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**Local Pesticide Regulation Since *Wisconsin
Public Intervenor v. Mortier***

by

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LOCAL PESTICIDE REGULATION SINCE *WISCONSIN PUBLIC INTERVENOR v. MORTIER*

*Elena S. Rutrick**

I. INTRODUCTION

There are approximately 83,000 units of local government in this country.¹ On June 21, 1991, the United States Supreme Court unanimously held in *Wisconsin Public Intervenor v. Mortier*² that each of these units of government has the power, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),³ to regulate pesticides in its own jurisdiction.⁴ The decision was important for two key reasons.⁵ First, it allowed local governments to share in the protection of their environments.⁶ Second, it made clear that states have the right to allocate to localities whatever roles the states wish within their schemes for pesticide regulation.⁷

In *Mortier*, the Supreme Court reversed the holdings of two lower courts⁸ by holding that FIFRA did not preempt local ordinances regarding pesticide regulation.⁹ The Court explained that FIFRA, while a comprehensive regulatory act, left open to the states and

* Articles Editor, 1992-1993, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ Brief *Amicus Curiae* on behalf of National Pest Control Association, National Agricultural Chemicals Association, Agricultural Commodity Coalition, Edison Electric Institute, and Chemical Manufacturers Association at 2-3, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89-1905).

² 111 S. Ct. 2476 (1991).

³ 7 U.S.C. § 136-136y (1988).

⁴ *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. at 2487.

⁵ For further discussion of the results of the decision, see Tom Dawson, *Local Regulation of Pesticides: The Victory and the Challenge Ahead*, J. PESTICIDE REFORM, Fall 1991, at 33, 33-34.

⁶ See *Mortier*, 111 S. Ct. at 2486-87.

⁷ *Id.* at 2483.

⁸ The decision of the Wisconsin Supreme Court in this case is reported as *Mortier v. Town of Casey*, 452 N.W.2d 555 (1990). The Washburn County, Wisconsin Circuit Court case is reported as *Mortier v. Town of Casey*, No. 86-CV-134 (Wis. Cir. Ct. filed June 16, 1988).

⁹ 111 S. Ct. at 2482.

localities the power to supplement federal pesticide regulation.¹⁰ Moreover, the Court reiterated its standard of “clear and manifest purpose” when inferring congressional intent in preemption cases¹¹ and, in a concurring opinion, questioned the value of congressional committee reports in determining congressional intent.¹²

The *Mortier* decision has set off a flurry of activity on federal and state levels.¹³ The fight to stop local governments from enacting their own pesticide ordinances has now moved from the courts to the United States Congress and state legislatures.¹⁴ Members of both the Senate and the House of Representatives have introduced bills amending FIFRA to include express preemptive language.¹⁵ At the same time, environmental and states’ rights groups are facing off against a coalition of pesticide industry and agricultural representatives.¹⁶ While the former are aiding local activists in drafting local pesticide ordinances or attempting to defeat preemptive state legislation, the latter are organizing advertising campaigns with national backing to halt any new local pesticide ordinances and to pass preemptive legislation at the state level.¹⁷

The pesticide manufacturers and users argue that local citizens and politicians are not capable of making informed decisions regarding pesticide use. The agricultural industry contends that only those with scientific resources and expertise should have the power to make these decisions.¹⁸ Furthermore, the industry maintains that if the more than 83,000 local governments in this country were allowed

¹⁰ *Id.* at 2482–87.

¹¹ *Id.* at 2483.

¹² *Id.* at 2487–91 (Scalia, J., concurring); see also *id.* at 2484–85 n.4.

¹³ See *FIFRA Pre-emption Battle Waged in Wake of Supreme Court Decision*, 15 Chem. Reg. Rep. (BNA) No. 24, at 764 (Sept. 13, 1991) [hereinafter *FIFRA Pre-emption Battle*]; *Congressman Calls for FIFRA Change to Address High Court Pre-emption Ruling*, 6 Toxics L. Rep. (BNA) No. 23, at 701 (Nov. 6, 1991); *Industry-Supported Pre-emption Bill would Uphold States’ Rights to Regulate Use*, 15 Chem. Reg. Rep. (BNA) No. 35, at 1327 (Nov. 29, 1991).

¹⁴ See *FIFRA Preemption Battle Expected to Shift to Congress, States in Wake of Supreme Court Decision*, 15 Chem. Reg. Rep. (BNA) No. 16, at 500 (July 19, 1991); *Congressman Tells Chemical Producers Pre-emption, Risk Will Top Debate on FIFRA*, 15 Chem. Reg. Rep. (BNA) No. 44, at 1600 (Feb. 7, 1992).

¹⁵ H.R. 3850, 102d Cong., 1st Sess. (1991); H.R. 3742, 102d Cong., 1st Sess. (1991); S. 2085, 102d Cong., 1st Sess. (1991).

¹⁶ See, e.g., Pete Fehrenbach, *A Not Supreme Verdict*, PEST CONTROL, Sept. 1991, at 44, 44–52; Terry McIver, *Local Laws: What to Do*, LANDSCAPE MANAGEMENT, Nov. 1991, at 8, 8–12.

¹⁷ See, e.g., Fehrenbach, at 44–52; McIver, at 8–12.

¹⁸ See, e.g., Jasper Womach, *Local Regulation of Pesticide Use: The Federal-State Preemption Debate*, CRS Report for Congress, Jan. 16, 1992.

to enact their own pesticide legislation, the cost to the industry would be prohibitive, and the intent of Congress to make FIFRA a comprehensive, standardized national plan would be frustrated.¹⁹

Supporters of *Mortier* have advanced both environmental and states' rights arguments. They insist that no one is in a better position to regulate pesticides than private citizens who are familiar with local climate, water, and population conditions.²⁰ They dispute the idea that scientific expertise is necessary in passing such simple legislation as posting notice requirements.²¹ They point to omissions in FIFRA that need supplementation by local regulations as well as to the administrative backlog that is making federal and state pesticide regulation increasingly ineffective.²² Finally, they affirm the Supreme Court's holding in *Mortier* that states should decide for themselves what role to grant local governments in regulating pesticide use.²³

The battle lines are thus drawn and the stakes are high. Since the 1960s, scientists have known that pesticides cause danger to both the environment and human health.²⁴ On the other hand, the pesticide industry is a multibillion-dollar business.²⁵ It is no coincidence that a group of one hundred sixty farm, agribusiness, pest control, chemical manufacturing, and other interest groups, including the United States Chamber of Commerce, have joined in the effort to add preemption language to FIFRA.²⁶

This Comment argues in favor of local control of pesticide regulation both because it makes environmental sense and because it comports with the constitutional rights of the states. Mindful of the arguments of the agri-pesticide industry that too many regulations will be too costly and will defeat the purpose of FIFRA, this Comment urges states to adopt uniform regulations modeled on those

¹⁹ *Id.* at CRS-3.

²⁰ *Id.* at CRS-2-3.

²¹ FIFRA Amendments, Hearings on H.R. 3850, S. 2985, and H.R. 3742 Before the U.S. House of Representatives Agriculture Subcommittee on Department Operations, Research, and Foreign Agriculture, 102d Cong., 1st Sess. (1992) (statement of Thomas J. Dawson, Wisconsin Public Intervenor).

²² *Id.* at 4-5.

²³ *Id.* at 2-3.

²⁴ See Martha McCabe, *Pesticide Law Enforcement: A View From the States*, 4 J. ENV'T'L. L. & LITIG. 35, 35 n.1; Tybe A. Brett & Jane E.R. Potter, *Risks to Human Health Associated with Exposure to Pesticides at the Time of Application and the Role of the Courts*, 1 VILL. ENV'T'L. L.J. 355, 368-80 (1990).

²⁵ The lawn care business alone produces annual revenues estimated at \$1.5 billion. See Nancy Lloyd, *Lethal Grass*, WASH. POST, Sept. 16, 1991, at D5.

²⁶ See Fehrenbach, *supra* note 16, at 44-52.

that Wisconsin is proposing. These regulations, drafted with input from local governments, should quell industry opposition while at the same time allowing for consideration of local conditions.

Section II of this Comment explains the Supreme Court's interpretation of preemption doctrine. Section III describes FIFRA as a three-level system of pesticide regulation envisioning federal, state, and local interaction. In Section IV, this Comment discusses the Supreme Court's *Mortier* decision. Section V recounts the action that has taken place since the decision, both on the federal level and within individual states. Section VI analyzes the arguments and current activities on both sides of the issue. This Comment concludes by predicting the outcome of this ongoing battle between the pesticide industry and environmental and states' rights forces and offers a compromise solution that considers the need both for local input and for nationwide uniformity in pesticide regulation.

II. THE SUPREME COURT'S STANDARDS FOR PREEMPTION

The Constitution's framers debated the relative powers of the federal and the state governments.²⁷ As a result, the Constitution delegates only limited powers to the federal government. The states retain the remaining powers.²⁸ The powers reserved for the states were to be those that concerned the everyday affairs of citizens, that affected their lives, liberties, and prosperity.²⁹ The powers assigned to the federal government were to involve mainly foreign affairs.³⁰

The Supreme Court has considered the balance between state and federal power under both the Constitution's Commerce Clause and its Supremacy Clause. Under the Commerce Clause,³¹ the Court has permitted federal regulation of local activities as long as they had substantial national impact and were of the type that only the federal government could manage.³² Under the Supremacy Clause,³³ state laws that interfere with or are contrary to the laws of the federal government are invalid.³⁴

²⁷ THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter, ed., 1961).

²⁸ *Id.*

²⁹ *Id.* at 292-93.

³⁰ *Id.* at 293.

³¹ U.S. CONST. art. I, § 8, cl. 3.

³² See *Wickard v. Filburn*, 317 U.S. 111, 124 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937).

³³ U.S. CONST. art. VI, cl. 2.

³⁴ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.).

