The Case Against FIFRA Preemption: Reconciling Cipollone's Preemption Approach with Both the Supremacy Clause and Basic Notions of Federalism

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THE PAST AND PRESENT STATE OF THE FIFRA PREEMPTION CONTROVERSY

The History, Regulatory Structure, and Preemption Language of FIFRA

The History of Pesticide Regulation

Congress' first attempt to regulate the pesticide industry was the Insecticide Act of 1910, which was primarily designed to protect consumers from acts of fraud relating to the commercial sale of misbranded or adulterated chemical products. Congress repealed the Act in 1947 and replaced it with a broader regulatory measure designed to ensure the "safe use and labeling of pesticides [in order] to protect those who came in immediate contact with them." Congress crafted the 1947 version of FIFRA to respond to regulatory demands brought on by a rapidly expanding pesticide industry. The measure was designed to provide for some level of uniformity in definitions, encourage cooperation between state and federal regulators, and create a centralized registration and licensing authority under the Secretary of Agriculture.

The focus of pesticide regulation continued to shift with increased public concern. Accordingly, the 1964 amendments to FIFRA broadened the regulatory scheme to address the effects of pesticides on wildlife and the environment. Given this new focus, upon its creation in 1970, the Environmental Protection...
Agency (EPA) assumed responsibility for pesticide regulation. Nonetheless, FIFRA remained “primarily a licensing and labeling statute” until 1972 when a “wholesale redrafting” of the statute “transformed FIFRA from a labeling law into a comprehensive regulatory statute.”

Overview of FIFRA’s Regulatory Structure

In its present form, FIFRA grants the EPA extensive regulatory authority over virtually every aspect of the pesticide manufacturing process. Manufacturers are required to register their production facilities with the EPA and to maintain books and records of their manufacturing processes for government inspection. In addition, to receive government registration for a particular compound, manufacturers must submit the chemical product to the EPA, complete with a proposed label and directions for use. Furthermore, the Administrator has the power to withhold a chemical product’s registration until the manufacturer provides additional information, such as chemical composition, physical and chemical characteristics, and chemical metabolism. Registration approval is granted only if the chemical product’s composition and labeling comply with EPA regulations, and the Administrator deems that the product will serve its intended function without unreasonable adverse effects on public health or the environment.

FIFRA also delegates to the EPA considerable enforcement

17. Smith & Coonrod, supra note 5, at 491.
18. Ruckelshaus, 467 U.S. at 991.
20. Id. § 136a; see also 40 C.F.R. § 156.10 (1993) (outlining the labeling requirements for pesticides).
21. 7 U.S.C. § 136a(c)(2); Ausness, supra note 5, at 213 (citing 40 C.F.R. §§ 158.150, 158.202 (1992)).
authority. Failure to comply with the standards enunciated by the Administrator can result in significant sanctions. In case of a violation, the EPA may prohibit the sale or use of the product, remove or seize it, enforce civil penalties of up to five thousand dollars, or impose criminal liability of up to twenty-five thousand dollars and/or up to one year of incarceration.

State involvement in the regulation of chemical products is a crucial aspect of the FIFRA regulatory scheme. Section 136t(b) requires the EPA Administrator to cooperate with other federal agencies as well as appropriate agencies of any state or political subdivisions thereof. Moreover, section 136w-1 grants to the states primary enforcement responsibility for pesticide use violations pursuant to FIFRA.

The Language of the FIFRA Preemption Provisions

Section 136v lies at the core of the FIFRA preemption controversy. The Supreme Court specifically addressed the preemptive effect of section 136v(a) in Wisconsin Public Intervenor v. Mortzer, concluding that the legislative history surrounding FIFRA clearly demonstrates "an unwillingness by Congress to grant political subdivisions regulatory authority, [but] does not demonstrate an intent to prevent the States from delegating such authority to its subdivisions, and still less does it show a

24. Id. §§ 136j-136l.
25. Id.
26. Id. § 136t(b).
27. Id. § 136w-1.
28. Section 136v states:
   Authority of States
   (a) In general
       A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
   (b) Uniformity
       Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

Id. § 136v. Significantly, Congress added the sub-headings to § 136v(a) and (b) to the language of the FIFRA preemption provisions via a 1978 amendment. Smith & Coonrod, supra note 5, at 491.
desire to prohibit local regulation altogether." Thus, section 136v(a) has been called a state power "savings clause" that reserves to the states broad powers within the FIFRA regulatory scheme.

Wisconsin Public Intervenor settled the issue of FIFRA preemption under the state "savings clause." However, the Supreme Court has not yet directly addressed the preemptive effect of FIFRA section 136v(b). As the interpretation of that provision has obvious implications for the viability of state common law tort claims, the preemptive scope of FIFRA section 136v(b) has been a topic of controversy in the legal community.

Traditional Preemption Analysis

The preemption doctrine derives from the Supremacy Clause of the Constitution, which declares that the laws of the United States shall be the supreme law of the land. Traditionally, preemption has been found in one of three ways: (1) express preemption (by the actual language of the federal statute or legislative history of the statute), (2) implied preemption by federal occupation of a regulatory field, or (3) implied preemption because of an actual conflict between federal and state law.

The Court has recognized sub-categories to each of these three

30. Id. at 609.
31. Id. at 609-10.
32. See id. at 606-16.
33. See supra notes 5-6 and accompanying text; see also infra notes 46-92 and 184-243 and accompanying text.
34. In full, the Supremacy Clause reads:
   This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
   U.S. CONST. art. VI, cl. 2.
36. Id. at 203-04 (citing Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 153 (1982)).
37. Id. at 204.
main categories of preemption. For instance, express preemption may occur either when a federal statute specifically excludes state regulation\(^{38}\) or when an administrative body promulgates preemptive regulations within the scope of its delegated authority.\(^{39}\) Similarly, implied preemption by federal occupation of a regulatory field may occur where a dominant federal interest is at stake or where federal regulation of a particular area is so pervasive as to leave no room for supplemental or parallel state regulation.\(^{40}\) Finally, implied preemption, because of an actual conflict between federal and state law, may occur where (1) compliance with both federal and state law is impossible,\(^{41}\) (2) compliance with state law would frustrate the objectives of the federal regulatory scheme,\(^{42}\) or (3) state law impairs a federally-created right.\(^{43}\)

Significantly, the Court's preemption jurisprudence recognizes the importance of state sovereignty, a principle upon which our federal system of government was constructed: "[C]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States are not to be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress."\(^{44}\) Thus, the Court has established a clear presumption against preemption of the general police power historically reserved for the states.\(^{45}\)

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45. *Id.* at 2618; *Rice*, 331 U.S. at 230; *Laurence H. Tribe, American Constitutional Law* § 6-25, at 479 & n.7 (2d ed. 1988).
The Circuit Split Regarding FIFRA Preemption Prior to Cipollone

Courts Finding No Preemption Prior to Cipollone

One of the first federal appellate cases to address whether FIFRA section 136v(b) preempted state common law claims based on inadequate labelling was Ferebee v. Chevron Chemical Co. In Ferebee, the estate of a deceased agricultural worker filed suit against Chevron, a manufacturer of the chemical paraquat, alleging that the decedent contracted pulmonary fibrosis from long-term skin exposure to diluted paraquat. The plaintiff claimed that the manufacturer failed to adequately label the substance to warn of such a risk. Chevron argued that the plaintiff's state law failure-to-warn claim was preempted by section 136v(b) of FIFRA, because FIFRA required Chevron to obtain EPA approval of its paraquat label. The court rejected Chevron's argument and held that FIFRA did not preempt the state common law failure-to-warn action.

The D.C. Circuit Court engaged in both an express and an implied preemption analysis in Ferebee. Initially, the court recognized the established presumption against federal preemption of state police powers. In light of this presumption, the court failed to find an explicit preemption of state common law actions because section 136v(b) does not specifically prohibit the imposition of common law liability. Rather, the court interpreted the language of the statute to "merely [preclude] states from directly ordering changes in the EPA-approved labels." In other words, the court drew a distinction between the imposition of

47. Id. at 1531.
48. Id. at 1531-32.
49. Id. at 1539.
50. Id. at 1543.
51. Id. at 1542-43.
52. "It is necessary to bear in mind the circumspect view courts must take of a claim that Congress has pre-empted states from exercising their traditional police powers on behalf of their citizens." Id. at 1542.
53. Id.
common law liability and positive enactments of state rule-making bodies, finding that the former, unlike the latter, was not a "requirement for labeling or packaging" so as to qualify for FIFRA preemption under section 136v(b) of that Act:

Maryland can be conceived of as having decided that, if it must abide by EPA's determination that a label is adequate, Maryland will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented had Maryland been allowed to require a more detailed label or had Chevron persuaded EPA that a more comprehensive label was needed. The verdict itself does not command Chevron to alter its label—the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label. 54

Having established that no express preemption existed, the court in Ferebee then considered the possibility of implied pre-emption. Because the court classified the provision of tort remedies for personal injuries as one of those powers traditionally exercised by the states on behalf of their citizens, 55 it did not find a dominant federal interest in pesticide regulation. 56 Moreover, the court concluded that the clear authority given the states in the "savings clause" of FIFRA section 136v(a) precluded the possibility of pervasive federal occupation of the field of pesticide regulation. 57 Similarly, the court was unable to find an actual conflict between FIFRA section 136v(b) and state common law damage claims. 58 Specifically, the court found that Chevron could comply with both federal and state laws in either of two ways: (1) by continuing to use the EPA-approved label and simply absorbing the costs of successful tort claims, or (2) by peti-

