Washington Law Review

Volume 68 | Number 4

10-1-1993

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FIFRA PREEMPTION OF STATE COMMON LAW CLAIMS AFTER *CIPOLLONE v. LIGGETT GROUP, INC.*

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Abstract: In *Cipollone v. Liggett Group, Inc.*, the Supreme Court reaffirmed a narrow application of the federal preemption doctrine where preemption would prevent a state from exercising its police powers through the common law. *Cipollone* marks the latest in a line of Supreme Court decisions requiring courts to employ a presumption against preemption if congressional intent to preempt is not clear. Nevertheless, recent circuit court decisions have held that FIFRA preempts state common law claims against pesticide manufacturers. This Comment concludes that courts continuing to hold FIFRA preemptive of state common law both misinterpret congressional intent and misapply *Cipollone*.

Ed was a farmer. Like most farmers, he regularly applied pesticides to his crops. Fearing the possible health effects of a certain pesticide, Ed read its warning label carefully. He avoided prolonged inhalation of the pesticide's fumes because the label warned of the potential for short-term headaches. He was relieved that the label mentioned no possibility of cancer or other chronic diseases resulting from long-term exposure. He therefore used the pesticide year after year, always following the instructions and avoiding prolonged inhalation.

Several years passed, and Ed developed an inoperable brain tumor. His doctor told him he had seen similar tumors quite frequently in farmers who, over many years, inhaled small quantities of the same pesticide. Angry that the pesticide's label made no mention of catastrophic long-term effects and eager to provide compensation for his family, Ed visited a lawyer to propose suing the pesticide's manufacturer. Imagine Ed's surprise when his attorney told him that a suit against the manufacturer was doomed to fail. By choosing to regulate pesticide labeling, Congress had prevented the state in which Ed lived from requiring pesticide manufacturers to compensate the victims of their products. "Congress said that?" Ed asked incredulously. "Well, not exactly . . . ," the lawyer replied.

Although Ed's case is hypothetical, plaintiffs increasingly face exactly this situation as they seek state law damages for injuries caused by pesticides. The source of confusion is the Federal Insecticide, Fungicide and Rodenticide Act[1] (FIFRA), a 46-year-old pesticide labeling and registration statute. A growing number of courts have accepted

1. 7 U.S.C.A. §§ 135–136y (West 1980 & Supp. 1993).

manufacturers' arguments that FIFRA preempts state common law claims for damages caused by pesticides. This Comment explores the interplay between FIFRA and the federal preemption doctrine. Part I examines the origins and interpretations of the preemption doctrine before briefly surveying FIFRA's history, language, and judicial treatment. Part II analyzes judicial application of the preemption doctrine in pesticide labeling cases. The Comment concludes that lower courts accepting the preemption defense in FIFRA cases misapply the Supreme Court's current understanding of the preemption doctrine and misinterpret congressional intent.

I. FEDERAL PREEMPTION DOCTRINE AND FIFRA: AN OVERVIEW

Lower courts denying relief to plaintiffs claiming pesticide-related damages have relied on the perceived preemptive force of FIFRA. As with many doctrines originating in the U.S. Constitution, judicial treatment of the preemption doctrine generally, and of FIFRA preemption specifically, has varied.

A. Federal Preemption Before and After Cipollone

Throughout its history, the preemption doctrine has undergone a series of transformations reflecting the fluctuating ideologies of the Supreme Court. The presumptions that have signaled these transformations illuminate the Court's preemption philosophy at each phase. The plurality opinion in *Cipollone v. Liggett Group, Inc.*[2] is the most recent illustration of the Court's preemption views.

1. Preemption Doctrine: Historical Judicial Treatment

At least since *McCulloch v. Maryland,*[3] the Supreme Court has held that the Constitution's Supremacy Clause[4] grants Congress the power to

2. 112 S. Ct. 2608 (1992).

3. 17 U.S. (4 Wheat.) 316 (1819) (invalidating a Maryland tax on the Bank of the United States).

4. "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

displace or "preempt" conflicting state and local regulations.[5] Over time, the Court's willingness to employ the doctrine to strike down state rules has varied. The shifting doctrinal tools used to determine congressional intent illustrate the evolving judicial attitude toward federal preemption.

a. The Categories of Preemption and the Importance of Congressional Intent

The Supreme Court has recognized that federal law may preempt state regulations in three analytically distinct situations. In each situation, the Court's predominant concern is Congress's intent to preempt,[6] and questions of statutory construction often dominate as the Court struggles to determine whether Congress intended the federal statute to preempt state law.[7]

First, the Supreme Court will invalidate any state regulation that Congress has expressed an intent to preempt through explicit statutory language.[8] Second, absent express congressional intent, federal law will still preempt state regulations that "conflict in fact" with the federal scheme.[9] Finally, the Court has held that states are powerless to regulate in fields in which federal law is so pervasive that Congress has left no room for the states to act.[10] None of these categories, however, is capable of complete analytic autonomy, and, in practice, courts often blur boundaries or merge classifications.[11]

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5. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 9.1–9.4 (4th ed. 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-25 to 6-27 (2d ed. 1988).

6. *See* Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) ("[t]he purpose of Congress is the ultimate touchstone" of preemption analysis) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

7. *See* TRIBE, *supra* note 5, § 6-25, at 479.

8. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 530–32 (1977). This Comment refers to this form of preemption as "express preemption."

9. *See, e.g.*, Rose v. Arkansas State Police, 479 U.S. 1 (1986); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 159–60 (1982); This Comment refers to this form of preemption as "conflict-preemption."

10. *See, e.g.*, Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 535 (1959); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947). This Comment refers to this form of preemption as "occupation-preemption." For the sake of clarity, this Comment treats conflict- and occupation-preemption as subcategories of "implied preemption."