To decide whether a federal law preempts a state law, the Court examines congressional intent.³⁵ Courts analyze local ordinances for preemption in the same manner.³⁶ When a statute's plain meaning is ambiguous, the Court considers the statute's legislative history to determine Congress's intent regarding preemption. The Supreme Court has been careful in assessing legislative reports and has insisted that strong evidence or explicit language from the legislative history is necessary to determine the true meaning of the statute.³⁷

There are three methods Congress may use to preempt state law.³⁸ First, Congress may expressly preempt state law in the language of a federal statute.³⁹ Second, even without explicit statutory language, Congress's intent to supersede state law may be implicit either if the federal regulation is so pervasive that there is no room for the state to supplement it, or if the congressional act covers a field in which the federal interest is so dominant that state enforcement of laws on the same subject is precluded.⁴⁰ Third, preemption may occur either when it is impossible to comply with both state and federal law,⁴¹ or when the state law becomes an obstacle to the accomplishment of the full purposes and objectives of Congress.⁴²

The Supreme Court has been hesitant to find implied preemption. Because Congress has the power expressly to preempt any state regulation, the Court places a heavy burden on plaintiffs trying to prove that Congress implied the federal preemption of a state or local law when it failed explicitly to preempt that law.⁴³ Thus the Supreme Court has held that the federal government was not to supersede the historic police powers of the states unless that was the "clear and manifest" purpose of Congress.⁴⁴ Particularly in the areas that states traditionally regulate, such as health, safety, and welfare, the Supreme Court has firmly insisted that plaintiffs demonstrate Congress's clear and manifest intent to preempt before

³⁵ JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 9.1, at 295 (3d ed. 1986).

³⁶ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

³⁷ See *In re Seidel*, 752 F.2d 1382, 1385 (9th Cir. 1985).

³⁸ GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 318 (1986).

³⁹ See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

⁴⁰ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 203-204 (1983).

⁴¹ See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

⁴² See *Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941).

⁴³ See *Chevron U.S.A., Inc. v. Hammond*, 726 F. Supp. 483, 488 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985).

⁴⁴ *Rice*, 331 U.S. at 230.

striking down a local regulation.⁴⁵ In other words, the Court has required that there be an unambiguous congressional mandate to preempt state regulations.⁴⁶

The rights of states are so strong that even when Congress explicitly states its intent to preempt state regulation in a particular field, the Supreme Court will not automatically strip a state of all authority to act in that area.⁴⁷ When an activity concerns especially deep-rooted local interests, there may be no preemption.⁴⁸ The Supreme Court has held that states will retain the power to handle matters of great local interest unless there is a "compelling congressional direction" to desist from enforcing local law.⁴⁹ Thus, in *Hillsborough County v. Automated Medical Laboratories, Inc.*,⁵⁰ the Court upheld a local statute that regulated blood plasma centers, despite the comprehensiveness of the federal regulations in the same field.⁵¹ The Court presumed that state and local regulations related to matters of health and safety could coexist with federal regulations.⁵² The Court refused to infer, solely from the comprehensiveness of the federal regulation, a congressional intent to preempt the field.⁵³

Furthermore, the Supreme Court has rejected the idea that preemption should occur simply because there is a dominant federal interest in the area in question. The Court has reasoned that every subject about which Congress legislates is of national concern: a conclusion that cannot mean every federal statute preempts all related state law.⁵⁴ The Court has consistently maintained that the regulation of health and safety matters is primarily and historically an area of local concern.⁵⁵

The Supreme Court has thus historically been mindful of the delicate balance between the states and the federal government. The Court has insisted on explicit language or evidence of clear and manifest intent before preempting local statutes. Furthermore, even when the language or intent of Congress was clear, the Supreme

⁴⁵ See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766 (1945).

⁴⁶ See *Florida Lime & Avocado Growers*, 373 U.S. at 147.

⁴⁷ See *Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 502 (1984).

⁴⁸ *Id.* at 502-03.

⁴⁹ See *Farmer v. Carpenters*, 430 U.S. 290, 296-97 (1977).

⁵⁰ 471 U.S. 707.

⁵¹ *Id.* at 717.

⁵² *Id.* at 718.

⁵³ *Id.* at 717.

⁵⁴ *Id.* at 719.

⁵⁵ *Id.*

Court has refused to allow preemption in the areas of health or safety, traditionally matters of local concern.

III. THE THREE-LEVEL SCHEME OF PESTICIDE REGULATION UNDER FIFRA

In the United States, federal, state, and local governments share in pesticide regulation. This three-tiered approach comports with other environmental statutes and is known as "environmental federalism."⁵⁶ The 1972 Federal Water Pollution Control Act,⁵⁷ the 1986 amendments to the Safe Drinking Water Act,⁵⁸ the Toxic Substances Control Act,⁵⁹ the Resource Conservation and Recovery Act,⁶⁰ and the Oil Pollution Act of 1990,⁶¹ all provide a regulatory role for local governments. FIFRA comports with these other environmental statutes by also providing regulatory roles for all three levels of government.

A. The Federal Government's Role in Pesticide Regulation

FIFRA⁶² regulates pesticides on the national level. Congress enacted FIFRA in 1947, primarily as a labeling statute aimed at eliminating unwarranted manufacturer claims and requiring warnings on product labels to prevent injury to pesticide users and harm to crops.⁶³ Thus, while FIFRA originally protected product purchasers and users, it failed to protect the general population from the adverse health or environmental effects of pesticides.⁶⁴

In 1972, faced with the growing body of scientific evidence of harm from pesticides, Congress amended FIFRA.⁶⁵ At that time, Congress transferred the administration of FIFRA to the newly created United States Environmental Protection Agency (EPA).⁶⁶ Under the

⁵⁶ See Brief of the Conservation Law Foundation of New England, Inc. and the Sierra Club as *Amici Curiae* in Support of Petitioners at 15, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89-1905).

⁵⁷ 33 U.S.C. § 1251.

⁵⁸ Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642 (1986).

⁵⁹ 15 U.S.C. § 2617(a)(1).

⁶⁰ 42 U.S.C. § 6901(a)(4).

⁶¹ 33 U.S.C.A. § 2718.

⁶² 7 U.S.C. § 136-136y (1988).

⁶³ CHRISTOPHER BOSSO, *PESTICIDES & POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE* 53-54 (1987).

⁶⁴ *Id.* at 58.

⁶⁵ Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (1972).

⁶⁶ *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2480 (1991).

FIFRA amendments, the EPA is to register and classify pesticides based on its review of the scientific evidence of their safety and impact on the health of individuals and the environment.⁶⁷

FIFRA, however, has failed to provide adequate pesticide regulation.⁶⁸ The 1972 FIFRA amendments require the EPA to review pesticides that are already on the market.⁶⁹ This review has not occurred. As late as 1986, the EPA had reregistered none of the 50,000 pesticides that it was to reregister, and had completed review of none of the six hundred pre-1972 active pesticide ingredients.⁷⁰ To help speed the process, Congress again amended FIFRA in 1988, but even under the new standards, it will be years until the EPA completes its statutorily assigned tasks.⁷¹

Along with registration and classification, labeling is another important aspect of pesticide control under FIFRA. To ensure national uniformity of label requirements, FIFRA expressly preempts states' labeling authority by explicitly providing that states shall not impose any requirements for labeling or packaging in addition to or different from those delineated in FIFRA.⁷²

There are, however, many areas in which FIFRA does not regulate at all. For example, the statute does not require public notice of pesticide use or its hazards.⁷³ The Town of Casey ordinance that was the subject of *Mortier* requires that pesticide users give notice to neighbors and the public and mandates permit requirements to protect the local community and the environment.⁷⁴ Through a permit system, the ordinance governs the time, place, and manner of actual pesticide application.⁷⁵ FIFRA has no permit system for the application of pesticides.⁷⁶

B. State Governments' Role in Pesticide Regulation

FIFRA mandates that states assume the role of the primary enforcers of pesticide use regulations, that they conduct inspections,

⁶⁷ Brief of *Amici Curiae* Village of Milford, Michigan, Mayfield Village, Ohio, and City of Boulder, Colorado at 6, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89-1905).

⁶⁸ *Id.* at 7.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Casey, Wis., Ordinance No. 85-1 (Sept. 10, 1985).

⁷⁵ *Id.* at § 1-3.

⁷⁶ See 7 U.S.C. § 136-136y (1988).

and that they certify pesticide applicators.⁷⁷ Additionally, FIFRA expressly authorizes states to set their own standards in regulating the sale or use of any federally registered pesticide in the state as long as the regulation is more stringent than FIFRA itself.⁷⁸ As a result, almost all of the fifty states have enacted statutes regulating pesticides.⁷⁹

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 but before the agency had restricted its use.⁸⁰ Similarly, about half of the states have attempted to bolster FIFRA by mandating notice requirements when users apply pesticides.⁸¹ As of 1989, forty-nine states had enacted EPA-approved pesticide applicator certification programs, and forty-eight states had enforcement programs.⁸² The total cost of pesticide enforcement, certification, and training programs in the states was almost \$30 million for 1990.⁸³

States have allocated responsibility for pesticide regulation to local governments in several ways.⁸⁴ Some states have encouraged local governments to share with them the responsibility of pesticide regulation.⁸⁵ Other states are express in their intention not to preempt local regulation.⁸⁶ Still other states do expressly preempt local governments from participating in pesticide regulation.⁸⁷

⁷⁷ 7 U.S.C. §§ 136f(b), 136g(a), 136i(a)(2), 136w-1.

⁷⁸ 7 U.S.C. § 136v(a).

⁷⁹ For a list of state pesticide statutes, see Brief for the Professional Lawn Care Association of America as *Amicus Curiae* in Support of Respondents at 9–10 n.5, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89–1905).

⁸⁰ Brief of *Amici Curiae* Village of Milford, Michigan, Mayfield Village, Ohio, and City of Boulder, Colorado at 9, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89–1905).

