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IN THE SHADOW OF THE SUPREMACY CLAUSE: HOW A "LOGICAL-CONTRADICTION" TEST CAN RESOLVE THE DEBATE OVER LEGISLATIVE HISTORY IN FIFRA PREEMPTION

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ABSTRACT:

In this Essay, I argue that the existing approach to preemption (especially in the environmental context) is flawed because it invites the kind of statutory interpretation that relies heavily on the use of legislative history. Of course, legislative history is not always an improper tool of interpretation. But when it is used, for example, to glean congressional intent to preempt state law, the costs to sound interpretation and institutional credibility are too high. To counter that risk, I propose that the Court replace its current preemption analysis for Professor Caleb Nelson's more versatile "logical contradiction" test (which in any event is more textually faithful to the Supremacy Clause). Relevant to my thesis, Professor Nelson's approach would stymie the use of legislative history in preemption cases, and would motivate courts to engage in a fair, textual examination of the federal and state laws that are at odds with each other.

I. INTRODUCTION

Judge Harold Leventhal of the U.S Court of Appeals for the D.C. Circuit once observed that using legislative history to interpret a statute is like "looking over a crowd and picking out your friends."[1] The analogy is simple, but packs a powerful punch: the use of legislative history is problematic because it permits judges to color an objective reading of the law with their own subjective bias.[2] Not surprisingly, Judge Leventhal's critique has been immortalized in numerous articles on statutory interpretation.[3] Yet, despite the enduring force of his metaphor, courts across the United States regularly invoke legislative history during the interpretive process. The academic literature is rife with explanations and justifications for this occurrence.[4] However, the pervasive use

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[1] Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting a conversation with Judge Leventhal).

[2] Justice Scalia has echoed this criticism of legislative history in his treatise on textualism. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 377 (2012) ("Legislative history creates mischief both coming and going—not only when it is made but also when it is used. With major legislation, the legislative history has something for everyone").

[3] A keyword search on Lexis yielded over 415 secondary sources citing Judge Leventhal's colorful aphorism. For some recent examples, see Alvan Balent, Jr., *Statutory Interpretation and the Presidency: The Hierarchy of "Executive History"*, 30 J. L. & POLITICS 341, 357 n.110 (2015); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 870 (2014); Andrew Tutt, *Legal Agreement*, 48 AKRON L. REV. 215, 258 (2015).

[4] *See, e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 55 (1988) (explaining that legislative history can help discern technical meaning); William Robert Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 16 (1965) (arguing that legislative history can

of legislative history can *at least* be traced to the demands placed on lawyers and judges by substantive rules of interpretation.[5] One example of this phenomenon lies within the doctrine of federal preemption, which guides courts in determining when a federal statute has superseded state law.[6]

The doctrine itself is an offspring of the U.S. Constitution, which states in Article IV, cl. 2 (the Supremacy Clause) that "the laws 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."[7] Over time, the U.S. Supreme Court has developed a three-tiered approach for applying this provision, and each tier corresponds to a different kind of preemption.[8] In a nutshell, state law may be preempted by the "express" terms of a federal statute, by the fact that a federal statute occupies the regulatory "field," or by the emergence of a "conflict" with a federal statute's commands.[9] Importantly, all three tiers require courts to find a *clear*

provide useful analytical guideposts); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L.J. 845, 849 (1992) (discussing the use of legislative history to discover latent drafting errors).

[5] Sometimes, a canon or court-made presumption will requires an inquiry into legislative intent (e.g. extraterritoriality canon, presumption against waivers of sovereign immunity). *See* SCALIA & GARNER, *supra* note 2, at 268, 281. This inquiry is achievable insofar as an intent is discernible from the text. *Id.* at 56. But more often than not, only an extra-textual analysis will aid the judge or lawyer in "discovering" the kind of intent he "needs" to win an argument. In my view, it is that temptation which makes legislative history such a popular tool of interpretation.

[6] In our system of dual sovereignty, states usually retain concurrent authority over areas in which the federal government can legislate. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter, ed., 1961). This means most federal statutes end up rubbing against a policy field where state law already existed. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994). In those cases, courts are often asked to determine whether Congress "meant" to enact a federal law that would disrupt the *status quo*.

[7] U.S. CONST. art. VI, cl. 2.

[8] Invoking the Supremacy Clause in this manner has been a staple of constitutional law since the earliest days of our republic. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.).

[9] *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (express preemption; Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 203-204 (1983) (field preemption); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963) (conflict preemption).

congressional intent to preempt state law.[10] Or, put differently, courts must start from a rebuttable presumption that federal enactments supplement rather than displace state law.[11]

In this Essay, I argue that the Court's existing approach to preemption is flawed because it *invites* the kind of purposive interpretation that relies heavily on the use of legislative history.[12] Of course, I do not propose that legislative history is *always* an improper interpretive tool.[13] But when it is used, for example, to glean congressional intent to preempt state law, the costs to sound interpretation and institutional credibility are too high.[14] To counter that risk, I propose that the Court replace its current preemption analysis for Professor Caleb Nelson's versatile "logical contradiction" test (which in any event is more textually faithful to the Supremacy Clause).[15] Relevant to my thesis, Professor Nelson's approach would stymie the use of legislative history in

[10] When the intent is expressed in words, it must be given the most natural meaning—for there Congress has spoken with authority. SCALIA & GARNER, *supra* note 2, at 293, *but see* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530-31 (1992) (holding that preemption clauses should be read "narrowly" by the courts). In other situations, however, the inquiry is not so clear-cut. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (observing that implied preemption occurs "when Congress intends federal law to 'occupy the field'").

[11] SCALIA & GARNER, *supra* note 2, at 290 ("It is a reliable canon of interpretation—though sometimes dishonored in the breach—to presume that a federal statute does not preempt state law").

[12] This concern is not a novel one. Justice Frankfurter warned against "interpretations by judicial libertines" who "draw prodigally upon unformulated purposes or directions." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947); Felix Frankfurter, *A Symposium on Statutory Construction: Foreword*, 3 VAND. L. REV. 365, 367 (1950)

[13] Legislative history can be useful in situations where the interpreter is not trying to discern intent. For example, it can be an indicator of specialized meaning—just as any dictionary would be. Aleinikoff, *supra* note 4, at 55-56. It can also be useful as a method of rebutting the absurdity canon (i.e. "this interpretation cannot be absurd because *at least one* legislator thought of it"). *See* Green v. Bock Laundry Machine Co. 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

[14] Judge Frank Easterbrook has discussed the institutional risk of letting legislative history distort statutory specificity (or generality). *See* Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 449 (1990) ("A corps of judges allowed to play with the level of generality will move every which way, defeating the objective of justice (equal treatment) under the law."). The same concern for consistency is reflected in the preemption context—where legislative history can distort the extent to which Congress meant to displace state law, if at all.

[15] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 260 (2000) ("When we put the various aspects of the Supremacy Clause together, we can clear away the overgrowth created by the Supreme Court's existing analytical framework for preemption cases . . . . Under the Supremacy Clause, then, the test for preemption is simple: *Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law*.").

preemption cases, and would motivate courts to engage in a fair, textual examination of the federal and state laws that are at odds with each other.

