Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green"

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In recent years, there has been a significant increase in the use of environmental, or "green," claims in marketing. The author argues that clearly defined national standards are necessary to combat the problems associated with such claims: deception on the part of manufacturers, uncertainty as to what claims they can legitimately make, and confusion among consumers as to what green marketing claims can be trusted. The author argues that state laws are inadequate for two reasons: first, general deceptive advertising laws are too ambiguous to address the specific problem of green marketing regulation; and second, because different states have set different standards, even those laws which directly address green marketing make it too difficult for manufacturers to market nationwide. The author further argues that the Deceptive Advertising Clause of the Federal Trade Commission Act is too ambiguous, and that Congress should enact a uniform national standard for green marketing. Since the FTC does not have the expertise to define the terms, the EPA ought to have primary responsibility for setting and enforcing the standards. Furthermore, the new federal standard ought to preempt state laws, but not prevent states from playing an active role in defining and enforcing federal law.

I
INTRODUCTION

Over the past few years, there has been a tremendous increase in the use of environmental, or "green," claims as a marketing technique.[1]

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1. For discussions of the growing use of green claims, see *Hearings on Environmental Marketing Issues Before the Federal Trade Comm'n* 30-36 (1991) [hereinafter *FTC Hearings*] (statement of Hubert H. Humphrey, III, Attorney General of Minnesota); Michael Specter, *Making Sense of Labeling on Products*, N.Y. TIMES, Dec. 16, 1991, at B1; *The Green Marketing Revolution: Special Edition*, ADVERTISING AGE, Jan. 29, 1991. For a comprehensive set of suggestions on how

Common examples of such claims include touting products' biodegradability or "ozone friendliness" to persuade consumers that they are making "ecologically correct" purchases.[2] In 1985, only one half of one percent of new products introduced into the marketplace were accompanied by some form of green marketing claim.[3] By 1990, that number had risen to over nine percent,[4] and the public's thirst for such information seems far from satiated.[5]

This surge in green marketing can be attributed to the American public's mounting awareness of and concern for the environmental problems our world faces.[6] In fact, recent surveys have found that eighty-two percent of American consumers would pay at least five percent extra for "environmentally friendly" products,[7] and a staggering ninety-six percent of consumers feel they need more environmental information to make sense out of claims already being made.[8]

In response to consumers' increasing desire for environmental information, manufacturers have been quick to provide favorable environmental data on their products. Undoubtedly, many manufacturers are trying to distribute useful and accurate information through their green marketing. Unfortunately, some are not. In the race to be the "greenest" company and to reap the profits synonymous with that distinction, certain companies "exaggerate or even fabricate the environ-

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the federal government should regulate this increasingly prevalent marketing technique, see generally THE GREEN REPORT II: RECOMMENDATIONS FOR RESPONSIBLE ENVIRONMENTAL ADVERTISING v-ix (1991) [hereinafter THE GREEN REPORT II] (report of a task force of eleven state attorneys general) (available from the Minnesota Attorney General's Office).

Green claims have also been called "environmental marketing," S. 615, 102d Cong., 1st Sess. § 3(4) (1991) (The Environmental Marketing Claims Act of 1991); "green labeling," Barry Meier, *It's Green and Growing Fast, But Is It Good for the Earth?*, N.Y. TIMES, Apr. 21, 1990, Consumer's World section at 48; and "environmental labeling," Jonathan Schorsch, *It's Not Easy Being Green: Can Our Economy Come Clean?*, COUNCIL ON ECON. PRIORITIES RES. REP., Apr. 1990, at 1, 3.

2. For an extensive list of examples of green marketing claims, see Bristol Voss, *The Green Marketplace*, SALES & MARKETING MGMT., July 1991, at 74, 75-76.

3. *Resource Conservation and Recovery Act Amendments of 1991: Hearings on S. 976 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102d Cong., 1st Sess. pt. 2, at 3 (1991) [hereinafter *S. 976 Hearings*] (statement of Hon. Frank R. Lautenberg, U.S. Senator, discussing S. 615, The Environmental Marketing Claims Act of 1991).

4. *Id.*

5. For a discussion of the growth in the public's call for green marketing, see *Going for the Green: Taking Stock of the Green Consumer Movement*, ENVTL. ACTION, Nov./Dec. 1990, at 19, 19-20 (noting that consumers are choosing to lead more "environmentally sound lives"); Connie Koenenn, *To Market, to Market—With a Mission*, L.A. TIMES, Mar. 15, 1990, at E1 (referring to "a '90s tide of 'Green Consumers' ").

6. *See, e.g.*, U.S. ENVTL. PROTECTION AGENCY, ASSESSING THE ENVIRONMENTAL CONSUMER MARKET 1-4 (1991); *FTC Hearings*, *supra* note 1, at 9 (statement of F. Henry Habicht, II, Deputy Administrator of the Environmental Protection Agency).

7. Gary Levin, *Consumers Turning Green: JWT Survey*, ADVERTISING AGE, Nov. 12, 1990, at 74 (citing Greenwatch survey by J. Walter Thompson Co.).

8. Judann Dagnoli, *Green Buys Taking Root*, ADVERTISING AGE, Sept. 3, 1990, at 27 (citing survey done by Joel Benson Associates for Gerstman & Myers, a package design company).

mental qualities of their goods."[9]

This deception highlights the need for effective regulation of environmental claims. However, current green marketing regulation is in disarray: there is no nationwide consensus on the best way to regulate these activities or even how to define the relevant terms.[10] Several states have adopted their own green marketing laws,[11] but no two laws are exactly alike. The federal government has yet to develop a national regulatory scheme for addressing environmental marketing claims.[12]

The lack of clearly defined national standards has left consumers uncertain about what claims to believe.[13] Less-than-honest manufacturers have the latitude to test the uncertain boundaries of existing regulations by making dubious claims.[14] Honest manufacturers, on the other hand, are left uncertain about what claims they can make, forced either to restrict severely their national environmental claims in order to comply with the most stringent state's regulations or to incur the cost of trying to comply with the divergent laws of all of the states. If manufacturers severely restrict their claims, the consumer has access to less useful information. If manufacturers try to follow all the different states' laws, it will cost them; they will have to pass those increased costs on to the

9. Roger D. Wynne, *Defining "Green": Toward Regulation of Environmental Marketing Claims,* 24 U. MICH. J.L. REF. 785, 787 (1991); *see also* Robert L. Goldemberg, *How Green Is My Product?,* DRUG & COSMETIC INDUSTRY, Mar. 1991, at 36, 36 ("Some companies, in their eagerness to make 'green' claims, come perilously close to 'deceptive intent' in labels and advertising.").

A basic example of a deceptive green claim is a label on a plastic trash bag claiming the bag is biodegradable. The bag may very well degrade within a reasonable amount of time if it is exposed to sunlight. But many, maybe even most, such trash bags will be deposited in landfills. Since these landfills lack the sunlight and microorganisms needed to efficiently degrade such plastics, degradation can take 25, 30, or possibly even 50 years. Thus, while the bag is readily "degradable" in theory, this kind of claim is almost certainly deceptive. For a specific example of such a dubious claim, see the discussion of the *Mobil* ease, *infra* notes 36-42 and accompanying text.

10. *See* Paul H. Luehr, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising,* 10 UCLA J. ENVTL. L. & POL'Y 311, 316-22 (1992) (identifying some key terms in green marketing claims and observing that there is no consensus on how to define those terms).

11. *See infra* notes 49-57 and accompanying text.

12. For discussions regarding the lack of green marketing standards, see *FTC Hearings, supra* note 1 *passim*; THE GREEN REPORT II, *supra* note 1, at 1-4; *FTC Conducts Two-Day Hearing on Need to Develop Environmental Marketing Guide,* 61 Antitrust & Trade Reg. Rep. (BNA) No. 1526, at 117 (July 25, 1991) (describing FTC hearing on the wisdom of developing nationwide uniform guidelines to regulate green marketing, and summarizing input from the federal government, the states, manufacturers and other constituencies); Wynne, *supra* note 9, at 800-03.

13. *See S. 976 Hearings, supra* note 3, at 54 (statement of Richard A. Denison, Environmental Defense Fund, citing a 1990 survey in which 89% of consumers either strongly agreed or somewhat agreed that "[t]here are so many different claims about the environmental benefits of various products that it is hard to know what to believe"); *FTC Hearings, supra* note 1, at 104-06 (statement of Walter Coddington of Persuasion Environmental Marketing, describing consumers' growing skepticism of green claims and confusion about what constitutes a valid green claim); Voss, *supra* note 2, at 74.

14. *See* Goldemberg, *supra* note 9, at 36 (discussing how some manufacturers, amidst a climate of legal uncertainty, come dangerously close to making false claims).

consumer by raising the prices of environmentally safe products. These price increases, in turn, threaten both the availability of environmentally beneficial products and the free flow of commerce across state lines.

Amidst all this uncertainty, many honest manufacturers are beginning to question the advisability of providing environmental information at all.[15] But if this information is not provided, consumers will be less knowledgeable about the range of products from which they may choose. Moreover, as consumers' ability to identify environmentally safe products decreases, the consumption and, in turn, the availability of such products may decrease.

These problems with current green marketing regulation have led to widespread calls for reform.[16] Academics,[17] industry representatives,[18] and government officials[19] have all recognized that the current state of green marketing regulation is in desperate need of change. As a top official at the Environmental Defense Fund stated, "[b]usiness, government, consumer and environmental groups have all acknowledged that a major obstacle to responsible use of environmental claims is the absence of clear, specific definitions for key terms"[20] such as "degradable" and "recyclable."[21]

This Comment argues that to remedy these problems, uniform nationwide regulation of green marketing is necessary. Although states should play a role in devising a regulatory scheme, federal preemption[22]

15. *See FTC Hearings, supra* note 1, at 71-72 (statement of James H. Skiles, Cosmetic, Toiletry, and Fragrance Association); Jennifer Lawrence, *Mobil,* ADVERTISING AGE, Jan. 29, 1991, at 12, 13 (discussing Mobil's reaction to lack of clarity in regulation of biodegradability claims); Jennifer Lawrence & Steven W. Colford, *Green Guidelines Are the Next Step,* ADVERTISING AGE, Jan. 29, 1991, at 28, 30 (observing that some companies, including Dow Chemical, have curtailed environmental claims in response to actions taken against Mobil).

16. *See FTC Hearings, supra* note 1 *passim;* THE GREEN REPORT II, *supra* note 1 at 1-2; Specter, *supra* note 1, at B1; Wynne, *supra* note 9, at 803-04.

This Comment will not focus on the general advisability of regulating product marketing since many commentators have ably discussed that topic. For purposes of this Comment, I assume that such regulation will continue and focus on how best to structure it. However, for a thought-provoking debate on whether regulation is desirable at all, see GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (1975).

For a discussion of private "environmental seal" programs which certify products' environmental attributes, see Wynne, *supra* note 9, at 818-20. Such private programs could be used to limit or augment government regulation in this area.

17. *See, e.g.,* Wynne, *supra* note 9, at 803-13.

18. *See, e.g., S. 976 Hearings, supra* note 3, at 20 (statement of Rajeev G. Bal, President of Webster Industries).

19. *See, e.g., FTC Hearings, supra* note 1, at 16 (statement of Clayton S. Fong, Deputy Director, U.S. Office of Consumer Affairs).

20. *S. 976 Hearings, supra* note 3, at 55 (statement of Richard A. Denison, Senior Scientist of the Environmental Defense Fund).

21. Although this Comment discusses competing regulatory theories, it does not address in depth what the actual regulations or definitions in the area of green marketing should be. Instead, it focuses primarily on who should regulate green marketing claims.

22. Through its enumerated powers, Congress may legislate in such a way as to "preempt" state laws, i.e., to announce one uniform law to be followed throughout the country. The Supremacy

is ultimately necessary to ensure that the law in this area is both clear and consistent. Part II articulates the interests at stake in green marketing regulation. Part III highlights the deficiencies in current green marketing regulation. Section III.A demonstrates that state regulation of green marketing claims is fundamentally inappropriate because it leads to nonuniform standards nationwide. Section III.B shows that current federal laws governing environmental claims are deficient because interpretation of these laws depends primarily on case-by-case adjudication and because the laws do not address the problem of nonuniformity created by independent state regulation. Part IV justifies federal preemption of green marketing, explaining the purposes served by federal preemption in general. It then establishes that federal preemption of green marketing in particular is necessary by illustrating that the interest in nationwide uniformity outweighs competing concerns. This Part also shows that less drastic alternatives will not adequately ensure the requisite uniformity. Part V concludes with a proposed preemption framework that gives the Environmental Protection Agency primary responsibility for setting and enforcing environmental marketing standards but still allows the states an active role in developing and implementing new federal laws in this area.

