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Robert M. O'Neil

Indiana University School of Law - Bloomington

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State Consumer Protection
in A Federal System

Robert M. O'Neil*

Increasing interest in consumerism has brought intensified efforts at every level of government to protect the consumer. While federal regulation seems desirable for nationally marketed products and interstate activities, the states retain the duty to protect the health and safety of their citizens. Where state regulation is more restrictive than concurrent federal regulation, however, the constitutional issue of preemption arises.

This Article analyzes the factors which have influenced the courts in resolving conflicts between federal and state regulation in the consumer field. Emphasizing the need for concurrent regulation, the author formulates guidelines by which the courts can examine the purposes and extent of consumer protection by competing governmental entities to resolve the issue of preemption.

I. INTRODUCTION: THE GROWTH OF REGULATION

A decade ago there was little risk of collision between federal and state regulation in the field of consumer protection. Such regulation was so modest that various agencies had ample latitude. When a manufacturer or retailer sought to avoid regulation by pointing to parallel or overlapping state and federal laws, the claim usually could be dismissed as disingenuous or evasionary. Within a few years all this has changed. Both federal and state activity in the consumer field have expanded rapidly. What seemed a bare possibility of conflict in the mid-1960's has become reality. The risks of confusion, overlap, and competition between regulatory sectors are quite real.

A. Federal Regulation

Federal consumer protection has long been concentrated in the Federal Trade Commission. Today, however, nearly 40 federal agencies have some role in consumer protection. Many of these agencies have only peripheral

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*Professor of Law and Vice President (Bloomington Campus), Indiana University. A.B. 1956, A.M. 1957, LL.B. 1961, Harvard University.

1. For a listing of these agencies and a summary of their activities and responsibilities in consumer protection, see D. ROTHSCHILD & D. CARNOLL, CONSUMER PROTECTION: TEXT & MATERIALS 21–40 (1973) (hereinafter cited as ROTHSCHILD & CARNOLL).
involvement; others exercise specific functions in the consumer field without serious risk of conflicting with other levels of government. The current problems arise from newer entries into the field: Newly created agencies (e.g., the Consumer Product Safety Commission), new responsibilities assigned to existing agencies (e.g., the Fair Packaging and Labeling Act), and the reactivation of old laws by old agencies for the benefit of consumer groups (e.g., the recently intensified "consumerism" of the Federal Trade Commission). The past several years have infused into the federal government a new level of consumer concern and a greatly expanded arsenal of weapons for the protection of consumer interests.

B. State Regulation

A growth of concern and activity at the state level has paralleled the federal expansion. Most states have now established consumer protection bureaus or divisions in the office of either the attorney general or the governor. Several states have instituted separate departments of consumer affairs. The laws creating these divisions are quite recent, nearly all having been enacted since 1965 and many since 1970. The precise model varies from state to state: Some have adopted the Uniform Deceptive Trade Practices Act, others the Model Unfair Trade Practices and Consumer Protection Act, and

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2. E.g., the Department of Interior, the Nuclear Regulatory Commission, the National Aeronautics and Space Administration.
3. E.g., the Federal Power Commission, the Federal Home Loan Bank Board.
6. See N.Y. Times, Nov. 8, 1974, § 1, at 1, col. 5.
8. The states are Connecticut, Delaware, and Oklahoma (limited to consumer credit matters); Puerto Rico also has a separate consumer affairs department. Committee on the Office of the Attorney General, National Association of Attorneys General, Report on the Office of Attorney General 415 (Feb. 1971); National Association of Attorneys General, State Programs for Consumer Protection 13 (Dec. 1973).
9. A recent compilation of these statutes is found in National Association of Attorneys General, State Programs for Consumer Protection, Table 9(a) (Jan. 1976).
11. The Unfair Trade Practices and Consumer Protection Act [UTPCPA], developed by the Federal Trade Commission and adopted by the Committee of State Officials on Suggested State Legislation, was first published in Council of State Governments, Suggested State Legislation A-71 (1967) [hereinafter cited as Suggested State Legislation]. See id. at 141. Significant amendments to the UTPCPA were published
some blend provisions from these and other uniform laws.12

Quite apart from the growth of state enabling legislation, and perhaps more significant in terms of the potential for conflict, has been the dramatic increase in personnel and resources committed to consumer protection activity by state and local governments. While consumer protection divisions are generally considered understaffed in terms of the problems facing them, several states have large professional staffs.13 Both staffs and budgets have continued to increase despite general cutbacks in many facets of state and local government.14

C. Conflict Between State and Federal Regulation

Such rapid growth has produced conflict between federal and state regulation for the protection of consumers. All such conflicts could be resolved if Congress expressed an intention either to preempt the field or to leave it to the states. But Congress, reluctant to move boldly in the sensitive area of federal-state relations, has done little. Even when explicit language does appear in regulatory laws,15 it tends to be ambiguous or fails to anticipate the full range of federal-state interaction. Moreover, lawyers representing multi-state corporations have been unusually imaginative in finding loopholes. Thus, the theoretical capacity of Congress to resolve the conflict remains unused.

