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Judicial Nullification in Georgia: Overriding Medical Malpractice Reform and Federal Law to Reward the Trial Bar

Hans A. von Spakovsky and Jack Park

Abstract: *Just as juries that ignore the evidence to reach a verdict contrary to the law engage in "jury nullification," judges that substitute their policy preferences for those of elected legislators commit "judicial nullification" by striking down democratically enacted statutes by judicial fiat. Two recent decisions by the Georgia Supreme Court are textbook examples. These decisions, overturning medical malpractice caps on noneconomic damages and overriding the federal ban on tort suits against vaccine makers, ignore prior precedent, statutory language, and limitations on judicial authority. Each decision will have a substantial and deleterious impact, both on Georgians' health and welfare and on the state's civil justice system, while enriching the trial bar at the expense of Georgia's citizens. Georgians are left with two options: (1) amend the state constitution to make it clear that the General Assembly has the authority to limit or eliminate damages in all tort claims or (2) replace the activist justices on the Georgia Supreme Court.*

Just as juries that ignore the evidence to reach a verdict contrary to the law engage in "jury nullification," judges that substitute their policy preferences for those of elected legislators commit "judicial nullification" by striking down democratically enacted statutes by judicial fiat. Two recent decisions by the Georgia Supreme Court are textbook examples. In *Atlanta Oculoplastic Surgery v. Nestlehutt* (2010), the court usurped the role of the Georgia General Assembly when it threw out a key part of the state's medical mal-

Talking Points

- The Georgia Supreme Court's decisions overturning medical malpractice caps on noneconomic damages and overriding the federal ban on tort suits against vaccine makers are unfortunate examples of activist judges substituting their policy preferences for those of elected officials.
- The justices ignored prior precedent, the plain text of statutory language, and limitations on judicial authority to overrule the Georgia General Assembly and the U.S. Congress.
- Georgians are faced with only two options: amending the state constitution to make it clear that the General Assembly has the authority to limit or eliminate damages in all tort claims or replacing the activist justices on the Supreme Court.
- Georgia's imperial Supreme Court is causing a crisis in the state's legal system that will subside only when the justices recognize that their duty is to apply the law impartially, not make up their own laws, or are replaced with judges who understand that duty.

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practice reforms.[1] And in *American Home Products v. Ferrari* (2008), the court second-guessed Congress's decision to place vaccine-related lawsuits in a specially created "vaccine court" that provides compensation to those who are injured by vaccines and does so on a non-adversarial, no-fault basis.[2]

Out-of-control medical malpractice verdicts are responsible for skyrocketing malpractice insurance premiums that raise the cost of medical care and drive some doctors out of the market altogether.

These decisions have real-world consequences. The damages cap that the court struck down in *Nestlehutt* was a central component of a tort reform package to slow the rise in the cost of malpractice insurance and, by extension, medical care in the state. With the cap gone, medical costs will resume their upward climb, and access to health care will be diminished. Similarly, the decision in *Ferrari* to allow state courts to hear vaccine-related cases will drive up the cost of producing vaccines, pushing vaccine-makers out of the market—the very ill that Congress sought to address by creating a vaccine court. With fewer vaccines being developed and manufactured, the greater good will suffer.

This is judicial activism run amok, and the consequences are what can be expected when judges attempt to make policy from the bench. Georgians, like all other Americans, deserve and should demand judges who apply the law impartially based on constitutional text, the plain language of statutes, and precedents and avoid injecting their own policy preferences into legal decisions.

Nestlehutt: Nullifying Malpractice Reform

Out-of-control medical malpractice verdicts are responsible for skyrocketing malpractice insurance premiums that raise the cost of medical care and drive some doctors, including those concentrated in certain specialties like obstetrics and gynecology, out of the market altogether. To rein in outrageous verdicts while still allowing a reasonable amount of compensation for injured individuals, Georgia followed the lead of many other states by instituting limits on certain types of damages in medical malpractice suits. But in a 2010 decision, the Georgia Supreme Court struck down those limitations, relying on outright misrepresentations of the law to hold that any cap on jury verdicts is somehow a denial of the jury right guaranteed by the Georgia Constitution.

