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I. INTRODUCTION

Imagine your friend Samantha just bought a purebred Siberian Husky and plans to enter it into the next dog show in town. One day she turns on the television and watches the infomercial for a new flee repellant product. She is immediately convinced that she must have this miracle product. The next day the product arrives by mail and she carefully reads the warning label and applies the product as directed on her new dog. Samantha has been using this product for the last couple of weeks, and it fails to repel flees as promised in the infomercial. To make matters worse, she notices that her dog is shedding all of its fur. Thus, she quickly takes the dog to the veterinarian only to find that the miracle product contains harmful pesticides that caused the massive fur shedding. Samantha rereads the warning label and finds no indication of harmful side affects of using the product. How do you think she feels? Probably the same way that twenty-nine Texas peanut farmers felt when their crops were damaged by the application of Strongarm, Dow Agrosciences's newly marketed pesticide.[1] At that time, Strongarm had been registered with the Environmental Protection Agency ("EPA") as required by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[2] Dow knew, or should have known, that the new

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1. Bates v. Dow Agrosciences, LLC, 125 S. Ct. 1788, 1793 (2005).

2. *Id.*

pesticide should not be applied to soil with pH levels over 7.0 since it would stunt the growth of those crops.[3] Dow failed to mention this important piece of information on its label; thus, the farmers applied the pesticide on their soil which had pH levels of 7.2.[4] Soon after the application of Strongarm, they noticed that their peanut crops were severely damaged.[5] Bates, a Texas peanut farmer, informed Dow of their intent to sue, and in response Dow filed a declaratory judgment action.[6] After several years of litigation, the Supreme Court clarified the scope of federal preemption and ultimately ruled that FIFRA did not preempt the farmers' state-law claims for damages.[7]

This note explores the Supreme Court's ruling in *Bates v. Dow Agrosciences LLC*. Part II discusses the historical background and procedural history of the case.[8] Part III lays out the facts of the Bates case.[9] Part IV analyzes the majority opinion given by Justice Stevens and Justice Breyer's concurring opinion, and the opinion of Justice Thomas, concurring in part and dissenting in part.[10] Part V considers *Bates's* judicial, legislative and administrative impact.[11] Part VI concludes the discussion of the *Bates* decision.[12]

II. HISTORICAL BACKGROUND

A. Federal Regulation of Pesticides

Poisonous chemical substances known as pesticides play a major role in our everyday lives. They are used to maintain our environment, control weeds, minimize crop damages and improve agriculture.[13] Although pesticides may offer various beneficial

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3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 1804.
8. *See infra* notes 13-78 and accompanying text.
9. *See infra* notes 79-101 and accompanying text.
10. *See infra* notes 102-223 and accompanying text.
11. *See infra* notes 224-255 and accompanying text.
12. *See infra* note 256 and accompanying text.
13. Michael Shields, Note, *Nathan Kimmel, Inc. v. Dowelanco: Broadening the Preemptive Scope of FIFRA*, 30 ECOLOGY L.Q. 521, 524 (2003). In the United

effects on productivity, one must also consider the negative aspects of high risk of harm to humans and the environment.[14] The Insecticide Act of 1910 was the first federal legislation passed to make it illegal to manufacture and sell pesticides that were mislabeled and misbranded.[15] In 1947 Congress repealed the 1910 Insecticide Act and replaced it with FIFRA to provide federal regulation over pesticide licensing and labeling.[16]

FIFRA requires that prior to their sale in local or foreign commerce, all pesticides must be registered with the Secretary of Agriculture.[17] Given the fact that pesticides are inherently dangerous substances, FIFRA was aimed at improving the warning labels attached to the pesticide products.[18] The 1947 Act set forth the basic

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States alone, there are as many as 890 active ingredients registered with the EPA. *Id.* (citing U.S. Environmental Protection Agency (U.S. EPA), Pesticides Industry Sales and Usage 1996 and 1997 Market Estimates 2, at http://www.epa.gov/opprd001/factsheets/index.htm (last visited Jan. 16, 2006). The United States consumes one quarter of the total world consumption of these poisonous substances. *Id.*; *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 990 (1984). Pesticides are used as a "plant regulator, defoliant, or desiccant," or for "preventing, destroying, repelling, or mitigating" plant or animal pests. 7 U.S.C. § 136(u) (2000). Pesticides refer to insecticides as well as herbicides, fungicides and other substances used to destroy and mitigate pests. U.S. E.P.A, What is a Pesticide?, http://www.epa.gov/pesticides/about/index.htm (last visited Jan. 16, 2006).

14. *Ruckelshaus*, 467 U.S. at 990.

15. *Id.* at 990 n.2.

16. *Id.* at 991; *see also* 7 U.S.C. §§ 136-136y (2000 & Supp. 2005); *see, e.g.*, U.S. EPA, FIFRA Amendments of 1988, *at* http://www.epa.gov/35thanniversary/topics/fifra/01.htm (last visited January 16, 2006). FIFRA is a "regulatory statute governing the marketing and use of pesticides, fungicides, rodenticides, and other designated classes of chemicals." No Spray Coalition, Inc. v. City of New York, 351 F.3d 602, 604 (2d Cir. 2003).

17. *Ruckelshaus*, 467 U.S. at 991; *see also* FIFRA Amendments of 1988, *supra* note 16.

18. Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788, 1802 n.25 (2005). Pesticides cause various health problems such as birth defects, damages to nerves and may also cause cancer. Shields, *supra* note 13, at 524; *see also* U.S. EPA, Pesticides and Food: What You and Your Family Need to Know, http://www.epa.gov/pesticides/food/risks.htm (last visited January 16, 2006).

minimal standards for proper labeling on registered pesticides.[19] The states' original power to regulate the distribution, sale, and use of pesticides was somewhat usurped by this new federal legislation.[20]

Due to growing environmental and safety concerns, Congress adopted several extensive amendments that greatly strengthened FIFRA in 1972, thereby transforming it from a "labeling law into a comprehensive regulatory statute."[21] Section 136v was added to FIFRA, which authorized the federal government to regulate of the uses, sale, labeling, licensing, manufacturing and distribution of pesticides in both intrastate and interstate commerce.[22]

Under the newly amended FIFRA, the Department of Agriculture's responsibilities were delegated to the Environmental Protection Agency to process and approve or deny registration of pesticides.[23] The EPA was given the authority to review, cancel or

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19. *Ruckelshaus*, 467 U.S. at 991. The labels must include "directions for use; warnings to prevent harm to people, animals, and plants; and claims made about the efficacy of the product." *Id.*

20. *Id.* at 990 n.2. Many states regulated pesticides before these federal laws were enacted, and they continue to do so in the face of these new laws. *Id.* at 990. Pesticide is a product designed to kill insects. H. Bishop Dansby, *Bates* v. Dow Argrosciences: U.S. Supreme Court Restores Sanity in Products Liability Law, 25 PESTICIDES & YOU 9 (2005), *available at* http://www.beyondpesticides.org/dow/media/*Bates*-Dansby.pdf.

21. *Ruckelshaus*, 467 U.S. at 991; *see also* Nathan Kimmel, Inc. v. DowElanco, 275 F.3d 1199, 1204 (9th Cir. 2002).

22. *Ruckelshaus*, 467 U.S. at 991. The labeling provision of section 136v preempts any state common law duty to warn and preserves federal regulation of labeling and packaging of pesticides. Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc., 981 F.2d 1177, 1179 (10th Cir. 1993).

23. *Ruckelshaus*, 467 U.S. at 991. The EPA is a federal agency that embodies the resources, expertise and experience necessary to regulate labeling, and ensure that the proper warnings and directions for use are clearly communicated to the consumer. Lawrence S. Ebner, *FIFRA Preemption After Bates v. Dow Agrosciences*, Toxic Law Reporter, June 9, 2005, *available at* http://www.mckennacuneo.com/news-articles-display-1492.html. The EPA must first determine if a pesticide is safe, effective and compliant with FIFRA's labeling standards before registering the product. *Ruckelshaus*, 467 U.S. at 991. The EPA must register the pesticide if:

> (a) its composition is such as to warrant the proposed claims for it; (b) its labeling and other material required to be submitted comply with the requirements of this subchapter; (c) it will perform its intended function without unreasonable adverse

suspend registration if the pesticide posed a safety or environmental hazard or if it failed to conform to any of the requirements under FIFRA.[24] The Act requires that new pesticides be registered and existing pesticides be re-registered with the EPA before they are distributed in the United States.[25] In deciding whether to register a certain pesticide, the EPA must first establish "whether the pesticide would cause unreasonable adverse effects on the environment" by determining if the pesticide would produce an "unreasonable risk to man" or "human dietary risk."[26] The statute further allows the EPA

> effects on the environment; and (d) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5) (2000 & Supp. 2005).

Once the EPA approves the label for the registered pesticide, the label is considered a binding regulation on the use of that specific pesticide. Shields, *supra* note 13, at 524. The 1972 Act established data-sharing provisions to streamline the pesticide registration process and increase competition. Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 571 (1985). Congress recognized a "limited proprietary interest in data submitted to support pesticide registrations would provide an added incentive beyond statutory patent protection for research and development of new pesticides." *Id.* at 572; *see also* H.R. Rep. No. 95-663, at 17-18 (1977).

24. *Ruckelshaus*, 467 U.S. at 991; *see also* 7 U.S.C. § 136a. If the EPA determines that the adverse effects of the pesticide cannot be avoided, then they will deny the registration unless the EPA decides that the benefits of registering the product would greatly outweigh the risks of doing so. This balance of cost and benefit is an ongoing duty in evaluating the effectiveness of a pesticide product. *See id.*

25. Ronald Fein, Note, *Should the EPA Regulate Under TSCA and FIFRA to Protect Foreign Environments From Chemicals Used in the United States?*, 55 STAN. L. REV. 2153, 2166 (2003); *see also* 7 U.S.C. § 136a(a); FIFRA Amendments of 1988, *supra* note 16. The EPA conditionally registered the pesticides but does not approve the product or its use. Perry A. Craft & Michael G. Sheppard, Supreme Court Review: *What the U.S. Supreme Court's 2004-2005 Decisions Mean to Tennessee Lawyers*, 41 TENN. B.J. 16, 19 (2005).