To aid in the exposition of my argument, I will first present one instance where courts have grappled with the use of legislative history to discern preemptive intent. In Part II, I will discuss how courts have read the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[16] with respect to the preemption of local pesticide regulation. My aim will be to compare how the U.S. Supreme Court and the Wisconsin Supreme Court used legislative history to reach different conclusions about FIFRA's preemptive force.[17]

Then, in Part III, I will use the FIFRA example to critique current preemption doctrine—especially as it relates to the flawed interpretive paradigm on which it relies. Based on this assessment, I will then suggest that the Supreme Court replace its purpose-driven analysis for Professor Nelson's versatile "logical-contradiction" test.[18] Concluding that this approach would produce more consistent interpretive results, I finally explore how the Court could have interpreted FIFRA by using the logical-contradiction analysis (and ignoring legislative history altogether).

II. FIFRA & LOCAL REGULATION: A CASE STUDY

Preemption doctrine impacts many areas of public policy, but it is often most visible when it shapes the body of federal environmental law. Within that field, the case law on FIFRA preemption is rife with debates about the interpretive role of legislative history. Thus, my goals in this Part are: (1) to give a flavor for those debates by exploring one line of FIFRA precedent, and (2) to establish, through this case study, a descriptive frame for my subsequent critique of preemption doctrine. To

[16] 7 U.S.C. §§ 136-136y (2012).

[17] *Compare* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991), *with* Mortier v. Town of Casey, 452 N.W.2d 555 (Wis. 1990).

[18] I will also briefly explain Professor Nelson's view of what adopting the "logical-contradiction" test would mean for the presumption-against-preemption canon. Nelson, *supra* note 15, at 290.

that end, I will first describe the history of FIFRA—with a focus on the legislative compromises surrounding its preemptive effect. Then, I will discuss how FIFRA's general preemption clause fared in litigation, and how it ultimately landed at the U.S. Supreme Court. Finally, I will conclude with a brief discussion of how states reacted to the Court's rejection of a preemption theory for FIFRA.

A. The Historical Context

Congress enacted FIFRA in 1947 to replace the Insecticide Act of 1910.[19] The 1910 Act was seen as inadequate because it merely prohibited the manufacture and transportation of adulterated or misbranded insecticides.[20] Indeed, the law left much of the substantive pesticide regulation to state governments. It was this lack of policy uniformity that led to the enactment of FIFRA,[21] which aimed to ensure cooperation between state and federal officials charged with regulating pesticides, to create a national clearinghouse for pesticide labeling (through the Secretary of Agriculture), and to require registration of all pesticides being produced and sold on the national market.[22] Thus, while the 1910 Act had protected pesticide buyers from fraud, FIFRA focused on safe use and labeling as a means of consumer protection.[23]

By 1964, however, policymakers began shifting their focus to the impact of pesticides on wildlife and the environment.[24] Although the 1947 Act had brought sweeping reform, the Secretary

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[19] The Insecticide Act of 1910, ch. 191, 36 Stat. 331 (1910).

[20] See CHRISTOPHER BOSSO, PESTICIDES & POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE 53-54 (1987) (detailing the narrow scope of the 1910 Act).

[21] The pesticide industry found the uncoordinated state regulation to be confusing and burdensome and, in reaction, the Council of State Governments recommended a policy overhaul. William T. Smith III & Kathryn Coonrod, *Cipollone's Effect on FIFRA Preemption*, 61 UMKC L. Rev. 489, 490 (1993), *and see* H. REP. NO. 313, 80th Cong., 1st Sess. (1947), *reprinted in* 1947 U.S.C.C.A.N. 1200, 1205-06.

[22] *See* Act of June 25, 1947, ch. 125, §§ 2-13, 61 Stat. 163-72 (1947); H. REP. NO. 313, 80th Cong., 1st Sess. (1947), *reprinted in* 1947 U.S.C.C.A.N. 1200.

[23] BOSSO, *supra* note 20, at 58.

[24] *See* S. REP. NO. 573, 88th Cong., 2nd Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2166; Smith & Coonrod, *supra* note 21, at 490-491.

of Agriculture was virtually powerless to regulate the unwanted side effects of pesticide use.[25] These concerns led Congress to redraft FIFRA in 1972 through the Federal Environmental Pesticide Control Act.[26] The 1972 Act significantly strengthened FIFRA's registration and labeling standards,[27] "regulated the use, . . . sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; [and] provided for review, cancellation, and suspension of pesticide registration. . . ."[28] The Act also strengthened the Environmental Protection Agency's (EPA) enforcement authority, which had been transferred from the Department of Agriculture in 1970.[29]

Most relevant here, though, the 1972 Act first raised serious questions about federal preemption. Although FIFRA's labeling and registration features were comprehensive, the Act did not impose use-based restrictions through permitting or notice requirements.[30] Indeed, many legislators and advocacy groups believed that state and local governments were better equipped to engage in that kind of regulation.[31] Meanwhile, industry members and their allies in Congress believed FIFRA was supposed to occupy the field of pesticide regulation, and thought any use

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[25] *See* ELIZABETH C. BROWN ET AL., A PRACTITIONER'S GUIDE TO THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT 10 (Environmental Law Institute eds., 2001).

[26] Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973, (codified as amended at 7 U.S.C. §§ 136-136y (2012)).

[27] *See* 7 U.S.C. § 136a (2015).

[28] Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 991-92 (1984) (describing FIFRA's revamped regulatory framework).

[29] Brown, *supra* note 25, at 10-11, *and see* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), 5 U.S.C. App., p. 1132.

[30] *See* Brief of Amici Curiae Village of Milford, Michigan, Mayfield Village, Ohio, and City of Boulder, Colorado at 6-7, Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (No. 89-1905) (describing the separate policy spheres envisioned for FIFRA).

[31] *See* Elena S. Rutrick, *Local Pesticide Regulation Since* Wisconsin Public Intervenor v. Mortier, 20 B.C. ENVTL. AFF. L. REV. 65, 73 (1993) ("Massachusetts and Wisconsin demonstrated the role of the states in pesticide regulation when they restricted the use of daminozide on apples after the EPA had determined that the chemical was a carcinogen . . . . Similarly, about half of the states . . . attempted to bolster FIFRA by mandating notice requirements when users apply pesticides. As of 1989, forty-nine states had enacted EPA-approved pesticide applicator certification programs, and forty-eight states had enforcement programs") *Id.*

restrictions should be enacted at the federal level only.[32] These debates led to the enactment of §136v(a), a general preemption provision which stated that: "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."[33] Behind this relatively clear statement, however, was a confounding tide of legislative history that indicated contradictory and unresolved intentions.

The confusion began in February 1971, when President Richard Nixon submitted the legislative recommendation that became the blueprint for the 1972 Act.[34] The package (which was initially reported as H.R. 4152) used similar language to the enacted version of §136v(a), but allowed "a State *or a political subdivision*" to enact regulations on pesticides.[35] Once submitted, the package was referred to The House Committee on Agriculture, which held seventeen public hearings on the bill.[36] On September 25, 1971, the Committee reported a new bill (H.R. 10729) out of committee.[37] That bill deleted any reference to political subdivisions in its preemption provision, and the Committee Report stated that local governments should not be allowed to regulate pesticide use.[38] After two days of debate on the floor, the House passed H.R. 10729 by a vote of 288-91.[39] It was then referred to the Senate.

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[32] Tom Dawson, *Local Regulation of Pesticides: The Victory and the Challenge Ahead*, J. PESTICIDE REFORM, Fall 1991, at 33 (discussing the industry's concern with burdensome and contradictory local regulations).

[33] 7 U.S.C. § 136v(a) (2012).

[34] H.R. 4152, 92d Cong., 1st Sess. (1971), *reprinted in* Hearings on Federal Environmental Pesticide Control Act of 1971, Before the House Committee on Agriculture, 92d Cong., 1st Sess. 904 (1971).

