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Commenting on Geier v. American Honda Motor Co.

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II. FEDERAL STATUTES AND REGULATIONS

A. Federal Preemption of State Law

1. Preemption of State Common Law. — Preemption is probably the most frequently used constitutional doctrine in practice.[1] It is the doctrine by which Congress supersedes state law and establishes uniform federal regulatory schemes to ensure the smooth functioning of the national economy. The Supreme Court, in an effort to cabin this immense congressional power, has traditionally applied a "presumption against preemption" — a rule of statutory interpretation under which federal law does not preempt state police powers absent clear congressional intent.[2] The presumption has recently fallen into some disfavor, however, and the Court has ignored it in some prominent preemption cases.[3] It remains viable, but its vitality is now in question. Last Term, in *Geier v. American Honda Motor Co.*,[4] the Court once again chose to disregard the presumption, holding that a Federal Motor Vehicle Safety Standard (FMVSS) preempted state tort claims against manufacturers who failed to install airbags.[5] Consistent with recent preemption precedent, *Geier* signals the Court's subtle drift away from the presumption against preemption in favor of a more functional federal law preference rule. In so doing, the Court revealed its concern

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[81] *See Laidlaw*, 120 S. Ct. at 704–06; *cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("[T]his is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis . . . .").

[82] *Laidlaw*, 120 S. Ct. at 706 (citing *Defenders of Wildlife*, 504 U.S. at 564).

[83] *See id.* (finding an injury in fact based on plaintiffs' response to Laidlaw's "illegal" (as defined by Congress), though apparently unharmful, conduct).

[84] *See id.* (stating that the congressional determination that civil penalties may deter future violations "warrants judicial attention and respect").

[1] Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994).

[2] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The presumption, however, is not necessarily applicable in areas of traditional federal involvement, such as waterways. *See, e.g.*, United States v. Locke, 120 S. Ct. 1135, 1143 (2000).

[3] *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 290–303 (2000).

[4] 120 S. Ct. 1913 (2000).

[5] *Id.* at 1928.

regarding the systemic, national effects of state law and exhibited a preference in the commercial sphere for uniformity, certainty, and technical expertise.

In 1992, Alexis Geier was seriously injured when her 1987 Honda Accord crashed into a tree.[6] Although the car was equipped with shoulder and lap belts, which Geier had duly fastened, it lacked an airbag.[7] Geier subsequently sued Honda in the District Court for the District of Columbia, alleging that Honda had negligently and defectively designed the Accord without an airbag.[8] The district court dismissed the suit, holding that the National Traffic and Motor Vehicle Safety Act[9] preempted Geier's state common law tort claim.[10] The court concluded that FMVSS 208,[11] promulgated by the Department of Transportation (DOT) under the Act, made airbag placement discretionary for auto manufacturers in 1987.[12] Geier's tort claim, which would have made airbags mandatory, attempted to set a standard not identical to the federal standard[13] and was therefore preempted.[14]

The D.C. Circuit affirmed.[15] The court of appeals, however, rejected the district court's analysis in light of the Act's "saving" clause, which explicitly states that compliance with federal safety standards does "not exempt any person from any liability under common law."[16] Instead, the court found that the Act impliedly preempted Geier's claim because her claim would have presented an "obstacle" to the federal policy that favored a gradual phase-in of passive restraints.[17]

The Supreme Court affirmed, following the D.C. Circuit's reasoning.[18] Writing for the Court, Justice Breyer[19] first held that to harmonize the Act's preemption clause and saving clause, it was necessary to

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6 *Id.* at 1917.

7 *Id.*

8 *Id.*

9 Pub. L. No. 89-563, 80 Stat. 720 (1966) (codified at 49 U.S.C. §§ 30101–30127 (1994)).

10 *Geier*, 120 S. Ct. at 1917.

11 49 Fed. Reg. 28,962, 29,009–10 (July 17, 1984).

12 *Geier*, 120 S. Ct. at 1916–17. FMVSS 208 did not make airbags entirely optional, but instead required that manufacturers install passive restraints in ten percent of their fleets as part of a "gradual phase-in." *Id.* at 1924 (emphasis omitted) (quoting 49 Fed. Reg. 28,999–29,000 (July 17, 1984)). Honda had complied with this standard. *Id.* at 1916–17.