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54. Id. at 1541.
55. Id. at 1542 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963)).
56. Id.
57. Id.
58. Id.
tioning the EPA to make the label more comprehensive.\textsuperscript{59} Furthermore, state common law claims were not seen as an obstacle to the federal regulatory objective because “federal legislation has traditionally occupied a limited role as a \textit{floor} of safe conduct [not as] a \textit{ceiling} on the ability of states to protect their citizens.”\textsuperscript{60} Indeed, rather than an obstacle in the federal regulatory scheme, the court viewed state common law actions as a measure that would further “legitimate regulatory aims” by exposing new dangers associated with pesticides and giving manufacturers an incentive to petition for adequate labeling standards.\textsuperscript{61}

The “choice of reaction”\textsuperscript{62} theory put forth in \textit{Ferebee} was adopted by the majority of courts that addressed the issue of preemption under section 136v(b) prior to \textit{Cipollone}.\textsuperscript{63}

\textbf{Courts Finding Preemption Prior to Cipollone}

In \textit{Fitzgerald v. Mallinckrodt, Inc.},\textsuperscript{64} a federal district court in the Sixth Circuit reached the opposite conclusion from \textit{Ferebee}. In that case, Fitzgerald, a greenskeeper who developed mercury poisoning after exposure to Mallinckrodt’s fungicide, sued for negligent labeling and failure to warn.\textsuperscript{65} Mallinckrodt moved for summary judgment because the state common law claim was preempted by FIFRA section 136v(b), and the district court granted the motion.\textsuperscript{66}

In \textit{Fitzgerald}, the district court, like the circuit court in

\begin{thebibliography}{99}
\bibitem{59} Id.
\bibitem{60} Id. at 1543.
\bibitem{61} Id. at 1541.
\bibitem{65} Id.
\bibitem{66} Id.
\end{thebibliography}
Ferebee,67 engaged in both an express and an implied preemption analysis.68 However, it is reasonable to conclude from the Fitzgerald opinion that the court found the language of section 136v(b) so clear that it would not have undergone any implied preemption analysis at all without the D.C. Circuit's opinion in Ferebee:

While typically divining whether Congress intended to preempt state law is a difficult, haphazard process, in the instant statute, Congress has expressly stated its intent to preempt any state labeling or packaging requirements different from or additional to those mandated by FIFRA. Although the language of the statute appears to clearly indicate Congressional intent to preempt state labeling regulations, one court has found to the contrary.69

In finding that state common law claims for failure to adequately warn were also impliedly preempted by section 136v(b) of FIFRA because they present an actual conflict between state and federal law, the district court in Fitzgerald relied heavily on the First Circuit's opinion in Palmer v. Ligget Group, Inc.,70 a preemption case arising under the Federal Cigarette Labeling and Advertising Act of 1965.71 Adopting language from Palmer, the court in Fitzgerald characterized the "choice of reaction" theory relied upon in Ferebee as "akin to the free choice of coming up for air after being underwater."72 In so holding, the court refused to recognize the distinction between positive enactments by state rule-making bodies and state common law actions, a distinction central to the D.C. Circuit's disposition of Ferebee.73 In other words, the court in Fitzgerald held that imposing state common law liability was sufficiently regulatory so as to qualify as a "requirement[] for labeling or packaging in

67. See supra notes 51-61 and accompanying text.
68. Fitzgerald, 681 F Supp. at 406-08.
69. Id. at 406.
70. 825 F.2d 620 (1st Cir. 1987).
addition to or different from” that required by FIFRA.\textsuperscript{74} The court in Fitzgerald refused to “effectively authorize the state to do through the back door exactly what it cannot through the front”\textsuperscript{75} in order to avoid “abrogat[ing] Congress’ intent to provide uniform regulations governing the labeling of pesticides”\textsuperscript{76} and “arrogat[ing] to a single jury the regulatory power explicitly denied to all fifty states’ legislative bodies.”\textsuperscript{77}

At least two federal circuit courts that addressed the issue prior to Cipollone agreed with the holding in Fitzgerald.\textsuperscript{78} In one of those decisions, Papas v. Upjohn Co. (Papas I),\textsuperscript{79} a humane society worker brought a common law claim for inadequate labeling against the manufacturers of flea and tick powder that he applied to animals in the course of his job.\textsuperscript{80}

The Eleventh Circuit Court of Appeals undertook both an express and an implied preemption analysis in Papas I.\textsuperscript{81} In its express preemption analysis, the court looked to the actual language of section 136v(b) as well as the legislative history of the statute.\textsuperscript{82} Ultimately, however, the court in Papas I skirted the

\textsuperscript{74} 7 U.S.C. § 136v(b).
\textsuperscript{75} Fitzgerald, 681 F. Supp. at 407.
\textsuperscript{76} Id.
\textsuperscript{77} Id. (quoting Palmer v. Ligget Group, Inc., 825 F.2d 620, 628 (1st Cir. 1987)).
\textsuperscript{79} Papas, 926 F.2d at 1019.
\textsuperscript{80} Id. at 1020.
\textsuperscript{81} Id. at 1021-26.
\textsuperscript{82} The court noted:

The statute’s language, by itself, is a powerful limit on state power over labeling. A report accompanying the bill, as originally reported out of the House Committee, also indicated the limits on state power due to the division of authority between the federal and state governments: ‘In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee had adopted language which is intended to completely preempt State authority in regard to labeling and packaging.’ H.R. Rep. 92-511, 92d Cong. 1st Sess. 16 (1971). [Similarly,] subsection (b) preempted ‘any State
express preemption question, noting: "Given FIFRA's words and its legislative history, FIFRA may expressly preempt state common law. But, mindful that 'Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires,' we admit to a little uncertainty and pass over the question of express preemption."83

The court began its implied preemption analysis by citing precedent finding that common law liability is tantamount to state regulation: "The principle of implied preemption 'applies whether the federal law is embodied in a statute or regulation, and whether the state law is rooted in a statute, regulation, or common law rule.'"84 Given this starting point, it is not surprising that the court in Papas I rejected the Ferebee "choice of reaction" rationale and adopted the Fitzgerald implied preemption holding.

The court's opinion in Papas I identified three independent reasons for the finding that state common law actions for inadequate labeling are impliedly preempted by FIFRA section 136v(b).85 First, like the district court in Fitzgerald,86 the circuit court in Papas I found that the imposition of civil liability would result in a direct conflict with federal law to the extent that a state jury could declare an EPA-approved label inadequate, thereby frustrating Congressional intent to charge the EPA Administrator with oversight of pesticide labeling regulation.87 Similarly, allowing state common law actions would "stand as an obstacle to the accomplishment and execution of the full objectives of Congress"88 to the extent that individual state jury findings would encourage manufacturers to utilize dif-

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83. Id. at 1023-24 (citation omitted).
84. Id. at 1022 (quoting Taylor v. General Motors Corp., 875 F.2d 816, 826 (11th Cir. 1989)).
85. Id. at 1024-26.
86. See supra note 74 and accompanying text.
87. Papas, 926 F.2d at 1025.
different labels in different states, thereby precluding the realization of the Congressional goal of uniformity in pesticide labeling. Finally, the circuit court found implied preemption because the regulations adopted pursuant to FIFRA "occup[y] the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions."

The key holding of Fitzgerald and Papas I—the finding of FIFRA preemption of state common law claims based on failure adequately to warn—was adopted in some form by a minority of courts which addressed the issue of preemption under FIFRA section 136v(b) prior to Cipollone.

**The Cipollone Decision**

**Facts and Procedural Posture**

In Cipollone v. Liggett Group, Inc., Cipollone, the son of a woman who died of lung cancer in 1984 after smoking for forty-two years, maintained a cause of action on behalf of her estate against Liggett, the manufacturer of her brand of cigarettes. Cipollone's suit alleged design defect, failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud. As one of its defenses, Liggett claimed that the Federal Cigarette Labeling and Advertising Act of 1965 (the 1965 Act) and its successor, the Public Health Cigarette Smoking Act of

89. Id. (citing 40 C.F.R. § 156).
90. Id.
94. Id. at 2614.
95. Id.
1969 (the 1969 Act) preempted state common law claims based on the conduct of the defendant after 1965. After the district court granted a motion by Cipollone to strike the preemption defense entirely, the Third Circuit Court of Appeals held on an interlocutory appeal that the federal legislation, while not expressly preempting the state common law claims, impliedly preempted those claims that "challenge[d] either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes" because the imposition of common law liability would conflict with federal law. After multiple remands on issues not pertaining to the preemptive effect of either the 1965 Act or the 1969 Act, the Supreme Court granted certiorari "to consider the preemptive effect of the federal statutes."

**Preliminary Holding Regarding Express and Implied Preemption**

The Supreme Court's opinion in *Cipollone* began with a reiteration of the basic principles of traditional preemption analysis, including the effect of the Supremacy Clause, the presumption against preemption of the states' historic police powers by the federal government, and the importance of congressional intent in preemption analysis. The Court recognized another well-established principle of traditional preemption analysis when it stated that "Congress' intent may be 'explicitly stated in

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98. *Cipollone*, 112 S. Ct. at 2614.
102. "Article VI of the Constitution provides that the laws of the United States 'shall be the supreme Law of the Land; any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Id.* at 2617 (citation omitted).
103. "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police power of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).
104. "Accordingly, '[t]he purpose of Congress is the ultimate touchstone' of preemption analysis." *Id.* (citation omitted).
the statute's language or implicitly contained in its structure and purpose.\textsuperscript{105} The Court departed significantly from traditional preemption analysis, however, when it declared that implied preemption analysis should not be undertaken where Congress has included in the statute an express preemption provision. In the words of the Court:

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.\textsuperscript{106}

Thus, in one paragraph, the Court declared traditional implied preemption analysis redundant when a federal statute explicitly contemplates some form of preemption of the states' historic police power.

