

PREEMPTION OF COMMON LAW CLAIMS AND THE PROSPECTS FOR FIFRA: JUSTICE STEVENS PUTS THE GENIE BACK IN THE BOTTLE

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INTRODUCTION

On a range of high-profile issues from affirmative action to sexual privacy to sovereign immunity, the Supreme Court in its 2002 Term declined to take the next expected step in its conservative revision of constitutional law.¹ With less fanfare, the Court did the same on preemption doctrine. On the question of when and to what extent federal safety regulations preempt state tort claims against regulated industries, a unanimous Court in *Sprietsma v. Mercury Marine*² halted what one scholar has identified as an unacknowledged but increasingly broad presumption in favor of preemption.³ And in a single paragraph, the Court rejected the reasoning of countless lower court decisions in favor of preemption.⁴ By speaking unanimously, the Court suggested that it had finally resolved key preemption issues on which it has waffled in recent years. While the opinions in *Pharmaceutical Research & Manufacturers of America v. Walsh*,⁵ decided later in the 2002 Term, have been said to crystallize the Justices' remaining philosophical disagreements on preemption doctrine,⁶ *Sprietsma* established important areas of agreement, or at least truce.

This article examines *Sprietsma*'s implications for preemption doctrine and applies its holdings to one federal statute whose preemptive scope the Supreme Court will address this Term: the Federal Insecticide, Fungi-

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1. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding affirmative action admissions program); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down sodomy law); *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (holding that federal Family and Medical Leave Act is enforceable against states).

2. 537 U.S. 51 (2002).

3. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002).

4. *Sprietsma*, 537 U.S. at 64; see also, *infra* notes 103-130 and accompanying text.

5. 538 U.S. 644 (2003).

6. *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 449 (2003).

cide, and Rodenticide Act (“FIFRA”).⁷ Under FIFRA’s authority, the Environmental Protection Agency, not the states, controls the labeling of pesticides.⁸ The overwhelming majority of lower courts have held that FIFRA’s regulatory scheme preempts at least some common law tort actions against pesticide manufacturers.⁹ The two holdouts are the Montana Supreme Court¹⁰ and the Oregon Court of Appeals,¹¹ which have held that FIFRA preemption applies only to labeling requirements established by positive enactments of state law, not to tort claims. *Sprietsma* was a victory for these FIFRA dissenters and a defeat for the pesticide industry, which has sought through FIFRA to immunize itself from tort claims. It was also a victory for Justice Stevens, whose careful opinion in an earlier case, *Cipollone v. Liggett Group, Inc.*,¹² has been transformed by the pesticide industry and the lower courts into a mandate for FIFRA preemption.¹³ As the author of the unanimous *Sprietsma* decision, Justice Stevens reined in these unintended progeny of his *Cipollone* opinion, choosing instead a new course away from the presumption in favor of preemption.

The history of preemption doctrine, however, is a history of doctrinal confusion and frequent changes of course. The Court’s decision in *Bates v. Dow Agrosciences*, a FIFRA preemption case to be decided this Term,¹⁴ may reveal whether the Court really meant what it said in *Sprietsma*.

7. 7 U.S.C. § 136-136v (2000).

8. *Id.*

9. See *infra* notes 103-130 and accompanying text. In this article I refer to the state law claims that may be preempted as both “common law claims” and “tort claims” because cases involving personal injury are the most common and also the most troubling when preemption means there is no remedy for the injury. It should be noted, however, that plaintiffs in such cases often also plead theories that sound in contract, such as breach of warranties related to safety. Many FIFRA preemption cases are also “efficacy cases,” in which the plaintiff claims that an agricultural pesticide did not work or even harmed the crop. *Bates v. Dow Agrosciences*, Case No. 03-388 pending in the Supreme Court, is an efficacy case.

10. *Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042 (Mont. 2000) (overruling *McAlpine v. Rhone-Poulenc Ag Co.*, 947 P.2d 474 (Mont. 1997), and allowing plaintiffs to proceed with claims for negligent design and manufacture, strict liability for defective design and manufacture, failure to warn, and breach of express and implied warranties), *cert. denied*, 534 U.S. 814 (2001). The author’s law firm represents the plaintiffs in *Sleath*, which is now awaiting trial on remand.

11. *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. App. 1999), *review denied*, 6 P.3d 1098 (Or. 2000); see also *Nathan Kimmel, Inc. v. DowElanco*, 64 F.Supp. 2d 939 (C.D. Cal. 1999) (holding that court was compelled by precedent to find preemption but urging Court of Appeals to reconsider FIFRA preemption), *rev’d* 255 F.3d 1196 (9th Cir. 2000) (holding that FIFRA did not preempt claim for unfair interference with prospective business advantage, based on change in label requested by manufacturer and approved by EPA), *rev’d on rehearing*, 275 F.3d 1199 (9th Cir. 2002) (holding that claim was preempted).

12. 505 U.S. 504 (1992).

13. See *infra* notes 103-116 and accompanying text.

14. Case No. 03-388, on writ of *certiorari* to the U.S. Court of Appeals for the Fifth Circuit.

I. THE *SPRIETSMA* CASE

Sprietsma was a preemption case under the Federal Boat Safety Act (“FBSA”).¹⁵ The FBSA authorizes the Coast Guard to issue regulations to promote safety in boating, and it contains an “express preemption” clause, that is, a clause that expressly uses Congress’s power under the Supremacy Clause to displace state law:

Unless permitted by the Secretary [of Transportation] under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.¹⁶

This preemption clause is qualified by a “saving clause,” which preserves some state law despite the preemption clause:

Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.¹⁷

Under the express preemption clause, the Secretary of Transportation has generally permitted state statutes and regulations to stand if they govern topics on which no federal regulation exists. Once a federal regulation is issued on a topic, however, it preempts state standards unless they are identical to the federal standard.¹⁸

In the late 1980s, the Coast Guard appointed a committee to consider requiring propeller guards on motor boats.¹⁹ The committee recommended regulations requiring the guards under some circumstances.²⁰ But the Coast Guard had not acted on the bulk of the recommendations by the time *Sprietsma* arrived in the Supreme Court in 2002.²¹ The Coast Guard told the Court that it planned to do so in unspecified “subsequent regulatory projects.”²²

Meanwhile, Jeanne Sprietsma died after being struck by the propeller of an outboard motor. Her husband brought common law tort claims in Illinois state court alleging that the motor was unreasonably dangerous, in part

15. 46 U.S.C. §§ 4301-4311 (2000).

16. 46 U.S.C. § 4306.

17. 46 U.S.C. § 4311.

18. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 59-60 (2002).

19. *See id.* at 60-61.

20. *See id.* at 61-62 (noting committee recommendation that propeller guards or other “propeller injury avoidance methods” be required on “new planing vessels 12 feet to 26 feet in length with propellers aft of the transom,” as well as on any “nonplaning houseboat for rent”).

21. *See id.* at 62.

22. *Id.*

because it lacked a propeller guard.²³ The question presented to the Supreme Court was whether, as the manufacturer argued, the Coast Guard's failure to require propeller guards on all motor boats barred the plaintiff's claim that this particular boat was defectively designed because it lacked a guard.²⁴

To anyone who has not followed the Supreme Court's preemption cases over the last decade, this issue hardly seems worth the Court's consideration. After all, the Coast Guard did not *ban* propeller guards; it only failed to act on the guards. And its inaction appears to have stemmed from bureaucratic inertia, not a belief that propeller guards were bad. Moreover, states were free to require propeller guards affirmatively under an exemption granted by the Secretary of Transportation.²⁵ And the saving clause clearly says that the FBSA does not preempt common law liability.²⁶ Why would the Supreme Court grant *certiorari* merely to affirm Congress's clearly expressed intent not to preempt a claim like Mr. Sprietsma's?

The answer is that the Illinois trial, appellate, and supreme courts had all held that Mr. Sprietsma's claim was in fact preempted by the FBSA.²⁷ Nor were the Illinois courts alone: the Fifth,²⁸ Eighth,²⁹ and Eleventh³⁰ Circuits, as well as the Michigan Supreme Court,³¹ had held the same. Justifying its grant of *certiorari* by a split of authority, the Supreme Court could cite only one jurisdiction, Texas, that had rejected the FBSA preemption defense.³²

23. *Id.* at 54-55.

24. *Id.* at 54.

25. *Id.* at 60, 65-66 (citing 38 Fed. Reg. 6914-15 (1973)).

26. To the uninitiated, the saving clause may even seem unnecessary: the rule is well-established at common law that compliance with government regulations is admissible evidence in a tort suit but is not a complete defense; regulations set the floor, not the ceiling, for the standard of care. *See* 2 American Law Institute, *Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change*, 83-84 (Reporters' Study 1991); *see also* Daniel B. Nelson, 1995 ANN. SURV. AMER. L. 565, 571-72 (discussing pros and cons of dual remedial systems).

27. *See Sprietsma*, 537 U.S. at 55.

28. *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000).

29. *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995).

30. *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997).

31. *Ryan v. Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997).

32. *Sprietsma*, 537 U.S. at 55 n. 3 (citing *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994)). In addition to the Texas Supreme Court, intermediate courts of appeals in California and Missouri had ruled against FBSA preemption of propeller guard claims. *See LaPlante v. Wellcraft Marine Corp.*, 114 Cal. Rptr. 2d 196 (Cal. App. 2002); *Ard v. Jensen*, 996 S.W.2d 594 (Mo. App. 1999) (ruling against FBSA preemption of propeller guard claims). No federal court had done so before *Sprietsma*. In addition to the federal courts of appeals listed above, a few federal district courts in other circuits had ruled in favor of preemption. *See Moss v. Outboard Marine Corp.*, 915 F.Supp. 183

Nor were these decisions anomalies in modern preemption doctrine. After an exhaustive review of a century of preemption decisions, Professor Mary Davis confidently predicted that *Sprietsma* would be decided in favor of preempting Mr. Sprietsma's claim.³³ Her prediction was wrong not because her analysis was faulty but because *Sprietsma* abandoned a course the Court had been charting since *Cipollone* a decade before.