13 *See* 49 U.S.C. § 30103(b) (1994) (recodification of 15 U.S.C. § 1392(d) (1988)).

14 *Geier*, 120 S. Ct. at 1917.

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

16 *Id.* at 1238 (quoting 15 U.S.C. § 1397(k) (1988) (current version at 49 U.S.C. § 30103(e) (1994)) (internal quotation marks omitted); *id.* at 1240–41.

17 *Id.* at 1242–43.

18 *Geier*, 120 S. Ct. at 1925, 1928. *Geier* resolved a split that rested definitively along "federal versus state" lines. Five federal circuit courts had found preemption, while several state supreme courts had not. *Id.* at 1917.

19 Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy joined Justice Breyer's opinion.

read the Act to preempt only positive state statutes and regulations, and not common law tort actions.[20] Any other reading would leave "few, if any, state tort actions . . . for the saving clause to save."[21] The Act thus did not *expressly* preempt Geier's tort claim.

With regard to *implied* preemption,[22] however, the Court declined to rely on the formal line drafted by Congress between positive law and common law.[23] Although the Court recognized that Congress had constructed the Act to preempt expressly only positive state statutes and regulations, the Court proceeded to adopt a functional approach to implied preemption.[24] Specifically, Justice Breyer held that the saving clause did not prevent the ordinary operation of implied preemption principles[25] because Congress was unlikely to preclude preemption "where an actual conflict with a federal objective [was] at stake."[26] Certainly, a tension might have existed between the preemption clause, which furthered uniformity and certainty, and the saving clause, which favored a retention of state jury control. Nevertheless, Justice Breyer concluded that "[t]he two provisions, read together, reflect a neutral policy" toward conflict preemption.[27] The creation of a "special burden" against preemption, such as the one suggested by the dissent, would engender unnecessary complexity, legal uncertainty, and systemwide costs contrary to the intent of Congress.[28]

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

[21] *Id.*

[22] Implied preemption breaks down into three essential forms: impossibility, obstacle, and field, each of which describes the preemptive scope of a statutory or regulatory provision. Impossibility preemption has an extremely narrow scope, operating only when federal and state law are irreconcilable. *See, e.g.*, Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (suggesting in dicta that, if federal law prohibited products with greater than seven percent oil content and California prohibited products with less than eight percent oil content, the situation would constitute a "physical impossibility"). Obstacle preemption is broader, its purview encompassing the policies surrounding the federal provision. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (noting that preemption exists when state law "stands as an obstacle to . . . the full purposes and objectives of Congress"). Field preemption is broader still, its sphere enveloping an entire subject matter. *See, e.g.*, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983) (holding that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States"). The three forms exist on a continuum, with impossibility most heavily favoring the concurrent maintenance of state law and field preemption eliminating state law entirely in favor of an exclusive federal regime. *See also* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2097–98 & fig.1 (2000) (describing the preemption spectrum by the relative presence or absence of congressional action).

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

[24] *See id.* at 1919–21.

[25] *Id.* at 1919. The Court had left this question unresolved in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). *See id.* at 287 n.3; *see also id.* at 288 (holding that, in general, the existence of an express preemption provision does not by itself foreclose the possibility of implied preemption).

[26] *Geier*, 120 S. Ct. at 1920.

[27] *Id.*

[28] *Id.* at 1921–22.

Turning to the history of FMVSS 208, Justice Breyer elucidated why Geier's tort claim presented an obstacle to federal objectives.[29] Because the public had opposed passive restraints as a result of safety, intrusiveness, and cost concerns, the DOT had deliberately rejected a mandatory "all airbag" standard in favor of a more gradual, flexible phase-in.[30] The DOT had intended for the gradual phase-in to promote public acceptance and to enable manufacturers to experiment with and develop more effective passive restraint systems.[31] A state tort law that required the immediate installation of airbags in all cars would have obstructed this federal scheme.[32]