26. Croplife Am. v. EPA, 329 F.3d 876, 879 (2003) (quoting 7 U.S.C. § 136a(c)(5)(C)). The EPA must also analyze the social and economic cost and benefits of the use of the pesticide when determining whether the pesticide should be registered. Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1539 (D.C. Cir. 1984); *see also* FIFRA Amendments of 1988, *supra* note 16.

Administrator to enter into agreements with the states to enforce FIFRA rules and regulations.[27]

Under the statute's labeling requirements, a label will be deemed misbranded and, thus, will not be registered, if it contains a false or misleading statement regarding the effectiveness of the product or omits necessary warnings mandated by FIFRA.[28] On the other hand, if the EPA decides to register a product, the new statute provides that they must first give notice to the public of their decision and the reasons for doing so.[29] The amended act thereby created a registration procedure that includes public notice and participation.[30]

Over time, the EPA struggled to keep up with its regulatory duties due to inadequate resources,[31] and accordingly, in 1978, Congress streamlined its workload by allowing the EPA to approve pesticide labels without confirming the effectiveness of the product.[32]

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27. Wisconsin Publ. Intervenor v. Mortier, 501 U.S. 597, 601 (1991). Under FIFRA, manufacturers are required to produce records for inspection at the request of any officer or employee of the EPA. *Id.*

28. *Id.*; *see also* 7 U.S.C. §§ 136(q)(1)(A), 136(q)(1)(F) (2000); 40 C.F.R. § 156.10(a)(5)(ii) (2003). FIFRA prohibits pesticide manufacturers from mislabeling or omitting warnings from the product labels. 7 U.S.C. §§ 136(q)(1)(A), 136(q)(1)(F). The EPA confirmed that a pesticide label is the user's direction for using pesticides safely and effectively. 40 C.F.R. § 156.10(a)(5)(ii) It contains important information about where to use, or not use, the product, health and safety information that should be read and understood before using a pesticide product, and how to dispose of that product. 70 Fed. Reg. 12,276, 12,281 (Mar. 11, 2005).

29. Merrell v. Thomas, 807 F.2d 776, 778 (9th Cir. 1986).

30. *Id.* at 779.

31. FIFRA Amendments of 1988, *supra* note 16.

32. Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788, 1796 (2005). Basically the EPA does not register pesticide labels based on how well a product works or whether the product might potentially harm crops. Brief for the United States as Amicus Curiae Supporting Respondents, Bates v. Dow Agrosciences LLC., 125 S. Ct. 1788 (Nov. 2004) (No. 03-388), *available at* http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2003-0388.mer.ami.html. Due to the overwhelming number of cases regarding trade secret protection and data compensation, Congress decided to relieve the EPA from resolving these disputes which were tying up the registration process. Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 573 (1985). The amendments created conditional registration procedures that basically waived certain data requirements when registering pesticides. *Merrell*, 807 F.2d at 779. Congress provided: In considering an application for the registration of a pesticide, the Administrator [of EPA] may waive data requirements pertaining to efficacy, in which event the

By allowing the EPA to waive this duty, pesticide manufacturers became directly liable for the damages caused by their products.[33] FIFRA also imposes the additional duty on manufacturers to report to the EPA any harmful effects which occur during or after the registration process of the pesticide product.[34] These new standards encourage victims harmed by pesticides to bring damage actions which, in turn, provided incentives to manufacturers to improve their products by utilizing the utmost care in labeling, packaging and distributing pesticides.[35]

Congress defines labeling as encompassing all labels, written, printed or graphic material which is attached to the product.[36] By strictly construing the statute, Congress wanted to ensure that FIFRA did not provide pesticide manufacturer with full immunity from tort liability.[37] The dangers of over-enforcement of FIFRA's regulations would impose unnecessary financial sanctions on manufacturers, while under-enforcement would create higher safety and environmental risks for the community at large.[38] Therefore, it was necessary for Congress to find a balance between potential liabilities

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Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy. 7 U.S.C. § 136a(c)(5).

33. *Bates*, 125 S. Ct. at 1796.

34. 40 C.F.R. §§ 158.640(b)(1), 158.540 (2003). If the manufacturer gains information or proof of harmful effects or risk to human health, crops or the environment, they must submit this evidence to the EPA if notice of this harm is not already provided on the labels. 40 C.F.R. 159.184(a)(1).

35. Wis. Publ. Intervenor v. Mortier, 501 U.S. 597, 613 (1991) (holding that FIFRA does not automatically preempt states and localities from regulating pesticide use, but that state laws which regulate labels fall under federal preemption); *see also* Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1541-42 (D.C. Cir. 1984).

36. 7 U.S.C. § 136v(b) (2000). The required warnings are "specified according to the degree to which ingestion or contact with an herbicide is toxic, and these warnings must include precautionary statements about risks posed to humans." King v. E.I. du Pont de Nemours & Co., 806 F. Supp. 1030, 1032 (D. Me. 1992) (citing 40 C.F.R. § 156.10(h)(2)(i)(A)), *aff'd*, 996 F.2d 1346 (1st Cir. 1993). FIFRA's definition of labeling does not include every type of written material attached to the pesticide at any time. Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby, 958 F.2d 941, 946 (9th Cir. 1992).

37. *Bates*, 125 S. Ct. at 1802.

38. *Id.*

faced by pesticide manufacturers and the potential harm caused by pesticides that are misbranded.

B. Federal Preemption of State Common Law Claims

The number of lawsuits against pesticide manufacturers rose sharply in the 1970s, during which time many manufacturers unsuccessfully argued that the common law tort claims brought against them were preempted by FIFRA.[39] The preemption doctrine originates from the Supremacy Clause of the United States Constitution, which provides that any state law which conflicts with a federal law is preempted by the federal law and is without effect.[40] A state law may conflict with a federal law when it interferes with the purposes or the methods by which the federal law was designed to achieve its goals.[41] In determining whether a conflict exists, courts consider the relationship between the two conflicting laws, as they are "interpreted and applied, not merely as they are written."[42] However, courts may not automatically infer that state laws are preempted, especially in areas where states have traditionally regulated, such as tort law.[43]

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39. *Ferebee*, 736 F.2d at 1529. Many courts found against preemption following the decision in *Ferebee*. 4-24 Frumer & Friedman, PRODUCTS LIABILITY § 24.05(3)(b) (2005).

40. U.S. CONST. art. VI, § 1, cl. 2; *see also* Gibbons v. Ogden, 22 U.S. 1 (1824).

41. Chem. Producers & Distribs. Ass'n. v. Helliker, 319 F. Supp. 2d 1116, 1126 (C.D. Cal. 2004) (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (holding that although the Clean Water Act preempted the nuisance action under Vermont common law, the Act did not preempt the suit in Vermont District Court under New York law, where the New York water pollution caused the Vermont injury).

42. *Id.* (citing Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977)). In determining Congress's intent, the courts must analyze the expressed statutory language and the purpose and structure of the statute. FMC Corp. v. Holliday, 498 U.S. 52, 56 (1990).

43. Higgins v. Monsanto Co., 862 F. Supp. 751, 755 (N.D.N.Y. 1994) (citing Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 144 (1963)). The Supreme Court is reluctant to find preemption of a conflicting state law where Congress is silent on the matter. *Id.* at 756. Due to a presumption against preemption, the court found that although FIFRA extended to claims based on inadequate labeling, preemption does not cover claims for negligent testing. *Id.*

Federal preemption has the effect of delegating the responsibility of ensuring product safety from the courts to the federal administrative bodies.[44] In analyzing whether a state law is preempted, the courts must presume that a Federal Act cannot supersede the state's historic police powers unless there is a clear and manifest Congressional intent to do so.[45] This presumption against preemption of a conflicting state law may be rebutted and overcome if there is a congressional intent that there be a federal preemption of the state law.[46] Congress's intent to preempt a law "may be either express or implied, and [preemption] is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[47] If there is an express preemption clause in the federal statute, then the conflicting state law will be superseded by the federal law.[48] However, if there is no express preemption clause, courts look for implied preemption where "it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to

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44. Dansby, *supra* note 20. Federal preemptions allow federal law and regulation to overcome state law. *Id.* The federal government has power to regulate the content of labels on pesticides, thus the federal statutes which confer this federal authority must be analyzed to determine whether a statute preempts a state common law claim. 1-3 Matthew Bender & Co., Inc., CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 3.23 (2005).

45. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). In many cases the police powers at issue are health and safety matters, which have historically been covered by state regulations. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 715-716 (1985).

46. *Rice*, 331 U.S. at 230. The court must first determine the congressional intent behind a federal statute before they can consider whether the statute preempts the conflicting state law. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

47. *FMC Corp.*, 498 U.S. at 56-57 (1990). If there is an express preemption clause in a statute, the court looks to *see* if the conflicting state law is covered by this preemption clause. *Cipollone*, 505 U.S. at 516.

48. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 598 (1991). Preemption of conflicting state law encompasses both states which actively regulate sale and use of registered pesticides and states which do not actively regulate those products. Taylor AG Indus. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995).

the accomplishment and execution of the full purposes and objectives of Congress".[49]

In *Wisconsin Public Intervenor v. Mortier*, the Court held that the small town's ordinance was not preempted by FIFRA because it did not affect the labeling of pesticides.[50] Rather, the ordinance simply mandated that farmers retain a permit before applying pesticides through aerial application.[51] Although the town's ordinance imposed requirements which were not mandated by FIFRA or the EPA, the Court noted that FIFRA was not a comprehensive statute by which the federal government regulated to the exclusion of the states.[52] Rather, FIFRA allows the states to regulate pesticide use in their territory as long as their rules are not contradictory to the regulations under FIFRA.[53]

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49. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995). "[I]n the absence of a clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect." Medtronic, Inc. v. Lohr, 518 U.S. 470, 505 (1996) (Breyer, J., concurring) (citing Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 721 (1985)); *see also Rice*, 331 U.S. at 218. Moreover, preemption may be implied if the "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone*, 505 U.S. at 516.