II. A BRIEF HISTORY OF PREEMPTING THE COMMON LAW³⁴

A. Basics of Preemption Doctrine

Federal preemption of state law can occur in two ways: express preemption or implied preemption. Either of these forms of preemption can preempt two categories of state law: positive law or common law.³⁵ Courts make decisions about whether a federal statute either expressly or implicitly preempts either type of state law by relying on presumptions favoring or disfavoring particular types of preemption.³⁶

Many federal statutes have express preemption clauses like the one in the FBSA. When such a clause is present, it is clear Congress intended to preempt some state law. The only question is the scope of that preemption. For example, the FBSA preempts any state law or regulation "establishing a recreational vessel or associated equipment performance or other safety standard."³⁷ Thus, to determine whether a particular state law is preempted, a court must decide whether it is a "performance or other safety standard" for a "recreational vessel or associated equipment" as those words are used in the statute. Similarly, FIFRA preempts only some state laws related to pesticides: FIFRA's express preemption clause prohibits states from imposing labeling requirements on pesticides, but it does not prohibit them from regulating matters such as the sale, use, or disposal of pesticides.³⁸

Even when a federal statute contains no express preemption clause, courts may conclude that it implicitly preempts some state law. Implied

(E.D. Cal. 1996); *Shield v. Bayliner Marine Corp.*, 822 F.Supp. 81 (D. Conn. 1993); *Mowery v. Mercury Marine*, 773 F.Supp. 1012 (N.D. Ohio 1991) (ruling in favor of preemption).

33. Davis, *supra* note 3, at 1025-28.

34. For a more comprehensive history, see *id.*

35. See *infra* notes 46-72 and accompanying text (discussing two seminal cases on the distinction between positive law and common law for purposes of preemption).

36. See *infra* notes 42-45 and accompanying text.

37. 46 U.S.C. § 4306.

38. 7 U.S.C. § 136v(b) (preemption clause); see also 7 U.S.C. § 136v(a) (2000) (saving clause); *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (affirming state authority to regulate pesticide use).

preemption occurs in three ways: impossibility preemption, where state and federal law are in such direct conflict that it is impossible to comply with the dictates of both; obstacle preemption, where dual compliance is technically possible but the state law nonetheless creates an obstacle to fulfilling federal policy; and field preemption, where Congress has so completely taken over a field of law as to create an inference of federal exclusivity.³⁹ For example, even if FIFRA did not have an express preemption clause about pesticide labeling, state labeling laws might be preempted by one or more forms of implied preemption. A state law requiring warning labels to be orange would be preempted by “impossibility preemption” if federal law required labels to be red. A state law requiring many warnings on a label might be preempted if it created an “obstacle” to a federal goal of keeping labels simple and easy to understand. Or all state labeling laws might be preempted by “field preemption” because FIFRA is so comprehensive that it suggests Congress intended to take over the field. Complicating matters, the Supreme Court has also occasionally found implied preemption *even when the statute also contains an express preemption clause*.⁴⁰ The result is greater preemption than the express clause specifies. With any form of implied preemption, as with express preemption, once a court decides that a federal statute impliedly preempts state law, it must determine the substantive scope of preemption, *e.g.*, whether FIFRA preempts all pesticide-related laws or just labeling laws.

In the case of both express and implied preemption, a court must also determine the scope of preemption with respect to the *type* of state law preempted: does the federal statute preempt only positive law enacted by the states, or does it also preempt tort claims under each state’s common law? An express preemption clause typically says that it preempts state “regulations,” “standards,” “requirements,” or “laws.” Courts must decide whether the duties forming the basis for tort liability are “regulations,” “standards,” “requirements,” or “laws,” as Congress intended those terms to be interpreted when it enacted the express preemption clause. For example, the first question presented in *Sprietsma* was whether the duty alleged in the tort claim was a “law or regulation” as those terms are used in the FBSA.⁴¹

39. See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63, 64-65 (2002) (describing express and implied preemption). The Supreme Court has not always been consistent in the terms it uses to describe the different kinds of preemption. Frequently, the Court uses the term “conflict preemption” to include the two kinds of preemption I have called “impossibility” and “obstacle.” I will use the latter terms to keep the distinction between the two clear.

40. See, *e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); see also *infra* notes 85-88 and accompanying text (discussing *Geier* and *Freightliner*).

41. *Sprietsma*, 537 U.S. at 62-63.

The same question arises under FIFRA: given that FIFRA's express preemption clause preempts state labeling "requirements," does FIFRA also preempt tort claims related to pesticide labels, such as a claim for breach of warranty or failure to warn? The question also arises when a court conducts an implied preemption analysis: does allowing a particular tort claim to proceed make it impossible to comply with federal law, create an obstacle to achieving federal policies, or intrude on a field that Congress has occupied exclusively?

Because every federal statute has different language, structure, and purpose, deciding its preemptive effect always requires an individualized examination of the statute. Nonetheless, the Supreme Court has articulated several presumptions to guide its preemption analysis. First, the Court has established a general presumption against preemption, at least in areas of law traditionally regulated by the states.⁴² Second, even after it is clear that a statute preempts *some* state law, the Court continues to apply this presumption against preemption to limit the substantive scope of preemption.⁴³ FIFRA, for example, clearly preempts pesticide labeling requirements under state law, but it allows states to regulate the use of pesticides. If a particular state law falls into a gray area, so that a court is unsure whether it regulates only pesticide use or whether it is also an attempt to regulate the label,⁴⁴ the court should apply the presumption against preemption and allow the state law to stand. The focus of this Article is a third presumption, one that applies to the *type* of state law preempted. Once a court decides that a federal statute preempts state regulation of a particular field through positive law, should the court presume that tort claims in that field are also preempted? Or should it adopt yet another presumption against preemption, requiring additional evidence of specific congressional intent to preempt the common law? The Supreme Court has done both at different points in the development of its preemption jurisprudence, without clearly articulating a presumption in one direction or the other.⁴⁵ In FIFRA cases, lower courts have preferred the Court's presumption in favor of preemption, holding that there is no meaningful difference between positive law and common law and that both must therefore be preempted. *Sprietsma*, however,

42. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), cited in *Medtronic, Inc. v. Lohr*, 418 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

43. *Medtronic*, 418 U.S. at 485.

44. For example, a state law might prohibit the residential use of a particular pesticide. The manufacturer would argue that this prohibition amounts to a regulation of the label since it suggests the label should advise users not to apply the product in homes.

45. See Part II.B, *infra*.

rejects this view and signals the Court's intent to adhere to all three presumptions *against* preemption.

B. *The Supreme Court Cases*

Modern jurisprudence on preemption of common law claims begins with *Cipollone* in 1992, but two earlier cases have continued to play key roles as embodiments of competing philosophies about preemption of tort liability. At important moments in the development of modern preemption doctrine, the Court has looked to the 1959 decision in *San Diego Building Trades Council v. Garmon*⁴⁶ when holding that common law claims are preempted⁴⁷ and to the 1984 decision in *Silkwood v. Kerr-McGee Corporation*⁴⁸ when holding that they are not.⁴⁹

In *Garmon*, an employer brought a tort claim against a union for economic losses allegedly caused by peaceful picketing.⁵⁰ The premise of the tort claim was that organizing the picket was an unfair labor practice.⁵¹ The Supreme Court held that this claim was preempted by the federal government's broad authority under the National Labor Relations Act ("NLRA").⁵² This holding might be considered atypical of preemption cases because the NLRA is a "strong" preemptor, on par only with ERISA⁵³ in the strength and breadth of its preemptive force.⁵⁴ But *Garmon* became influential as precedent for its recognition of the regulatory role—and thus the "preemptability"—of the common law.

Tort law aims not only at compensating victims but also at regulating behavior through the threat of damages awards.⁵⁵ The duty of care that forms the basis for a tort action can thus be likened to a statute or other enactment of positive law. The *Garmon* Court relied on this analogy to hold

46. 359 U.S. 236 (1959).

47. *See, e.g., Cipollone*, 505 U.S. at 521 (citing *Garmon*). *Cipollone* is discussed *infra* at notes 73-84 and accompanying text.

48. 464 U.S. 238 (1984).

49. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (citing *Silkwood*). *Medtronic* is discussed *infra* at notes 85-101 and accompanying text.

50. *Garmon*, 359 U.S. at 237.

51. *Id.* at 245.

52. 29 U.S.C. §§ 151-69 (2000).

53. The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461.

54. The strength of preemption under ERISA and the NLRA is evidenced primarily through removal doctrine. Normally, under the well-pleaded complaint rule, a federal defense such as preemption cannot serve as a basis for removal to federal court. Preemption under these two statutes, however, is so complete that a complaint purporting to plead common law claims will be construed as stating a claim under the federal law and can thus be removed. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (ERISA); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) (NLRA).

55. *Garmon*, 359 U.S. at 247.

that a state could no more regulate industrial relations through its tort law than it could through its positive law.⁵⁶ Hence state tort claims arising from a labor dispute were preempted by federal law.⁵⁷

The Court did not face another case involving preemption of common law claims until *Silkwood* twenty-five years later. In *Silkwood*, the Court held that the plaintiff could recover under state tort law for injuries caused by negligent operation of a nuclear power plant, even though nuclear safety is regulated exclusively by the federal Atomic Energy Commission.⁵⁸ The Court acknowledged the defendant's reliance on *Garmon* and did not refute its assertion that the common law has a regulatory function.⁵⁹ The Court, however, held that a federal law's preemption of the common law should not automatically mimic its preemption of positive law.⁶⁰ There was no question that the Atomic Energy Act preempted the state from enacting statutes or administrative regulations governing the nuclear industry: although it contained no express preemption clause, Congress had concluded the states were basically incompetent in this field of regulation, and it had occupied the field.⁶¹ Nonetheless, the Court insisted on a distinction between regulation by common law and regulation by positive law. Applying a presumption against preemption, the Court noted there was no specific evidence that Congress had intended to preempt common law claims, while there was some evidence that Congress had assumed the common law survived.⁶² Most importantly, Congress had not provided an alternative means of redress for people injured by negligence in the nuclear industry. The Court simply could not believe "that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."⁶³

Silkwood is an especially strong statement against preemption of common law claims because the issue before the Court was limited to

56. *See id.* at 245.

