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## A Case Study in the Superiority of the Purposive Approach to Statutory Interpretation: Bruesewitz v. Wyeth

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# A CASE STUDY IN THE SUPERIORITY OF THE PURPOSIVE APPROACH TO STATUTORY INTERPRETATION: *BRUESEWITZ V. WYETH*

Donald G. Gifford,<sup>\*</sup> William L. Reynolds,<sup>\*\*</sup> & Andrew M. Murad<sup>\*\*\*</sup>

*This Article uses the Supreme Court’s 2011 decision in Bruesewitz v. Wyeth LLC to examine the textualist, or “plain meaning,” approach to statutory interpretation. For more than a quarter century, Justice Scalia has successfully promoted textualism, usually associated with conservatism, among his colleagues. In Bruesewitz, Justice Scalia, writing for the majority, and his liberal colleague Justice Sotomayer, in dissent, both employed textualism to determine if the plaintiffs, whose child was allegedly harmed by a vaccine, could pursue common law tort claims or whether their remedies were limited to those available under the no-fault compensation system established by the National Childhood Vaccine Injury Act. Despite these Justices’ common approach to statutory interpretation, they reached diametrically opposite conclusions in opinions that dissected the statutory language and quarreled over the meaning of “even though” and “if” clauses. In contrast, Justice Breyer employed a purposive, or “purposes and objectives,” approach to statutory interpretation. Rather than obsessing over the meaning of each and every phrase, Justice Breyer looked at Congress’s goals in passing the Act. He recognized that Justice Scalia’s conclusion was correct, not because of the supposedly “plain” meaning of specific language, but because this interpretation was the only one that enabled the alternative compensation system to function as Congress envisioned. Other scholars have analyzed Bruesewitz as a preemption case, but despite statutory interpretation’s inherently decisive role in express preemption cases, this is the first Article to highlight Bruesewitz as an illustration of the emptiness of textualism.*

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## I. INTRODUCTION

How to interpret a statute has long been a vexing question. Put bluntly, the Supreme Court has oscillated over the years between two schools of thought.<sup>1</sup> One school purports to look only at the plain meaning of the statutory language to find meaning; the other construes the law in light of the purpose that Congress sought to achieve.<sup>2</sup> Although advocates of the former, “plain meaning” approach claim that it reduces judicial discretion,<sup>3</sup> it is evident that it does not.

The opinions in *Bruesewitz v. Wyeth LLC*<sup>4</sup> illustrate this problem. Although literalism is associated with conservatives such as Justice Scalia,<sup>5</sup> in *Bruesewitz*, Justice Scalia and the liberal Justice Sotomayor reached opposite results<sup>6</sup> while

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1. See William N. Eskridge, Jr., *The Next Textualism*, 37 UCLA L. REV. 621, 623 (1990).

2. See *id.*

3. See, e.g., *id.* at 654 (describing Justice Scalia’s belief that “legislative history should not be consulted (except in cases of absurd results and, possibly, of ambiguity), as something of a prophylactic rule to cabin the discretion of judges”).

4. 131 S. Ct. 1068 (2011).

5. E.g., Bradley C. Karkkainen, Note, “*Plain Meaning*”: *Justice Scalia’s Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL’Y 401, 401 (1994).

6. Compare *Bruesewitz*, 131 S. Ct. at 1082 (majority opinion) (holding that the National Childhood Vaccine Injury Act preempts design defect claims against vaccine manufacturers), with *id.* at 1100–01 (Sotomayor, J., dissenting) (arguing that the majority’s decision to bar all design defect claims against vaccine manufacturers is one that Congress should make).

both were purportedly applying the plain meaning rule.<sup>7</sup> In contrast, Justice Breyer sought to determine the reason or purpose that motivated Congress to adopt the law.<sup>8</sup> In doing so, he considered why Congress concluded that a no-fault compensation system offered a better approach to the handling of vaccine-related injuries than did traditional tort law.<sup>9</sup> In short, Justice Breyer thought seriously about a difficult problem. Justices Scalia and Sotomayor, on the other hand, used shortcuts that led them not to think about the problem at all.

In 1992, six-month-old Hannah Bruesewitz developed residual seizure disorder and developmental delay after receiving her third dose of the diphtheria-pertussis-tetanus (DPT) vaccine manufactured by Lederle Laboratories.<sup>10</sup> Her parents were unable to receive compensation from the National Vaccine Injury Compensation Program (NVICP), a no-fault compensation system for vaccine-related injuries and deaths,<sup>11</sup> because her conditions were not identified as ones that were compensable.<sup>12</sup> Her parents then filed a tort claim against the manufacturer in state court,<sup>13</sup> but in *Bruesewitz v. Wyeth LLC*,<sup>14</sup> the Supreme Court held that the National Childhood Vaccine Injury Act (NCVIA) preempted Hannah's tort claims.<sup>15</sup> The majority in *Bruesewitz*, led by Justice Scalia, applied the plain meaning rule of statutory construction to find that the "plain" language of the Act preempted Hannah's design-defect claims.<sup>16</sup> Justice Sotomayor, writing in dissent, applied the same textual theory, yet she reached a completely different conclusion.<sup>17</sup> In other words, Justice Sotomayor did not believe that the "plain" language of the NCVIA preempted Hannah from seeking recovery in the tort system.<sup>18</sup>

Justice Scalia claims that the plain meaning rule is the most principled method of statutory interpretation because it forces judges to uphold the letter of the law.<sup>19</sup> Scalia argues that the text *alone* is the only true indicia of

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7. See *id.* at 1075–80 (majority opinion) (citations omitted); *id.* at 1086–93 (Sotomayor, J., dissenting) (citations omitted); see also *infra* Part III.A (discussing Justice Scalia's majority opinion and Justice Sotomayor's dissent).

8. See *id.* at 1082–83 (Breyer, J., concurring); see also *infra* Part IV.D (discussing Justice Breyer's concurrence).

9. See *id.*

10. See *id.* at 1074–75 (majority opinion) (citing *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 236 (3d Cir. 2009)).

11. See 42 U.S.C. § 300aa-10 (2006).

12. See *Bruesewitz*, 561 F.3d at 237 (citing *Bruesewitz v. Sec'y of Dep't of Health & Human Servs.*, No. 95-0266V, 2002 WL 31965744, at \*13–17 (Fed. Cl. Dec. 20, 2002)).

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

14. 131 S. Ct. 1068.

15. See *id.* at 1082.

16. See *id.* at 1075–80 (citations omitted).

17. See *id.* at 1086–1101 (Sotomayor, J., dissenting) (citations omitted).

18. See *id.* at 1101.

19. See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) (analyzing the textualist method of interpretation). For a biting critique of the views expressed in *Reading Law* by a leading conservative jurist who echoes the views expressed in this Article, see Richard A. Posner, *The Spirit Killeth, but the Letter Giveth*

congressional intent.<sup>20</sup> Looking outside the statutory text to legislative history, according to Justice Scalia, promotes unprincipled judicial subjectivity, which he likens to “entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”<sup>21</sup>

If, as Scalia argues, the plain meaning approach is the most straightforward indicator of legislative intent, then both he and Justice Sotomayor should have reached the same result in *Bruesewitz*; however, they reached opposite conclusions.<sup>22</sup> This Article suggests that it is not unusual to reach inconsistent results when using the so-called plain meaning rule. In fact, ever since Justice Scalia joined the Supreme Court and began promoting his agenda,<sup>23</sup> such plain meaning debates have become common.<sup>24</sup>

The alternative to textualism and the plain meaning rule is Justice Breyer’s purposive or functional approach to statutory interpretation.<sup>25</sup> Breyer, who leads the fight against Scalia’s interpretive ideology,<sup>26</sup> supports an approach that seeks to identify and follow the purpose of the statute.<sup>27</sup> Rather than attempt to interpret statutory language in a vacuum as Justice Scalia does,<sup>28</sup> Justice Breyer seeks *first* to understand Congress’s goals in passing a particular statute.<sup>29</sup> After

*Life*, NEW REPUBLIC, Sept. 13, 2012, at 18 (book review); Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012, 12:00 PM), <http://www.tnr.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism> (book review).

20. See *infra* notes 59–61 & 76–82 and accompanying text.

21. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).

22. Compare *Bruesewitz*, 131 S. Ct. at 1082 (holding that the NCVIA preempts design defect claims against vaccine manufacturers), with *id.* at 1100–01 (Sotomayor, J., dissenting) (arguing that the majority’s decision to bar all design defect claims against vaccine manufacturers is one that Congress should make).

23. See, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992 n.4 (2001) (“Those associated with conservative causes, like Justice Scalia and Judge Easterbrook, are leading theorists of the new textualism . . .”).

24. See, e.g., Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 180–81 (1996) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 528–29 (1996) (Thomas, J., dissenting)) (discussing a case involving a debate between Justices over the use of statutory interpretation and legislative history); see also *infra* Part III.B (providing examples of such debates).

25. See Ken I. Kersch, *Justice Breyer’s Mandarin Liberty*, 73 U. CHI. L. REV. 759, 771 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

26. See Dortzbach, *supra* note 24, at 182 (“While other justices have defended the use of legislative history, Justice Breyer is seen as having the greater role of acting as the new counterweight to Justice Scalia’s textualism.”).

27. See *id.* at 169 (citing Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992)).

28. See generally Eskridge, Jr., *supra* note 1, at 623 (describing how Justice Scalia does not think the Court should look to legislative history if there is an apparent plain meaning).

29. See, e.g., *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1083–84 (2011) (Breyer, J., concurring) (citations omitted) (showing how Justice Breyer began by analyzing Congress’s motive behind legislation).

uncovering the purpose of the legislation, Justice Breyer *then* interprets the statutory language in a manner that fulfills these goals.<sup>30</sup>

Justice Breyer's concurring opinion in *Bruesewitz* demonstrates the advantages of discarding Justice Scalia's plain meaning approach in favor of Breyer's functional theory.<sup>31</sup> Breyer realized that Scalia and Sotomayor had reached inconsistent results using the same method of interpretation.<sup>32</sup> Instead of obsessing over the meaning of each and every statutory word, as Scalia and Sotomayor did, Breyer first looked to Congress's goals in passing the NCVIA.<sup>33</sup> After placing the text within its proper legislative context, he concluded that Congress intended to preempt state law design-defect claims.<sup>34</sup>

We believe the Court should adopt Justice Breyer's analysis. To understand why the plain meaning rule should be abandoned in favor of the purposive approach, we provide a brief overview of both methods in Part II of this Article. With an understanding of these interpretive theories in mind, in Part III, we begin by discussing the conflicting plain meaning results of Justices Scalia and Sotomayor in *Bruesewitz*. At the end of Part III, we argue that conflicting interpretations have become increasingly common since Justice Scalia was appointed to the Court in 1986. Part IV analyzes Justice Breyer's concurring opinion by considering, as he did, how the way in which an alternative no-fault compensation plan works inherently leads to the correct interpretation of the statutory language at issue in *Bruesewitz*.

Finally, we contend that Justice Breyer's approach to statutory interpretation resolves the frequent interpretive conflicts that arise when the plain meaning rule is applied. Too many inconsistent opinions have been authored on the basis of Justice Scalia's incoherent theory. The Court should ensure that *Bruesewitz* is the last opinion to suffer from this flaw; it is time to abandon the conservative, plain meaning rule in favor of Justice Breyer's functional alternative.

## II. STATUTORY INTERPRETATION

Although *Bruesewitz* features two conflicting opinions purporting to apply the plain meaning rule, one written by a liberal Justice and the other by a conservative Justice, the doctrine is more commonly associated with conservatives.<sup>35</sup> In a 1983 law review article on statutory interpretation, Judge Posner noted: "It is not an accident that most 'loose constructionists' are political

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30. See, e.g., *id.* at 1085–86 (citations omitted) (applying Congress's purposes to interpretation of the legislation).

31. See *id.* at 1082–86 (citations omitted).

32. See *id.* at 1082–83.

33. See *id.* at 1083–84 (citations omitted).

34. See *id.* at 1085–86 (citations omitted).

35. See Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669, 674 (2005).

liberals and most ‘strict constructionists’ are political conservatives. The former think that modern legislation does not go far enough, the latter that it goes too far. Each school has developed interpretive techniques appropriate to its political ends.”<sup>36</sup> Posner made this claim nearly thirty years ago, but his astute observation still rings true today. In fact, this ideological split between liberals and conservatives is most readily apparent among the nine Justices of the United States Supreme Court.<sup>37</sup>

Conservative Justices, led most prominently by Justice Scalia, approach statutory interpretation through the narrow lens of the plain meaning rule.<sup>38</sup> This approach, also known as “textualism,”<sup>39</sup> looks primarily to the statutory *text* to uncover its “plain meaning.”<sup>40</sup> Textualists rarely, if ever, look seriously to legislative history documents for evidence of Congress’s intent.<sup>41</sup> Textualism, of course, is not inherently conservative; indeed, the liberal Justice Sotomayor used textualism in her dissent in *Bruesewitz*.<sup>42</sup> Nevertheless, textualism seems to lend itself to the limited style of government that conservatives favor.<sup>43</sup>

In contrast, proponents of the practical alternative, such as Justice Breyer, seek to interpret the statutory text in a manner that is consistent with the *purpose* of the legislation.<sup>44</sup> To uncover Congress’s goals in passing the legislation, liberal Justices, unlike their conservative counterparts, properly look beyond the text to legislative history documents.<sup>45</sup> The purposive or practical approach to

36. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 822 (1983).

37. E.g., Robert Barnes, *Term Saw High Court Move to the Right: Roberts-Led March Likely to Continue*, WASH. POST, July 1, 2009, at A1.

38. See, e.g., McCubbins & Rodriguez, *supra* note 35, at 674 (“In recent years, judicial conservatives champion an approach to statutory interpretation labeled ‘textualism,’ that is, fidelity to the so-called plain meaning of legislation.”); see also Eskridge, Jr., *supra* note 23, at 992 n.4 (“Those associated with conservative causes, like Justice Scalia and Judge Easterbrook, are leading theorists of the new textualism . . .”).

39. Throughout this Article, we use the term “plain meaning” and “textualist” interchangeably.

40. See McCubbins & Rodriguez, *supra* note 35, at 674.

41. See, e.g., Eskridge, Jr., *supra* note 1, at 623 (describing how Justice Scalia, a textualist, has “criticized the Court for relying on legislative history to confirm or rebut the apparent plain meaning of a statute”).

42. See *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1088 (2011) (Sotomayor, J., dissenting); see also *infra* Part III.A.2.

43. See Paul Killebrew, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1899–1900 (2007). A comparison could be drawn with another favorite conservative interpretive ideology, “originalism,” although originalism can lead to activist results. See, e.g., *Alden v. Maine*, 527 U.S. 706, 713 (1999) (finding sovereign immunity using an originalist approach even though the Eleventh Amendment provided no textual support). See generally R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 PEPP. L. REV. 37, 41–64 (1997) (detailing the history of statutory interpretation in this country).

44. See Dortzbach, *supra* note 24, at 169 (citing Breyer, *supra* note 27).

45. See, e.g., James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 120 & n.6

interpretation is based on the notion that legislators who pass a law are addressing a specific problem or set of problems.<sup>46</sup> The mission of the faithful interpretive court under that theory is to interpret the law so as to address the problem.<sup>47</sup> A literalist such as Justice Scalia, however, is interested only in what he perceives the language to say.

