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Federalism is allegedly eroding. Prior to 1986, courts rejected allegations that the ever increasing Federal regulatory schemes preempted state common law products liability actions. However, during the mid-1980s, courts became more willing to entertain preemption arguments. Recently, the Supreme Court of Ohio had occasion to rule on the issue of whether a federal law containing an express preemption provision preempted Ohio statutory tort claims predicated on an inadequate warning label of a consumer product. In the case of Jenkins v. James B. Day & Company, the Ohio Supreme Court held that the Federal Hazardous Substances Act (FHSA) does not preempt a plaintiff's statutory products liability claim challenging a label on a substance covered by the Act. In reaching this conclusion, the court formulated a new argument to defeat the preemption provision of the FHSA; an argument which may be applicable to other federal enactments with analogous provisions.

This Note will recount the general law of federal preemption and its recent developments. Next, it will describe the Jenkins case, the facts leading to the litigation, the prior procedure in the lower courts, and the Ohio

2. Edell & Walters, supra note 1, at 603.
3. Id. at 613-14.
4. See id. at 618.
5. 634 N.E.2d 998 (Ohio 1994).
7. Jenkins, 634 N.E.2d at 1003.
8. This Note groups the Federal Hazardous Substances Act with the Federal Insecticide, Fungicide and Rodenticide Act and the Federal Cigarette Labeling and Advertising Act. See infra note 42 for a more detailed explanation of the similarities between the preemption provisions of these acts.
9. See infra part II. A.
Supreme Court’s reasoning in the opinion. Lastly, this Note will critically evaluate the court’s new argument supporting the preservation of state tort claims in light of familiar principles of statutory construction.

II. BACKGROUND

A. The General Law of Federal Preemption

The general scheme of the law of preemption is well settled. Most courts considering the issue first outline a set of principles that are more or less constant across jurisdictional boundaries.

The power of the federal government to supersede state law flows from the Supremacy Clause of the United States Constitution. As preemption occurs only when Congress actually exercises its power to issue superior law granted by the Constitution, the key question in every preemption analysis is whether Congress intended to displace state law by its legislative enactments.

There are two kinds of preemption: express and implied. Where Congress has explicitly addressed the issue of preemption within the text of the statute, State law is said to be expressly preempted. Only state law that actually conflicts with the express scheme of federal regulation is pre-
Implied preemption results where Congressional intent to displace state law, though not express, is nevertheless "clear" or "manifest." The unspoken manifestation of Congressional intent may take several forms. First, Congress may have "occupied the field" by crafting a statutory scheme of directives "so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it." Second, state law may be displaced where it directly conflicts with federal law. Such conflict may occur if it is impossible to simultaneously comply with state and federal laws, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

In cases where a federal statute has an express preemption provision that does not clearly preempt the particular state law claim wherein the preemption defense was raised, courts have divided over the question of whether it is appropriate to look further for federal preemption if none is apparent after an express preemption analysis. Some courts will not conduct an implied preemption analysis if an express analysis fails. A majority


19. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[W]e are to start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). rev'd, 331 S. Ct. 247 (1947).

20. Id.

21. Rice, 331 U.S. at 230 (holding the purpose of Congress to preempt state law "may be evidenced in several ways"), rev'd, 331 S. Ct. 247 (1947). The opinion proceeds to describe four methods of implied preemption, which are largely recounted in the infra notes 23-26 and accompanying text. See also id. at 230; see Edell & Walters, supra note 1 for a general discussion.

22. Rice, 331 U.S. at 230.

23. Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (holding that state law that conflicts with federal law is without effect); See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 427 (1819) (holding that state laws conflicting with constitutionally permissible federal laws are void).

24. Florida Lime & Avocado Growers Inc., v. Paul, 373 U.S. 132, 142-43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulation is a physical impossibility.").

25. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See also Finberg v. Sullivan, 634 F.2d 50, 63 (3d Cir. 1980) (further describing the steps to analyze whether state law interferes with or hinders the objectives of Congress).


of courts, however, proceed automatically after failing to find express
preemption.28

Lastly, in order to safeguard State sovereignty in marginal cases where
it is unclear whether Congress expressly or impliedly intended to wield its
superior authority, the courts have adopted a presumption against preemp-
tion.29 The presumption against preemption may be considered to be height-
ened when Congress trespasses upon the historic police powers of the State.30
The common law tort system, which safeguards citizens against unsafe con-
sumer products though the imposition of damage awards upon irresponsible
manufacturers, is a manifestation of the State’s police power.31

B. Case Treatment of Specific Legislative Acts

Over the past several decades, the Federal government has enacted a
number of provisions affecting State law. In 1947, Congress passed the Fed-
eral Insecticide, Fungicide, and Rodenticide Act (FIFRA).32 FIFRA was ini-
tially designed to license and label the various pesticides being used in this
country.33 In 1972, it was strengthened to provide a more comprehensive

1988), rev’d, 437 N.W.2d 655 (Minn. 1989) (“Where Congress has spoken on the subject of
preemption and not explicitly preempted the fundamental right to bring a state tort action, we
find it inappropriate and wholly unnecessary to strain to find implied preemption.”).