57. *Id.*

58. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984).

59. *Id.* at 249.

60. *See id.* at 256.

61. *Id.* at 248-51.

62. *Id.* at 251-55. The Court noted that Congress had passed legislation establishing a government-backed indemnification and limited liability scheme available to nuclear facilities that obtained insurance against the first \$60 million in tort claims. The Senate Report on that legislation stated that "the rights of third parties who are injured are established by State law." *Id.* at 252 (quoting S. REP. NO. 85-296, at 9 (1957), reprinted in 1957 U.S.C.C.A.N. 1803, 1810). Later amendments required nuclear facilities to waive certain defenses they could otherwise assert in state tort actions. *Id.* at 253.

63. *Silkwood*, 464 U.S. at 251. Despite this reference to "illegal" conduct, the Court's preemption analysis did not limit the defendant's liability to claims for negligence *per se* based on violations of federal regulations.

whether *punitive* damages were preempted; the jury's award of compensatory damages was unchallenged.⁶⁴ Far from seeking to "remove *all* means of judicial recourse,"⁶⁵ the defendant challenged only that portion of the judgment which was avowedly regulatory.⁶⁶ The Court rejected the arguments of both the defendant and the government (appearing as amicus) and noted there was no actual conflict with federal law since it was not physically impossible to pay both punitive damages and any fines imposed under federal law.⁶⁷ Having concluded that Congress did not intend to preempt common law claims in general and that impossibility preemption did not apply, the Court simply noted that punitive damages were an established feature of tort law and that there was no specific evidence that Congress intended to eliminate them.⁶⁸ The Court declined to find either field or obstacle preemption in the absence of concrete evidence of congressional intent to preempt common law claims rather than just positive law.

Silkwood's insistence on a distinction between positive and common law at first seems inconsistent with *Garmon's* treatment of them as equivalent. But the cases differ in whether a remedy was available for the wrongful conduct, and this difference was important to the Court.⁶⁹ In *Garmon*, the Court could rely on the broad authority of the National Labor Relations Board to provide a remedy through its oversight of labor disputes and power to enjoin unfair pickets,⁷⁰ whereas in *Silkwood* there was no federal relief available. Moreover, *Garmon* was limited to the narrow circumstances where the state tort duty arose directly from standards about what constitutes an unfair labor practice.⁷¹ The Court made clear that tort law would *not* be preempted in other labor disputes, for example those "marked by violence and imminent threats to the public order," because in those situations the state's compelling interest in preserving its own laws "is not

64. *See id.* at 246.

65. *Id.* at 251 (emphasis added).

66. *Id.* at 244-45 (quoting trial court's instructions on punitive damages).

67. *Id.* at 257. In *Silkwood*, the Court did not appear even to consider whether the government's view on preemption was entitled to special weight. More recent cases have debated the degree of deference that should be afforded to the executive branch's opinions about the preemptive scope of statutes administered by executive agencies. This debate is discussed *infra* notes 181-191 and accompanying text.

68. *Silkwood*, 464 U.S. at 255.

69. *Compare id.* at 251 (noting that Congress's failure to provide remedy supported conclusion that Congress did not intend to eliminate state remedies) with *Garmon*, 359 U.S. at 242 (explaining that Congress had "entrusted administration of the labor policy for the Nation to a centralized administrative agency").

70. *Garmon*, 359 U.S. at 246.

71. *Id.* at 239 (noting that state court had "held that those activities constituted a tort based on an unfair labor practice under state law").

overridden in the absence of clearly expressed congressional direction.”⁷² Thus, even under the strongly preemptive NLRA, most common law claims are governed by the *Silkwood* rule and presumed to survive preemption. While *Garmon* says tort claims can be subjected to preemption analysis, *Silkwood* says that in the absence of clear evidence of preemptive intent, state law will survive and that the absence of a federal remedy is evidence that Congress did not intend to preempt state remedies.

Despite having joined the majority in *Silkwood*, Justice Stevens cited only *Garmon* when he authored the plurality opinion in *Cipollone*.⁷³ Justice Stevens’s *Cipollone* opinion staked out a middle ground between complete preemption and no preemption based on close readings of the two preemption statutes at issue in that case: two different versions of the Federal Cigarette Labeling and Advertising Act, later known as the Public Health Cigarette Smoking Act.⁷⁴ The 1965 version of the Act’s preemption clause stated,

No statement relating to smoking and health shall be required [on cigarette packages or advertisements, except as provided by the federal law].⁷⁵

In 1969, this clause was revised to state,

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.⁷⁶

Writing for a majority of the Court, Justice Stevens first concluded that the 1965 Act preempted only positive enactments of state law, leaving common law claims untouched.⁷⁷ To the majority, the term “statements” implicitly referred to the type of warning requirement that Congress imposed elsewhere in the same Act and thus appeared to preempt only similar enactments by States.⁷⁸ Echoing though not citing *Silkwood*, the Court briefly noted that there was “no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions.”⁷⁹ Justice Stevens also wrote for the majority what might have been (if adhered to in later cases) an important new rule for restricting preemption: where Congress has expressed its intentions

72. *Id.* at 247.

73. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992).

74. 15 U.S.C. §§ 1331-39 (Supp. I 1965); 15 U.S.C. §§ 1331-39 (Supp. V 1965-1969).

75. Pub. L. No. 89-92, 79 Stat. 282 § 5(b) (1965).

76. Pub. L. No. 91-222, 84 Stat. 87 § 5(b) (1969).

77. *Cipollone*, 505 U.S. at 519-20.

78. *Id.* at 518-19.

79. *Id.* at 518.

through a preemption clause, the Court's duty begins and ends with interpreting that clause.⁸⁰ The *Cipollone* majority thus rejected the notion that "implied preemption" could operate to preempt state law beyond Congress's expressed intent.

Turning to the 1969 Act, Justice Stevens—writing no longer for a majority but for a plurality—quoted *Garmon* and emphasized the fungibility of the common law and positive law as means for regulating conduct.⁸¹ He found that the phrase "[n]o requirement or prohibition . . . under State law" was a broad one and could reasonably be read to include common law claims.⁸² Contrary to *Silkwood*, he stated that common law claims should be deemed within the scope of the Act's preemption clause unless there was "good reason to believe" they were excluded.⁸³ The *Cipollone* plurality thus appeared to abandon *Silkwood*'s presumption against preemption of common law claims. In doing so, it sowed the seeds of a presumption in favor of preemption, based on a philosophical stance that saw no functional difference between positive and common law. Although only three other Justices joined this portion of Justice Stevens's opinion, Justices Scalia and Thomas disagreed with Justice Stevens only in that they felt he did not go far enough, arguing that both versions of the Act preempted common law claims.⁸⁴

Justice Stevens's opinion in *Cipollone* contained two innovations in preemption law. First, Justice Stevens focused intensely on the language of the express preemption clause, refusing to consider an implied preemption analysis unmoored from Congress's words. Second, he continued this close examination of the text in deciding whether common law claims were preempted, without reference to *Silkwood*'s presumption against extending preemption to include tort claims. Instead, the bulk of the *Cipollone* opinion relied on *Garmon*'s theory of the equivalence of positive and common law. This second innovation could have expanded federal preemption beyond what Congress expected when it enacted the scores of federal statutes that regulate areas of traditional state authority. But it was restrained by the first innovation's requirement to study the statutory language for signs of congressional intent.

The Court soon repudiated Justice Stevens's first innovation. In 1995 in *Freightliner Corp. v. Myrick*, a unanimous Court hinted that it could go beyond an express preemption clause and apply implied preemption analy-

80. *Id.* at 517.

81. *Id.* at 521.

82. *Id.* at 520, 522.

83. *Id.* at 521 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)).

84. *Id.* at 548-49 (Scalia, J., concurring and dissenting).

sis even where Congress's express preemptive intent did not extend to common law claims.⁸⁵ One year later, in *Medtronic, Inc. v. Lohr*, the Court flip-flopped again, re-embracing Justice Stevens's first innovation and limiting its analysis of the Medical Device Amendments ("MDA") to the express terms of the statute.⁸⁶ Once again, the Court was unanimous on this point. But this vacillating unanimity evaporated in *Geier v. American Honda Motor Co.*, which came down heavily in favor of implied preemption even where an express preemption clause exists and does not contemplate preempting common law claims.⁸⁷ Justice Stevens capitulated to the new majority in *Sprietsma*, accepting that there may be implied preemption even where Congress has expressly stated what should be preempted.⁸⁸ Preemption doctrine thus lost the benefit of Justice Stevens's effort in *Cipollone* to tie the preemption analysis closely to Congress's expressed intent. This concession, however, enabled Justice Stevens to use *Sprietsma* to rein in the expansion of his second innovation, which lower courts had carried well beyond the bounds of *Cipollone*.

While the lower courts tended to ignore the first *Cipollone* innovation, which operated to limit implied preemption, they embraced the second, which expanded express preemption.⁸⁹ In *Medtronic*, however, four years after *Cipollone*, Justice Stevens wrote another plurality opinion, again highlighting the importance of focusing the preemption inquiry on Congress's intent.⁹⁰ The Medtronic company sought to shield itself from liability for injuries caused by a pacemaker, under the preemption clause of the MDA:

[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under [federal law] and (2) which relates to the safety or effectiveness of the device or to any other matter [covered by a federal requirement].⁹¹

The company, modeling its arguments on *Cipollone*'s treatment of the 1969 Cigarette Act, claimed that because the word "requirement" is used in both Acts, both should be construed to preempt common law duties as well as positive law.⁹²

85. 514 U.S. 280, 288-89 (1995).

