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Case Note: Getting the Bugs Out: The Role of Legislative History in Determining the Pre-emptive Effect of FIFRA Upon Local Regulation of Pesticides in *Wisconsin Public Intervenor v. Mortier 111 S. Ct. 2476, (1991)*

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Getting the Bugs Out: The Role of Legislative History in Determining the Pre-emptive Effect of FIFRA Upon Local Regulation of Pesticides in Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991)

I. INTRODUCTION

America's efforts to control the environment have not always had the ideal results initially promised. Nowhere is this more true than with respect to our desire to eradicate various "pests" that have been deemed to have a deleterious effect upon our lives in some manner. Although we may be grateful for the ability to control plant-choking weeds and crop-destroying insects, we are aghast at the side effects of various pesticides whose benefits are tempered by the threats they pose to public health and the environment.

Congress, recognizing both the costs and benefits of pesticides, enacted the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[1] which represents a comprehensive effort to regulate the labelling, sale, and use of pesticides.[2] Although the issue of pesticide regulation is properly addressed at the federal level, the use of pesticides has a strong local character that warrants concern on the part of municipalities in and around which pesticides are used. Whether a municipality's legitimate concern about pesticide use could be translated into action has been unclear until the recent decision by the U.S. Supreme Court in *Wisconsin Public Intervenor v. Mortier*[3] in which the Court ruled that a local ordinance regulating the use of pesticides was not pre-empted by FIFRA.[4]

While the resolution of this legal question is significant, of greater

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1. 7 U.S.C. §§ 136-136y (1990). Initially enacted in 1947 as a licensing and labelling statute, FIFRA was amended in 1972 to provide increased regulation of pesticides. As part of the amendment, the Environmental Protection Agency (EPA) was granted increased enforcement authority over pesticide labeling, sale, and use. Under the statute, the EPA is authorized to enter into cooperative agreements with the states to enforce FIFRA provisions. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2477-78 (1991).

2. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991)(citing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)).

3. 111 S. Ct. 2476 (1991).

4. The Court held that FIFRA pre-empted local ordinances regulating the use of pesticides in Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109(D.Md. 1986), *aff'd without published opinion*, 822 F.2d 55 (4th Cir. 1987), *further related proceedings*, 884 F.2d 160 (4th Cir. 1989); Professional Lawn Care Ass'n v. Village of Milford, 909 F.2d 929 (6th Cir.

importance is the Court's avoidance of the jurisprudential issue raised by *Mortier* and its predecessors, namely, what role a statute's legislative history should play in a court's interpretation of that statute. This issue has been at the center of the conflict over local regulation of pesticides, not only in *Mortier*, but in previous court cases as well.[5]

This Note will examine the Court's use of legislative history in determining the pre-emptive effect of FIFRA upon local regulation of pesticides. Ways in which that relationship has been construed will be analyzed following an overview of the principles of pre-emption and their application to FIFRA in regard to the local regulation of pesticides. As the title of this Note suggests, there is room for improvement. Specifically, a clear standard governing the use of legislative history will be proposed as a necessary element of pre-emption analysis. The standard proposed will involve an interpretive strategy regarding the use of legislative history that respects congressional authority as well as the principles of federalism necessarily implicated in any pre-emption analysis of federal statutes.

II. STATEMENT OF THE CASE

A. Facts

Acting under authority delegated by section 61.34 of the Wisconsin Statutes,[6] the town of Casey, Wisconsin[7] adopted in 1985 an ordinance that regulates the use of pesticides.[8] The ordinance requires a permit for the application of any pesticide to public lands or to private land subject to public use, or for the aerial spraying of pesticides on private land.[9] The town board has the authority to deny or grant the permit, as well as the option to grant the permit with conditions.[10] The ordinance further requires a grantee to post placards giving notice of the pesticide use and information regarding a safe reentry time.[11]

1990). The court held that FIFRA did not pre-empt local regulation in People *ex rel.* Deukmejian v. County of Mendocino, 683 P.2d 1150 (Cal. 1984); Coparr v. City of Boulder, 735 F. Supp. 363 (D. Colo. 1989); Central Maine Power Co. v. Town of Lebanon, 571 A.2d 1189 (Me. 1990). *See infra* notes 45-83 and accompanying text.

5. *See supra* note 4.

6. *Mortier*, 111 S. Ct. at 2480 (citing WIS. STAT. § 61.34(1), (5) (1989-1990)). These sections grant the village board power to act for the health and safety of the public.

7. Casey, Wisconsin is a town of 400 to 500 persons located in rural Washburn County, Wisconsin, several miles northwest of Spooner.

8. *Mortier*, 111 S. Ct. at 2480.

9. *Id.*

10. *Id.*

11. *Id.* at 2481.

Ralph Mortier, a private landowner, applied for a permit for the aerial spraying of his land.[12] The town board granted him a permit, however, it was conditioned by a denial of aerial spraying and restrictions on the area of land on which ground spraying would be allowed.[13] Together with an association of other pesticide users, the Wisconsin Forestry/Rights-of Way/Turf Coalition, Mortier brought an action in the circuit court of Washburn County seeking a declaratory judgment that the town of Casey's ordinance was pre-empted by both state and federal law.[14] The Wisconsin Public Intervenor, an assistant attorney general charged with the protection of environmental public rights, was admitted as a defendant as well.[15] The circuit court granted Mortier summary judgment, holding that the ordinance was indeed pre-empted by both FIFRA and the applicable state statute regulating the use of pesticides.[16]

B. The Wisconsin Supreme Court

Pursuant to the joint petition of all parties, the Wisconsin Supreme Court accepted the town of Casey's appeal on bypass of the court of appeals.[17] Declining to address the issue of state law pre-emption, the court affirmed the decision of the circuit court in a 4-3 decision.[18] The court found that, while the text of FIFRA was ambiguous regarding congressional intent to pre-empt local ordinances, the legislative history made that intent clear.[19] The majority was opposed by the vigorous dissents of Justices Abrahamson and Steinmetz. They argued that Congress' intent to pre-empt local regulation was unstated in the statute and that, contrary to the majority's interpretation, the statute's legislative history failed to make clear that intent.[20]