28. These courts exemplify the tendency to move immediately on to an implied preemption
analysis after failing to find express preemption: See, e.g., Worm v. Am. Cyanamid Co., 970
F.2d 1301, 1305-06 (4th Cir. 1992); Chemical Specialties Mfrs. Assoc., v. Allenby, 958 F.2d
941, 947 (9th Cir. 1992); Lee v. Boyle–Midway Household Products, Inc., 792 F. Supp.

29. CSX Trans., Inc. v. Easterwood, 113 S. Ct. 1732, 1737 (1993) (“In the interest of
avoiding unintentional encroachment on the authority of the States, however, a court
interpreting a federal statute pertaining to a subject traditionally governed by state law will
be reluctant to find preemption.”).

presumption against preemption is heightened by four factors, one of them being whether the
federal act allegedly displaces laws relating to the preservation of the health and safety of the
citizens, an historic police power), rev’d, 437 N.W.2d 655 (Minn. 1989).

U.S. 1062 (1984) “The provision of tort remedies to compensate for personal injuries 'is a
subject matter of the kind [the] Court has traditionally regarded as properly within the scope
of state superintendence.'” Id. (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373
U.S. 132, 144 (1963)).

(prior to 1972 amendment).

33. McLaughlin et al., supra note 14, at 658. Section 3 of the Act sets forth the labeling
requirements on substances covered by the Act. Section 4 provides that “every economic
poison [i.e., pesticide] which is distributed, sold, or offered for sale [anywhere in the United
States]... shall be registered with the Secretary [of Agriculture].” ch. 125, §§ 3-4, 61 Stat.
164, 166-67 (1947).
regulatory scheme of labeling requirements, and more vigorous enforcement by the Environmental Protection Agency. In 1960, Congress passed the FHSA, which was designed to "provide nationally uniform requirements for adequate cautionary labeling" of substances covered by the Act. In 1965, Congress passed the Federal Cigarette Labeling and Advertising Act (the Cigarette Act). The Cigarette Act prevented a "potential maze of inconsistent state regulations" by establishing a strict scheme of warnings to be placed on all cigarette packages. In 1969, these labeling requirements were enhanced.

FIFRA, the FHSA, and the Cigarette Act all contain similar preemption

34. McLaughlin et al., supra note 14, at 658. Section 3(a)(2) of the 1947 version required that labels on pesticides bear (i) the name and address of the manufacturer, (ii) the name brand of the toxic substance, (iii) an indication of the net weight of the contents of the package, (iv) a skull and crossbones, (v) the word "poison" printed in bold red letters, and (vi) a statement of the antidote. See ch. 125 § 3 (a)(2), 61 Stat. 164, 166 (1947).

In contrast, § 2(q)(1) and (2) of the 1972 version required that labels on pesticides bear (i) the EPA registration number of the product, (ii) directions for safe use, (iii) a warning adequate to "protect health and the environment," (iv) a statement of the product's use classification, (v) the name and address of the manufacturer, (vi) the name brand of the toxic substance, (vii) the net weight of the contents, (viii) a skull and crossbones, (ix) the word "poison", and (x) a statement of practical treatment or first-aid. See Pub. L. No. 92-516, §§ 2(a)(1-2), 86 Stat. 973, 977 (codified as amended at 7 U.S.C. §§ 136-136y (1988)).


The Administrator of the EPA had a variety of enforcement powers under the 1972 version of the Act. Under § 9(a), the Administrator could inspect the premises of producers. Under § 13(a) the administrator could issue stop sale, use, or removal orders. Under 13(b), the administrator may seize misbranded substances. Section 14(a) empowers the Administrator to impose civil fines. Section 25(a) gives the EPA the power to promulgate regulations relating to labeling requirements. Lastly, § 14(b) imposes criminal liability on those found to distribute misbranded substances. See Pub. L. No. 92-516, §§ 9(a), 13(b), 14(a), 14(b), 86 Stat. 973, 988-89, 991-93 (1972).


40. Id.

provisions. Inevitably, questions arose as to whether these acts preempted state common law tort claims predicated on inadequate warning labels. When faced with the issue, different courts applying the general scheme of Federal preemption reached different conclusions. Some courts found that the challenged provisions did not expressly preempt such claims, and held that an implied preemption analysis was improper. Other courts, while agreeing that the preemption provision under review did not expressly preempt such claims nevertheless went further to conduct an implied preemption analysis, and determined that there was no occupation of the field and no actual conflict. Other courts who also failed to find occupation succeeded in finding an actual conflict with the Federal law. Still others found both occupation of the field and actual conflict with federal law.