Indirect interaction of two regulatory systems also may cause conflicts; one example is found in the private tort suit against a federally regulated manufacturer that is based on state products liability law. Attempts to resolve conflicts between state and federal regulatory agencies would have difficulty with such collateral tensions. Yet these issues form a substantial part of the problem of federal-state interaction in the consumer area.

Conflicts can be partially mitigated through inter-governmental cooperation.


14. This conclusion and other comments on state consumer protection agencies are based in part on a survey conducted in 1972 and 1973 by the author and by Daniel Schneider of the Ohio Bar. Chief law enforcement officers or other appropriate divisions of virtually every state responded. Copies of these replies are on file with the author and at the Arizona State Law Journal. See also Report from the (Ohio) Attorney General, William J. Brown, April/May 1974, at 203.

Since the mid-1960's the Federal Trade Commission has maintained a special section on federal-state cooperation. In addition to disseminating information, this section encourages states and their subdivisions to adopt laws which complement federal consumer protection provisions. FTC field offices have sought to facilitate coordination at the regional level among various public agencies and even private groups concerned with consumer problems. Such cooperation does not cover the entire field of potential conflict and confusion. It would be impossible to anticipate through collaborative machinery all the possible areas of interaction. Moreover, the FTC appears to be the only federal agency which maintains liaison of this type. This is unfortunate, for although it is the largest federal consumer protection unit, it is by no means the only one.

Many conflicts can only be resolved through adjudication. There is relatively little law dealing specifically with federal-state interaction in the consumer protection area, although during the past half century courts have dealt with many analogous issues and have evolved a substantial body of constitutional precedent.

Perhaps the most complex formula for federal-state interaction in the consumer field is the Magnuson-Moss Warranty Act. The new federal warranty and disclosure requirements contained in the Act are generally preemptive in the consumer product area, but the Act also provides for the survival of selected portions of state law remedies that serve the interests of federal law. Further administrative rulings will be necessary to clarify

16. See, e.g., Dixon, Federal-State Cooperation to Combat Unfair Trade Practices, 39 STATE GOV'T 37-38 (1966), in which the Chairman of the Commission described in some detail the creation and the responsibilities of this new liaison section.


20. The Act in part provides:

(b)(2) Nothing in this chapter (other than sections 2304(a)(2) and (4) and 2308 of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

(c)(1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303 and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder). The Act in part provides:

(b)(2) Nothing in this chapter (other than sections 2304(a)(2) and (4) and 2308 of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

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the relationship between prior existing state law, including Article 2 of the Uniform Commercial Code, and the new federal law.

II. Preemption and the Consumer: General Principles

The supremacy clause of the Constitution has been invoked over the years in a wide variety of contexts displaying no particular unifying theme. In few fields of constitutional law has the Supreme Court relied so heavily upon case by case adjudication.

One attempt to resolve some of the preemption issues was Florida Lime & Avocado Growers, Inc. v. Paul. A California law prohibited sale of avocados having less than 8 percent oil content; fruit which failed the test was deemed immature and unfit for market. Under this law, a high percentage of Florida avocados was excluded from California markets although West Coast avocados, which generally have more oil, usually passed the test. Because the Florida avocados met the terms of a federal agricultural marketing agreement, Florida growers attacked the California law as invalid under the supremacy clause. In a five to four decision, the Supreme Court disposed of the supremacy clause issue:

[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.

The Court then examined the nature of the regulated field to determine whether it was "a subject by its very nature admitting only of national superintendence," and on this ground rejected the preemption claim of the

mission determines (pursuant to rules issued in accordance with section 2309 of this title) that any requirement of such State covering any transaction to which this chapter applies (A) affords protection to consumers greater than the requirements of this chapter and (B) does not unduly burden inter-state commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

Id. §§ 2311(b)(2), (c)(1), (2).

22. U.S. Const. art. VI, § 2.
25. 373 U.S. at 138–39. The Court found that the locally drafted and administered agreements were part of a congressional scheme which was designed to promote orderly competition among South Florida growers and not designed to establish a pervasive federal scheme. Id. at 150–51. See 7 C.F.R. § 915.20 (1975).
26. Three constitutional issues had been raised in the district court and were before the Supreme Court on direct appeal: Commerce clause, equal protection, and preemption. The case was remanded on the commerce clause issue. 373 U.S. at 152–56.
27. Id. at 142. Preemption clearly occurs when compliance with both federal and state regulations is physically impossible. If, for example, a federal regulation forbade shipment from Florida of an avocado with more than 7 percent oil content while California would not allow fruit with less than 8 percent oil content into the state, the state regulation would be invalid. Id. at 143.
Florida growers. The maturity of avocados, observed the majority through Mr. Justice Brennan, "seems to be an inherently unlikely candidate for exclusive federal regulations." 

Earlier decisions involving the non-health aspects of food retailing were cited as supporting the view that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." Federal regulation of one end of a stream of commerce did not inherently require the states to keep their hands off the other end. The Court did not distinguish between protecting consumers against wasting money on immature produce and protecting health or safety. In fact, the Court seems to have deliberately declined a clear invitation to establish a hierarchy of state regulatory interests. Thus, by implication, preventing deception is as constitutionally valid a purpose as preventing disease in event of a federal-state conflict.

