ensure the adequacy of the regulatory regime. To paraphrase an oft-quoted scripture, faith without funds is dead.[77]

II. FEDERAL JURISDICTION AND PROCEDURE

A. Federal Preemption of State Law

1. Agency Deference. — Arguably the greatest development in public law in the last quarter-century has been the increased willingness of courts to allow an administrative agency "to say what the law is."[1] The increased complexity of government has induced courts to cede some of their interpretive authority to those who better understand the intricacies of the programs that the state administers.[2] But the expertise argument in favor of delegation to agencies raises special concerns when a legal question implicates structural constitutional values such as the division of power between the states and the federal government. Preemption questions raise precisely these concerns.

Last Term, in *Williamson v. Mazda Motor of America, Inc.*,[3] the Supreme Court held that a federal regulation that gave manufacturers a choice of installing, on certain rear seats, either lap-only seatbelts or lap-and-shoulder seatbelts, did not preempt state tort suits against the manufacturer for failing to install a lap-and-shoulder seatbelt.[4] The Court's result was grounded, at least in part, in the promulgating agency's opinion of the regulation's preemptive effect. Deference to an agency's current views on preemption, expressed in the course of litigation, is misplaced — it threatens federalism interests and raises concerns of legitimacy, accountability, transparency, and fairness. Removing this factor from the Court's analysis would alleviate some of these concerns.

In 2002, the Williamson family was in an auto accident while riding in a 1993 Mazda minivan.[5] The vehicle was manufactured at a time when Federal Motor Vehicle Safety Standard (FMVSS) 208[6] left auto manufacturers the choice of whether to install lap-only seatbelts or lap-and-shoulder seatbelts at certain rear seating positions such as a

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[77] *See James* 2:17.

[1] *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2580 (2006). *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the Court set out the modern doctrine of deference to agencies, has become "the most cited case in modern public law." Sunstein*, supra,* at 2580.

[2] *See* Sunstein, *supra* note 1, at 2582–83.

[3] 131 S. Ct. 1131 (2011).

[4] *Id.* at 1134.

[5] *Id.*

[6] Occupant Crash Protection, 49 C.F.R. § 571.208 S4.1.2.1(b) (1993) (promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified at 49 U.S.C. §§ 30101–30170 (2006))).

minivan's aisle seat.[7] Thanh Williamson, who at the time of the crash was seated in a rear aisle seat equipped with a lap-only seatbelt, was fatally injured; Delbert and Alexa Williamson, who wore lap-and-shoulder seatbelts, survived the crash.[8] The Williamsons brought suit in California state court against Mazda for failing to install a lap-and-shoulder seatbelt on Thanh's seat.[9] The trial court agreed with the defendants that the plaintiffs' claims were preempted to the extent that they sought to impose "liability just based on [defendant's decision to install] a lap[ ]belt"[10] and entered judgment for the defendants.[11]

The California Court of Appeal affirmed, holding that the plaintiffs' claims were preempted by FMVSS 208.[12] The court relied primarily on the reasoning of *Geier v. American Honda Motor Co.*,[13] in which the Supreme Court held that a state law tort claim against an auto manufacturer for failing to install an airbag was preempted by an earlier version of FMVSS 208 that required auto manufacturers to install passive restraint devices in vehicles but mandated the installation of airbags in only a portion of the fleet.[14] The California Court of Appeal concluded that the Williamsons' claims, if successful, would effectively bar auto manufacturers from utilizing one of the passenger restraint options authorized by federal law.[15] This result would "stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208"; therefore, the court held, the Williamsons' claims were preempted.[16] The court's decision relied on the consensus among state and federal courts that these claims were preempted under the reasoning in *Geier*.[17] After the California Supreme Court denied discretionary review,[18] the Supreme Court granted certiorari.[19]

The Supreme Court reversed. Writing for the Court, Justice Breyer[20] held that FMVSS 208 did not preempt a claim against a motor

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7 *Williamson*, 131 S. Ct. at 1134.

8 *Id.*

9 *See* Williamson v. Mazda Motor of Am., Inc., 84 Cal. Rptr. 3d 545, 547–48 (Cal. Ct. App. 2008).

