Comment

Pesticides, Preemption, and the Return of Tort Protection

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

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In Bates v. Dow Agrosciences LLC, *the U.S. Supreme Court took a narrow view of the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act. Lower courts had previously read FIFRA to preempt virtually all state tort liability for inadequate labeling and failure to warn. As a result, pesticide manufacturers enjoyed years of virtually no liability for the injuries caused by their products. This Comment supports the holding of* Bates. *Unlike an earlier labeling statute for cigarettes, FIFRA confronted a heterogeneous and dynamic product market. In such a market, a decentralized state tort regime provides the best regulatory structure. The prophylactic effect of federal preemption in such areas results in grievous externalities that outweigh the social costs of litigation. Hence, the policy rationales underlying the* Bates *decision counsel careful consideration when using federal preemption as a general method of tort reform.*

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Introduction

In April 2005, the U.S. Supreme Court decided *Bates v. Dow Agrosciences LLC*,[1] overturning thirteen years of precedent during which pesticide companies enjoyed relative immunity from tort liability. Before *Bates*, victims who suffered property damage and bodily harm from pesticides had no legal recourse, despite compelling claims of product misrepresentation and inadequate warning labels. This state of affairs stemmed from the dominant judicial interpretation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[2]

Under FIFRA, a pesticide company that seeks to market its product submits a proposed label and supporting data to the Environmental Protection Agency (EPA).[3] The EPA then registers the product if it determines that the chemical does not unreasonably endanger humans or the environment,[4] and that the product label is not false, misleading, or lacking adequate instructions or warnings.[5] Finally, § 136v(b) of FIFRA provides the pivotal language articulating the Act's preemptive effects, declaring that no state shall "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."[6]

Before *Bates*, U.S. courts interpreted the latter provision to bar tort claims that, if successful, might induce pesticide companies to change their warning labels. This reading of FIFRA proceeded from the 1992 Supreme Court decision *Cipollone v. Liggett Group, Inc.*[7] *Cipollone* held that the Federal Cigarette Labeling and Advertising Act[8] preempted not only state law that differed from federal cigarette labeling requirements, but also common-law duties imposed by courts that differed from federal standards.[9] The Court reasoned that, although the imposition of common-law duties might not explicitly require cigarette companies to change their labels, judgments might still indirectly compel companies to make such changes.[10] Through analogous reasoning, lower courts also broadened FIFRA's preemptive effect, and as a result a staggering number of tort claims were summarily dismissed: Since

1 125 S. Ct. 1788 (2005).
2 7 U.S.C. §§ 136-136y (2000).
3 *Id.* § 136a(c)(1)(C), (F).
4 *Id.* §§ 136(bb), 136a(c)(5)(C), 136a(c)(5)(D).
5 *Id.* § 136(q)(1)(A), (F), (G).
6 *Id.* § 136v(b).
7 505 U.S. 504 (1992).
8 15 U.S.C. §§ 1331-1341 (2000).
9 *Cipollone*, 505 U.S. at 521-24.
10 *Id.*

1990, only three suits against pesticide companies filed by farmers prevailed while 100 failed.[11]

Bates finally brought this confounding practice to an end, but the saga of FIFRA preemption should not be forgotten. Rather, the experience provides insight and direction regarding the use of preemption as a method of tort reform. Many commentators view federal, administrative, and even corporate models of preemption as a means to remove tort claims from courtrooms to more efficient, specialized institutions with standard review procedures.[12] However, the draconian results of FIFRA preemption reveal the potential danger of these proposals if they are not carefully constructed by policymakers and properly comprehended by the implementing body. The FIFRA saga ultimately delineates several guiding principles to consider when using preemption to limit the economic waste associated with excessive tort litigation.