[35] *Id.* at § 19(c).

[36] Rudrick, *supra* note 31, at 75.

[37] H.R. 10729, 92d Cong., 1st Sess. (1971).

[38] H.R. REP. NO. 511, 92d Cong., 1st Sess. at 16 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4066 ("The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions").

[39] *See* 117 Cong. Rec. 40,068 (1971).

In the Senate, the bill was forwarded to two committees with jurisdiction. First, the Senate Committee on Agriculture and Forestry agreed with the House Committee's version of preemption.[40] Its Committee Report explained that few local governments had the resources or expertise to properly regulate the industry.[41] The Senate Commerce Committee, however, took the opposite position on the issue.[42] The Committee drafted its own version of FIFRA's preemption provision, which would explicitly let local governments regulate pesticide use. In reporting the amendment, the Commerce Committee reasoned that cities and counties would be better able to perceive their own specific needs than federal or state regulators.[43] The Agriculture and Forestry Committee then promptly filed a Supplemental Report, in which it criticized the Commerce Committee's amendment.[44] After two months of negotiations, the Committees agreed on a

[40] S. REP. NO. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4008.

[41] *Id.* ("The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the 50 States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities, whether towns, counties, villages or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis, and on the basis that permitting such regulation would be an extreme burden on interstate commerce, *it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and regulation of pesticides*" (emphasis added)).

[42] S. REP. NO. 970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4111.

[43] In relevant part, the Senate Commerce Committee stated:

> The amendment gives local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by State and Federal authorities.
>
> While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is *intended to continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA.*

Id. at 4111-12 (emphasis added).

[44] *Id.* at 4026 ("regulation by the Federal government and the 50 States should be sufficient and *should preempt the field*" (emphasis added)).

substitute provision, and concurred that the Commerce Committee's amendment would be dropped.[45]

On September 26, 1972, the full Senate considered H.R. 10729. The amendment proposed by the Commerce Committee was raised on the floor.[46] At that time, Senator Allen (the chair of the Agriculture and Forestry subcommittee that handled the bill) requested that the amendment be withdrawn and the substitute bill be offered.[47] He then read into the record an excerpt from the Agriculture and Forestry Committee Report, which stated that the substitute provision "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides."[48] The Senate approved this version by a vote of 71-0, and subsequently, a Conference Committee was convened to resolve the differences between the Senate and House versions of FIFRA.[49] However, no further discussion arose on the local regulation issue, since the House and Senate versions were consistent on that point. The House and the Senate both approved the Conference Report,[50] and the bill was sent to the President for his signature. This is how §136v(a) came to be.

Not surprisingly, the tensions in the legislative history led to disagreements about the meaning and scope of FIFRA's preemption provision. After the Act went into effect, several municipalities enacted pesticide control ordinances.[51] The industry promptly took these localities to court, and with mixed success, argued that §136v(a) preempted their regulations.[52] In *People ex rel. Deukmejian v. Mendocino County*, for example, the California Supreme Court upheld an herbicide

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[45] *Id.* at 4088-91. The compromise was approved by a unanimous vote of the Agriculture and Forestry Committee, as well as by a majority of members on the Commerce Committee.

[46] 118 CONG. REC. 32,249-51 (Sept. 26, 1972).

[47] *Id.* at 32,251-52.

[48] *Id.* at 32,256.

[49] *See Id.* 32,263.

[50] 118 CONG. REC. 35,546 (October 12, 1972) (House proceedings); 118 CONG. REC. 33,924 (October 5, 1972) (Senate proceedings).

[51] Rudrick, *supra* note 31, at 76.

[52] Dawson, *supra* note 32, at 33.

ordinance after concluding that FIFRA's legislative history did not indicate a preemptive intent.[53] This holding was followed by judges in Maine and Colorado, even though courts in other jurisdictions were reaching different conclusions.[54] For example, in *Pest Control Association v. Montgomery County*, a Maryland federal court invalidated a pre-spray notice ordinance on the ground that FIFRA's legislative history placed a preemptive gloss on §136v(a).[55] And in *Professional Lawn Care Association v. Town of Milford*, the U.S. Court of Appeals for the Sixth Circuit struck down a Michigan ordinance for the same reason.[56]

B. The Wisconsin Litigation

Against this contentious backdrop, the rural town of Casey, Wisconsin enacted a pesticide ordinance to protect its twenty-six lakes and surrounding forest land.[57] The ordinance required users to obtain a permit before applying pesticide or spraying it by airplane.[58] In that endeavor, permit applicants were required to provide the town board with specific information from which it could render a permitting decision.[59] Once a permit was issued, the user had to post warning notices around the affected area.[60]

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[53] 683 P.2d 1150, 1160-61 (Cal. 1984) (holding that the Committee Reports could not be read as depriving states of their power to subdelegate).

[54] *See* Central Maine Power Co. v. Town of Lebanon, 571 A.2d 1189, 1192 (Me. 1990); COPARR, Ltd. v. City of Boulder, 735 F. Supp. 363, 367 (D. Colo. 1989), *aff'd*, 942 F.2d 724 (10th Cir. 1991).

[55] 646 F. Supp. 109, 113 (D. Md. 1986) ("Although there was an interim disagreement between two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the [Commerce Committee's] proposed language").

[56] 909 F.2d 929, 930 (6th Cir. 1990) ("Both houses of Congress positively rejected President Nixon's proposal that local governments be permitted to regulate pesticides").

[57] Rudrick, *supra* note 31, at 80.

[58] Casey, Wis. Ordinance No. 85-1 § 1.2 (Sept. 10, 1985), http://townofcaseygov.net/ordinances/ (last visited Dec. 25, 2015).

[59] *Id.* § 1.3(2)

[60] *Id.* § 1.3(7)

Less than two years after Casey adopted its ordinance, Ralph Mortier applied for a permit to spray herbicides on his two hundred acres of forest land.[61] In March 1985, the town board granted only partial approval of Mortier's request. The board restricted the lands on which he could ground-spray, and refused to grant a permit for any aerial spraying.[62] Thereafter, Mortier challenged the ordinance in the Washburn County Circuit Court, naming the town of Casey and the Wisconsin Public Intervenor as defendants.[63] The Washburn County Circuit Court declared the ordinance void on preemption, and the town of Casey appealed.[64]

1. The Wisconsin Supreme Court's Opinion

In an opinion written by Chief Justice Heffernan, the Wisconsin Supreme Court affirmed the circuit court's conclusion that FIFRA preempted Casey's pesticide ordinance.[65] The court's analysis began with a nod to the presumption-against-preemption canon, and the attendant search for congressional intent.[66] However, it then cautioned *against* taking the presumption seriously, since "anything less than a forthright preemption statement [would be] ambiguous and traditional state powers [would] be allowed to stand. While this is an attractive and logical option, it is not the law."[67] Therefore, applying a more relaxed version of the presumption, the court concluded that "while

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[61] Brief for the Respondents at 6, Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (No. 89-1905).

[62] *Id.* at 6-7

[63] Brief for the Petitioner at 6, Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (No. 89-1905).

[64] Mortier v. Town of Casey, No. 86-CV-134 at 8-9 (Wis. Cir. Ct. filed June 16, 1988) (ruling against Casey on FIFRA and state preemption).

[65] Mortier v. Town of Casey, 452 N.W.2d 555, 561 (Wis. 1990).

[66] *Id.* at 556.