A Commonsense Solution

Georgia's Tort Reform Act of 2005 was a comprehensive attempt to improve justice in the state's courts while reducing frivolous litigation and gaming of the judicial system. The act made its most sweeping changes in the area of medical malpractice liability in response to the widespread view that malpractice litigation in the state was out of control and that Georgia was in the midst of a malpractice "crisis"[3] that was limiting access to care within the state.[4] The General Assembly stated as a legislative finding in the Tort Reform Act:

> Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly…[with] a resulting adverse impact on the health and well-being of the citizens of this state.[5]

The legislation was intended to "promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and…thereby assist in promoting the provision of health care liability

1. Atlanta Oculoplastic Surgery v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010).
2. American Home Products v. Ferrari, 668 S.E.2d 236 (Ga. 2008).
3. Mac Gibson and Josh Belinfante, "The Need for Mandatory Medical Review Panels: The Medical Malpractice Crisis in Georgia," Georgia Public Policy Foundation, Nov. 14, 2003, at http://www.gppf.org/article.asp?RT=11&p=pub/LegalReform/MedicalMalpractice/malpractice_full_study.htm.
4. S.B. 3, Ga.L. 2005, §1.
5. *Id.*

insurance by insurance providers."[6] The key provision was a limitation on "noneconomic" damages, which the statute defined as damages

> for physical and emotional pain, discomfort, anxiety, hardship, distress, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, lost of society and companionship, loss of consortium, injury to reputation, and all other nonpecuniary losses of any kind or nature.

The provision limited recovery for noneconomic damages in medical malpractice actions, including wrongful death lawsuits, to $350,000 from any single medical provider or facility; to $700,000 from all medical facilities combined; and to a total of $1,050,000.[7] It did not apply to medical expenses, lost wages, lost income, and funeral, burial, and other "monetary expenses," for which there are no limitations.[8]

Noneconomic damages are frequently subject to caps, for two good reasons.

First, unlike economic damages—for example, lost wages and future medical expenses—noneconomic damages cannot be estimated and proven to a reasonable certainty with documentary evidence. The result is "jackpot justice": Some plaintiffs receive reasonable awards, while others get awards that are hugely disproportionate to any possible injury. The Georgia General Assembly recognized that injuries such as "pain" and "discomfort" are real and worthy of compensation, but it also made a rational determination that, because these damages are impossible to calculate with any certainty, they should be subject to a reasonable limit to prevent runaway verdicts.

Second, noneconomic damages, if left uncapped, can be abused as a substitute for attorneys' fees, which cannot otherwise be recovered in medical malpractice actions. Given that most medical malpractice lawsuits are brought on a contingency fee basis, unlimited awards of noneconomic damages help the plaintiffs' lawyers to arrive at a bountiful payday.

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A Deceptive Decision

In *Nestlehutt*, the Georgia Supreme Court unanimously struck down the cap on noneconomic damages on the ground that it violated the right to trial by jury provided by the Georgia Constitution. The case concerned a botched facelift that the plaintiffs alleged was due to the surgeon's failure to adhere to the proper standard of care. After a mistrial, the second jury awarded the plaintiffs $1,265,000 in damages, including $115,000 for past and future medical expenses. The rest was for noneconomic injuries: $900,000 for pain and suffering and $250,000 for loss of consortium.[9] Those sums exceeded the Reform Act's damage cap.

In evaluating the constitutionality of the damages cap, the Georgia Supreme Court proceeded with a three-step legal analysis based on Georgia law but informed by snippets of law from other jurisdictions. First, it asserted that the right to a trial by jury for medical malpractice claims predated the 1798 adoption of the Georgia Constitution.[10] Second, it stated that this right included an "attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury."[11] Third, it reasoned that,

6. *Id.*
7. GA. CODE ANN. § 51-13-1(b)–(e) (2011).
8. GA. CODE ANN. § 51-13-1(a)(4) (2011).
9. *Nestlehutt*, 691 S.E.2d at 220.
10. The Georgia Constitution provides a "right to trial by jury" in art. I, § I, para. XI.
11. *Nestlehutt*, 691 So. 2d at 223.

