

1996

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Recommended Citation

Norman I. Silber, *Consumer Protection Laws of the States: How Much Diversity Should the Central Government Discourage? Where Desirable, How Should Uniformity Be Promoted?* 431 (1996)

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Consumer Protection Laws of the States: How Much Diversity Should the Central Government Discourage? Where Desirable, How Should Uniformity Be Promoted?

Norman I. Silber

THE PARADOX OF THE "EMPIRE WITHIN AN EMPIRE"

At the core of American federalism lies the paradox of *Imperium in Imperio*, or an "empire within an empire."¹ It has been said that without the exercise of relatively autonomous political power by legislative bodies on at least two planes of government, there would be no federal system. Without such a concept, political power would be either centralized or else dispersed in a confederal fashion. The framers of the Constitution most feared usurpation of power, not by the federal government, but by the states. James Madison, for example, expressed the common opinion, based on the experience with the Articles of Confederation, that

there was less danger of encroachment from the General (federal) government than from the state government; that the mischief from encroachments would be less fatal if made by the former than if made by the latter. All the examples of other confederacies prove the greater tendency in such systems to anarchy than to tyranny; to a disobedience of the members than to usurpations of the federal head.²

At the core of the American federal system are concurrent powers that belong to the states, and that are beyond the ability of the federal government to curtail or displace through preemption. These include the power to tax in the absence of evidence that a state has imposed a burden on commerce among the several states; the power to regulate the impact of businesses and individuals on localities; and the power of state courts to enforce common law rules.

Historically, the states have taken on a first-line role in policing the local marketplace for signs of fraud and abuse. In recent years, and especially after the Republican election victory of 1980, states aggressively have pursued the

enforcement of consumer rights in areas where federal agencies also have authority. One reason for this state assertiveness is that many federal agencies no longer have the resources to carry out their responsibilities by themselves. Another is that states may have stronger laws at their disposal than the federal government. And the deregulation of health and safety programs, which was aggressively pursued during the Reagan and Bush administrations, was a goal not shared by many segments of society, well-reflected in many state political bodies. Not surprisingly, state agencies often decided to take actions that might have been taken by previous federal regimes. These trends have been reflected in increasingly divergent attitudes toward consumer protection taken by state and federal court systems.

While there has been a trend in favor of increasingly aggressive consumer protection by the states, there also has been a countervailing trend at work: a sharp increase in federal preemptive action. Many recently enacted federal laws express provisions for "total," or "complete," federal preemption (although there are many kinds of "totality").

Political scientists and legal scholars have identified various types of "complete" federal preemption.³ These types include (1) laws that repudiate state financial or administrative assistance to the federal government in implementing a regulatory regime but depend on interpretations and legal definitions in significant respects; (2) laws that forbid states from establishing economic regulations; (3) laws that forbid individuals from discriminating on particular grounds but that reserve the right to discriminate to government entities; (4) federal laws incorporating state and local assistance; (5) laws that preempt the states from regulating but that allow states to regulate their own activities; (6) limited regulatory turnbacks that allow federal authorities to delegate certain authorities to the states; (7) mandates to states to enact parallel state laws; and (8) requirements that states must comply with federal laws in the enactment of state laws.

Let me provide a few examples of such preemptive rules. The Flammable Fabrics Act stipulates that "this Act is intended to supersede any law of any State or political subdivision thereof inconsistent with its provisions."⁴ Similarly, the U.S. Grain Standards Act⁵ forbids states or political subdivisions to require "inspection or description in accordance with any standards of kind, class, quality, condition or other characteristics of grain as a condition of shipment, or sale, of such grain in interstate or foreign commerce, or require any license for, or impose any other restrictions upon, the performance of any official's inspection function under the Act by official inspection personnel."⁶ The Federal Food, Drug, and Cosmetic Act⁷ forbids state and local governments "to establish . . . any standard which is applicable to the same aspect of the performance of such product and which is not identical to the federal standard."⁸ At the state level, laws continue to be passed that serve local needs, but whose subjects touch on federally regulated fields.⁹

And so the state "empires" are being confined by federal action. The increasingly aggressive consumer protection activities of the states have been confronted, and increasingly thwarted, by preemptive provisions of federal laws. Challenges based on explicit preemption provisions, and on doctrines that assert preemption by implication, are being levied against state consumer protection laws and state common law causes of action. In fact, as indicated below, states are now being encouraged to express the inclination to be preempted by federal laws within their own state regulations and administrative decrees.¹⁰ It falls to the courts to determine where the appropriate limits of federal preemption are to be drawn to determine how far each empire may extend.