After finding concurrent regulation neither impossible nor incompatible with the nature of the field, the Court turned to the intent of Congress. Given its presumption against preemption, the Court would not "conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect." Nothing in the Agricultural Adjustment Act specifically foreclosed higher or different state rules for the marketing of federally inspected produce. While the federal statute did set "minimum standards of quality and maturity [to] effectuate . . . orderly marketing . . . in the public interest," such general language did not require a holding of preemption. Other sections of the Act, moreover, revealed a rather narrow view of the legal import of marketing agreements and were concerned primarily with the point of origin rather than with the destination market. Avocado growers in various regions presumably would be free to adopt (and the Secretary of Agriculture presumably would approve) marketing orders which gauged maturity in entirely different ways, suggesting that national uniformity was not deemed essential. The Court also was influenced by the manner in which the Florida growers' marketing agreement was adopted; it was a product of the affected growers themselves, rather than impartial experts, and thus subject to more than a touch of self-interest. Finally, the available legislative history strengthened the argument against preemption.

28. Id.
29. Id.
31. 373 U.S. at 144.
32. Id. at 146.
33. Id. at 146-47.
35. Id. § 602(3) (1970) (as amended).
36. 373 U.S. at 147-48.
37. Id. at 149-50.
The majority's conclusion on the preemption issue was sharply disputed by the four dissenters, Justices Black, Douglas, Clark, and White. In their view the California law violated the supremacy clause because it had the practical effect of excluding from the state a substantial amount of Florida produce which had met federal standards. The dissenters took a different view of the purpose of the federal marketing agreements program and the legal effect to be given approval of such agreements by the Secretary of Agriculture. After intensive analysis of statutory provisions and legislative history, they concluded:

The conflict between federal and state law is unmistakable here. The Secretary asserts certain Florida avocados are mature. The state [California] law rejects them as immature. And the conflict is over a matter of central importance to the federal scheme. . . .

We have, then, a case where the federal regulatory scheme is comprehensive, pervasive, and without a hiatus which the state regulations could fill. Both the subject matter and the statute call for uniformity.

During the same term as the Avocado decision, the Court reviewed another preemption claim in the consumer context. In Head v. New Mexico Board of Examiners in Optometry, a New Mexico law forbidding the advertising of eyeglass prices was challenged by a radio station on several constitutional grounds including alleged conflict with the authority of the Federal Communications Commission. While recognizing that the content of advertising might play some role in an FCC decision to renew or revoke a broadcaster's license, the Court unanimously held that the federal law did not foreclose state regulation of eyeglass advertising. "The nature of the regulatory power given to the federal agency," wrote Mr. Justice Stewart for the majority, "convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulation of professional advertising practices . . . ." Several factors reinforced that conclusion, among them the Commission's drastic sanction for dealing with errant licensees and the large number of states having similar laws which would be displaced by a preemption holding.

Mr. Justice Brennan, who wrote the majority opinion in the Avocado case, offered a slightly different view in a separate concurring opinion. He noted that the FCC could use less drastic sanctions than revoking or cancelling licenses, and had shown some interest in advertising practices. Thus, pre-

38. Id. at 159–78.
39. Id. at 173, 176.
42. 374 U.S. at 431.
43. Id. at 434 (Brennan, J., concurring).
44. Id. at 435–37.
emption could not be avoided because of any lack of federal authority in the field. Rather, Justice Brennan thought the answer must come through application of the several tests in the Avocado case. The field of retail advertising was not one that required exclusive federal superintendence.\textsuperscript{46} A broadcaster could comply with both federal and state law. There was no clear evidence of federal intent to preempt the field; regulation of broadcasting was confined to certain specific facets of licensee conduct, with the implication that others should remain open to state regulation.\textsuperscript{47} Finally, the operation of the state law did not threaten the federal superintendence of the field:

The New Mexico law is one designed principally to protect the State's consumers against a local evil by local application to forbid certain forms of advertising in all mass media. Such legislation, whether concerned with the health and safety of consumers, or with their protection against fraud and deception, embodies a traditional state interest of the sort which our decisions have consistently respected.\textsuperscript{47}

Since 1963 there have been remarkably few Supreme Court decisions on supremacy clause matters.\textsuperscript{48} None of these has shed more light on consumer protection issues than the Avocado and Head cases. Meanwhile, lower federal and state courts, faced with regulatory conflicts in the consumer area, have looked to Avocado for guidance.\textsuperscript{49}

III. PREEMPTION GUIDELINES: LIMITING THE FIELD

Four situations involve federal-state interaction in the consumer area but do not invoke the supremacy clause. First, no preemption question exists when both federal and state agencies are engaged in non-regulatory activity such as gathering and disseminating data for the benefit of consumers, encouraging sound buying practices, describing remedies, or exposing fraud and deception. Even if collaboration in such ventures is not guaranteed by liaison machinery such as the FTC Section on Federal-State Cooperation,\textsuperscript{50}

\begin{itemize}
  \item E.g., Mariniello v. Shell Oil Co., 511 F.2d 853, 856 (3d Cir. 1975) (termination of franchise agreements without cause); Edina State Bank v. Mr. Steak, Inc., 487 F.2d 640, 644 (10th Cir. 1974) (state registration of transfers of pledged shares of unregistered stock); Chemical Specialties Mfrs. Ass'n, Inc. v. Lowery, 452 F.2d 431, 433 (2d Cir. 1971) (pressurized products); State v. 28 Containers of Thick & Frosty, 82 Wash. 2d 722, 514 P.2d 140 (1973) (labeling of substitute dairy products).
  \item Efforts to prevent such risks through closer federal-state liaison are discussed in notes 16–18 supra.
\end{itemize}
the possibility that a federal agency would demand or disclose information subversive to the enforcement of state law, and vice versa, is remote. Even if conflict occurred in this context, interagency discussion or legislative revision would seem more appropriate than litigation.

