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A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?

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I. INTRODUCTION

Two years have passed since the United States Supreme Court decided *Geier v. American Honda Motor Co.*,[1] a preemption decision through which the Supreme Court appeared to work significant changes in preemption jurisprudence.[2] There has been some discussion[3] of the opinion and only recently some detailed analysis of its long-term effects on the doctrine of preemption.[4] Because of the potential for *Geier*'s having significant impact, this Article will dissect the majority opinion and then examine the Court's subsequent preemption decisions for indications of *Geier*'s impact.

As a necessary first step and as part of its primary thesis, this Article will demonstrate how the Court in *Geier* departed from decades of its preemption jurisprudence without a sound. Rather, the Court proceeded about its business according to what it termed "ordinary" preemption principles that it neither detailed nor employed in reaching its decision. It

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

2. One commentator has said "*Geier* represents a seismic shift in the Court's preemption doctrine." Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1012 (2002).

3. *See, e.g.*, Davis, *supra* note 2; M. Stuart Madden, *Federal Preemption of Inconsistent State Safety Obligations*, 21 PACE L. REV.103 (2000); Mark Tushnet, *Globalization and Federalism in a Post*-Printz *World*, 36 TULSA L.J. 11 (2000); *The Supreme Court 1999 Term: Leading Cases, Federal Preemption of State Law*, 114 HARV. L. REV. 339 (2000) (hereinafter "*Supreme Court: Leading Cases*").

4. *See generally* Davis, *supra* note 2; Joseph Mulherin, Note, Geier v. American Honda Motor Company, Inc.*: Has the Supreme Court Extended the Pre-emption Doctrine Too Far?*, 21 J. NAT'L. ASS'N. ADMIN. L. JUDGES 173 (2001).

thus worked a judicial sleight of hand, by reaching a result it desired on the facts of the case, which it should not have reached with preemption law as it existed. Rather than up-end preemption jurisprudence with a change in the law, then, it simply glossed over the content of that law, never defining the applicable contours, and reached its desired result based on "ordinary" (although undisclosed) principles.

More specifically and comprising the other part of the Article's thesis, this Article contends that, despite the cautions urged by commentators,[5] the Supreme Court in *Geier* jumped headlong into the "obstacle" conflict preemption abyss and demonstrated in a powerful and paradigmatic way the danger that obstacle or obstruction-of-purposes preemption poses to state law when judges are unrestrained by anything but their own policy predilections. The five-member majority accomplished its apparent goal of preemption in the case by abandoning the long-standing presumption against preemption[6] and the concomitant requirement that Congress's intent to preempt be clear, and it thereby removed any protections the presumption provided to federalism principles, state tort law, and Congress's own preemptive intentions.[7] In fact, in numerous statements that reveal its approach, the Court evidences

5. *See, e.g.,* Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 AM. J. TRIAL ADVOC. 435 (1992); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997); Susan Raeker-Jordan, *The Pre-emption Presumption that Never Was: Pre-emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998); David E. Seidelson, *Express Federal Preemption Provisions, State Law Actions for Damages, Congress, and the Supreme Court: A Penitent Seeks Redemption*, 58 LA. L. REV. 145 (1997); KENNETH STARR, ET AL., AMERICAN BAR ASSOCIATION, THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69 (1988).

6. Justice Stevens, along with Justices Souter, Thomas, and Ginsburg, *Geier*, 529 U.S. at 886, dissented because he felt in part that the majority "wrong[ly] characterize[d] its rejection of the presumption against pre-emption . . . as 'ordinary experience-proved principles of conflict pre-emption.'" *Id.* at 888 (quoting *id.* at 874). Justice Stevens also observed that "the Court simply ignores the presumption" and argued that "in view of the important principles upon which the presumption is founded, . . . rejecting it in this manner is profoundly unwise." *Id.* at 906-07.

7. Beyond the scope of this Article is whether the presumption against preemption is warranted at all, either by policy or by the Constitution. I find more persuasive the arguments in Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000), regarding the non obstante provision of Article VI, than those in Viet D. Dinh, *Regulatory Compliance as a Defense to Products Liability: Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000), focusing on the "Constitution's text and structure" and "substantive principles of federalism." *Id.* at 2097. Professor Nelson's article contains a major caveat that is particularly significant in a case like *Geier*, which involves a statute with a savings clause. He stated, "The non obstante clause instructs courts that *in the absence of other indications*, they should not automatically assume that Congress intends to avoid contradicting state laws. But *if Congress does give other indications*, courts do not have to ignore them." *Id.* at 294 (emphases added). Even though in his view the presumption against preemption is improper under Article VI, when Congress employs a savings provision, then the presumption may apply. But indicative of the Supreme Court's dramatic shift in doctrine in *Geier*, the Court ignored the presumption against preemption even in a case involving a crystal-clear savings clause.

a predisposition toward preemption rather than a presumption against it and employs obstacle preemption to effectuate that predisposition.[8] The *Geier* Court, although further muddling long-standing preemption doctrine, seemed nonetheless determined to make it much easier for judicial preemption[9] to trump even clear congressional enactments that explicitly save state law from federal law override.

The purpose of this Article, then, is to demonstrate in detail what is wrong with the Court's preemption doctrine as styled in *Geier*, in particular what is wrong with the implied "obstacle" sort of conflict preemption.[10] One must of necessity use the "airbag dispute"[11] in the case as a vehicle for illustrating the doctrine's failings and for further illustrating how much further afield the Court went from good rules and toward ones detrimental to state tort law and federalism principles. The real test of the Article's thesis, though, comes from the analysis of preemption decisions in the two years since *Geier*. For all of these reasons, this Article in Part II will first briefly set out the basic preemption rules as historically recognized. Part III equally briefly provides the needed context of the airbag controversy. Parts IV and V contain the bulk of the discussion, with Part IV analyzing the Supreme Court's approach in *Geier* and the consequences of employing that approach. Part V will examine developments since *Geier* and conclude that subsequent decisions of the Supreme Court do not evidence the elimination of the presumption against preemption (and its clarity requirement), at least in name. At the same time, however, those decisions demonstrate the disarray in preemption doctrine because they do not debunk the assertion that *Geier* expanded obstacle conflict preemption as a powerful form of judicial preemption by its eschewing of the application of the presumption against preemption in a case where the presumption should apply.

8. For a similar charge, see Davis, *supra* note 2, at 1013 (stating that "[p]reemption analysis is now organized not only to prefer federal law, but to presume its operation to the exclusion of state law that has even a minimal effect on the accomplishment of federal objectives"), 968 ("It is inescapable: there is a presumption in favor of preemption."), 971 (arguing that "the Court's preemption analysis has, in effect, created a presumption *in favor of* preemption, contrary to the Court's oft-quoted dicta that there is a presumption *against* preemption of historic state police powers"). Another commentator called the *Geier* Court's "method of decisionmaking . . . essentially a federal law preference rule" that shows a "strong preference for preemption." *Supreme Court: Leading Cases*, *supra* note 3, at 345-46.

9. By this I mean those instances in which *courts* are implying preemption from legislation that does not clearly and expressly preempt state law.

10. For a general critique of implied "obstacle" conflict preemption, see Nelson, *supra* note 7, at 265-90 (concluding that "obstacle" implied preemption can be justified neither as a doctrine of constitutional law nor as one of statutory interpretation).

11. *See infra* notes 22-27 and accompanying text.

II. PREEMPTION

In many cases, the Supreme Court has described its preemption doctrine in various ways, but the basics of its taxonomy of preemption can be captured in the following quote from the Court:

> It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." . . . Even where Congress has not entirely displaced state regulation in a specific area, [known as "field" preemption,] state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[12]

The United States Court of Appeals for the District of Columbia Circuit, in its opinion in *Geier v. Honda Motor Co.*,[13] identified in the following way how federal law can preempt state law: "by express pre-emption, by 'field' pre-emption (in which Congress regulates the field 'so extensively that [it] clearly intends the subject area to be controlled only by federal law'), and by implied or conflict pre-emption, which applies when a state law conflicts with a federal statute or regulation."[14] Later, the court of appeals more clearly defined how implied conflict preemption could occur: "[i]mplied conflict pre-emption occurs 'where it is impossible for a private party to comply with both state and federal requirements, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[15] The D.C. Court of Appeals's articulation of preemption conformed to that of the Supreme Court. The second kind of implied conflict preemption, or "obstacle" conflict preemption, is the one the

12. Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (quoting Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), and Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

13. 166 F.3d 1236 (D.C. Cir. 1999).

14. *Id*. at 1237.

15. *Id.* at 1242 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).

Supreme Court employed in *Geier* and the one with which this Article mainly deals.[16]

There is more to the doctrine than just the categories, however, and the D.C. Court of Appeals immediately recognized that fact when it added:

> [t]he Supreme Court has identified two presumptions that courts must consider when invoking the doctrine of preemption. First, in areas where States have exercised their historic police powers (such as the health and safety of their citizens), courts must start with a presumption against preemption, absent a "clear and manifest purpose of Congress." Second, in every pre-emption case, "the purpose of Congress is the ultimate touchstone."[17]

The D.C. Court of Appeals correctly identified the presumption against preemption and the clarity requirement that goes with it, in cases involving areas of health and safety that the states have traditionally occupied.[18] All of this is standard preemption doctrine,[19] as articulated by the Supreme Court over the course of many decades.[20]

In order to analyze what the Supreme Court has done in its application of preemption doctrine in *Geier*, however, one must first understand the substantive federal and state law involved in the case. At bottom, the issue in *Geier* was whether a federal traffic safety act "pre-empts a state common-law tort action in which the plaintiff claims that the defendant auto manufacturer, who is in compliance with [a 1984 federal safety standard promulgated pursuant to the safety act], should

16. I have elsewhere undertaken a more expansive critique of this form of preemption. *See* Raeker-Jordan, *supra* note 5.

17. *Geier*, 166 F.3d at 1238 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S 218, 230 (1947) and Retail Clerks Int'l Assoc. v. Schermerhorn, 375 U.S. 96, 103 (1963))).

18. This idea goes back at least as far as *Reid v. Colorado*, 187 U.S. 137 (1902), in which the Court stated, "It should never be held that Congress intends to supercede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested." *Id.* at 148, *quoted in* Savage v. Jones, 225 U.S. 501, 537 (1912).

19. For a hornbook discussion of preemption, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-28 to -32 (3d ed. 2000).

20. In his dissent, Justice Stevens recognized this history of the presumption:

> Because of the role of States as separate sovereigns in our federal system, we have *long presumed* that state laws – particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers – are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so.

Geier v. American Honda Motor Co., 529 U.S. 861, 894 (2000) (emphasis added). He elsewhere referenced "our repeated emphasis on the importance of the presumption against pre-emption . . . ." *Id.* at 906. For a fuller discussion of this history and preemption doctrine, see Raeker-Jordan, *supra* note 5, at 1382-1423.

nonetheless have equipped a 1987 automobile with airbags."[21] In taking up this question, the Court waded into an area with much history.

III. THE AIRBAG DISPUTE

The "airbag dispute" describes the years-long debate in the courts and in the commentary over the very question the Court addressed in *Geier*: whether Congress in the 1966 National Traffic and Motor Vehicle Safety Act[22] (the "Safety Act" or "Act") preempted, either expressly or impliedly, state common-law tort actions for damages based on a manufacturer's failure to equip an automobile with an airbag. Key provisions in the debate include the purpose section. Congress wrote that "[t]he purpose of this chapter is to reduce traffic accidents and deaths and injuries resulting from traffic accidents. Therefore it is necessary . . . to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce . . . ."[23] Congress defined those standards as "*minimum* standards for motor vehicle performance, or motor vehicle equipment performance. . . ."[24]

Section 1392 of the Act supplied a preemption provision:

> 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.[25]

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

22. 49 U.S.C. §§ 30101-30169 (2002). The statute was previously codified at 15 U.S.C. §§ 1381-1431, and most of the case law, including the United States Supreme Court's opinions in *Geier* and *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), cites the sections from that prior codification. *See, e.g., Geier*, 529 U.S. at 865 ("We, like the courts below and the parties, refer to the pre-1994 version of the statute throughout the opinion."). For clarity and consistency, this Article will also refer to the pre-1994 statutory text, because although Congress made some changes on re-enactment, "the stated purpose of the [re-enactment of the] statute was to revise, codify, and enact the[] law[] 'without substantive change.'" Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415, 416 n.2 (1996) (quoting Pub. L. No. 103-272, 108 Stat. 745 § 1 (1994)).

