Preemption in Green Marketing: The Case for Uniform Federal Marketing Definitions[†]

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INTRODUCTION

Most American consumers understand that the choices they make impact the environment, and are often drawn to products that claim to be environmentally friendly.[1] Surveys over the past fifteen years have consistently found that most consumers are more likely to choose products that claim to be environmentally friendly over products that do not make such a claim.[2] A majority of these consumers are willing to pay up to five percent more for those products.[3] By choosing products advertised as environmentally friendly, these consumers believe they will have less of a negative impact on the environment.[4] Manufacturers respond to this consumer demand by developing greener products, and marketing these products as more "environmentally friendly" than traditional products of the same nature.[5] Such

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1. *See, e.g.*, Thomas C. Downs, Comment, *"Environmentally Friendly" Product Advertising: Its Future Requires a New Regulatory Authority*, 42 AM. U. L. REV. 155, 161–62 (1992) ("Recognition that the individual has a pivotal role to play in solving the solid waste crisis through purchase and disposal decisions has brought about an unprecedented era of environmental consumerism.").

2. *See, e.g.*, David F. Welsh, Comment, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991, 992 (1993) ("[R]ecent surveys have found that eighty-two percent of American consumers would pay at least five percent extra for 'environmentally friendly' products . . . ."); Press Release, Performics, *Performics* Survey Finds 60 Percent of Online Consumers Consider Environmental Consciousness an Important Company Trait (Apr. 8, 2008), http://www.performics.com/news-room/press-releases/research-consumer-opinions-on-green-marketing/674 ("83 percent [of consumers] indicated they are extremely or very likely to choose the environmentally friendly option. . . . [and] our survey shows that nearly half of them will pay at least five percent more for [it].").

3. *See, e.g.*, Welsh, *supra* note 2, at 992; Press Release, *supra* note 2.

4. *See* Lauren C. Avallone, Comment, *Green Marketing: The Urgent Need for Federal Regulation*, 14 PENN. ST. ENVTL. L. REV. 685, 687 (2006) ("Manufacturers began to make claims such as 'environmentally friendly,' 'biodegradable,' and 'recyclable' in an effort to persuade consumers to purchase their products."); *cf.* Peter S. Menell, *Structuring a Market-Oriented Federal Eco-Information Policy*, 54 MD. L. REV. 1435, 1474 (1995) ("Ecolabeling reinforces a highly limited understanding of the opportunities for consumers to lessen environmental impacts and perpetuates common misperceptions about the environmental impacts of consumer choices.").

5. *See, e.g.*, Kimberly C. Cavanagh, Comment, *It's a Lorax Kind of Market! But Is It a Sneetches Kind of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133, 135 (1998).

advertising that highlights the environmentally beneficial characteristic of a product is commonly referred to as "green marketing."[6]

Green marketing encourages consumers to "buy the advertised eco-friendly product instead of the environmentally inferior alternative, while obtaining equivalent or better product performance at a comparable price."[7] However, green-marketing claims are often false or misleading.[8] In a 2007 study of 1018 products claiming environmental benefits in North American consumer markets, "all but one made claims that [were] demonstrably false or that risk[ed] misleading intended audiences."[9] Such false and misleading claims, often referred to as "greenwashing," are difficult for consumers to detect because consumers "generally cannot substantiate environmental claims on their own."[10] Thus, greenwashing leads to consumer confusion and hinders consumers' ability to make legitimate environmentally conscious purchasing decisions.[11]

Regulations to protect consumers from greenwashing exist both on the federal and state level. Part I.A and Part I.B of this Note analyze each level of regulation. Part I.C discusses the inadequacy of the current two-tiered regulatory scheme. Part II analyzes complete federal preemption as an alternative to the current regulatory framework and discusses the potential problems of complete preemption. It argues that federal regulation of green marketing should not completely preempt state law. Instead, Part II identifies dynamic preemption as a better method for solving the current problems with green-marketing regulations. Part III argues for a model of dynamic preemption termed the "uniform definitions model." It argues that this proposed model is the optimal solution for solving the identified problems of the current regulatory framework and avoids the potential problems of complete preemption.[12]

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6. *See, e.g.*, Avallone, *supra* note 4 at 785. The same marketing practice is also referred to as "environmental marketing," "environmental labeling," and "green labeling." *See* Roger D. Wynne, Note, *Defining "Green": Toward Regulation of Environmental Marketing Claims*, 24 U. MICH. J.L. REFORM 785, 786 n.6 (1991).

7. Christopher A. Cole & Linda A. Goldstein, *"Green" Is So Appealing*, N.Y. L.J., Sept. 15, 2008, at 52.

8. TERRACHOICE ENVTL. MKTG. INC., THE "SIX SINS OF GREENWASHING" 1 (2007), *available at* http://sinsofgreenwashing.org/findings/greenwashing-report-2007/.

9. *Id.* This study's research methodology utilized a broad definition of "misleading." A claim was considered misleading for: (1) having hidden trade-offs, (2) having no proof or substantiation, (3) being overly broad or too vague, (4) being irrelevant or unhelpful, (5) claiming to be a "green" form of an inherently harmful product, or (6) being a demonstrable lie. *Id.* at 2–4. The same study was repeated in 2009 and found that of "the 2219 North American products surveyed, over 98% committed at least one of the previously identified Six Sins of Greenwashing . . . ." TERRACHOICE ENVTL. MKTG. INC., THE SEVEN SINS OF GREENWASHING 1 (2009), *available at* http://sinsofgreenwashing.org/findings/greenwashing-report-2009/.

10. Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 150 (1993); *see also* Cole & Goldstein, *supra* note 7, at 52 ("[T]he consumer must take the advertiser's word for it that the product is environmentally friendly.").

11. Bryan Walsh, *Eco-Buyer Beware: Green Can Be Deceiving*, TIME.COM, Sept. 11, 2008, http://www.time.com/time/magazine/article/0,9171,1840562,00.html.

12. One scholar argues that "preemption doctrine as it is currently applied on the national level and in many states may be good law but not good policy" because it invalidates local environmental protection efforts that are not intended to be and should not be invalidated. Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24

I. CURRENT GREEN-MARKETING REGULATIONS

Green marketing is currently regulated on both the federal and the state level.[13] The two layers of regulations operate independently of each other and regulate green-marketing claims differently.

A. Federal Regulations

On the federal level, two separate laws exist that regulate green-marketing claims: section 5 of the Federal Trade Commission Act ("FTC Act")[14] and section 43(a) of the Lanham Act.[15]

1. Section 5 of the FTC Act and the *Green Guides*

Congress enacted the FTC Act in 1914[16] as an antitrust statute to supplement the Sherman Act[17] and Clayton Antitrust Act.[18] Originally, section 5 of the FTC Act gave the Federal Trade Commission ("FTC") power to prevent "unfair methods of competition."[19] In 1938, Congress expanded the Act to outlaw "unfair or deceptive acts or practices,"[20] which has since been interpreted to permit the FTC to regulate "false, deceptive and misleading advertising claims."[21]

The FTC defines "deceptive" as "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[22] Whether an advertising claim constitutes a deceptive act or practice is determined through case-by-case prosecution.[23] If a company makes a specific claim that the FTC believes is deceptive, the FTC will bring charges against that company.[24] Although case-by-case prosecution gives some guidance to future green marketers as to what the FTC considers deceptive, it does not establish discernable marketing

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HARV. ENVTL. L. REV. 237, 238 (2000).

13. *See infra* notes 14–95 and accompanying text.

14. 15 U.S.C. § 45 (2006).

15. 15 U.S.C.A. § 1125(a) (2009).

16. Federal Trade Commission Act of 1914, ch. 311, Pub. L. No. 63-203, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1) (2006)); *see also* Wynne, *supra* note 6, at 789.

17. 15 U.S.C. §§ 1–7 (2006).

18. *Id.* §§ 12–27; 29 U.S.C. §§ 52–53 (2006);Wynne, *supra* note 6, at 789.

19. Federal Trade Commission Act of 1914, 38 Stat. at 719.

20. Federal Trade Commission Act of 1938, ch. 40, Pub. L. No. 75-447, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

21. E. Howard Barnett, *Green with Envy: The FTC, the EPA, the States, and the Regulation of Environmental Marketing*, 1 ENVTL. LAW. 491, 495 (1995); *see also* Jay Norris, Inc. v. FTC, 598 F.2d 1244, 1252 (2d Cir. 1979) ("The FTC is charged by Congress with the duty of protecting consumers from the deceptive and misleading use of commercial speech or advertising . . . .").

22. *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 176 app. (1984).

23. Barnett, *supra* note 21, at 495, 497.

24. *See* Stephen Gardner, *How Green Were My Values: Regulation of Environmental Marketing Claims*, 23 U. TOL. L. REV. 31, 50–53 (1991). For specific examples of the first FTC prosecutions for deceptive and misleading green-marketing claims, see *id.* at 44–45.

standards upon which green marketers can dependably rely when marketing their own environmentally friendly products.[25] Green-marketing claims are unique in that each claim is made about a specific product with distinctive properties, and each claim is judged by the effect it would have on a "reasonable consumer."[26]

For example, a claim that a t-shirt is biodegradable may be judged differently than a claim that a clock is biodegradable. The FTC might prosecute the t-shirt manufacturer's biodegradable claim if not all elements of the t-shirt are completely biodegradable because a reasonable consumer might expect complete biodegradability from a product like a t-shirt. However, based on the FTC's prosecution of the t-shirt claim, the clock manufacturer would not know whether it is required to discontinue its claim of biodegradability if only the clock's plastic components are biodegradable, but not the rest of the clock. The clock manufacturer might believe that a reasonable consumer would not expect every part of the clock to be biodegradable. The FTC, however, might disagree as to what the reasonable consumer would expect. The elemental differences between the two products, and the subjectivity of the reasonable consumer standard make it impossible for the clock manufacturer to extrapolate a discernable standard from the FTC's prosecution of the t-shirt manufacturer's biodegradability claim. The clock manufacturer has no way of knowing whether its biodegradable claim will be considered deceptive.