⁸¹ *Id.* at 9. For a list of some states requiring notification, see Martha McCabe, *Pesticide Law Enforcement: A View from the States*, 4 J. ENV. L. & LITIG. 35, 48 n.50 (1989).

⁸² Brief of *Amici Curiae* Village of Milford, *supra* note 80, at 10.

⁸³ *Id.* at 11–12.

⁸⁴ For a discussion of the role of states in pesticide regulation under FIFRA, see PATTI A. GOLDMAN, PUBLIC CITIZEN, LOCAL PESTICIDE AUTHORITY: IF IT ISN'T BROKEN, DON'T FIX IT, i, 3–4 (1992) [hereinafter GOLDMAN].

⁸⁵ See, e.g., IOWA CODE ANN. § 206.19(3) (local governments have role in establishing public notification rules, in scheduling pesticide applications, and in enforcement); LA. ADMIN. CODE § 12.4 (1989) (local governments have role in establishing notice requirements for aerial spraying).

⁸⁶ See, e.g., COLO. REV. STAT. § 35-10-112(3) (1990) (notice requirements); LA. REV. STAT. ANN. § 3:3225 (1989) (sale and application).

⁸⁷ See *Pesticide Public Policy v. Wauconda*, 622 F. Supp. 423, 431 (D.C. Ill. 1985).

C. Local Governments' Role in Pesticide Regulation

The role of localities under FIFRA in regulating pesticides was the central issue of *Wisconsin Public Intervenor v. Mortier*. In that case, a land owner questioned the validity of a town ordinance that required a user to apply for a permit before applying pesticides to public or publicly used areas or before spraying pesticides aerially.⁸⁸ Both the district court and the state supreme court held that the ordinance was preempted by FIFRA.⁸⁹ The question arose because of the statute's ambiguous language and disputed legislative history.

1. FIFRA's Plain Language

FIFRA requires the EPA to cooperate with any appropriate agency of any state or political subdivision thereof in carrying out the statute's provisions.⁹⁰ It states that the EPA is to develop monitoring plans in cooperation with other federal, state, or local agencies.⁹¹ Furthermore, FIFRA requires manufacturers to produce records for inspection upon the request of any employees of either the EPA or any state or political subdivision that the EPA has designated.⁹² Other sections of FIFRA, however, omit any mention of the role of localities and imply that it is the states alone that are to assume regulatory responsibilities along with the federal government.⁹³ This ambiguous language was to lead to many court battles over the power of towns and cities to regulate pesticides.⁹⁴

2. FIFRA's Legislative History

FIFRA's legislative history indicates that the then members of Congress could not agree on whether to preempt local pesticide regulation.⁹⁵ In February 1971, President Richard M. Nixon submitted a legislative recommendation that was the basis for the 1972 FIFRA amendments.⁹⁶ This recommendation became Section 19(c) of H.R. 4152, which originally provided that a state or a political

⁸⁸ 111 S. Ct. 2476, 2481 (1991).

⁸⁹ *Id.*

⁹⁰ 7 U.S.C. § 136t(b) (1988).

⁹¹ 7 U.S.C. § 136r(b) (1988).

⁹² 7 U.S.C. § 136f(b) (1988).

⁹³ *See* 7 U.S.C. § 136v, 136(a), 136u(a)(1).

⁹⁴ *See infra* notes 113–57 and accompanying text.

⁹⁵ *See Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2484 (1991).

⁹⁶ Brief for the Respondents at 20, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89–1905).

subdivision thereof could regulate pesticide sale or use within its jurisdiction as long as such regulation did not permit a use prohibited under FIFRA.⁹⁷ The House Committee on Agriculture held seventeen public hearings on H. R. 4152 and similar bills and on September 25, 1971, reported a new bill, H. R. 10729, out of committee.⁹⁸ That bill deleted any reference to political subdivisions in the section authorizing states to regulate the sale or use of pesticides.⁹⁹ The committee report explicitly stated that the committee had rejected the idea of allowing local governments to regulate pesticides, on the grounds that the fifty states and the federal government should be able to regulate.¹⁰⁰

The Senate Committee on Agriculture and Forestry agreed with the House committee's reasoning. The Senate committee report explained that few, if any, local governments have the financial capacity to provide necessary expert regulation comparable to that which the state and federal governments are able to supply.¹⁰¹ The committee report explicitly stated that FIFRA is designed to deprive local authorities and political subdivisions of authority over pesticides and the regulation of pesticides.¹⁰²

The Senate Commerce Committee, however, took the opposite position on the issue of preempting local pesticide regulation. That committee drafted its own version of the FIFRA amendments that authorized local governments to regulate the use of pesticides beyond the requirements that state and federal authorities imposed.¹⁰³ The Commerce Committee reasoned that many local governments would be better able to perceive their own specific needs than would federal or state regulators.¹⁰⁴

The two Senate committees studied the issue for nearly sixteen months,¹⁰⁵ eventually producing a substitute bill that did not contain

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ H. R. REP. No. 511, 92d Cong., 1st Sess. at 16 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4066. The California Supreme Court interpreted this report as saying that FIFRA should not authorize local governments to regulate pesticides, not that local governments were prohibited from doing so. *See* *People ex rel. Deukmejian v. County of Mendocino*, 683 P.2d 1150, 1160 (Cal. 1984).

¹⁰¹ S. REP. No. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4008.

¹⁰² *Id.*

¹⁰³ S. REP. No. 970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4111.

¹⁰⁴ *Id.*

¹⁰⁵ H. R. REP. No. 1540, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4923.

the provision authorizing local regulation of pesticides.¹⁰⁶ A majority of the Commerce Committee members and all of the Agricultural and Forestry Committee members agreed to this compromise.¹⁰⁷ The Senate then unanimously passed the substitute bill.¹⁰⁸ Senator James B. Allen, chair of the Senate Subcommittee on Agricultural Research and General Legislation, inserted into the Congressional Record an excerpt from the Senate report which included the statement that FIFRA deprives local authorities and political subdivisions of any authority over the regulation of pesticides.¹⁰⁹

When members of the Senate and House met in conference to resolve differences between the Senate and House versions of the bill, they failed to address the issue of local preemption because neither version of the bill mentioned local regulation.¹¹⁰ The Senate agreed to the subsequent conference report without a recorded vote on October 5, 1972.¹¹¹ The House passed the conference report on October 12, 1972, by a vote of 198 to 99.¹¹² Thus, apparently the legislators purposefully left the local preemption language ambiguous.

D. Lower Courts' Interpretation of FIFRA Preemption

The lower courts' treatment of the preemption issue mirrored FIFRA's ambiguous legislative history. After Congress adopted the amendments to FIFRA in 1972, several local communities throughout the United States enacted pesticide control ordinances.¹¹³ The pesticide industry promptly took these localities to court,¹¹⁴ arguing that FIFRA preempted such ordinances. The industry plaintiffs achieved conflicting holdings.

The county of Mendocino, California, passed an ordinance by initiative in 1977 prohibiting the aerial application of phenoxy herbi-

¹⁰⁶ *Id.* at 4091.

¹⁰⁷ *Id.*

¹⁰⁸ 118 CONG. REC. 32,263 (Sept. 26, 1972).

¹⁰⁹ *Id.* Senator Allen was probably cognizant of the importance of legislative history in interpreting ambiguous statutes. See *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2487-91 (Scalia, J. concurring).

¹¹⁰ 118 CONG. REC. 33921-22 (Sept. 26, 1972).

¹¹¹ *Id.*

¹¹² *Id.* at 35543-46.

¹¹³ For a discussion of some of these ordinances that divides them according to concern with record keeping, water supply protection, nuisance and proprietary, and notification, see GOLDMAN, *supra* note 84, at 5-10.

¹¹⁴ See Dawson, *supra* note 5, at 33.

cides.¹¹⁵ The county passed the ordinance after a forest products company sprayed herbicides that drifted nearly three miles and covered two school buses.¹¹⁶ Wishing to protect its citrus industry, the State of California brought an action for declaratory and injunctive relief against Mendocino County.¹¹⁷ The Mendocino County Superior Court entered summary judgment for the state, but the California Supreme Court reversed.¹¹⁸

In *People ex rel. Deukmejian v. County of Mendocino*,¹¹⁹ the Supreme Court of California applied standard preemption analysis, examining FIFRA's language, its legislative history, and the pervasive nature of its regulation.¹²⁰ The court found that there was no provision in FIFRA either prohibiting local governments from regulating the use of pesticides,¹²¹ expressly declaring that the term "State" excluded local governments, or providing that the state could not act through its local agencies.¹²² In addition, the court found no implied congressional intent to preempt local regulation of pesticides in FIFRA's legislative history.¹²³ Finally, the court reasoned that FIFRA was not too pervasive to be supplemented by local regulation.¹²⁴ Thus, the Mendocino County ordinance stood.

The Supreme Judicial Court of Maine reached a similar conclusion in *Central Maine Power Co. v. Town of Lebanon*.¹²⁵ In March 1983, the town of Lebanon, Maine, passed an ordinance that prohibited any commercial spraying of herbicides for nonagricultural uses without approval by a vote at a town meeting.¹²⁶ In 1986, the Central Maine Power Company (CMP) asked Lebanon for permission to spray herbicides along its transmission lines to prevent interference and allow access for maintenance and repair.¹²⁷ On August 26, 1986, the Lebanon Town Meeting voted down the permit.¹²⁸

CMP brought an action in Superior Court claiming, among other things, that both state and federal laws regulating pesticides

¹¹⁵ *People ex rel. Deukmajian v. County of Mendocino*, 683 P.2d 1150, 1152 (Cal. 1984).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1151-52.

¹¹⁸ *Id.* at 1152, 1157.

¹¹⁹ 683 P.2d 1150 (Cal. 1984).