\textit{Preemption by the 1965 Act}

The 1965 Act was designed to promote two discrete and sometimes competing federal objectives: (1) adequately informing the public that cigarette smoking may be hazardous to health and (2) protecting the national economy from the burden imposed by diverse, nonuniform and confusing cigarette labeling and advertising regulations.\textsuperscript{107} Addressing the first objective, section 4 of the 1965 Act\textsuperscript{108} required the following warning to be affixed on every package of cigarettes sold in the country "Caution: Cigarette Smoking May Be Hazardous To Your Health."\textsuperscript{109} To the latter objective, section 5 of the 1965 Act, entitled "Preemption," provided:

\begin{footnotesize}
\begin{enumerate}
\item[105.] Id. (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).
\item[106.] Id. at 2618 (citations omitted).
\item[108.] Id. § 1333.
\item[109.] Id.
\end{enumerate}
\end{footnotesize}
(a) No statement relating to smoking and health, other than the statement required by Section 1333 of this title shall be required on any cigarette package.
(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.\(^\text{110}\)

In its express preemption analysis in *Cipollone*, the Court held that Congress spoke "precisely and narrowly"\(^\text{111}\) in enacting the preemption provision of the 1965 Act. Justice Stevens' analysis of the 1965 Act, representing a majority of seven Justices,\(^\text{112}\) reasoned that the word "statement" in section 5 of the 1965 Act included only legislative enactments, as evidenced by the fact that section 5(a) of that Act specifically referred to the congressionally-mandated warning statement identified in section 4 of that Act.\(^\text{113}\) The majority opinion's express preemption analysis thus concluded that "on their face, these provisions merely prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels (§ 5(a)) or in cigarette advertisements (§ 5(b))."\(^\text{114}\)

Given the Court's preliminary holding regarding the preemptive reach of explicit preemption provisions, the majority's consideration of the 1965 Act arguably should have ended with that conclusion. Nonetheless, the Court elaborated upon its reasoning in a portion of the opinion which bears remarkable resemblance to an implied preemption analysis.\(^\text{115}\) Initially, the Court stated that such a narrow interpretation of the explicit preemption provisions was appropriate given the presumption against the preemption of historic state police powers.\(^\text{116}\) Secondly, the Court reasoned that a congressionally-promulgated "particular warning does not automatically pre-empt a regulatory field.\(^\text{117}\)

\(^{110}\) *Id.* § 1334.
\(^{111}\) *Cipollone*, 112 S. Ct. at 2618.
\(^{112}\) Justices Stevens, Rehnquist, White, Blackmun, O'Connor, Kennedy, and Souter.
\(^{113}\) *Cipollone*, 112 S. Ct. at 2618.
\(^{114}\) *Id.*
\(^{115}\) *Id.*
\(^{116}\) *Id.*
\(^{117}\) *Id.*
Perhaps most significantly, the Court held that "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions."\(^{118}\) This reasoning led the Court to conclude that none of Cipollone's common law damages claims against Liggett was preempted by the relevant provisions of the 1965 Act.

**Preemption by the 1969 Act**

The 1969 Act amended the above provisions of the 1965 Act in two apparently significant ways.\(^{119}\) First, section 4 of the 1969 Act changed the wording of the congressionally-mandated warning statement to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health."\(^{120}\) Perhaps more germane to the present issue, section 5(b) of the 1965 Act was amended by the 1969 Act to read as follows: "No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this act."\(^{121}\)

In his express preemption analysis of the 1969 Act, Justice Stevens, writing for the plurality,\(^{122}\) focused on the manner in which the 1969 Act changed the language of the 1965 Act. In particular, the plurality found the substitution of the phrase "requirement[s] or prohibition[s] imposed under State law"\(^{123}\) for the term "statements"\(^{124}\) and the substitution of the phrase "with respect to the advertising or promotion"\(^{125}\) for the phrase "in the advertising"\(^{126}\) to signify a "much

\(^{118}\) *Id.*


\(^{120}\) *Id.*

\(^{121}\) *Id.* § 1334(b).

\(^{122}\) Joining Justice Stevens were Chief Justice Rehnquist, Justice White, and Justice O'Connor. Justices Scalia and Thomas concurred in the judgment.


\(^{124}\) *Id.* § 1334(b) (1965).

\(^{125}\) *Id.* (1969)

\(^{126}\) *Id.* (1965).
broader congressional intent to preempt state law

Addressing the words "requirement or prohibition," in the former phrase, the plurality stated:

[Cipollone] argues that common law damages actions do not impose "requirement[s] or prohibition[s]" and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement[s]." We disagree; such an analysis is at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions. The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules. As we have noted in another context, "state regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Furthermore, according to the plurality opinion, common law damages actions are tantamount to the imposition of a requirement or prohibition because they are "premised on the existence of a legal duty." In this respect, the plurality distinguished the language of the 1969 Act from that of the 1965 Act. Following Justice Stevens' reasoning, no state common law claim would require a cigarette vendor to attach a specifically worded warning statement to cigarette packages or advertisements in contravention of section 5 of the 1965 Act. Therefore, the 1965 Act did not preempt state common law claims. On the other hand, a state common law claim could impose liability based on the existence of a legal duty that could be construed as an "affirmative requirement[] or negative prohibition[]." Thus, the

127. Cipollone, 112 S. Ct. at 2619.
130. Id.
131. Id.
132. Id.
1969 Act preempts at least some state common law claims. 133

In interpreting the words "under State law," 134 the plurality also rejected Cipollone's claim that such language preempts only positive enactments by state rule-making bodies:

[W]e have recognized the phrase "state law" to include common law as well as statutes and regulations. Indeed, just last Term, the Court stated that the phrase "all other law, including State and municipal law" "does not admit of a distinction between positive enactments and common-law rules of liability." 135

Thus, the plurality in Cipollone apparently rejected the "choice of reaction" theory established in Ferebee by concluding that state common law claims are part of the rubric of state law and, as such, potentially impose a state legal requirement.

Finding that state common law damages claims potentially impose some state legal requirements or prohibitions did not mean, however, that all of Cipollone's state common law claims were preempted by section 5(b) of the 1969 Act. 136 Rather, in keeping with the presumption against preemption, the plurality narrowly interpreted the language of section 5(b) so that only those claims that imposed certain types of requirements or prohibitions were preempted by the 1969 Act. Specifically, the plurality announced the following test:

The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition based on smoking and health imposed under State law with respect to advertising or promotion," giving that clause a fair but narrow reading. 137

The plurality then applied this test to each of the four types of claims Cipollone had asserted against Liggett. 138

133. Id.
136. Id. at 2621.
137. Id.
138. Id.
Cipollone alleged two kinds of failure-to-warn claims: 139 (1) negligence in testing, research, sale, promotion, and advertisement of cigarettes and (2) failure to provide "adequate warnings of the health consequences of cigarette smoking." 140 The plurality concluded that the failure to warn claims based on a state common law duty related to advertising were preempted, but the failure to warn claims based on actions unrelated to the advertisement or promotion of cigarettes, such as testing or research, were not preempted. 141

The plurality further held that Cipollone's breach of express warranty claim was not preempted because "[a] manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty Accordingly, the 'requirements' imposed by an express warranty claim are not "imposed under State law,' but rather imposed by the warrantor." 142

Cipollone also alleged two kinds of fraudulent misrepresentation claims: 143 (1) that Liggett's advertising neutralized the effect of the congressionally-mandated warning statement and (2) that Liggett falsely represented or concealed a material fact. 144 The plurality concluded that the first of these claims was the converse of the failure to warn claim—based on a common law prohibition related to advertisement and promotion of cigarettes—and was therefore preempted by section 5(b) of the 1969 Act. 145 Interestingly, the Court viewed the second fraudulent misrepresentation claim as based on a general duty not to make false or misleading statements, not on a duty related to the advertisement or promotion of cigarettes. 146 Thus, the plurality held that Cipollone's second fraudulent misrepresentation claim was not preempted by section 5(b) of the 1969 Act. 147

139. Id.
140. Id.
141. Id. at 2621-22.
142. Id. at 2622.
143. Id. at 2623.
144. Id.
145. Id.
146. Id. at 2623-24.
147. Id.
Lastly, the plurality applied the same logic to Cipollone's conspiracy to defraud claim as it had to the second of Cipollone's fraudulent misrepresentation claims and declared that the conspiracy to defraud claim was based on a general duty not to conspire to commit fraud, not on a duty related to the advertisement or promotion of cigarettes. Accordingly, the plurality opinion held that Cipollone's conspiracy to defraud claim was not preempted by section 5(b) of the 1969 Act.

*Justice Blackmun's Opinion*

In his separate opinion, Justice Blackmun endorsed the plurality's preliminary holding that implied preemption analysis is unnecessary where Congress has included express preemption provisions in legislation:

Where, as here, Congress has included in legislation a specific provision addressing—and indeed, entitled—pre-emption, the Court's task is one of statutory interpretation—only to "identify the domain expressly pre-empted" by the provision. We resort to principles of implied pre-emption only when Congress has been silent with respect to pre-emption.

Justice Blackmun also recognized the Court's longstanding adherence to the presumption against preemption by requiring "clear and unambiguous evidence" to justify federal preemption of state regulating authority.