10 *Id.* at 548 (alterations in original).

11 *Id.*; *see also id.* at 556–57.

12 *Id.* at 547.

13 529 U.S. 861 (2000).

14 *Id.* at 881.

15 *Williamson*, 84 Cal. Rptr. 3d at 555–56.

16 *Id.* at 556 (quoting Heinricher v. Volvo Car Corp., 809 N.E.2d 1094, 1098 (Mass. Ct. App. 2004)) (internal quotation marks omitted).

17 *See id.* at 552, 556.

18 *See* Petition for Writ of Certiorari at 1, *Williamson*, 131 S. Ct. 1131 (No. 081314), 2009 WL 1114640.

19 *Williamson*, 131 S. Ct. at 1135.

20 Justice Breyer announced the judgment of the Court, which was joined by all eight Justices who participated in the case. Justice Breyer's opinion was joined by Chief Justice Roberts and by

vehicle manufacturer for choosing to install a lap-only belt even though federal law expressly permitted the manufacturer to make that choice.[21] Like the California Court of Appeal, Justice Breyer applied the three-step framework developed by the Court in *Geier*. The first question in the *Geier* analysis asked whether the regulation at issue expressly preempted the state tort action.[22] In *Geier*, the Court had answered that question in the negative: although the National Traffic and Motor Vehicle Safety Act contained a provision that prohibited a state from establishing "*any safety standard* . . . which is not identical to the Federal standard,"[23] the Act also contained a "saving clause," which stated that "[c]ompliance with a federal safety standard does not exempt any person *from any liability under common law*."[24] Due to the presence of this saving clause, the *Geier* Court had concluded that the then-applicable version of FMVSS 208 did not expressly preempt the state tort suit.[25] This first step of the inquiry was directly applicable to the *Williamson* case.[26]

The second question in the *Geier* framework asked whether the presence of the saving clause *barred* a finding of conflict preemption.[27] In *Geier*, the Court had held that the saving clause did not foreclose an implied preemption inquiry.[28] Again, the Court's analysis and conclusion in *Geier* was directly applicable to *Williamson*.[29]

Finally, Justice Breyer turned to the third question in the *Geier* framework, which asked whether conflict preemption barred the suit — that is, whether the Williamsons' claims would stand as an obstacle to the execution of the full purposes and objectives of federal law.[30] In answering that question, Justice Breyer relied on the same three criteria that the *Geier* Court had used when it concluded "that giving auto manufacturers a choice among different kinds of passive restraint devices was a *significant objective* of the [1984 version of FMVSS 208]":

Justices Scalia, Kennedy, Ginsburg, Alito, and Sotomayor. Justice Kagan took no part in the consideration or decision of the case.

[21] *Williamson*, 131 S. Ct. at 1134.

[22] *See id.* at 1135.

[23] *Id.* (quoting 15 U.S.C. § 1392(d) (1988) (repealed 1994)) (internal quotation marks omitted).

[24] *Id.* (quoting 15 U.S.C. § 1397(k) (1988) (repealed 1994)) (alteration in original) (internal quotation marks omitted).

[25] *See id.*

[26] *Id.* at 1136.

[27] *Id.* at 1135.

[28] *Id.* at 1135–36. The *Geier* Court reached this counterintuitive conclusion by reasoning that Congress would likely not have intended to preserve state law actions that "conflict with federal regulations." Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000). Instead, the Court saw the purpose of the saving clause as merely barring "a defense that compliance with a federal standard automatically exempts a defendant" from liability under state law. *Id.*

[29] *Williamson*, 131 S. Ct. at 1136.