[67] *Id.* at 557. In my view, this was a bald attempt to tip the balance in favor of Mortier. Worse yet, the court's retreat from the presumption-against-preemption is a dangerous precedent. To accept it would be to let courts fundamentally alter the balance of federalism. See LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, THE REGULATORY STATE 327 (2d ed. 2013) (The presumption against preemption 'provides assurance that the federal-state balance will not be disturbed'" (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))).

FIFRA does not contain any express preemption language [relating to localities], it does . . . contain language which is *indicative* of Congress' intent to deprive political subdivisions, like the Town of Casey, of authority to regulate pesticides."[68]

Specifically, it pointed to the fact that §136v(a) "authorized" states—but not localities—to regulate pesticide use.[69] From this observation, the court noted, "it is possible to infer that regulation by other entities . . . is preempted."[70] It reasoned that this inference was also supported by the statutory definition of "State," which by the terms of 7 U.S.C. § 136(aa), did not include "political subdivisions thereof."[71] To imply such a definition, the court went on, would render other parts of FIFRA superfluous—since Congress had gone out of its way to mention "political subdivisions" elsewhere in the law.[72] It pointed out that even EPA had read §136v(a) in this way; after enactment, the agency had stated that FIFRA "did not authorize political subdivisions below the state level to further regulate pesticides."[73]

To reinforce its unique reading of §136v(a), the court then turned to the legislative history. It concluded that a preemptive intent could be gleaned from the "repeated references in the course of the legislative committee reports that the decision of both the House and Senate was to 'deprive'

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[68] *Mortier*, 452 N.W.2d at 557 (emphasis added). Notice this deviation from the original rule that courts must find a *manifest* preemptive intent. *See supra* note 68 and accompanying text.

[69] *Id.* at 559-60. In one of its footnotes, the court itself acknowledges the oddity of referring to §136v(a) as an "authorization"—particularly since states have never needed permission from the federal government to exercise their police powers. *See id.* at 560 n.18.

[70] *Id.* This inference, however, ignores the simple fact that political subdivisions have long been considered delegates of each sovereign state. *Cf.* Lyle Kossis, *Examining the Conflict between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 113-115 (2013 (providing a brief historical overview of local government law).

[71] *Mortier*, 452 N.W.2d at 560. Under 7 U.S.C. § 136(aa), "the term State means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa."

[72] *Mortier*, 452 N.W.2d at 560. For this proposition, the court cited 7 U.S.C. §136t(b), which provides that EPA shall cooperate with any appropriate agency of any "State or any political subdivision."

[73] *Mortier*, 452 N.W.2d at 560 (quoting 40 Fed. Reg. 11700).

political subdivisions . . . of any authority or jurisdiction over pesticides."[74] In support of this finding, the court cited approvingly the legislative-history analysis conducted by the court in *Pest Control Association v. Montgomery County*.[75] Specifically, it agreed with the Maryland court's conclusion that "the legislative history could not be more clear. Both the House and the Senate expressly considered [and rejected] the question of whether local governments should be authorized to regulate pesticides . . . . Principled decision-making and respect for the legislative process compel the conclusion that Congress knew and meant what it was doing."[76]

2. Justice Abrahamson's Dissenting Opinion

Justice Abrahamson filed a dissenting opinion in the case, in which he pushed back against the proposition that FIFRA's legislative history showed a clear preemptive intent.[77] He asserted six arguments in support of this thesis. First, he argued, the Committee Reports used by the court did not interpret the *enacted* legislation, but rather, earlier versions of the bill.[78] Second, the fact that both Senate Committees interpreted FIFRA's preemption clause differently showed that neither

[74] *Id.* The number of times that the Committee Reports mentioned "deprivation" of regulatory power, however, does not necessarily measure congressional intent. The court's analysis seems to gloss over the conflicting Senate reports, even though it quoted from them at length. *See id.* at 559.

[75] *Id.* at 560, *and see* Pest Control Assn. v. Montgomery County, 646 F. Supp. 109, 112-14 (D. Md. 1986).

[76] *Mortier*, 452 N.W.2d at 560 (quoting *Pest Control Assn.*, 646 F. Supp. at 513). Ironically, the court's outcome-oriented approach *undermines* the legislative process by failing to give effect to the compromise struck in in the Senate. For all we know, the substitute amendment could have been worded vaguely so that FIFRA could pass. At most, this means that Congress passed the buck on the issue—which is undoubtedly short of *manifest* preemptive intent.

[77] *Id.* at 562-63 (Abrahamson, J., dissenting). Justice Abrahamson criticized the court for not sticking to the familiar three-tiered analysis. *Id.* at 563 n.3. In any event, he argued, FIFRA could not pass muster under field or conflict preemption. *Id.* at 562-63.

[78] *Id.* at 565 ("The Senate Commerce Committee added numerous amendments after the Senate Agriculture and Forestry Committee had considered the legislation. A joint Senate . . . also further changed the bill reported to the Senate by the Commerce Committee and created a compromise bill. The bill the Senate passed was further modified by the Committee of Conference composed of members of the House and Senate").

embodied the unanimous purpose of Congress.[79] Third, the Agriculture and Forestry Committee's earlier report did not account for the compromise reached two months later with the Commerce Committee.[80] Fourth, Senator Allen's statement in the Congressional Record was simply a regurgitation of the Agriculture and Forestry's dubious report.[81] Fifth, the Commerce Committee's amendment against preemption was *withdrawn* rather than rejected by the full Senate.[82] And sixth, the political atmosphere demanding FIFRA reform pressured Congress to overlook the preemption issue in favor of passage.[83]

Even if these criticisms did not carry weight, Justice Abrahamson argued, using legislative history at all to discern *express* preemption was improper.[84] "Neither case that the majority opinion cites" he noted, "supports its approach that legislative history may serve as the sole basis for finding . . . the clear and manifest purpose of Congress required for preemption of state or local regulation."[85] He proceeded to explain how one case used legislative history to determine field (rather than express) preemption.[86] And then, he discussed how the second case used legislative history to ascertain technical meaning—not the preemptive effect of a statute.[87] In closing, he

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[79] *Id.* ("The disagreement between the two committees over the meaning and effect of [§136v(a)] depreciates the value of the Agriculture and Forestry Committee's interpretation . . . . Despite this disagreement about the meaning of [§136v(a)], the statute was never changed to clarify whether FIFRA preempted local regulation").

[80] *Id.* ("Congress never resolved the issue of preemption. In the interest of reporting a bill in the current session of Congress, members of both Senate committees agreed to disagree on the issue of preemption of local regulation").

[81] *Id.* at 565-566.

[82] *Id.* at 566 ("As far as I can discern from the Congressional Record, the full Senate never considered the issue of local regulation of pesticides and therefore did not reject it by full vote").

[83] *Id.* ("The bill was considered highly controversial and was at risk of being defeated at nearly every turn. A number of speakers, including then Senator Gaylord Nelson of Wisconsin, rose to speak on the highly partisan nature of the debate and the fragility of the compromise reached").

[84] *Id.* at 563 n.3.

[85] *Id.*

[86] *Id.* (discussing how the Supreme Court wads using legislative history in a belt-and-suspenders manner), *and see* City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1972).

[87] *Mortier*, 452 N.W.2d at 563 n.3 (Abrahamson, J., dissenting) ("Using the *Philko* approach, the majority opinion should look for legislative history illuminating the meaning of the word 'State.' It does not. It cannot because the definition of state is clear. Instead, the majority looks to legislative history to determine

observed that "FIFRA contains no express language preempting local regulation, nor does it exclude political subdivisions from the definition of states, as the majority claims. Nor is the statute 'ambiguous' regarding preemption—it is simply silent."[88]

Justice Steinmetz joined in Justice Abrahamson's opinion, and also filed a dissent of his own.[89] The Steinmetz dissent largely echoed Justice Abrahamson's arguments, but also discussed the state preemption issue that had been raised below.[90] Those observations, however, are less relevant to my thesis; I will simply note that state preemption of the Casey ordinance was likewise rejected by the court.

