Bruesewitz v. Wyeth, Inc.: A Change in Preemption

I. INTRODUCTION

The Supreme Court’s decision in Bruesewitz v. Wyeth, Inc.¹ was incorrectly motivated by a desire to change prior preemption precedent and ultimately obstructed the intent of the National Childhood Vaccine Injury Act of 1986² (hereinafter “Vaccine Act”). Because of split circuits and a desire for uniformity, the Supreme Court of the United States (hereinafter the “Court”) granted certiorari in Bruesewitz to determine if the Vaccine Act preempted state courts from hearing design defect claims³ on nationally mandated childhood vaccines.⁴ Despite childhood vaccines falling under the traditional health and safety police powers of state governments,⁵ the Court held that federal law preempted design defect claims.⁶ The holding in Bruesewitz deviates from the Court’s historical preemption jurisprudence, and incorrectly focuses on statutory text while ignoring legislative intent.⁷

The Vaccine Act was implemented to stabilize the vaccine market and to ensure a steady supply of safe and affordable vaccines.⁸ Concerned with high litigation costs and jury awards, Congress sought to stabilize the market by providing an easy forum⁹ in which plaintiffs, inevitably injured from the administration of vaccines,¹⁰ could receive compensation for
those injuries. However, the Act specifically left the door open for plaintiffs to bring their claims in state court under traditional common law theories (such as design defect) should they not be satisfied with their judgment from the Vaccine Court. Despite the Act’s language specifically allowing state claims, the majority held that the Vaccine Act explicitly preempted design defect causes of action.

The Court erred in finding express preemption, and because the statutory language is ambiguous the Court should have followed its implied preemption jurisprudence, which weighs heavily against preemption.

A. BACKGROUND

In areas traditionally regulated by the states, the Court is hesitant to find preemption unless the statutory language is express. However, because statutory drafting is often ambiguous, the Court preserves state sovereignty by assuming that Congress did not intend preemption unless that intent is made manifest. Thus, in cases of ambiguity, the Court will look to legislative history and other outside sources to determine if preemption is implied.

The Court will find implied preemption when a federal regulatory scheme dominates the field, or there is conflict between state and federal law, making it impossible to implement state law without disrupting federal purposes and objectives.
As the federal government expands, growing tension has arisen between state and federal powers. In this increasingly inharmonious dichotomy between federal and state governments, the Court continues to serve as the arbitrator in determining whether state law interferes with federal law. The trend in statutory interpretation is an "increasing reluctance to expand federal statutes beyond their terms through the doctrine of implied preemption."

In *Bruesewitz*, Justice Scalia, writing for the majority, attempts to narrow the Court’s preemption jurisprudence by forcing the Court to focus strictly on statutory text. However, this strict interpretation ignores the very reason implied preemption jurisprudence developed. Because it’s often difficult, if not impossible, to determine Congressional intent just from the text of the statute, the Court developed the implied preemption analysis, which attempts to determine legislative intent through the examination of other sources, including legislative history.

This casenote will explore prior preemption jurisprudence and various approaches the Court uses in determining if federal law preempts state law. The three approaches discussed are express preemption, implied preemption, and conflict preemption.

This note will then evaluate *Bruesewitz* under each of the aforementioned approaches. Additionally, the note will touch on
Justice Scalia’s dissents in previous preemption cases, and how Justice Scalia used Bruesewitz as a platform for changing preemption precedent. The note will conclude with an analysis of why this holding violates constitutional theories of federalism as discussed in Justice Sotomayor’s dissent.

II. PRIOR LAW

Preemption can be found in a number of ways: 1) express preemption (the statute explicitly preempts state law); 2) field preemption (congressional intent to preempt is inferred from a pervasive federal regulatory scheme); and 3) conflict preemption (state and federal law cannot coexist without conflicting with the federal regulatory scheme).

A) EXPRESS PREEMPTION: THE LANGUAGE IS CLEAR AND UNAMBIGUOUS.

The Court concludes that Congress expressly preempted state law when the statutory language explicitly dictates that states are preempt from passing statutory regulation. When the language is express, federal courts hold that congressional intent is made manifest and states are therefore prohibited from enacting law. Because statutory construction is often subject to personal interpretation and rarely express, the Court typically doesn’t find express preemption and next looks to whether preemption is implied.