Consider, in this context, several illustrations of the development of case law with respect to the preemption of state law and state common law rights of action.

PREEMPTION OF STATE AND LOCAL LAWS BY FEDERAL LAWS AND FEDERAL REGULATIONS: FOOD LABELING

There exist, and have existed for a long time, extensive federal regulations affecting the marketing of food and food products. Some of the federal statutes that regulate food labeling contain specific preemption language—principally the Federal Meat Inspection Act (FMIA),¹¹ the Poultry Products Inspection Act,¹² and the Fair Packaging and Labeling Act.¹³ Others, such as the Food, Drug, and Cosmetic Act (FDCA),¹⁴ contain no specific language. Nevertheless, the states have continued to legislate in the area of food packaging and food labeling.

The touchstone case for any discussion of preemption in the food labeling area is *Jones v. Rath Packing Co.*¹⁵ In *Jones*, a meatpacker sought to prevent a California county director of weights and measures from removing from stores packages of bacon that the California director declared to be underweight.¹⁶ The Supreme Court held that, as applied to packaged bacon that was subject to the labeling requirements of the FMIA, a state's weight labeling statute and duly promulgated regulations were preempted by federal law. The Court began its analysis by observing that, when the area sought to be preempted has been "traditionally occupied by the states, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act."¹⁷ For preemption to occur, the Court held, such a result must have been "the clear and manifest purpose of Congress."¹⁸ This assumption was intended to assure that "'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts."¹⁹ Thus, Congress must *intend*, either explicitly or impliedly, that federal legislation preempt conflicting state law.

When there is no clear expression of Congress' intent to preempt, preemption may still occur if Congress has impliedly expressed an intent to preempt state law. Such an intent may be implied if Congress (1) occupies the field of law, leaving no room for state law to coexist, or (2) by creating an actual conflict between state and federal law. The latter is accomplished when (a) Congress makes compliance with both the state and federal laws impossible, or (b) state law stands as an obstacle to the accomplishment or execution of the full purposes and objectives of Congress under the federal law.²⁰

The Court in *Rath Packing Co.* held that state statutes and regulations that did not allow for reasonable variations from stated weight, resulting from loss of moisture during the course of good distribution practices, were in actual conflict with the federal FMIA.²¹ The Court explained that FMIA, in defining when meat or a meat product was misbranded, provided that "reasonable variations" between the actual weight and the weight stated on the label could be permitted by regulations prescribed by the Secretary of Agriculture, and the Secretary's *regulations* did, in fact, permit "[r]easonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice[s]."²² The federal law prohibited the states from imposing labeling or packaging requirements "different than" those imposed under the act.²³ The Court noted that the state law implicitly allowed for variations from the stated weight caused by unavoidable deviations in the manufacturing process by its use of a statistical sampling process. Nevertheless, the state law failed to allow for moisture loss and so was "different than" the federal requirement, thus, falling within the scope of the federal preemption provision.

In 1985 a grocery manufacturers' association brought an action against the enforcement of a New York regulatory scheme.²⁴ The state scheme required anyone who sold prepared foods containing cheese "alternatives," whether for carry-out or for consumption on the premises, to display a sign that disclosed, in three-inch letters, those foods that contained "imitation cheese," and other specific packaging labels. Nowhere in the FMIA or the FDCA was the word "imitation" defined. The Department of Agriculture contended that a nutritionally *superior* food substitute would be misbranded under the state law because of an FDCA regulation,²⁵ which provided that the word "imitation" must only be used with respect to a nutritionally *inferior* substitute. The court found that there was actual conflict between the New York labeling scheme and its federal counterpart. Since including the term "imitation" on the label of a nutritionally superior alternative cheese in order to comply with New York law would render the product misbranded under federal law (FDCA), actual conflict existed between the two regulatory schemes.²⁶ The court stressed that, in concurrent enforcement of a law, a state will not be permitted to prevent the distribution in commerce of any article that conformed to the definition and standard of identity or composition set by the federal act. The court, thus, by

summary judgment, concluded that the Poultry Products Inspection Act²⁷ preempted New York laws.