11. *See* TRIBE, *supra* note 5, §§ 6-26, 6-27 (identifying two categories and noting the difficulties in air-tight categorization); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 70–71 (1988) (identifying four categories of preemption and noting the inconsistent application of these categories in any given case).

b. Presumptions: Shifting Aids in Determining Congressional Intent

The Court analyzes issues in each of the three categories with the aid of presumptions designed to determine Congress's intent to preempt. The rapid growth of the federal regulatory state in this century has increased frictions between federal and state legislative objectives.[12] This friction has accelerated calls for judicial application of the preemption doctrine, and the Supreme Court has responded by employing an evolving series of presumptions. These presumptions have expanded or contracted the preemption doctrine to conform it to the Court's vacillating ideological views.[13] For instance, during the 1920s and 1930s, the Supreme Court greatly restricted the previously expansive preemption doctrine[14] by erecting a presumption in favor of state regulation. Plaintiffs could rebut this presumption only by a clear demonstration of actual conflict between federal and state laws or congressional intent to occupy the field.[15] In contrast, the New Deal and Warren Courts erected several presumptions in favor of federal preemption. These Courts invalidated state laws without any showing of explicit congressional intent to occupy the field or actual conflict between the state and federal regulatory schemes.[16]

In recent years, however, the Supreme Court has once again employed presumptions that demonstrate reluctance to infer federal preemption.[17] The Court commonly refers to this reluctance as a presumption that Congress did not intend to displace state law.[18] The Court has been especially hesitant to find preemption if the federal regulation threatens a state's ability to exercise its police powers or to apply its common law.

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12. *See generally* THE GROWTH OF FEDERAL POWER IN AMERICAN HISTORY (Rhodri Jeffreys-Jones & Bruce Collins eds., 1983).

13. *See* William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 623 (1975).

14. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (broadly construing a federal licensing statute to find it preemptive of New York's ferry monopoly statute). The expansive view of preemption held forth into this century. *See* Charleston & W. Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915) (holding that any federal legislation in a field preempts all state legislation in that field, whether coinciding or conflicting).

15. *See, e.g.*, Mintz v. Baldwin, 289 U.S. 346, 350 (1933); *see also* Bratton, *supra* note 13, at 627.

16. *See, e.g.*, Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 531–32 (1959); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); Hines v. Davidowitz, 312 U.S. 52 (1941).

17. *See* TRIBE, *supra* note 5, § 6-25, at 479; Bratton, *supra* note 13, at 649 (noting that early Burger Court decisions showed a renewed emphasis on the state-directed doctrine).

18. Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

i. Presumption Against Preemption: The Police Power

Modern cases indicate that the presumption against preemption is even more difficult to rebut where preemption would displace the state in its role as protector of health and safety. The Court has often noted that federal legislation will not supersede the historic police powers of the states unless that is the clear and manifest purpose of Congress.[19] By emphasizing the special interests of a state in protecting the health and safety of its citizens, the Court has preserved a variety of state regulations in the face of preemption challenges.[20]

ii. Presumption Against Preemption: The Common Law

The vast majority of federal preemption cases involve claims that the federal statute displaces state positive law.[21] It is settled, however, that Congress may also preempt state common law claims.[22] Nevertheless, the Supreme Court has been even less likely to find preemption of state common law claims than it has been to find displacement of states' positive enactments.[23]

Silkwood v. Kerr-McGee Corp.[24] illustrates the Court's reluctance to preempt state common law. The *Silkwood* Court acknowledged that it recently had held the Atomic Energy Act to preempt any state regulation

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19. *E.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (dictum).

20. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442–43 (1960) (upholding local pollution controls); H.P. Welch Co. v. New Hampshire, 306 U.S. 79, 84–85 (1939) (upholding state truck safety requirements); *see also* City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981); Jones v. Rath Packing Co., 430 U.S. 519, 544 (1977) (Rehnquist, J., dissenting). *See generally* NOWAK, *supra* note 5, § 9.3, at 313.

21. *See* Marc Z. Edell & Cynthia A. Walters, *The Doctrine of Implied Preemption in Products Liability Cases—Federalism in the Balance*, 54 TENN. L. REV. 603, 607 (1987).

22. Congress has enacted a variety of statutes containing language explicitly preempting state common law claims. *See, e.g.*, Copyright Act of 1976, 17 U.S.C.A. §§ 301(a)–(b) (West 1988 & Supp. 1993); Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1144(a) (West 1985). The Supreme Court occasionally has struck down state common law claims without finding explicit congressional design to do so. *See, e.g.*, International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244–45 (1959).

23. Some decisions have classified this reluctance as a corollary of the heightened presumption against preemption of states' police powers. *See* Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1542 (D.C. Cir.) (noting that state common law claims are within "the scope of state superintendence"), *cert. denied*, 469 U.S. 1062 (1984).

24. 464 U.S. 238 (1984). *Silkwood* involved a tort action for state law punitive damages against a nuclear power plant that allegedly failed to follow safe operation practices. *Id.* at 243.

of nuclear safety.[25] However, the Court distinguished a state's award of common law punitive damages from enactment of ordinary safety regulations.[26] The Court concluded that Congress had not preempted punitive damage claims because there was no evidence that Congress intended, without comment, to remove all means of judicial recourse for those injured by illegal conduct.[27] Although he believed that punitive damages were preempted, Justice Blackmun drew even sharper distinctions than the majority between traditional compensatory damage actions and state regulations.[28] According to Blackmun, courts must not lightly infer conflict between a federal regulation and a state compensatory damage action because the two pursue different goals.[29]

Cipollone v. Liggett Group, Inc.[30] provided the most recent opportunity for the Court to address the proper interpretation of congressional intent in the context of claimed state common law preemption. The plurality decision in *Cipollone* remains largely within the preemption framework developed between *McCulloch* and *Silkwood*. However, the decision also provides new insights into the appropriateness of implied preemption analysis where Congress has expressly addressed the preemption issue.

2. *Federal Preemption Doctrine:* Cipollone *and Beyond*

In 1983 Rose Cipollone and her husband sued three cigarette manufacturers for the lung cancer Rose allegedly suffered as a result of smoking the manufacturers' products.[31] The Cipollones based their

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25. *Id.* at 249 (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983)).

26. *Silkwood,* 464 U.S. at 255–56.

27. *Id.* at 251. In other words, where preemption would foreclose all judicial remedies, the majority would require a still stricter indicium of intent before holding a federal statute preemptive of state common law duties. *See also* International Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) (holding the Clean Water Act to preempt certain nuisance actions only after noting that such a resolution of the case would "not leave respondents without a remedy"). *See generally* Edell & Walters, *supra* note 21, at 607–13. This theme was undermined to some extent by *Cipollone's* holding that the 1969 Act preempted certain failure to warn and misrepresentation claims. *See infra* note 87.

28. *Silkwood,* 464 U.S. at 263 (Blackmun, J., dissenting) (noting that compensatory damages merely compensate the victim of a harm, while punitive damages encourage or discourage conduct).

29. *Id.* at 263–64. Under Blackmun's analysis, a power plant operator could continue operating under federal statutes and pay tort damages for any subsequent resulting injuries. *Id.* at 264.

