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David Beugelmans

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THE FEDERALISM OF *CLIMEX* *LECTULARIUS*: WHAT BED-BUGS TELL US ABOUT FIFRA PREEMPTION IN PESTICIDE APPLICATOR CASES

DAVID BEUGELMANS*

INTRODUCTION

During July 2010, a New Jersey exterminator sprayed seventy residences – including mattresses and toys – with malation and carbaryl to combat *Climex lectularius*, otherwise known as bed bugs.¹ Both pesticides are absorbed by the skin and are dangerous at high concentrations.² During October 2010, an exterminator hired to eradicate bed bugs in a New York City elementary school left pesticides puddled “on the teachers’ desks, on the children’s desks, on their books, [and] on the floor,” with cleanup costs of more than \$200,000.³ Despite such close calls, state authorities clamored for EPA exemptions⁴ of non-indoor use pesticides to combat the bed bug

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* J.D. Candidate, 2012, University of Maryland School of Law (Baltimore, MD); B.A., Politics, 2009, University of California, Santa Cruz (Santa Cruz, CA).

1. Judy Peet, *DEP Orders Exterminator to Clean Up Toxic Residue*, THE STAR-LEDGER, July 13, 2010 at 9.

2. *Id.*; see also *Malathion for Mosquito Control*, ENVTL. PROT. AGENCY, available at <http://www.epa.gov/opp00001/health/mosquitoes/malathion4mosquitoes.htm> (last updated July 7, 2008) (“[A]t high doses, malathion, like other organophosphates, can over-stimulate the nervous system causing nausea, dizziness, or confusion. Severe high-dose poisoning with any organophosphate can cause convulsions, respiratory paralysis, and death.”); *Amended Reregistration Eligibility Decision (RED) for Carbaryl*, ENVTL. PROT. AGENCY, 9 (Aug. 2008), available at <http://www.epa.gov/opp00001/reregistration/REDS/carbaryl-red-amended.pdf> (“[C]arbaryl is currently classified as . . . ‘likely to be carcinogenic to humans.’”).

3. Art McFarland, *Bed bug ridding chemicals contaminate school*, WABC, Oct. 26, 2010, <http://abclocal.go.com/wabc/story?section=news/local&id=7748002>.

4. Matt Leingang, *US Grapples With Bedbugs, Misuse of Pesticides*, ASSOCIATED PRESS, Aug. 30, 2010, http://news.yahoo.com/s/ap/20100831/ap_on_re_us/us_bedbug_conundrum. Recently, Governor Strickland of Ohio pleaded with EPA to issue an emergency exemption for home use of propoxur, a pesticide the agency has banned from home use and considers a probably carcinogen. *Id.* EPA Administrator Jackson denied his request. *Id.*

epidemic.⁵ Justified or not, the pandemonium of the 2010 bed bug epidemic exemplifies how hazardous pesticides may come into contact with unknowing individuals. The potential for harm also raises the question how the Federal Insecticide, Rodenticide and Fungicide Act (“FIFRA”)⁶ may preempt claims against negligent pesticide applicators.

FIFRA includes express preemption language regarding state labeling requirements.⁷ *Bates v. Dow Agrosciences Inc.*⁸ clarified this preemption language in manufacturer cases.⁹ After *Bates*, courts cannot impose a blanket preemption regime where all claims invoking FIFRA labeling requirements are automatically preempted.¹⁰ In this settled landscape, however, one area of uncertainty remains: FIFRA preemption of claims against pesticide applicators.¹¹ Courts have relied on wildly divergent rational, leaving them divided on how claims against applicators implicate FIFRA labeling requirements.¹² Under the *Bates* preemption regime, these divergent theories operate in even more contradictory ways; some theories preempt all claims against applicators,¹³ while others preempt no claims against applicators.¹⁴ Only one court applies *Bates* directly to applicator cases, preempting claims that impose additional or different labeling requirements on EPA approved labeling.¹⁵

This article begins by summarizing FIFRA provisions and EPA regulations relevant to common law claims against applicators, including pesticide labeling requirements¹⁶ and pesticide applicator certification guidelines.¹⁷ Generally, courts have given only cursory attention to these requirements in applicator cases,¹⁸ yet they provide valuable insight as to FIFRA’s preemptory effect.¹⁹ This article then briefly recounts the

5. For a summary and statistics of the epidemic, see *id.*; see also *America’s bedbug invasion: By the numbers*, THE WEEK, July 26, 2010, <http://theweek.com/article/index/205392/americas-bedbug-invasion-by-the-numbers>.

6. Federal Insecticide, Rodenticide, and Fungicide Act, 7 U.S.C. 136 (2006); 61 Stat. 163 § 1 (1947) (“This Act may be cited as the “Federal Insecticide, Fungicide, and Rodenticide Act.”).

7. 7 U.S.C. 136v(b) (2006).

8. 544 U.S. 431 (2005).

9. See *infra* SECTION III.C.

10. See *infra* SECTION III.C.

11. See *infra* SECTION IV.

12. See *infra* SECTION IV.

13. See *infra* note 159 and accompanying text.

14. See *infra* SECTION IV.A.1.

15. See *infra* notes 167–89 and accompanying text.

16. See *infra* SECTION I.A.

17. See *infra* SECTION I.B.

18. See *infra* SECTION IV (discussing how courts have addressed this issue, almost none of which discussed EPA regulations).

19. See *infra* SECTION V.A (discussing how *Bates* interacts with EPA regulations).

preemption doctrine,²⁰ before proceeding with an extensive analysis of Supreme Court decisions interpreting FIFRA preemption.²¹ It then analyzes cases from the state and federal levels that apply the FIFRA preemption regime to common law claims against applicators.²² This section organizes disparate decisions into the select modes of preemption, breaking analysis first into express²³ and implied²⁴ preemption, and then into relevant subparts. This article ends by concluding that the majority of courts fail to consider a key element in the FIFRA regulatory scheme: EPA regulations themselves.²⁵ This analysis suggests FIFRA does preempt many common law claims against applicators.²⁶ While this is a proper extension of administrative expertise, EPA should take additional precautions to guard against unwarranted preemption of claims against applicators.²⁷

I. FIFRA, EPA, AND STATE REQUIREMENTS ON PESTICIDE LABELING AND APPLICATORS

A. Pesticide Label Requirements

To sell pesticides in the United States, manufacturers must comply with FIFRA registration standards.²⁸ Once approved, pesticide manufactures must comply with EPA-imposed labeling requirements.²⁹ Noncompliance is “unlawful.”³⁰ Pertinent to the preemption debate, states may not “impose or continue in effect any requirements for labeling or packaging in addition to or different from those required” under the statute.³¹ Also, it is unlawful “to use any registered pesticide in a manner inconsistent with its labeling.”³²

20. See *infra* SECTION II.

21. See *infra* SECTION III.

22. See *infra* SECTION IV.

23. See *infra* SECTION IV.A.

24. See *infra* SECTION IV.B.

25. See *infra* SECTION V.

26. See *infra* SECTION V.

27. See *infra* SECTION V.

28. 7 U.S.C. § 136a (2006) (providing registration requirements for pesticide manufactures, including submission of pesticide contents and proposed labeling); see also Ian M. Hughes, Comment, *Does FIFRA Level State Tort Claims for Inadequate Warning “Preempted?” Welcher v. American Cyanamid, Inc.*, 7 VILL. ENVTL. L.J. 313, 316–17 (1996) (explaining various registration procedures).

29. 7 U.S.C. § 136j(a)(1)(E) (2006) (making it illegal to distribute or sell “any pesticide which is adulterated or misbranded”); §136(q)(1)(E) (defining misbranding as, in part, “any word, statement, or other information required by or under authority ... [of FIFRA] to appear on the label or labeling is not prominently placed thereon”).

30. *Id.* § 136j(a)(1)(E).

31. *Id.* § 136v(b).

32. *Id.* § 136j(a)(2)(G).

FIFRA defines pesticide labels as “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.”³³ Pesticide labels must specify “the name and percentage by weight of each active ingredient,” and “the total percentage of weight of all inactive ingredients.”³⁴ Moreover, if the pesticide includes arsenic, the label must include “a statement of the percentages of total and water-soluble arsenic calculated as elemental arsenic.”³⁵

A pesticide’s label must include whether the pesticide is classified as restricted,³⁶ its approved sites of application,³⁷ the target pest of each site,³⁸ and the method of application including dilution.³⁹ Labels must also include “[t]he frequency and timing of applications necessary to obtain effective results without causing unreasonable adverse effects on the environment”⁴⁰ and “[o]ther pertinent information which the Administrator determines to be necessary for the protection of man and the environment.”⁴¹

Furthermore, EPA regulations provide standards for adequacy and clarity of directions.⁴² First, directions must be written so that the average person likely to use or supervise the use of the pesticide can understand them.⁴³ Second, and more importantly, “when followed, directions must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.”⁴⁴

B. Federal and State Pesticide Applicator Certification

Under the authority of FIFRA, EPA has imposed stringent requirements on pesticide applicator certification.⁴⁵ States may also create certification programs so long that their regulations are at least as stringent as the EPA regulations.⁴⁶ Importantly, these applicator certification

33. *Id.* § 136(p)(1).