Second, no preemption question exists when a state regulation or requirement is less stringent than a federal law. Absent a specific exemption for matters regulated by states, the federal standard would be preemptive. All persons subject to federal law must meet the higher federal standard. Yet Congress might insist that where a state remedy exists, it must be pursued before a matter is brought to a federal tribunal. The exhaustion of remedies requirement may postpone, but does not preclude, the application of a higher federal standard.

Third, when federal and state standards are identical, no preemption issue is presented. The only risk of conflict is that state courts may construe the same provisions differently. That risk inheres in any judicial system, however. Two federal judges may differ on the interpretation of statutory language as easily as judges from federal and state courts. The only alternative would be to hold that state law may not operate at all, or at least must await federal construction of common statutory provisions. Such a holding would cripple state and local consumer protection efforts and would be entirely at variance with the concept of a flexible federal system.

Even where the substantive provisions are identical, state law may require different levels of proof or may impose harsher sanctions for a given infraction and thus conflict with federal law. If the variances are slight and do not disrupt the federal regulatory scheme, further inquiry may be unnecessary.

Finally, federal and state law may conflict without invoking preemption. A recent occurrence illustrates this fourth category. In the summer of 1974, the California Milk Producers Board, a state agency representing dairy processors, sponsored a series of television commercials designed to stimulate demand for dairy products. The advertisements featured numerous celebrities lauding the nutritive value of milk. Among other claims, the ads asserted that milk would cure various ills, including some which it could not possibly remedy. The FTC announced it would initiate proceedings against the California Board for misleading the consuming public. The FTC was concerned about the effects on persons with allergic reactions to milk.

52. For example, many states have passed “Little FTC” laws: Massachusetts, Montana, Nevada, North Carolina, South Carolina, Vermont, Washington, and Wisconsin. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE PROGRAMS FOR CONSUMER PROTECTION 34 (Dec. 1973).
54. See, e.g., Fitzgerald v. Catherwood, 388 F.2d 400 (2d Cir. 1968).
or with "lactose intolerance." After the FTC made its announcement, the California Attorney General's office planned to seek a federal injunction against the FTC on the grounds that state agencies were exempt from FTC regulation. 55

The milk dispute would have raised preemption issues if the state consumer agency had enjoined commercials which the Federal Trade Commission had held to be nondeceptive. The latter case is the central concern of this Article; guiding principles are badly needed for this situation.

IV. PREEMPTION GUIDELINES: THE EASY CASES—A STARTING POINT

Perhaps the clearest situation leading to federal preemption occurs when the nature of the field precludes all state regulation. Examples are relatively rare, since the distribution of power in our federal system creates a broad presumption in favor of concurrent regulation. 56 A persuasive case can be made for exclusive federal regulation in some areas of consumer interests, at least with respect to nationally advertised and distributed goods. A recent report of the Council of State Governments, an unlikely proponent of state abstention, summarizes a case for federal primacy:

Most consumer products are produced for the national market. The safety and purity of these products and how they are packaged, labeled and advertised in national media are matters of national concern and should be regulated by national authority. Congress has and, apparently with some renewal of vigor, will continue to provide these standards . . . . This leadership role of the federal government in rule initiation, interpretation and application is crucial to consumer protection because the problems involved require great expertise, as in assessing the seriousness of the probable side effects of a new drug or the probable life and hazards of a new turbine engine for automobiles. 57

The above statement does not propose that state and local governments withdraw from consumer protection. While the federal government may be best equipped to formulate standards for national products, those standards can be enforced quite effectively at state levels. In many consumer areas the state and local interest in consumer protection is strong and well established. A vast and diverse body of non-federal legislation exists that would suddenly be displaced if this field were held to require exclusive federal superintendence. 58 Moreover, the federal government could not practicably assume all consumer protection activity. Many federal agencies, while anxious to promote

uniformity and avoid conflict or confusion, have argued vigorously for shared responsibility in the consumer field. Given the state interest in protecting the health and safety of citizens, a holding of complete preemption might violate the tenth amendment to the Constitution. Thus, it seems clear that consumer protection does not, by its basic nature, require exclusive federal regulation.

Certain consumer matters demand a single body of law. A few years ago New Jersey prohibited the advertising of passage upon a vessel without a clear indication of the vessel's country of origin and its registry. The state Attorney General contended that the law was designed to alert New Jersey citizens to the foreign registry of ocean-going ships, and thereby provide a warning that such ships often did not follow American safety standards. When the Cunard Line challenged the law, the field was found to be federally preempted. The power of Congress to regulate and control foreign commerce and, with the President, to guide international relations, was emphasized in the New Jersey decision. The court implied that any state interference with these federal prerogatives could hopelessly encumber an area of national importance. This provides a rare but illustrative example of preemption based not upon conflict in the operation of particular laws, but on the nature of the regulated field.

