

ality on the ground that it is states and localities that must accommodate immigrants.”⁹² Critics may have valid concerns about the capacity of the federal government to regulate immigration.⁹³ However, it should be left up to Congress, and not the courts, to cede regulatory control to the states. Courts should not decide on their own that federal statutes like the IRCA have become inadequate to police immigrant employment. If the Court wishes to narrow the range of state laws that are impliedly preempted under the IRCA and similar federal statutes, it should wait for Congress to make the first move.

3. *Tort Law.* — The multitude of preemption cases heard during the October 2010 Term¹ suggested a confused and confusing preemption jurisprudence. The Court has struggled to consistently apply the presumption against preemption.² While the presumption has been vigilantly applied in areas of traditional state regulation,³ “[i]n the realm of products liability preemption, the presumption does yeoman’s work in some cases while going AWOL . . . in others.”⁴ This seemingly arbitrary application of the presumption has fostered scholarly arguments about its very existence.⁵ Last Term, in *Bruesewitz v. Wyeth LLC*,⁶ the Supreme Court held that the National Childhood Vaccine Injury Act⁷ (NCVIA) bars state design-defect claims against vaccine manufacturers.⁸ The Court failed to recognize the ambiguity in the statute and, based on its distrust of the operation of state tort law, imposed its own policy views. Instead, the Court

⁹² Maria Marulanda, Note, *Preemption, Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 FORDHAM L. REV. 321, 362 (2010).

⁹³ For an example of such critics, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 623–28 (2008). However, a federal failure to act does not automatically justify state action. See Gilbert, *supra* note 81.

¹ See, e.g., *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (preemption of state failure-to-warn claims); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (legislative preemption of federal common law); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (conflict preemption of state labor law); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (preemption of state contract law); *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011) (preemption of state tort law); *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011) (preemption of state design-defect claims).

² See Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 458 (2008) (“I join a veritable chorus of scholars pointing out the Court’s haphazard application of the presumption.”).

³ See, e.g., *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

⁴ Sharkey, *supra* note 2, at 458 (footnote omitted).

⁵ Compare Erwin Chemerinsky, *Empowering States when It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1315 (2004) (“[T]he recent Supreme Court preemption cases clearly put the presumption in favor of preemption.”), with Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1013 (2002) (“[T]here is no meaningful presumption against preemption.”).

⁶ 131 S. Ct. 1068.

⁷ 42 U.S.C. §§ 300aa-1 to -34 (2006).

⁸ *Bruesewitz*, 131 S. Ct. at 1082.

should have adopted an initial presumption against preemption in products liability, a field traditionally occupied by the states.

Due in part to the risk of litigation, a number of vaccine manufacturers left the market during the 1980s,⁹ which led to vaccine shortages.¹⁰ Moreover, experts and legislators felt that obtaining compensation for vaccine-related injuries was too costly and complicated.¹¹ In response, Congress in 1986 enacted the NCVIA, “establish[ing] a no-fault compensation program designed to work faster and with greater ease than the civil tort system.”¹² The system was designed to provide quick and certain compensation to those injured while limiting the scope of liability for vaccine manufacturers. Claimants must seek relief through the compensation system, paid for by an excise tax on vaccines, before they can file suit.¹³ In relevant part, the Act reads:

No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine . . . if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.¹⁴

In April 1992, six-month-old Hannah Bruesewitz received a diphtheria, tetanus, and pertussis vaccine.¹⁵ Within twenty-four hours,¹⁶ Hannah had seizures that led to “residual seizure disorder and developmental delay.”¹⁷ Following the guidelines of the NCVIA, Hannah’s parents filed a vaccine injury petition in the Court of Federal Claims.¹⁸ Their claim was denied, though they received \$126,800 in attorney’s fees and costs.¹⁹ Hannah’s parents rejected the unfavorable judgment and sued in Pennsylvania state court, alleging that a defective vaccine design caused Hannah’s disabilities.²⁰ Citing Pennsylvania common law, they asserted that the vaccine manufacturer was subject to strict liability and liability for negligent design.²¹ The

⁹ *Id.*

¹⁰ Joanna B. Apolinsky & Jeffrey A. Van Detta, *Rethinking Liability for Vaccine Injury*, 19 CORNELL J.L. & PUB. POL’Y 537, 550 (2010).