30. 112 S. Ct. 2608 (1992).

31. *Id.* at 2613–14.

complaint on five separate New Jersey common law causes of action.[32] The manufacturers raised preemption as an affirmative defense, contending that the 1965 Federal Cigarette Labeling and Advertising Act[33] (1965 Act) and its successor, the Public Health Cigarette Smoking Act of 1969[34] (1969 Act), shielded them from liability.[35] Both of these statutes contain sections captioned "Preemption" that purport to govern continued state authority in the cigarette arena.[36]

In a plurality opinion by Justice Stevens, four justices held that the 1965 Act did not preempt any of the Cipollones' five state law claims[37] but that the 1969 Act did expressly preempt aspects of two of these five claims.[38] The plurality began its analysis by stating that congressional intent to preempt is the "ultimate touchstone."[39] The plurality then held that the express language in section 5 of each Act governed the Acts' preemptive scope and precluded any argument that the statutes impliedly preempted state law actions.[40] The plurality construed the express language of both Acts in light of the "strong presumption" against preemption of state police power regulations.[41] The Court concluded that the language of the 1965 Act did not preempt any state law damage actions.[42] However, after examining the 1969 Act in light of the same

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32. *Id.* at 2614. These causes of action were design defect, failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud. *Id.*

33. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C.A. §§ 1331–1341 (West 1982 & Supp. 1993)).

34. Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C.A. §§ 1331–1341 (West 1982 & Supp. 1993)).

35. *Cipollone,* 112 S. Ct. at 2614.

36. Section 5(b) of the 1965 Act reads:

> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 89-92, 79 Stat. 282, 283, *replaced by* 15 U.S.C.A. § 1334(b) (West 1982).

The 1969 Act modified this preemption section to read:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C.A. § 1334(b) (West 1982).

37. *Cipollone,* 112 S. Ct. at 2619.

38. *Id.* at 2625 (holding the Cipollones' failure to warn and misrepresentation claims preempted to the extent that those claims relied on omissions in the manufacturers' advertising or promotions).

39. *Id.* at 2617 (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

40. *Id.* at 2618.

41. *Id.* at 2618, 2621.

42. *Id.* at 2618–19. Three other justices joined this portion of the opinion. *Id.* at 2625 (Blackmun, J. concurring).

assumptions and presumption, the plurality concluded that the 1969 provision was much broader than that in the 1965 Act.[43] The plurality rejected the Cipollones' arguments that the amended language did not cover any common law claims[44] and examined each claim individually to determine whether the 1969 Act preempted it.[45] This inquiry led the Court to hold one of the Cipollones' misrepresentation claims and all of their failure to warn theories expressly preempted.[46]

Two factions of the Court criticized the plurality for crafting a bifurcated opinion which would frustrate lower courts.[47] Justice Blackmun wrote for three justices concurring in the plurality's discussion of the applicable law, but dissenting in part because, in his view, neither Act preempted state common law claims.[48] Justice Blackmun would have required a far clearer statement of congressional intent to preempt than was evidenced by the 1969 Act.[49]

The *Cipollone* plurality decision reinforces three themes that the Court had expressed in preemption decisions for over twenty years. First, congressional intent remains the Court's primary consideration in determining a statute's preemptive scope.[50] Second, the Court uses a presumption against preemption to resolve any difficulties in determining this intent.[51] Finally, the Court considers this presumption against preemption heightened whenever preemption would encroach upon a state's traditional police powers.[52] The Court failed to articulate clearly how to apply these presumptions to common law claims absent clear congressional language. This uncertainty has serious implications for FIFRA, a federal statute, which, like the 1965 and 1969 Cigarette Acts,

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43. *Id.* at 2619.

44. *Id.* at 2620–21 (concluding that the term "state law" encompasses common law as well as statutes and regulations).

45. *Id.* at 2620–25. With each claim, the plurality inquired, in light of the "strong presumption against preemption," whether the legal duty underlying the claim constituted a "requirement or prohibition based on smoking and health." *Id.* at 2621.

46. *Id.* at 2625. The Court permitted claims under three remaining theories to proceed. These conclusions were based on a detailed analysis of the legal duty imposed by each state law cause of action. If the plurality equated the underlying duty with the "requirement[s] or prohibition[s]" proscribed by the statute, then it deemed the claim preempted. *Id.* at 2621–25.

47. *Id.* at 2638 (Scalia, J., concurring and dissenting) (predicting that the decision would "fill the law books for years to come"); *see also id.* at 2631 (Blackmun, J., concurring and dissenting).

48. *Id.* at 2625–32 (Blackmun, J., concurring and dissenting).

49. *Id.* at 2627.

50. *See supra* notes 6–7, 39 and accompanying text.

51. *See supra* notes 17–18, 41 and accompanying text.

52. *See supra* notes 19–29, 41 and accompanying text.

raises difficult questions about Congress's intent to preempt state common law remedies.

B. Regulation and the Role of the States Under FIFRA

In 1972, Congress enacted sweeping amendments to the 1947 Federal Insecticide, Fungicide, and Rodenticide Act.[53] The 1972 amendments strengthened the Act's regulatory structure while shifting its policy focus from promotion of efficient agricultural use to protection of human health and the environment.[54] Today, FIFRA prohibits the distribution or sale of any pesticide not registered by the Environmental Protection Agency (EPA).[55] The EPA has adopted labeling requirements pursuant to FIFRA that specify the background color, placement, and prominence required of warnings on registered pesticides and that include numerous directives on the warnings' content.[56] However, neither FIFRA nor EPA regulations mandate the specific language required on a given label, but rather set a general standard of adequacy.[57] FIFRA ultimately leaves it to manufacturers to compose the labels' language.[58]

Like many other federal environmental laws,[59] FIFRA does not expressly provide for private damage remedies for injuries caused by the substance it regulates.[60] Further, no court has read FIFRA to contain an implied private right of action to recover damages for injuries caused by

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53. Pub. L. No. 92-516, 86 Stat. 973 (1972). Passage followed years of congressional hearings prompted by the public concern over unchecked pesticide use. *See* H.R. REP. No. 939, 100th Cong., 2d Sess. 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3474, 3475–76. *See generally* Michael T. Olexa, *Pesticide Use and Impact: FIFRA and Related Regulatory Issues*, 68 N.D. L. REV. 445, 445–46 (1992).