Justice Stevens dissented.[33] With regard to the express preemption clause, he agreed with the majority that the clause's prohibition of disparate safety standards precluded only positive rules set by state legislatures or agencies, not case-specific common law claims.[34] With regard to implied preemption, however, he suggested that the limited construction of the preemption clause, taken together with the saving clause, imposed a "special burden" on parties invoking implied conflict preemption.[35] The dissent ultimately concluded that Geier's tort claim did not present a significant obstacle to federal objectives: The absence of a ceiling on airbag adoption cast doubt on the importance of a gradual phase-in.[36] In addition, because of the small risk of tort liability and the considerable time delay in litigation, Justice Stevens found it highly unlikely that manufacturers would alter their behavior to comply with uncertain future tort standards.[37]

Finally, Justice Stevens criticized the Court for ignoring the presumption against preemption and for imposing its own ideas about tort reform on the states in violation of federalism principles.[38] Obser-

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29 *Id.* at 1922–26.

30 *Id.* at 1924.

31 *Id.* Although Justice Breyer acknowledged that FMVSS 208 did not guarantee a gradual phase-in by setting a "ceiling" on airbag adoption, he noted that considerable resistance by manufacturers rendered any threat of excessive airbag adoption minimal. *Id.*

32 *Id.* at 1925. Because of the subject's technical nature, the Court also gave weight to the DOT's longstanding position (as presented in the government's amicus brief) that state tort claims were contrary to FMVSS 208's objectives. *Id.* at 1926.

33 Justices Souter, Thomas, and Ginsburg joined Justice Stevens's dissenting opinion.

34 *Geier*, 120 S. Ct. at 1934 (Stevens, J., dissenting).

35 *Id.* at 1934–35. Although Justice Stevens found that the saving clause "unquestionably limit[ed]" preemption and imposed a "special burden," he was reluctant to foreclose implied preemption altogether. *Id.* at 1935 n.16.

36 *Id.* at 1937.

37 *Id.* at 1936–37. Seemingly invoking rule of law values, the majority rebuffed the dissent's compliance argument, arguing that preemption analysis "assume[s] compliance with the state law duty in question." *Geier*, 120 S. Ct. at 1926 (emphasis omitted).

38 *Id.* at 1932, 1938–42 (Stevens, J., dissenting); *see also id.* at 1928 ("'This is a case about federalism,' that is, about respect for 'the constitutional role of the States as sovereign entities.'"

vance of the presumption, he argued, was particularly crucial in the case of agency regulations because agencies, unlike legislatures, lack the structural safeguards to "defend state interests from undue infringement."[39] In light of its failure to address preemption clearly, FMVSS 208 was insufficient to overcome the presumption.[40]

The Court's implied preemption analysis in *Geier* reflects a victory of function over form. As previously noted, in analyzing preemption the Court could have easily relied on the distinction between positive law and common law drawn in the statute's text. The Court nevertheless refused.[41] Instead, the Court found an ambiguity in the Act's text and chose a more functional analysis that accounted for its underlying policies. This textual indeterminacy allowed for a new exposition on implied preemption and the presumption against preemption, as neutral situations are the playground of presumptions.[42]

Among the various forms of implied preemption[43] Congress has unfettered choice, for preemption is ultimately a question of congressional intent.[44] But because Congress did not definitively set forth the preemptive scope of the Act, the *Geier* Court had to apply some rule of construction — the presumption against preemption being the most likely candidate. With the underlying policies of the Act in mind, however, the Court plainly rejected the presumption.[45] As the dissent

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(quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991); and *Alden v. Maine*, 527 U.S. 706, 713 (1999))).

[39] *Id.* at 1939–40.

[40] *See id.* at 1941.

[41] *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938) (disregarding the distinction between positive law and common law). After all, many states have codified their tort laws, and as the Court recognized in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a state can regulate just as effectively through an award of damages as through a positive enactment. *Id.* at 521. To rest on this formal distinction would have led to further anomalous results. For example, a line between positive law and common law would have established a power to frustrate federal policies in the state courts while eviscerating any such power in the state legislatures. It would have also created a preference for ex post common law over ex ante legislation. Such a preference for judicial over legislative policymaking would have been starkly undemocratic.

[42] *Cf.* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975) (suggesting that, "when no settled rule dictates a decision either way, . . . a proper decision could be generated by either policy or principle").

[43] *See supra* note 22.