#### A. *The Interpretive Problems in Bruesewitz*

*Bruesewitz v. Wyeth LLC* is interesting for any number of reasons. One such reason is its use—or rejection—of legislative history to interpret the NCVIA.<sup>48</sup> Both the liberal Justice Sotomayor and the conservative Justice Scalia used the plain meaning rule for statutory interpretation in *Bruesewitz* to reach opposite results despite their ostensible use of the same methodology.<sup>49</sup> The two opinions are fascinating because they show that the plain meaning, literalist approach does not necessarily lead to an easy, nonideological result.

In contrast, Justice Breyer used a more functional approach, the “purposes and objectives” theory of statutory interpretation.<sup>50</sup> Although we argue that Breyer’s approach is the better of the two methods,<sup>51</sup> it is important to have a general understanding of both theories before delving into the particulars of each Justice’s opinion. Therefore, the next two Sections briefly summarize the conservative plain meaning rule and the functional theory Justice Breyer espoused.

#### B. *The Plain Meaning Rule*

##### 1. *A Brief Overview*

The plain meaning rule generally stands for the proposition that the meaning of a statute can be revealed through a simple examination of the statutory

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(2008) (finding that between 1969 and 2006 the “liberals—Justices Brennan, White, Marshall, Blackmun, Stevens, Souter, Ginsburg, and Breyer—rely on legislative history as a group far more often than their . . . conservative counterparts”); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1659 (2010) (“[T]he propensity of Justices to cite legislative history is significantly correlated with the ideology of the Justices themselves: liberal Justices are more likely than conservative Justices to use it.”).

46. See Breyer, *supra* note 27, at 858.

47. See *id.* at 853.

48. Cf. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075–82 (2011) (citations omitted) (illustrating the fact that the majority does not use legislative history in interpreting the NCVIA and explicitly rejects the dissent’s use of it).

49. See *id.* at 1075–80 (citations omitted); *id.* at 1086–93 (Sotomayor, J., dissenting) (citations omitted).

50. See *id.* at 1083–86 (Breyer, J., concurring) (citations omitted).

51. See *infra* notes 314–51 and accompanying text.

language.<sup>52</sup> In 1917, the Supreme Court pronounced what has become the traditional articulation of the plain meaning rule in *Caminetti v. United States*.<sup>53</sup> The Court explained that “[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.”<sup>54</sup> Thus, judges applying the plain meaning rule must *first* look to the language of the statute. If the statutory language is *unambiguous*, then the court should enforce the statute according to its plain, or ordinary, meaning.<sup>55</sup> On the other hand, if the statute is ambiguous, then courts are permitted to use external sources, such as legislative history,<sup>56</sup> to help guide their interpretation of the statute.<sup>57</sup>

Proponents of the plain meaning approach claim that the rule furthers the democratic process.<sup>58</sup> Unlike legislative history, which is *not* law, the statutory text becomes law through the proper constitutional channels of bicameralism and presentment.<sup>59</sup> Therefore, the only instrument entitled to constitutional deference is the actual statutory language. The statute itself, not legislative

52. See 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2007) (citations omitted).

53. 242 U.S. 470 (1917). In *Caminetti*, the Supreme Court interpreted a provision of the White Slave Traffic (Mann) Act, which made it a crime to “knowingly transport . . . in interstate . . . commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.” *Id.* at 482, 488 n.1 (quoting White Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2006))). Several defendants had been convicted under the Act for transporting their mistresses across state lines. *See id.* at 482–84 (citing *Diggs v. United States*, 220 F. 545, 559 (1915)). On review in the Supreme Court, the defendants pointed to the legislative history, which indicated that the Act was intended to prevent the interstate transportation of women for *prostitution*. *See id.* at 484–85. Therefore, the defendants argued that the prohibition did not apply to them because they did not transport their mistresses for commercial gain. *See id.* The Court rejected defendants’ proffer of legislative history because there was “no ambiguity in the terms of [the] act,” which prohibited the defendants from transporting the women for “an immoral purpose, to wit, becoming a concubine or mistress.” *Id.* at 485–86. Thus, the Court affirmed the defendants’ convictions based on the plain meaning of the statute without the need to resort to external aids. *See id.* at 485, 496.

54. *Id.* at 485 (citing *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899)).

55. *See id.* (citing *United States v. First Nat’l Bank of Detroit*, 234 U.S. 245, 258 (1914); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409–10 (1914); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1895); *Lake Cnty. v. Rollins*, 130 U.S. 662, 670, 671 (1889)).

56. “Legislative history” is a particularly broad term. Some commentators have noted that the phrase encompasses “almost anything that casts light upon what Congress attempted to do when it enacted a statute.” Eskridge, Jr., *supra* note 1, at 626. Thus, the phrase includes committee reports, statements made in committee hearings, and statements made on the floor. *See id.*

57. *See Caminetti*, 242 U.S. at 490 (citing *Binns v. United States*, 194 U.S. 486, 495 (1904); *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U.S. 238, 245–46 (1902); *Bate Refrigerating Co.*, 157 U.S. at 41–43; *Blake v. Nat’l Banks*, 90 U.S. 307, 319 (1874)).

58. *See, e.g.*, Eskridge, Jr., *supra* note 1, at 654 (explaining Justice Scalia’s belief that “[t]he only legitimate statutory law is that which has been approved by both chambers of Congress and by the President”).

59. *See* U.S. CONST. art. I, § 7, cl. 2.

history, is the primary indicator of legislative purpose.<sup>60</sup> The text, according to Justice Scalia, is the only *true* unified voice of Congress because:

Committee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President. It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions.<sup>61</sup>

Finally, many fear that the use of legislative history promotes unbridled judicial subjectivity.<sup>62</sup> As law and economics scholar Judge Easterbrook once warned, the expansive legislative record allows a “court [to] manipulate the meaning of a law by choosing which snippets to emphasize . . . [It] offers wilful judges an opportunity to pose questions and devise answers . . .”<sup>63</sup> Justice Scalia shares that fear, reasoning that neither judges nor practitioners should be allowed to undermine the plain language of a statute and emphasize only those parts of the legislative history that are favorable to their position.<sup>64</sup>

## 2. Justice Scalia’s “Textualist” Approach to Statutory Interpretation

“Justice Antonin Scalia hates legislative history.”<sup>65</sup> Scalia endorses a strict application of the plain meaning rule known as textualism.<sup>66</sup> As a textualist, Justice Scalia will not consider legislative history *even* to “confirm the apparent meaning of a statutory text.”<sup>67</sup> Since joining the nation’s top bench in 1986,

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60. See Eskridge, Jr., *supra* note 1, at 649 (quoting Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375).

61. *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) (citation omitted) (citing *Thompson*, 484 U.S. at 84–85); see also *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (“The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.”).

Notwithstanding these attacks, critics of the plain meaning rule have argued that the approach has many interpretive fallacies of its own. See, e.g., Karkkainen, *supra* note 5, at 476 (“[A] statute’s plain meaning is often an interpretive conclusion reached only after a series of difficult and controversial interpretive choices are made—choices of what rules to apply, what evidence to admit, what dictionary definitions to invoke.”). For example, while the rule purports to cabin judicial discretion, opponents claim that judges must make a number of subjective decisions to reach the conclusion that a particular statute has a “plain,” or common, meaning. See *id.*

62. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1885 (1998).

63. *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989).

64. See *supra* note 21 and accompanying text.

65. JOSEPH L. GERKEN, WHAT GOOD IS LEGISLATIVE HISTORY? JUSTICE SCALIA IN THE FEDERAL COURTS OF APPEALS I (2007) (“Justice Antonin Scalia hates legislative history. That is only a *slight* oversimplification.” (emphasis added)).

66. See *id.* at 2.

67. Eskridge, Jr., *supra* note 1, at 623.

Justice Scalia has not shied away from asserting his textualist ideology.<sup>68</sup> For example, in the spring of 1987, shortly after his appointment to the Supreme Court, Justice Scalia issued an opinion in *INS v. Cardoza-Fonseca*<sup>69</sup> in which he criticized the majority for relying on legislative history to support its interpretation of the Immigration and Nationality Act of 1952.<sup>70</sup>

In *Cardoza-Fonseca*, the Court was faced with the task of deciding whether a Nicaraguan citizen was eligible for asylum under section 208(a) of the Immigration and Nationality Act.<sup>71</sup> Section 208(a) authorizes the Attorney General to grant asylum “to an alien who is unable or unwilling to return to his home country ‘because of persecution or a *well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion.’”<sup>72</sup> The Court, led by Justice Stevens, rejected the government’s contention that an alien needed to prove that he was “more likely than not to be subject to persecution” to receive asylum.<sup>73</sup> Instead, the Court found that the language clearly supported a “well-founded fear” standard.<sup>74</sup> After engaging in a textual analysis, the Court also determined that the legislative history verified “the plain language of the Act.”<sup>75</sup>

Although Justice Scalia agreed with the Court’s textual argument, he concurred in the judgment because the majority did not adhere to a strict plain meaning approach.<sup>76</sup> In his view, after finding that the text was clear, the Court should not have examined the legislative history.<sup>77</sup> Justice Scalia explained:

Although it is true that the Court in recent times has expressed approval of this doctrine, that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.<sup>78</sup>

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68. *See id.*

69. 480 U.S. 421 (1987).

70. *See id.* at 452–53 (Scalia, J., concurring in judgment) (quoting *id.* at 448 (majority opinion)); *see also* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)) (providing the Act at issue in this case).

71. *See Cardoza-Fonseca*, 480 U.S. at 424 (citing Refugee Act of 1980, Pub. L. No. 96-212, § 208, 94 Stat. 102, 105 (codified as amended at 8 U.S.C. § 1158 (2006)); Immigration and Nationality Act § 243(h)).

72. *Id.* (emphasis added) (quoting Refugee Act § 201 (codified at 8 U.S.C. § 1101(a)(42))).

73. *Id.* (citing Refugee Act § 208(a); Immigration and Nationality Act § 243(h)).

74. *See id.* at 430 (citing Refugee Act § 208(a); Immigration and Nationality Act § 243(h)).

75. *See id.* at 432.

76. *See id.* at 452 (Scalia, J., concurring in judgment) (citing *id.* at 432–43 (majority opinion)).

77. *See id.* (citing *id.* at 432–43 (majority opinion)).

78. *Id.*

Because the language was clear, argued Justice Scalia,<sup>79</sup> the Court had fulfilled its interpretive duty and was “not free to replace [the language] with an unenacted legislative intent.”<sup>80</sup>

Justice Scalia’s opinion in *Cardoza-Fonseca* provided a glimpse of what was yet to come. According to Scalia, if the statutory text is clear, the analysis is over; “do not pass go, do not collect \$200.”<sup>81</sup> His strict adherence to the plain meaning rule continues to guide conservatives.<sup>82</sup>

### C. *The Purposive or Functional Approach*

On the opposite side of the interpretive spectrum are the liberal Justices, led by Justice Breyer, who advocate an approach to statutory interpretation that focuses on the legislature’s purpose in adopting the legislation.<sup>83</sup> This interpretive method has an ancient and impeccable lineage.<sup>84</sup> In 1584, for example, the Court of the Exchequer stated:

[F]or the sure and true interpretation of all statutes . . . four things are to be . . . considered:—

[] 1st. What was the common law before the making of the Act.

[] 2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved . . .

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such [] construction as shall suppress the mischief, and advance the remedy . . . .<sup>85</sup>

In other words, a court should consider the evil, or mischief, that the law sought to correct, and then the court should interpret the law so as to eradicate that evil.<sup>86</sup> There is nothing here to suggest that a court should look solely to the

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79. *See id.*

80. *Id.* at 453.

81. This phrase is a popular-culture reference to the board game Monopoly (2006 Hasbro). *See About Monopoly*, HASBRO GAMING, [http://www.hasbro.com/monopoly/en\\_US/discover/about.cfm](http://www.hasbro.com/monopoly/en_US/discover/about.cfm) (last visited Nov. 21, 2012).

82. *See McCubbins & Rodriguez, supra* note 35, at 674.

83. *See generally* Brudney & Ditslear, *supra* note 45, at 119–20 (discussing attempts to ascertain the purposes or intentions of legislation); Law & Zaring, *supra* note 45, at 1659 (declaring the influence of political ideology on use of legislative history).

84. *See generally* Eskridge, Jr., *supra* note 23, at 998–99 (describing how English judges, as early as 1500, went outside the language of statutes and used nontextualist approaches in interpreting them).

85. *Heydon’s Case*, (1584) 76 Eng. Rep. 637, 638; 3 Co. Rep. 7 a, 7 b (citations omitted). It is interesting that Justice Scalia—as devoted to history as he claims to be—does not seem to have grappled with this history of interpretive methods employed by the great common law judges of England.

86. *See id.* (citations omitted).

plain language of the statute and not consider the purposes that led to the adoption of the law.

Justice Story, in his great treatise on constitutional law, was of like mind: “[T]he reason and spirit of the law, or the causes, which led to its enactment, are often the best exponents of the words, and limit their application.”<sup>87</sup>

The Supreme Court has long recognized this approach to interpretation. After the Court’s 1917 decision in *Caminetti v. United States*,<sup>88</sup> for example, the plain meaning approach remained the dominant theory of statutory interpretation for the next twenty years.<sup>89</sup> In 1940, however, the Supreme Court ushered in a new era of statutory interpretation jurisprudence when it issued its decision in *United States v. American Trucking Ass’n*.<sup>90</sup> In *American Trucking*, a group of truckers and common carriers sought an injunction requiring the Interstate Commerce Commission (ICC) to regulate the qualifications and hours of service of all employees in the motor carrier industry, not just those employees whose jobs affected public safety.<sup>91</sup> The Court was asked to determine who was considered an “employee” under section 204(a) of the Motor Carrier Act.<sup>92</sup> Because the statute did not define “employee,” the Court turned to the legislative history and concluded that Congress did not intend for the ICC to have the authority to regulate *all* employees—rather, only those employees “whose activities affect[ed] the safety of operation.”<sup>93</sup>

The holding, however, was not the most influential component of the Court’s decision. Instead, it was the Court’s discussion of legislative history<sup>94</sup> that turned the tide of statutory interpretation jurisprudence for the next forty years. Significantly, the Court explained the propriety of relying on legislative history to uncover congressional purpose, reasoning that “[w]hen aid to construction of the meaning of words, as used in the statute, is available, there

87. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 400, at 384 (Cambridge, E.W. Metcalf & Co. 1833) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*61).

88. 242 U.S. 470 (1917). For a discussion of the Court’s use of the plain meaning approach in *Caminetti*, see *supra* note 53 and accompanying text.

89. See Arthur W. Murphy, *Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975) (quoting *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 278 (1929)).

90. 310 U.S. 534 (1940). See also GERKEN, *supra* note 65, at 57–65 (citations omitted), for an overview of the Supreme Court’s use of the plain meaning rule between the Court’s 1917 decision in *Caminetti* and its 1940 decision in *American Trucking Ass’n*.

91. See *Am. Trucking Ass’n*, 310 U.S. at 541 (citing Motor Carrier Act, 1935, ch. 498, sec. 204(a), 49 Stat. 543, 546–47 (codified as amended at 49 U.S.C. § 31502 (2011)); INTERSTATE COMMERCE COMM’N, RULES OF PRACTICE BEFORE THE COMMISSION Rule XV (1922)).