23. 15 U.S.C. § 1381.

24. 15 U.S.C. § 1391(2) (emphasis added). The statute as amended provides the following definition: "'motor vehicle safety standard' means a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9) (2002).

25. 15 U.S.C. § 1392(d). As amended, that section reads:

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

49 U.S.C. § 30103(b)(1) (2002).

This section does not settle the preemption question, however, since there exists ambiguity in the word "standard." It could be read by some to include state tort actions in which the fact finder finds an automobile defective for its failure to have an airbag, and if that tort "standard" were not identical to the federal standard, it would be preempted under this section.

Further complicating the preemption analysis, however, is section 1397(k) of the Act, which provides that "compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[26] Together, these four provisions help to indicate the preemptive intent of Congress.

The final item in the mix is the federal safety standard that adopted a phased-in approach to mandatory airbag installation, meaning that for a number of years before they were required to install airbags, manufacturers were given the option of choosing which form of passive restraint system to install. [27] The state tort liability question arose when people were allegedly injured due to the absence of an airbag in an automobile that was manufactured before the date of mandatory installation. The preemption question arose because manufacturers argued that the phase-in itself was the exclusive method by which Congress intended to achieve safety, preempting state tort law's attempt to require airbag installation through the imposition of damage awards.

IV. THE SUPREME COURT TAKES UP *GEIER*

Ultimately, the Supreme Court impliedly preempted the state tort

26. 15 U.S.C. § 1397(k). Currently that section provides that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt any person from liability at common law." 49 U.S.C. § 30103(e) (2002).

27. In a prior article, I described the scheme in more detail: prior to the date when airbag installation would be mandated,

> manufacturers could comply with Standard 208 in one of three ways: they could install either full airbag protection, frontal-only airbag protection, or a lap and shoulder belt system. The standard required that cars manufactured on or after September 1, 1989, but before September 1, 1996, be equipped with a passive restraint system for both front seating positions (driver and right passenger). Between September 1, 1996, and August 31, 1997, manufacturers were still required to install passive restraint systems for both front seating positions, but now the standard required that ninety-five percent of each manufacturer's total production of cars be equipped with airbags. Finally, Standard 208 required that all cars manufactured on or after September 1, 1997, be equipped with air bags at both the driver's and front right passenger's seating positions.

Raeker-Jordan, *supra* note 5, at 1449 (citing 49 C.F.R. § 571.208 (2002)). Some of these requirements were mandated by Congress in 49 U.S.C. § 30127(b)(1) (2002). In making these changes, Congress nonetheless made clear that "[t]his section and amendments to Standard 208 made under this section may not be construed as indicating an intention by Congress to affect any liability of a motor vehicle manufacturer under applicable law related to vehicles with or without inflatable restraints." 49 U.S.C. § 30127(f)(2).

action that the plaintiff had brought in *Geier*, concluding that the state law would obstruct the purposes of the federal statute and regulations.[28] But the Court took a circuitous route to that conclusion, which this part will detail. It should have been difficult for the Court to take such a complicated route to implied preemption, though, considering the lack of any articulated preemption principles such as those outlined above to guide the majority's reasoning. This section therefore begins with a discussion of this failure of rule delineation before proceeding to more detailed discussions of the express and implied preemption issues.

It is worth noting at the outset that the Supreme Court had ample lower court precedent to assist its decision making on the preemption question, since numerous state and federal courts had addressed the question under the Safety Act.[29] The Court itself observed that "[s]everal state courts have held . . . that neither the Act's express pre-emption nor [the federal airbag safety standard] pre-empts a 'no airbag' tort suit. All of the Federal Circuit Courts that have considered the question, however, have found pre-emption."[30] But in itself finding implied preemption, and agreeing with most of the lower federal courts, the Court appeared to reach its conclusion without reference to preemption doctrine that has been rather elaborately articulated over many years and that the lower courts had set out and attempted to follow; in short, the nation's highest court never said exactly what rules it was following, enabling it to do essentially whatever it wanted without having to justify the result as soundly based on the law. In addition, the Supreme Court's opinion and approach illustrates both how courts have historically paid lip service to portions of the doctrine without actually heeding it and how that lack of adherence endangers state law and federalism principles in the process.

Most blatantly, the Supreme Court's five-member majority ignored[31] the long-standing[32] presumption against preemption and the "clear and manifest" requirement in favor of a never-defined set of "preemption

28. 529 U.S. at 886.

29. For a listing and discussion of many of the cases, see Raeker-Jordan, *supra* note 5, at 1450-67.

30. Geier v. American Honda Motor Co., 529 U.S. 861, 866 (2000) (citations omitted).

31. One could argue that the Court recognized the presumption later in the opinion when it said that it "accept[ed] the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict . . . ." *Id.* at 885 (citation omitted). But that argument is weak; this statement was tucked into the end of a long opinion in which the Court had already reached a decision. The majority at most gave an empty nod to the presumption, as evidenced by its finishing its sentence this way: "for the reasons set out above we find such evidence [of conflict] here." *Id.*

32. One commentator has observed that the phrase "presumption against preemption" itself first appeared in a 1985 case. Tushnet, *supra* note 3, at 24 n.79 (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)). The concept of the presumption, however, has been around for some time. *See* Raeker-Jordan, *supra* note 5, at 1384-1406; *see also supra* note 18.

principles" to which the Court obliquely referred again and again. It is difficult to analyze what the Court has done, since it never explains which principles it is using; the Court repeats a staggering *ten times* the phrase "ordinary pre-emption principles"[33] as if the phrase is self-explanatory. The five-member majority is thereby able to preempt state tort law when it could not have done so had it employed the doctrine it espoused for decades.

The Court first employed the phrase "ordinary pre-emption principles" when discussing the decision below of the District of Columbia Circuit Court of Appeals.[34] The Supreme Court stated that the court of appeals "found . . . that, under *ordinary pre-emption principles*, the [National Traffic and Motor Vehicle Safety] Act . . . pre-empted the lawsuit."[35] In its decision and as noted above,[36] the court of appeals indeed articulated those principles: it listed the types of preemption, noted that the presumption against preemption plays a part when state safety laws are at issue, and recognized the presumption that the purpose of Congress is the "ultimate touchstone" in any analysis. By its citation to and quotation of prior Supreme Court opinions, the court of appeals was invoking decades-old preemption doctrine and what should be considered "ordinary pre-emption principles."

When the Supreme Court cited the lower court for its reasoning under those principles, however, it did not include the court of appeals's recitation of types of preemption or of the presumptions.[37] Considering that the court of appeals decision occupied only eight pages of the reporter, the Supreme Court's citation to all of the opinion except the one page that contained the relevant "principles" takes on added significance in a study charging the Court with engaging in a sleight of hand.[38]

33. *See, e.g.,* 529 U.S. at 866, 869, 870 (employing the phrase twice without more explanation), 871, 872, 874, 886 (changing the formulation to say instead "ordinary principles of pre-emption"). Elsewhere the Court, just as generally, called them "well-established pre-emption principles." *Id.* at 873. In other places the Court used nearly identical phrases such as "the ordinary working of conflict pre-emption principles," *id.* at 869, "ordinary conflict pre-emption principles," *id.* at 871, and "ordinary experience-proved principles of conflict pre-emption." *Id.* at 874.

34. Geier v. American Honda Motor Co., 166 F.3d 1236 (D.C. Cir. 1999).

35. *Geier*, 529 U.S. at 866 (emphasis added).

36. *See supra* notes 13-15, 17 and accompanying text.

37. The Court wrote, "[The court of appeals] found that those claims conflicted with [the federal safety standard], and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit. The Court of Appeals thus affirmed the District Court's dismissal. 166 F.3d 1236, 1238-1243 (CADC [*sic*] 1999)." *Geier*, 529 U.S. at 866. The Court's citation to the first page of the lower court's opinion and to pages 1238-1243 omits page 1237, on which the court of appeals detailed the "principles" on which it was relying, including the presumption against preemption.

38. It is true that the court of appeals referred again to the presumption against preemption within the pages cited by the Supreme Court, *see Geier*, 166 F.3d at 1241, so that one could argue that the Supreme Court was not ignoring the presumption altogether. The court of appeals, however, only relied on the presumption when it addressed the express preemption issue, *see id.*; it did not rely

The Supreme Court then recognized that although a number of state supreme courts have found no preemption of these state tort claims, all of the federal appeals courts have found preemption, mostly "under *ordinary pre-emption principles* by virtue of the conflict such suits pose" to federal law.[39] After concluding that it agreed with these federal courts, the Court identified the three questions involved in reaching that conclusion:

> First, does the Act's express pre-emption provision pre-empt this lawsuit? We think not. Second, do *ordinary pre-emption principles* nonetheless apply? We hold that they do. Third, does this lawsuit actually conflict with [the federal safety standard], hence with the Act itself? We hold that it does.[40]

With that beginning, the Court proceeded to detail its analysis.

A. The Express Preemption Discussion

Although the Court decided, as most other courts also have, that the Safety Act in expressly displacing all nonidentical state "standards" did not expressly preempt state tort claims,[41] this section will make several observations to support the thesis that the Court will nonetheless preempt what it wants to preempt and will not necessarily rely on congressional intent as the ultimate touchstone. The express preemption discussion reveals the Court's failure not only to settle a basic interpretive question in the language of the statute but more importantly to employ any discernible traditional preemption principles in its resolution of the issue. This trend, carried through the entire opinion, will ultimately let the Court preempt whatever it wants to preempt. Further, while the Court

on the presumption when it addressed implied preemption by obstruction of purposes, *see id.* at 1242-43, when the presumption is most needed because of the ease with which courts can use that kind of implied preemption to displace state law. For arguments to that effect, see Raeker-Jordan, *supra* note 5, at 1382-1428. The court of appeals's opinion itself demonstrates this last point: it found implied preemption by obstruction of purposes even though it had previously stated that

> the presumption against pre-emption counsels against finding express pre-emption when the purpose is not clear from the statute's language. In light of the apparent tension between [two sections of the Act], *it would be difficult to discern from the Act a "clear and manifest purpose of Congress" to pre-empt a design defect claim* based on the absence of an airbag.

Geier, 166 F.3d at 1241 (emphasis added). Although the court of appeals had identified the presumption against preemption absent the clear and manifest intent of Congress as the starting point, and despite that it found no clear and manifest intent on the part of Congress to preempt state tort airbag suits, the court of appeals implied preemption by finding some purpose of Congress that a tort suit would frustrate. It was able to do this by separating congressional intent to displace state law from the conflict determination, an approach later clearly sanctioned by the Supreme Court majority.

39. *Geier*, 529 U.S. at 866 (emphasis added).

40. *Id.* at 867 (emphasis added).

41. *Id.* at 868.

attempts to support its conclusion that there is no express preemption with a determination that Congress meant state tort law to play some role in relation to the federal standards, the Court's analysis of the interplay between the two laws underscores the Court's strained approach to preemption in this case and its confusing view of Congress's intentions, which intentions in the end seem to have no hold on the Court.

First, the Court did not resolve the basic question of whether the preempted "standards" should encompass state tort claims. Rather, the Court found in the Act's savings clause[42] an indication that common law actions should not be included in the statute's preemptive reach.[43] In the Court's view, the expressly preempted state safety "standards" arguably could include those "standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations," under a "broad reading" of the term "standards."[44] But if the preemption provision were read so broadly, the Court reasoned, then "little, if any, potential 'liability at common law' would remain" to be saved by the savings clause.[45] The court concluded that because of the savings clause and because "[t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions," it would read that provision narrowly.[46]

In a vacuum, this reading by the Court makes sense. But the Court does not come to preemption questions in a vacuum, without "preemption principles" to guide its judgment. Among other criticisms,[47] one would argue that the savings clause should not have been the only justification for reading the preemption provision more narrowly than the "broad reading," which would encompass state tort claims. Put another way, the savings clause should not alone "permit[] a narrow reading"[48] of the preemption provision. The presumption against preemption, "in areas where States have exercised their historic police powers (such as the

42. The clause applying at the time provided that "compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

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

44. *Id.* In previous cases, the Court has discussed whether tort actions effectively force a defendant to comply with a tort duty and thereby have an inherently regulatory effect. *See, e.g.,* English v. General Elec. Co., 496 U.S. 72 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

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

46. *Id.*

47. One could rightly criticize, for example, the Court's failure to analyze the meaning of "standards" and whether it includes common-law damages actions, as well as its failure "to clarify the manner by which such provisions are to be interpreted, whether narrowly . . . or by reference to legislative and administrative history." Davis, *supra* note 2, at 1007.