The congressionally declared goal of the Fair Packaging and Labeling Act²⁸ is that packages and their labels should allow consumers to obtain accurate information about the quantity and the contents of goods and facilitate comparisons of value.²⁹ Section 1461 of the act provides that it is the express intent of Congress to supersede less stringent state laws relating to the net quantity of contents of consumer commodities, as well as those that require different information from the requirements of the act. In *L & L Started Pullets, Inc. v. Gourdine*,³⁰ the court held that city and state regulations involving the labeling of egg weights and measures were not preempted by the Fair Packaging and Labeling Act or other laws because that was not Congress' intent. The court relied on the "presumption" against finding congressional intent to preempt where the specific subject of regulation has traditionally been delegated to the states "as within their legitimate police powers."³¹

On the other hand, consider the recent case of *Lever Bros. Co. v. Maurer*,³² in which a manufacturer of dairy products successfully enjoined the enforcement of a state statute that prohibited the use in a product label of the word "BUTTER." The court held that since federal law required that a product label must include the ingredients contained in a product, it would be impossible to comply with both state and federal laws. Again the state law was preempted by federal laws under the supremacy clause.³³

The increasing success of federal preemption claims diminishes the range and intensity of state protective activity without ensuring that the federal activity will replace that state activity which had been foregone. Recent conflicts between the state and federal levels of government over food labeling, in particular, show signs of further reducing the realm of state activities. After more than a decade in which the federal government has been inactive with respect to the establishment of labeling requirements, the Environmental Protection Agency, the Food and Drug Administration, and the Federal Trade Commission have begun to develop new regulations that would dramatically change nutritional labeling requirements for many foods. These regulations would also regulate the marketing of environmental marketing claims—by providing minimum standards, for example, for such words as "recyclable" or "biodegradable."³⁴ This federal activity may be attributed, at least in part, to the fact that manufacturers have expressed some dismay at the profusion of state and local laws that provide different definitions for these and other terms. This suggests a sensible desire to increase marketing predictability and uniformity of regulating laws. It also threatens to cut back on state policing initiatives, however, since most of the proposals for these regulations would involve strong preemption provisions that would have the federal regulations supersede state and local laws.³⁵

THE IMPLICIT PREEMPTION OF COMMON LAW TORT REMEDIES: CIGARETTES AND AIRBAGS

Cigarettes

A great deal of attention has attended the tort claims brought by smokers against cigarette manufacturers. The most publicized claim was that of Rose and Antonio Cipollone, who charged three cigarette manufacturers with failing to adequately warn them of the risks of smoking and with producing an unreasonably dangerous product.³⁶ The Cipollones' claim was opposed by cigarette manufacturers, who claimed that the 1965 federal Cigarette Act,³⁷ which prescribed uniform warning labels for cigarette packages and advertisements, preempted any state tort law claims relating to smoking and health that would seek to challenge the adequacy of those warning labels.³⁸ Initially, the content and sufficiency of cigarette warning labels were left to the individual states to define. However, after the states passed numerous different warning labels that were to be placed on cigarettes sold within each of their different jurisdictions, Congress created a single federal warning label scheme with its enactment of the 1965 Cigarette Act. Through the Cigarette Act, Congress dictated the specific wording of a cigarette label intended to warn consumers of the product's health hazards and created a uniform standard. The act included this congressional declaration of policy and purpose:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing labeling and advertising regulations with respect to any relationship between smoking and health.³⁹

Nowhere does the Cigarette Act state specifically that state court actions are barred.⁴⁰ The Cigarette Act also contains a preemption provision that states:

- (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
- (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.⁴¹

Despite the absence of express preemption language, the courts in cigarette preemption cases have taken the view that, under an "implied preemption"

analysis, which asks whether state law stands as an obstacle to the accomplishment of the full purposes of Congress,⁴² by "disrupting excessively" the balance of interests established by Congress. That is, that the suits against the cigarette manufacturers and distributors upset the Cigarette Act's balance between the protection of health and the protection of trade and the national economy.⁴³ This position was first assumed in 1986 by the Third Circuit Court of Appeals⁴⁴ and subsequently upheld by at least three other courts of appeal and two state appellate courts.⁴⁵