Thus, case-by-case prosecution provides an inadequate standard for evaluating complex, scientific green-marketing claims.[27] Because of this uncertainty, the advertising industry and state attorneys general petitioned the FTC to adopt uniform green-marketing guidelines that would allow them to better differentiate between a legal green-marketing claim and an illegal green-marketing claim.[28]

The FTC responded to the petitions by adopting the Guides for the Use of Environmental Marketing Claims, commonly known as the *Green Guides*, in July 1992.[29] The *Green Guides* contain general recommendations for the use of common green-marketing terms, such as "compostable"[30] and "recyclable,"[31] and give numerous illustrative examples of both permissible and deceptive uses of such terms.[32] As

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25. Barnett, *supra* note 21, at 497 ("Moreover, selective enforcement by FTC failed to delineate between acceptable and deceptive practices."); Grodsky, *supra* note 10, at 155 ("A central problem of this case-by-case approach is that it fails to demarcate clear boundaries between deceptive and permissible practices."). For specific examples of FTC prosecutions after it defined "deceptive" but before the *Green Guides* (general recommendations by the FTC for the use of common green-marketing terms) were issued, see Gardner, *supra* note 24, at 50–52.

26. Barnett, *supra* note 21, at 496–97 ("[D]ue to the complexity of issues surrounding environmental marketing claims, the FTC general rules and policy statements proved ill-suited for proper enforcement."); *see also* Wynne, *supra* note 6, at 791 ("Unfortunately, generic standards often fail to draw a discernable line between permissible and illegal practices in particular circumstances. Such is the case with most green marketing practices . . . .").

27. *See* Gardner, *supra* note 24, at 52 ("[M]any honest marketers had forgone making legitimate claims because they did not know where the limits were.").

28. Barnett, *supra* note 21, at 498.

29. 16 C.F.R. § 260 (2009).

30. *Id.* § 260.7(c).

31. *Id.* § 260.7(d).

32. *Id.* § 260.7.

"administrative interpretations of law,"[33] the *Green Guides* do not have the force or effect of law but are meant solely to "address the application of section 5 of the FTC Act to environmental advertising and marketing practices."[34] Thus, the *Green Guides* only summarize the FTC's standards and give marketers more guidance as to what the FTC will consider a deceptive green-marketing practice.[35] All environmental claims are still reviewed on a case-by-case basis using the section 5 "deceptive" standard.

Importantly, as administrative interpretations of law, the *Green Guides* cannot preempt other federal, state, or local green-marketing regulations.[36] Thus, whereas compliance with the *Green Guides might* constitute a safe harbor from FTC prosecution, it does not preclude prosecution under other federal, state, or local regulations for deceptive marketing practices.

The *Green Guides* were last revised in May 1998, and only minor changes were made.[37] In November 2007, the FTC announced a review of the *Green Guides* and requested public comment.[38] Thus far, no new revisions have been instituted.[39]

2. Lanham Act Section 43(a)

Section 43(a) of the Lanham Act creates a private cause of action for false advertising.[40] In pertinent part, section 43(a) provides that "[a]ny person who . . . uses in commerce any word, term, name, symbol, or device . . . which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of . . . goods, services, or commercial activities, shall be liable in a civil action."[41] This provision allows challenges to marketing practices that are false or, although literally true, misleading or deceiving to the target audience.[42] Thus, the standard for false advertising suits under the Lanham Act "nearly mirrors" the "deceptive" standard under the FTC Act.[43]

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33. *Id.* § 260.1.

34. *Id.*

35. *See* Avallone, *supra* note 4, at 619; K. Alexandra McClure, *Environmental Marketing: A Call for Legislative Action*, 35 SANTA CLARA L. REV. 1351, 1358 (1995).

36. 16 C.F.R. § 260.2.

37. The 1998 revision of the *Green Guides* slightly modified the recommendations for the use of the terms compostable and recyclable. It also explicitly claimed jurisdiction over all advertisements, specifically including advertisement on the Internet and through electronic mail. *Compare* Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (July 28, 1992), *with* 16 C.F.R. § 260.

38. Request for Public Comment and Announcement of Public Meetings, 72 Fed. Reg. 66,091 (Nov. 27, 2007).

39. *See* Gregory A. Bibler, Christopher G. Courchesne, Shailesh R. Sahay & David M. Young, *United States: Making the Case for Your Green Marketing Claims*, MONDAQ, Sept. 22, 2008, http://www.mondaq.com/article.asp?articleid=66476.

40. 15 U.S.C. § 1125(a) (2006).

41. *Id.*

42. Ciannat M. Howett, *The "Green Labeling" Phenomenon: Problems and Trends in the Regulation of Environmental Product Claims*, 11 VA. ENVTL. L.J. 401, 436 (1992).

43. John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 308 (1994).

In fact, section 43(a) of the Lanham Act functions much like section 5 of the FTC Act. Both acts contain broad generic standards of "misrepresentation" and "deceptiveness" under which offending marketers may be prosecuted.[44] Under the Lanham Act, however, private litigants do not have the benefit of the FTC's *Green Guides* to aid in determining whether a certain advertising practice is deceptive.[45] Additionally, the Lanham Act provides only for a limited private cause of action while the FTC Act is enforceable only by the FTC.[46]

Although section 43(a) purports to give standing to "any person who believes that he or she is or is likely to be damaged by such act,"[47] consumers are regularly denied standing to bring false advertising claims under the Lanham Act.[48] Some scholars argue that consumers should be given standing to sue under section 43(a), but most courts continue to hold that the section was "enacted to provide relief to competitive or commercial interests, and not consumer interests."[49] Thus, standing to sue for false advertising has generally only been granted to business competitors of the person or company making the allegedly false advertisements.[50]

Although the Lanham Act is not specifically a green-marketing regulation, companies have successfully utilized section 43(a) to challenge the validity of their business competitors' green-marketing claims.[51] Thus, the Lanham Act represents an important, albeit nonspecific, green-marketing regulation because it allows businesses—who are likely to be vigilant in pursuing lawsuits against competitors—to

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44. *Compare* 15 U.S.C. § 45(a)(1) (2006) ("[U]nfair or deceptive acts or practices in or affecting commerce . . . are hereby declared unlawful."), *with id.* § 1125(a)(1) ("Any person who . . . misrepresents the natures, characteristics, [or] qualities . . . of . . . goods . . . shall be liable . . . .").

45. *See* 16 C.F.R. § 260 (2009). The *Green Guides* are used only to ensure compliance with section 5 of the FTC Act and cannot preempt any other laws or agency regulations. *See id.*

46. *Compare* 15 U.S.C. § 1125(a)(1) (stating that violators "shall be liable in a civil action"), *with id.* § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons . . . from using unfair or deceptive acts or practices in or affecting commerce.").

47. *Id.* § 1125(a)(1).

48. *See, e.g.*, Made in the USA Found. v. Phillips Food, Inc., 365 F.3d 278 (4th Cir. 2004) ("At least half of the circuits hold (and none of the others disagree) that . . . § 45, or 15 U.S.C. § 1127, bars a consumer from suing under the [Lanham] Act."); Barrus v. Sylvania, 55 F.3d 468 (9th Cir. 1995); Serbin v. Ziebart Int'l Corp., 11 F.3d 1163 (3d Cir. 1993); Dovenmuehle v. Gilldorn Mortgage Midwest Corp., 871 F.2d 697 (7th Cir. 1989); Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686 (2d Cir. 1971); *see also* Joseph A. Larson, Note, *Taming the Wild West: An Examination of Private Student Loan Consolidation Companies' Violations of § 43(a) of the Lanham Act by Using Trade Names and Logos That Closely Resemble Those Used by the United States Department of Education*, 41 CREIGHTON L. REV. 515, 524 (2008) ("Thus far, five circuit courts have stated that consumers do not have standing to sue under § 43(a) for false advertising."); Howett, *supra* note 42, at 439.

49. Tawnya Wojciechowski, Comment, *Letting Consumers Stand on their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising under Lanham Act Section 43(a)*, 24 SW. U. L. REV. 213, 215 (1994) (arguing for consumer standing under section 43(a) of the Lanham Act); *see, e.g.*, *Made in the USA*, 365 F.3d at 278; *Barrus*, 55 F.3d at 468.

50. Howett, *supra* note 42, at 439.

51. *See* Cole & Goldstein, *supra* note 7, at 54 (discussing three recent green-marketing cases brought under section 43(a)).

bring claims against competitors who greenwash in order to achieve a commercial advantage.