50. *Mortier*, 501 U.S. at 597. The Court determined that FIFRA does not expressly or impliedly preempt local government use permit regulations because § 136v does not intend to preempt all aspects of pesticide regulations. *Id.* at 615. *Mortier* provided that FIFRA gives the States ample authority to supplement federal efforts. *Id.* at 613. Furthermore, there is no conflict between FIFRA and the local ordinance, and compliance with both of these laws does not pose a physical impossibility. *Id.* at 599.

51. *Id.* at 597. Local use permit regulations are not covered under FIFRA's preemption clause. *Id.* at 615.

52. *Id.* at 597. Congress did not intend to regulate the pesticide industry, rather Congress recognized the States continuing role in monitoring pesticide use and sale. Wright v. Dow Chem. U.S.A., 845 F. Supp. 503, 510 (M.D. Tenn. 1993).

53. Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788, 1797 (2005). Section 136v is silent as to whether local government may regulate pesticides, and this alone is not sufficient to establish a Congressional intent to preempt local authority. *Mortier*, 501 U.S. at 607. Local governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them." *Id.*; *see also* Sailors v. Bd. of Educ., 387 U.S. 105, 108 (1967). Furthermore, section 136t(b) expressly states that the Administrator "shall cooperate with . . . any appropriate agency of any State or any political subdivision

In 1992, the controversy of whether state law claims for damages were deemed to be "requirements" within FIFRA's preemption clause was settled in the Cipollone case.[54] This was the first major case to deal with the preemption issue.[55] The Supreme Court held that the federal statute that required Surgeon General warnings to be applied to all cigarette packages encompassed common law duties which expressly preempted certain tort claims brought against the cigarette manufacturers.[56] However, courts must analyze the particular language of a statute's preemption clause against each common law claim asserted in order to determine if the claim is in fact preempted.[57] The Court also found that the express preemption clause provided a "reliable indicium" of Congress's intent to preempt

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thereof, in carrying out the provisions of this [Act] and in securing uniformity of regulations." *Mortier*, 501 U.S. at 615. Thus, FIFRA encourages cooperation between federal and state in regulating pesticides. *Id.* at 601.

54. Shields, *supra* note 13, at 527. According to *Cipollone*, the FIFRA term "requirements" applies to both positive enactments and common law. MacDonald v. Monsanto Co., 27 F.3d 1021, 1024 (5th Cir. 1994) (holding that FIFRA preemption does not cover non-labeling state common law claims). However, FIFRA only preempts state laws that impose different or additional requirements, not those that are equivalent to the requirements under FIFRA. *Id.* at 1025.

55. *See generally Cipollone*, 505 U.S. 504 (holding that "the term "requirement or prohibition" in the Public Health Cigarette Smoking Act of 1969 included common-law duties, and therefore preempted certain tort claims against cigarette companies"). The Court also held that there was "no inherent conflict between the federal preemption of the state warning requirement and the continued vitality of state common law damages action" rather the "main purpose of the 1965 Act was to avoid consumer confusion by ensuring uniform labeling, a purpose which could coexist along with state tort actions." King v. E.I. Du Pont de Nemours & Co., 806 F. Supp. 1030, 1035 (D. Me. 1992), *aff'd*, 996 F.2d 1346 (1st Cir. 1993). The scope of a preemption statute is determined on a "fair understanding of congressional purpose." *Cipollone*, 505 U.S. at 516. Additionally, *Cipollone* explains that "damage actions can be used to enforce state regulations as effectively as other forms of preventative relief and thus damage actions must be preempted where positive enactments are preempted." Waterview Mgmt. Co. v. FDIC, 105 F.3d 696, 699 (D.C. Cir. 1997).

56. *Cipollone*, 505 US at 505. The Court ruled that a federal act requirement or prohibition regulating cigarette labels encompassed common law duties and thus preempted state tort law. *Id.*; *See also* Craft, *supra* note 25, at 19; Frumer & Friedman, PRODUCTS LIABILITY § 24.05c (2005); *Mortier*, 501 U.S. at 597.

57. *Cipollone*, 505 U.S. at 505.

state law claims[58] and that claims for damage awards were deemed to be requirements under the preemption clause.[59] However, courts still debate over the issue of whether Congress intended FIFRA's preemption clause to cover state law damage claims.[60]

Although the *Cipollone* case did not directly involve FIFRA, the Public Health Cigarette Smoking Act of 1969 incorporated similar terminology to that under FIFRA concerning federal regulation of warning labels.[61] The Court's decision in *Cipollone* swept broadly and covered many tort claims which resulted in a big victory for pesticide manufacturers.

Similar to the 1969 Public Health Cigarette Smoking Act, FIFRA also contains an express preemption clause, 7 U.S.C. 136v, which 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.[62]
>
> (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.[63]

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58. *Id.* at 517 (holding that Congress's enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted).

59. *Id.* at 521.

60. *See, e.g.,* Burke v. Dow Chem. Co., 797 F. Supp. 1128 (E.D.N.Y. 1992).

61. Dansby, *supra* note 20. "Not even the most dedicated hair splitter could distinguish FIFRA's preemption clause from that of the Cigarette Act." Jillson v. Vt. Log Bldgs., 857 F. Supp. 985, 990 (D. Mass. 1994) (citing Shaw v. Dow Brands, Inc., 994 F.2d 364, 371 (7th Cir. 1993)).

62. 7 U.S.C. § 136v(a) (2000). This section directly states and confirms Congress's intent to recognize the State's power to regulate pesticides which may affect public health and safety. MacDonald v. Monsanto Co., 27 F.3d 1021, 1023 (5th Cir. 1994).

63. Section 136v(b). This savings clause delegates limited authority to the States to regulate the "registration, sale, sue, labeling and packaging of pesticides sold within their borders." Chem. Producers & Distribs. Assn v. Helliker, 319 F. Supp. 2d 1116, 1119 (C.D. Cal. 2004).

To preserve uniformity of laws regarding labeling of pesticides, FIFRA clearly identifies that the state regulation or requirement must fall under a labeling or packaging requirement that is "in addition to or different from" the requirements under FIFRA in order for it to be preempted by the federal act.[64] Accordingly, State-law labeling requirements that are consistent or equivalent to FIFRA's mislabeling provisions are not preempted.[65]

In essence, FIFRA authorizes states to impose stricter regulations on the use of registered pesticide than those imposed by the EPA itself, as long as those regulations do not allow a sale or use which FIFRA forbids.[66] States may review pesticide warning labels to make sure they comply with FIFRA or else they may impose state sanctions for violating the federal law.[67] States may also impose greater registration requirements on federally registered pesticides when facing imminent pest problems within the state, for which there is no readily available pesticide product to combat such problems.[68] However, state registration would not be allowed if the EPA has previously vetoed, denied or cancelled such registration.[69] Thus, this

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64. § 136v(b); *see MacDonald*, 27 F.3d at 1024. Courts have recognized that the term "requirements" under section 136v(b) encompasses both positive state enactments as well as common law claims. Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788, 1798 (2005). States review pesticide labels and packaging to ensure that it complies with both federal and state requirements. *Id.* at 1797.

65. § 136v(b). A State regulation on pesticide use, sale and distribution which do not affect a labeling or packing requirement would not be preempted. *Bates*, 125 S. Ct. at 1798. Pesticide manufacturers who violate FIFRA may not only face penalties for violating the federal law, but may also face additional State sanctions. Id at 1797.

66. Roberson v. E.I. DuPont de Nemours & Co., 863 F. Supp. 929, 931 (W.D. Ark. 1994). *See* 7 U.S.C. § 136v(b). Thus, FIFRA empowered states to regulate alongside with federal law without express authorization.

67. Craft, *supra* note 25, at 19. State sanctions for violating FIFRA are consistent with section 136v(b) since it prohibits additional requirements not additional sanctions or remedies. *Id.* Therefore, FIFRA does not cover state tort law. *Id.*

68. § 136v(c); *see* 40 C.F.R. § 162.151(i).

69. 7 U.S.C. § 136v(c)(1). The EPA may veto state registration that does not have a similar composition or a similar use pattern as that of a federally registered pesticide product, or if it possess an imminent hazard or is inconsistent with the Federal Food, Drug and Cosmetic Act. 7 U.S.C § 136v(c)(2); *see* 40 C.F.R. §

Act balances state regulatory power with federal uniform labeling and packaging requirements. Furthermore, since the EPA acts as the primary administrative agency which interprets FIFRA, it would be in a better position than the courts to determine whether "state liability rules mirror or distort federal requirements."[70]

Following the *Cipollone* decision, federal and state courts alike have uniformly held that FIFRA expressly preempts failure to warn and other labeling related common law claims.[71] Overall, there have been at least one hundred documented claims filed against pesticide manufactures within the last fifteen years which have been dismissed as a result of federal preemption.[72]

However, there still exist a few greatly criticized damage claims which have survived federal preemption.[73] Under those claims, farmers and other pesticide victims are able to recover under state remedies since federal law does not provide a remedy when manufactures violate the statute.[74] Thus, pesticide manufacturers are punished twice since they may face both federal and state sanctions if they are found to be guilty of misbranding their products.[75]

162.154; 21 U.S.C. § 3489(c)(3); 7 U.S.C. § 136v(c)(3). Whether or not a pesticide is essential is not a valid basis for the EPA to veto such product. 7 U.S.C § 136v(c)(2).

70. *Bates*, 125 S. Ct. at 1804.

71. Frumer, *supra* note 56. *See also* Craft, *supra* note 25, at 19. Congress intended that "requirement" in § 136v(b) to refer to legislative or administrative enactments of positive law, not state law damages actions. Frumer, *supra* note 56. Prior to the *Cipollone* case, preemption defenses were rare, however post-*Cipollone* there was a multitude of lawsuits. David C. Vladeck, Symposium: Federal Preemption of State Tort Law: The Problem of Medical Drugs and Devices: Preemption and Regulatory Failure, 33 PEPP. L. REV. 95, 106 (2005).

