Geier v. American Honda Motor Company, Inc. Has the Supreme Court Extended the Pre-emption Doctrine Too Far?

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I. INTRODUCTION

Pre-emption, as demonstrated in this article and more explicitly in the Supreme Court's varying opinions, is a difficult doctrine to understand and apply. Generally, pre-emption occurs in situations where a state legislature has concurrent power with the federal legislature, but is still stripped of its legislative authority in a given area, regardless of whether the state and federal legislation conflict.¹ Pre-emption issues are frequently litigated as evidenced by the four pre-emption cases the Court heard during the 1999 session.² Many believe that Geier v. American Honda Motor Co., Inc.³ was the most important pre-emption case decided by the Court because of the decision's potentially harmful effect on future pre-emption cases.⁴ Mark Levy, a

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veteran Supreme Court litigator, commented, "Geier will tell us more generally what the Court thinks about pre-emption in a lot of areas. The general question of when federal regulations pre-empt state laws goes well beyond the airbag area . . . the issue comes up routinely all around the country." Mr. Levy is likely correct because the decision could have major ramifications in automobile safety requirements and other manufacturing areas where tort liability is a major concern. Specifically, the Geier decision could preclude manufacturers from common-law tort liability in situations where a federal statute or administrative standard regulates the technological development and growth of a particular aspect of manufacturing a product. Additionally, the decision stands for the proposition that the traditionally federalist majority of the Court, in holding that an administrative standard could preclude a state common-law tort suit, is not completely dedicated to its federalist principles, or perhaps, these principles may be different than commonly understood. This note will attempt to reconcile the Court's decision in Geier with its traditional federalist principles and the pre-emption doctrine generally.

Part II provides the historical background of the Court's jurisprudence regarding the pre-emption doctrine. Part III furnishes the procedural history and basic facts of the case. Part IV is a summary of the majority and dissenting opinions and Part V analyzes these opinions. Part VI is a

cluding that both business and consumer organizations flagged Geier as their highest stakes battle of the 1999 court term).

5. Id.
6. infra Part VI.B.
8. infra Part VI.D. See generally Greve, supra note 7, at 715 (concluding that in deciding Geier, the price of releasing state tort law to run rampant was too big a risk for the traditional federalists on the Court).
discussion of the impact the Geier decision could have on: (1) plaintiffs seeking redress for harm caused by manufacturers; (2) the liability of manufacturers; (3) the presumption against pre-emption; and (4) the Court. Part VII concludes the article by holding that the Majority’s decision was a hiccup from its traditionally federalist position that will negatively impact the pre-emption doctrine and, most importantly, close the door to many injured citizens of the United States who seek redress.

II. HISTORICAL BACKGROUND

A. General Background

While the Court is struggling to solidify the pre-emption doctrine, certain fundamental parts of the doctrine remain static. Pre-emption is fundamentally rooted in the Supremacy Clause’s language that the Constitution, treaties, and valid federal statutes “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 withstanding.” Under the umbrella of the Supremacy Clause, the Court classifies pre-emption as either express or implied. Express pre-emption occurs when a federal statute explicitly states a certain type of state law shall be pre-empted. For implied pre-emption,

12. See discussion infra Part VI.
13. See discussion infra Part VII.
15. U.S. CONST. art. VI, cl. 2. But see Gardbaum, supra note 1, at 769 (arguing that pre-emption has “little if anything to do with the Supremacy Clause”).
the Court maintains two sub-categories: field pre-emption and conflict pre-emption. Under "field" pre-emption, a state statute is superceded when a federal statute wholly occupies a particular field and takes away state power to supplement it. "Conflict" pre-emption occurs when compliance with both the federal and state statute is impossible, and the state law stands as an obstacle to the legislative objectives of Congress.

B. Case History

The recent influx of pre-emption cases is not indicative of the doctrine's controversial history of limited use and misunderstanding. Surprisingly, the Supreme Court did not clearly explain the pre-emption doctrine or utilize it until the early 1900's, opting instead to decide prior pre-emption cases on other grounds. Before the first state law was

with the participation of federal funds and thereby pre-empted a common-law tort action.


21. See Gardbaum, supra note 1, at 787. See also Houston v. Moore, 18 U.S. 1 (1820) (answering the question of whether a state overstepped its power in enacting legislation and deciding that a state had concurrent power to punish an insubordinate militiaman); Willson v. Black-bird Creek Marsh Co., 27 U.S. 245 (1829) (deciding that the Dormant Commerce Clause and the Supremacy Clause were the only constitutional principles that could invalidate a state statute which supposedly conflicted with the power of the United States to regulate commerce); City of New York v. Miln, 36 U.S. 102 (1837) (holding that a New York statute was not an interference on the part of the state with commerce between the port of New York and foreign ports because the state had the appropriate police power to promulgate the statute). The Dormant Commerce Clause is "the constitutional principle that the Commerce Clause (U.S. Const. art. I, § 8. cl. 3) prevents state regulation of interstate commercial activity even when Congress has not acted under its Commerce Clause power to regulate that activity." BLACK'S LAW DICTIONARY 1344 (7th ed. 1999).
pre-empted in 1912, the Justices considered whether Congress even had the power to pre-empt.22 When the Court finally acknowledged the validity of the doctrine, it was out of necessity; Congress’s creation of regulatory agencies under the Commerce Clause was creating serious questions as to the diminution of the traditional powers of the state.23 The Court’s early attempts to explain the doctrine acknowledged that pre-emption could be either express or implied, but most of these early cases were decided under “occupation of a field” pre-emption.24 The issue became prevalent as the United States attempted to deal with the “rapid growth of federal regulation and the perceived need for uniform national laws.”25 One commentator described this early “occupation of field” doctrine as “automatic, based on a new jurisdictional concept of latent exclusivity,” meaning that “occupation of field pre-emption” rendered any analysis of congressional intent unnecessary.26 Nevertheless, the Court began to shy away from this early doctrine, realizing that its own analysis was unclear.

After years of confusion and inconsistency, the Court finally took a step toward clarifying the pre-emption doctrine in the 1912 case Savage v. Jones.27 In addressing whether the Federal Food and Drug Act pre-empted an Indiana statute requiring the publication of certain items on animal

22. Gardbaum, supra note 1, at 788. In researching the history of pre-emption, Stephen Gardbaum failed to find the word “pre-empt” in the U.S. Reports before 1917. Instead, the word “superceded” was used to describe pre-emption as we know it today. Id. at 815 n.65.

23. Id. at 787.

24. Id.

25. Id. at 801.

26. Id. at 802, 806. Stephen Gardbaum noted three unique characteristics of the early “occupation of field” pre-emption doctrine. First, pre-emption was an automatic result of congressional action in that when the states and the government had concurrent power, the federal law automatically pre-empted the state law. Id. Second, Congress had “latent exclusivity,” referring to the notion that states had the power to act until Congress exercised its inherent power under the Commerce Clause. Id. at 802. Finally, pre-emption was seen as a result of the “paramount power” of the Supremacy Clause. Id.

food labels, the Court capitalized on the opportunity to explain the basic principles of implied and express pre-emption. The Court explained that "[i]f the purpose of the act cannot otherwise be accomplished — if its operation within its chosen field must else be frustrated and its provisions be refused their natural effect — the state law must yield to the regulation of Congress within its sphere of delegated power." One commentator viewed Savage as the basis for the presumption against pre-emption because of the Court's requirement that Congress manifest the intent to pre-empt.