if a Georgia trial court were to follow the Reform Act and reduce a jury's award of noneconomic damages that was greater than the statutory limit, that court would "clearly nullif[y] the jury's findings of fact and thereby undermine [] the jury's basic function."[12] Therefore, it concluded, the "very existence of the caps, in any amount, is violative of the right to a jury."[13]

The court's legal reasoning, though simple enough, was built on deception. Crucial to the court's judgment was the assertion that, "as with all torts, the determination of damages rests 'peculiarly within the province of the jury,'" for which it cited to the U.S. Supreme Court's decision in *Dimick v. Scheidt*.[14]

However, *Dimick* does not support this proposition. That case concerned a trial court's attempt to add to the damages awarded by a jury, or "additur." The *Dimick* court explained that "it was always admitted 'that in cases where the amount of damages was uncertain their assessment was so peculiarly within the province of the jury that the Court should not alter it.'"[15] But *Dimick* does not suggest that damages may not be subject to a legislative maximum, merely that a judge may not substitute his findings for those of the jury. Indeed, any number of statutory schemes provide for damages within a limited range or even precise damages. Such limitations increase certainty by confining damages to a sum or range.

The deception gets worse. The Georgia Supreme Court quoted language from another decision of the U.S. Supreme Court, *Feltner v. Columbia Pictures Television*, in support of its assertion that the legislature cannot limit damages in medical malpractice cases in particular. It quoted *Feltner* for the proposition that "'[t]he right to a jury trial includes the right to have a jury determine the *amount* of…damages, if any, awarded to the [plaintiff].'"[16] The ellipsis substitutes for a single word: "statutory." What the U.S. Supreme Court actually said in *Feltner* is that the right to a jury trial includes the right to have a jury "determine the amount of *statutory* damages, if any, awarded to the [plaintiff]."[17] The Georgia Supreme Court's elision completely altered the meaning of the quote.

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In *Feltner*, moreover, the U.S. Supreme Court was considering Columbia Pictures' claim for *statutory* damages under the Copyright Act, which allows a copyright holder to elect to recover "the sum of not less than $500 or more than $20,000 as the court considers just," instead of actual damages.[18] In short, *Feltner* is not an unqualified endorsement of the jury's right to determine damages as the Georgia Supreme Court implied. To the contrary, the case was about a jury's right to *determine damages within the statutory range that Congress established through legislation*.[19]

The Georgia Supreme Court demonstrated even less fidelity to its own precedents. This included two cases in which it had approved limitations on punitive damages; with little explanation, it deemed them irrelevant.[20] The court also dis-

12. *Id.*
13. *Id.*
14. *Id.* at 222 (quoting *Dimick v. Scheidt*, 293 U.S. 474, 480, 55 S. Ct. 296 (1935)).
15. *Dimick*, 293 U.S. at 480 (quoting MAYNE'S TREATISE ON DAMAGES (9th ed.), at 571).
16. *Nestlehutt*, 691 S.E. 2d at 222 (quoting Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998)) (emphasis in original).
17. *Feltner*, 523 U.S. at 353 (emphasis added). 17 U.S.C. § 504(c).
18. *Id.*, at 343.
19. It should be noted that if a lawyer practicing before the court included such a misleading citation to authority in a brief, it would potentially subject that lawyer to disciplinary proceedings under Rule 3.3 of the Georgia Rules of Professional Conduct, which says that a lawyer shall not "make a false statement of…law to a tribunal."

missed as irrelevant the General Assembly's power to "modify or abrogate the common law" and power to "define, limit, and modify available legal remedies," both of which the court had recognized in prior decisions.[21] In the court's view, the legislature's right to modify or abrogate the common law and to define, limit, or modify legal remedies is now subject to an absolute veto by the court.

The court also struggled to differentiate between the noneconomic damages cap and various Georgia statutes authorizing double or treble damages in certain cases and awards of pre- and post-judgment interest, all of which it stated were lawful. For example, O.C.G.A. § 10-1-399 allows a Georgia court to award treble damages for an intentional violation of the state's Fair Business Practices Act.