[44] Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963) (stating that the "purpose of Congress is the ultimate touchstone" in preemption analysis). Indeed, last year Congress considered but did not pass legislation that would have set new ground rules for preemption. *See* S. 1214, 106th Cong. (1999); H.R. 2245, 106th Cong. (1999).

[45] The Court's failure to observe the presumption against preemption is hardly suprising given its recent "half-hearted" application of the presumption. Nelson, *supra* note 3, at 298. In addition, commentators, most notably Professor Nelson, have exposed the presumption's dubious constitutional foundations and questioned its desirability. *See, e.g.*, *id.* at 290–303 (arguing that the Supremacy Clause's last phrase, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," operates as a *non obstante* clause, which directs courts *not* to interpret federal statutes narrowly so as to harmonize them with state law).

suggested, if a true presumption against preemption existed, the Court would have been strongly disinclined to find preemption under an ambiguous statute.[46] Only when harmonization of state and federal law was physically impossible would there be a clear (albeit implicit) congressional command to preempt.[47] The Court's analysis of "obstacle" preemption was at odds with this presumed "impossibility" approach.

Functionally, impossibility preemption is intractable: it preempts state law only in rare cases in which an actor cannot comply simultaneously with state and federal law.[48] Congress — and even administrative agencies such as the DOT — must operate at some level of generality;[49] they cannot possibly overturn state law in every niche. An overzealous application of impossibility preemption would therefore allow state courts to frustrate congressional will by setting countervailing tort standards. Such a regime would also create a one-way ratchet. Unless made absolutely explicit, congressional attempts to expand industry discretion or to lower tort standards would fail to preempt state law because actors could technically comply with both federal and state law by simply adhering to state standards.

The *Geier* Court's rejection of the presumption against preemption, however, was predictably not accompanied by a broad expansion of preemption doctrine toward field preemption. The Court has remained reluctant to find field preemption except when confronted with pervasive federal regulation.[50] To presume field preemption without such a limitation would not only drastically alter the balance between federal and state power, but would also be ill-advised from a practical standpoint. Establishing federal exclusivity and superseding state tort law without a viable federal replacement would leave large areas devoid of legal standards.[51]

The *Geier* Court thus drew a practical compromise by selecting obstacle preemption. Unfortunately, this choice faces its own difficulties. Because obstacle preemption relies by definition on the "full purposes

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46 *See Geier*, 120 S. Ct. at 1934, 1939 (Stevens, J., dissenting).

47 *See* Fla. Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

48 Impossibility preemption only occurs when federal law imposes a *requirement* that conflicts with a state law *prohibition* (or vice versa). If federal law only provided a "right," the actor could comply with both federal and state law by simply refraining from the activity. *See, e.g.*, Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996); Nelson, *supra* note 3, at 228 n.15.

49 For an interesting discussion of the reasons for limiting a legislature to broad prospective rules, see Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 343–48 (1962).

50 *See, e.g.*, English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).

51 Moreover, field preemption through the use of overly broad federal prohibitions would undesirably restrict commercial activity. *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 477–78 (1996) (describing the necessity of the "grandfathering" provision of the Medical Device Amendments to permit existing medical devices to remain on the market while the Food and Drug Administration completed its lengthy review process).

and objectives of Congress,"[52] its boundaries are somewhat indeterminate. The generality or particularity with which one defines the federal objectives of a regulation or statute can easily affect its preemptive scope.[53] For example, in *Geier*, Justice Breyer defined FMVSS 208's objective as providing for the "*gradual* phase-in of passive restraints,"[54] resulting in a broad preemptive scope, whereas Justice Stevens defined the objective more loosely as enhancing automobile safety, resulting in a narrower preemptive scope.[55] Similar difficulties have plagued other obstacle preemption cases.[56] Furthermore, the common formulation of obstacle preemption is vulnerable to the same criticisms as any judicial attempt to divine legislative purpose.[57] Federal agencies, though perhaps more unitary in purpose than Congress, still consist of multiple actors who often change with each administration, and even unitary actors often balance multiple and conflicting purposes.[58]

In spite of these difficulties, the Court's recent obstacle preemption jurisprudence suggests the beginnings of a more principled method of decisionmaking. This method, essentially a federal law preference rule,[59] requires courts to analyze the functional "fit" between a federal regulatory regime and state tort law — instead of applying a presumption or using formal classifications. Thus, the Court has generally found preemption in cases in which a federal agency had set a uniform

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[52] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[53] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689–90 (1976) (discussing the functional effects of the relative generality of a given rule).