B. State Regulations

Like the federal green-marketing regulations, there are two types of state green-marketing regulations. States regulate green-marketing claims either by general consumer protection acts, or, in a few states, by specific green-marketing acts. The general consumer protection acts operate much like the federal regulations whereas the specific green-marketing acts are narrowly tailored laws that specifically address only green-marketing claims.

1. Consumer Protection Laws

Every state has a consumer protection law similar to section 5 of the FTC Act that can be invoked against marketers who make false or deceptive marketing claims.[52] These laws, often called little FTC acts,[53] "broadly prohibit unfair and deceptive" trade practices.[54] Each state uses state common law or FTC regulations and FTC cases to define "unfair" and "deceptive" rather than defining the terms in the state acts themselves.[55] Thus each state's little FTC act is susceptible to the same praises and criticisms as the FTC Act.[56]

One difference between many little FTC acts and the FTC Act is that the little FTC acts often authorize private causes of action whereas the FTC Act does not.[57] These private rights of action usually provide for the recovery of costs and attorney's fees, as well as multiple damages.[58] Most states' private rights of action also differ from the Lanham Act's private right of action by allowing consumer standing.[59] Furthermore, in

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52. *See, e.g.*, Alan S. Brown & Larry E. Hepler, *Comparison of Consumer Fraud Statutes Across the Fifty States*, 55 FED'N DEF. & CORP. COUNS. Q. 263, 269 (2005), *available at* http://www.thefederation.org/documents/Vol55No3.pdf.

53. Cavanagh, *supra* note 5, at 177.

54. Church, *supra* note 43, at 305.

55. *Id.*; *see also* GA. CODE ANN. § 10-1-391(b) (2000) ("It is the intent of the General Assembly that this part be interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)), as from time to time amended."); Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 376–77 (1990) ("Just as the federal act does not provide working definitions for what will constitute an unfair or deceptive trade practice, these state statutes generally do not provide any guidance in answering the question.").

56. *See* Welsh, *supra* note 2, at 1000 ("Since state deceptive advertising laws are phrased in general terms, case-by-case adjudication is necessary to give content to the language and to establish clear guidelines for manufacturers. Manufacturers . . . have little guidance about what the broad statutory language means until they are charged with violating that language.").

57. Brown & Hepler, *supra* note 52, at 270.

58. Todd A. Rathe, Note, *The Gray Area of the Green Market: Is It Really Environmentally Friendly? Solutions to Confusion Caused by Environmental Advertising*, 17 J. CORP. L. 419, 434 (1992).

59. *See* Glenn Israel, *Taming the Green Marketing Monster: National Standards for*

those states that provide a private right of action for consumers, some state courts have held that consumer class actions may proceed "without individualized proof of knowledge of and reliance upon the ad," [60] consequently making it easier for a consumer to bring a meaningful lawsuit against a company engaged in greenwashing. Thus, despite being substantially similar to the FTC Act, most states' little FTC acts add elements of consumer protection not offered by the FTC Act.

2. Green-Marketing Acts

In addition to consumer protection laws, at least eight states have laws that specifically regulate green-marketing claims.[61] Green-marketing laws vary significantly from state to state but usually fall under one of three main categories: (1) comprehensive definitional statutes, (2) market-oriented regulations, or (3) adoption of the FTC's *Green Guides*.[62]

a. Comprehensive Definitional Statutes

Indiana's Environmental Marketing Claims Act[63] exemplifies comprehensive definitional statutes and is currently the most comprehensive state law regulating green-marketing claims. Indiana's law defines the terms "biodegradable,"[64] "compostable,"[65] "ozone friendly,"[66] "photodegradable,"[67] "recyclable,"[68] and "recycled,"[69] and makes the improper use of these terms a violation of state law.[70] Alternatively, the terms can be used despite not satisfying state law definitions if they comply with the *Green Guides* or any other federal green-marketing regulations.[71]

Environmental Marketing Claims, 20 B.C. ENVTL. AFF. L. REV. 303, 312 (1993).

60. Tracy Heinzman & Hugh Latimer, *Understanding the Carbon Footprint–New Advertising Claims Under Scrutiny Despite Lack of FTC Guidelines*, METROPOLITAN CORP. COUNS., Apr. 2008, at 29A; *see, e.g.*, Morgan v. AT&T Wireless Servs., Inc., 99 Cal. Rptr. 3d 768, 785–86 (Ct. App. 2009); Weinberg v. Hertz Corp., 116 A.2d 1, 6 (N.Y. App. Div. 1986).

61. *See* CAL. BUS. & PROF. CODE §§ 17580–17581 (West 2008); IND. CODE ANN. §§ 24-5-17-1 to -14 (West 2006); ME. REV. STAT. ANN. tit. 38, § 2142 (2001); MICH. COMP. LAWS ANN. § 445.903 (West Supp. 2009); MINN. STAT. ANN. § 325E.41 (West 2004); R.I. GEN. LAWS §§ 6-13.3-1 to -4 (2008); WASH. REV. CODE ANN. § 43.21A.520 (West 2009); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 368.1 to .7 (2008); WIS. ADMIN. CODE ATCP §§ 137.01–.09 (2009). Washington's law authorizes the establishment of market-oriented regulations but there is no evidence that such regulations have actually been established, thus only eight states actually regulate green-marketing claims. *See infra* note 85.

62. The first two of these three approaches result in definitive, bright-line standards for green-marketing claims, whereas the third approach falls prey to the same problems associated with the current regulatory framework. *See infra* text accompanying notes 85–95.

63. IND. CODE ANN. §§ 24-5-17-1 to -14.

64. *Id.* § 24-5-17-1.

65. *Id.* § 24-5-17-2.

66. *Id.* § 24-5-17-6.

67. *Id.* § 24-5-17-8.

68. *Id.* § 24-5-17-9.

69. *Id.* § 24-5-17-10.

70. *Id.* § 24-5-17-2.

71. *Id.* § 24-5-17-2.

The second part of Indiana's green-marketing law requires that marketers maintain specific "information and documentation supporting the validity of the representation."[72] The department of environmental management or the office of the attorney general can request the marketer's documentation and make it available to the public.[73] Indiana's law also creates a private cause of action for any person who suffers actual damage from a violation of the act and allows the recovery of attorney's fees.[74] Three other states—California, Michigan, and Wisconsin—have adopted similar laws.[75]

b. Market-Oriented Regulations

In 1990, New York's State Department of Environmental Conservation promulgated regulations establishing official recycling emblems for voluntary use.[76] The standards for the use of the emblems include minimum content requirements and definitions of "recycled,"[77] "recyclable,"[78] and "reusable."[79] The regulations allow the use of the terms "recycled," "recyclable," or "reusable" instead of using the recycling emblem, but require that such terms be used in compliance with the FTC *Green Guides*.[80] Thus, individuals marketing in New York can either comply with New

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72. *Id.* § 24-5-17-12. Indiana's Environmental Marketing Claims Act requires the marketer to maintain records of the following information:

> (1) The reasons why the person believes the representation to be true; (2) Any significant adverse environmental impacts directly associated with the production, distribution, use, or disposal of the consumer good; (3) Any measures that the person has taken to reduce the environmental impacts directly associated with the production, distribution, and disposal of the consumer good; (4) Any violations of federal, state, or local permits directly associated with the production or distribution of the consumer good; and (5) Whether the consumer good is recycled, recyclable, biodegradable, photodegradable, compostable, or ozone friendly.

Id.

73. *Id.* § 24-5-17-13.

74. *Id.* § 24-5-17-14.

75. *See* CAL. BUS. & PROF. CODE §§ 17580–17581 (West 2008); MICH. COMP. LAWS ANN. § 445.903(ee) (West Supp. 2009); WIS. ADMIN. CODE ATCP §§ 137.01 to .09 (2009). In fact, Indiana's law is based primarily on California's first green-marketing act, which was passed in 1990 but later repealed in 1995. 2 KENNETH A. MANASTER & DANIEL P. SELMI, STATE ENVIRONMENTAL LAW § 19:36 (2008). Although California's law now adopts the *Green Guides*' standards and is no longer a comprehensive definitional statute, it still contains the documentation requirements found in Indiana's law. *Id.* Wisconsin's law, on the other hand, is nearly as comprehensive as Indiana's except that it only regulates claims that a product is "recycled, recyclable or degradable." WIS. ADMIN. CODE ATCP § 137.03 (2009). Neither California's nor Wisconsin's law provides for a private cause of action.

76. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 368.1–.7 (2008); *see also* Howett, *supra* note 42, at 433 (noting that New York's regulations became effective on December 14, 1990). New York's regulations only regulate recycling claims. *Id.*

77. *Id.* § 368.2(k).

78. *Id.* § 368.2(l).

79. *Id.* § 368.2(n).

80. *Id.* § 368.1(a).

York's definitions and the *Green Guides*' standards for making recycling claims, or they could use New York's official recycling emblem program.

Marketers wishing to use New York's official recycling emblem must apply for authorization from the commissioner of the Department of Environmental Conservation.[81] To get authorization, the product and its packaging must meet the minimum statutory requirements for that product.[82] For instance, if newspapers wish to use the "recycled" emblem, the regulation requires that the newspaper be composed of at least forty percent (by weight) postconsumer material.[83] Washington is the only other state to adopt a similar program, but it has not actually implemented the program.[84]

c. Adoption of FTC's *Green Guides*

Minnesota's adoption of the FTC *Green Guides* as state law exemplifies the most recent, majority approach in state green-marketing regulations.[85] The law takes the nonbinding standards found in the *Green Guides* and makes them enforceable state law.[86]

California, Maine, New York, and Rhode Island have also adopted some of the standards contained in the *Green Guides* as state law.[87] Both California and Rhode Island first regulated green-marketing claims with comprehensive definitional statutes,[88] but they ultimately revised their laws to adopt the standards contained in the

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81. *Id.* § 368.5(d).