Years later in Hines v. Davidowitz, the Court attempted to clarify the pre-emption doctrine further. In Hines, an obstacle pre-emption case, a Pennsylvania statute conflicted with Congress's Alien Registration Act of 1940. The Pennsylvania state statute required aliens to register with the state once a year, to carry an identification card at all times, and to be prepared to show the card whenever it was demanded by a police officer or federal official. The conflicting federal statute required no identification card. In response, the Court stated:

[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or inter

29. Id. at 533.
31. 312 U.S. 52 (1941).
32. Raeker-Jordan, supra note 27, at 1385 (deeming Hines the "genesis" for the current doctrine).
34. Id. at 59-61. The Pennsylvania state act also subjected aliens to $100 fine or imprisonment if they failed to register. See id. at 59, 60. Also, for failing to show one's identification card, the aliens could be fined ten dollars or placed in jail for ten days. See id. at 60.
35. Id.
fere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.\textsuperscript{36}

The Alien Registration Act of 1940 contained no express provision providing for pre-emption of state law, but the Court found that the national scheme for aliens pre-empted the state law by implication.\textsuperscript{37}

\textbf{C. The Modern Doctrine}

Unlike the early doctrine, which was "automatic and based on a new jurisdictional concept of latent exclusivity,"\textsuperscript{38} the central issue in all modern pre-emption cases is the determination of whether Congress truly intended federal law to supercede state law.\textsuperscript{39} Congress’s intention can be either implied or expressed.\textsuperscript{40} A key factor in the modern intent-centric analysis is the "presumption against pre-emption," which the Court first recognized in \textit{Rice v. Santa Fe Elevator Corporation}.\textsuperscript{41} The Court created this important limitation in stating that pre-emption analysis starts "with the assumption that the historic police powers of the States [are] not to be superceded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress."\textsuperscript{42} This simply means that if Congress wants to pre-empt a state statute,

\begin{enumerate}
\item \textit{Id.} at 66-67.
\item \textit{Id.} at 74.
\item \texti{Savage}, 225 U.S. at 521.
\item Gardbaum, \textit{supra} note 1, at 806.
\item 331 U.S. 218 (1947).
\item \textit{Rice}, 331 U.S. at 230. The statutory conflict was between the United States Warehouse Act (federal statute) and an Illinois statute regulating warehousemen and warehousing. Congress legislated in an area that was traditionally occupied by the States. Nevertheless, the Court looked to the legislative history of the Act and found that Congress occupied the field of warehousemen and warehousing, so the states could not act without obstructing the federal plan. The Court found that Congress intended to have only one system of regulation and to occupy the field. In a fashion very similar to \textit{Geier}, the Court ignored the express statutory language and found that there was an obstruction to pre-emption, thus ignoring the presumption against pre-emption.
\end{enumerate}
it should explicitly state it in the congressional act.\textsuperscript{43} 

As recently as the 1980s, the Court seemed dedicated to the presumption against pre-emption which ensured that citizens had a means of seeking compensation in common-law tort suits.\textsuperscript{44} The Court suggested that if no alternative compensatory remedy was available, a strong presumption against pre-emption of tort claims was appropriate.\textsuperscript{45} Compensation for the injured citizens and federalism principles were the driving reasons for the Court's adherence to the presumption.\textsuperscript{46} The Court confirmed its dedication to the presumption against pre-emption in \textit{English v. General Electric Co.}\textsuperscript{47} In \textit{English}, the Court unanimously decided that an employee's state common-law claim for intentional infliction of emotional distress was not pre-empted despite the federal occupation of the field of nuclear safety.\textsuperscript{48} The Court stated that "[i]t is undisputed that Congress has not explicitly pre-empted petitioner's state-law tort action by inserting specific pre-emptive language into any of its enactments governing the nuclear industry."\textsuperscript{49} Again the Court seemed dedicated to the idea that, without specific congressional intent, there could be no pre-emption.\textsuperscript{50} 

The Court's adherence to the presumption against pre-emption ended shortly after \textit{English}.\textsuperscript{51} In \textit{Cipollone v. Lig-
gett, Inc., the Court considered whether a 1969 act requiring warning labels on cigarette packaging or its 1965 predecessor act pre-empted state common-law tort claims against a cigarette manufacturer. The Court held that the 1965 Federal Cigarette Labeling and Advertising Act did not pre-empt any common-law claims, but held that the Public Health Cigarette Smoking Act of 1969 did pre-empt some claims. The Court based its decision on the express pre-emption provision in the 1969 Act, stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." The Court seemingly abandoned the "presumption against pre-emption," by finding pre-emption against the tort claims even if the intent was not specifically stated in the statute.

The Cippollone decision, in addition to weakening the presumption against pre-emption, also created two pre-emption rules. First, the Court ordered that any statute pre-empting state police regulations be read narrowly in light of the presumption against pre-emption. By "narrowly," the Court meant that if the intent is not clear and manifest in the words of the statute, the Court may not in-

56. Cippollone, 505 U.S. at 529.
57. Id. at 515 (holding that when Congress has considered the issue of pre-emption and has included in the enacted legislation an explicit pre-emption provision, and the provision provides "a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of legislature").
58. Id. at 530-31.
59. Id. at 545.
60. Id. at 518. Scalia dissented, writing that the statute should be interpreted under "ordinary principles of statutory construction." Id. at 545 (Scalia, J., dissenting).
quire any further into the express language for an implied intent." 61 Secondly, the Court stated that when an express pre-emption provision is a satisfactorily reliable indicia of congressional intent, the Court need not look to the substantive provisions for implied pre-emption. 62 In response to the Court’s altered pre-emption analysis in Cippollone, lower courts had difficulty applying the Court’s new pre-emption analysis. 63 In fact, many lower courts interpreted Cippollone as an expansion of the pre-emption defense and a mandate to continue pre-emption analysis no further than an express pre-emption clause. 64

In Medtronic, Inc. v. Lohr, 65 the Court’s second most recent state tort law pre-emption case before Geier, the Court experienced a slight case of schizophrenia and held that a plaintiff’s claims were not pre-empted. 66 Justice Stevens, the author of the dissent in Geier and the plurality in Cippollone, wrote for the Majority. 67 The Court addressed whether the Medical Device Amendments (MDA) of 1976 68 pre-empted a state negligence action for a defective pacemaker. 69 The manufacturer argued that the claims were pre-empted by an express pre-emption provision in the statute, but Justice Stevens emphasized the importance of the presumption against pre-emption using the pro-victim rhetoric from Silkwood v. Kerr-McGee. 70 Justice Stevens

62. Cippollone, 505 U.S. at 519. Scalia also dissented on this issue, stating that a valid express pre-emption provision should not foreclose the possibility of finding implied pre-emption. Id. at 548 (Scalia, J., dissenting).
64. Id. In Freightliner v. Myrick, 514 U.S. 280 (1995), the Court declared that the lower courts had in fact overreacted to Cippollone. As a result, the Court attempted to correct the pre-emption analysis by removing the rule that express and implied pre-emption could not co-exist. Id. at 288-89. The Court refused to accept a claim that the NTMVSA of 1966 pre-empted a stated design defect for a failure to install antilock braking systems in eighteen-wheelers and ruled for the plaintiff. Id. at 289-90.
67. Id. at 474.
69. Medtronic, 518 U.S. at 474.
70. Id. at 485. "Start with the assumption that the historic police pow-
examined the congressional intent in creating the statute and concluded that the MDA's purpose was consumer protection. He attempted to weaken future pre-emption defenses by restricting pre-emption only to situations "where a particular state requirement threatens to interfere with a specific federal interest," but Justice Stevens’s addition to the pre-emption analysis has not been widely accepted.

D. Pre-emption in Administrative Law

In the case of United States v. Shimer, the Court addressed the pre-emptive effect of an administrative regulation for the first time. In answering whether a Veterans' Administration's regulation for guaranteeing a loan pre-empted Pennsylvania law, the Court decided that the "Serviceman's Readjustment Act authorized the Veteran's Administrator to displace state law by establishing[] exclusive procedures." The Court affirmatively held that an administrative regulation can pre-empt a state law.

The Court, however, failed to address two key issues in Shimer which the Court later addressed in Fidelity Federal Savings & Loan Ass'n. v. De La Cuesta: (1) what Congress must authorize to give agencies pre-emptive power; and (2) whether regulatory pre-emption cases should be analyzed

ers of the States [are] not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 715-16 (1985)). See also Silkwood, 464 U.S. at 251 (stating that it is "difficult to believe that Congress would, without comment, remove all means of judicial resources for those injured by illegal conduct").

71. Medtronic, 518 U.S. at 485 ("The purpose of Congress is the ultimate touchstone in every pre-emption case.") (quoting Cipollone, 505 U.S. at 516).
72. Id. at 472.
76. Shimer, 367 U.S. at 377-81.
77. Id.
78. 458 U.S. 141 (1982).
differently than federal statutory pre-emption cases. In *De la Cuesta*, the Court addressed the pre-emptive effect of a Federal Home Loan Bank Board regulation. The court clarified that "[f]ederal regulations have no less pre-emptive effect than federal statutes," concluding that regulatory pre-emption does not require "express congressional authorization to displace state law." In answering whether regulatory and statutory pre-emption cases were to be treated the same, the Court, in a circular fashion, referred to *Shimer* when they stated, "[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." The *Shimer* and *De la Cuesta* cases were crucial to the *Geier* decision because (1) the decision affirmatively adopted pre-emption of state laws by administrative regulations, and (2) restricted the amount of scrutiny allowed when questioning an administrative regulation.