72. Dansby, *supra* note 20. In light of the *Cipollone* decision, many courts had applied section 136v(b) preemption provision to preempt all failure to warn and other labeling related damages claims. *Id.*

73. *See* generally *Ferebee*, 736 F.2d 1529; Am. Cyanamid Co. v. Geye, 79 S.W.3d 21 (Tex. 2002) (holding that FIFRA did not preempt certain state law claims regarding crop damage because the EPA no longer evaluates product efficacy).

74. *Bates*, 125 S. Ct. at 1801. Although FIFRA limits States' power in defining labeling and packaging requirements, they may freely impose different or additional remedies for farmer and other pesticide victims. *Id.*

75. *Id.*

Furthermore, up until that time, courts still had not addressed the issue of whether non-label based claims were preempted by FIFRA.[76] Federal and state courts used the "effects-based" test to determine if a non-warning claim was preempted.[77] This test provided that a claim was preempted if "one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label."[78] This was an issue left to the Supreme Court to discuss in the *Bates* case.

III. FACTS

In *Bates*, the main question before the Court was whether FIFRA section 136 preempted the farmer's state law claims for damages.[79] Petitioners, twenty-nine Texas peanut farmers ("Bates") claimed that Strongarm, a new pesticide produced by Dow, severely damaged their crops during the growing season in the year 2000.[80] Pursuant to FIFRA, the EPA registered Strongarm two months before the product was place on the market.[81] The farmers alleged that at that time, Dow knew or should have known that its new product would stunt the growth of peanuts if it was used in soils that contained pH levels over 7.0.[82] However, Dow failed to warn its customers of this fact and instead the Strongarm label recommended use of this pesticide wherever peanuts were grown.[83] Thus, the farmers unknowingly applied Strongarm to their soils which contained pH levels of 7.2 or

76. Frumer & Friedman, PRODUCTS LIABILITY § 24.05d (2005).

77. *Id.* § 24.05e.

78. *Id.* § 24.05d.

79. *Bates*, 125 S. Ct. at 1793.

80. *Id.*

81. *Id.* Thus, Dow was legally allowed to sell this new pesticide anywhere in the United States. *Id.*

82. *Id.* "pH" is the acronym for potential hydrogen which represents the acidity of the soil. *Id.*

83. *Id.* Dow verbally confirmed this representation when selling the product to the farmers. *Id.*

higher.[84] The use of Strongarm subsequently led to the damage of their peanut crops.[85]

The farmers complained to Dow, and Dow later added an EPA-approved supplemental label warning against the use of Strongarm on soils with pH levels over 7.2.[86] After many unsuccessful negotiations, the farmers gave notice of their intent to bring a lawsuit.[87] Dow filed a declaratory judgment action against Bates in anticipation that the farmers would sue them in state court.[88] Dow claimed that the farmers' claims were preempted by FIFRA.[89]

In response, Bates counterclaimed for breach of express warranty, fraud, violation of the Texas Deceptive Trade Practices Act ("DTPA"), strict liability for defective design and defective manufacture, and negligent testing and negligent failure to warn.[90] The District Court granted Dow's motion for summary judgment on the grounds that Bates's claims either failed on state law grounds or

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84. *Id.*

85. *Id.* It is typical for farms to have soils with pH levels of 7.2 or greater in western Texas. *Id.* The farmers' losses in crops came to about a couple million of dollars, according to an attorney who represented the farmers. Eric P. Martin & David Keating, *Bates, Dennis, et al. v. Dow Agrosciences LLC*, July 12, 2005, http://docket.medill.northwestern.edu/archives/000845.php. Dow argued that other chemicals not attributed to Strongarm and the weather conditions may have affected the farmers' crops. *Id.*

86. *Bates*, 125 S. Ct. at 1793. These new labels were directed to farmers who had experienced severe crop damage from the application of Strongarm. *Id.*

87. *Id.* As required by the Texas Deceptive Trade Practices-Consumer Protection Act, plaintiff must give defendants sixty days prior notice before bringing a lawsuit. Tex. Bus. & Com. Code Ann. § 17.505(a) (West 2002).

88. *Bates*, 125 S. Ct. at 1793.

89. *Id.* Dow alleged that:

> (1) all of petitioners' state law claims were preempted by FIFRA; (2) petitioners' remedies were limited to the purchase p*Rice* of Strongarm because of a paragraph titled "Limitation of Remedies" on the Strongarm label; and (3) petitioners' warranty claims were barred by a "Warranty Disclaimer" paragraph on the label.

Brief for the United States, *supra* note 32 at 6.

90. *Bates*, 125 S. Ct. at 1793.

else they were barred by FIFRA's section 136v preemption provision.[91]

Following the decision in the district court, the farmers appealed to the Court of Appeals for the Fifth Circuit.[92] They argued that their claims regarding Texas labeling laws, which regulated pesticide effectiveness, were not preempted since the EPA chooses not to review the effectiveness of the products.[93] The Fifth Circuit rejected the farmers' product effectiveness argument because under section 136v(b), the fact that the EPA does not require manufacturers to produce efficacy information to register their product is not relevant to the preemption issue.[94] Additionally, the court held that section 136v(b) expressly preempted any state law claim where a victory against Dow would induce them to change its product label which would basically have the same effect as a state requirement for a label change.[95] The court also found that since Bates's fraud, warranty, and DTPA claims were based on Dow's oral statements, which were in essence the same as those on Strongarm's label, any success on those claims would induce Dow to change its label to avoid future liability.[96] Moreover, the court determined that the farmers' strict liability claims for defective design were really a failure to warn of the dangers and thus all their claims were preempted under FIFRA.[97] Thus, the Fifth Circuit affirmed the District Court's decision.[98] However, that decision conflicted with the EPA's view.[99] In acknowledging the confusion among the

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91. *Id.* The District Court rejected one claim on state law grounds and dismissed the remaining claims under FIFRA's section 136v(b) provision. *Id.*

92. *Id.*

93. Martin, *supra* note 85.

94. 7 U.S.C. § 136v(b) (2000); *see also* Brief for the United States, *supra* note 32.

95. Dow Agrosciences LLC v. Bates, 332 F.3d 323, 331 (5th Cir. 2003).

96. *Bates*, 125 S. Ct. at 1794.

97. Dow, 332 F.3d at 331-32.

98. *Bates*, 125 S. Ct. at 1793; *see* Dow, 332 F.3d at 331-32; *see generally Cipollone*, 505 U.S. at 515.

99. *Bates*, 125 S. Ct. at 1794. In 2000, the government filed an *amicus curiae* brief in the California Supreme Court in which they unsuccessfully argued that section 136v(b) does not preempt state tort actions. *See* Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366 (Cal. 2000). The government has since reversed it's position on the matter. *Bates*, 125 S. Ct. at 1794 n.7.

federal and state courts as to how to rule on the FIFRA preemption issue regarding non-labeling claims, the United States Supreme Court granted certiorari and remanded the Fifth Circuit's decision.[100] The Court held that FIFRA did not preempt the farmers' claims for defective design, defective manufacture, negligent testing, breach of express warranty and violation of the DTPA.[101]

IV. ANALYSIS OF OPINION

A. Majority

Justice John Paul Stevens delivered the 7-2 majority opinion for the Court.[102] He began his discussion with a detailed summary of the facts leading up to Bates's appeal to the Fifth Circuit Court of Appeals.[103] He then addressed the history behind pesticide regulation.[104] He explained that the States regulated the distribution of pesticides long before the Federal government enacted the Insecticide Act of 1910.[105] The 1910 Act was subsequently repealed and replaced with FIFRA in 1947 which mainly focused on regulating, licensing, and labeling of poisonous substances.[106] In 1970, the EPA took over this registration process.[107] Two years later, due to increasing environmental and safety concerns, Congress amended the statute by adding section 136v and thereby transformed

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100. *Bates*, 125 S. Ct. at 1793; *see also* Gougler v. Sirius Products, Inc., 370 F. Supp. 2d 1185, 1196 (S.D. Ala. 2005). The Solicitor General filed an *amicus curiae* brief on behalf of the United States in support of preemption of failure to warn and other labeling related claims. Brief for the United States, *supra* note 32.

101. *Bates*, 125 S. Ct. at 1804.

102. *Id.* at 1792. Justice Stevens was joined in his opinion by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, and Ginsburg. *Id.*

103. *Id.* at 1792-94. *See supra* notes 76-98 and accompanying text.

104. *Id.* at 1794.

105. *Bates*, 125 S. Ct. at 1794. This was the Federal Government's first effort to regulate pesticides. *Id.*

106. *Id.* FIFRA required that all pesticides sold in the United States to be registered with the Secretary of Agriculture. The Secretary would register the product if it met FIFRA's labeling requirements and was determined to be safe and effective. *Id.*

107. *Id.*

FIFRA into an all-comprehensive regulatory statute.[108] In 1978, Congress again amended the statute by authorizing the EPA to "register a pesticide without confirming the efficacy claims made on its label."[109]

Following the history of the statute, Justice Stevens noted that although FIFRA was enacted many decades ago, the Court had never

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108. *Id.* (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984)). "As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority." *Id.* at 1794-95. (quoting *Ruckelshaus*, 467 U.S. at 991-92). A manufacturer must first submit a proposed label and supporting data to the EPA before they can register a pesticide. *Id.* at 1795 (citing 7 U.S.C. § 136a(c)(1)(C), (F) (2000)). The EPA will register the product if the pesticide is effective, if it will not cause unreasonable harmful effects on humans and the environment, and if the label satisfies FIFRA's misbranding provisions. *Id.* (citing 7 U.S.C. § 136a(c)(5)(A), (B), (C), & (D)). Manufacturers have a continuing duty to abide by FIFRA's labeling requirements and must report any evidence regarding pesticide toxic effects which are not already apparent on the label's warnings. *Id.* (citing § 136a(f)(2), (1); 40 C.F.R. § 159.184(a), (b) (2004)). At this time if the EPA determines that the product is misbranded, it may stop the sale and use of the product. *Id.* (citing 7 U.S.C. § 136d(b); § 136k(a), (b)). Section 136v provides:

> (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. (c) Additional uses. (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State.

Id. at 1795-96 (quoting § 136v).