[30] *Id.*

(1) the history of the regulation, (2) "the promulgating agency's contemporaneous explanation of its objectives," and (3) "the agency's current views of the regulation's pre-emptive effect."[31]

Beginning with the first criterion, Justice Breyer noted that the two regulations' respective histories appeared quite similar: just as the Department of Transportation (DOT) had considered (and rejected), prior to promulgating the 1984 safety standard, a rule that would have mandated the installation of airbags, it also had considered (and rejected), prior to promulgating the 1989 safety standard, a rule that would have mandated the installation of lap-and-shoulder seatbelts in rear inboard seating positions.[32] On the second criterion — DOT's contemporaneous explanation of the regulation — Justice Breyer pointed out some distinctions. He concluded that whereas DOT's decision to retain manufacturer choice with respect to airbags was primarily driven by safety considerations, its decision to retain choice with respect to seatbelts was driven primarily by cost considerations.[33] Justice Breyer determined that such an objective was not, on its own, significant enough to warrant a finding of preemption.[34] Finally, Justice Breyer considered the last criterion: the Solicitor General's present view of the regulation's preemptive effect.[35] When *Geier* was before the Court in 2000, the Solicitor General argued that the tort suit would stand as an obstacle to the accomplishment of FMVSS 208's objectives.[36] In the *Williamson* litigation, however, the Solicitor General took the opposite position, arguing that FMVSS 208 did *not* preempt the tort suit.[37] After examining the three criteria, Justice Breyer was unconvinced that manufacturer choice with respect to seatbelts was a

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[31] *Id.* (emphasis in original).

[32] *See id.* at 1137–38.

[33] *Id.* at 1139. Although DOT had at one time expressed safety concerns over the compatibility of lap-and-shoulder belts with child car seats, Justice Breyer concluded that those concerns had largely subsided by 1989. *See id.* at 1138.

[34] *Id.* at 1139. Justice Breyer reasoned that a justification grounded in cost-benefit analysis could not be enough to implicitly preempt state law because nearly every federal regulation "embod[ies] some kind of cost-effectiveness judgment." *Id.*

[35] The Court saw the Solicitor General as accurately representing the view of the agency. *See id.* Whether the Court was right, and if so, whether such a role is in fact a proper one for the Solicitor General to play, is beyond the scope of this comment. Regardless, the Solicitor General has played an increasing role in litigation before the Court, is having increased success, and is likely to be relied upon as a mouthpiece for agencies in future cases. *See* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1323 (2010) (referring to the Solicitor General as the Court's "most frequent and successful litigant" and noting that the Solicitor General "now participat[es] in over three-quarters of the Court's cases").

[36] *Williamson*, 131 S. Ct. at 1137.

[37] *See id.* at 1139 (noting that even in *Geier*, the Solicitor General conceded that if the availability of options had not been necessary to promote safety, no conflict would have existed between the tort suit and the regulation).

"significant regulatory objective[]"[38] and concluded that allowing the suit would "not 'stan[d] as an obstacle to the accomplishment . . . of the full purposes and objectives' of federal law."[39] Therefore, the Williamsons' claims were not preempted.[40]

Justice Sotomayor concurred, writing separately only to clarify *Geier* for lower courts that had, in her opinion, overread its holding.[41] She asserted that "*Geier* does not stand . . . for the proposition that any time an agency gives manufacturers a choice[,] . . . a tort suit that imposes liability on the basis of one of the options is . . . pre-empted."[42] Rather, Justice Sotomayor advocated a narrow reading of *Geier* that would confine a finding of preemption to the rare instance in which manufacturer choice was an important regulatory objective.[43]

Justice Thomas concurred in the judgment,[44] challenging the majority opinion on two grounds: First, he rejected the Court's approach of engaging in an implied preemption analysis despite clear statutory language preserving common law tort suits — he would have found against preemption solely on the basis of the saving clause.[45] Second, he reiterated his view that "purposes-and-objectives pre-emption [is] inconsistent with the Constitution because it turns entirely on extratextual 'judicial suppositions.'"[46] According to Justice Thomas, the only legitimate preemption inquiry is one that engages solely with the text of a federal statute or regulation.[47] He criticized the "significant objective" test for being "utterly unconstrained," as evidenced by the fact that it resolved two very similar cases differently.[48]

The different outcomes in *Williamson* and *Geier* appear to depend, at least in part, on the differing views of DOT in each case regarding FMVSS 208's preemptive effect, as communicated through the Solicitor General.[49] Deference to agency views on preemption is troubling for at least three reasons. First, agencies, as highly specialized — and often, highly politicized — institutional actors, are generally ill-suited

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[38] *Id.*

[39] *Id.* at 1140 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (alteration in original).