42. FIFRA's preemption provision reads: "[A] State shall not impose or continue in effect any requirements for labeling . . . in addition to or different from those required under this [Act]." 7 U.S.C. § 136v(b) (1988). The FHSA's preemption provision reads: "no State . . . may establish or continue in effect a cautionary labeling requirement . . . unless such cautionary labeling requirement is identical to the labeling requirement under section [1261(p)] or [1262(b) of this Act]." 15 U.S.C. § 1261, note (1988) (Effect Upon Federal and State Law). The Cigarette Act's preemption provision in effect from 1965 to 1969 read: "No statement relating to smoking and health, other than the statements required by [this Act], shall be required on any cigarette package." Pub. L. No. 89-92, § 5(b), 79 Stat. 282, 283 (1965). That provision was amended to read: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]." 15 U.S.C. § 1334(b) (1988).

43. There is no more reliable indication of what Congress intended to preempt on a given subject than what it expressly preempted in the statute. It is one thing for the courts to try to divine congressional intent from the overall operation of a statute and its legislative history when Congress has been silent, but it is quite another to do so when Congress has included specific [preemption] provisions. Forster v. R.J. Reynolds Tobacco Co., 423 N.W.2d 691, 696 (Minn. Ct. App. 1988), rev'd, 437 N.W.2d 655 (Minn. 1989) (considering the Cigarette Act) (After the quoted passage, the court skipped an implied preemption analysis).

44. See, e.g., Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 612-13 (1991) (holding FIFRA does not occupy the field or conflict with state law); Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby, 958 F.2d 941 (9th Cir. 1992), (holding neither FIFRA nor the FHSA occupies the field or conflicts with state law) cert. denied, 113 S. Ct. 80 (1992); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1248-50 (N.J. 1990) (holding the Cigarette Act does not occupy the field or conflict with state law).

45. Worm v. Am. Cyanamid Co., 970 F.2d 1301, 1306-07 (4th Cir. 1992) ("FIFRA . . . leaves substantial portions of the field vacant . . ." but "[i]f federal law mandates a specific label and permits nothing additional or different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and inconsistent with those labeling requirements established by Congress in FIFRA or by the EPA in its regulations made pursuant to congressional directive."); Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 659 (Minn. 1989) (holding jury verdict under state tort law actions will directly conflict with the Cigarette Act's purposes).

46. See, e.g., Papas v. Upjohn Co., 926 F.2d 1019, 1024-25 (11th Cir. 1991) ("We conclude that FIFRA impliedly preempts state common law tort actions based on labeling in several
C. Cipollone v. Liggett Group

In 1992, the Supreme Court of the United States addressed the issue of whether the Cigarette Act preempted a state tort law failure to warn claim.\(^{47}\) The plaintiff, Rose Cipollone, brought suit against the manufacturer of the cigarettes she claimed gave her lung cancer.\(^{48}\) The defendant alleged the Cigarette Act preempted Mrs. Cipollone’s failure to warn claim.\(^{49}\) After a lengthy yet thoughtful opinion, the District Court disagreed, holding that the Cigarette Act did not preempt Mrs. Cipollone’s claim.\(^{50}\) The Third Circuit Court of Appeals reversed.\(^{51}\) The Supreme Court, noting a split among the jurisdictions on this point, granted certiorari.\(^{52}\)

Justice Stevens began the plurality’s opinion by disposing of a few preliminary matters.\(^{53}\) First, he recounted the general scheme of Federal preemption.\(^{54}\) Second, the Court considered the question of whether it should confine itself to an express preemption analysis since the Cigarette Act contains an express preemption provision.\(^{55}\) The Cipollone Court decided that when (a) there is an express preemption provision, and (b) the provision is a “reliable indicium of congressional intent to preempt State laws,”\(^{56}\) a reviewing court does not need to resort to an implied preemption analysis.\(^{57}\) Justice Stevens wrote: “Congress’ enactment of a provision defining the preemptive reach of the statute implies that matters beyond that reach are not preempted.”\(^{58}\) Since both the 1965 and the 1969 preemption provisions appeared to represent reliable indicia of Congressional intent to preempt state law,\(^{59}\) the Court conducted only an express preemption analysis on the


\(^{49}\) \textit{Id.}

\(^{50}\) \textit{Id.} at 1171.


\(^{53}\) \textit{Id.} at 2617.

\(^{54}\) \textit{Id.}

\(^{55}\) \textit{See supra} note 42.

\(^{56}\) Cipollone, 112 S. Ct. at 2618 (quoting Melone v. White Motor Corp., 435 U.S. 497, 505 (1978)).

\(^{57}\) \textit{Id.} at 2618 (citation omitted).