II

INTERESTS AT STAKE IN GREEN MARKETING REGULATION

Before examining the specific problems with green marketing regulation and the solutions to those problems, it is important to identify the different competing interests sought to be protected by such regulation. First, consumers should receive the information they desire about products' environmental impacts. A well-functioning free market requires

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Clause guarantees that state laws in conflict with such a federal law will be preempted. The areas of green marketing regulation would almost certainly affect interstate commerce within the broad meaning of the Commerce Clause. Thus, Congress has the power to preempt state laws that regulate green marketing. The question then is not whether Congress can preempt state laws dealing with green marketing, but whether it *should* do so. For a discussion of the Commerce Clause and preemption doctrines, see Susan Bartlett Foote, *SMR Forum: Changing Regulatory Strategies—What Managers Should Know About Federal Preemption,* SLOAN MGMT. REV. (MIT), Fall 1984, at 69, 69-70 [hereinafter *Regulatory Strategies*]; Paul Wolfson, *Preemption and Federalism: The Missing Link,* 16 HASTINGS CONST. L.Q. 69 (1988).

Congress can also grant an agency power to promulgate preemptive laws, either at the time the agency is created or at some later point. For instance, the FTC was not given preemptive power when it was established. Therefore, the FTC can pass a preemptive administrative rule only if Congress passes a law expressly preempting a given area of regulation and giving the FTC power to replace the state laws that have been preempted. For a discussion of preemption by administrative agencies, see Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation,* 46 U. PITT. L. REV. 607 (1985); see also Susan Bartlett Foote, *Administrative Preemption: An Experiment in Regulatory Federalism,* 70 VA. L. REV. 1429 (1984) [hereinafter *Administrative Preemption*] (proposing a model for administrative preemption in the health and safety field).

that consumers possess adequate information about a given product when making a purchase.[23] While the problem of fraudulent claims could be cured easily by banning all green marketing, such drastic action would deny consumers important information.

Second, only truthful green claims should be made. If manufacturers are allowed to make unsubstantiated green claims, they will unfairly profit by playing on consumers' environmental sympathies. Honest manufacturers who make legitimate green claims will suffer because their advertising may be indistinguishable from their competitors' deceptive claims, leading to less informed or misinformed purchases. Some consumers may eventually become jaded and ignore all green claims, including those which are true.[24]

Third, environmentally beneficial products should be introduced into the marketplace to protect the environment.[25] Such products also benefit individual consumers who prefer environmentally safe products by giving them a wider range of favorable purchase options. Therefore, encouraging the development and sale of products that contain "green attributes" is a legitimate state interest.

Fourth, the free flow of commerce among the states should be maintained. As highlighted by a long history of cases involving the Commerce Clause,[26] one important role of the federal government is to ensure that individual state regulations do not detrimentally fragment our national markets. Open interstate markets benefit consumers in two ways: by giving them access to as many products as possible; and by keeping prices lower than they would be if there were multiple state regulations. When producers must comply with many different state laws, or even just a few laws with heavy requirements, manufacturing costs are likely to increase because economies of scale cannot be reached or

23. *See, e.g.*, Earl W. Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269, 1269 (1966) ("The success of an economic democracy, no less than that of a political democracy, depends upon informed, intelligent choice. Thus, the widespread dissemination of information with respect to alternatives is imperative; otherwise, choices would be made in a vacuum and would becomes meaningless, if not plainly capricious.").

24. *See* Luehr, *supra* note 10, at 325.

25. There is an intense debate over how helpful "green" products are to the environment. *See* THE GREEN REPORT II, *supra* note 1, at 21-22 (discussing whether degradation of products helps or hurts the environment); Luehr, *supra* note 10, at 320-22 (noting that the use of either cloth or disposable diapers can adversely affect the environment in different ways); Meier, *supra* note 1, at 48 (noting that consumption of either styrofoam or paper cups can have adverse effects on the environment); *cf.* Wynne, *supra* note 9, at 820 (acknowledging but rejecting the argument that the best way to protect the environment might be to consume *less* rather than *differently*). This Comment assumes that changes in products will at least help minimize some damage to the environment.

26. *See, e.g.*, New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

because companies must research multiple compliance requirements.[27] While some of these costs may be absorbed by manufacturers accepting lower profits, many costs are likely to be passed on to consumers.

While these interests are to some extent interdependent, they may, at times, conflict. For example, there may be a tension between the goals of maximizing information distribution and restricting the distribution to only truthful information. A state may want to encourage companies to provide environmental information so that consumers can make informed choices. However, if the definition of "deceptive" is vague and the penalties for making deceptive claims are severe, companies may be deterred from providing any environmental information: they would not want to incur the penalties but lack the knowledge to conform their claims to the law.

Similarly, the goal of ensuring truth may conflict with the goal of maximizing development and marketing of environmentally safe products. If green marketing is banned or severely curtailed to prevent consumers from being misled, green products may not be produced at all. If "green-seeking" consumers are not told which products are green, they will not be willing to pay more for them. Thus, manufacturers will not be able to profit from investing in the research and development of "greener" products. Under this scenario, both the environment and consumers stand to lose.[28]

Despite these conflicts, regulation, in and of itself, can still help the development and marketing of green products. The absence of regulation can prevent the introduction of environmentally safe products as

27. *See infra* notes 68-75 and accompanying text.

28. *See FTC Hearings, supra* note 1, at 225-28 (statement of L. Ross Love, The Procter & Gamble Company, noting the effect on development of environmentally safe products if environmental claims are made impractical by regulations that differ from state to state); *see also* John C. Phillips, Note, *Sui Generis Intellectual Property Protection For Computer Software,* 60 GEO. WASH. L. REV. 997, 1006-07 (1992) (discussing how, in the intellectual property area, development and innovation of products will occur only if manufacturers can recover the expenses they put into development in the form of higher profits).

Some might argue that the disincentive to manufacture environmentally safe products is mitigated if particular manufacturers are reputed to be environmentally conscious, and consumers know that these manufacturers will produce environmentally safe products, regardless of environmental marketing regulation. Moreover, a consumer might be able to identify environmentally safe products if they are priced higher than non-environmentally safe products. However, this argument is flawed. The proposition that consumers are aware of manufacturers' policies regarding the environmental safety of their products assumes that consumers have more access to information and greater incentives to investigate manufacturers' practices than they realistically do. Furthermore, price differentials alone are not a reliable clue to the environmental safety of products. If some consumers base purchase decisions on price differences on the assumption that these differences indicate environmental safety, "non-green" companies may simply raise their prices above the ordinary market level to try to capture these "price informed" consumers. Consumers then face the same problem: they cannot distinguish environmentally safe and unsafe products and will therefore buy the products that are sold at the regular market price rather than the products that are, for no apparent reason, more expensive.

much as extremely restrictive regulation. Since there are no direct costs to making dishonest claims in an unregulated or minimally regulated market, and since many consumers are willing to pay more for products that are marketed as environmentally safe, dishonest manufacturers will have an incentive to make false environmental claims. The expected profits will be greater than the costs of getting caught.

As this occurs, honest manufacturers will have less incentive to invest in research and development of green products because they cannot capture the true profits which should come from developing "better" products.[29] If manufacturers incur the cost of developing legitimate environmentally safe products and honestly claim that the products are safe, they cannot pass the costs of production on to the consumer because the consumer, unable to distinguish honest from fraudulent claims, will simply purchase the cheapest product making a green claim.[30]

Finally, the goals of facilitating interstate commerce and maximizing truth may conflict. Protection of consumers is traditionally regarded as a state interest.[31] Federal regulation may undermine a state's ability to adequately protect its citizens from fraudulent green claims—especially if federal regulations are less stringent than state regulations.[32]

These are the main interests and tensions that should be considered when analyzing how to regulate green marketing. Some well-placed line must be drawn between a total ban on green marketing and no regulation at all in order to ensure that manufacturers are given adequate incentives to develop green products. The need to guard against fraudulent claims must be balanced against the competing goal of encouraging the manufacture of environmentally conscious products. Moreover, the appropriate roles of the state and federal governments in balancing these concerns must be weighed.

29. *See* Phillips, *supra* note 28, at 1006-07.

30. *See* JAMES R. BETTMAN, AN INFORMATION PROCESSING THEORY OF CONSUMER CHOICE 221 (1979) (observing that when products are hard to differentiate according to other criteria, price becomes the overriding factor in consumer purchasing decisions).

31. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978) (indicating that states have a great interest in protecting consumers).

32. States might feel that federal regulators are being unduly deferential to manufacturers' desires for an unimpeded market. Alternatively, states may feel that federal regulators are truly trying to protect the national markets for consumers but that the federal regulatory scheme is simply too weak. In either case, a tension can exist between protecting a free-flowing national market and assuring that fraudulent information does not reach consumers.

III
DEFICIENCIES IN EXISTING REGULATION OF ENVIRONMENTAL MARKETING

A. Inappropriateness of Relying on State Law to Regulate Environmental Marketing

Since protection of consumers is an area traditionally within the scope of state control, all states have laws that regulate environmental claims by product manufacturers. Such regulation can take place either directly through green marketing statutes or indirectly through general deceptive advertising laws. Nevertheless, the existing laws are inadequate. Indirect regulation is undesirable because it does not give manufacturers sufficiently clear guidance as to which kinds of claims are illegal.[33] Direct regulation is ultimately unworkable because each state has different standards and consequently the approach to green marketing nationwide is not uniform. This lack of uniformity carries with it unacceptable costs to manufacturers and consumers. Because this lack of uniformity is inherent to a system of state-by-state regulation, state law is a fundamentally improper vehicle for environmental claim regulation.[34]

1. State Deceptive Advertising Laws: The Problem of Ambiguity

Every state has its own deceptive advertising statute which can be invoked against a manufacturer making a false or misleading claim about a product, unless the area in question is specifically preempted by federal law.[35] But these state laws are not the appropriate devices for regulating environmental claims. The statutes and judicial interpretations of the statutes are often too vague to be useful to manufacturers, and state prosecutors are seldom successful in using them to regulate environmental claims.

For example, seven state attorneys general recently brought suits in each of their states against the Mobil Corporation.[36] Mobil had made claims that its Hefty trash bags were degradable and that the bags demonstrated Mobil's "commitment to a better environment."[37] Because seventy percent of the bags wound up in landfills where they took several years to degrade, the states charged Mobil with deceptive advertising.[38] Mobil settled the suits, agreeing to discontinue these green

33. *See infra* Part III.A.1.

34. *See infra* Part III.A.2.

35. For an explanation and examples of administrative preemption of state health and safety laws, see Foote, *Administrative Preemption*, *supra* note 22.

36. Lawrence, *supra* note 15, at 13. California, Massachusetts, Minnesota, New York, Texas, Washington, and Wisconsin were the states that brought suits.

37. Wynne, *supra* note 9, at 799.

38. Lawrence, *supra* note 15, at 13.

claims and to pay money to each state.[39]

The attorneys general cited the Mobil incident as an example of how state deceptive advertising laws can be used effectively to regulate green marketing claims.[40] But what the case really shows is just how inefficient such laws are at regulating environmental marketing. Since state deceptive advertising laws are phrased in general terms,[41] case-by-case adjudication is necessary to give content to the language and to establish clear guidelines for manufacturers. Manufacturers like Mobil have little guidance about what the broad statutory language means until they are charged with violating that language.

Further, adjudication yields standards that are sometimes as vague as the statutory language itself. In Mobil's case, neither the state statutes nor the case settlements indicate how Mobil might have changed its claims to meet with the states' approval.[42] More importantly, the suits did little to clarify the standards for manufacturers wanting to make green claims in the future.

Because of these deficiencies, few suits have been brought under general state deceptive advertising laws; the Mobil situation remains the exception rather than the rule.[43] Nor does it seem likely that enforcement of these general deceptive advertising laws will increase. First, there has been a dearth of cases since the Mobil suit. Second, there has been almost no discussion in the academic literature or in legislative or administrative hearings suggesting that general state deceptive advertising laws can be refined in order to form the basis of successful green marketing prosecutions. Third, the discussion of the subject by state officials has focused on the need to develop specific green marketing statutes.[44] The enactment of green marketing laws[45] further evinces the trend toward more specific laws and away from relying on general deceptive advertising laws.