An obvious finding of federal preemption results when compliance with both federal and state regulations is literally impossible. Such a conflict was hypothesized by the Supreme Court in the Avocado case: A federal marketing order forbidding the exportation from a state of avocados having more than 7 percent oil content while the market state forbade avocados having less than 8 percent oil content. A grower exporting avocados could not comply with both federal and state law. Without question, the state law must yield.

Preemption through impossibility has been applied to current consumer regulation. At one time, Michigan law required that meat have 12 percent protein content. The Federal Wholesome Meat Act prohibited sale in interstate commerce of meat containing less than 11.2 percent protein, but did not set minimum percentages for other ingredients. The Court of Appeals for the Sixth Circuit held the Michigan law unconstitutional as being preempted by the federal statute, although conceding that compliance with

59. See notes 16–18 supra.
60. See Rothschild & Carroll, supra note 1, at 296–98.
63. 92 N.J. Super. at 160, 222 A.2d at 528–29.
64. 373 U.S. at 143.
65. Id.
both statutes was not impossible. The court found a substantial risk that a problem might arise in the future because the federal government had the power to regulate the amount of each ingredient. A manufacturer meeting Michigan's 12 percent protein requirement would have to reduce the percentages of other ingredients. Thus, compliance with the Michigan statute would become impossible if federal power in the field were fully exercised.

Congress can, of course, decree national uniformity; yet relatively few federal regulatory laws contain unambiguous preemption language. One recent example of such a definitive preemption declaration is found in the 1972 Consumer Product Safety Act. This legislation forbids any attempt by a state or political subdivision of a state to prescribe or regulate safety standards for the products covered by the Federal Act.

Although the language is plainly drawn, interpretive questions might arise over the scope of preemption. In that event the presence of such clear language will aid the courts in resolving any possible preemption controversies. One problem which may survive involves a private suit in tort against a manufacturer or seller of a product subject to the Federal Act. State courts might create a standard of product liability higher than or different from the federal agency standards. Does state "regulation" as proscribed by the Act include a court decision which extends strict liability to certain defective products? Tort decisions could undermine uniformity just as effectively as the divergent rules of a state agency. To date, the courts do not seem to have addressed this issue.

Although resolution of many preemption problems has been simple, more troubling decisions lie ahead. Most state and local regulation in the consumer area is not preempted because of the nature of the field, the impossibility of dual compliance, or an express congressional declaration. Therefore, courts reconcile potentially conflicting laws under a vague set of guidelines and principles and a half century's ad hoc adjudication. The results may be erratic;

68. Armour & Co. v. Ball, 468 F.2d 76, 82 (6th Cir. 1972). The 11.2 percent figure was not provided in the statute, but was drawn from the allowable percentages of other ingredients. See 9 C.F.R. § 319.180 (1975).

69. 468 F.2d at 82.

70. If Congress had been more willing to give such guidance, the courts would have been spared most of the troublesome preemption cases that have plagued them over the years. See Note, Preemption As a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208 (1959).


72. Whenever a consumer product safety standard under this act is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.

Id. § 2075.
federal court decisions within a year forbade Michigan from regulating the protein content of sausages, yet allowed New York to regulate labeling based on the constituent matter of frankfurters. These and other increasingly complex and troublesome cases raise additional considerations.

V. Preemption Guidelines: The Hard Cases

Where the nature of the field permits the coexistence of both federal and state regulation and Congress has not clearly spoken either way, courts must look elsewhere for guidance. The occasional Supreme Court guidelines are too abstract and too general to harmonize individual cases. These cases provide only a starting point for further analysis.

The preemption problem in its clearest form was presented when the Federal Department of Housing and Urban Development promulgated regulations concerning the use of lead-based paint in federally assisted or federally operated renewal projects. The rules required that cracking, scaling, or peeling lead-based paint must be removed, but that paint which had not yet "broken down" could remain on the walls. The Philadelphia Department of Public Health adopted a more stringent rule that required complete removal of all lead-based paint on surfaces accessible to children. HUD often acquired buildings for rehabilitation and resale and budgeted for that purpose enough money to meet the federal rules on paint removal. Philadelphia strictly enforced its regulation. Wherever a resident child suffered lead poisoning and inspection revealed noncompliance, the building was condemned unless all lead-based paint was removed. Thus conflict between the federal and city standards was inevitable. A public interest group brought suit in federal court to compel HUD compliance with the city regulation. The court ruled that the city's higher standard was not preempted and could be validly enforced, even against HUD as the errant landlord.