¹¹ *See Bruesewitz*, 131 S. Ct. at 1073.

¹² *Id.* (quoting *Shalala v. Whitecotton*, 514 U.S. 268, 269 (1995)) (internal quotation marks omitted).

¹³ *See id.* at 1073–74.

¹⁴ 42 U.S.C. § 300aa-22(b)(1).

¹⁵ *See Bruesewitz*, 131 S. Ct. at 1074–75.

¹⁶ *Id.* at 1075.

¹⁷ *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 236 (3d Cir. 2009).

¹⁸ *Bruesewitz*, 131 S. Ct. at 1075.

¹⁹ *Id.* Attorney’s fees are awarded to claimants who bring nonfrivolous claims under the compensation system. *See id.* at 1074.

²⁰ *Id.* at 1075.

²¹ *Id.*

manufacturer removed the suit to federal court, which granted summary judgment for the defendant.²²

In granting summary judgment, the district court held that Pennsylvania law — providing for strict liability and negligent design causes of action — was preempted by subsection 22(b)(1) of the NCVIA.²³ Judge Baylson used the legislative history of the NCVIA to determine congressional intent in enacting the statute.²⁴ Judge Baylson found that, by passing the Act, Congress sought to provide “an umbrella under which manufacturers would improve the safety of their products while remaining immune from design-defect claims.”²⁵

The Third Circuit affirmed.²⁶ In his opinion for the panel, Judge Smith²⁷ laid out the development of preemption jurisprudence and noted that “courts must begin their analysis . . . by applying a presumption against preemption.”²⁸ After acknowledging that it could not resolve the scope of the express preemption provision of the Act from the text alone, the Third Circuit used legislative history to determine the intent of Congress and, from that, the scope of the express preemption²⁹: all design-defect claims.³⁰

The Supreme Court affirmed.³¹ Writing for the Court, Justice Scalia³² began with the text of the statute.³³ He found that the text of the statute suggested only one conclusion: the NCVIA preempts all state design-defect claims.³⁴ According to him, the “even though” clause in the statute clarifies the word “unavoidable.”³⁵ As such, unavoidable side effects are those that occur even though the vaccine was properly manufactured and proper warnings were provided.³⁶ The opinion put forward two textual arguments for its conclusion. First, the Court stated that “[i]f a manufacturer could be held liable for failure to use a different design, the word ‘unavoidable’ would do no work”³⁷ since all side effects could be avoided “by use of a differently designed vac-

²² *Bruesewitz v. Wyeth Inc.*, 508 F. Supp. 2d 430, 433 (E.D. Pa. 2007).

²³ *Id.* at 445–46.

²⁴ *See id.* at 438–40.

²⁵ *Id.* at 445.

²⁶ *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 235 (3d Cir. 2009).

²⁷ Judge Smith was joined by Judges Weis and McKee.

²⁸ *Bruesewitz*, 561 F.3d at 240; *see also id.* at 238–40.

²⁹ *See id.* at 245–51.

³⁰ *See id.* at 251 (“The legislative history identifies the scope of this preemption, which encompasses both strict liability and negligent design defect claims.”).

³¹ *Bruesewitz*, 131 S. Ct. at 1082.

³² Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Alito. Justice Kagan took no part in the consideration or decision of the case.

³³ *See Bruesewitz*, 131 S. Ct. at 1075.

³⁴ *See id.* at 1075–76.

³⁵ *Id.* at 1075.