¹²⁰ *Id.* at 1157-61.

¹²¹ *Id.* at 1158.

¹²² *Id.*

¹²³ *Id.* at 1160.

¹²⁴ *See id.*

¹²⁵ 571 A.2d 1189 (Me. 1990).

¹²⁶ *Id.* at 1190-91.

¹²⁷ *Id.* at 1191.

¹²⁸ *Id.*

preempted the ordinance.¹²⁹ On June 19, 1988, the Superior Court entered summary judgment in favor of the town and determined that neither federal nor state laws preempted the Lebanon ordinance.¹³⁰

In affirming the lower court's ruling, the Supreme Judicial Court of Maine held that Congress did not intend FIFRA to preclude state regulation of pesticide use when such regulation is stricter than the minimum federal standards established by the federal act.¹³¹ The court explained that the only explicit language in FIFRA that does preclude state regulation of pesticides relates to pesticide labeling and packaging.¹³² Clearly, according to the court, the Lebanon ordinance involved pesticide use, not packaging and labeling.¹³³

CMP argued that FIFRA's express grant of authority to the states to regulate pesticides and its lack of an explicit reference to local governments showed that Congress intended to exclude local government participation in the regulatory scheme.¹³⁴ The Supreme Judicial Court of Maine disagreed on three grounds. First, the court held that as a general principle, a state is free to delegate any of its powers to its political subdivisions.¹³⁵ Second, it held that under the Supremacy Clause, courts must analyze the constitutionality of local ordinances as they would analyze the constitutionality of statewide laws.¹³⁶ Third, the court explained that under the Supremacy Clause there exists a presumption that the federal government is not to preempt state or local regulation of health and safety matters.¹³⁷ In other words, the court held that CMP's interpretation of FIFRA disregarded traditional notions of state sovereignty.¹³⁸

The Federal District Court of Colorado held a consistent opinion regarding two Boulder 1987 and 1988 pesticide ordinances.¹³⁹ The Colorado Pesticide Applicators for Responsible Regulation (COPARR), a nonprofit trade association of commercial pesticide applicators, challenged the ordinances' validity.¹⁴⁰ The first, Ordinance

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1192.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *See* COPARR, Ltd. v. City of Boulder, 735 F. Supp. 363, 367 (D. Colo. 1989), *aff'd*, 942 F.2d 724 (10th Cir. 1991).

¹⁴⁰ 683 P.2d at 364.

No. 5083, provided for local enforcement of FIFRA and Colorado laws complementary to FIFRA.¹⁴¹ The second, Ordinance No. 5129, required noncommercial users to notify the public prior to aerial pesticide spraying.¹⁴²

The court agreed with the analysis of the California Supreme Court in *Deukmejian v. Mendocino*.¹⁴³ According to the Colorado court, this approach was consistent with the ideas of state sovereignty and states' rights to delegate regulatory power in any way they deem fit.¹⁴⁴ The court found that Ordinance No. 5083 conflicted with FIFRA,¹⁴⁵ but found no such problem with Ordinance No. 5129, stating that areas of legitimate local regulatory power do exist under FIFRA.¹⁴⁶

Two federal courts reached conclusions contrary to those of the California and Maine courts, and the Federal District Court of Colorado. In *Maryland Pest Control Assn. v. Montgomery County, Maryland*,¹⁴⁷ the United States District Court for the District of Maryland held that FIFRA preempted two Maryland counties' ordinances imposing pesticide posting and notice requirements.¹⁴⁸ Both in the language of FIFRA itself and in the statute's legislative history, the court found what it considered clear evidence that Congress had intended to preclude the regulatory functions of local communities.¹⁴⁹ The court held that if Congress had wanted to include local governments in the regulation of pesticides, it would have.¹⁵⁰

In January 1986, the Village of Milford, Michigan, enacted Ordinance No. 197, which required all commercial pesticide users to pay a nominal registration fee, provide the fire department with a copy of their registration forms, and supply operators of commercial businesses or public buildings with decals that indicated the date pesticides were applied.¹⁵¹ In addition, the ordinance listed residents

¹⁴¹ *Id.* at 367.

¹⁴² *Id.*

¹⁴³ 683 P.2d 1150 (1984); see *COPARR*, 735 F. Supp. at 366-67.

¹⁴⁴ See *COPARR*, 735 F. Supp. at 367.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 646 F. Supp. 109 (D. Md. 1986).

¹⁴⁸ *Id.* at 110.

¹⁴⁹ *Id.* at 111.

¹⁵⁰ *Id.*

¹⁵¹ See *Professional Lawn Care Ass'n. v. Village of Milford*, 909 F.2d 929, 930 (6th Cir. 1990). The ordinance mandated that the decals be posted at building entrances until the time of the next application or ninety days, whichever occurred first. *Id.*

“sensitive” to pesticides and required that all commercial users of pesticides notify each person on the list at least twenty-four hours before spraying.¹⁵² The ordinance also required that outdoor pesticide users place signs with specific language warning of the particular pesticide’s hazards.¹⁵³ It assessed penalties for violators.¹⁵⁴

While noting the conflicts among several courts, including the Wisconsin Supreme Court, the Sixth Circuit prohibited Milford from enforcing its ordinance.¹⁵⁵ The court based its decision on two grounds: that such local ordinances would obstruct FIFRA’s goals because they would destroy the uniformity and comprehensiveness which Congress sought;¹⁵⁶ and that the legislative history of the 1972 FIFRA amendments suggested Congress did not intend local governments to regulate pesticides.¹⁵⁷

These conflicting court opinions provided the background for the case which the Supreme Court finally decided.

IV. THE HISTORY OF *WISCONSIN PUBLIC INTERVENOR V. MORTIER*

In 1983, Casey, Wisconsin, a rural town with a population of 404,¹⁵⁸ sought the help of the Office of the Wisconsin Public Intervenor¹⁵⁹ in developing a local pesticide regulation.¹⁶⁰ The town was concerned with protecting its twenty-six lakes and county forest land used for fishing, hunting, berry picking, and hiking.¹⁶¹ The regulation that the town board finally adopted, Ordinance 85-1, requires the acqui-

¹⁵² *Id.*

¹⁵³ *Id.* The signs had to contain the words “Chemically Treated Lawn—Keep Children and Pets Off for 72 Hours.” *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* at 929, 934.

¹⁵⁶ *Id.* at 934.

¹⁵⁷ *Id.*

¹⁵⁸ Brief for the Respondents at 4, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89-1905).

¹⁵⁹ The Wisconsin Public Intervenor is an assistant attorney general whose responsibility is to intervene and initiate actions in any court or agency for the protection of the Wisconsin environment. For a discussion of the office of Wisconsin Public Intervenor, see PHILIP L. DUBOIS & ARLEN C. CHRISTENSON, *PUBLIC ADVOCACY AND ENVIRONMENTAL DECISION-MAKING: THE WISCONSIN PUBLIC INTERVENOR*, ENVIRONMENTAL QUALITY SERIES, Monograph No. 26, University of California-Davis (1977); Arlen Christenson, *The Public Intervenor: Another Look*, Draft (Feb. 1985) (on file with author).

¹⁶⁰ Telephone interview with Thomas J. Dawson, Wisconsin Public Intervenor (Nov. 15, 1991).

¹⁶¹ *Pesticide Rules Change: Supreme Court Gives Control to Locals*, COUNTRY TODAY, June 26, 1991, at A1, A2.

sition of a permit to apply pesticides to public lands or private lands subject to public use, or to conduct aerial pesticide spraying.¹⁶² A permit applicant must submit to the town board specific information from which the board can determine whether to grant the permit;¹⁶³ the ordinance allows hearings.¹⁶⁴ In addition, the ordinance mandates the posting of warning signs after pesticide application.¹⁶⁵

Less than two years after the board adopted the ordinance, a permit seeker challenged its validity. Ralph Mortier, a retired employee of the Wisconsin Department of Natural Resources, applied for a permit to spray herbicides both aerially and on the ground on his two hundred acres of forest land in Casey.¹⁶⁶ He wanted to control the nonforest vegetation on his land so that he could plant valuable coniferous trees to sell for lumber and Christmas trees.¹⁶⁷ In March 1985, the town board granted only partial approval of Mortier's request.¹⁶⁸ The board restricted the lands on which he could ground spray and refused to grant a permit for any aerial spraying.¹⁶⁹

Joined by the Wisconsin Forestry/Rights-of-Way/Turf Coalition,¹⁷⁰ Mortier challenged the Ordinance in the Washburn County Circuit Court in June 1986, naming the town of Casey and its board members as defendants.¹⁷¹ The Wisconsin Public Intervenor entered as a party defendant.¹⁷² The Washburn County Circuit Court declared the ordinance void on the grounds that both FIFRA and state law preempted it.¹⁷³ On appeal, the Wisconsin Supreme Court upheld the circuit court's order on the federal preemption question.¹⁷⁴

On June 5, 1990, the Wisconsin Public Intervenor petitioned the United States Supreme Court for a writ of certiorari.¹⁷⁵ He argued that FIFRA did not preempt local governments from enacting their own pesticide regulations, and that under the Tenth Amendment,

¹⁶² Casey, Wis. Ordinance No. 85-1 § 1.2 (Sept. 10, 1985).

¹⁶³ *Id.* at § 1.3(2).

¹⁶⁴ *Id.* at § 1.3(4) & (5).

¹⁶⁵ *Id.* at § 1.3(7).

¹⁶⁶ Brief for the Respondents at 6, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89-1905).

¹⁶⁷ *See Town Wins Supreme Court Pesticide Case*, MILWAUKEE SENTINEL, June 22, 1991, at 4A.

¹⁶⁸ Brief for the Respondents at 6, *Mortier* (89-1905).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Brief of Petitioners at 7, *Mortier* (No. 89-1905).

¹⁷² Brief of Petitioners at 7-8, *Mortier* (No. 89-1905).