109. *Bates*, 125 S. Ct. at 1796 (quoting § 136a(c)(5)). Congress amended FIFRA due to EPA's overwhelming task of evaluating the efficiency of the products, which took away from its duty to determine the health and environmental risks posed by the product. *Id.* Thus, manufacturers were aware of the potential liability they faced if their products were proven to be ineffective. *Id.* (citing 47 Fed. Reg. 40661 (1982)).

addressed whether FIFRA preempts tort and state common law claims.[110] In 1991, the Court held that Congress intended for the States to supplement federal efforts in regulating pesticides even though there was no expressed authorization apparent in the statute.[111] It was only in 1992, when the Court ruled that section 136v(b) preempted certain tort claims.[112]

Against this background, Justice Stevens addressed whether Bates's claims are preempted by section 136v(b) which provides that "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."[113] The Court explained that the statute applies to Texas because "it regulates the sale and use of federally registered pesticides and does not permit any sales or uses prohibited by FIFRA."[114] The Court further acknowledged that the prohibitions in the statute only apply to "requirements."[115] Thus, according to Justice Stevens, the Court of Appeals was "quite wrong" when it assumed that an occurrence, such as a jury verdict that would induce a manufacturer to alter its label, should qualify as a

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110. *Bates*, 125 S. Ct. at 1796. There were numerous tort actions against pesticide manufacturers well before the 1972 amendment to FIFRA, however the manufacturer's argument on preemption of these claims were usually unsuccessful. *Id.* (citing Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984)).

111. *Bates*, 125 S. Ct. at 1797 (citing *Mortier*, 501 U.S. at 613 (holding that section 136v(b) did not preempt the town's ordinance which called for a special permit for the aerial application of pesticides)). According to the EPA's website, States may review pesticide labels to make certain that both federal and state labeling rules are met, and they may also impose state sanctions when a federal requirement is violated. *Id.*; *see* U.S. EPA, Pesticides: Evaluating Potential New Pesticides and Uses, *available at* http://www.epa.gov/pesticides/food/risks.htm. (last visited Jan. 16, 2006).

112. *Bates*, 125 S. Ct. at 1797 (citing *Cipollone*, 505 U.S. at 504) (holding that terms "requirement or prohibition" according to the Smoking Act of 1969 included common law duties, and thus preempted specific tort claims against cigarette manufacturers)). After *Cipollone*, many federal and state courts alike ruled that section 136v(b) preempted state common law claims. *Id.*

113. *Id.* (quoting § 136v(b)). Thus, a state law that required "poison" to appear in big red letters would overcome preemption if there exists an EPA regulation which imposed the same labeling requirement. *Id.* at 1798.

114. *Id.* at 1798.

115. *Id.* Therefore, an occurrence which may motivate an optional decision would not qualify as a requirement. *Id.*

"requirement."[116] However, the Fifth Circuit was correct in finding that the term "requirements" included statutes, regulations, as well as common law duties.[117]

Justice Stevens then explained that for a state rule to be preempted, two conditions must be satisfied.[118] First, it must be a requirement "for labeling or packaging" and second, it must impose a requirement which is "in addition to or different from those required under this subchapter."[119] Justice Stevens further said that "[r]ules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for 'labeling or packaging.'"[120] In this case, the Court determined that Bates's claims for defective manufacture, defective design, negligent testing, and breach of express warranty would not qualify as requirements for labeling and packaging and thus would fail the first prong and would not be pre-empted.[121]

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116. *Id.* His position is in direct conflict with his earlier opinion in *Cipollone*, where he held that "[s]tate regulation can be effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone*, 505 U.S. at 521 (internal quotation marks omitted).

117. *Bates*, 125 S. Ct. at 1798; *see Cipollone*, 505 U.S. at 548-49 (holding that "the phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, this words easily encompass obligations that take the forms of common law rules").

118. *Id.* at 1798.

119. *Id.* at 1798 (citing §136v(b)). The Court noted that these common law rules do not require manufacturers to label or package their pesticides in any specific manner. California Environmental Law & Land Use Practice, *supra* note 44.

120. *Id.*

121. *Id.* at 1799. In this case, there are no common law rules that force a manufacturer to provide an express warranty or to say anything in a specific manner in an express warranty. *Id.* at 1798-99. Therefore, the warranty on Strongarm's label is not a requirement for labeling or packaging because the warranty merely asks that a manufacturer follow through with their contractual duty, and thus is not preempted. *Id.* at 1798-99 (citing *Cipollone*, 505 U.S. at 525-26). The Court also noted that section 136v(b) does not apply to Bates's warranty and fraud claims that are based on Dow's oral statements because FIFRA applies only to "written, printed or graphic matter" that is attached to the pesticide. *Id.* at

Justice Stevens then analyzed the reasoning of the court below regarding the inducement test, also known as the effects-based test.[122] He criticized this test, which several federal and state courts have used in determining whether a failure to warn claim was pre-empted.[123] Justice Stevens explained that the inducement test is not applicable to the pre-emption issue since § 136v(b) deals solely with "requirements," and does not implicate an analysis of whether a jury verdict would pressure a manufacturer to alter its label.[124] Accordingly, the Court defined a requirement as a "rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement."[125] Moreover, Justice Stevens stated that the fact "[t]hat §136v(b) may pre-empt judge-made rules, as well as statutes and regulations, says nothing about the scope of that pre-emption."[126] Thus, he concluded that the inducement test was overbroad and inconsistent with FIFRA, which actually promotes state regulation of the use and sale of pesticides.[127]

The Court then analyzed the remaining claims for fraud and negligent failure to warn, which were premised on common law rules that qualify as "'requirements for labeling or packaging.'"[128] Justice Stevens stated that these rules provide strict standards for labeling on

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1798-99 n.17. Additionally, requirements based on a manufacturers agent's oral representation would not qualify as a requirement for labeling or packaging. *Id.* Moreover, the Court held that since *Bates's* warranty claim was not pre-empted, then his claim under the DTPA was not pre-empted either. *Id.* at 1799 n.18.

122. *Id.* at 1799.

123. *Id.*

124. *Id.* (citing *Cipollone*, 505 U.S. at 524). The Court must focus on the elements of the common law duty, and should not apply the effects-based test (also called the inducement test) in determining whether that state law is preempted. *Id.* Justice Stevens illustrated that under § 136v(a) a state may ban a pesticide for safety reasons, and this ban may motivate a manufacturer to alter its label. *Id.* Under the inducement test, this restriction would automatically qualify as a labeling requirement, a result the Court doubts Congress intended. *Id.*

125. *Id.*

126. *Id.* at 1798 (emphasis in original).

127. *Id.* The inducement test would pre-empt many valid design defect claims since, if the claim were successful, it would motivate a manufacturer to change its label to avoid future liability. *Id.* at 1799. *See generally* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 614 (1991) (noting that the section indicates what powers have been retained by the states).

128. *Bates*, 125 S. Ct. at 1799 (quoting 7 U.S.C. § 136v).

pesticides, and, in this case, Strongarm's label allegedly violated these standards because it contained false representations and inadequate warnings.[129] He acknowledged that the Court of Appeals properly followed *Cipollone's* interpretation of "requirements" that § 136v(b) encompasses not only statutes and regulations but also common law duties.[130] However, he noted that many courts have made the mistake of pre-empting failure to warn claims under FIFRA simply due to the fact that those same claims were pre-empted in *Cipollone*.[131] He stated that these courts glossed over the obvious textual differences between FIFRA and the 1969 Smoking Act.[132] Unlike the *Cipollone* pre-emption clause,[133] § 136v(b) specifically targets state law labeling and packaging requirements, which are in addition to or different from those under FIFRA.[134] Therefore, "a state-law labeling requirement is not pre-empted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions."[135] Thus, state laws that create parallel labeling requirements as to those under FIFRA would survive pre-emption.[136] Additionally, the Court agreed with the farmers' argument that their fraud and failure to warn claims are not pre-empted since these state laws are equivalent to the rules under FIFRA.[137] Moreover, the

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129. *Id.* at 1800.

130. *Id.* at 1799 (citing *Cipollone*, 505 U.S. at 521 (holding that the term "requirement or prohibition" included common law rules, and thus preempted certain common law tort claims)).

131. *Id.* at 1800.

132. *Id.* at 1800 n.21 (quoting Taylor AG Indus. v. Pure-Gro, 54 F.3d 555, 559 (9th Cir. 1995) ("[t]here is no notable difference between the language in the 1969 Cigarette Act and the language in FIFRA")); and Shaw v. Dow Brands, Inc., 994 F.2d 364, 371 (7th Cir. 1993) ("Not even the most dedicated hair-splitter could distinguish these statements.")).

133. *Id.* at 1800. The Smoking Act provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]" Id at 1800 n.22. (quoting *Cipollone*, 505 U.S. at 515).

134. *Id.*

135. *Id.*

136. Vladeck, *supra* note 71, at 106, 116.

137. *Bates*, 125 S. Ct. at 1800. FIFRA and the state laws at issue both prohibits a label from containing "false or misleading" statements, or inadequate

Court held that "state law need not explicitly incorporate FIFRA's standards as an element of a cause of action in order to survive pre-emption."[138]

In ruling on the *Bates* case, the Court heavily depended on the *Medtronic* decision, which supports the "parallel requirements" interpretation of § 136v(b).[139] In that case, the Court found that the pre-emption provision at issue did not prevent the state from providing damages remedies for the violation of state laws when those laws parallel federal laws.[140] Justice Stevens also mentioned Justice O'Connor's separate opinion in *Medtronic* discussing how the pre-emption provision "does not preclude States from imposing different or additional remedies, but only different or additional requirements."[141] Justice O'Connor explained that a state claim seeking to enforce a federal law does not in itself impose an additional or different requirement; rather, the threat of a damages remedy will provide manufacturers with greater incentives to comply with the requirements.[142] This is consistent with the Court's reasoning that § 136v(b) allows states to provide remedies to those who are injured by pesticides when there are no federal remedies available when a manufacturer violates FIFRA's labeling requirements.[143]

Justice Stevens then addressed the arguments, presented by Dow and the United States as amicus curiae, against the parallel requirements interpretation of § 136v(b). Dow argued that this reading of the statute would allow juries to interpret FIFRA to their liking thereby creating a "crazy-quilt" of anti-misbranding

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instructions or warnings. *Id.* (citing § 136(q)(1)(A), (F), (G)). The Court of Appeals must first determine whether these state laws are in fact equivalent to FIFRA's misbranding requirements. *Id.*

138. *Id.*

139. *Id.* (citing Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)).