B) IMPLIED PREEMPTION: PREEMPTION IS IMPLIED FROM FEDERAL DOMINANCE IN THE FIELD.
Preemption can be inferred when the federal government predominantly regulates a field. When the federal government establishes a pervasive federal regulatory scheme, the Court infers that Congress intended to preempt state law. However, because Congress traditionally allows states to regulate concurrently with federal regulation, it’s difficult to determine if the federal government intended to be the sole regulatory body; thus, the Court is usually reluctant to find complete field preemption.

C) CONFLICT PREEMPTION: STATE AND FEDERAL LAW CANNOT COEXIST WITHOUT CONFLICT.

Conflict preemption (another form of implied preemption) is found when state law (including common law) creates conflict with federal law. When such conflict exists, the Supremacy Clause dictates that federal law prevails. As aforementioned, because the federal government often allows state law to supplement federal law, conflict preemption is common throughout the Court’s preemption jurisprudence.

III. MAIN CASE

The issue presented in Bruesewitz is whether the federal government intended to bar state design defect claims by stating that no vaccine manufacturer shall be liable for damages “if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and accompanied by proper directions and warnings.” The crux of the argument in
Bruesewitz hinges on the term *unavoidable*.\(^46\) This “term of art,” as the petitioner argues, is subject to interpretation.\(^47\)

Under the common law, the term *unavoidable* means: given present day science and technology, the inherently dangerous product cannot be made safer for its intended use, and as such, the injury could not be avoided.\(^48\) Respondent urged adoption of a novel definition of the term *unavoidable*, which ignores present day science and technology. Respondent argued that approval by the Food and Drug Administration (hereinafter “FDA”) is a complete bar to design defect claims, and once approved, side effects are deemed unavoidable.\(^49\) According to respondent, vaccine manufacturers should not be held liable if the FDA approved the product.\(^50\)

Respondent argued that design defect claims are exactly the type of litigation Congress intended to prevent, and that increasing litigation costs were the original cause of instability in the vaccine market.\(^51\) Alternatively, petitioners argued that Congress only intended to create an alternate forum\(^52\) to obtain compensation and to alleviate manufacturers from being held strictly liable,\(^53\) but did not intend to preempt design defect claims.\(^54\) Thus, the Vaccine Court functions merely as an alternative forum to seek compensation.\(^55\)

To support this contention, petitioners pointed to the statute which states that “[n]o state may establish or enforce a
law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for vaccine-related injury or death if such civil action is not barred by this part.”56

Oddly enough, the majority in Bruesewitz concluded that Congress explicitly barred design defect claims.57 To reach this conclusion, the Court undertook an extensive analysis of statutory construction and qualifying terms.58 Justice Breyer’s concurrence on the other hand, takes the position that while the text alone does not support the conclusion, when supplemented with legislative history and statutory purpose, the same conclusion is warranted.59

In her dissent, Justice Sotomayor, argued that neither the text of the Vaccine Act, nor its legislative history supports such conclusion.60 Justice Sotomayor correctly points out that the Court’s decision “leaves a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing and distributing their products.”61 Furthermore, the dissent rejected the majority’s viewpoint on the explicitness of the statutory text.62

Justice Sotomayor argued that Congress adopted comment K of §402A of the Restatement (Second) of Torts when writing the Vaccine Act.63 Comment K would imply that Congress intended for
unavoidable to be defined as “products, which in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use.” If comment K were incorporated, then design defect claims would be allowed. Thus, manufacturers would not be held strictly liable, but would only be held liable in negligence. As such, design defect claims would only prevail when manufacturers fail to place a safer product on the market, despite its availability.

IV. ANALYSIS

The statutory text of the Vaccine Act does not explicitly bar design defect claims. Justice Scalia interprets, however, and holds otherwise. Justice Breyer, in his concurrence, correctly points out that Justice Scalia’s personal interpretation of the statute as unambiguous is unsupported, and as such, the Court should incorporate legislative intent into its determination. Because Justice Scalia has previously expressed his distaste for narrow readings “in light of the presumption against the pre-emption,” he deviates from the Court’s preemption precedent to allow for wide judicial interpretation of statutory construction.