86. 518 U.S. 470, 484 (1996).

87. 529 U.S. 861, 869 (2000).

88. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002) (quoting *Geier*, 529 U.S. at 869).

89. See *supra* notes 103-130 and accompanying text.

90. *Medtronic, Inc. v. Lohr*, 518 U.S. 479, 487 (1996).

91. 21 U.S.C. § 360k(a) (2000).

92. *Medtronic*, 518 U.S. at 486.

Despite his *Cipollone* opinion, Justice Stevens called this argument “not only unpersuasive” but even “implausible.”⁹³ This time he turned to *Silkwood*, arguing the unlikelihood that Congress would have eliminated tort liability for an entire industry without comment, especially since the stated purpose of the MDA was the need for *more* oversight of that industry.⁹⁴ Justice Stevens distinguished *Cipollone*, saying that the substantive scope of the Cigarette Act was narrow, extending only to advertising and promotion.⁹⁵ Applying the same reasoning in *Medtronic* would have preempted a much wider range of claims, and Justice Stevens was not comfortable extinguishing so much common law and effectively immunizing an entire industry without better evidence of Congress’s intent. Thus, *Medtronic* qualified Justice Stevens’s apparent proposal in *Cipollone* to disregard the *Silkwood* presumption against preempting common law claims, even where preemption of positive law was clear. The drastic act of dispensing with the *Silkwood* presumption was appropriate only where the class of tort claims thereby eliminated was narrow. This qualification also helps explain Justice Stevens’s reliance on *Garmon* in his *Cipollone* opinion since *Garmon* explicitly stated that most tort claims would be preserved unless Congress “clearly expressed” its desire to preempt them, and since *Garmon* used the NLRA to preempt only a narrow class of claims.⁹⁶ Justice Stevens’s *Medtronic* opinion clarified that *Cipollone*’s reliance on *Garmon*, and its abandonment of the *Silkwood* presumption, was appropriate only because the preemptive effect was narrow.

Again, however, Justice Stevens wrote only for a plurality. The fifth vote against preemption came from Justice Breyer, who wrote his own opinion concurring in the judgment.⁹⁷ While he did not reject a general presumption against preempting common law claims, Justice Breyer chafed at the plurality’s suggestion that the MDA categorically did not preempt common law claims. He insisted that some common law claims would be preempted.⁹⁸ As an example, he imagined a federal regulation that required a hearing aid to have a two-inch wire, while a state court action alleged negligence or design defect for failure to use a one-inch wire. Surely, he argued, such a claim would be preempted.⁹⁹ Justice Breyer’s view prevailed in *Geier*, where his opinion for the Court held that under the National Traf-

93. *Id.* at 487.

94. *Id.*

95. *Id.* at 488-89.

96. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

97. *Medtronic*, 518 U.S. at 502 (Breyer, J., concurring).

98. *Id.* at 504-05 (Breyer, J., concurring).

99. *Id.* at 504 (Breyer, J., concurring).

fic and Motor Vehicle Safety Act¹⁰⁰ a tort claim for failure to install an airbag was implicitly preempted because it posed an obstacle to federal policy that airbags be phased-in gradually rather than installed all at once.¹⁰¹

In *Geier* and *Sprietsma*, the Court at last concluded that it will apply its implied preemption doctrine even where an express clause exists. The Court has even at times found it more convenient to give only cursory treatment—or none at all—to a statute's express preemption clause, focusing instead on the Court's own analysis of what kinds of state law activity might conflict with federal goals.¹⁰² Until *Sprietsma*, the Court had offered little further guidance on express preemption beyond the confusing array of opinions in *Cipollone* and *Medtronic*.

C. Lower Court Responses in FIFRA Cases

Cipollone and *Medtronic* dominate lower court decisions on FIFRA preemption. Before *Cipollone*, federal courts were split on FIFRA preemption. The D.C. Circuit had ruled against preemption of common law claims, echoing *Silkwood* in its concern not to eliminate tort liability just because the federal government had taken over the role of establishing minimum safety standards.¹⁰³ The Eleventh Circuit rejected this view and argued that positive law and common law were equivalent, and both were preempted.¹⁰⁴ But after *Cipollone*, FIFRA preemption swept the courts.¹⁰⁵ Like

100. 15 U.S.C. §§ 1381-1431 (repealed 1994).

101. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864-866 (2000).

102. *See, e.g., id.* at 867-69 (briefly discussing express preemption before considering implied preemption); *see also* Davis, *supra* note 3, at 1007 (discussing *Geier*'s cursory treatment of express preemption clause); *Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (finding implied preemption without any discussion of MDA's express preemption clause).

103. *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1540-43 (D.C. Cir. 1984).

104. *See Papas v. Upjohn Co.*, 926 F.2d 1019, 1024 (11th Cir. 1991), *cert. granted and jmt. vacated*, 505 U.S. 1215 (1992). The *Papas* court noted that *Ferebee* was the only other court of appeals decision on FIFRA preemption and that the district courts were divided in their opinions on the issue. *Id.* at 1021 n. 1 (citing district court cases). The Supreme Court vacated the Eleventh Circuit's ruling in favor of preemption and remanded for reconsideration in light of *Cipollone*. On remand, the Eleventh Circuit adhered to its original holding, and *certiorari* was denied. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied*, 510 U.S. 913 (1993).

105. All six federal courts of appeals to consider FIFRA preemption in the four years after *Cipollone* concluded that it preempted at least some common law claims. *Welchert v. Am. Cyanamid, Inc.*, 59 F.3d 69, 75 (8th Cir. 1995); *Taylor Ag Indus. v. Pure-Gro*, 54 F.3d 555, 559-60 (9th Cir. 1995); *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1024-25 (5th Cir. 1994); *Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993); *Ark.-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993). The supreme courts of eleven states agreed. *McAlpine v. Rhone-Poulenc Ag Co.*, 947 P.2d 474, 477 (Mont. 1997), *overruled by Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042 (Mont. 2000); *Schuver v. E.I. du Pont de Nemours & Co.*, 546 N.W.2d 610, 612-16 (Iowa 1996); *Hopkins v. Am. Cyanamid Co.*, 666 So.2d 615, 619-22 (La. 1996); *Eide v. E.I. du Pont de Nemours & Co.*, 542 N.W.2d 769, 771-72 (S.D. 1996);

the 1969 Cigarette Act at issue in *Cipollone*, FIFRA uses a form of the word “requirement” in its preemption clause:

[A] 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.¹⁰⁶

Even more important than this textual similarity was *Cipollone*'s suggestion that there is no meaningful difference between regulation through positive law and regulation through the tort system.¹⁰⁷ Lower courts have repeated this principle like a mantra in FIFRA cases without recognizing the narrow bounds placed on it in *Garmon*.¹⁰⁸

The sweeping effect of *Cipollone* on FIFRA preemption cases is a striking example of how a nuanced Supreme Court decision can be applied simplistically by lower courts seeking doctrinal guidance. *Cipollone* was hardly an enthusiastic endorsement of preemption; it held that one preemption clause did not preempt common law claims while the other preempted some, but not all. Lower courts, however, seized on the word “requirement” as a similarity between the preempting 1969 Cigarette Act and FIFRA and ignored a different form of the same word—“required”—in the non-preempting 1965 Cigarette Act.¹⁰⁹ Justice Stevens reached opposite conclusions about these two versions of the Cigarette Act based not on this single word but on a close reading of the entire statute. His opinion in *Medtronic* and his reliance on *Garmon* make clear he was influenced by the fact that only a small class of claims would be barred if he found preemption.¹¹⁰ That factor, however, was not immediately clear in his *Cipollone* opinion, nor was it a factor for lower courts busily clearing their dockets of pesticide cases. “*Cipollone*” became shorthand for the simple syllogism that the word “requirements” in preemption clauses undoubtedly includes enact-

Hochberg v. Zoecon Corp., 657 N.E.2d 1263, 1265-67 (Mass. 1995); Quest Chem. Corp. v. Elam, 898 S.W.2d 819, 820-21 (Tex. 1995); Goodwin v. Bacon, 896 P.2d 673, 681 (Wash. 1995); Gorton v. Am. Cyanamid Co., 533 N.W.2d 746, 753, 754 n. 8 (Wis. 1995); Banks v. ICI Americas, Inc., 450 S.E.2d 671, 676 (Ga. 1994); Jenkins v. Amchem Prods., Inc., 888 P.2d 869, 873-84 (Kan. 1994); Davidson v. Velsicol Chem. Corp., 834 P.2d 931, 937 (Nev. 1992).

106. 7 U.S.C. § 136v(b) (2000).

107. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992).

108. See, e.g., *Ark.-Platte & Gulf P'ship*, 981 F.2d at 1179 (“Indeed, a state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less a “requirement” in the preemption scheme than a state statute imposing the same burden.”). See also Nelson, *supra* note 26, at 584 (“*Cipollone*'s rejection of a distinction between common law damage actions and positive legal enactments has had significant consequences for the FIFRA preemption controversy.”).

109. See, e.g., *MacDonald*, 27 F.3d at 1024 (“If the encompassing words of the statute standing alone do not convince the skeptics, surely *Cipollone* leaves no doubt but that the FIFRA term ‘any requirements’ makes no distinction between positive enactments and the common law.”).

110. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-89 (1996); *Cipollone*, 505 U.S. at 521.

ments of positive state law; positive and common law are equivalent; therefore, common law claims are preempted.¹¹¹

Once this reading of *Cipollone* became entrenched in FIFRA litigation, the question became not *whether* common law claims were preempted, but which claims were preempted. In *Cipollone*, Justice Stevens had used his close reading of the Cigarette Act to identify which claims fell within the substantive reach of the preemption clause.¹¹² In *Cipollone*, that meant “failure to warn” claims were preempted since they rested on a state law duty “based on smoking and health.”¹¹³ Other claims, however, were not preempted. An express warranty claim was based on general contract law, not on smoking and health, and thus was not preempted.¹¹⁴ Further complicating the matter, Justice Stevens found that a claim for fraudulent misrepresentation was *partially* preempted, depending on the particular factual allegations and duty of care alleged by the plaintiff.¹¹⁵ Courts have followed a similar approach in FIFRA preemption cases, usually holding that failure-to-warn claims are preempted but design defect claims are not.¹¹⁶

The intricacy of this analysis, however, opened the door to a creeping expansion of preemption: in FIFRA cases, it boils down to a litigation strategy by the pesticide industry that recasts all claims as essentially about the labels.¹¹⁷ Suppose a plaintiff alleges a pesticide was defectively designed because it was unreasonably dangerous when used, as intended, in homes, offices, and other indoor places where people breathe. Says the de-

111. See, e.g., Nelson, *supra* note 26, at 584-85 (“*Cipollone* must be seen to clearly repudiate *Ferebee*’s permissive approach to state damage actions.”).

112. *Cipollone*, 505 U.S. at 524-30.

113. *Id.* at 524-25.

114. *Id.* at 525-27.

115. Justice Stevens indicated that claims based on misrepresentations in advertising or promotional materials were preempted, except to the extent that there were actual, intentional misstatements of material fact. A fraudulent misrepresentation claim could also be based on the failure to disclose material facts through channels other than advertising or promotion, such as to a state regulatory agency. The rationale for these distinctions was that the text of the preemption clause limited its scope to “advertising or promotion” and that the general duty not to make false statements of material fact could be applied in this context without thereby becoming a “requirement . . . based on smoking and health.” *Id.* at 527-29.

116. Nelson, *supra* note 26, at 586 (summarizing areas of agreement among lower courts addressing FIFRA preemption after *Cipollone*).

117. See, e.g., Grenier v. Verm. Log Bldgs., Inc., 96 F.3d 559, 564-65 (1st Cir. 1996) (accepting defendant’s argument that design defect claim, premised on product being unreasonably dangerous when used in foreseeable manner, to control pests in private homes, was preempted because it was “effectively no more than an attack on the failure to warn against residential use”); Sleath v. West Mont Home Health Servs., Inc., 16 P.3d 1042, 1043-44, 1053 (Mont. 2000) (noting defendant’s argument that even design defect claims were preempted); see also *infra* note 118 (citing cases involving arguments that claims for breach of express warranty are preempted).

fendant, “What you *really* mean is that the label should have warned you not to use it in homes or offices without adequate ventilation. Your ‘design defect’ claim is merely a failure-to-warn claim in disguise.” This argument has the same easy appeal as the argument that tort law is just positive law in disguise, and the pesticide industry has had some success pushing the boundaries of preemption through this reasoning.¹¹⁸ But the further it is pushed, the more FIFRA preemption threatens a broad class of claims as in *Silkwood*, rather than a narrow class as in *Garmon*. Indeed, this overreaching may have prompted a few courts to re-examine their position on FIFRA preemption in light of *Medtronic*.¹¹⁹

In most jurisdictions, *Medtronic* has not affected FIFRA preemption. Even though *Medtronic* also involved the word “requirement” and found no preemption, most courts have not been moved to revisit FIFRA for a closer analysis; instead, they have continued to rely on their *Cipollone*-based preemption holdings.¹²⁰ But as FIFRA preemption spread, the EPA got involved. In 1999 it submitted a brief in a California case in which it undertook a comprehensive analysis of FIFRA, as Justice Stevens had done for the Cigarette Act and the MDA but which lower courts had failed to do in simplistically applying only a portion of *Cipollone* to FIFRA.¹²¹ Mimicking Justice Stevens’s discussion of the 1965 Cigarette Act, the EPA showed that, throughout FIFRA, the word “requirements” is used to refer to positive law.¹²² The EPA drew on *Medtronic* and *Silkwood* to show that there was no specific congressional intent to extinguish tort liability, and that

118. For example, courts have split on whether express warranty claims are preempted. Some courts have held that all warranty claims are preempted because the warranty appears on the label. *E.g.*, *Grenier v. Verm. Log Bldgs., Inc.*, 96 F.3d 559, 564 (1st Cir. 1996); *Taylor Ag. Indus. v. Pure-Gro*, 54 F.3d 555, 562-63 (9th Cir. 1995); *Lowe v. Sporicidin Int’l*, 47 F.3d 124, 129 (4th Cir. 1994); *McAlpine v. Rhone-Poulenc Ag Co.*, 947 P.2d 474, 478 (Mont. 1997), *overruled by Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042 (Mont. 2000); *Clubine v. Am. Cyanamid Co.*, 534 N.W.2d 385, 387 (Iowa 1995). Others have held that a warranty was preempted to the extent the EPA mandated the warranty but not preempted to the extent the EPA merely approved the inclusion on the label of a warranty proposed by the manufacturer. *Welchert v. Am. Cyanamid, Inc.*, 59 F.3d 69, 73 n. 6 (8th Cir. 1995); *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993); *United AGRI Prods. v. Kawamata Farms, Inc.*, 948 P.2d 1055, 1078-80 (Haw. 1997); *Higgins v. Monsanto Co.*, 862 F.Supp. 751, 760-61 (N.D.N.Y. 1994). None of these courts has grappled with the absurdity of a system under which a warranty is either mandated or approved but is unenforceable.

119. In the Montana case, for example, the lower court had held that all the plaintiffs’ tort claims were preempted, even a claim for design defect, and the state supreme court expressed concern about the breadth of preemption claimed by the defendant. *Sleath*, 16 P.3d at 1043-44, 1053.

120. *See, e.g.*, *Hawkins v. Leslie’s Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Grenier v. Verm. Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996).

121. Br. Amicus Curiae for the U.S. in Support of Plaintiffs-Appellants, *Etcheverry v. TRI-AG Serv. Inc.*, No. S072524 (Cal.) (filed March 1999).

122. *Id.* at 14-17.

there was some evidence Congress assumed the common law would survive.¹²³ Although the California Supreme Court rejected the EPA's analysis,¹²⁴ Montana embraced it in *Sleath v. West Mont Home Health Services, Inc.*¹²⁵ Overruling a prior decision, *Sleath* held that FIFRA's preemption clause does not apply to common law actions for damages.¹²⁶ But the Montana court's reliance on the EPA brief may have come just in time for the *Sleath* plaintiffs, as this brief was itself short-lived.

Sleath was decided in December 2000, around the same time a new president, more inclined to favor the pesticide industry over tort plaintiffs, was selected. In May 2003, the U.S. Solicitor General submitted a brief on a *certiorari* petition in a FIFRA preemption case from Texas.¹²⁷ In that brief, the (Bush) government repudiated its prior (Clintonian) brief and embraced the lower court authority holding that FIFRA preemption includes common law claims.¹²⁸ Like those lower court decisions, the government's reasoning was based primarily on the theory that there is no coherent distinction between positive and common law.¹²⁹ Until *Sprietsma*, Montana and Oregon stood alone in rejecting this theory and refusing to believe that the Congress that enacted FIFRA had, "without comment, remove[d] all means of judicial recourse for those injured by illegal conduct."¹³⁰

For those who read the tea leaves of the Court's grants of *certiorari*, the grant in *Bates v. Dow* bodes well for Montana, Oregon, and FIFRA plaintiffs. Heedless of *Sprietsma*, the government has continued to argue its new theory that FIFRA preempts common law claims when commenting on *certiorari* petitions in FIFRA preemption cases. In its first amicus brief announcing its new position, the government suggested that *certiorari* might be appropriate but for the fact that the petition was premature, thus depriving the Court of jurisdiction.¹³¹ But in *Bates*, where the lower court favored the defendant, the government argued against *certiorari*, noting that almost all lower courts had accepted the preemption argument and por-

123. *Id.* at 23-32.

124. *Etcheverry v. TRI-AG Serv. Inc.*, 993 P.2d 366 (Cal. 2000).

125. 16 P.3d 1042 (Mont. 2000).

126. *Id.* at 1047-48, 1048-49, 1050, 1052 (referring to the *Etcheverry* brief).

127. Br. for the U.S. as Amicus Curiae, *Am. Cyanamid Co. v. Geye*, Case No. 02-367 (U.S.).

128. *Id.* at 17. The problems with this theory are discussed in Part III.B *infra*.

129. *Id.* at 18-19.

130. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

131. Br. for the U.S. as Amicus Curiae at 8-9, *Am. Cyanamid Co. v. Geye*, Case No. 02-367 (U.S.) (stating that petition "raises potentially important questions" regarding FIFRA preemption but that lower court decision was not final judgment).

traying Montana as an insignificant anomaly.¹³² Statistically, of course, the Supreme Court tends to grant *certiorari* in the cases it is inclined to reverse rather than those it is inclined to affirm.¹³³ The grant in *Bates*, especially against the government's recommendation, may thus be an indication that the Court plans to stick to its *Sprietsma* guns, once again upsetting the settled view of most lower courts (including the Fifth Circuit in *Bates*) in favor of preemption.

One wild card, though, is the government's own flip-flop. The weight accorded to the executive branch's opinion about preemption has been an increasingly important theme of preemption cases, a theme especially emphasized by Justice Breyer.¹³⁴ In addition, *Bates* concerns claims that a pesticide did not work as promised, causing crop damage, not claims of personal injury from exposure to a pesticide. It thus raises an issue similar to the issue in *Sprietsma* regarding the scope of preemption when an agency has authority to enact potentially preemptive regulations but has not done so. It may have been this issue, rather than FIFRA *per se* or the theoretical differences between common law and positive law, that piqued the Court's interest in *Bates*. Depending on how the Court resolves those issues, it may avoid a broad holding on FIFRA preemption.