\(^{58}\) \textit{Id.}

\(^{59}\) The Court did not come right out and declare the Cigarette Act constitutes a reliable indicium of Congressional intent; it impliedly assumed so and restricted itself to the express
two preemption provisions.\textsuperscript{60}

Beginning with the 1965 preemption provision, which prohibited the imposition of any “statement relating to smoking or health” under state law,\textsuperscript{61} the \textit{Cipollone} court drew two conclusions. First, the Court concluded that the 1965 provision only preempted “state . . . rule making bodies from mandating particular cautionary statements.”\textsuperscript{62} Second, the Court concluded that the 1965 provision did not expressly preempt state tort law failure to warn claims.\textsuperscript{63} Turning to the 1969 provision, which prohibited any “requirement or prohibition”\textsuperscript{64} imposed under state law that is different than those imposed under the Act,\textsuperscript{65} the Court opined that “[t]he phrase ‘[n]o requirement or prohibition’ sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules.”\textsuperscript{66} The court went on to hold the 1969 preemption provision expressly preempted the plaintiff’s failure to warn claims inasmuch as the claims required a showing that the labels should have included “additional, or more clearly stated”\textsuperscript{67} warnings than those required by the Act.\textsuperscript{68}

The \textit{Cipollone} decision precipitated an avalanche of scholarly comment.\textsuperscript{69} Since FIFRA and the FHSA contain similar preemption provisions,\textsuperscript{70} courts on analyzing these statutes were quick to analogize to \textit{Cipollone}. In both the FIFRA and the FHSA contexts, the \textit{post-Cipollone} decisions are


\textsuperscript{61} Id.

\textsuperscript{62} \textit{Cipollone}, 112 S. Ct. at 2619.

\textsuperscript{63} Id.

\textsuperscript{64} 15 U.S.C. § 1334(b) (1988) (“No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of [this Act].”).

\textsuperscript{65} Id.


\textsuperscript{67} Id. at 2621–22.

\textsuperscript{68} Id.


\textsuperscript{70} \textit{See supra} note 42.
exemplified by the Fourth Circuit Court of Appeals' opinions in Worm v. American Cyanamid Company,71 and Moss v. Parks Corporation.72 In both of these cases, the Fourth Circuit adopted the general rule of law from Cipollone that plaintiffs’ failure to warn claims that seek to impose more elaborate or different labeling requirements upon the manufacturer than those imposed under the Acts are expressly preempted by the preemption provisions contained therein.73 The court went on to hold that since there were no issues as to whether the defendants' labels complied with the federal requirements, the plaintiffs’ claims must be viewed as seeking more elaborate or additional warnings on those labels, and therefore preempted.74

Just as the courts across the country began to issue opinions conforming with the principles of preemption law the Supreme Court of the United States set forth in Cipollone,75 the Supreme Court of Ohio appeared on the scene issuing its opinion in Jenkins v. James B. Day & Company.

III. STATEMENT OF THE CASE

A. Facts

One day, Julette Jenkins decided to strip the paint from some of her old furniture.76 She bought a can of Dayco Marine-Strip, a chemical paint stripper produced by the defendant, James B. Day & Company77 As the product’s

71. 5 F.3d 744 (4th Cir. 1993).
73. Moss, 985 F.2d at 741 (“to the extent the Plaintiff seeks warnings that are more elaborate or different from those issued by Congress and promulgated by the CPSC . . . the Plaintiff’s claim is preempted [by the FHSA]”); Worm, 5 F.3d at 748 (holding the plaintiff’s claims were preempted by FIFRA to the extent they challenged the adequacy of the label found to comply with the statutory and regulatory requirements).
74. Moss, 985 F.2d at 742; Worm, 5 F.3d at 749.
75. Other courts had adopted the rule of law articulated in Cipollone. See, e.g., Shaw v. Dow Brands, Inc., 994 F.2d 364, 371 (7th Cir. 1993) (holding that because the preemption provisions of FIFRA are analogous to the 1969 preemption provision of the Cigarette Act, and because the U.S. Supreme Court held in Cipollone that a plaintiff’s common law damage actions cannot survive the 1969 provisions, the plaintiff’s claims cannot survive under the preemption provisions of FIFRA); Papas v. Upjohn Co., 985 F.2d 516, 518 (11th Cir. 1993) (“[FIFRA] preempts those of the [plaintiff’s] state law claims which constitute ‘requirements for labeling or packaging in addition to or different from’ the labeling and packaging requirements imposed under [the Act].”); Arkansas–Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177, 1179 (10th Cir. 1993) cert. denied, 114 S. Ct. 60 (1993); Salazar v. Whink Products Co., 881 P.2d 431, 433 (Colo. Ct. App. 1994) (“The FHSA preempt[s] common law failure to warn claims when the plaintiff seeks additional or more clearly stated warnings than those required by the FHSA.”); State ex rel. Jones Chemicals v. Seier, 871 S.W.2d 611, 614 (Mo. Ct. App. 1994) (FHSA).
77. Id. at 999-1000.
active ingredient was methylene chloride, the paint stripper bore numerous and lengthy warnings. The relevant portions of the warnings concerned (1) descriptions of the principle hazards of the product, and (2) precautions to be followed to avoid injury. Ms. Jenkins ascended into her attic where the furniture was being stored, cracked the sole attic window a mere two inches, and began to apply the product. She was overcome by fumes, and subsequently died. The coroner reported that she had died of methylene chloride poisoning.