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

health and safety of their citizens),"[49] should have strongly counseled against a broad reading of the "state standards" language in the preemption provision or even prescribed a narrow reading.[50] But because the Court never set out the "ordinary preemption principles" it was following, it did not have to explain why it ignored the presumption and why the presumption did not inform the Court's interpretation of the provision.

The Court attempted to bolster its conclusion that state tort law is not expressly preempted with a brief discussion of the role that state tort law could play vis-à-vis the federal regulations promulgated pursuant to the Safety Act. But the Court curiously stumbles by apparently failing to recognize the true nature of the federal standards promulgated pursuant to the Safety Act; that is, *all* of these federal standards are by definition minimum standards.[51] An example of this stumbling is seen in the following statement: "a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate – *for example, where federal law creates only a floor, i.e., a minimum safety standard*."[52] Shortly thereafter, positing the alternate scenario in which the preemption provision is read broadly to preempt even state tort actions, the Court stated:

> if [that were the case, the preemption provision] would pre-empt all non-identical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, *even if the federal standard merely established a minimum standard*. On that broad reading of the pre-emption clause little, if any, potential 'liability at common law' would remain. And few, if any, state tort actions would remain for the saving clause to save.[53]

In this discussion, the Court plainly suggests that some safety standards promulgated under this Act would not be minimum standards, but that suggestion is flatly at odds with the way Congress defined these

49. Geier v. Honda Motor Co., 166 F.3d 1236, 1237 (D.C. Cir. 1999).

50. As I have noted in a previous article, the Court has not confined its application of the presumption to implied preemption but has prefaced its entire approach to preemption, including express preemption, with that language. *See* Raeker-Jordan, *supra* note 5, at 1414 & nn. 212-13. The D.C. Circuit in the *Geier* case did the same when reciting the preemption principles that it ascribed to the Supreme Court. *See Geier*, 166 F.3d at 1237. The D.C. Circuit, however, only used the presumption in its express preemption analysis. *See id.* at 1241, 1242-43.

51. Recall that the Act provided that the safety standards promulgated thereunder would be "*minimum* standards for motor vehicle performance, or motor vehicle equipment performance." 15 U.S.C. § 1391(2) (emphasis added).

52. *Geier*, 529 U.S. at 868 (emphasis added).

53. *Id.* (emphasis added).

standards.[54] This misreading is representative of a blind spot the Court appears to have in the case. Because it does not recognize (or simply refuses to recognize) that the standards Congress authorized are *only* minimum standards, it cannot credit (or refuses to credit) an argument that Congress intended state common law tort actions and federal minimum safety standards, together, to comprise its scheme for achieving more highway safety. The Court's imprecise analysis of the entire preemption question, begun because of its failure to employ the longstanding "principles" that govern these questions, shows itself in microcosm on the express preemption question.

Finally, the Court stated that "[w]e have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, *in such circumstances*."[55] By this last statement, the Court must have meant "in situations in which the federal standard would be a minimum standard." If that is what it meant, the express preemption provision *would* logically operate to preempt state tort actions in cases involving a federal standard that would not be a minimum standard but would be a maximum or exclusive standard. Because the Court nowhere recognizes or acknowledges that the airbag standard at issue is a minimum standard,[56] under the Court's reasoning, *Geier* should be a case involving a maximum or exclusive standard. In that event, and again under the Court's reasoning, the express preemption provision *should* operate *expressly* to preempt state tort airbag suits; the savings provision would not save those tort suits because a maximum or exclusive federal standard is involved. But the Court does not take its own analysis to the logical conclusion to find express preemption.

It appears, rather, that the Court treats [57] the airbag standard as a

54. The dissenters agreed that "the Court completely ignores the important fact that by definition all of the standards established under the Safety Act . . . impose minimum, rather than fixed or maximum, requirements." *Id.* at 903; *see also* Davis, *supra* note 2, at 1007-08 & n.274.

55. *Geier*, 529 U.S. at 868 (emphasis added).

56. The majority does not address it here and appears to skirt the issue later in the case, not saying whether the airbag standard is a minimum or maximum standard. *See id.* at 874-86. Rather, the Court acknowledges that during the phase-in period, the standard did not require manufacturers to install one safety device and no other, but rather gave manufacturers options. *See id.* at 875-76. Had the standard required a certain device and no other, it arguably thereby would have set an exclusive or maximum requirement. The Court instead acknowledges that the standard "did not guarantee the mix [of options] by setting a ceiling for each different passive restraint device." *Id.* at 879.

57. Again, I say "treats " because that is the only conclusion one can draw from the Court's finding, under the analysis it outlines, that the state tort suit is not expressly preempted. Elsewhere the Court is elliptical on the question. *See, e.g., id.* at 874 ("In petitioners' and the dissent's view, [the airbag standard] sets a minimum airbag standard. As far as [the standard] is concerned, the more airbags, and the sooner, the better. But that was not the Secretary's view.").

minimum standard that the express preemption provision would not affect, and it therefore finds there is no express preemption of a state tort suit concerning airbag absence. One is then left with the Court's seemingly categorical statement about Congress's intent, which after all is the "ultimate touchstone"[58] in preemption analysis: that a majority of the Justices of the Court "have found no convincing indication [in the express language of the Act] that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances [; in other words, when the federal standard is only a minimum standard]."[59]

But if that is so, the Court's conclusion is puzzling in light of its later finding, discussed immediately below, that state tort suits were *impliedly* preempted under conflict preemption principles because of the obstruction of federal *purposes*.[60] It seems beyond logical that if Congress's purpose was *not* to preempt state tort actions when a federal minimum standard was in operation; if it instead meant explicitly to save them from preemption; and if "the purpose of Congress is the ultimate touchstone in any preemption case," then the continued viability of state claims against auto manufacturers could not, by definition, obstruct the purposes of Congress's safety legislation, which intended dual state and federal participation.[61] The puzzle is solved once one realizes that the Court is shearing congressional intent away from the implied conflict preemption analysis and finding "actual" conflict irrespective of what Congress intended; congressional intent no longer is the "touchstone" it has always been. Substituted for congressional intent is the Court's judgment about what law should survive and what should not.[62] As long

58. *See supra* note 17 and accompanying text.

59. Geier v. American Honda Motor Co., 529 U.S. 861, 868 (2000).

60. Another commentator has viewed it this way: "If the Court had concluded that 'standard' does not include common law damages actions in [the Safety Act], it could not then easily have concluded, in the face of its purported focus on congressional intent, that the statute's purposes would be frustrated by permitting such actions." Davis, *supra* note 2, at 1009.

61. The Court has reached such a seemingly incongruous result before. *See* Jones v. Rath Packing Co., 430 U.S. 519 (1977) (finding no intent to preempt according to express language, but then finding implied/obstruction of purposes preemption). This approach has been criticized. *See* Raeker-Jordan, *supra* note 5, at 1393-95.

62. To be sure, the Court has on occasion ignored congressional intent entirely, despite other cases' usual recitation of the taxonomy of preemption and recognition of the overriding vital role played by congressional intent. *Perez v. Campbell*, 402 U.S. 637 (1971) is illustrative. In *Perez*, the Court examined a state motor vehicle financial responsibility law for its collision with the federal bankruptcy laws. *Id.* at 638, 643. In answering this question, the Court made no pretense of attempting to discern congressional intent: it did not examine any federal statutory provisions for some indication of intent to preempt, nor did the Court examine legislative history to ascertain Congress's preemptive intent. The Court simply decided that the state law frustrated one of the objectives of the federal legislation, which objective the Court had identified on its own. *See id.* at 648 (stating that "[t]his Court on numerous occasions has stated . . . one of the primary purposes of

as the Court can find some federal purpose that it thinks state tort law obstructs, congressional intent is irrelevant.[63] An analysis of the Court's express preemption approach reveals its later conflict preemption approach to be inconsistent and lacking in logic. But there is much about the rest of the Court's opinion that is inconsistent and without logic.

B. The Implied Preemption Discussion

1. In general

The Court preempted state tort actions, employing what it said was implied "obstacle" preemption,[64] which displaces state law that conflicts with the purposes and objectives of Congress. It is clear from the Court's approach to the question, however, that it is not applying the ordinary preemption principles it refers to, including the presumption against preemption. In addition, through a series of contortions, it effects a preemption result that ignores and even subverts congressional preemptive intent. The result is that the Court appears to be presuming preemption, in the face of congressional intent to the contrary, rather than casting a skeptical eye on the displacement of historic state health and safety law.

The Court began its implied preemption discussion with a statement that itself illustrates the Court's snubbing of the "ordinary pre-emption principles" on which it purports to rely: "We have just said that the saving[s] clause *at least* removes tort actions from the scope of the express pre-emption clause."[65] This statement is problematic first because the presumption against preemption should mean that tort

the bankruptcy act.")(internal citations omitted). The Court never mentioned the presumption against preemption, even though the state law arguably touched on an area of traditional state regulation. Perhaps the failure to employ the presumption could be explained by the federal constitutional power over bankruptcies under U.S. Const. art. I, § 8, cl. 4, and a need for uniformity, but the Court never said so. Without much analysis apart from its own decree that the two laws could not stand together, the Court overruled two earlier cases that had found no conflict on essentially the same facts. *Id.* at 651-52 (overruling Kesler v. Department of Public Safety, 369 U.S. 153 (1962) and Reitz v. Mealey, 314 U.S. 33 (1941)). But *Perez*'s failure to follow the doctrine does not support the Court's approach in *Geier*; instead, it highlights the dangers inherent in implied obstacle conflict preemption.

63. Congressional intent was entirely absent in another seemingly aberrational case in which the Court preempted state tort law with federal common law, the "government contractor defense," implicating what the Court called "uniquely federal interests." *See* Boyle v. United Tech. Corp., 487 U.S. 500, 504-07, 512 (1988). Because there was no congressional intent to contend with, presumably there was no need for the presumption, which applies regarding *Congress's* preemptive intentions. *See* Dinh, supra note 7, at 2109. Then, once the Court decided the federal common law involved uniquely federal interests, and the presumption presented no obstacle, it was a short road to a finding of obstacle preemption, even of a traditional state law area.

64. *Geier*, 529 U.S. at 881.

65. *Id.* at 869.

actions should not have to be "removed" from the scope of the ambiguous express preemption clause; the presumption says unless Congress has been clear, one presumes this kind of state law is not preempted. By relying on the savings clause to remove tort actions from express preemption's purview, the Court has again approached the question from a position in essence *presuming preemption*. The Court continued:

> Does [the savings clause] do more? In particular, does it foreclose or limit the operation of *ordinary pre-emption principles* insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that 'actually conflict' with the statute or federal standards promulgated thereunder?[66]

At the outset, the Court has put its thumb on the scale. By beginning with the assertion that "ordinary pre-emption principles" "instruct" the Court to pre-empt when there exists conflict, the Court emphasizes preemption by some conflict that exists wholly apart from the preemption analysis. But that approach puts the doctrinal cart before the horse in the following way: the majority essentially begins with the *presumption* that there is *conflict* and *then* asks whether a savings clause would alter a finding of preemption dictated because of that conflict. The presumption would have caused the Court to phrase the question differently, to ask in the first instance *whether* there is conflict posed by state tort suits, as determined by the scheme as Congress created it.