³⁶ This definition is according to Justice Scalia. *See id.*

³⁷ *Id.*

chine.”³⁸ Thus, “unavoidable” must mean that the side effect itself was not avoidable given a particular vaccine design.³⁹ Second, the Court presented an *expressio unius est exclusio alterius* argument.⁴⁰ Since two of product liability law’s triumvirate,⁴¹ failure-to-warn and manufacturing-defect claims, are explicitly excluded from preemption in the statute, the failure to exclude design-defect claims strongly suggested that such claims are preempted by the statute.⁴²

Next, the Court rejected the dissent’s textual reading of the “if” as distinguishing between avoidable and unavoidable designs by positing that the “if” clause referred to whether “the vaccine ha[s] been properly labeled and manufactured.”⁴³ However, the Court acknowledged that “[t]he ‘if’ clause makes total sense” either way.⁴⁴ Moreover, the Court agreed that its own reading was imperfect as it left thirteen words superfluous.⁴⁵ The Court pointed out that every reasonable interpretation, including the dissent’s, rendered some language superfluous.⁴⁶

Having completed its textual analysis, the Court turned to the structure of federal vaccine regulation.⁴⁷ The Court pointed out that manufacturing standards and required printed directions and warnings are explicitly spelled out.⁴⁸ In contrast, there is no guidance to determine when a vaccine is improperly designed.⁴⁹ Next, the Court addressed how the structure of the Act complemented the policy justifications for the Court’s conclusion.⁵⁰ In accordance with the goals of design-defect torts, the NCVIA provides alternative ways to prompt improved vaccine designs and compensate victims for injuries.⁵¹ The Act’s “silence regarding design-defect liability . . . reflects a sensible choice to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries.”⁵² The majority opinion concluded its structural arguments by pointing out the quid pro quo exchange in the Act of “vaccine manu-

³⁸ *Id.*

³⁹ *Id.* at 1075–76.

⁴⁰ *See id.* at 1076.

⁴¹ *See* Harvey M. Grossman, *Categorical Liability: Why the Gates Should Be Kept Closed*, 36 S. TEX. L. REV. 385, 402 (1995).

⁴² *See Bruesewitz*, 131 S. Ct. at 1076.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ The passage “the injury or death resulted from side effects that were unavoidable even though” would be unnecessary. *Id.* at 1078.

⁴⁶ *See id.*

⁴⁷ *See id.* at 1078–80.

⁴⁸ *Id.* at 1079.

⁴⁹ *See id.*

⁵⁰ *Id.* at 1079–80.

⁵¹ *See id.* at 1079.

⁵² *Id.* at 1080.

facturers fund[ing] from their sales an informal, efficient compensation program for vaccine injuries . . . [for] avoid[ing] costly tort litigation and the occasional disproportionate jury verdict.”⁵³

In the final part of the Court’s opinion, Justice Scalia criticized the dissent’s use of legislative history.⁵⁴ The dissent’s reasoning, according to Justice Scalia, “ignore[d] unhelpful statements in the [1986 Committee] Report.”⁵⁵ Moreover, the dissent also relied on a later committee report, which Justice Scalia criticized as “[p]ost-enactment legislative history (a contradiction in terms).”⁵⁶

While he signed onto the Court’s opinion, Justice Breyer wrote a separate concurring opinion to express his view that while the text suggests the majority’s conclusion, “the textual question considered alone is a close one.”⁵⁷ He looked to “legislative history, statutory purpose, and the views of the federal administrative agency, here supported by expert medical opinion,”⁵⁸ and agreed with the majority’s interpretation.⁵⁹ In looking at legislative history, Justice Breyer concluded that Congress sought both to protect the vaccine supply by ensuring that manufacturers did not leave the market and “to provide generous compensation to those whom vaccines injured.”⁶⁰ Preserving design-defect claims would be inconsistent with these two goals.⁶¹

Justice Sotomayor dissented.⁶² She argued that Congress did not intend the NCVIA to preempt state defective-design suits.⁶³ The majority, according to her, merely substituted its own policy preferences for those of Congress.⁶⁴ As a result of looking at the text, structure, and legislative history of the NCVIA, Justice Sotomayor concluded that the majority opinion “excise[d] 13 words from the statutory text, misconstrue[d] the Act’s legislative history, and disturb[ed] the careful balance Congress struck between compensating vaccine-injured children and stabilizing the childhood vaccine market.”⁶⁵

Justice Sotomayor’s textual analysis pointed out that the baseline rule under the NCVIA is that state tort law applies.⁶⁶ Moreover, according to her, “‘side effects that were unavoidable’ must refer to side

⁵³ *Id.*

⁵⁴ *See id.* at 1081–82.