B. Proceedings in the Lower Courts

Julette’s father, Richard W. Jenkins, filed what was essentially a statutory products liability claim for failure to warn under Ohio Revised Code section 2307.76 in the Court of Common Pleas of Franklin County. The defendant moved for summary judgment, alleging that the plaintiff’s claim

78. Id. at 999.
79. The full label is reprinted in the opinion, id. at 1000. As this label takes up nearly three pages, it will not be reproduced here beyond those portions in footnotes 80-81, which are relevant to the discussion of the Ohio Supreme Court’s reasoning. See infra part III. C.
80. On this point the label reads: “HARMFUL IF INHALED OR SWALLOWED... SKIN AND EYE IRRITANT... Keep away from heat, sparks and flame... Contact with flame or hot surfaces may produce toxic gases... Prolonged breathing of vapors in poorly ventilated areas can be hazardous and even fatal to persons with heart disease.” Jenkins, 634 N.E.2d at 1000.
81. On this point, the label reads:

Extinguish all flames, including pilot lights, and turn off stoves, ovens, heaters, electric motors, and other sources of ignition during use and until all vapors (odors) are gone... Avoid prolonged breathing of vapor or contact with skin or eyes. To avoid breathing vapors or spray mist, open windows and doors or use other means to ensure fresh air entry during application and drying. If you experience eye watering, headaches, or dizziness, increase fresh air, wear respiratory protection... or leave the area. Do not transfer contents to unlabeled bottles or other containers. Close container after each use. ... USE ONLY WITH ADEQUATE VENTILATION.

Id.
82. Id. at 999.
83. Id.
84. Id.
85. Id. at 1000.
86. The statute provides that a product:

is defective due to inadequate warning or instruction at the time of marketing if, when it left control of its manufacturer, both of the following applied: (a) The manufacturer knew or, in the exercise of reasonable care, should have known about the risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages; [and] (b) the manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the
was preempted by the FHSA.\textsuperscript{87} The trial court granted defendant's motion,\textsuperscript{88} and the plaintiff appealed.\textsuperscript{89} The Court of Appeals for Franklin County reversed, holding that there were genuine issues of fact as to whether the warnings complied with the requirements of the FHSA.\textsuperscript{90} The appeals court went on to hold that even if the defendant's label met the FHSA's requirements as a matter of law, the plaintiff's claim still would not be preempted.\textsuperscript{91} The defendant then appealed to the Ohio Supreme Court.\textsuperscript{92}

\textbf{C. The Ohio Supreme Court's Opinion}

Writing for a unanimous court, Justice Alice Robie Resnick first sketched an abbreviated version of the general law of federal preemption,\textsuperscript{93} and admitted that "state tort claims can be within the preemptive reach of a federal statute in the appropriate situation, despite the presumption against preemption."\textsuperscript{94} Next, the Ohio court cited \textit{Cipollone} for the proposition that when a federal statute has an express preemption clause, no implied preemption analysis is proper.\textsuperscript{95} Thus, the court examined the text of the FHSA to see if Congress intended to expressly extinguish Mr. Jenkins' state law claims.\textsuperscript{96}

As noted earlier,\textsuperscript{97} the preemption provision in the FHSA reads in pertinent part that "no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement ... unless such cautionary labeling requirement is identical to the labeling requirement[s] under [this Act]."\textsuperscript{98} The Ohio court followed the precedents set in \textit{Cipollone}, \textit{Moss v. Parks Corporation}\textsuperscript{99} and \textit{Worm v. American Cyanamid Company}\textsuperscript{100} and

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\item \textsuperscript{87} \textit{Jenkins}, 634 N.E.2d at 1000.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{91} \textit{Id.} at *3.
\item \textsuperscript{92} \textit{Jenkins}, 634 N.E.2d at 1001.
\item \textsuperscript{93} \textit{Id.}
\item \textsuperscript{94} \textit{Id.} (citing \textit{In Re Miamisburg Train Derailment Litigation}, 626 N.E.2d 85, 91 (Ohio 1994)), \textit{cert. denied}, 115 S. Ct. 59 (1994).
\item \textsuperscript{95} \textit{Id.}
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} \textit{See supra}, part II. B. (discussing the case treatment of specific legislative acts).
\item \textsuperscript{99} 985 F.2d 736 (4th Cir. 1993), \textit{cert. denied}, 113 S. Ct. 2999 (1993).
\item \textsuperscript{100} 5 F.3d 744 (4th Cir. 1993).
\end{itemize}
held that Mr. Jenkins' claim would be preempted to the extent that it "attempts to impose a responsibility on appellant to label Marine-Strip in a more elaborate or different manner than that imposed by the FHSA."101