C. The Supreme Court's Intervention

On June 5, 1990, the Wisconsin Public Intervenor petitioned the U.S. Supreme Court for a writ of certiorari, arguing that the Wisconsin Supreme Court had erred in its preemption analysis.[91] The Court, in turn, invited the U.S. Solicitor General to file a brief stating the views of the federal government on the petition.[92] In his brief, the Solicitor General recommended that the Court grant certiorari and reverse the findings of the court below.[93] The Court then granted the writ of certiorari,[94] and on June 21, 1991, reversed the Wisconsin Supreme Court. The Court unanimously

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Congressional express intent about preemption"), *and see* Philko Aviation, Inc. v. Shacket, 462 U.S. 406 (1983).

[88] *Mortier*, 452 N.W.2d at 562 (Abrahamson, J., dissenting).

[89] *Id.* at 566 (Steinmetz, J., dissenting).

[90] *Id.* at 569-70 (arguing that Wisconsin's preemption doctrine also did not render the Casey ordinance invalid).

[91] *See* Petition for a Writ of Certiorari to the Supreme Court of Wisconsin at 26-37, Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (No. 89-1905).

[92] *See* Brief for Petitioners at 10, Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (No. 89-1905) (describing the proceedings).

[93] *See* Brief for the United States at 3-5, Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (No. 89-1905).

[94] Wisconsin Public Intervenor v. Mortier, 498 U.S. 1045 (1991).

held that FIFRA did not preempt local regulation of pesticides.[95] Specifically, it was unable to infer from either FIFRA's statutory language or its legislative history that Congress had communicated a clear preemptive intent.[96]

1. Justice White's Majority Opinion

Writing for the Court, Justice White stressed that the Supremacy Clause requires courts to give the presumption-against-preemption its adulterated effect.[97] Thus, the Court began from the premise that only the *clearest* congressional intent could tip the balance against state power.[98] On those terms, it asserted, "neither the language of the statute nor its legislative history, standing alone, would suffice to pre-empt local regulation. But it is also our view that, even when considered together, the language and the legislative materials relied on below are insufficient to demonstrate the necessary congressional intent to pre-empt."[99]

To reach this conclusion, the Court first analyzed the language of §136v(a). At the threshold, it disagreed with the Wisconsin Supreme Court's inference that the inclusion of state regulatory power necessarily meant the exclusion of local authority.[100] But even if it did, that reading did not deprive localities of their power; rather, it only meant that local governments could not claim an *additional*

[95] Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 616 (1991).

[96] *Id.* at 606-611

[97] *Id.* at 604. In no unclear terms, the Court rebuffed the Wisconsin Supreme Court's conjecture that rigidly applying the presumption-against-preemption was "not the law." *See supra* note 67 and accompanying text.

[98] *Mortier*, 501 U.S. at 604-605. Compare this standard with the diluted approach the Wisconsin Supreme Court took. *See supra* note 67 and accompanying text. The comparison further highlights the outcome-oriented judging the happened below.

[99] *Mortier*, 501 U.S. at 607.

[100] *Id.* (observing that §136v(a) "plainly authorizes the 'States' to regulate pesticides and just as plainly is silent with reference to local governments. Mere silence, in this context, cannot suffice to establish a "clear and manifest purpose" to pre-empt local authority").

safe harbor against preemption.[101] This latter reading, it went on, was supported by the definition of "State" in §136(aa). It reasoned that, since "political subdivisions are components of the very entity the statute empowers," the "more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities."[102]

Ignoring that organic interpretation, the Court continued, would create absurd results in other portions of the Act.[103] It noted, for example, that §136f(b), requires pesticide manufacturers to produce records upon the request of "any State *or political subdivision* duly designated by the [EPA] Administrator."[104] Meanwhile, §136u(a)(1) authorizes EPA to "delegate to *any State* . . . the authority to cooperate in the enforcement of this [Act] through the use of its personnel."[105] If the Court were to give "State" an exclusive meaning, it would pit these sections against each other. The Court surmised that Congress must not have intended that result, since "the one provision would allow the designation of local officials for enforcement purposes while the other would prohibit local enforcement authority altogether."[106]

These points convinced the Court that the terms of §136v(a) did not evince a preemptive intent. Nevertheless, it accepted the invitation to delve into the legislative history—if anything, to confirm its text-based conclusion.[107] The Court first addressed the House Agriculture Committee Report, finding that its "rejection" of express authority did not correlate with an intent to *deprive*

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[101] *Id.* ("At a minimum, localities would still be free to regulate subject to the usual principles of pre-emption").

[102] *Id.* at 608.

[103] *Id.* ("Mortier . . . contends that other provisions show that Congress made a clear distinction between nonregulatory authority, which it delegated to the States or their political subdivisions, and regulatory authority, which it expressly delegated to the 'States' alone. The provisions on which he relies, however, undercut his contention").

[104] *Id.* (quoting 7 U.S.C. § 136f(b) (2012) (emphasis added)).

[105] *Id.* (quoting 7 U.S.C. 136u(a)(1) (2012) (emphasis added)).

[106] *Id.* at 609.

[107] *Id.* ("Mortier, like the court below and other courts that have found pre-emption, attempts to compensate for the statute's textual inadequacies by stressing the legislative history").

states from the ability to subdelegate their power.[108] Concededly, the Senate Agriculture Committee did communicate that precise intent; however, the Commerce Committee's rebuttal proved there was no actual consensus on the meaning of §136v(a).[109] This brought the Court to conclude that, "like FIFRA's text, the legislative history . . . falls far short of establishing that preemption of local pesticide regulation was the 'clear and manifest purpose of Congress.'"[110]

The Court then moved on to the subjects of field and conflict preemption—concluding that neither applied to FIFRA.[111] Before doing so, however, it defended its analysis of the legislative history. "Common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it," the Court asserted.[112] It then quoted Chief Justice Marshall for the proposition that "where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."[113] Finding the preemption debates in Congress probative, the Court noted that those "materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent."[114] To conclude otherwise, it mused, would be to turn a blind eye to traditional methods of interpretation.[115]

2. Justice Scalia's Concurring Opinion

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[108] *Id.* ("While this statement indicates an unwillingness by Congress to grant political subdivisions regulatory authority, it does not demonstrate an intent to prevent the States from delegating such authority to its subdivisions, and still less does it show a desire to prohibit local regulation altogether").

[109] *Id.* at 609-610.

[110] *Id.* at 610.

[111] *Id.* ("None of the Committees mentioned asserted that FIFRA pre-empted the field of pesticide regulation"). Beyond marking this conclusion for the reader, I have omitted an in-depth discussion of those topics; the Court did not rely primarily on legislative history to reject the field and conflict preemption arguments. *See id.* at 612-615.

[112] *Id.* at 610 n.4.

[113] *Id.* (quoting United States v. Fisher, 6 U.S. 358, 386 (1805)).

[114] *Id.*

[115] *Id.* ("Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past . . . . We suspect that the practice will likewise reach well into the future" (citing Wallace v. Parker, 6 Pet. 680, 687-690 (1832)).