82. *Id.* § 368.4.

83. *Id*.

84. WASH. REV. CODE ANN. § 43.21A.520(1) (West 2009). The Washington State Department of Ecology does award the "Environmental Excellence Award" to "individuals, businesses, and organizations that have shown leadership, innovation, or extraordinary service in protecting, improving, or cleaning up the environment," but there is no evidence of a similar award for environmentally friendly products or companies that make such products. Dep't of Ecology, Environmental Excellence Awards, http://www.ecy.wa.gov/environmental_excellence.htm.

85. The comprehensive laws were enacted in 1990 (California's original law), 1991 (Indiana), and 1994 (Wisconsin). *See* IND. CODE ANN. § 24-5-17-1 to -14 (West 2006); WIS. ADMIN. CODE ATCP § 137.01–.09 (2009); 2 MANASTER & SELMI, *supra* note 75, § 19:36. The market-oriented laws were originally enacted in 1990 (New York) and 1989 (Washington). *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1–.7; WASH. REV. CODE ANN. § 43.21A.520. The laws adopting the *Green Guides* were enacted most recently—1993 (Maine), 1995 (California's revised law), 1995 (Rhode Island), and 1996 (Minnesota). *See* CAL. BUS. & PROF. CODE §§ 17580–17581 (West 2008); ME. REV. STAT. ANN. tit. 38, § 2142 (2001); MINN. STAT. ANN. § 325E.41 (West 2004); R.I. GEN. LAWS § 6-13.3-1 to -4 (2008).

86. MINN. STAT. ANN. § 325E.41 ("Environmental marketing claims . . . must conform to the standards or be consistent with the examples contained in [the *Green Guides*].").

87. CAL. BUS. & PROF. CODE § 17580.5(a); ME. REV. STAT. ANN. tit. 38, § 2142; N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1(b)(1)(ii); R.I. GEN. LAWS § 6-13.3-1(2).

88. *See* 2 MANASTER & SELMI, *supra* note 75, § 19:36 ("California in 1995 abandoned its own definitional approach in favor of incorporation by reference of the FTC guidelines terminology."); Howett, *supra* note 42, at 434–35 (noting that Rhode Island's approach in the early 1990s banned the use of certain environmental marketing claims and defined and regulated some of the terms that could be used). Rhode Island repealed its definitional statutes in 2000. *See* R.I. GEN. LAWS §§ 23-18.8-3, 23-18.14 (repealed 2000).

Green Guides.[89] California's law also regulates other terms that are beyond the scope of the *Green Guides*.[90] Similarly, New York's voluntary recycling-emblem program is in addition to the adoption of the *Green Guides*' standards for the terms "recycled," "recyclable," and "reusable."[91] If a marketer uses any of these terms in New York instead of using the official emblem, the use of the terms must conform to the *Green Guides*.[92] Maine's statute simply makes any violation of the *Green Guides* a violation of Maine's Unfair Trade Practices Act.[93]

Despite their many differences, most state green-marketing acts ultimately fall under this third approach by allowing compliance with the *Green Guides* as a valid defense to a violation of the state's law, thus deferring to the *Green Guides* as if they were state law.[94] Michigan and Wisconsin are the only states that do not make compliance with the *Green Guides* an affirmative defense to suits brought under their state laws.[95] Therefore, a majority of state green-marketing laws actually incorporate the *Green Guides*' standards into state law, either explicitly as the established state standards or implicitly as an affirmative defense to other state standards.

C. Problems with Current Green-Marketing Regulations

The two layers of green-marketing regulations (federal and state), and the various standards within each layer present many problems. The current regulatory framework remains substantially the same as it was in 1992 when the *Green Guides* were originally issued, yet studies indicate that false or misleading green-marketing claims are still commonplace, and that greenwashing remains a serious problem.[96] Moreover, the current regulatory framework lacks both identifiable federal green-marketing standards and national uniformity.

1. Lack of Identifiable Federal Green-Marketing Standards

At the federal level, the FTC *Green Guides* have done little to alleviate the uncertainty caused by the FTC's case-by-case adjudication of "deceptive" green-marketing claims. Even though the *Green Guides* are meant to facilitate compliance

89. *See* CAL. BUS. & PROF. CODE § 17580.5; R.I. GEN. LAWS § 6-13.3-1(2).

90. *See* CAL. BUS. & PROF. CODE § 17580; *supra* text accompanying note 75.

91. N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1(b)(1)(ii).

92. *Id.*

93. ME. REV. STAT. ANN. tit. 38, § 2142 (2001).

94. *See, e.g.*, Barnett, *supra* note 21, at 505 ("Indiana's environmental marketing statute contains a self-destruct clause in the event that a federal agency passes conflicting guidelines.").

95. *But see* CAL. BUS. & PROF. CODE § 17580.5(b). Outside of compliance with the FTC *Green Guides*, Indiana's law makes compliance with *any* "enforceable regulations adopted by another federal agency expressly for the purpose of establishing standards for environmental advertising or representations" a defense to its law. IND. CODE ANN. § 24-5-17-2(b) (West 2006). Maine, Minnesota, New York, and Rhode Island all explicitly adopt the *Green Guides*' standards so compliance with them would not violate the state law. *See supra* text accompanying note 87.

96. *See* TERRACHOICE ENVTL. MKTG. INC., *supra* note 8 (finding that out of 1018 products reviewed, "all but one made claims that are demonstrably false or that risk misleading intended audiences").

with section 5 of the FTC Act, the *Guides* are not binding and green-marketing claims are still prosecuted on a case-by-case basis under the "deceptive" standard.[97] This case-by-case prosecution inherently generates uncertainty because marketers do not have adequate notice of what the FTC considers deceptive.[98] The *Green Guides* fail to provide that notice because of the FTC's desire for generality.[99] The *Guides* do not contain definitions for most environmental-marketing terms, and broadly require that claims be "substantiated,"[100] "clear,"[101] and not "overstat[ed]"[102] without defining any of these three terms.[103] Thus, the *Green Guides*' broad guidelines "do little to solve the FTC's traditional line-drawing problems."[104]

Since the range of possible deceptive green-marketing claims is broad, the FTC would need to prosecute a significant number of various deceptive green-marketing claims to give the *Green Guides* sufficient context and provide marketers with well-defined, predictable standards of what it considers "deceptive."[105] The FTC, however, has only prosecuted thirty-seven green-marketing claims since the release of the *Green Guides*.[106] Moreover, the FTC has not prosecuted a single green-marketing claim since May 2000—meaning that many recent developments in green marketing, such as carbon offset advertising, have not been addressed at all.[107] Thus, limited FTC precedent exists on which green marketers may rely to interpret the *Green Guides* or determine the FTC's definition of "deceptive"—leaving relatively uncertain the federal standards regarding valid green-marketing claims.

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97. *See supra* text accompanying notes 35–37; *see also* McClure, *supra* note 35, at 1369 (noting that the FTC can choose to enforce the FTC Act against certain green-marketing claims while ignoring other green-marketing claims that do not comply with the *Green Guides*). *But cf.* Paul H. Luehr, Comment, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL. L. & POL'Y 311, 330 (1992) (arguing that the *Green Guides* "could acquire de facto force of law through FTC prosecutions" when the *Guides* were first issued).

98. *See* Rathe, *supra* note 58, at 437.

99. Grodsky, *supra* note 10, at 158–59 ("Because of their generality, the guidelines will do little to reduce the FTC's enforcement burdens."). One author suggests that the *Green Guides* are "handicapped" because "the FTC has been careful not to set national environmental policy." Israel, *supra* note 59, at 327.

100. 16 C.F.R. § 260.7(a) (2009).

101. *Id.* § 260.6(a).

102. *Id.* § 260(c).

103. *See id.* § 260; *see also* Welsh, *supra* note 2, at 1011–12.

104. Grodsky, *supra* note 10, at 158.

105. *See* Cavanagh, *supra* note 5, at 141 n.21.

106. Fed. Trade Comm'n, The FTC's Enforcement Cases, http://www.ftc.gov/bcp/conline/edcams/eande/contentframe_environment_cases.html; *see also* Bibler et al., *supra* note 39.

107. Fed. Trade Comm'n, *supra* note 106; *see also* Bibler et al., *supra* note 39. If the FTC has not prosecuted a single green-marketing claim since May 2000, and has not revised the *Green Guides* since 1998, any manufacturers with innovative or new green-marketing claims that have arisen in the past eight years have no guidance on how to avoid making "deceptive" claims.