If the statutory text reveals that Congress's intent was to achieve its objectives through the dual application of federal and state law, not only is preemptive intent lacking, but so is any indication that the application of state law would pose a conflict with federal law's purposes or objectives; the survival of state law was *part* of Congress's objectives. In

66. *Id.* (emphasis added). The Court also repeated its dictum from *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) to the effect that the existence of an express preemption provision "does not foreclose . . . 'any possibility of implied conflict pre-emption.'" 529 U.S. at 869 (quoting *Myrick*, 514 U.S. at 288). The *Myrick* Court had seemed to reverse the approach taken in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), which was to limit the preemption analysis to an express preemption provision when that provision provided a "'reliable indicium of congressional intent with respect to state authority.'" *Id.* at 517 (quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978)). *Myrick*'s dicta, reworking the rule from *Cipollone*, becomes the rule adopted by the *Geier* Court. ("Petitioner's concede, as they must in light of [*Myrick*], that the pre-emption provision, by itself, does not foreclose (through negative implication) 'any possibility of implied conflict pre-emption.'" 529 U.S. at 869 (quoting *Myrick*, 514 U.S. at 288)). For *Geier*, that means that the bare presence in the Safety Act of a provision that explicitly preempts some state standards does not determine the inquiry; a court could still find implied conflict preemption even if Congress expressly preempted only a limited area of state law. Whether or not *Myrick* was sound in its reasoning, that holding does not address or require the rejection of the argument made herein that the express provision *together with* a savings clause and other provisions could indeed demonstrate Congress's intent to preempt *nothing more* than is contained within the express provision, as well as inform the conflict assessment.

this way, "obstacle" or obstruction-of-purposes preemption cannot be viewed in isolation from congressional preemptive intent.[67] Because the presumption works to focus the analysis on whether there is clear and manifest evidence that Congress intended to preempt state tort suits, the Court should first discern whether tort suits in fact conflict, or whether the scheme as Congress set it up desires the dual regulation, contemplates the coexistence of state and federal law, or at least exhibits tolerance for some tension between state and federal law. But the Court's apparent inclinations away from state law influence its posture toward preemption of that law, as seen here in the way the Court phrased its question; the Court must already have concluded that state tort suits pose some conflict to some purposes the Safety Act seeks to achieve. By separating that conflict assessment from Congress's intent, the Court is free to do as it will with state law. That very inclination against state tort actions, and the ease with which a court could override such tort actions, however, are what the presumption against preemption was meant to protect against.

In addition, by taking an approach that is at least not protective of state safety law and is at most hostile to it, the Court essentially read the savings clause out of the statute.[68] If the Court can say that "ordinary preemption principles" dictate that the Court must preempt when there is conflict between state and federal law regardless of the existence of a savings clause that, despite the Court's best effort to make it ambiguous, could not be clearer, then the savings clause clearly does not play a role in the "conflict" or "frustration of purposes" determination and then may just as well not even be in the statute. But because of the presumption against preemption, a clause saving state tort law should play a central role in the assessment of whether state law conflicts with the purposes of federal law.

67. A corollary to this argument is that judicial preemption is accomplished in this very way: judges roam around a federal statute and federal regulations to find some purpose that might be obstructed by state law, even if examination of the statute, say of an express preemption clause, demonstrates no congressional intent to displace state law. It happened in *Geier* and has happened before. *See supra* note 61 and accompanying text. By separating congressional intent regarding preemption from judicially-attributed congressional purposes that are often not stated, and finding preemption by "obstruction" or conflict that way, judges are able to circumvent Congress and preempt state law absent a clear and manifest congressional intent to do so and even in the presence of congressional intent *not* to preempt state law. For similar observations, see Davis, *supra* note 2 , at 971 (stating that "the Court has found preemption of state law tort actions when Congress has, in no uncertain terms, expressly stated the contrary"); *Supreme Court: Leading Cases*, *supra* note 3, at 356 (seeing a preference in favor of preemption that "often leads the Court to impose an exclusively federal standard despite even seemingly contrary statutory provisions").

68. Justice Stevens in dissent agreed with this conclusion if not with this reasoning. *See Geier*, 529 U.S. at 898 (asserting that "[t]he Court's approach to the case has the practical effect of reading the saving clause out of the statute altogether")(Stevens, J., dissenting).

But the Court did not approach the preemption question as ordinary preemption principles would dictate. The Court began explaining its conclusion, that the savings clause "(like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles,"[69] with the statement that "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations."[70] One can make two observations about this statement. First, as indicated in part above, the Court's approach more clearly separates the savings clause from the "conflict" assessment, rather than seeing in the savings clause some evidence of Congress's view of conflict. Had the Court employed the presumption in its conflict analysis, it likely would have attributed more significance to the savings clause since the clause at least appears to take the presumption against preempting state law to an irrebuttable level and then should have some bearing on the "conflict with purposes" question.

The second point is that the savings clause could not be clearer when it says "compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[71] No one is exempted from "*any*" common-law liability, which obviously includes even that liability that may at first appear to conflict with federal law. Even the Court itself recently said the word "any" in a statute had a clear and expansive meaning. In *Department of Housing and Urban Development v. Rucker*,[72] the Court considered a statute providing "that each 'public housing authority shall utilize leases which . . . provide that . . . *any* drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.'"[73] The Court held that the "plain language of the statute"[74] "unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."[75] The Court explained:

> Congress' decision not to impose any qualification in the statute,

69. *Id.* at 869.
70. *Id.*
71. 15 U.S.C. § 1397(k).
72. 122 S. Ct. 1230 (2002).
73. *Id.* at 1232 (quoting 42 U.S.C. § 1437d(l)(6) (1994 ed., Supp. V))(emphasis added).
74. *Id.* at 1233.
75. *Id.*

> combined with its use of the term "any" to modify "drug-related criminal activity," precludes any knowledge requirement. As we have explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" Thus, *any* drug-related activity engaged in by the specified persons is grounds for termination, not just drug-related activity that the tenant knew, or should have known, about.[76]

Applying such a definition to the use of the word "any" in the Safety Act, the Court should have concluded that no one is exempted from "one [type of liability] or some [type of liability] indiscriminately of *whatever kind*." This application of course would mean that even liability that the Court might think conflicts with federal law is not preempted but survives under the Safety Act.

The fact that one must discuss the interpretation of "any" due to the Court's twisting of clear and unambiguous language is troubling. But even more troubling is the Court's apparent determination to take some cover from preemption doctrine from which the Court has stripped those aspects that are the most problematic to its finding of implied preemption. Even if one were to concede that "any" in the savings clause is ambiguous, is not expansive in meaning, and might permit the preemption of some tort claims, one should still have the previously-reliable argument that the presumption against preemption urged an expansive reading of the savings clause, together with a narrow reading of the express preemption provision. But the Court has eschewed even mention of the presumption, to say nothing of the heeding of it. So the Court compounds the barriers to plaintiffs who argue that there is no preemption under this Act: the Court refuses to acknowledge any presumption against preemption and pays no heed to the plain meaning of the savings clause.

It appears that, before it will validate or give effect to a savings clause, the Court wants Congress to say that tort claims that appear to conflict with federal law actually do not and are not preempted. The Court seems to expect the possibility of such an express provision because it assumes that there exist some tort claims that must conflict with some purposes of federal law. But the presumption exists to prevent a court from lightly implying conflict and requires that preemption only be implied when Congress's intent to preempt is clear. So the Court's apparent requirement that Congress say plainly that "no state tort suit will conflict with federal purposes" turns preemption doctrine on its head, putting the burden on Congress to overcome what seems to be a

76. *Id.* (citations omitted); *see also* John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 96 (1993) (finding that the word "any" modifies "without qualification").

presumption of conflict. If Congress fails to do that, it is then a short road to courts' finding that some federal purpose is obstructed by the state law.[77]

Perhaps most fundamentally, however, by saving all tort claims from preemption, Congress is saying that it did not view tort claims, under its scheme, as conflicting.[78] Put simply, Congress probably thought, with good reason, that its intent was clear enough. How can Congress be clearer than to say that no one is exempt from any liability? There is no good reason why Congress would even consider including a provision to the effect that "compliance does not exempt any person from any liability at common law, even if that liability conflicts with federal law." If Congress thought there was no conflict, they would never contemplate including the provision the Court appears to want to see in the statute. The Court's approach creates a straw man that cannot be knocked down because Congress would never do more than it already did in the Safety Act, using clear and comprehensive language that should suffice to make its intentions clear and manifest.[79]

In the next line of the opinion and further contorting the analysis, the Court focuses on the words "compliance" and "does not exempt" in the savings clause,[80] arguing that those words "sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the federal government meant that standard to be an absolute requirement or only a minimum one."[81] If the Court is talking about some *state-law* defense that compliance with federal standards shields a defendant from liability under state law, then the Court's ear for what this clause "sounds

77. Indeed, that has been the conclusion reached by all but one of the federal courts addressing this issue. *See Geier*, 529 U.S. at 866 (indicating that the lone federal court not finding obstacle preemption nonetheless preempted state law under the express preemption provision of the Safety Act). Not surprisingly, "[s]everal state courts have held to the contrary," *id.*, presumably because they have more of an interest in applying the presumption, thereby protecting state law against easy override and protecting the federal-state balance ensured by the federal scheme.

78. Justice Stevens viewed the issue in a similar fashion:

> I believe the language of this particular saving clause unquestionably limits, and possibly forecloses entirely, the pre-emptive effect that safety standards promulgated by the Secretary [of Transportation] have on common-law remedies. Under that interpretation, *there is by definition no frustration of federal purposes* – that is, no 'toleration of actual conflict' – when tort suits are allowed to go forward.

529 U.S. at 900 n.16 (emphasis added)(citations omitted)(quoting *Geier* majority opinion, *id.* at 872).

79. *See also* Davis, supra note 2, at 1020 (stating that in the future, "[t]he Court will . . . require a clarity of language . . . perhaps not known to humankind").

80. Recall that the savings clause in effect at the time provided, "compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

81. Geier v. American Honda Motor Co., 529 U.S. 861, 869 (2000).

like" is not very reliable, first because the "defense" that it posits is not the general rule. The "traditional view,"[82] as indicated in the Restatement (Third) of Torts: Products Liability, is that "compliance with an applicable product safety statute or administrative regulation . . . does *not* preclude as a matter of law a finding of product defect"[83] and therefore a finding of liability under state law. In fact, the Restatement elaborates further that its approach

> reflects the traditional view that the standards set by most product safety statutes or regulations generally are only minimum standards. Thus, most product safety statutes or regulations establish a floor of safety below which product sellers fall only at their peril, but they leave open the question of whether a higher standard of product safety should be applied. This is the general rule, applicable in most cases.[84]

The bottom line is that in most jurisdictions, defendants simply would not have the defense that the Court identifies as being singled out by Congress. In fact, such a defense in a state tort case is "rare."[85] It seems highly unlikely that Congress would have devoted a savings clause to the nullification of a defense that is rare. The Court's impression, therefore, that the savings clause "sounds like" Congress was anticipating such a defense rings hollow.

In addition, as the Restatement notes,

> When a court concludes that a defendant is not liable by reason of having complied with a safety . . . statute or regulation, it is deciding that the product in question is not defective *as a matter of the law of that state*. The safety statute or regulation may be a federal provision, but *the decision to give it determinative effect is a state-law determination*. . . . [By contrast, in the preemption context,] [j]udicial deference to federal product safety statutes or regulations occurs not because the court concludes that compliance with the statute or

82. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4 cmt. e (1998).

83. *Id.* § 4(b) (emphasis added).

84. *Id.* cmt. e.; *see also* Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2050-51 (2000). The same is true in a simple negligence case. *See* DAN B. DOBBS, THE LAW OF TORTS § 224 (2000)(stating that "[t]he fact that the defendant has complied with a statute is not ordinarily in itself a defense. The trier of fact may find that, although the defendant complied with the statutory directives, he should have done even more to attain reasonable levels of safety"). The bases Professor Dobbs cites for this general rule include that "[most statutes] aim at minimum standards but are not meant to establish the outer limits of the defendant's safety responsibilities" and that "many statutes are written in response to lobbying efforts of the industry they purport to regulate, and they are not likely to represent a balanced attempt by neutral parties to achieve appropriate safety." *Id.*

85. Professor Dobbs has said that it is only in "exceptional" and "rare" cases that courts find "compliance with statutory standards is a complete defense." DOBBS, *supra* note 84, § 224. But Professor Rabin has recently examined whether the regulatory compliance defense is being reconsidered. *See* Rabin, *supra* note 84.

