the extreme deference owed the judgments of their officials — than the former Arizona legislator and state court judge Sandra Day O'Connor. She had been weaned on her rancher-father's vehement opposition to the big government social welfare policies of Roosevelt's New Deal, and every station in her professional career — from her first job as deputy county attorney in San Mateo, California, through her work as a precinct captain for Barry Goldwater in 1964, until her appointment to the Arizona bench — had served only to confirm her inherited bias toward lean government and local autonomy. . . . [S]he championed state authority in the face of federal interference and exalted the centrality of state sovereignty in the overall constitutional scheme.[149]

Nevertheless, O'Connor came down on the side of pre-emption. Perhaps O'Connor's conservative instincts overcame her states-rights convictions. As such, it is possible that she decided it would be better to sacrifice a measure of state autonomy to prevent the floodgates of litigation to be open against the nation's automobile manufacturers.

Justice Scalia's decision to join the majority is even more fascinating. Scalia has long been a leader among the textualists – those jurists and scholars who believe that courts should construe statutes by looking only to their texts. In fact, it was Scalia who wrote that the role of a jurist was "not to enter the minds of the Members of Congress – who need have nothing in mind in order for their votes to be both lawful and effective – but rather to give a fair and reasonable meaning to the text of the United States Code."[150] It seems almost shocking that Justice

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[148] *See generally supra* note 4.

[149] LAZARUS, *supra* note 4, at 300.

[150] Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (Scalia, J., concurring in part and dissenting in part) (1989). Aside from Justice Scalia, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit may be the most outspoken proponent of the textualist theory of statutory construction. For a general overview of this theory from the perspective of Judge Kozinski, *see* Honorable Alex Kozinski, *Should Reading Legislative History Be an Im-*

Scalia would join a majority opinion whose conclusion is based almost exclusively on "history and regulatory commentary rather than either statutory or regulatory text."[151]

Even more important, the *Geier* Court seems to retreat from the Court's recent trend toward a renewed emphasis on federalism. Justice Stevens was correct when he wrote "This is a case about federalism."[152] One of the most important presumptions in constitutional jurisprudence has been the presumption against pre-emption. It is firmly rooted in sound public policy. In dissent, Justice Breyer writes of the history and virtues of this presumption:

[I]t is . . . clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States. Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws – particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the State's historic police powers – are not pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so.[153]

There are a number of public policy considerations that weigh in favor of the aforementioned presumption. As noted by Stevens, it lays 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. . . ."[154] Stevens also notes that it "serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption."[155] Finally, Stevens makes the interesting, and persuasive, observation that the presumption "becomes crucial" when

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peachable Offense? 31 SUFFOLK U. L.REV.807 (1998).

[151] *Geier*, 120 S.Ct. at 1929 (Stevens, J., dissenting).

[152] *Id.* at 1928 (Stevens, J., dissenting) (quoting Coleman v. Thompson, 501 U.S. 722, 726, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

[153] *Id.* at 1932 (Stevens, J., dissenting) (citing Medtronic v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996); Gade v. National Solid Wastes Management Ass'n., 505 U.S. 88, 116-17, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (Souter, J., dissenting) ("If the [federal] statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred")).

[154] *Id.* at 1939 (Stevens, J., dissenting).

[155] *Id.*

a court is addressing an administrative regulation as opposed to a statute.[156] Justice Stevens correctly notes, "Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law."[157] Each of these points are well taken. However, the primary reason for the presumption is more fundamental. States are sovereign entities. That truth lies at the core of our republic. There is no doubt that Congress has the power to pre-empt certain state laws. Courts, however, should be careful not to find pre-emption absent a clear indication from Congress that pre-emption was intended.[158] In *Geier*, there was no such clear indication. Virtually all would agree that states were not free to impose a *regulation* that was different from the federal regulation at issue in *Geier*. Such standards would be pre-empted by the express pre-emption clause. As discussed previously, however, the clear language of the statues rendered them ambiguous as to whether *common law* tort claims were pre-empted.[159] When such an ambiguity is present, the presumption should dictate that there is no pre-emption. That should have been the result in *Geier*. The Court passed on an important opportunity to clarify the law of federal pre-emption. Instead, they handed down a decision that merely raised more questions—the most important of which is whether the presumption against federal pre-emption still exists.

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[156] *Id.* at 1940. (Stevens, J., dissenting).

[157] *Geier*, 120 S.Ct. at 1940 (Stevens., J., dissenting).

[158] *See supra* text accompanying note 28.

[159] *See supra* text accompanying notes 45-48.