92. See *id.* at 542 (quoting § 204(a)(2), 49 Stat. at 546). Under § 204(a)(1) and (2), the ICC could regulate the “qualifications and maximum hours of service of *employees*.” § 204(a), 49 Stat. at 546 (emphasis added).

93. See *id.* at 553. In particular, the Court noted that the “committee reports and the debates contain no indication that a regulation of the qualifications and hours of service of all employees was contemplated; in fact, the evidence points the other way.” *Id.* at 547–48.

94. See *id.* at 542–44 (citations omitted).

certainly can be no ‘rule of law’ which forbids its use, however *clear* the words may appear on ‘superficial examination.’”<sup>95</sup> No longer was the Court limited to the four corners of the statute. Instead, it was free to examine any sources that aided the interpretive process, even if the statutory language had an apparently *plain* meaning.

Many believed that the legislative history era, beginning with the Court’s opinion in *American Trucking*, came to an abrupt end in 1986 when Justice Scalia was appointed to the Supreme Court.<sup>96</sup> As demonstrated throughout his opinion in *INS v. Cardoza-Fonseca*,<sup>97</sup> Justice Scalia is unwilling to use legislative history for anything, even to confirm his own “plain” interpretation. For those jurists who endorsed the purposive approach, it appears that their search for congressional purpose had taken a back seat to Scalia’s conservative agenda. Indeed, by the early 1990s, it seemed likely that Justice Scalia’s textualism had spread like wildfire, even among those members of the Court who had previously favored the use of legislative history.<sup>98</sup> As one commentator explained, those Justices “who[] have from time to time endorsed the use of legislative history—now regularly produce textualist opinions that look very much like those written in the workshops of Justices Scalia and Thomas.”<sup>99</sup>

In 1994, however, the purposive approach to statutory interpretation was saved from its impending doom when Justice Breyer was appointed to the Supreme Court.<sup>100</sup> Justice Breyer, viewed by many as the liberal “counterweight” to Justice Scalia, made it clear that he would stand up to the conservative jurist.<sup>101</sup> Indeed, even before Justice Breyer joined the Court, he clearly articulated this point.<sup>102</sup>

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95. *Id.* at 543–44 (quoting *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 465 (1934); *Bos. Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928)).

96. *See, e.g.*, Eskridge, Jr., *supra* note 1, at 656–57 (1990) (stating that since Justice Scalia has been on the Court, “the Court is now somewhat less willing to refer to legislative history”); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 365 (1994) (recognizing that “in any case in which another Justice needs the vote of Justice Scalia to form a majority or controlling opinion . . . he or she will lose majority status” if legislative history is employed); *cf.* Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court’s Bankruptcy Jurisprudence*, 45 N.Y.L. SCH. L. REV. 149, 155–59 (2001) (focusing on the exclusion of legislative history as the defining feature of the new textualism).

97. *See* 480 U.S. 421, 452–55 (1987) (Scalia, J., concurring).

98. *See, e.g.*, Eskridge, Jr., *supra* note 1, at 656 (“In each year that Justice Scalia has sat on the Court . . . his [textualist] theory has exerted greater influence on the Court’s practice.”); Merrill, *supra* note 96, at 365 (discussing how more Justices began endorsing the use of legislative history after Justice Scalia joined the Court).

99. Merrill, *supra* note 96, at 365.

100. *See* Dortzbach, *supra* note 24, at 169 (citing Breyer, *supra* note 27).

101. *See id.* at 182 (“While other justices have defended the use of legislative history, Justice Breyer is seen as having the greater role of acting as the new counterweight to Justice Scalia’s textualism.”).

102. *See generally* Breyer, *supra* note 27 (illustrating his viewpoints in an article promoting legislative history published before joining the Court).

In 1992, while serving as the Chief Judge of the Court of Appeals for the First Circuit, Justice Breyer published his well-known law review article entitled, *On the Uses of Legislative History in Interpreting Statutes*.<sup>103</sup> There, he promoted the use of legislative history as an aid to uncover congressional purpose.<sup>104</sup> Justice Breyer asserted that “[a] court often needs to know the purpose a particular statutory word or phrase serves within the broader context of a statutory scheme in order to decide properly whether a particular circumstance falls within the scope of that word or phrase.”<sup>105</sup>

Essentially, then-Judge Breyer was pointing out a fundamental difference between the two dominant approaches to statutory interpretation. Unlike the plain meaning rule, the inquiry into purpose does *not* view the statutory language in complete isolation; instead, it provides the necessary legislative context, which is then used to put “meat” on the bare statutory bones.

Justice Breyer’s support for a purposive approach to questions of interpretation can be traced directly to the famous and vastly influential work by Professors Henry Hart and Albert Sacks, *The Legal Process*.<sup>106</sup> The book mocks the plain meaning rule, and especially the *Caminetti* decision, for their simplicity.<sup>107</sup> Instead, Hart and Sacks cogently and powerfully make the case for a comprehensive approach to interpretation, one that tries to place the language of the statute in context, giving due consideration to the relevance, competence, and probative value of legislative history (defined very broadly).<sup>108</sup>

Hart and Sacks summarize their approach to questions of interpretation in this way:

[T]he object of interpretation of a statute is to determine the meaning . . . and

[s]ince meaning depends upon context; and

. . . [A]ll aspects of the internal legislative history of a statute . . . are part of its context;—

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103. *Id.*

104. *See id.* at 853–54.

105. *Id.* at 853.

106. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). *The Legal Process* had a long gestation period and was originally “published” in mimeograph form in 1958. *See* Erwin N. Griswold, *Preface to id.*, at vii. For many years, all 1,400 plus pages of it circulated in that unwieldy form. *See id.* at vii–viii. Finally, Professors William N. Eskridge, Jr. and Philip P. Frickey polished and republished it. *See id.* at ix. Eskridge and Frickey’s introduction to *The Legal Process* contains a lengthy history of the ideas found in the book. *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra*, at li–cxxxv (citations omitted).

107. *See* HART & SACKS, *supra* note 106, at 1211–12, 1238–43 (citations omitted).

108. *See id.* at 1253–54.

All such aspects may be directly relevant in determining the meaning which ought to be attributed to the statute.<sup>109</sup>

Hart and Sacks, in other words, favored a contextual and nuanced method of looking at questions of interpretation.<sup>110</sup> They would have been horrified at the simplistic approach Justice Scalia adopted. Both Scalia and Breyer were at Harvard Law School in the 1960s during the heyday of the Legal Process School.<sup>111</sup> One has followed the Legal Process School, and one has not.<sup>112</sup> It would be fascinating to trace the reasons behind their individual responses to the Hart and Sacks model of interpretation. The divergence may not be more complicated than gravitation to the interpretive method that is most likely to lead the writer to a desired result: It simply may be easier to manipulate simplistic doctrines than nuanced ones.<sup>113</sup> On the other hand, the preferences may have deeper roots.

Rejection of the plain meaning rule is not necessarily a liberal trait, however. Judge Henry Friendly, for example, a noted conservative jurist, had short shrift for the doctrine.<sup>114</sup> Additionally, Judge Learned Hand, perhaps the most famous federal circuit judge of the twentieth century, and also a conservative, wrote what is perhaps the most quoted damnation of the rule: “There is no surer way to misread any document than to read it literally . . . .”<sup>115</sup> Nevertheless, the plain meaning rule has come to be associated with current-day conservatives.

### III. “PLAIN MEANING” AND INCONSISTENT RESULTS

Although the plain meaning approach appears to be the most straightforward approach to statutory interpretation, this philosophy can often lead to inconsistent results. The debate between the majority and dissent in the Supreme

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109. *Id.* at 1253. The Hart and Sacks method of interpretation is laid out more carefully later in the book. *See id.* at 1374–80.

110. *See id.* at 1374–80.

111. *See* Eskridge, Jr. & Frickey, *supra* note 106, at c–cxiii (citations omitted); THE SUPREME COURT HISTORICAL SOC’Y, THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1995, at 512, 537 (Clare Cushman ed., 2d ed. 1995). One of the authors of this article (Bill Reynolds) was also at Harvard Law School during that time and taught for many years a course based on *The Legal Process*; he is an ardent follower of the Hart and Sacks methodology.

112. *See, e.g.,* Kelso, *supra* note 43, at 38, 39–40 (1997) (recognizing that Justice Scalia’s “New Textualism” approach is a clear alternative to the Legal Process School and that “Breyer clearly reject[s] the New Textualism model”).

113. For example, literalists tend to rely on dictionaries—and to pick and choose what dictionaries are used. *See* Kelly Casey Mullally, *Patent Hermeneutics: Form and Substance in Claim Construction*, 59 FLA. L. REV. 333, 368 (2007) (citing Joseph Scott Miller & James A. Hilsenteger, *The Proven Key: Roles and Rules for Dictionaries at the Patent Office and the Courts*, 54 AM. U. L. REV. 829 app.B, tbl.5 (2005)).

114. *See* DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 187 (2012) (quoting *Giuseppe v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring)) (citing BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 66–67 (1984)).

115. *Giuseppe*, 144 F.2d at 624 (Hand, J., concurring).

Court's recent decision in *Bruesewitz v. Wyeth LLC* highlights the inconsistent application of this purportedly "plain" theory.<sup>116</sup>

#### A. *Bruesewitz v. Wyeth LLC: The Case*

After receiving her third dose of the DPT vaccine on April 1, 1992, six-month-old Hannah Bruesewitz began experiencing seizures.<sup>117</sup> Shortly thereafter, Hannah was diagnosed with residual seizure disorder and developmental delay.<sup>118</sup> Hannah still suffers from both conditions, and doctors predict that they will continue to affect her for the rest of her life.<sup>119</sup>

In 1995, Hannah's parents, seeking redress for their daughter's condition, which they believed to be vaccine-related,<sup>120</sup> followed the administrative procedures set forth in the NCVIA<sup>121</sup> and filed a petition for compensation through its no-fault system.<sup>122</sup> The special master found that Hannah was not entitled to compensation because her conditions were not listed in the NCVIA's Vaccine Injury Table.<sup>123</sup>

After Hannah was denied compensation in the no-fault regime, her parents sued Wyeth in state court,<sup>124</sup> claiming that the vaccine's defective design caused Hannah's alleged harms.<sup>125</sup> The case was removed to federal court, and a judge granted Wyeth's motion for summary judgment, holding that Hannah's design-defect claims were preempted by the NCVIA.<sup>126</sup> On appeal, the Third Circuit

116. See *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075–82 (2011) (citations omitted); *id.* at 1086–1101 (Sotomayor, J., dissenting) (citations omitted).

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

118. See *id.*

119. See *id.*

120. This belief has been challenged by numerous studies showing no link between childhood vaccines and neurological illnesses. See, e.g., Michael J. Smith & Charles R. Woods, *On-Time Vaccine Receipt in the First Year Does Not Adversely Affect Neuropsychological Outcomes*, 125 PEDIATRICS 1134, 1140 (2010) ("[R]eceipt of vaccines during infancy has no effect on neurodevelopmental outcomes 7 to 10 years later.").

121. National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34 (2006). The NCVIA established a no-fault compensation regime for vaccine-related injuries or deaths through the NVICP. See *id.* at §§ 300aa-10 to -15.

122. See *Bruesewitz*, 561 F.3d at 237 (citing *Bruesewitz v. Sec'y of Dep't of Health & Human Servs.*, No. 95-0266V, 2002 WL 31965744, at \*1 (Fed. Cl. Dec. 20, 2002)).

123. See *id.* (citing *Bruesewitz*, 2002 WL 31965744, at \*13–17). See 42 C.F.R. § 100.3 (2011), for a current listing of the vaccines and related injuries that are covered under the NVICP no-fault compensation regime.

124. See *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075 (2011). Wyeth did not actually manufacture the vaccine. The vaccine was manufactured by Lederle Laboratories, Wyeth's predecessor in interest. See *id.*

125. See *id.* Specifically, the Bruesewitzes claimed that Wyeth was both negligent in failing to produce a safer vaccine and strictly liable for a design defect. *Bruesewitz*, 561 F.3d at 237.

126. See *id.*

affirmed the district court's decision, ruling that the Bruesewitzes' claims were "expressly preempted by the Vaccine Act."<sup>127</sup>

The Supreme Court granted certiorari to determine whether section 22(b)(1) of the NCVIA preempted Hannah Bruesewitz's design-defect claims against Wyeth.<sup>128</sup> The Court engaged in a detailed linguistic analysis of the preemption language found in section 22(b)(1),<sup>129</sup> which states:

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 after October 1, 1988, 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.<sup>130</sup>

After examining the statutory text, Justice Scalia, writing for the Court,<sup>131</sup> held that section 22(b)(1) preempts *all* state law design-defect claims against vaccine manufacturers.<sup>132</sup> As such, Hannah Bruesewitz was not entitled to any compensation for her injuries.<sup>133</sup>

Justice Breyer, who wrote a concurring opinion, agreed that the NCVIA preempts design-defect claims.<sup>134</sup> However, unlike the majority, Breyer reached this conclusion by looking at the purposes behind the NCVIA.<sup>135</sup>

Justice Sotomayor wrote an energetic dissent<sup>136</sup> in which she accused the majority of "impos[ing] its own bare policy preference over the considered judgment of Congress."<sup>137</sup> In her view, section 22(b)(1) protects vaccine manufacturers from civil liability for design defects *only* if the manufacturer can

127. *Id.* at 255–56.

128. *See Bruesewitz*, 131 S. Ct. at 1072 (citing 42 U.S.C. § 300aa-22(b)(1) (2006)).

129. *See id.* at 1075–78 (citations omitted).

130. 42 U.S.C. § 300aa-22(b)(1).

131. *See infra* notes 140–54 and accompanying text for a discussion of Justice Scalia's majority opinion in greater detail.

132. *See Bruesewitz*, 131 S. Ct. at 1082. A design defect is any "unreasonably dangerous" product hazard that exists even when the actual product causing an injury conforms to the manufacturer's own design specifications. *See* DAVID G. OWEN, *PRODUCTS LIABILITY LAW* 34, 37 (2d ed. 2008); *see also infra* notes 146–54 and accompanying text (discussing Scalia's analysis of design-defect claims).

133. *See Bruesewitz*, 131 S. Ct. at 1082.

134. *See id.* at 1082–83 (Breyer, J., concurring).

135. *See id.* To be sure, Justice Scalia briefly scanned the structure and legislative history of the NCVIA. *See id.* at 1078–82 (majority opinion) (citations omitted). However, Scalia simply used the structure to reinforce his main textual argument and pointed to the legislative history in response to the dissent's reliance on it. *See id.* (citations omitted). Justice Breyer's opinion, on the other hand, was primarily based on policy grounds. *See id.* at 1083–86 (Breyer, J., concurring). *See also infra* notes 314–41 and accompanying text for further discussion of Justice Breyer's opinion.

136. *See infra* notes 155–69 and accompanying text for a discussion of Justice Sotomayor's dissent in greater detail.