III. FACTS OF THE CASE, GEIER V. AMERICAN HONDA MOTOR CO.

In 1992, Alexis Geier spun out and collided with a tree while driving her 1987 Honda Accord. Geier suffered multiple serious injuries in the crash, arguably more serious than if the car was equipped with a driver's side airbag. Geier, a minor at the time, and her parents sued under District of Columbia tort law claiming that Honda negligently and defectively designed the car because it lacked a driver's side airbag. The district court dismissed the claim because Federal Motor Vehicle Safety Standard

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80. *De la Cuesta*, 458 U.S. at 144. The Board was vested with the authority to administer the Home Owners Loan Act of 1933. *Id.*
81. *Id.* at 153.
82. *Id.* at 154.
83. *Id.* at 153-54 (citing *Shimer*, 367 U.S. at 381-82).
86. Geier, 529 U.S. at 865.
(FMVSS or Standard) 208, as promulgated by the Department of Transportation (DOT) under the authority of the National Traffic and Motor Vehicle Safety Act (NTMVA or Safety Act) of 1966, expressly pre-empted the lawsuit. The district court felt that the lawsuit attempted to establish an airbag requirement that was inapposite to FMVSS 208. The District of Columbia Court of Appeals upheld the district court's dismissal and ruled for Honda, reasoning that state law tort claims presented obstacles to the accomplishments of FMVSS 208's objectives.

IV. ANALYSIS OF OPINION

A. Majority

Justice Breyer delivered the opinion of the Court, framing the key issue as, "whether the Act [National Traffic and Motor Vehicle Safety Act of 1966] pre-empts a state common-law tort action in which the plaintiff claims that the defendant auto manufacturer, who was in compliance with the standard, should nonetheless have equipped a 1987

87. 49 C.F.R. § 571.208 (1996). FMVSS 208 required manufacturers to phase-in either automatic seat belts or airbags over time. Cars manufactured on or after September 1, 1989, but before September 1, 1996, were to be equipped with a passive restraint system for both front seat positions. 49 C.F.R. § 571.208, S4.1.2.1. Between September 1, 1996 and August 31, 1997, manufacturers were expected to have passive restraint systems for ninety-five percent of the cars manufactured. 49 C.F.R. § 571.208, S4.1.5.2.1. All cars manufactured after September 1, 1997, are required to be equipped with air bags at both the driver's and front right passenger's seating positions. 49 C.F.R. § 571.208, S4.1.5.3.


89. Geier, 529 U.S. at 865.
90. Id.
91. Id.
92. Id. at 863. (Rehnquist, C.J., and O'Connor, Scalia, and Kennedy, J.J., joined in the Majority opinion).
automobile with airbags." In holding that the "no airbag" lawsuit conflicted with the objectives of FMVSS 208, Justice Breyer addressed three separate questions. First, does the Act's express pre-emption provision pre-empt Geier's lawsuit? Second, do ordinary pre-emption principles apply, and third, does the Geier's airbag lawsuit actually conflict with FMVSS 208?  

1. Whether the Express Provision in the National Traffic and Motor Vehicle Safety Act of 1966 Pre-empts the Common-law Tort Action?  

Under a narrow reading of the Safety Act's pre-emption clause, the Majority found that there was no convincing indication that Congress wanted to pre-empt common-law state tort actions. Justice Breyer could not reconcile this supposition without considering the effect of the Safety Standard's savings clause. The Court stated that, without the savings clause, a broad reading might favor pre-emption because of the conflict between the goals of FMVSS 208 and common-law tort actions. Instead, the Majority decided that there are "a significant number of

93. Id. at 865.  
94. Id. at 867.  
95. The narrow reading of the statute was established in Cipollone, 505 U.S. at 505. The Court has since required that there be a narrow reading when analyzing an express pre-emption situation.  
96. 15 U.S.C. § 1392(d) (West 1988). 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. Id.  
97. Geier, 529 U.S. at 868.  
98. Id. A savings clause is "[a] statutory provision exempting from coverage something that would otherwise be included. [It] is generally used in a repealing act to preserve rights and claims that would otherwise be lost." BLACK'S LAW DICTIONARY 1344 (7th ed. 1999). Here, the savings clause, 15 U.S.C. § 1397(k) (renumbered to 49 U.S.C. § 30103(e)) says, "[c]ompliance with a motor vehicle safety standard . . . does not exempt a person from liability at common-law."  
99. Id.
common-law liability cases to save,"\(^{100}\) and with a court-imposed requirement to read the standard narrowly, there could be no express pre-emption.\(^ {101}\)

2. Whether Implied Pre-emption Principles Apply.

In considering whether there was a valid implied pre-emption defense, the Majority addressed whether the savings clause, in addition to allowing common-law tort actions under express pre-emption, accomplished the same for field and implied pre-emption.\(^ {102}\) The Court looked at two main factors: the language of the savings clause\(^ {103}\) and Congress’s level of articulation as to whether common-law tort claims were specifically to be saved.\(^ {104}\) The Court concluded that “[n]othing in the language of the savings clause suggests an intent to save state law tort actions that conflict with federal regulations.”\(^ {105}\) The Majority reasoned that if Congress intended to save all state law tort claims, regardless of their overall effect on the objectives of FMVSS 208, Congress would have specifically stated this position.\(^ {106}\)

The dissent proposed that there should be a special pleading burden beyond the regular burden for ordinary pre-emption.\(^ {107}\) The Majority, agreeing with the court of appeals, dismissed the special pleading burden by reading the savings and pre-emption provisions as creating a neutral policy.\(^ {108}\) The Court justified its creation of the neutral

\(^{100}\) Id. at 868.

\(^{101}\) Id. Interestingly, the court acknowledged that where a federal law creates a minimum safety standard, the state tort laws can act. But see id. (Stevens, J., dissenting) (arguing that the NTMVS Act actually only creates a minimum standard and thus, state law tort actions should not be pre-empted).

\(^{102}\) Id. at 869. (acknowledging that the Court declined to address this issue in Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)).

\(^{103}\) 15 U.S.C. § 1397(k).

\(^{104}\) Geier, 529 U.S. at 869.

\(^{105}\) Id. (reasoning that the words in the savings clause, particularly “compliance” and “does not exempt” simply bar a defense that compliance with the FMVSS automatically exempts a defendant from state law).

\(^{106}\) Id. at 870.

\(^{107}\) Id. (citing Stevens, J., dissenting at 886-913).

\(^{108}\) Id. at 870-71.
policy by reasoning that it would ensure a single uniform set of federal safety standards within the industry.\textsuperscript{109} The savings clause, according to the Majority, would "stand as an 'obstacle' to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{110} The Court failed to recognize any intent expressed by Congress in the statute that either justified the application of the savings clause to implied pre-emption or added a special pleading burden requirement.\textsuperscript{111} Accordingly, the Majority reasoned that if Congress wanted to avoid using ordinary pre-emption principles when there was an actual conflict, they would have said so.\textsuperscript{112}

3. Whether a "No Airbag" Common-law Tort Action Actually Conflicts With FMVSS 208.

The Court decided that common-law tort actions would create a mandatory airbag requirement that would ultimately stand as an obstacle to the accomplishment of FMVSS 208's objectives\textsuperscript{113} of gradually developing a mix of alternative passive restraint devices for safety-related reasons.\textsuperscript{114} This objective did not create a minimum airbag standard or a requirement for airbags, but only suggested that airbags were part of the larger passive restraint program.\textsuperscript{115} The Court laid out seven considerations that the

\textsuperscript{109} Id. The Court struggles with the importance of the savings clause. The Court acknowledged its validity in saving common-law tort actions from the express pre-emption provision and also the usefulness of the safety standard in "providing necessary compensation to victims." \textit{See id.} at 871. However, the Court abides to a neutral reading of the pre-emption provision and the savings provision, essentially eliminating the value of the savings clause for field and implied pre-emption.

\textsuperscript{110} Id. at 873. \textit{See also} Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (framing the question as to whether Pennsylvania state law stands as an obstacle to, "the accomplishment and execution of the full purposes and objectives of Congress").

\textsuperscript{111} Id. at 869-72.

\textsuperscript{112} Id. at 872.

\textsuperscript{113} Id. at 886.

\textsuperscript{114} Id. (explaining that the benefits of FMVSS 208 would be lowering costs, overcoming technical difficulties, encouraging technological development, and winning widespread consumer acceptance).