54. *See* S. REP. No. 970, 92nd Cong., 2d Sess. 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4092, 4093 (claiming that the legislation responded to the adverse impact of pesticides on human health and the environment); S. REP. No. 838, 92d Cong., 2d Sess. 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3993 (citing protection of "man and his environment" as FIFRA's purpose); 3 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, PESTICIDES AND TOXIC SUBSTANCES § 5.3, at 42 (1988) (noting that the 1972 Act marked the first FIFRA amendments in which environmental interests played a significant role).

55. 7 U.S.C.A. § 136a(a) (West 1980).

56. *See* 40 C.F.R. § 156.10 (1992).

57. *See id.* Where the EPA determines a pesticide to be inadequately labeled after registration, FIFRA subjects manufacturers of pesticides to civil and criminal penalties. *See* RODGERS, *supra* note 54, § 5.24, at 314–19.

58. *See* 40 C.F.R. § 156.10 (1992).

59. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251–1387 (West 1990 & Supp. 1993); The Solid Waste Disposal Act, 42 U.S.C.A. §§ 6902–6992k (West 1990 & Supp. 1993).

60. *See* RODGERS, *supra* note 54, § 5.7, at 92.

registered pesticides.[61] The federal common law similarly offers no remedy to plaintiffs seeking damages from manufacturers of registered pesticides.[62] Damages from the government under the Federal Tort Claims Act[63] also appear largely unavailable.[64] Thus, plaintiffs seeking compensation for injuries caused by a registered pesticide must rely on state common law. However, judicial acceptance of preemption defenses has raised serious questions about the viability of this only remaining avenue to compensation.

Problems in determining FIFRA's preemptive scope stem from section 136v, a "uniformity" provision added in 1972 to preempt certain state labeling requirements.[65] Section 136v's statutory language, legislative history, and judicial interpretation offer varying degrees of support for the claim that Congress did not intend the section to preempt state law claims.

1. Section 136v: Statutory Language and Legislative History

The 1972 FIFRA amendments explicitly address the allocation of pesticide regulation authority to the states. Section 136v of the Act provides in part:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.[66]

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61. *See* In re "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 991–92 n.9 (2d Cir. 1980) (finding no implied right of action under FIFRA), *cert. denied,* 454 U.S. 1128 (1981); *see also* Kelley v. Butz, 404 F. Supp. 925, 940 (W.D. Mich. 1975); People for Envtl. Progress v. Leisz, 373 F. Supp. 589, 592 (C.D. Cal. 1974).

62. *See "Agent Orange" Litig.*, 635 F.2d at 995 n.14 (noting that FIFRA "is certainly an insufficient basis for a displacement of the entire body of state product liability law"); *see also* City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding the detailed regulatory scheme adopted by Congress as Clean Water Act amendments to preempt federal common law nuisance actions).

63. 28 U.S.C.A. § 1346 (West 1976 & Supp. 1993).

64. *See* RODGERS, *supra* note 54, § 5.7, at 93–95.

65. 7 U.S.C.A. §§ 136v(a)–(b) (West 1980).

66. *Id.*

Nothing in the statute's language indicates whether this limitation on state labeling authority is confined to positive enactments or whether section 136v preempts state common law as well.

Much of section 136v's published legislative history merely restates the provision's language.[67] Although the legislative history emphasizes that Congress was striving to preempt state authority with regard to labeling and packaging,[68] the reports do not indicate whether Congress intended "state authority" to include common law actions and remedies.[69]

2. *Section 136v: Lower Court Interpretation*

Courts interpreting section 136v have reached opposing conclusions on the section's preemptive scope. Some state courts and perhaps the majority of federal district courts have followed *Ferebee v. Chevron Chemical Co.*[70] by refusing to find that FIFRA preempts state common law claims. In early 1993, however, three federal circuit court decisions cited *Cipollone* while upholding FIFRA preemption defenses to common law tort actions.

In *Ferebee,* the first federal appeals court to address FIFRA preemption held that state failure to warn claims were neither expressly nor impliedly preempted.[71] Relying on a presumption against preemption,[72] the *Ferebee* court first concluded that FIFRA did not state with the requisite clarity an intent to expressly preempt state common law damage actions.[73] The court also disposed of the manufacturer's implied preemption arguments by concluding that state claims neither made compliance with FIFRA impossible nor prevented accomplishment

67. *See* S. REP. No. 838, *supra* note 54, *reprinted in* 1972 U.S.C.C.A.N. at 4021 (stating that subsection (a) is intended to leave to the states the authority to impose stricter regulation on pesticide use); S. REP. No. 970, *supra* note 54, *reprinted in* 1972 U.S.C.C.A.N. at 4128 ("Subsection (b) preempts any . . . labeling or packaging requirements differing from such requirements under the Act.").

68. H.R. REP. No. 511, 92d Cong., 1st Sess. 16 (1971). *But see* S. REP. No. 970, *supra* note 54, *reprinted in* 1972 U.S.C.C.A.N. at 4128 ("Generally the intent of [section 136v] is to leave to the States the authority to impose stricter regulation on pesticides use than that required under the Act.").

69. *See generally* NATIONAL AGRIC. CHEM. ASS'N, FEDERAL ENVTL. PESTICIDE CONTROL ACT OF 1972, A COMPILATION OF THE STATUTE AND LEGISLATIVE HISTORY 205–23 (1972).

70. 736 F.2d 1529 (D.C. Cir.), *cert. denied,* 469 U.S. 1062 (1984).

71. *Id.* at 1539–43.

72. *Id.* at 1542 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

73. *Id.* at 1542.

of FIFRA's goals.[74] Cases after *Ferebee* elaborated on its rationales for rejecting implied preemption defenses.[75] However, most decisions between *Ferebee* and *Cipollone* finding no preemption dismissed the possibility of express preemption without complete analysis.[76]

Decisions since *Cipollone* remain split in their conclusions about FIFRA's preemptive reach. While most courts have followed *Cipollone's* command and confined their analysis to the expressly preemptive scope of section 136v,[77] they have continued to give the provision divergent constructions. Cases like *Burke v. Dow Chemical Co.*[78] cite *Cipollone* for the proposition that FIFRA does not preempt state law tort actions.[79] Some of these courts hold section 136v's preemptive language to be indistinguishable from the language of the 1965 Act declared non-preemptive in *Cipollone.*[80] Other courts uphold the state claim by focusing on the broad grant of state power in the savings clause of section 136v(a) and on *Cipollone's* command to presume validity.[81]

A second group of lower courts cite *Cipollone* for the proposition that FIFRA does expressly preempt all or some state law causes of action.[82] In 1993, four circuits have joined this line of cases by holding that FIFRA expressly preempts certain state law claims. In *King v. E.I. du*

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74. *Id.* at 1542–43. The court founded this implied preemption analysis on the premise that a manufacturer found liable in tort for failure to warn would not be required to change the label (as he or she would be required to do under FIFRA), but instead could choose to continue to sell the chemical with the same label and to pay damages to those injured as a result. *Id.* at 1542. *Cf. supra* note 29.