34. 40 C.F.R. § 156.10(g)(1) (2010).

35. *Id.* § 156.10(g)(1).

36. *Id.* § 156.10(i)(2)(i).

37. *Id.* § 156.10(i)(2)(iii).

38. *Id.* § 156.10(i)(2)(iv).

39. *Id.* § 156.10(i)(2)(vi).

40. *Id.* § 156.10(i)(2)(vii).

41. *Id.* § 156.10(i)(2)(x)(F).

42. *Id.* § 156.10(i)(1)(i).

43. *Id.*

44. *Id.*

45. 40 C.F.R. § 171 (2010).

46. *Id.* § 171.7(e)(1)(i)(C). Since FIFRA’s preemption clause applies only to pesticide labeling, the statute does not preempt state applicator certification requirements. *See* 7 U.S.C. § 136v(b) (2006) (preempting “additional or different” state labeling requirements).

requirements may help assert a duty of care in state tort claims.⁴⁷ For the preemption question, the applicator certification requirements illustrate knowledge that may give rise to “additional or different” general standards of care and warnings than provided in EPA approved labeling.⁴⁸

FIFRA defines a “certified applicator” as any individual who is certified under the act to “use or supervise the use of any pesticide which is classified as restricted use.”⁴⁹ An individual who applies a restricted use pesticide on property other than her own is a “commercial applicator,”⁵⁰ while an applicator who applies a restricted use pesticide on her own property is a “private applicator.”⁵¹ A pesticide is considered applied under the supervision of a certified applicator, even if the certificated application is not present when the pesticide is applied.⁵²

EPA does not require private applicators to take a test establishing their competency to apply restricted use pesticides.⁵³ However, commercial applicators are subject to more stringent requirements.⁵⁴ Section 136i provides the EPA administrator can set certification requirements, which implicitly include a training program.⁵⁵ Most importantly, EPA has authority to impose an examination requirement on commercial applicators.⁵⁶ Section 136i permits states to submit a certification plan to the EPA for approval.⁵⁷ In absence of an approved state plan, EPA takes responsibility for certification.⁵⁸

Pursuant to this authority, 40 C.F.R. § 171 delineates commercial applicator certification requirements. Competency is determined by

47. See generally Restatement (Second) of Torts § 299A (1965) (“Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”); *id.* § 288B(2) (“The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct.”); *id.* § 288C (“Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.”).

48. See 40 C.F.R. §171.4(b)(1)(ii) (2010) (providing that commercial applicators must know about pesticide application and dangers generally, in addition to label comprehension).

49. 7 U.S.C. § 136(e)(1) (2006).

50. *Id.* § 136(e)(3).

51. *Id.* § 136(e)(2).

52. *Id.* § 136(e)(4).

53. *Id.* § 136i(a)(1).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* § 136i(a)(2).

58. *Id.* § 136i(a)(1). As of 2004, EPA had 1,081,803 certified applicators on file. *1987-2004 Annual Certified Applicator Data*, EPA, <http://www.epa.gov/oppfead1/safety/applicators/data.htm> (last visited August 24, 2011).

“examinations, and, as appropriate, performance testing.”⁵⁹ All commercial applicators must prove competence in certain base-line standards,⁶⁰ while different categories of commercial applicators also must prove competence in specific standards.⁶¹

General areas of competency encompass label comprehension,⁶² various safety factors,⁶³ and application techniques.⁶⁴ Commercial applicators must understand the format and terminology of pesticide labeling,” including “instructions, warnings, terms symbols, and other information appearing on pesticide labels.”⁶⁵ They must also understand that the pesticide must be applied in a manner consistent to its label.⁶⁶ Required safety factors include “pesticide toxicity and hazard to man and common exposure routes,” “common types and causes of pesticide accidents,” and “precautions necessary to guard against injury to applicators and other individuals in or near treat areas.”⁶⁷ Lastly, applicators must understand various procedures used to apply pesticides, along with which application techniques to use in a given situation.⁶⁸

Those applicators involved in “industrial, institutional, structural, and health related pest control” must understand pesticide formulations appropriate for various structural pests.⁶⁹ They must also understand how to “avoid contamination of food, damage and contamination of habitat, and exposure of people and pets.”⁷⁰ Furthermore, applicators must have a practical understanding of what factors lead to dangerous conditions, “including continuous exposure in the various situations encountered in this category.”⁷¹

At their discretion, states may promulgate their own standards for commercial applicator certification.⁷² State standards must be at least equal to the standards promulgated by EPA under § 171.4(b).⁷³ In Maryland, applicators must have one year prior experience working for an applicator

59. 40 C.F.R. §171.4(a) (2010).

60. *Id.* § 171.4(b).

61. *Id.* § 171.4(c).

62. *Id.* § 171.4(b)(1)(i).

63. *Id.* § 171.4(b)(1)(ii).

64. *Id.* § 171.4(b)(1)(vii).

65. *Id.* § 171.4(b)(1)(i).

66. *Id.*

67. *Id.* § 171.4(b)(1)(ii).

68. *Id.* § 171.4(b)(1)(vii).

69. *Id.* § 171.4(c)(7).

70. *Id.*

71. *Id.*

72. *Id.* § 171.7.

73. *Id.* § 171.7(e)(1)(i)(C).

in the area in which she is seeking certification, obtain “a degree or academic certificate” approved by the Maryland Department of Agriculture, or accomplish a combination of both.⁷⁴ Furthermore, applicants must score 70 percent or higher on their exams to obtain certification.⁷⁵

II. THE PREEMPTION DOCTRINE

The Supremacy Clause of the United States Constitution provides:

[t]his Constitution and the laws of the United States which shall be made in Pursuance thereof; and all treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.⁷⁶

In light of this language, Congress has authority to use its delegated powers to preempt state laws, even without conflict or invoking the Supremacy Clause.⁷⁷ Nevertheless, courts assume “the historic police powers of the States [are] not to be superseded by [a] Federal Act unless [there is a] clear and manifest purpose of Congress.”⁷⁸ Importantly, the federal preemption doctrine applies to both state statutes and common law.⁷⁹ A state common law rule has the same preemptive effect as a state statute.⁸⁰

There are three modes of federal preemption. First, Congress may “supplant state authority in a particular field . . . [through express] terms of the statute.”⁸¹ Second, Congress may preempt an entire field by implication if “the scheme of federal regulation is ‘so pervasive as to make reasonable the inference that Congress left no room for States to supplement it,’”⁸² or where a Congressional enactment touches an area with a federal interest so dominant that it precludes state law.⁸³ Third, Congress may preempt by

74. MD. CODE REGS. 15.05.01.08 (2010).

75. *Id.* 15.05.01.09.

76. U.S. CONST. art. VI, cl. 2.

77. Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1155 (1998).

78. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

79. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding that state common law claims are preempted by federal statute).

80. *Id.*

81. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604–05 (1991).

82. *Id.* at 605 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

83. *See Jordan, supra* note 77, at 1165.

implication if “the state law actually conflicts with federal law,”⁸⁴ such that the state law imposes an obstacle to accomplishing the objectives of Congress⁸⁵ or complying with both the federal and state standards is a “physical impossibility.”⁸⁶ While the Court recognizes that implied preemption can exist independently of a statute’s express preemption, it is not clear whether implied preemption should influence a court’s express preemption analysis.⁸⁷ Lastly, important to administrative law issues, federal regulations are no less preemptive than federal statutes.⁸⁸

III. FIFRA PREEMPTION CASES: BUILDING UP TO *BATES*

Congress passed FIFRA in 1947 to protect consumers from defective pesticides.⁸⁹ However, due to burgeoning safety and environmental concerns, in 1972 Congress passed extensive amendments expanding FIFRA from a simple labeling law to an inclusive regulatory regime.⁹⁰ Through these amendments, Congress gave EPA authority to regulate the use, sale, and labeling of pesticides, as well as enforcement power.⁹¹ Most importantly, however, these amendments require that states not create any labeling requirements “in addition to or different from those required” under the statute and its regulations.⁹² With little guidance on this amendment, the Court began to interpret how this clause – and enhanced EPA authority under FIFRA – interacts with the broader preemption doctrine.⁹³

A. *Wisconsin Public Intervenor v. Mortier: State Positive Law*

In *Wisconsin Public Intervenor v. Mortier*,⁹⁴ the Court considered whether FIFRA preempts local ordinances regulating pesticide use.⁹⁵ The

84. *Id.*

85. *Mortier*, 501 U.S. at 605 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

86. *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 142–43 (1963)).

87. See *Jordan*, *supra* note 77, at 1164–65 (“[T]he Court’s recent cases have sent a mixed message as to the extent to which the implied preemption doctrines should play a role in construing express preemption provisions. The cases suggest that the Court as a whole agrees that an express preemption provision does not foreclose consideration of the implied preemption doctrines. However, not all of the Justices are ready for a wholesale incorporation of the doctrines into a traditional express preemption analysis.”).

88. *Fidelity Federal Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153–54 (1982) (quoting *U.S. v. Shimer*, 367 U.S. 374, 383 (1961)).

89. See Ian M. Hughes, *supra* note 28, at 315–16.

90. *Bates v. Dow Agrosciences Inc.*, 544 U.S. 431, 437 (2005) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1994)).