C. The United States Supreme Court

The United States Supreme Court granted certiorari[21] and unani-

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Mortier v. Town of Casey, 452 N.W.2d 555 (Wis. 1990).
18. *Id.*
19. *Id.* at 557-60. *See infra* notes 84-90 and accompanying text.
20. *Id.* at 561-71 (Abrahamson & Steinmetz, JJ., dissenting).
21. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991), *cert. granted*, 111 S. Ct. 750 (1991).

mously reversed the decision of the Wisconsin Supreme Court.[22] The Court found that FIFRA contained no clear pre-emptive intent and that its legislative history was, at best, ambiguous.[23] Concurring in the judgment, Justice Scalia nonetheless objected to the Court's reliance on legislative history and found that the terms of the statute alone sufficed to rule out any pre-emptive intent on the part of Congress.[24]

III. BACKGROUND

Wisconsin Public Intervenor v. Mortier illustrates the tenuous relationship between courts' application of pre-emption analysis and their attendant use of legislative history as an aid for interpretation. Indeed, the entire judicial history of FIFRA's impact upon local regulation of pesticides reveals an underlying confusion as to the proper use of legislative history when trying to ascertain the pre-emptive effect of a federal statute.

A. Preemption Principles

The need for pre-emption analysis grows out of America's federal system, which involves the diffusion of power between the central federal government and the states.[25] Under this system, the states enjoy sovereignty apart from that of the United States. While these separate spheres of power can, and often do, operate without conflict, such a system makes some conflict virtually inevitable as the respective sovereigns exercise their power. On the one hand, the Constitution creates the possibility of conflict between sovereign powers. On the other hand, it provides for the resolution of any conflict that might arise in the exercise of state and federal power. Under the Supremacy Clause, laws made pursuant to the Constitution are "the supreme law of the land."[26] Thus, in the event of a conflict between state and federal laws, the federal law is said to pre-empt the state law and render it void.

Out of regard for state sovereignty, however, courts presume that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Con-

22. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2481 (1991).

23. *Id.* at 2484.

24. *Id.* at 2487 (Scalia, J., concurring).

25. The Tenth Amendment to the U.S. Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

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

gress."[27] The required showing of a "clear and manifest purpose" to pre-empt a state law is heightened when the state or local regulation relates to health or safety, concerns that are historically of a local nature.[28]

Courts have ruled that a "clear and manifest purpose" to pre-empt state law may be (1) expressed explicitly in the statute; (2) implied by the comprehensive nature of the statute; or (3) caused by actual conflict between state and federal laws.[29] Not surprisingly, the second of these, implied pre-emption, is the most problematic. When Congress has explicitly stated its purpose to pre-empt state law, or when an actual conflict is present, the question of pre-emption usually does not arise. The question of pre-emption becomes more acute when courts consider the nature of the legislation to determine whether it implies pre-emption because of its comprehensive scope. This pre-emption by implication is said to occur when federal legislation occupies an entire field of regulation leaving no room for states to supplement federal law.[30]

Cases involving pre-emption are, unfortunately, rarely clear. As the Wisconsin court observed in *Casey*, requiring an express and unequivocal statement by Congress regarding its pre-emptive intent might be an attractive option that would clear up many ambiguities.[31] Because courts have allowed the "clear and manifest purpose" of Congress to be inferred from legislation, however, most pre-emption cases reaching the United States Supreme Court deal with ambiguous statutes in which Congress has expressed no clear pre-emptive intent.[32] As courts seek to resolve the ambiguities, they quite naturally turn to a statute's legislative history hoping to find therein a solution to the "pre-emption puzzle."[33]

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27. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2482 (1991) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

28. Mortier v. Town of Casey, 452 N.W.2d 555, 561 (Wis. 1990) (Abrahamson, J., dissenting, citing Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 718 (1985)).

29. *See, e.g.*, Louisiana Pub. Serv. Comm. v. F.C.C., 476 U.S. 355, 368 (1986); *Casey*, 452 N.W.2d at 556-57; *Mortier*, 111 S. Ct. at 2481-82.

30. *Louisiana Pub. Serv. Comm.*, 476 U.S. at 368.

31. 452 N.W.2d at 557.

32. *Id.*

33. Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 72 (1988). The author points to the difficulties stemming from overlapping categories in pre-emption analysis that have made resolution of pre-emption cases puzzling.

B. Legislative History of FIFRA

The question before the Court in *Mortier* was whether the town of Casey's ordinance regulating the use of pesticides was pre-empted by FIFRA. Had the ordinance in question been adopted by a state legislative body, the answer clearly would be negative. FIFRA explicitly states 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."[34] Whether a local ordinance is included under the authority granted to the states, however, is not as clear. The ambiguity lies in the definition of "State" in the statute. FIFRA defines a "State" as "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."[35] The absence of any mention of political subdivisions in these two sections is what finally led the Supreme Court to review FIFRA's impact upon the ability of local governments to regulate the use of pesticides. The same problem has prompted courts to turn to the legislative history of FIFRA to determine whether Congress intended to preclude political subdivisions from exercising any regulatory authority under FIFRA.

A brief review of the pertinent legislative history of FIFRA shows that, prior to its enactment, considerable disagreement existed among members of Congress as to whether political subdivisions of states should be granted authority to regulate the use of pesticides or be prohibited from so doing.[36] Although the proposed bill contained a section providing that "nothing in this Act shall be construed as limiting the authority of a State or political subdivision thereof to regulate the sale or use of a pesticide within its jurisdiction . . . ,"[37] the House Agricultural Committee deleted any reference to political subdivisions "on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions."[38] When referred to the Senate Committee on Agriculture and Forestry, that committee's report agreed with the House Committee and further stated that "it is

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34. 7 U.S.C. § 136v(a) (1988).