I. The Preemption Doctrine and FIFRA

The preemption doctrine finds textual basis in the Supremacy Clause of the Constitution, which declares that all courts are bound to follow federal law, "laws of any State to the contrary notwithstanding."[13] Over the years, courts have refined preemption to a more precise articulation. In particular, sovereignty considerations have led courts to presume against federal preemption unless it is shown to be "the clear and manifest purpose of Congress" in passing a federal law.[14] Congress's intent to preempt may be expressly stated on the face of a federal law[15] or it may be implied in two ways. First, preemption by implication can occur when the scope of a federal law covers the entire area that a state law regulates.[16] Second, implied preemption can result when federal and state regulations are actually in conflict; that is, when state law either frustrates the purpose of federal law, or state and federal laws are such that an actor cannot comply with both simultaneously.[17]

The first case to address whether FIFRA preempted state-tort claims was *Ferebee v. Chevron Chemical Co.*[18] In 1984, the family and estate of an agricultural worker brought a suit against Chevron, alleging that the defendant

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11 H. Bishop Dansby, Bates v. Dow Agrosciences: *U.S. Supreme Court Restores Sanity in Products Liability Law*, PESTICIDES & YOU, Summer 2005, at 9, 10-11, *available at* http://www.beyondpesticides.org/infoservices/pesticidesandyou/Summer 05 vol. 25 no. 2.pdf.

12 *See, e.g.*, Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 388-91 (1988) (arguing that agencies are better equipped to create and interpret regulations than are courts and juries).

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

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

15 Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983).

16 La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986).

17 *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

18 736 F.2d 1529 (D.C. Cir. 1984).

negligently failed to warn that prolonged exposure to its herbicide could result in pulmonary fibrosis.[19] The trial court found for the plaintiff, but on appeal Chevron argued that failure-to-warn claims were preempted by § 136v(b) of FIFRA.[20] Responding to this argument, the court of appeals held that the provision did not expressly preempt common-law judgments.[21] Moreover, in regard to implied preemption, the court found that common-law judgments did not prevent pesticide companies from complying with EPA requirements. The court explained that companies retained a choice either to modify their labels in response to adverse judgments or to do nothing and risk future law suits.[22]

Other courts disagreed with the "choice of reaction" theory. In the 1987 case *Fitzgerald v. Mallinckrodt, Inc.*,[23] a greenskeeper alleged that a chemical manufacturer failed to warn that prolonged exposure to its fungicide could result in mercury poisoning.[24] The district court granted summary judgment for the defendant, explaining that the plaintiff's claim was expressly preempted by FIFRA.[25] The plaintiff argued that the "choice of reaction" theory urged against preemption, but the court found that "the damages awarded and verdict rendered . . . can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warning."[26]

The conflicting *Ferebee* and *Fitzgerald* decisions made failure-to-warn claims against pesticide companies an uncertain undertaking. From 1987 to 1992, state and federal courts were divided on the preemption issue,[27] and it was not until the Supreme Court decided *Cipollone* that courts began to adjudicate FIFRA cases uniformly.

II. The Impact of *Cipollone*

The 1992 *Cipollone* decision summarily dashed the legitimacy of the "choice of reaction" theory. In *Cipollone*, the plaintiff sued a group of cigarette manufacturers claiming, inter alia, that the manufacturers failed to sufficiently

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19 *Id.* at 1533. Pulmonary fibrosis is the scarring of the lungs resulting in the irreversible loss of the tissue's ability to transfer oxygen into the bloodstream. What is Pulmonary Fibrosis?, http://www.pulmonaryfibrosis.org/ipf.htm (last updated Mar. 15, 2005).

20 *Ferebee*, 736 F.2d at 1540.

21 *Id.* at 1542.

22 The court explained what became known as the "choice of reaction" theory by saying that compliance with both federal and state law cannot be said to be impossible: Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.

Id.

23 681 F. Supp. 404 (E.D. Mich. 1987).

24 *Id.* at 405.

25 *Id.* at 408.

26 *Id.* at 407 (emphasis omitted) (quoting Palmer v. Liggett Group, Inc., 825 F.2d 620, 627 (1st Cir. 1987)).

27 *See* William T. Smith, III & Kathryn M. Coonrod, Cipollone's *Effect on FIFRA Preemption*, 61 UMKC L. REV. 489, 499 & n.61 (1993).

warn that their product caused cancer.[28] However, the Supreme Court held that this claim was preempted by the Federal Cigarette Labeling and Advertising Act, a federal statute providing 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 chapter."[29] The Court interpreted "requirement or prohibition" to include judgments based on state common-law rules, explaining that "[t]he obligation to pay compensation can be . . . a potent method of governing conduct and controlling policy."[30] As a result, lower courts began to interpret the "requirements" language of FIFRA as a restriction sweeping similarly broadly.