Justice Scalia agreed with the Court's holding that §136v(a), by its terms, did not indicate a preemptive intent. However, he wrote separately to disparage the Court's reliance on legislative history to support its conclusion.[116] Instead, he suggested, "we should try to give the text its fair meaning, whatever various committees might have had to say" about preemption.[117] This interpretive preference, he urged, derives from the unreliability of legislative history, "not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction."[118] To illustrate this point, he proceeded to draw a *hypothetically* different conclusion on preemption by using the same materials the Court cited.[119]

First, he disputed the Court's reading of the House Agriculture Committee Report as not evoking preemptive intent. He contended that the Report cited "an excessive number of regulatory jurisdictions [as] the problem," meaning "the Committee *wanted* localities out of the picture."[120] That intent, he went on, was eagerly seconded by the Senate Agriculture Committee—and "if such a direction had any binding effect, the question of interpretation in this case would be no question at all."[121] This preemptive gloss on §136v(a), he argued, was not even doubted by the Senate Commerce Committee.[122] He observed that its Report "does not offer a different *interpretation* of the pre-emptive effect of [§136v(a)]. To the contrary, it . . . questions not the existence [of preemption]

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[116] *Mortier*, 501 U.S. at 621 (Scalia, J., concurring) ("Today's decision reveals that, in their judicial application, Committee reports are a forensic rather than an interpretive device, to be invoked when they support the decision and ignored when they do not. To my mind that is infinitely better than honestly giving them dispositive effect. But it would be better still to stop confusing the Wisconsin Supreme Court, and not to use committee reports at all").

[117] *Id.* Incidentally, this is the approach that I take in Part III, and that Professor Caleb Nelson endorses. *See* Nelson, *supra* note 15, at 260.

[118] *Mortier*, 501 U.S. at 617 (Scalia, J., concurring).

[119] *Id.* at 617 ("Consider how the case would have been resolved if the Committee Reports were taken seriously").

[120] *Id.* (emphasis added).

[121] *Id.* at 618.

[122] *Id.* at 619 ("The Court claims that . . . 'the two principal Committees responsible for the bill were in disagreement . . . .' I confess that I am less practiced than others in the science of construing legislative history, but it seems to me that quite the opposite is the case").

but the *desirability* of that restriction on local regulatory power."[123] Accordingly, if he were bound by the legislative history, he "would have to conclude that a meaning opposite to our judgment has been commanded three times over—not only by one committee in each House, but by *two* Committees in one of them."[124]

Drawing that conclusion in reality, however, would be deeply flawed for several reasons. First, he thought, congressional intent could not be reasonably inferred from the desires of a select group of legislators.[125] Second, he believed it was "unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill."[126] And finally, he doubted that a rejection of the Commerce Committee's pro-localities amendment carried any weight. That rejection, he argued, could be attributed to any number of motives aside from the preemption issue.[127] Aggregating these concerns, he concluded that any interpretation based on legislative history was entirely unreliable.[128] If the Court had resisted the temptation to use those materials, he observed, it could have affirmed "the proposition that we are a Government of laws, not of committee reports. That is, at least, the way I prefer to proceed."[129]

III. INTERPRETATION & PREEMPTION: A FRESH LOOK

[123] *Id.* (emphasis in original)

[124] *Id.* at 621.

[125] *Id.* at 620 ("Assuming that all the members of the three Committees in question . . . actually adverted to the interpretive point at issue here—which is probably an unrealistic assumption—and assuming further that they were in unanimous agreement on the point, they would still represent less than two-fifths of the Senate, and less than one-tenth of the House").

[126] *Id.* ("Those pertinent portions, though they dominate our discussion today, constituted less than a quarter-page of the 82-page House Agriculture Committee Report, and less than a half-page each of the 74-page Senate Agriculture Committee Report, the 46-page Senate Commerce Committee Report, and the 73-page Senate Agriculture Committee Supplemental Report").

[127] *Id.* at 620-21 ("The full Senate could have rejected [the amendment] *either* because a majority of its Members disagreed with the Commerce Committee's proposed policy; *or* because they disagreed with the Commerce Committee's and the Agriculture Committee's interpretation (and thus thought the amendment superfluous); *or* because they were blissfully ignorant of the entire dispute and simply thought that the Commerce Committee . . . was being a troublemaker").

[128] *Id.* at 621.

[129] *Id.* (paraphrasing Marbury v. Madison, 5 U.S. 137, 163 (1803)).

In Part II, I have sketched a rough outline of the debates surrounding FIFRA preemption. However, the arguments deployed in *Mortier*—whether for or against legislative history—are hardly limited to the FIFRA context. In large part because of the Court's insistence on finding preemptive intent, the use of that material continues to foment controversy in all kinds of federal preemption cases. Yet, that reality begs an important question: should we accept the current doctrine, even if its myopic focus on legislative purpose propagates conflict on interpretive issues rather than debate on the substance of the Supremacy Clause? In this Part, I hope to convince the reader that the answer is "no," and that in fact, changing the rules of analysis can focus judicial attention away from the *method* of discerning preemption, and toward the *substance* of preemption itself.

My argument proceeds in two sections. First, I will expose some of the flaws in current preemption doctrine by addressing two rhetorical points about the existing paradigm. And second, concluding that a better approach exists, I will show how the *Mortier* Court could have arrived at the same conclusion without expending its energy on the issue of legislative history.

A. Conventional Wisdom Reexamined

As I have noted, my goal in this section is to address a couple of conceptual questions. By answering them, I aim to: (1) assess the strengths and weaknesses of the *Mortier* decision, (2) discuss how the *Mortier* Court's weaknesses can be attributed to the current test for preemption, and (3) evaluate whether an alternative approach (i.e. Professor Nelson's "logical-contradiction" test) can stymie the recurrence of legislative history in similar cases.

1. Was *Mortier* Correctly Decided on its Own Terms?

Within the familiar three-tiered approach to preemption, it seems the U.S. Supreme Court got it right in *Mortier*. Put bluntly, the Wisconsin Supreme Court's application of the presumption-against-preemption was erroneous,[130] and so was its analysis of §136v(a)'s language. By contrast, Justice White's discussion of the statutory text was disciplined, and shed light on the proper way to measure preemptive intent.[131] Because his analysis was so compelling, however, the Court's resort to legislative history was puzzling.[132] Indeed, Justices Abrahamson and Scalia were right when they emphasized that the question of FIFRA preemption could have been decided on the face of §136v(a) without resort to secondary tools of interpretation.[133] In my view, Justice White's use of legislative history amounted to a belt-and-suspenders approach that sent mixed signals and encouraged bad judging.[134]

To better understand this point, it is useful to more closely assess the Wisconsin Supreme Court's decision. At the threshold, the court seemed to struggle with the tenor of preemption doctrine generally[135]—commenting that "there are many paths to determine preemption."[136] This, however, was a gross mischaracterization of the law. There is only *one* "path to preemption," and it is through a judicial determination that Congress expressed (or clearly implied) an intent to displace state power.[137] By equivocating on that point, the Wisconsin Court was able to justify its deviation from the text of §136v(a). Justice Abrahamson picked up on this, and noted with merit that "the majority opinion does not fit into the traditional preemption analysis of express preemption, implied

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130 *See supra* note 67 and accompanying text.

131 *See supra* notes 101-106 and accompanying text.

132 See supra note 116 and accompanying text. In this regard, I agree with Justice Scalia's characterization of legislative history as a "forensic" exercise rather than an "interpretive" one.

133 *See supra* notes 77, 117 and accompanying text.

134 *See supra* note 107 and accompanying text.

135 *See supra* note 67 and accompanying text, *and cf.* SCALIA & GARNER, *supra* note 2, at 290 (outlining the proper method for invoking the presumption-against-preemption).