35. 7 U.S.C. § 136(aa) (1988).

36. For a more thorough treatment of FIFRA's legislative history, see Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109, 111-13 (D.Md. 1986); People *ex rel.* Deukmejian v. County of Mendocino, 683 P.2d 1150, 1158-59 (1984); and Mortier v. Town of Casey, 452 N.W.2d 555, 558-59 (Wis. 1990).

37. *Maryland Pest Control*, 646 F. Supp. at 111-12.

38. *Id.* at 112.

the intent that Section 24 [7 U.S.C. § 136v], 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 the regulation of pesticides."[39] The Senate Commerce Committee offered an amendment authorizing local regulation but subsequently withdrew it after conferring with the Agriculture and Forestry Committee. Together, these two committees offered a compromise measure which did not include a provision for or against local regulation.[40] The compromise version passed in the Senate by a vote of seventy-one to zero.[41] Subsequent conferences between members of the House and Senate were held to resolve the differences between the two bills. These joint conferences failed to address the issue of local regulation because both versions lacked any such provision.[42]

Taken at face value this legislative history may, as some courts have found, be quite clear.[43] Others have found it to be ambiguous and indispositive of the issue of local authority to regulate pesticides.[44] This disagreement is illustrated by a review of prior decisions rendered by courts that, when faced with the issue of local regulation of pesticide use under FIFRA, all considered the statute's legislative history, but reached different conclusions.

C. Prior Decisions Regarding FIFRA's Pre-emptive Effect

The town of Casey, Wisconsin was not the first political subdivision of a state to enact an ordinance regulating the use of pesticides within its jurisdiction, nor was it the first to have its ordinance tested before a court to determine whether it was pre-empted by FIFRA. However, the courts that have ruled on the pre-emptive effect of

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39. *Id.*

40. *Id.* at 113.

41. *Id.*

42. *Id.*

43. *See, e.g., Maryland Pest Control*, 646 F. Supp. 109, 113 (D.Md. 1986) (legislative history clearly shows intent to pre-empt local regulation); Professional Lawn Care Ass'n v. Village of Milford, 909 F.2d 929, 935 (6th Cir. 1990) (Nelson, J., concurring) ("legislative history . . . suggests about as strongly as it possibly could that Congress did indeed intend to keep the field of pesticide regulation clear of local ordinances); Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2488 (1991) (Scalia, J., concurring: "Clearer committee language 'directing' the courts how to interpret a statute could not be found.").

44. *See, e.g.*, People *ex rel.* Deukmejian v. County of Mendocino, 683 P.2d 1150, 1160-61 (Cal. 1984) ("The legislative history does not manifest a clear congressional intent to preclude states from authorizing local government entities to adopt restrictive regulations of pesticides."); *Mortier*, 111 S. Ct. at 2484, 2485 (finding that the legislative history is "ambiguous").

FIFRA upon ordinances of political subdivisions have been sharply divided in their decisions. Two strong and opposing voices, whose fundamental disagreement lies in their respective standards of interpreting the legislative history of FIFRA, have spoken through these courts.

1. Decisions Against Pre-emption

The California Supreme Court in *People ex rel. Deukmejian v. County of Mendocino*[45] ruled that a county ordinance prohibiting aerial spraying of phenoxy herbicides was not pre-empted by FIFRA.[46] The court first found that Congress had not occupied the field of pesticide regulation because the Act explicitly grants states the authority to supplement federal legislation.[47] The court then proceeded to address the question of whether Congress, by authorizing states to regulate pesticides, had expressly prohibited a state from authorizing its political subdivisions to participate in its regulatory program.[48] The framing of the question was crucial. First, the court required an express prohibition of a state's power to delegate its reserved powers to its political subdivisions. As such, the court read the legislative history with a view toward prohibition instead of searching for a grant or denial of authority by Congress to the political subdivisions themselves. This tactic avoided any deference to the maxim relied upon by the State in its argument in favor of pre-emption, *expressio unius est exclusio alterius* (the expression of one term, e.g. "State", is the exclusion of the other, e.g. "political subdivisions").[49] Under the court's analysis the issue is whether states have been prohibited from exercising their power, not whether political subdivisions have been granted authority to regulate. Second, the framing of the question was generally faithful to the doctrine of pre-emption because it honors principles of federalism that reserve a sphere of sovereignty to the states over those matters that Congress has not proscribed.[50]

With the issue framed in terms of congressional intent to restrict the exercise of state power, the court considered the legislative history of FIFRA and held that Congress had not so intended.[51] The court's

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45. 683 P.2d 1150 (Cal. 1984).

46. *Id.* at 1152. The ordinance included, but was not limited to, 2,4,5-T, Silvex, 2,4-D, and other herbicides containing Dioxin.

47. *Id.* at 1159.

48. *Id.*

49. People *ex rel.* Deukmejian v. County of Mendocino, 683 P.2d 1150, 1160 (Cal. 1984).

50. U.S. CONST. amend. X.

51. *County of Mendocino*, 683 P.2d at 1160.

interpretation of the legislative history led it to conclude that Congress intended only that political subdivisions should not be *authorized* to regulate, not that they should be *prohibited* from so doing.[52] Further, in the absence of any language prohibiting states from delegating their power to political subdivisions, the court found that a state is free, under FIFRA, to distribute regulatory power between itself and its political subdivisions.[53] In sum, the court concluded, "The legislative history does not manifest a clear congressional intent to preclude states from authorizing local governmental entities to adopt restrictive regulations of pesticides."[54]