[54] *Geier*, 120 S. Ct. at 1924.

[55] *Id.* at 1937 (Stevens, J., dissenting).

[56] For example, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Court, in construing the Public Health Cigarette Smoking Act, declined to find preemption of fraudulent misrepresentation claims because such claims were not narrowly "'based on smoking and health' but rather on a more general obligation — the duty not to deceive." *Id.* at 528–29 (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 5, 84 Stat. 87, 88 (codified as amended at 15 U.S.C. §§ 1331–1340 (1994))). The Court, however, held that the act preempted failure-to-warn claims, *id.* at 524, even though the Court could just as easily have construed these claims as the "'more general obligation' to inform consumers of known risks," *id.* at 543 (Blackmun, J., concurring in part and dissenting in part) (quoting *Cipollone*, 505 U.S. at 528–29) (criticizing the plurality's analysis for its "frequent shift in the level of generality").

[57] *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 120 S. Ct. 2288, 2303–04 (2000) (Scalia, J., concurring) (criticizing the use of statements of individual members of Congress, executive statements, and other legislative history materials to divine legislative intent).

[58] *See, e.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984) (grappling with the competing policies of promoting nuclear power and protecting public health and safety).

[59] *See* Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 948–57 (1996) (attempting to reconceptualize an "intermediate version" of federal preemption as utilizing a "choice of law" principle). *See generally* Kenneth S. Geller & Alan E. Untereiner, *Is There a 'Noncompliance' Exception to Federal Preemption?*, 24 Prod. Safety & Liab. Rep. (BNA) 57 (1996) (discussing whether preemption applies when a defendant fails to satisfy a federal standard).

standard that adequately[60] replaced state standards.[61] This strong preference for preemption often leads the Court to impose an exclusively federal standard despite even seemingly contrary statutory provisions.[62] At the same time, the Court has vigorously policed the boundaries of this decisional rubric — if the federal standard is somehow infirm, it will not preempt state law.[63]

The Court's adoption of a federal law preference rule evinces an acute awareness of the increasingly borderless American economy. Considerations of efficiency and practicality often demand a single set of federal standards to facilitate commercial activity. For example, in *United States v. Locke*,[64] also decided last Term, the Court emphasized the systemic or extraterritorial effects of state law in determining preemption.[65] This concern almost certainly informed the Court's decision in *Geier*. National manufacturers who sell mobile goods cannot require them to remain in the place of sale; therefore, manufacturers cannot effectively customize their goods and price them in accordance with the tort law of the place of expected use.[66] Varying tort standards

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60 As with any legal standard, the definition of "adequate replacement" is not inherently clear, but reflects a policy choice. *Cf.* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (suggesting that the scope of proximate cause is a policy determination).

61 *See, e.g.*, CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (interpreting the Federal Railroad Safety Act to require that federal regulations "substantially subsume" state law in order to trigger preemption). Incidentally, this "replacement" rule is consistent with Professor Nelson's "logical-contradiction test," which finds preemption when a state law contradicts a federal rule. *See* Nelson, *supra* note 3, at 260–61.

62 For example, in *CSX*, the Court held that a federal standard preempted a state claim for excessive train speed despite the Federal Railroad Safety Act's qualified allowance of more stringent state safety standards. *CSX*, 507 U.S. at 673–76. The act's provision that allowed more stringent state standards required that they be compatible with the federal standard and not create "an undue burden on interstate commerce." *Id.* at 662 & n.2. In both *Geier* and *CSX*, the Court rejected arguments that the federal standard represented only a "minimum" on which states could build. *See Geier*, 120 S. Ct. at 1922; *CSX*, 507 U.S. at 674.

