

Chipping Away at State Tort Remedies Through Pre-emption Jurisprudence: *Geier v. American Honda Motor Co.*

Alexander K. Haas[†]

In Geier v. American Honda Motor Co., the United States Supreme Court held that a minimum federal motor vehicle safety standard, relating to the passive restraint devices in automobiles, pre-empted a private tort suit under state law. This Casenote argues that while this holding clarifies existing pre-emption jurisprudence, the Court's decision runs contrary to the Rehnquist Court's recent federalism jurisprudence and betrays individual rights in an area of traditional state control. Moreover, the majority reached this decision to pre-empt contrary to the plain language in the statute and through an unprecedented reliance on legislative history, thereby opening the door to greater pre-emption of state common-law claims. Finally, this Casenote suggests two legislative means of preserving state common-law claims in the wake of Geier.

INTRODUCTION

Imagine suffering serious injuries in a car accident. Following the accident, you decide to file suit against the car manufacturer under your state's tort system, claiming they negligently designed the car. However, without even reaching the merits of your claim, the court dismisses your case because an administrative regulation, which established only minimum safety standards, pre-empted your state tort action. Although this may seem an unlikely outcome, the U.S. Supreme Court recently held that just

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[†] J.D. Candidate, School of Law, University of California, Berkeley (Boalt Hall), 2002; B.A., University of California, Berkeley, 1997 (Molecular & Cell Biology and Philosophy). I will be a law clerk for the Honorable Andrew J. Kleinfeld, United States Court of Appeals for the Ninth Circuit, Fairbanks, Alaska, for the 2002-2003 term. I wish to thank Professors Steven P. Croley and Howard A. Shelanski for their advice and guidance on this Casenote. I also wish to thank the members of the *California Law Review*, particularly Jen Polse, Sarah Shaw, and Jason Snyder, for their careful editing. Finally, I would like to dedicate this Casenote to my wife and dearest friend, Jean, who inspires me on a daily basis.

such an administrative regulation pre-empted Alexis Geier's tort suit. The ruling leaves Geier and potentially millions of other state tort claimants without any legal recourse or remedy.

In *Geier v. American Honda Motor Co.*,¹ the U.S. Supreme Court held that a federal minimum safety standard promulgated by the Department of Transportation ("DOT"), under the National Traffic and Motor Vehicle Safety Act ("NTMVSA") of 1966, pre-empted a state tort claim. Historically, the Court has presumed a state's traditional police powers remain unpre-empted unless Congress evinces a "clear and manifest purpose"² to pre-empt state law. *Geier* considered whether this presumption is overcome where (1) the statute contains an express pre-emption clause,³ (2) the statute contains a saving clause,⁴ and (3) a conflict exists between an administrative federal safety standard's purpose and state tort liability. Relying on conflict and obstacle pre-emption principles,⁵ the Court found the presumption overcome, so that the minimum safety standard pre-empted the state tort suit.⁶

In so doing, the Court ostensibly reaffirmed its holding in *Cipollone v. Liggett Group, Inc.*⁷ that state tort suits may be pre-empted by federal actions. However, the statutory pre-emption language at issue in *Cipollone* is much broader than the statutory language at issue in *Geier*.⁸ Further, because *Geier*, unlike *Cipollone*, involved a saving clause,⁹ *Geier* actually extends *Cipollone* rather than simply reaffirming it. Moreover, statutes similar to the one at issue in *Geier* exist in a variety of areas, making the *Geier* holding and analysis broadly applicable.¹⁰ Consequently, after *Geier*, bringing various state tort suits will likely be more difficult when the defendant has complied with minimum federal safety standards. This Casenote analyzes the *Geier* holding and its implications. Part I provides a primer on the principles of pre-emption law, while Part II describes the

1. 529 U.S. 861 (2000).

2. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (holding that Congress had not pre-empted a state policy through adoption of a similar federal policy).

3. A pre-emption clause expressly states Congress's intent that federal law will trump state law. See Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2100 (2000). For the precise language of the express pre-emption clause at issue in *Geier*, see text accompanying *infra* note 83.

4. A saving clause expressly states Congress's intent to protect some areas of state law from the pre-emptive effect of the statute or limit the effect of a pre-emption clause. See *id.* at 2091.

5. *Geier*, 529 U.S. at 874-83. Conflict pre-emption refers to actual direct conflict between federal law and state law. See Dinh, *supra* note 3, at 2102-03. Obstacle pre-emption involves a situation where state law does not conflict directly with federal law, but stands as an obstacle to the implementation of federal law. See *id.* at 2104-05.

6. *Id.*

7. 505 U.S. 504 (1992) (holding that the Federal Cigarette Labeling Act pre-empted plaintiff's failure-to-warn claim under New Jersey tort law).

8. Compare *Cipollone*, 505 U.S. at 509, 513-15, with *Geier*, 529 U.S. at 867-68.

9. See *Geier*, 529 U.S. at 866.

10. See *infra* note 98.

history of the safety regulation at issue in *Geier*. Part III discusses the facts and procedural history surrounding the *Geier* case. Finally, Part IV examines the positive and negative effects of the *Geier* holding and provides possible solutions to the problems it creates.

I

LEGAL BACKGROUND: A PRE-EMPTION PRIMER

The source of federal pre-emptive power is the Constitution's Supremacy Clause, which states that federal laws "shall be the supreme Law of the Land."¹¹ Federal laws and regulations may supersede and negate state law when Congress's intent¹² to pre-empt state laws is express¹³ or where a conflict of some kind exists between state and federal law.¹⁴ Congress may manifest its intent to pre-empt state laws in an express pre-emption clause, delineating the scope of federal pre-emption.¹⁵

Alternatively, federal pre-emption of state laws, regulations, or standards may be reasonably implied from the structure and purpose of the federal legislation at issue.¹⁶ Implied pre-emption can arise in either of two sets of circumstances. First, federal law may impliedly pre-empt state law where federal regulations demonstrate Congress's intent to fully occupy the field,¹⁷ meaning that federal regulations are so extensive that there can be no room for state law to add to the comprehensive federal regulations in a certain area.¹⁸ For example, a federal regulatory scheme fully occupies the field of nuclear energy.¹⁹ The Court deemed the nuclear energy field as fully occupied by federal regulations because of their comprehensiveness and the fact that the overall effectiveness of Congress's safety and efficiency goals for the nuclear industry depended on a total uniformity of standards among the states.²⁰ For this reason, the *Silkwood* Court held that federal regulations pre-empted the application of a state's punitive

11. U.S. CONST. art. VI, cl. 2; see *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152 (1982) (discussing the supremacy clause's role in pre-emption jurisprudence).

12. See *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (stating that "[t]he purpose of Congress is the ultimate touchstone" for whether pre-emption exists in a certain area (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963))).

13. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235-36 (1946).

14. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987).

15. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (stating that pre-emption is required whenever "Congress' command is explicitly stated in the statute's language").

16. See, e.g., *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (holding that a federal statute pre-empts state law whenever the federal statute's scope shows Congress's intent to regulate a field exclusively or upon a showing of actual conflict between state and federal law).

17. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983).

18. *Id.* at 210-12.

19. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 282-83 (1984).

20. See *id.*

damages laws.²¹ This "field-occupying rationale" acts as a ratchet such that as the federal regulation of a given area becomes more encompassing and comprehensive, leaving less room for the operation of state law in that area, it becomes more likely that federal pre-emption of state law exists.