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That statute, said the court, does "not in any way nullify the jury's damages award but rather merely operate[s] upon and thus affirm[s] the integrity of that award."[22] Yet treble damages cannot be awarded unless a jury finds that a defendant's actions were "intentional." Under the court's reasoning in striking down the damages cap, if the General Assembly were to amend this statute to eliminate treble damages, its amendment would necessarily act to limit the amount of damages that a jury could award—and would therefore be unlawful.

Similarly, under the court's flawed reasoning, the workers compensation systems of most states, including Georgia, that are administered through an administrative system set up by statutes that define what remedies are available[23] would be unconstitutional. Obviously, such statutes "interfere" with a jury's ability to determine what remedy is available in court to an injured worker. Thus, they must be unconstitutional.

Finally, the court simply asserted that the traditional and inherent power of the trial courts to reduce damages awards that they deem clearly excessive, known as "remittitur," did not represent a threat to the right to a jury trial because it is "a carefully circumscribed power."[24] The noneconomic damages caps, however, are just as carefully "circumscribed," if not more so.

The Georgia Supreme Court also played tricks with its citation to cases from other states. It declined to follow the overwhelming authority from other states where limits on noneconomic damages have been upheld. Instead, it listed decisions from just six other states and stated flatly that they "employ unpersuasive reasoning."[25] If the court had examined those decisions closely, however, it might have noted that one of them, the *Arbino v. Johnson & Johnson* case from Ohio, lists at least *19 other states* that have approved damage caps, including Alaska, California, Colorado, Florida, Indiana, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, Oregon, South Carolina, Texas, Utah, Virginia, and West Virginia.[26] Only five states are listed in the Ohio case as finding such attempts at reform to be unconstitutional, placing Georgia in a distinct minority.[27]

Finally, the Georgia Supreme Court took the unusual step of warning the General Assembly not to attempt to override its decision. The court pointedly observed that, in this particular case, it did not

20. *Nestlehutt*, 691 S.E.2d at 223.
21. *Nestlehutt*, 691 S.E.2d at 223, 224.
22. *Nestlehutt*, 691 S.E.2d at 224.
23. *See* GA. CODE ANN. § 34-9-1 *et seq*.
24. *Nestlehutt*, 691 S.E.2d at 224.
25. *Nestlehutt*, 691 S.E.2d 224, fn. 8.
26. Arbino v. Johnson & Johnson, 880 N.E.2d 420, 444, n. 8 (Ohio 2007).
27. *Arbino*, 880 N.E.2d at 444, n.9. Those states are Illinois, New Hampshire, North Dakota, South Dakota, and Wisconsin.

need to address the contention that the cap on noneconomic damages violates the separation of powers and equal protection provisions of the Georgia Constitution.[28] It thereby left open the possibility that it might follow the egregious example of the Illinois Supreme Court, which has struck down tort reform measures three times based on dubious legal reasoning concerning the separation of powers.[29]

Major Consequences

Nestlehutt displays no respect for the circumstances that caused the Georgia General Assembly to act in 2005, and it is reasonable to expect that those circumstances will return. Despite the fact that the risk of medical injury due to physician negligence had remained unchanged for 30 years, the "number of medical malpractice claims of $500,000 or more ha[d] doubled since 1995 and the claims over a million dollars ha[d] tripled."[30] Georgia had been listed by the American Medical Association as one of 19 states with a malpractice crisis. One of Georgia's major physician insurers, the St. Paul Companies, had ceased offering medical liability insurance in the state.[31] Liability premiums for hospitals in Georgia increased 177 percent from 1999 to 2002, "while some hospitals experienced rate increases of 700 percent."[32]

Physicians in high-risk specialties were being forced "to consider cutting services or leaving health care altogether."[33] Twelve percent of Georgia obstetricians, who are in a medical specialty most often hit with medical malpractice claims, particularly frivolous ones, had left the profession between 2002 and 2005.[34] In a dramatic example, the city of Athens lost a third of its obstetricians after one medical group that had been delivering babies for 35 years in the area had to close its doors because it was unable to purchase adequate malpractice insurance.[35]

The effect of the* Nestlehutt *ruling and the others of its ilk will be to drive up the cost of medical care, limit access to health care providers, and jeopardize the delivery of charity care for those who cannot afford health insurance or to pay directly for medical services.