The lead paint case presents difficult problems. Concurrent federal and state or local regulation has not been foreclosed in any manner discussed in the previous section. Moreover, the local interest in protecting city children from brain damage through lead poisoning is unusually compelling. On the other hand, the federal agency must have carefully considered the particular lead-paint standard, entitling that standard to considerable deference by state and local regulators. The city's higher standards would increase the cost of renovating dwellings that are already at the marginal level and thus may

73. Armour & Co. v. Ball, 468 F.2d 76 (6th Cir. 1972); see notes 66–69 supra and accompanying text.
76. Id. §§ 35.16, .18.
78. Id. at 126.
frustrate the federal interest in encouraging rehabilitation. In short, there are many considerations on both sides. The courts need a framework within which to balance the relevant interests.

A. Presumption for Concurrent Regulation

The courts have indicated a preference for concurrent state and federal regulation. Several factors support such a presumption. First, Congress can make any law or regulation preemptive where it is necessary. Where it fails to include such language, an inference of coexistence seems reasonable. Second, where a vast area like consumer protection is involved, regulation needs to be encouraged, not restrained by preemption. Third, the consumer area is especially suitable for state and municipal concerns due to the local nature of many consumer problems. Finally, the coordination of a broad range of consumer protection activities, including civil remedies, criminal sanctions, educational campaigns, investigations, and dissemination of information, depend on state and local governments. Thus, a general presumption of non-preemption seems appropriate.

B. Factors Supporting Preemption

Since Congress seldom declares that a given statute or regulation shall supersede state or local law, courts must look to other indicia, such as the purpose of the federal regulation, the extent of federal activity in the field, the practical capacity of the federal agency to regulate the field, and the policy or attitude of the federal agency on the preemption issue.

Guessing legislative motive is almost always hazardous. At times, although the objectives of an act of Congress are not clearly stated, they can be readily inferred. For example, when Congress seeks to provide a license or immunity to a person who complies with federal law, the state is impliedly preempted from restricting the use of that license or privilege. Such a result is particularly common in the case of interstate carriers where the need for interstate mobility transcends local interests. Courts sometimes have held a federal standard preemptive because of the need to give comprehensive and predict-
able effect to a federal action. The Supreme Court has held that a person given a federal discharge in bankruptcy could not be denied a state driver's license on grounds of financial irresponsibility. Conceding that a valid state interest in ensuring highway safety could be linked with solvency, the majority nonetheless held that denying the license "frustrates the full effectiveness of federal law" and the goal of the bankruptcy discharge procedure. The strong federal policy was to enable discharged debtors to enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt," a goal which the state law thwarted.

The federal purpose test of preemption occasionally has found its way into the consumer area. Relatively few federal laws bearing on consumer interests grant the seller a federal license or immunity from state registration. However, in striking down a California law governing accuracy of weight statements on meat package labels, a district court talked of the "federal statutory scheme which, when properly executed by state or federal officers, secures to the American homemaker the assurance that expected wholesomeness and value is [sic] received for each consumer dollar spent." Such a sweeping holding is quite unusual in the judicial interpretation of federal consumer laws.

From time to time the courts have suggested that federal regulation may be so pervasive that it leaves little or no room for state intervention. If, for example, a federal agency has issued extensive regulations covering virtually every dimension of a field, concurrent regulation by other governmental entities is likely to be foreclosed. On this basis the Supreme Court held that cities could not restrict the schedules of federally regulated aircraft. In City of Burbank v. Lockheed Air Terminal, Inc., a five to four majority held that local regulations must yield, although "control of noise [was] of course deep-seated in the police powers of the States." The pervasive nature of the scheme of federal regulation of aircraft noise led to the conclusion that the field was preempted. The pervasive control vested in the EPA and the FAA seem to leave no room for local curfews or other noise control.

Partial or limited federal regulation may tip the balance in favor of

85. Id. at 652.
86. Id. at 648, citing Local Loan Co. v. Hunt, 292 U.S. 234 (1934). For a recent reaffirmation of this principle in a slightly different context, see Rutledge v. City of Shreveport, 357 F. Supp. 1277 (W.D. La. 1973) (effect of bankruptcy and discharge on eligibility for public employment).
89. Id. at 638.
coexistence between federal and state regulation. In the Avocado case the Court stressed that the Agriculture Department regulated only the origin of the avocados and not their shipment or sale. In the previous term, the Court had given preemptive effect to the Tobacco Inspection Act. The Avocado majority distinguished that law as more pervasive than the Agricultural Marketing Act since the Tobacco Act covered production, shipment, sale, and storage.

A regulatory scheme can be “pervasive” without occupying every nook and cranny. If there are gaps, they may be the deliberate result of a federal decision that no one should regulate the lacunae, not of Congress having abstained. In addition to the sheer amount of federal legislation and rule-making, the pervasiveness of the federal scheme should be examined. A recent consumer case illustrates this point. In resolving a dispute between state and federal regulations, a federal district court found the federal provision invalid but nonetheless concluded that the state regulation was preempted. The ultimate issue was the pervasiveness of the federal scheme or system, not of the particular law implementing that system.

Even if the federal purpose or the extent of regulation suggests preemption, courts should consider the practical consequences of such a holding. A federal agency may have extensive legal powers but lack the personnel and other resources necessary for effective regulation. Such practical considerations will often tip the balance in favor of state or local regulation. In Head v. New Mexico Board of Examiners in Optometry, for example, when the radio station argued that the powers of the Federal Trade Commission were preemptive in the field of regulation of price advertising in eyeglasses, Mr. Justice Brennan dismissed the suggestion on practical grounds:

[I]t appears that the FTC is neither-equipped for nor desirous of assuming exclusive responsibility for essentially local advertising abuses, particularly where the state regulation complements the federal prohibitions.