The adoption of this expansive view of FIFRA preemption sounded the death knell for pesticide claimants and promised almost complete tort immunity to pesticide companies. As Smith and Coonrod explain, products liability claims against pesticides are "peculiarly dependent on failure to warn" and similar theories.[31] Design defect claims against a notoriously dangerous product are unlikely to garner much sympathy from a jury, but juries are still likely to "understand and sympathize with an injured plaintiff's plea that he would not have used the product as he did if he had only understood the risks or been told how to properly use it."[32] Thus, when courts finally closed the door on failure-to-warn and misrepresentation claims, they effectively stamped out liability for pesticide companies altogether. Surprisingly, courts maintained this posture notwithstanding amicus curiae briefs submitted by the EPA, the agency administering FIFRA, on behalf of plaintiffs.[33] Law review articles frequently chastised courts for their stubborn adherence to a doctrine that transformed FIFRA's warning label requirement—a device that should protect consumers—into a method by which pesticide companies could avoid compensating victims.[34] Over a decade would pass until these criticisms would be acknowledged.

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28 Cipollone v. Liggett Group, Inc., 505 U.S. 504, 508 (1992).

29 15 U.S.C. § 1334(b) (2000).

30 *Cipollone*, 505 U.S. at 521 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)).

31 Smith & Coonrod, *supra* note 27, at 495.

32 *Id.* at 496.

33 *See, e.g.*, Netland v. Hess & Clark, Inc., 284 F.3d 895, 899 (8th Cir. 2002); Etcheverry v. Tri-Ag Service, Inc., 993 P.2d 366, 374 (Cal. 2000).

34 *See, e.g.*, Joseph T. Carter, Papas v. Upjohn Co. — *The Possibility That FIFRA Might Preempt State Common-Law Tort Claims Should Be Exterminated*, 45 ARK. L. REV. 729 (1992); James M. Graves, Ciba-Geigy Corporation v. Alter*: Federal Preemption, FIFRA, and Compensatory Damages in Arkansas*, 48 ARK. L. REV. 577 (1995); Robert Waltz, *Environmental Protection and Pre-Emption of State Common Law Tort Claims by FIFRA:* Netland v. Hess, 11 SOUTHEASTERN ENVTL. L.J. 109 (2002).

III. *Bates* and the Return of Tort Protection

In April 2005, the Supreme Court finally recast FIFRA preemption with the *Bates* decision. A group of Texas farmers sued Dow Agrosciences over an herbicide named Strongarm that damaged their peanut crops.[35] The plaintiffs alleged, inter alia, that the Strongarm product label failed to indicate that in soil with a pH level of 7.2 or higher, the chemical not only failed to prevent weeds but also damaged crops.[36] Dow Agrosciences raised an affirmative defense of FIFRA preemption, and the district court granted the defendant's motion for summary judgment, which was then affirmed by the court of appeals.[37] The Supreme Court granted certiorari to finally delineate the nature of FIFRA's preemption provision.[38]

Justice Stevens, writing for the majority, first affirmed the application of the central holding in *Cipollone*, finding that the "requirements" language of FIFRA pertained not only to positive statutory requirements, but also to common-law duties.[39] However, Stevens said that lower courts applied this holding too broadly. In regard to claims for defective design, defective manufacture, negligent testing, and breach of express warranty, common-law duties did not specifically implicate any standards for labeling or packaging.[40] While it is true that an adverse judgment on these claims might induce a manufacturer to modify its label, no new *labeling* requirements were imposed per se.[41] However, the Court continued, claims for failure to warn and misrepresentation *exclusively* involve common-law requirements for labels and packaging, and are preempted.[42] Still, according to the language of FIFRA, these claims are preempted *only* when the common-law requirements are "in addition to or different from" those imposed by FIFRA;[43] an exception which the Court read very narrowly.

Before *Bates*, most courts viewed the phrase "in addition to or different from" as a hair-trigger; suits that could potentially change any aspect of an EPA-approved label were preempted per se. In contrast, *Bates* held that "the state law need not explicitly incorporate FIFRA's standards as an element of a

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35 Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788, 1792-93 (2005).

36 *Id.* at 1793.