The effect of this ruling and the others of its ilk[36] will be to drive up the cost of medical care, limit access to health care providers, and jeopardize the delivery of charity care for those who cannot afford health insurance or to pay directly for medical services.

Overcoming Judicial Nullification

Georgia has two options, neither easy, to correct the court's erroneous decision. The first is to amend the Georgia Constitution to specify in clear and unambiguous language that the Georgia General Assembly has full authority to limit or eliminate damages in all tort claims. In Georgia, amending the state's constitution requires passage by the General Assembly or a constitutional convention and approval by the voters.[37]

28. *Id.*, at 224, fn. 8.
29. *See* Lebron v. Gottlieb Memorial Hospital, 930 N.E.2d 895 (Ill. 2010). *See generally* Hans A. von Spakovsky, *A Case Study in Judicial Nullification: Medical Malpractice Reform in Illinois*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 52 (April 29, 2010), *available at* http://www.heritage.org/Research/Reports/2010/04/Medical-Malpractice-Reform-in-Illinois-A-Case-Study-in-Judicial-Nullification.
30. Brenda Fitzgerald, *Medical Liability: Balancing Access to Health Care, Patient Safety and Compensation*, GEORGIA PUBLIC POLICY FOUNDATION, Feb. 11, 2005.
31. Susan Laccetti Meyers, *Medical Crisis—Malpractice Premiums on a Rocket Ride*, ATLANTA JOURNAL & CONSTITUTION, Aug. 11, 2002.
32. Julie Bryant, *Inside Hospitals, a Climate of Fear*, ATLANTA BUSINESS CHRONICLE, Sept. 15, 2003.
33. *Id.*
34. Brenda Fitzgerald, *Medical Liability: Balancing Access to Health Care, Patient Safety and Compensation*.
35. *Id.*
36. *See* Hans A. von Spakovsky, *A Case Study in Judicial Nullification: Medical Malpractice Reform in Illinois*.

The second alternative is to change the composition of the Georgia Supreme Court by replacing its activist judges who consider themselves a *de facto* superlegislature with justices who understand both the limits on their authority and the power of the General Assembly to "define, limit, and modify available legal remedies." Since judges in Georgia are elected, this would require lawyers who understand the role of judges to challenge the incumbent justices. That would be somewhat unusual since most appellate court judges tend to run unopposed, but it would not be unprecedented.[38]

That is what occurred in Ohio. The Ohio Supreme Court repeatedly threw out medical malpractice reforms passed by the state legislature until 2007, when three of the activist justices who had engaged in such judicial nullification had been replaced on the court. The court finally recognized the authority of the legislature and upheld limits on noneconomic and punitive damages, finding that the evidence "sufficiently demonstrated the need to reform the civil litigation system" and affirming "the General Assembly's efforts over the last several decades to enact meaningful tort reforms."[39]

Ferrari: Overturning National Vaccine Policy

The Georgia Supreme Court's decision in *American Home Products Corp. v. Ferrari*[40] is also problematic and threatens to affect health and welfare across the nation. The unanimous court held that the National Childhood Vaccine Injury Act of 1986 does not preempt state court lawsuits claiming that injuries incurred by a vaccine recipient resulted from the vaccine's defective design. The court's decision allows Georgia plaintiffs claiming that the defective design of a vaccine caused an injury to a case-by-case decision on their claims in state court. The result once again will be to threaten vaccine manufacturers with enormous liability risk, reducing the flow of money that can be devoted to creating and producing vaccines.