137. *Bruesewitz*, 131 S. Ct. at 1086 (Sotomayor, J., dissenting).

demonstrate, in each action, that a plaintiff's injury could not have been prevented by a feasible alternative design.<sup>138</sup> In short, Sotomayor would have preempted only a small subset of all design-defect claims.<sup>139</sup>

### 1. Justice Scalia's Majority Opinion

In his majority opinion,<sup>140</sup> Justice Scalia predictably applied the plain meaning approach to reach the Court's holding that section 22(b)(1) of the NCVIA preempts state-law design-defect claims against vaccine manufacturers.<sup>141</sup> Justice Scalia began his analysis by setting forth the statutory text at issue.<sup>142</sup> He then focused on the "even though" clause of section 22(b)(1),<sup>143</sup> which states that "[n]o vaccine manufacturer shall be liable in a civil action for damages . . . 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.*"<sup>144</sup>

Justice Scalia argued that the "even though" clause clarifies the word "unavoidable," which immediately precedes the clause.<sup>145</sup> He then asserted that the plain meaning of the statute dictates that when a vaccine is properly manufactured and is accompanied by proper warnings, "*any* remaining side effects, including those resulting from *design defects*, are deemed to have been *unavoidable.*"<sup>146</sup> Assuming proper warnings and manufacture, Justice Scalia therefore claimed that the manufacturer could not be held civilly liable for injuries caused by the vaccine's defective design because this was an unavoidable side effect of the vaccine.<sup>147</sup> Thus, Scalia argued, the NCVIA expressly preempts state-law design-defect claims against vaccine manufacturers.<sup>148</sup>

138. *See id.* at 1093.

139. *See id.*

140. Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Alito joined Justice Scalia's majority opinion. *Id.* at 1071 (majority opinion). Justice Kagan did not take part in the decision. *Id.* at 1072. Justice Kagan recused herself, presumably due to her prior work as Solicitor General. *See* Robert Barnes, *Vaccine Makers Are Protected from Suits, Supreme Court Rules*, WASH. POST, Feb. 23, 2011, at A2.

141. *Bruesewitz*, 131 S. Ct. at 1075–82 (citations omitted).

142. *See id.* at 1075 (quoting 42 U.S.C. § 300aa-22(b)(1) (2006)).

143. *See id.*

144. § 300aa-22(b)(1) (emphasis added).

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

146. *See id.* (emphasis added).

147. *See id.*

148. *See id.* Justice Scalia also claimed that if the NCVIA did not preempt state-law design-defect claims, then the use of the word "unavoidable" would add nothing to the plain text of the statute because a vaccine's adverse side effects "could *always* have been avoidable by use of a differently designed vaccine." *Id.* Therefore, argued Justice Scalia, the use of the word "unavoidable" "plainly implies that the design itself is not open to question." *Id.* at 1076.

Justice Scalia also noted that although section 22(b)(1) explicitly preserves liability for two products liability claims—failure to warn and manufacturing defects<sup>149</sup>—the statute does not explicitly preserve any design-defect claims.<sup>150</sup> Applying the canon *expressio unius est exclusio alterius*,<sup>151</sup> Justice Scalia claimed that the statute “fail[ed] to mention design-defect liability ‘by deliberate choice, not inadvertence.’”<sup>152</sup> Although Congress could have preserved all three products liability claims,<sup>153</sup> it chose not to; thus, according to Justice Scalia, design-defect claims are preempted by the NCVIA.<sup>154</sup>

## 2. Justice Sotomayor’s Dissent

Like Justice Scalia, Justice Sotomayor also applied the plain meaning approach in her dissenting opinion in *Bruesewitz*.<sup>155</sup> Unlike Justice Scalia, however, Justice Sotomayor did not believe that section 22(b)(1) preempted *all* design-defect claims; rather, she believed that vaccine manufacturers are exempt from *some* design-defect claims.<sup>156</sup> Specifically, Justice Sotomayor would have held that section 22(b)(1) preempts state law design-defect suits only upon a

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149. *See id.* at 1076 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). In fact, both the majority and dissent agreed that section 22(b)(1) preserves liability for failure to warn claims and manufacturing defects. *Compare id.* at 1075 (finding that design-defect claims are preempted “[p]rovided that there was proper *manufacture and warning*” (emphasis added)), *with id.* at 1087 (Sotomayor, J., dissenting) (“[A] vaccine manufacturer in each civil action [must] demonstrate that its vaccine is free from manufacturing and labeling defects to fall within the liability exemption of § 22(b)(1).”).

150. *See id.* at 1076 (quoting *Barnhart*, 537 U.S. at 168).

151. “[T]o express or include one thing implies the exclusion of the other . . . .” BLACK’S LAW DICTIONARY 661 (9th ed. 2009).

152. *Bruesewitz*, 131 S. Ct. at 1076 (quoting *Barnhart*, 537 U.S. at 168).

153. *See generally* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998) (providing the three types of claims). The Restatement lists three categories of product defects: (1) manufacturing defects; (2) design defects; and (3) failure to warn defects. *See id.*

154. *Bruesewitz*, 131 S. Ct. at 1076 (quoting *Barnhart*, 537 U.S. at 168). Even the most ardent proponent of the plain meaning rule cannot resist buttressing his argument. After concluding his plain meaning analysis, Justice Scalia also explained that the structure of the NCVIA reinforced his textual interpretation of section 22(b)(1). *See id.* at 1078–82 (citations omitted). Scalia explained that design-defect liability promotes two goals: “prompting the development of improved designs” and “providing compensation for inflicted injuries.” *Id.* at 1079. Justice Scalia argued that the NCVIA achieves these same goals because it instructs the Secretary of Health and Human Services (HHS) to explore new “means of improving vaccine design” and it establishes a no-fault compensation scheme. *See id.* (quoting 42 U.S.C. § 300aa-27(a)(1) (2006)). That instruction demonstrates Congress’s deliberate decision not to preserve design-defect liability; instead, it “reflects a sensible choice to leave complex epidemiological judgments about vaccine design to the . . . National Vaccine Program rather than juries.” *See id.* at 1080.

155. *See id.* at 1086–88 (Sotomayor, J., dissenting) (citations omitted). Justice Ginsburg joined Justice Sotomayor’s dissenting opinion. *Id.* at 1086.

156. *See id.* at 1088.

showing that no feasible alternative design could have reduced the vaccine's negative side effects.<sup>157</sup>

Justice Sotomayor's textual analysis focused on the "if" clause of section 22(b)(1),<sup>158</sup> which states "[n]o vaccine manufacturer shall be liable in a civil action for damages . . . 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."<sup>159</sup> Sotomayor agreed with Scalia that the phrase "side effects that were unavoidable" includes side effects caused by a vaccine's design.<sup>160</sup> Justice Sotomayor argued that the use of the conditional term "if" "plainly implies that some side effects stemming from a vaccine's design are 'unavoidable,' while others are avoidable."<sup>161</sup> In other words, section 22(b)(1) sets forth an additional condition before vaccine manufacturers are exempt from civil liability for design defects: Not only must the manufacturer prove that the vaccine was free from manufacturing and warning defects, it must also prove that the "particular side effects of a vaccine's design were 'unavoidable.'"<sup>162</sup>

Justice Sotomayor next analyzed the NCVIA's legislative history to determine the scope of the term "unavoidable."<sup>163</sup> She pointed to the House Energy and Commerce Committee Report, which stated:

The Committee . . . intends that the principle in Comment K regarding 'unavoidably unsafe' products, i.e., those products which in the present state of human skill and knowledge cannot be made safe, apply to the vaccines covered in the bill and that such products *not be the subject of liability in the tort system*.<sup>164</sup>

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157. *See id.* at 1093.

158. *See id.* at 1087.

159. 42 U.S.C. § 300aa-22(b)(1) (2006) (emphasis added).

160. *See Bruesewitz*, 131 S. Ct. at 1087 (Sotomayor, J., dissenting). Similarly, Justice Scalia noted this agreement in his majority opinion. *See id.* at 1076 (majority opinion) ("We agree with [the dissent's] premise that 'side effects that were unavoidable' must refer to side effects caused by a vaccine's design." (quoting *id.* at 1087 (Sotomayor, J., dissenting))).

161. *Id.* at 1087 (Sotomayor, J., dissenting). Justice Scalia disagreed with this "second step" in the dissent's reasoning. *See id.* at 1076 (majority opinion) ("We do not comprehend, however, the second step of its reasoning, which is that the use of the conditional term 'if' . . . 'plainly implies that some side effects . . . are unavoidable, while others are avoidable.'" (quoting *id.* at 1087 (Sotomayor, J., dissenting))).

162. *See id.* at 1087 (Sotomayor, J., dissenting).

163. *See id.* at 1088–93 (citations omitted).

164. *Id.* at 1088 (quoting H.R. REP. NO. 99-908, pt. 1, at 26 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6367) (emphasis added). Scalia accused the dissent of ignoring unfavorable portions of the legislative history. *See id.* at 1081 (majority opinion). In particular, the report instructs those who cannot prove a manufacturing defect or a failure to warn claim to "pursue recompense in the compensation system, not the tort system." *Id.* (quoting H.R. REP. NO. 99-908, at 26, reprinted in 1986 U.S.C.C.A.N. at 6367).

Based on this report, Justice Sotomayor argued that Congress intended to codify comment k of section 402A of the Restatement (Second) of Torts,<sup>165</sup> which exempts sellers of “unavoidably unsafe” products from strict liability.<sup>166</sup> In that context, the phrase refers to a handful of products, such as the pharmaceutical products listed as examples, which have great social utility even if they do pose risks to consumers.<sup>167</sup> Further, Justice Sotomayor claimed that when the NCVIA was enacted in 1986, courts interpreted comment k to require a case-by-case showing that “no feasible alternative design would reduce the safety risks without compromising the product’s cost and utility.”<sup>168</sup> Because Congress intended to codify comment k, and its “commonly understood meaning” in 1986, Justice Sotomayor would have held that section 22(b)(1) only preempts design-defect claims when the vaccine manufacturer can prove that no feasible alternative design existed.<sup>169</sup>

### 3. *An Evaluation of the Two Plain Meaning Opinions*

In our opinion, both Justices Scalia and Sotomayor reach plausible decisions regarding the linguistic interpretation of NCVIA. That conclusion sets the stage for an analysis of Justice Breyer’s purposive approach to interpretive issues. Before discussing his opinion, however, we should mention another view of the problem. Catherine Sharkey, perhaps the leading scholar on issues of federal preemption involving tort law, recently reached a conclusion regarding the substantive result in *Bruesewitz* that mirrors our own,<sup>170</sup> but we believe that her reasoning is deeply flawed. Using preemption analysis to analyze Justice Scalia’s majority opinion, Sharkey argues that in all but label, the majority’s

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165. Comment k states, in part:

There are some products, which in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk . . . Such a product, properly prepared, and accompanied by proper directions and warning, is *not defective*, nor is it *unreasonably dangerous*. . . The seller of such products . . . is *not to be held to strict liability* . . .

RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) (additional emphasis added).

166. See *Bruesewitz*, 131 S. Ct. at 1089 (Sotomayor, J., dissenting) (quoting 42 U.S.C. § 300aa-22(b)(1) (2006); H.R. REP. NO. 99-908, at 26, *reprinted in* 1986 U.S.C.C.A.N. at 6367).

167. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. k.

168. See *Bruesewitz*, 131 S. Ct. at 1089 (Sotomayor, J., dissenting). Justice Scalia disputed this assertion and claimed that “[c]omment k did not have a ‘commonly understood meaning.’” See *id.* at 1082 (majority opinion) (quoting *id.* at 1090 (Sotomayor, J., dissenting)).

169. See *id.* at 1089–90 (Sotomayor, J., dissenting) (citing H.R. REP. NO. 99-908, at 26, *reprinted in* 1986 U.S.C.C.A.N. at 6367).

170. See Catherine M. Sharkey, *Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle*, 61 DEPAUL L. REV. 643, 667–68 (2012).

opinion is based on policy-laden implied analysis and not express preemption.<sup>171</sup> She refuses to accept at face value Justice Scalia's statement that his opinion is "the only interpretation supported by the text and structure of the NCVIA" and that there is "no need to resort to" legislative history.<sup>172</sup> We, like Sharkey, disagree with Justice Scalia's approach to statutory interpretation, but we take Scalia at his word. It is true that Justice Scalia goes on to discuss the policies and legislative history that lie behind the NCVIA, but he makes clear that his purpose in doing so is only to rebut the dissent's argument that legislative history contradicts the conclusion he reached through plain meaning analysis.<sup>173</sup> Further, Justice Scalia's analysis of the intricacies of the statutory language itself precedes his far briefer discussion of the legislative history and policies undergirding the statutory framework.<sup>174</sup>

### B. Other Examples of "Plain" but Inconsistent Interpretations

Both Justices Scalia and Sotomayor applied the plain meaning approach to interpret the NCVIA, but they reached different conclusions.<sup>175</sup> Although it seems unlikely that two Supreme Court Justices could reach different conclusions about the plain meaning of a statute, such inconsistency is actually quite common when using this interpretive theory.<sup>176</sup>

171. See *id.* at 667. Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, which states, in relevant part, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof[] . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. When a state law and federal law conflict with one another, the Supremacy Clause demands that the federal law trump, or "preempt," the state law. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

There are three types of preemption: express preemption, field preemption, and conflict preemption. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000). Express preemption exists when a federal law contains explicit preempting language. See, e.g., *Cippolone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) (plurality opinion) (analyzing the preemptive scope of an act by looking to the express language of the act). Field preemption exists when a "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* at 516 (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)); see also *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (finding preemption based on the "pervasive nature of the scheme" of an act). Finally, conflict preemption occurs when it is impossible to comply with both state and federal laws. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881–82 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (stating that a state law would have "stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives").

172. *Bruesewitz*, 131 S. Ct. at 1081; see Sharkey, *supra* note 170, at 651–52.

173. See *Bruesewitz*, 131 S. Ct. at 1081–82 (citations omitted).

174. See *id.* at 1075–80, 1081–82 (citations omitted). Justice Scalia's nearly five-page discussion of the text and structure of the Act, see *id.* at 1075–80 (citations omitted), is followed by his less than two-page discussion of legislative history. See *id.* at 1081–82 (citations omitted).

175. See *id.* at 1075–82 (citations omitted); *id.* at 1088 (Sotomayor, J., dissenting).

176. To be sure, the purposes and objectives approach can also lead to inconsistent results. Compare, e.g., *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1139–40 (2011) (quoting *Hines*, 312 U.S. at 67) (using the purposes and objectives approach to find that a Department of

A brief review of the Supreme Court's recent statutory interpretation jurisprudence illustrates the inconsistencies inherent in the plain meaning doctrine. In *Smith v. United States*,<sup>177</sup> the Court considered whether a defendant, who had exchanged his gun for cocaine, "'use[d]' . . . a firearm 'during and in relation to . . . [a] drug trafficking crime'" in violation of 18 U.S.C. § 924(c)(1)(A).<sup>178</sup> The majority, led by Justice O'Connor, looked to the plain language of the statute and held that the defendant "used" his firearm when he traded it for cocaine.<sup>179</sup> Justice O'Connor noted that although the term "use" was not defined in the statute, the Court could look to its "ordinary," or "common," understanding to provide the plain meaning.<sup>180</sup> Because the term "use" was ordinarily defined as "to employ," the defendant "used" his firearm during the transaction because he "'employed' [the gun] as an item of barter to obtain cocaine."<sup>181</sup>

Justice Scalia took issue with the majority's application of his conservative plain meaning approach to interpretation and wrote a dissenting opinion.<sup>182</sup> He faulted the majority for its overly broad "common" definition of the word "use," claiming that the Court failed to "grasp the distinction between how a word *can* be used and how it *ordinarily is* used."<sup>183</sup> Justice Scalia used an example to illustrate the majority's flawed plain meaning analysis: "When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane."<sup>184</sup> Likewise, although a firearm *can* be used as a bartering item, Justice Scalia believed the statute's plain meaning was limited to its *ordinary use* "as a weapon."<sup>185</sup> As such, because the defendant did not use his gun as a weapon,<sup>186</sup> Justice Scalia would have held that defendant did not violate the plain language of the statute.<sup>187</sup>

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Transportation (DOT) regulation for seatbelts does *not* preempt design-defect claims), with *Geier*, 529 U.S. at 881–82 (quoting *Hines*, 312 U.S. at 67) (using the purposes and objectives approach to hold that a nearly identical DOT regulation for passive restraint devices preempts tort claims).