Airbags

The question of whether common law tort actions can be preempted by federal laws in the absence of explicit preemption language has expanded from cigarette litigation to airbag litigation. Recent circuit court decisions suggest that manufacturers are successfully raising the preemption defense in other types of product liability, design defect actions, related to the absence of airbags in cars.⁴⁶ Safety standards adopted pursuant to the National Traffic and Motor Vehicle Safety Act of 1966,⁴⁷ as subsequently amended, provide manufacturers with options for complying with occupant crash protection standards, of which airbags in conjunction with seatbelts is only one.⁴⁸ The issue is whether a manufacturer who chooses one of these options and meets all of its requirements thereby is free from tort liability.⁴⁹ The inquiry in these cases has been whether Congress intended to prevent all further state action concerning safety restraints in automobiles by giving manufacturers these options; in essence, whether Congress intended to preempt state tort law claims.

In 1968 the Eighth Circuit decided that Congress intended the National Traffic and Motor Vehicle Safety Act to be an addition to the common law of negligence and product liability and not a replacement for it.⁵⁰ Therefore, plaintiffs could maintain state tort actions under the 1966 law.⁵¹ Several recent court decisions, however, have held that the National Traffic and Motor Vehicle Safety Act preempts a consumer's ability to maintain a state common law design action against an automobile manufacturer for failing to install an airbag in its products.⁵² As the First Circuit viewed it,

Congress believed that for the federal standards to be effective, they had to be uniform throughout the country. . . . A state regulation requiring passive restraints would be expressly preempted because it would destroy the uniformity of the federal standard. . . . By the same token, a defective design action which, if successful, effectively would likewise destroy the national uniformity of the federal standard and exceed the state's authority.⁵³

The opposing view, expressed recently in *Garret v. Ford Motor Co.*,⁵⁴ relies on cases such as *Silkwood v. Kerr-McGee Corp.*⁵⁵ to support the proposition that a

jury award of damages is not a form of state regulation, that damage awards for failure to install airbags are not a form of state regulation, and that "damage suits will tend to encourage safety, not countervail it." From this perspective, state tort law claims should not be preempted because, while they do not encourage uniformity, they do achieve Congress' goals of more safely designed cars.

PREEMPTION BY STATE INVITATION: CONSUMER BANKING SERVICES

Suppose you are a state legislator presented with the latest version of Revised Articles III and IV by the National Conference of Commissioners on Uniform State Laws and the America Law Institute, which is concerned with negotiable instruments and bank collections.⁵⁶ Among the earliest sections you encounter is Section 3-102(c),⁵⁷ which delineates the following relationship between federal and state law: "Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provisions of this Article to the extent of the inconsistency."⁵⁸

This preemption language sounds familiar enough and, indeed, similar preemption clauses exist in many federal banking enactments. Perhaps the only unusual aspect of the language itself lies in its inclusion of "operating circulars," in addition to regulations, as administrative declarations that preempt state law. Regulations of the Federal Reserve Board have the effect of statutory law and, as we have already seen, may preempt inconsistent state law.⁵⁹

Operating circulars, however, are not developed and promulgated according to the administrative processes and procedures that normally lend legitimacy to federal regulations.⁶⁰ Federal Reserve Banks develop operating circulars pursuant to authority either granted by the Federal Reserve Act or delegated through a Federal Reserve regulation.⁶¹ When operating circulars are uniform for all Reserve Banks, as are the majority, the individual Reserve Banks themselves draft the language of the operating circular, which is then submitted to the Federal Reserve Board, which adopts the operating circular, presumably in the same way it would a regulation.⁶² The same procedural standards, including procedures for public notice and comment, which are met by the Federal Reserve Board when it promulgates regulations, apparently are not met when operating circulars are developed.⁶³

It is not only the language of the preemption provision that is unusual; it is also the plane of government at which the provision has been located. This particular preemption provision is located within a body of state law. Why should a state legislator adopt a state law that reifies federal preemption of

essentially the same subject matter—negotiable instruments law—that has not previously been wholly occupied by federal law? It is possible that, since the drafters' goal is to create uniformity and predictability in commercial transactions, and since banking law has become increasingly national in scope, a state would contain within it interest groups that would welcome one uniform rule in preference to nonuniform state rules, however advantageous particular divergent rules otherwise might be. Any such intent is not compellingly expressed in the statute or indicated by its comments—and if it were so expressed might generate controversy.