> regulation shows the product to be nondefective [under state tort law]; the issue of defectiveness under state law is never reached. Rather, the court defers because, when a federal statute or regulation is preemptive, the Constitution mandates federal supremacy.[86]

Presumably, Congress would be aware of its constitutional role under the Supremacy Clause and would understand that the contents of its legislation, including savings clauses, delimit the statute's preemptive reach. And because congressional enactments usually do not determine state-law questions, such as the appropriate role of federal standards in state product liability suits, the savings clause language is more likely to be language of preemption than of anything else.[87] The Court's reading of the savings provision as merely one that would simply affect a state tort defense demonstrates again its determination first to disbelieve Congress meant what it said in a clear savings clause, and then to substitute the Court's desired objectives of the legislation for those that Congress sought.

Next, the Court found it "difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the [savings] provision's applicability had it wished the Act to 'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act."[88] Purely as a matter of semantics, the Court's statement is difficult to fathom; Congress's statement is simply not written as containing a precondition. A more straightforward way to place a precondition on applicability would be to provide that "*if* one complies with federal regulations, *then* he is not exempt from any liability at common law." The restatement of the clause as a true precondition reveals the absurdity in the Court's interpretation of the original statement as a precondition; a precondition would *require* compliance with federal regulation before a defendant would be subjected to state tort liability. The logical analytical corollary would then suggest that *noncompliance* with the federal regulations *would* exempt one from state tort liability, since noncompliance does not fall within the saving "precondition" set by Congress. But surely even the Court would find such a statement absurd,

86. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4 cmt. e (1998). (emphases added).

87. Congress could say that compliance with federal standards proves non-negligence or product non-defectiveness, which would mean that the Supremacy Clause then applies and has the same effect as preempting state tort actions. Congress does not usually do that, however. *See* DOBBS, *supra* note 84, § 224 (calling it an "[e]xceptional case[]" for legislators to "expressly provide that the compliance with a particular statute is a complete defense").

88. Geier v. American Honda Motor Co., 529 U.S. 861, 869 (2000).

as that result would contradict settled tort principles.[89] There are also at least three substantive reasons why the Court has difficulty understanding what Congress has done, all of which stem from the Court's failure to heed the presumption against preemption. The overarching reason seems to be that the Court has its own idea about the proper roles of federal and state law in achieving highway safety such that it has difficulty seeing that Congress could seek to achieve safety in a different way and so have different "purposes" for writing a statute the way it did. The Court's failure to heed the presumption against preemption permits its own predilections about purposes of legislation to pose the biggest threat to federalism and state tort law in the "obstacle" preemption context.[90]

That failure and the Court's resultant posture lead directly to the second reason the Court cannot understand why Congress would have saved all state tort claims "*regardless of their potential threat to the objectives of federal safety standards promulgated under that Act*." Because it is not starting from a presumption against preemption, the Court cannot accept that Congress simply saw no conflict in setting minimum standards and in recognizing and even assuming that state tort law still does operate under those circumstances. The very inability of the Court to accept that possibility again demonstrates the need for the presumption in the implied "obstacle" preemption context. Had the Court begun from a presumption against lightly inferring Congress's preemptive intent to displace state tort law, it could have been more open to seeing that Congress could have intended the very thing the Court could "not understand": that state tort law and federal minimum standards, far from conflicting, in fact can and often do work together to achieve Congress's desired ends. Instead, the Court distorts clear statutory language with tortuous interpretations to reach what appears to be *its* desired end, the preemption of state tort law,[91] which it could not do under this statutory language were it to apply the presumption against

89. *See, e.g.,* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4(a) & cmt. d reporters' note (the latter note recognizing that "[t]he overwhelming majority of courts hold that violations of product safety regulations cause products to be defective as a matter of law in cases involving both design and failure to warn," and that "the rule . . . that noncompliance with an appropriate governmental product safety regulation renders a product defective . . . finds its origin in a common-law rule holding that the unexcused omission of a statutory safety requirement is negligence per se").

90. One commentator similarly explained: "One important explanation for this shift in preemption doctrine must be that the Court's distrust of products liability actions is greater than its interest in determining congressional intent or preserving traditional state authority." Davis, *supra* note 2, at 1009.

91. *See id.* at 1021 (observing that the Court presumes preemption and then seeks support to justify preemption).

preemption.

By labeling the clause a "precondition," the Court reveals a third reason for its inability to understand why Congress would include the clause if it meant to save all tort claims. As a "precondition," the clause would seemingly exclude some state law claims and include or save from preemption only those that had met the condition. Had it applied the presumption against preemption, however, the Court should have read the savings clause with an eye against preemption of state tort claims and so would not read the clause as containing a "precondition," which is by nature exclusionary and under the Court's reasoning would not save all claims. The proper reasoning would go like this: if one assumes that Congress would not lightly preempt state tort law, but would have to do so "clearly and manifestly," then one would not read the savings clause as containing a "precondition" to its applicability, but read it in a light at least somewhat more favorable to the preservation of state law. Not read as an exclusionary precondition, then, the "compliance" language simply evidences a congressional recognition of what a first-year student of tort law knows: that usually federal standards are only minimums that do not automatically trump state tort liability principles. It was a way for Congress to make clear the desire to preserve state law claims as supplements to federal minimum standards, by simply reiterating the general state law rule about compliance with federal minimum standards. The Court's labeling of the clause a "precondition" skews the preemption analysis from the outset.

The Court next contended that its interpretation of the savings clause does not conflict with the clause's purpose, "say by rendering it ineffectual."[92] The Court recognized some role remaining for the savings clause: "it . . . preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor."[93] But as has already been noted, Congress prescribed that all the standards promulgated pursuant to this Act were to be minimum standards. Under the Court's statement here, then, and according to what Congress intended, all state tort actions should be saved. Any other interpretation necessarily renders the clause "ineffectual." As the preceding dissection of the Court's reasoning demonstrates, the Court struggled mightily to imply preemption in this context, contrary to congressional intent and traditional preemption analysis.

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

93. *Id.*

2. The majority's treatment of broad savings clauses

The approach the majority took to the savings clause, saving any common-law claim against anyone governed by the Safety Act, further demonstrates its failure to apply or heed a presumption against preemption and any requirement that Congress's intent to preempt be clear and manifest. In the end, in fact, the Court's approach effectively reads a clear savings clause out of the federal statute, thereby frustrating Congress's clear and manifest intent *not* to preempt state tort actions and accomplishing judicial preemption instead.

On the way to nullifying the savings clause, and to further support its narrow and tortured construction of the clear savings clause, the Court reminded readers that "this Court has repeatedly 'declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'"[94] For this proposition, the Court rather disingenuously relied on *United State v. Locke*,[95] which ultimately did decline to give full effect to a broad savings clause, but which involved a much different statutory scheme and regulatory environment than that involved in *Geier*. *Locke* involved Washington State's regulation of oil tanker design and operations in the face of a "comprehensive federal regulatory scheme governing oil tankers."[96] More significantly, however, describing the backdrop against which Congress legislated and against which the Court evaluated the preemption case, the Court stated,

> The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.[97]

The Court discussed three federal statutes governing the issues[98] and "a significant and intricate complex of international treaties and maritime agreements bearing upon the licensing and operation of vessels."[99] Because the regulated area in *Locke* was already one of peculiarly national interest, the presumption against preemption did not and should

94. *Id.* at 870 (quoting United States v. Locke, 529 U.S. 89, 106 (2000)).
95. 529 U.S. 89 (2000).
96. *Id.* at 94.
97. *Id.* at 99.
98. *See id.* at 100-102. The Court said that these were the "principal statutes." *Id.* at 100.
99. *Id.* at 102.

not have affected the interpretation, broad or narrow, of the savings clause. The Court itself made this distinction in *Locke*:

> The *Rice* [*v. Santa Fe Elevator Corp.*] opinion stated: "The question in each [preemption] case is what the purpose of Congress was. Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." The qualification given by the word "so" and by the preceding sentences in *Rice* are of considerable consequence. As *Rice* indicates, an "assumption" of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.[100]

The Court in *Locke* was right that the presumption should not apply in that instance because "Congress has legislated in the field from the earliest days of the Republic, creating an extensive statutory and regulatory scheme."[101] The *Locke* Court distinguished the situation in *Medtronic, Inc. v. Lohr*,[102] stating parenthetically that *Medtronic* involved "medical negligence, a subject historically regulated by the States,"[103] implying that the presumption recognized in *Rice* should apply in the *Medtronic* situation. The same should be said of *Geier*, involving tort claims and product safety. In short, the *Geier* Court erroneously relied on *Locke* for a principle governing the interpretation of a savings clause in a case involving an area of peculiarly *state* interest, in which even the *Locke* Court recognized the presumption should apply. And if the presumption against lightly inferring preemption should apply, then the clause saving state law claims from preemption should be given broad effect or at least not constricted to the point of rendering it entirely ineffectual.

More generally, that the Court in *Locke* bothered to reference the presumption against preemption and explain its inapplicability shows starkly the failings of an apparently preemption-determined Court in *Geier*. Rather than rely on the empty construct of "ordinary pre-emption principles" as it did in *Geier*, the *Locke* Court followed prior articulations of the law.[104] In not overtly recognizing the presumption and not

100. *Id.* at 108 (quoting *Rice*, 331 U.S. 218, 230 (1947)(also quoting Jones v. Rath Packing, 430 U.S. 519, 525 (1977) for the proposition that the "'assumption' is triggered where 'the field which Congress is said to have pre-empted has been traditionally occupied by the States'").

101. *Id.*

102. 518 U.S. 470 (1996).

103. *Locke*, 529 U.S. at 108 (citing *Medtronic*, 518 U.S. at 485).

104. One commentator has said that "*Locke* is more representative of modern preemption law than *Geier*, at least in the sense that it implicitly acknowledges the general availability of a presumption against preemption." Tushnet, *supra* note 3, at 24.

applying the rules it articulated in a case just two months before it decided *Geier*,[105] the *Geier* Court appears to show its determination to preempt through employment of the nebulous "obstruction of purposes" approach in a way that substantiates this Article's criticism of that approach.

To further support its narrow reading of the savings clause, the Court also cited *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*[106] and *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*[107] But, like *Locke*, *Abilene Cotton* involved an area of peculiar federal concern: the setting of reasonable rates for interstate rail shipment under the Interstate Commerce Act.[108] Under traditional preemption rules, the presumption against preemption and the requirement of clarity regarding Congress's intent to preempt would not affect the reading of the savings clause in that situation.[109] The *Geier* Court's reliance on *Abilene Cotton* is therefore misplaced.

The case of *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*,[110] ("*AT&T*") involved a savings clause identical to that in *Abilene Cotton* and the issue was nearly identical. In fact, the Court in *AT&T* took the same approach that it had in *Abilene Cotton*, applying what it called the "filed-rate doctrine": "[t]hese provisions [in *AT&T*] are modeled after similar provisions of the Interstate Commerce Act (ICA) and share its goal of preventing unreasonable and discriminatory charges. Accordingly, the century-old 'filed-rate doctrine' associated with the ICA tariff provisions applies to the [act here involved] as well."[111] In addressing the effect the savings clause should

105. The Court decided *Locke* on March 6, 2000, and *Geier* on May 22, 2000. *See Locke*, 529 U.S. at 89; *Geier*, 529 U.S. at 861.

106. 204 U.S. 426 (1907).

107. 524 U.S. 214 (1998).

108. *See* 204 U.S. at 430.

109. The *Abilene Cotton* Court did use language that seemed nearly to replicate the presumption: "we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law [sic] right existing at the date of its enactment unless that result is imperatively required . . . ." *Id.* at 436-37. But it followed those words with, "that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render [the statute] nugatory." *Id.* at 437. The Court was essentially saying that a statute will not be seen to preempt the state law unless that law conflicts with federal law. Clearly, the Court was not recognizing or, later in the opinion, applying a presumption or clarity requirement when it decided that the broad savings clause should not be interpreted broadly. And as previously mentioned, it need not have applied the presumption since although state common law was involved, the state claims touched upon a peculiarly federal area of interest to which the presumption would not apply. *Abilene Oil* is thus consistent with prior doctrine, whereas *Geier* is not.

110. 524 U.S. 214 (1998).