[40] *Id.*

[41] *Id.* at 1140 (Sotomayor, J., concurring).

[42] *Id.*

[43] *See id.* at 1140–41.

[44] *Id.* at 1141 (Thomas, J., concurring in the judgment).

[45] *Id.*

[46] *Id.* at 1142 (quoting Wyeth v. Levine, 129 S. Ct. 1187, 1216 (2009) (Thomas, J., concurring in the judgment)).

[47] Justice Thomas has become a persistent and outspoken critic of the Court's implied preemption jurisprudence — and purposes-and-objectives preemption in particular. *See Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring in the judgment).

[48] *Williamson*, 131 S. Ct. at 1143 (Thomas, J., concurring in the judgment).

[49] *See id.* ("The dispositive difference between this case and *Geier* — indeed, the only difference — is the majority's 'psychoanalysis' of the regulators.").

to make judgments about the balance of power between the states and the federal government. Second, the Court's reliance on the agency's *present* view of the regulation's effect may create an avenue for agencies to circumvent traditional rulemaking channels and impose new policies in illegitimate ways, undermining administrative transparency. Finally, consideration of the agency's litigating position regarding the regulation's preemptive effect is unfair to the regulated parties who will be forced to anticipate agency shifts in policy far into the future. By not considering an agency's current views in preemption cases, the Court could alleviate some of these concerns.

At their core, preemption cases are about federalism: the distribution of power between the states and the federal government.[50] Federalism is a value enshrined in the Constitution and, as such, is a value over which the Court has traditionally acted as guardian.[51] Because the Supremacy Clause allows Congress to preempt state law at will, the Court has historically been reluctant to find preemption in the absence of clear congressional intent.[52] The presumption against preemption, however, appears to have eroded in recent years,[53] and the *Williamson* Court made no mention of it even though doing so would have supported its conclusion.[54] Rather than rest its decision on the presumption, the Court in *Williamson* relied on the *agency* to reach its result, signaling the dangerous ascendancy in preemption cases of an institutional actor ill-suited to make determinations about the balance of power between the states and the federal government.[55]

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[50] *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 887 (2000) (Stevens, J., dissenting) ("'This is a case about federalism,' . . . that is, about respect for 'the constitutional role of the States as sovereign entities.'" (quoting Coleman v. Thompson, 501 U.S. 722, 726 (1991); Alden v. Maine, 527 U.S. 706, 713 (1999))).

[51] *See* Gregory v. Ashcroft, 501 U.S. 452, 457–60 (1991) (discussing the value of federalism that springs from certain constitutional structural provisions).

[52] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (announcing a presumption against preemption); *cf. Geier*, 529 U.S. at 885 ("[A] court should not find pre-emption too readily in the absence of clear evidence of a conflict . . . .").

[53] *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 741 & nn.62 & 64 (2008) (citing four cases since 2000 in which the Court declined to apply the presumption and asserting that "the Court seems to have recognized [problems with the presumption's overbreadth] in recent decisions," *id.* at 741).

[54] Justice Sotomayor's concurrence was the only opinion that made subtle reference to the presumption. *See Williamson*, 131 S. Ct. at 1140 (Sotomayor, J., concurring).

[55] In recent years, scholars have debated which institutional actor — Congress, the courts, or federal agencies — is in the best position to decide preemption questions. *See, e.g.*, Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004); Merrill, *supra* note 53; Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008). In implied preemption cases such as *Williamson*, the institutional competence question presents only a binary choice: either the Court or the agency will decide the preemption issue.