Second, where a federal regulation makes it impossible to comply with both state and federal regulations in a given area,²² or where compliance with state law "stands as an obstacle" to the federal regulation, the federal regulation pre-empts state law.²³ This conflict pre-emption rationale extends to cases where the state regulation stands as an obstacle to the implementation of congressional intent.²⁴ For example, in *Hines v. Davidowitz*, the Supreme Court held that a federal alien registration act pre-empted a state act whose purpose was to register illegal aliens.²⁵ The *Hines* Court held that allowing the state act to remain in force would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁶ The *Hines* Court rationale was two-fold. First and foremost, registering foreign nationals implicates international relations, which has always been the province of the federal government to the exclusion of the states.²⁷ Second, Congress enacted a "broad and comprehensive plan" regulating entry of foreign aliens into the country.²⁸ Because of the international effects of state action in registering foreign aliens at the state level and the "single integrated and all-embracing" federal alien registration system, the *Hines* Court found that state action would be an obstacle to Congress's purpose here.²⁹

Although a long history of pre-empting state laws and regulations exists, the Court has only recently endeavored to define the extent to which federal actions may pre-empt state tort suits.³⁰ The gravamen of the Court's struggle is that the federal government supplants powers traditionally in the realm of state sovereignty when a federal statute pre-empts a state tort

21. See *id.* at 250.

22. See Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1761 (1992) (detailing the conflicts between various federal and state laws).

23. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

24. *California Fed. Sav. & Loan Ass'n*, 479 U.S. at 281.

25. 312 U.S. 52 (1947). Of particular importance to the *Hines* Court was the act's involvement in foreign relations, an area of policy explicitly left under control of the federal government, unlike tort suits that have been under the rubric of state police powers.

26. *Hines*, 312 U.S. at 67. However, the Court did not always take this position. For instance, in *Savage v. Jones*, 225 U.S. 501, 533 (1911), the Court required something more than mere frustration of Congress's purpose, stating that if the purpose of Congress "cannot otherwise be accomplished . . . the state law must yield to the regulation of Congress within the sphere of its designated power."

27. See *Hines*, 312 U.S. at 67-69.

28. See *id.* at 69-72 (describing the congressionally imposed conditions).

29. *Id.* at 74. Indeed, the "single integrated and all-embracing system" rationale hints at the field occupying notion the Court developed later. See *supra* notes 17-21.

30. See Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 908-09 (1996).

suit.³¹ Because displacement in areas of traditional state power strongly implicates federalism concerns,³² the Court has established a “presumption against pre-emption” in the tort context.³³ For example, the *Silkwood* Court held that despite federal regulations pre-empting state regulations in the nuclear power field, plaintiffs could still seek punitive damages under state tort law.³⁴ The Court reaffirmed this holding several years later in *English v. General Electric*,³⁵ finding that the pre-emptive effect of federal statutes in the nuclear field did not bar an intentional infliction of emotional distress suit.³⁶

However, the Court began moving away from this position in 1992’s *Cipollone v. Liggett Group*,³⁷ which examined whether the Federal Cigarette Labelling Act (“FCLA”) pre-empted some common-law tort claims.³⁸ In a plurality decision, the Court held that the FCLA’s express pre-emption provision pre-empted some state law tort suits.³⁹ The *Cipollone* Court focused on the express pre-emption provision’s broad language that “suggest[ed] no distinction between positive enactments and common-law rules of liability.”⁴⁰ Following *Cipollone*, federal district and circuit courts have held that numerous federal statutes pre-empt state tort suits.⁴¹ But while *Cipollone* opened the door to pre-emption of tort suits, it should be noted that the FCLA contains no saving clause to preserve a citizen’s traditional common-law rights under state law.⁴²

Where no conflict exists between the proposed state action and the federal law, the federal law has no pre-emptive effect on the state laws or

31. See, e.g., *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715 (1985) (requiring a higher level of Congressional intent to pre-empt state laws in areas of health and safety, which are within the traditional police powers of the states).

32. See *Geier*, 529 U.S. at 887 (Stevens, J., dissenting); *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (holding that federal courts must respect state procedural rules when reviewing a state prisoner’s habeas claim because of the federalism concerns involved in areas of traditional state power such as criminal law).

33. *Geier*, 529 U.S. at 888 (Stevens, J., dissenting).

34. See *Silkwood*, 464 U.S. at 251.

35. 496 U.S. 72 (1990).

36. *Id.* at 80-86.

37. 505 U.S. 504 (1992).

38. *Id.* at 524.

39. *Id.* at 517-18.

40. *Id.* at 521-22. Congress could, however, distinguish between positive enactments of state law, such as a state statute or regulation, and judicially-created state common law in the pre-emption context, see *infra* Part IV.C.1., as they emanate from distinct sources. Notwithstanding this possibility of distinguishing between positive enactments and common law, when Congress uses broad language to refer to “all state law,” it makes no such distinction. See *Norfolk & Western R. Co. v. Train Dispatchers Ass’n*, 499 U.S. 117, 127-28 (1991).

41. See, e.g., *Anguiano v. E.I. Du Pont de Nemours & Co., Inc.*, 44 F.3d 806 (9th Cir. 1995) (medical devices); *Bice v. Leslie’s Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994) (pesticides). See generally Noah, *supra* note 30, at 924-36 (discussing lower court opinions following *Cipollone*).

42. *Geier*, 529 U.S. at 897 (Stevens, J., dissenting).

claims.⁴³ For example, in *Freightliner Corp. v. Myrick*, the Supreme Court analyzed the same express pre-emption and saving clause provisions of the NTMVSA that are at issue in *Geier*.⁴⁴ However, unlike in *Geier*, the Court concluded that the NTMVSA did not pre-empt the common-law tort claims.⁴⁵ The two cases differed factually in one respect: *Freightliner* dealt with negligence based on failure to include antilock brakes in a federal design whereas *Geier* concerned negligence based on failure to include an airbag in a design.⁴⁶ This difference is significant, however, because no safety standard exists relating to antilock brakes, while the regulations at issue in *Geier* actually mandate a minimum safety standard for passive restraint devices.⁴⁷ Indeed, the Court in *Freightliner* left open the possibility that a minimum safety standard could embody a congressional purpose such that a state tort suit could frustrate the "accomplishment and execution of the full purposes and objectives of Congress."⁴⁸

Statutes are not the only federal enactments that may pre-empt state laws and tort suits. Federal regulations promulgated by an administrative body have just as much pre-emptive power as federal statutes because in both cases Congress has exercised its power in a given field.⁴⁹ However, there is usually a requirement for the "administrative regulation to declare any intention to pre-empt state law with some specificity."⁵⁰

43. See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (holding that state common-law claims alleging negligence due to the absence of an antilock braking system are not pre-empted by the NTMVSA because there is no conflict between the tort suits and the purposes of the act).

44. *Id.* at 283-84.

45. *Id.* at 289.

46. Compare *id.* at 283, with *Geier*, 529 U.S. at 865.

47. *Geier*, 529 U.S. at 869; 49 Fed. Reg. 28997 (1984) (not found in C.F.R., but incorporated by reference pursuant to 49 C.F.R. § 571.5).

48. 514 U.S. at 289 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

49. See *United States v. Shimer*, 367 U.S. 374, 381-82 (1961). Here, as in *Shimer*, Congress delegated some of its authority to an agency, which can then promulgate regulations under the Administrative Procedures Act of 1946. As this is an act of delegation and Congress can only delegate its Article I power, the agency acts with quasi-legislative power, meaning that Congress could have issued the very same enactments as the agency. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 9-17 (2d ed. 2001) (discussing Congress's ability to delegate its Article I Power to administrative agencies). Because Congress authorizes the agency to issue regulations, those regulations can carry the pre-emptive weight of congressional legislation. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986) ("[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.").

50. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987); *Geier*, 529 U.S. at 908 (Stevens, J., dissenting) ("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.").

II

THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT AND DOT SAFETY STANDARDS

Congress's overarching purpose in enacting the NTMVSA was to "reduce traffic accidents and deaths and injuries resulting from traffic accidents."⁵¹ To this end, Congress delegated the power to create federal safety standards to the Secretary of Transportation.⁵² Specifically, Congress authorized the DOT to provide "minimum" safety standards for all automobiles to be sold in the United States.⁵³ The NTMVSA defines "safety standard" as a "minimum standard for motor vehicle performance, or motor vehicle equipment performance."⁵⁴ Beginning in 1970, the DOT began promulgating minimum safety standards relating to the use of passive restraint devices, such as airbags and automatic seat belts, on automobiles.⁵⁵ The DOT's interest in promulgating such standards arose from a concern over the number of deaths on the nation's highways.⁵⁶

Because the convoluted history of the Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") is central to the Court's holding in *Geier*, it requires a brief explanation. The DOT sought to require automakers to include passive restraint systems in automobiles sold in the United States. Before arriving at the current safety standards, the DOT experimented with other versions. Initially, the DOT required full passive restraint systems to protect front seat passengers but allowed automakers to choose which passive restraints to use.⁵⁷ However, some of these systems were unpopular with the public, and in 1976, the DOT suspended the requirement.⁵⁸ The next year the new DOT secretary reinstated FMVSS 208 to again require passive restraint devices.⁵⁹ Finally, in 1984 the DOT promulgated the current version of FMVSS 208, which required gradual implementation of passive restraint devices on automobiles.⁶⁰ It mandated that a certain

51. 15 U.S.C. § 1381 (1988), *recodified at* 49 U.S.C. § 30101 (1994).

52. 15 U.S.C. § 1392(a) (1988) (authorizing the Secretary of Transportation to promulgate motor vehicle safety standards).

53. 15 U.S.C. § 1392(2) (1988) (defining safety standard as "minimum standards for motor vehicle performance").

54. 15 U.S.C. § 1392(a)(2) (1988).

55. Although originally promulgated in 1970, *see* 35 Fed. Reg. 16,927 (Oct. 21, 1970), these requirements did not begin to take effect until 1972. Standard No. 208; Occupant Crash Protection, 49 C.F.R. § 571.208, S4.1.1 (2001). Passive restraint devices require no action on the part of the driver to activate. 34 Fed. Reg. 11,148 (1969).

56. Standard No. 208; Occupant Crash Protection, 49 C.F.R. § 571.208, S2 (2001).

57. Standard No. 208; Occupant Crash Protection, 49 C.F.R. § 571.208, S4.1.1 (requiring manufacturers to either install passive restraint devices or add a device to warn the driver to buckle manual seat belts).

58. *Geier*, 529 U.S. at 876.

59. *Id.*; *see* Standard No. 208; Occupant Crash Protection, 49 C.F.R. § 571.208, S4.1.2 (2001).

60. Standard No. 208; Occupant Crash Protection, 49 C.F.R. § 571.208, S4.1.3-S4.1.4 (2001); *see Geier* 529 U.S. at 878-79.

percentage of automobiles sold have some type of passive restraint device,⁶¹ and required that this percentage would increase over the years until September 1989 when all automobiles would be required to have a passive restraint system.⁶² Its purpose was to "reduce the number of deaths of vehicle occupants, and the severity of injuries."⁶³ The DOT stated that this purpose was best promoted by "alternative protection systems in [auto] fleets rather than one particular system in every car."⁶⁴ The federal government claimed that a state tort suit would frustrate gradual implementation sought by the DOT, therefore requiring pre-emption of such lawsuits.⁶⁵ The *Geier* Court confronted this issue, ultimately agreeing that the NTMVSA pre-empted the state tort suit at issue.

III THE CASE

A. *Facts & Procedural History*

Alexis Geier suffered serious injuries when her 1987 Honda Accord collided with a tree.⁶⁶ The car had no airbag or other passive-restraint device, but did have a manual shoulder and lap belt, which Geier had buckled.⁶⁷ *Geier* sued American Honda Motor Company ("Honda") under District of Columbia tort law⁶⁸ claiming, in part, that Honda "designed its car negligently and defectively because it lacked a driver's side airbag."⁶⁹ The district court dismissed the suit on summary judgment, agreeing with Honda that a federal safety standard promulgated by the DOT expressly pre-empted Geier's suit because her suit would have created an airbag standard for all automobiles.⁷⁰

While the D.C. Circuit Court of Appeals affirmed, it did so on implied pre-emption grounds, holding that no express pre-emption was possible due to the presence of the "saving" clause.⁷¹ The D.C. Circuit determined

61. Standard No. 208; Occupant Crash Protection, 49 C.F.R. § 571.208, S4.13.2 (mandating 25% compliance between September 1987 and September 1988), S4.1.3.3 (mandating 40% compliance between September 1988 and September 1989), S4.1.4 (mandating full compliance) (2001).

62. *Id.*

63. Standard No. 208; Occupant Crash Protection, 49 C.F.R. § 571.208, S2 (2001).

64. 49 Fed. Reg. 28,962 (1984), **28997 (July 17, 1984).

65. See *Geier*, 529 U.S. at 881 (referring to the solicitor general's amicus brief).

66. *Geier*, 529 U.S. at 865.

67. *Id.*

68. Since D.C. tort law is functionally identical to state tort systems, *Geier* is applicable nationwide.

69. *Geier*, 529 U.S. at 865.

70. *Geier v. American Honda Motor Co.*, 166 F.3d 1236, 1238 (D.C. Cir. 1999) (referring to the unpublished district court opinion, *Geier v. American Honda Motor Co.*, Civ. No. 95-CV-0064 (D.D.C. Dec. 9, 1997)).

71. *Id.* at 1238-43. According to the D.C. Circuit, the broad language of the saving clause foreclosed pre-emption, but pre-emption of *Geier*'s suit could be implied from the statute's structure.

that the tension between the express pre-emption clause and the saving clause meant that no express pre-emption was possible with respect to Geier's claims.⁷² Despite recognizing that it was possible to comply with both the safety standard and the tort standard simultaneously,⁷³ the court determined that requiring an airbag would still "frustrate the [agency's] policy of encouraging both public acceptance of airbag technology and experimentation with better passive restraint systems."⁷⁴ The D.C. Circuit reasoned that the effect of Geier's tort suit would be to compel the use of a particular passive restraint system, which runs contrary to the aforementioned purpose.⁷⁵ Thus, the court held Geier's suit to be "implicitly pre-empted" and affirmed the district court's summary judgment order.⁷⁶ Perhaps recognizing that the D.C. Circuit and other circuit court findings⁷⁷ conflicted with decisions by many state supreme courts,⁷⁸ the U.S. Supreme Court granted certiorari.

B. The Court's Decision

Geier involves the pre-emptive effect of the minimum passive restraint standards for automobiles established in the NTMVSA⁷⁹ and FMVSS 208.⁸⁰ The NTMVSA contains both an express pre-emption clause⁸¹ and a saving clause that limits the express clause's scope.⁸² The *Geier* Court focused on the interaction between the express pre-emption clause and the saving clause and whether this interaction altered ordinary pre-emption principles.

Under the NTMVSA's pre-emption clause, once a federal safety standard is in place, "no State or political subdivision of a State shall have any authority . . . to establish . . . any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not

Id. For the text of the saving clause, see *infra* note 84 and accompanying text. For a discussion of the effect of the clause, see *infra* notes 110-140.

72. *Id.* at 1242.