2. Lack of National Uniformity

While the FTC has not prosecuted a green-marketing claim in the past eight years, the state attorneys general have become increasingly active and aggressive in challenging deceptive green marketing.[108] The increased enforcement activity under various state laws has made the lack of uniformity in green-marketing regulations evident.[109] Even though most states follow the FTC's lead when enforcing their own little FTC acts—adopting green-marketing laws that incorporate the *Green Guides* into state law[110]—the FTC's lack of a discernable standard for green-marketing claims makes it impossible for states to follow a single federal standard. Instead, states are left to their own interpretation of which green-marketing claims violate the *Green Guides* or are "deceptive." In the absence of a clear federal standard, states adopt standards that are in their own best interests[111]—requiring green marketers to follow up to fifty different standards. The lack of national uniformity gives rise to three distinct, yet interrelated, problems: economic inefficiency, consumer confusion, and companies' unwillingness to develop or market green products.

Economic inefficiency results from the lack of uniformity in at least two different ways. First, without uniform standards, companies must determine the federal green-marketing standards and the standards for all of the states in which their products will be marketed. Companies must then constantly monitor the standards for any changes.[112] The time and money spent researching various states' laws would be saved if a single uniform standard existed. Second, companies that want to advertise their products' environmental benefits and market their products in multiple states might need to customize labels for each state as well as maintain separate inventories and distribution systems to comply with the different laws.[113] The cost of compliance could be incalculable[114] and would be unnecessary if there were a national standard controlling green-marketing claims.

Furthermore, nonuniformity also results in consumer confusion.[115] Because the *Green Guides* do not establish binding federal definitions, and only three states have comprehensive definitional statutes,[116] consumers do not understand what it means for

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108. *See* Church, *supra* note 43, at 307; Heinzman & Latimer, *supra* note 60.

109. *See* Avallone, *supra* note 4, at 690.

110. *See* Israel, *supra* note 59, at 327.

111. Jeff B. Slaton, Note, *Searching for "Green" Electrons in a Deregulated Electricity Market: How Green is Green?*, ENVIRONS ENVTL. L. & POL'Y J., Fall 1998, at 21, 43 ("[A]n individual state is primarily concerned with its own particular situation, not that of its neighbor.").

112. Welsh, *supra* note 2, at 1003–04.

113. Barnett, *supra* note 21, at 507; *see also* Welsh, *supra* note 2, at 1003.

114. Welsh, *supra* note 2, at 1003.

115. Avallone, *supra* note 4, at 690; *see also* Jim Hanas, *A World Gone Green*, ADVERTISINGAGE.COM, June 8, 2007, http://adage.com/eco-marketing/article?article_id=117113 ("One of the things you can definitely predict for the next few years is mass confusion, because where there's a void of government direction . . . plus huge demand from consumers . . . companies are going to be putting products out there with claims that can't be substantiated." (alteration in original)).

116. *See supra* text accompanying notes 63–75. California's repealed comprehensive definitional statute is not counted among the three comprehensive definitional statutes currently

a product to be "environmentally friendly" or even "biodegradable." Moreover, these terms may even be used differently for different brands of the same product.[117]

For instance, a product labeled "biodegradable" could mean that the product "has a proven capability to decompose in less than one (1) year in the most common environment where the material is usually disposed through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide."[118] Alternatively, the "biodegradable" claim could mean that the product will "completely decompose into elements found in nature within a reasonably short period of time."[119] The second meaning does not require that the product actually be biodegradable in "the most common environment where the material is usually disposed,"[120] which allows companies to claim that a product is biodegradable when it decomposes under conditions not found in the landfills where the product is likely to be disposed.[121] Thus, consumers cannot effectively exercise their purchasing power to promote the products that have the best environmental characteristics because consumers cannot know precisely what the green-marketing claim represents, and whether that representation is better or worse than the same representation made by a comparable brand.

Finally, some companies (particularly smaller companies) are less likely to develop or market the environmental benefits of their products due to economic inefficiencies caused by the variety of state standards.[122] While green marketing may remain profitable for larger companies, they may still elect not to market the environmental benefits of their products to avoid possible penalties for violating vague statutes.[123] In the green-marketing context, companies are especially conscientious about their public reputation[124] and may forgo making a green-marketing claim rather than risk a greenwashing lawsuit.[125] Thus, the risk of prosecution, even for the marketing of products with legitimate environmental benefits, is too great for some companies to bear, and, consequently, these companies are less likely to develop or market green products.[126]

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in force.

117. In states without definitional statutes, two products sitting beside each other on a shelf could utilize two different definitions of the same green-marketing term.

118. IND. CODE ANN. § 24-5-17-3 (West 2006).

119. MICH. COMP. LAWS ANN. § 445.903(ee) (West Supp. 2009).

120. IND. CODE ANN. § 24-5-17-3.

121. For an example of this problem involving one company's promotion of its disposable diapers as "compostable," see Gardner, *supra* note 24, at 49–50.

122. Rathe, *supra* note 58, at 450 & n.282.

123. *See* Avallone, *supra* note 4, at 695.

124. *Being Green a Marketing 'Must,' Says UK Study*, GREENBIZ.COM, Nov. 13, 2006, http://www.greenbiz.com/news/2006/11/13/being-green-marketing-must-says-uk-study ("PR is seen as the most credible channel of communication when it comes to green marketing . . . .").

125. *See* Thomas P. Lyon & John W. Maxwell, *Greenwash*, ADMIN. & REG. L. NEWS, Summer 2007, at 9, 9–10 ("There is a real possibility that the fear of public backlash for greenwash will cause firms to 'clam up' rather than become more forthcoming.").

126. *See* Barnett, *supra* note 21, at 507–08. One author argues that companies' unwillingness to participate in green marketing will "increase[] [the] use of environmentally harmful products or processes." Rathe, *supra* note 58, at 450.

II. SHOULD FEDERAL GREEN-MARKETING REGULATIONS PREEMPT STATE GREEN-MARKETING REGULATIONS?

The problems with the current green-marketing regulations have led many scholars to call for complete federal preemption of the state green-marketing regulations.[127] These scholars argue that the certainty and national uniformity gained by complete federal preemption outweighs the corresponding state concerns.[128] Yet, there are numerous potential problems with complete preemption that cannot be ignored. This Note identifies these potential problems and then argues that dynamic preemption, instead of complete preemption, would be the optimal form of preemption for green-marketing regulations.

A. Preemption Doctrine

Preemption is the constitutional principle "that a federal law can supersede or supplant any inconsistent state law or regulation."[129] Based most often on the Supremacy Clause of the United States Constitution (rather than the Commerce Clause),[130] preemption ensures the effectiveness and uniformity of federal laws by invalidating any state laws that conflict with the federal law.[131] However, it also infringes upon states' autonomy by preventing them from implementing their chosen policies.[132]

Whether and to what extent a federal law preempts a state law depends entirely upon congressional intent.[133] The Supreme Court recognized in *Barnett Bank of Marion County, N.A. v. Nelson*[134] that congressional intent to preempt a state law may be manifested as express preemption, field preemption, or conflict preemption.[135] Express preemption occurs when the language of the statute explicitly states that it

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127. *See, e.g.*, Avallone, *supra* note 4, at 702 ("[N]ational uniform laws need to preempt state law . . . ."); Cavanagh, *supra* note 5, at 189–90 ("The federal government must, however, entirely preempt state action in the green marketing context."); McClure, *supra* note 35, at 1377 ("[T]he federal legislation should preempt state environmental marketing laws.").

128. *See, e.g.*, Slaton, *supra* note 111, at 13; Welsh, *supra* note 2, at 1015.

129. BLACK'S LAW DICTIONARY 1297 (9th ed. 2009).

130. Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 629 (1985) ("The Court frequently can choose which constitutional provision to use[, Supremacy Clause or Commerce Clause,] as the principal basis for its decision upholding or invalidating a state action. . . . [T]he Court usually bases its decision on the supremacy clause . . . .").

131. Avallone, *supra* note 4, at 697; Welsh, *supra* note 2, at 14.

132. *See, e.g.*, Jonathon H. Adler, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 84 (2007); Avallone, *supra* note 4, at 698.

133. David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 510 (2008) ("One ostensibly uncontroversial proposition in preemption doctrine is that congressional intent governs whether, and to what extent, federal law preempts state law.").

134. 517 U.S. 25 (1996).

135. *Id.* at 31; *see also* Ronald G. Aronovsky, *A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes*, 16 N.Y.U. ENVTL. L.J. 225, 272 (2008).

preempts corresponding state law.[136] Field preemption differs from express preemption in that preemption is implied under field preemption when a federal statute creates "a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[137] Conflict preemption is also a form of implied preemption but arises when a federal law is in "irreconcilable conflict" with a state law because the state law prevents the federal law from accomplishing its full objective.[138] Thus, courts utilize both express and implied congressional intent to determine whether a federal law should preempt a state law.[139]

When discerning congressional intent, a court must first determine whether the legislation in question is in a policy field traditionally occupied by the states.[140] If so, the court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[141] This principle is known as the "presumption against preemption."[142] Express statutory preemption easily overcomes the presumption against preemption.[143] Conflict preemption and field preemption, on the other hand, may overcome the presumption against preemption only if congressional intent is "clear and manifest," thus making arguments for implied preemption in areas of traditional state regulation less successful than arguments for express preemption.[144]

The problem with the presumption against preemption is that "the category of traditional arenas of state regulation is so subject to manipulation that almost any state law or regulation could be characterized as falling or not falling within a traditional arena."[145] Thus, even if an issue—such as green marketing—seems to fall within a traditional state arena, it is not enough to claim a presumption against preemption as the reason to forego preemption. There is almost certainly an argument for characterizing that same issue as not being within a traditional state arena and thus not subject to the presumption against preemption.[146]

Despite the importance of congressional intent in preemption cases, Congress is not the only federal actor that can utilize the preemption doctrine to invalidate state laws.[147] Federal agencies, such as the FTC, may use the regulatory powers granted to them by Congress to preempt state regulations as well.[148] Courts review federal agency preemption similar to congressional preemption by determining whether Congress

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136. *See Barnett*, 517 U.S. at 31.