¹⁷³ *Mortier v. Town of Casey*, No. 86-CV-134 (Wis. Cir. Ct. filed June 16, 1988) at 5, 9.

¹⁷⁴ *Mortier v. Town of Casey*, 452 N.W.2d 555, 555n.2 (Wis. 1990).

¹⁷⁵ Brief of Petitioners at 10, *Mortier* (No. 89-1905).

states had the right to allocate regulatory power to any of their local agencies.¹⁷⁶ The United States Supreme Court in turn invited the United States Solicitor General to file a brief stating the views of the United States on the petition.¹⁷⁷ In his brief, the Solicitor General recommended that the Court grant certiorari and reverse the findings of the lower court.¹⁷⁸ In January 1991, the Court granted the writ of certiorari.¹⁷⁹

On June 21, 1991, the Supreme Court unanimously decided in *Wisconsin Public Intervenor v. Mortier* that FIFRA did not preempt local regulation of pesticides.¹⁸⁰ The Court was unable to infer from either FIFRA's statutory language or its legislative history that Congress intended federal pesticide regulation to preempt local regulation.¹⁸¹ Despite the fact that both sides submitted briefs on the subject,¹⁸² the Court declined to address FIFRA's policy and instead concentrated on the statute's language and legislative history.¹⁸³

In *Mortier*, the Court explained that preemption could occur in several ways: when a federal statute expressly preempts state law,¹⁸⁴ when the statute so pervasively occupies the field that state supplemental action is precluded;¹⁸⁵ when state and federal laws conflict;¹⁸⁶ and when state laws stand as an obstacle to the fulfillment of federal goals.¹⁸⁷ The Court considered and rejected each of these possibili-

¹⁷⁶ See Petition for a Writ of Certiorari to the Supreme Court of Wisconsin at 26-37, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89-1905).

¹⁷⁷ Brief of Petitioners at 11, *Mortier* (No. 89-1905).

¹⁷⁸ *Id.* at 11.

¹⁷⁹ *Id.* at 12.

¹⁸⁰ 111 S. Ct. 2476, 2482 (1991).

¹⁸¹ *Id.*

¹⁸² See Briefs *Amicus Curiae* on behalf of National Pest Control Association, National Agricultural Chemicals Association, Agricultural Commodity Coalition, Edison Electric Institute, and Chemical Manufacturers Association; Green Industry Council; Professional Lawn Care Association of America; American Association of Nurserymen; American Pulpwood Association, Associated Landscape Contractors of America, Chemical Producers and Distributors Association, Industrial Biotechnology Association, International Apple Institute, International Sanitary Supply Association, Midwest Food Processors Association, National Agricultural Aviation Association, National Arborist Association, National Fertilizer Solutions Association, National Forest Products Association, Roses, Inc., and Society of American Florists; Conservation Law Foundation of New England, Inc. and the Sierra Club; Brief of Village of Milford, Michigan, Mayfield Village, Ohio, and the City of Boulder, Colorado, *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (No. 89-1905).

¹⁸³ Lawrence S. Ebner, *FIFRA Pre-emption Battle Expected to Shift to Congress, States in Wake of Supreme Court Decision*, 15 Chem. Reg. Rep. (BNA) No. 16, at 500 (July 19, 1991).

¹⁸⁴ *Mortier*, 111 S. Ct. at 2481.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 2482.

¹⁸⁷ *Id.*; see *supra* notes 35-55 and accompanying text.

ties.¹⁸⁸ The Court then considered FIFRA's statutory language and declared that it could not find that Congress had indicated a "clear and manifest purpose" to preempt local regulation.¹⁸⁹

Not finding congressional intent to preempt in the language of FIFRA, the Court carefully reviewed the statute's legislative history and concluded that the evidence of legislative intent to preempt local regulation was ambiguous at best.¹⁹⁰ The Court began its analysis by considering the committee report of the House Agricultural Committee.¹⁹¹ According to the Court, the report clearly stated that the House Agricultural Committee had rejected a proposal to permit political subdivisions to regulate pesticides, reasoning that the fifty states along with the EPA provided a sufficient number of regulatory jurisdictions.¹⁹² The Court found, however, that while the committee report did refuse to grant local governments direct regulatory authority, it did not indicate Congress's intent to prevent states from delegating such authority to their political subdivisions.¹⁹³

The Court further found that the two principal committees responsible for the FIFRA amendments bill disagreed over whether FIFRA preempted local regulation of pesticides.¹⁹⁴ Noting that the Senate Committee on Agriculture and Forestry report explicitly stated its agreement with the House Agricultural Committee,¹⁹⁵ the Court also pointed out that the Senate Commerce Committee had proposed an amendment expressly authorizing local regulation.¹⁹⁶ Thus, the Court held that FIFRA's legislative history, like its language, did not indicate that Congress's "clear and manifest purpose" was to preempt local pesticide regulation.¹⁹⁷

The Supreme Court then explained that while it could not find preemption through its reading of FIFRA's text or legislative history, it also could not find preemption through field preemption.¹⁹⁸ The Court concluded that FIFRA was not so comprehensive as to leave no room for states and localities to supplement it.¹⁹⁹ On the

¹⁸⁸ *Mortier*, 111 S. Ct. at 2482.

¹⁸⁹ *Id.* at 2483.

¹⁹⁰ *Id.* at 2484.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Mortier*, 111 S. Ct. at 2484.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 2486.

¹⁹⁹ *Mortier*, 111 S. Ct. at 2486.

contrary, the Court noted that FIFRA does not address many areas of regulation, including permit schemes and the consideration of factors such as climate, population, geography, and water supply.²⁰⁰ Additionally, the Court found no conflict between FIFRA and either the town of Casey's Ordinance 85-1 or local regulation in general.²⁰¹ It stated that compliance with both Ordinance 85-1 and FIFRA was not an impossibility.²⁰²

The 9-to-0 decision finding neither express, implied, field, nor conflict preemption seemed to settle the matter of pesticide regulation by local government once and for all. Such was not, however, to be the case.

V. EVENTS SINCE *MORTIER*

Within eleven days of the Supreme Court's decision in *Mortier*, several pesticide associations organized a "summit meeting" of national trade associations. Ninety-two people from more than sixty associations attended.²⁰³ The participants considered *Mortier* to be the most devastating news ever to hit their industry.²⁰⁴ To counter the feared effect of the Supreme Court's decision, they formed a steering committee²⁰⁵ that developed a three-pronged strategy to combat local pesticide regulation on the federal, state, and local levels simultaneously.²⁰⁶ By the end of July, at the time of its next general meeting, the committee had assumed the name of the Coalition for Sensible Pesticide Policy (CSPP).²⁰⁷ By November 1991, CSPP's membership had grown to include one hundred thirty associations and businesses, including pest control companies, nurseries, florists, arborists, landscape and lawn care companies, chemical manufacturers,²⁰⁸ and the United States Chamber of Commerce.²⁰⁹ CSPP's objective was to obtain uniform federal-state pesticide reg-

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Fehrenbach, *supra* note 16, at 47-48.

²⁰⁴ *Id.* at 44.

²⁰⁵ *Id.* at 48. The steering committee consisted of the National Pest Control Association, the National Agricultural Chemicals Association, the Chemical Specialty Manufacturers Association, the Agricultural Commodities Coalition, and the Professional Lawn Care Association of America. *Id.* at 44-48.

²⁰⁶ *Id.* at 48.

²⁰⁷ *Id.*

²⁰⁸ Memorandum from The Coalition for Sensible Pesticide Policy (Sept. 16, 1991) (on file with author).

²⁰⁹ Fehrenbach, *supra* note 16, at 48.

ulation by passing preemptive legislation while still encouraging local input at the state level.²¹⁰

CSPP moved fast. By early September 1991, CSPP had drafted a proposed amendment to FIFRA that expressly denied local governments regulatory power over pesticides.²¹¹ To garner further support for its bill, the coalition sent letters to members of President George Bush's administration.²¹² At the end of November 1991, Representatives Charles Hatcher, a Democrat from Georgia, and Ron Marlenee, a Republican from Montana, and thirty of the forty-five members of the House Committee on Agriculture²¹³ introduced the CSPP-sponsored legislation in the House of Representatives²¹⁴ while Senator David Pryor, a Democrat from Arkansas, introduced companion legislation in the Senate.²¹⁵

The Hatcher-Marlenee technical amendment to FIFRA, known as the "Federal-State Pesticide Regulation Partnership Act of 1991," purported to clarify FIFRA's past ambiguities regarding federal preemption of local pesticide regulation.²¹⁶ The amendment defined the term "State" in FIFRA to exclude local governments.²¹⁷ It also included a paragraph expressly stating that local governments are to play no role in regulating pesticides.²¹⁸ The Hatcher-Marlenee amendment was an attempt to replace a provision in a bill introduced by Representative Charles Rose, Democrat from North Carolina, chairman of the House Agricultural Subcommittee on Department Operations, Research, and Foreign Agriculture. Representative Rose's bill is the reauthorization vehicle for FIFRA, whose authorization expires at the end of fiscal 1992.²¹⁹ The Rose bill originally left preemption up to each state.²²⁰ On May 19, 1992, the House Agricultural Subcommittee adopted the Hatcher-Marlenee language

²¹⁰ Memorandum, *supra* note 208, at 1.

²¹¹ See *FIFRA Pre-emption Battle*, *supra* note 13, at 764.

²¹² *Id.* CSPP sent letters to the President; Vice President; Secretaries of Agriculture, Commerce, Energy, Health and Human Services, Housing and Urban Development; Departments of the Interior, Labor, State, and Transportation; Administrator of the EPA; and United States Trade Representative. *Id.*

²¹³ See *Industry-Supported*, *supra* note 13, at 1327.

²¹⁴ H.R. 3850, 102d Cong., 1st Sess. (1991).