The reasoning of the California Supreme Court was followed by the Supreme Judicial Court of Maine in *Central Maine Power Co. v. Town of Lebanon*.[55] In that case, the town of Lebanon had enacted an ordinance prohibiting commercial spraying of herbicides for non-agricultural purposes unless approved by a town meeting vote.[56] Upon application by Central Maine Power Company for permission to use herbicides to control brush growth along their transmission lines, a town meeting voted to deny permission to spray.[57] Central Maine Power Company filed a declaratory action to determine whether the town ordinance was pre-empted by state and federal laws, including FIFRA.[58]

On appeal, the Supreme Judicial Court of Maine pointed to a state's power to delegate any authority it possesses to its political subdivisions and to the deference accorded local regulation of matters related to health and safety.[59] The court concluded that the absence of any mention of local governments in section 136v could not be read to preclude a state's political subdivisions from regulating pesticides without disregarding traditional notions of state sovereignty.[60] On the issue of interpreting the legislative history of FIFRA, the court found persuasive the reasoning of *County of Mendocino*. It therefore ruled that local regulation is neither authorized nor prohibited by FIFRA, but that such authority is for a state to delegate.[61]

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52. *Id.*
53. *Id.*
54. *Id.* at 1161.
55. 571 A.2d 1189 (Me. 1990).
56. *Id.* at 1190-91.
57. *Id.* at 1191.
58. *Id.*
59. *Id.* at 1192.
60. *Id.*
61. *Id.* at 1193.

A federal district court in *Coparr, Ltd. v. City of Boulder*[62] also agreed with *County of Mendocino*, stating that "[t]he California court's approach is consistent with the historical view of state sovereignty and the state's freedom to distribute regulatory power between itself and its political subdivisions."[63] Finding that the legislative history was not conclusive of congressional intent[64] and that the use of pesticides is a matter affecting health and safety,[65] the court ruled that Boulder had the authority to enact legislation regulating the use of pesticides.[66]

2. *Decisions in Favor of Pre-emption*

The first court to rule in favor of the pre-emptive effect of FIFRA upon local regulation was the federal district court of Maryland in *Maryland Pest Control Ass'n v. Montgomery County*.[67] The court addressed the question of "whether the term 'State' as used in Section 136v includes a State's political subdivisions."[68] Again, the question shapes the answer. The question requires that Congress be found to have *authorized* regulation of pesticides by local governments; it does not allow for the possibility that the absence of political subdivisions within the meaning of the word "State" might be merely a lack of authorization to regulate and not a prohibition of regulation.

In light of the question presented, the court proceeded to examine the legislative history of FIFRA. Its reading led to the conclusion that "the legislative history could not be more clear" and that Congress obviously intended to exclude political subdivisions from the authorizing language of section 136v.[69] The court reasoned that "[p]rincipled decision-making and respect for the integrity of the legislative process compel the conclusion that Congress knew and meant what it was doing."[70]

The *Maryland Pest Control* court cited the dissent in *County of Mendocino* as an accurate analysis of the legislative history of FIFRA.[71] In that dissent, Justice Kaus pointed to the language from

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62. 735 F. Supp. 363 (D. Colo. 1989).
63. *Id.* at 367.
64. *Id.* at 366.
65. *Id.* at 367.
66. *Id.*
67. 646 F. Supp. 109 (D. Md. 1986), *aff'd without published opinion*, 822 F.2d 55 (4th Cir. 1987), *further related proceedings*, 884 F.2d 160 (4th Cir. 1989).
68. *Id.* at 111.
69. *Id.* at 111-13.
70. *Id.* at 113.
71. *Id.* at 111, n. 2.

the congressional committee reports. That language clearly stated that section 136v should be understood to deprive political subdivisions of authority to regulate because the fifty states and the federal government would be an adequate number of regulatory jurisdictions.[72] Justice Kaus dismissed as specious and unsupportable the majority's reasoning that the compromise bill neither authorized nor prohibited local regulation because the legislative history made the intent of Congress clear.[73]

Finally, the Sixth Circuit Court of Appeals held in *Professional Lawn Care Ass'n v. Village of Milford*[74] that FIFRA pre-empts local regulation of pesticides, citing favorably the dissent in *County of Mendocino* and the opinion in *Maryland Pest Control*. Its own analysis of the legislative history led to the conclusion that FIFRA was a comprehensive statute occupying the entire field of pesticide use and regulation.[75] The court also concluded that section 136v was a limited authorization to the states that did not include political subdivisions.[76] The court agreed with *Maryland Pest Control* that the committee reports explicitly stated an intent to deprive local authorities of the power to regulate pesticide use.[77]

In a concurring opinion, Judge Nelson disagreed that FIFRA was intended to occupy the entire field of pesticide regulation because the language of section 136v grants states the authority to regulate.[78] Judge Nelson also considered notions of state sovereignty regarding a state's ability to delegate power to political subdivisions. However, he found that FIFRA was unclear as to whether state authority to delegate was given in section 136v.[79] Because of this ambiguity Judge Nelson turned to the legislative history and discovered that it clearly represented an intent to deprive local governments of any regulatory power.[80] Judge Nelson, however, went on to remark that committee reports, no matter how clear, have not been passed by Congress or presented to the President.[81] As such, they cannot possibly be consid-

72. People *ex rel.* Deukmejian v. County of Mendocino, 683 P.2d 1150, 1164 (1984) (Kaus, J., dissenting).

73. *Id.* at 1165.

74. 909 F.2d 929 (6th Cir. 1990).

75. *Id.* at 933.

76. *Id.*

77. *Id.* at 934.

78. *Id.* at 935 (Nelson, J., concurring).

79. *Id.* at 937.

80. *Id.* at 940.