75. *See, e.g.,* Roberts v. Dow Chem. Co., 702 F. Supp. 195, 197–99 (N.D. Ill. 1988); Cox v. Velsicol Chem. Corp., 704 F. Supp. 85, 87 (E.D. Pa. 1989).

76. *See, e.g.,* Thornton v. Fondren Green Apartments, 788 F. Supp. 928, 931–32 (S.D. Tex. 1992); Montana Pole & Treating Plant v. I.F. Laucks & Co., 775 F. Supp. 1339, 1343 (D. Mont. 1991).

77. *E.g.,* Shaw v. Dow Brands, Inc., 994 F.2d 364, 370 (7th Cir. 1993); Burke v. Dow Chem. Co., 797 F. Supp. 1128, 1131 (E.D.N.Y. 1992); Couture v. Dow Chem. U.S.A., 804 F. Supp. 1298 (D. Mont. 1992); Brennan v. Dow Chem. Co., 613 So. 2d 131 (Fla. App. 1993). *But see* Davidson v. Velsicol Chem. Corp., 834 P.2d 931, 937–38 (Nev. 1992) (holding that FIFRA impliedly, but not expressly, preempts state tort claims based on failure to adequately label), *cert. denied,* 113 S. Ct. 1944 (1993); Yowell v. Chevron Chem. Co., 836 S.W.2d 62, 66 (Mo. App. 1992); Burge v. Jones, No. B-92-022, 1992 U.S. Dist. LEXIS 21208, at *6 (S.D. Tex. Nov. 18, 1992).

78. 797 F. Supp. 1128 (E.D.N.Y. 1992).

79. *Burke,* 797 F. Supp. at 1131; *see also Couture,* 804 F. Supp. 1298; Soli v. Harvest States Coop., No. A3-89-77 (D.N.D. 1992); *Brennan,* 613 So. 2d 131.

80. *See, e.g., Couture,* 804 F. Supp. at 1302.

81. *See, e.g., Burke,* 797 F. Supp. at 1140.

82. *See, e.g.,* Levesque v. Miles, Inc., 816 F. Supp. 61 (D. N.H. 1993); Casper v. E.I. du Pont de Nemours & Co., 806 F. Supp. 903 (E.D. Wa. 1992).

Pont de Nemours & Co.,[83] the First Circuit purported to rely on *Cipollone* in holding that FIFRA preempted the plaintiffs' state law claims based on a failure to warn.[84] In *Shaw v. Dow Brands, Inc.*,[85] the Seventh Circuit held that FIFRA preempted state failure to warn claims based on negligence or strict liability.[86] The court in *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*[87] concluded that, although the words employed in FIFRA's preemption provision are different from those in the 1969 Act at issue in *Cipollone,* their effect is the same. FIFRA therefore preempted all state law failure to warn claims.[88] The court in *Papas v. Upjohn Co.*[89] relied on Congress's use of the word "requirements" in section 136v(b) to hold that FIFRA preempted state law negligence, strict liability, and implied warranty claims premised on a failure to warn.[90]

II. FIFRA DOES NOT PREEMPT STATE COMMON LAW CLAIMS

Courts that continue to hold that FIFRA preempts state common law claims misapply *Cipollone.* Despite the confusing distribution of votes, the Supreme Court's *Cipollone* opinions contain several unmistakable directives. Seven justices agreed that courts analyzing statutes with explicit preemption provisions must not look beyond the language of the provision to infer preemption.[91] These same seven justices also agreed that a court must construe the language of such a provision in light of a strong presumption against preemption.[92] Courts must settle any ambiguity in the language against preemption, especially where a state's authority to enforce its police powers is involved.[93]

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83. 1993 U.S. App. LEXIS 16809 (1st Cir. July 7, 1993).

84. *Id.* at *10.

85. 994 F.2d 364 (7th Cir. 1993).

86. *Id.* at 371 (finding that "not even the most dedicated hair-splitter could distinguish" section 136v(b) from section 5 of the 1969 Act).

87. 981 F.2d 1177 (10th Cir. 1993).

88. *Id.* at 1179.

89. 985 F.2d 516 (11th Cir. 1993).

90. *Id.* at 518.

91. *See supra* text accompanying note 40; Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2625 (1992) (Blackmun, J., concurring in part III of the plurality opinion).

92. *See supra* text accompanying note 41; *Cipollone,* 112 S. Ct. at 2625 (Blackmun, J., concurring in part III of the plurality opinion).

93. *See supra* note 41 and accompanying text; *Cipollone,* 112 S. Ct. at 2625–26 (Blackmun, J., concurring in part III of the plurality opinion). A different alignment of six justices apparently

Courts finding preemption of state common law claims also misconstrue Congress's intent in enacting FIFRA and disregard important federalism and due process concerns. This disregard has devastating results for plaintiffs denied all relief for their injuries. The effect on sensitive federal/state relations and Fifth Amendment jurisprudence may prove no less destructive.

A. FIFRA Does Not Impliedly Preempt State Common Law Claims

The *Cipollone* Court's clearest command is that a court construing a federal statute that contains an explicit preemption provision must confine its analysis to an interpretation of that provision.[94] Courts therefore may not interpret statutes with express preemption provisions to impliedly preempt state law.[95] FIFRA contains such an express preemption section.[96] Section 136v, like section 5 in the 1965 and 1969 Acts analyzed in *Cipollone,* provides a sufficiently reliable "indicium of congressional intent with respect to state authority"[97] to foreclose the need for implied preemption analysis. Therefore, any court that bases its finding of FIFRA preemption on an implied preemption analysis necessarily contradicts *Cipollone.*[98]

Despite this relatively clear command, some courts have continued to analyze FIFRA preemption defenses as if they raise questions of implied preemption.[99] Courts must reject implied preemption defenses to

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rejected the notion that a stricter showing of intent is required for preemption of state common law claims than for preemption of states' positive enactments. *Id.* at 2620 ("it is difficult to say that [common law] actions do not impose 'requirements or prohibitions'"); *id.* at 2634 (Scalia, J., concurring with much of part V of the plurality opinion). *But see id.* at 2618 (Stevens, J.) (finding no inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions).