The National Childhood Vaccine Injury Act

History shows that we can have either boundless vaccine liability or a vaccine program, but not both. In 1986, Congress enacted the National Childhood Vaccine Injury Act[41] in response to product liability litigation that had exposed vaccine manufacturers to great risk and costs whether the manufacturer prevailed or not.[42] The flood of expensive litigation led vaccine manufacturers to exit the market, causing shortages of vaccines, including many crucial childhood vaccines. By 1986, "there [was] only one manufacturer of the polio vaccine, one manufacturer of the measles, mumps, rubella (MMR) vaccine, and two manufacturers of the [diphtheria, pertussis, and tetanus] DPT vaccine" left in the United States.[43] State tort lawsuits were threatening to reverse decades of

37. Art. I, § I, para. I, II, and IV.

38. The Georgia Supreme Court has seven members who are elected to six-year terms. The terms of four of the justices expire in 2012: Chief Justice Carol Hunstein, Presiding Justice George Carley, Justice Hugh Thompson, and Justice Harold Melton. In addition to the cases discussed in this paper, Hunstein, Benham and Thompson also dissented in *Gliemmo v. Cousineau*, 694 S.E.2d 75 (Ga. 2010). In *Gliemmo*, the Georgia Supreme Court upheld a Georgia law that requires a gross negligence standard for recovery for medical malpractice from emergency room care; these three justices would have struck down that medical malpractice reform as well.

39. *Arbino*, 880 N.E.2d 420, 444 (Ohio 2007).

40. *Ferrari*, 668 S.E.2d 236 (Ga. 2008).

41. 42 U.S.C. §§ 300aa-1, *et seq*.

42. *See generally* Hans A. von Spakovsky, *Killing Americans by Stifling Medical Innovation: The Medical Device "Safety" Act of 2009*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 46 (August 4, 2009), page 9, *available at* http://www.heritage.org/Research/Reports/2009/08/Killing-Americans-by-Stifling-Medical-Innovation-The-Medical-Device-Safety-Act-of-2009; Jack Park, *Vaccines, Preemption, and Federalism Rightly Understood: Why the Supreme Court Should Find Federal Preemption in Bruesewitz v. Wyeth, Inc.*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 59 (Nov. 12, 2010), *available at* http://www.heritage.org/Research/Reports/2010/11/Vaccines-Preemption-and-Federalism-Rightly-Understood.

43. H.R. REP. NO. 908, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 6344, 6348.

progress in the fight against some of the most virulent and crippling childhood maladies.

Accordingly, Congress barred the state court lawsuits that were pushing vaccine manufacturers out of the market. Recognizing that no matter how safely a vaccine may be designed and manufactured, a very small percentage of the population will inevitably have an adverse reaction, Congress crafted a replacement "no fault" liability system. Instead of treating adverse reactions as a product defect, a National Vaccine Injury Compensation Program administered by a "vaccine court" would offer compensation to individuals who can demonstrate that an injury was "more likely than not" caused by exposure to a vaccine. To that end, the program has a "Vaccine Injury Table," which lists injuries that will be presumed to have been caused by a vaccine if occurring soon after vaccination.[44] More than 1,500 claimants have received in excess of $1.18 billion in compensation from the program since 1988, and the average award is more than $1 million.[45]

The result of the Ferrari ruling will be to threaten vaccine manufacturers with enormous liability risk, reducing the flow of money that can be devoted to creating and producing vaccines.

According to the U.S. Department of Justice, the program has been an overwhelming success: "costly litigation against drug manufacturers and health care professionals who administer vaccines has virtually ceased." Compensation is readily available in a non-adversarial process to those who need it, and "[t]he supply of vaccines in the U.S. has been stabilized, and the development of new vaccines has markedly increased."[46]

A Win for Bad Science

Ferrari arose out of what was meant to be a very narrow exception to the preemption clause of the Vaccine Act. The act allows individuals who are dissatisfied with a decision of the federal vaccine court to bring suit in state court, but only when the injury at issue did not "result[] from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings."[47] Marcelo and Carolyn Ferrari claimed that thimerosal, a vaccine preservative that contains a tiny amount of mercury, injured their son and was avoidable because the vaccine should have been designed and made without using thimerosal, despite the fact that the vaccine's design had been approved by the Food and Drug Administration.