This trend is not surprising given states' limited resources to prose-

39. *See* Wynne *supra* note 9, at 799 n.88; *see also* Allanna Sullivan, *Mobil Settles Suit Over Claims Made for Its Hefty Bags,* WALL ST. J., June 28, 1991, at A4 (discussing the terms of the settlement of the *Mobil* case, including Mobil's contention that the money it paid was a "donation" rather than a "fine").

40. *See FTC Hearings, supra* note 1, at 32-33 (statement of Hubert H. Humphrey III, Attorney General of Minnesota).

41. *See, e.g.,* CAL. BUS. & PROF. CODE § 17500 (West 1987); MINN STAT. ANN. § 325f.67 (West 1981); N.Y. GEN. BUS. LAW § 350 (McKinney 1988); TEX. BUS. & COM. CODE ANN. § 17.12 (West 1987).

42. *Cf.* Sullivan, *supra* note 39, at A4 (noting that a Mobil spokesperson said the company offered the donation in order "to provide funding for a joint effort with the government to develop guidelines and standards for degradable products").

43. *See* Specter, *supra* note 1, at B1 ("Neither the federal government nor many states have taken strong action to dissipate the emerging babel in the market place.").

44. *See, e.g.,* THE GREEN REPORT II, *supra* note 1.

45. *See infra* notes 49-57 and accompanying text.

cute marketing violations.[46] Since general deceptive advertising laws provide no concrete standards for the future, prosecutors taking on green marketing claims are forced to work in a technically complicated area with little guidance. They must expend a lot of time to learn the area prior to prosecuting such claims, and since prosecutors have little precedent upon which to base their cases, the chances of success are uncertain. Prosecutors are likely to become frustrated and focus their limited resources on other areas.[47] Relying on deceptive advertising laws, then, yields haphazard enforcement and unclear standards, which in turn undermine the interests sought to be protected by green marketing regulation.

Moreover, it seems likely that laws with more concrete definitions of relevant green marketing terms will yield increased enforcement. The state attorneys general who wrote the *Green Report II* and the state officials who testified at the FTC Hearings identified the lack of concrete green marketing definitions as the major problem in environmental marketing regulation.[48] While none of these officials explicitly stated that enforcement would increase if such definitions were promulgated, the inference is clear: once officials have something to "sink their teeth into," they are more likely to start policing the area more vigorously.

Thus, the path toward more effective green marketing regulation must begin with the formulation of specific standards—a task some states have attempted to undertake.

2. *State Green Marketing Laws: The Costs of Nonuniformity*

Calls for a revamped system to regulate green marketing claims have not gone unnoticed. Recently, some states have begun to develop specific green marketing laws. Unlike the general deceptive advertising statutes, these new laws contain well-defined environmental terms. California,[49] Rhode Island,[50] Indiana,[51] and Wisconsin[52] have already passed laws in this area. Lawmakers in New Jersey,[53] Pennsylvania,[54]

46. *See* Mark S. Pollock, *Criminal Enforcement of Environmental Laws: Prosecution of Environmental Crime*, 22 ENVTL. L. 1405, 1405-06 (1992) (discussing how the limited resources of states hinder their ability to bring suits against all environmental law violators).

47. *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 474-78 (2d ed. 1977) (discussing the logical decisionmaking process of prosecutors who have limited resources).

48. *See* THE GREEN REPORT II, *supra* note 1, at 1-3; *FTC Hearings*, *supra* note 1, at 7-66.

49. CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1993).

50. R.I. GEN. LAWS §§ 23-18.14-2 to .14-3 (Supp. 1991).

51. IND. CODE ANN. § 24-5-17 (West Supp. 1992).

52. WIS. CODE ANN. § 100.295 (West Supp. 1992).

53. A. 4767, 204th Leg., 2d Reg. Sess. (N.J. 1990).

54. S. 920, 175th Gen. Assembly, Reg. Sess. (Pa. 1991).

Massachusetts,[55] New York[56] and Maryland[57] are considering similar legislation. Each law or bill specifically defines what constitutes a legitimate environmental claim.

Unfortunately, while some green marketing terms have been defined similarly by various states,[58] many states' definitions differ. For example, manufacturers attempting to market a "biodegradable" product nationally face several conflicting standards. In Pennsylvania, a manufacturer must show only that the product will *eventually* break down naturally into nonharmful material.[59] In California, a manufacturer must prove that the product will decompose naturally *within one year* into nontoxic soil, water or carbon dioxide.[60] Rhode Island carries regulation to an extreme, banning all use of the term "biodegradable" in product advertising.[61] As this brief survey of states reveals, the definitions fall far short of consensus.

Similarly, states do not uniformly define the term "recyclable." All state statutes seem to contemplate that the used materials should be returned to the economic mainstream as useable raw materials. However, states disagree on the local infrastructure that must exist to support a "recyclable" claim. For example, California will allow a "recyclable" claim only if the product may be "conveniently recycled . . . in every county in California with a population over 300,000 persons."[62] Indiana requires only that an "identifiable" recycling location exist before the claim can be made.[63] Pennsylvania's proposed legislation states only that the material must be capable of re-use "through a process that is demonstrated to be technically and economically feasible."[64]

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55. H. 5202, 177th Gen. Court, Reg. Sess. (Mass. 1991).

56. S. 2499, 214th Gen. Assembly, 2d Reg. Sess. (N.Y. 1991).

57. S. 273, 398th Leg. Sess., Reg. Sess. (Md. 1992).

58. For an example of states using similar meanings to define terms, compare the definitions of biodegradable used by California and New Jersey. CAL. BUS. & PROF CODE § 17508.5(b) (West Supp. 1993); A. 4767, 204th Leg., 2d Reg. Sess. § 1(b) (N.J. 1990). But note that in California, legislation has been introduced in the Assembly to alter this definition. *See* A. 2496, 1991-92 Gen. Assembly, Reg. Sess. (Cal. 1992).

59. S. 920, 175th Gen. Assembly, Reg. Sess. § 102 (Pa. 1991). The bill pending in Pennsylvania defines biodegradable as "[t]he ability of a material to degrade through a biological process, or the microbial action of fungi and bacteria upon natural materials such as cornstarch into a residue or by-product that is not considered harmful . . . to the environment or human health." *Id.*

60. CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1993). To be biodegradable, a material must have the "proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide." *Id.*

61. R.I. GEN. LAWS § 23-18.14-3 (Supp. 1991). The Rhode Island statute also bans the use of "degradable," "photodegradable," "environmentally safe," or "any other such terms as to imply any of the above." *Id.* Legislation banning the use of these terms has also been introduced in Maryland. S. 273, 398th Leg. Sess., Reg. Sess., § 1(b) (Md. 1992).

62. CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1993). "Recycle" is defined in CAL. PUB. RES. CODE § 40180 (West Supp. 1993).

63. IND. CODE ANN. § 24-5-17-9 (West Supp. 1992).

64. S. 920, 175th Gen. Assembly, Reg. Sess. § 102 (Pa. 1991).

"Biodegradable" and "recyclable" are just two of the more common terms found in current green marketing legislation. Terms such as "ozone friendly," "environmentally friendly," "compostable," and "photodegradable" appear in many of these statutes as well. Although states agree on the definitions of some of these terms, other terms remain disparately defined or completely undefined.[65] For example, Rhode Island has decided not to define some terms at all and has banned substantive green claims.[66] Maryland may soon reach the same decision.[67]

This lack of uniformity is unacceptable. Without uniform standards, the costs involved in marketing products to different states can make it virtually impossible for honest manufacturers to provide environmental information.[68] One such cost is the substantial burden of complying with conflicting state green marketing laws. One commentator discussing food labeling, an analogous situation, stated that the costs to manufacturers of complying with differing labeling requirements "are literally incalculable."[69] There can be direct costs like printing new labels for each different state, and indirect costs like maintaining two or more product inventories and imposing separate distribution and record-keeping requirements for each state.[70]

Another cost involves monitoring up to fifty independent standards. Without a uniform law, manufacturers must spend time and money staying abreast of each state's changing laws.[71] For larger companies, this involves creating or expanding legislative monitoring programs.[72] Smaller companies may lack the resources necessary to monitor up to fifty possible variations in green marketing regulation. These smaller

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65. *See, e.g., supra* notes 49-57.

66. *See* R.I. GEN. LAWS § 23-18.14-3 (Supp. 1991).

67. *See* S. 273, 398th Leg. Sess., Reg. Sess. § 1(b) (Md. 1992).

68. *See, e.g., FTC Hearings, supra* note 1, at 80 (statement of Robert Gal, Food Marketing Institute), 215 (statement of Theodore Brenner, The Soap and Detergent Association), 221 (statement of Peter G. Mayberry, INDA, Association of the Nonwoven Fabrics Industry), 229 (statement of L. Ross Love, The Proctor & Gamble Company), 254 (statement of Red Cavaney, American Paper Institute); *ABA Seminar Explores Regulation of Environmental Safety Claims,* 61 Antitrust & Trade Reg. Rep. (BNA) No. 1537, at 459 (Oct. 17, 1991) ("[T]he current 'Tower of Babel' situation is resulting in a 'chilling effect' on the submission of information") (quoting, in part, the statement of William Randolph Smith); Specter, *supra* note 1, at B7 (" 'In a national market you can't put different labels on each product in every state. It would cost a fortune and it certainly wouldn't help shoppers much either.' ") (quoting Kathleen Grant, Environmental Issues Consultant to the National Food Processors Association).

69. Richard L. Frank, *Food Labeling—The Case for National Uniformity,* 1979 FOOD DRUG COSM. L.J. 512, 512.

70. *Id.*

71. *See* JAMES GREENE, REGULATORY PROBLEMS AND REGULATORY REFORM: THE PERCEPTIONS OF BUSINESS 8 (1980) (citing one business person's complaints about the "headaches and extra man-hours" his firm faces trying to know and comply with building standards that vary from state to state).

72. *See, e.g., FTC Hearings, supra* note 1, at 353 (statement of Dewitt F. Helm, Jr., Association of National Advertisers, Inc.).

companies may be unable to provide any environmental information.[73]

A third cost is the elimination of economies of scale. In determining when preemption might be necessary, Professor Susan Bartlett Foote noted that "[i]n essence, regulations adopted by individual states are inappropriate when they impose costs on manufacturers by interfering with economies of scale that would otherwise be available in the production of nationally distributed goods."[74] Foote cites state labeling and packaging requirements as examples of state laws that might in some circumstances sufficiently impede the flow of interstate commerce to justify federal preemption.[75]

As the costs associated with green marketing rise, honest manufacturers may simply cease providing environmental information. One manufacturer testified before the FTC that "[t]he Balkanization of environmental regulation effectively bars national manufacturers from making truthful, beneficial claims about the environmental attributes of their products and packaging. These laws deny consumers truthful, educational and valuable environmental information."[76] According to a trade association representative, "[i]f, as seems likely, conflicting local and state regulations silence national marketers with respect to environmental claims, the ability of consumers to make [environmentally beneficial] choices . . . will be seriously impeded."[77]

Moreover, if manufacturers stop making green claims, consumers may lose more than environmental information. Manufacturers will undoubtedly also cut back on research and development of environmentally safe products.[78] Green products are more profitable, after all, if manufacturers can profit from consumers' environmental sympathies. Fewer environmentally safe products on the market deprive the consumer of desirable purchase alternatives.

Presumably, the manufacturer can try to avoid these costs by simply adjusting its marketing to match the most stringent state's laws. But the strictest state laws severely curtail all green claims. Indeed, Rhode Island bans such claims outright in many cases. Therefore, adjusting to comply with the most stringent state's requirements is functionally the same as not providing environmental information at all, and therefore carries with it all of the attendant problems.[79]

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73. The problems encountered by small businesses in trying to keep up and comply with multiple state green marketing laws are discussed in *FTC Hearings, supra* note 1, at 202 (statement of Hal Lightman, Independent Cosmetic Manufacturers and Distributors).

74. Susan Bartlett Foote, *Beyond the Politics of Federalism: An Alternative Model*, 1 YALE J. ON REG. 217, 220 (1984).

75. *Id.* at 220-21.

76. *FTC Hearings, supra* note 1, at 312 (statement of Melinda Sweet, Lever Brothers Company).

77. *Id.* at 218 (statement of Theodore Brenner, The Soap and Detergent Ass'n).

78. *See supra* notes 28-30 and accompanying text; *see also* Luehr, *supra* note 10, at 324-25.