\textsuperscript{115} Id. at 874.
DOT claimed helped them formulate FMVSS 208. \(^{116}\) With these considerations in mind, the DOT felt that a gradual phase-in of passive restraints would allow manufacturers and regulators more time to develop the best mix of safety restraints and ease public acceptance of several new technologies. \(^{117}\)

In evaluating the objectives of FMVSS 208, the Majority reasoned that deference must be given to the DOT and its secretary. \(^{118}\) Because the DOT and its secretary believed that the common-law tort actions would pose an obstacle to accomplishing their goals, common-law tort actions were to be pre-empted. \(^{119}\) The Court stated:

> Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified to comprehend the likely impact of state requirements." \(^{120}\)

After finding that there was proper delegation, the Court gave deference to the agency's and secretary's position and held that the state tort law would stand as an obstacle to the attainment of these positions. \(^{121}\)

\(^{116}\) Id. at 877-78. (the considerations were that: (1) Buckled up seatbelts are necessary for safety; (2) more than 80% of front seat passengers were not buckling their manual seatbelts; (3) airbags could not entirely protect the unbuckled passenger as airbags by themselves were less effective than manual lap and shoulder belts; (4) passive restraint systems had other disadvantages such as customer dissatisfaction and discomfort; (5) airbags were dangerous to children and "out-of-position occupants;" (6) airbags were expensive; and (7) generally, the public might not use the passive restraints because of cost, fear or, physical intrusiveness).

\(^{117}\) Id. at 879.

\(^{118}\) Id. at 883. See also Medtronic, Inc. v. Lohr, 512 U.S. 470, 512 (1995) (O'Connor, J., concurring in part and dissenting in part) ("[I]t is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference.") (Emphasis in original).

\(^{119}\) Id. at 886.

\(^{120}\) Id. at 883.

\(^{121}\) Id. at 886.
B. Dissent

"This is a case about federalism, that is about respect for the constitutional role of the States as sovereign entities." Commentators differ as to whether this case is about federalism or something different, but what is clear is that in order to find pre-emption, the Majority was forced to address many tough administrative law issues. Accordinly, Justice Stevens's dissent addressed the issue of federalism and the states’ historic police powers to protect their citizens, as well as the pre-emption doctrine as it relates to an administrative standard. With these two major issues controlling the tone of the dissent, Justice Stevens addressed Honda's pre-emption defense: (1) the Safety Act's safety pre-emption provision expressly pre-empts Geier's common-law "no airbag claims;" and (2) the airbag claims are impliedly pre-empted because the imposition of liability in cases such as Geier would frustrate the purposes of 208.

Before rebutting Honda's arguments, Justice Stevens provided his own history of FMVSS 208, depicting the promulgation of the rule as a disorganized, unstructured process. Justice Stevens went so far as to construct a version of the FMVSS which encompassed what he thought

123. Geier, 529 U.S. at 884-86. See also infra note 256.
124. Geier, 529 U.S. at 886-913 (Stevens, J., dissenting).
125. Id. at 895-905.
126. Id. at 888-92. The first version of the standard was issued in 1967 requiring the installation of manual seatbelts. In 1977, the DOT amended the standard to require passive restraints (either an airbag or automatic seatbelts) in all cars by model year 1984. At all times the various editions of the rule were promulgated as exemplified by the 60 rulemaking notices. As a result of a deregulatory initiative of the Reagan Administration in 1981, the Secretary initially delayed the effective date of the 1977 standard, but then rescinded the program. The Court in Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), ruled that this rescission was arbitrary and capricious. After the ruling, Elizabeth Dole, through proper rulemaking procedures, amended FMVSS 208 to a format requiring the gradual installation of passive restraint devices starting in 1984. The standard was amended most recently in 1991, with the Secretary mandating that all automobiles be equipped with passive restraints by 1998.
the standard should have been, had Congress pre-empted common-law tort actions.\(^{127}\) Justice Stevens interpreted the standard as failing to provide "any . . . specific evidence of an intent to preclude common-law tort actions."\(^{128}\) Thus, where no intent is evident, the dissenters hold that the state's historic police powers cannot be divested. Therefore, because tort remedies are a part of these powers, they cannot be impliedly pre-empted.\(^{129}\)

1. The Safety Act's Safety Pre-emption Provision

Expressly Pre-empts Petitioner's Common-law "No Airbag" Claims.

Recognizing that the Supremacy Clause causes a state law to concede to a conflicting federal law, the dissent argued that the Court is giving the lower courts "carte blanche to use federal law as a means of imposing their own ideas of tort reform . . . ."\(^{130}\) According to the dissent, for a state law within a state's historic police powers to be pre-empted, Congress must express a clear and manifest purpose in a federal statute.\(^{131}\) In an attempt to find Congress's clear and manifest purpose, Justice Stevens called for a plain reading of the statute to interpret the intent of the statute.\(^{132}\) Refusing to read the statute as a neutral policy, Justice Stevens could not find any specific intent to pre-empt, basing his finding on the interpretation of the term "safety standard" in the express pre-emption provi-

\(^{127}\) Id. at 887-88.
\(^{128}\) Id. at 892.
\(^{129}\) Greve, supra note 7, at 3. (stating that the liberal Justices Stevens, Souter, and Ginsburg fiercely oppose federalism in constitutional cases, where it tends to confine regulation, but holding that these Justices will welcome more expansive states' rights in pre-emption cases).
\(^{130}\) Geter, 529 U.S. at 894 (Stevens, J., dissenting).
\(^{131}\) Id. (citing Medtronic, 518 U.S. at 485 (1996)).
\(^{132}\) Id. at 895 (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).
\(^{133}\) Id.
ferent from 208. "Safety standard" for Justice Stevens is an administrative rule and not "a case-specific decision by judges." Because common-law tort actions could not be found under a "plain meaning" reading, Justice Stevens found that common-law actions are therefore not expressly pre-empted by the words of the FMVSS 208.

In order to accomplish a "plain meaning" reading, Justice Stevens conceded that the Court held in three previous decisions that common-law tort actions were pre-empted. The dissent distinguished these cases concluding that the statutes in these cases were much broader and did not contain a savings clause. Further, the language of 15 U.S.C. § 1392(d) (the pre-emption clause) clearly failed to express an intent to pre-empt and 15 U.S.C. § 1397(k) (the savings clause) clearly expressed an intent to save common-law tort claims. Thus, Justice Stevens felt that the Court ignored the plain meaning and "read[] the savings clause out of the statute altogether."

2. The Airbag Claims are Impliedly Pre-empted Because the Imposition of Liability in Cases Such as This Would Frustrate the Purposes of FMVSS 208.

In its amicus brief supporting Honda, the United States argued that had the manufacturers known in 1984 that they might later be liable for failing to install airbags, the manufacturers would have installed airbags in all cars.

134. Id. at 896 (stating that the express pre-emption provision prohibits the promulgation of any safety standard dealing with the same aspect of performance and not identical to the Federal standard).
135. Id.
136. Id.
137. Id. See also Cippollone v. Liggett, Inc., 505 U.S. 504, 548-49 (1991) (Scalia, J., concurring in part and dissenting in part) (finding that common-law tort actions were expressly pre-empted); CSX Transp., 507 U.S. at 664 (concluding that a negligence suit was pre-empted by the language of the Federal Railroad Safety Act of 1970); Medtronic, 518 U.S. at 502-03 (deciding that the statutory reference to "any requirement" may include common-law duties).
138. Geier, 529 U.S. at 897 (Stevens, J., dissenting).
139. Id. at 897-98 (Stevens, J., dissenting).
140. Id. at 898 (Stevens, J., dissenting).
141. Id. at 901 (Stevens, J., dissenting).
Justice Stevens retorted with three counter-arguments. First, the pre-1984 risk of liability did not compel manufacturers to install airbags, so the fact that there was a standard addressing the installation of airbags did not increase the liability. Second, tort liability would be an afterthought because the standard would already be implemented by the time liability became an issue. Tort liability would not frustrate the Secretary's desire to encourage better passive restraint systems and customer satisfaction because of the great length of time that passes from the filing of negligence suits and a court's decisions. Third, in response to the Majority's assertion that "the savings clause preserves those actions seeking to establish a better than minimum standard," Justice Stevens held that the Safety Act merely imposed a minimum requirement. In total, Justice Stevens stated that he could not find a clear expression of FMVSS 208's policies that would be frustrated by the common-law suits.