Explicit preemption provisions contained within federal legislation and regulations provide courts and regulators with valuable guidance about legislative or administrative intentions to preempt. What incentive is there, however, for a state to issue a written declaration and "invitation" to a federal regulatory body to exercise a maximum level of federal supersession over a broad area of law that is "traditionally the province" of the states? It might be argued that after a state has adopted such a preemption provision, preemption determinations will still be made under the same traditional preemption analysis outlined above. The very fact that the state has adopted such a preemption provision, however, will be strong evidence of the states' *intent* to be preempted.

The problem I refer to will arise when courts are asked to address the preemption by a federal regulation or operating circular of a state law related to Article III. A court so challenged reasonably may assume that the state intended to be preempted because, in adopting the Uniform Commercial Code (UCC), the state could have chosen not to adopt any such preemption provision. A court might conclude, in its choice of a preemption provision, that the state adopted a highly restrictive provision.⁶⁴ Beyond the effect on courts that determine preemption under a standard analysis, consider the "chilling" effect such a provision may have on state consumer initiatives. Adopting such a provision may well provide a disincentive to states contemplating the adoption of their own legislation in areas where the provision might intrude.⁶⁵

THE CORROSIVE EFFECT OF "COMPLETE" PREEMPTION

The doctrine of preemption is complex and unsettled. What does appear, however, is a trend toward the inclusion of explicit federal preemption provisions that confine areas of governance in domains formerly the traditional province of the states. Although there have been instances in which states have invited preemption, driven by a presumable need for uniformity, those situations are exceptional. On the whole, state governors and activists have resisted the preemption of what had previously been exclusively state activities.

This resistance to preemption has been especially vigorous with respect to

consumer protection laws. Local consumer groups often have lobbied for their own states to better protect consumer interests and have obtained significant consumer protection measures or won higher consumer protection thresholds through court decisions. In the cases considered here, however, it has been just when local consumer groups have made these substantial gains that local companies and businesses have lobbied Congress to obtain complete preemption by enacting a "uniform" standard.⁶⁶

If and when such uniform standards are adopted through a total preemption approach, state interests may be damaged. The vitality of the state governments may be diminished, individual state innovation may be stifled, and popular resentment may be sparked by local consumer groups. The tension between federal and state governments, furthermore, creates conflicts that serve to corrode federalism and that, in turn, erodes political safeguards that federalism, at least in theory, seeks to protect and to maintain.

As demonstrated above, uniformity appears to be the chief benefit out of such a "complete preemption" arrangement—and the advantages to uniformity, both for businesses and consumers, should not be minimized. However, if uniformity sufficient to achieve national goals can be accomplished without total preemption of state consumer protection laws, much would be gained. It appears to me that there are several uniformity-promoting solutions, short of total preemption provisions, that should be considered. Here I will mention two. Interstate compacts and regional agreements can be used to foster uniformity without federal involvement. And perhaps the most notably successful American approach to achieving uniformity without federalization, which began almost a century ago, has been the encouragement of model legislation proposed for adoption in each state: Model Rules, and Uniform State Laws.

INTERSTATE COMPACTS, MODEL LAWS, AND UNIFORM CODES: MINIMIZING THE STATE-FEDERAL CONFLICT

Professor Jonathan R. Macey recently observed that, in the abstract, the concept of federalism is a "revered sacred cow"—politicians shout the virtues of state autonomy whenever deference to the states happens to serve their political needs, yet "are quick to wield the power of the supremacy clause whenever a single national rule in a particular area furthers their political interests."⁶⁷ Politically, the incentives for federal lawmakers and state lawmakers to desire either to defer to, or preempt, legislation promulgated at another level are continually shifting as the political landscape changes. On occasions, the states have attempted to forestall federal preemptive action by promoting the adoption of uniform state laws and entering into interstate compacts, creating agencies with powers to solve problems. An example of the unsuccessful effort of the latter nature is the Mid-Atlantic States Air Pollution Control Compact, which

was entered into by Connecticut, New Jersey, and New York in 1967 subsequent to President Lyndon B. Johnson's message to Congress on air pollution, recommending federal preemption no responsibility for air pollution abatement. Congress did not grant its consent to the use of the interstate compact.