If Congress clearly favors some regulation and a preemptive decision would leave an overburdened federal agency alone in the field, the case for concurrent regulation is strengthened.

Another airline regulation case illustrates the “practical capacity” principle. In the late 1950’s the practice of “overbooking” by major airlines became increasingly common and seriously inconvenienced air travelers. In response

92. 373 U.S. at 150.
94. 373 U.S. at 147.
97. 374 U.S. at 441 n.20 (concurring opinion).
to many complaints, the Civil Aeronautics Board adopted a regulation forbidding the practice, but failed to enforce it. A federal district court took matters into its own hands and fashioned a remedy for a passenger who had been "bumped" as a result of overbooking. The court based its decision substantially on the inability or unwillingness of the responsible agency to address a serious consumer problem. Using similar logic, a federal court of appeals allowed recovery under state tort law for burns suffered from the combustion of a flammable nightgown, rejecting the manufacturer's argument that the federal Flammable Fabrics Act set exclusive standards. The preemption argument was denied in part because the Secretary of Commerce had not, in the 14 years since passage of the law, exercised his responsibility to promulgate regulations. The dilemma facing the court was particularly difficult; in 1967 Congress had added a provision that federal law should supersede inconsistent state standards governing flammable fabrics. The court gave this language a very narrow scope, partly because the responsible federal administrator had failed to employ the rulemaking authority which probably would have occupied the field.

A final and closely related factor is the position taken by the federal agency itself on the issue of preemption. In the Head case, the Supreme Court deferred in large part to the view of the FCC that state eyeglass price advertising regulation should not be preempted. Such statements are highly relevant in the absence of any congressional declaration or evidence of legislative intent. Occasionally, however, a court has refused to permit an agency to abrogate its responsibility for a particular regulatory field, reading its congressional mandate more broadly. In other contexts, notably labor-management relations, the courts have held a field preempted by the federal government even though the agency declined to exercise its authority.

In the consumer area, federal agencies have not only permitted but have often encouraged concurrent state and local regulation. The FTC has been particularly hospitable. Nearly a decade ago the Commission created a special Office of Federal-State Cooperation. The office staff has worked

101. 484 F.2d at 1028.
103. 484 F.2d at 1028.
107. See notes 16--18 supra.
closely with state and local consumer protection agencies not only in gathering and disseminating information but in strengthening laws and remedies below the federal level. Special encouragement has been given to the enactment of so-called "little FTC" laws which imitate the federal statute and provide parallel penalties. In seven cities, the FTC field offices have organized consumer protection committees which attempt "to bring all federal, state and local consumer protection agencies in a particular area together" and thus "create a 'one stop' consumer protection complaint service." Recently, the FTC also has urged states to repeal or abolish laws such as fair trade and resale price maintenance provisions which may hurt consumer interests. Thus the federal practice increasingly has been one of close cooperation and willingness to share jurisdiction with state and local agencies.

Other federal agencies in the consumer field are not as cooperative as the FTC. As noted earlier, some 40 departments, bureaus, commissions, and other units of the federal government are involved to some degree in consumer protection. A substantial risk of conflict may exist but may not have been addressed by an agency. Courts must try to infer the agency's position on concurrent regulation. If the CAB will not act on overbooking or the Commerce Department on combustible nightgowns when the need for effective consumer protection is clear, the agency may have waived any claim to exclusive regulation. Obviously a clear statement of agency position, such as that adopted by the FTC, would give the courts far better guidance than the more typical silence. The courts perform a useful service by refusing to honor preemption claims absent substantial agency commitment to consumer interests.

C. Factors Supporting State Regulation

State and local interests in consumer protection may be easier to assess than the federal. The time is long gone, if it ever existed, when Congress could not touch certain subjects because of the strong interests of the states and cities in the health, safety, and welfare of their citizens. The Supreme Court has recognized that falling back on the general local police power does little to resolve preemption claims. More careful analysis is required. Where the objective of state or local regulation differs substantially from that of a conflicting federal law, the disparity may support coexistence. Perhaps the best illustration is the Supreme Court's decision in Huron Portland Cement Co. v. City of Detroit. In Huron, the Court upheld a municipal smoke

108. See A Time for Renewal, supra note 7, at 413–14.
109. See note 52 supra.
abatement law as applied to ships with federally inspected and approved boiler systems. The majority emphasized that Detroit wanted to reduce air pollution while the federal inspection and licensing system sought to ensure safety. But for this difference of purpose, preemption would probably have existed since the federal law was pervasive and Congress clearly intended to permit licensed vessels to pass freely through interstate waterways.

The "difference of purpose" test has supported several later decisions upholding concurrent regulation. A federal district court recently supported a New York City regulation that reduced the lead in retail gasoline below the federally allowed amount. The federal rule was designed to protect automobile emission control devices, while the city ordinance promoted health and safety. In addition, the federal administrator had authority to promulgate rules for the second purpose, but had done nothing, possibly tipping the balance in favor of coexistence.