63 *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 492–94 (1996) (declining to find preemption of a products liability claim under the Medical Devices Amendments because its "grandfathering" provision had not imposed any federally enforceable design requirement); Freightliner Corp. v. Myrick, 514 U.S. 280, 289 (1995) (refusing to find preemption when the relevant federal standard had been suspended); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 528–31 (1992) (confining the preemptive scope of the Public Health Cigarette Smoking Act to failure-to-warn claims because the act had only set a standard for cigarette warnings and not for cigarette safety in general). *Compare CSX*, 507 U.S. at 671–72 (declining to find preemption of a claim regarding inadequate railroad crossing devices when federal funds had been diverted to another intersection and thus federal standards did not apply), *with* Norfolk S. Ry. Co. v. Shanklin, 120 S. Ct. 1467, 1476–77 (2000) (finding preemption when a federal agency had approved crossing devices and had provided funding).

64 120 S. Ct. 1135 (2000).

65 *See id.* at 1150–52; *cf.* Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (discussing the systemic implications of an individual farmer's otherwise trivially sized wheat crop in the Commerce Clause context).

66 Stephen F. Williams, *Public Choice Theory and the Judiciary: A Review of Jerry L. Mashaw's* Greed, Chaos, and Governance, 73 NOTRE DAME L. REV. 1599, 1620 (1998).

thus raise a number of related concerns, many of which have informed the Court's dormant commerce clause analysis in other contexts.[67] If manufacturers strained to meet the strictest safety standard, a small minority of states could affect standards nationally and hold all other states hostage.[68] If manufacturers instead met only an average or median standard[69] or if conflicting state standards made full compliance impracticable,[70] then liability-friendly states could effectively "tax" their more reserved neighbors.[71] Tort suits would thus enable parasitic states to redistribute profits from out-of-state manufacturers to in-state consumers without internalizing the costs of such suits.[72] These problems are arguably among those that the Framers designed the Constitution to prevent.[73]

The *Geier* Court's intense focus on federal uniformity might appear to clash with the Court's recent Commerce Clause jurisprudence,[74]

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[67] The concern about the systemic commercial effects of one state's regulations on the Union as a whole seems to link inextricably dormant commerce clause and preemption jurisprudence. Dormant commerce clause doctrine, however, more closely resembles field preemption than the federal law preference rule because it "preempts" and overrides state law even when no federal standard exists, thus resulting in areas devoid of regulation. *See generally* Dinh, *supra* note 22, at 2109–12 (discussing the relationship between the dormant commerce clause and preemption doctrines).

[68] *Cf.* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670–71 (1981) (striking down a state statute limiting the use of certain trucks as an impermissible burden on interstate commercial traffic).

[69] In actuality, manufacturers are unlikely either to satisfy multiple standards through customization or to conform to the strictest standard. To maximize efficiency and economies of scale, they will observe only one average level of care that minimizes *both* compliance costs and litigation costs. David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 428–29 (2000).

[70] *Cf.* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 527–30 (1959) (striking down, on dormant commerce clause grounds, an Illinois statute requiring contoured mudguards that conflicted with an Arkansas statute forbidding such mudguards).

[71] *Cf.* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) ("The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State.").

[72] *See* Williams, *supra* note 66, at 1620. For an alternative, non-preemptive solution to the redistribution problem that preserves state variation, see William A. Niskanen, *Do Not Federalize Tort Law: A Friendly Response to Senator Abraham*, 1 MICH L. & POL'Y REV. 105 (1996), which proposes a federal choice-of-law rule that applies the law of the state in which the majority of the manufacturer's employees work. *See id.* at 109.

[73] *See* THE FEDERALIST NO. 42, at 214–15 (James Madison) (Max Beloff ed., 1987) (discussing the evils of import and export duties among the several states). Indeed, some commentators suggest that a system of differing regulations might actually give a competitive advantage to *intra*state firms. *See, e.g.*, ROBERT H. BORK, FEDERALISM AND FEDERAL REGULATION: THE CASE OF PRODUCT LABELING 3 (Wash. Legal Found. Working Paper, 1991).