The claim that thimerosal causes neurological problems like autism is a claim that has been made frequently by tort lawyers in their attempts to wring large judgments and settlements (and attorneys' fees) from vaccine makers. The problem they have encountered is that the scientific evidence of a causal connection is nonexistent. In a mammoth and long-awaited 2010 opinion surveying the scientific literature on the issue, the vaccine court determined that "there is no causal connection" between thimerosal and autism.[48]

These types of frivolous claims about vaccines have led to real harm and injury. The conclusions of a 1998 paper published in the medical journal *Lancet* that linked the MMR (measles-mumps-rubella) vaccine to autism led parents worldwide to avoid getting their children immunized. The *Lancet* now admits that the report it published, written by a British doctor who received thousands of pounds from a tort lawyer suing pharmaceutical companies over MMR, was "an elaborate fraud."[49]

44. *See* U.S. Department of Health and Human Services, Health Resources and Services Administration, National Vaccine Injury Compensation Program, *Vaccine Injury Table*, http://www.hrsa.gov/vaccinecompensation/table.htm.
45. *See* U.S. Department of Justice, Vaccine Injury Compensation Program, http://www.justice.gov/civil/torts/const/vicp/about.htm.
46. *Id.*
47. 42 U.S.C. § 300aa-22(b)(1).
48. Dwyer v. Secretary of Health and Human Services, No. 03-1202V (March 12, 2010), at http://www.uscfc.uscourts.gov/sites/default/files/Vowell.Dwyer.FINAL.pdf.

This article caused a "firestorm" that led thousands of parents to decide not to vaccinate their children, which in turn led to measles outbreaks that hospitalized hundreds of children and killed four.[50] Measles was declared endemic in England and Wales, and the general distrust of vaccines caused by such fabricated claims meant that "epidemics of measles, mumps, bacterial meningitis and whooping cough swept across the United States," threatening the lives and safety of countless children.[51]

Juries often make awards based on sympathy for an injured individual, not on actual scientific proof of causation of injury. Those awards threaten to upset the balance that Congress sought to strike in the Vaccine Act.

Vaccine lawsuits are damaging for another reason. When the Food and Drug Administration and the Centers for Disease Control and Prevention approve a vaccine, their medical experts balance the benefits that the many will receive in immunity from communicable diseases against the harm that only a few will suffer from adverse reactions. In a lawsuit, only the harm is considered; the general benefits that the vaccine provides for a large group of individuals are irrelevant. Jurors see only a disabled or injured child in a courtroom, not the millions of healthy children saved from potential epidemics because of a vaccine, and juries often make awards based on sympathy for an injured individual, not on actual scientific proof of causation of injury. Those awards threaten to upset the balance that Congress sought to strike in the Vaccine Act.

The Georgia Supreme Court ignored all of this in *Ferrari*. It held that when Congress barred lawsuits arising from the use of vaccines that were "properly prepared and…accompanied by proper directions and warnings," it did not intend to bar defective design claims. The court reasoned that the conditional language used in the statute meant that Congress believed that some side effects were avoidable and would have to be identified in litigation on a case-by-case basis. The court attempted to buttress its incorrect reading of the statute by using *subsequent* legislative history, a 1987 committee report regarding amendments to the 1986 act.

In order to reach this result, the court had to reject the reasoning of every other court to have considered the issue, all of which have held that defective design claims are preempted.[52] This it did, briefly noting that "[o]nly two federal district courts and one state court other than Georgia" had gone the other way.[53] The Georgia court claimed that the federal courts "erroneously" misread a key authority and that one of them reasoned "mistakenly" from that authority.[54] The justices criticized the federal courts in Pennsylvania for not explaining how safer vaccines would be produced if the manufacturers had "blanket tort immunity for design defects."[55] Rather than focus on the text of the federal statute, as courts are obligated to do when determining the meaning and effect of a law, the Georgia Supreme Court leapt into the public policy debate, criticizing the use of preemption

49. *Journal: Study Linking Vaccines to Autism Was Fraud*, AOL NEWS, Jan. 5, 2011; Shirley S. Wang, *Lancet Retracts Study Tying Vaccine to Autism*, THE WALL STREET JOURNAL, Dec. 21, 2010, http://online.wsj.com/article/SB10001424052748704022804575041212437364420.html.