A clearer example of divergent purposes occurred recently in the drug and pharmaceutical area. When a pharmacist's license was suspended by the state licensing board for "grossly unprofessional conduct," the pharmacist appealed the suspension on the ground that federal drug laws covered the same infraction. The court rejected the claim of preemption because the objectives of the two laws were quite different. The purpose of the federal act was to prevent unfair trade practices, while the state law sought to protect the public health.

At this point the case of the lead-based paint conflict between the Department of Housing and Urban Development and the City of Philadelphia is instructive. All the criteria examined thus far supported preemption. The federal scheme was pervasive and the standard quite explicit; the purposes of the two laws were identical; and meeting the city standard would entail substantial cost. Nevertheless, the court found no preemption. The dispositive factors appear to have been the strength of the state interest and the judge's feeling that HUD was insensitive to that interest:

To equate the admittedly real and grave danger of permanent brain damage to small children with the relatively modest additional cost of rehabilitating houses to free them from lead-based paint raises issues that no amount of rationalization or legal theory can justify on moral grounds.

A similar concern appeared in the flammable nightgown case; the court of

115. Id. at 663.
117. Id.
appeals noted "the plight of burn victims who are most often the very young and the aged . . . "120 Earlier, a district court had upheld a municipal anti-fireworks ordinance in part because of "Houston's tragic experience with fireworks explosions."121 Courts in these cases did not hesitate to consider the preemption issue in the light of the strength or gravity of the state's interest.

The Supreme Court has hesitated to rank regulatory interests for supremacy clause purposes. In the Avocado case, the Florida growers challenging the California law argued that, because the California law did not relate to health or safety, it was less worthy of concurrent existence with the federal regulation. Immature avocados were not dangerous, just a waste of money. But the Court found no hierarchy of regulatory interests, suggesting that a law designed to keep consumers from being cheated was as valid as one to keep them healthy.122

Perhaps any valid exercise of state regulatory power is entitled to considerable deference. The question may focus less on the importance of the state or local interest than on the adequacy of the allegedly conflicting federal standard in serving that interest. Thus, interests as insignificant as protecting consumers from poor quality avocados and as important as protecting children from lead poisoning can survive in the face of concurrent federal regulation.

Courts consider the scope of state and local regulation just as they appraise the extent of federal activity before deciding the preemption issue. At the very least, such information relates to whether Congress meant to displace state and local law. The Supreme Court remarked in the Head case that a broad grant of federal power would be a curious way to "supplant all the detailed state regulation of professional advertising practices" that had been brought to the Court's attention.123 Similar issues were raised in a challenge to a Massachusetts law124 prohibiting promotional contests or games of chance with cash prizes for promotional purposes.125 Mobil Oil sued in state court alleging that the law was unconstitutional because it conflicted with a recent FTC rule regulating games of chance in the gasoline industry.126 The court found state regulation of a field into which the FTC had only lately moved to be pervasive and of long standing. Prior to the FTC rule, similar promotional games had been declared unlawful in many states under traditional anti-gambling laws. At least three states had specific laws covering such games and contests. The court concluded:

In view of the demonstrated local interest in this area, we believe

122. 373 U.S. at 144.
123. 374 U.S. at 431.
126. Id. at 408, 280 N.E.2d at 412. The conflicting FTC rule is found in 16 C.F.R. § 419 (1975).
that had the Commission intended to affect the substantial body of
existing State law and preclude further State action it would have
expressly so stated. 127

In the consumer protection area, the extent of state and local involvement
varies widely. Certain practices have been regulated for decades, while others
have only recently come under legal scrutiny and constraint. Consumer
interests at the state and local level are represented increasingly by agencies,
not through private suits or criminal prosecutions. 128 The staffs to enforce
consumer protection laws have expanded impressively in recent years. As
such regulation increases, the case for preemption becomes weaker.

VI. CONCLUSION

Given the increasing importance of preemption issues in the rapidly
proliferating field of consumer protection, it is imperative that courts have
some firm guidelines. Disturbingly few fixed principles have emerged.
Although Congress could declare which laws are preemptive, the exigencies
of the federal system and national politics have virtually precluded such
clarification. The Supreme Court has resolved supremacy clause cases in a
highly individualized fashion. In highlighting what common factors exist,
this Article has sought to rationalize an inordinately untidy area of constitu-
tional law. Attempting to find coherence may be the ultimate testimony to
the extent of the chaos. Seizing these few threads of continuity, courts may
be able to lessen future confusion and delay in protecting consumers.

127. Id. at 411, 280 N.E.2d at 414.
128. See, e.g., Sand & Weisberg, Translating Sympathy for Deceived Consumers into
Second Year Candidates

Jennifer B. Beaver
Carol E. Bentz
Michael J. Brophy
Susan K. Helm
J. Lawrence McCormley
Richard K. Mahrle
Kathleen D. Masters
Jeffrey D. Menicucci
James T. Myres

Arthur G. Newman
Patricia K. Norris
Allen L. Orr
Marilyn A. Pollard
Michelle L. Ratner
Jack N. Rudel
Robert L. Shaw
Gordon G. Stoner
Kevin Tehan
R. Jeffrey Woodburn