Agencies are in a worse position than courts to decide preemption questions for two reasons: first, they are too "interested," and second, they are (ironically) too expert to account for the broad, systemic federalism values that preemption cases implicate. With regard to the first reason, "interested" can refer to two things: self-interest or politicization. The self-interest problem arises from the agency's ability, when deciding preemption questions, essentially "to act as judge in its own cause."[56] Whereas there is little risk of self-aggrandizement when a court acts as arbiter between the states and the federal government, the same question in the hands of a federal agency would present the agency with the opportunity to determine the scope of its own power.[57] Deference to an agency when the risk of self-aggrandizement is so apparent could, over time, threaten the balance of power between the states and the federal government.[58]

The other way in which agencies are too "interested" to decide preemption questions arises from their position in the federal government: whereas federal courts were designed to be independent, the agency is an arm of the highly politicized executive branch.[59] One scholar who has examined official executive branch policies on preemption has concluded "that recent Presidents (from Reagan through Obama) do not demonstrate a philosophical commitment to federalism, but use federalism rhetoric when it supports their substantive policy aims."[60] And, in addition to being influenced (or pressured) by the President, at least some agencies are also captured by the entities they regulate.[61] Taken together, these points demonstrate that agencies are simply too interested to be trusted to make unbiased judgments in federalism cases.

In addition to being too interested to decide preemption questions, agencies are also too "expert." This conclusion may sound puzzling to some — agencies are often lauded for their expertise and that charac-

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[56] Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 206 (2004) (calling this result "incompatible with a long line of authority demanding disinterested and impartial governmental decision-making").

[57] *See* Merrill, *supra* note 53, at 756 n.110 (noting that "[c]ourts have long worried about trusting agencies to determine the scope of their own jurisdiction").

[58] *Cf.* Armstrong, *supra* note 56, at 207 (arguing that courts should not defer to agency "interpretations of law that implicate the self-interest of the issuing agency").

[59] *See* Jody Freeman & Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54–55 (discussing the problem of political interference with agency expertise and asserting that "[e]very administration exerts some degree of political influence over agency decision making," *id.* at 54).

[60] *See* Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 341 (2010).

[61] *See* Merrill, *supra* note 53, at 756 (conceding that "[n]ot every agency . . . is captured by the firms it regulates" but nevertheless concluding that such "phenomena are not unheard of and warrant caution" before deference is given to agency preemption determinations).

teristic has in fact served as a rationale in *support* of deference.[62] How is it then that an agency's greatest virtue becomes, in preemption cases, one of its vices? In the words of Professor Thomas Merrill, the agency suffers from "tunnel vision."[63] Its comparative advantage is in marshalling its technical expertise to resolve policy issues in a narrow field, not in considering the broad, systemic interests of government. Agency officials are not experts in constitutional law nor "steeped in the framework assumptions that govern preemption."[64] And, as Professor Nina Mendelson argues, agencies are unlikely to "evince concern with preserving state prerogatives for their own sake."[65] Preemption questions, because they implicate structural values, should be decided by a court, which has a bird's-eye view of the Constitution and the government, and not by an agency, the defining characteristic of which is specialization.

The Court's reliance on DOT in *Williamson* was especially problematic not only from the perspective of institutional competence, but also because it ratified inadequate and unfair administrative procedures. Consideration of an agency's *present* view of whether a regulation preempts a state tort suit allows agencies to circumvent the administrative process to achieve ends that the agencies were not able or would not be able to achieve through notice-and-comment rulemaking.[66] There are two situations in which this circumvention can occur: (1) the agency can endorse preemption to impose federal policy nationwide, or (2) the agency can reject preemption to encourage nationwide compliance with a state policy that is more stringent than the federal one.

Geier illustrates the first situation. At the time FMVSS 208 was enacted, the agency did not include preemptive language in its final rule.[67] Given the ease with which agencies are generally able to preempt,[68] this omission certainly could be viewed as having been a

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[62] *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[63] Merrill, *supra* note 53, at 755.

[64] *Id.*

[65] *See* Mendelson, *supra* note 55, at 781 (explaining that "the federal agency may be less likely to develop experience or expertise in [questions implicating the allocation of authority among different levels of government]").

[66] *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 911 (2000) (Stevens, J., dissenting) (arguing that the Secretary of Transportation's litigating position warrants neither *Chevron* deference nor the "lesser deference paid to it by [the majority in *Geier*]" because it was not a position arrived at "after a formal adjudication or notice-and-comment rulemaking").