111. *Id.* at 222 (citations omitted).

have on the preemption question, the Court in *AT&T* simply stated that "we have long held that the [savings clause in the ICA] preserves only those rights that are not inconsistent with the statutory filed-tariff requirements."[112] Therefore, far from creating a general rule against giving "broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law,"[113] *Abilene Cotton* and *AT&T* simply illustrate the application of an idiosyncratic rule adopted for particular areas of law implicating peculiar federal interests in interstate commerce and rate setting.

That the *Geier* Court represented, as it did with *Locke*, that these cases set out a general rule that broad savings clauses should not be construed as written in any case where the federal regulatory scheme might be "upset" demonstrates that the Court has rejected the presumption against preemption. To be consistent with precedent, the Court should have restricted those prior holdings to their facts, or at least not imported their rule into a case involving state tort safety law, an area of traditional state concern. The application of this general rule in a case like *Geier* means that there is no obligation on courts to presume that Congress, in its use of a clear and broad savings clause, did not intend to preempt state law unless its intent to that end was elsewhere clear and manifest. It will now be much more likely that courts, unrestricted by the presumption against preemption, will overreach in their attempt to find "obstruction of purposes" conflict preemption and work a result that Congress did not intend.[114] The very likelihood of easy override of state

112. *Id.* at 227.

113. Geier v. American Honda Motor Co., 529 U.S. 861, 870 (2000) (quoting United States v. Locke, 529 U.S. 89, 106 (2000)).

114. In another case, Justice Kennedy recognized and was troubled by this danger as well. Concurring in the judgment but not in the opinion in which the plurality implied preemption by obstruction-of-purposes conflict, he wrote that

> [t]he plurality's broad view of actual conflict pre-emption is contrary to two basic principles of our pre-emption jurisprudence[, one of which is the presumption against preemption]. . . . A free-wheeling judicial inquiry into whether a state [law] is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law.

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (Kennedy, J., concurring in part and concurring in the judgment). In light of his approach in *Gade*, it is surprising that Justice Kennedy joined the majority in *Geier*, *see* 529 U.S. at 863, which not only engaged in a "free-wheeling judicial inquiry" but wholly ignored and even eradicated the presumption against preemption.

Justice Rehnquist in a much earlier case had also dissented when the Court overrode a state law relating to the state's traditional police power, believing that the clarity requirement's "stringent standard" required a different result. *See* Jones v. Rath Packing Co., 430 U.S. 519, 544-45 (1977) (Rehnquist, J., concurring in part and dissenting in part). Justice Rehnquist's opinion in *Rath Packing*, as with Justice Kennedy's opinion in *Gade*, is difficult to reconcile with his joining of the majority in *Geier*.

In dissent in *Geier*, Justice Stevens made clear his view of the necessity for the presumption: "the presumption reduces the risk that federal judges will draw too deeply on malleable

law was the reason for the presumption and clarity requirement in the first place.[115] Nonetheless, despite the presence of a clear and comprehensive savings clause and the presence of an ambiguous express preemption provision, and in the context of an area of traditional state law control, 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"[116] and opened the door to unbridled *judicial* preemption against the intent of Congress.

3. The majority's reply to the dissent

The dissent charged the Court with overreaching to find preemption, expanding preemption doctrine, and rejecting settled principles like the presumption against preemption.[117] The majority's response to these charges, however, does not counter them but serves to illustrate the Court's rejection of the presumption against preemption and the clarity requirement appended to it. As the Court was arguing that what the dissent urged on the Court added unnecessary and unworkable complexity, the Court was busy stripping the doctrine of whatever coherence it had before *Geier*, simplifying it beyond anything it had done before, and thereby enabling the ascendancy of judicial preemption.

The Court opined that the express preemption provision and the savings clause together evidenced a "neutral policy, not a specially favorable or unfavorable policy, towards the application of ordinary conflict pre-emption principles."[118] Based on that finding of equipoise,

and politically unaccountable sources . . . in finding pre-emption based on frustration of purposes." 529 U.S. at 908 n.22.

115. Justice Stevens in dissent put it this way:

> Our presumption against pre-emption is rooted in the concept of federalism. . . . The signal virtues of this presumption [against preemption] are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement. In addition, *the presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes*[.]

Geier, 529 U.S. at 907 (Stevens, J., dissenting)(emphasis added)(citations omitted); *see also* Raeker-Jordan, *supra* note 5, at 1391 n.52.

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

117. *See id.* at 886 ("I respectfully dissent . . . especially from the Court's unprecedented extension of the doctrine of pre-emption."), *id.* at 894 ("[I]t is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States."), *id.* at 906-10.

118. *Id.* at 870-71.

the Court concluded, "we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard."[119] The first point to note here is that, as already demonstrated, the Court engaged in anything but a "natural reading" of the provisions, particularly the savings clause. So it is not surprising that it missed any favoritism toward state common-law actions expressed in the provisions.

That observation aside, there are two indications that the Court again purposely ignored or at the very least misapplied the settled doctrine. First, by admitting that "we can finding nothing" that would tip the balance between the ambiguous preemption provision and the clear savings clause, it is clearly ignoring the presumption that is "inherent in ordinary preemption principles" that the Court mentions so often. The presumption against preemption, requiring that courts not infer preemption, *including conflict preemption*, without some clear and manifest intent on the part of Congress to do that, would require the preservation of state tort law in this instance in which the Court finds the two clauses and their policies in equipoise.[120]

Second, it is again evident that the majority ignored the presumption by assuming that actual conflict can be determined in a vacuum, separately from the questions of the meanings of the preemption and savings provisions. The presumption should guide the Court's determination of the preemption and savings provisions in the first instance, and only then assist in reaching a conclusion on the conflict. For the Court to say that it cannot find anything that tips the scales "*where* a jury-imposed safety standard actually conflicts with a federal safety standard" puts the interpretive cart before the horse and naturally permits an easy override of state law, because conflict by obstruction of some purposes is determined without reference to the very parts of the statute that indicate congressional intent regarding the state law at issue.

The Court further argued that Congress would have wanted some "ordinary preemption principle" to apply in cases of actual conflict with federal purposes; "in [the absence of such principle], state law could impose legal duties that would conflict directly with federal regulatory mandates, say by premising liability upon the presence of the very windshield retention requirements that federal law requires."[121] To be

119. *Id.* at 871.

120. The dissenters were of a similar view: "[t]he Court apparently views the question of pre-emption in this case as a close one. Under 'ordinary experience-proved principles of conflict pre-emption,' therefore, the presumption against pre-emption should control. Instead, the Court simply ignores the presumption." *Id*. at 906 (quoting *Geier* majority opinion, *id.* at 874) (citations omitted).

121. *Id.* at 871. If these were regulatory mandates or maximum standards, the result could well be different because then state tort law, to the extent that it might force manufacturers to adopt a

sure, there is likely a "presumption that Congress did not intend to allow state obstructions of federal policy," and the existence of that presumption is a "central inquiry in conflict preemption analysis."[122] But when the issue involves a federal statutory scheme, what Congress viewed as an obstacle must of necessity determine the analysis. But here again the Court misapprehends or refuses to credit what Congress has done or intended in the Safety Act. The standards established under the Act are minimum standards, to be supplemented by common-law actions that may determine that even more safety is required to make the automobile safe. That Congress set up the system in this way is not puzzling but is a quite common scenario.[123] Yet this Court, which tortured the language of a clear savings clause, sees a complex arrangement that Congress could not have intended, despite its clear language: "[w]e do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. But there is no reason to believe Congress has done so here."[124]

In fact, the relationship that Congress set up is complex to the Court only because it fails to apply the "ordinary preemption principles" it repeatedly refers to without detail. Because it starts from the assumption that there can be conflict, irrespective of congressional intent and statutory language, the Court makes the statutory scheme much more complex than it is. It determined there was possible conflict first, and then asked the question whether Congress meant to allow actual conflict to exist with the federal rules. The apparent complexity flows only from the Court's analysis, not from Congress's scheme. And the Court sees "no reason to believe" Congress would set up a system wherein state tort law supplements minimum federal standards because it ignores the presumption that Congress did not intend to preempt this sort of state law. The presumption supplies the very reason to believe that Congress saw no conflict between federal minimum standards and state tort law, absent something much clearer in the legislation to negate that presumption. The presumption also then renders the statutory scheme much less complex and much easier to understand.

different standard, could create a situation of impossibility of compliance; it would arguably be impossible to comply both with the federal mandatory standard and with the different state tort standard. Were that problem to be viewed as one of impossibility, I have argued elsewhere that the presumption against preemption would not apply to protect the state law; the Supremacy Clause would preempt it automatically. *See* Raeker-Jordan, *supra* note 5, at 1439-43. For another view of the impossibility of compliance issue when state tort law is at issue, *see id.* at 1443-45.

122. TRIBE, *supra* note 19, § 6-28, at 1177.

123. *See supra* note 84 and accompanying text.

124. 529 U.S. at 872 (citations omitted).

Finally, in dismissing an argument by the dissent that the federal act in this case imposed a "special burden" on those alleging implicit conflict preemption to demonstrate that Congress preempted common-law claims,[125] the Court more clearly rejected any possibility that the long-standing presumption against preemption had a place among those "ordinary preemption principles" to which it constantly referred; the Court stated that there was no basis for interpreting the express preemption and savings provisions as imposing any special burden.[126] Even if Justice Stevens would impose some special burden beyond the presumption against preemption,[127] the Court treated the burden more generally, and so treated it more like the presumption against preemption, which challengers to state law would have to overcome as with a "special burden." Because the Court was rejecting something that it was treating as a sort of presumption against preemption, it arguably expressly rejected the actual presumption as well, which it had not done before in the opinion.

In further dismissing Justice Stevens's special burden, the Court claimed that Stevens was "further complicating well-established pre-emption principles that already are difficult to apply."[128] Instead, it said, "*ordinary pre-emption principles*, grounded in longstanding precedent, apply. We would not further complicate the law with complex new doctrine."[129] This last statement is both misleading and a tremendous understatement by the Court. It is misleading first because the Court leads the reader to believe that there has never existed some particular hurdle, such as a presumption, that had to be vaulted by one claiming implied preemption of state law in an area of traditional state regulation. It is an understatement because, as demonstrated, the Court kept the law so simple throughout the opinion that it never clarified just what comprised those "ordinary preemption principles" to which it repeatedly referred. The Court stripped the doctrine of much of its content, replacing it with the five-member majority's views of obstacles and objectives unencumbered by the plain meaning of the language used by Congress. The added benefit to the majority in their approach became clear in the form of more simplicity. In not detailing the contours of

125. *See id.* at 898 (Stevens, J., dissenting).

126. *Geier*, 529 U.S. at 873.

127. And it appears that he would, since he elsewhere discussed the presumption and did not link the special burden with it. *See, e.g.*, *id.* at 906-07. Further, the full text of Justice Stevens's "special burden" idea suggests that he would apply the special burden to cases in which a party is relying for preemption on a "temporary regulatory policy – rather than a conflict with congressional policy or with the text of any regulation." *Id.* at 898-99.

128. *Id.* at 873.

129. *Id.* at 874 (emphasis added).

preemption doctrine, the majority could ignore and then even reject the presumption against preemption and clarity requirement, thereby leaving the doctrine shorn of those portions that constrained courts from easily, and against Congress's intent, overriding state law in areas of traditional state control. And that is what happened in *Geier*, as the majority proceeded to explain why the state law was impliedly preempted.[130] It was clear from the majority's approach to the applicable principles that the Court would ultimately preempt state tort actions.

We can see what the Court did in *Geier*. The question now becomes, has the Supreme Court continued on that path.

V. THE FUTURE OF THE DOCTRINE AFTER *GEIER*

What one sees upon an examination of post-*Geier* preemption decisions is a doctrine still in disarray. The opinion in *Geier* sits as an elephant in the judicial living room, with its absence of articulated standards standing in stark contrast to the details provided in later decisions.[131] In the final assessment, this Article's thesis stands: the Supreme Court will ignore the presumption when it suits its purposes and will employ obstruction-of-purposes conflict preemption to impliedly preempt state law that it wishes to neutralize.