73. *Id.*

74. *Id.* at 1243.

75. See *id.* at 1242-43.

76. *Id.*

77. See, e.g., *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Estate of Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir. 1990).

78. See, e.g., *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376 (N.Y. 1998); *Minton v. Honda of Am. Mfg., Inc.*, 684 N.E.2d 648 (Ohio 1997); *Munroe v. Coalati*, 938 P.2d 1114 (Ariz. 1997).

79. Specifically, the case addressed the 1988 version of the National Traffic Motor Vehicle Safety Act, 15 U.S.C. § 1381 et. seq., which was recodified at 49 U.S.C. § 30101 (1994), et. seq. *Geier* refers to the 1988 version, and I will also to avoid confusion.

80. Standard No. 208; Occupant Crash Protection, 49 C.F.R. § 571.208, S4.1.1-S4.1.4 (2001).

81. See *infra* note 83 and accompanying text.

82. See *infra* note 84 and accompanying text.

identical to the Federal standard.”⁸³ In tension with the broad pre-emption clause, the NTMVSA’s saving clause provides that “[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law.”⁸⁴ Statutes like the NTMVSA exist in a variety of areas where the federal government provides regulatory guidelines, making the *Geier* holding and analysis broadly applicable.⁸⁵

In deciding the case, the Court first examined whether the NTMVSA’s express pre-emption clause pre-empted *Geier*’s tort action.⁸⁶ The Court noted that where a saving clause is also present, it is necessary to read the express pre-emption provision in conjunction with the saving clause.⁸⁷ Applying this to the NTMVSA, the Court concluded that while the express pre-emption provision alone would likely pre-empt state tort actions, the saving clause’s presence prevented such a broad reading and meant that there could be no express pre-emption of state tort suits.⁸⁸ The Court then examined whether the saving clause did more than just limit the express pre-emption clause’s reach.⁸⁹ Despite the saving clause’s presence, the Court concluded that ordinary conflict and obstacle pre-emption principles still apply because the saving clause’s express terms should not be given such broad effect as to actually conflict with Congress’s purpose in enacting the legislation.⁹⁰

The Court then held that the NTMVSA and FMVSS 208 actually conflicted with *Geier*’s state tort suit,⁹¹ relying on the convoluted legislative history surrounding FMVSS 208.⁹² According to the Court, the legislative history showed that Congress sought only gradual implementation of passive restraint systems.⁹³ While a state tort suit such as *Geier*’s might not

83. *Geier*, 166 F.3d at 1238 & n.4 (quoting 15 U.S.C. § 1392(d) (1988), recodified at 49 U.S.C. § 30103(b)(1) (1994), using slightly different language).

84. *Geier*, at 1238 n.5 (quoting 15 U.S.C. § 1397(k) (1988), recodified at 49 U.S.C. § 30103(e) (1994)).

85. See, e.g., 49 U.S.C. § 41713(b)(1) (1994) (the Federal Aviation Act’s pre-emption provision). The FAA also grants the Federal Aviation Administration the ability to provide minimum safety standards. See 49 U.S.C. § 44701(a)-(b) (1994).

86. *Geier*, 529 U.S. at 867.

87. *Id.*

88. *Id.* at 868. In so doing, the Court disagreed with the district court’s decision in *Geier* and the Ninth Circuit’s holding in *Harris v. Ford Motor Corp.*, 110 F.3d 1410, 1415 (9th Cir. 1997), both of which had held that the administrative regulations here expressly pre-empted the state tort claims. See *id.* at 865-66.

89. See *id.* at 869.

90. *Id.* at 874 (citing *Am. Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998)). The Court concluded that “the saving clause foresees—it does not foreclose—the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts.” *Id.*

91. *Id.* at 875-86. This Casenote disputes this finding because the NTMVSA’s purpose was to reduce deaths on the nation’s highways, which is a goal that tort law effectuates. See 15 U.S.C. § 1381 (1988), recodified at 49 U.S.C. § 30101 (1994); *infra* Part IV.B.2.

92. The legislative history is described in *supra* Part II. See also *Geier*, 529 U.S. at 875-77.

93. *Id.* at 878.

necessarily come into direct conflict with this legislative purpose, the Court concluded that the state tort suit would nonetheless stand as an obstacle to the DOT's purpose in seeking gradual implementation of mandatory passive restraint systems.⁹⁴ On this basis, the Court found the administrative regulation (FMVSS 208) pre-empted Geier's tort suit.

IV DISCUSSION

On its face and viewed in light of the Court's precedents, *Geier* appears only to clarify pre-emption jurisprudence, which it does effectively. At first blush, the majority's holding seems to comport with the settled principles of pre-emption jurisprudence and judicial interpretation: the opinion seems to unremarkably reaffirm *Cipollone* and its progeny. However, Justice Stevens' dissent exposes numerous flaws in the majority's reasoning, principally that the majority opinion ignores the presumptions against pre-emption in traditional areas of state control.⁹⁵ In addition, the dissent rightly points out that the majority finds administrative intent to pre-empt state tort claims when the saving clause's plain meaning appears to exempt state tort suits from pre-emption.⁹⁶ For these and other reasons, the majority's decision improperly extends prior pre-emption principles.

Although the dissent recognizes the majority's incorrect assumptions and analysis, it only touches on the reasons for the majority's faulty opinion. A fundamental issue at stake both in *Geier* and for the future is the increasing power of administrative agencies. After *Geier*, administrative agencies, with the promulgation of only minimum safety standards, can easily extinguish a citizen's right to seek a state tort remedy. In this sense, the *Geier* Court provides manufacturers with a shield against tort suits through compliance with safety standards promulgated by administrative agencies. Moreover, the majority's opinion provides an outline for a manufacturer to influence administrative agencies to seek a regulatory compliance defense cloaked in the language of pre-emption. This increased power of administrative agencies to deprive people of traditional state remedies may be the true legacy of *Geier*.

This Part critically examines both the majority and dissent as well as *Geier*'s potential effects. Part IV.A describes *Geier*'s important

94. *Id.* at 886.

95. *Id.* at 906-07 (Stevens, J., dissenting).

96. This fact may explain why Justice Thomas joined the dissent, given his history of strict interpretation of both the Constitution and statutes. *See, e.g.,* *United States v. Lopez*, 514 U.S. 549, 584-93 (1995) (Thomas, J., concurring) (taking a position beyond that of the majority by finding that modern Commerce Clause jurisprudence could not be correct as it would render the express grants of power in Article I a nullity). However, Justice Scalia's position with the *Geier* majority is much harder to explain, given the majority's reliance upon legislative and administrative history rather than the plain meaning of the safety regulation and statute. *See infra* Part IV.B.1.

contribution to pre-emption jurisprudence: the clarity with which Justice Breyer provides guidance to lower courts in analyzing the interaction of the express and saving clauses as well as the effect (or lack thereof) of a saving clause on the operation of ordinary conflict pre-emption principles. Part IV.B argues that the *Geier* Court misapplied the law by ignoring long-held principles of pre-emption and judicial interpretation, based in part on its mistaken view that a contrary holding would frustrate the purpose underlying the federal safety standards. Finally, Part IV.C proposes legislative solutions to the problems caused by *Geier* to ensure the rights of citizens to seek relief in state court.

A. *Geier Effectively Clarifies Existing Law on Pre-emption and Saving Clauses*

Federal pre-emption jurisprudence is quite complex, leading to varying applications of this body of law by lower courts. Further, pre-emption issues arise often in disparate pieces of congressional legislation or administrative regulations, containing analogous pre-emption provisions and saving clauses.⁹⁷ These statutes exist in a wide variety of areas where Congress exerts authority to regulate,⁹⁸ meaning that the analysis of such clauses in *Geier* could have far-reaching implications.