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148. *Id.* at 2624.
149. *Id.* at 2624-25.
150. *Id.* at 2625 (Blackmun, J., concurring in part and dissenting in part) (quoting plurality opinion).
151. *Id.*
152. As Justice Blackmun noted:

I further agree with the Court that we cannot find the state common-law damages claims at issue in this case pre-empted by federal law in the absence of clear and unambiguous evidence that Congress intended that result. *See, e.g.*, Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"); [Florida Lime &] Avocado Growers [Inc., v. Paul], 373 U.S. [132], 146-47 (1963) ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute in the absence of an unambiguous congressional
Applying his preemption methodology in the context of the cigarette acts at issue in *Cipollone*, Justice Blackmun also agreed with the plurality's conclusion that common law failure-to-warn claims were not preempted by the 1965 Act. Specifically, Justice Blackmun believed that the preemption provisions in the 1965 Act, given their ordinary interpretation, could only mean "that States are prohibited merely from 'mandating particular cautionary statements in cigarette advertisements.'"[^153] Like the plurality, then, Justice Blackmun concluded that the preemption provisions of the 1965 Act preempted only positive enactments by state legislatures or administrative agencies and not common law damages claims.[^154]

Justice Blackmun found the plurality's conclusions with respect to the 1969 Act "little short of baffling"[^155] in light of the plurality's preemption methodology and its disposition with respect to the 1965 Act. In his view, the same plain meaning test that the plurality applied to the language of the 1965 Act should also have been applied to the language of the 1969 Act.[^156] Justice Blackmun cited dictionary definitions of the language in question and concluded that the "terms suggest, if anything, specific actions mandated or disallowed by a formal governing authority."[^157] To clarify that such mandates did not include common law claims, he emphasized the indirect, non-compulsory, and compensatory regulatory impact of common law claims.[^158] In other words, he endorsed the "choice of reaction" theory elucidated in *Ferebee*. Thus, for Justice Blackmun, "the modified language of [the 1969 Act] no more ‘clearly’ or ‘manifestly’ exhibit[ed] an intent to pre-empt state common-law mandate to that effect"); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947) (“Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States”) (opinion of Frankfurter, J.).

[^153]: *Cipollone*, 112 S. Ct. at 2626.
[^154]: Id.
[^155]: Id. at 2627.
[^156]: Id.
[^157]: Id.
[^158]: Id. at 2627-28.
damages actions than did the language of the 1965 Act.\textsuperscript{159}

Justice Blackmun supported his interpretation of the plain meaning of the language in the preemption provisions of the 1969 Act with an analysis of the relevant legislative history, in which he found "no suggestion that Congress intended to expand the scope of the pre-emption provision when it amended the statute in 1969."\textsuperscript{160}

Lastly, Justice Blackmun criticized the plurality opinion for distinguishing the plaintiff's claims which rely upon a state law "requirement or prohibition with respect to advertising or promotion"\textsuperscript{161} of cigarettes from those based upon more general duties, such as the general duty not to deceive or to conspire to commit fraud.\textsuperscript{162} According to Justice Blackmun, the plurality artificially shifted the level of generality with which it considered the plaintiff's individual claims,\textsuperscript{163} resulting in a "crazy quilt of pre-emption that Congress surely could not have intended."\textsuperscript{164}

\textit{Justice Scalia's Opinion}

Like Justice Blackmun, Justice Scalia castigated the plurality for taking a seemingly self-contradictory middle position in \textit{Cipollone}.\textsuperscript{165} However, whereas Justice Blackmun agreed with

\begin{itemize}
\item \textsuperscript{159} \textit{Id.} at 2627.
\item \textsuperscript{160} \textit{Id.} at 2629.
\item \textsuperscript{161} \textit{Id.} at 2621.
\item \textsuperscript{162} See \textit{id.} at 2623-24.
\item \textsuperscript{163} In Justice Blackmun's words:
  \[\text{[T]he Court states that fraudulent misrepresentation claims are not}
  \text{"predicated on a duty 'based on smoking and health' but rather on a}
  \text{more general obligation—the duty not to deceive,' and therefore are not}
  \text{pre-empted by the 1969 Act. Yet failure to warn claims—which could just as easily be described as based on a "more general obligation"}
  \text{to inform consumers of known risks—implicitly are found to be "based on}
  \text{smoking and health" and are declared pre-empted.}
  \textit{Id.} at 2631 (Blackmun, J., concurring in part and dissenting in part) (quoting plurality opinion).
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.} at 2632 (Scalia, J., concurring in part and dissenting in part) ("The lifespan of [the plurality's new pre-emption methodology] may have been blessedly brief, inasmuch as the opinion that gives it birth in Part I proceeds to ignore it in Part V, by adjudging at least some of the common-law tort claims at issue here pre-empted.").
\end{itemize}
the plurality's approach to preemption questions. Justice Scalia found the plurality's holdings in this regard "extraordinary and unprecedented." Justice Scalia's criticism of the majority's preemption approach is discussed more fully below.

Justice Scalia's belief that the presumption against preemption is inoperative in express preemption and implied "conflict" analyses eradicates the plurality's policy rationale for strictly construing such express statutory provisions. Accordingly, Justice Scalia argued in Cipollone that express preemption provisions should be given their ordinary meaning, whether broad or narrow, so as to most nearly effectuate congressional intent. Applying this methodology for statutory construction to the ambiguous language of the cigarette acts at issue in Cipollone, Justice Scalia posited that "[t]he test for pre-emption in this setting should be one of practical compulsion, i.e., whether the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly." Like Justice Blackmun, Justice Scalia discerned no reason to interpret the language of the 1965 Act differently from that of the 1969 Act. Also like Justice Blackmun, Justice Scalia castigated the plurality for making artificial distinctions among the plaintiff's claims based on varying levels of generality. How-

166. Id. at 2625 (Blackmun, J., concurring in part and dissenting in part).
167. Id. at 2632 (Scalia, J., concurring in part and dissenting in part).
168. See infra notes 253-70 and accompanying text.
169. See infra notes 263-66 and accompanying text.
170. Cipollone, 112 S. Ct. at 2634 (Scalia, J., concurring in part and dissenting in part).
171. Id. at 2637.
172. Id. at 2627 (Blackmun, J., concurring in part and dissenting in part).
173. Id. at 2634-35 (Scalia, J., concurring in part and dissenting in part).
174. In Justice Scalia's words: This analysis is suspect, to begin with, because the plurality is unwilling to apply it consistently. As Justice Blackmun cogently explains, if New Jersey's common-law duty to avoid false statements of material fact is not "based on smoking and health," the same must be said of New Jersey's common-law duty to warn about a product's dangers. Id. at 2636 (citing id. at 2631 (Blackmun, J., concurring in part and dissenting in part)).
ever, Justice Scalia's ultimate conclusion directly contradicted that of Justice Blackmun. Justice Scalia found that the 1969 Act completely preempted the plaintiff's claims and that the 1965 Act preempted the failure-to-warn claims.\textsuperscript{175}

**Summary of the Cipollone Decision**

As the foregoing analysis suggests, the Court's ultimate disposition in *Cipollone* is confusing, if not self-contradictory. A bloc of seven Justices\textsuperscript{176} endorsed a new methodology for preemption issues\textsuperscript{177} and, applying that new methodology to the 1965 Act, found no preemption of any of the petitioner's state common law tort claims.\textsuperscript{178} Yet four members of the same bloc of Justices,\textsuperscript{179} purportedly applying the same methodology to a similarly worded 1969 Act, found preemption of the petitioner's state common law tort claims based on a failure to warn and neutralization of federal warning labels.\textsuperscript{180} The plurality was joined in this latter holding by the two Justices\textsuperscript{181} who dissented from the Court's formulation of a new preemption methodology and the Court's holding with respect to the 1965 Act.\textsuperscript{182} Given this curious combination of authority, the merit of Justice Scalia's and Justice Blackmun's somewhat prophetic criticisms of the plurality opinion is apparent.\textsuperscript{183}

\textsuperscript{175} *Id.* at 2632.
\textsuperscript{176} Justices Rehnquist, White, Blackmun, Stevens, O'Connor, Kennedy, and Souter.
\textsuperscript{177} See *Cipollone*, 112 S. Ct. at 2618.
\textsuperscript{178} *Id.* at 2619.
\textsuperscript{179} Justices Rehnquist, White, Stevens, and O'Connor.
\textsuperscript{180} *Cipollone*, 112 S. Ct. at 2625.
\textsuperscript{181} Justices Scalia and Thomas.
\textsuperscript{182} *Cipollone*, 112 S. Ct. at 2632 (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{183} See *id.* at 2638 ("[The] questions raised by today's decision will fill the lawbooks for years to come."); *id.* at 2631 (Blackmun, J., concurring in part and dissenting in part) ("I can only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision.").
Cipollone's Impact on the FIFRA Preemption Controversy

Academic Reaction

The plurality's decision has led to considerable speculation among legal commentators as to the applicability of the pre-emption principles outlined in *Cipollone* to numerous products liability industries regulated by federal statutes such as FIFRA, the Alcoholic Beverage Labeling Act, the National Traffic and Motor Vehicle Safety Act, the Federal Food, Drug, and Cosmetic Act, and the Medical Device Amendments of 1976. In the context of FIFRA specifically, the commentators appear to fall into one of two separate camps: those who are uncertain (or at least non-committal) as to the effect *Cipollone* will have on the FIFRA preemption debate and those who conclude that the language of the 1969 Act is sufficiently similar to that of FIFRA so as to require a finding of preemption in the FIFRA context based on the reasoning of *Cipollone*.