After failing to find any policy that would be impeded by a common-law tort suit, Justice Stevens called for a stronger adherence to the "presumption against pre-

142. Id. (Stevens, J., dissenting).
143. Id. (Stevens, J., dissenting). Justice Stevens admitted that even if Standard 208 did not create a pre-emption defense, it reduced the likelihood of manufacturer liability because the manufacturers could point to compliance to nullify negligence claims.
144. Id. at 901-02 (Stevens, J., dissenting). In footnote 18, Justice Stevens rebukes the Majority, explaining that they misunderstood him on this point. Specifically, the suit for negligent and defective design of a car is not limited to the duty to install an airbag. Rather, it is a violation of the general duty to provide an automobile with an airbag or a reasonable substitute. Therefore, the Majority was wrong to assume that only the installation of an airbag would enable a manufacturer to avoid liability. Id. at 903 n.18 (Stevens, J., dissenting).
145. Id. at 902 (Stevens, J., dissenting).
146. Id. (Stevens, J., dissenting). Justice Breyer wrote that "a reading of the express pre-emption provision that excludes common-law actions gives actual meaning to the clause's literal meaning, while leaving adequate room for state law to operate — where the federal law creates only a floor, i.e., a minimum safety standard." Id. at 886. Ironically, the Safety Act defines "safety standard" as "a minimum standard for motor vehicle equipment performance, which is practicable, which meets the needs for motor vehicle safety and which provides objective criteria." Id. at 889. Because it is a minimum standard, common-law tort actions would be allowed.
147. Id. at 904 (Stevens, J., dissenting).
The dissent believed that Honda had not crossed the high threshold created by the presumption against pre-emption of a state law. They argued that the presumption against pre-emption could not be defeated when the standard clearly lacks the intent needed to displace state law. Justice Stevens believed that the presumption against pre-emption was an important safeguard because the presumption: (1) demands that Congress speaks clearly when limiting the areas of traditional state regulation; and (2) prevents federal judges from applying implied pre-emption too loosely.

The dissent felt that the presumption was even more crucial when addressing the pre-emptive force of an administrative regulation. Justice Stevens felt that when the DOT intended to pre-empt with Standard 208, the states and the agencies should have engaged in normal notice-and-comment rulemaking procedures. Justice Stevens believed the standard violated these procedures because there was no specific intent in the standard to pre-empt a state law, nor were the states given notice that a standard would pre-empt common-law tort actions. Justice Stevens also felt that the standards should have been given no deference per Chevron. Instead, he believed a weaker
standard of deference was more appropriate considering that the standard was created from an informal policy plan.\textsuperscript{156} Justice Stevens wrote that deference to FMVSS 208 could only be given after formal notice-and-comment rulemaking.\textsuperscript{157} Only then could the standard satisfy the federalism and non-delegation principles that underlie the presumption against pre-emption.\textsuperscript{158} Thus, Justice Stevens dissented because neither the FMVSS nor the enabling statute expressed an intent to pre-empt a common-law tort action and because the Court extended implied pre-emption too far.\textsuperscript{159}

V. ANALYSIS

This note asserts that Justice Stevens’s approach to pre-emption was the better approach, but nonetheless inaccurate in some respects. This note also asserts that the Court overlooked the underlying administrative issues and as a result incorrectly analyzed the pre-emption of a common-law tort action by an administrative regulation. A more amenable and fair analysis would result if the Court would first address whether Congress delegated the power to the DOT to promulgate binding rules that could pre-empt a common-law tort action. Secondly, if the Court found that the DOT did indeed have the appropriate delegation, the Court should then address whether formal notice-and-comment rulemaking proceedings were appropriate for the FMVSS 208 pre-emption provision. Third, the Court should then address the most prevalent issue of whether under the presumption against pre-emption, an administrative standard, not a congressional statute or legislative rule, can pre-empt a common-law tort claim. If these questions were answered affirmatively in favor of

\begin{itemize}
\item 156. \textit{Geter}, 529 U.S. at 911 (Stevens, J., dissenting). Justice Stevens is most likely referring to \textit{Skidmore} weak deference where the administrative standard would be “entitled to respect,” but only to the extent that [it is] persuasive. \textit{See} Christensen v. Harris County, 529 U.S. 576, 577 (2000) (citing \textit{Skidmore} v. Swift & Co., 323 U.S. 134, 140 (1944)).
\item 157. \textit{Geter}, 529 U.S. at 912 (Stevens, J., dissenting).
\item 158. \textit{Id.} (Stevens, J., dissenting).
\item 159. \textit{Id.} at 912-13 (Stevens, J., dissenting).
\end{itemize}
Honda, then the Court's holding would have been more substantial.

A. Did the DOT Have the Proper Delegation by Congress to Create Binding Rules?

Before addressing whether Congress intended an agency interpretation to bind the courts, a court must decide whether Congress intended to delegate to the agency the power to attach binding effect to the particular format used.\textsuperscript{160} Courts can struggle with finding delegatory intent and must sometimes look to inferential evidence when direct evidence of the intent is not manifest.\textsuperscript{161} Unfortunately, the strict requirement of delegation is sometimes skipped over pursuant to \textit{Chevron}.\textsuperscript{162} Under \textit{Chevron}, when a court cannot find delegatory intent, the delegation is assumed because of the "gap" of statutory silence or ambiguity.\textsuperscript{163} However, under the non-delegation doctrine,\textsuperscript{164} Congress delegates its powers to an agency under carefully controlled conditions with a clear expression of these conditions in the enabling act.\textsuperscript{165}

\begin{flushleft}
\textsuperscript{160} Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules, and "Spurious" Rules: Lifting the Smog, 8 ADMIN. L.J. AM. U. 1, 5 (1994).
\textsuperscript{161} See id.
\textsuperscript{163} Id. See also Marshall, supra note 75, at 263 (1998) (arguing Chevron deference should not apply in regulatory pre-emption cases). \textit{But see Geter}, 529 U.S. at 912 (Stevens, J., dissenting) [citing Christenson, 529 U.S. at 587 arguing that "an interpretation contained in a [legal brief], not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking[,]... do[es] not warrant Chevron-style deference"].
\textsuperscript{164} BERNARD SCHWARTZ, ADMINISTRATIVE LAW, 43-44 (3rd Ed. 1991) [quoting Mistretta v. United States, 488 U.S. 361, 371-72 (1989). "The non-delegation doctrine is rooted in the principle of the separation of powers," which "mandate[s] that Congress... cannot delegate its legislative power to another branch."]
\textsuperscript{165} WILLIAM F. FOX JR., UNDERSTANDING ADMINISTRATIVE LAW 22 (2d ed. 1992). See also Whitman v. Am. Trucking Ass'n., Inc., 531 U.S. 457 (2001) [delineating the rules for delegation by stating "when Congress confers decision-making authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform"].
\end{flushleft}
In analyzing a delegation, the Court should look to see if Congress provided sufficient standards to guide the agency's exercise of delegated power.\textsuperscript{166} The overall purpose is to ensure that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."\textsuperscript{167} As such, the Majority acknowledged that Congress delegated the power to the DOT to implement the NTMVS of 1966, but the Court failed to complete the analysis.\textsuperscript{168} The Court should have looked back to the enabling statute.\textsuperscript{169}

Upon looking at the NTMVS, the first inquiry is whether Congress delegated the power to the Secretary of Transportation (Secretary) to promulgate rules that pre-empt common-law. The Enabling Act delegates to the Secretary the general responsibility of promulgating safety standards under the NTMVS.\textsuperscript{170} The Secretary commented that he in fact had the power to promulgate safety standards that pre-empt state law.\textsuperscript{171} In response, Justice Stevens quoted Executive Order 12612 stating, "[w]hen an Executive department or agency proposes to act through adjudication or rulemaking to pre-empt state law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings."\textsuperscript{172} Although this executive order, previously enacted by President Reagan, was revoked by President Clinton, the Secretary's self-proclamation still seems to be a stretch under the non-delegation doctrine. That doctrine requires

\textsuperscript{166} SchwARTZ, supra note 164, at 46.
\textsuperscript{167} Id. (quoting Industrial Dep't. v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring)).
\textsuperscript{168} Geier, 529 U.S. at 883.
\textsuperscript{170} 49 U.S.C.A. § 105(b) (West 1998) ("The head of the Administration is the Administrator who is appointed by the President, by and with the advice of and consent of the Senate."); 49 U.S.C.A. § 105 (c)(1) (West 1998) ("The administrator shall carry out – duties and powers vested in the Secretary by chapter 4 of title 23 [23 U.S.C.S. §§ 410 et seq]"); 49 U.S.C.A. § 30111 (West 2000) ("The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.").
\textsuperscript{171} Geier, 529 U.S. at 910 (Stevens, J., dissenting).
\textsuperscript{172} Id. at 912-13
that there be specific intent for delegation. The power of pre-emption over such a valuable right as the ability to sue on a common-law tort assumes a great deal, considering that Congress did not expressly delineate the power to the Agency.