⁵⁵ *Id.* at 1081.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1082 (Breyer, J., concurring).

⁵⁸ *Id.* at 1082–83.

⁵⁹ *Id.* at 1083, 1086.

⁶⁰ *Id.* at 1084.

⁶¹ *Id.* at 1085.

⁶² Justice Sotomayor was joined by Justice Ginsburg.

⁶³ *Id.* at 1086 (Sotomayor, J., dissenting).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

effects caused by a vaccine's *design* that were 'unavoidable.'⁶⁷ Thus, claims would be preempted where "no feasible alternative design would reduce the safety risks without compromising the product's cost and utility."⁶⁸ Justice Sotomayor disparaged the structural arguments for concluding that Congress's silence must mean state tort claims are preempted after enactment of the NCVIA despite the fact that this same silence existed before enactment.⁶⁹ Justice Sotomayor suggested that state tort law can supplement the NCVIA system as the NCVIA system alone "provid[es] only carrots and no sticks."⁷⁰ Finally, she charged that the majority's decision disturbed the balance Congress sought to achieve based on nothing more than the Court's own policy preferences.⁷¹

Despite the lengthy opinion, a sizeable concurrence, and an extensive dissent, no member of the Court discussed the presumption against preemption in detail.⁷² In a case where ambiguity regarding preemption exists, particularly in areas traditionally occupied by the states, courts should avoid preempting state law.⁷³ Where two reasonable readings of a statute exist, courts "have a duty to accept the reading that disfavors pre-emption."⁷⁴ The Court itself conceded the text alone was inconclusive,⁷⁵ and the Court's structural arguments ultimately rested on precisely the sort of policy determinations that the presumption against preemption takes out of courts' hands. The Court should have recognized this uncertainty, invoked the presumption, and allowed these design-defect claims to go forward. In failing to do so, the majority selected among multiple plausible interpretations of an ambiguous statute and ultimately usurped the legislature's role

⁶⁷ *Id.* at 1087.

⁶⁸ *Id.* at 1089.

⁶⁹ *See id.* at 1097.

⁷⁰ *Id.* at 1098–99.

⁷¹ *Id.* at 1100.

⁷² The majority and concurring opinions ignored the presumption entirely while the dissent mentioned it in one footnote. *See id.* at 1096 n.15. The Third Circuit, for its part, recognized the need to apply the presumption but tacitly concluded that clear evidence of congressional intent to preempt allowed it to overcome the presumption in this case. *See Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 240, 243–50 (3d Cir. 2009).

⁷³ *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

⁷⁴ *Id.*

⁷⁵ According to the majority, the text alone merely "suggests" the result reached. *See Bruesewitz*, 131 S. Ct. at 1078–79 ("The structure of the NCVIA and of vaccine regulation in general reinforces what the text of § 300aa-22(b)(1) suggests."). The NCVIA can be reasonably read to preempt or not to preempt state tort law with respect to design-defect claims. *See Eva B. Stensvad, Note, Immunity for Vaccine Manufacturers: The Vaccine Act and Preemption of Design Defect Claims*, 95 MINN. L. REV. 315, 329 (2010) ("The plain text of the statute does not clearly indicate its preemptive scope.")

by selecting the policy judgments it favored most. In preempting such state claims, the Court simply imposed its policy choice.⁷⁶

The presumption against preemption applies to both express and implied preemption.⁷⁷ The Court recently reaffirmed the cornerstones of its preemption jurisprudence in an express preemption case:

First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” Second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”⁷⁸

Thus, before finding that a federal statute preempts state tort suits, the Court must find that Congress, even if it included an express preemption provision in a statute, had the clear and manifest purpose of preempting the full scope of state claims.⁷⁹ Any ambiguity concerning this purpose must lead to a finding that suits are not preempted.