One way that the states have preserved their autonomy while achieving a degree of uniformity not otherwise obtainable has been through two institutions: the National Conference of Commissioners on Uniform State Laws established in 1891, and the American Law Institute established in 1923. These two groups are responsible for the development and promulgation of model rules and uniform state laws. The UCC is prepared by the American Law Institute (ALI) in cooperation with the National Conference of Commissioners on Uniform State Laws. The initial drafting of the uniform laws is accomplished by practicing lawyers and legal teachers in the particular field or area of law, under the supervision of the ALI and the commissioners.

Model rules (for example, the Model Penal Code) and uniform legislation (for example, the Uniform Commercial Code) have approached the goal of a uniform interpretation of the law without resort to federal legislation. Where the goals of uniformity arise from concern that an individual state's legislation can be defeated through the application of conflict of law rules in federal litigation, or when the interest in an essentially uniform national law is great, it may be sufficient to adopt such an approach instead of adopting a federal rule.

The Uniform Commercial Code provides an excellent example of uniform laws approach; the Model Penal Code provides an example of the model law approach. Model laws may serve other, seemingly secondary, functions as well as providing uniformity. The Model Penal Code (MPC), for example, is far more complete than any state legislation. In this instance, model laws serve a notice-giving function; what is a crime in one state would be a crime in any other state that had adopted the MPC.⁶⁸

CONCLUDING THOUGHTS

I am not familiar with the law of the Soviet Union. It would appear, however, that the problems of the "empire within an empire" are particularly troublesome at this moment in history. The very idea of "total preemption" by the central authority may be out of the realm of possibility. In such an environment, the use of a model law or a uniform law approach may prove to be worth considering.

NOTES

1. See Joseph Francis Zimmerman, *Federal Preemption, The Silent Revolution*, 83–107 (1991).
2. James Madison, *Notes of Debates in the Federal Convention of 1787*, 164–65 (Koch, ed., 1987).
3. See Zimmerman, *supra* note 1, at 83–107.
4. 15 U.S.C.A. §§ 1191 et. seq. (West, 1992).
5. 7 U.S.C.A. § 71 et. seq. (West, 1992).
6. 7 U.S.C.A. § 87g (West, 1992).
7. 21 U.S.C.A. §§ 301 et. seq. (West, 1992).
8. 21 U.S.C.A. § 360ss (West, 1992).
9. See e.g., *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (federal ERISA preempting employee's Texas state law claim for wrongful discharge); *California v. Federal Energy Regulatory Comm'n.*, 495 U.S. 490 (1990) (Federal Power Act preempting more stringent California state statutes relating to minimum stream flow requirements for river on which a federally licensed hydroelectric project was located); *Felder v. Casey*, 487 U.S. 131 (1988) (federal civil rights actions brought in state court preempting Wisconsin notice-of-claim statute); *Mackey v. Lanier Collections Agency & Svce.*, 486 U.S. 825 (1988) (federal ERISA preempting Georgia state statutes singling out ERISA welfare plan benefits for protective treatment under state garnishment procedures); *City of New York v. FCC*, 486 U.S. 57 (1988) (FCC regulations preempting state and local technical standards governing cable television); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (Natural Gas Act preempting Michigan state utility company regulations).
10. See, e.g., Revised Uniform Commercial Code § 3–102 (West, 1991).
11. 21 U.S.C.A. §§ 601–691 (West, 1992).
12. 21 U.S.C.A. §§ 451–469 (West, 1992).
13. 15 U.S.C.A. §§ 1451–1461 (West, 1992).
14. 21 U.S.C.A. §§ 301–392 (West, 1992).
15. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).
16. *Id.*, at 523–24.
17. *Id.* at 525.
18. *Id.*
19. *Id.*
20. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
21. *Jones*, *supra* note 15, at 526–28.
22. *Id.*, at 529–30.
23. *Id.*, at 530.
24. *Grocery Mfrs. of America, Inc. v. Gerace*, 755 F.2d 993 (2d Cir. 1985).
25. The discussion, up to this point, has been whether federal *statutes* preempt state law. However, as has long been the case, federal *regulations* have "no less preemptive effect than federal statutes." *De La Cuesta*, 458 U.S. at 153. See also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). The Court in *De La Cuesta* held that "[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *De La Cuesta*, 458 U.S. at 153–54 (citing