The Ohio court next examined the list of requirements imposed under section 1261(p) of the FHSA.102 Section 1261(p)(1)(E) requires "an affirmative statement of the principle hazard or hazards," and lists some examples, such as "Flammable," "Combustible," "Vapor Harmful," "Causes Burns," "Absorbed Through Skin," or similar wording.103 Section 1261(p)(1)(F) requires a statement of "precautionary measures describing the action to be followed or avoided."104 Next, the Ohio court considered the plaintiff's claim as essentially seeking to impose a requirement on the defendant to "provide a warning label which was reasonably adequate under the circumstances to inform a user of the product of the risks involved, and the steps to be taken to avoid those risks."105

In comparing the requirements imposed under the federal law with those sought to be imposed under state law, the court reasoned that because a manufacturer must write his own label, and because that label is not reviewed by any federal agency for adequacy,106 the section 1261(p) requirements must be read to impose a duty on the manufacturer to draft a reasonably adequate warning.107 The court reasoned that since the plaintiff's claim also seeks to impose a duty to provide a reasonably adequate warning under the circumstances,108 the two are identical.109 Because they are identical, opined the court, the plaintiff's state tort claim does not seek to impose additional or different requirements than those imposed by the FHSA, and therefore, the claim is not preempted.110

IV. ANALYSIS

The Ohio Supreme Court's new argument that the FHSA really imposes upon defendants the same duty at common law to provide a reasonably adequate warning under the circumstances has the effect of preserving state tort...

102. Id. at 1002.
106. Id. at 1004. See also id. at n.4.
107. Id. at 1004.
108. Id. at 1003. See also supra note 86 for text of statute.
110. Id.
law systems in the face of federal legislation. By construing section 1261(p) in this way, the court was able to avert preemption of section 2307.76 of the Ohio Revised Code. This approach can be partially justified, but in the end it must be condemned.

A. Supporting Rationale

There are a variety of reasons supporting the conclusion in 

Jenkins

that the FHSA does not preempt state tort claims upon which the Ohio court did not rely. In the case 

Silkwood v. Kerr-McGee Corporation,' the Supreme Court of the United States held that a punitive damage award in a claim under state tort law was not preempted by the Atomic Energy Act of 1954 (AEA). The holding rested in part on the fact that without a cause of action at common law, putative plaintiffs would be left without an adequate judicial remedy. Since the 

Silkwood decision, other courts have relied on this same reasoning in holding other Federal acts do not preempt state tort law claims. Like the AEA, the FHSA does not provide an alternative cause of action for those injured by hazardous substances. This lack of an alternative remedy bolsters the holding in 

Jenkins.

In addition, there are several principles of statutory construction that support the Ohio court’s conclusion. First, statutes in derogation of common law rights are to be strictly construed. Second, for any change in the common law by statute, the legislative purpose to do so must be clearly and plainly expressed. Even after 

Cipollone, it may be argued that there is no clear,

111. See infra part IV. A (discussing supporting rationale).
112. See infra part IV. B (discussing the Ohio court’s reasoning in light of the rules of statutory construction relating to ascertaining and giving effect to the will of the legislative body).
114. Id. at 258.
115. Id. at 251 (“It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”).
118. See generally, 

SUTHERLAND, STATUTORY CONSTRUCTION § 61.01 (5th ed. 1992) (for an discussion on strict construction of statutes); Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992) (holding that a court must construe preemption provisions narrowly in light of the presumption against preemption of historic state police powers).
119. SUTHERLAND STATUTORY CONSTRUCTION § 61.01 (5th ed. 1992).
plainly expressed Congressional intent to supersede state tort law claims in a 
preemption provision like the one contained in the FHSA. This lack of any 
clear manifestation of Congressional intent to preempt state law tort claims, 
combined with the notion that federal acts inimical to state common law like 
the FHSA should be narrowly construed, supports the Ohio court’s conclu-
sion that the FHSA does not preempt those claims.

B. Higher Principles of Statutory Construction

Notwithstanding the arguments submitted by the Ohio court and by other 
courts, the Jenkins decision runs afoul of another accepted principle of statu-
tory construction. It is well settled that in reviewing a statute, a court must 
interpret it in such a way as to promote, not defeat, the purposes of the Leg-
islature in enacting the statute in the first place. This has been the rule in 
Ohio since at least 1956, when the Ohio Supreme Court recognized that “the 
primary duty of a court in construing a statute is to give effect to the intention 
of the Legislature.” This rule stems from the conception that the primary 
duty of our judicial system is to discern and carry out the will of the legisla-
tive branch, and is said to be paramount over all other rules of statutory

120. Davidson v. Velsicol Chem. Corp. 834 P.2d 931, 934 (Nev. 1992), cert. denied, 113 S. Ct. 1994 (1993). The Nevada Supreme Court held that even though FIFRA forbids states from imposing different labeling requirements than those found in the Act, there was still no express preemption of common law claims. Davidson was decided after the U.S. Supreme Court’s decision in Cipollone. As noted earlier, the Cipollone court held that the word “requirements” in the preemption provision of the 1969 Cigarette Act expressly preempts state common law claims. See supra note 66 and accompanying text. FIFRA also uses the “requirements” language (as does the FHSA). See supra note 42. To support its position that FIFRA’s “requirements” language does not preempt Nevada common law claims, the Davidson court relied upon a line of pre-Cipollone cases. Davidson, 834 P.2d at 934.