The Majority did not address this issue because they believed that Congress delegated the power to the DOT to promulgate the standard, and that the DOT acted reasonably in its promulgation of the 1984 version of the standard. Expert opinions vary on the current state of the non-delegation doctrine, and this article does not favor or disfavor the doctrine, it merely suggests that the Court review whether important policy decisions are in fact made by the right people. If a policy judgment is made which denies citizens the right to retrieve redress for injuries, that decision should be made by Congress, and not by the Secretary of Transportation.

B. Notice-and-comment Rulemaking

Section 553 of the Administrative Procedure Act (APA or Section 553) requires that, in order for a federal regulation or agency rule, herein called legislative rules, to be binding, it must be promulgated in a public notice-and-comment proceeding. If the rule is not promulgated by

174. Geier, 529 U.S. at 883.
175. Whitman, 531 U.S. 457 (2001) (upholding the delegation of the EPA in setting "air quality standards"). See also id. at 916 (Thomas, J., concurring) (inviting the chance to reconsider whether the delegation doctrine is in line with the Founders' understanding of separation of powers).
176. Geier, 529 U.S. at 911-12; Medtronic, 516 U.S. at 512 (O'Connor, J., dissenting) (stating that "[i]t is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference.").
178. 5 U.S.C. § 551(4) (1988). A rule is "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...."
179. 5 U.S.C. § 553 (1988). For the promulgation of a valid rule, there
notice-and-comment proceedings, then courts should not impose these rules as mandatory obligations or standards on the public.¹⁸⁰ Rules that do not bind are called "interpretive rules."¹⁸¹ These rules take the form of policy statements,¹⁸² (the interpretive rule at issue in Geier), guidances, manuals, circulars, bulletins, and memoranda.¹⁸³ Interpretive rules should merely explain and not add to the law that exists.¹⁸⁴

Although neither the Majority nor the dissent mentioned it, the NTMVS has its own rulemaking provisions.¹⁸⁵ Under section 2502, there are specific provisions for the notice element,¹⁸⁶ comment,¹⁸⁷ and rule promulgation. In fact, the statute also states that "the Secretary is not required to follow such notice with a notice of proposed rulemaking if the Secretary determines on the basis of such advanced notice and the comments received thereon should not be taken under the provision of the [Act]."¹⁸⁸ Congress also wrote that the Secretary, as part of any action taken under section 2502, may amend any standard or create a new stan-

are three steps that must be satisfied: (1) notice must be given to the affected parties of the agency's intent to publish a rule; (2) solicitation of comments from all interested persons; (3) a concise and general statement of the basis and purpose of the rule.

¹⁸⁰. Geier, 529 U.S. at 912 (Stevens, J., dissenting). See also Paralyzed Veterans of Am. v. D.C. Arena L. P., 117 F.3d 579, 586 (D.C. Cir. 1997) (holding "[i]t is possible then that an agency's may make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements"); Anthony, supra note 160, at 1315 (advancing the theory that agencies should observe legislative rulemaking for any action that is to impose obligations or standards on private parties).

¹⁸¹. United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947). Interpretive rules are defined as "rules or statements issued by an agency to advise the public of the construction of the statutes and rules it administers."

¹⁸². Anthony, supra note 160, at 1315. The Administrative Procedure Act includes all these interpretive statements as "policy statements."

¹⁸³. Id.

¹⁸⁴. Id.


¹⁸⁶. Id.

¹⁸⁷. Id.

¹⁸⁸. Id.
Thus, the statute creates some ambiguity as to whether an amendment must really go through notice-and-comment rulemaking. Nevertheless, the agency properly complied with section 553 in the past when amending rules and did in fact follow section 553 when promulgating FMVSS 208. Justice Stevens argued that "we should be quite reluctant to find pre-emption based on the Secretary's informal effort to recast the 1984 version of the Standard 208 into a pre-emptive mode." On the whole, the dissent was troubled by the informality of FMVSS 208's promulgation, proclaiming that a standard promulgated in such an inconsistent matter should not pre-empt common-law tort actions. Although the indecisiveness of the DOT's secretaries demonstrates that the agency could not settle on a scheme of regulation, it is still clear that when the agency amended the rules, the Secretary followed the notice-and-comment rulemaking procedure. Justice Stevens wants the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking, but this argument is fruitless here because, as the Majority stated, nowhere in implied pre-emption has the Court ever required an express pre-emption provision. As a result, the notice-and-comment rulemaking argument was a poor one.

191. Id. See also Greve, supra note 7, at 3 (summarizing Steven's observations in writing, "the pre-emptive policy is cobbled together by the Court from the convoluted history of air-bag and seat-belt regulation, the likely effects of tort suits on the dispersion of air-bag technology, inferences from the secretary's explanation accompanying the standard and the federal government's litigation position").
194. Geier, 529 U.S. at 885 (quoting Justice Breyer's statement: "To insist on a specific agency intent to pre-empt made after notice-and-comment rulemaking would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended.").
C. Pre-emption Analysis

In Geier, the Supreme Court held that a regulatory standard could impliedly pre-empt a common-law tort action. The Court's analysis in reaching the decision was unorthodox, to say the least. The Court found that the NTMVS section 1392(d) and section 1392(k) created a neutral policy, thereby eliminating the possibility of express pre-emption. However, the Court still found that the FMVSS 208 impliedly pre-empted common-law tort actions because it was an "obstacle" to the objectives of the standard. This section will analyze each of the Court's findings individually.

The Majority correctly dismissed the possibility of express pre-emption, but Justice Stevens conducted the better analysis by looking to the statute for a specific intent to pre-empt. Whether under the plain or ordinary meaning, the savings clause states that, "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common-law." Clearly, the provision states that common-law tort actions are not to be pre-empted. Additionally, nowhere in the pre-emption provision does it explicitly state that common-law tort actions are prohibited. In Medtronic, the Court also eliminated the possibility of express pre-emption, but for a wholly different reason. The Court ruled out express pre-emption because the purpose of the Medical Device Amendment of 1976 was to assure consumer protection. Likewise, Congress enacted the NTMVS to protect

195. Id. at 885-86.
196. Id. at 862.
197. Id. at 886.
198. Peter W. Schroth, Language and Law, 46 AM. J. COMP. L. 17, 26 (1998) (defining ordinary meaning as a mechanical application of the "ordinary meaning"); [differentiating ordinary meaning from plain meaning in that plain meaning refers more to the "the sense [the] expression usually has in such contexts" while ordinary meaning requires a lack of ambiguity].
200. Geier, 529 U.S. at 897-98.
201. Supra text accompanying note at 98.
203. Id.
passengers, but the Court obviously did not feel compelled to follow *Medtronic* or Congress's intent when they promulgated the rule.\textsuperscript{204}

Justice Stevens's dissent was also more amenable because it called for a rededication to the presumption against pre-emption.\textsuperscript{205} Since its inception in 1947, the presumption against pre-emption has demanded that Congress expressly state its purpose if the historic police powers of the state are to be superceded.\textsuperscript{206} Health and welfare laws continue to be two important areas under the protection of the states' historic police powers.\textsuperscript{207} Irreconcilably, the Court adhered to the presumption in *Medtronic*,\textsuperscript{208} but ignored the presumption in *Geier*, allowing implied pre-emption, claiming that a common-law tort action conflicted with the objectives of the administrative standard.\textsuperscript{209}

The Majority in *Geier* revealed the Court's stance on the presumption by failing to address it.\textsuperscript{210} Previously, in *Cipollone*, the Court at least gave "lip service" to the presumption issue before disregarding it, arguably doing more damage to the presumption than any other case.\textsuperscript{211} In a similar fashion, the *Geier* Court ignored the requirement of

\textsuperscript{203} Geier, 529 U.S. at 896.
\textsuperscript{204} Id. at 907 (Stevens, J., dissenting).
\textsuperscript{207} Raeker-Jordan, supra note 24, at 1468-69 (arguing that the cause of the weakening of the presumption against pre-emption is three-fold: the Court (1) "refused to erect a bar to implied pre-emption even in cases in which Congress has explicitly spoken to the pre-emption question; (2) infused its express pre-emption analysis with implied pre-emption principles such that there appears to be little distinction between the two 'types' of pre-emption; (3) seemingly placed no limits on 'obstruction of purposes' implied pre-emption").
\textsuperscript{208} Medtronic, 518 U.S. at 485.
\textsuperscript{209} Geier, 529 U.S. at 885.
\textsuperscript{210} Id. at 864-86.
\textsuperscript{211} Cipollone v. Liggett, Inc., 505 U.S. 504, 516 (1991). See also Raeker-Jordan, supra note 24, at 1416 (holding that on its face the *Cipollone* decision required express congressional intent to pre-empt, but in actuality, the Court found pre-emption in the absence of express language by Congress); Viet D. Dinh, *Whose Call is it? Supreme Court Should Rethink Pre-emption Law*, 22 LEGAL TIMES Vol. 29 (Dec. 6, 1999) (arguing that the Court should get rid of the presumption against pre-emption because the Court will rely on the presumption in express pre-emption, but not in obstacle pre-emption).
a clear statement of congressional intent, failing to even lay out the full rule from *Rice*. As a result, the application of the presumption is now uncertain because the Court is willing to rely on the presumption for express provisions, but not obstacle provisions. This is exemplified in *Geier* by the Court failing to find pre-emption under the express provision of FMVSS 208, but finding for pre-emption under obstacle pre-emption analysis. This skewed analysis, unless corrected, will negatively affect many pre-emption cases in the future.