United States v. Shimer, 367 U.S. 374, 381–82 [1961]). Thus, federal regulations are given the same preemptive effect as federal statutes if those regulations are a valid exercise of validly delegated congressional authority.

26. The federal FDCA regulation provided that if the substitute product contained less of any essential nutrient present to a measurable degree in the food for which it was substituted, the substitute must be labeled with the word "imitation."

27. 21 U.S.C.A. §§ 451–469 (West, 1992) (the federal regulatory scheme at issue in that case).

28. 15 U.S.C.A. §§ 1451–1461 (West, 1992).

29. *Id.*

30. 592 F. Supp. 367 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 1 (2d Cir. 1984).

31. *Id.* at 372. The court found that "protection of the public against false weights and measures or misleading statements about them is one of the oldest exercises of governmental regulatory power." *Id.* (quoting *Swift & Co. v. Wickham*, 230 F. Supp., 151, 153 [S.D.N.Y. 1974, *aff'd mem.*, 508 F.2d 836 (2d Cir. 1975)]).

32. 712 F. Supp. 645 (S.D. Ohio 1989).

33. U.S. Const. art. VI, cl. 2. "The preemption doctrine . . . has its roots in the Supremacy Clause." *De La Cuesta*, 458 U.S. at 152.

34. Eric T. Greenberg, "Green Issues Are Ripe: The Regulation of Environmental Marketing Claims," 3 *Loyola Consumer Law Reporter* 80 (1991).

35. See Robert J. Del Tufo, "How Federal and State Governments Can Share Consumer Protection Power," 43 *Administrative Law Review* 495 (1991).

36. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

37. P.L. 89-92, 79 Stat. 282 (1965).

38. *Cipollone*, *supra* note 36, at 183–84.

39. 15 U.S.C.A. § 1331 (West, 1992).

40. But see Paul G. Christ and John M. Majoras, "The 'New' Wave in Smoking and Health Litigation," 54 *Tennessee Law Review* 551 (1987) (arguing express preemption of state court actions).

41. 15 U.S.C.A. § 1334 (West, 1992).

42. Mary Ann K. Bosack, "Cigarette Act Preemption—Refining the Analysis," 66 *New York University Law Review* 756, 774 (1991).

43. See *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987).

44. *Cipollone*, *supra* note 36, at 187.

45. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Roysdon v. R. J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Forster v. R. J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989); but see *Dewey v. Brown & Williamson Tobacco Corp.*, 225 N.J. Super 375, 542 A.2d 919, *rev'd*, 121 N.J. 69, 577 A.2d 1239 (1990). See also Note, "The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Act Preemption—Refining the Analysis," 66 *New York University Law Review* 756 (1991).

46. *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989).

47. 15 U.S.C.A. §§ 1381–1420 (West, 1982 & Supp., 1992) [hereinafter NTMVSA].

48. See 49 C.F.R. §§ 571.208 S4.1.2.1, .2, .3 (1987).

49. The manufacturers have consistently chosen their third option, providing a lap and shoulder belt with a warning system. See Frank Waters, "Air Bag Litigation: Plaintiffs, Start Your Engines," 13 *Pepperdine Law Review* 1063, 1068 n. 39 (1986).

50. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

51. The act, on its face, dealt with both the preemption of state laws and state common law actions. Section 1392(d) clearly seems to preempt any state safety standard on a subject that is addressed by a comparable federal standard:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Section 1397(k), however, states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." This language would appear to clear the way for common law suits; and yet, some courts have held that these suits are preempted despite the language in this savings clause, see, e.g., *Hestel v. General Motors Corp.*, No. 85-1713 (D.D.C. February 23, 1988); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Cox v. Baltimore County*, 646 F. 761 (D.Md.1986); *Wood v. General Motors Corp.*, 673 F. Supp. 1108 (D.Mass 1987) (Wood I), *rev'd*, 865 F.2d 395 (1st Cir. 1988) (Wood II), *appeal pending*, 110 S.Ct. 41 (1989).