III. *SPRIETSMA* AND THE PROSPECTS FOR FIFRA

Despite its rejection of the reasoning of many FIFRA preemption cases, *Sprietsma* by itself was unlikely to lead the lower courts *en masse* to reconsider prior holdings that FIFRA preempts common law claims. Particularly in the federal courts of appeals, the fact that *Sprietsma* involved a different statute would probably have been enough for most courts to adhere to their prior rulings based on *stare decisis* and the rule against overruling the decision of a prior panel.¹³⁵ But as the Supreme Court considers the question of FIFRA preemption in *Bates*, the principles set out unani-

132. Br. for the U.S. as Amicus Curiae at 18-19, *Bates v. Dow Agrosciences LLC*, Case No. 03-388. The *Bates* brief did not mention the Oregon decision in *Brown v. Charles H. Lilly Co.*, 985 P.2d 846 (Or. App. 1999), *review denied*, 6 P.3d 1098 (Or. 2000).

133. Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 742 n. 66 (2001) (noting that Supreme Court "routinely reverses or vacates twice as many cases as it affirms").

134. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) ("We place some weight upon [the Department of Transportation's] interpretation of [regulatory] objectives and its conclusion, as set forth in the Government's [amicus] brief, that a tort suit such as this one would "'stan[d] as an obstacle to the accomplishment and execution"' of those objectives."). See also *infra* notes 181-191 and accompanying text.

135. See, e.g., *Santamaria v. Horsely*, 110 F.3d 1352, 1355 (9th Cir. 1997) ("It is settled law that one three-judge panel . . . cannot ordinarily reconsider or overrule the decision of a prior panel.").

mously in *Sprietsma* should lead it to conclude that FIFRA preempts very few, if any, common law claims. The Court should hold that FIFRA's express preemption clause does not apply to common law claims and that implied preemption arises only in "impossibility" cases, where the common law duty alleged in a state lawsuit would require that federal law be violated.

A. FIFRA's Express Preemption Clause

The starting point for any preemption analysis is the text of the potentially preemptive federal statute. In *Cipollone* and *Medtronic*—and again in *Sprietsma*—Justice Stevens scrutinized the statutory text for evidence of whether Congress intended to preempt common law claims as well as enactments of positive law.¹³⁶ In FIFRA's case the text and the legislative history support an inference that Congress did not intend to preempt common law claims. Because, however, there is no clear statement one way or the other in the text, it is critical which presumption one adopts: a presumption that common law is equivalent to positive law, and thus presumed to be preempted, or a presumption against expanding the scope of preemption automatically to include common law merely because positive law has been preempted. As we shall see, *Sprietsma* adopts the latter presumption, rightly recognizing a meaningful distinction between common law and positive law.¹³⁷ But first, this section sets forth the textual argument that FIFRA's express preemption clause does not encompass common law actions.

A casual reader of the many judicial decisions finding broad FIFRA preemption of state law would be surprised to discover that the so-called FIFRA preemption clause is actually subsumed within a provision that expressly *reserves* power to the States:

§ 136v. Authority of States.

(a) In general. 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) Uniformity. 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.¹³⁸

Taken as a whole, this provision is better described as a qualified saving clause rather than as a preemption clause. Subsection (a) plainly refers to

136. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-91 (1996) (Stevens, J., concurring).

137. See Part III.B, *infra*.

138. 7 U.S.C. § 136v.

positive enactments by the State. While the first clause of (a) could, in the abstract, be understood to permit both positive and common law “regulation” of the sale or use of pesticides, the “but only . . .” clause cannot naturally or even coherently be understood in that fashion. In order for a common law “regulation” to “not permit” a particular sale or use of a pesticide, a state would have to be *required* to impose tort liability for such a sale or use. If Congress had wanted to create tort-like remedies for violations of FIFRA, it would have done so directly, not by trying to mandate liability under state law. The natural reading of subsection (a) – as referring exclusively to positive law – is also the only possible reading.

Before moving on to subsection (b), it is worth pausing to consider one possible implication of this argument. The purpose of a saving clause is to foreclose preemption that might otherwise be inferred (under principles of implied preemption) from FIFRA’s comprehensive regulation of pesticides. I have just argued that subsection (a), FIFRA’s saving clause, does not refer to common law claims. Does this mean that common law claims based on sale or use violations are preempted, even though positive law is “saved”? To the contrary, the statute is clear that states have primary enforcement responsibility for both state and federal rules for pesticide use, as long as the State regime is *at least* as stringent as the federal one.¹³⁹ The point is not that Congress was drawing a distinction between positive law and common law but that it was not even thinking about common law in this context. The common law tort system is ancillary to, not directly part of, the regulatory system that was Congress’s focus in drafting FIFRA.¹⁴⁰

Turning, then, to subsection (b), its most salient feature is that its scope is limited to qualification of subsection (a). It opens “Such State . . .,” meaning “a state that is exercising the regulatory authority reserved to it by subsection (a).”¹⁴¹ This context compels the conclusion that when it prohibited any State labeling “requirements,” Congress was contemplating requirements that might be imposed on labels *in the course* of State regulation of sale or use. After all, in the absence of subsection (b), a State enacting a prohibition on a particular use of a pesticide might well “require” that this prohibition be mentioned on the label. This relationship between subsections (a) and (b) strongly suggests that the word “requirements” in subsection (b) refers only to positive law.

139. *See* 7 U.S.C. § 136v(a).

140. *See* The Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 92-516, § 24 (a), 86 Stat. 973, 997 (1972).

141. *Id.*

This context also explains the use of the word “requirements” in subsection (b) rather than “rule” or “regulation,” each of which more strongly connotes positive law.¹⁴² Subsection (a) authorizes particular categories of “regulations,” while subsection (b) is concerned with particular features or “requirements” that might be part of those regulations. It would be unnatural to use the word “regulation” again in subsection (b) where a different meaning was intended. “Requirements” is a natural alternative that does not necessarily refer to common law duties, and in this context clearly does not do so.

The conclusion that § 136v(b) does not preempt common law claims is reinforced by a thorough review of FIFRA’s text and legislative history presented by the EPA in its original amicus brief on this issue. Citing *Medtronic*, which examined how the word “requirements” was used throughout the statute at issue, the EPA noted the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.¹⁴³ The EPA then counted seventy-five uses of the word “requirements” in FIFRA, each plainly referring only to positive law.¹⁴⁴ As in *Medtronic*, the EPA concluded, the statute’s “focus is . . . positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries.”¹⁴⁵ A similarly exhaustive review of FIFRA’s extensive legislative history revealed no intent or expectation that tort liability would be preempted.¹⁴⁶ To the contrary, as in *Silkwood*, what evidence exists suggests that tort liability was preserved. For example, the EPA’s General Counsel testified, “The bill does not affect tort liability.”¹⁴⁷ As the Supreme Court observed in *Medtronic*, if Congress

142. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519 (1992) (“Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies . . . , the term ‘regulation’ most naturally refers to positive enactments by those bodies, not to common-law damages actions.”).

143. Br. for United States as Amicus Curiae in Support of Plaintiffs-Appellants at 14, *Etcheverry v. TRI-AG Serv. Inc.*, No. S072524 (Cal.) (filed March 1999) (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)).

144. *Id.* at 14-16.

145. *Id.* at 17 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489 (1996)).

146. *Id.* at 23-32. The EPA reviewed over 2,300 pages of transcripts from 26 days of hearings held by three congressional committees; over 300 pages of committee reports; and over 150 pages of transcripts from the five days of floor debate. *Id.* at 23-24. Out of 250 witnesses, including 36 from the pesticide industry, three of the industry representatives mentioned product liability suits against their companies, but there was no suggestion that they would be protected from suits in the future. *Id.* at 28. During the floor debates, the Senate version of the bill prevailed over the House version. The latter would have prohibited the states from regulating certain pesticides more strictly than the EPA. *Id.* at 31-32. Congress also debated an indemnity provision, and members were assured that it would not apply to common law tort actions that might be brought against pesticide manufacturers. *Id.* at 32.

147. *Id.* at 28.

intended the opposite result, “its failure even to hint at it is spectacularly odd.”¹⁴⁸

As discussed above, the vast majority of courts (and the EPA under the Bush administration) have refused even to engage in this statutory analysis in order to determine the scope of FIFRA’s express preemption clause.¹⁴⁹ Rather than analyze the statute, courts have relied on the equation of common law and positive law to erase any distinction between them with respect to preemption. *Sprietsma* rejects this easy approach and, by insisting that common law claims be considered separately, will require courts to analyze FIFRA and other federal statutes closely before deciding their preemptive scope.¹⁵⁰

B. *The Return of Compensation*

Sprietsma’s unanimous statement that “[i]t would have been perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims”¹⁵¹ reinstated the presumption against preemption of common law claims and signaled a return to *Silkwood*’s concern for preserving remedies and preserving state authority. Of course, even discounting the Court’s history of erratic holdings on preemption, the ruling against preemption by the FBSA does not compel the same outcome for FIFRA: the language and structure of the two Acts are of course different. What *Sprietsma* does suggest, however, is that the Supreme Court will decide the question of FIFRA preemption without the facile assumptions that have led so many courts to use FIFRA broadly to preempt state common law.

Those assumptions are pinned to an enthusiastic acceptance of the theory of positive law—common law equivalence set forth in *Garmon* and expanded in Justice Stevens’s plurality opinion in *Cipollone*.¹⁵² While it is certainly true that the common law regulates behavior, *Silkwood* and *Sprietsma* recognized that the common law’s role in compensating victims is equally well-established and important.¹⁵³ In recent years, several industries have tried to convince Congress to give them explicit federal immunity from state tort law; their attempts have sparked intense political con-

148. *Medtronic*, 518 U.S. at 490.

149. See Part II.C, *supra*.

150. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002).

151. *Id.*

152. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-22 (1992).

153. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984); *Sprietsma*, 537 U.S. at 70.

trover and public debate about the role of the tort system and the merits of having Congress take control of it.¹⁵⁴ Regardless of the outcome of those debates, their intensity underscores the unlikelihood that the Congress that enacted FIFRA believed it was extinguishing significant areas of tort liability. To hold that FIFRA broadly preempts common law claims is to hold that what is now a question of great debate about “tort reform” was accomplished implicitly and without comment in 1972, when FIFRA’s preemption clause became law.¹⁵⁵

In addition to advancing the separate goal of compensation, the tort system regulates by a different means from positive law. The threat of tort liability means a manufacturer of a potentially dangerous product cannot assume that a government seal of approval has immunized it from future liability. Traditionally, that uncertainty was seen as a good thing: compliance with government regulations was not a defense to a negligence action.¹⁵⁶ It is simply too much to expect the government to make every necessary safety decision in a timely fashion, as the Coast Guard’s bureaucratic delay in *Sprietsma* demonstrates.¹⁵⁷ It also makes no sense to immunize the entity that is the primary source of information about the product. While federal regulators may be more skilled and have more resources than state regulators, a jury, despite its lack of expertise, will often have more information than was available to federal or state regulators at the time they approved a particular safety standard. The common law regulates by giving the party in the best position to take safety precautions an incentive to do so, rather than foisting the entire burden of protecting consumers onto government agencies. The common law’s compensatory role and its unique form of regulation make it meaningfully different from positive law.

While Justice Stevens’s plurality opinion in *Cipollone* relied on *Garmon* and emphasized the similarities between regulation through positive and common law, it should not have been read as an all-out endorsement of their equivalence, as his follow-up opinion in *Medtronic* made clear. Although lower courts have reached near-universal agreement that *Cipollone*

154. See, e.g., Maria Newman, *New Jersey Doctors Find Unity in Fight to Limit Malpractice Awards*, N.Y. TIMES, Feb. 1, 2003, at B3 (discussing attempts by New Jersey doctors, including a threatened strike, to force medical malpractice reform legislation); *Y2K Liability Limits*, N.Y. TIMES, July 3, 1999, at A10 (discussing the political struggle surrounding legislation to limit liability for potential “Y2K” computer failures).

155. Pub. L. No. 92-516, § 24, 86 Stat. 997 (1972).

156. See Reporters’ Study: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE, Vol. 2, 83-84 (Am. L. Inst. Ed., 1991); see also Nelson, *supra* note 26, at 571-72 (discussing pros and cons of dual remedial systems).

157. See *Sprietsma*, 537 U.S. at 62.

compelled FIFRA preemption of common law claims, in *Sprietsma* Justice Stevens finally had the opportunity to right this wrong and return to *Silkwood*'s presumption against preemption of common law claims.

C. *The Importance of a Saving Clause?*

One important factor in *Sprietsma*, as in several of the Court's recent preemption cases, was the presence of a "saving clause" expressly limiting the preemption clause, thereby preserving liability under the common law.¹⁵⁸ Does FIFRA's lack of a similar saving clause require the conclusion that common law claims against pesticide manufacturers are not saved but preempted?

The *Sprietsma* Court stated that the FBSA's saving clause "but-tresse[d]" its conclusion, suggesting that the clause was not necessary to the Court's conclusion.¹⁵⁹ The Court analyzed the language of the preemption clause separately from the saving clause, turning to the latter only as reassurance that it had correctly interpreted the statute by reading the preemption clause narrowly.¹⁶⁰ The Court also noted that the saving clause supported its position that it was reasonable to conclude that Congress intended to preempt positive law but not common law since the saving clause focused on preserving private damages remedies.¹⁶¹

FIFRA's saving clause is of a different sort. Recall that FIFRA's saving clause preserves the authority of states to make certain categories of substantive regulations: "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."¹⁶² The combination of this saving clause with the preemption clause means that states may regulate the sale and use of pesticides even if they cannot impose labeling requirements.

A state thus has a back-door method of disagreeing with federal labeling requirements: if a state believes the EPA has not required sufficiently stringent safety warnings on a particular pesticide, it can ban the pesticide altogether through positive law. Although the state might not always choose this drastic step, if it does so, nothing in FIFRA makes the validity of the ban hinge on the state's motive; so long as the ban is directed at the sale or use of the pesticide, it is within the saving clause.

158. 46 U.S.C. § 4311(g).

159. *Sprietsma*, 537 U.S. at 63.

160. *Id.*

161. *Id.* at 64.

162. 7 U.S.C. § 136v(a).

As a practical matter, if a large state believed more stringent labels were needed, it could use the threat of a complete ban to convince the manufacturer to submit a revised label for EPA approval. This scenario shows the incoherence of preempting common law claims by dissecting which claims are “really” about the label and which are independent of the label. A state is free under FIFRA to use positive law to ban the sale of a pesticide if it considers the warnings on the label inadequate. Why, then, should the same state be precluded from imposing tort liability under the same circumstances?

A saving clause should not be necessary to save common law claims from preemption when there is no evidence Congress intended to preempt anything beyond competing positive law enactments from the states. Congress knows that it acts against a backdrop of tort liability.¹⁶³ Courts should neither presume Congress meant to alter that backdrop nor require Congress to include a special saving clause in order to preserve common law claims. In FIFRA’s case, assuming the equivalence of positive law and common law can lead either to preempting common law claims or to preserving them, depending on whether one focuses on the preemption clause or the saving clause. FIFRA is thus an excellent example of why courts should not assume such equivalence and should adhere to the *Silkwood* presumption against preemption of common law claims.

D. *Implied Preemption: Lingering Distrust of State Courts and Juries*

In addition to returning to *Silkwood* and recognizing the independent status of the common law, *Sprietsma* solidified the emerging majority view on applying implied preemption doctrine even when a statute contains an express preemption clause. In *Cipollone* and *Medtronic*, Justice Stevens eschewed the implied preemption analysis, limiting himself to interpretation of Congress’s stated intent.¹⁶⁴ The contrary majority view, which Justice Stevens accepted and incorporated into his opinion in *Sprietsma*,¹⁶⁵ reflects an unfortunate distrust of juries and state court judges. It holds the potential for repeating past mistakes by authorizing ever-expanding preemption unmoored from congressional intent; however, Justice Stevens also suggested some limitations, again based on a distinction between positive law and common law.¹⁶⁶ While still engaging in the implied preemption analysis in

163. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812) (stating that common law doctrines “ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose”).

164. See *Cipollone*, 505 U.S. at 530-531; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 503 (1996).

165. See *Sprietsma*, 537 U.S. at 70.

166. *Id.* at 69-70.

order to ensure any cases of “impossibility” preemption are addressed, Justice Stevens would require clear evidence of congressional intent to preempt common law in addition to positive law under “field” or “obstacle” preemption.¹⁶⁷

The Court’s strongest advocate of the need for implied preemption is Justice Breyer. In *Medtronic*, he argued the Court should not exempt common law claims from preemption without leaving the possibility of preempting tort claims that directly conflicted with federal rules.¹⁶⁸ It is worth giving closer attention to the hypothetical hearing aid example he offered:

Imagine that, in respect to a particular hearing aid component, a federal MDA regulation requires a 2-inch wire, but a state agency regulation requires a 1-inch wire. If the federal law, embodied in the “2-inch” MDA regulation, preempts the state “1-inch” agency regulation, why would it not similarly pre-empt a state-law tort action that premises liability upon the defendant manufacturer’s failure to use a 1-inch wire (say, an award by a jury persuaded by expert testimony that use of a more than 1-inch wire is negligence)?¹⁶⁹

The litigation envisioned by this example requires, first, a plaintiff’s lawyer willing to allege that the defendant was negligent for failing to break federal law; second, a trial judge who will rule, on a motion for summary judgment, that a reasonable jury could find the defendant negligent for failing to break federal law; third, a jury that will so find; and fourth, appellate courts that will affirm such a verdict. Granting the existence of audacious plaintiffs’ lawyers and judges asleep at the wheel, it is still hard to imagine the convergence of all these requirements in a single case. Perhaps preemption doctrine needs a safety valve in case they do, but that small possibility warrants *only* a safety valve, not wholesale preemption of tort law.

Of the three kinds of implied preemption—impossibility preemption, obstacle preemption, and field preemption—Justice Breyer’s example is one of impossibility. As a formal matter, there is nothing wrong with applying impossibility preemption to common law claims, in recognition of the theoretical possibility of a rogue judge and jury punishing a defendant for obeying federal law. Justice Breyer, however, uses the example to justify applying the full range of implied preemption doctrine. But the example does not support applying field or obstacle preemption to common law claims in cases where an express preemption clause exists and does *not* clearly preempt those claims. If interpretation of the express preemption clause results in preservation of common law claims, how can Congress

167. *Id.*

168. *Medtronic*, 518 U.S. at 504.

169. *Id.*

have intended to occupy the field, and how can allowing common law claims create an obstacle to Congress's goals?

A problem inherent in field and obstacle preemption of common law claims is that they require courts to assess competing legislative goals. Many federal safety laws try to create uniform, national standards *and* increase safety and oversight of the industry. Congress's job is to balance these competing interests, but too often the Court has relied solely on the need for uniformity and thus preempted tort claims without any evidence of how Congress might have struck the balance.¹⁷⁰ Implied preemption analysis thus draws courts into the legislative task of fine-tuning remedies to achieve specific policy goals. While this may be inevitable where Congress has not provided guidance through an express preemption clause, it should be avoided in cases where Congress has already spoken.

Although the Court has now made clear that the existence of an express preemption clause does not preclude application of its implied preemption doctrine,¹⁷¹ *Sprietsma* hints at a limitation on this rule. Justice Stevens, of course, argued in *Cipollone* and *Medtronic* that implied preemption analysis had no place where Congress had already expressly stated its preemptive intent.¹⁷² Although in *Sprietsma* he acceded to Justice Breyer's arguments in favor of a safety valve, he adhered to his own views by treating the existence of the express preemption clause as creating at least a presumption against implied preemption:

The FBSA might be interpreted as expressly occupying the field with respect to state positive laws and regulations but its structure and framework do not convey a clear and manifest intent to go even further and implicitly pre-empt all state common law relating to boat manufacture. Rather, our conclusion that the Act's express preemption clause does not cover common-law claims suggests the opposite intent.¹⁷³

Thus Justice Stevens treated the "field" of providing remedies for unsafe boat manufacture as separate from the "field" of governing boat manufacture through positive law and required separate evidence of preemptive intent, just as he had when analyzing the express preemption clause. Congress would not be presumed to have occupied one field merely because it had occupied the other. That the rest of the Court, including Justice Breyer, joined in this analysis suggests that a compromise has been struck.