Rather than apply the presumption against preemption, the majority relied on two textual arguments for why the NCVIA expressly preempts state tort law claims. Beginning with the text in statutory interpretation is typically sound,⁸⁰ but in preemption cases, the text should be read not only to determine what is likely the congressional purpose, but also to determine whether the purpose is clear.⁸¹

In rejecting the dissent’s textual arguments, Justice Scalia explained why he was not persuaded by them but stopped short of calling the dissent’s reading unreasonable.⁸² In fact, he conceded that “[t]he ‘if’ clause makes total sense” under either interpretation.⁸³ Moreover, while the dissent’s reading of the statute is far from per-

⁷⁶ Cf. Sara Wexler, Commentary, *Bruesewitz v. Wyeth: The “Unavoidable” Vaccine Problem*, 6 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 93, 105 (2011), <http://www.law.duke.edu/journals/djclpp/index.php?action=downloadarticle&id=194> (“[T]he Court likely will find for Wyeth based on Wyeth’s policy rationale. Because the statutory text and congressional intent are unclear, the Court’s public policy preferences likely will determine the outcome . . .”).

⁷⁷ See Mary J. Davis, *The “New” Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1220 (2010).

⁷⁸ *Wyeth v. Levine*, 129 S. Ct. 1187, 1194–95 (2009) (citations omitted).

⁷⁹ Cf. *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 243 (3d Cir. 2009) (noting that courts “must still determine the scope and reach of . . . express preemption provision[s]”). An express preemption clause that can be reasonably read both broadly and narrowly must be read narrowly.

⁸⁰ See, e.g., Erica B. Haggard, Note, *Removal to Federal Courts from State Administrative Agencies: Reevaluating the Functional Test*, 66 WASH. & LEE L. REV. 1831, 1862 (2009) (“It is axiomatic that statutory interpretation begins with the text of the statute . . .”).

⁸¹ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485–86 (1996); see also Recent Decision, *Retail Industry Leaders Ass’n v. Fielder: ERISA Preemption Trumps the “Play or Pay” Law*, 67 MD. L. REV. 885, 890 (2008).

⁸² See *Bruesewitz*, 131 S. Ct. at 1076–78.

⁸³ *Id.* at 1076.

fect,⁸⁴ the Court acknowledged that its own reading was not without flaws as it left superfluous words.⁸⁵ Finally, and most tellingly, the Court admitted that the text of the statute did not prove that all design-defect claims are preempted but merely “suggest[ed]” it.⁸⁶ Instead, the Court implied that its structural arguments were necessary to prove that the act unambiguously preempts all such claims.⁸⁷

The Court stretched its structural analysis to make its conclusion seem inevitable,⁸⁸ but its conclusion, while plausible, is not necessary. The inferences that led to the conclusion all arose from the Court’s distrust of the tort system to adjudicate these claims fairly and efficiently.

The Court’s structural argument — that the lack of guidance to determine when a vaccine is improperly designed along with “extensive guidance” about what constitutes manufacturing defects and failure-to-warn “strongly suggests that design defects were not mentioned because they are not a basis for liability”⁸⁹ — is flawed. The majority’s conclusion that the “lack of guidance” means Congress intended to preempt state law is based on the premise that without guidance, “the universe of alternative designs [will be] limited only by an expert’s imagination.”⁹⁰ However, it is just as plausible that the FDA can police manufacturing and warnings but may struggle to ensure that pharmaceutical companies explore safer alternative designs once their vaccines have been approved for market.⁹¹ Policing manufacturing and warning requires merely spelling out guidelines of what must be done and comparing real-world actions to those guidelines. Conversely, the FDA cannot evaluate every alternative design of every vaccine to determine if there is a safer effective design. Therefore, the lack of guidance from the FDA may suggest the opposite of what the Court concluded — Congress intended not to preempt state design-defect suits that provide the financial incentives necessary to encourage pharmaceutical companies to explore reasonable alternative designs. Hence, a basic premise that the tort system is better than an expert agency at adjudicating design defect claims leads to the conclusion that the “lack of guidance” reflects deference to the tort system’s adjudication of such claims. One’s belief about the capacity of the tort system thus controls the inference drawn from the Court’s observation.

⁸⁴ For example, the dissent’s reading preempts only those suits that do not allege a safer alternative design existed. Plaintiffs’ lawyers would surely take notice and begin to allege safer alternative designs.