137. *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

138. *Id.*

139. *See generally* Weiland, *supra* note 12, at 253–55 (discussing the three types of preemption and how courts apply them).

140. *See* United States v. Locke, 529 U.S. 89, 108 (2000).

141. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

142. *See* Dana, *supra* note 133, at 510–11 ("[C]ourts repeatedly have stated that they will be guided by a presumption rooted in federalism against preemption of the state law.").

143. Adler, *supra* note 132, at 83–84.

144. Weiland, *supra* note 12, at 258–60.

145. *See* Dana, *supra* note 133, at 515.

146. *See infra* text accompanying notes 181–84.

147. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 793 (2006).

148. *See id.* at 793–95; *see also* Pierce, *supra* note 130, at 636–40 ("Congress can preempt state regulatory action itself or it can delegate that power to a federal agency.").

intended to grant the agency the power to preempt the type of state regulation in question.[149]

There are two primary conceptions of federal preemption. Federal preemption is most often conceptualized as a static, one-level-only doctrine under which regulatory authority of an issue resides exclusively in the federal government.[150] Under this concept of "complete preemption," multiple levels of government might be allowed to implement and enforce the standards, but only one level of government may actually set the standards.[151] So-called ceiling preemption is an example of complete preemption because, under ceiling preemption, "[t]he federal regulation constitutes a choice that is final" and precludes states "from any further regulation in the area."[152]

In contrast to complete preemption, some scholars advocate a second type of preemption that allows for cooperative[153] or alternative[154] schemes of regulation and enforcement. Instead of vesting regulatory authority exclusively in one level of government, this "dynamic preemption" allows the different levels of government to share regulatory authority despite the necessary existence of some preemption.[155] Floor preemption, where the government sets a minimum federal standard, is an example of dynamic preemption because it permits the federal government to preempt state laws that are less stringent than the federal laws, but also allows the states to adopt regulations that are tougher or more specific than the federal laws.[156]

Thus, choosing which of these two competing concepts of preemption to employ determines how the federal regulatory role, regardless of whether it is limited or expansive, will affect the states' ability to regulate the issue.[157] Under complete preemption, state regulation will be prohibited. Under dynamic preemption, state regulation will be permitted but restricted.

In the context of green-marketing regulations, most scholars advocate for the concept of complete preemption and argue that the "federal government must . . . entirely preempt state action."[158] These scholars primarily argue that complete

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149. *See* Pierce, *supra* note 130, at 636–38.

150. *See* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 163–64, 175 (2006).

151. *See id.* at 163–64. For an example of a complete preemption proposal that provides for multiple levels of enforcement in green-marketing regulations, see Welsh, *supra* note 2, at 1025.

152. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1559 (2007); *see also* Engel, *supra* note 150, at 185.

153. *See* William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 127–28 (2005).

154. *See* Dana, *supra* note 133, at 546–49.

155. *See, e.g.*, Glicksman, *supra* note 147, at 720.

156. Ceiling preemption is, confusingly, not the exact converse of floor preemption. If it were, ceiling preemption would merely set maximum standards and allow states to issue regulations that were not stricter than the maximum federal standards. Buzbee, *supra* note 153, at 177–78.

157. *See* Buzbee, *supra* note 152, at 1576 ("In short, the mode of federal preemption choices makes a difference, totally independent from any underlying views about the desirability of more or less risk regulation or constitutionally driven views about state and federal roles and the appropriateness of federal standard setting.").

158. Cavanagh, *supra* note 5, at 189–90 (ruling out the possibility of floor preemption); *see also, e.g.*, Welsh, *supra* note 2, at 1026 ("[S]tates could only hold companies to federal

preemption is necessary "to avoid confusion and dissimilar standards among the states."[159] However, while complete preemption would effectively address the problems associated with the current green-marketing regulations,[160] it presents many new potential problems that must be considered.[161]

B. Potential Problems of Complete Preemption of State Green-Marketing Regulations

The certainty offered by complete preemption comes at the expense of other benefits.[162] Arguments for complete preemption of the current green-marketing regulations often neglect or dismiss this tradeoff.[163] To determine whether complete preemption is the optimal form of federal preemption of green-marketing regulations, one must consider the negative aspects of complete preemption, such as the risk of interest group capture, the limitation on local democracy, the loss of state experimentation, and the inability to address purely local issues.

1. Interest Group Capture

When all the power to regulate an issue resides exclusively at one level of government or with one agency—as it does in complete preemption—no system exists to challenge that government's or agency's regulations.[164] Without preemption, states could pass green-marketing laws that might prompt the federal government to evaluate its own green-marketing regulations. If state green-marketing law is completely preempted, this prompting cannot occur. Nor is it likely that, under a system of complete preemption, the political momentum necessary to incentivize revisions will come from the people since green-marketing regulations constitute a complex issue that is hard to turn into a public sound bite. Instead, the federal government or agency itself will decide if and when to revise its laws or regulations. However, the federal regulator, especially if it is an agency, has little or no motivation to reexamine and revise past regulations because such revisions are not as politically rewarding as new regulatory actions.[165] Therefore, once regulations are passed, it is unlikely that such regulations will be regularly revised.

Because complete preemption limits the source of regulation to one federal actor and makes frequent regulatory revisions unlikely, the decision to enact a law that completely preempts state law often results from interest group lobbying rather than an

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standards but could autonomously decide to supplement federal enforcement efforts.").

159. Avallone, *supra* note 4, at 702.

160. *See supra* Part I.C.2.

161. *See* Buzbee, *supra* note 152, at 1619 (concluding that choosing floor or ceiling preemption has regulatory consequences beyond just setting a federal standard).

162. *See id.* at 1599–1612; Grodsky, *supra* note 10, at 178–79.

163. *See, e.g.*, Avallone, *supra* note 4, at 698 (concluding summarily that "the need for uniform federal regulations in the area of environmental marketing outweighs [states'] concerns"); Cavanagh, *supra* note 5, at 185–87 (concluding summarily that "[a]fter balancing all relevant interests, the need for domestic uniform regulation overcomes any state objection to preemption," without defining the "relevant interests").

164. *See* Engel, *supra* note 150, at 178–81.

165. *See* Buzbee, *supra* note 152, at 1593–95.

analysis of complete preemption's actual costs and benefits.[166] Interest groups lobby for lenient federal standards that completely preempt state standards to advance or protect their economic interests.[167] Once the industry-friendly federal standards are implemented, competing policies such as environmental protection are unlikely to be considered because the resulting structure does not create conditions conducive to reexamination or revision.[168] Thus, interest group capture occurs to the detriment of important competing policies.[169]

Interest group capture would be a potential problem for federal green-marketing regulations that completely preempt state green-marketing regulations. In 1993, one proponent of complete preemption dismissed the interest group capture threat, claiming that "the federal government has demonstrated a strong commitment to effective regulation of environmental claims."[170] The problem with such a statement is that the federal government is constantly subject to interest group pressure and can change from effectively regulating green-marketing claims to not regulating green-marketing claims at all.[171] In fact, that is exactly what has happened since this statement was made. In the 1990s, the FTC prosecuted thirty-seven green-marketing claims, implemented the *Green Guides*, and revised the *Green Guides*. But since May 2000, the FTC has not prosecuted a single green-marketing claim or issued any *Green Guides* revisions.[172] Regardless of whether this change in the FTC's regulation and enforcement habits was due to interest group lobbying or not, it demonstrates that even though the FTC once exhibited a strong commitment to effective regulation of green-marketing claims, it will not necessarily always exhibit that same level of commitment.

As federal enforcement and regulation of green marketing has declined, states have attempted to fill the void through their green-marketing regulations.[173] Without the state regulations, marketers would have been allowed to greenwash freely. Allowing both states and the federal government to implement and enforce green-marketing regulations severely decreases the likelihood of interest group capture since the jurisdictional overlap creates multiple venues in which competing policies can be advanced.[174]

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166. Adler, *supra* note 132, at 85.

167. *See id.* at 84–85 (discussing how federal preemption of state automotive emission regulations resulted from automakers' lobbying for less stringent federal standards).

168. Buzbee, *supra* note 152, at 1597–98; *see also* Engel, *supra* note 150, at 185 (discussing bills that would, and do, protect business interests through complete preemption at the expense of competing environmental interests).

169. *See* Engel, *supra* note 150, at 185 ("[P]reemption shuts down a valuable source of competing policies . . . .").

170. Welsh, *supra* note 2, at 1024–25.

171. *See* Engel, *supra* note 150, at 181 (noting the potential for pendulum swings in environmental protectiveness between the federal and the state governments).

172. Bibler et al., *supra* note 39; Fed. Trade Comm'n, *supra* note 106. The FTC is currently considering revisions to the *Green Guides* for the first time in ten years. *See* Bibler et al., *supra* note 39.

173. *See* Heinzman & Latimer, *supra* note 60.