However, we argue that such inconsistent results are less likely when one approaches statutory interpretation as Justice Breyer does in *Bruesewitz*. See *infra* notes 312–51 and accompanying text. If, after a cursory review of the statutory text, congressional intent does not appear to be "plain," we believe that judges should follow Justice Breyer's lead and immediately look to the legislative goals of the underlying statute. This approach, in turn, will enable the interpreter to place the text in its proper legislative context, thus helping to uncover the true "plain meaning" of the text.

177. 508 U.S. 223 (1993).

178. *Id.* at 225 (emphasis added) (quoting 18 U.S.C. § 924(c)(1)(A) (2006)).

179. See *id.* at 228, 241.

180. See *id.* at 228 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

181. *Id.* at 228–29 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2806 (2d ed. 1959)).

182. See *id.* at 242–43 (Scalia, J., dissenting) (quoting *id.* at 230 (majority opinion)).

183. *Id.* at 241, 242.

184. *Id.* at 242.

185. See *id.*

186. See *id.* at 225–26 (majority opinion).

187. See *id.* at 241–47 (Scalia, J., dissenting) (citations omitted).

The inconsistent results reached by Justices O'Connor and Scalia in *Smith* are not an isolated occurrence. Rather, such disagreements over the plain meaning of a statute have become increasingly common. In 2008, for example, the Supreme Court interpreted an exception to the Federal Tort Claims Act's (FTCA) waiver of sovereign immunity.<sup>188</sup> In *Ali v. Federal Bureau of Prisons*,<sup>189</sup> a prisoner claimed that the Bureau of Prisons (BOP) negligently lost his luggage when he was transferred to another prison.<sup>190</sup> The BOP claimed that it fell within the "law enforcement" officer exception to the FTCA,<sup>191</sup> which preserves sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."<sup>192</sup>

Justice Thomas, writing for the majority, agreed with the BOP based on the plain meaning of the exception.<sup>193</sup> Thomas, applying Justice Scalia's interpretive theory, found that the word "*any*" modified the clause: "other law enforcement officer."<sup>194</sup> That phrasing, argued Justice Thomas, demonstrated Congress's "expansive" intent to include "law enforcement officers of whatever kind" within the FTCA exception.<sup>195</sup>

The dissent, led by Justice Kennedy, accused the majority of expanding the plain meaning beyond customs and tax officers.<sup>196</sup> Kennedy believed that the combination of the first clause, which referred to the "collection of any tax or customs duty," and the middle of the subsequent clause, referring to "officer[s] of customs or excise," plainly illustrated Congress's intent to limit the exception to customs and tax officers.<sup>197</sup>

Proponents of the plain meaning rule claim that by focusing within the "four corners" of the statute, judges are less likely to be swayed by subjective

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188. See 28 U.S.C. § 1346(b)(1) (2006); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 215 (2008) (citing 28 U.S.C. § 2680 (2006)). The FTCA waives the federal government's sovereign immunity for torts federal employees commit. See § 1346(b)(1). In *Ali*, the Federal Bureau of Prisons claimed that its officers fell within an *exception* to the FTCA, thus preserving its sovereign immunity for any tort claims. See *Ali*, 552 U.S. at 217 (citing § 2680(c)).

189. 552 U.S. 214 (2008).

190. See *id.* at 216.

191. See *Ali*, 552 U.S. at 217.

192. § 2680(c).

193. See *Ali*, 552 U.S. at 218 (quoting § 2680(c)).

194. See *id.* at 218–20 (quoting § 2680(c); *United States v. Gonzales*, 520 U.S. 1, 4, 5 (1997); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 584, 588–89 (1980)).

195. *Id.* at 220.

196. See *id.* at 230, 231 (Kennedy, J., dissenting).

197. See *id.* at 230–31 (quoting § 2680(c)). In statutory construction terms, Justice Kennedy claimed that the *ejusdem generis* canon dictates such a result. See *id.* at 231 ("The *ejusdem generis* canon provides that, where a seemingly broad clause constitutes a residual phrase, it must be controlled by, and defined with reference to, the 'enumerated categories . . . which are recited just before it' so that the clause encompasses only objects similar in nature." (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001))).

influences.<sup>198</sup> On the other hand, some commentators believe that plain meaning judges are *not* immune to unprincipled judicial decisionmaking.<sup>199</sup> Whether the plain meaning approach prevents or promotes judicial subjectivity is a topic that is open to debate. However, after a review of *Bruesewitz* and its predecessors, we can note one thing with some certainty: the only thing “plain” about the plain meaning approach is that it leads to a number of inconsistent results. That is to say, ever since Justice Scalia brought his conservative, textualist ideology to the nation’s top bench in 1986, the Justices have reached a number of conflicting interpretations when applying this rule.<sup>200</sup> Because the plain meaning rule does not eliminate judicial discretion, as Justice Scalia claimed it did in justifying its use,<sup>201</sup> the time has come to adopt a more consistent, practical approach to statutory interpretation.

#### IV. THE LESSON OF *BRUESEWITZ*: PLACING STATUTORY LANGUAGE WITHIN ITS LEGISLATIVE CONTEXT

The debate between Justices Scalia and Sotomayor in *Bruesewitz* highlights the obvious truth that the plain meaning rule yields inconsistent results. How could two highly educated and sophisticated jurists apply the same interpretive rule, yet reach completely different results? Because it is debatable whether Justice Scalia or Justice Sotomayor presented a better textual analysis, *Bruesewitz* demonstrates exactly why Justice Breyer’s purposive approach is so pivotal: it breaks the textual “tie” in situations like this. Understanding that the textual analysis was a close call, Justice Breyer considered the purpose of the NCVIA, thus placing the ambiguous text within its legislative context.<sup>202</sup> Justice Breyer noted that Congress intended to compensate children suffering from vaccine-related injury through a no-fault alternative to the common law tort system.<sup>203</sup> This led him to understand that if the Court allowed Hannah Bruesewitz’s claim to proceed in tort, it could effectively destroy Congress’s efficient alternative to the tort system.<sup>204</sup>

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198. See *supra* note 61 and accompanying text.

199. See, e.g., Karkkainen, *supra* note 5, at 476 (arguing that the plain meaning approach involves interpretive choices about “what rules to apply, what evidence to admit, [and] dictionary definitions to invoke”).

200. See *supra* notes 176–97 and accompanying text; see also *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 128–29 (1989) (Marshall, J., dissenting) (citing *id.* at 123–24 (majority opinion)) (plain meaning debate between Justices Scalia and Marshall regarding whether Rule 11 sanctions could be imposed against a law firm), *superseded by statute*, FED. R. CIV. P. 11, as recognized in *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1339 (9th Cir. 1995).

201. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

202. See *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082–83 (2011) (Breyer, J., concurring).

203. See *id.* at 1083 (quoting H.R. REP. NO. 99-908, pt. 1, at 26 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6367).

204. See *id.* at 1085–86 (quoting Brief Amici Curiae of the American Academy of Pediatrics and 21 Other Physician and Public Health Organizations in Support of Respondent at 24,

Before discussing Justice Breyer's opinion, this Part analyzes the inherent characteristics of no-fault compensation systems, with a focus, in particular, on the NVICP.<sup>205</sup> It then concludes with a discussion of Justice Breyer's opinion in *Bruesewitz*, demonstrating that his understanding of how a no-fault compensation system works helps validate his purposive approach to statutory interpretation.<sup>206</sup>

There is little doubt about what prompted Congress to pass the National Childhood Vaccine Injury Act of 1986. One manufacturer had withdrawn from the vaccine market in 1984, and several others were suggesting they might do the same.<sup>207</sup> Insurance premiums for manufacturers had skyrocketed, and there were concerns that insurance would no longer be available.<sup>208</sup> Although Congress acknowledged that vaccines had led to "great progress . . . in eliminating" childhood diseases,<sup>209</sup> it also recognized that in a few instances vaccinations result in "serious—and sometimes deadly"—side effects.<sup>210</sup> For victims and their families, the common law tort system offered only "opportunities for redress and restitution" that were "limited, time-consuming, expensive, and often unanswered."<sup>211</sup> Despite the fact that "futures have been destroyed and mounting expenses must be met," often no recovery was available within the tort system.<sup>212</sup> In the NCVIA, Congress turned instead to a no-fault compensation system.<sup>213</sup>

#### A. Shared Goals of No-Fault Systems

The goal of no-fault compensation systems is to benefit both potential tortfeasors and injured parties through an administrative regime that replaces costly, unpredictable tort litigation with a predictable, less-expensive method for awarding compensation.<sup>214</sup> No-fault compensation systems are based upon a hypothetical quid pro quo, also known as the compensation bargain,<sup>215</sup> between

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*Bruesewitz*, 131 S. Ct. 1068 (No. 09-152)). Justice Breyer's opinion is discussed in detail at *infra* notes 314–341 and accompanying text.

205. See *infra* notes 214–311 and accompanying text.

206. See *infra* notes 313–51 and accompanying text.

207. See H.R. REP. NO. 99-908, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6347.

208. See *id.* at 6 (concluding that manufacturers "face great difficulty in obtaining insurance," but leaving unanswered the question whether this unavailability results from "a crisis in the tort system or from a particularly bad downturn in the business cycle of the insurance industry").

209. *Id.* at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6346.

210. *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6346.

211. *Id.*, *reprinted in* 1986 U.S.C.C.A.N. at 6347.

212. *Id.*

213. See National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34 (2006).

214. See H.R. REP. NO. 99-908, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6348 (discussing H.R. 5546, 99th Cong. (1986)).

215. See generally Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800–01 (1982) (discussing no-fault systems with respect to workers' compensation programs).

potential tortfeasors and the injured parties. Unlike traditional tort litigation, victims are entitled to compensation without having to prove fault or tortious conduct on the part of injurers,<sup>216</sup> and without the fear that affirmative defenses will operate as a bar to recovery.<sup>217</sup> Instead, victims receive compensation through a simple showing that they suffered injuries that fall within the boundaries of the no-fault regime.<sup>218</sup> In exchange for guaranteed compensation, a claimant's recovery is usually limited to a certain percentage of her or his actual *economic* loss.<sup>219</sup> Moreover, compensation for noneconomic loss, such as pain and suffering, is typically unavailable.<sup>220</sup> Thus, the claimant is assured compensation, and the tortfeasor has the benefit of knowing the boundaries of his potential liability, a pair of societal benefits that the less predictable tort system lacks.<sup>221</sup>

The compensation bargain can be examined more closely. No-fault systems, such as the NCVIA, share three objectives. The first is to compensate as many victims of harm-producing behavior as possible.<sup>222</sup> These programs sometimes cover repetitive injuries caused by manufacturers or other businesses.<sup>223</sup> In other instances, no-fault programs, such as automobile no-fault, require participants to purchase insurance to cover the comparatively modest injuries—numerous in the aggregate—that fall within statutorily defined boundaries.<sup>224</sup> As such,

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216. See *id.* at 800; Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 406 (1998).

217. See Epstein, *supra* note 215, at 801; King, *supra* note 216, at 406. During the nineteenth century, the “unholy trinity” of defenses—contributory negligence, assumption of risk, and the fellow-servant doctrine—prevented an employee from recovering against his employer in tort. See Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation “Reform,”* 50 RUTGERS L. REV. 657, 669 (1998).

218. See King, *supra* note 216, at 406.

219. See *id.* at 407.

220. See *id.* One notable exception to this generalization, however, is the September 11 Victim's Compensation Fund, which allows for \$250,000 for “presumed non-economic losses for decedents” and “an additional \$100,000 for the spouse and each dependent.” 28 C.F.R. § 104.44 (2011).

221. See Epstein, *supra* note 215, at 818 (“The goal of the compensation statutes was that uncertain remedies should be replaced by certain ones, so as to prevent litigation from becoming a grotesque imitation of global war.”).

222. See Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 675 (2000).

223. See, e.g., Black Lung Benefits Act, 30 U.S.C. §§ 901–944 (2006) (compensating coal miners and their dependents for the consequences of a disabling disease similar to tuberculosis known as “black lung”); Fla. Stat. Ann. §§ 766.301–316 (West 2011) (outlining no-fault compensation plan for a narrow subset of claims resulting from birth-related neurological injuries in response to arguments by obstetricians in the late 1980s that liability insurance was either unavailable or unaffordable); see also Stephen Todd, *Privatization of Accident Compensation: Policy and Politics in New Zealand*, 39 WASHBURN L.J. 404, 405 (2000) (describing New Zealand's comprehensive no-fault accidental injury compensation system).

224. See, e.g., ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 5 (1965) (discussing

compensation as a goal of no-fault compensation systems is inextricably linked to the related concept of loss distribution: the idea that “accident losses will be least burdensome if they are spread broadly among people and over time.”<sup>225</sup> The common law tort system, standing alone, does a particularly poor job of fulfilling this instrumental objective. Instead, many victims are forced to absorb most of their losses. This can be devastating: researchers have estimated that less than 5% of economic losses are compensated through the tort system, while victims are forced to “absorb nearly 40% of medical costs and two thirds of lost wages.”<sup>226</sup> Indeed, many victims are often precluded from recovery because they are unable to prove a common law tort. For example, before the NVICP, many vaccine-injured claimants were simply unable to prove that the manufacturer engaged in tortious conduct,<sup>227</sup> or that the manufacturer caused the victim’s loss.<sup>228</sup> In fact, this was one of the primary justifications for passing the NCVIA: “[The no-fault system is] intended to compensate persons with recognized vaccine injuries without requiring the difficult individual determinations of *causation* of injury and without a demonstration that a manufacturer was *negligent* or that a vaccine was *defective*.”<sup>229</sup>

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how compulsory automobile insurance operates). *See generally* Schwartz, *supra* note 222, at 674–75 (evaluating the benefits and drawbacks of no-fault automobile insurance systems).

225. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 39 (Student ed. 1970). Justice Traynor explained the “loss distribution” objective of tort law in his concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944):

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

*Id.* at 441 (Traynor, J., concurring).

226. *See* NEIL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 9 (2000) (citing DEBORAH R. HENSLER ET AL., *RAND INST. FOR CIVIL JUSTICE, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* 52–53, 80 (1991), *available at* <http://www.rand.org/content/dam/rand/pubs/reports/2006/R3999.pdf>). The remainder, Feigenson claims, is covered by first-party insurance and workers’ compensation. *See id.* (citing HENSLER ET AL., *supra*, at 53).