²¹⁵ S. 2085, 102d Cong., 1st Sess. (1991).

²¹⁶ See H.R. 3850, 102d Cong., 1st Sess. (1991).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Congressman Tells Chemical Producers Pre-Emption, Risk will Top Debate on FIFRA*, 15 Chem. Reg. Rep. (BNA) No. 44, at 1600 (Feb. 7, 1992).

²²⁰ See H.R. 3742, 102d Cong., 1st Sess. (1991).

into Representative Rose's FIFRA reauthorization bill.²²¹ As it is now written, the bill would preempt local government regulation of pesticides.²²²

In their floor statements introducing their bill, Representatives Hatcher²²³ and Marlenee²²⁴ reviewed the history of *Wisconsin Public Intervenor v. Mortier*. Representative Hatcher based his support for the proposed amendment to FIFRA on three major policy arguments. First, he maintained that pesticide regulation is complex and must be based on scientific judgment not available in local jurisdictions.²²⁵ Second, he argued that local regulations would quickly encumber agricultural production.²²⁶ Third, Representative Hatcher insisted that too much regulation of pesticides might actually damage the health and welfare of the public because pesticides provide benefits to human health such as mosquito control.²²⁷

Representative Marlenee argued similar policy positions on the House floor. Raising the specter of 83,000 different pesticide regulations, Representative Marlenee suggested that the economic burden on pest control and lawn care companies would be enormous.²²⁸ In addition, he pointed out that local regulations would bring about a state of regulatory chaos that would undermine the goals of FIFRA.²²⁹ Finally, Representative Marlenee maintained that states had to avoid local input because pesticide regulation required technical and scientific expertise.²³⁰ Senator Pryor echoed these general arguments in his floor statements.²³¹ He opposed local regulation of pesticides on the grounds that localities did not have the necessary scientific resources, that local regulations would amount to regulatory confusion, and that local regulations would produce an enormous economic burden on farmers and the pesticide industry.²³²

As a hedge against the possibility that Congress will not pass the Rose bill, or that it will take several years to do so, CSPP has

²²¹ Amy Porter, *One Year After Local Pesticide Use Controls Upheld, Debate Continues in State Legislatures, City Halls, Congress*, 16 Chem. Reg. Rep. (BNA) No. 14, at 687 (July 3, 1992).

²²² *Id.*

²²³ 137 CONG. REC. E3983 (daily ed. Nov. 22, 1991) (extension of remarks by Rep. Hatcher).

²²⁴ 137 CONG. REC. E3987 (daily ed. Nov. 22, 1991) (extension of remarks by Rep. Marlenee).

²²⁵ 137 CONG. REC. at E3983.

²²⁶ *Id.*

²²⁷ *Id.* at E3984.

²²⁸ *Id.* at E3987.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ 137 CONG. REC. S18401 (daily ed. Nov. 26, 1991) (statement of Sen. Pryor).

²³² *Id.*

instituted an interim strategy of organizing at the state level.²³³ Prior to *Mortier*, the courts in several states already had held that their state pesticide legislation implied preemption of local ordinances.²³⁴ After the decision, CSPP moved to try to get express preemptive language placed in other states' statutes. The group drafted a model amendment.²³⁵ The first such push occurred in the state of Washington and was apparently unsuccessful.²³⁶ As of June 1992, thirteen of the twenty-seven states addressing the issue had enacted preemption legislation, eight had defeated such legislation, and action in six states was still pending.²³⁷

The third tier of CSPP's campaign to halt local pesticide regulation is taking place at the local level. As soon as the Supreme Court decided *Mortier*, CSPP escalated industry efforts to monitor and to defeat any local ordinances being considered throughout the country.²³⁸ Typical of those efforts was what transpired in Missoula, Montana.

²³³ See Fehrenbach, *supra* note 16, at 52.

²³⁴ See *Pesticide Public Policy Foundation v. Village of Wauconda*, Illinois, 622 F. Supp. 423, 432 (N.D. Ill. 1985); *Town of Wendell v. Attorney General*, 476 N.E. 2d 585, 592 (Mass. 1985); *Ames v. Smoot*, 471 N.Y.S. 2d 128, 133 (1983); *Town of Salisbury v. New England Power Co.*, 437 A. 2d 281, 281 (N.H. 1981).

²³⁵ Porter, *supra* note 221, at 687. The model state preemption language calls for prohibiting any city, town, county, or other political subdivision from adopting or maintaining existing rules regarding the sale or use of pesticides. *Id.*

²³⁶ See John Dodge, *Pesticide-Use Bill Dies in House Committee*, THE OLYMPIAN, Feb. 4, 1992; John Trombold, *State Lawmakers Debate Rule for Pesticide Use*, THE PENINSULA GATEWAY, Jan. 29, 1992.

²³⁷ Porter, *supra* note 221, at 687; Telephone interview with Christina Roessler, Development Director, NCAMP, Feb. 14, 1992. In New Mexico, the state Farm and Livestock Bureau and the Department of Agriculture have been meeting to draft legislation barring local governments from passing their own pesticide laws. See Kent Paterson, *Environmental Urgency for '90s*, THE SUN, Feb. 1992, at 9.

In the state of Washington, the House defeated legislation, H.B. 2531, that would have banned cities and counties from having stricter pesticide use regulations than the state regulations. See John Dodge, *supra* note 236, at 32. This followed contamination of wells in Thurston County, blamed on the legal use of farm chemicals. *Id.*

In Michigan, Senate Bill 643 is aimed at amending the state Pesticide Control Act to prevent local ordinances that conflict with or duplicate state law. See Barbara McClellan, *State May Weaken Local Pesticide Laws*, DETROIT NEWS, Feb. 4, 1992. Currently, there are about a half-dozen Michigan communities with pesticide laws. *Id.*

In Kansas, Senate Bill 543 would preempt local pesticide ordinances. See Memorandum from Jim Kaup, Gen. Counsel, League of Kansas Municipalities, to Chairman Doyen and Members, Sen. Com. on Energy and Natural Resources (Apr. 7, 1991) (on file with author).

²³⁸ See generally *McIver*, *supra* note 16, at 8-12. Members were asked to be on the alert for information about any local pesticide ordinances and to fax any information they received to the affected parties. CSPP has offered its members answers and arguments to use when attempting to defeat local pesticide regulations. *Id.*

In the fall of 1991, Missoula, Montana, proposed the first local ordinance to go to a public vote since the *Mortier* decision.²³⁹ The Missoula Pesticide Right-to-Know ordinance would have required property owners to post warning signs twenty-four hours before pesticide application; the signs were to remain up for forty-eight hours after the application.²⁴⁰ Missoula drafted the ordinance because it relied completely on its EPA-designated sole source aquifer for its drinking water supply, and a portion of the aquifer had already become contaminated with pesticides.²⁴¹ A group calling itself the "Missoula Homeowners, Yard and Garden Care Professionals, and Suppliers Opposed to the City Pesticide Ordinance" launched a media campaign, directed by a public relations firm, to defeat the ordinance.²⁴² They spent over \$40,000, largely on radio and television commercials, and suggested that passage of the ordinance would make one's neighbors into criminals.²⁴³ The ordinance was defeated.²⁴⁴

In an attempt to defeat the proposed FIFRA preemption amendments and halt state and local preemption activities such as that in Missoula, the National Coalition Against the Misuse of Pesticides (NCAMP), a Washington, D.C. based environmental group, has joined forces with other environmentalists, states' rights advocates, and the Wisconsin Public Intervenor.²⁴⁵ In December 1991, Thomas J. Dawson, the Wisconsin Public Intervenor who argued *Mortier*, sent a letter to President Bush urging him to uphold the right of local governments to continue regulating pesticide use.²⁴⁶ The National Association of SARA TITLE III Program Officials, an organization representing more than forty states, wrote in support of the right of local governments to regulate pesticides to EPA offi-

²³⁹ Kent Curtis, *Chemical Warfare: National Chemical Lobbying Group Funds Pro-Pesticide Campaign*, MISSOULA INDEPENDENT, Oct. 31, 1991, at 11.

²⁴⁰ *Id.*

²⁴¹ Letter from Ellen Leahy, Director, Missoula City County Health Department, to Rep. Pat Williams, U.S. Cong. (Mar. 2, 1992) (on file with author).

²⁴² Curtis, *supra* note 239, at 11. No single Missoula homeowner has contributed money or significant time to this campaign. A single fifty dollar contribution represented the only local contribution. The rest came from out of town and state lawn care businesses and chemical industries. Interestingly, the campaign finance report disclosing the source of these contributions was not filed until after the election. *Id.*

²⁴³ Don Wiener, *The Pre-Emptive Strike on Env't'l Law*, IN THESE TIMES, Jan. 15-21, 1992.

²⁴⁴ Kent Curtis, *Chemical Companies Withheld Report of \$25,000 Until after Election*, MISSOULA INDEPENDENT, Nov. 14, 1991, at 4.

²⁴⁵ See *FIFRA Pre-emptive Battle*, *supra* note 13, at 764.

²⁴⁶ Letter from Thomas J. Dawson, Wisconsin Public Intervenor, to The President, Wash. D.C. (Dec. 16, 1991) (on file with author).

cials.²⁴⁷ Similarly, various groups and officials have been lobbying members of Congress to oppose preemption legislation.²⁴⁸ NCAMP does its best to monitor statewide and local pesticide regulatory activity, but its resources are not as great as those of its opposing group, CSPP.²⁴⁹ NCAMP and its allies wish to make certain that the *Mortier* decision is not made moot.