174. Engel, *supra* note 150, at 178–81; *see also* David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1832–33 (2008).

2. Democratic Concerns

Complete preemption also comes at the expense of some fundamental democratic principles—such as local governance, which has often been considered a staple of American democracy.[175] Local governance is important for two reasons. First, state and local governments have smaller constituencies than the federal government and are thus more likely to be politically accountable to their constituents.[176] As a result, localized governments are likely to be more responsive to citizens.[177] Second, because of their increased accountability and responsiveness, state legislatures better reflect the preferences of the people.[178] As an agent and trustee of the people,[179] the "federal government should look to the output of the state legislatures to help ensure that what the federal government does is consistent with the preferences and values" of the people.[180] Complete preemption, however, prevents state legislatures from regulating preempted issues and thus terminates the states' ability to respond to and be reflective of the peoples' preferences.

A second democratic concern with complete preemption is the federal usurpation of traditional state functions and state autonomy.[181] States traditionally retained the power to protect the welfare of their citizens and safeguard their crops and landscapes.[182] Complete preemption of state green-marketing regulations would encroach upon these traditional state powers because states would be powerless to protect their citizens and environment against greenwashing. Notably, this second democratic concern is less compelling than the first for the simple fact that green marketing does not fall exclusively within the confines of a traditional state function. Green marketing also impacts interstate commerce, which gives the federal government the authority to regulate it as well.[183] Thus, green marketing embodies aspects of both traditional state functions and a constitutional federal function.[184]

One scholar has argued that the possibility of states enforcing preemptory federal law lessens the force of these democratic concerns.[185] State enforcement does partially address the second democratic concern because states could prosecute instances of greenwashing through their own enforcement mechanisms to the extent that the national law allows. This argument, however, does not address the first democratic

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175. Weiland, *supra* note 12, at 246.

176. *See* Pierce, *supra* note 130, at 645–46.

177. *See* Weiland, *supra* note 12, at 246.

178. *See* Dana, *supra* note 133, at 522 (discussing federal cases that have used state legislatures' laws to gauge national values).

179. THE FEDERALIST NO. 46 (James Madison).

180. Dana, *supra* note 133, at 522.

181. *See id.* at 514–18.

182. *See id.* at 516.

183. *See* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ."); Glicksman, *supra* note 147, at 727.

184. This is not uncommon. It is often difficult or impossible to determine whether something falls within a traditional or nontraditional state function. *See* Dana, *supra* note 133, at 515–17. The inability to classify with certainty an issue as a traditional state function affects a court's ability to determine when there should be a presumption against preemption. *See supra* notes 129–57 and accompanying text.

185. Welsh, *supra* note 2, at 1019–20.

concern. Allowing state enforcement of national laws is not the same as allowing states to respond to their constituents' concerns through new regulations. States would not be allowed to adopt supplemental regulations to protect their citizens or landscapes from greenwashing that is not prohibited by the federal law. Nor is allowing state enforcement the same as allowing the peoples' voices to be heard by the federal government through their state legislatures. Thus, complete preemption of state green-marketing laws would come at the expense of at least one fundamental principle of American democracy.

3. Innovation

Perhaps the most popular argument against complete preemption is that the states are laboratories for experimentation.[186] Justice Brandeis first popularized this argument when he stated, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[187]

States have long been laboratories for innovative environmental policies and green-marketing regulations.[188] For instance, before the FTC released the *Green Guides* in 1992, some states had already implemented a variety of green-marketing regulations: New York implemented its recycling emblem program in 1990;[189] California and Indiana implemented their comprehensive definitional statutes in 1990 and 1991, respectively;[190] and Rhode Island implemented a restrictive statute that banned the use of certain terms in product advertising.[191] States have also experimented with the available remedies for violations of green-marketing regulations. For example, state laws vary in providing for private civil suits, immediate civil sanctions, and/or class action lawsuits in which it is possible to obtain injunctions, damages, and/or attorney's fees.[192]

Complete preemption of state green-marketing regulations would end most innovation at the state level. Although most states with individual green-marketing laws have repealed them and instead enacted the FTC *Green Guides* as state law,[193] some states are still experimenting with different forms of green-marketing regulations.[194] These state experiments would cease and the federal law would be forced upon every state under complete preemption. If the chosen federal law had

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186. *See* Weiland, *supra* note 12, at 245–46; *see also* Edmund Mierzwinski, *Preemption of State Consumer Laws: Federal Interference is a Market Failure*, 6 GOV'T L. & POL'Y J. 6, 6 (2004), *available at* http://www.pirg.org/consumer/pdfs/mierzwinskiarticlefinalnysba.pdf (discussing federal legislation that began as state legislation).

187. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Weiland, *supra* note 12, at 245.

188. Mierzwinski, *supra* note 186, at 9; Welsh, *supra* note 2, at 1017.

189. *See supra* note 76.

190. *See supra* note 85.

191. Welsh, *supra* note 2, at 1002 & n.61; *see also supra* note 88.

192. *See* Grodsky, *supra* note 10, at 179 & n.178.

193. *See supra* notes 85–95 and accompanying text.

194. *See supra* notes 63–84 and accompanying text.

unintended negative consequences, such as to stifle green-marketing claims altogether, then all fifty states would suffer those negative consequences.

While one scholar has recommended that states "could contribute their innovations in an advisory capacity to the federal agencies creating national policies,"[195] such an "advisory capacity" does not serve the same purpose as actual experimentation with an implemented law. Thus, the loss of possible innovation and experimentation through various state laws weighs as a cost of complete preemption.

4. Local Issues

Finally, a completely preemptory federal green-marketing law could only achieve nationwide uniformity by ignoring local green-marketing issues and preferences.[196] A completely preemptory federal law would have to choose to address local issues *or* achieve national uniformity; it could not do both.

A federal law attempting to address local issues or preferences would create a geographic patchwork of different regulations.[197] In addressing the local issues, for example, the national law might require that appropriate recycling, composting, or disposal facilities exist within every geographic area in which the product making such a compostable, recyclable, or disposal claim is sold so as to make the claim meaningful.[198] This type of requirement would result in the same lack of uniformity associated with the current regulatory framework because there would be areas in which adequate facilities do not exist, and thus certain green-marketing claims could not be made.

On the other hand, a federal law that achieves uniformity would be undemocratic and allow green claims that are misleading.[199] The law would be undemocratic because it would not take into account the regulatory preferences of each state, which are the best reflections of the preferences of that state's people.[200] The law would be misleading because it would allow claims to imply the existence of an environmental benefit even where such environmental benefits cannot possibly be realized. For example, a claim that a printer cartridge is recyclable would perhaps entice a consumer to purchase that particular cartridge when, in fact, the consumer cannot practically recycle the product because no appropriate recycling facility exists locally. Such a claim misleads the consumer to purchase what he or she believes to be an

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195. Welsh, *supra* note 2, at 1018.

196. *See id.* at 1015–22.

197. *See* Howett, *supra* note 42, at 408 (discussing how environmental groups and government officials want to ban "recyclable" claims in communities where no recycling program for the particular material exists).

198. *See* Mark Green, *Recyclable . . . or Just Fraudulent?*, N.Y. TIMES, Apr. 21, 1991, § 3, at 13 (highlighting specific recycling and compostable claims in New York that were deceiving because there were not adequate facilities in New York to carry out these functions for the products about which they were claimed); *see also* Downs, *supra* note 1, at 166–67 (noting problems with recycling facilities not existing and "degradable" products not being specific about the process necessary to degrade).

199. *See* Howett, *supra* note 42, at 408; *see also* Grodsky, *supra* note 10, at 181–82.

200. *See supra* text accompanying notes 178–80.

environmentally beneficial product when, in fact, the product has no practical environmental benefit.

Thus, complete preemption of state green-marketing regulations either would attempt to address all local issues and preferences and not attain its goal of uniformity, or, more likely, it would impose a single federal standard on localities that is undemocratic and allows some deceptive green-marketing claims. Therefore, complete preemption would result in either incomplete uniformity or undemocratic, imperfect consumer protection.

C. The Need for Dynamic Preemption

This Note has identified serious problems with the current regulatory framework for green marketing.[201] It has, likewise, identified the significant potential problems of complete federal preemption of state green-marketing regulations.[202] Each set of problems is the converse of the other—that is, in order to completely remedy one set of problems, it would be necessary to completely accept the other set. Thus, adopting either complete preemption or a complete lack of preemption results in consequences that go too far in one direction or the other.

Neither set of values represented by these contrasting forms of regulation should be completely disregarded. Each set of values is "too fundamental and enduring to sacrifice in a wholesale manner."[203] In order to avoid the wholesale sacrifice of one set of values, many scholars advocate the adoption of dynamic preemption as a compromise between a lack of preemption and complete preemption.[204]

Dynamic preemption, which permits different degrees of overlapping regulation and enforcement, is a viable option for green-marketing regulation. Floor preemption, which occurs when the federal government sets a minimum federal standard that each state must adhere to or exceed,[205] is probably the most common model of dynamic preemption. This model of dynamic preemption has, however, been soundly rejected in the context of green marketing. It would be difficult to quantitatively compare state definitions of green-marketing terms to the federal minimum definitions of the same terms to determine whether the states' terms actually satisfy the federal "minimum" requirements.[206]

For example, the federal government might define "biodegradable" to mean that a product must degrade into elements found in nature within a reasonably short period of time. A state might define the same term to mean that a product must degrade into a residue or by-product that is not considered harmful to the environment or human health.[207] It is impossible to determine whether the state definition is more stringent

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201. *See supra* text accompanying notes 96–126.