37 *Id.*

38 Justice Stevens explained:

> [The Fifth Circuit's] decision was consistent with those of a majority of the Courts of Appeals, as well of several state high courts, but conflicted with the decisions of other courts and with the views of the EPA set forth in an amicus curiae brief filed with the California Supreme Court in 2000. We granted certiorari to resolve this conflict.

Id. at 1794 (footnotes omitted).

39 *Id.* at 1798.

40 *Id.*

41 *Id.* at 1798-99.

42 *Id.* at 1800.

43 *Id.* (quoting 7 U.S.C. § 136v(b) (2000)).

cause of action in order to survive pre-emption."[44] Rather, the Court endorsed a "'parallel requirements' reading" of FIFRA, permitting any additional statutory or common-law standards which served FIFRA's primary purpose to prevent "false or misleading" statements or "inadequate instructions or warnings."[45]

The Court offered several justifications for its "parallel requirements reading." First the Court pointed to the glaring fact that FIFRA provided no federal remedy to those injured by pesticides violating the Act's labeling requirements. This fact, in light of "[t]he long history of tort litigation against manufacturers of poisonous substances," led the Court to conclude that "[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."[46] Furthermore, the Court declared that private claims in state courts would further the central purpose of FIFRA, which was the protection of consumers and the environment. Specifically, private claims would provide an incentive for manufacturers to use the "utmost care in the business of distributing inherently dangerous products."[47] Ultimately, while the Court sought to accomplish the positivist goal of interpreting FIFRA's preemption provision, it also implicitly articulated normative compensatory and deterrence-based considerations that shed light on how preemption regimes should function generally.

IV. The Lessons of the FIFRA Saga

The normative considerations underlying Justice Stevens's opinion permit an expansive view of the FIFRA saga. Specifically, it is quite possible to view the decade-long perversion of the Act as a lesson demonstrating the ills of hasty tort reform. As FIFRA preemption cases began to appear in the early 1980s, calls for tort reform were escalating throughout the country. Many perceived the liberalization of tort law during the 1960s and 1970s as producing a "litigation explosion" accompanied by higher insurance premiums.[48] This perspective, termed the "jaundiced view" by Professor Marc Galanter,[49] had reached its zenith by the *Bates* decision and was a prominent topic in the 2004 U.S. presidential race.[50]

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44 *Id.*

45 *Id.* (quoting 7 U.S.C. § 136(q)(1)(A), (F), (G) (2000)).

46 *Id.* at 1801.

47 *Id.* at 1802.

48 Martha Chamallas, *Vanished from the First Year: Lost Torts and Deep Structures in Tort Law*, *in* CANONS OF LAW 104, 105-06 (Jack Balkin & Sanford Levinson eds., 2000).

49 *See* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717 n.1 (1998).

50 *See, e.g.*, Richard A. Oppel Jr. & Glen Justice, *Kerry Gains Campaign Ace, Risking Anti-Lawyer Anger*, N.Y. TIMES, July 7, 2004, at A15; David G. Savage, *Texans Still at Odds over Bush's Legal Reforms*, L.A. TIMES, Sept. 22, 2004, at A1.

Taken as a whole, *Bates* and its antecedents reveal several issues to consider when removing tort claims from courtrooms and standardizing, if not precluding, their resolution. The *Bates* decision, while seeming to acknowledge the prophylactic effect of the *Cipollone* holding on FIFRA preemption cases, cautions that a potent preemption regime should not originate through guesswork; when tort claims are summarily jettisoned from courtrooms, decision-makers must be confident that policymakers have planned for this outcome and established appropriate alternative forms of compensation. Second, *Bates* implicitly calls upon policymakers to consider the shortcomings of centralized preemption regimes in informing the actions of parties engaging in risky activities, particularly when these activities develop and change at dramatic rates. In such situations, the decentralized tort process is likely to be superior, and the benefits of this system are likely to outweigh the often dreaded costs of excessive litigation.