A) INTERPRETATION OF THE VACCINE ACT UNDER THE EXPRESS PREEMPTION APPROACH.

Express preemption is found when Congress considers the issue of preemption and includes in the text a provision explicitly addressing that issue. In Cipollone, the Court found
preemption when the statute explicitly stated that “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to advertising or promotion.” The Court held that because states were strictly prohibited from regulating labeling requirements, they were also preempted from suing for failure to warn.

Comparing Bruesewitz, it seems counterintuitive that Congress would include a clause specifically stating that compliance with federal regulation does not preempt state law failure to warn claims but preempts design defect claims. Following the Court’s logic, Congress intended to impose the same common law duty of care for labeling, but not for consumer protection of dangerous side effects. To be clear, this would require an assumption that as new technology exposed potentially dangerous side effects, vaccine manufacturers would have a duty to disclose such side effects; however, if the vaccine manufacturer discovered through advanced technology that one of those side effects could be avoided by a change in the chemical makeup, the same manufacturer is under no common law duty to change the drug composition making it safer for consumers. It doesn’t logically follow that Congress would explicitly write a savings clause for failure to warn claims and not intend the same conclusion for design defect claims. Rather than refer to outside sources to determine Congressional intent, the Court
concluded that Congress’s silence regarding design defect claims conclusively resulted in express preemption.\textsuperscript{78}

Because the Vaccine Act does not explicitly and expressly preempt design defect claims, the Court should not have found express preemption.\textsuperscript{79} The split among various federal circuit courts regarding the meaning of unavoidable in the Vaccine Act demonstrates that the language is not express.\textsuperscript{80} As stated by the Eastern District of Pennsylvania, “both readings of the statute are plausible, and . . . the plain text of the Vaccine Act does not resolve the proper interpretation.”\textsuperscript{81}

The Court should not have used express preemption jurisprudence, and should have engaged in an implied preemption analysis. Justice Scalia wrongly based his opinion strictly on the text of the statute, which does not support the majority’s conclusion that design defect claims are expressly prohibited.\textsuperscript{82} Therefore, design defect claims should not be found barred under an express preemption analysis.

\textbf{b) Interpretation of the Vaccine Act under implied preemption approach.}

Under the implied preemption approach the Court will look at legislative intent in determining whether Congress intended to preempt state law.\textsuperscript{83} The “purpose of Congress is the ultimate touchstone of preemption analysis.”\textsuperscript{84} “A preemption clause tells [the Court] that Congress intended to supersede or modify state law to some extent. In the absence of legislative precision . . .
courts ordinarily ‘accept the reading that disfavors pre-
emption.’”85 Under such analysis, given the ambiguity of the term
unavoidable, the Court should have held that the Vaccine Act did
not preempt design defect claims. 86

The fact that Congress expressly left the door open to
state tort law claims87 supports the conclusion that Congress did
not intend to commandeer the field.88 Preemption will be implied
when the federal statutory scheme is so pervasive that state law
and federal law cannot coexist.89 Because the federal statutory
scheme explicitly allows for state tort law claims, field
preemption cannot be implied.

C) INTERPRETATION OF THE VACCINE ACT UNDER THE CONFLICT PREEMPTION APPROACH.

Design defect claims do not conflict with federal
regulation or the federal regulatory scheme.90 Respondents argued
that design defect claims are the type of claims that required
enactment of the Vaccine Act.91 As previously mentioned, it was
the cost and amount of litigation that drove many manufacturers
out of the market.92 Congress enacted the Vaccine Act to relieve
manufacturers from defending a tremendous number of lawsuits.93

The Vaccine Court is unique in that it provides attorney’s
fees for unsuccessful claims provided they’re not frivolous.94
The same cannot be said for the traditional adversarial
process.95 Thus, it is highly speculative that a floodgate of
litigation will arise by allowing state design defect claims.96
However, allowing design defect claims assures that as medical technology advances manufacturers will be held responsible for placing the safest product possible on the market. Design defect claims maintain accountability and thus further Congress’s goal of providing a safe and stable vaccine market. Furthermore, because attorneys will have to pay their own way in the traditional adversarial process, they will only bring claims when a known product of increased safety is available, but not used. Thus, high litigation costs are an unlikely threat to the current stability of the vaccine market. Conflict preemption therefore cannot be found and the Court should have recognized that design defect claims actually further congressional intent.