50. Paul A. Offit, *Junk Science Isn't a Victimless Crime*, THE WALL STREET JOURNAL, Jan. 11, 2011.

51. *Id.*

52. *See* Bruesewitz v. Wyeth, 508 F. Supp. 2d 430 (E.D. Pa. 2007); Sykes v. GlaxoSmithKline, 484 F. Supp. 2d 289 (E.D. Pa. 2007); Blackmon v. American Home Products Corp., 328 F. Supp. 2d 659 (S.D. Tex. 2004); Militrano v. Lederle Laboratories, 3 Misc. 3d 523, 769 N.Y.S. 2d 839 (2003), *aff'd*, 26 A.D. 475, 810 N.Y.S. 2d 506 (2006). *See also Bruesewitz*, 561 F. 3d 233 (3d Cir. 2009).

53. *Ferrari*, 668 S.E.2d at 239.

54. *Id.*

55. *Id.* at 242.

and, in the process, once again usurping the role of a legislature.

In addition to other courts, the Department of Justice and the Obama Administration also disagree with the Georgia Supreme Court's reading of the Vaccine Act. A case currently pending before the U.S. Supreme Court, *Bruesewitz v. Wyeth*, presents the same issue as *Ferrari*. The federal government's brief explains that "Congress intended, through the express preemption language of Section 22(b)(1), to exempt vaccine manufacturers from tort liability for the designs of their FDA-licensed vaccines." It continues, explaining that an "unavoidably unsafe product—which the Act in effect deems vaccines to be—is not defective in its design, though it still exposes its manufacturers to liability for manufacturing and labeling defects." The result of the Vaccine Act, it concludes, is "a robust federal framework that encourages the development of even safer vaccines and that provides compensation where Congress deemed it appropriate."[56]

In order to reach its decision, the court had to reject the reasoning of every other court to have considered the issue, all of which have held that all defective design claims are preempted.

As if he were directly answering the Georgia justices' assertions about how safer vaccines might be produced, Assistant Solicitor General Benjamin J. Horwich told the Supreme Court at oral argument in *Bruesewitz* that, with regard to "the incentives and who is actually making the decision and…trying to determine if there's [a] better vaccine…out there that we should be pursuing—that is the mission of the Centers for Disease Control and Prevention."[57] In fact, the whole principle lying behind the federal vaccine law, which the Georgia Supreme Court basically ignored, is "that socially beneficial products that nonetheless have these adverse effects ought to be on the market and we ought not to allow tort law to push them off the market."[58]

An Imperial Court

The Georgia Supreme Court's decisions in *Nestlehutt* and *Ferrari* share two features: They are both cursory and unanimous in their central holdings. This might suggest that nothing noteworthy was at issue in either case.

Nothing could be further from the truth. Each of these decisions will have a substantial and deleterious impact, both on Georgians' health and welfare and on the state's civil justice system. By invalidating the cap on noneconomic damages in medical malpractice cases, *Nestlehutt* reopens the door to the crisis in the provision, quality, and expense of health care that the Georgia General Assembly was trying to stem. *Ferrari* extends Georgia tort law and the specter of abusive litigation into another area that Congress was trying to protect—vaccines and immunization—thus endangering the health of almost every resident of Georgia, particularly its children. The court's actions will enrich the trial bar at the expense of Georgia's citizens.

The imperial Georgia Supreme Court presides over a crisis in the legal system in Georgia. This crisis will subside only when the court's justices recognize that their duty is to apply the law impartially, according to statutory text and original meaning, and not to write their own policy preferences into the law.

*—**Hans A. von Spakovsky** is a Senior Legal Fellow and Manager of the Civil Justice Reform Initiative in the Center for Legal and Judicial Studies at The Heritage Foundation. **Jack Park** is a former Assistant Attorney General for the State of Alabama and a former Visiting Fellow at The Heritage Foundation.*

56. Brief for the United States as Amicus Curiae Supporting Respondents, Bruesewitz v. Wyeth, Inc., No. 09-152, pages 6–7.

57. Transcript of Oral Argument at 44–45, *Bruesewitz v. Wyeth, Inc.*, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-152.pdf.

58. *Id.* at 48.