79. Some might argue that if Rhode Island's statute truly inhibits interstate commerce, it

If manufacturers do attempt to comply with divergent state laws and continue to make green claims, the consumer may still be harmed. If a manufacturer is honest and decides to incur the costs, it will undoubtedly pass those costs on to the consumer.[80] Higher prices harm the consumer, undermine the free flow of goods across state lines, and threaten the viability of environmentally safe products in the market. Though consumers have shown a willingness to pay higher prices for environmentally safe products,[81] there is a point at which prices are too high and consumers will no longer be willing to pay.[82]

If a manufacturer is dishonest and gives false or misleading information, the consumer may not know what to believe. Since standards vary across states, it may be difficult for consumers to figure out the mutations among state legal standards and, therefore, whether the applicable state law has screened out the untrue claims. This problem may be exacerbated when consumers regularly shop in multiple states. Certain heavily-regulated claims in one state may be minimally regulated in an adjoining state. Consumers might be left trying to figure out whether a given environmental claim is false according to the local legal standard.

State law, then, is fundamentally inappropriate as a device to regulate environmental claims. States have different interests and their environmental policies, therefore, will inevitably diverge. A nationwide policy on green marketing is needed. This policy should certainly be informed in part by the states' various interests—especially states' policy judgments on how best to protect local consumers and stimulate local manufacturing. But to eliminate the costs of nonuniformity, the regulatory framework must ultimately be developed by the federal government.

B. Inadequacy of Current Federal Regulation

Federal law is the appropriate device for regulating green marketing. But the current federal system of regulation is inadequate. Relying heavily on case-by-case adjudication, it often provides little more guidance to manufacturers than state deceptive advertising laws. Moreover, since federal law currently allows the states substantial freedom to set

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would be invalidated by a court under the Dormant Commerce Clause, even without a preemptive federal law. Though such an analysis may be correct, it should not lead one to believe that such a federal preemptive law is, therefore, unnecessary. To the contrary, such a law will save courts from having to deal with the multiplicity of overly restrictive state green marketing laws which are starting to emerge. Though each restrictive state law could ultimately be invalidated, legislative and judicial efficiency would be best served if one preemptive federal law were passed.

80. *See* POSNER, *supra* note 47, at 55-60, 136-43.

81. *See supra* note 7 and accompanying text.

82. *See* POSNER, *supra* note 47, at 3-7 (explaining that for virtually all products—except those with completely inelastic demand curves, which it can be assumed that green marketing products are not among—there is a point where price will become so high as to make demand nonexistent).

their own standards, it does not solve the problem of nonuniformity among state laws.

1. *The Deceptive Advertising Clause of the Federal Trade Commission Act: Case-by-Case Enforcement and Ambiguity*

Federal regulation of green marketing is currently controlled by the deceptive advertising clause of the Federal Trade Commission Act (FTC Act).[83] Because no concrete definition of "deceptive practices" was included in the FTC Act,[84] the FTC was left to develop the specific contours of this standard through case-by-case adjudication. Not surprisingly, since 1938 changing times and political influences have resulted in several fluctuations of the "deceptive practices" standard.[85]

Originally, the FTC considered a claim "deceptive" if it had a "tendency or capacity" to mislead "the ignorant, the unthinking and the credulous."[86] In *In re Cliffdale Assocs.*,[87] the FTC modified the standard to make a representation, omission, or practice deceptive only if it was material, which was defined as "likely to affect [consumers'] choice of, or conduct regarding, a product"[88] and "likely to mislead consumers acting reasonably under the circumstances."[89] Although many commentators have attacked this change as capricious,[90] the FTC has consistently applied this new standard since *Cliffdale*.[91]

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83. 15 U.S.C. §§ 41-77 (1988 & Supp. III 1991) (deceptive advertising clause found at §§ 52-55). For a discussion of the FTC Act and its historical background, see PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 59-60 (4th ed. 1988). When originally enacted in 1914, the FTC Act was merely supposed to supplement the Sherman and Clayton Antitrust Acts. *Id.* In 1938, however, Congress amended the FTC Act to include the deceptive advertising clause. This was hailed as a landmark victory for consumer protection because it allowed the FTC to "center its attention on the direct *protection of the consumer* where formerly it could protect him only indirectly through the protection of the competitor." Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 161 (3d Cir. 1941).

84. *See* S. REP. No. 221, 75th Cong., 1st Sess. 2 (1937).

85. For a discussion of some of these changes and the accompanying problems, see Roger E. Schechter, *The Death of the Gullible Consumer: Towards a More Sensible Definition of Deception at the FTC*, 1989 U. ILL. L. REV. 571, 574-76 (1989).

86. FTC v. Cinderella Career & Finishing Schools, 404 F.2d 1308, 1314 (D.C. Cir. 1968) (employing the "ignorant, unthinking and the credulous" language); *see also* Standard Oil Co. v. FTC, 577 F.2d 653, 657 (9th Cir. 1978) (applying the "tendency or capacity" standard); U.S. v. Reader's Digest Ass'n, 464 F. Supp. 1037, 1054 (D. Del. 1978) (combining the "tendency" or "capacity" language and the "ignorant and unthinking and the credulous" language).

87. 103 F.T.C. 110 (1984).

88. *Id.* at 165.

89. *Id.*

90. *See, e.g.*, Patricia P. Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849, 850-51 (1984) (written by the two FTC Commissioners who dissented in the *Cliffdale* case, noting that "[t]he novel phrasing of this standard constitutes a departure from nearly fifty years of essentially consistent federal jurisprudence and raises many questions and much uncertainty about the Commission's ability to prevent certain 'deceptive' trade practices").

91. *See, e.g.*, Figgie Int'l, Inc., 107 F.T.C. 313, 373-74 (1986); International Harvester Co., 104 F.T.C. 949, 1056 (1984); Thompson Medical Co., 104 F.T.C. 648, 788 (1984).

While the *Cliffdale* standard's generality and flexibility may be assets in other contexts,[92] they are drawbacks in green marketing regulation. Whereas simply proscribing any "deceptive" action can effectively regulate false claims in most advertising contexts, *prescription*, not proscription, is the key to effective regulation of green claims. This is true because of the very specific and detailed nature of the terms comprising green claims and because the terms have been previously interpreted in so many different ways. Absent uniform definitions of green marketing terms, compliance with a generic deceptive advertising clause will simply be a guessing game for manufacturers. They will be unaware which of the multitude of proffered definitions will be used to enforce the general deceptive advertising standard. Ultimately, if they elect to make green claims at all,[93] manufacturers must have concrete definitions before they can confidently avoid being deceptive.[94]

The *Cliffdale* standard, in theory, is broad enough to invalidate many current green claims. Although many people like to consider themselves "environmentalists," most have at best only a perfunctory understanding of environmental claims.[95] Consequently, claims exaggerating or slightly misstating a product's environmental characteristics quite possibly will affect their purchasing decisions and therefore can be considered deceptive under the FTC standard. However, since the outer boundaries of the standard are completely unclear, knowing that the standard is broad is of little help to manufacturers trying to stay within the law.

Theoretically, the FTC's case-by-case method of prosecution should develop reliable green marketing standards over time. However, there are three problems with relying on FTC adjudication to solve the current confusion. First, case-by-case adjudication is time-consuming, especially

92. Wynne, *supra* note 9, at 790-91 ("The FTC Act and the state consumer protection laws that emulate it are 'useful for attacking a wide range of deceptive practices precisely because [such laws] are so general and can be adapted to address a broad range of conduct.' ") (quoting a letter from Julie A. Vergeront, Special Assistant Attorney General, Minnesota Attorney General's Office, Consumer Division, to Roger D. Wynne (Oct. 11, 1990)).

93. Some might argue that not having green claims at all really is the best policy. Rhode Island has embraced this argument and outlawed printing the terms "biodegradable" and "environmentally safe" on retail packaging. *See supra* note 50 and accompanying text. However, outlawing all green claims would be, as the old adage goes, like cutting off the head to save the foot. Many people want this type of environmental information. If regulated properly, green marketing can benefit consumers, manufacturers, and the environment.

94. *See FTC Hearings*, *supra* note 1, at 72 (statement of James H. Skiles, Cosmetic, Toiletry and Fragrance Association). Recently, the FTC promulgated guidelines meant to help industry determine what the FTC and other organizations consider valid environmental claims. *See Agency Rulings: FTC Issues Voluntary Green Labeling Guidelines*, 61 U.S.L.W. 2078 (Aug. 11, 1992). As discussed *infra* notes 117-25 and accompanying text, however, these guidelines really will do little to help alleviate the confusion surrounding current green marketing regulation and reliance on them as a standard measure for evaluating green marketing claims is misplaced.

95. *See, e.g.*, *FTC Hearings*, *supra* note 1, at 107-11 (statement of Brian Perkis, George Washington University); Wynne, *supra* note 9, at 793.

when developing precise technical definitions.[96] Consistent regulation of green marketing is needed now, not at some point in the "foreseeable future." There is no telling how long it might take the FTC to establish widely accepted standards via its case-by-case approach.

Second, there is ample evidence that the case-by-case approach is ineffective. One need only look at how long it has taken the FTC to establish a clear definition of "deceptive" through the case-by-case method.[97] Even now, decades after the FTC started trying to establish a workable "deception" standard, the definition employed has been subject to criticism.[98]

One reason the law has developed so slowly is that the FTC brings very few prosecutions to enforce the standards.[99] Since the FTC began investigating alleged fraudulent green claims in 1989, it has filed only nine complaints against marketers for making false or misleading environmental claims.[100] It will certainly take more than a handful of cases to develop the many technical definitions necessary to establish uniform green marketing standards. Although some recent efforts by the FTC, such as hearings specifically geared toward green marketing regulation, may imply that the FTC wishes to increase enforcement efforts in this area, the number of enforcement actions remains extremely low. The

96. For a discussion of how long it took the FTC to develop nutritional labeling standards, see *infra* notes 107-16 and accompanying text.

97. *See supra* notes 84-91 and accompanying text.

98. *See supra* note 90 and accompanying text.

99. Enforcement under the FTC Act's deceptive advertising clause has been limited and haphazard even since the FTC's newly-developed definition of deceptive. *See, e.g.*, Stephen Calkins, *Counsel's Summary: The ABA Special Committee's Report on the FTC (Kirkpatrick II), in* MARKETING AND ADVERTISING REGULATION: THE FEDERAL TRADE COMMISSION IN THE 1990S 7, 9-10 (Patrick E. Murphy & William L. Wilkie eds., 1990) (discussing recommendations from the ABA Section of the Antitrust Law Special Committee to Study the Role of the FTC regarding how the FTC should handle enforcement of laws under its jurisdiction); Bruce A. Silverglade, *Comments by a Consumer Advocate at the CSPI, in* MARKETING AND ADVERTISING REGULATION, *supra* at 22, 22-23 (criticizing the recent ABA report on the relationship between state and federal enforcement of deceptive advertising laws); Wallace S. Snyder, *The FTC and Advertising Regulation, in* MARKETING AND ADVERTISING REGULATION, *supra* at 35, 35-37 (discussing the apparent weaknesses in the FTC's commitment to advertising regulation); Louis W. Stern, *The Federal Trade Commission: Going, Going, . . ., in* MARKETING AND ADVERTISING REGULATION, *supra* at 40, 40-44 (discussing apparent weaknesses of the FTC and tracing those weaknesses to the Reagan administration's policy). There is no indication that this trend of weak enforcement is about to end. *See* Linley Pearson, *Comments by a State Attorney General, in* MARKETING AND ADVERTISING REGULATION, *supra* at 31, 32-33 (discussing lack of resources as an ongoing problem plaguing the FTC); Silverglade, *supra* at 24; Steru, *supra* at 40-44.

100. *See* Perfectdata Corp., No. 922 3166, 1992 FTC LEXIS 311 (Sept. 3, 1992); Mobil Oil Corp., 5 Trade Reg. Rep. (CCH) ¶ 23,238 (July 27, 1992) (consent order); RMED Int'l, Inc., 5 Trade Reg. Rep. (CCH) ¶ 23,149 (May 14, 1992) (consent order); Tech Spray, Inc., 5 Trade Reg. Rep. (CCH) ¶ 23,125 (Mar. 25, 1992) (consent order); American Enviro Prod., 5 Trade Reg. Rep. (CCH) ¶ 23,048 (Mar. 18, 1992) (consent order); First Brands Corp., 5 Trade Reg. Rep. (CCH) ¶ 23,069 (Jan. 3, 1992) (consent order); Jerome Russell Cosmetics U.S.A., Inc., 5 Trade Reg. Rep. (CCH) ¶ 23,001 (Aug. 21, 1991) (consent order); Zipatone, Inc., 5 Trade Reg. Rep. (CCH) ¶ 22,976 (July 9, 1991) (consent order).

lack of action is seemingly caused by a "Catch-22" in which the FTC finds itself: thorough case-by-case enforcement will not occur until well-defined predictable standards are set, but such standards can only be set by greatly increasing the level of FTC case-by-case enforcement.