One month after the Court decided *Geier*, it handed down *Crosby v. National Foreign Trade Council*,[132] another frustration-of-purposes conflict preemption case involving a Massachusetts law attempting to regulate state contracts with those doing business with the country of Burma.[133] Congress, however, enacted a federal law giving the president plenary power over economic sanctions and power to develop a "comprehensive, multilateral strategy" with respect to Burma.[134] In determining that the state law indeed posed a conflict with the purposes of the federal law,[135] the Court first properly recited the types of

130. *See id.* at 874-86.

131. One month before the Court decided *Geier* on implied preemption grounds, it decided *Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000) on express preemption grounds. Even though the Court similarly provided no details about the preemption doctrine it was applying, it relied heavily on an earlier preemption case that had interpreted the same statute and had identified the presumption against preemption. *See* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993). For a charge that the result in *Shanklin* is inconsistent with the presumption against preemption, however, see Davis, *supra* note 2, at 1004-05.

132. 530 U.S. 363 (2000).

133. *See id.* at 366-67.

134. *Id.* at 368-69.

135. The Court held: "[b]ecause the state Act's provisions conflict with Congress's specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause." *Id.* at 388.

preemption,[136] as it had not in *Geier*, and even mentioned the presumption against preemption.[137] But because this case touched on foreign affairs and involved the "plenitude of Executive authority"[138] that Congress gave to the president over these matters regarding Burma, it was easy to see why the state law conflicted with the federal mandate. Also because of the subject matter involved, this would have been more of a case like *Locke*, implicating an area of traditional federal authority where the same presumptions against preemption do not apply. Even so, the Court at least paid some attention to the presumption: "[w]e leave for another day a consideration in this context of a presumption against preemption. Assuming, *arguendo*, that some presumption against preemption is appropriate, we conclude, based on our analysis below, that the state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal Act to find it preempted."[139] This case would not have been an appropriate one for the presumption; nonetheless, even if the presumption did apply, the Court said in a footnote that it would find the presumption overcome in this case. The *Crosby* Court's treatment of the presumption comports with prior law and its ultimate conclusion is supportable on the law. Again, it is *Geier* that seems to stand alone.

The next significant preemption decision was *Buckman Co. v. Plaintiffs' Legal Committee*,[140] which involved not only implied conflict preemption but also state tort law. Plaintiffs claimed that in order to get approval for a medical device, defendant company made fraudulent representations to the Food and Drug Administration ("FDA" or "Agency").[141] Plaintiffs were therefore suing defendant company under state tort law asserting a "fraud-on-the-FDA" theory of liability.[142] The Supreme Court held that the claims were impliedly preempted because they conflicted with federal law: "the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Agency, and . . . this authority is used by the Agency to achieve a somewhat delicate balance of statutory objectives,"[143] which would be frustrated by state

136. *Id.* at 372-73.

137. *See id.* at 374 n.8.

138. *Id.* at 376. In full, the Court stated, "[w]ithin the sphere defined by Congress, then, the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. And it is just this plenitude of Executive authority that we think controls the issue of preemption here." *Id.* at 375-76.

139. *Id.* at 374 n.8.

140. 531 U.S. 341 (2001) (hereinafter "*Buckman*").

141. *Id.* at 343.

142. *See id.* at 347.

143. *Id.* at 348.

tort fraud claims.[144]

The important part of *Buckman* for the purposes of this Article is what the Court said from the start of its discussion of the applicable preemption principles. Rather than merely tout "ordinary pre-emption principles" without definition as it did in *Geier*, the Court began this way:

> Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied,' such as to warrant a presumption against finding federal pre-emption of a state-law cause of action. To the contrary, the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law. . . . Accordingly – and in contrast to situations implicating 'federalism concerns and the historic primacy of state regulation of matters of health and safety' – no presumption against pre-emption obtains in this case.[145]

Immediately thereafter, the Court held that the conflict required preemption of the tort claim.[146]

The contrast with *Geier* is striking. The *Buckman* Court found the possible applicability of the presumption significant enough to begin its discussion with it and to show why it was not applicable. Whether one ultimately agrees or not that the claims in *Buckman* frustrate the objectives of the federal scheme, the fact remains that the Court noted the existence of the presumption in cases involving historic state police powers and at least made a case for the presumption's inapplicability.[147] One could charge that the Court reached the result it desired and then rationalized it by dismissing the presumption as inapplicable; it would then not have to view the conflict question in a light more favorable to the plaintiffs' state-law claims and explain a perhaps less obvious result regarding conflict. Such a scenario is not impossible, of course. What the *Buckman* Court did, however, is much less open to indictment[148] than what it did in *Geier*, which was to ignore the presumption entirely in a

144. *Id.*

145. *Id.* at 347-48 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) and Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

146. *See id.* at 348.

147. The Court in summary explained that, with their fraud-on-the-FDA claims, the plaintiffs "would not be relying on traditional state tort law which had predated the federal enactments in question. On the contrary, the existence of these federal enactments is a critical element in their case," in the sense that "the fraud claims exist solely by virtue of the [federal statutory] disclosure requirements." *Id.* at 353. The area therefore is one not of traditional state regulation but of federal regulation.

148. *But see* Davis, *supra* note 2, at 1022 (arguing that the argument for federal primacy in the field, and thus the case for preemption, was weak in *Buckman*).

case in which it clearly applied. After *Buckman*, then, *Geier* continued to stand alone in its apparent rejection of the presumption against preemption.

One year after *Geier*, the Supreme Court decided *Egelhoff v. Egelhoff*.[149] This case implicated the Employee Retirement Income Security Act of 1974 ("ERISA") with its "clearly expansive"[150] express preemption provision. ERISA preemption applies to "'supercede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan' covered by ERISA."[151] The state law at issue provided that upon divorce, the spouse's designation as beneficiary of certain assets would be revoked.[152] The Court found that ERISA expressly preempted the state law because "[t]he [state] statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status. The administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the [ERISA] plan documents."[153] The Court's conclusion rested in part upon the expansiveness of the "relate to" portion of the preemption provision.[154] But the Court also rested its holding on the state statute's interference with ERISA's goals of national uniformity in employee benefit plan administration.[155] It was able to portray the express preemption question as one looking just like conflict preemption because in the past the Court has looked to Congress's objectives as a guide to what would be preempted under the "relate to" clause.[156]

For the purposes of this Article, however, it is significant that the Court acknowledged the applicability of the presumption against preemption. In response to an argument that the state statute touched on two areas of traditional state regulation, family and probate law, the Court stated that "[t]here is indeed a presumption against preemption in areas of traditional state regulation such as family law. But that presumption can be overcome where, as here, Congress has made clear its desire for pre-emption."[157] One might note that there was no

149. 532 U.S. 141 (2001).

150. *Id.* at 146 (internal quotation omitted).

151. *Id.* (quoting 29 U.S.C. § 1144(a))(emphasis added).

152. *Id.* at 143.

153. *Id.* at 147.

154. *See id.* at 146-47.

155. *See id.* at 148. Specifically, "[r]equiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimizing the administrative and financial burdens' on plan administrators." *Id.* at 149-50 (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990)).

156. *See id.* at 147. In fact, the Court concluded that the state law related to or had a "connection with" ERISA plans because it directly conflicted with ERISA requirements. *Id.* at 150.

157. *Id.* at 151 (citation omitted).

discussion of a savings clause in this case, so the Court had only to analyze the very broad express preemption provision. From that perspective, and even assuming the presumption would apply, there exists some foundation for the Court's conclusion. Significantly, then, although the Court ultimately found the presumption overcome because of the expansive express preemption provision, the Court nonetheless recognized the presumption's applicability in this case, again in contrast to the presumption's exceedingly conspicuous absence in *Geier*.

Even more notable, perhaps, than the *Egelhoff* majority's acknowledgment of the presumption is Justice Breyer's dissenting opinion, in which he argued in part that the presumption against preemption counseled strongly against preemption in this case.[158] It is notable because Justice Breyer wrote the majority opinion in *Geier*,[159] the one that ignored, even arguably rejected, the presumption in favor of allusive (and, in *Geier*, elusive) "ordinary preemption principles." By contrast, Justice Breyer appeared to be a champion of the presumption in *Egelhoff*. In his view, the "most serious" preemption issue in the case was whether there existed the obstacle kind of implied conflict preemption.[160] He next recognized that

> [i]n answering that [implied conflict preemption] question, we must remember that petitioner has to overcome a strong presumption *against* pre-emption. That is because the Washington statute governs family property law – a "field of traditional state regulation," where courts will not find federal pre-emption unless such was the "'clear and manifest purpose of Congress'"[161]

He concluded that "[n]o one can seriously argue that Congress has *clearly* resolved the question before us."[162] In light of his opinion in *Geier*, these statements from Justice Breyer are astounding. Not only did he emphasize that the presumption was *against* preemption, but he emphasized that Congress had not *clearly* manifested its intent to preempt. Had this emphasis on the presumption and clarity requirement been brought to bear in *Geier*, no doubt the result would have been as Justice Breyer saw it in *Egelhoff*. His silence in *Geier* and his emphasis in *Egelhoff* support the argument that the *Geier* majority engaged in

158. *See id.* at 157 (Breyer, J., dissenting).

159. *See* 529 U.S. 861, 864 (2000).

160. 532 U.S. at 156.

161. *Id.* at 157 (quoting New York State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)(quoting Rice v. Santa Fe Elevator Corp., 331 U.S 218, 230 (1947))).

162. *Id.* His final conclusion repeated that "the state statute before us is one regarding family property – a 'field of traditional state regulation,' where the interpretive presumption against pre-emption is particularly strong." *Id.* at 161 (quoting *New York State Conf.* 514 U.S. at 655).

sleight of hand, ignoring the law to reach the result they desired.

Shortly after *Egelhoff*, the Supreme Court decided *Lorillard Tobacco Co. v. Reilly*.[163] The case involved the very intricate preemption issues raised by the express preemption clauses in the Federal Cigarette Labeling and Advertising Act ("FCLAA").[164] At issue was the validity of Massachusetts regulations governing cigarette advertising and sales.[165] This case is again distinct from *Geier* in that the majority at least identified the presumption and indicated that it applied in this case implicating an area of traditional state regulation: advertising.[166] Although the Court noted the presumption's applicability, it can be criticized for failing to heed it. Words of presumption were not mentioned again, and even when the Court acknowledged that the text of the express preemption provision was ambiguous,[167] it nonetheless proceeded to reject Massachusetts' narrow reading of the statute's preemption language.[168] The presumption would require that narrow reading and protection of the historic police powers.[169] Consistent with the argument in this Article, then, it appears that the Court here paid lip service to the presumption, but ignored it when its applicability most counted, when it would have dictated a different result. The Court preempted the state law in a field of traditional state regulation and under an ambiguous express provision.

163. 533 U.S. 525 (2001).

164. *See id.* at 532, 541-42. The text of the provisions read:

> "(a) Additional statements
> No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
> (b) State regulations
> No 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 chapter."

Id. at 541 (quoting 15 U.S.C. § 1334).

165. *See id.* at 532-36.

166. *Id.* at 541-42 ("[W]e work on the assumption that the historic police powers of the states are not to be superceded by the Federal Act unless that [is] the clear and manifest purpose of Congress.")(internal quotations omitted)(second alteration in original).

167. *See id.* at 547 ("To be sure, Members of this Court have debated the precise meaning of 'based on smoking and health' [in the preemption section]").

168. *See id.* (recognizing that the language is debatable and stating "but we cannot agree with the [state] Attorney General's narrow construction of the phrase").

169. Justices Stevens, Ginsburg, Breyer, and Souter noted the presumption in a case like this involving a state's traditional police power, *see id.* at 591 (Stevens, J., dissenting in part), and acknowledged that "our precedents [therefore] require that the Court construe the preemption provision narrowly. If Congress' intent to preempt a particular category of regulation is ambiguous, such regulations are not preempted." *Id.* at 591-92 (internal quotations omitted). The dissenters believed the express preemption provision was ambiguous and that therefore Congress did not make "clear and manifest" its intention to preempt the regulations at issue. *See id.* at 598. It is interesting to note that, as in *Egelhoff*, Justice Breyer appeared to place such emphasis on the presumption that he would have declined to preempt the state law when in *Geier* he wholly ignored the presumption.