91. *Id.* (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991–92 (1994)).

92. 7 U.S.C. § 136v(b) (2006).

93. See *infra* SECTION III.A–C.

94. 501 U.S. 597 (1991).

Court held FIFRA does not expressly or impliedly preempt state or local level regulation of pesticides.⁹⁶ The Court rejected the Wisconsin Supreme Court's holding that § 136v and the provision's legislative history evidenced Congress' preemptive intent.⁹⁷ The ordinance, enacted by the town of Casey, required a permit for pesticide application.⁹⁸ Upon grant of a permit, the ordinance required the permittee to display signs notifying the public about the pesticide used and any labeling denoting a safe time to reenter the area.⁹⁹

The Court explained that § 136v(a) allows states to regulate the "use and sale of pesticides" because it did not evidence Congress' intent to preempt local regulations.¹⁰⁰ Reviewing the legislative history of the provision, the Court concluded that while there are some hints that Congress may have intended to preempt state regulations, the record fell short of showing a "clear and manifest purpose of Congress."¹⁰¹ Furthermore, the Court observed § 136v(b) would be surplusage if Congressional intent was to capture all pesticide regulation.¹⁰² Thus, the Court held that § 136v "plainly authorizes the 'States' to regulate pesticides and just as plainly is silent to local governments."¹⁰³ There was little evidence that FIFRA is a "comprehensive statute that occupied the field of pesticide regulation."¹⁰⁴

B. Cipollone v. Liggett Group, Inc.: A Shift (and Split) in the Preemption Debate

Despite the Court's holding in *Mortier*, the FIFRA preemption debate shifted when the Court decided a case applicable specifically to labeling requirements.¹⁰⁵ In *Cipollone v. Liggett Group, Inc.*,¹⁰⁶ the Court considered whether the Federal Cigarette Labeling and Advertising Act of 1965 preempted state common law requirements on cigarette labels.¹⁰⁷ The

95. *Id.* at 600.

96. *Id.* at 606–08.

97. *Id.* at 607.

98. *Id.* at 602.

99. *Id.* at 603.

100. *Id.* at 610 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). If still current doctrine, this would suggest state common law rules imposing additional application techniques on applicators are never preempted. With *Bates*, however, this rule no longer stands.

101. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

102. *Id.* at 613.

103. *Id.* at 607.

104. *Id.* at 612.

105. See *infra* notes 106–19 and accompanying text.

106. 505 U.S. 504 (1992).

107. *Id.* at 508.

preemption language of the statute reads, “[n]o 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 [lawfully] labeled.”¹⁰⁸

The Court interpreted this provision as encompassing both positive state enactments and common law rules because the provision is broad and does not distinguish between positive state enactments and common law rules.¹⁰⁹ Because the Court read the “requirement or prohibition” language to include common law rules, lower courts proceeded to interpret FIFRA’s “requirements” provision in a similarly broad fashion.¹¹⁰ However, courts disagreed over whether FIFRA expressly or impliedly preempted state common law claims.¹¹¹

For instance, the Eleventh Circuit concluded FIFRA expressly preempts state common law claims against manufactures.¹¹² The court compared the requirements language of § 136v to the Cigarette Labeling Act.¹¹³ Taking *Cipollone* into account, the court found the requirement language does not manifest a Congressional intent to treat the preemption of common law and state statutes differently.¹¹⁴ Accordingly, all common law claims constituted requirements under the FIFRA provision and were preempted.¹¹⁵

Contrary to the Eleventh Circuit, the Tenth Circuit found FIFRA impliedly preempts state common law claims against manufacturers.¹¹⁶ The court based its reasoning on a conflict between the two laws and field preemption.¹¹⁷ On the first point, the court reasoned that damages in state court founded on failure to warn claims do constitute “ad hoc determinations of the adequacy of statutory labeling standards,” hindering the purpose of §136v(b): ensuring uniform labeling standards.¹¹⁸ On the second point, the court reasoned that while the Supreme Court in *Mortier* found FIFRA does not preempt state application requirements, “Congress

108. *Id.* at 515 (quoting Pub. L. 91-222, § 5b, Apr. 1, 1970).

109. *Id.* at 521.

110. Joseph Frueh, Comment, *Pesticides, Preemption, and the Return of Tort Protection*, 23 YALE J. REG. 299, 303 (2006).

111. See Hughes, *supra* note 28, at 325–30.

112. *Papas v. Upjohn Co.*, 985 F.2d 516, 517 (11th Cir. 1993).

113. *Id.*

114. *Id.* at 518 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)).

115. *Id.*

116. *Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 164 (10th Cir. 1992).

117. *Id.*

118. *Id.* at 162.

had impliedly preempted state regulation in the more narrow area of labeling.”¹¹⁹

C. Bates v. Dow Agrosciences, Inc.: The Parallel Requirements Standard

In *Bates v. Dow Agrosciences, Inc.*,¹²⁰ the Supreme Court clarified the FIFRA preemption doctrine – at least regarding manufactures – in favor of express preemption.¹²¹ In *Bates*, farmers sued Dow Agrosciences, Inc. (“Dow”) claiming that the company’s pesticide damaged their peanut crop.¹²² The pesticide’s EPA approved label stated that it should be used “in all areas where peanuts are grown.”¹²³ The farmers claimed, however, that Dow knew or should have known that the pesticide would harm peanuts in soils over a 7-pH level.¹²⁴ The farmers alleged strict liability, negligence, fraud, breach of warranty, and violation of the Texas DTPA.¹²⁵

After examining an “inducement” test applied by some courts,¹²⁶ the Court held § 136v(b) expressly preempts state-law labeling and packing requirements “in addition to or different from” the labeling and packaging requirements approved by the EPA.¹²⁷ According to the Court’s reading of the provision, there are two situations where state common law claims are not preempted.

First, FIFRA preempts a state common law claim only if the claim directly imposes labeling requirements.¹²⁸ For instance, FIFRA does not preempt rules requiring “manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments” because they have nothing to do with FIFRA pesticide labels.¹²⁹ The mere fact that a state common law

119. *Id.* at 163 (emphasis in original). The court did not change its reasoning while considering the case on remand after the Supreme Court decided *Cipollone*. The court did not consider EPA regulations that require application standards on the labeling. *Arkansas-Platte & Gulf P’ship v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir. 1993) (“We believe Congress circumscribed the area of labeling and packaging and preserved it only for federal law.”).

120. 544 U.S. 431 (2005).

121. *Id.* at 447.

122. *Id.* at 435.

123. *Id.*

124. *Id.*

125. *Id.* at 435–36.

126. *Id.* at 445–46. The “inducement” test was an effects-based test that presumed imposing liability upon pesticide manufactures would induce them to change their labeling. *Id.* at 445. The court critique this test, explaining it is “unquestionably overbroad because it would impeach many “genuine design defect claims.” *Id.*

127. *Id.* at 447.

128. *Id.* at 444.

129. *Id.*

claim of this kind may induce a pesticide manufacture to alter its label is immaterial.¹³⁰

Second, the Court held that certain state-law claims, such as failure-to-warn, can impose labeling requirement if they claim the label included misleading or inadequate warnings.¹³¹ The court explained, however, that § 136v(b) does not preempt these claims if the requirements and equivalent or consistent with the FIFRA misbranding provisions.¹³² Furthermore, state common law claims “need not explicitly incorporate FIFRA’s standards as an element of a cause of action in order to survive pre-emption.”¹³³

Importantly, the Court noted “[s]tate-law requirements must also be measured against any relevant EPA regulations that give content to FIFRA’s misbranding standards.”¹³⁴ Thus, if an EPA regulation provides guidelines for labeling requirements, a state court cannot create a requirement inconsistent with the EPA guideline.¹³⁵ To be sure, “a manufacturer should not be held liable under a state labeling requirement subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA.”¹³⁶ This language is relevant to claims against applicators because it connects a court imposed duty of care to EPA labeling regulations.¹³⁷ Nonetheless, courts have generally failed to consider EPA regulations during FIFRA preemption analysis in applicator cases.¹³⁸

IV. PESTICIDE APPLICATORS AND THE POST-*BATES* PREEMPTION DOCTRINE

A. Express Preemption: Stuck at “Step-One”

Bates clarified express preemption under FIFRA, at least as applied to manufacturers.¹³⁹ FIFRA preempts a state common law claim only if the claim directly imposes labeling requirement and it is in additional to or

130. *See id.* at 445 (“[The] effects-based test finds no support in the text of § 136v(b), which speaks only of ‘requirements.’”).

131. *Id.* at 446–47.

132. *Id.* at 447.

133. *Id.*

134. *Id.* at 453.

135. *See id.* (“For example, a failure-to-warn claim alleging that a given pesticide’s label should have stated “DANGER” instead of the more subdued “CAUTION” would be pre-empted because it is inconsistent with 40 CFR § 156.64 (2004), which specifically assigns these warnings to particular classes of pesticides based on their toxicity.”).

136. *Id.*

137. *See infra* SECTION V.

138. *See infra* SECTION IV.