V. IMPACT

A. Effect on Tort Litigation

Prior to the Court hearing the *Geier* case, Professor Rob Leflar of the University of Arkansas Law School commented, "Plaintiffs fear that a pro-pre-emption holding in *Geier* [will] undermine a vast domain of state tort law." In the wake of the lower courts' heavy reliance on *Cipollone* to decide pesticide, boat safety and other consumer products cases, the plaintiffs have a valid right to worry. *Geier* will do as much or more damage to common-law tort actions as *Cipollone* did.

The Court was not always adverse to plaintiffs in common-law tort pre-emption cases. In *Silkwood v. Kerr-McGee*, the estate of Karen Silkwood sued, under Okla-

212. *Cipollone*, 505 U.S. at 518.
213. Dinh, *supra* note 211, at 3. See also Raeker-Jordan, *supra* note 24, at 1382 (concluding that absent the clear and unambiguous preemptive language, state common-law-damage actions for automobile design defects or state tort remedies against manufacturers cannot be precluded).
215. *Id.*
216. See infra pgs. 20-21 and notes 232-34.
homacommunalaw principles, the Kerr-McGee power plant for contamination injuries resulting from the escape of plutonium at its factory. ²¹⁹ The jury awarded Silkwood $505,000 in actual damages and ten million dollars in punitive damages. ²²⁰ The court of appeals reversed the punitive damages award, holding that the award was preempted by federal nuclear law. ²²¹ Writing for the Majority, Justice White reversed the appellate court’s holding, reasoning that in the absence of indication that Congress intended to foreclose common-law tort actions, “[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.” ²²² The Court also noted that common-law tort claims might still be foreclosed if such claims frustrated “[t]he objectives of federal law.” ²²³ Nonetheless, the Court was willing to award common-law tort remedies even in the face of a strong pre-emption defense. ²²⁴

Unfortunately, the Court in Cippollone reformulated the plaintiff-friendly pre-emption analysis from Silkwood. ²²⁵ As a result, Cippollone now stands as “[a] mandate to dismantle the protections of state tort law.” ²²⁶ In a similar fashion as Cippollone, the Geier decision has once again weakened plaintiffs in common-law tort suits. ²²⁷ Justice Stevens foresaw this problem in Geier, warning that, “the Supremacy Clause does not give unelected federal judges carte blanche to use federal law as a means of imposing their

²¹⁹. Silkwood, 464 U.S. at 243.
²²⁰. Id. at 245.
²²¹. Id. at 246.
²²². Id. at 251.
²²³. Id. at 256.
²²⁴. Id. at 258.
²²⁵. Id. at 279.
²²⁶. Lars Noah, Reconceptualizing Federal Pre-emption of Tort Claims as the Government Standards Defense, 37 WM. & MARY L. REV. 903, 904 (1996) (arguing that Cippollone has been misread to provide a defense that would “[a]bsolve a company of liability only upon a showing of compliance with a relevant safety requirements”).
²²⁷. Cippollone, 505 U.S. at 544 (Blackmun, J., dissenting). Justice Blackman foreshadowed Justice Stevens’s dissent in Geier by stating, “[t]he decision today eliminates a critical component of the States’ traditional ability to protect the health and safety of their citizens.” Id.
own ideas of tort reform on the States."\(^{228}\) Geier provides that not only will a victim who is injured in an area which federal law occupies receive no redress through the use of common-law tort actions, but judges will have the ability to continue weakening the states historic police powers.\(^{229}\) If Congress continues to increasingly regulate many facets of life, victims may soon have nowhere to turn.

Pre-emption of common-law tort actions, "[m]ay at times restrict a state's right to regulate and protect its citizens."\(^{230}\) This is already evidenced in the boating accidents area.\(^{231}\) Despite a number of gruesome injuries and deaths, the courts have consistently held that common-law suits based on negligence and products liability are pre-empted by the Federal Boat and Safety Act (FBSA) of 1971.\(^{232}\) Much akin to the FMVSS, Congress also included a savings clause in the FBSA that precluded the pre-emption of common-law actions.\(^{233}\) However, like in the automobile safety restraint area, courts have refused to honor the savings clause in implied pre-emption cases in this area.\(^{234}\) Clearly, the preclusion of common-law tort suits against boating and

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228. Geier, 529 U.S. at 894 (italics omitted).
229. Grey, supra note 14, at 562-63 (arguing that the Court's inconsistency in pre-emption decisions has confused the lower courts). See also Noah, supra note 226, at 904 (quoting Judge Jack Weinstein from an opinion one month after Cipollone where he cautioned, "that too ready a tendency to declare the state protective shield replaced by the still somewhat spotty federal protections will leave many injured persons without recourse." (quoting Burke v. Dow Chem. Co., 797 F. Supp. 1128, 1132 (E.D.N.Y. 1992)).
231. Id.
233. 46 U.S.C.A. § 4311(g) (West 1994).
234. Chiang, supra note 230, at 489. Most recently, in Lady v. Neal Glaser Marine, Inc., 228 F.3d 598, 615 (5th Cir. 2000), the Fifth Circuit held that the plaintiff's state common-law tort actions were impliedly pre-empted despite the savings Clause. The court acknowledged the savings clause's actual use in saving some common-law suits, but decided that the case was not appropriate. Id.
automobile manufacturers is a bad sign of things to come.

Arthur H. Bryant of the Association of Trial Lawyer's for Public Justice and head counsel for Geier, remarked that Congress stated:

Compliance with any Federal motor vehicle safety standard does not exempt any person from any liability under common law. That ought to end the analysis. If the Supreme Court says pre-emption can be found when Congress has been this clear, then the whole area is wide open for the elimination of tort law whenever the federal government regulates.\(^{235}\)

If courts refuse to honor states' right to protect their citizens, congressional statutes protecting common-law tort actions, and completely disregard the holdings of Medtronic and Silkwood, plaintiffs will receive no restitution for injuries suffered.

**B. Employers Will be Relieved of Tort Suits.**

As a direct result of the Court's favoritism of the pre-emption defense, manufacturers can rest assured that common-law tort actions stemming from automobile safety devices will be precluded.\(^{236}\) The likely impact of the Geier decision was not what was originally intended from FMVSS 208.\(^{237}\) During the House of Representatives debates on the House version of the Transportation Bill, Tom Triplett, an attorney from South Carolina, surmised about the potential harmful effects of a bill without a savings clause.\(^{238}\) He states:

We need a traffic safety agency and we need to research our problem from end to end, but we

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236. Michael Hoenig, *More Pre-emption of Air-Bag Restraint Claims*, 224 N.Y.L.J. 3 (2000) (writing that Geier forecloses the floodgate of litigation the manufacturers could have faced considering that there are millions of cars on the roads and plenty of accidents).


don't need to relieve the manufacturer of his natural responsibility for the performance of his product. You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our Product meets government standards," and an already compounded problem will be recompounded.239

Although the finished NTMVS did contain a savings clause and this Court refused to honor the savings clause, Mr. Triplett's prediction could very well come true. Manufacturers in the automobile240 and boating241 industries have both achieved great success in the courtroom in the past and will most likely continue to enjoy the same success in the future.242

C. Presumption Against Pre-emption

By weakening the presumption against pre-emption, the Court has once again given the lower courts free reign to find in favor of the manufacturers in common-law tort suits.243 The Framers feared that a national legislature