**d) Federalism and Sotomayor’s dissent.**

Historically both the Court and Congress value state sovereignty. Recognizing that congressional intent is often convoluted, traditional preemption jurisprudence starts “with the basic assumption that Congress did not intend to displace state law.” In enacting the Vaccine Act it follows that Congress sought to preserve state causes of action, including design defect claims.

The holding in *Bruesewitz* deviates from the Court’s traditional preemption jurisprudence, which focused on congressional intent and state sovereignty. While Justice
Scalia is correct in his position that implied preemption analysis forces the Court to make far-reaching conclusions regarding congressional intent, he is incorrect in his position that congressional intent can be found exclusively in the statutory text.

The holding in *Bruesewitz* forces the Court to manipulate text and make strained assumptions, which is the very reason implied preemption analysis developed. Implied preemption analysis is a tool for allowing the Court to turn to additional sources (such as legislative history) to assist in its determination of congressional intent. However, the holding in *Bruesewitz* deviates from this analysis and pushes the Court toward a strictly textual analysis, ignoring federalism and state sovereignty.

Justice Sotomayor correctly points out that this holding is a complete usurpation of traditional state police powers, a questionable conclusion given that Congress usually leaves matters of public health and safety to state regulation. Even when the federal government does regulate health and safety, very rarely will it usurp all state power. The Court engages in an implied preemption analysis to ensure its holding accurately reflects congressional intent. The *Bruesewitz* decision departs from this tradition. Because the holding in *Bruesewitz* destroys state sovereignty and usurps all power from
the states in ensuring their citizens receive the safest vaccine available, the Court’s holding banning design defects is in error.

V. CONCLUSION

Because the Vaccine Act does not expressly preempt design defect claims, nor can such conclusions be inferred through an implied preemption analysis, the Court erred in finding design defect claims barred. The conclusion in Bruesewitz completely removes vaccine manufacturer accountability from state regulation.

While the federal government does have a pervasive regulatory scheme, it explicitly allows for state law to regulate concurrently, which compliments and furthers the scheme’s purposes and objectives. The exclusion of design defect claims from this scheme usurps state power and violates federalism and state sovereignty. It’s highly speculative that Congress intended to fully commandeer the vaccine market and remove such an important power. Based on prior preemption precedent, the Court should have concluded that Congress intended to preserve state sovereignty and permit design defect claims.
1 See Bruesewitz v. Wyeth, Inc., No. 09-152, slip op. at 3 (U.S. Feb. 12, 2011).


3 Bruesewitz, supra note 1, at 1.


6 Bruesewitz, supra note 1, at 19.

7 Cf. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516-17 (1992) (citing Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) stating “[t]he purpose of Congress is the ultimate touchstone” in preemption analysis), with Bruesewitz, supra note 1, at 16 (Scalia, J., majority) (“even those of us who believe legislative history is a legitimate tool of statutory interpretation have no need to resort to it”).

8 See Brief in Response to Petition for Writ of Certiorari at 15-16, Bruesewitz, No. 09-152, slip op. (U.S. Feb. 12, 2011), (“The parties are in agreement that Congress enacted the Vaccine Act
to ensure that there would be a stable supply of safe and
effective vaccines today and in the future”).


10 See Mary Holland et al., Unanswered Questions from the Vaccine Injury Compensation Program: A Review of Compensated Cases of Vaccine-Induced Brain Injury, 28 PACE ENVTL. L. REV. 480, 516-22 (2011) (detailing a chart used by the Vaccine Court in determining damages for associated side effects resulting from mandated childhood vaccines).

11 See id.

12 42 U.S.C. § 300aa-22(e) (2008); see also Cantor, supra note 4, at 1876.

13 See id. § 300aa-22(e).

14 Bruesewitz, supra note 1, at 19.

15 Contra Sykes v. Glaxo-SmithKline, 484 F. Supp. 2d 289, 299 (E.D. Pa. 2007) (interpreting the Vaccine Act as having two alternate and distinctly separate meanings); see also Am. Home Prod. Corp., 668 S.E.2d at 237 (holding the Vaccine Act is subject to multiple interpretations).