139. *See supra* SECTION III.C.

different from EPA approved labeling.¹⁴⁰ However, applying this parallel requirements test to common law claims against applicators is problematic because it is not immediately clear how those claims invoke EPA labeling. The express preemption debate thus centers on the first step of the *Bates* test: do common law claims against applicators impose labeling requirements at all? A survey of cases on the matter reveals three general approaches to the issue. First, some courts have found that imposing requirements on applicators in no way implicates FIFRA labeling requirements.¹⁴¹ Second, some courts have found FIFRA preempts claims against applicators in an almost blanket fashion.¹⁴² Third, some courts have found FIFRA preempts claims against applicators under more nuisance terms.¹⁴³ Courts, including the one post-*Bates* federal district court to consider this issue, have generally not considered state common law claims against “any relevant EPA regulations that give content to FIFRA’s misbranding standards.”¹⁴⁴

1. Preemption Not Possible: No Connection

At least two courts have found FIFRA labeling requirements do not implicate claims against applicators.¹⁴⁵ Nevertheless, these courts have reached the same result with different logic, focusing on a lack of an affirmative labeling requirement and the purpose of EPA labeling.¹⁴⁶ Neither court considered the content of EPA promulgated labeling regulations.¹⁴⁷

The Supreme Court of Indiana reasoned that, since FIFRA does not create an affirmative labeling requirement for applicators, it does not preempt any common law failure to warn claims against pesticide applicators.¹⁴⁸ The court explained that while FIFRA does require pesticide manufactures to attach EPA-approved labels to their products in order to sell them, FIFRA does not require applicators to label anything.¹⁴⁹ Thus, due to the lack of an affirmative labeling requirement on applicators, the court found the tort claim does not impose “a requirement additional to or different from those imposed by FIFRA.”¹⁵⁰ Importantly, this presumption

140. *See supra* SECTION III.C.

141. *See infra* SECTION IV.A.1.

142. *See infra* SECTION IV.A.2.

143. *See infra* SECTION IV.A.3.

144. *Bates v. Dow Agrosciences Inc.*, 544 U.S. 431, 447 (2005).

145. *See infra* notes 148–57 and accompanying text.

146. *See infra* notes 148–57 and accompanying text.

147. *See infra* notes 148–57 and accompanying text.

148. *Dow Chem. Co. v. Ebling ex rel. Ebling*, 753 N.E.2d 633, 639 (Ind. 2001).

149. *Id.*

150. *Id.*

against preemption applies independently of a common law claim's differences with EPA approved labeling.¹⁵¹

The Second Circuit reached a similar conclusion when finding a New York pesticide notification program was not preempted by FIFRA, but focused on the purpose of the labeling requirements rather than an affirmative duty to label the pesticide.¹⁵² A New York statute required applicators to provide their customers with a list of applied chemicals, the EPA's approved label, and a cover sheet including additional warnings and safety information than provided on EPA labeling.¹⁵³

The court focused on the purpose of the two requirements. On one hand, FIFRA labeling "is designed to be read and followed by the end user. Generally, it is conceived as being attached to the immediate container of the product in such a way that it can be expected to remain affixed during the period of use."¹⁵⁴ On the other hand, the target audience of the state notification program are members of the public or individuals who contracted for pesticide application who enter areas where pesticides – often strong poisons – have been applied.¹⁵⁵ Thus, the court reasoned, the state notification requirement does not impose additional requirements upon the EPA label because its purpose – warning the innocent public – does not address the purpose of FIFRA labeling requirements: informing applicators.¹⁵⁶ As a result, the court did not discuss the § 136v(b) prohibition against "additional or different" labeling requirements in relation to the New York law requirement that applicators provide additional safety information than on EPA labeling.¹⁵⁷

2. Preemption Possible: No Explanation

The majority of courts have found FIFRA can preempt claims against applicators, but do not explain why.¹⁵⁸ Prior to *Bates*, many courts held FIFRA preempts common law claims against applicators in a seemingly blanket fashion and did not consider how tort claims against applicators

151. *See id.* (explaining that this theory draws from the lack of affirmative labeling requirements on pesticide applicators). Furthermore, the court did not find most applicator cases persuasive because they failed to consider this distinction. *Id.*

152. *New York State Pesticide Coal., Inc. v. Jorling*, 874 F.2d 115 (2d Cir. 1989).

153. *Id.* at 116–17.

154. *Id.* at 119.

155. *Id.*

156. *Id.*

157. *Id.*; 7 U.S.C. § 136v(b) (2006).

158. According to my calculations, approximately 63 percent of the courts cited in this article found preemption but did not explain why.

interact with EPA labeling regulations.¹⁵⁹ However, these cases may fall in line with a *Cipollone*-based notion that any mention of FIFRA labeling – even parroting EPA-approved labeling – automatically led to preemption.¹⁶⁰ Even so, other courts completely skirted this issue under the theory that the plaintiffs’ claims merely involved a duty to warn of dangers printed on the label. Thus, under no formulation of the preemption doctrine could they impose additional or different requirements.¹⁶¹

3. Preemption Possible: Explained

Some courts have found FIFRA can preempt claims against applicators and have explained their logic.¹⁶² However, their reasoning ranges from a lack of a duty to warn within EPA-approved pesticide labeling to an applicator’s reliance on the labeling.¹⁶³ Furthermore, these cases give only a cursory reading (if any) to EPA promulgated labeling requirements.¹⁶⁴

One district court viewed the requirement of an affirmative duty to warn as imposing additional requirements upon EPA labels because EPA labels do not specify a duty to warn.¹⁶⁵ As the court explained, “[t]he practical effect of permitting a jury to return a verdict against a defendant who has complied with the federal labeling requirements for violation of a

159. See *Hottinger v. Trugreen Corp.*, 665 N.E.2d 593, 598 (Ind. Ct. App. 1996) (explaining the “broad prohibition imposed by FIFRA against state regulation of warning labels on hazardous substances bars common-law liability attempts to impose liability on top of that provided by federal laws” without explaining how the principle applies to pesticide applicators); *King v. E.I. du Pont de Nemours & Co.*, 806 F.Supp. 1030, 1037 (D. Me. 1992) (finding that FIFRA preempts strict liability and negligence claims “for defective warnings or the failure to warn of the hazards associated with the products subject to regulation under the Act”); *Tyler v. Dow Chem. Co. Inc.*, 683 N.Y.S.2d 619, 620–22 (N.Y. App. Div. 1998) (explaining that FIFRA preempts common law claims against applicators, but not explaining its logic).

160. See *Frueh*, *supra* note 110, at 302–04.

161. *Villari v. Terminix Int'l, Inc.*, 692 F. Supp. 568, 578 (E.D. Pa. 1988) (“Recognition of this ‘failure-to-warn’ claim does not conflict with FIFRA’s prohibition of state labeling or packaging requirements because the defendant’s liability is unrelated to the manner in which the product is labeled or packaged. Under plaintiffs’ theory, liability attaches as a result of defendant’s failure to relay the warning that FIFRA requires sellers to affix to their product.”); see also *Dow Chem. Co. v. Ebling ex rel. Ebling*, 753 N.E.2d 633, 640 (Ind. 2001) (“We hold that FIFRA preemption does not apply to preclude the plaintiff’s action against ... [the defendant] for its failure to warn the plaintiffs by providing them with the FDA-approved [sic] labeling information.”); *Eyl v. Ciba-Geigy Corp.*, 650 N.W.2d 744, 758 (Neb. 2002) (“[T]he applicators are simply being required in their use of the product to relay information to additional people.”); *Pisano v. Budget Termite*, No. 551800, 2000 WL 226425 at *5 (Conn. Super. Ct. Feb. 10, 2000) (“Where the claim is merely failure to convey any warnings contained in the label then FIFRA is not implicated.”).

162. See *infra* notes 165–89 and accompanying text.

163. See *infra* notes 165–89 and accompanying text.

164. See *infra* notes 165–89 and accompanying text.

165. *Watson v. Orkin Exterminating Co.*, 1988 U.S. Dist. LEXIS 17607 at *3 (D. Md. Nov. 8, 1988).

common law duty to warn would be to require the defendant to provide warnings different than those required by the federal label.¹⁶⁶ This has broad reach, preempting any claim not based on an explicit warning requirement in the pesticide's labeling.

Another district court found FIFRA preempts common law claims against applicators based on the applicator's reliance on the pesticide labeling.¹⁶⁷ This case is of particular importance because it is the only post-*Bates* court to decide this issue. In *Morgan v. Powe Timber Company*,¹⁶⁸ eighty-one plaintiffs sought damages for wrongful death and personal injuries they claimed resulted from the defendant's treated wood product.¹⁶⁹ The defendants owned the treated wood processing facility and, in that capacity, applied pesticide to wood.¹⁷⁰ The defendants, in their motion for summary judgment, claimed the FIFRA preempted plaintiff's failure to warn claim.¹⁷¹ The plaintiffs, in response, claimed that "FIFRA preemption extends only to manufacturers, sellers and distributors of EPA-registered pesticides,"¹⁷² pointing to various cases where courts did not find FIFRA preempts claims that applicators failed to convey information printed on EPA approved labels.¹⁷³ The plaintiffs also asserted that EPA approved labeling for the pesticides in question warned of skin and fume exposure.¹⁷⁴

After summarizing the holding of *Bates*,¹⁷⁵ the court explained FIFRA preemption analysis focuses on whether the legal duty imposed creates a state law requirement to provide information in addition to or different from the label, rather than on whom the state law imposes the duty.¹⁷⁶ Connecting common law requirements on applicators to FIFRA labeling requirements, the court noted that FIFRA gives manufactures the duty to register its pesticides with EPA for approval.¹⁷⁷ Importantly, applicators can rely to the same extent as distributors or sellers on the manufacturer's labels because the labels have satisfied the rigorous label approval process.¹⁷⁸ There is no need for applicators to research the accuracy of individual labels when they are in the worst position to access that

166. *Id.*

167. *Morgan v. Powe Timber Company*, 367 F.Supp.2d 1032 (S.D. Miss. 2005).