121. Cipollone 112 S.Ct. at 2618.


124. SUTHERLAND STATUTORY CONSTRUCTION § 45.05, at 22 (5th ed. 1992) (Separation of powers principles obligate the judicial branch to construe statutes “so that they will carry out
construction.125 Given these principles, it is difficult to understand why the Jenkins court neglected to investigate the legislative purpose behind the FHSA when it undertook to construe that act.126

The purpose of a statute may be contained within a section of the statute itself,127 impliedly stated in its structure,128 or otherwise explained in its legislative history.129 Unfortunately, the FHSA does not contain an express statement of purpose within the text itself. However, there is ample legislative history useful in determining the purposes of the Act.

The FHSA was enacted in 1960 in response to what were at the time modern developments in applied chemistry.130 As those developments were incorporated into household consumer products, more and more dangerous chemicals entered the home.131 The stated purpose of the FHSA has already been mentioned briefly,132 but bears repeating in greater detail. As revealed in the 1960 report of the House Committee on Interstate and Foreign Commerce, "[t]he purpose of [the FHSA] is to provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use."133

The FHSA did not contain a preemption provision when it was enacted.134 Congress reconsidered and amended the Act in 1966 to remedy

125. Id. ("It has also been stated to show that all rules of statutory construction are subservient to the one that legislative intent must prevail . . . .").
126. The Jenkins court only mentioned the purposes of Congress in enacting the FHSA in passing, and only then because Justice Robie-Resnick quoted the Fourth Circuit’s opinion in Moss v. Parks Co. See Jenkins, 634 N.E.2d at 1001.
128. Jones, 430 U.S. 519, 525 (citing City of Burbank v. Lockneed Air Terminal Inc., 411 U.S. 624, 633 (1973) for the proposition that Congress’ intent to preempt state law may be implicitly contained in the statute’s structure).
129. E.g., Blum v. Stenson, 465 U.S. 886, 896 (1984) ("Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear [or nonexistent].").
131. Id.
132. See supra note 37 and accompanying text.
this defect.\textsuperscript{135} While amending the Act, Congress reiterated the fundamental goal of the FHSA is to achieve nationally uniform labeling requirements, stating that "[i]t is impractical, unnecessary, and undesirable for each . . . product [covered by the Act] to be labeled specially for those States and cities which have developed their own . . . special forms of warnings over the years during which there was no Federal law."\textsuperscript{136} The added preemption provision was designed to relieve manufacturers and marketers of products entering interstate commerce from the burdens of complying with fifty or more different schemes of labeling requirements.\textsuperscript{137} State and local governments were "encouraged"\textsuperscript{138} and "permitted"\textsuperscript{139} to establish identical requirements.\textsuperscript{140} In further comment, Congress explained that this preemption system was intended to strike a balance between "those who view Federal requirements as merely minimum standards and those who would opt for uniform national requirements."\textsuperscript{141} To satisfy the former, the States were allowed to preserve their own labeling requirements so long as they were identical to the Federal requirements.\textsuperscript{142}

The Supreme Court of Ohio’s construction of section 1261(p) of the FHSA as imposing a requirement upon manufacturers to draft reasonably adequate warnings under the circumstances of each particular case serves to defeat Congress’ goals of establishing a nationally uniform system of labeling requirements. A state law tort action for failure to warn is predicated on a duty incumbent upon the manufacturer to provide a warning which adequately informs the consumer of the dangers of the product.\textsuperscript{143} When state tort law claims are allowed to go forward, each individual jury would evaluate the label for its adequacy.\textsuperscript{144} A damage award following a plaintiff’s

\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Cipollone v. Liggett Group, 112 S.Ct. 2608, 2620 (1992) ("common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty."). See W. Page Keeton Et. Al., Prosser and Keeton on the Law of Torts, § 99, at 695 (5th ed. 1984) (A manufacturer will be held strictly liable for producing a product that is unreasonably dangerous in that the label fails to adequately warn of a risk or hazard to the consumer).
\textsuperscript{144} E.g., Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 659 (Minn. 1989)("If
verdict will impose a “requirement” under state law that the manufacturer alter the label to avoid continuing liability. As juries from different jurisdictions reach different conclusions as to whether the manufacturer’s label was reasonably adequate to warn of the unique danger which injured the plaintiff, the manufacturers will be forced to tailor its labels so as to provide the warnings demanded by the various state tort law systems. The resulting divergence of labeling requirements across fifty different state law systems obviously contravenes Congress’ intent to establish nationally uniform labeling requirements in enacting the FHSA.

state claims are allowable, the jury on each state claim reevaluates the federal duty [to warn] in terms of the state standards of adequacy and assesses tort damages against a manufacturer found to be wanting.