136 *See* Mortier v. Town of Casey, 452 N.W.2d 555, 557 (Wis. 1990).

137 *See* SCALIA & GARNER, *supra* note 2, at 291 ("In our view . . . 'intent' must derive from the text of the federal laws and not from such extraneous sources as legislative history. The problem here lies in ensuring certainty in the law").

preemption, or conflict preemption even when you accept that the three categories are not analytically airtight."[138] Thus, because the court was sloppy in framing the inquiry, its subsequent analysis was likewise flawed.

Take, for instance, the court's unusual reading of §136v(a). Invoking the canon of *inclusio unius, exclusio alterius*, the court concluded that Congress had used the word "State" to implicitly define all entities not protected from preemption.[139] However, my impression is that this was a misapplication of the canon because the court used too broad of an exclusionary scope.[140] In other words, Congress probably did not use "State" to imply that *all other polities* were excluded; more likely, the implication was that *other sovereigns* were (e.g. Indian tribes).[141] Because the court failed to recognize the distinction, however, its subsequent analysis was fraught with errors. On that point, Justice Abrahamson rightfully criticized the court for manufacturing ambiguity in the statute where none had existed.[142] Objectively speaking, he reasoned, "nothing in FIFRA expressly prohibits a state from delegating its power . . . to municipalities. Congress apparently viewed the local governments as playing some role."[143] As it were, Justice Abrahamson's view makes eminent sense: express state authorization in §136v(a) is not the same as an implied denial of local power.

Because the Wisconsin court's interpretation was clearly wrong, it is not surprising that Justice White's analysis for the U.S. Supreme Court was markedly different. In particular, Justice White's use of the absurdity canon to rebut the Wisconsin Court's gloss on the word "State" was

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[138] Mortier v. Town of Casey, 452 N.W.2d 555, 563 n.3 (Wis. 1990) (Abrahamson, J., dissenting).

[139] *Id.* at 560, *but see* SCALIA & GARNER, *supra* note 2, at 107 ("Virtually all the authorities who discuss the negative-implication canon emphasize that it must be applies with *great caution*, since its application depends so much on context" (emphasis added)).

[140] *See* SCALIA & GARNER, *supra* note 2, at 108 ("Even when an all-inclusive sense seems apparent, one must still identify the scope of the inclusiveness (thereby limiting implied exclusion)").

[141] *Id.* at 108-109 (citing examples where the negative-implication rule might not apply due to a term's broad scope of inclusion), *and cf.* Jane Kloeckner, *Hold On to Tribal Sovereignty: Establishing Tribal Pesticide Programs That Recognize Inherent Tribal Authority and Promote Federal-Tribal Partnerships*, 42 E.L.R. 10057 (2012).

[142] *Mortier*, 452 N.W.2d at 562 (Abrahamson, J., dissenting).

[143] *Id.*

persuasive.[144] As the reader will recall, that canon applies if: (1) no reasonable person would intend a certain meaning, and (2) the perceived absurdity could be corrected by an alternative reading of the law.[145] On both prongs of that test, Justice White's delivered. First, he made a compelling observation that no reasonable legislator would authorize *and* prohibit local FIFRA regulation at the same time.[146] And second, he firmly explained that avoiding that result only required giving the word "State" its most natural meaning (i.e. a sovereign entity with the capacity to subdelegate police powers).[147]

Giving the absurdity canon its curative effect, of course, meant that §136v(a) had to be read as authorizing direct state regulation *plus* subdelegated local regulation.[148] Accordingly, when Wisconsin opted to let the town of Casey regulate pesticides, it acted in a way that did not countermand Congress' wishes; indeed, the state *followed* the blueprint of cooperative federalism enshrined in the statute.[149] That alone should have been enough for the Court to rule against Mortier—especially in light of how the doctrinal inquiry was framed by Justice White (i.e. only a clear and manifest intent to displace state power controls).[150] Instead, out of an abundance of precaution, the Court chose to engage with FIFRA's legislative history. Undoubtedly, this was an odd step for the Court to take, since Justice White had decisively rejected a pro-preemption reading of §136v(a).

Ironically, by double-guessing itself, the Court invited some harsh criticism from Justice Scalia. As even Scalia recognized, the Court had handily navigated a "close question" through textual

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144 Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 608 (1991).

145 *See* SCALIA & GARNER, *supra* note 2, at 237-38; *See also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2476-79 (2003) (describing the reasonable-use-of-language approach)

146 *See supra* notes 103-106 and accompanying text (referring back to 7 U.S.C. §§ 136f(b), 136u(a)(1)).

147 *See supra* note 107 and accompanying text.

148 *See supra* notes 100-101 and accompanying text

149 *See* Stephen D. Otero, *The Case Against FIFRA Preemption: Reconciling* Cipollone*'s Preemption Approach with Both the Supremacy Clause and Basic Notions of Federalism*, 36 WM. & MARY L. REV. 783, 815-17 (1995) (describing the cooperative design of the statute).

150 This approach stands in stark contrast to the one taken by the Wisconsin Supreme Court. *See supra* notes 77, 117 and accompanying text; *See* SCALIA & GARNER, *supra* note 2, at 291.

analysis.[151] Yet, delving into the pre-enactment debates undermined the very conclusion the Court had painstakingly reached. On this point, the concurrence's exposition was especially convincing. By carefully parsing the Committee Reports the Court had used to *reject* preemption, Justice Scalia was able to read the legislative history as *mandating* it.[152] Thus, as Scalia concluded, the Court had used unreliable materials to reach what was an otherwise defensible holding.[153] That dichotomy in and of itself shows how useless legislative history is as an indicator of congressional intent.[154] Accordingly, Justice Scalia was right in declaring that the Court's reliance on Committee Reports undermined its principled text-driven conclusion. Surely, the Supremacy Clause requires a more disciplined approach than that.

2. Is There a Better Approach to Federal Preemption?

On the whole, the discussion above shows that the *Mortier* Court was correct in rejecting FIFRA preemption. As I have pointed out, however, that conclusion could have been reached just by studying the language of §136v(a).[155] Even Justice White acknowledged this, but proceeded to consult the legislative history anyway.[156] Fundamentally, this belt-and-suspenders approach suggests that preemption doctrine places too much emphasis on congressional intent at the expense of sound interpretation.[157] But, is there an alternative approach that does not rely heavily on purpose? In fact,

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151 *Mortier*, 501 U.S. at 616 (Scalia, J., concurring).

152 This was an artful sleight of hand. It conveyed the strong point that legislative history provides little useful information as far as legislative intent is concerned. *See id* at 617 ("As the Court today recognizes, the Wisconsin justices agreed with me . . . and would have come out the way that I and the Court do *but for* the Committee Reports contained in FIFRA's legislative history").

153 *See Id.* at 621 ("On the important question before us today, whether [FIFRA] denies local communities throughout the Nation significant powers of self-protection, we should try to give the text its fair meaning, whatever various committees might have had to say").

154 *See supra* note 12 and accompanying text.

155 *See supra* note 77, 117 and accompanying text.

156 *See supra* notes 107-110 and accompanying text.

157 *Cf.* Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1172-76 (1998) (discussing the centrality of legislative purpose to preemption analysis).

does Article IV, cl. 2 of the Constitution even *require* a showing of intent for the federal preemptive power to apply?