VI. LOCAL CONTROL OF PESTICIDES: OPPOSING POLICIES AND MOVEMENT TOWARD A COMPROMISE

In *Mortier*, the plaintiffs relied on two main legal arguments: that under strict preemption principles the court was required to find "clear and manifest intent" to preempt on the part of Congress; and that under the system of federalism, states have the right to regulate matters concerning their health and safety.²⁵⁰ Now that the action has moved from the courts to the political arena, public policy stances define the debate over local control of pesticide use.²⁵¹

A. Arguments For and Against Local Control of Pesticide Regulations

Policy arguments in favor of local control of pesticide regulations are generally divided between environmental imperatives and principles of state sovereignty. Environmentalists maintain that localities have individual conditions such as climate, wind, population, and geographic differences and varying needs to protect their groundwater supplies. No federal policy can encompass all of these con-

²⁴⁷ Letter from Gordon Henderson, President, Delaware Division of Energy, to Ms. Linda Fisher, Assistant Administrator, Pesticide and Toxic Substances, EPA (Jan. 30, 1992) (on file with author).

²⁴⁸ See, e.g., Memorandum from Jim Kaup, *supra* note 237; Letter from Kristine M. Gebbie, Secretary of Health, State of Washington, to Rep. Margaret Rayburn, Chair, Washington House Agr. & Rural Dev. Comm. (Feb. 26, 1992) (on file with author); Letter from Philip N. Bredesen, Mayor, Nashville, Tenn., to Rep. Charles Rose, Ch. Subcomm. on Dept. Operations, Research and Foreign Agriculture (Mar. 2, 1992) (on file with author); Letter from James E. Doyle, Attorney General of Wisconsin, to Rep. Charles Rose, Washington, D.C. (Mar. 3, 1992) (on file with author).

²⁴⁹ Telephone interview with Christina Roessler, Development Director, NCAMP (Feb. 14, 1992).

²⁵⁰ See Linda Greenhouse, *Justices Rule Localities May Impose Pesticide Rules Stiffer than U.S. Laws*, N.Y. TIMES, June 22, 1991, at 9.

²⁵¹ See 137 CONG. REC., *supra* note 224, at E3987; 137 CONG. REC., *supra* note 223, at E3983; 137 CONG. REC., *supra* note 231, at S18401.

cerns.²⁵² Furthermore, the EPA has not been able adequately to control the use of pesticides. It could use the assistance of local governments because it is lagging in its goals to regulate pesticides.²⁵³ Additionally, there are major areas of pesticide regulation, such as notice requirements, that FIFRA does not address. Local governments could regulate these areas best since they are individualized and require little technical or scientific expertise.²⁵⁴

Environmentalists also point out that Congress originally envisioned FIFRA as part of its overall environmental scheme. The environmental statutes which are part of this scheme work most effectively with cooperation between the federal, state, and local governments.²⁵⁵

States' rights advocates present other arguments. Under the Constitution, states have the right to determine for themselves what role local governments are to play in areas of health, safety, and welfare. Regulating pesticides, they argue, is such a matter.²⁵⁶

Probably the strongest argument against preemption that supporters of the *Mortier* decision offer is that both preceding and following *Mortier*, there has been no "floodgate" of pesticide regulations. Instead, local regulations have been relatively few and narrow and have come in response to compelling problems.²⁵⁷ Even representatives of the pesticide industry estimate that there are only one hundred local jurisdictions in the United States with pesticide controls on the books or under consideration.²⁵⁸

Policy arguments against local control have centered on two major areas: the regulatory chaos that might ensue if tens of thousands of localities did in fact enact their own pesticide ordinances,²⁵⁹ and the lack of scientific expertise available to local governments.²⁶⁰

The most prevalent argument against local pesticide regulation emphasizes that there are 83,000 local governments in this country. If each could pass pesticide regulations, the multitude of conflicting

²⁵² See FIFRA Amendments, Hearings on H.R. 3850, S. 2985 and H.R. 3742 Before the U.S. House of Representatives Agriculture Subcommittee on Department Operations, Research, and Foreign Agriculture, 102d Cong., 1st Sess. (1992) (statement of Thomas J. Dawson, Wisconsin Public Intervenor).

²⁵³ See Goldman, *supra* note 84, at 2.

²⁵⁴ See FIFRA Amendments, Hearings, *supra* note 252.

²⁵⁵ See Brief of Conservation Law Foundation, *supra* note 56, at 10-35.

²⁵⁶ See Brief *Amici Curiae* of the States of Hawaii, Alabama, Illinois, Kansas, Maine, Michigan, Missouri, Nevada, Pennsylvania, Utah and Vermont, Wisconsin Public Intervenor v. *Mortier*, 111 S. Ct 2476 (1991) (No. 89-1905).

²⁵⁷ See Letter of Thomas J. Dawson to Pres. Bush, *supra* note 246, at 5.

²⁵⁸ Porter, *supra* note 221, at 687.

²⁵⁹ See CONG. REC., *supra* note 251.

²⁶⁰ *Id.*

regulations would frustrate the purpose of FIFRA as a comprehensive act.²⁶¹ This view also maintains that a federal and state plan would be sufficiently comprehensive to regulate pesticides.²⁶²

Additionally, opponents of local regulation point out that pesticide regulation requires technical and scientific expertise that is not available at the local level. They thus suggest that local input would be harmful to the goal of pesticide control.²⁶³ Opponents of local pesticide regulation insist that agriculture would be in jeopardy if local governments enacted their own pesticide regulations. They maintain that the cost to farmers of studying and complying with the myriad of local and often conflicting regulations would be so costly that it would put some farmers out of business.²⁶⁴

The debate over these arguments is continuing. Most recently, the EPA seems to have changed its position since arguing in *Mortier* in favor of local control.²⁶⁵ During testimony before a congressional subcommittee considering the preemption legislation, an EPA administrator proposed a new administration position maintaining that FIFRA should prohibit local governments from regulating pesticide sale and use unless a state has acted affirmatively to allow local regulation.²⁶⁶

B. Movement Toward a Compromise

In Wisconsin, a group of environmental, turf industry, and local and state government representatives has recently attempted to reach a compromise solution to the continuing debate over local pesticide regulation.²⁶⁷ The group has drafted proposed pesticide regulations at the state level that are more stringent than previous regulations and to whose development local governments have contributed.²⁶⁸ These regulations would preempt any county or municipality from enacting any law related to landscape applications by commercial applicators which conflicts with or is more stringent than

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See FIFRA Amendments, Hearings before the U.S. House Subcommittee on Department Operations, Research and Foreign Agriculture (1992) (statement of Victor J. Kimm, Deputy Ass't. Administrator for Prevention, Pesticides, and Toxic Substances, EPA).

²⁶⁶ *Id.*

²⁶⁷ See *FIFRA Pre-emption Battle*, *supra* note 13, at 764.

²⁶⁸ See Draft, Proposed Order of the State of Wisconsin Department of Agriculture, Trade and Consumer Protection Adopting Rules, February 13, 1992.

the proposed rules.²⁶⁹ No other state has reported similar compromise efforts. Instead, the battle seems to be heating up.

VII. A WORKABLE SOLUTION FOR LOCAL CONTROL OF PESTICIDES

One would have thought that a unanimous Supreme Court decision in *Mortier* in June 1991 would have settled once and for all the issue of federal preemption of local pesticide ordinances. While *Mortier* decided the legal issue of preemption under FIFRA, it left still subject to debate the policy behind local control of pesticide use. This Comment has presented both sides of the issue of local control of pesticides. It concludes that localities should have the right to participate in the three-level scheme of pesticide control envisioned under FIFRA for reasons of both environmental policy and state sovereignty.

Federal and state regulations have not adequately protected local areas from the dangers of pesticides.²⁷⁰ While the federal government's goals of registration and regulation under FIFRA are laudable, the United States General Accounting Office has acknowledged that the EPA simply does not have the resources to accomplish the task that Congress has assigned to it.²⁷¹ The scientific community knows well the dangers of pesticides.²⁷² Federal preemption would leave the public insufficiently protected.

Most of the arguments against local control of pesticide use presented by the agri-chemical industry are premature, without proof, and based on scenarios that are unlikely to occur. There is no reason to believe, for instance, that all 83,000 localities in the United States are going to enact pesticide ordinances in reaction to the Supreme Court's decision in *Mortier*. In fact, only eighty local units of government have passed their own ordinances to regulate pesticides since Congress passed the 1972 FIFRA amendments.²⁷³

Furthermore, most of these local ordinances are not even regulatory in nature.²⁷⁴ Most ordinances merely require the posting of

²⁶⁹ *Id.* at 5.

²⁷⁰ See Brief of *Amici Curiae* Village of Milford, *supra* note 67, at 10.

²⁷¹ *Id.* at 7.

²⁷² Tybe A. Brett & Jane E.R. Potter, *Risks to Human Health Associated with Exposure to Pesticides at the Time of Application and the Role of the Courts*, 1 VILL. ENV'T'L L. J. 355 (1990).

²⁷³ Mary Jodron, Tom Kenworthy & Michael Weisskopf, *White House Shift on Pesticides*, WASH. POST, Mar. 5, 1992, at A19.

²⁷⁴ See FIFRA Hearings, *supra* note 252.

notices after pesticide application and do not prohibit or restrict the use of FIFRA-approved pesticides.²⁷⁵ Other ordinances apply only to property owned by municipal governments themselves.²⁷⁶ Some local pesticide regulations impose limits on aerial pesticide spraying to accord with local wind conditions²⁷⁷ or prevent surface and ground-water contamination.²⁷⁸ The only reported permitting system for pesticide registration is the Town of Casey ordinance, which only applies in limited situations.²⁷⁹ No ordinance in any locality has banned the sale of a pesticide.²⁸⁰

The local ordinances that had been the subject of litigation prior to *Mortier*—which, because they were chosen for court battle, one would expect to be the most egregious in their effect on the pesticide industry—are quite rational and limited in their scope.²⁸¹ They arose not out of an abstract desire to rid the community of the evils of pesticides but as the result of a particular harm or contamination caused by unregulated pesticide use.²⁸² It is exactly situations like these that provide the reason for local involvement in environmental or, for that matter, any health, safety, or welfare matter. This is how the system is supposed to work. Once communities experience a specific need for pesticide regulation, it is their prerogative and their duty to draft and debate the proposed ordinance through their legislative processes. There does not seem to be any compelling reason to halt this process, which has been proceeding so well.