239. Id.
240. Geier, 529 U.S. at 866 (writing "[a]ll of the Federal Circuit Courts that have considered the question, however, have found pre-emption").
242. Hoenig, supra note 236 (writing that three recent federal circuit court decisions "show that Geier wields influence beyond pure 'no-air-bag' allegations and, further, that those lawyers seeking to question a manufacturer's choice among restraint options authorized by the federal motor vehicle safety standard need to consider the realities of the pre-emption issue at the outset").
243. Geier, 529 U.S. at 907-08 (Stevens, J., dissenting). See also Grey, supra note 14, at 540 (stating that the presumption against pre-emption
could consume the rights of states, and some believe the fear has been realized as a result of the expanding congressional power and pre-emption defense.\textsuperscript{244} What is clear is that the presumption against pre-emption no longer holds weight with the current Court.\textsuperscript{245}

The concern about the disappearance of the presumption against pre-emption is especially significant when analyzing the pre-emptive effect of an administrative standard.\textsuperscript{246} If the Court can find the express language and intent manifested in FMVSS 208 without fully exploring the agency's rulemaking power or delegatory power to pre-empt, the Court will be able to find pre-emption anywhere.\textsuperscript{247} Justice Stevens reminded the Court that in administrative regulations, "we generally, 'expect an administrative regulation to declare any intention to pre-empt state law with some specificity.'"\textsuperscript{248} By its complicated nature, implied pre-

\textsuperscript{244} Schrot, supra note 198 (arguing that the Court should get rid of the presumption against pre-emption because the Court is not relying on the presumption in obstacle pre-emption). \textit{But see} Susan J. Stabile, Pre-emption of State Law by Federal Law: A Task for Congress or the Courts?, 40 \textit{Vill. L. Rev.} 1, 73 (1995) (criticizing the use of the presumption against pre-emption for only analyzing the intent of the statute and not the balancing of state and federal interests).

\textsuperscript{245} The Supreme Court 1999 Term Leading Cases, 114 \textit{Harv. L. Rev.} 339 (2000) (writing that "\textit{Geter} signals the Court's subtle drift away from the presumption against pre-emption in favor of a more functional federal law preference rule."). The functional federal law preference is the Court's finding of pre-emption in cases in which a federal agency (experts) has promulgated a "uniform national standard" which can adequately replace the state laws. \textit{Id.} at 349.

\textsuperscript{246} Raeker-Jordan, supra note 24, at 1426 (discussing the difference between state regulatory actions and state common-law actions). This difference is not really relevant for this case. The Majority agreed in \textit{Geter}. Justice Breyer wrote that a narrow reading must be given to the standard because under a broad reading state legislation or regulations might be pre-empted. \textit{Geter}, 529 U.S. at 868. This would include the pre-emption of non-identical state statutes concerning the same areas of law. \textit{Id.}

\textsuperscript{247} \textit{Geter}, 529 U.S. at 908-09 (Stevens, J., dissenting).

\textsuperscript{248} \textit{Id.} at 908 (Stevens, J., dissenting). See also Exec. Order 12612, 52 Fed. Reg. 41685 (Oct. 30, 1987, revoked Aug. 4, 1999) (laying out special requirements for pre-emption: "Executive departments and agencies shall construe . . . a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law.").
emtion does not demand a clearly manifested intent.\textsuperscript{249} However, for the "presumption against pre-emption" to have teeth, the Court should examine implied pre-emption cases as stringently as it does in express cases, especially when analyzing the pre-emptive effect of an administrative standard.\textsuperscript{250} Because the Court does not seem willing to use the strict standard of statutory analysis, the presumption is no longer a valid impediment to pre-emption.\textsuperscript{251} The current Court disregarded the presumption, and until the make-up of the Court changes or the analysis changes, the presumption is essentially worthless.\textsuperscript{252}

\textbf{D. A Potential Clash With Federalism.}

In stressing that \textit{Geier} was about federalism, Justice Stevens directly attacked the Majority's apparent hypocrisy between the pre-emption and federalism doctrines.\textsuperscript{253} Over the last decade, the Court, cloaked in its federalist regalia, reshaped constitutional law in many areas.\textsuperscript{254} However, in a surprising turn of events, the Court decided the four pre-emption cases from last term in favor of the federal government.\textsuperscript{255} One commentator surmised that, "[p]re-emption law is on a collision course with the conservative

\textsuperscript{249} See supra notes 18-21.
\textsuperscript{250} Greve, \textit{supra} note 7, at 3. The Majority defends its position that requiring an official indication of intent to pre-empt would "tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." \textit{Id.} Greve attacks this reasoning by questioning how pre-emptive authority that an agency assumes under statutory provisions can be attributed to Congress. The presumption against pre-emption demands that specific intent be evident in the language of the statute in order to pre-empt a common-law action. \textit{Id.} This intent would be evident in the explicit words written by Congress. \textit{Id.}
\textsuperscript{251} Coyle, \textit{supra} note 217, at 3.
\textsuperscript{252} Raeker-Jordan, \textit{supra} note 24, at 1379. See also \textit{Geier}, 529 U.S. at 864 (forming the Majority was Chief Justice Rehnquist and Justices Breyer, O'Connor, Scalia, and Kennedy).
\textsuperscript{253} \textit{Geier}, 529 U.S. at 887.
\textsuperscript{255} See Gardbaum, \textit{supra} note 1, at 771.
justices' celebrated project to re-establish structural Constitutional principles on federalism." Professor and Dean of the University of California, Los Angeles, Law School, Jonathan Varat, construes the issue differently, surmising that "there is more to predicting the stance of individual members of the Court than to ask each what his or her general predisposition is towards the salience of the general roles of the State and Nation in our federalist structure." Varat hypothesized that the Court may be more likely to find federal pre-emption than one might think. Nonetheless, the Majority was not compelled to defend any apparent inconsistencies, but may be forced to reconcile the two competing doctrines in the near future.

Another direct result of the Court's apparent inconsistency in its federalist's analysis, is demonstrated in the strange make-up of the majority and minority decisions in Geier. The unusual make-up of the two sides demonstrates that the votes in the next pre-emption case could be up for grabs. For instance, Thomas departed from Justice Scalia and the other conservatives while Justice Breyer left his liberal brethren. The departures were quite unusual because the more liberal justices typically favor federalism in pre-emption cases, but oppose federalism on

256. Greve, supra note 7, at 1. But see Paul D. Clement & Viet D. Dinh, There's No Conflict in Interpreting Commerce Clause Despite Stevens's Claim, FULTON COUNTY DAILY REPORT, Jun. 20, 2000, at 3 (claiming that Geier was not about federalism, but rather about congressional intent).


258. Id.

259. Geier, 529 U.S. at 887.

260. Varat, supra note 257, at 3.

261. Geier, 529 U.S. at 864, 886. See also Clement, supra note 256, at 3 (hypothesizing that Thomas thinks that Congress exceeds its delegated power under the Commerce Clause much of time and as a result the presumption against pre-emption is another way to invalidate these laws). As for Justice Breyer, Dinh states that Breyer might be advocating a pro-federal government stance. Id. at 4. Jonathan Varat agrees with both of these assessments. Varat, supra note 257. However, he further concludes that Thomas is the most consistently state-power oriented justice and is in fact in favor of limiting the pre-emptive effect of federal statutes. Id.

262. The liberal wing of the Court includes Justices Stevens, Breyer, Souter, and Ginsburg.
most other constitutional issues. Professor Varat commented on the strange split:

Because federal preemption of state law eliminates one source of regulation, just as rulings that Congress or the States lack constitutional power to regulate a particular field or subject do, those Justices inclined to curtail congressional power, under the Constitution may not be inclined, when congressional power is clear, to interpret the preemptive intent of Congress narrowly in favor of preserving concurrent, or dual, state regulation.

If the current balance of the Court is disrupted by retirement or change in ideology, perhaps the presumption against pre-emption could regain its initial forcefulness. Until then, advocates for the presumption against pre-emption and plaintiffs' rights will continue to lose the day.

VI. CONCLUSION

Commentators deemed Geier v. American Honda Motor Co., Inc. one of the most important cases of the 1999 term. These commentators were right as the case not only changed the method of analysis for pre-emption, but in doing so infringed on many plaintiffs' rights, leaving them with no forum for relief. The Court concluded that even in the absence of an express intent to pre-empt, courts are free to hold that administrative standards pre-empt common-law tort actions. In decreasing the states' historic police powers, victims of serious injuries could now be foreclosed from receiving any remedy when a federal regulation or standard occupies an area of law. Manufacturers can breathe a sigh of relief as hundreds of pending design defect lawsuits involving lap belts, shoulder harnesses and airbags will now be foreclosed. As inequitable as the Geier decision is, it seems only fair that in the near future, the Court's decision to expand pre-emption in favor

263. Greve, supra note 7, at 3.
265. Coyle, supra note 217, at 1.
of administrative agencies could cause a major inconsistency in the Majority's federalist's agenda. Only time will tell.