One aspect of the case that works in the majority's favor is the lack of a savings clause. This is another way that *Lorillard Tobacco* is different from *Geier*: the *Lorillard Tobacco* Court did not consider any savings clause in analyzing the preemptive effect of the FCLAA and so did not have an extra reason, beyond the presumption, to decline to find preemption. A savings clause addressing the sort of state regulation at issue, coupled with the ambiguous preemption provision and the presumption against preemption, would strongly and affirmatively indicate that Congress did not intend to preempt state law. Such was the case in *Geier*. As it stands, *Lorillard Tobacco*, because it mentioned but did not heed the presumption, is not as much of an aberration as *Geier*.

Most recently, the Court decided *Sprietsma v. Mercury Marine*,[170] in which it unanimously declined to impliedly preempt state tort actions against recreational boat manufacturers that failed to equip their boats with propeller guards.[171] For that reason, it is perhaps the most anomalous of the post-*Geier* cases. Factually, the case is strikingly similar to *Geier*. The federal statute at issue in *Sprietsma*, the Federal Boat Safety Act of 1971 ("FBSA"),[172] contained express preemption and savings provisions that are nearly identical to those examined in *Geier*.[173] And just as had occurred in *Geier*, the plaintiff in *Sprietsma* had filed a tort action alleging that the defendant's product was unreasonably dangerous because of its lack of a safety device. On the law, the case is also similar to *Geier* in terms of its omission of any mention of the presumption against preemption, even though the case involves a traditional area of state law to which the presumption has applied. In light of this ignoring of the presumption, the Court's unanimous finding that the state tort claims were not either expressly or impliedly preempted makes *Sprietsma* both completely surprising and somewhat of an aberration. In that way, the case throws another wild card into preemption doctrine and again leaves lower courts with no consistent guidance about how to approach these questions.[174]

170. 537 U.S. ___ (2002), No. 01-706, 2002 U.S. LEXIS 9067 (Dec. 3, 2002).

171. *Id.* at *6, *25.

172. 46 U.S.C. §§ 4301-4311, *cited in Sprietsma*, 2002 U.S. LEXIS 9067, at *7.

173. The express preemption provision provides in pertinent part:

> [A] State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under . . . this title.

2002 U.S. LEXIS 9067, at *14 (quoting 46 U.S.C. § 4306). The savings clause provides the following: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." *Id.* (quoting 46 U.S.C. § 4311(g)).

174. Indeed, the Supreme Court reversed the Illinois Supreme Court, *see id.* at *34, which had

Despite its failure to employ the presumption, the Court did not find that Congress expressly preempted state common-law claims under the FBSA. The Court first employed reasoning similar to that used in *Geier* but then went further in actually interpreting the words of the express provision and determining that they did not include common-law claims.[175] The Court also referred to the savings clause to buttress its conclusion that state law claims were not expressly preempted. And where in *Geier* the majority saw a "compliance-with-federal-regulation precondition" to the savings clause that obscured the plain meaning of the clause, the *Sprietsma* Court saw clearer, easier to interpret language that saved common-law claims. The *Sprietsma* Court simply did not engage in the contortions of statutory interpretation that was common in *Geier* and thereby reached a more sensible result.

In further opining about the place of state common law in this statutory scheme, the *Sprietsma* Court surprisingly added the following:

> Our interpretation of the statute's language does not produce anomalous results. It would have been perfectly rational for Congress not to pre-empt common-law claims, which – unlike most administrative and legislative regulations – necessarily perform an important remedial role in compensating accident victims. Indeed, compensation is the manifest object of the saving clause, which focuses not on state authority to regulate, but on preserving 'liability at common law or under State law.'[176]

The statement is surprising because such a common-sense recognition of the "rationality" of devising a scheme whereby common law's remedial purposes would co-exist with Congress's safety regulation was nowhere to be found in *Geier*. Rather, in *Geier*, the Court saw a "complex type of state/federal relationship" that it had "no reason to believe" Congress would establish.[177] That professed disbelief more easily allowed the *Geier* Court to find conflict between the state and federal law and, later, to imply preemption in that manner. The opposite belief articulated in *Sprietsma* appears to have influenced its view of conflict in the opposite direction, such that the *Sprietsma* Court did not imply preemption. Lower courts will have difficulty reconciling these views in the two cases,

made an explicit effort to follow the federal district and appellate courts, several of which "have found preemption, express or implied, in similar propeller guard cases." Sprietsma v. Mercury Marine, 757 N.E.2d 75, 85 (Ill. 2001). It should be safe to say that all of those courts will find the Supreme Court's result in *Sprietsma* surprising.

175. *See Sprietsma*, 2002 U.S. LEXIS 9067, at *21 (stating that "the terms 'law' and 'regulation' used together in the pre-emption clause indicate that Congress pre-empted only positive enactments").

176. *Id.* at *22-23 (citations omitted).

177. Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 872 (2000).

because the cases themselves are so similar, and will have difficulty predicting when the Court ultimately will respect Congress's express intent to save state tort claims and when it will not.

Whether those difficulties will carry over into the *Sprietsma* Court's implied preemption approach is another question. The Court first identified the implied preemption principles and then quoted the statement from *Geier* that "Congress' inclusion of an express pre-emption clause 'does *not* bar the ordinary working of conflict pre-emption principles,'"[178] so implied preemption analysis was necessary. Again despite its failure to recognize the presumption against preemption, the Court did not imply preemption based on conflict. Important to the discussion was the fact that the federal authority charged with regulating in this area, the Coast Guard,[179] had chosen not to issue a federal standard requiring the safety device that the plaintiff in *Sprietsma* alleged was necessary to make the product safe.[180] The Court found that "although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an 'authoritative' message of a federal policy against propeller guards," and therefore the survival of state common-law tort actions based on a boat's failure to have the guard would not frustrate the objectives of the federal scheme or pose an obstacle to Congress's purposes under the FBSA.[181] Indeed, the Coast Guard had never asserted that common-law claims would obstruct the federal scheme.[182] The Court contrasted this case with *Geier*, in which the federal agency had determined that safety was best achieved through giving manufacturers options among safety devices, and the agency had asserted in litigation that common-law claims would disrupt the federal scheme.[183] In this regard, the Court's decision in *Sprietsma* makes sense and appears to reach the right, albeit surprising, result. But again in terms of consistency of doctrine, the Court's failure to mention and apply the presumption against preemption leaves one wondering whether the presumption continues to exist and influenced the Court's conflict analysis.

178. *Sprietsma*, 2002 U.S. LEXIS 9067, at *24.

179. The Secretary of Transportation delegated rulemaking authority to the Coast Guard. *Id.* at *12.

180. *See id.* at *18-20. In *Geier*, the federal regulatory agency had made a deliberate decision to give manufacturers options of safety devices from which to choose. *See id.* at *29.

181. *Id.* at *28.

182. *Id.* at *26.

183. *Id.* at *29.

When it addressed defendant's alternate conflict preemption claim that the statute as a whole occupied the field of regulation and therefore preempted state common-law remedies, the Court relied on the long-standing principle that Congress's intent to preempt must be "clear and manifest."[184] In finding that there was no such clear and manifest intent on the part of Congress to preempt state tort claims, the Court added, "Rather, our conclusion that the Act's express pre-emption clause does not cover common-law claims suggests the opposite intent."[185] By linking the discernment of Congress's "clear and manifest" intent to the express preemption provision in this way, the Court did what it did not do in *Geier* but what this Article argues should be done: *not* sheer congressional intent away from the conflict determination by ascertaining the existence of conflict wholly apart from what the statutory text indicates about what Congress intended. *Sprietsma* in this way begins to restore some sense to preemption doctrine, but whether it truly will have that restorative function remains to be seen.

At bottom, it appears that the Court defied what it has done of late because it did not presume preemption. And although it neglected the presumption against preemption, it appeared to apply the clarity requirement to one aspect of the case. The Court analyzed the case straightforwardly, without the contortions in statutory interpretation that the majority engaged in in *Geier*, and therefore is somewhat of an abnormality. How *Sprietsma* will ultimately affect preemption doctrine will have to await future analysis.

Apart from the anomalous *Sprietsma*, what emerges from these post-*Geier* cases is the sense that the Court will acknowledge the presumption against preemption when the presumption can be said to be inapplicable or when it ultimately can be overcome by something else in the statute. In a case like *Geier* in which the presumption would have made a difference, because there was an ambiguous express preemption provision and a very clear, unambiguous clause saving state tort claims, the Court ignored the presumption completely, and indeed ignored the details of preemption doctrine itself, choosing instead to find some obstruction of federal purposes. The absence of principles to support the *Geier* decision remains telling, exposing the Court to a charge that it is engaging in sleight of hand to reach its desired result. But what, ultimately, is that desired result, or why does the Court go to the lengths it does to skirt the rules and displace state law in favor of federal law? The impetuses may be several, ranging from a potentially laudable goal

184. *Id.* at *32.

185. *Id.* at *32-33.

of ensuring uniformity of law application to national product manufacturers, to a disguised goal of achieving tort reform that could not be had, or had not been effected, another way.[186] Because the Court is at times using indiscernible doctrine that can also obscure motivation, it is difficult to state definitively what is driving its approaches and urging it to conclusions displacing state law. But assuredly, it is vigorously displacing state law, and the presumption against preemption has at times been an inconvenient obstacle to that end. Given the post-*Geier* cases' reiterations of the principle, however, perhaps one cannot say that *Geier* entirely eradicated the presumption. Perhaps the most that one can say is that the presumption exists in name only; otherwise, its applicability and even the acknowledgment of its existence are dependent on the whims of the Court and the Court's desired outcome in any particular case.

VI. CONCLUSION

This Article has dissected the Court's opinion in *Geier v. American Honda Motor*, noting where the Court diverged from traditional principles and identifying the inconsistencies inherent in some of its analysis. Those inconsistencies, the Court's ignoring of provisions that would change its analysis, and its ignoring of the very preemption principles it purported to apply but never did, all coalesce to betray the Court's purpose. That purpose appears to be to achieve a version of tort reform through the vehicle of judicial preemption,[187] and the Court is enabled in that goal by obstruction-of-purposes conflict preemption. In taking the approach it did, the Court demonstrated the dangers posed by the obstruction-of-purposes type of conflict preemption and courts' overuse of it in contradiction to the presumption against preemption. The Court overrode state tort law through the malleable obstacle implied preemption approach in the face of a command from Congress that any person could still bring any common law claim against someone subject to and even in compliance with the Act. It is no coincidence that "[a]ll of the Federal Circuit Courts that have considered the question . . . have

186. *See* Davis, *supra* note 2, at 1017 (also giving the Justices' politics as one explanation for their preference for federal law over state tort law).

187. *Cf. id.* (observing that "the Justices are, for the most part, conservative and their conservatism is more fiercely directed *against* state tort law than *for* notions of federalism"); *id.* at 970 (noting the difficulty in resisting the strong temptation to attribute the Court's preemption approach to the Justices' politics); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1130 (stating that both ideological predispositions and legal and factual contexts play roles in preemption decision making, but also noting that, "[g]iven the prevalence of Republicans on the federal bench, the influence of policy preferences and regulatory philosophy on these decisions helps to explain the modern preemption doctrine's hostility to state and local regulation").

found pre-emption"[188] on the facts of *Geier* while state courts, which presumably have an interest in not lightly implying the override of state law, have not.

The presumption against preemption and the clarity requirement, borne of federalism principles cognizant of the need to respect state sovereignty, were adopted to protect against this very danger of easy override. The danger is greatest when courts can, under other parts of preemption doctrine, roam at large around the federal statute and around state law to divine any federal purpose that state law might frustrate. Despite the presumption's appearance in several Supreme Court cases post-*Geier*, its viability remains an open question. Indeed, obstacle implied preemption may effectively constitute a presumption that prevails in the opposite direction, that is in favor of federal law. Only one recent case casts any doubt on that assertion.[189] The Court should revisit this issue and clearly reaffirm the presumption against preemption and the clarity requirement in cases like *Geier*, where it is appropriate and necessary, and not just in those cases where the presumption is irrelevant or insignificant. The Court would then clarify preemption doctrine and continue the tradition of respecting state sovereignty in our federalist system.

188. Geier v. American Honda Motor Co., 529 U.S. 861, 864 (2000).

189. Sprietsma v. Mercury Marine, 2002 U.S. LEXIS 9067