Judicial Reaction

As one might expect, the judicial reaction to the *Cipollone* decision in the FIFRA context has not been so one-sided. Although the majority of courts that have addressed the issue of FIFRA preemption after *Cipollone* have found that the federal legislation preempts state common law actions based on a failure-to-warn, at least two federal district courts in different

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184. See, e.g., Ausness, *supra* note 5; Smith & Coonrod, *supra* note 5; Boeh, *supra* note 5; Brown, *supra* note 5.
190. See Smith & Coonrod, *supra* note 5; Boeh, *supra* note 5; Brown, *supra* note 5.
191. See MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994); Worm v.
circuits have found no preemption of failure to warn claims.\textsuperscript{192} Moreover, the analyses in some of the decisions finding preemption suggest some confusion over key holdings in the \textit{Cipollone} decision.\textsuperscript{193}

\textit{Cases Finding Preemption After Cipollone}

The Tenth Circuit was the first federal court of appeals to consider the FIFRA preemption issue in the wake of \textit{Cipollone}. In \textit{Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc. (Arkansas-Platte III)},\textsuperscript{194} a landowner filed suit against a chemical manufacturer for environmental damage to property allegedly caused by the application of the defendant's product by
the plaintiff's predecessor.\textsuperscript{195} The Tenth Circuit affirmed its prior decision, on remand from the Supreme Court, and held that "Cipollone does not require a conclusion different than the one we reached initially."\textsuperscript{196} Nonetheless, although Cipollone may not have changed the Tenth Circuit's ultimate conclusion between Arkansas-Platte I and Arkansas-Platte III, it certainly changed the nature of the analysis undertaken by the court to decide the issue. In Arkansas-Platte I, the court found that FIFRA impliedly preempts state common law tort actions because such claims would (1) conflict with the EPA's authority under FIFRA to evaluate and approve labeling standards, (2) hinder the purpose of achieving uniformity in labeling, and (3) interfere with federal methods of achieving a statutory purpose.\textsuperscript{197} In contrast, in Arkansas-Platte III the court engaged only in an express preemption analysis.\textsuperscript{198} Presumably, this change in the Tenth Circuit's analysis is the result of the language in Cipollone that implied preemption analysis is redundant where a federal statute contains express preemption provisions.\textsuperscript{199} Indeed, in a case with a procedural history almost identical to that of Arkansas-Platte, the Eleventh Circuit Court of Appeals read Cipollone to require that only express preemption analysis be applied to statutes like FIFRA that contain express preemption provisions.\textsuperscript{200} Similarly, four other circuit courts that have considered the FIFRA preemption issue after

\begin{footnotes}
\item[197] See supra note 106 and accompanying text.
\item[198] Specifically, the court compared the language of FIFRA § 136v(b) (states "shall not impose any requirements") and the Public Health Cigarette Smoking Act of 1969 § 5(b) ("[n]o requirement or prohibition shall be imposed"), concluding, "[w]e believe the prohibition of 'any' requirement is the functional equivalent of 'no' requirement. We see no difference between the operative effect of the two acts." Arkansas-Platte III, 981 F.2d at 1179.
\item[199] See supra note 106 and accompanying text.
\item[200] "To determine FIFRA's pre-emption of the [plaintiffs'] claims we will 'only identify the domain expressly pre-empted' Papas v. Upjohn Co., 985 F.2d 516 (11th Cir.) (Papas III), cert. denied, 114 S. Ct. 300 (1993) (Papas IV)."
\end{footnotes}
Cipollone, have limited their analyses to the express language of FIFRA section 136v(b).\(^\text{201}\)

In Worm v. American Cyanamid Co. (Worm II),\(^\text{202}\) the plaintiff farmers brought suit because the defendant's herbicide allegedly retarded crop growth for a period significantly longer than the period indicated on the label of the product.\(^\text{203}\) The Fourth Circuit Court of Appeals affirmed a FIFRA preemption decision, declining to find express preemption because "Congress has not failed to make such preemption clear when it desired to do so."\(^\text{204}\) In Worm II, the Fourth Circuit recognized the new standard for preemption analysis announced by the Supreme Court in Cipollone: "Articulating a specific approach to interpreting a statute that expressly addresses preemption, the Court limited the task to first determining whether the relevant provisions reliably indicate congressional intent with regard to preemption of state authority, and second, if so, to interpreting the express language."\(^\text{205}\) Despite this accurate summation of one of the key holdings in Cipollone,\(^\text{206}\) the court in Worm II concluded that the "restrictive analysis [in Cipollone] would appear to require no change in the analysis of Worm I\(^\text{207}\)" Yet, Worm I was decided on the basis of an "implied conflict" preemption analysis,\(^\text{208}\) an approach that would appear to be inapplicable to FIFRA cases after Cipollone because FIFRA contains an express preemption provision.

In MacDonald v. Monsanto Co.,\(^\text{209}\) a chemical sprayer filed suit against a chemical manufacturer for personal injuries alleg-
edly caused by exposure to the defendant’s herbicide. The Fifth Circuit relied on Cipollone to hold that FIFRA preempts state common law damage claims concerning the improper labeling of herbicides. The court engaged in an express preemption analysis finding that the “clear language of the statute” required a finding of preemption. This decision reversed the district court, which had criticized the Tenth Circuit’s finding of express preemption in Arkansas-Platte III on the grounds that the circuit court failed to recognize Cipollone’s emphasis “that there is no inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damage actions.” Moreover, the district court criticized the decision in Arkansas-Platte III because it failed to recognize significant differences between the language in the Cigarette Acts and FIFRA. The district court also criticized the Tenth Circuit’s rationale that state common law claims would conflict with the congressional intent to achieve uniformity in the labeling of chemical products through FIFRA.

State courts also have grappled with the effect of Cipollone on FIFRA preemption cases. In Davidson v. Velsicol Chemical Corp., the first state case to address the issue after Cipollone, the plaintiffs filed suit to recover for injuries allegedly caused by the application of the defendant’s termite compound to the foundation of their home. The Nevada Supreme Court recognized that after Cipollone, “[w]here Congress has expressly provided for pre-emption, resort to the implied pre-emption doctrines is unnecessary; instead, the court need only

210. Id. at 1022-23.
211. Id. at 1024-25.
212. Id.
213. Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10th Cir.), cert. denied, 114 S. Ct. 60 (1993); see supra notes 194-99 and accompanying text.
215. Id.
216. Id., see infra note 326 and accompanying text. Although MacDonald has been overruled, the district court's analysis in that case is indicative of the difficulty lower courts have encountered in interpreting Cipollone.
218. See Recent Case, supra note 6, at 964.
219. Davidson, 834 P.2d at 932.
determine the scope of the pre-emption." In its express pre-emption analysis, the court stated that FIFRA section 136v(b) makes no specific mention of state common law claims and concluded that "[b]ecause Congress has expressly pre-empted common law in other pre-emption clauses, Congress' silence cannot be ignored—it is inimical to a finding of express pre-emption."

Given the court's accurate summation of one of the key holdings in Cipollone, the Nevada Supreme Court's decision should not have gone any further, and the plaintiff in that case should have prevailed. Nevertheless, the court went on to find common law claims barred by FIFRA because of an "implied field" preemption and an "implied conflict" preemption. The court attempted to explain its apparent discord with Cipollone in the following statement: "Our opinion is consonant with Cipollone in that we address implied pre-emption only after concluding that FIFRA does not expressly pre-empt such claims. Thus, in Davidson, the court interpreted Cipollone to require an express preemption analysis "in addition to—rather than to the exclusion of—an implied preemption analysis."

Yowell v. Chevron Chemical Co., decided by a Missouri Court of Appeals within three weeks of Cipollone, was a wrongful death action against a pesticide manufacturer. The court in Yowell relied heavily on Papas I and Arkansas-Platte I to conclude that "FIFRA impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides to the

220. Id.
222. See supra notes 102-06 and accompanying text.
223. Davidson, 834 P.2d at 934-37.
224. Id. at 933 n.2.
225. See Recent Case, supra note 6, at 964.
extent that such actions are based on claims of inadequate labeling. 227

Although the ultimate dispositions of these federal and state cases are in harmony, the differences in their approaches to the FIFRA preemption question suggest that Justice Blackmun was correct in forecasting the difficulty that lower courts would have in attempting to apply the Cipollone holding in other preemption contexts. 228

Cases Finding No Preemption After Cipollone

One of the first federal cases to address the FIFRA labeling preemption issue after Cipollone was Burke v. Dow Chemical Co. 229 In that case, the parents of two children sued the manufacturers of an insecticide, alleging that the mother's exposure to the active ingredient during her pregnancies caused her children to have brain damage. 230 Dow claimed that the suit was preempted by FIFRA and its corresponding regulations. 231

The district court in Burke began its FIFRA labeling preemption analysis by noting that the language of FIFRA expressly grants the states considerable regulatory powers with respect to the sale and use of pesticides, 232 while prohibiting them from directly imposing labeling requirements. 233 In the district court's opinion, the language of FIFRA is broader than that of the 1965 Cigarette Act but not as broad as that of the 1969 Cigarette Act. 234 Because of the "expansive" regulatory powers

227. Id. at 66 (quoting Papas v. Upjohn Co., 926 F.2d 1019, 1026 (11th Cir. 1991)).
228. See supra note 183 and accompanying text.
230. Id. at 1130.
231. Id.
232. Id. at 1136; see also 7 U.S.C. § 136v(a) (1988); supra notes 29-31 and accompanying text.
234. The fact that the provision speaks only to labeling and packaging causes it to resemble the 1965 cigarette act's provision that "no statement relating to smoking or health shall be required on any cigarette package." Unlike the 1965 act, however, FIFRA bars states from imposing "requirements" (rather than requiring statements), a usage which the Cipollone Court took to have a broader preemptive effect. Burke, 797 F Supp. at 1140.
granted to the states in section 136v(a), however, the court was especially reluctant to read section 136v(b) broadly. "While courts must ordinarily construe preemption clauses narrowly, they must be especially cautious when Congress itself has identified an extremely broad area of authorized state conduct." Accordingly, the district court in *Burke* interpreted the FIFRA preemption provision more narrowly than most courts which have considered the issue. Specifically, the court determined:

\[\text{[If EPA-approved labels were in fact affixed to the relevant containers, plaintiffs may not claim that defendants' products were mislabeled. If, however, warnings to the trade, warnings apart from labels or packaging, limitation on sales to professionals, or other protections falling generally within the ambit of warnings should have been used when the content of the label was fixed by EPA there remains a liability question for the trier of fact.}^{238}\]

One interpretation of this holding is that the district court in *Burke* found preemption of government misfeasance claims alleging that the EPA mislabeled the product based upon the product-specific information provided to the Agency, but found no preemption of common law manufacturer misfeasance claims alleging that the manufacturer provided inadequate or inaccurate product-specific information to the Agency.