168. 367 F.Supp.2d 1032 (S.D. Miss. 2005).

169. *Id.* at 1034.

170. *Id.* at 1043.

171. *Id.* at 1041.

172. *Id.* at 1042-43.

173. *Id.* at 1043-44.

174. *Id.* at 1044.

175. *Id.* at 1041.

176. *Id.* at 1043.

177. *Id.*

178. *Id.* (quoting *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 560 (9th Cir. 1995)).

information.¹⁷⁹ Furthermore, the court rejected the plaintiff's argument that applicator claims are not preempted, reasoning that all the claims cited by the plaintiff did not impose requirements in addition to or different from EPA imposed labeling requirements.¹⁸⁰

Having established that claims against applicators implicate labeling requirements, the court then moved to the defendant's primary preemption argument.¹⁸¹ Namely, since the EPA approved label does not warn against burning wood treated by the pesticide, any common law requirement for failure to warn of such a danger – even upon applicators – would impose “addition or different” labeling requirements.¹⁸² In response, the plaintiff presented evidence that many EPA approved labels for the pesticide in question included warnings about skin absorption and even the dangers of exposure to fumes.¹⁸³ Parsing this evidence, the court rejected the defendants' claim that FIFRA preempted plaintiff's failure to convey EPA-approved handling instructions for chemically treated wood products.¹⁸⁴ According to the court, FIFRA does not preempt failure to convey claims regarding the contents of EPA approved labels; FIFRA, however, does preempt claims involving additional or different requirements than EPA approved labels.¹⁸⁵

While the court's application of the basic *Bates* preemption doctrine is relatively straightforward,¹⁸⁶ its connection between applicator common law claims and EPA labeling requirements is undeveloped.¹⁸⁷ In fact, the court does not articulate how this EPA labeling regulations can invoke the FIFRA preemption provision.¹⁸⁸ In SECTION V, this article contends *Bates* fully supports such a connection.¹⁸⁹

179. *Id.* (quoting *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 560–63 (9th Cir. 1995)).

180. *Id.* at 1043–44.

181. *See infra* notes 182–85 and accompanying text.

182. *Id.* at 1044.

183. *Id.*

184. *Id.* at 1045.

185. *See id.* (concluding that FIFRA never preempts failure to convey claims, but not precluding the possibility that FIFRA preempts failure to warn claims imposing additional or different labeling requirements).

186. *See id.* (applying the *Bates* “additional or different” test).

187. *See id.* (finding that preemption is possible, but not discussing EPA labeling requirements).

188. *See id.* (discussing the possibility of preemption without analyzing how EPA labeling requirements interact with the FIFRA preemption provision).

189. *See infra* SECTION V.

B. Implied Preemption: An Unworkable Defense

It is possible, but extremely unlikely, that FIFRA preemption of claims against applicators exists independently of the express preemption regime established in *Bates*.¹⁹⁰ The Supreme Court allows implied preemption claims even if an express preemption claim exists for another portion of a statute.¹⁹¹ Furthermore, while the Supreme Court held in *Mortier* that FIFRA does not impliedly preempt all state labeling requirements, it did not specifically address applicator claims.¹⁹² Thus, FIFRA can preempt common law claims against applicators under a theory of implied preemption, even if a court does not find FIFRA and EPA regulations adequately connect labeling requirements and the conduct of applicators.¹⁹³ However, as the discussion below reveals, it is very difficult or even impossible to raise an implied preemption defense under FIFRA.

1. Field Preemption

a. Pervasive Regulatory Scheme

Congress may preempt an entire field by implication if “Congress intended the federal government to occupy [the field] exclusively.”¹⁹⁴ There is no exact measure for when a regulatory scheme is comprehensive enough to imply preemption.¹⁹⁵ However, the Court has found implied preemption both where, in addition to an extensive regulatory scheme, federal interest in regulation is low.¹⁹⁶ The Court has paid particular attention to the regulation of “minutiae” – whether the federal regulatory program is so pervasive that it regulates down to the most specific aspects

190. See *infra* notes 191–247 and accompanying text.

191. See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288–89 (1995) (allowing an implied preemption defense even though the requirements for a judicially established express preemption defense were not met).

192. See *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 611–12 (1991) (finding FIFRA does not broadly preempt state claims against applicators).

193. This is an ideal claim in jurisdictions that find “no connection” between applicators and labeling requirements. See *Dow Chem. Co. v. Ebling ex rel. Ebling*, 753 N.E.2d 633, 639 (Ind. 2001) (noting the lack of an affirmative notification requirement on applicators); *New York State Pesticide Coal.*, 874 F.2d at 119 (noting the difference of audience between pesticide labeling and general warnings to the public).

194. *Jordan*, *supra* note 77, at 1165.

195. *Id.* at 1168.

196. Compare *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 688–890 (1965) (noting the pervasive features of a federal government regulatory program that arguably dealt with a strong federal interest – trade with Native Americans), with *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 169 (1942) (noting the pervasive features of a federal government regulatory program in an area of low federal interest: butter regulation).

of the field.¹⁹⁷ Nonetheless, the Court views pervasive administrative regulations with reluctance because agencies deal with issues in much greater detail than Congress, greatly increasing the likelihood of preemption under the non-administrative standard.¹⁹⁸

Focusing on this issue, the Indiana Supreme Court held FIFRA does not preempt claims against applicators via a pervasive regulatory scheme.¹⁹⁹ It explained FIFRA allows states in some instances to regulate pesticides, noting the act provides ample room for States and localities to supplement federal regulatory efforts even without the express authorization of §136v(a).²⁰⁰ Relying on *Mortier*,²⁰¹ the court reasoned that “like a state or local regulatory scheme that requires permits and notice to the non-user consumer/bystander and imposes penalties, the imposition of a duty to warn on applicators is not preempted by FIFRA.”²⁰²

In the end, courts are simply reluctant to find implied preemption from the extent of administrative regulations.²⁰³ Since modern regulatory legislation is necessarily complex, with Congress not always intending such legislation to be preemptive, it is unlikely a court would view extensive FIFRA regulations as impliedly preempting common law claims against applicators.²⁰⁴

197. See *Warren Trading Post*, 380 U.S. at 688–90 (“The Commissioner has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a licensed trader’s premises.”); *Cloverleaf Butter*, 315 U.S. at 168 (1942) (“By the statutes and regulations, the Department of Agriculture has authority to watch the consumer’s interest throughout the process of manufacture and distribution. It sees to the sanitation of the factories in such minutiae as the clean hands of the employees and the elimination of objectionable odors, inspects the materials used, including air for aerating the oils and confiscates the finished product when materials which would be unwholesome if utilized are present after manufacture.”).

198. *Hillsborough County, Fla. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

199. *Dow Chem. Co. v. Ebling ex rel. Ebling*, 753 N.E.2d 633, 639-40 (Ind. 2001).

200. *Id.* at 640.

201. *Id.*

202. *Id.*

203. *Hillsborough County, Fla.*, 471 U.S. at 717 (noting the Court’s skepticism towards the extent of administrative regulations in preemptions cases).

204. See *New York State Dept. of Soc. Services v. Dublino*, 413 U.S. 405, 415 (1973) (“[T]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem.”).

b. Dominant Federal Interest

Congress may preempt an entire field where its enactment touches an area with a federal interest so dominant that it precludes state law.²⁰⁵ Dominant federal interest field preemption requires an issue greater than a mere federal interest because almost every topic subject to Congressional action is a national issue.²⁰⁶ For instance, the Court has found a dominant federal interest in alien registration because of the national government's traditional role in international affairs.²⁰⁷ Additionally, the Court balances federal and state interest by analyzing the history of state and federal regulation, as well as the regulatory scheme as a whole.²⁰⁸

No courts, federal or state, have considered this type of preemption defense in a pesticide applicator case.²⁰⁹ Ironically, this defense may operate identically to a defense under FIFRA's express preemption language.²¹⁰ Commercial concerns suggest a dominant federal interest in regulating the contents of pesticide labels.²¹¹ The federal government working alone can impose uniform labeling requirements, while states operating separately would impose many different labeling requirements, unjustifiably burdening pesticide manufactures.²¹² State common law claims that require a different standard of care than on EPA-approved labeling disrupt this uniformity, implying EPA was abusing its discretion by requiring a specific standard of care on the product's label to fulfill its labeling regulations.²¹³ Thus, the dominant federal interest in uniform labeling requirements is implicated by imposing additional or different standards of care upon pesticide applicators.²¹⁴

205. Jordan, *supra* note 77, at 1165.

206. *Id.* at 1166.