[74] *See, e.g.*, United States v. Morrison, 120 S. Ct. 1740, 1751 (2000) (holding that gender-motivated crimes do not fall under the Commerce Clause power); United States v. Lopez, 514 U.S. 549, 567 (1995) (holding that gun possession in a school zone is insufficiently connected with economic activity to implicate the Commerce Clause).

which has sought to return more power to the states.[75] A careful analysis of the Court's federalism and preemption jurisprudence, however, reveals no such conflict. The Court's federalism cases, which have principally addressed "immobile" concerns, such as social and criminal legislation, are far more susceptible to states' rights arguments.[76] Such legislation generally affects only the limited geographic area in which it applies, enabling local governments to emphasize differing regional values without systemic or national effects. There, the Brandeisian concept of the states as experimental laboratories[77] is not only plausible, but also preferable. By contrast, the Court's preemption cases, which have principally involved mobile products, represent situations in which inconsistent state regulations could have significant (and likely detrimental) systemic effects.

Beyond its federalism ramifications, *Geier*'s federal law preference rule also suggests a preference for ex ante determinations of reasonable care by expert agencies over ex post ones by lay juries. Federal agencies are arguably far more institutionally competent than are juries in performing the complex cost-benefit analyses necessary in modern products liability law, which involve not only compensation and deterrence, but also broader policy questions such as job creation and foreign relations.[78] As a consequence of *Geier* and other recent preemption cases, federally imposed agency *rules* regarding due care have replaced the vague *standards* of reasonableness that have traditionally characterized tort law. Lay juries are still used for their unique competency in determining case-specific facts, but agency rulemaking has considerably reined in jury discretion in establishing standards of behavior. This triumph of experts over laity may be a matter of concern, particularly for consumer advocacy groups that believe that federal agencies succumb to industry pressure.[79] In the end, consumers may be left only with the hope that journalists and watchdog groups will provide a sufficient counterbalance to the influence of industry.

In summary, *Geier*, in conformity with the Court's recent preemption jurisprudence, reflects a gradual shift away from the traditional

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[75] *See, e.g.*, Michael Greve, *Collision Court: Upcoming Clash Between Federalism and Preemption Is Foretold in the* Geier v. American Honda *Opinions*, LEGAL TIMES, June 12, 2000, at 74.

[76] Another distinguishing factor is that the Court's federalism cases patrol the constitutional boundaries of Congress's power, *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803), whereas the preemption cases only apply the Supremacy Clause in areas in which Congress's power is already well established.

[77] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[78] *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing institutional competence).

[79] *See, e.g.*, Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415, 435, 457 (1996).

presumption against preemption toward a functional, federal law preference rule. The Court, in recognition of the increasingly complex and interlinked economy, has modernized preemption doctrine, favoring uniform national standards established by experts. The Court's quest to strike down disparate state standards when they may have undesirable national effects has created a curious (though not contradictory) complement to its Commerce Clause jurisprudence. The implications and reach of this new complement, however, are unknown. Beyond those products liability areas that *Geier* will almost certainly influence, such as boats,[80] airplanes,[81] and pesticides,[82] the Court's concern regarding the systemic national effects of state laws may signal an impending reinvigoration of the dormant commerce clause.[83] Whether this more drastic implication will follow, however, is left for another Term.

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[80] *See, e.g.*, Lewis v. Brunswick Corp., 107 F.3d 1494, 1505 (11th Cir. 1997) (holding that the Coast Guard's refusal to adopt a safety standard requiring propeller guards under the Federal Boat Safety Act preempted state tort claims seeking to require such guards).

[81] *See, e.g.*, Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1445–46 (10th Cir. 1993) (refusing to find preemption when the Federal Aviation Administration's safety standards did not cover the design element in question).

[82] *See, e.g.*, King v. E.I. Dupont de Nemours & Co., 996 F.2d 1346, 1347–49 (1st Cir. 1993) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act, which "provides a detailed scheme for regulating the content of an herbicide's label," preempted state tort claims for failure to warn).

[83] *See supra* note 67.

[1] *E.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-5, at 656 (3d ed. 2000); Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 823–24 (1989).

[2] The movement included religious organizations, shareholders, and students. JOHN M. KLINE, STATE GOVERNMENT INFLUENCE IN U.S. INTERNATIONAL ECONOMIC POLICY 197 (1983).

[3] Although the ruling government has changed Burma's name to Myanmar, both the state and federal sanctions laws refer to it as Burma, and the courts followed suit for clarity's sake. Crosby v. Nat'l Foreign Trade Council, 120 S. Ct. 2288, 2290 n.1 (2000).