Further, the current FTC adjudication method does nothing to separate grossly exaggerated claims from ones just bordering on deceptive. Therefore, while the FTC's case-by-case enforcement has stopped some of the most egregious green marketing transgressions,[101] it has left a void by not supplying the definitions necessary for consistent and predictable green marketing adjudication.[102] Many manufacturers have stated that without more stable guidance they simply will not be able to make green claims.[103] Other commentators respond that without guidance, manufacturers will continue to make claims; many such claims, however, will lack substantiation.[104]

The third problem with relying on FTC adjudication is that the FTC does not have the technical expertise necessary to define the complex environmental terms used in green marketing claims. As one FTC Commissioner stated before the guidelines were issued, "writing [environmental] guidelines . . . might require the Commission to travel far beyond its traditional territory."[105] Several industry representatives and environmental advocates have also recoguized the FTC's limitations.[106] Given the lack of expertise, it is not surprising that case-by-case adjudication has failed to develop any useful definitions for environmental terms or working standards for green marketing.

The difficulty of relying on case-by-case enforcement to establish technical definitions is not unprecedented. Regulation of health and nutritional claims, a technical area involving issues similar to those of environmental claims,[107] encountered problems. Although this area

101. *See, e.g.*, Zipatone, Inc., 5 Trade Reg. Rep. (CCH) ¶ 22,976 (July 9, 1991) (consent order to an aerosol manufacturer to stop labeliug its product "ecologically-safe" when it was found the aerosol contained a Class I ozone-depleting substance).

102. *See FTC Conducts Two-Day Hearing on Need to Develop Environmental Marketing Guide*, 61 Antitrust & Trade Reg. Rep. (BNA) No. 1526, at 122 (July 25, 1991)[hereinafter *FTC Conducts Two-Day Hearing*] (prosecuting green claims under the deceptive advertising clause of the FTC Act would be "inappropriate now since advertisers are 'pleading for guidance and . . . the most important issues requiring resolution are in decidedly "gray" areas.' ") (quoting Steven Cole, General Counsel of the Council of Better Business Bureaus, Inc.) (omission in original).

103. *See, e.g., FTC Hearings, supra* note 1, at 66-80, 218-25, 312, 350-400 (statements by various industry officials indicating that the hardship of dealing with current green marketing laws is deterring some companies from making even legitimate environmental claims).

104. *See, e.g.*, Wynne, *supra* note 9, at 804-05.

105. *S. 976 Hearings, supra* note 3, at 56 (quoting statement of Commissioner Mary L. Azcuenaga).

106. *See FTC Hearings, supra* note 1, at 138-39 (statement of Jeanne Wirka, Environmental Action Foundation).

107. *See S. 976 Hearings, supra* note 3, at 56 (discussing the similarities between environmental and nutritional claims); *FTC Hearings, supra* note 1, at 145 (statement of Richard A. Denison, Environmental Defense Fund).

received significant attention from the FTC, prolonged case-by-case enforcement efforts failed to fill a conspicuous definitional void.

It is worth considering the difficulties encountered in regulating health and nutritional claims, so as to avoid the same mistakes in regulating green marketing claims. As early as 1962, the FTC began bringing suits for what it considered to be questionable health or nutritional claims.[108] Over the next twenty years, the FTC's prosecution of more than twenty-five actions relating to such claims[109] failed to produce broadly applicable advertising standards.[110] As Americans became more health-conscious in the 1980s, consumers' calls for health and nutritional information steadily rose.[111] Manufacturers, wanting to offer the information consumers desired, sought more definite standards.[112] However, the FTC maintained its case-by-case enforcement strategy.[113] Again, manufacturers were left haphazardly guessing in their attempts to make "non-deceptive" health and nutritional claims, and consumer groups

108. *See* Dannon Milk Prod., Inc., 61 F.T.C. 840 (1962).

109. *See, e.g.*, An-Mar Int'l, 112 F.T.C. 72 (1989); Kraft, Inc., FTC No. 9208 (May 1, 1989); General Nutrition, Inc., FTC No. 9175 (Feb. 25, 1989); Bristol-Myers Co., 102 F.T.C. 21 (1983); Kellogg Co., 99 F.T.C. 8 (1982); National Comm'n on Egg Nutrition, 88 F.T.C. 89 (1976); ITT Continental Baking Co., 83 F.T.C. 865 (1973); Coca-Cola Co., 83 F.T.C. 746 (1973); Grove Lab., 71 F.T.C. 822 (1967); The Mentholatum Co., 70 F.T.C. 1671 (1966); E.C. Dewitt & Co., 70 F.T.C. 1647 (1966); National Research Corp., 66 F.T.C. 1068 (1964); Dannon Milk Prod., 61 F.T.C. 840 (1962).

110. *See* Nell Henderson, *Consumer Groups Attack FTC Performance: Charge Agency Fails to Police Food Industry Advertising*, WASH. POST, June 16, 1985, at F1, F5 (discussing consumer groups' perceptions that the FTC's policing of advertising is inadequate).

111. *See Hearings Under Way on Food Labeling*, ST. PETERSBURG TIMES, Oct. 17, 1989, at 4A (discussing hearings to be held on the need to revamp nutritional labeling rules because of consumers' growing health consciousness); *Shop Rite: Nutritional Consumer Week*, PR NEWSWIRE (April 23, 1984) (pointing out that because of Americans' growing health and fitness concerns, consumers are becoming more nutrition-conscious); *What's Hot, What's Not*, 216 U.S. DISTRIBUTION J. 24 (May, 1989) (discussing "growing concern not only for low-calorie foods but also low-salt, low-fat and low-cholesterol"); *see also* Thomas C. Downs, Comment, *"Environmentally Friendly" Product Advertising: Its Future Requires A New Regulatory Authority*, 42 AM. U. L. REV. 155, 190-91 (1992) (proposing a new regulatory structure for environmental marketing in which the EPA assumes a primary role); Peter B. Hutt, *Government Regulation of Health Claims in Food Labeling and Advertising*, 41 FOOD DRUG COSM. L.J. 3, 17-20 (1986) (discussing the controversy over what role the FTC should have in enforcing advertising regulations); Carole Sugarman, *The New Chow Hounds: States Join Forces to Monitor Product Claims*, WASH. POST, Sept. 21, 1988, at E1 (discussing collaborative efforts by states to enforce advertising standards).

112. *See Business Representatives Urge FTC to Strengthen Role as Chief Enforcer*, 57 Antitrust & Trade Reg. Rep. (BNA) No. 1443, at 749, 750 (Nov. 30, 1989) (industry representatives call for consistent regulatory policy and bright-line rules).

113. *See, e.g.*, Kraft, Inc., 5 Trade Reg. Rep. (CCH) ¶ 22,937 (Jan. 31, 1991) (affirming administrative law judge's finding that Kraft was liable for misrepresenting nutritional value of its cheese); Viobin Corp., 108 F.T.C. 385 (1986) (consent order against Viobin for misrepresenting the nutritional value of its wheat germ); P. Leiner Nutritional Prods. Corp., 105 F.T.C. 291 (1985) (consent order against defendant for misrepresenting the value of nutritional supplements); Bristol-Myers Co., 102 F.T.C. 21 (1983) (prohibiting defendant from claiming that certain analgesic products are more effective than competitors' products absent scientific verification of claim).

complained that many unsubstantiated claims were being made.[114]

By the 1980s, it became clear that the FTC's case-by-case enforcement procedure was not going to develop the needed nutrition labeling standards.[115] Congress responded to the growing problems caused by the lack of standards by enacting the Nutrition Labeling and Education Act of 1990, which more clearly defines relevant nutritional terms.[116] While the FTC's case-by-case enforcement may have played a role in developing the terms ultimately used in the recent nutrition labeling law, it took nearly thirty years for consistently accepted standards to emerge from the FTC's method of regulation.

The problems faced in developing nutritional labeling standards illustrate the difficulties of developing specific technical standards through case-by-case enforcement. Attempting to generate green marketing standards in this manner has proven equally futile. The cases so far have not been instructive and further adjudication will be very time-consuming. The FTC's lack of technical ability to develop functional standards will only slow the process down more. Continued attempts to use the case-by-case method will almost undoubtedly cause more confusion and frustration for both manufacturers and consumers.

2. *Federal Guidelines and the Lingering Problem of Nonuniformity*

In addition to enforcement actions under the deceptive advertising clause, the FTC has promulgated a set of nonbinding green marketing guidelines.[117] Although these guidelines represent a step in the right direction, they are not adequate. First, the guidelines do not contain the detailed definitions necessary to jump-start federal enforcement. Rather than thoroughly defining the environmental terms relevant to green marketing, the guidelines give only broad parameters, stating that claims should be "substantiated," "clear," and "not overstated."[118] The guidelines attempt to define a few terms, such as "biodegradable" and "recycled content,"[119] but fall far short of adequately defining most rele-

114. *See* Henderson, *supra* note 110, at F5 ("Advertisers need predictable, uniform regulatory requirements, and consumers in all states, not just certain areas of the country, deserve uniform protection.") (quoting Bruce Silverglade, Director of Legal Affairs for the Center For Science in the Public Interest (CSPI)).

115. *See* Sugarman, *supra* note 111, at E1.

116. *See* Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified at 21 U.S.C. § 343 (Supp. II 1990)).

117. For a description and discussion of these guidelines, see *FTC Issues Voluntary Green Labeling Guidelines,* 61 U.S.L.W. 2078 (Aug. 11, 1992). "Nonbinding" means that these guidelines are purely suggestive. Neither federal nor state enforcement officials are obligated to consider them when making their enforcement decisions. The guidelines are intended merely to articulate the current FTC position on green marketing.

118. *Guides for the Use of Environmental Marketing Claims,* 6 Trade Reg. Rep. (CCH) ¶ 39,064 (Aug. 25, 1992).

119. *Id.*

vant terms. The guidelines also do not adequately define "substantiated." As one assessment of the FTC's efforts has pointed out, "the guides are neither motivated by nor intended to implement environmental policy."[120]

Second, states need not follow nonbinding federal guidelines. Although a few states have shown a willinguess to change their laws based on FTC guidelines (by specifically stating in their new laws that if FTC guidelines passed, the new law would follow those guidelines),[121] most states have taken no account of FTC guidelines in their green marketing laws.[122] Some argue that this is simply because the FTC has yet to establish adequate guidelines and that if the FTC (or some other federal agency) were to promulgate appropriate guidelines, more states would follow them. The FTC's lack of technical expertise and familiarity with complex environmental claims, however, makes it unlikely that expanded efforts by the FTC would result in the type of specific guidelines that are necessary. Thus, to the extent that commentators have argued that the FTC alone could promulgate effective guidelines,[123] the position seems misguided. The only possible way sufficient guidelines can be pursued is through an agency—like the Environmental Protection Agency (EPA)—with more environmental expertise.

But even if the FTC could act in concert with the EPA to develop guidelines that are generally accepted by the states, problems would still exist. The failure of even one state to adhere to these guidelines might cause distribution inefficiencies if that state's law is sufficiently extreme. For example, Rhode Island's law, which entirely bans the use of certain terms on packaging,[124] might present such a case. If Rhode Island retains the ban while the rest of the country accepts the FTC's suggested guideline for "biodegradable," manufacturers still incur significant costs in altering their products to accommodate this one renegade state. Unfortunately, the probability of one or more states refusing to adopt the

120. *Green Guide Won't Have Adverse Impact On Environment,* 63 Antitrust & Trade Reg. Rep. (BNA) No. 1579, at 234 (Aug. 20, 1992).

121. *See, e.g.,* CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1993) (indicating that a claim satisfies the law if it meets definitions set within the statute or "established in trade rules adopted by the Federal Trade Commission").

California, however, is the only state that has effectively adopted the FTC guidelines, and it did so even before they were actually promulgated. Though a few other states previously expressed some interest in following FTC guidelines, there has been little interest by these states since the guidelines were actually promulgated. Considering the lack of technical definitions in the guidelines, this response is not surprising. States are not willing to follow guidelines that do very little to resolve the tough issues surrounding green marketing definitions. Unless the FTC delivers much more comprehensive guides in the future (which is doubtful considering the FTC's lack of expertise in this area), even states that have shown some interest in following FTC guides will probably decide against following them.