207. Hines v. Davidowitz, 323 U.S. 52, 62–63 (1941).

208. Jordan, *supra* note 77, at 1168.

209. However, courts have discussed the matter in regards to manufactures. See *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 144 (Ark. 1992) (examining preemption of claims against manufactures and explaining that “[t]he adoption of Section 136v(a) demonstrates that the scheme created by FIFRA is not so pervasive or the federal interest so dominant as to demonstrate an intent to preempt state tort claims”).

210. See *infra* notes 211–219 and accompanying text (explaining how this theory operates, in the end imposing the same standard as FIFRA's express preemption clause).

211. See *Bates v. Dow Agrosiences, Inc.*, 544 U.S. 431, 452 (2005) (discussing the danger of multiple state labeling requirements).

212. *Id.* (“In the main, [§ 136v(b)] preempts competing state labeling standards—imagine 50 different labeling regimes prescribing the color, font, size, and wording of warnings—that would create significant inefficacies for manufacturers.”).

213. This argument mirrors the argument for applicator preemption under *Bates*. See *infra* SECTION V.A.

214. For a full explanation of how EPA labeling regulations preempt claims against applicators, see *infra* SECTION V.A.

Similarly, a dominant federal interest may extend from the relative expertise of EPA in developing a standard of care for pesticide applicators.²¹⁵ As Justice Breyer explains in his concurring opinion in *Bates*, “the federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements.”²¹⁶ Since EPA is a national agency charged with approving application standards included in pesticide labeling,²¹⁷ it is in the best position to determine what conduct should be able to undergird a negligence claim, thus preempting state common law claims.²¹⁸ However, FIFRA would not preempt common law claims mirroring EPA-approved standards of care because they do not implicate the federal interest in uniform labeling.²¹⁹

2. Conflict Preemption

As discussed earlier, Congress may preempt by implication if “state and federal law actually conflict,”²²⁰ such that the state law “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress”²²¹ or complying with both the federal and state standards is a “physical impossibility.”²²² Courts rarely struggle with the later point because such cases normally involve state laws that allow an act prohibited by federal law – a fairly obvious physical impossibility.²²³

The former method of preemption, however, presents more of a challenge. In these instances, the courts must determine, based on how the law is applied rather than written, whether the State law presents an obstacle to the accomplishment of Congress’ objectives.²²⁴ Under this inquiry, while it may be possible for parties to comply with both a state and

215. See *Bates*, 554 U.S. at 455 (Breyer, J., concurring) (explaining EPA may be in the best position to address the extent to which FIFRA preempts state law).

216. *Id.* (Breyer, J., concurring).

217. See *infra* SECTION I (outlining EPA’s authority under FIFRA).

218. See *Bates*, 554 U.S. at 455 (Breyer, J., concurring) (“[T]he federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements.”).

219. In the end, this functionally mirrors the operative effect of *Bates*’ express preemption language. See *infra* SECTION V.A.

220. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991).

221. *Id.*

222. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963).

223. *Jordan*, *supra* note 77, at 1171.

224. *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (quoting *Hines v. Davidowitz*, 323 U.S. 52, 67 (1941)).

federal law, the state law conflicts with an essential federal purpose behind the regulation.²²⁵

One district court explained that allowing common law claims against applicators does not frustrate what it determined is FIFRA's underlying purpose: "that non-uniform requirements by states would burden interstate trade of pesticides."²²⁶ Under this logic, successful plaintiffs would only encourage compliance with state pesticide use and sale regulations, rather than induce sellers to alter their labeling.²²⁷ Furthermore, the Indiana Supreme Court explained the purpose of FIFRA is not frustrated by requiring applicators to convey warnings because the requirement promotes rather than frustrates FIFRA's objectives and does not burden applicator compliance with FIFRA.²²⁸

It is important to note, however, that these two courts were considering failure to relay already established EPA labeling warnings, not additional or different warnings.²²⁹ Legislative history suggests Congress, via § 136v(b), directly aimed to preempt additional applicator requirements imposed by state pesticide programs existing at the time Congress passed FIFRA.²³⁰ As Representative Helstoski explained during floor debate, "[t]he preemption of State authority . . . seems to be clearly aimed at the heart of these strong State programs. If one examines the history of this bill as it moved through markup in committee, it seems apparent that this gutting of strong State programs is intentional."²³¹ He further explained that the preemption language was designed to prevent states from creating more tightly regulated pesticides that required the written approval of a "Pest Management Specialist" before use.²³² This limitation was of particular concern because the House during markup had removed a provision for "use by permit only" pesticides applicable only by "Pest Management Specialists."²³³ Thus, if the purpose of the FIFRA preemption language was specifically added to prohibit state requirements on applicators, then

225. *See id.* (holding a state flour weight labeling requirement preempted by federal law because, while it would have been possible to comply with both laws, doing so would conflict with a main purpose behind the federal law: uniform labeling for easy product comparison).

226. *Villari v. Terminix Int'l, Inc.*, 692 F. Supp. 568, 578 (E.D. Pa. 1988).

227. *Id.*

228. *Dow Chem. Co. v. Ebling ex rel. Ebling*, 753 N.E.2d 633, 640 (Ind. 2001).

229. *Id.* (holding that FIFRA preemption does not apply instances where an applicator failed to provide a copy of the pesticide labeling); *see Villari v. Terminix Int'l, Inc.*, 692 F. Supp. 568, 578 (E.D. Pa. 1988) (noting that the plaintiff's claim does not involve additional or different warnings than as contained in the label).

230. *See* 117 Cong. Rec. 40034 (1971) (discussing FIFRA's preemptive intent regarding state pesticide programs).

231. *Id.*

232. *Id.* at 40035.

233. *Id.*

additional state common law claims frustrate this purpose. It is worth remembering, however, the considerable debate surrounding the authoritative strength of legislative history.²³⁴

3. *Administrative Intent to Preempt*

If an agency intends its regulations to preempt state law and it acts within the scope of its delegated authority, it can impliedly preempt common law claims.²³⁵ More specifically, a court should not disturb an applicator's choice if it is a reasonable accommodation of conflicting policies delegated to the agency, unless the statute or its legislative history evidence that the accommodation is not sanctioned by Congress.²³⁶ Furthermore, the force of preemptive regulation is not contingent upon express congressional authorization to preempt state law.²³⁷

The Federal Register reveals EPA promulgated many FIFRA labeling requirements in response to the Federal Environmental Pesticide Control Act of 1972,²³⁸ which changed the focus of pesticide regulation from labeling verification to public health and environmental concerns.²³⁹ EPA promulgated the labeling requirements with the intent that they would provide "restrictions appropriate to the nature and degree of hazard posed by a particular pesticide use."²⁴⁰ Additionally, EPA designed the regulations to "assure that human health and the environment are not exposed to unreasonable risk"²⁴¹ and "to improve the quality of labels in terms of communication to pesticide users by grouping required precautionary statements together."²⁴² Similar to the dominant federal interest argument,²⁴³ this may fall in with Justice Breyer's reasoning that

234. See generally Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2005) (discussing the use of legislative history generally); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 824-25 (2010) (discussing the use of legislative history as applied to administrative law).

235. *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982).

236. *United States v. Shimer*, 367 U.S. 374, 383 (1961).

237. *Fidelity Federal Sav. & Loan Ass'n*, 458 U.S. at 154.

238. 39 Fed. Reg. 36973 (Oct. 16, 1974). The notice of final rulemaking reveals EPA made few changes to the final rule, including the essential language currently at 40 C.F.R. § 156.10(i)(1)(i) (directions for use). 40 Fed. Reg. 28242, 28252 (July 3, 1975).

239. Marina M. Lolley, Comment, *Carcinogen Roulette: The Game Played Under Fifra*, 49 MD. L. REV. 975, 978 (1990).

240. 39 Fed. Reg. 36974 (Oct. 16, 1974).

241. *Id.*

242. *Id.*

243. See *infra* SECTION IV.B.1.b.

EPA is in the best position to determine the appropriate standard of care for pesticide application.²⁴⁴ EPA may be exercising this authority.

Nevertheless, EPA has not explicitly stated its intent to preempt state requirements.²⁴⁵ Furthermore, even if FIFRA does preempt state-level requirements on pesticide applicators, there is no indication of intent to preempt common law tort claims through depriving them of redress.²⁴⁶ Other portions of FIFRA also complicate this claim, allowing states to create their own requirements for pesticide applicator certification, in effect creating greater standards of care for pesticide applicators.²⁴⁷ Taken as a whole, these considerations prove fatal to preemption through administrative intent.

V. PREEMPTION, ADMINISTRATIVE FEDERALISM, AND SOME SUGGESTIONS

In his *Bates* concurrence, Justice Breyer emphasized the importance of EPA expertise in lieu of FIFRA's preemption language.²⁴⁸ As Justice Breyer explained:

the federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements. Thus, the EPA may prove better able than are courts to determine whether general state tort liability rules simply help to expose new dangers associated with pesticides or instead bring about a counterproductive crazy-quilt of anti-misbranding requirements.²⁴⁹

Because FIFRA may preempt certain common law claims against pesticide applicators, with EPA effectively creating a nationwide standard of care for pesticide application, EPA should take the preemptive effect of its regulations into account when promulgating future FIFRA labeling

244. *Bates v. Dow Agrosciences Inc.*, 544 U.S. 431, 454-55 (2005) (Breyer, J., concurring).

245. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 702 (1984) (finding the FCC determined the preemptive effect of its regulations on state level telecommunications regulations via express purpose).

246. *See Hardin v. BASF Corp.*, 2005 U.S. Dist. LEXIS 43112, *9 (E.D. Ark. Dec. 15, 2005) (holding tort actions in pesticide drift claims are not preempted by FIFRA because the court was "without evidence that the EPA intended its regulations regarding spray drift to prohibit state law claims seeking compensation for property damage caused by off-target drift").

247. *See* 40 C.F.R. § 171.7 (2010) (establishing standards for state certification programs).

248. *Bates v. Dow Agrosciences Inc.*, 544 U.S. 431, 454-55 (2005) (Breyer, J., concurring).

249. *Id.* at 455 (Breyer, J., concurring).

regulations and approving new or altered pesticide labeling.²⁵⁰ With adequate safeguards, FIFRA preemption in applicator cases is an appropriate use of administrative expertise, aligning the scope of FIFRA preemption to the federalism concerns of the *Bates* Court.²⁵¹ This section first describes how *Bates* opens the door for preemption of common law claims against pesticide applicators.²⁵² It then outlines a few basic precautionary measures for EPA against unnecessary preemption, briefly considering administrative federalism issues.²⁵³

A. Preempting Claims Against Pesticide Applicators

Bates lays the groundwork for preemption of certain state common law claims against pesticide applicators,²⁵⁴ although the decision affects general negligence and negligent failure to warn claims differently.²⁵⁵ In *Bates*, the Court noted § 136v pre-empts positive or common law rules that impose labeling requirements different than those provided in FIFRA and its regulations.²⁵⁶ To this end, courts must weigh state law requirements against “any relevant EPA regulations that give content to FIFRA’s misbranding standards.”²⁵⁷ As an example, “[a] failure-to-warn claim alleging that a given pesticide’s label should have stated ‘DANGER’ instead of the more subdued ‘CAUTION’ would be pre-empted because it is inconsistent with 40 CFR § 156.64 (2004), which specifically assigns these warnings to particular classes of pesticides based on their toxicity.”²⁵⁸ Thus, the focus is not on what a state law specifically requires a label to

250. See *Hillsborough County, Fla. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 721 (1985) (explaining that, as summarized by Justice Breyer in his *Bates* concurrence, agencies “can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements”).

251. *Bates* does not recognize the pesticide market as more appropriate for the decentralized tort process than federal administrative control. While *Bates* does limit the extent of preemption, it only does so to the logical contours of EPA’s expertise. Indeed, while state tort does create a “counterbalance as the profit motive urges manufacturers to introduce new, potentially harmful products,” EPA control of such claims goes further by replacing judicial variability with administrative certainty. Furthermore, I disagree that state courts are an appropriate forum for pesticide manufacturers and applicators to realize the “social costs” of their potentially deadly products. See Frueh, *supra* note 110, at 308–09 (explaining that pesticide tort claims are not suitable for wide-scale federal control and advocating market efficiency through the adjudication of injuries).

252. See *infra* SECTION V.A.

253. See *infra* SECTION V.B.

254. See *infra* notes 256–60 and accompanying text.

255. See *infra* notes 261–68 and accompanying text.

256. *Bates v. Dow Agrosiences Inc.*, 544 U.S. 431, 452 (2005).

257. *Id.* at 453.

258. *Id.*

include.²⁵⁹ Instead, preemption arises whenever a state common law claim is additional to or different from what EPA required on the label to fulfill its labeling regulations.²⁶⁰

Under this logic, FIFRA preempts general negligence claims in a relatively straightforward fashion. Pursuant to EPA regulations, the label, when followed, must be adequate to protect the public from personal injury.²⁶¹ Therefore, if a state common law claim against an applicator holds she should have followed different conduct than the standard of care required on the label, the state court is creating a standard different than what EPA determined is required by its labeling regulations. In essence, EPA, pursuant to its regulations, has determined the label is sufficient to protect the public. The single, adequate standard of care for application of the pesticide must be on the label and EPA is charged with authority to determine this standard of application. State courts cannot impose a different standard of care because, pursuant to the EPA regulations, that standard should be included on the labeling.²⁶²

Taking into account additional regulations, claims an applicator was negligent for applying a pesticide to a particular site²⁶³ or diluting the pesticide in a certain way²⁶⁴ are preempted by FIFRA if they are “additional or different” than what EPA determined satisfied the labeling regulations. In fact, since the label must include “[o]ther pertinent information which the Administrator determines to be necessary for the protection of man and the environment,”²⁶⁵ arguably any other standard of application apart from those listed on the label are preempted.

Bates has a slightly different effect on negligent failure to warn claims. On one hand, the CFR does not impose an outright verbal warning, suggesting additional or different warnings cannot invoke EPA promulgated labeling requirements.²⁶⁶ Without an EPA promulgated regulation explicitly requiring specific warnings based on specific criteria, a common law duty to provide warnings in no way conflicts with EPA

259. *See id.* at 443 (noting the Court of Appeals correctly held “that the term ‘requirements’ in § 136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties.”).

260. *See id.* at 453 (explaining that “a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA to survive-preemption”).

261. 40 C.F.R. 156.10(i)(1)(i) (2010).

262. *See id.* § 156.10(i)(1)(i) (“When followed, directions must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.”).

263. *Id.* § 156.10(i)(2)(iii).

264. *Id.* § 156.10(i)(2)(vi).

265. *Id.* § 156.10(i)(2)(x)(F).

266. *See generally id.* § 156.10 (providing labeling requirements, but not providing an affirmative warning requirement).

standards.²⁶⁷ On the other hand, EPA labeling requirements use broad enough language that imposing additional or different warning requirements can fall within their authority. For instance, EPA can interpret the statutory provision that “directions must be adequate to protect the public . . . from personal injury” to require an affirmative warning upon application.²⁶⁸ Thus, the statute arguably preempts additional or different warning requirements.²⁶⁹

B. *A Few Suggestions*

In the end, while *Bates* does extend preemption to claims against pesticide applicators in certain circumstances,²⁷⁰ EPA can limit the extent these regulations interfere with state regulation.²⁷¹ At the same time, EPA can also ensure that commercial applicators are held a standard equal to that created by the federal and state certification requirements.²⁷²

Administrative agencies have expertise in technical fields that courts do not.²⁷³ Furthermore, Congress often leaves broad discretion to administrative agencies, both purposefully and inadvertently, in order to administer a “statute in light of everyday realities.”²⁷⁴ Recognizing this role, courts typically afford administrative agencies wide latitude in technical determinations within their regulatory field.²⁷⁵ While there is considerable scholarly debate as to how much deference courts should afford agencies in the absence of an express preemption clause,²⁷⁶ FIFRA

267. See *supra* SECTION I.A (discussing EPA labeling regulations under FIFRA, none of which include an affirmative duty to warn).

268. 40 C.F.R. § 156.10(i)(1)(i).

269. Alarming, this theory means that a pesticide applicator can *never* be held liable for failure to warn unless EPA imposes an explicit requirement via its regulations. See *supra* notes 266–68 and accompanying text.

270. See *supra* SECTION V.A.

271. See *infra* notes 297–308 and accompanying text.

272. See *infra* note 304 and accompanying text.

273. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864–66 (1984).

274. *Id.* at 865–66.

275. See *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (“When examining . . . [a] scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”); *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 130 (1944) (“In making [the NLRB’s] determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board’s ultimate conclusions, it is not the court’s function to substitute its own inferences of fact for the Board’s, when the latter have support in the record.”).

276. See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 741–42 (2004) (“Although the political accountability of agencies for considering state interests is not significantly inferior to that of Congress . . . Chevron deference to agency interpretations of the preemptive effect of statutes is nonetheless inappropriate.”).

includes such a clause.²⁷⁷ *Bates* dictates the scope of this clause,²⁷⁸ allowing EPA to determine its preemptive effect.²⁷⁹

While the outcome of administrative implied preemption cases rests more heavily on a judicial balancing act between federal and state interests, courts apply with express preemption.²⁸⁰ In these cases, “the outcome frequently turns on the resolution of statutory ambiguities such as whether state law can be said to ‘relate to’ a subject covered by federal law or to impose a ‘requirement’ or ‘standard’ subject to federal control.”²⁸¹ This analysis “includes, at least implicitly, an evaluation of the real-world impact of state regulation on maintaining a national commercial market.”²⁸² In *Bates*, the Court drew “a conceptual wedge between liability standards and remedies,”²⁸³ preempting liability standards inconsistent with those created by the EPA, but not preempting state created remedies. This may stem from the court’s general unwillingness to leave injured citizen without redress.²⁸⁴

Still, the *Bates* Court did nothing to prevent what is, under the current EPA regulations, both a preemptive ceiling and floor. Preemptive floors create a federal baseline standard, with states able to create more stringent standards.²⁸⁵ FIFRA regulations create a preemptive floor by allowing states to promulgate certification requirements at least as stringent as EPA requirements.²⁸⁶ Alternatively, preemptive ceilings completely preclude more stringent state regulation, but allow less stringent state regulations.²⁸⁷

277. 7 U.S.C. § 136(v)(b) (2010). Even if *Bates* did not extend preemption to applicator claims, EPA could arguably extend the scope of FIFRA through an interpretive rule, entitling the agency to Chevron deference. See Mendelson, *supra* note 276, at 753 (noting “the agency might interpret the scope of an express preemption clause to, say, preempt state statutory law but not state tort law. The relevant agency interpretations are those eligible for *Chevron* deference – hence those reached in a rulemaking or formal adjudication”).