⁸⁵ *Bruesewitz*, 131 S. Ct. at 1078.

⁸⁶ *Id.* at 1075.

⁸⁷ *See id.* at 1078–79.

⁸⁸ *See id.* at 1079–80.

⁸⁹ *Id.* at 1079.

⁹⁰ *Id.*

⁹¹ The dissent makes a similar argument. *See id.* at 1097–98 (Sotomayor, J., dissenting).

Similarly, the Court's policy argument that the NCVIA preempts state tort law because it provides an alternative way to achieve the same goals⁹² rests on an inference that a regulatory scheme that seeks to achieve some objectives of tort law must displace tort law entirely. This inference stems from a premise that state tort law must be wholly ineffective and only detrimental to policing vaccine design-defect claims. Adopting the alternative viewpoint that state tort law provides some benefits leads to the inference that the NCVIA system should supplement rather than replace the tort system.⁹³ Under this premise, tort law further advances the statutory purpose. Both views of the NCVIA are reasonable, and the text and structure of the statute do not reveal a clear and manifest congressional intent.

Finally, Justice Scalia opined, while offering no support, that a system that allows design-defect suits to go forward would "hardly coax manufacturers back into the market" because "design-defect allegations are the most speculative and difficult type of products liability claim to litigate."⁹⁴ The NCVIA system may not need to eliminate plaintiffs' ability to sue in state courts to persuade them to pursue their cases in the NCVIA system. Just like Justice Scalia, plaintiffs must recognize that "design-defect allegations are the most speculative and difficult type of products liability claim to litigate." Risk-averse plaintiffs and plaintiffs' attorneys are more likely to pursue their claims in the NCVIA system than in state courts.⁹⁵ The conclusion that the few plaintiffs who may eventually pursue a state case will win judgments so excessive that they will drive manufacturers out of the market rests on the Court's assumptions about the inefficiency of the tort system, assumptions Congress never made explicit in the statute.

The Court's finding that the structure of the NCVIA reinforces the text's suggestion is based on an implicit belief in the deficiency and dysfunction of state tort law. Scholars have repeatedly noted that the conservative majority on the Court harbors a bias against the tort system.⁹⁶ Empirically, scholars have observed that while the Court

⁹² See *id.* at 1079–80 (majority opinion).

⁹³ For example, the dissent spelled out one benefit that state tort law provides: it "places a legal duty on vaccine manufacturers to improve the design of their vaccines to account for scientific and technological advances." *Id.* at 1097 (Sotomayor, J., dissenting).

⁹⁴ *Id.* at 1080 (majority opinion).

⁹⁵ After all, even in the case of Hannah Bruesewitz, the Court of Federal Claims awarded \$126,800 in attorney's fees and costs. *Id.* at 1075.

⁹⁶ See, e.g., Davis, *supra* note 5, at 1017 ("[T]he Justices are, for the most part, conservative and their conservatism is more fiercely directed *against* state tort law than *for* . . . federalism."); Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1260–61 (2010) (noting that critics "have suggested that pro-preemption holdings . . . are nothing more than an effort by 'conservative' Justices to use the preemption doctrine to carry out tort reform at the federal level").

preempts state law in about half of all such cases it hears,⁹⁷ it preempts a higher percentage of state tort law claims.⁹⁸ This paradoxical result suggests skepticism about and distaste for the operation of the state tort system,⁹⁹ “a realm in which the putative anti-preemption presumption should be at its zenith, given the historic role of the states in matters of health and safety.”¹⁰⁰ *Bruesewitz* is a particularly egregious example of this trend because the Court’s decision is based largely on the majority’s entrenched skepticism about the tort system.