A. *Rectifying the Jurisprudence of Tort Preemption*

The *Bates* decision revived the weighty presumption against federal preemption of state law. In his opinion, Justice Thomas unwittingly exemplifies the dilution of this tenet, claiming that FIFRA contains "an explicit statement that FIFRA pre-empts some state-law claims" and therefore "our task is to determine which state-law claims [FIFRA] pre-empts, without slanting the inquiry in favor of either the Federal Government or the States."[51] Thomas's apparent confidence in statutory interpretation is uncommon; not only have lower courts disagreed over the extent of FIFRA's preemptive effect and the applicability of the "choice of reaction" theory, many have also come into conflict over whether the type of preemption was express or implied.[52] The tort process, as a well-developed and responsive mechanism to civil wrongs, should not be brushed aside absent a clear and unambiguous statement on the face of a federal law. Stevens reaffirms this view, quoting the Court's earlier statement that "[b]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."[53]

Not only does *Bates* reinstate a jurisprudential presumption against preemption, it also points to special circumstances that buttress this presumption. For example, Stevens' opinion implies that states enjoy a "first-mover advantage" of sorts in establishing a compensatory regime. That is, in spheres where states have established a long history of providing remedies,

51 *Bates*, 125 S. Ct. at 1806 (Thomas, J., concurring in part and dissenting in part).

52 *See, e.g.*, Netland v. Hess & Clark, Inc., 284 F.3d 895 (8th Cir. 2002) (finding express preemption); Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991) (finding implied preemption); Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir. 1984) (finding neither implied nor express preemption).

53 *Bates*, 125 S. Ct. at 1801 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

courts must look to an explicit showing from Congress of its intentions to interfere,[54] dictum which arguably marginalizes the role of implied preemption. Moreover, where Congress supplants states' authority to compensate victims, courts should expect Congress to provide federal remedies. To make this point, Stevens refers to the 1984 Supreme Court decision *Silkwood v. Kerr-McGee Corp.*[55] which held that the Atomic Energy Act, in failing to compensate persons injured by hazardous nuclear materials, was unlikely to preempt state common-law awards. In that decision, the Court declared "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[56] Ultimately, through his analysis of FIFRA preemption in the *Bates* decision, Stevens clarifies and arguably increases the burden courts must overcome in order to find federal preemption. As a result, *Bates* helps to return tort protection to the status quo before *Cipollone*.

B. *Characteristics of Proper Preemption Regimes*

Bates goes beyond articulating to courts a proper approach to finding tort preemption; the decision also implicitly informs policymakers regarding the circumstances in which preemption is an appropriate means of tort reform. The contrasting outcomes of *Bates*, a tort preemption case about pesticides, and *Cipollone*, an analogous case about cigarettes, encourages policymakers to consider the nature of the industry targeted by potential preemption regimes. Characteristics such as the homogeneity of products across an industry and the likelihood of informational asymmetries indicate the likelihood of success for a centralized federal regime featuring preemption, rather than continued reliance on the decentralized tort process.

In *Cipollone*, the preemptive effect of the Federal Cigarette Labeling and Advertising Act (FCLAA) complied with a rational policy of uniform labeling requirements and consumer protection. In stark contrast to FIFRA, the federal law central to the *Cipollone* holding applies to a single, relatively homogenous product with a static set of ingredients. Given these characteristics, the federal government is a capable body to assess the health risks of smoking, establish a standard warning, and prohibit state interference. The preemptive effect of a federal act would benefit manufacturers by alleviating the burden of specializing cigarette packages and labels to comply with a patchwork of state and local laws.[57] Moreover, uniformity would aid consumers by disallowing confusing modifications of warning standards; cigarette manufacturers could no

54 *See supra* text accompanying note 46.

55 *Bates*, 125 S. Ct. at 1801; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

56 *Silkwood*, 464 U.S. at 251.

57 *See generally* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 514 (1992) (stating that one of the purposes of the FCLAA was to "protect[] the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations").

longer exploit loopholes in state regulations or common law. Ultimately, the measures of the FCLAA represent an effective and successful use of preemption, furthering the goals of economic efficiency and consumer protection.