278. See *supra* SECTION III.C.

279. See *Bates v. Dow Agrosiences Inc.*, 544 U.S. 431, 455 (2005) (Breyer, J., concurring) (examining how the majority’s holding allows EPA to determine the preemptive effect of its regulations).

280. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 744 (2008).

281. *Id.*

282. *Id.*

283. Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 470 (2008).

284. *Id.* at 471 (“Viewed from [a] remedial vantage point, *Bates* seems to settle comfortably within a wider pattern in the Court’s general unwillingness, in the products liability realm, to leave injured citizens without any remedy whatsoever.”).

285. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1558 (2007).

286. See 40 C.F.R. § 171.7(e)(1)(i)(C) (2010) (“[State commercial application requirements] shall conform and be at least equal to those prescribed in § 171.4 for the various categories of applicators utilized by the State.”).

287. Buzbee, *supra* note 285, at 1558.

Through its “additional or different” preemption language, FIFRA operates as a preemptive ceiling by preventing states from imposing more stringent standards for pesticide labeling and application.²⁸⁸ FIFRA also operates as a preemptive floor by preventing less stringent standards.²⁸⁹ These types of preemption regimes typically benefit target industries.²⁹⁰ However, preemptive ceilings may threaten the federal system.²⁹¹ To be sure, the “new unitary federal choice preemption . . . threatens to displace completely state and local legal developments and the benefits of intersystemic interaction inherent in federalist schemes.”²⁹²

This dual floor and ceiling means that plaintiffs injured by pesticides may be without redress afforded by a jury verdict. Since EPA applicator certification standards require that applicators understand “precautions necessary to guard against injury to applicators and other individuals in or near treatment areas,”²⁹³ commercial applicators are required to have the capacity to follow a standard of care higher than included on pesticide labeling.²⁹⁴ Nevertheless, while “[t]he state-law requirement need not be phrased in the *identical* language of its corresponding FIFRA requirement,”²⁹⁵ a plaintiff who seeks to hold an applicator to a higher standard of care than required by a pesticide’s label may find herself unable to receive compensation.²⁹⁶

One way to prevent this sort of unnecessary preemption is through label-by-label analysis. EPA can scrutinize labels for unjust preemptive effects.²⁹⁷ Through adopting a new procedural rule, it can attempt to provide the most comprehensive list of proper application techniques possible, making it less likely that a plaintiff may try to impose a requirement that is not offered on the label. While EPA must already determine that its labeling when followed is adequate to protect the public

288. See *supra* SECTION III.C (examining the holding of *Bates* preempting additional or different state labeling requirements, including implicitly more stringent standards).

289. *Id.*

290. Buzbee, *supra* note 285, at 1590

291. Buzbee, *supra* note 285, at 1556.

292. *Id.*

293. 40 C.F.R. §171.4(b)(1)(ii)(c) (2010).

294. See, e.g., *Johnson v. County Arena, Inc.*, 349 A.2d 643, 645–46 (Md. Ct. Spec. App. 1976) (explaining that individuals engaged in a profession must “observe precautionary rules established by competent authority to guard against accidents and prevent injuries to others.”).

295. *Bates v. Dow Agrosciences Inc.*, 544 U.S. 431, 454 (2005)

296. See *supra* SECTION V.A.

297. EPA labeling regulations include similar ambiguous requirements, necessitating the agency to adhere to general policy goals rather than merely require certain warnings under a set list of criteria. *C.f.* 40 C.F.R. §156.10(i)(1)(i) (2010) (providing labels “must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.”).

from personal injury,²⁹⁸ adding an explicit requirement that the administrator consider the labeling's preemptive effect may protect against unintentional omissions that, ultimately, would preempt a plaintiff's worthy claim.

However, this type of case-by-case analysis may be inappropriate for EPA because "[t]he decision to displace [state law] is a multifaceted, high-stakes discretionary policy judgment that requires considerable sophistication if it is to be exercised properly."²⁹⁹ Since, "it is a fair question whether any legal institution is up to the task,"³⁰⁰ EPA arguably does not have the institutional competence to undergo federalism analysis at the same time as science-based label certification and changing political influence.³⁰¹ However, a simple change to pesticide labeling can at least partially address these concerns.

Since designing federal regulatory regimes to rely on state administration may be more effective than judicial intervention at incorporating federalism concerns into agency decisionmaking,³⁰² EPA should require all pesticide labels include a requirement that commercial applicators apply the pesticide in a manner consistent with EPA or state promulgated certification standards.³⁰³ This scheme would be advantageous in a number of ways. First, it would hold pesticide applicators to a standard commensurate with their training, not the potentially lower standard included in EPA approved labeling.³⁰⁴ Second, it would remove the federal preemptive ceiling in regards to pesticide applicators, allowing states to create their own, more stringent standards for applicators.³⁰⁵ Third, since

298. 40 C.F.R. 156.10(i)(1)(i) (2010).

299. Merrill, *supra* note 280, at 744.

300. *Id.*

301. *Id.* at 755–66 (“[A]gencies know little about constitutional law and usually disclaim any authority to opine on questions like the scope of the commerce power or other constitutional provisions bearing on the division of authority between the federal government and the states. Agencies may also pose a greater threat to stability in the division of authority, given that they are prone to policy shifts with changes in administration and can act to implement policy shifts much more quickly than Congress or the courts. In terms of balance, transferring preemption authority to agencies would increase the capacity of the legal system to displace state law, which would probably result in a further shift in the direction of more federal authority.”).

302. Gillian E. Metzger, *Administrative Law As the New Federalism*, 57 DUKE L.J. 2023, 2071 (2008).

303. See 40 C.F.R. § 171 (2010) (providing commercial applicator certification guidelines).

304. However, this would also make it more difficult for applicators to determine if they are committing an unlawful act because the price application standards will not longer be printed on the pesticide labeling. See 7 U.S.C. § 136j(a)(2)(G) (2006) (providing it is unlawful for a person “to use any registered pesticide in a manner inconsistent with its labeling”).

305. For commercial applicators, this would remove FIFRA's preemptive ceiling, leaving only the preemptive floor created by EPA commercial applicator certification regulations. This would address the federal concerns discussed earlier in this subsection. See 40 C.F.R. § 171.7(e)(1)(i)(C)

EPA must approve state certification requirements, such a regulation would promote communication between federal and state authorities. Rather than completely displacing developments at the state and local level, this would promote federal and state collaboration and perhaps better promote state interests.³⁰⁶ Fourth, it would maintain the *Bates* Court's requirement that EPA misbranding requirements control jury verdicts. Upon a defendant's request, a trial court would "instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards,"³⁰⁷ including implicitly the EPA or state commercial applicator certification requirements. The standard of care would no longer be limited to the labeling, encompassing the entire curriculum required for commercial applicator certification.³⁰⁸

VI. CONCLUSION

State and federal courts have generally failed to consider EPA labeling regulations in their preemption analysis in pesticide applicator cases.³⁰⁹ This has left courts divided, often reaching contradictory results based on fuzzy logic.³¹⁰ *Bates v. Dow Agrosciences* reshapes this analysis, holding that EPA regulations preempt claims against both applicators and manufactures if they are additional or different than EPA approved labeling.³¹¹ *Bates* requires courts to consider EPA misbranding requirements, preempting claims against commercial applicators that require a different standard of care than included on EPA approved labeling to comply with EPA labeling regulations.³¹² Based in part on federalism concerns, EPA should limit the far reaching effect of this decision.³¹³ On all pesticide labeling, EPA should require commercial applicators apply the pesticide in a manner consistent with the training necessitated for state or federal commercial applicator certification.³¹⁴

(2010) (State commercial application requirements "[s]hall conform and be at least equal to those prescribed in § 171.4 for the various categories of applicators utilized by the State.").

306. Unlike an ordinary preemption regime, this rule would promote communication between federal and state administrative authorities, effectively circumventing a perceived limitation of federal preemption. *See* Buzbee, *supra* note 285, at 1556 (warning that unitary federal choice preemption "threatens to displace completely state and local legal developments and the benefits of intersystemic interaction inherent in federalist schemes").

307. *Bates v. Dow Agrosciences Inc.*, 544 U.S. 431, 454 (2005).

308. *See* 40 C.F.R. § 171 (2010) (providing commercial applicator certification guidelines).

309. *See supra* SECTION IV.

310. *See supra* SECTION IV.

311. *See supra* SECTION III.C.

312. *See supra* SECTION V.A.

313. *See supra* SECTION V.B.

314. *See supra* SECTION V.B.