[67] Occupant Crash Protection, 49 C.F.R. § 571.208 S4.1.2.1(b) (1993) (promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified at 49 U.S.C. §§ 30101–30170 (2006))) (requiring some motor vehicles to be equipped with passive restraints but failing to address state legislation on the subject of passive restraint systems).

[68] *See Geier*, 529 U.S. at 908 (Stevens, J., dissenting) (noting that agencies have the ability to promulgate rules preempting state law "with relative ease").

deliberate choice by the agency. If the agency's view regarding the preemption issue had changed since the rule's promulgation, the agency could have utilized traditional administrative channels to make its views known — but, for political or other reasons, it did not. By considering the agency's litigating position, *Geier* expanded the agency's power from being able to *explicitly* preempt state law through a formalized decisionmaking process — one replete with procedural safeguards — to also being able to *informally* preempt state law through a mechanism with virtually no procedural safeguards.[69]

This procedural infirmity extends also to cases in which the agency's political interests conflict with a finding of preemption. Suppose that after FMVSS 208 was promulgated, DOT had wanted to impose a lap-and-shoulder requirement but anticipated that backlash from interested parties would thwart its goals. In light of the weight placed on the agency's present view regarding the preemption of state tort law in *Williamson*, DOT would have had an incentive to adopt an anti-preemption stance before a court in a state where it knew a jury would be likely to impose the lap-and-shoulder requirement in a tort suit. With such a standard in place in one state, motor vehicle manufacturers would have been faced with the choice of whether to subject themselves to liability in that state or, if it was more cost effective, to make their entire fleet compliant with that state's more stringent standard.[70] If the latter course were taken, DOT would have "implemented" a new national policy requiring lap-and-shoulder seatbelts, despite the fact that it could not have achieved that policy through the traditional administrative channels. This circumvention of rulemaking procedures undermines transparency and legitimacy and is antithetical to the modern Administrative Procedure Act (APA) administrative model.[71]

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[69] *See id.* at 911–12 (arguing that, in light of the more formalized policymaking channels available to the agency, courts should be reluctant to find preemption "based only on the Secretary's informal effort to recast [an old rule] into a pre-emptive mold").

[70] Advocates of a regulatory compliance defense (which gives a tortfeasor who complied with federal standards a defense against state tort claims) cite concerns "about the burdens on producers of risk if they face potentially disparate state standards of care." William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1582 (2007). Due to these disparate standards, "either . . . products will not move across borders, or . . . producers will strive to meet the standards of the most protective state, even if they are excessively stringent." *Id.*

[71] *See* Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35, 40 & n.32 (1996) (citing "fairness, . . . consistency of agency decisionmaking," *id.* at 40, and "openness, accountability, and participation," *id.* at 40 n.32, as some of the central goals of the APA); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 100–01 (2003) (describing the three types of requirements the APA imposes on the administrative process as (1) the publicization of governmental actions, (2) compliance with procedural requirements when crafting policy, and (3) the opportunity for aggrieved parties to challenge agency action in court); *cf.* Merrill, *supra* note 53, at

A final problem with the Court's reliance on the agency's present view in its preemption analysis is that such a practice is unfair to regulated parties. When Mazda manufactured the Williamsons' 1993 minivan, it likely had available much of the same information regarding the cost effectiveness of the seatbelts that was available to DOT in 1989 when the agency concluded that the benefits of installing lap-and-shoulder belts on rear inboard seats were not worth their costs.[72] Allowing the agency's view twenty years after the regulation was promulgated to factor into the Court's determination of whether the tort suit against the manufacturer should move forward is tantamount to a retroactive application of a new policy. A central advantage that the modern administrative state has over the common law regulatory system is that its rules are generally prospective in nature.[73] Indeed, the idea that parties should be on notice regarding developments in regulatory policy is a central tenet of modern administrative law.[74] In keeping with this principle, when the Court is making a determination that will directly affect the liability of regulated parties, it should focus on the information that was available to those parties at the time of their decisions.[75]

The problem with *Williamson* is not the result the Court reached, but the manner in which it reached it. Given that even *explicit* agency pronouncements about preemption may put federalism interests at

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756–57 ("Much of the current controversy about the role of agencies in preemption concerns statements in the preambles of regulations for which neither advance notice nor opportunity to comment was afforded.").