81. *Id.*

ered "law".[82] Nevertheless, Judge Nelson believed that such reports are useful for interpreting a "doubtful" statute, and in this case he concluded that FIFRA was "doubtful enough" to give the legislative history sufficient weight to conclude that FIFRA does pre-empt local regulation of pesticides.[83]

3. *Summary of FIFRA Pre-emption Decisions*

These decisions, along with their accompanying dissents and concurrences, illustrate the kinds of disagreement associated with attempts to resolve the pre-emptive effect of FIFRA upon the regulation of pesticides at local levels. These decisions in part reflect differences arising out of the ambiguity of the statute. However, they also reflect a deep disagreement among courts rooted in a particular outlook that influences their interpretation of statutes and their reading of legislative history. In short, the argument involves the significance to be accorded the sovereignty of the states and the relative weight to be given to legislative history when resolving pre-emption issues such as those presented above and in *Wisconsin Public Intervenor v. Mortier*. Left unaddressed, this disagreement gives rise to confusion regarding the proper role and interpretation of legislative history.

IV. ANALYSIS

A. The Continuing Confusion

The confusion concerning how to treat legislative history was evident in *Casey*.[84] There the Wisconsin court, conceding that FIFRA does not contain an express pre-emption of local regulation,[85] nonetheless went on to find in the legislative history a "clear and manifest purpose of Congress" to pre-empt.[86] This holding led to the strong dissent of Justice Abrahamson who tracked the course taken by the majority in *County of Mendocino* and argued that FIFRA does not expressly prohibit a state from delegating its power under FIFRA to local governments.[87] She then expressed her disagreement with finding congres-

82. *Id.*

83. *Id.* at 940-41.

84. *See Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2490 (1991) (Scalia, J., concurring: "[I]t would be better still to stop confusing the Wisconsin Supreme Court, and not to use committee reports at all.").

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

86. *Id.* at 558-59.

87. *Id.* at 562 (Abrahamson, J., dissenting).

sional intent to pre-empt solely on the basis of legislative history.[88] Furthermore, Justice Abrahamson contended that the legislative history was not as clear as the majority thought it to be. In so doing, she called into question the usefulness of legislative history and committee reports in particular.[89] She concluded her dissent by stating, "In contrast to the majority opinion, I prefer construing FIFRA with 'due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy.' "[90]

The confusion seen in *Casey* appears not to have been eliminated by the U.S. Supreme Court in *Mortier*. Although the Court made clear that FIFRA does not pre-empt local regulation of pesticides, it did so in such a way as to perpetuate the confusion over how FIFRA's legislative history fits in to such a decision. Instead of clarifying the weight to be accorded legislative history, the Court simply dismissed it as being "at best ambiguous."[91] Over and against the findings by other courts that the legislative history "could not be more clear",[92] this dismissal amounts to a decision without supporting rationale. The closest the Court comes to supplying some standard for reading legislative history is when, responding in a footnote to Justice Scalia's concurrence, it says, "[T]he meaning a committee puts forward must at a minimum be within the realm of meanings that the provision, fairly read, could bear."[93] "Congress cannot," the Court tells us, "take language that could only cover 'flies' or 'mosquitos', and tell the courts that it really covers 'ducks.' "[94]

B. Some Proposals to End the Confusion

How, then, should courts utilize legislative history, especially when, as is the case with FIFRA, it seems to be capable of such varying interpretations? The problem is one that deserves attention because, as one judge has noted, "Statutes are the federal courts' daily bread. The way in which courts go about reading those statutes . . . is

88. *Id.* at 563, n.3.

89. *Id.* at 564-65.

90. *Id.* at 566 (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959)).

91. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2484 (1991).

92. *See, e.g.*, Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109, 111, 113 (D.Md. 1986).

93. *Mortier*, 111 S. Ct. 2476, 2485, n. 4 (1991).

94. *Id.*

therefore of particular importance to our jurisprudence."[95] The concern over the proper role and utilization of legislative history in the interpretation of a statute does not involve the question of whether courts should enforce the statute in the manner it was designed to be enforced. That end is presumed to be the courts' task[96] and reflects the "democratic ideal"[97] embodied in our political system that gives legislative power to Congress as the representative body. Rather, the problem is one of means, namely, how best to attain the democratic ideal when faced with an ambiguous statute.

1. The Textualist Approach[98]

Justice Holmes stated "[w]e do not inquire what the legislature meant; we ask only what the statute means."[99] While this may sound disrespectful of Congress, modern disciples of Holmes would contend that "sticking to the text" actually respects the function of Congress by interpreting only that which was actually passed by the legislative body. As one writer has observed: "All of [the legislators'] considerable skills and energies are directed toward [the passage of legislation], and in almost all cases they consider the enacted statute the only expression of their intent."[100]

The textualists' approach to statutory interpretation decries the use of legislative history, largely on the basis of its hostility toward the

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95. Kenneth Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987).

96. *See, e.g.*, Mortier v. Town of Casey, 452 N.W.2d 555, 556 (Wis. 1990) (citing New York State Pesticide Coalition v. Jorling, 874 F.2d 115, 118 (2d Cir. 1989): "[O]ur task is to ascertain the intent of Congress").

97. Abner Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 628 (1987). Judge Mikva, citing A. BICKEL, THE LEAST DANGEROUS BRANCH 27 (1962), states that the "democratic ideal" may be considered as "the idea . . . that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy." He also observes that statutory interpretation by the courts can achieve consonance with this democratic ideal "without strain . . . through a search for and understanding of legislative intent and goals."

98. The schools of thought termed "textualist" and "contextualist" are often given the designation "nonintentionalist" and "intentionalist" respectively. These labels make an unfair and mistaken attribution inasmuch as both groups are concerned about intent. The difference between them is more clearly indicated by a distinction that describes the source from which that intent is derived. Thus, the categories employed herein, textualist-contextualist, more appropriately describe the basis of the conflict.

99. Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988)(quoting Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)).