122. *See supra* notes 49-64 and text of statutes and bills cited therein.

123. *See, e.g.,* Luehr, *supra* note 10.

124. *See* R.I. GEN. LAWS § 23-18.14-3 (Supp. 1991).

federal guidelines is high.[125]

The Rhode Island example shows that some states have taken a radical stance against environmental marketing. The chances are slim that such a state will change its law to comport with more lenient federal guidelines. It is not as if Rhode Island is choosing between two competing definitions of "biodegradable": the state does not want any definition at all. Other states, some of which have not yet voiced opinions about green marketing, may follow Rhode Island's lead. If this occurs, it is clear how inadequate reliance on nonpreemptive federal guidelines will be in solving green marketing problems.

Admittedly, in the unlikely event that no more than one or two states fail to comply with federal guidelines, manufacturers could just refrain from shipping products to those states. However, relying on manufacturers to follow this strategy is unacceptable for at least two reasons. First, allowing even one state to disrupt distribution in this way directly conflicts with the principles laid down by the Commerce Clause.[126] Such interference also causes harm to both manufacturers and consumers because the former lose the ability to fully profit from their trade and the latter lose access to goods they may want.

Second, if the states ignoring the guidelines have large populations, manufacturers may be forced to change their products labels just for those states in order to stay in business. Manufacturers cannot generally afford to lose such large markets for their products. Thus, while simply ignoring renegade states is possible in theory, it is not a viable option in practice.

V

JUSTIFICATION FOR FEDERAL PREEMPTION OF ENVIRONMENTAL MARKETING REGULATION

In light of these deficiencies in current federal regulations, federal preemption of laws governing environmental claims is necessary. This Part will begin by explaining the purposes served by federal preemption in general. It will then show that the need for nationwide uniformity

125. *See, e.g., FTC Hearings, supra* note 1, at 375 (FTC Commissioner Starek stating that "I do not think that simply issuing guides is going to deter state legislators"); *id.* at 385 (Rajeev Bal of Webster Industries stating that "[t]he guidelines we believe will not preempt the onslaught of varying state and local laws which add compliance costs to businesses").

Further evidence that some of the states will fail to follow the guidelines comes from the fact that since the guidelines were passed, no state has adopted or incorporated them into its own laws. The only law which does incorporate the guidelines was passed before the guidelines themselves were passed (the law said if the guidelines were passed, it would follow them). *See supra* note 121 and accompanying text. Rhode Island has, in direct contradiction to the guidelines, kept its total ban on green marketing. Other states which have proposed or adopted green marketing definitions have kept their pre-guideline definitions, though most of them differ significantly from the FTC suggestions. *See supra* notes 49-64 and accompanying text.

126. *See supra* note 26 and accompanying text.

overcomes possible objections to the federal government overriding state regulatory authority in this area. It concludes that full federal preemption of standard-setting is necessary because less thorough alternatives do not adequately ensure national uniformity.

A. The Functions of Federal Preemption

Under the United States Constitution, only certain, specifically enumerated powers are vested in the federal government. All residual authority not contained within one of the enumerated powers belongs to the states. Under the Supremacy Clause, however, federal laws trump state laws. The federal government, therefore, has the power to preempt state laws.

A federal law can explicitly state that it preempts any state law in the same area.[127] Even in the absence of explicit preemptive language, courts have still inferred preemption when state laws have been at odds either with federal laws[128] or with enumerated powers granted to the federal government by the Constitution. The most widely known type of preemption in this latter category occurs under the "Dormant Commerce Clause."[129]

There is no clear-cut policy pronouncement concerning when or why Congress preempts. However, a predominant function of preemption is to invalidate state laws that frustrate the development of necessary, uniform federal laws.[130] Additionally, preemption often acts as a means of stopping states from interfering with the free flow of goods across state lines.[131] In both of these cases, preemption is used to stop states from fractionalizing the country in pursuit of independent, local commercial concerns. As the Supreme Court clearly stated, "a central concern of the Framers . . . [was] that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations . . . among the States under the Articles of Confederation."[132]

Federal preemption successfully performed all of these functions in the area of nutritional labeling standards. Congress enacted the

127. *See* Foote, *Administrative Preemption, supra* note 22, at 1432-36.

128. Ordinarily, though, a court will presume that "Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

129. *See* Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation,* 102 HARV. L. REV. 842, 850-53 (1989). For a thorough discussion of instances when the federal government has preempted certain fields, see S. Candice Hoke, *Preemption Pathologies and Civic Republican Values,* 71 B.U. L. REV. 685 (1991).

130. *See, e.g.,* Pierce, *supra* note 22, at 630.

131. *Id.* at 613-19.

132. Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979). Although a full discussion of when and why preemption is appropriate is beyond the scope of this Comment, it has been observed that noncommercial factors do influence the Court in some instances to find preemption. *See* Pierce, *supra* note 22, at 622-26.

Nutrition Labeling and Education Act of 1990,[133] giving the Food and Drug Administration the power to promulgate specific regulations governing nutritional claims.[134] The law contains a specific preemption clause, which provides that no state shall enact a requirement for nutrition labeling of food in interstate commerce "that is not identical to the requirement[s] [of the federal law]."[135]

B. The Necessity for Federal Action: Uniformity Pressures Outweigh States' Concerns

Since federal preemption would deprive the states of substantial power over environmental marketing regulation, it might be argued that the costs entailed in the loss of this power are unacceptable. The states, after all, have an interest in preserving their autonomy—autonomy that includes implementing their own policies and value judgments concerning how best to protect consumers and the environment. Nevertheless, the need for uniform regulation nationwide outweighs these concerns and, therefore, overcomes the objections to preemption.

1. State Autonomy

Every use of federal preemption as a means to achieve doctrinal uniformity is, to some extent, a blow to state autonomy and the attendant federalism values.[136] The federal government was founded on the recognition of a need for states to retain some control over the welfare of their citizens and over intrastate activities.[137] Protecting individual liberty and self-determination lies at the heart of arguments in favor of defending state autonomy.[138] Protecting this value helps ensure the stability

133. 21 U.S.C. § 343-1 (Supp. II 1990). Other examples of Congressional preemption of labeling and marketing laws include the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 99-117, § 11(d), 99 Stat. 495 (1985) (codified at 15 U.S.C. § 1333 (1988)); Poultry and Poultry Products Inspection Act, Pub. L. No. 90-492, § 17, 82 Stat. 807 (1968) (codified at 21 U.S.C. § 467(e) (1988)); Federal Meat Inspection Act, Pub. L. No. 90-201, § 16, 81 Stat. 600 (1987) (codified at 21 U.S.C. § 678 (1988)).

134. *See* H.R. REP. No. 538, 101st Cong., 2d Sess. 8-9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3336, 3337-39 (describing the need for uniform regulation of nutritional claims because of confusion caused by haphazard development and enforcement of existing guidelines).

135. 21 U.S.C § 343-1(a)(4) (Supp. II 1990).

136. *See* Pierce, *supra* note 22, at 609-13.

137. For an extensive discussion of federalism and the values of protecting state autonomy, see Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century,* 88 COLUM. L. REV. 1 (1988).

138. *See* Lino A. Graglia, *In Defense of Federalism,* 6 HARV. J.L. & PUB. POL'Y 23, 23-26 (1982) (defending federalism on the ground that it promotes the autonomy of both local governments and individuals).

While there are other values attendant to state autonomy like state experimentation or tapping state expertise, it is important to recognize the value of autonomy in and of itself. The value goes beyond protecting individualism and extends to the value inherent in simply maintaining a system of government in which individuals do not feel suffocated by a giant central bureaucracy. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of*

and legitimacy of the national government[139] and any intrusion on it must not be made lightly.

Accordingly, maintaining states' power to protect their citizens by implementing green marketing regulations and encouraging state input in the development of green marketing standards are both key factors related to preserving state autonomy. Nevertheless, attempts to maintain autonomy must at times yield where other goals—such as protecting consumers nationwide—are more important and cannot effectively be accomplished by any other means. In the case of green marketing, unconditional adherence to protecting state autonomy will almost certainly lead to fragmented and conflicting state laws and, in so doing, ultimately harm the consumers that the regulations are designed to protect.

Moreover, in the green marketing context, even if one were unilaterally to reject the use of preemptive federal law, there is no guarantee that states would truly retain their autonomy. A single state could nullify the way in which several, if not all, other states choose to regulate green marketing. Such a state could do this by passing a law that, because of its particular requirements or strictness, all manufacturers would have to follow.

Once again, the Rhode Island example helps illustrate this point. The effect of Rhode Island's strict law is to force any manufacturer that wants to distribute products nationwide to stop using certain terms altogether or to make the economically unfeasible choice of trying to comply with different states' laws.[140] Discontinuing green marketing, however, may conflict with the policy of another state that has placed a higher premium on consumer information and has decided that it is worth the risk of allowing a greater number of deceptive claims to slip through the regulatory net. In such a situation, lack of preemption undermines state autonomy rather than protecting it.

Maintaining state autonomy, therefore, cannot be seen as the ultimate goal; rather, it must be viewed in light of the realities of the given

National Environmental Policy, 86 YALE L.J. 1196, 1210-11 (1977) (describing the "[i]mportant nonutilitarian" values served by protecting state autonomy).

139. *See* Merritt, *supra* note 137.

140. I argue elsewhere in this Comment that in reality it is hard to say which green marketing laws are "stricter" than others. To the extent that I use "stricter" here, I refer to laws like those of Rhode Island which *can* meaningfully be compared to other states. Such a comparison here does not involve an evaluation of the relative strictness of technical environmental terms because Rhode Island has simply banned many of these terms. Moreover, some quantitative comparisons are possible even when one is dealing with green marketing standards. For example, it is possible to say that defining "biodegradable" to mean that the item must degrade within 10 days might be called more harsh than a definition that allows 20 days. These limited comparisons are useful to make the point in the text here even though they are insufficient to validate a nationwide regulatory approach that consists of divergent laws. *See FTC Hearings*, *supra* note 1, at 352-54 (statement of Dewitt F. Helm, Jr., Ass'n of Nat'l Advertisers, Inc., discussing how, because of costs of trying to comply with multiple laws, a single county in a single state could set the green marketing policy for the entire nation).

situation. However, to the extent that it is possible to do so, all efforts should be made towards maintaining state autonomy, while still achieving the uniformity necessary to implement an effective regulatory system. It is with an eye towards trying to balance these competing interests that I consider other arguments against preemption and suggest a regulatory regime to monitor green marketing.

2. *State Experimentation*

One traditional argument against preemption tied to the more general value of state autonomy is that states should be able to experiment with various regulatory schemes; a uniform nationwide green marketing standard might inhibit beneficial innovation. Justice Louis Brandeis voiced this position well when he stated:

> Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[141]

There is certainly truth in this statement. Given fifty separate state agencies, any one may be led by "more innovative officials than the federal agency with analogous regulatory authority."[142] There is also evidence that, until now, much of the innovation and leadership in green marketing regulation has come from the states.[143]

However, a key phrase in Justice Brandeis' statement sums up why experimentation must sometimes yield to national uniformity. That phrase is "*without risk* to the rest of the country." Rhode Island's "novel experiment" of enacting very strict regulation has already caused harm by prompting manufacturers whose products meet other states' standards to discontinue their "recyclable" claim nationwide.[144] In response, some observers have noted that what were once idealistically referred to by Justice Brandeis as " 'laboratories of democracy' " have produced "50 mad scientists . . . with regulatory potions and statutory creations that are downright terrifying"[145] for interstate commerce and for states attempting to formulate workable regulatory regimes. Indeed, some argue that state experimentation should not be considered when deciding

141. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

142. Pierce, *supra* note 22, at 656.

143. *See FTC Hearings, supra* note 1, at 150-51 (statement of Craig Merrilees, National Toxics Campaign). For an example of such state leadership, see THE GREEN REPORT II, *supra* note 1.

144. *See, e.g., FTC Hearings, supra* note 1, at 358 (statement of Harold A. Shoup of the American Association of Advertising Agencies describing how a member of his Association in Ohio no longer makes "recyclable" claims because he became "very concerned about the conflict in regulations passed in California versus Rhode Island versus Indiana").