94. *Id.* at 2618. This command is arguably also the decision's only unexpected statement. *See generally Cipollone Frustrating but Pro-Plaintiff, Law Professor Tells ATLA Convention Session,* TOXICS L. REP., July 29, 1992, at 278; *The Supreme Court—Leading Cases,* 106 HARV. L. REV. 163, 355 (1992).

95. *Cipollone,* 112 S. Ct. at 2618; *see also supra* note 40 and accompanying text.

96. 7 U.S.C.A. §§ 136v(a)-(b) (West 1980).

97. *See Cipollone,* 112 S. Ct. at 2618 (quoting Malone v. White Motor Corp., 435 U.S. 497, 505, 1190 (1978)).

98. The Court no doubt recognized this when it vacated and remanded in light of *Cipollone* the two circuit court cases which had held FIFRA to impliedly preempt state tort actions. *See supra* notes 87, 89; *The Supreme Court—Leading Cases,* 106 HARV. L. REV. 163, 356 (1992).

99. *See supra* note 77.

common law claims and confine their FIFRA preemption analyses to the express preemption inquiry employed by seven justices in *Cipollone*.

B. FIFRA Does Not Expressly Preempt State Common Law Claims

Cipollone reaffirms that express preemption requires clear evidence that Congress manifested an intent to preempt.[100] In addition, a court interpreting an ambiguous preemption provision must employ a presumption against preemption when attempting to interpret Congress's intent to preempt state police powers.[101] Neither the plain language nor legislative history of section 136v evince the level of intent necessary to overcome *Cipollone's* presumption and thereby find express preemption.

1. Section 136v's Plain Language Does Not Support Preemption

Statutory construction is necessarily the primary task of any court engaging in express preemption analysis. The *Cipollone* plurality found that Congress drafted section 5(b) of the 1965 Act narrowly enough to preserve state common law claims.[102] Courts deciding FIFRA preemption defenses to common law claims should construe section 136v(b) much as the *Cipollone* Court read section 5(b) of the 1965 Act and therefore hold FIFRA non-preemptive of state common law. On the other hand, the 1969 Act is distinguishable from section 136v, and the detailed analysis employed by the *Cipollone* plurality to measure its preemptive scope is not applicable to a FIFRA preemption defense.

As it did through the 1965 Cigarette Act, Congress speaks "precisely and narrowly"[103] when it preempts state positive enactments in section 136v(b). Nothing in the plain language of section 136v(b) suggests that Congress intended to do anything other than to prevent state legislatures and regulatory agencies from imposing additional form or content labeling requirements on pesticide manufacturers. Unlike other statutes' preemption provisions, section 136v(b) makes no reference to FIFRA's effect on state common law remedies.[104] In fact, by prohibiting only "labeling or packaging" requirements, section 136v(b) may encroach less

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100. *See supra* note 39 and accompanying text.

101. *See supra* note 41 and accompanying text.

102. *See supra* note 42 and accompanying text.

103. *See Cipollone*, 112 S. Ct. at 2618.

104. *See* Riden v. ICI Americas, Inc., 763 F. Supp. 1500, 1505 (W.D. Mo. 1991) (noting this omission and declining to find express preemption). See also *supra* note 22 for examples of federal statutes making explicit reference to preempted common law.

on state regulatory power than does the 1965 Act's prohibition on statements in "advertising."[105]

Arguably, section 136v's language is ambiguous on its face. However, tort claims, since they involve a state's exercise of its police powers through the common law, are subject to *Cipollone's* strong presumption against preemption.[106] Courts therefore must resolve any ambiguity in favor of preservation of the state common law claim. The language of section 136v(b) does not express the "clear and manifest purpose" necessary to rebut the presumption against preemption. Several lower courts have properly used similar reasoning to equate section 136v(b) with the 1965 Act and thus deny preemption defenses.[107]

Congress's use of the phrase "requirements for labeling or packaging" in section 136v(b) does not compel a conclusion that FIFRA preempts state common law actions. Pesticide manufacturers and other proponents of FIFRA preemption argue that by prohibiting state "requirements," Congress clearly expressed its intent to preempt certain failure to warn and misrepresentation claims.[108] Several post-*Cipollone* courts have accepted manufacturers' arguments and concluded that the word "requirement" in the 1969 Act was dispositive in leading the *Cipollone* Court to hold that the 1969 Act preempts such claims.[109] These courts have refused to distinguish between the "requirement" language in the 1969 Act and the "requirements" language in section 136v(b) and therefore have equated the preemptive force of FIFRA with the 1969 Act.[110]

The *Cipollone* plurality did partially rest its distinction between the 1965 and 1969 Acts on the change in language from "[n]o statement . . . shall be required" to "no requirement . . . shall be imposed."[111] However,

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105. *See* Burke v. Dow Chem. Co., 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992) (accepting a version of this argument).

106. *See supra* note 41 and accompanying text.

107. *E.g.*, Couture v. Dow Chem. Co., 804 F. Supp. 1298, 1302 (D. Mont. 1992); *cf. Burke*, 797 F. Supp. at 1140 ("FIFRA lies somewhere in between the 1965 and 1969 cigarette laws.").

108. *See, e.g.*, Mary Pat Benz & Derek J. Meyer, *Express Federal Preemption: Where is it After* Cipollone?, 59 DEF. COUNS. J., 491, 497 (1992); Sheila L. Birnbaum & Gary E. Crawford, *How* Cipollone *Affects Other Industries*, NAT'L L.J., Aug. 24, 1992, at 20; *Recent Case*, 106 HARV. L. REV. 963, 966 (1993).

109. *See, e.g.*, Papas v. Upjohn Co., 985 F.2d 516 (11th Cir. 1993); King v. E.I. du Pont de Nemours & Co., 806 F. Supp. 1030, 1032 (D. Me. 1992), *aff'd*, 1993 U.S. App. Lexis 16809 (1st Cir. July 7, 1993).

110. *See, e.g.*, *King*, 806 F. Supp. at 1032.