170. See Davis, *supra* note 3, at 1016-18 ("The perceived need for uniformity of standards is, and has always been, a critical factor to the Court in evaluating whether a state law stands as an obstacle to the accomplishment of federal objectives.").

171. *Sprietsma*, 537 U.S. at 65 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)).

172. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 470, 518 (1992); *Medtronic*, 518 U.S. at 499.

173. *Sprietsma*, 537 U.S. at 69.

This compromise avoids an absolute ban on implied preemption where an express preemption clause exists, thus alleviating Justice Breyer's concern that state tort law could impose a duty in direct conflict with federal law. At the same time, it avoids the approach suggested by *Geier*, which renders Congress's words and intent superfluous, passing by express preemption clauses in favor of the Court's own policy analysis under the rubric of implied preemption. As the Court explained in *Myrick*, a presumption against "field" or "obstacle" preemption beyond the scope of an express preemption clause is merely an application of "a familiar canon of statutory construction."¹⁷⁴

Sprietsma thus represents an important opportunity for cabinining the implied preemption analysis to a safety valve against direct, "impossible" conflicts, where it is impossible to obey both state and federal law. "Field" and "obstacle" preemption of common law claims would be rejected unless the Court found that Congress's "clear and manifest intent" was to preempt common law claims. If evidence of such intent is not discovered in the course of analyzing the express preemption clause, it is unlikely to emerge as a basis for implied preemption—at least not if the Court's analysis is limited to the text of the statute and its legislative history, the traditional sources of evidence of congressional intent.

E. *Post Script: Chevron, Skidmore, and Political Preemption*

In recent cases, however, the Supreme Court has increasingly looked beyond the text and legislative history to a new source of information regarding the proper preemptive scope of a statute: the opinions of the agency charged with enforcing the statute.¹⁷⁵ I have argued above that, under *Sprietsma*, if an express preemption clause is found to be narrow and not to apply to common law claims, then the Court should presume that common law claims are not preempted and invoke implied preemption only in cases of impossibility. Because the Court should already have examined Congress's intent in its analysis of the express preemption clause, this presumption against any significant role for implied preemption is unlikely to be rebutted by some new evidence of congressional intent that, for some reason, was not considered in interpreting the express preemption clause. The more likely source of new evidence is the administrative agency's statements to the Court, probably in the form of an amicus brief, that allowing tort claims to proceed would interfere with its ability to achieve Congress's goals.

174. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995).

175. *E.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883-86 (2000).

In *Silkwood*, the government made this very argument, appearing as an amicus to argue in favor of preemption.¹⁷⁶ The Court rejected the government's arguments in the same way it would dismiss the unpersuasive contentions of a litigant.¹⁷⁷ But more recently, in *Geier*, the views of the executive branch played a more prominent role in the Court's preemption analysis.¹⁷⁸ In the FIFRA context, the EPA's public stance against preemption helped drive the small groundswell of reconsideration that produced the anti-preemption decisions in Montana and Oregon.¹⁷⁹ The Montana court, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, held that it would defer to the EPA's views on preemption.¹⁸⁰ In *Bates*, the pesticide manufacturer will undoubtedly urge the Court to defer to EPA's new position in favor of preemption.

But should the Court really defer to the executive branch on what is, after all, a legal question under the Supremacy Clause? The answer is that it depends. The purpose of preemption analysis is to determine whether and to what extent the exercise of federal law-making authority has displaced state authority. The Supreme Court recently explained that the deference owed to the executive branch's views on preemption depends on how Congress has exercised its preemptive power: either directly or by delegating the preemption decision to the agency.¹⁸¹

True *Chevron* deference applies where the agency interprets a statutory provision that it is charged with enforcing. Such delegation of policy-making power is more common on substantive issues than on quasi-procedural issues like preemption. For example, the National Bank Act charged the federal Comptroller of the Currency with enforcing rules governing "interest" on credit cards.¹⁸² The Supreme Court deferred to the agency's view that "interest" included "late fees." Resolving this kind of ambiguity is a policy choice, which Congress left for the agency to

176. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984).

177. *See id.* (stating that "exposure to punitive damages does not frustrate any purpose of the federal remedial system").

178. *Geier*, 529 U.S. at 883-86.

179. The EPA's brief was also temporarily accepted in the Ninth Circuit. In *Nathan Kimmel, Inc. v. DowElanco*, 64 F.Supp. 2d 939 (C.D. Cal. 1999), the district court held that it was compelled by precedent to find preemption but urged the court of appeals to revisit the issue. The Ninth Circuit complied, reversing the district court's decision, 255 F.3d 1196 (9th Cir. 2000), but then reversed itself again on rehearing, 275 F.3d 1199 (9th Cir. 2002).

180. *Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042, 1048 (Mont. 2000) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

181. *U.S. v. Mead*, 533 U.S. 218, 227-28 (2001).

182. *Smiley v. Citibank (S. Dak.)*, N.A., 517 U.S. 735 (1996).

make.¹⁸³ Under *Chevron* deference, the agency's view is upheld so long as it is reasonable.¹⁸⁴ Delegation is less common on the preemption question, but *Sprietsma* is one example, since the Federal Boat Safety Act allowed the Secretary of Transportation to exempt state regulations from preemption.¹⁸⁵ In most instances, however, including FIFRA, there is no delegation of authority to the agency to make decisions about preemption.

Even outside the agency's delegated sphere of authority, it may still be helpful for the agency to supply a court with its views on questions of statutory interpretation, including preemption, that affect its field of operation. In such a case, however, the agency's views are entitled to less weight and constitute merely "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹⁸⁶ This kind of deference goes by the less famous moniker of "*Skidmore* deference," after *Skidmore v. Swift & Co.*¹⁸⁷ Under *Skidmore*, the agency's argument does not receive deference as under *Chevron*; instead, the agency's argument is accorded "respect according to its persuasiveness."¹⁸⁸

The difference between *Chevron* deference and *Skidmore* deference has important implications for the government's reversal of its position on FIFRA preemption. *Chevron* deference allows the agency to make a policy choice. Although the Court has put limits on an agency's ability to reverse that choice once made, the matter remains within the agency's discretion.¹⁸⁹ As long as the change is well-justified, it may still receive deference. With *Skidmore* deference, however, the agency's contribution is not its policy choice but its familiarity and insight into the practical realities of implementing the statute. This institutional knowledge does not change at the agency's discretion, nor does the persuasiveness of an argument. When the government reversed its position on FIFRA preemption, it was not because it discovered an error in its previous analysis of the statute or because the reality of implementing the statute changed. The government merely decided that it preferred a different legal analysis, one that embraced the equivalence of tort claims and positive law, rather than one driven by the text and history of the statute.¹⁹⁰ The conflict between the EPA's old brief

183. *Id.* at 742.

184. *Id.* at 744-45.

185. *See* *Sprietsma v. Mercury Marine*, 537 U.S. 51, 58-59 (2002).

186. *Mead*, 533 U.S. at 227.

187. 323 U.S. 134 (1944).

188. *Mead*, 533 U.S. at 227.

189. *See, e.g., Smiley*, 517 U.S. at 742.

190. The government's only explanation for its reversal was that it had "reexamined the position that it urged" in prior cases, which "no longer represents the view of the United States." Br. for the U.S. as Amicus Curiae at 9, *Am. Cyanamid Co. v. Gey*, Case No. 02-367 (U.S.).

and the new one is not a conflict over how to exercise the agency's discretion over policy-making but a disagreement over legal analysis. Courts do not need agency guidance on how to perform a legal analysis of a statute, and the arguments in both briefs, like the government's arguments in *Silkwood*, should be accorded only "respect according to [their] persuasiveness."¹⁹¹

When Congress regulates on matters of health and safety, its mandates set a floor. The extent to which federal requirements are also a ceiling (and thus additional state requirements are preempted) is a policy judgment based on the relative value of uniformity as compared to increased safety and the availability of compensation. Administrative agencies, however, can reasonably be expected to have an institutional bias in favor of uniformity. Where the preemption decision has not been delegated, the agency's claim that tort claims would interfere with uniformity goals is a complaint that should be directed to Congress, not the courts. The courts should not defer to the agency's policy judgment on this issue when Congress has not delegated the agency the authority to make that call.

CONCLUSION

As the author of the plurality opinions in *Cipollone* and *Medtronic*, Justice Stevens has had enormous influence on the jurisprudence of FIFRA preemption. Unfortunately, that influence has taken the form of lower courts simplistically applying one part of *Cipollone* rather than imitating the Justice's careful analysis of the statute at issue in each case. In *Sprietsma*, Justice Stevens marshaled the full Court behind an opinion correcting the lower courts' one-sided and expansive approach to preempting common law claims.

While the Court has previously issued and then quickly abandoned unanimous statements regarding preemption doctrine, *Sprietsma* is a step toward formulating a more coherent doctrine that will be more easily applied in the lower courts, rather than requiring the Supreme Court to address each statute one-by-one. This approach reinstates the presumption in *Silkwood* that Congress would not preempt a significant number of tort claims without giving clear indication of its intent to do so. The Court will continue to use implied preemption analysis as a safety valve against "impossible" conflicts between state and federal law. But the Court should apply the presumption against preemption and find "obstacle" or "field" preemption only in unusual circumstances and on the basis of clear evidence of congressional intent. Where Congress has provided an express preempt-

191. *Mead*, 533 U.S. at 227.

tion clause, that clause should be taken as the full expression of the extent to which Congress wishes to occupy the field, or the extent to which state law would pose an obstacle to congressional policy. This more modest preemption doctrine will steer the Court away from increasing reliance on federal regulatory agencies as the sole protectors of public safety, to the exclusion of state law protections, and back toward the traditional method of using the common law to promote safety and compensate victims of unsafe conduct.