Due to the complexity of the various doctrines, interpreting the interaction between express pre-emption and saving clauses and other pre-emption principles has occasionally led to differences in interpretation amongst the circuits.⁹⁹ For example, courts have split over the pre-emptive effect of federal safety standards in the air safety context.¹⁰⁰ In *Abdullah v. American Airlines Inc.*,¹⁰¹ the Third Circuit determined that "federal law establishes the applicable standards of care in the field of air safety . . . preempting the entire field from state and territorial regulation."¹⁰² Consequently, the *Abdullah* court held that the Federal Aviation Act¹⁰³ pre-empted application of state standards of care in a

97. These clauses often form the starting point of a judicial pre-emption analysis. Aside from express provisions, courts must also apply implied and conflict pre-emption principles during a pre-emption analysis. See *supra* Part III.

98. See Noah, *supra* note 30, at 924-35 (discussing medical devices, hazardous chemicals, and transportation where Congress often employs similar regulatory schemes); see also 21 U.S.C. § 360(k)(2) (1994) (medical devices); 15 U.S.C. § 1261-1278 (1994) (hazardous chemicals).

99. Compare *Abdullah v. American Airlines Inc.*, 181 F.3d 363, 376 (3d Cir. 1999) (holding state standards of care are pre-empted by the FAA), with *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1445-46 (10th Cir. 1993) (holding no pre-emption of state tort suits).

100. See, e.g., *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1263 (9th Cir. 1998) (stating that with respect to the Airline Deregulation Act, an analogous statute to the Federal Aviation Act, "the scope of this preemption has been a source of considerable dispute since its enactment").

101. 181 F.3d 363 (3d Cir. 1999).

102. *Id.* at 367.

103. 49 U.S.C. § 40101.

passenger's tort suit.¹⁰⁴ The Federal Aviation Act, like the act at issue in *Geier*, contained both an express pre-emption clause and a saving clause. The *Abdullah* court focused on the meaning of the express pre-emption clause and determined that "state . . . standards of care relating to aviation safety are federally preempted."¹⁰⁵ However, several other circuits facing similar facts have held that the Federal Aviation Act does not pre-empt state tort suits.¹⁰⁶ Instead of emphasizing the express pre-emption clause, this second line of court decisions focuses on the saving clause in order to spare state tort suits from pre-emption.¹⁰⁷

With so many differences in interpretation among the courts,¹⁰⁸ the *Geier* decision will likely serve to clarify existing pre-emption law. Fortunately, Justice Breyer's opinion in *Geier* provides a clear template for lower courts to analyze pre-emption issues,¹⁰⁹ allowing the lower courts to reach uniform conclusions across a wide variety of statutes. Breyer's opinion accomplishes this by its methodological treatment and application of pre-emption jurisprudence.

1. *The Presence of a Saving Clause Prevents a Broad Reading of the Express Pre-emption Clause*

When Congress enacts legislation containing an express pre-emption provision, the Supremacy Clause mandates that the provision supersedes all state laws within its scope.¹¹⁰ Thus, the breadth of such an express pre-emption clause dictates the outer boundary of federal pre-emption. A court interprets the breadth of an express pre-emption clause using ordinary

104. *Abdullah*, 181 F.3d at 376 ("[w]e hold that state and territorial standards of care in aviation safety are federally preempted"). Despite finding federal pre-emption of state tort standards, the *Abdullah* court found no pre-emption of the passenger's state tort suit. *Id.* The court held that one had a state tort remedy based on a federally defined standard of care. *Id.* This seems internally inconsistent with the determination that state standards are pre-empted. The only way one could receive a remedy would be through violation of a federal standard. Aside from delivering a regulatory compliance defense to potential tortfeasors, this guts the essential character of a state tort suit, namely a state standard of care. As such, this is not much of a state tort remedy.

105. *Id.*

106. See, e.g., *Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988) (holding that "[t]he Federal Aviation Act does not expressly preempt state damages remedies"); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1445-46 (10th Cir. 1993) (same).

107. See *Cleveland*, 985 F.2d at 1445-46 (focusing on the saving clause); *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 294-95 (11th Cir. 1993) (finding that the saving clause showed that "Congress did not intend to pre-empt state laws on matters unrelated to airline rates, routes or services").

108. Indeed, the district court, D.C. Circuit, and Supreme Court each had differing rationales for finding pre-emption here in *Geier*. See *Geier*, 529 U.S. at 865-66, 974-75 (discussing the lower court decisions and finding the pre-emption on different grounds than those courts).

109. The structure of Breyer's opinion reveals that lower courts should first look to express pre-emption and saving clauses, then to implied pre-emption principles, and then to conflict pre-emption in analyzing questions of federal pre-emption. See *Geier*, 529 U.S. at 867-83.

110. See U.S. CONST. art. VI, cl. 2; *Fidelity Fed. Sav. & Loan Ass'n. v. De La Cuesta*, 458 U.S. 141, 152 (1982).

principles of statutory construction¹¹¹: for an express pre-emption provision to pre-empt state law, Congress's intent must be clear and unambiguous.¹¹² According to *Geier*, courts must first analyze the pre-emption clause's plain meaning to determine whether Congress intended to pre-empt the state law in question.¹¹³ As stated previously, it is within Congress's power to pre-empt state common law, depending on the wording of the express pre-emption clause.¹¹⁴ For this reason, a properly crafted express pre-emption provision could pre-empt all state standards, regulations, and laws, including state tort suits.¹¹⁵ The FCLA contains an example of a fairly broad-reaching pre-emption clause, which is at the heart of the *Cipollone* Court's holding.¹¹⁶ Only where the express pre-emption clause's plain meaning is ambiguous should the statute's structure and purpose or its legislative history guide a court's analysis.¹¹⁷

Although the effect of an express pre-emption clause may be sweeping, often Congress seeks to preserve some role for the states. Congress commonly manifests such an intent through a saving clause, which literally saves some role for state regulation.¹¹⁸ The saving clause may save any number of state laws from pre-emption, often including state tort laws,¹¹⁹ because it shows a clear congressional intent to preserve state sovereign power.¹²⁰ Thus, Justice Breyer rightly notes that a saving clause should prevent a broad reading of an express pre-emption clause.¹²¹ Specifically, Breyer first examines the pre-emption clause's breadth noting that, taken

111. See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent."); *Cipollone*, 505 U.S. at 548 (Scalia, J., dissenting).

112. See *CSX*, 507 U.S. at 664 (imposing a clear-statement rule in the pre-emption context).

113. *Geier*, 529 U.S. at 867-68.

114. See *supra* note 3 for a discussion of the difference between positive enactments under state law and common law.

115. See *Geier*, 529 U.S. at 868 (stating that without a saving clause, an express pre-emption provision could be given a "broad reading" to "pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance"); *Cipollone*, 505 U.S. at 518 (holding that some state tort claims were pre-empted by the statute).

116. 505 U.S. at 513-14; Federal Cigarette Labelling Act § 5(a), Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1340) (1994) (stating in the 1965 version of the Act's section entitled "Preemption": "No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.").

117. See *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. 272, 282 (1987) (finding that "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" unless the legislation fails to provide a clear view of congressional intent to pre-empt).

118. See *Dinh supra* note 3.

119. See *id.* (noting that where there is a saving clause that saved common-law claims from pre-emption, "[t]he saving clause assumes that there are some significant number of common-law liability cases to save").

120. The presence of the saving clause and an express pre-emption clause proscribes express pre-emption in the area of state law. The *Geier* Court dealt with the issue of whether conflict pre-emption principles apply.