The Supreme Court has usurped the legislative role by preempting state tort claims due to its distrust of the operation of state tort law.¹⁰¹ In doing so, it has imposed its own policy views — that the state tort system is so flawed that it should not handle design-defect claims.¹⁰² The Court should have applied a presumption against preemption because the presumption prevents precisely these types of intrusions by courts into the legislative arena and safeguards state power against federal interference.¹⁰³ The presumption preserves the federal-state balance by requiring a clear congressional purpose to preempt.¹⁰⁴

⁹⁷ See Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 57 (2006) (finding that the Rehnquist Court preempted state law in 52% of decisions); Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612–13 (2007) (“Between the 1983 and 2003 Terms the Supreme Court decided 127 cases involving federal preemption of state law, finding state law preempted approximately half of the time.” (footnote omitted)).

⁹⁸ See Greve & Klick, *supra* note 97, at 52 (reporting a 62.5% preemption rate in state tort law cases between 1986 and 2004 and a 67.6% rate between 1994 and 2004).

⁹⁹ *But see id.* at 52–53 (arguing that the higher preemption rate is due to the lack of state participants in court rather than to hostility to state common law).

¹⁰⁰ Sharkey, *supra* note 2, at 454.

¹⁰¹ By disregarding the default antipreemption presumption, the Court has broadened its discretion to make “illegitimate policy choices.” Cf. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 648 (1990) (noting that the use of legislative history allows judges to usurp legislative power because it “increases their discretion to make illegitimate policy choices”).

¹⁰² Cf. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting) (“[T]he 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.”).

¹⁰³ The presumption promotes federalism and ensures the balance of power between the federal government and the states. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

¹⁰⁴ See Brief of Amici Curiae Kenneth W. Starr and Erwin Chemerinsky in Support of Petitioners Urging Reversal at 8–9, *Bruesewitz*, 131 S. Ct. 1068 (No. 09-152) (“Requiring evidence of a clear and manifest preemptive purpose provides a political check, by affording notice to the states’ representatives in Congress, and it also creates a procedural check, by demanding that state-law-displacing choices satisfy the bicameralism and presentment standards of Article I.”); cf. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1427 (2001) (“Unless the Court is convinced that Congress actually considered — and proceeded to enact into law — a proposal that threatens state prerogatives, there is no guarantee that federal lawmaking procedures served to safeguard federalism.”).

The text of the NCVIA does not clearly evince a congressional intent to preempt state defective-design claims. Rather than be bound by a presumption against preemption, the Court interpreted the NCVIA by drawing inferences about its structure that were based on its own hostility toward state tort law. Where it should have looked for the existence of clear *congressional* intent, the Court instead viewed the statute through its own lens of distrust for tort law. As a result, it substituted its policy judgment for congressional choice and disregarded the checks of federalism, eliminating state control over a field traditionally occupied by the states and perpetuating precisely the evils that the presumption against preemption was designed to avert.

B. Personal Jurisdiction

Stream-of-Commerce Doctrine. — The Due Process Clause of the Fourteenth Amendment limits a state’s ability to exercise personal jurisdiction over a nonresident defendant by requiring that the defendant have sufficient “minimum contacts” with the forum state.¹ At its inception, the concept of minimum contacts performed “two related, but distinguishable, functions[:] [i]t protected the defendant against the burdens of litigating in a distant . . . forum,” an interest “typically described in terms of ‘reasonableness’ or ‘fairness’”;² and it “ensure[d] that the States . . . d[id] not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system,” an interest typically described in terms of “federalism” or “sovereignty.”³ As the American economy grew and transformed in the latter half of the twentieth century, the Supreme Court recognized that the scope of personal jurisdiction had to expand,⁴ and it placed more emphasis on the reasonableness rationale at the expense of sovereignty.⁵ This trend came to a head in *Asahi Metal Industry Co. v. Superior Court*,⁶ in which the Court considered whether the act of placing a good into the stream of commerce was sufficient to trigger personal jurisdiction over the manufacturer in a state where an injury relating to that product occurred.⁷ Although the Court was unanimous in its judgment, it produced two competing opinions, one by Justice O’Connor for four Justices and the other by Justice Brennan for four Justices. Justice O’Connor would have held that the manufacturer must engage in something more to target the forum state than merely placing the

¹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

³ *Id.* at 292–94.

⁴ *See, e.g., McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957).

⁵ *See, e.g., Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

⁶ 480 U.S. 102 (1987).

⁷ *See id.* at 108.