52. *Wood v. General Motors Corp.*, *supra* note 51. See, e.g., *Hestel v. General Motors Corp.*, No. 85-1713, *Hughes v. Ford Motor Co.*, *Cox v. Baltimore County*, *Wood v. General Motors Corp.*—all *supra* note 51.

53. *Wood*, 865 F.2d at 412.

54. 684 F. Supp. 407 (D.Md. 1987).

55. 464 U.S. 238 (1984).

56. See generally Revised Uniform Commercial Code, Articles 3 and 4 (West, 1991) [hereinafter UCC].

57. Revised UCC § 3-102(c) (West, 1991).

58. *Id.*

59. Most federal regulations, including those of the Federal Reserve, are promulgated by authority of congressional enactments, thus the requirement that a regulation, to preempt state law, must be a valid exercise of validly delegated authority to the agency by Congress. The supremacy clause of the Constitution provides that federal law shall displace or preempt state laws in the event of conflicts. Norman Silber, "Why the UCC Should Not Subordinate Itself to Federal Authority," 55 *University of Pittsburgh Law Review* 441, 1994.

60. See the Administrative Procedures Act, 5 U.S.C. §551 et seq.; see also Peter Strauss, *An Introduction to Administrative Justice in the United States*, 155-84 (1989).

61. Federal Reserve Act §§ 4, 13, 14(e), and 16 (codified, in part, at 12 U.S.C.A. §§ 248, 301, 341, 342, 343, 358). See, e.g., 12 C.F.R. §§ 210.25(c), 210.3(a) (1991).

62. Telephone interview with Federal Reserve Bank of New York.

63. For example, it is still not clear whether the Board provides for the same notice and comment periods required by the Administrative Procedure Act. "In some instances,

the operating circulars are issued pursuant to a Federal Reserve Board regulation. In other cases, the Reserve Bank issues the operating circular under its own authority under the Federal Reserve Act, subject to *review* by the Federal Reserve Board." Official Comment #3, Revised UCC § 3-102 (West, 1991). See also *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990) (holding that consent orders issued by the Federal Trade Commission could preempt state law if all conditions were met under the traditional preemption analysis).

64. Less absolute preemption provisions are well known to banking law. See e.g., Consumer Credit Protection Act § 919, 15 U.S.C.A. § 1693q (West, 1991) ("A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter"); Uniform Commercial Code § 4-103 (West, 1991), which provides that "Federal Reserve regulations and operating circulars . . . have the affect of agreements . . . whether or not specifically assented to by all parties interested in items handled," UCC § 4-103(b). Comment 3 states that "[t]his Article recognizes that 'operating circulars' issued pursuant to the regulations and concerned with operating details *as appropriate* may, within their proper sphere, vary the effect of the Article." *Id.*

65. State legislatures would be forced to steer far clear of the area covered by the preemption provision. Federal statutes and regulations are promulgated as a result of a well-defined, well-publicized procedure. Operating circulars, however, may be revised at will by the Federal Reserve Banks. See Federal Reserve Bank of New York Operating Circular #4, Para. 78 (Revised 1988). Additionally, it is unclear what procedural safeguards are provided for in the adoption, much less the revision of operating circulars. See Silber, *supra* note 59, at 463-69. Thus, state legislators will never be certain of whether new state legislation will be preempted by an operating circular.

66. Zimmerman states that manufacturing industries became concerned with individual state laws prescribing standards that varied from state to state, thereby necessitating the manufacture of different models to meet standards in particular states. The automobile industry, for instance, lobbied Congress to preempt, totally, responsibility for establishing emission standards for new motor vehicles. One representative wrote that "a single standard, though tough, is likely to be better than fifty standards, some loose, some very tough. Another governor wrote that "industry can function more efficiently when state to state differences in product regulation are eliminated." Zimmerman, *supra* note 1.

67. "Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism," 76 *Virginia Law Review* 265 (1990).

68. See Model Penal Code and Commentaries (ALI, 1985).