16 Cipollone, 505 U.S. at 516.
17 Sykes, 484 F. Supp. 2d at 307 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action").


19 Cipollone, 505 U.S. at 532 (Blackmun, J., concurring in part and dissenting in part) (citing English v. General Elec. Co., 496 U.S. 72, 79 (1990)).

20 Id. at 516 (Stevens, J., plurality opinion) (quoting Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta, 458 U.S. 190, 204 (1982) ("or if 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’").


23 Id. at 1223.

24 See id. at 1220.
Bates, 544 U.S. at 459 (Thomas, J. concurring in part and dissenting in part).

See Bruesewitz, supra note 1, at 7-13.

See generally Davis, supra note 22.

See id. at 1221-22.

See id. at 1221; See also Cipollone, 505 U.S. at 516.

See Sykes, 484 F. Supp. 2d at 296.


Sykes, 484 F. Supp. 2d at 296.

See Cipollone, 505 U.S. at 515-16.

See id. at 516.

See Bates, 544 U.S. at 449 (stating the proposition that given the history of tort litigation, if Congress intended to preempt design defect claims, depriving injured parties from compensation, it would express that intent clearly and expressly).

See generally Davis, supra note 22.

Cipollone, 505 U.S. at 516.

Id.

Cantor, supra note 4, at 1878 (“Fearful of interfering with States rights, courts are reluctant to preempt state law in areas of traditional state regulation”).
40 Cipollone, 505 U.S. at 522 (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)).
41 Cantor, supra note 4, at 1876-78.
42 U.S. Const. art. VI.
43 See Cantor, supra note 4, at 1878.
44 See Davis, supra note 22, at 1221-23.
45 Bruesewitz, supra note 1, at 7-12.
46 Id.
47 Brief for Petitioners, supra note 8, at 29.
48 Id. at 28-31.
49 See Brief for Respondent, supra note 8, at 40-44.
50 See id. (cf. Sykes, 484 F. Supp. 2d at 320 (referencing Hillsborough Cnty. v. Automated Med. Lab., Inc. 471 U.S. at 717-18 (1985) “But the Supreme Court has made clear that the detail of a federal agency’s regulations, in particular the FDA’s, is not a sufficient basis for a court to find preemption of state law”).
51 Brief for Respondent, supra note 8, at 28; see also Cantor, supra note 4, at 1858.
52 Brief for Petitioners, supra note 8, at 10 (citing H.R. REP. No.100-391 (1987) “The Act created a no-fault administrative compensation program—the National Vaccine Injury Compensation
Program (‘Compensation Program’)–to supplement the traditional tort system”).

53 Id. at 23; see also Am. Home Prod. Corp., 668 S.E.2d at 239 (arguing that “every case correctly recognized that Congress modeled subsection (b)(1) after comment k to § 402A of the Restatement (Second) of Torts”).


55 See id.

56 42 U.S.C. § 300aa-22(e) (2008); see Brief for Petitioners, supra note 8, at 23.

57 See Bruesewitz, supra note 1, at 16 (stating that the majority’s interpretation is the only interpretation supported by the text).

58 Id. at 7-9.

59 Id. at 1 (Breyer, J., concurring).

60 Id. at 1 (Sotomayor & Ginsberg, JJ., dissenting).

61 Id.

62 Id.

63 Id. at 5-13; see also Sykes, 484 F. Supp. 2d at 300.
See Bruesewitz, supra note 1, at 6-8, n.4 (Sotomayor & Ginsberg, JJ., dissenting).

Id. at 5-13.

Brief for Petitioners, supra note 8, at 27.


Bruesewitz, supra note 1, at 19.

Id. at 1 (Breyer, J., concurring).

Cipollone, 505 U.S. at 544 (Scalia, J., concurring in part and dissenting in part).

Id. at 517.

Id. at 515-25.

Id.


Id.

Id. The statute reads that “a vaccine shall be presumed to be accompanied by proper directions and warnings . . . unless the plaintiff shows by clear and convincing evidence that the manufacturer failed to exercise due care notwithstanding its compliance with such Act.” The Court makes the assumption that because the Vaccine Act omitted a savings clause regarding design defect claims, Congress intended to bar those claims, See Bruesewitz, supra note 1, at 15. But design defect claims are
neither expressly barred nor can that conclusion be inferred given Congress’s silence and this Court’s preemption precedent.