145. *See* W. John Moore, *Dear Feds—Help!*, NAT'L J., July 9, 1988, at 1788, 1791 (quoting *Liebmann, supra* note 141, at 311 (Brandeis, J., dissenting)).

whether to preempt state laws, because federal agencies can also experiment without adverse effects on interstate commerce.[146]

A preemptive scheme would avoid these ill effects while still remaining open to innovation. Under a preemptive scheme, states could contribute their innovations in an advisory capacity to the federal agencies creating national policies. Although a state's ideas would not be authoritative, they would be considered together with other states' innovative suggestions to fashion the most effective national strategy. The experimentation that would otherwise take place on the state level would simply shift to the federal level.

3. *State Expertise in Setting Green Standards*

Some states have significant expertise in defining environmental terms and developing comprehensive green standards.[147] One possible argument against a preemptive federal green marketing law is that this source of expertise may be lost. The larger states in particular have teams of experts and financial resources which can be used to develop workable green marketing standards.[148] For example, California and New York have developed well-defined standards for certain terms.[149] The achievements of such states should not simply be brushed aside; they have undoubtedly helped advance the cause of formulating adequate green marketing standards.

However, even with state involvement, the more substantial resources and technical expertise of federal agencies are necessary to define adequately all of the requisite environmental terms.[150] While some states have made inroads in developing standards, no state has adequately defined all the relevant terms, which suggests that leaving the research burden in a complex area like environmental marketing to the states is a mistake.[151] The federal government has more scientific resources to define technical terms than any individual state.[152]

However, the fact that federal regulations should be paramount does

146. *See* PRESIDENT'S COMMISSION FOR A NATIONAL AGENDA FOR THE EIGHTIES, GOVERNMENT AND THE REGULATION OF CORPORATE AND INDIVIDUAL DECISIONS IN THE EIGHTIES 32-33 (1980).

147. For example, see CAL. BUS. & PROF. CODE § 17508.5 as evidence of well-defined green marketing standards that were obviously developed by people with expertise.

148. *See* Pierce, *supra* note 22, at 655.

149. *See* CAL. BUS. & PROF. CODE § 17508.5; *FTC Hearings, supra* note 1, at 40-41 (statement of Thomas C. Jorling, New York State Department of Environmental Conservation, discussing New York's "recyclable" standard).

150. Pierce, *supra* note 22, at 654-55.

151. *See id.* at 655 (stating that as the complexity of regulatory matter increases, the necessity for federal resources also increases).

152. *See id.* at 654-55 ("The federal government obviously has an enormous comparative advantage with respect to expertise required to make technologically complex regulatory decisions . . . . Few states have sufficient resources and need for access to relevant expertise to justify employment of the many scientists and engineers required to perform these regulatory tasks.").

not preclude a federal preemptive structure that utilizes state expertise. States can still play a significant, influential advisory role by actively commenting on federally proposed definitions and suggesting improvements in those definitions. The states' promulgation of the *Green Report II*[153] shows that states have the ability to cooperate and contribute to setting national standards in this area. By continuing such cooperative efforts, states can be influential in developing future federal green marketing laws—and their innovative ideas will not be lost.

4. *States' Unique Relationship to Constituencies: Assuring the Requisite Ability and Motivation to Acknowledge Competing Interests*

Another objection to preemption is that the federal government is too distant from the constituencies that will be affected by the regulation and thus will be hindered in developing and enforcing standards that effectively balance competing interests. Since state and local authorities are closer to their constituencies, including consumers and businesses, they have a better sense of those constituencies' best interests and preferences.[154] Moreover, this closeness subjects the states to greater pressure to respond effectively when concerns are raised.[155] States are therefore more motivated to come up with effective standards and to make sure the standards are enforced.

In contrast, "the major disadvantage of federal regulation [is] the fact that it is implemented by a massive, inefficient bureaucracy remote from the needs of the people in each locality."[156] The federal government may be less aware of or sensitive to the concerns of the affected constituencies.[157] Even worse, it may be sensitive only to the concerns of those (like big businesses) with the power and resources to make themselves heard.[158] Many commentators have recently voiced concern over ineffective or apathetic federal enforcement of consumer protection laws[159] and have argued that further preemption will give industry opportunity to manipulate the federal goverument into lax enforcement

153. *See* THE GREEN REPORT II, *supra* note 1.

154. *See* Pollock, *supra* note 46, at 1418-19 (discussing the fact that the local enforcement authorities within each state are particularly in touch with the problems of that state or regions within the state).

155. *Id.*

156. Pierce, *supra* note 22, at 645 (citing C. Boyden Gray, *Regulation and Federalism,* 1 YALE J. ON REG. 93 (1983)).

157. *See* Hoke, *supra* note 129, at 692-93.

158. *See id.* at 693.

159. *See, e.g,* Merritt, *supra* note 137, at 6 (discussing certain instances where states have regulated business activities more heavily than the federal government); *cf.* Foote, *Regulatory Strategies, supra* note 23, at 69 (discussing the reconsideration of federal preemption after a decade of federal government deregulation); Moore, *supra* note 146, at 1789-92 (discussing businesses' emerging interest in federal regulation after experiences with tough state laws in the last decade).

of whatever standards are devised.[160]

While these concerns are legitimate, they are not dispositive. First, the federal government can develop a uniform system that allows independent state enforcement of the federal green marketing laws. Second, federal enforcement has many advantages. For example, some states do not have the financial resources to establish an adequate enforcement regime for green marketing claims.[161] The federal government could supplement enforcement efforts in these states. Third, federal government involvement allows the use of both state and federal court systems for pursuing deceptive green marketing claims.[162]

Finally, federal enforcers may be better positioned to see the "big picture" and alleviate problems that may not be too threatening to a particular state, but are quite threatening when all the states are considered together. For instance, a company which inappropriately labels its product "biodegradable" may distribute that product in relatively small numbers in any given state, but its distribution area could be all fifty states. Thus, the problem may not be worth individual state's time and resources to deal with. But when federal regulators see that an otherwise minor problem is actually occurring in all fifty states, it might be more inclined to address the situation.

C. *Superiority of Preemption over Alternative Federal Strategies: Inability of Minimum Standards to Ensure Uniformity*

Many environmental laws already include preemption clauses. However, those clauses preempt only state laws that are *less* strict than the federal standards.[163] The federal government sets a regulatory floor below which the states cannot set their laws. This system works well when dealing with wholly in-state pollution and environmental problems. It gives states the freedom to deal with their unique problems, while assuring that no state drops its standards in order to attract business.

Because such regulatory floors have been successful in other contexts, a similar approach has been considered for green marketing.[164] In fact, the only green marketing regulation bill under consideration by Congress, the Environmental Marketing Claims Act of 1991,[165] contains

160. *See FTC Hearings, supra* note 1, at 150-51 (contention of Craig Merrillees, National Toxics Campaign, that manufacturers support federal preemption because "they want relatively low . . . standards in many cases that make life easier for them").

161. *See* Stewart, *supra* note 138, at 1201 (noting that "funding normally available to state environmental agencies is gravely deficient, given their responsibilities").

162. *See infra* notes 193-99 and accompanying text.

163. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7412(d)(7) (Supp. II 1990); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9614(a) (1988).

164. *See FTC Hearings, supra* note 1, at 22-24 (conversation between FTC Commissioner Deborah K. Owen and F. Henry Habicht II, Environmental Protection Agency).

165. S. 615, 102d Cong., 1st Sess. (1991).

this type of typical preemption clause. The Act states:

> Nothing in this act shall be construed so as to prohibit a State from enacting and enforcing a standard or requirement with respect to the use of an environmental marketing claim that is more stringent than a standard or requirement relating to an environmental marketing claim established or promulgated under this Act.[166]

Unfortunately, there are two reasons why a minimum federal standard that preempts only those laws less "stringent" than the federal minimum is ineffective for regulating green marketing. First, it would be very difficult to define exactly what constitutes a law less "stringent" than the federally enacted minimum standard. In other federal statutes containing minimum standards, violations can be quantitatively measured. For example, the Clean Water Act is violated when a given percentage of pollutants exist in a given quantity of water.[167]

In contrast, quantitative assessments are not always possible in the green marketing context. Most violations are tied to definitions not easily operationalized in quantitative terms.[168] For example, under the federal biodegradability standard articulated in recent FTC guidelines, a product must degrade into "elements found in nature within a reasonably short period,"[169] whereas under the proposed Pennsylvania standard, the product must degrade into "a residue or by-product that is not considered harmful . . . to the environment or human health."[170] Neither of these constructions is more or less "stringent"; they are simply different. The determination of relative "stringency" of green marketing regulations, then, is quite problematic, if not impossible.

Second, even if quantitative comparisons of green marketing terms were possible, setting a minimum federal standard would still be unwise. States have an incentive to go beyond any minimum federal standards because they want to be recognized as leaders in high profile fields like environmental regulation.[171] This point was reinforced when FTC

166. *Id.* § 13(c).

167. *See* 33 U.S.C. § 1317(a)(2) (1988) (giving the Administrator of the EPA power to set acceptable "effluent standards" regarding the percentage of waste allowable in a given quantity of water for various pollutants); *see also* Clean Air Act, 42 U.S.C. 7412(r)(5) (Supp. II 1990) (discussing how quantitative assessments go into a decision as to whether certain levels of pollution violate the Clean Air Act).

168. *See supra* notes 58-64 and accompanying text for definitions of environmental terms contained within various state statutes and bills.

169. *FTC Issues Voluntary Green Labeling Guidelines,* 61 U.S.L.W. 2078 (Aug. 11, 1992) (quoting FTC guidelines).

170. S. 920, § 102, 175th Gen. Assembly, Reg. Sess. (Pa. 1991).

171. This was demonstrated when several states sought to have the Clean Air Act amended so that they could pass stricter laws than the federal government enacted. *See* Allen R. Ferguson, Jr., Comment, *Federal Supremacy Versus Legitimate State Interests in Nuclear Regulation:* Pacific Gas & Electric *and* Silkwood, 33 CATH. U. L. REV. 899, 915-16, 921-22 (1984).

Commissioner Mary Azcuenaga asked a New York state official whether New York would change its "recyclable" standard to meet FTC guidelines. The officer stated that New York would certaiuly continue to "be creative" with regulatory approaches if the federal government established merely a regulatory floor.[172] Similarly, another witness at the FTC hearings gave the following example of competition among states to pass the "toughest" environmental laws:

> When Florida was one of the first states to pass a degradable bag law . . . a particular state . . . said that, well, we can do one better. Florida has a law that mandates photodegradability of bags in 120 days. We can do ours in 60. This is a state that is north of the Mason-Dixon Line and gets sufficiently less sun, far less sun, than Florida gets. They simply wanted to be better than the State of Florida.[173]

Pressure among states to be the "king of environmental protection" is high. States which have pioneered green marketing regulations will not be overly willing to scrap the standards they have set. The ultimate result is a lack of uniform standards and the accoinpanying costs.

V
ENSURING NATIONWIDE UNIFORMITY: A PROPOSED PREEMPTIVE SYSTEM FOR REGULATING GREEN MARKETING

Given the need for uniform regulation, the federal governinent should promulgate preemptive green marketing standards. However, states should be given ample opportunity to contribute to the development of the standards. They should also have the right to enforce federal green marketing laws independently within their borders.

A. Setting Green Marketing Standards

The Environmental Protection Agency (EPA) should assume the lead role in defining the uniform federal standards to regulate environmental claims. Some have suggested that the FTC should promulgate the standards in this area;[174] however, the FTC has very little technical expertise regarding environmental matters. The FTC demonstrated this lack of expertise when it chose to promulgate broad, nontechnical green marketing guidelines.[175]

It is somewhat unclear why the FTC shouldered the burden of regu-

172. *See FTC Hearings, supra* note 1, at 62-64 (discussion between Commissioner Mary L. Azcuenaga and Thomas C. Jorling, New York State Department of Environmental Conservation).

173. *FTC Hearings, supra* note 1, at 246 (statement of Timothy L. Draeger, Degradable Plastics Council, Inc.).

174. *See, e.g.,* Luehr, *supra* note 10, at 325-27.

175. *See* Downs, *supra* note 111, at 186-87 (noting FTC's lack of technical expertise in the

lating this area initially. A possible reason is that federal officials' failure to recognize the need for specific environmental definitions led them to believe this area was just like any other deceptive advertising situation. Since such situations are traditionally under the FTC's authority, they may have seen no reason to treat environmental marketing any differently.