145. See Cipollone v. Liggett Group, 112 S. Ct. 2608, 2619 (1992) (holding common law damage actions impose “requirement[s] or prohibition[s]” on the defendant); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959); Worm v. Am. Cyanamid Co., 970 F.2d 1301, 1307 (4th Cir. 1992) (“[A] jury verdict resulting from a . . . manufacturer’s failure to warn of the dangers of the product has an effect no different from a legislatively enacted state regulation requiring the insertion of a specific warning on the . . . label.”); Palmer v. Liggett Group Inc., 825 F.2d 620, 627 (1st Cir. 1987) (“If a manufacturer’s warning that complies with the [Cigarette] Act is found inadequate under a state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation.”); Salazar v. Whink Products Co., 831 P.2d 431, 433-34 (Colo. Ct. App. 1994) (“[A] state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less ‘a requirement’ in the preemption scheme than a state statute imposing the same burden.”).

146. See Papas v. Upjohn Co., 926 F.2d 1019, 1026 n.7 (11th Cir. 1991) (If tort claims were allowed, the defendant manufacturer would have to “change its methods of doing business . . . to avoid the threat of ongoing liability.”); Palmer v. Liggett Group Inc., 825 F.2d 620, 627-28 (1st Cir. 1987) (“Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take, of course, is to change its label [the plaintiff’s verdict] effectively compels the manufacturer to alter its warning to conform to different state law requirements as ‘promulgated’ by a jury’s findings.”); See also Steven P. Croley & Jon D. Hanson, Rescuing the Revolution: The Revived Case For Enterprise Liability, 91 MICH. L. REV. 683, 787 (1993) (Under traditional products liability scheme, manufacturers will alter labels in response to tort liability); Mary Lee A. Howarth, Preemption and Punitive Damages: The Conflict Continues Under FIFRA, 136 U. PA. L. REV. 1301, 1324-25 (1988) (The net effect of unconsolidated tort claims brought against a manufacturer in different states would be to compel the manufacturer to use different labels in different states).

147. Palmer, 825 F.2d at 627 (State tort claims that challenge federal warning labels as insufficient “... and the resulting confusion it would engender – surely contravenes the [Cigarette] Act’s policy of uniform labeling.”); Lee v. Boyle–Midway Household Products Co., 792 F. Supp. 1001, 1008 (W.D. Pa. 1992) (“A jury verdict or court decision ruling that compliance with the labeling requirements of the FHSA does not provide a sufficient warning under state law would frustrate the Congressional purpose of providing nationally uniform requirements.”); Forster, 437 N.W.2d at 659 (Minn. 1989) (“the state tort claim regulatory scheme would directly conflict with one of the announced purposes of the [Cigarette] Act, namely, to avoid ‘diverse, nonuniform, and confusing’ [labeling] regulations . . . and would effectively dismantle the federal plan.”).
V. CONCLUSION

If the Jenkins court's interpretation that section 1261(p) of the FHSA imposes essentially the same requirements as under common law were adopted by other states seeking to protect their state tort law systems, the net effect would be to dismantle any remaining semblance of a nationally uniform system of labeling requirements envisioned by Congress. The area of federal preemption of state tort law existed in disarray before the U.S. Supreme Court's decision in Cipollone. After Cipollone, courts reluctantly accepted the Supreme Court's move toward federal preemption of state tort claims. The new rationale proposed by the Supreme Court of Ohio has the potential to cause new turmoil by reviving the state tort law systems that the federal government is seeking to bring under control. Should this idea catch on with other state courts, the erosion of federalism will be arrested. In the end, it will be up to the Supreme Court to pass ultimate judgment upon this new defense of State sovereignty.

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To be sure, the requirements imposed under the FHSA are not as "uniform" as those imposed under the Cigarette Act. The 1969 version of the Cigarette Act requires a set of four short, rotating messages to be reprinted verbatim on all cigarette packages sold in this country. See 15 U.S.C. § 1333 (1988). In contrast, the FHSA's requirements are not so exact. At best they provide manufacturers with a series of examples, and leave it up to them to select one, or to invent "similar wording." See, e.g., 15 U.S.C. § 1261(p)(1)(E). However, just because absolute uniformity can never be reached does not mean that a court sitting in review of the FHSA can ignore this goal, nor does it mean that court should therefore interpret the statute in such a way as to defeat all possibilities of achieving some semblance of uniformity. After all, the legislative history on the purposes of the FHSA is clear. Evidently Congress believes it better to allow manufacturers to design labels which cluster around the examples of the FHSA than to continue to allow all 50 state tort systems to haphazardly fashion inconsistent schemes of labeling requirements.