In a seminal law review article, Professor Caleb Nelson attempted to answer those questions by arguing that the Court's blinkered focus on legislative intent has "produced such poor results in area after area, [that] it is time to take a fresh look at the doctrine itself."[158] To that end, he proposed revisiting the basic tenets of the Supremacy Clause, root and branch.[159] After engaging in an extensive historical account of the provision, Nelson argued that the Supremacy Clause prescribes three interrelated judicial rules: (1) a rule of applicability (i.e. federal law applies in the states),[160] (2) a rule of priority (i.e. in the case of a conflict with state law, federal law controls),[161] and (3) a rule of construction (i.e. in the case of a conflict with state law, federal law must be given its natural meaning).[162] Combining all three rules, Nelson then proposed a simple but versatile test: "courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law."[163]

Noticeably absent from this formula is the concept of "clear legislative intent." That, of course, was a deliberate omission; under the "logical-contradiction" test, preemption can only occur when the *terms* of a federal enactment are irreconcilable with the *terms* of a state (or local) law.[164]

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158 *See* Nelson, *supra* note 15, at 233.

159 *Id.* at 234.

160 *Id.* at 246, *and see* Claflin v. Houseman, 93 U.S. 130, 137 (1876) ("[A state court] . . . is just as much bound to recognize [federal laws] as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State").

161 Nelson, *supra* note 15, at 250.

162 As Professor Nelson explained, the Supremacy Clause's rule of construction is embodied in its *non obstante* clause, which was the equivalent of a "global" savings provision for the purpose of ensuring preemption. *Id.* at 256 ("the Supremacy Clause indicates that the content of state law should not alter the meaning of federal law").

163 *Id.* at 260

164 *Id.* at 261-62 ("if a state purports to regulate the forbidden field, a court would have to choose between giving legal effect to the state regulation and giving legal effect to the federal rule depriving such regulations of authority. Again, the Supremacy Clause tells the court to resolve this contradiction in favor of the federal rule (if that rule is within Congress's power to promulgate)").

Thus, the formula values close text-based comparisons over purposive conjecture. Flowing from that model, the natural consequence would be a de-emphasis on legislative materials during the interpretive process. Instead, any preemption inquiry would center on the reconcilability of conflicting provisions. But this conflict analysis, Nelson adverted, should not be confused with the "physical impossibility" prong of the Court's existing preemption doctrine.[165] "There are plenty of circumstances," he noted, "in which it is physically possible for *individuals* to comply with both state and federal law even though *courts* would have to choose between them."[166]

Taking these dynamics into account, the appeal of Professor Nelson's proposed test is obvious. First, it is taken directly from the Supremacy Clause, which suggests the Framers envisioned a rule of preemption that had little to do with Congress's "clear preemptive intent."[167] Second, it is versatile; the rule can be applied to any preemption controversy through a disciplined text-based interpretation.[168] Third, the test unlocks analytical insights about the traditional tiers of preemption.[169] And fourth, by obtaining these insights, the logical-contradiction analysis lets us "question the usefulness of dividing [preemption cases] into the separate analytical categories of

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[165] *Id.* at 260-61, *and cf.* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (elaborating the "physical impossibility" rule)

[166] Nelson, *supra* note 15, at 260.

[167] *Id.* at 242-45 (discussing the colonial history of the Supremacy Clause and its *non obstante* provision).

[168] *Id.* 261-62 ("The logical-contradiction test is not confined to instances of what the Court calls 'conflict' preemption. It also comfortably accommodates both 'express' preemption and appropriate instances of 'field' preemption").

[169] Specifically, Nelson identified three insights. Id. at 262-65. "First, any important distinction between 'substantive' and 'jurisdictional' rules (or between what the Court calls 'conflict' preemption and what it calls 'field' preemption) is independent of the distinction between 'express' and 'implied' rules. *Id.* at 262-63. "Second, even with this clarification, the distinctions on which the Court's taxonomy rests are not very crisp . . . . Even the distinction between 'express' and 'implied' rules is surprisingly elusive." *Id.* at 263. "Third, and most fundamentally, the labels that one uses to describe different types of rules do not capture anything very important about preemption doctrine." Id. at 264.

'express' . . . , 'field' . . . , and 'conflict' preemption. The Supreme Court itself has been unable to keep these categories 'rigidly distinct.'"[170]

B. FIFRA and the Logical-Contradiction Test

Keeping those observations in mind, Professor Nelson's approach classifies as a worthy substitute to the traditional, intent-driven preemption test. As my thesis suggests, the logical-contradiction test provides a convenient justification for *not* consulting FIFRA's legislative history.[171] To see why that is the case, consider how *Mortier* could have been decided under Professor Nelson's formula.

The threshold step, of course, would be to frame the issue properly: *under the Supremacy Clause, the Court would be required to disregard Casey's pesticide ordinance if, but only if, it contradicted FIFRA's mandate under §136v(a).*[172] This is a clear enough directive, whose resolution would depend primordially on the construction of the relevant provision: "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."[173] To fulfill its interpretive task, the Court would need to resort to the canons of statutory interpretation—just as it did in the actual case. Rejecting a theory of negative-implication, and invoking the absurdity canon, the Court would likely reach the same text-based conclusion as Justice White did.[174] Thus, under §136v(a), states could regulate pesticides, and would not be barred from delegating their power to counties and cities.

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[170] *Id.* at 262 (citing English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990)).

[171] As I have stated, legislative history should be avoided whenever the interpretive task is to determine congressional intent. There may be other situations where that history is relevant. *See supra* note 14 and accompanying text.

[172] Nelson, *supra* note 15, at 260.

[173] 7 U.S.C. § 136v(a) (2012).

[174] *See supra* notes 100-106 and accompanying text.

Unlike the real *Mortier* decision, however, this textual conclusion could stand on its own. In other words, the Court would not have to *guess* whether the enacted statement evoked a clear enough "preemptive intent"—or whether it communicated any intent at all.[175] Accordingly, there would be no need for the Court to understand the opinions of §136v(a)'s draftsmen, and no need to consult the legislative history. Instead, all the Court would have to do is inquire whether the passage of Casey's ordinance would *contradict* the regulatory permission FIFRA gave to Wisconsin.[176] To answer that question, the Court would need to know what Wisconsin's state-level regulation of pesticide looked like. For example, if Casey passed its ordinance, and that ordinance was not invalid under state law, there would be no clash with the power flowing from FIFRA.

However, if Casey passed its ordinance, and that ordinance subverted Wisconsin's choice to retain FIFRA power (e.g. through a statewide agency), there *would* be a contradiction between Casey's claim of authority and that retained by Wisconsin. Based on that determination, the Court would then be required to invalidate the ordinance on the grounds of preemption. That analysis, while not entirely simple, would still be more manageable than having to scour the legislative history of §136v(a). Fundamentally, it is this result that leads me to believe in the power and utility of Professor Nelson's logical-contradiction test.

IV. CONCLUSION: DEMYSTIFYING PREEMPTION

In the preceding section, I have provided my own analysis of how FIFRA preemption should have been resolved. Not only did I conclude that *Mortier* was properly decided on its own terms, I also identified a better way of analyzing the preemption issue raised by the fact-pattern. Specifically, Professor Nelson's logical-contradiction test appears to be a good alternative. It is a

[175] *See supra* notes 107-115 and accompanying text.
[176] *See supra* notes 164-165 and accompanying text.

versatile test that focuses on text-based analysis, and stays true to the original tenor of the Supremacy Clause. Most importantly, however, the Nelson approach permits courts to dodge the "preemptive intent" question—which, in my view, is a large contributor to the disagreements about the use of legislative history. If we are able to cure this interpretive deficiency by changing the substantive rules of preemption, I do not see a reason for declining to do so.