But the decision to place responsibility on the FTC was inappropriate. While the FTC has enforced regulations in technical areas once the relevant definitions were articulated,[176] the FTC has never been in charge of setting definitional or policy guidelines in technical areas.[177] Rather, since its inception, the main purpose of the agency has been to prosecute deceptive or unfair trade practice claims and to set out general definitions and policies exclusively toward that end.[178]

In contrast, the EPA has direct authority over federal environmental policy and a great deal of expertise in defining technical environmental terms.[179] As one environmental expert testified before the FTC, "[d]ue to the complex and technical nature of defining terms for use in products claims we feel it is best that the EPA make those types of [definitional] decisions."[180] While the FTC may have a role to play in enforcing the green marketing law once the terms are established, the EPA is the appropriate agency to spearhead the term-defining effort. Moreover, the EPA has shown a willinguess to take on this task.[181]

While the EPA should lead the charge in defining green marketing terms, states should also retain a major role. Some states undoubtedly have environmental expertise comparable to that of the EPA.[182] States should be guaranteed the opportunity to contribute to the development of green marketing standards during the EPA's formal notice and comment period. Even if an individual state is not able to aid the EPA signif-

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environmental area); *see also supra* notes 117-20 and accompanying text for a discussion of the FTC guidelines.

176. *See, e.g.*, Pompeian Inc., No. C-3402, 1992 FTC LEXIS 267 (Oct. 27, 1992); Isaly Klondike Co., No. 9123067, 1992 FTC LEXIS 114 (Mar. 11, 1992); Bertolli USA, Inc., No. 9023135, 1991 FTC LEXIS 411 (June 19, 1991) (all applying the Nutrition Labeling and Education Act of 1990, after the FDA had set relevant definitions).

177. *See* BERNICE ROTHMAN HASIN, CONSUMERS, COMMISSIONS, AND CONGRESS: LAW, THEORY, AND THE FEDERAL TRADE COMMISSION, 1968-1985, at 3-4 & n.17 (1987) (discussing the purpose behind the establishment of the FTC and noting that the FTC was formed to police generally under the guise of "unfair methods of competition").

178. *Id.*

179. *See S. 976 Hearings, supra* note 3, at 18-19 (statement of Richard Denison of the Environmental Defense Fund, arguing that the EPA's technical expertise is necessary in setting green marketing standards).

180. *FTC Hearings, supra* note 1, at 98-99 (statement of Andrew Stoeckle, Abt Associates).

181. *FTC Hearings, supra* note 1, at 8-14 (statement of F. Henry Habicht, II, of the EPA).

182. *See* Pierce, *supra* note 22, at 654-55 (noting the technical expertise of regulatory agencies in certain states); *see also supra* notes 147-49 and accompanying text.

icantly in developing all of the relevant green marketing standards, the accumulated contributions from several states may be extremely helpful.

To make states' input most effective, states should not be limited to participation in the formal notice-and-comment stage. By the time the notice-and-comment stage of the regulation-setting process is reached, an agency may already have invested considerable resources in a particular standard or approach. Once the EPA's time and resources have been committed to a certain strategy, it seems much less likely that the agency would make significant alterations in order to incorporate states' suggestions. No agency likes to backtrack, especially when doing so will be equivalent to admitting that the agency did not handle the matter correctly on its own. But if state input occurs earlier in the regulation-setting process, the agency will be more likely to consider the input thoroughly. States should, therefore, be encouraged to contribute at an earlier stage in the process to assure that they are given the opportunity to contribute meaningful input.

Fortunately, the federal government has already demonstrated a willingness to consider input from the states prior to the formal notice-and-comment period. For example, state officials have been allowed to participate in FTC and congressional hearings concerning green marketing regulation.[183] Many federal officials have acknowledged the value of state contributions to the development of national green marketing standards.[184] The *Green Report II* in particular is strong evidence that states are eager to provide meaningful input in the standard-setting process.[185] Therefore, while the states will be guaranteed the ability to participate in the formal notice-and-comment period which occurs with any agency action, recent federal attitudes indicate that states' input will be welcomed at an earlier stage in the process as well.

Notwithstanding these considerations, there remain problems with giving the federal government complete discretion. For example, the federal government might be too submissive to industry's interests. Thus, it might set inadequate standards that are merely tailored for easy compliance.[186] The threat of "agency capture"[187] and industry-biased standards could undermine the legitimacy of federal green marketing preemption. To date, however, the federal government has demonstrated

183. *See FTC Hearing, supra* note 1, at 30-65; *S. 976 Hearings, supra* note 3, at 7-13, 45-48.

184. *See, e.g., S. 976 Hearings, supra* note 3, at 4 (statement of U.S. Senator Frank R. Lautenberg of New Jersey); *FTC Hearings, supra* note 1, at 3-5 (statements of FTC Commissioner Janet D. Steiger); *id.* at 10-11 (statement of F. Henry Habicht II of the EPA).

185. *See* THE GREEN REPORT II, *supra* note 1 (setting out a framework that certain states recommended for formulating green marketing standards).

186. *See* W. John Moore, *Stopping the States*, NAT'L L.J., July 21, 1990, at 1758, 1760-61 (discussing consumer groups' fears that preemption will lead to a weaker national standard).

187. Agency capture "refers to an agency's decisions being strongly influenced, if not dictated, by a particular special interest group or groups." Hoke, *supra* note 129, at 693 n.33.

a strong commitment to effective regulation of environmental claims.[188]

B. *Enforcement of the Regulations*

Enforcement of uniform, national green marketing standards should be a cooperative effort between federal and state actors. Due to the federal government's more extensive resources and broader national perspective, the EPA (possibly in combination with the FTC or some other federal agency) should have primary responsibility for enforcing green marketing laws.[189] Hence, the federal agencies should, to the maximum extent possible, police green marketing violations. But even the extensive resources of one or two federal agencies may be inadequate to enforce green marketing laws throughout the country.[190] Furthermore, the states have no absolute guarantee that the federal agencies will seriously attempt to punish green marketing transgressors. Accordingly, the states should be allowed to maintain a significant role in the enforcement of green marketing regulations.

Such shared enforcement among multiple federal agencies as well as state governments is not unprecedented.[191] Moreover, since the EPA has the expertise for setting this type of environmental policy and has traditionally been vested with that responsibility,[192] while the FTC is traditionally considered the agency with the power and responsibility to prosecute deceptive advertising claims, combining the efforts of the two agencies in regulating green marketing makes sense. This combined federal effort, coupled with widespread enforcement resources of the states,

188. *See, e.g.*, S. 615, 102d Cong., 1st Sess. (1991); *S. 976 Hearings*, *supra* note 3, at 3 (U.S. Senator Frank Lautenberg stating that "[w]e need to create a framework to protect the consumer, to protect industry, and to protect the environment" from increasing fraudulent green marketing); *FTC Hearings*, *supra* note 1, at 8 (F. Henry Habicht II of the EPA stating his view of the need to "deal with this very important issue of an informed marketplace with regard to environmental claims"); *id.* at 10 (Mr. Habicht stating the EPA believes that the federal government does have a "role to reinforce this consumer interest, to put the wind at the backs of consumer interest and environmental protection and to ensure that with good information—good, accurate and consistent information, that the marketplace stimulates . . . product innovation for the good of the environment"); *id.* at 20 (statement of FTC Commissioner Azcuenaga that green marketing is an "enormously important" area for the FTC and the EPA).

While FTC enforcement has been lacking, that underenforcement should be attributed to lack of concrete standards under which the FTC could regulate effectively—not a lack of interest. The FTC and the EPA both showed their interest in this topic by participating in FTC hearings geared toward solving the problem. The FTC showed further interest by attempting, albeit unsuccessfully, to create guidelines to help concentrate and clarify enforcement in this area. Thus, resources focused in the right area would probably be successful.

189. *See* Downs, *supra* note 111, at 187-93 (discussing how the EPA could play the lead role in setting green marketing policy).

190. *Id.* at 194.

191. *See id.* at 194 (alluding to combined state and federal efforts under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1988)).

192. *See* Downs, *supra* note 111, at 187-88.

offers the most comprehensive means of effectively regulating environmental claims.

Under this cooperative enforcement program, states could only hold companies to federal standards but could autonomously decide to supplement federal enforcement efforts. If a state saw a manufacturer distributing products within state borders that did not satisfy the federal standards, the state could bring an action to have those standards enforced by the appropriate federal agency.[193] Alternatively, the state could bring an action in federal court to enforce the federal standards.[194]A final possibility is that states could be allowed to pass their own green marketing laws, but be required to retain the same technical definitions as the federal law. Under such an approach, states would use their own enforcement mechanisms and courts to prosecute green marketing violators in their state.

Cooperative federal-state enforcement has been part of other environmental statutory schemes.[195] Generally, these statutes require that, prior to assuming regulatory responsibility, the state must demonstrate that it has the necessary regulatory capabilities to determine when violations have occurred.[196] Since many states already have systems in place to monitor deceptive advertising practices,[197] meeting this requirement in the green marketing context should not be problematic once well-defined green marketing terms have been defined at the federal level.[198] Thus, any concerned state could make sure that complacent federal agencies do not permit manufacturers to elude enforcement of green marketing laws. Local knowledge and the states' dispersed enforcement resources need

193. *Cf.* S. 615, 102d Cong., 1st Sess., § 10 (1991) (allowing cooperative enforcement by federal and state agencies).

194. *Id.*

195. *See, e.g.,* Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136u, 136w-1 (1988); Clean Water Act, 33 U.S.C. §§ 1251(g), 1314(l), 1316(c), 1344(g)-(j) (1988); Clean Air Act, 42 U.S.C. §§ 7407, 7410 (1988 & Supp. II 1990); *see also* Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and Efficient Relationship,* 14 HARV. ENVTL. L. REV. 7 (1990) (generally describing cooperation between federal and state officials in enforcing environmental laws).

196. Humphrey & Paddock, *supra* note 195, at 13.

197. *See supra* notes 35-41 and accompanying text.

198. The problem with exclusive state enforcement stemmed not from a lack of interest, but rather from lack of resources and technical expertise to set the standards necessary to effectively police this area. Once those standards have been set, it will be much less costly for states to get involved. As long as a state has a general deceptive advertising regime set up, it can more readily determine when violations of specific rules have occurred.

Of course, there are a few states that do have the resources to establish fairly respectable green marketing laws. *See* CAL. BUS. & PROF. CODE § 17500 (West Supp. 1993). The problem with letting these states have control is lack of uniformity rather than lack of technical ability. In such states, resources to enforce are not a problem, but that does not mean that allowing them to pursue their own laws is appropriate. It is more appropriate to channel these resources that would otherwise go to exacerbate the problems of nonuniformity to the more productive effort of developing and implementing a nationwide policy.

not go unutilized as they would under a system of complete federal preemption.[199]

VI
CONCLUSION

Consumers will be the big losers if substantial changes in the green marketing regulatory scheme are not made. If the standards are not clarified, some manufacturers are likely to stop making environmental claims altogether,[200] while others continue to get away with borderline or deceptive green claims.[201] Many manufacturers who discontinue claims will also curtail research and development of environmentally beneficial products. Consumers will be deprived of truthful and educational information and fewer environmentally helpful products will be consumed.

Preempting the field of green marketing regulation constitutes a major change—one with the potential to inhibit effective state regulatory programs. Hence, as Professor Foote has noted, "[a]ppropriately and sparingly employed, preemption can restore a proper balance, protecting legitimate corporate goals of economic efficiency in the national marketplace. Abuse of the doctrine, however, may have adverse economic, political, and institutional consequences . . . ."[202] But a carefully crafted preemption system will not create these problems. States can maintain an active role in developing and enforcing green marketing laws. While states may be reluctant at first to accept preemption, the system proposed here provides a middle ground that effectively balances the competing concerns of the federal government, states, and consumers interested in improving green marketing regulation.

199. For a discussion of how shared enforcement helps alleviate some of the problems caused by complete preemption, see Pierce, *supra* note 22, at 660; *see also* Frank J. Thompson & Michael J. Scicchitano, *State Enforcement of Federal Regulatory Policy: The Lessons of OSHA,* 13 POL'Y STUD. J. 591 (1985) (discussing how state efforts to enforce federally enacted OSHA standards have worked).

200. *See* Specter, *supra* note 1, at B7 ("[M]any companies fear that [due to strict regulation by one state] . . . they will end up being forced to drop reasonable claims from labels that could have helped educate consumers.").

201. *See* Wynne, *supra* note 9, at 804-05.

202. Foote, *Regulatory Strategies, supra* note 22, at 72.