140. *Id.* (citing *Medtronic*, Inc., 518 U.S. at 495).

141. *Id.* (citing *Medtronic*, Inc., 518 U.S. at 513).

142. *Id.* at 1800 (citing *Medtronic*, 518 U.S. at 513) (O'Connor, J., concurring in part and dissenting in part)).

143. *Id.* at 1801.

requirements.[144] He noted that although Dow and the Unites States are against this reading of the statute, they failed to provide an alternative reading of the phrase "in addition to or different from."[145] Instead, it appears that they would rather have the whole phrase deleted from the statute, thereby having the statute provide that all state laws regarding labeling would be pre-empted.[146] Justice Stevens stated that this is obviously not what Congress intended since it specifically added § 136v(b), which in itself is evidence of congressional intent to distinguish between state labeling requirements that are preempted from those that are not preempted.[147] He also acknowledged that even if Dow had provided a plausible alternative interpretation of the § 136v(b), the Court must favor and accept the interpretation against pre-emption.[148] He explained that in areas that states have traditionally regulated, federal law will not override state law unless there is a "'clear and manifest'" Congressional intent to do so.[149] Thus, the Court determined that the "parallel requirements" interpretation is to be favored and accepted since it is the only plausible reading of § 136v(b).[150]

In addition, Justice Stevens pointed out the long history of pesticide manufacturers being sued in tort actions as evidence

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144. *Id.* The United States joined Dow as amicus curiae arguing against the parallel reading of the statute since Congress intended only for the EPA to interpret FIFRA. *Id.* (citing Brief for the United States, *supra* note 32).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* According to *Medtronic*, the states are independent sovereigns in this federal system, thus it is presumed that "Congress does not cavalierly pre-empt state law causes of action." *Id.* (citing *Medtronic*, 518 U.S. at 485).

149. *Id.* (citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

150. *Id.* The idea that FIFRA supports pre-emption of common law tort claims that parallel FIFRA's labeling requirements is far-fetched because just five years ago the United States advocated the parallel requirement interpretation. *Id* n.24. Critics believe that another plausible reading of the statute is that "rather than merely prohibiting state labeling requirements that differ from federal requirements, Congress also expressly barred additional state labeling requirements in order to entirely preclude state regulation of labeling." Ebner, *supra* note 23. *See also* H.R. REP. NO. 92-511, at 16 (1971).

supporting the presumption against pre-emption.[151] This history more significantly emphasizes the importance of motivating manufacturers to make their products safer,[152] especially since the newly-amended FIFRA allowed the EPA to waive efficacy review of new pesticides.[153] He also stated that if Congress wanted to deprive the injured of state compensation and remedies, it would have expressed that intent in a clear manner[154] because it is unlikely that Congress wanted to give manufacturers full immunity from certain tort liability by way of § 136v(b).[155] Thus, the Court read the statute in a manner that would balance out the risks for both sides because "[o]verenforcement of FIFRA's misbranding prohibition creates a risk of imposing unnecessary financial burdens on manufacturers; under-enforcement creates not only financial risks for consumers, but risks that affect their safety and the environment as well."[156]

Justice Stevens then turned to the policy objections raised against his interpretation of § 136v(b), which he found to be unpersuasive.[157] He accused Dow and the United States of overestimating the statute's uniformity and centralization.[158] Justice Stevens pointed out that in reality, the statute allows for a "relatively decentralized scheme" that maintains an extensive role for state regulation of pesticides.[159] More importantly, the Court held that States have the power to ban or restrict the use and sale of pesticides which the EPA has already approved.[160] States also can register pesticides for uses beyond those

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151. *Bates*, 125 S. Ct. at 1801.

152. *Id.* at 1802 (quoting Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 613 (1991)) (holding that the goal of the 1972 amendments was to "'strengthen existing labeling requirements and ensure that these requirements were followed in practice'")).

153. *Id.*

154. *Id.* at 1801. (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)). Given the dangerous nature of pesticides, risk of harm would be reduced through improvement of warnings and instruction on labels, not merely through modifying the design of the product. *Id.* at 1801-02 n.25.

155. *Id.*

156. *Id.*

157. *Id.* at 1802.

158. *Id.*

159. *Id.* (citing *Mortier*, 501 U.S. at 613).

160. *Id.* (citing § 136v(a)).

which the EPA has approved, subject to certain federal restrictions.[161] Therefore, Justice Stevens urged that a literal reading of § 136v(b) would be consistent with the federal and state powers jointly regulating the pesticide industry.[162]

The Court continued by distinguishing FIFRA from the pre-emption provision in *Cipollone*. Justice Stevens believed that private remedies that help enforce federal labeling laws would help, rather than hinder the efforts of the statute.[163] In contrast to the cigarette labeling law in *Cipollone*, which prohibited certain immutable warning labels, FIFRA incorporates future pesticide labels which will evolve and change as manufacturers gain additional information of the effects of their products.[164] Contrary to Dow's and the United States's exaggeration of the disruptive effects of these state tort actions to enforce the federal labeling requirements,[165] Justice Stevens explained that these state tort actions are necessary and advantageous because:

> By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides such as [the pesticide there at issue], a state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed labeling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits. In addition, the specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement.[166]

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161. *Id.* (citing § 136v(c)). *See also* 7 U.S.C § 136w-1 (2000) (authorizing EPA to grant states primary enforcement responsibility for use violations).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* (quoting *Ferebee*, 736 F.2d at 1541-42).

Additionally, Justice Stevens noted that FIFRA has prohibited inaccurate and misleading statements, representations, and warnings ever since it was first enacted in 1947.[167] On the other hand, tort actions for failure to warn claims were prevalent well before the creation of the statute and continued to be common well after the 1972 amendments to FIFRA.[168] Accordingly, there has been no evidence supporting Dow's and the United States' arguments that such tort actions have produced a "crazy-quilt" of FIFRA standards or otherwise have burdened manufacturers or the EPA with increasing hardships.[169] Instead, there has been evidence showing that the EPA actually welcomed these types of tort actions.[170] Justice Stevens then discussed the argument concerning juries coming up with contradictory results regarding misbranding. He noted that this is possible, however, there is no reason to believe that this would happen frequently or that it would cause greater difficulties for manufacturers who face the everyday risk of contradictory jury verdicts.[171]

The Court stated that under its reading of the statute, the impact of § 136v(b) is narrowed, however, it still retains an important role in regulating pesticides.[172] Justice Stevens explained that § 136v(b) primarily pre-empts competing state labeling requirements that would produce major inefficiencies for manufacturers and the EPA.[173] In addition, the pre-emption provision also overrides any state law that would impose a different or additional labeling requirement from those that are required under FIFRA and its

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167. *Id.* at 1803.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* Justice Stevens also notes that "lay juries are in no sense anathema to FIFRA's scheme: In criminal prosecutions for violation of FIFRA's provisions, . . . juries necessarily pass on allegations of misbranding." *Id.*

172. *Id.*

173. *Id.* The Court explained that competing state labeling requirements such as "50 different labeling regimes prescribing the color, font size, and wording of warnings" would create confusion and impose additional burdens on manufacturers. *Id.* This statute satisfies the need for uniformity in the pesticide industry. *Id.* n.26. Moreover, the long history of FIFRA amendments lacks any evidence that Congress intended to abolish the common-law duties owed by manufacturers of harmful substances. *Id.*

implementing laws.[174] On the other hand, Justice Stevens pointed out that the § 136v(b) does not pre-empt state laws that are fully consistent and equivalent with federal requirements.[175]

Having settled on one definite interpretation of § 136v(b), the Court then focused on the remaining issues of whether the statute pre-empted the farmers' fraud and failure to warn claims.[176] The Court recognized that it had not received sufficient briefing on this matter, which primarily rests on Texas law.[177] Thus, the Court remanded the action to the Court of Appeals.[178] In doing so, Justice Stevens emphasized the point that a state labeling law must be equivalent and fully consistent with FIFRA's misbranding standards to survive pre-emption.[179] Furthermore, the Court held that state labeling rules must be measured against all relevant EPA rules that support FIFRA's misbranding requirements.[180] To illustrate this point, Justice Stevens provided the example that "a failure-to-warn claim alleging that a given pesticide's label should have stated 'DANGER' instead of the more subdued 'CAUTION' would be pre-empted because it is inconsistent with 40 C.F.R. § 156.64 (2004), which specifically assigns these warnings to particular classes of pesticides based on their toxicity."[181]

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* Dow does not focus on whether Texas's fraud and failure to warn claims are or are not equivalent to FIFRA's standards. *Id.* n.27. Instead, Dow primarily targets the "parallel requirements" interpretation, and argues for preemption of all state law actions, even those that expressly incorporate FIFRA's labeling requirements. *Id.* Thus, because Dow did not have the benefit of this Court's interpretation of § 136v(b), Dow should be given the opportunity to address these issues on remand. *Id.*

178. *Id.* at 1803.

179. *Id.* Justice Stevens explained that if the court of appeals determined that the Texas' law imposed a broader labeling obligation than that required under FIFRA, then the state law claim would be preempted by § 136v(b), since it would be imposing a requirement that is different or in addition to federal labeling requirements. *Id.*

180. *Id.* at 1804.