227. *See, e.g.,* *Schindler v. Lederle Labs.*, 725 F.2d 1036, 1039–40 (6th Cir. 1983) (holding that warnings given by a polio vaccine manufacturer were “adequate” enough to defeat plaintiffs’ negligence claim); *Percival v. Am. Cyanamid Co.*, 689 F. Supp. 1060, 1061, 1064 (W.D. Okla. 1987) (finding DPT manufacturer did not have a duty to directly warn parents of infant, who “developed severe and permanent neurological damage,” because of the “learned intermediary” doctrine); *Koehler v. Wyeth Labs. Div. of Am. Home Prods. Corp.*, No. NA 85-284-C, 1987 WL 47831, at \*3–4 (S.D. Ind. Sept. 8, 1987) (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965)) (denying plaintiff’s strict liability claim for design defect because DPT vaccine is “unavoidably unsafe” pursuant to comment k).

228. *See, e.g.,* *Sheffield v. Eli Lilly & Co.*, 144 Cal. Rptr. 870, 880, 884–85 (Ct. App. 1983) (quoting *Sindell v. Abbot Labs.*, 607 P.2d 924, 937 (Cal. 1980)) (denying both “market share liability” and “enterprise liability” claims against five manufacturers of polio vaccine).

229. H.R. REP. NO. 99-908, pt. 1, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6353 (emphasis added).

This system has ensured that many vaccine-related injuries are compensated; since the no-fault system started receiving claims in 1989, 3,023 injured children have received compensation.<sup>230</sup>

The second objective of no-fault compensation systems in general, and the NVICP in particular, is to limit the liability of businesses or insurers, and to make their liability exposures more predictable.<sup>231</sup> As previously discussed, the original impetus for the NCVIA was primarily to assure vaccine manufacturers that they would not be faced with liability insurance that was either unavailable or unaffordable.<sup>232</sup> This is not surprising. Decades earlier, the National Association of Manufacturers and other business groups came around to supporting the adoption of the workers' compensation statutes because of growing fears about the liability exposure of their members under the common law system.<sup>233</sup> More recently, physicians have advocated for no-fault compensation systems to replace common law handling of medical malpractice claims.<sup>234</sup> Similarly, although many victims of vaccine-related injuries were unable to recover in tort,<sup>235</sup> there had been a number of plaintiffs who prevailed in the tort system and thus recovered large verdicts against the vaccine manufacturers.<sup>236</sup> The unpredictability of such awards, as well as their magnitude, caused liability insurers to increase their premiums.<sup>237</sup>

The third and final objective of no-fault systems is to significantly reduce administrative costs when compared with the tort system.<sup>238</sup> Together with the reduction in the amount of compensation paid to each victim, these cost savings enable a much greater percentage of victims to be compensated without a sharp

230. Health Res. & Servs. Admin., *National Vaccine Injury Compensation Program: Data & Statistics*, U.S. DEP'T HEALTH & HUM. SERVICES, <http://www.hrsa.gov/vaccinecompensation/data.html> (last visited Oct. 5, 2012).

231. See H.R. REP. NO. 99-908, at 7, *reprinted in* 1986 U.S.C.A.N. at 6348.

232. See *id.* at 6, *reprinted in* 1986 U.S.C.A.N. at 6347.

233. See DOMENICO GAGLIARDO, *AMERICAN SOCIAL INSURANCE* 389 (rev. ed. 1955) (citing F.C. Schwedtmann, *Principles of Sound Employers' Liability Legislation*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, July 1911, at 202, 202); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 *COLUM. L. REV.* 50, 65–69 (1967) (citations omitted).

234. See, e.g., Clark C. Havighurst & Laurence R. Tancredi, "Medical Adversity Insurance"—*A No-Fault Approach to Medical Malpractice and Quality Assurance*, 51 *MILBANK MEMORIAL FUND Q.* 125 (1973) (advocating for a no-fault medical malpractice compensation system); Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 *MD. L. REV.* 908, 910 (1993) (stating that the traditional malpractice system has sent doctors to the "nation's capital" for relief in the form of legislation).

235. See *supra* notes 227–29 and accompanying text.

236. See, e.g., *Toner v. Lederle Labs.*, 828 F.2d 510, 511, 514 (9th Cir. 1987) (affirming \$1.1 million damage award against vaccine manufacturer for negligent design); *Tinnerholm v. Parke Davis & Co.*, 285 F. Supp. 432, 452, 454 (S.D. N.Y. 1968) (awarding \$651,783.52 in damages for vaccine manufacturer's negligent failure to properly test vaccine and failure to warn), *aff'd*, 411 F.2d 48 (2d Cir. 1969).

237. See H.R. REP. NO. 99-908, pt. 1, at 6 (1986), *reprinted in* 1986 U.S.C.A.N. 6344, 6347.

238. See DON DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* 393 (1996).

increase in the amounts manufacturers and their insurers pay.<sup>239</sup> One study showed that before the adoption of the NCVIA, pharmaceutical firms expected to spend between five and seven dollars to transfer a single dollar of compensation to victims of vaccine-related harms.<sup>240</sup> Even if these estimates are high, studies by the independent RAND Corporation Institute for Civil Justice (RAND) estimate that tort victims received only between 46% and 56% of the total amount expended on tort litigation in 1985, while transaction costs ranged from 44% to 54% of the total expenses.<sup>241</sup> A later RAND study found that products liability and medical malpractice victims received only about 43% of all litigation-related expenditures and that transaction costs accounted for 57%.<sup>242</sup> More recent data show that as of 2002, asbestos claimants had received approximately 42% of the total amount spent, with transaction costs amounting to 58%.<sup>243</sup>

In contrast to the exorbitant transaction costs inherent in vaccine litigation, the costs of administering the NVICP, according to the Congressional Budget Office, represent approximately 15% of the total cost.<sup>244</sup> Other estimates place the percentage of administrative costs for the NVICP between 10% and 30%.<sup>245</sup>

Further, because no-fault compensation schemes remove the time-consuming, case-by-case determinations of fault necessary in common law tort cases,<sup>246</sup> they can provide quick compensation to victims.<sup>247</sup> For example, a 1996 study showed that uncontested claims in the workers' compensation system—the no-fault system that handles most claims of workers injured in the

239. *See id.*

240. *See* Richard L. Manning, *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J.L. & ECON. 247, 271 (1994). These figures, according to Manning, were “conservative.” *Id.*

241. *See* JAMES S. KAKALIK & NICHOLAS M. PACE, RAND INST. FOR CIVIL JUSTICE, COSTS AND COMPENSATION PAID IN TORT LITIGATION, at xi fig.S.1 (1986), available at <http://www.rand.org/content/dam/rand/pubs/reports/2006/R3391.pdf>.

242. DEBORAH R. HENSLEY ET AL., RAND INST. FOR CIVIL JUSTICE, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 27 fig.4.2 (1987), available at <http://www.rand.org/content/dam/rand/pubs/reports/2006/R3583.pdf>.

243. STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION, at xxvi (2005), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf).

244. CONGRESSIONAL BUDGET OFFICE, THE ECONOMICS OF U.S. TORT LIABILITY: A PRIMER 21 (2003), available at <http://cbo.gov/sites/default/files/cbofiles/ftpdocs/46xx/doc4641/10-22-tort-reform-study.pdf>.

245. *See* James R. Copland, *Administrative Compensation for Pharmaceutical-and-Vaccine-Related Injuries*, 8 IND. HEALTH L. REV. 277, 285 (2011) (11% with 3% going towards attorneys' fees); Robert L. Rabin, *The Vaccine No-Fault Act: An Overview*, 8 IND. HEALTH L. REV. 269, 271 (2011) (between 10% and 30%).

246. *See* Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 951 (1993).

247. *See* DEWEES ET AL., *supra* note 238, at 393 (“It was thought that by relegating the courts to a secondary role, compensation could be delivered to victims much faster and less expensively than under the former system of tort liability.”).

course of their employment—were typically paid within about three weeks of the date of filing.<sup>248</sup> Contested claims took a bit longer and averaged about four months.<sup>249</sup> In contrast, tort claims handled by the common law judicial system usually take approximately fifteen to twenty months to resolve.<sup>250</sup> In other words, on average, it takes at least four times as long for an injured claimant to receive compensation in the tort system. The ability of no-fault systems to administer claims promptly is a huge benefit for injured parties, especially when the injury renders the victim incapable of performing her job.

### *B. Structural Overview of the National Vaccine Injury Compensation Program*

Two major recurring issues must be addressed when devising an alternative compensation system for product-related injuries.<sup>251</sup> First, the no-fault alternative must designate a “compensable event” to determine which claims are entitled to compensation in the administrative system.<sup>252</sup> Once the claimant has established that he is entitled to compensation, the second major issue that must be addressed is which parties are required to finance the no-fault system.<sup>253</sup>

This Section provides an overview of the NVICP. It explains how the NVICP addresses the recurring issues inherent in alternative compensation systems by (1) using vaccine injury tables to designate a compensable event and (2) placing the financial burden for the compensation on the vaccine manufacturers.

#### *1. Defining the Compensable Event*

In any compensation system, the claimant must establish that her injury constitutes a compensable event entitling her to compensation.<sup>254</sup> Recovery in the tort system is premised upon the plaintiff’s ability to prove that the

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248. See *id.* at 394 (citing 1 AM. LAW INST., REPORTER’S STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 119 (1991)).

249. See *id.* (citing AM. LAW INST., *supra* note 248, at 119).

250. See *id.* (citing Theodore F. Haas, *On Reintegrating Workers’ Compensation and Employers’ Liability*, 21 GA. L. REV. 843, 848 n.23 (1987)).

251. See Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting From Mass Products*, 64 MD. L. REV. 613, 688–94 (2005) (citations omitted); Rabin, *supra* note 246, at 964–71, 976–78 (citing MARK A. PETERSON & MOLLY SELVIN, RAND INST. FOR CIVIL JUSTICE, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES 6 (1988), available at <http://www.rand.org/pubs/notes/2009/N2805.pdf>).

252. See Gifford, *supra* note 251, at 688.

253. See *id.* at 689.

254. See Rabin, *supra* note 246, at 964; see also Donald G. Gifford, *The Death of Causation: Mass Products Torts’ Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943, 949 (2006) (employing term “compensation entitlement boundary”).

defendant's tortious conduct proximately caused the plaintiff's injury.<sup>255</sup> In contrast, no-fault compensation systems provide recovery as long as the injury falls within the statutory or administrative definitions of a compensable event, thus avoiding the time-consuming, case-by-case inquiries into fault and causation required by the tort system.<sup>256</sup>

NCVIA established a no-fault compensation system for vaccine-related injuries or deaths.<sup>257</sup> The statute makes clear that a petitioner *must first* seek compensation through the no-fault system before attempting to initiate a civil action for damages against a vaccine manufacturer.<sup>258</sup> As is true of most no-fault regimes,<sup>259</sup> the petitioner is not required to prove tortious conduct on the part of the vaccine manufacturer.<sup>260</sup> Instead, the petitioner must demonstrate that she has suffered an injury, or compensable event, that is within the jurisdiction of the administrative regime.<sup>261</sup> A compensable event is defined by the "Vaccine Injury Table," which lists: (1) the vaccines that are covered under the program; (2) those injuries/disabilities "resulting from the administration of such vaccines" that are entitled to compensation; and (3) the period of time following the vaccination during which the first manifestation of the injury/disability must occur.<sup>262</sup> To establish a *prima facie* case for compensation, the petitioner must demonstrate that she received a covered vaccine and suffered a "table injury" within the proper time period.<sup>263</sup> The petitioner does not need to prove

255. See Gifford, *supra* note 251, at 688.

256. See Rabin, *supra* note 246, at 964 ("[T]he jurisdiction of an administrative compensation scheme is premised on the existence of an activity-related nexus between the claimant's harm and the fund's obligation."). For example, workers' compensation benefits are provided to employees for the following compensable event: "personal injury by accident arising out of and in the course of employment." Epstein, *supra* note 215, at 790 (internal quotation marks omitted) (quoting Workmen's Compensation Act of 1897, 60 & 61 VICT., ch. 37, § 1(1) (Eng.)); see also Gifford, *supra* note 251, at 688 (describing the challenge of designating a "compensable event"); Rabin, *supra* note 246, at 964.

257. National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34 (2006). Since October 1, 1988, all persons seeking compensation for a vaccine-related injury or death have been *required* to file a petition for compensation in the United States Court of Federal Claims, where the HHS serves as the respondent. See *id.* §§ 300aa-11(a)(1) to (a)(2)(A). Once this petition is filed, it is forwarded to a special master who is required to issue a decision within 240 days. See *id.* § 300aa-12(d)(3)(A). There are two limited exceptions, which may result in a delay in the special master's decision beyond the 240-day period. See *id.* § 300aa-12(d)(3)(C). First, either party has a right to suspend the proceedings for thirty days. See *id.* Following the initial thirty-day suspension, a special master may grant a second suspension, for an aggregate period of up to 150 days, only upon a finding that the "suspension is reasonable and necessary." See *id.*

258. See *id.* § 300aa-11(a)(2)(A) ("No person may bring a civil action for damages in an amount greater than \$1,000 . . . against a vaccine administrator or manufacturer . . . unless a petition has been filed . . .").

259. See *supra* note 256 and accompanying text.

260. See 42 U.S.C. § 300aa-14(a) (2006) (listing the compensable injuries the NCVIA covers regardless of whether causation can be proven).

261. See *id.*

262. See *id.* See also 42 C.F.R. § 100.3(a) (2011) for the most recent Vaccine Injury Table.

263. See § 300aa-11(c)(1).

causation.<sup>264</sup> Instead, after establishing a prima facie case, the petitioner will receive compensation for her injury *unless* the Secretary of HHS can demonstrate that the injury was “unrelated to the administration of the vaccine.”<sup>265</sup> Petitioners who cannot establish their compensation entitlements based on the vaccine injury table—for example, those who suffered injuries that are unlisted or occurred outside the coverage period—are not necessarily without recourse. Such claimants may still receive compensation for “non-table” injuries,<sup>266</sup>—injuries not specified in the statute—if they can demonstrate that the vaccine caused their injury.<sup>267</sup>

If the special master determines that the claimant is entitled to compensation, the claimant may recover damages for both economic and noneconomic harms.<sup>268</sup> Unlike most no-fault compensation systems, in which a fixed schedule caps the claimant’s economic recovery,<sup>269</sup> the NVICP provides economic compensation for an *unlimited* amount of certain actual and projected “unreimbursable”<sup>270</sup> expenses, including medical and rehabilitative costs.<sup>271</sup> Injured claimants may also receive compensation for actual and projected lost earnings.<sup>272</sup> Finally, all claimants, regardless of whether they receive an award through the NVICP, are generally entitled to recover reasonable attorneys’ fees and costs.<sup>273</sup>

When it comes to recovery for noneconomic injuries, the NVICP also represents a departure from traditional no-fault systems that limit a claimant’s recovery to economic loss.<sup>274</sup> The NVICP permits the special master to award up to \$250,000 for “pain and suffering” and “emotional distress” on account of a vaccine-related injury.<sup>275</sup> In spite of this “scaled-down discretionary decision” for noneconomic damages, however, scholars have praised the NVICP for “[assessing] damages in a simple and administratively efficient manner.”<sup>276</sup>

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264. *See id.*; *id.* § 300aa-13(a)(1).