121. *Geier*, 529 U.S. at 868 ("Hence the broad reading [of the express clause] cannot be correct.").

by itself, it would likely pre-empt all tort suits under state law.¹²² Second, Breyer evaluates the pre-emption clause's scope in an effort to determine what state actions the saving clause covers.¹²³ In this way, Breyer's opinion makes clear that the saving clause scope places a substantive restriction on the breadth of a pre-emption clause and prevents too broad a reading of the pre-emption clause. However, because the saving clause's scope creates this substantive restriction on the breadth a court may give to a pre-emption clause, determining the saving clause's scope is of utmost importance. Of course, evaluating the saving clause's scope remains a matter for judicial interpretation, although ostensibly the analysis should first look to the plain meaning and next to legislative history, just as in the case of evaluating the pre-emption clause's breadth.

2. *The Saving Clause Does Not Prevent the Operation of Ordinary Conflict Pre-emption Principles*

As previously stated, federal pre-emption of state regulations or standards may be either express or implied.¹²⁴ Pre-emption based on frustration of purpose (implied or conflict pre-emption) lies at the core of the *Geier* Court's holding.¹²⁵ However, for pre-emption to exist, intent to pre-empt must be clear and manifest, especially where Congress or an administrative agency seeks to pre-empt an area traditionally under state control.¹²⁶ Because states are independent sovereigns, whatever pre-emption exists in areas of traditional state power must be carefully circumscribed to protect the state sovereignty. Therefore, courts have created a presumption against pre-emption in areas within traditional state spheres of power. For example, the Court examined concurrent federal and state regulation of grain storage and warehousing services, noting that these regulated activities were within the state's traditional locus of control.¹²⁷ The Court found that "the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."¹²⁸

Federal statutes pre-empt state law only to the extent necessary to achieve the purpose of Congress in enacting the federal statute.¹²⁹ Therefore, in any pre-emption analysis, "a fair understanding of congressional

122. See *supra* note 115.

123. *Geier*, 529 U.S. at 868.

124. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (finding that pre-emption is required whenever it "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly in its structure and purpose"); see *supra* Part III.

125. See *Geier*, 529 U.S. at 875.

126. *Cipollone*, 505 U.S. at 516.

127. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

128. *Id.*

129. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963).

purpose" is necessary to resolve the question of pre-emption of state law.¹³⁰ On this view, the majority holds that the purpose and legislative history surrounding a statute or administrative action are central to a determination of its pre-emptive effect on state law claims.¹³¹ The majority reasoned that the purpose and legislative history surrounding a federal action help the examining court measure the particular state action's consequences so that it can determine whether potential conflict or frustration of the federal purpose necessitates pre-emption.¹³²

The *Geier* Court also addressed the effect of a saving clause on the traditional pre-emption analysis. Although a saving clause circumscribes the scope of express pre-emption,¹³³ *Geier* clarifies that the clause does not limit the operation of ordinary conflict pre-emption principles;¹³⁴ according to the *Geier* Court, to allow it to do so would impermissibly broaden the saving clause's scope.¹³⁵ The Court, therefore, has not interpreted saving clauses so broadly that such an interpretation would upset the regulatory balance outlined by Congress.¹³⁶ Therefore, congressional determinations of regulatory balance, constrained by federalism concerns in areas of traditional state control, form the boundaries of a saving clause's reach.

At issue is the balance between national uniformity and the right of states to exercise their police powers in areas traditionally under their control. As the Court stated in *Geier*, "the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards"¹³⁷ However, the Court does not give saving clauses broad interpretations where doing so could upset the regulatory balance necessary to fulfil Congress's goals.¹³⁸ So, according to the Court, non-uniformity between state and federal law cannot rise to the level of actually conflicting with federal law to make the federal goal impossible.¹³⁹ Thus, in a pre-emption analysis like *Geier*, the court ultimately must address whether a

130. *Cipollone*, 505 U.S. at 530 & n.27 (holding that federal statutes pre-empt some state law damage claims with respect to cigarette smoking due to the Court's view that Congress's intent was to bar some claims from being litigated in state courts, but not others).

131. *See Geier*, 529 U.S. at 874-83.

132. *Id.*

133. *Id.* at 868.

134. *See id.* at 869-70.

135. *Id.*

136. *See Am. Tel. & Tel. Co.*, 524 U.S. at 214, 227-28 (1998) (holding that a saving clause cannot preserve a common-law right that is "absolutely inconsistent" with the act such that the act would "destroy itself" or its purpose if the right were preserved).

137. *Geier*, 529 U.S. at 870-72.

138. *See United States v. Locke*, 529 U.S. 89 (2000) (pre-empting state laws on oil tanker design).

139. *See Geier*, 529 U.S. at 871-72.

state tort suit frustrates or conflicts with the purpose of congressional (or administrative) action.¹⁴⁰

Geier will guide lower courts through issues relating to both the interaction of the express pre-emption and saving clauses as well as the impact of implied and conflict pre-emption principles on the standard pre-emption inquiry. With this guidance lower courts will apply uniform pre-emption principles.

B. Geier Betrays Federalism by Abandoning a Long-Held Presumption Against Pre-emption in Areas of Traditional State Control

While the process described by the majority's opinion in *Geier* provides clear guidance to lower courts, the question remains whether this uniform interpretation reaches a proper outcome. The largest problem with the majority opinion is that it manufactures a pre-emption problem,¹⁴¹ concluding that a tort suit "stands as an obstacle" to the federal safety standards.¹⁴² However, this holding flies in the face of significant ambiguity over whether Congress clearly intended such a result. This unprecedented move by the Court defies canons of judicial interpretation. As the dissent rightly points out, in no precedent prior to *Geier* did the Court "up[hold] a regulatory claim of frustration-of-purposes implied conflict pre-emption based on nothing more than an *ex post* administrative litigating position and inferences from regulatory history and final commentary."¹⁴³ Because it ignores the ambiguity in Congress's intent and dismisses the general presumption against pre-emption, the majority's holding goes too far in pre-empting state tort suits.

Where federal pre-emption is alleged in an area of traditional State control, as in the area of tort law, there is an "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."¹⁴⁴ Underlying this presumption are concerns over the balance of power between the state and federal governments in our constitutional system of dual sovereignty.¹⁴⁵ On the one hand, the Federal Government may undoubtedly "oust state courts of their traditional jurisdiction over common-law tort actions."¹⁴⁶ On the other hand, states should retain significant autonomy

140. See *id.* at 874 ("The basic question, then, is whether a common-law 'no airbag' action . . . actually conflicts with FMVSS 208. We hold that it does.").

141. See *id.* at 910-13 (Stevens, J., dissenting) (discussing "the Court's unprecedented use" of legislative history as a basis for finding pre-emption).

142. *Id.* at 873 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

143. *Id.* at 910-11 (Stevens, J., dissenting).

144. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

145. *Geier*, 529 U.S. at 887 (stating that the case is about "respect for the constitutional role of the states as sovereign entities" (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999))).

146. 529 U.S. at 887.

from this federal power where their historic police powers are implicated, such as in the realm of tort liability, and federal law should pre-empt state law in these areas only if that is the clear and unambiguous intent of Congress. Although the *Geier* majority refers to this principle, there is no clear intent to pre-empt state tort suits based on the plain meaning of the NTMVSA or FMVSS 208. The Court was therefore forced to look to legislative history to find this intent.