[72] *See* Williamson v. Mazda Motor of Am., 84 Cal. Rptr. 3d 545, 550 (Cal. Ct. App. 2008) ("NHTSA concluded the 'small safety benefits' [of a] lap/shoulder seatbelt requirement . . . did not outweigh the resulting 'technical difficulties' and 'substantially greater costs.'" (citing 53 Fed. Reg. 47,984 (Nov. 29, 1988))).

[73] *See, e.g.*, Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 695 (1997) (citing uniformity and prospectivity as two benefits of administrative regulation over tort regulation). Regulating prospectively (through administrative agencies) as opposed to retrospectively (through private tort actions) minimizes the dangers of hindsight bias — the phenomenon by which juries have trouble reaching "proper negligence determinations because juries are likely to believe precautions that could have been takeu [sic] would have been more cost-effective than they actually appeared to be *ex ante*." Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1099 (2000).

[74] *See* Croley, *supra* note 71, at 40 & n.32; Rubin, *supra* note 71, at 100.

[75] It is true that, even if the agency's present view is eliminated from consideration, regulated parties will have to play "guessing games" to determine a regulation's preemptive effect in implied preemption cases. But this result flows from the Court's doctrine of purposes-and-objectives preemption and the holding in *Geier* that a saving clause does not foreclose an implied preemption inquiry. This comment takes as given the existence of purposes-and-objectives preemption and argues only that decision costs will be lower if regulated parties are required to look only to contemporaneous statements as opposed to conjecturing about the agency's future views — views about which they have little or no information at the time of decision.

stake,[76] the fact that the Court is now giving substantial weight to the agency in *implied* preemption inquiries is disconcerting. By eliminating the criterion that considers the agency's present view of a regulation's preemptive effect, the Court could alleviate many of the concerns raised in this comment.

2. Immigration Law. — In 1986, Congress passed the Immigration Reform and Control Act[1] (IRCA or the Act), making it unlawful for American employers to hire undocumented workers.[2] The IRCA marked Congress's first foray into the regulation of immigrant employment and signaled that "combating the employment of illegal aliens" had become "central" to federal immigration policy.[3] Congress included an express provision in the IRCA noting that the new law would preempt any state legislation imposing civil or criminal sanctions on businesses found to be employing undocumented workers.[4] The Act also featured a parenthetical savings clause that exempted state licensing laws from the preemption provision.[5]

Last Term, in *Chamber of Commerce v. Whiting*,[6] the Supreme Court held that the IRCA's savings clause exempts from preemption an Arizona law[7] allowing, and in some cases requiring, state courts to suspend or revoke the business licenses of Arizona employers who "knowingly or intentionally employ an unauthorized alien."[8] *Whiting* was right to entertain both express and implied preemption arguments against the validity of the new state law. However, *Whiting*'s focus in its implied preemption analysis on the IRCA's express savings clause did significant harm to the Court's established preemption framework and undermined the comprehensive federal immigration scheme the IRCA sought to create. As the Court has in years past, the *Whiting* Court should have acknowledged the IRCA's intended impact and invalidated a state law that intrudes on the federal government's long-established purview over the regulation of immigrant employment.

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[76] *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 512 (1996) (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference . . . .") (emphasis in original).

[1] Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

[2] 8 U.S.C. § 1324a(a)(1) (2006).

[3] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

[4] 8 U.S.C. § 1324a(h)(2).

[5] *Id.*

[6] 131 S. Ct. 1968 (2011).

[7] Legal Arizona Workers Act, 2007 Ariz. Sess. Laws 1312 (codified at ARIZ. REV. STAT. ANN. §§ 13-2009, 23-211 to -214 (2008)).

[8] *Whiting*, 131 S. Ct. at 1976; *see id.* at 1987.