77 Brief for Petitioners, supra note 8, at 27.

78 See Bruesewitz, supra note 1, at 7-12.

79 Id. at 1 (Sotomayor & Ginsberg, JJ., dissenting).

80 Petition for a Writ of Certiorari, supra note 8, at 3.

81 Sykes, 484 F. Supp. 2d at 299.

82 See Bruesewitz, supra note 1, at 1 (Sotomayor & Ginsberg, JJ., dissenting).

83 Wyeth, 129 S.Ct. at 1194 (citing Medtronic, Inc., 518 U.S. at 485).

84 Id.


86 See Bates, 544 U.S. at 449 (stating that if s statute has two alternative readings then the Court has a duty to accept the reading disfavoring preemption).


88 See Sykes, 484 F. Supp. 2d at 320.

89 Id.
See Bates, 544 U.S. at 448 ("this history emphasizes the importance of providing an incentive to manufacturers [fear of high damages from tort claims] to use the utmost care in the business of distributing inherently dangerous items").

See Brief in Response to Petition for Writ of Certiorari, supra note 8, at 19.

Cantor, supra note 4, at 1858.

Id.

Brief for the United States as Amicus Curiae Supporting Respondents, supra note 8, at 26.

Id.

Bruesewitz, supra note 1, at 27 n.25 (Sotomayor & Ginsberg, JJ., dissenting) ("[d]espite the doomsday predictions of respondent and the various amici cited by the concurrence . . . the possibility of a torrent of meritless lawsuits bankrupting manufacturers seems remote at best").

Wyeth, 129 S. Ct. at 1202 (stating that “[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly").

See Bates, 544 U.S. at 448.

See Bruesewitz, supra note 1, at 27 n.25 (Sotomayor & Ginsberg, JJ., dissenting).

Id.
See id.; see also Wyeth, 129 S. Ct. at 1202; Bates, 544 U.S. at 458 (citing Hines, 312 U.S. at 67 (stating that implied preemption can be inferred when state law directly conflicts with Congress’s purposes and objectives of the statute or regulatory scheme)).

See Sykes, 484 F. Supp. 2d at 307 (quoting “because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action”).


See Cipollone, 505 U.S. at 516; see also Riegel, 552 U.S. at 334-335 (citing Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230 (1947) “[p]reemption analysis starts with the assumption that ‘the historic police powers of the States are not to be superseded . . . unless that was the clear and manifest purpose of Congress’”).

is not ‘a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’

106 Bruesewitz, supra note 1, at 1 (Sotomayor & Ginsberg, JJ., dissenting) (“the Court imposes its own bare policy preference over the considered judgment of Congress . . . [i]n doing so, the Court excises 13 words from the statutory text”).

107 See id.

108 See Davis, supra note 22, at 1221.

109 Id.

110 See id. at 1241 (discussing the lack of respect for state tort law and its role in ensuring consumer product protection).

111 See Bruesewitz, supra note 1, at 20-24 (Sotomayor & Ginsberg, JJ., dissenting).

112 Sykes, 484 F. Supp. 2d at 320 (stating “[g]iven the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt it its entirety a field related to health and safety”).

113 See Riegel, 552 U.S. at 334-335.

114 See Davis, supra note 22, at 1221-23.

115 See Bruesewitz, supra note 1, at 20-24 (Sotomayor & Ginsberg, JJ., dissenting).
116 Id. at 28 (Sotomayor & Ginsberg, JJ., dissenting).

117 Id. at 20-24.

118 See id.

119 See Bates, 544 U.S. at 449-50 (stating the history of tort litigation against manufacturers adds force behind the presumption against preemption and emphasizes the importance of providing incentive to manufacturers to use the upmost care).

120 See Bruesewitz, supra note 1, at 28 (Sotomayor & Ginsberg, JJ., dissenting).

121 Cipollone, 505 U.S. at 545 (Scalia & Thomas, JJ., dissenting).

122 See Bruesewitz, supra note 1, at 20-24 (Sotomayor & Ginsberg, JJ., dissenting).