The local legislative process also assures that there will be no real damage to agriculture through local pesticide control. While Representative Hatcher and Senator Pryor spoke on the House and Senate floors of the economic burdens local pesticide regulation would bring to farmers, common sense points to the contrary. Most rural town boards are comprised of farmers.²⁸³ These board members are very knowledgeable about pesticides and their dangers and would not pass ordinances that would damage their own livelihood.²⁸⁴

²⁷⁵ GOLDMAN, *supra* note 84, at 10.

²⁷⁶ *Id.* at 8.

²⁷⁷ *Id.* at 7.

²⁷⁸ *Id.*

²⁷⁹ Casey, Wis. Ordinance No. 85-1, § 1.2 (Sept. 10, 1985).

²⁸⁰ GOLDMAN, *supra* note 84, at 6.

²⁸¹ See FIFRA Hearings, *supra* note 252.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See FIFRA Amendments, Hearings on H.R. 3850 and H.R. 3742 before the U.S. House of Representatives Agricultural Subcommittee on Department Operations, Research, and Foreign Agriculture, 102d Cong., 1st Sess. (1992) (statement of Paul Swart).

The industry's argument that pesticide use regulation necessitates scientific expertise not available to local governments also seems without much merit. The types of local ordinances that cities and towns have adopted require mostly common sense.²⁸⁵ Most impose the posting of warning signs or reflect concerns about local water supplies or wind and population conditions.²⁸⁶ Who is more familiar with these areas than local citizens?

Local regulation of pesticide use should continue not only because it is sound environmental policy but also because it comports with notions of state sovereignty. In *Mortier*, the Supreme Court held that states are free to decide for themselves what regulatory role their local governments will play in the area of pesticide use.²⁸⁷ States thus may expressly authorize, restrict, or prohibit local governments' exercise of pesticide regulatory functions.

From the beginning, the plaintiffs framed the *Mortier* case largely as involving a states' rights issue rather than simply an environmental one.²⁸⁸ Framing the issue in this manner was a deliberate strategic decision based on the Wisconsin Public Intervenor's desire to present his case to the current members of the Supreme Court in the most favorable light.²⁸⁹ As a result, the *Mortier* decision was dry and devoid of any mention of environmental policy. The Court decided the case as the plaintiffs predicted it would, writing an opinion based on strict preemption principles. These principles were rooted in the fundamental power of the states. Although the Court never specifically decided the Tenth Amendment question posed by the petitioners, the Court's opinion made it clear where it stood.

In *Mortier*, one of the Court's more important decisions on preemption, the Court refused to accept implied congressional intent

²⁸⁵ See FIFRA Amendments, Hearings, *supra* note 252.

²⁸⁶ Goldman, *supra* note 84, at 5-10.

²⁸⁷ 111 S. Ct. at 2483.

²⁸⁸ The two questions presented for review by the Supreme Court were: "1. Under the Supremacy Clause of the United States Constitution, is the authority of local units of government to enact ordinances in the exercise of their policy powers to protect their citizens and environments from hazards of chemical pesticides preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). . . and 2. Where the Congress in FIFRA expressly allows states to regulate pesticides, may FIFRA, consistent with fundamental principles of federalism embodied in the Tenth Amendment to the United States Constitution, be interpreted to deprive states of their authority to delegate to local governments the task of regulating pesticides for protecting the health, safety, and welfare of their citizens?". Brief of Petitioners, *supra* note 171, at i.

²⁸⁹ Telephone interview with Thomas J. Dawson, Wisconsin Public Intervenor (Nov. 15, 1991). Eleven states supported the plaintiffs' position by filing an amicus brief with the Court. See Brief of the States of Hawaii, Alabama, Illinois, Kansas, Maine, Michigan, Missouri, Nevada, Pennsylvania, Utah, and Vermont, *supra* note 256.

as an indication of preemption. While the majority of the Court did not go so far as to reject the use of legislative history in ascertaining Congress's intent, the Court did state that the "clear and manifest intent" to preempt must be present.²⁹⁰ According to the Court, because Congress has the power explicitly to write into statutes the preemption of state or local authority, it should do so when it wants preemption. Courts should not have to rely on legislative reports and congressional records, which staff members and legislators often include to influence the courts in a particular manner, to discern what Congress meant. Thus, while the majority did not share Justice Scalia's concurrence suggesting the rejection of legislative history as a means of ascertaining congressional intent, the effect of the decision was probably to do just what Scalia suggested.²⁹¹ In the future, Congress must draft statutes—particularly those in the area of rights of the states and localities versus the federal government—that state expressly what they mean.

Advocates of local control of pesticide use are again raising the issue of state sovereignty to the Bush Administration and to members of Congress to get them to oppose the proposed preemption amendments to FIFRA. In a letter to President Bush, Wisconsin Public Intervenor Thomas J. Dawson wrote that no matter what its position on local regulation of pesticides, the Administration must promote the sovereign rights of states to protect the health and safety of their citizens.²⁹² Politics indeed makes strange bedfellows, and on the issue of local regulation of pesticides, environmental and states' rights advocates have joined forces. It is this coalition that probably will stop the FIFRA amendments from passing in Congress, although the vote appears to be a close one.²⁹³

Now is the perfect time for representatives from both sides of the issue of local control of pesticides to come to the bargaining table. While in the past the pesticide industry relied on its vast resources to fight local control through litigation, that option no longer exists. Industry now is relying on lobbying efforts, both at the national level and throughout all the states, to get preemption language into FIFRA and state statutes and halt any new local ordinances. Each time a locality passes an ordinance, it makes the battle that much more difficult for the pesticide industry. Even though they currently

²⁹⁰ See *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991).

²⁹¹ See *id.* at 2492.

²⁹² Letter of Thomas J. Dawson to President Bush, *supra* note 246.

²⁹³ Telephone interview with Christina Roessler, Development Director, NCAMP (Feb. 14, 1991).

have the law on their side, advocates of local control realize that the battle is continuing, and that their resources are limited. Power seems to be equally divided between the sides. This, then, is the time for some creative negotiation.

The state of Wisconsin again has taken the lead by forming a committee of environmental, government, and turf industry representatives under the leadership of the state Department of Agriculture.²⁹⁴ The committee has drafted regulations that establish notice and information requirements for the residential and landscape applications of pesticides.²⁹⁵ These regulations are more stringent than the current state statute and, if the Wisconsin legislature enacts them after public hearings, they would prohibit counties and municipalities from passing ordinances that vary from any of the new provisions.²⁹⁶

The Wisconsin proposed turf regulations do not cover every area of pesticide use, only those upon which the committee was able to agree.²⁹⁷ The proposed regulations do demonstrate, however, that the main argument of the pesticide industry—that local control will produce a patchwork of ordinances that will frustrate FIFRA and economically burden the industry—can be addressed and overcome. The industry has repeatedly stated that it wants uniform state rules. If this is true, then it should be satisfied with the type of regulations that the state of Wisconsin has proposed. If industry refuses to negotiate, then it will reveal that it has been disingenuous—that what it really wants is not uniform regulation but no regulation at all.

Wisconsin Public Intervenor v. Mortier emphasized that FIFRA is a tripartite scheme involving a partnership of federal, state, and local governments. In the state of Wisconsin, environmental advocates and local government representatives have shown a willingness to work with the pesticide industry and state agencies to develop model ordinances and uniform state regulations acceptable to both sides. These regulations would protect citizens and the environment; coordinate local, state, and federal regulation; and at the same time provide the uniformity that industry says it wants.

²⁹⁴ Telephone interview with Thomas J. Dawson, Wisconsin Public Intervenor (Mar. 11, 1992).

²⁹⁵ Draft, Proposed Order of the State of Wisconsin Department of Agriculture, Trade and Consumer Protection Adopting Rules, Feb. 13, 1992.

²⁹⁶ *Id.* at 5.

²⁹⁷ Telephone interview with Thomas J. Dawson, Wisconsin Public Intervenor (Mar. 11, 1992).

Preemption of local control of pesticides is not necessary and would be harmful. Cooperation between representatives of the pesticide industry and environmental and state associations is what is needed.

VIII. CONCLUSION

The Supreme Court did not settle the issue of local pesticide regulation by deciding *Wisconsin Public Intervenor v. Mortier*. Although the Court held that FIFRA does not preempt local governments from enacting pesticide bylaws and ordinances, it based its holding on both a reading of the plain language of the statute and an analysis of its legislative history through preemption principles requiring clear and manifest intent.

The Court's holding suggests that if a legislature wants to preempt local control, it should explicitly say so in a statute. Following the Court's advice, pesticide manufacturers and users are trying to amend FIFRA to include express preemption language and, in case that tactic fails, are trying to write such language into the pesticide acts of every state. Supporters of preemption argue that local regulation will lead to regulatory confusion based on nonscientific principles that will frustrate the original purpose of FIFRA. Supporters of local control of pesticide regulation maintain that FIFRA requires local input because the EPA is regulating in an insufficient manner, and because the statute provides for no other means to consider local conditions. Furthermore, they believe that under the Tenth Amendment, it is the right of the states to determine the role that local governments will play.

Now is the time for both sides to work out a compromise solution because both sides of the issue are fairly equally balanced in terms of political power. Each state that has not already preempted local control of pesticides should follow the lead of Wisconsin. That state has formed a committee of representatives of environmental, government, and pesticide manufacturers and users groups to draft uniform statewide regulations: regulations more stringent than current state statutes that would preempt localities from enacting bylaws or ordinances varying from them. Such statutes would provide the needed local input into pesticide regulation while avoiding the industry's feared conflicting regulatory hodge-podge.