181. *Id.* Currently there are few regulations that narrow or elaborate on FIFRA's labeling standards. *Id.* n.28. In contemplating future EPA regulations, the Court recognizes that these regulations will definitely impact the scope of the preemption provision. *Id.*

In the last section of the opinion, the Court revisited the concept of equivalence.[182] Justice Stevens noted that in order to overcome pre-emption, the state law requirement does not have to include the identical language as its corresponding federal requirement.[183] Rather, if the case proceeds to trial, Justice Stevens explained that the "court's jury instructions must ensure that nominally equivalent labeling requirements are genuinely equivalent."[184] Additionally, the court should, at a defendant's request, explain to the jury the relevant FIFRA labeling requirement, and any EPA regulation that support and add content to the statute.[185] Moreover, the Court provided that a manufacturer should not be liable under a state labeling law subject to § 136v(b) pre-emption provision unless it is likewise liable under FIFRA's misbranding standards.[186] The Court then vacated the judgment of the Court of Appeals and remanded the case for further proceedings consistent with the opinion.[187]

B. Concurring - Justice Breyer's Opinion

Justice Breyer authored a concurring opinion.[188] In his opinion he primarily stressed the importance of the majority's statement that state law requirements must "'be measured against' relevant [EPA] regulations 'that give content to FIFRA's misbranding standards.'"[189] He compared *Medtronic* to the *Bates* case, noting that in *Medtronic* the Food and Drug Administration had the power to determine the pre-emptive effect of agency rules in light of the agency's understanding that state rules may interfere with federal goals and objectives.[190] Similarly, the EPA enjoys the same level of authority

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182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* (Breyer, J., concurring in part and concurring in judgment).
189. *Id.* (quoting Justice Stevens's majority opinion in *Bates*, 125 S. Ct. at 1804).
190. *Id.* (citing *Medtronic*, 518 U.S. at 506) (Breyer, J., concurring in part and concurring in judgment)).

as the FDA.[191] Additionally, he acknowledged that the federal agency in charge of enforcing the statute is usually better equipped than are the courts to decide whether state liability rules are consistent with or contradictory to federal laws.[192] In applying this analysis to the case at hand, Justice Breyer explained that the EPA is in a better position than the courts to decide "whether general state tort liability rules simply help to expose 'new dangers associated with pesticides,' . . . or instead bring about a counterproductive 'crazy-quilt of anti-misbranding requirements.'"[193] Moreover, he stated that the EPA may efficiently carry out this duty within proper administrative constraints.[194] Thus, Justice Breyer joined the majority opinion in emphasizing the importance of the EPA's role in enforcing FIFRA's future requirements.[195]

C. Concurring and Dissenting Opinion - Justice Thomas's Opinion

Justice Thomas, joined by Justice Scalia, concurred with the majority opinion that the term "requirements" in section 136v(b) encompassed common law duties for labeling or packaging of pesticides.[196] He also agreed that state law damages claims are prohibited from imposing requirements "in addition to or different from" FIFRA.[197] He explained that although states may impose sanctions based on a violation of FIFRA and any relevant EPA regulations, they cannot impose liability for violation of state labeling laws based on state standards of care.[198] He recognized that since

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191. *Id.* (citing 7 U.S.C. § 136w(a)(1)).

192. *Id.*

193. *Bates*, 125 S. Ct. at 1804 (quoting *Ferebee*, 736 F.2d at 1541 and Justice Steven's majority opinion at 1801)).

194. *Id.* at 1804-05 (comparing *Hillsborough*, 471 U.S. at 731) (stating that "agencies can monitor the dynamic between federal and local requirements and promulgate regulations pre-empting local legislation that interferes with federal goals").

195. *Id.*

196. *Id.* (Thomas, J., concurring in part and dissenting in part).

197. *Id.* (citing § 136v(b)).

198. *Id.* He notes that section 136v(b) allows the states to provide remedies, but it does not allow states to change the substantive rules which govern liability for pesticide labeling. *Id.* (citing *Medtronic*, 518 U.S. at 513).

Bates did not allege that Dow violated FIFRA's labeling requirements, the majority properly remanded the case for the District Court to consider the issue of whether Texas law is equivalent to the federal standards.[199]

Justice Thomas observed that the majority omitted a major point, namely that "[a] state-law cause of action, even if not specific to labeling, nevertheless imposes a labeling requirement 'in addition to or different from' FIFRA's when it attaches liability to statements on the label that do not produce liability under FIFRA."[200] To clarify this issue, he explained that these state law claims call for the additional requirement of truthfulness to FIFRA's rule prohibiting labeling statements from being "false or misleading."[201] Justice Thomas proffered that this is the missing step in the majority's discussion as to why the fraud claims are properly remanded to the lower court.[202]

In omitting this crucial step, the majority failed to properly rule on two of the farmers' claims.[203] To begin with, Justice Thomas believed that the farmers' breach of warranty claims should have been remanded for proper preemption analysis.[204] Contrary to the majority's opinion, Justice Thomas felt that state law is preempted in a situation such as when Texas's law of warranty imposes liability for misbranding, where FIFRA under the same circumstances would not impose such liability.[205] As for the second claim, he stated that the majority mistakenly held that Bates's cause of action for the violation of the DTPA was not preempted since it is really a breach of warranty claim.[206] Justice Thomas claimed that the majority failed to recognize that the DTPA claim could also be interpreted as a claim for false or misleading representation on the pesticide label.[207]

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199. *Id.* at 1805. The farmer's counterclaim disclaims that Dow violated the provisions under FIFRA. *Id.*

200. *Id.*

201. *Id.* (citing § 136(q)(1)(A)).

202. *Id.* The fraud claims are remanded to the lower court to determine if the state and federal requirements for misbranding liability are the same. *Id.*

203. *Id.*

204. *Bates*, 125 S. Ct. at 1805.

205. *Id.* (citing *Cipollone*, 505 U.S. at 551).

206. *Id.*

207. *Id.*

Accordingly, he acknowledged that all aspects of the DTPA cause of action should be remanded, since this claim should be preempted because it imposes liability for misbranding where FIFRA would not impose such liability.[208]

Justice Thomas continued by noting that Bates had not yet brought a failure to warn claim.[209] Rather, the Fifth Circuit had treated Bates's claims for defective design and manufacture and for negligent testing as "disguised claims for failure to warn."[210] Thus, Justice Thomas urged the majority to recognize that if Bates fails to provide evidence on remand that Dow erred in the design, manufacture or testing of Strongarm pesticide, these claims will automatically fail on their merits.[211]

Aside from the issues discussed above, Justice Thomas provided that the analysis is complete since section 136v(b) clearly states that FIFRA preempts certain state law claims.[212] He felt that it was unnecessary and unpersuasive for the majority to argue against preemption, thereby favoring State regulation over federal law.[213] He observed that because Congress intended to include an express preemption provision in FIFRA, the majority statement encouraging an interpretation against preemption is inapplicable.[214] Therefore, he stated that the Court's main objective should be to figure out which state law claims are preempted by section 136v(b) without sliding the scale in favor of either the states or the federal government.[215]

He also felt that the history of tort actions against pesticide manufacturers was irrelevant in ruling on Bates's claims since there is no way of knowing if FIFRA actually followed or diverged from the tradition simply by looking at the text of section 136v(b).[216] Even so, the majority argued that Congress must have intended to preserve state tort actions because this history does not indicate that

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208. *Bates*, 125 S. Ct. at 1805.
209. *Id.* at 1806.
210. *Id.* (quoting *Dow*, 332 F.3d at 332-33).
211. *Id.*
212. *Id.*
213. *Bates*, 125 S. Ct. at 1806.
214. *Id.* (citing *Cipollone*, 505 U.S. at 545-46).
215. *Id.*
216. *Id.*

Congress intended to preempt these actions.[217] He continued by stating that the Court is not satisfied with a preemption provision, and Congress must either "speak with added specificity in the statute" or there must be clear congressional preference for preemption in the legislative record to overcome the presumption against preemption.[218] However, contrary to the Court's prior statements, the majority argued that section 136v(b) alone is sufficient evidence that Congress intended to abrogate various state claims.[219] Furthermore, Justice Thomas observed that Congress, not the Court, wields the power to authorize additional state law remedies to help enforce FIFRA's requirements, and to mediate between state tort actions and federal laws.[220]

Justice Thomas explained that the main issue at hand is to determine the meaning of section 136v(b); thus, he agreed that the majority properly declined to address the argument as to whether Bates's claims are subject to other preemption statutes.[221] He concluded his opinion by stating that the majority's decision is consistent with the "Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption"[222] which proves that the preemption analysis is not "[a] freewheeling judicial inquiry into whether a state statute is in tension

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217. *Id.* (citing majority opinion at 1803; Small v. United States, 125 S. Ct. 1752 (2005) (Thomas, J., dissenting) (criticizing the Court's reliance on silence in the legislative history); Koons Buick Pontiac GMC, Inc. v. Nigh, 125 S. Ct. 460, 472 (2004) (Scalia, J., dissenting)).

218. *Bates*, 125 S. Ct. at 1806.

219. *Id.*

220. *Id.*

221. *Id.* He argues that there is no reason for the majority to indulge in a discussion as to whether FIFRA's standards are exceedingly persuasive or dominant such that they would override State power to create additional remedies, or "whether enforcement of state-law labeling claims would 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress's in enacting FIFRA." *Id.* at 1807 (citing *Rice*, 331 U.S. at 230) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

222. *Id.* at 1807 (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting)).

with federal objectives . . . but an inquiry into whether the ordinary meanings of state and federal law conflict."[223]

V. IMPACT

The ramifications of the Supreme Court's decision in Bates remains to be seen since there are several issues that have been remanded and thus remain unresolved. Nonetheless, the overall decision has a broad impact on the general population, pesticide consumers, the pesticide industry, and state and federal courts alike. Since the majority opinion has signaled a shift away from federal preemption of state tort claims,[224] this will trigger a chain reaction affecting everyone who uses, produces and manages pesticides. The Court's decision will open the gates to an increased amount of pesticide injury related lawsuits, which will affect how manufacturers produce their pesticides and how the EPA will regulate pesticide labeling and distribution.

In determining the true meaning and scope of FIFRA's preemption provision section 136v(b), advocates have claimed that the *Bates* Court has provided greater clarity as to the balance of power between the federal and state government in regulating the pesticide industry. However, on the other hand, some critics claim that *Bates* is not deserving of landmark status since the lower court will be left to untangle the many inconsistencies that infect the decision.[225] They argue that "neither the pesticide industry nor anti-pesticide militants and their trial lawyer allies obtained the clear-cut ruling that they sought regarding the Federal Insecticide, Fungicide, and Rodenticide Act's preemptive scope."[226] Nevertheless, this

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223. *Id* (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment).