Despite "the directive in *Cipollone* to focus exclusively on express preemption clauses," the court in *Burke* undertook an implied preemption analysis for the sake of argument, and concluded that FIFRA did not impliedly preempt the common law failure-to-warn claims. While noting analytical weaknesses on both sides of the debate, the district court ultimately decided the implied preemption question on policy

235. *Id.*
236. *Id.*
237. *Id.* at 1141.
238. *Id.*
239. Specifically, the court recognized that the "choice of reaction" theory underlying the anti-preemption decisions offers manufacturers no real choice, while also acknowledging that the preemption of common law failure-to-warn claims would eliminate any incentive for manufacturers to actively evaluate the adequacy of their labels. *Id.*
grounds: "The federalism issues are too important to warrant foreclosing recovery to an injured party on a questionable theory of implied preemption."\footnote{240}

In \textit{Couture v. Dow Chemical U.S.A.},\footnote{241} a federal district court in Montana relied on \textit{Burke} in finding no FIFRA preemption of common law failure-to-warn claims. In \textit{Couture}, the plaintiff asserted that exposure to the defendant's herbicides resulted in his contraction of T-cell lymphoma.\footnote{242} The defendant contended that FIFRA preempted the claims.\footnote{243} The district court reaffirmed one of its own pre-\textit{Cipollone} FIFRA decisions\footnote{244} and adopted the \textit{Ferebee} "choice of reaction" rationale.\footnote{245} The court relied on \textit{Burke} in the sense that it found the "choice of reaction" interpretation of the express language in FIFRA more appropriate than a broad reading of that language, given (1) the expansive regulatory powers granted to the states in section 136v(a) of FIFRA and (2) the Supreme Court's directive in \textit{Cipollone} to interpret preemption provisions narrowly.\footnote{246}

\textit{Conclusion: Cipollone's Impact on the FIFRA Preemption Debate}

The circuits were split with regard to FIFRA preemption prior to the \textit{Cipollone} decision. After \textit{Cipollone}, the circuits remain split, though considerably less dramatically. Moreover, federal and state courts have employed a hodgepodge of express and implied preemption analyses in FIFRA cases decided in the wake of \textit{Cipollone}.

Part Two of this Note suggests an alternative to the preemption analysis outlined in \textit{Cipollone} and attempts to apply this suggested analysis to FIFRA.

\begin{footnotes}
\item[240.] \textit{Id.}
\item[242.] \textit{Id.} at 1299.
\item[243.] \textit{Id.}
\item[244.] Montana Pole \& Treating Plant v. I.F. Laucks, 775 F Supp. 1339 (D. Mont. 1991), \textit{aff'd}, 993 F.2d 676 (9th Cir. 1993).
\item[245.] \textit{Couture}, 804 F Supp at 1300.
\item[246.] \textit{Id.} at 1300-02.
\end{footnotes}
An Alternative to the Cipollone Preemption Analysis

Although there has been some confusion about the Supreme Court's preemption methodology in *Cipollone*, most federal and state courts that have addressed the preemptive effect of federal statutes in the wake of *Cipollone* have recognized that a majority of the Court reformulated traditional preemption methodology in that decision. Specifically, the Court held that (1) implied preemption analysis is unnecessary where Congress has included in federal legislation a provision that, as "a 'reliable indicium of congressional intent with respect to state authority,'" expressly addresses preemption and (2) express preemption provisions deserve only a narrow interpretation, in light of the strong presumption against preemption inherent in a federal system of government.

The Need for Implied Preemption Analysis

The majority's rationale for eliminating implied preemption analysis where federal legislation includes express preemption provisions appears to be based on common sense: "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." In other words, where Congress has taken the time to enact a preemption section, Congress meant what it said and nothing more.

In his separate opinion, Justice Scalia criticized the Court's decision to ignore implied preemption analysis altogether where federal legislation contains an express preemption provision.

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249. See supra notes 102-06 and accompanying text.
251. Id. at 2617-21.
252. Id. at 2618.
253. Id. at 2633 (Scalia, J., concurring in part, and dissenting in part).
Justice Scalia apparently accepted the majority's new approach to the extent that it rendered implied "field" preemption analysis unnecessary in the face of an express preemption provision, for the Court need not infer congressional intent from regulatory structure where Congress itself has endeavored to codify it. Justice Scalia disagreed with the majority's new rule, however, to the extent that it precludes implied "conflict" preemption analysis. He contended that such an approach would work "mischief" in effectuating congressional intent. Extending the Court's holding to its logical extreme, Justice Scalia noted that such a rule would require "[t]he statute that says anything about pre-emption [to] say everything."

Although the majority's formulation has obvious appeal in the sense that it reserves default police powers to the states, the Supremacy Clause requires state powers to yield to conflicting federal law. Because of the Supremacy Clause, Justice Scalia's position on the necessity of implied preemption analysis proves more persuasive than the majority's new rule. Under the majority's formulation, states could directly contravene federal statutes merely because those statutes contain under-inclusive preemption provisions. To illustrate the point, consider a hypothetical federal statute that outlaws the sale and use of assault rifles and contains the following preemption provision: "No state shall regulate the sale of assault rifles as those weapons are defined herein." Under the plurality's preemption approach, this statute would not preempt a state law permitting the use of assault rifles, despite the federal statute's express prohibition of such use, because the preemption provision does not expressly preclude state regulation of the use of assault rifles. The majority would not undertake any implied preemption analysis in such a case, since the federal legislation included an express preemption section. In contrast, Justice Scalia's approach would result

254. "The existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines." Id.
255. Id.
256. Id.
257. Id. at 2634.
258. U.S. Const. art. VI, cl. 2; see supra note 34.
in a finding of preemption. Although the preemption provision in the federal statute would not expressly preclude a state from allowing the use of assault rifles, it would impliedly preempt a state law permitting use of assault rifles because such a law would actually conflict with the federal legislation.259

A second reason that Justice Scalia's approach is more convincing than the majority's approach is that under the latter, Congress has more power to preempt state law when it is silent than when it expressly addresses preemption in a particular statute. In the foregoing assault rifle hypothetical, for instance, if the federal legislation had not included any express preemption provision, the majority would inevitably find an implied "conflict" preemption of the state law permitting use of assault rifles. Yet, as noted above, the majority would not even undertake this implied "conflict" analysis if the federal statute contained an express preemption section.

The end result of the majority's formulation is hardly consistent with the Supremacy Clause. As soon as Congress endeavors to enact an express preemption provision, it is deprived of its inherent power to supersede substantively conflicting state law; and federal legislation is potentially eviscerated by state legislation, because only those state laws that conflict with the policies enumerated in a preemption provision are precluded by that provision, though other state legislation may conflict with policies of the statute not enumerated in the preemption provision.

The Presumption Against Preemption

As noted above,260 a majority of the Cipollone Court recognized a purportedly longstanding presumption against the preemption of state police powers when it noted that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless

259. Cf. BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1776 (1994) (Souter, J., dissenting) ("[O]ur cases describe a contrary [preemption] rule: whether or not Congress has used any special 'preemptive' language, state regulation must yield to the extent it actually conflicts with Federal law.").
260. See supra note 116 and accompanying text.
that [is] the clear and manifest purpose of Congress."\textsuperscript{261} The opinions in \textit{Cipollone} also indicate that a majority of the Court found this presumption significant in both express and implied preemption analysis.\textsuperscript{262}

Justice Scalia disagreed with the plurality's emphasis on the presumption against preemption in express preemption analysis.\textsuperscript{263} While he recognized that such a presumption was appropriate where Congress has remained silent with respect to preemption and the Court consequently engages in an implied "field" preemption analysis,\textsuperscript{264} Justice Scalia believed that such a presumption "dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself."\textsuperscript{265} Such language suggests that Justice Scalia considered the presumption against preemption rebuttable by Congress' enactment of an express preemption provision, whereupon the only question to be resolved was the extent to which Congress intended to displace state law, not whether it intended to displace state law.\textsuperscript{266}

Justice Scalia also stated that the presumption against preemption, coupled with the lack of any implied "conflict" analysis where Congress enacted an express preemption provision, would effectively function as a guarantee of congressional inaction.\textsuperscript{267} As Justice Scalia admonished:

When this second novelty is combined with the first, the result is extraordinary: The statute that says \textit{anything} about pre-emption must say \textit{everything}; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of congresses will dare to say anything about pre-emption.\textsuperscript{268}

\textsuperscript{261} \textit{Cipollone}, 112 S. Ct. at 2617 (quoting \textit{Rice v. Santa Fe Elevator Corp.}, 331 U.S. 218, 230 (1947)).
\textsuperscript{262} \textit{Id.} at 2625-26 (Blackmun, J. concurring in part and dissenting in part).
\textsuperscript{263} \textit{Id.} at 2632 (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{264} \textit{Id.} at 2633.
\textsuperscript{265} \textit{Id.} at 2632.
\textsuperscript{266} \textit{Id.}
\textsuperscript{267} \textit{Id.} at 2633-34.
\textsuperscript{268} \textit{Id.} at 2634.
Justice Scalia's objection to the emphasis placed upon the presumption against preemption by the majority is well-taken when the presumption is coupled with the lack of any implied conflict analysis, for, as noted above, such an approach robs Congress of some of the preemptive power it inherently possesses by virtue of the Supremacy Clause. The presumption against preemption would not create any disincentive to enact express preemption provisions, however, if courts had to engage in implied "conflict" analysis as well as express analysis. Under such an approach, Congress would retain the same power to preclude substantively conflicting state law after the enactment of an express preemption provision that it had before enacting such an express provision. Moreover, the enactment of an express preemption provision would be more likely than congressional silence to serve as the "clear and manifest" evidence of congressional intent to preempt that is required to override the presumption. Rather than a deterrent, therefore, Congress would have an affirmative incentive to enact express preemption provisions if the presumption against preemption were coupled with the requirement to engage in both an express preemption analysis and an implied "conflict" preemption analysis.