Bates helps to illustrate why the market for pesticides, unlike the cigarette industry, is a poor place to apply preemption. In contrast to the homogenous market regulated by the FCLAA, FIFRA regulates thousands of pesticide products with hundreds of active ingredients.[58] The daunting task of regulating the market explains not only the flexibility given to manufacturers to design their labels,[59] but also Congress's decision to no longer require companies to provide data demonstrating the efficacy of their pesticides.[60] This reality stems from the nature of the market for pesticides: a fast-paced growth market where innovation and new product development are paramount.[61] In this industry, the tort process serves as a valuable counterbalance as the profit motive urges manufacturers to introduce new, potentially harmful products. The *Ferebee* court recognized the tort process's valuable role, declaring:

> By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides . . . a state tort action . . . may aid in the exposure of new dangers associated with pesticides. . . . 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.[62]

The preservation of tort protection in the market for pesticides clearly benefits consumers in that compensation is available for injuries resulting from pesticide manufacturers. Furthermore, pesticide manufacturers benefit from the tort process as well, since it provides rapid feedback regarding adequate product warnings and instructions. Arguably, Dow Agrosciences preserved substantial goodwill through discovering the harmful interaction between Strongarm and alkaline soil before marketing the product outside of Texas, or before the company used Strongarm's active ingredient in future products.

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58 *See* Riden v. ICI Americas, Inc., 763 F. Supp. 1500, 1508 (W.D. Mo. 1991) (citing U.S. GEN. ACCOUNTING OFFICE, RCED-86-125, PESTICIDES: EPA'S FORMIDABLE TASK TO ASSESS AND REGULATE THEIR RISKS 10 (1986)).

59 *See* 7 U.S.C. § 136a(c)(1)(C), (F) (2000).

60 The Court noted:

> In 1978, Congress once again amended FIFRA . . . in response to EPA's concern that its evaluation of pesticide efficacy during the registration process diverted too many resources from its task of assessing the environmental and health dangers posed by pesticides. Congress addressed this problem by authorizing EPA to waive data requirements pertaining to efficacy, thus permitting the agency to register a pesticide without confirming the efficacy claims made on its label.

Bates, 125 S. Ct. at 1796 (citation omitted).

61 *See* U.S. ENV'L PROT. AGENCY, EPA-735-R-05-001, TAKING CARE OF BUSINESS: PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT, EPA'S PESTICIDE PROGRAM FY 2004 ANNUAL REPORT 5 (2004), *available at* http://www.epa.gov/oppfead1/annual/2004/04annualrpt.pdf (showing the rapid rate of new antimicrobial, conventional, and biological active ingredient registrations).

62 Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1541-42 (D.C. Cir. 1984).

Some may criticize this deference to the tort process, believing that the standard-of-living benefits gained from pesticides will be stamped out by the imposition of "crushing liability." These arguments, incorporating Horwitz's relation between liability standards and economic growth,[63] drip of the classic liability fallacy—a perspective which effectively ignores the ability to internalize social costs. Instead, efficiency is achieved when pesticide companies factor in the social costs of their products, and a flexible, diffuse tort process is an excellent way to reveal these social costs. In fast-paced markets similar to that for pesticides, the tort process—not preemption—ultimately yields greater social efficiency.

V. Conclusion

Although *Bates* demystified the preemptive nature of FIFRA, it remains unclear whether FIFRA now stands as Congress intended. As the Supreme Court remarked, examination of the Act's legislative history "is at best ambiguous."[64] Nonetheless, the current interpretation of FIFRA's preemptive effects is likely the most promising for society at large. After the *Cipollone* decision and its unfortunate application to claims against pesticide companies, victims of negligence went uncompensated while manufacturers produced under distorted market pressures, delivering pesticides to consumers without an accurate ascertainment of the products' social costs. To avoid similar pitfalls with preemption regimes in the future, *Bates* urges that courts must stay the hand of preemption unless given a nearly explicit mandate by the enabling statute, and policymakers must carefully and completely consider the nature of the claims and alternative forms of compensation when applying preemption as a means of prophylactic tort reform. As commentator H. Bishop Dansby argues, lawmakers must recognize the tort process's "traditional role of responding to societal needs in a complex, rapacious, and competitive world."[65] Granted, discouraging frivolous lawsuits and reducing economic waste are noble goals of tort reform, and in some cases preemption can serve these goals effectively. However, before a policy of preemption is put in place, careful measures must be taken to "get the bugs out."

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63 *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 99-101 (1977). "One of the most striking aspects of legal change during the antebellum period is the extent to which common-law doctrines were transformed to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development." *Id.* at 99-100.

64 Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 609 (1991).

65 Dansby, *supra* note 11, at 11.