224. *Bates*, 125 S. Ct. at 1801.

225. Ebner, *supra* note 23.

226. *Id.* Only three weeks before the *Bates* decision, a federal district judge provided that "many commentators believe these post-*Cipollone* cases did little to cure the confusion . . . Justices Blackmun and Scalia predicted that the plurality opinion in *Cipollone* would engender." *Id.* (citing In re Welding Fume Prod. Liab. Litig., 364 F.Supp.2d 669, 681 (N.D. Ohio 2005)). Rather than providing guidance and clarifying the preemption issue, the *Bates* decision *see*ms to have added to the overall confusion that surrounds this issue.

decision undeniably provides a greater foundation for the application of section 136v(b) to state common-law claims.

A. Defining the Preemption Provision

The Bates Court provided two additional factors to the process of determining whether a state statute is preempted by FIFRA.[227] First, the majority focused on the history of tort actions against pesticide manufacturers as supporting evidence that the farmers' claims were not preempted under FIFRA. According to the Court this history is significant because it provides support for the idea that if Congress had intended to deprive those injured by pesticides the right to compensation or to provide full immunity to pesticide manufacturers from certain tort actions, it would have clearly made this intent known.[228] Additionally, this long history emphasizes the importance of motivating manufacturers to increase their efforts in producing reasonably safe pesticides for consumer use, since the 1972 amendment's primary objective was essentially to enhance existing labeling standards while ensuring that these rules were followed in practice.[229]

Second, the Court focused on the policy objections regarding common law tort claims. The Court recognized the need for the states' tort actions and state involvement to help enforce FIFRA's labeling and packaging rules and regulations.[230] The majority explained that these two factors would ultimately benefit pesticide consumers and motivate the EPA and manufacturers to improve pesticide products.[231] This is especially important in the face of the many mistakes and irreversible damage that have been caused by pesticides in the past. Inadequate warning labels have and may continue to lead to devastating events such as the near extinction of the American bald eagle due to the pesticide DDT; persistent organic

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227. Vladeck, *supra* note 71, at 106, 117.

228. *Id; see also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984).

229. *Id; see* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 613 (1991); Dansby, *supra* note 20.

230. *Id.*

231. *Bates*, 125 S. Ct. at 1802.

pesticides found in sea animals and human breast milk; and pesticides contaminating millions of American homes.[232]

Consequently, tort actions and state regulations which comport to federal law would aid the functioning of FIFRA.[233]

This decision allows for the preservation of uniformity in labeling standards, while also maintaining that states may, without express authorization, supplement the EPA's efforts in regulating pesticides.[234] *Bates* was the perfect opportunity for the Court "to return the civil litigation system to its traditional role of responding to societal needs in a complex, rapacious, and competitive world."[235]

On the other hand, critics believe that the decision is full of inconsistencies and fails to provide clear guidelines for the lower courts. They claim that *Bates* mischaracterizes FIFRA as "a relatively obscure provision"[236] when in reality it has been a "long-standing cornerstone of the federal-state pesticide regulatory scheme."[237] The Court also fails to recognize Congress's intent "[i]n dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program . . . to completely preempt State authority in regard to labeling."[238]

Then turning to the lower court's task of determining whether a failure to warn claim imposes requirements which actually parallel federal requirements, critics claim that this process involves a great deal more than a simple comparison between the elements of a state claim and the text of FIFRA's provisions.[239] Critics conclude that the

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232. Dansby, *supra* note 20.

233. *Id.*

234. Craft, *supra* note 25, at 19. FIFRA reserves for the states some regulatory powers while mandating nationwide uniformity in the labeling and packaging of pesticides. Shields, *supra* note 13, at 524. This uniformity allows for the interstate trading of pesticides. *Id.*

235. Dansby, *supra* note 20.

236. *Bates*, 125 S. Ct. at 1802.

237. Ebner, *supra* note 23.

238. H.R. Rep. No. 92-511, at 16 (1971).

239. Ebner, *supra* note 23. In a situation where a person's hair fell out after the use of a certain pesticide, the court would have to determine if the omission of the warning on the label was necessary and whether the person had

> credible scientific evidence to support his claim that the pesticide caused his hair to fall out; whether the manufacturer was aware of any such scientific evidence; and whether EPA, if

Bates decision greatly increased the burden on pesticide manufacturers to boost their efforts to protect themselves from product liability and damages suits.[240] Despite the fact that manufacturers may face greater challenges, pesticide consumers and the environment will actually benefit from this added effort to improve pesticide products.

B. Narrowing the Scope of FIFRA Preemption

The most evident judicial impact of the *Bates* ruling is that this decision narrowed the Cipollone decision regarding the application of preemption to common law claims.[241] Before the ruling in *Bates*, the California Supreme Court ruled that FIFRA expressly preempted state law actions premised on failure to warn.[242] Unlike Cipollone and other previous decisions, the *Bates* Court maintains that section 136v(b) should be interpreted narrowly since it only applies to state regulation of pesticide labels.[243] The Court recognized that, although common law duties may qualify as "requirements," this does not automatically preempt all tort claims premised on common law duties.[244]

Additionally, before a state claim may properly be preempted, the Court demands a further inquiry as to whether these state common law rules are "in addition to or different from" the labeling

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aware of such evidence, would have required a warning on the product's labeling regarding the risk to a user's hair. *Id.*

240. *Id.*

241. Craft, *supra* note 25, at 19. If a plaintiff brought an action for negligent design because they were harmed by the product even through they used it according to the label, the court would preempt the claim and rule the action as failure to warn claim. Dansby, *supra* note 20. Thus, products could be deemed legal and harmful even if used as directed. *Id.* However, the *Bates* decision changed this ruling as to harmful products such as pesticides. *Id.* Additionally, following the *Cipollone* decision, "farmers [were] not allowed to bring suit when their crops [were] damaged by a product, it allow[ed] and it license[d] these companies to use farmers as their guinea pigs." Martin, *supra* note 85.

242. CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE, *supra* note 44.

243. Dansby, *supra* note 20.

244. Vladeck, *supra* note 71, at 106.

requirements under FIFRA.[245] Accordingly, it remains to be seen whether the Fifth Circuit determines that the farmers' fraud and failure to warn claims are in fact equivalent to, or whether they diverge from FIFRA's misbranding provision, thereby resolving the preemption issue regarding those claims.[246] Thus, the two major revelations of the Bates decision are: (1) there is no need for the state regulation to expressly incorporate FIFRA's standards as an element of a claim to survive preemption[247] and (2) a state labeling requirement will overcome preemption if it is in fact equivalent to and fully consistent with FIFRA's labeling standards.[248] Consequently, some failure to warn claims will survive preemption if it parallels the requirements imposed under FIFRA.[249]

C. Impact on Health and Safety

In declaring a trend away from preemption, the Court ruled that farmers and others who are injured by pesticides are once again[250] able to bring common law tort claims against pesticide manufacturers.[251] Federal regulations such as FIFRA were originally created "to protect the public welfare by enforcing uniform standards for pesticide labeling, allowing the public to make informed decisions as to the risks associated with pesticides and the steps they can take to protect themselves."[252] Thus, the Bates decision is entirely consistent with Congress's objective of protecting consumers from dangerous pesticide products.[253] Moreover, the ruling provides greater incentives for manufacturers to be truthful when registering their pesticide labels.[254] All in all, the benefit of increased safety and

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245. *Id.*

246. *Bates*, 125 S. Ct. at 1803.

247. *Id.* at 1805.

248. *Bates*, 125 S. Ct. at 1803.

249. Dansby, *supra* note 20.

250. *Id.* Prior to *Cipollone*, pesticide manufacturers were exposed to common law tort actions. *Id.*

251. *Id.*

252. Shields, *supra* note 13, at 524; *see, e.g.*, S. Rep. 92-838 (1972), reprinted in 1972 U.S.C.C.A.C. 1359.

253. *Bates*, 125 S. Ct. at 1794.

254. Shields, *supra* note 13, at 524; *see, e.g.*, S. Rep. 92-838.

health measures in the pesticide industry will outweigh any burdens which manufacturers must face.

D. The EPA's Scope of Authority

In Justice Breyer's concurring opinion, he stressed that the federal administrative agency, in this case the EPA, is in a superior position than the courts to determine whether a state regulation actually parallels or distorts federal provisions.[255] Hence, although the issue of whether the farmers' claims for fraud and failure to warn were remanded to the lower courts, the EPA may have the final say as to whether these claims are indeed preempted by FIFRA. Consequently, the *Bates* decision has enhanced the scope of the EPA's authority by recognizing its' experience in dealing with these types of matters.

VI. CONCLUSION

The Supreme Court's decision in *Bates* when taken as a whole will have a tremendous impact on past and future administrative law. This ruling will affect how administrative agencies, such as the EPA, manage, administer and enforce pesticide regulations. However, the EPA's power over this regulatory field may have been somewhat constricted after *Bates*, since the majority opinion has clearly established and recognized the states' power to supplement the EPA's efforts when regulating the use and distribution of pesticides. On the other hand, although the states may compliment the EPA's efforts, the Court made it clear that it is the EPA who will have the last word as to whether state regulations actually mirror or distort federal requirements.

Before the *Bates* decision, people who were injured by pesticides had no opportunity to recover from pesticide manufacturers since their common law claims were deemed to be preempted under section 136v(b). However, the *Bates* Court has signaled a shift away and against federal preemption of common law tort actions. Consequently, access to long available compensation and state

255. *Bates*, 125 S. Ct. at 1804.

remedies has been restored to consumers such as Samantha[256], farmers and utility companies[257] who have wrongly been injured by harmful substances. By shedding light on the importance of the history of tort litigation against pesticide manufacturers, the Court highlighted the evidence favoring the interpretation against federal preemption. As a result, this ruling has significantly increased the autonomy of state agencies to regulate pesticide within their boarders, thereby paving the way for limiting the scope and reach of federal regulatory powers.

256. *See supra* Section I.

257. U.S. EPA, Federal Insecticide, Fungicide, and Rodenticide Act, http://www.epa.gov/35thanniversary/topics/fifra/01.htm (last visited Jan. 16, 2006).