The presumption against preemption is also consistent with the most fundamental notions of federalism. As James Madison, one of the most staunch advocates of a strong federal government in the debate surrounding the ratification of our federal constitution, observed:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs,

269. See supra notes 258-59 and accompanying text.
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concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.\textsuperscript{271}

According the presumption against preemption great weight might make the federal legislature's exercise of authority more difficult by requiring Congress to speak precisely in express preemption provisions. However, such a requirement only enhances legislative accountability, which serves as the foundation of any democratic system of governance. Furthermore, such a requirement would not emasculate federal legislative power, for the Supreme Court has long recognized that "Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States."\textsuperscript{272}

Requiring an implied "conflict" preemption analysis while consistently recognizing the presumption against preemption strikes the proper balance between the preeminence of the federal government established by the Supremacy Clause and the deference to the traditional police powers of the states inherent in the most fundamental notions of federalism.

Applying the Alternative Preemption Analysis to FIFRA

FIFRA Does Not Expressly Preempt State Common Law Claims

As noted above,\textsuperscript{273} the first step in an express preemption analysis is to ascertain whether the express preemption provision at issue is "a 'reliable indicium of congressional intent with respect to state authority'"\textsuperscript{274} The FIFRA preemption provisions\textsuperscript{275} appear to satisfy this requirement. Indeed, section

\textsuperscript{271} THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

\textsuperscript{272} Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947).

\textsuperscript{273} See supra note 250 and accompanying text.


\textsuperscript{275} See supra note 28.
136v is itself entitled "Authority of States." It is difficult to imagine a more "reliable indicum of congressional intent with respect to state authority" than a federal statutory provision so entitled.

Also as noted above, the presumption against preemption requires clear and manifest evidence of congressional intent to displace the police powers that have historically inhered in the states. Although section 136v(b) clearly and manifestly indicates congressional intent to displace some state authority, it does not clearly and manifestly exhibit an intent to displace all state authority. The language of section 136v(b) is ambiguous; it prescribes state imposition of "any requirements for labeling or packaging in addition to or different from those required under this subchapter." This language does not explicitly proscribe state common law actions, as other federal statutes have. Moreover, the regulations implementing the FIFRA regulatory scheme repeatedly refer to the term "state" as the legislative, executive or administrative authorities of the several states.

278. See supra note 251 and accompanying text.
281. See, e.g., 40 C.F.R. § 162.151(j) (1993) (defining state for purposes of FIFRA as state agency); id. § 166.20(a) (defining authority of the governor of a state, head of a state agency, or official designee to grant exemptions under FIFRA); id. § 166.22 (requiring consultation with state governor in the determination of a state emergency warranting exemption); id. § 166.40 (stating authority of the head of a state agency or governor or official designee to issue crisis exemption); id. § 166.43(a) (requiring state agency issuing crisis exemption to notify the EPA of such a determination); id. § 166.47 (requiring notification of state agency officials for crisis exemptions resulting in chemical residues); see also id. § 166.20(a) (referring to the authority of the head of a state agency, the state governor, or a state's official designee to grant an exemption under FIFRA for state emergencies).
The only time the regulations explicitly mention state common law claims is to convey the importance of such claims in the FIFRA regulatory scheme—a reference that in fact assumes the validity of state common law claims within that scheme. In light of both the presumption against preemption and the fact that Congress can speak with "drastic clarity" when it so chooses, it would certainly be reasonable to conclude that section 136v(b) does not preempt state common law claims on its face.

An analysis of the operative language in section 136v(b) yields the same conclusion. As with the language of the cigarette acts at issue in *Cipollone*, the dictionary definitions of the terms "impose" and "requirements" in section 136v(b) "suggest, if anything, specific actions mandated by a formal governing authority." Thus, section 136v(b), if read to preempt anything at all, should be read to preempt only affirmative enactments by state legislatures and executive or administrative agencies, not state common law tort claims.

Such a reading of section 136v(b) is arguably at odds with the language in *Cipollone* stating that "[a]s we noted in another context, '[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy'" However, as Justice Blackmun astutely pointed out in his separate opinion in *Cipollone*, the other context to which the above language alludes is labor law, where the dominant federal interest in regulating labor relations rebuts the presumption

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282. *Id.* § 153.74(c) (referring to the manufacturer's responsibility to produce incident reports based on state law product liability claims).
283. See *supra* note 272 and accompanying text.
284. *Cipolone* v. Liggett Group, Inc., 112 S. Ct. 2608, 2627 (1992) (Blackmun, J., concurring in part and dissenting in part); see *Webster's Encyclopedic Unabridged Dictionary* 716, 1219 (1989) (defining "impose" as "to lay on or set as something to be borne, endured, obeyed, fulfilled, paid, etc." and "requirement" as "a thing demanded or obligatory"); see also *Black's Law Dictionary* 755, 1304 (6th ed. 1990) (defining "impose" as "[t]o levy or exact as by authority" and "require" as "[t]o direct, order, demand, instruct, command, claim, compel, request, need, exact").
against preemption and creates primary federal jurisdiction. No such dominant federal interest exists in the FIFRA context. The purported government interest underlying section 136v(b) is uniformity. Yet, uniformity in labeling does not exist under the current FIFRA structure. Because different manufacturers of the same active chemical ingredient submit their own proposed labels and directions for use to the EPA, identical compounds may have different labels under the current FIFRA regulatory scheme. Given that the FIFRA preemption provision lacks a dominant federal interest, the above language from Garmon (as cited in Cipollone) would not appear to apply in a FIFRA preemption analysis.

Other passages in Cipollone, other recent Supreme Court decisions, and fundamental principles of administrative law also recognize the legitimacy of distinguishing between positive enactments of state legislative, executive, and administrative authorities and state adjudicative pronouncements. When analyzing the similarly-worded preemption provision of the 1965 Cigarette Act, the Court in Cipollone stated that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." Similarly, in Goodyear Atomic Corp. v. Miller, the Court recognized the difference between "direct state regulation" and "the incidental regulatory effects" of state common law damage awards, concluding that "Congress may

286. Id. at 2628 n.3 (Blackmun, J., concurring in part and dissenting in part).
288. See infra notes 324-26 and accompanying text.
289. See Palmer v. Liggett Group, Inc., 825 F.2d 620, 629 n.13 (1st Cir. 1987) (discussing differences between FIFRA and the cigarette acts at issue in Cipollone). "Under FIFRA, each manufacturer drafts a warning label for each product for EPA approval. Thus, two manufacturers of the same regulated product may use different labels of their own choosing, provided only that they obtain EPA approval." Id.
290. See supra note 285.
291. Cipollone, 112 S. Ct. at 2618.
293. Id. at 185; see also Cipollone, 112 S. Ct. at 2628 (Blackmun, J., concurring in part and dissenting in part) (distinguishing the direct effect of statutes and administrative regulations from the common law's indirect regulatory effect).
reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.”

In another recent preemption case, *English v. General Electric Co.*, the Court recognized that while common law damages awards could alter behavior, “such an effect would be ‘neither direct nor substantial enough’ to warrant preemption.” In addition, failing to distinguish between the regulatory nature of positive enactments and common law judgments is akin to ignoring the distinction between the rule-making and adjudicative capacities of an administrative agency that dates back almost eighty years.

Although the Court was not persuaded in *Cipollone* by the “choice of reaction” theory established by the D.C. Circuit Court of Appeals’ in *Ferebee*, that theory may be more persuasive in the FIFRA context. The cigarette acts at issue in *Cipollone* mandated that manufacturers include a specific cautionary statement on their cigarette packages. Thus, a jury determination that such a warning was inadequate left the manufacturer with no choice and no means of escaping liability. The manufacturers would have to either abide by the mandate of the Cigarette Act and be found civilly liable to consumers or ignore the federally mandated warning requirement and incur liability to the government. FIFRA, by way of contrast, does not require any particular warning statement; indeed, it allows manufacturers to actively engage in the process of determining optimal labeling by providing the EPA with relevant information regarding the chemical product.


297. See *BiMetallic v. State Bd. of Equalization*, 239 U.S. 441 (1915) (distinguishing administrative rulemaking, whereby a public or a quasi-public procedure formulates generally applicable policy, from administrative adjudication, whereby the adversarial context of a specific controversy determines individual rights and duties).

298. See *supra* notes 54-61 and accompanying text.

299. See *supra* notes 107-09, and 119-20 and accompanying text.

determination finding inadequate labeling, a manufacturer has exactly the choice outlined in Ferebee: (1) leave the label unchanged and absorb the costs of common law damages claims or (2) petition the EPA to alter the label. Moreover, such a choice is not "only notional" in the FIFRA context when one considers that Congress enacted the statute to balance the need for continued development of chemical products against the need to protect humans, wildlife, and the environment from unreasonably adverse effects. The fact that a state common law damages award could help effectuate this statutory purpose is fairly evident. When damages are minor, a manufacturer required to pay a relatively small amount of compensatory damages for inadequate labeling will choose not to alter the product label because the profit margin can absorb the additional costs. In this instance the value of the product to society would outweigh the harm. In contrast, a manufacturer required to pay an inordinately large amount of compensatory damages will likely choose either to remove the product from the stream of commerce or modify the product label. In this instance, the harm of the product would outweigh its value to society. Thus, the "choice of reaction" theory has merit in the FIFRA context.

Additionally, the language in section 136v(b) is more similar to the language in the 1965 Cigarette Act at issue in Cipollone (which the Court held did not preempt state common law claims) than it is to the language of the 1969 Cigarette Act (which the Court held did preempt state common law claims). The operative words in the preemption provision in the 1965 Act are "[n]o statement shall be required". The Court in Cipollone concluded that in this provision "Congress spoke precisely and narrowly [O]n their face, these provisions merely prohibited state and federal rule-making bod-

301. See supra note 59 and accompanying text.
303. See supra notes 107-18 and accompanying text.
304. See supra notes 119-33 and accompanying text.
In contrast, the operative language in the 1969 Act read, "'[n]o requirement or prohibition shall be imposed under State law..." The Court ultimately concluded that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law." The preemption provision in section 136v(b) would appear to more closely resemble the language of the 1965 Act than the 1969 Act because that section precludes a state from effecting "any requirements for labeling or packaging" and makes no mention of state-imposed prohibitions.