111. *See* Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2619 (1992) (finding the modified language to be "much broader").

courts that focus their analyses on the meaning of "requirement" ignore *Cipollone's* command to construe individual preemptive words in their textual and legislative context.[112] Viewing section 136v(b) in context, a court could not ignore the savings clause in section 136v(a). This subsection reserves to the states the expansive power to regulate the sale or use of registered pesticides.[113] As the *Ferebee* court noted, Congress would be unlikely to prohibit state courts from compensating victims of dangerous pesticides while leaving the state the power to ban the pesticide altogether.[114]

Read in its textual context, FIFRA's language is also distinguishable from that in the 1969 Act because section 136v(b) refers only to "requirements" rather than to the "requirement[s] or prohibition[s]" the *Cipollone* plurality interpreted broadly.[115] Additionally, Congress omitted from section 136v(b) any reference to "State law," which the *Cipollone* plurality found broad enough in the 1969 Act to include common law claims.[116]

Finally, courts construing the language of section 136v(b) must regard with some caution the *Cipollone* plurality's finding of preemption by the 1969 Act. The Court based this finding on questionable distinctions in meaning between the 1965 and 1969 Acts. The five concurring and dissenting *Cipollone* justices criticized the plurality's willingness to find meaningful differences between the two cigarette laws.[117] At least three of these five believed that the 1969 Act's language no more clearly or manifestly exhibited an intent to preempt than did its predecessor.[118] This criticism is warranted for two reasons. First, the plurality ignores its own announced presumption by finding preemption.[119] Second, preemption is antithetical to the federalism and due process concerns

112. *Cipollone,* 112 S. Ct. at 2608, n.16 (criticizing Justice Scalia's "apparent meaning" reading of the preemption sections for artificially severing the words from their context).

113. 7 U.S.C.A. § 136v(a) (West 1980).

114. Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1541 (D.C. Cir.), *cert. denied,* 469 U.S. 1062 (1984).

115. For the plurality's views on the significance of the word "prohibition," see *Cipollone,* 112 S. Ct. at 2620.

116. *Id.* at 2620–21. *But see id.* at 2627 (Blackmun, J., concurring and dissenting).

117. *Id.* at 2627 (Blackmun, J., concurring and dissenting); *cf. id.* at 2632 (Scalia, J., concurring and dissenting). In addition, the briefs submitted by both parties contended that the 1969 Act did not materially alter the preemptive sweep of federal cigarette law. *Id.* at 2619.

118. *Id.* at 2627 (Blackmun, J., concurring and dissenting).

119. *See id.* at 2632 (Scalia, J., concurring and dissenting) (noting (with satisfaction) that the plurality seems to ignore its own announced presumption when applying preemption doctrine to the 1969 Act).

discussed below. The *Cipollone* plurality should have accepted Justice Blackmun's arguments that a statute as ambiguous as the 1969 Act could not preempt state common law. It is unlikely that a majority of the Court would extend the plurality holding regarding the 1969 Act and read FIFRA's section 136v(b) to preempt state common law claims.

2. *Section 136v's Legislative History Does Not Support Preemption*

The House and Senate Reports accompanying section 136v likewise offer no evidence of clear and manifest congressional intent for FIFRA to preempt state common law. The scant legislative history of section 136v merely reflects a desire to allow states to impose stricter use requirements on pesticides, but makes no mention of intent to displace state law claims.[120] If anything, preemption of state common law claims counteracts Congress's expressed desire to protect "man and his environment" through FIFRA.[121]

In addition, the regulatory context in which Congress amended FIFRA supports a narrow reading of its preemption provisions. Congress amended FIFRA in 1972 partially in response to state statutes imposing diverse labeling requirements on pesticides.[122] FIFRA therefore established a comprehensive regulatory scheme that displaced state pesticide legislation. There is no indication that Congress was responding to the imposition of state common law duties when it enacted section 136v(b). Therefore, as the *Cipollone* plurality noted with regard to the 1965 Cigarette Act,[123] the regulatory backdrop to section 136v does not support a finding of preemption.

Congress must clearly express its intent to displace state common law claims. FIFRA, like the 1965 Cigarette Act, lacks this requisite intent. Courts construing FIFRA in light of the traditional presumption against preemption should conclude that it neither impliedly nor expressly preempts any state common law tort actions. In addition, preservation of state common law claims is the only conclusion entirely consistent with prevailing notions of federalism and the Fifth Amendment.

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120. *See supra* notes 67–68 and accompanying text.

121. *See supra* notes 53–54 and accompanying text.

122. *See Hearings on the Fed. Pesticide Control Act of 1971 Before the House Agric. Comm.*, 92nd Cong., 1st Sess. 8 (1971) (noting that 48 states had administrative pesticide registration programs).

123. *Cipollone*, 112 S. Ct. at 2619.

C. *Permitting FIFRA To Preempt State Common Law Disregards Important Federalism Concerns*

Current concepts of federalism support the strong presumption against preemption and the preservation of state common law claims against pesticide manufacturers. The Court's shifting preemption presumptions may reflect individual justices' opinions about constitutional federalism and the role of the states rather than illuminating a consistent doctrinal framework.[124]

Historically, Supreme Court preemption decisions have demonstrated varying attitudes toward federalism.[125] Since the early 1970s, however, the Court has appeared reluctant to use preemption doctrine to strike down state laws.[126] The heightened presumption of validity afforded state police power regulations and common law duties[127] provides evidence that the current Court emphasizes the independent authority of states to regulate themselves.[128] The Court's recent reluctance to infer preemption in ambiguous cases can also be explained with reference to the seminal federalism case *Garcia v. San Antonio Metropolitan Transit Authority*.[129] By requiring explicit expressions of congressional intent before holding FIFRA preemptive, courts can avoid assuming an activist role in delineating the boundaries of state sovereignty and thus can remain faithful to *Garcia*.[130]

It may be impossible to reconcile the positions of individual justices in *Cipollone* with this federalism-based preemption theory. Justice Blackmun authored the *Cipollone* opinion which would have granted the states the most leeway in preserving their common law authority.[131] Yet

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124. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 355 (2d ed. 1991); Bratton, *supra* note 13, at 623–24.

125. *See supra* notes 12–16 and accompanying text.

126. *See supra* notes 17–18 and accompanying text.

127. *See supra* notes 19–29 and accompanying text.

128. The Court also fosters state independence through narrow construction of congressional language in other contexts. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (requiring "unmistakably clear" language to abrogate state sovereign immunity); Coleman v. Thompson, 111 S. Ct. 2546 (1991) (interpreting the federal habeas corpus statute).