100. Eric Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 652 (1987).

democratic process.[101] Legislative history, the textualists would argue, has the potential to obscure the meaning of a statute by supplanting it with reports and speeches that were never voted upon.[102] The textualists are concerned that a resort to legislative history "is a disguise for judicial opposition to the outcome of the application of the statute as enacted."[103] Thus, Judge Starr cautions that "the dangers inherent in the use of legislative history generally outweigh the arguable advantages resulting from its use."[104]

Justice Scalia is perhaps the best known representative of those who adhere to a textual interpretation of statutes. His concurrence in *Mortier* makes note of his two principle concerns regarding legislative history: first, it is an unreliable indicator of congressional intent; and second, it is used by courts only when it is "convenient" and otherwise is ignored.[105] Underlying these concerns, however, is his more basic contention that "we are a Government of laws not of committee reports"[106] and should, therefore, avoid committee reports and simply "try to give the text its fair meaning."[107]

Scalia's reliance on the "fair meaning" of the text presents a more subtle element of the textualists' argument. That element is an emphasis on the "meaning" of a statute as opposed to the "intent" of the

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101. *See, e.g.*, Peter Schanck, *An Essay on the Role of Legislative Histories in Statutory Interpretation*, 80 LAW LIBR. J. 391, 402 (1988). The author points out that the public rightly expects to know the law by reading the statutes. When legislators are able to introduce a "different version of the law" into the legislative history, the danger exists that courts may seize upon such statements to resolve a conflict based upon the statute's proper interpretation. As he says, "Relying upon the legislative history in these contexts is . . . not only technically unconstitutional [because of the Constitution's requirement that legislation be embodied in statutes] but undemocratic. *See also* Starr, *supra* note 95, at 375-77. Judge Starr raises two categories of concerns: those based on democratic theory and those based on practical reasons. Regarding democratic theory concerns, he states: "The enacted statute definitively represents the avowed 'intent' of the Congress as a whole." Committees, though reservoirs of expertise and technical knowledge, may be narrow and parochial in their outlook. Thus, relying on committee reports raises the danger that unrepresentative materials will be accepted as authoritative. Regarding practical concerns, Judge Starr points to the potential for abuse, the cost of usage, and fictitious use. The most compelling of these is the potential for abuse by way of manipulating legislative history. The most common form of abuse is comments made by legislators and entered into the congressional record after the legislation has been enacted.

102. Schanck, *supra* note 101, at 402. *See also* Starr, *supra* note 95, at 375.

103. Lane, *supra* note 100, at 654.

104. Starr, *supra* note 95, at 375.

105. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2488 (1991) (Scalia, J., concurring). Indeed, Justice Scalia concludes that the majority's decision "reveals that . . . committee reports are a forensic rather than an interpretive device, to be invoked when they support the decision and ignored when they do not." *Id.* at 2490.

106. *Id.*

107. *Id.*

legislature that passed it. The concern of the textualists is that legislative intent has come to dominate the text of the statute in the minds of many judges. In other words, the "true law" is not the statute that was passed by Congress and signed by the President; the "true law" is in the minds of legislators and can be ascertained by delving into legislative history.[108] As Judge Easterbrook has noted, "[t]his slide from meaning to intent has occurred almost without notice."[109] In opposition to this movement, Justice Scalia, echoing Justice Holmes, insists that "[j]udges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."[110]

Applying his approach in *Mortier*, Justice Scalia concluded that "the terms of the statute do not alone manifest a pre-emption of the entire field of pesticide regulation."[111] Directly disagreeing with the majority's interpretation of the legislative history, however, Scalia said that "clearer committee language 'directing' the courts how to interpret a statute of Congress could not be found, and if such a direction had any binding effect, the question of interpretation in this case would be no question at all."[112] "Of course," Scalia went on to note, "that does not necessarily say anything about what Congress as a whole thought."[113] Because of the possible lack of continuity between committee reports and the intent of Congress as a whole, Scalia refuses to give any force to those otherwise clear committee reports. Rather, he insists that the fair meaning of the text is sufficient to interpret the meaning of FIFRA.

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108. Easterbrook, *supra* note 99, at 60-61.

109. Easterbrook, *supra* note 99 at 61. Judge Easterbrook shows how relying upon *intent* as opposed to the reasonable import of the language of a statute "greatly increases the discretion, and therefore the power, of the court." Such a technique may also produce "laws" (via judicial construction) that never could have been passed. *Id.* at 62-63.

110. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

111. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2487 (1991) (Scalia, J., concurring). Justice Scalia, noting that the question of whether FIFRA pre-empts the entire field of pesticide regulation is "certainly a close one," states that if there were field pre-emption, § 136v would be construed as a limited authorization to states apart from their political subdivisions. *Id.* at 2487-88.

112. *Id.* at 2488.

113. *Id.* at 2489. Regarding what the Senate as a whole thought about a proposed amendment to FIFRA explicitly granting political subdivisions the power to regulate pesticides, Justice Scalia notes that it could have been rejected because (1) a majority of its members disagreed with the proposal; (2) they thought it superfluous; (3) they were blissfully ignorant of the dispute and just wanted to avoid further trouble; or (4) three different minorities had each of these respective reasons. The bottom line, as Scalia says, is that "[w]e have no way of knowing; indeed, we have no way of knowing that they had any *rational* motive at all." *Id.* at 2489-90.