Like the actual language of section 136v(b), the legislative history is ambiguous with respect to state common law tort claims. The discussion of section 136v(b) in the final Senate Report is as follows: "Generally, the intent of the provision is to leave to the States the authority to impose stricter regulation on pesticides use than that required under the Act. Subsection (b) preempts any State labeling or packaging requirements differing from such requirements under the Act." This lack of information has led two commentators to conclude that the legislative history of this section of FIFRA "is, on the whole, not very helpful in determining the preemptive effect of § 136v(b) on state tort claims [because] there was little controversy and, hence, little discussion of the labeling question."

A particularly compelling policy rationale suggests that section 136v(b) does not expressly preempt state common law claims. As Justice Blackmun noted in his separate opinion in Cipollone, state common law tort claims serve a compensatory purpose separate from their regulatory purpose. Indeed, the primary purpose of state common law claims is compensatory,

306. Cipollone, 112 S. Ct. at 2618.
308. Id. at 2620 (alteration in original).
311. Smith & Coonrod, supra note 5, at 493.
312. Cipollone, 112 S. Ct. at 2628 (Blackmun, J., concurring in part and dissenting in part).
while their regulatory purpose is only incidental. A finding of express preemption would leave victims of chemical torts without any effective remedy. Such a devastating effect upon an entire class of citizens should necessitate particularly clear and manifest evidence of congressional intent. As the Court noted in a similar context, "[the Atomic Energy Act's] silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."314

Congress clearly intended to preempt some state authority when it enacted section 136v(b) of FIFRA. Yet, the language of that section does not unequivocally preempt state common law claims. The legislative history surrounding section 136v(b) is similarly ambiguous. In light of (1) the presumption against preemption, (2) the literal meaning of the statutory language, (3) the lack of a dominant federal interest, (4) the merit of the "choice of reaction" theory in the FIFRA context, (5) the distinction between pronouncement of rules and adjudicative judgments, (6) the Court's analysis of the 1965 Cigarette Act in Cipollone, and (7) the unavailability of other compensatory remedies to victims of chemical torts, the most reasonable interpretation of section 136v(b) is that it expressly preempts only positive enactments by state legislatures and executive agencies, and does not expressly preempt state common law claims.

State Common Law Claims Do Not Impliedly Conflict with the Regulatory Aims of FIFRA

In keeping with the alternative preemption analysis suggested above, an implied "field" analysis is not necessary in the FIFRA context because Congress specifically enacted a preemption provision in that statute.315 Thus, the final step in ascertaining the preemptive scope of section 136v(b) is an implied "conflict" analysis in order to determine if state common law claims would

313. See supra notes 291-97 and accompanying text.
315. See supra notes 250-51 and accompanying text.
make FIFRA compliance impossible, frustrate federal legislative objectives, or impair a federally-created right.\textsuperscript{316}

As noted above, a jury award of damages to a chemical product consumer would not require the manufacturer to change that product's label.\textsuperscript{317} The EPA Administrator, not state court judges, has the authority to require a change in the labeling of a particular chemical product.\textsuperscript{318} Moreover, the Administrator approves or disapproves a proposed label based upon information submitted by the manufacturer, including laboratory results and empirical evidence such as product liability claims.\textsuperscript{319} Thus, rather than rendering compliance with FIFRA impossible, state common law claims for inadequate warnings would effectively encourage manufacturer compliance with FIFRA.

Similarly, state common law claims serve to further FIFRA's objective of protecting public health, wildlife, and the environment from unreasonable adverse effects of chemical product development.\textsuperscript{320} Under the current regulatory scheme, a manufacturer is subject to possible civil and criminal liability for failing to provide all relevant information to the EPA when originally petitioning for product registration and approval.\textsuperscript{321} These penalties provide a sufficient incentive to manufacturers to disclose all pertinent data when initially soliciting the EPA for approval. They do not, however, provide any incentive to manufacturers to undertake additional studies of empirical evidence once a chemical product has been approved. State common law product liability claims are the most effective check to possible manufacturer negligence or willful ignorance in ensuring the safety of chemical products that have been brought into the stream of commerce. Indeed, EPA regulations implementing FIFRA expressly contemplate the use of state tort claims in assessing the hazards of chemical products that have received

\textsuperscript{316} See supra notes 41-43 and accompanying text.
\textsuperscript{317} See supra notes 300-05 and accompanying text.
\textsuperscript{320} See supra note 302 and accompanying text.
Thus, rather than obstructing the realization of FIFRA's objectives, state common law claims effectuate those objectives by giving manufacturers an affirmative incentive to engage in ongoing evaluations of their products and encouraging them to cease the manufacture and sale of those chemical products that pose an unreasonable risk to public health, wildlife and the environment.\textsuperscript{323}

Although state common law actions might not further the objective of uniformity to the extent that they would further the environmental objectives of FIFRA, uniformity is not an obtainable objective under the regulatory structure currently outlined in FIFRA, regardless of whether state common law claims are preempted. Presently, manufacturers play an extremely active role in the regulation of their own pesticides. Indeed, they propose their own labels when submitting a product for EPA approval and registration.\textsuperscript{324} At least two federal courts in separate jurisdictions\textsuperscript{325} have noted that the purported federal interest in uniformity does not justify preempting traditional state police power: "Under FIFRA, no such uniform labeling occurs. (the requirements nevertheless permit labeling variations even among products containing the same active ingredient. Thus, to argue that a [sic] adverse jury award would threaten FIFRA's policy of uniform labeling belies the truth.)"\textsuperscript{326} Because allowing state common law claims would not further undermine the purported government interest in uniform labeling requirements, the federal government should defer to the traditional police powers of the states.

Lastly, FIFRA does not implicate any federally-created statutory right so as to render state common law tort actions preempted by virtue of interference with such rights. In fact, state common law products liability claims serve to safeguard the

\textsuperscript{322} 40 C.F.R. § 153.74 (1993).
\textsuperscript{323} See supra notes 300-05 and accompanying text.
\textsuperscript{325} See MacDonald v. Monsanto Co., 813 F Supp. 1258, (E.D. Tex. 1993), rev'd, 27 F.3d 1021 (5th Cir. 1994); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987).
\textsuperscript{326} MacDonald, 813 F Supp. at 1261 (quoting Riden v. ICI Ams., Inc., 763 F Supp. 1500 (W.D. Mo. 1991)); see also supra notes 288-90 and accompanying text.
rights of consumers to legal recourse for torts against their person or property

Rather than conflicting with federal regulatory structure, objectives, or rights, state common law damages actions would encourage stricter compliance with FIFRA requirements, promote the objectives of FIFRA, and preserve the rights of citizens.

CONCLUSION

The Court's reformulation of preemption analysis in *Cipollone* does not strike the proper balance between the Supremacy Clause and basic notions of federalism. As noted above,327 *Cipollone's* two key holdings are: (1) that implied preemption analysis is altogether unnecessary where Congress has enacted an express preemption provision and (2) that such express preemption provisions should be narrowly construed absent some clear and manifest evidence of congressional intent to preempt the historic police powers of the states. The first of these holdings is not in accord with the Supremacy Clause because it requires a Congress which endeavors to enact a preemption provision to expressly preempt all potentially conflicting state laws, thereby depriving Congress of its inherent constitutional power to supersede substantively conflicting state law which may not be expressly enumerated in the preemption provision.328

The second of *Cipollone's* key holdings is deeply rooted in notions of our federal system of government.329 When coupled with the lack of a requirement to engage in implied "conflict" preemption analysis, however, the federalism concerns embodied in *Cipollone's* affirmation of the presumption against preemption effectively provide to Congress a disincentive to enact any preemption provisions at all.330 The Court should reformulate its preemption analysis in *Cipollone* to require an implied "conflict" preemption analysis even where Congress has enacted an express preemption provision. Not only would such a reformulation

327. See supra notes 249-51 and accompanying text.
328. See supra notes 253-59 and accompanying text.
329. See, e.g., supra note 271 and accompanying text.
330. See supra notes 267-69 and accompanying text.
reconcile the Court's approach to preemption questions with the Supremacy Clause, but it would also accord the historic police powers of the states their proper import in our federal system of government. In addition, such a reformulation would provide to Congress an incentive to enact preemption provisions where it intends to displace state authority, since such provisions would provide the best evidence of the clear and manifest congressional intent to override the default powers of the states which is necessary to rebut the presumption against preemption.

The series of FIFRA preemption cases decided in both federal and state courts in the wake of Cipollone is perhaps the most publicized example of the widespread confusion and debate regarding the preemption analysis formulated by the Court in that case. Consequently, the FIFRA preemption controversy represents an ideal opportunity for the Court to reconsider the Cipollone approach to preemption issues and pronounce a new requirement of implied "conflict" analysis in all preemption cases. Moreover, if the Court were to utilize a FIFRA preemption case to adopt such an approach, it would have the opportunity to pervade its new preemption model with some flexibility based upon the regulatory structure and objectives of the federal statute at issue. Specifically, a Supreme Court pronouncement of the requirement of implied "conflict" preemption in the context of a FIFRA case would enable the Court to admit that where an express preemption provision is ambiguous about the viability of state common law claims, as FIFRA's preemption provision is, the preclusive effect of that provision turns on whether state common law claims impliedly conflict with the regulatory structure and objectives of the federal statute. The resolution of this

331. See supra notes 258-59 and accompanying text.
332. See supra notes 269-72 and accompanying text.
333. See supra notes 269-72 and accompanying text.
334. See supra notes 194-246 and accompanying text.
pivotal question in a FIFRA preemption case should be abundantly clear: not only do state common law claims not conflict with the regulatory structure and objectives of FIFRA, they are explicitly contemplated in the regulatory structure of the statute and would serve to effectuate its articulated objectives.\textsuperscript{335}

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\footnotesize{335. See \textit{supra} notes 315-16 and accompanying text.}