265. *See* § 300aa-13(a)(1)(B).

266. Some estimate that up to 90% of the no-fault petitions filed are for non-table injuries. *See* Betsy J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 HARV. J. ON LEGIS. 343, 345–46 (2011).

267. § 300aa-11(c)(1)(C)(ii)(I).

268. *See id.* § 300aa-15(a). In the event of a vaccine-related death, total recovery for the claimant’s estate is limited to \$250,000. § 300aa-15(a)(2).

269. *See supra* notes 219–20 and accompanying text.

270. *See* § 300aa-15. Thus, the petitioner’s recovery is offset by collateral source payments, such as insurance benefits. *See id.* § 300aa-15(a).

271. *See* § 300aa-15(a)(1).

272. *See* § 300aa-15(a)(3). The September 11th Victim Compensation Fund provided another rare exception to the general rule that no-fault systems do not allow compensation for non-economic damages. *See* 28 C.F.R. § 104.44 (2011) (entitling family members of deceased victims to a “presumed” noneconomic damage award of \$250,000 plus an additional \$100,000 for the spouse and each additional dependent).

273. *See* § 300aa-15(e).

274. *See supra* notes 219–20 and accompanying text.

275. *See* § 300aa-15(a)(4).

276. *See* Rabin, *supra* note 246, at 959.

After the special master issues a final judgment, the petitioner has two options. The petitioner can accept the master's judgment, precluding her from bringing a civil suit for damages against the vaccine manufacturer.<sup>277</sup> In the alternative, the petitioner may reject the special master's judgment and file a claim for damages.<sup>278</sup> The NCVIA, however, severely limits a vaccine manufacturer's liability in tort actions and thus discourages petitioners from pursuing these claims.<sup>279</sup> Specifically, the NCVIA completely eliminates the manufacturer's liability for: (1) the failure to "provide direct warnings to the injured party";<sup>280</sup> (2) punitive damages, assuming that the manufacturer did not engage in fraudulent, or otherwise illegal, conduct;<sup>281</sup> and (3) damages resulting from any "injury or death result[ing] from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings."<sup>282</sup> This third limitation, found in section 22(b)(1), is, of course, the preemption provision at issue in *Bruesewitz*.<sup>283</sup> As we know, the Court held that this third limitation preempted a plaintiff's ability to sue a vaccine manufacturer for alleged design defects.<sup>284</sup>

## 2. *Financing the NVICP*

Having discussed the compensation entitlement provisions of the vaccine no-fault system, we now turn to the opposite side of the equation: Who is responsible for financing this compensatory regime? As Professor Rabin explains, "Typically, a no-fault scheme is financed through charges imposed on those parties engaged in the injury-producing activity."<sup>285</sup> The NVICP stays true to this principle and funds the compensation system through an excise tax

277. See 42 U.S.C. § 300aa-21(a) (2006); see also Brief for the United States as Amicus Curiae Supporting Respondents at 28, *Bruesewitz v. Wyeth, Inc.*, 130 S. Ct. 1734 (2010) (No. 09-152) [hereinafter Amicus Brief] ("Department of Justice records indicate that 99.8% of successful Compensation Program claimants have accepted their awards, foregoing any tort remedies against vaccine manufacturers.").

278. See § 300aa-21(a).

279. See Rabin, *supra* note 246, at 959 (citing § 300aa-15(d); 42 U.S.C. § 300aa-22(b)–(c) (2006); *id.* § 300aa-23(d)); see also Amicus Brief, *supra* note 277, at 28 (noting that 99.8% of successful claimants accept the master's judgment and waive their ability to sue in tort).

280. See § 300aa-22(c). In other words, the NVICP adopts the so-called "learned intermediary" doctrine. See Rabin, *supra* note 246, at 959 (citing § 300aa-22(c)).

281. See § 300aa-23(d)(2).

282. See § 300aa-22(b)(1).

283. See *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075 (2011) (quoting § 300aa-22(b)(1)).

284. See *id.* at 1082.

285. Rabin, *supra* note 246, at 976. Rabin notes that "there is considerable divergence among [compensation] systems" as to whether the assessment funding the compensation system places an equal tax on all units of an injurious product or whether such funding will be variable, based on the "risk-generating character of contributing enterprises." *Id.* at 976–77. As explained in the text, in enacting the NVICP, Congress opted for the former method of funding, placing a \$0.75 excise tax on all vaccine manufacturers who produce a vaccine that is covered under the Act. See 26 U.S.C. § 4131(b) (2006).

imposed on *all* vaccine manufacturers that are covered under the no-fault system.<sup>286</sup> A \$0.75 excise tax is imposed on the manufacturer for each dose of a covered vaccine;<sup>287</sup> thus, for example, manufacturers of the DPT vaccine, which protects against three separate diseases, must pay an excise tax of \$2.25 for each DPT vaccine produced.<sup>288</sup> The proceeds from the excise tax are funneled into the Vaccine Injury Compensation Trust Fund,<sup>289</sup> which holds the funds until they are eventually distributed to victims.<sup>290</sup>

### C. *The Importance of Enforcing the Boundaries of a No-Fault System*

The previous analysis shows that Congress had three objectives in enacting the NCVIA: (1) compensating a much higher percentages of victims harmed by the vaccines than had been compensated by the common law tort system;<sup>291</sup> (2) capping and stabilizing the liability costs imposed on vaccine manufacturers;<sup>292</sup> and (3) reducing administrative costs.<sup>293</sup> The ability to compensate more victims and keep manufacturers' costs stable required that damages for any particular claim be capped.<sup>294</sup> Thus, the compensation bargain, with its roots in the early enactment of workers' compensation legislation,<sup>295</sup> was transposed into the vaccine compensation program.

However, the vaccine version of the compensation bargain would fail if alleged vaccine victims and their counsel were allowed to choose between pursuing claims under the NCVIA and filing common law tort actions. On one hand, victims who were not able to prove the defectiveness of their vaccine under strict products liability rules would presumably file under the NCVIA, where such proof is not required.<sup>296</sup> On the other hand, plaintiffs with a favorable chance of proving a vaccine defect or other tortious conduct on the manufacturer's part would elect to file a common law tort claim seeking to

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286. See 42 U.S.C. § 300aa-15(i) (2006); see also § 4131 (placing a \$0.75 excise tax on all vaccine manufacturers who produce a vaccine that is covered under the NVICP); *id.* § 9510 (providing that the tax collected be appropriated to the Vaccine Injury Compensation Trust Fund).

287. § 4131(b)(1).

288. See Health Res. & Servs. Admin., *National Vaccine Injury Compensation Program*, U.S. DEP'T HEALTH & HUM. SERVICES., <http://www.hrsa.gov/vaccinecompensation/index.html> (last visited Nov. 3, 2012).

289. See § 9510.

290. See § 300aa-15(i) to (j). However, funds for compensating vaccine-related injuries occurring *before* October 1, 1988, are appropriated by Congress. See *id.*

291. See *supra* notes 222–30 and accompanying text.

292. See *supra* notes 231–37 and accompanying text.

293. See *supra* notes 238–50 and accompanying text.

294. See H.R. REP. NO. 99-908, pt. 1, at 39 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6380.

295. See Jason M. Solomon, Note, *Fulfilling the Bargain: How the Science of Ergonomics Can Inform the Laws of Workers' Compensation*, 101 COLUM. L. REV. 1140, 1145 (2001).

296. See generally 42 U.S.C. § 300aa-14(a) (2006) (showing the vaccines for which compensation can be received under the Program without proof of the vaccine's defectiveness).

recover both uncapped economic damages and noneconomic damages as determined by the jury. While victims would benefit, the vaccine manufacturers' financial situations would be considerably worse than under either the common law system alone or a vaccine program with strictly enforced boundaries.<sup>297</sup> They would face financial exposure both within the common law tort system and in terms of assessments to fund the alternative system. Also, their inability to quantify confidently the risk of future tort losses probably would lead liability insurers—generally a cautious, self-protective group—to charge even higher premiums than the absolute degree of financial exposure warranted.

Whenever a no-fault compensation plan has been implemented, claimants who believe they have a strong chance of receiving a larger recovery under the common law have challenged the exclusivity of the compensation plan.<sup>298</sup> For example, in *Licari v. Elliott*,<sup>299</sup> a plaintiff who had been injured in a car accident tried to bring a common law negligence action against the driver of the car that hit him.<sup>300</sup> The problem, however, was that the plaintiff's jurisdiction had adopted a no-fault automobile insurance law.<sup>301</sup> Notwithstanding that fact, the plaintiff claimed that it was up to the jury to decide whether his injury fell outside of the no-fault compensation system and thus whether he was entitled to sue in tort.<sup>302</sup> The court disagreed and held that, as a matter of law, the plaintiff was not entitled to sue in tort.<sup>303</sup>

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297. The result parallels “adverse selection” in the insurance marketplace. See ROBERT H. JERRY, II & DOUGLAS S. RICHMOND, UNDERSTANDING INSURANCE LAW 13 (5th ed. 2012). For example, before the enactment of the individual mandate to purchase health insurance, those individuals with the highest health risks were most likely to purchase health insurance and the healthiest, often young, individuals were least likely to purchase insurance. See generally *id.* at 51–52 (citing Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)) (discussing how the enactment of the individual mandate affects insurance and noting that adults up to age twenty-six are often uninsured). The net result operates to the detriment of the health insurer and ultimately its policyholders.

298. See, e.g., *Humana of Fla., Inc. v. McKaughan*, 652 So. 2d 852, 860 (Fla. Dist. Ct. App. 1995) (holding that plaintiffs had the right to have a common law court determine whether their minor child suffered “birth-related neurological injur[ies]” within the meaning of Florida’s no-fault compensation system, which provided exclusive compensation remedy for such injuries within an alternative no-fault compensation system); *Blankenship v. Cincinnati Milacron Chems., Inc.*, 433 N.E.2d 572, 578 (Ohio 1982) (upholding plaintiff’s right to have a common law court determine whether employer intentionally caused workplace injury, thus taking claim out of exclusivity of remedy provisions of workers’ compensation statute).

299. 441 N.E.2d 1088 (N.Y. 1982).

300. See *id.* at 1089 (citing Act of Aug. 11, 1977, ch. 892, § 8(4), 1977 N.Y. Laws 1, 7 (codified as amended at N.Y. INSURANCE LAW § 5104 (McKinney 2008))).

301. See *id.* (citing Act of Aug. 11, 1977, ch. 892, 1977 N.Y. Laws 1 (codified as amended at N.Y. INSURANCE LAW §§ 5101–5109 (McKinney 2008))). See generally STEPHEN J. CARROLL & JAMES S. KAKALIK, RAND INST. FOR CIVIL JUSTICE, NO-FAULT AUTOMOBILE INSURANCE: A POLICY PERSPECTIVE (1991), for an overview of no-fault automobile insurance.

302. See *Licari*, 441 N.E.2d at 1091.

303. See *id.* at 1092.

Significantly, the holding was based on the purpose behind the automobile no-fault compensation system.<sup>304</sup> The court recognized that the legislature passed the no-fault regime to *replace* the “costly and time-consuming” tort system with an automobile no-fault regime that “assure[d] prompt and full compensation.”<sup>305</sup> Thus, “to preserve the valuable benefits of no-fault[] at an affordable cost,”<sup>306</sup> claimants suffering injuries within no-fault’s entitlement boundaries *cannot* seek recompense in the tort system; instead, their only remedy is through the administrative system.<sup>307</sup> “[I]f the procedural system cannot find a way to keep cases that belong in no-fault out of the courthouse, the system is not going to work.”<sup>308</sup>

In essence, permitting a jury to hear a case that belongs in the no-fault system would destroy no-fault’s cost-effectiveness by “perpetuat[ing] a system of unnecessary litigation.”<sup>309</sup> No-fault systems reduce transaction costs, permitting a greater number of victims to recover compensation, many of whom would be unable to recover anything through tort litigation.<sup>310</sup> The increased transaction costs associated with defending claims in court that belong in the no-fault system, coupled with the higher compensation awards for cases heard within the tort system, would destroy no-fault’s cost effectiveness.<sup>311</sup> That, in turn, would render the goal of providing compensation to *all* injured claimants impossible.

#### D. Justice Breyer and the Purposes of No-Fault Compensation

The legal process issue in *Licari*—who should determine in the first instance whether an injured claimant must seek compensation in the no-fault regime or in the courts—is quite similar to the substantive issue posed in *Bruesewitz*: Is it the alternative compensation system or common law courts that should adjudicate most design defect claims? As we know, the Supreme Court held that Congress preempted *all* state law design-defect claims against vaccine manufacturers, thus directing those claims to the no-fault system.<sup>312</sup> In the process, both Justices

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304. *See id.* at 1091–92 (citations omitted).

305. *Id.* at 1092 (citing 1977 N.Y. Sess. Laws 2448, 2450 (McKinney)).

306. *Id.* at 1091 (quoting 1977 N.Y. Sess. Laws 2450 (McKinney)) (internal quotation marks omitted).

307. *See id.* at 1092 (citing *Montgomery v. Daniels*, 340 N.E.2d 444, 460–61 (N.Y. 1975)) (“If it can be said, as a matter of law, that plaintiff suffered no serious injury within the meaning of . . . the Insurance Law, then plaintiff has no claim to assert and there is nothing for the jury to decide.”).

308. *Id.* (emphasis added) (quoting David Herbert Schwartz, *No-Fault Insurance: Litigation of Threshold Questions Under the New York Statute—The Neglected Procedural Dimension*, 41 BROOK. L. REV. 37, 53 (1974)).

309. *See id.*

310. *See id.* at 1091 (quoting 1977 N.Y. Sess. Laws 2448 (McKinney)).

311. *See id.* at 1092 (quoting Schwartz, *supra* note 308, at 53).

312. *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011).

Scalia and Sotomayor applied the plain meaning rule to the relevant statutory passages, yet reached polar opposite conclusions.<sup>313</sup>

Rather than engage in a laborious textual analysis over the plain meaning of section 22(b)(1),<sup>314</sup> Justice Breyer realized that such attempts to uncover purely textual meaning were futile.<sup>315</sup> Instead, because he recognized that the plain meaning debate between Scalia and Sotomayor was a “close one,”<sup>316</sup> he turned his attention to the congressional goals in passing the NCVIA.<sup>317</sup>

After reviewing the relevant House Committee Report,<sup>318</sup> Justice Breyer determined that Congress had two objectives in mind when it passed the NCVIA.<sup>319</sup> First, Congress “sought to provide generous compensation to those whom vaccines injured”<sup>320</sup> without requiring the claimant to go through the

313. *See supra* notes 140–69 and accompanying text (discussing Justices Scalia’s and Sotomayor’s respective plain meaning approaches).

314. The text of which provides:

“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 after October 1, 1988, 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.”

42 U.S.C. § 300aa-22(b)(1) (2006).

315. *See Bruesewitz*, 131 S. Ct. at 1082–83 (Breyer, J., concurring).

316. *Id.* at 1082. Justice Breyer explained:

The textual question considered alone is a close one. Hence, like the dissent, I would look to other sources, including legislative history, statutory purpose, and the views of the federal administrative agency, here supported by expert medical opinion. Unlike the dissent, however, I believe these other sources reinforce the Court’s conclusion.

*Id.* at 1082–83.