2. *The Contextualist Approach*

Whereas the textualists stress the meaning of statutes, another group of scholars and judges recognizes that the "meaning of statutes" can be violated if sought for apart from their context. Indeed, one writer has suggested that the textualist, non-intentionalist theories of statutory interpretation are inconsistent with the "democratic ideal" previously referred to[114] because they put too much power into the hands of the judiciary—power that rightfully belongs in the legislative branch.[115] This school of statutory interpretation acknowledges that much legislation is the product of political compromise that leads to ambiguous provisions.[116] This ambiguity makes the use of legislative history not only helpful but even necessary.[117] And although this school of thought promotes going beyond the text when interpreting statutes, they are not necessarily trying to ascertain the subjective intent of members of Congress. Rather, the task is usually thought of as an attempt to discern the meaning of an unclear statute by considering the intent behind it. As one writer has observed, "meaning presupposes intent."[118]

Therefore, it is important to distinguish two kinds of intent. Ronald Dworkin suggests that we should distinguish "collective" intent from "institutional" intent.[119] Collective intent is the intent that is often derided by the textualists, namely, the subjective beliefs in the minds of legislators regarding the meaning of a statute.[120] Institutional intent, on the other hand, is the kind of intent represented by a policy or principle that is in some way enacted in the statute.[121] This institutional intent is what contextualists seek. Peter Schanck writes: "Since legislatures are policy-making bodies, there must be some intent behind the policies embodied in statutory form. In keeping with the separation of powers doctrine—in this case, the supremacy of the legislature in law making—it is the responsibility of the courts to find that intent, if

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114. Mikva, *supra* note 97 and accompanying text.

115. Earl Maltz, *Statutory Interpretation and Legislative Power: The Case For a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 9-12 (1988).

116. Abner Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380 (1987). Judge Mikva locates the origin of statutory ambiguity in the dilemma caused by having "435 prima donnas in the House and 100 prima donnas in the Senate, and the name of the game is to get them to agree on a single set of words." *Id.*

117. *Id.*

118. Schanck, *supra* note 101, at 395.

119. *Id.* at 405, (citing RONALD DWORKIN, A MATTER OF PRINCIPLE 320-21 (1985)).

120. *Id.* at 405.

121. *Id.* at 405.

possible."[122]

Richard Posner alludes to this institutional intent in his model of statutory interpretation based on the notion of statutes as communications from a superior. Posner contends:

> [t]he platoon commander will ask himself, if he is a responsible officer: what would the company commander have wanted me to do if communications failed? Judges should ask themselves the same type of question when the "orders" they receive from the framers of statutes . . . are unclear: What would the framers have wanted us to do in this case of failed communication?[123]

Elaborating on this notion, Posner says that interpretation requires "figuring out what outcome will best advance the program or enterprise set on foot by the enactment" of a particular statute.[124] More precisely, as Ronald Dworkin says, "a statute should be interpreted to advance the policies or principles that furnish the best political justification for the statute."[125] But both Posner and Dworkin take seriously the legislature behind the legislation in their efforts to interpret unclear or ambiguous statutes. Instead of viewing a statute in a vacuum, removed from its source, these writers want to include the context of a statute—a context best provided by studying the legislative history of a statute. A statute, after all, "can appear to mean one thing *in vacuo*, but mean something quite different within the context of information furnished in the legislative history."[126]

Courts that attempted to find the intent within FIFRA clarifying the meaning of section 136v looked to the context of the statute found in the legislative history. As we have seen, the courts took a different perspective on the legislative history.[127] Their differing interpretations concerning the context were used to lend authority to their subsequent decisions regarding the meaning of the text as applied to the particular facts. The Wisconsin Supreme Court in *Casey* surely had in mind its role of deferring to Congress, and thereby furthering the "democratic ideal," when it stated:

> Because we conclude there was pre-emption of local regulation, it is clear that the policymaker—in this case the congress—must be

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122. *Id.* at 395.

123. Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. L. REV. 179, 190 (1987).

124. *Id.* at 191.

125. Schanck, *supra* note 101, at 406.

126. Schanck, *supra* note 101, at 403-04.

127. *See supra* notes 46-83 and accompanying text.

> given ultimate deference in its determination of policy, *i.e.*, that it is the policy of the United States Congress to allocate the power to regulate pesticides at a level that stops at the state level. If that policy is less than the optimum, the resolution must be left to the political arena and not to the judiciary.[128]

Whether the court's interpretation of FIFRA was correct, however, did not depend on its proper deference to Congress. Instead, it hinged on its interpretation of FIFRA's legislative history—an interpretation with which the United States Supreme Court simply disagreed.

Legislative history, it seems, is not always illuminating. Nor is a particular policy or principle always easily found by wandering through committee reports. Such appears to be the case regarding section 136v of FIFRA, where strong disagreement has been seen over what the legislative history actually proved. In light of the continuing ambiguity, the inability to decide with confidence which meaning will prevail points to the need for a standard that can serve as the foundation for consistent interpretation. Textualists have it easier in this respect, for the range of options is narrowed if legislative history is removed from the equation. But even then some statutes may be so ambiguous that a judge may be tempted, as Judge Easterbrook counsels, to "put the statute down—the question is not within its domain."[129]

Unfortunately, courts are called upon to decide matters even if they might prefer to withdraw from the conflict. If a statute is in question, the courts simply must provide an answer. And when the United States Supreme Court gives an answer, it carries authority. It would be preferable if that authority rested upon something more substantial than the Supreme Court's status. In the case of an ambiguous statute, that authority should rest in part upon a standard of interpretation that enjoys wide support. Thus far, judicial attempts to use legislative history as a basis for decisions regarding the pre-emptive effect of FIFRA have failed to provide clear and consistent decisions. Instead, as the courts' experience with FIFRA indicates, legislative history has added to the confusion. Confusion of this kind erodes the authority of the courts and diminishes their capacity to resolve conflicts centered on questions of pre-emption.

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

129. Easterbrook, *supra* note 99, at 65. *See also*, Mikva, *supra* note 116, at 382. Judge Mikva says that where the language of a statute is ambiguous, "judges have to look at the committee reports and at other clues. And we do have to look. We cannot just tell Congress that they could have said it more plainly, and that until they do, we are not going to enforce it. We can't say, 'We pass.' "

3. *A Proposed Standard For Interpreting Legislative History*

While the interpretive strategy proposed by Scalia and the textualists has the virtue of simplicity, it is probably not capable of dealing with the complex nature of much of modern legislation.[130] It seems likely, therefore, that the practice of utilizing legislative history will reach "far into the future."[131] But the use of legislative history needs to be governed by a guiding principle that will yield a standard of interpretation able to provide a sound basis for decisions when clarity is not readily found in the text of a statute or the context of its legislative history. Legislative history, like any tool, must be used properly if it is to perform the expected job. Likewise, the nature of the job determines the way in which a tool should be used.