1. *The Plain Meaning of the Safety Standards Does Not Reveal Intent to Pre-empt*

Because it did not find clear congressional intent to pre-empt from a plain reading of the statute and safety standard, the *Geier* majority errs by looking deeply into the history surrounding both the statute and safety standard to find the required intent to pre-empt. This is a mistake on the part of the majority, because the first step in determining congressional intent is to examine the statute's ordinary meaning.¹⁴⁷ With respect to the saving clause, it appears that the Court ignored the statute's ordinary meaning. The saving clause clearly states that "compliance with" a federal safety standard "does not exempt any person from any liability under common law."¹⁴⁸ Because the ordinary meaning of "any liability" includes tort liability under state law, Congress clearly intended to exempt tort suits from federal pre-emption. The majority, however, chooses not to give broad effect to saving clause language due to concerns over disrupting the federal regulatory scheme.¹⁴⁹

Moving beyond the statute's plain meaning required the Court to engage in an extensive analysis of legislative history of the statute and safety standard, stretching legislative history to find a conflict between the safety standard and the tort suit.¹⁵⁰ Two problems flow from the majority's

147. *CSX Transp., Inc. v. Easterwood*, 507 U.S. at 664 ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.").

148. 15 U.S.C. § 1397 (k) (1988 ed.); see *supra* Part IV.B.

149. *Geier*, 529 U.S. at 870 (citing *United States v. Locke*, 529 U.S. 89 (2000)). Generally, the more comprehensive and extensive a set of federal regulations in a given area (that is, the federal regulatory scheme), the more likely a court is to find pre-emption of state laws in that area. See also *supra* notes 17-20 and accompanying text. For a discussion of the relationship between the extensiveness of a federal regulatory scheme and pre-emption, see Dinh, *supra* note 3, at 2101-04.

150. *Geier*, 529 U.S. at 875-82; *supra* Part II.B. One reason that Justice Thomas may have joined the dissent along with Justice Souter and Justice Ginsburg (making it a very odd assortment of justices on both sides) is that a strict constructionist or originalist view would be that Congress's language from the saving clause should exempt all common-law liability from pre-emption. Curiously, Justice Scalia joined the majority opinion, despite his well-known positions on originalism and judicial interpretation, which make it odd that he joined a majority that relied so heavily on legislative and administrative history materials in arriving at its decision. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14-36 (1997). As Justice Scalia has stated, "legislative history should not be used as an authoritative indication of a statute's meaning" because the words of the statute have an objective meaning. *Id.* at 29. In fact, in *Cipollone*, Justice Scalia's separate

improper search through legislative history. First and foremost, courts that focus on legislative history in cases like *Geier* do so at the expense of a statute's clear language and plain meaning. Second, legislative history is notoriously murky and is far easier to manipulate than a statute's plain text. Increased reliance on legislative history creates an incentive for parties to influence the history in order to provide courts with reasons to pre-empt state tort claims. Judges will be able to pick and choose from these reasons to achieve a desired pre-emptive outcome. Nonetheless, the majority holds that courts must examine legislative history in these situations.¹⁵¹ On this basis the court determines the purpose of the FMVSS 208 was the gradual implementation of passive restraint devices and that a tort suit claiming negligent design for lack of an airbag would stand as an obstacle to this safety standard.¹⁵²

2. *The Majority's Claim That the Statute's Purpose Would Be Frustrated by Allowing State Tort Claims Is Simply False*

According to the Court, the clear purpose of the FMVSS 208 was the gradual imposition of passive restraint devices,¹⁵³ a purpose which the Court finds would be frustrated if citizens were allowed to sue under state tort law.¹⁵⁴ But the Court's definition of the supposedly frustrated purpose failed to take into account the DOT's mandate or the NTMVSA itself. The safety standard in question supplied only a minimum standard;¹⁵⁵ the dissent points out that the FMVSS 208's stated purpose was reducing the number of deaths and severity of injuries of vehicle occupants.¹⁵⁶ Imposing

opinion bemoans the plurality for ignoring the "ordinary meaning" of the statutes involved. *Cipollone*, 505 U.S. at 544-46. This makes his association with the majority in *Geier* even more confusing, because the *Geier* majority seemingly ignores the saving clause's ordinary meaning. As Justice Scalia stated in *Cipollone*, "when [a statute] bespeaks a narrow scope of pre-emption, so must our judgment." *Id.* at 548 (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7-8 (1987)). The NTMVSA's saving clause clearly exempts any common-law liability from the statute's pre-emptive breadth. It was a mistake for the DOT, the majority, and especially Justice Scalia to interpret the regulation and saving clause as contrary to this plain meaning.

151. The legislative history the Court relies on is convoluted at best, with the DOT repeatedly modifying the passive restraint regulations. *Geier*, 529 U.S. at 874-83. The majority uses these repeated modifications of FMVSS 208 to assert that to accomplish its stated goals the DOT sought gradual implementation of such devices, to the exclusion of other incentives like tort law. *Id.* This approach has two main flaws. First, it elevates legislative history above the state's text (the saving clause) and the import of a regulation that supplies only a minimum safety standard (a floor) to manufacturers. Second, it ignores the purpose of both the NTMVSA and FMVSS 208 since tort law would conflict with neither. See *infra* notes 153-164 and accompanying text. In this way, the *Geier* Court stretches legislative history to find a purpose that might conflict with tort law.

152. *Geier*, 529 U.S. at 874-83.

153. *Id.* at 879.

154. *Id.* at 881 (stating that the duty to install an airbag upon which a state tort action could be based would "have presented an obstacle to the variety and mix of devices that the federal regulation sought").

155. See 15 U.S.C. § 1391(2) (1988).

156. *Geier*, 529 U.S. at 889 (Stevens, J., dissenting).

tort

liability would not conflict with this purpose, but could even effectuate it.¹⁵⁷

The NTMVSA shares the same overarching purpose as the FMVSS 208, a purpose that is certainly not frustrated by a state tort suit that challenges adherence to what is solely a minimum safety standard.¹⁵⁸ Actual conflict between the state and federal standards is unlikely, because if a state tort standard sets a higher bar than the federal minimum standard, the federal standard would be met upon compliance with the state tort standard and there would be no actual conflict. Likewise, the state tort suit may or may not frustrate Congress's purpose in enacting the NTMVSA, depending on what purpose one examines. Only if one examines the most narrow administrative purpose of only a portion of FMVSS 208 could one stretch, as the Court does, to say that the tort suit frustrates its purpose. Arguably, under different views of the regulation's purpose, which could be extracted from the murky waters of legislative history, it is likely that the tort suit effectuates Congress's and the DOT's purpose.¹⁵⁹

Moreover, imposition of the tort standard of care sought by Geier likely would not impact the incentive structure set up by the federal regulations. It is a tenet of law and economics that potential tort liability provides an incentive to install airbags and other passive restraint devices and to improve safety,¹⁶⁰ because the risk of liability provides an incentive to meet the ordinary standard of care.¹⁶¹ Arguably, although tort liability had been present prior to *Geier*, the risk of a tort suit did not provide sufficient incentives to install passive restraint devices since it took a federal regulation to initiate their installation.¹⁶² Indeed, as the dissent notes, the preemption issue did not exist until the DOT promulgated the safety standard, so "it is reasonable to infer that the manufacturers' assessment of their potential liability" did not provide enough incentive to install them.¹⁶³ If the incentives of tort liability were so ineffectual as to require federal regulation to guarantee safety, it is unclear how the very same tort liability would frustrate the purpose of the regulations.

But even if one concedes the potential importance of incentives created by tort law, tort liability effectuates, rather than frustrates, the

157. See *id.*

158. Compare 15 U.S.C. § 1381 (1988), recodified at 49 U.S.C. § 30101 (1994) (stating that the statute's purpose is to reduce deaths on highways), with Standard No. 208; Occupant Crash Protection, 49 C.F.R. § 571.208, S2 (2001) (same).