129. 469 U.S. 528 (1985). *Garcia* recognized that the states occupy a special position in the constitutional system, but that Congress and the political process are the proper arbiters to ensure that the federal government does not promulgate laws unduly burdening the states. *Id.* at 556.

130. *See* TRIBE, *supra* note 5, § 6-25, at 480. *But see* Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution,* U. PA. L. REV. 121, 177 (1985) (finding it unlikely that the Court which decided *Garcia* would hold a federal statute preempting state common law violative of the Tenth Amendment).

131. *See supra* note 48 and accompanying text.

Chief Justice Rehnquist and Justices O'Connor and Scalia, who have been most ardent in their support for states' rights in the federal scheme,[132] all refused to join the Blackmun opinion. This refusal may suggest that the justices could not set aside their reservations about some of the underlying state law claims in order to reach a decision more consistent with their views on federalism. It is unclear whether these justices would be equally hostile toward state law claims against pesticide manufacturers.

Federalism is not the only constitutional concept which counsels restraint to courts deciding whether state common law claims are preempted. Courts must also consider the implications of the Due Process and Takings Clauses before they can validly infer that Congress has removed all remedies for a harm actionable under state common law.

D. Permitting FIFRA To Preempt State Common Law Disregards Fifth Amendment Concerns

The Supreme Court has traditionally been most reluctant to find preemption of state common law actions when invalidation would deprive victims of all remedies for tortious conduct.[133] This reluctance may be explained in part as an effort to avoid the more difficult question of whether Congress may deprive citizens of all damage remedies without running afoul of the Due Process and Takings Clauses of the Fifth Amendment.[134]

An act of Congress that deprives citizens of all avenues for monetary redress for injury may constitute a deprivation of liberty or property implicating these clauses in any one of three ways. First, it is possible that common law remedies constitute the type of liberty or property interest offered procedural protection by the Fifth Amendment.[135] The Court has long held, however, that legislatures may pass generally

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132. *See, e.g.,* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 687 (1981) (Rehnquist, J., dissenting); National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *Garcia,* 469 U.S. 528 (1985) (O'Connor, J., dissenting); City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991) (Scalia, J.) (holding federalism to render the Sherman Act inapplicable to the states).

133. *See supra* notes 23–29 and accompanying text.

134. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

135. *See* Glicksman, *supra* note 130, at 179–80; Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights,* 95 HARV. L. REV. 1193, 1310 n.479 (1982) (arguing that the government's refusal to offer procedural protective mechanisms raises substantive due process questions).

applicable laws affecting these interests without affording procedural safeguards beyond those specifically required by the Constitution.[136] It is therefore extremely unlikely that interpreting FIFRA to preempt state law claims would raise important procedural due process concerns. More serious concerns may arise, however, under the guise of substantive due process.

A number of Supreme Court opinions have indicated that Congress may not abrogate certain "core" common law rights without either showing a compelling necessity or providing for alternative remedies.[137] Unlike statutes that the Court has found preemptive of common law remedies,[138] FIFRA provides no alternative remedy for consumers or others injured by pesticides.[139] It is also unlikely that a court would find that protecting pesticide manufacturers from state law compensatory suit is a compelling necessity. It is nevertheless unclear whether the right to be compensated for injuries from pesticides is the sort of "core" common law right Justice Marshall and others saw as inviolable. However, the Court may be seeking to avoid addressing the application of this doctrine by adopting a more restrictive view of preemption in cases in which preemption would eliminate all remedies.[140]

Finally, the Constitution may protect state common law remedies from uncompensated taking. The common law generally functions as a baseline for determining the forms of private property to be protected under the takings clause. Recent Supreme Court takings jurisprudence has focused on "expectations" and "absolute deprivation" as prerequisites to a compensation requirement.[141] By preempting state

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136. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); STONE ET AL., *supra* note 124, at 1009.

137. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 94 (1980) (Marshall, J., concurring); New York Cent. R.R. v. White, 243 U.S. 188, 201 (1917) (expressing doubt whether "a state might, without violence to the constitutional guaranty of 'due process of law' suddenly set aside all common-law rules respecting liability . . . without providing a reasonably just substitute"). *But see,* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 (1978) (dicta) (professing uncertainty as to whether due process in fact requires legislatively enacted compensation schemes to duplicate common law recovery or to provide a substitute remedy).

138. *See, e.g.*, International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (preempting the common law nuisance remedies available in the plaintiff's home state where the common law of the point source state is available); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (state common law governing labor disputes preempted where federal law provided for administrative adjudicative procedure).

139. *See supra* notes 60–64 and accompanying text.

140. *See* Glicksman, *supra* note 130, at 179–82.

141. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992); *see also* Dames & Moore v. Regan, 453 U.S. 654 (1981) (concluding that property interests in claims against Iran

common law tort actions, Congress would be defeating absolutely state citizens' reasonable expectations of compensation for injuries caused by pesticides. Thus, the takings clause may be relevant whenever a court construes FIFRA to preempt state common law.

A claim that the Fifth Amendment proscribes courts from interpreting FIFRA to preempt state law actions is highly speculative. However, when coupled with the paucity of expressed congressional intent to preempt and the federalism concerns discussed above, the Fifth Amendment arguments raised here counsel courts to exercise extreme caution before finding state claims preempted.

III. CONCLUSION

Congress did not enact FIFRA to provide blanket amnesty for pesticide manufacturers who breach state common law duties. Courts holding that section 136v preempts state common law misconstrue Congress's intent in enacting FIFRA and misapply the preemption doctrine articulated in *Cipollone*. Nothing in FIFRA's language or legislative history indicates that Congress intended to deprive those injured by pesticides of state common law remedies. *Cipollone* reinforces the strong presumption against preemption of state common law claims applicable where there is no explicit congressional intent to preempt. Constitutional jurisprudence, federalism, and due process concerns all testify to the strength of this presumption in favor of state law claims. Nevertheless, courts continue to deny pesticide-injured plaintiffs the opportunity to pursue common law claims. Courts must not read *Cipollone* to prevent them from interpreting section 136v(b) as it was intended: a narrow preemption of state positive enactments. In the interests of certainty and clarity, the Supreme Court should adopt the "clear statement" standard proposed by the Blackmun concurrence in *Cipollone*. Courts must not read federal statutes to foreclose common law remedies absent a clear, explicit statement of congressional intent to do so.

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were too revocable, contingent, and subordinate to support a constitutional claim for compensation); TRIBE, supra note 5, § 9-1, at 587–88 (noting that takings jurisprudence is based on a model of settled expectations).