The job at hand is interpreting a federal statute for its pre-emptive effect upon state or local legislation. The tool at our disposal is legislative history. How should we use it? We have already decided not to throw it out. Neither, however, do we want to flail it about and create more damage. What principle should govern its use? And what standard of interpretation might result?

When interpreting a federal statute for its pre-emptive effect, we are in the realm of federalism. This obvious point is often either overlooked or given merely a cursory glance.[132] Because we are in the realm of federalism, however, principles of federalism should guide our way and govern the application of whatever tools we bring to the task of interpretation. Courts should begin, therefore, by extending the context of an ambiguous statute to include those very basic mechanisms of federalism that operate to balance conflicting interests.[133] Of specific importance is the notion of dual sovereignty involving the diffusion of power between the federal government and the states. Courts readily acknowledge the *separation* of powers when they defer to the legislature as the law-making body; they should acknowledge as well the *diffusion* of power and give appropriate deference to the power of the

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130. Mikva, *supra* note 116, at 382.

131. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2485, n.4 (1991).

132. *See* Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69 (1988). While not addressed to the use of legislative history, the author argues strongly that courts routinely analyze statutes for their congressional intent to pre-empt state law as if the states did not exist. The author argues that this practice only encourages Congress to exercise a power that threatens to upset and circumvent the political safeguards afforded to our nation by the principles of federalism.

133. *See* THE FEDERALIST NO. 10, at 77-84 (James Madison) (Clinton Rossiter ed., 1961). Madison discusses the way in which the effects of factionalism are remedied by a republican (as distinguished from a democratic) form of government.

states as they interpret ambiguous statutes to determine their pre-emptive effect.

By beginning with the broader context and invoking the principles of federalism, judicial resolution of pre-emption questions would have support from those ideas that animated our Constitution and work to maintain a balance between competing interests and unequal spheres of power. Even as federalism provided a foundation for our nation, so too ought it to guide our continuing course. One way to further principles of federalism is to use them as a norm or yardstick under which interpretation of ambiguous statutes may be governed and against which they may be measured. The result, with regard to pre-emption decisions, would be to give preference to the state unless a finding of pre-emption would do no violence to the principles of federalism.[134]

Justice Abrahamson, dissenting in *Casey*, invoked similar notions when she stated, "In contrast to the majority opinion, I prefer construing FIFRA with 'due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy.' "[135] For Justice Abrahamson, principles of federalism increased the burden of proof for showing a clear and manifest intent on the part of Congress to pre-empt the town of Casey's ordinance. Such an approach shows explicit regard for the principles of federalism, but it fails to provide any guidance for using legislative history to interpret an ambiguous statute. A clear standard would prove helpful when a statute's ambiguous language threatens to become more confusing by reference to the legislative history.

With principles of federalism acting as a normative guide when interpreting statutes for their pre-emptive effect, the following standard of interpretation should apply to the use of legislative history: If the legislative history adds substantive language to a statute *and* is inconsistent with principles of federalism, it should be construed in favor of allowing the state or local legislation.

The effect of this standard will be to eliminate the search for congressional intent within the legislative history of a statute. Such lan-

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134. *Cf.* Exec. Order No. 12612, 3 C.F.R. 252 (1988), *reprinted in* 5 U.S.C. § 601 app. at 478-79 (1988). This order, entitled "Federalism Considerations in Policy Formulation and Implementation" mandates that Executive departments and agencies, in their formulation and implementation of policy, be guided by principles of federalism, and further directs them not to submit to Congress any legislation that would pre-empt state law unless doing so would be consistent with principles of federalism.

135. Mortier v. Town of Casey, 452 N.W.2d 555, 566 (Wis. 1990) (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959)).

guage would almost invariably be considered "substantive." Nonetheless, this standard still allows the legislative history to illuminate the meaning of particular words or phrases that may well indicate the intent with which they were used. For example, if the legislative history of FIFRA contained mention of what "State" really meant, it would necessarily clarify the intent of Congress regarding the pre-emptive effect of FIFRA upon the regulation of pesticides by municipalities such as Casey, Wisconsin. Because the legislative history failed to make such mention, application of the proposed standard would lead to the conclusion that Casey's ordinance would not be pre-empted by FIFRA.

The standard proposed above has the virtue of applying principles of federalism to an arena of conflict resulting from that same aspect of our nation's political organization. Clearly the conflict engendered by the sharing of power between the state and federal governments will not soon pass away. Applying principles of federalism to cases where pre-emption is at issue seems, in this respect, unremarkable, even natural. Moreover, the explicit application of the principles of federalism to the interpretation of legislative history would give the resulting decision an authority beyond that of the courts alone. The standard proposed herein would provide a rationale that, excepting the dissent of Justice Abrahamson in *Casey* and the concurrence of Justice Scalia in *Mortier*, was seemingly absent from the resolution of the pre-emptive effect of FIFRA upon the ordinance of the town of Casey. The presence of this rationale would eliminate the kind of confusion so apparent in its absence. Finally, this use of legislative history supports the power of Congress without neglecting the legitimate power that resides in state and local governments. As such, it furthers the democratic ideal to which our nation aspires.

V. CONCLUSION

Although the Supreme Court has put to rest the conflict over FIFRA's pre-emptive effect upon local regulation of pesticides, the use of legislative history in such cases remains as yet unclear. In order that the meaning of federal statutes not be subject to overly broad interpretations, the use of legislative history should be circumscribed by the use of principles of federalism as a norm for interpretation. Doing so would not only bring more clarity and certainty to the resolution of cases in-

volving pre-emption, it would also further the goals of democracy inherent in our nation's political structures.

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