159. The overarching safety standard seeks to reduce death on the highways. If tort liability would effectuate this purpose, then there would be no conflict between tort law and the safety standard at all. See *infra* notes 160-164 and accompanying text.

160. See, e.g., Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972).

161. See *Geier*, 529 U.S. at 892 & n.5 (Stevens, J., dissenting).

162. See *id.* at 893-94.

163. *Id.*

NTMVSA's purpose because the threat of tort liability reduces the number of traffic deaths by increasing compliance with the state standard of care. Therefore, one effect of the *Geier* holding is to remove this incentive, leaving manufacturers with only an incentive to comply with the minimum federal safety standards. In effect, this creates a regulatory compliance defense to shield manufacturers that comply with only minimum safety standards.¹⁶⁴ The supposed frustration-of-purpose between the minimum safety standard and a tort suit upon which the majority relies, provides a blueprint for those subject to federal safety regulations to defend state suits against them on pre-emption grounds. It is even conceivable that regulated groups could influence the implementation of safety regulations to which they are subject, which may in turn provide a defense from tort suits under *Geier*. Arguably, the effect of this could be to increase the number of deaths on the roads. *Geier*'s holding will ultimately increase the power of administrative agencies, which are not constitutionally required to represent the interests of states, to remove the traditional right to seek a remedy in the state tort system.

C. Potential Solutions to the Problems Created by Geier: Protecting the Realm of State Tort Law from Federal Pre-emption

The right to seek a tort remedy in state court is a traditional common-law right that should only be pre-empted upon a clear showing of congressional or administrative intent to pre-empt.¹⁶⁵ However, the *Geier* holding makes it far easier for administrative agencies to pre-empt these traditional common-law rights. Although administrative agencies have always had the power to pre-empt these rights under state law, they now need not state explicitly their intent to pre-empt state tort suits.¹⁶⁶ Administrative agencies may pre-empt these traditional common-law rights in the face of significant ambiguity regarding congressional intent on that issue.¹⁶⁷ Because, unlike Congress, administrative agencies do not represent either state or individual interests, this raises concerns that the agencies will abuse these relaxed requirements and pre-empt citizens' common-law rights where they arguably could not or would not before *Geier*. Aside from reversing the decision in *Geier* or limiting it only to state regulations as opposed to state tort suits, the following legislative solutions would solve the problems that *Geier* creates by helping to secure citizens' rights to state tort remedies, absent explicit congressional intent to pre-empt.

164. See generally Noah, *supra* note 30, at 964-78 (discussing a regulatory compliance defense cloaked in pre-emptive language).

165. *CSX*, 507 U.S. at 664.

166. See *supra* Part IV.B.

167. See *id.*

1. *Clearer Congressional Intent on Tort Suit Pre-emption*

As discussed above, the *Geier* majority seems to have difficulty interpreting the scope and reach of a saving clause in the pre-emption context, due in part to a fear of upsetting a regulatory balance struck by Congress or an agency.¹⁶⁸ Congressional action provides one solution to the concerns raised by the majority. Congress could amend statutes to add a sort of "super saving clause" that expressly deals with the consequences to state tort suits of prospective regulatory legislation.¹⁶⁹ For instance, Congress could protect a citizen's traditional right to seek a state tort remedy by explicitly stating that the scope of a statute's pre-emptive breadth does not reach such suits. This would alleviate the Court's concern over upsetting the regulatory balance and would protect the right to seek traditional state remedies.

Courts would likely respect the plain meaning of a super saving clause because they would alleviate the concerns underlying the current narrow reading of saving clauses. Motivating the Court's concerns, which prevent an expansive reading of saving clauses, is the worry of upsetting the regulatory balance that Congress constructs.¹⁷⁰ In effect, this is a concern based on the separation of powers; that is, the Court is concerned that too broad a reading of a saving clause has the effect of the Court acting as regulator rather than merely the regulation's interpreter.¹⁷¹ A super saving clause would ameliorate this concern because Congress would explicitly state what level of conflict with state law that the federal regulations would tolerate. For example, Congress could tailor a super saving clause to allow for cases where common-law actions stand as an obstacle to a federal statute's implementation, but would not tolerate direct conflicts between the common-law action and the federal regulations. Even though the Court ignores the plain meaning of ordinary saving clauses, because of the explicit language of a super saving clause a court would have less trouble upsetting regulatory policy.¹⁷²

168. *Geier*, 529 U.S. at 870 (quoting *United States v. Locke*, 529 U.S. 89 (2000)).

169. For example, "Compliance with the terms of these regulations does not exempt any person from tort liability under state law. Neither this statute's express pre-emption provision, the scope of this legislation, nor any potential conflict between this legislation and state tort law shall be construed as frustrating the Congress's purpose in this legislation."

170. See *Geier*, 529 U.S. at 870 (citing concerns over "upset[ting] the careful regulatory scheme established by federal law"); *Am. Tel. & Tel. Co.*, 524 U.S. at 227-28.

171. For instance, if the Court reads a saving clause in such a way that it allows a tort suit that actually conflicts with a federal regulation, then the Court ultimately stymies Congress's decision to legislate, which is not the Court's traditional role.

172. In effect, the super saving clause would act as a green light from Congress to the courts delineating the degree of acceptable regulatory conflict that common-law actions could pose to pieces of legislation.

2. A "Special Burden" on Administrative Agencies

Another possible solution to these problems would be for Congress to restrict the powers of administrative agencies or to impose what the majority calls a "special burden" upon them when they seek to pre-empt state tort claims.¹⁷³ The majority hesitated to impose this burden on administrative agencies on its own.¹⁷⁴ However, Congress need not have such qualms: it could effectively deal with the *Geier* problem by requiring administrative agencies to state with particularity their intention to pre-empt state tort suits. This would require an administrative agency to affirmatively include language with safety regulations when they wish to preclude state tort suits. Likewise, in the absence of such language, Congress could impose an un rebuttable presumption that the agency did not intend to pre-empt state tort suits. Under this plan, in the absence of clear, particularized language from an agency to the contrary, administrative regulations will not pre-empt state tort suits. Either of these solutions restricts the power of administrative agencies and protects the traditional right to seek a state tort remedy.

CONCLUSION

Although the *Geier* holding provides clear guidelines to lower courts in the pre-emption context, it has broad implications whenever a federal agency imposes minimum safety standards. It effectively strengthens the power of administrative agencies to remove a traditional remedy under state law with virtual ease. In so doing, the Court ignores the long-held presumption against pre-emption in the area of a state's traditional police powers by searching for intent to pre-empt in the history surrounding the safety standard at issue, while ignoring the saving clause's plain meaning. This provides a shield to a manufacturer through compliance with only minimum safety standards. As such, this ostensible reaffirmation of *Cipollone* seems to create a regulatory compliance defense cloaked in the language of pre-emption.

This extension unnecessarily broadens pre-emption jurisprudence and destroys critical rights under state law. After *Geier*, bringing a tort suit against an alleged tortfeasor who complies with minimum federal safety standards will be far more difficult. Congress should act either to clarify the scope of existing saving clauses in regulatory schemes to state expressly that state tort suits are not pre-empted or to impose a special burden on administrative agencies when they seek to pre-empt state tort suits. These solutions would temper the increase in administrative power and

173. *Geier*, 529 U.S. at 870.

174. *Id.* at 885 (refusing to "insist on a specific expression of an agency's intent to pre-empt").

would guarantee the rights of citizens to seek traditional remedies under state law.

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