317. *See generally id.* at 1083–86 (citations omitted) (walking through Congress’s goals). Before discussing the congressional purpose in enacting the statute, Justice Breyer briefly responded to the dissent’s argument that Congress intended to codify comment k to the Restatement (Second) of Torts. *See id.* at 1083 (citing H.R. REP. NO. 99-908, pt. 1, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6366). Even assuming that Congress intended to codify the “principle” of comment k, Justice Breyer noted that the legislative history is *silent* on whether a court or administrator should determine the availability of a feasible alternative design and thus whether any remaining side effects are rendered unavoidable. *See id.* Ultimately, Justice Breyer determined that based on the legislative goals, an expert agency, not a court, has the authority to make this determination. *See id.* at 1085 (citing 42 U.S.C. §§ 300aa-13 to -14 (2006); *Bruesewitz*, 131 S. Ct. at 1073–74; A COMPREHENSIVE REVIEW OF FEDERAL VACCINE SAFETY PROGRAMS AND PUBLIC HEALTH ACTIVITIES 13–15, 32–34 (2008), *available at* <http://www.hhs.gov/nvpo/nvac/documents/vaccine-safety-review.pdf>).

318. H.R. REP. NO. 99-908, pt. 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344.

319. *See Bruesewitz*, 131 S. Ct. at 1084, 1085 (quoting H.R. REP. NO. 99-908 at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6348) (internal quotation marks omitted) (citing H.R. REP. NO. 99-908, at 6, 24, *reprinted in* 1986 U.S.C.C.A.N. at 6347, 6365; STAFF OF H.R. COMM. ON ENERGY & COMMERCE, 99TH CONG., CHILDHOOD IMMUNIZATIONS 85–86 (Comm. Print 1986) [hereinafter CHILDHOOD IMMUNIZATIONS]).

320. *See Bruesewitz*, 131 S. Ct. at 1084 (citing H.R. REP. NO. 99-908, at 6, 24, *reprinted in* 1986 U.S.C.C.A.N. at 6347, 6365).

“expensive,” “time-consuming” process of common law tort litigation.<sup>321</sup> Second, Congress sought to stabilize a vaccine market where an increase in tort litigation “prompted manufacturers to question their continued participation in the vaccine market.”<sup>322</sup> Congress recognized that the withdrawal of more vaccine manufacturers from the market “would present the very real possibility of vaccine shortages,” potentially causing a “genuine public health hazard.”<sup>323</sup> Thus, Congress created a no-fault compensation system in which vaccine manufacturers could predictably assess their liability, thereby providing an incentive for manufacturers to remain in the market.<sup>324</sup>

These legislative goals led Justice Breyer to argue that it would be “anomalous” to interpret the statute “as preserving design-defect suits,”<sup>325</sup> because such an interpretation would destroy the viability of the no-fault compensation plan, its effectiveness in capping pharmaceutical manufacturers’ liability, and their ability to predict the extent of their liabilities.<sup>326</sup> Thus, he agreed with Justice Scalia that the NCVIA preempted Hannah’s tort claim.<sup>327</sup>

Justice Breyer, however, made clear that he was basing his holding on the *purpose* underlying the statute.<sup>328</sup> He explained that Congress intended to fulfill its objectives through an administrative no-fault compensation regime, rather than the tort system.<sup>329</sup> Justice Breyer explained:

To allow a jury in effect to second-guess [an administrator’s determination that an injured claimant is entitled to compensation] is to substitute less expert for more expert judgment, thereby threatening

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321. H.R. REP. NO. 99-908, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6347. The House Report acknowledged that injured parties frequently receive little to no redress in a tort system that is inefficient, “time-consuming,” and “expensive.” *Id.* The report also acknowledged the need to provide injured parties with compensation because:

[T]he opportunities for redress and restitution are limited, time-consuming, expensive, and often unanswered. Currently, vaccine-injured persons can seek recovery for their damages only through the civil tort system . . . . Lawsuits . . . can take months and even years to complete. Transaction costs—including attorneys’ fees and court payments—are high. And in the end, no recovery may be available. Yet futures have been destroyed and mounting expenses must be met.

*Id.*

322. *Bruesewitz*, 131 S. Ct. at 1084 (Breyer, J., concurring) (quoting H.R. REP. NO. 99-908 at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6348) (internal quotation marks omitted) (citing CHILDHOOD IMMUNIZATIONS, *supra* note 319, at 85–86); *see also* H.R. REP. NO. 99-908 at 6–7, *reprinted in* 1986 U.S.C.C.A.N. at 6347–48 (indicating that as of 1986, there was one manufacturer of polio vaccine, one manufacturer of MMR vaccine, and two manufacturers of DPT vaccine).

323. *Bruesewitz*, 131 S. Ct. at 1084 (Breyer, J., concurring) (quoting H.R. REP. NO. 99-908 at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6348) (internal quotation marks omitted).

324. *See id.* at 1083–85 (citations omitted).

325. *Id.* at 1085.

326. *See id.*

327. *See id.* at 1086.

328. *See id.* at 1085.

329. *See id.*

manufacturers with liability (indeed, strict liability) in instances where any conflict between experts and nonexperts is likely to be particularly severe—instances where *Congress intended* the contrary.<sup>330</sup>

Justice Breyer recognized that if the NCVIA is to have any utility at all, injured claimants must seek compensation in the no-fault system, and not in the tort system.<sup>331</sup> If injured claimants can pursue tort claims, the NCVIA will not accomplish its dual purpose of stabilizing the vaccine market and compensating a much higher percentage of vaccine victims. Justice Breyer recognized that Congress passed the NCVIA to prevent vaccine manufacturers from leaving the market due to fear of tort liability.<sup>332</sup> Interpreting the NCVIA in a way that did not preempt design-defect claims would thwart this goal by increasing the cost of liability insurance, forcing manufacturers to question their continued participation in the market.<sup>333</sup>

Moreover, Justice Breyer understood that Congress's second purpose in passing the NCVIA was to provide "generous compensation" for vaccine-related injuries.<sup>334</sup> The withdrawal of even a single manufacturer from the system, due to the liability concerns discussed above, would disrupt this goal. Claimants harmed by vaccines produced by non-participating manufacturers would be unable to recover from the NVICP on a no-fault basis. Only those few injured plaintiffs who could prove the common law requirements of fault and causation would be compensated.<sup>335</sup>

330. *Id.* (emphasis added). Congress recognized the inherent risk that when a jury is faced with either imposing a loss on an innocent, young child, or distributing the loss through an innocent manufacturer, it may be more inclined to select the latter option. See H.R. REP. NO. 99-908, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 6367. The "authoritative" House Report notes:

[T]he plaintiff is almost invariably a young child, often badly injured or killed, and free from wrongdoing. And, even if the defendant manufacturer may have made as safe a vaccine as anyone reasonably could expect, a court or jury undoubtedly will find it difficult to rule in favor of the "innocent" manufacturer if the equally "innocent" child has to bear the risk of loss with no other possibility of recompense.

*Id.*; see also Copland, *supra* note 245, at 282 ("[I]n practice, the tort system's *ex post* feature likely exacerbates hindsight bias—the tendency to infer causation and negligence inappropriately given injury—particularly when a decision-making body of unsophisticated lay jurors is involved . . .").

331. See generally *Bruesewitz*, 131 S. Ct. at 1083–86 (Breyer, J., concurring) (citations omitted) (analyzing why the no-fault system preempts tort suits).

332. See *id.* at 1085 (quoting Amicus Brief, *supra* note 277, at 30, 31).

333. See, e.g., H.R. REP. NO. 99-908, at 6–7, *reprinted in* 1986 U.S.C.C.A.N. at 6347–48 (describing manufacturers' difficulty in obtaining insurance); Stephen Engelberg, *Maker of Vaccine Quits the Market*, N.Y. TIMES, Dec. 12, 1984, at A21 (discussing Connaught Laboratories Inc.'s withdrawal from the DPT market due to high liability insurance premiums associated with the rise in lawsuits against vaccine manufacturers).

334. See *Bruesewitz*, 131 S. Ct. at 1084 (Breyer, J., concurring) (citing H.R. REP. NO. 99-908, at 6, 24, *reprinted in* 1986 U.S.C.C.A.N. at 6347, 6365).

335. See H.R. REP. NO. 99-908, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6347 ("Lawsuits . . . can take months and even years to complete. . . . And in the end, no recovery may be available.").

Justice Breyer's purposive approach reflects a keen understanding of the structure and objectives of no-fault compensation systems. He recognized that in order to accomplish the congressional goal of compensating a large number of vaccine injuries without regard to fault, vaccine-injured children must seek recompense in the no-fault system.<sup>336</sup> The no-fault system must be the *exclusive* forum for design-defect claims, not simply an alternative to the tort system. This is the lesson of *Licari v. Elliott*: "[I]f the procedural system cannot find a way to keep cases that belong in no-fault out of the courthouse, the system is not going to work."<sup>337</sup>

Subjecting manufacturers to both to potential tort liability for claims viewed as strong common law claims and to assessments to fund the NVICP, from which other victims would recover, would impair the congressional objective of establishing a cost-effective no-fault compensation system. If claims of victims such as Hannah Bruesewitz enter the tort system, either manufacturers will leave the market, or pressure from the manufacturers will force lower assessments and hence render less money available to compensate all of those entitled to recompense in the NVICP. As Justice Breyer properly recognized, it is necessary to divert *all* vaccine-injury claims to the no-fault system.<sup>338</sup> Preemption of design-defect claims will promote the goal of providing "generous compensation"<sup>339</sup> to a broad class of children, not just those who can prove a common law tort. Admittedly, a few victims who allege they suffered harms as a result of vaccine exposure, such as Hannah Bruesewitz herself, will be denied compensation, but such a denial reflects the best judgment of Congress and the experts the NVICP retains.

Finally, Justice Breyer reasoned, allowing a jury to "second-guess"<sup>340</sup> the no-fault administrator would destroy the cost-effectiveness of the no-fault regime and "perpetuate a system of unnecessary litigation."<sup>341</sup> Had the Court supported Justice Sotomayor's view and found that the NCVIA did not preempt design-defect claims,<sup>342</sup> then manufacturers would be taxed twice—once for the NCVIA assessment, and a second time for the liability premiums to cover common law liability and the substantial transaction costs inherent in the litigation process. Meanwhile, victims and their counsel would be able to game the system and choose the approach that offered them the better probability of prevailing and the larger amount of compensation. Congress sought to establish a comprehensive compensation program that would make it financially feasible

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336. See *Bruesewitz*, 131 S. Ct. at 1085 (Breyer, J., concurring).

337. *Licari v. Elliott*, 441 N.E.2d 1088, 1092 (N.Y. 1982) (alteration in original) (quoting Schwartz, *supra* note 308, at 53) (internal quotation marks omitted).

338. See *Bruesewitz*, 131 S. Ct. at 1085 (Breyer, J., concurring).

339. *Id.* at 1084 (citing H.R. REP. NO. 99-908, at 6, 24, *reprinted in* 1986 U.S.C.C.A.N. at 6347, 6365).

340. *Id.* at 1085.

341. See *Licari*, 441 N.E.2d at 1092.

342. See *Bruesewitz*, 131 S. Ct. at 1100–01 (Sotomayor, J., dissenting).

for the continued production of vaccines, not to give victims the proverbial “two bites at the apple.”

Later in the same Term as *Bruesewitz*, the wisdom of Justice Breyer’s functional analysis prevailed when he wrote for the Court in *Kasten v. Saint-Gobain Performance Plastics Corp.*<sup>343</sup> *Kasten* considered whether oral complaints were covered under the Fair Labor Standards Act’s (FLSA) antiretaliation provision, which prohibits an employer from terminating or discriminating against an employee that “has *filed any complaint*.”<sup>344</sup> Breyer quickly scanned the statutory text in search of a plain meaning.<sup>345</sup> He realized that the plain meaning was not readily apparent because while the word “filed” may “contemplate a writing,”<sup>346</sup> the subsequent phrase, “any complaint,” implies that *all* complaints, both written and oral, are included.<sup>347</sup> Thus, because Justice Breyer quickly realized that “the text, taken alone, cannot provide a conclusive answer,” he applied a functional analysis to the FLSA.<sup>348</sup>

Considering the antiretaliation provision from a functional perspective, Justice Breyer realized that Congress intended to enforce the FLSA not by initiating proactive federal regulation, but by responding to employee complaints.<sup>349</sup> Given that Congress wanted to facilitate employee complaints about deleterious working conditions, Justice Breyer questioned: “Why would Congress want to limit the enforcement scheme’s effectiveness by inhibiting use of the Act’s complaint procedure by those who would find it difficult to reduce their complaints to writing . . . ?”<sup>350</sup> Unless oral complaints were included within the ambit of the antiretaliation provision, the thoughtful enforcement regime that Congress has established would be defeated.<sup>351</sup>

## V. CONCLUSION

Over the last twenty years, the Justices have fought an intense ideological battle regarding the proper method of statutory interpretation. Since joining the Supreme Court in 1994, Justice Breyer has actively opposed Justice Scalia’s literalist agenda. Justice Breyer, the liberal “counterweight”<sup>352</sup> to Justice Scalia, favors a more pragmatic approach to statutory interpretation—one that does not

343. 131 S. Ct. 1325 (2011).

344. 29 U.S.C. § 215(a)(3) (2006) (emphasis added); see *Kasten*, 131 S. Ct. at 1329.

345. See *Kasten*, 131 S. Ct. at 1331–33 (citations omitted).

346. *Id.* at 1331. Justice Breyer also acknowledged that the word “filed” can be used “in conjunction with oral material.” *Id.*

347. See *id.* at 1332.

348. See *id.* at 1333.

349. See *id.*

350. *Id.*

351. See *id.* Justice Scalia, of course, did not sign on to Justice Breyer’s opinion. See *id.* at 1339 (Scalia, J., dissenting) (“The meaning of the phrase ‘filed any complaint’ is clear in light of its context, and there is accordingly no need to rely on abstractions of congressional purpose.”).

352. Dortzbach, *supra* note 24, at 182.

simply consider the statutory text in isolation. Justice Breyer's method, the purposive approach Professors Hart and Sacks advocated, and conservative judges such as Friendly and Hand endorsed, seeks to understand the goals that Congress had in passing a particular statute, and *then* interprets the statutory language to fulfill these purposes.<sup>353</sup> Justice Scalia is not interested in any of this; he tries to interpret the words in a vacuum. This approach may work in some cases, but it leads to misguided and inconsistent results when complicated legislative schemes are involved. It is no wonder, then, that reasonable jurists—Justices Scalia and Sotomayor—can disagree so vehemently about the meaning of the same statute, such as the one at issue in *Bruesewitz*.

Such inconsistent conclusions, with potentially devastating results, *can* be prevented through the purposive mode of statutory interpretation exemplified by Justice Breyer's concurrence in *Bruesewitz*. When, after briefly reviewing the statutory text, the meaning is not apparent without having to engage in a drawn out textual analysis, the Court should *stop*, consider the legislative goals in passing the particular provision, and interpret the text in accordance with these goals. With today's complex regulatory state, considering statutory text in a vacuum will not yield the true meaning of a statute, but considering legislative purpose will. The lesson of *Bruesewitz* is clear, even if the language it construed is not: It is time to declare Justice Breyer's purposive approach the winner in this interpretive battle and put Justice Scalia's textualism to a long, overdue rest.

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353. *See id.*

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