202. *See supra* text accompanying notes 162–200.

203. Pierce, *supra* note 130, at 609.

204. *See* Dana, *supra* note 133, at 545–46 (advocating a federal preemption scheme that is a "middle path" between complete preemption and complete lack of preemption); Grodsky, *supra* note 10, at 178–82 (advocating a form of dynamic preemption in order to gain uniformity but protect states' autonomy).

205. *See supra* text accompanying note 156.

206. *See, e.g.*, Cavanagh, *supra* note 5, at 189–90; Welsh, *supra* note 2, at 1020–22.

207. *See* Welsh, *supra* note 2, at 1021 (noting that these definitions are "simply different").

than the federal definition. In other words, it is impossible to quantitatively compare the two definitions to determine if the state is adhering to the federal minimum. To assure such adherence, the definitions of the green-marketing terms could not differ between the federal and the state level. This problem means that the states could not possibly enact different definitional laws that are measurably more stringent than the federal laws, which is the whole basis of floor preemption.

Dynamic preemption is, however, a flexible concept not limited to the floor preemption model. Instead, any preemption model that contains some form of federal preemption but allows for some jurisdictional overlap in regulation and enforcement would constitute dynamic preemption and would be a compromise between complete preemption and a lack of preemption.[208] Such dynamic preemption is possible for green-marketing regulations and is necessary to avoid the harsh consequences of an all-or-nothing tradeoff.

III. THE CASE FOR UNIFORM FEDERAL GREEN-MARKETING DEFINITIONS

In the search for an adequate dynamic-preemption model for green-marketing regulations, one scholar identified, as an alternative to his proposal, a model wherein "states could be allowed to pass their own green-marketing laws, but be required to retain the same technical definitions as the federal law."[209] Although this scholar actually advocated a model akin to complete preemption that only gave states the right to enforce a federal law,[210] this Note argues that the alternative he did not pursue[211]—which this Note terms the "uniform definitions model"—is the optimal form of green-marketing regulation.

The lack of uniform definitions for green-marketing terms is perhaps the most fundamental problem in green-marketing regulation.[212] Currently, there are only three states with definitional statutes,[213] and the *Green Guides* only contain broad suggestions—not definitions—for the use of certain terms.[214] The uniform definitions model would adopt federal definitions for common green-marketing terms that expressly preempt all state definitions. All basic terms like "recyclable," "recycled," "biodegradable," "compostable," and "ozone safe," along with newer green-marketing terms such as "renewable energy," "sustainable," and "carbon offsets" would be specifically defined so consumers could know exactly what each term represents and

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208. *See supra* text accompanying notes 153–56.

209. Welsh, *supra* note 2, at 1026.

210. *See id.* at 1022–27 (advocating state involvement throughout the process of implementing completely preemptory federal laws).

211. *See* Welsh, *supra* note 2, at 1026.

212. *See* Slaton, *supra* note 111, at 42 ("Until accepted standard definitions for environmental marketing terms exist, any attempt to eliminate deceptive marketing will fail."); Welsh, *supra* note 2, at 994; *supra* notes 115–22 and accompanying text.

213. *See supra* notes 63–75 and accompanying text. California's repealed comprehensive definitional statute is not counted among the three comprehensive definitional statutes currently in force.

214. *See* Israel, *supra* note 59, at 327; *see supra* notes 97–107 and accompanying text.

marketers could objectively know whether their product meets the definitional requirements.[215]

Once uniform definitions exist, the FTC could continue its enforcement against deceptive claims by prosecuting green-marketing claims that do not meet the objective definitional requirements, and businesses could continue to bring federal causes of action under the Lanham Act using the uniform definitions as an objective standard of evaluation. Additionally, the forty-two states that regulate green-marketing claims through their little FTC acts[216] could all utilize the same definitions in determining whether a claim is deceptive instead of each determining deceptiveness on a case-by-case basis. Since determining whether a green-marketing claim meets the requirements of the definition is an objective test, the standard for green-marketing claims in each of these forty-two states would be uniform.

The states that want to further regulate green-marketing claims or that are unhappy with the federal definitions could not alter the definitional requirements of green-marketing terms but could regulate the *use* of the terms in one of two ways. First, the state could ban the use of a term if the state was not satisfied with the federal definition and believed that the definition would potentially allow misleading claims.[217] Second, the state could require that adequate facilities exist within a certain area before a specific term could be used in that area.

For example, suppose the federal definition of "recyclable" requires that the materials labeled as recyclable can be "collected, separated, or otherwise recovered from the solid waste stream"[218] and can, "by means of established commercial processes, be processed and reused as raw materials for the manufacture of new products."[219] Every state would be required to adhere to this definition and evaluate green-marketing claims by determining if they satisfy the elements of the definition. A

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215. The implementation of specific definitions for green-marketing terms is likely to be considered outside the authority of the FTC, which cannot set national environmental policy. *See, e.g.*, Barnett, *supra* note 21, at 510; Israel, *supra* note 59, at 327. Thus, the FTC would have to work in conjunction with the Environmental Protection Agency to issue the specific definitions for green-marketing terms. *See* Barnett, *supra* note 21, at 510.

216. *See supra* note 61 (discussing the eight states with regulations beyond little FTC acts).

217. An outright ban on specific green-marketing terms would likely raise commercial free speech concerns. The constitutionality of limiting the use of green-marketing terms was examined when California's first comprehensive law was challenged in *Ass'n of National Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994). The court held that California's statute did not violate the First Amendment because the terms restricted were potentially misleading speech, no less restrictive alternative to restricting the terms existed, and the restriction of the potentially misleading speech directly advanced the state's interest in ensuring truthful environmental advertising and increasing consumer protection. *Id.* at 731–37. For a brief discussion of the constitutionality of regulating commercial speech in the green-marketing context, see McClure, *supra* note 35, at 1366–68, 1373–75. After discussing the constitutionality of regulating commercial speech in green marketing, McClure proposes a ban on the use of certain green-marketing terms. *See id.* at 1376–77. Also note that Rhode Island's first green-marketing statute banned outright the use of many green-marketing terms, and was in effect for nearly a decade without being held unconstitutional. *See supra* note 88.

218. WIS. ADMIN. CODE ATCP § 137.05(1)(a) (2008). This is Wisconsin's definition of "recyclable" but without the locality requirement. *See id.* § 137.05(1)(a)–(b).

219. *See id.* § 137.05(1)(b).

state could, however, impose one of two additional requirements. First, a state could decide that the "recyclable" definition is inadequate and ban the use of the term in the state. Second, if the state wanted to allow the term to be used but still account for the fact that adequate recycling facilities exist in only a few parts of the state, the state could require appropriate recycling facilities to be "readily available to a substantial majority of the population in the area where the product is sold."[220] If neither of these regulatory options were important to the state, then it would simply enforce the federal uniform definition.

The uniform definitions model is not a perfect solution; it would only improve—not completely solve—the problems associated with both a lack of preemption and complete preemption. It would, however, avoid the extreme consequences that come with either of these two alternatives. This Note will demonstrate the optimality of the uniform definitions model for green-marketing regulations by first applying the model to the problems with the current lack of preemption as identified in Part I.C to evaluate the effect the model would have on these problems. Then, this Note will apply the uniform definitions model to the potential problems with complete preemption identified in Part II.B to determine the effectiveness of the model at solving these problems. Although it will not be able to completely solve every problem identified in Parts I.C and II.B, the uniform definitions model will prove to be a valuable compromise between the two extremes.

A. Evaluating the Problems of the Current Lack of Preemption under the Uniform Definitions Model

As discussed in Part I.C, there are two main problems resulting from the current lack of preemption of green-marketing regulations: uncertain federal green-marketing standards and a lack of national uniformity.[221] The green-marketing definition's preemptive nature in the uniform definitions model would largely address both problems.

First, the uniform definitions model would significantly improve federal green-marketing standards' uncertainty. Uniform definitions would provide marketers with an objective standard for green-marketing claims rather than making them rely on the FTC's subjective "deceptive" standard. If the product satisfies the green-marketing term's federal definition, then the marketer's claim could not be considered deceptive. Moreover, the standards would be clear. Marketers would not have to extrapolate the applicable standard from the FTC's case-by-case prosecutions. Thus, the uniform definitions would actually transform the FTC's enforcement procedure from a case-by-case procedure to an objective compliance determination.

As a result of solidifying the federal standards' certainty, the uniform definitions model would also significantly improve the national uniformity problem. Without a discernable federal standard, states interpret the federal green-marketing regulations differently, and apply their own little FTC acts in various ways—resulting in many different state standards.[222] With uniform definitions, states that incorporate the federal

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220. *Id.* §137.05(1)(a). This is Wisconsin's locality requirement for the use of the term "recyclable."

221. *See supra* notes 96–126 and accompanying text.

222. *See supra* text accompanying notes 111–12.

green-marketing regulations into state law or that use their own little FTC acts for green-marketing claim enforcement would all utilize the same definitions to objectively evaluate green-marketing claims. Theoretically, all of these states should come to the same conclusion about the legality of each green-marketing claim since they all employ the same federal definitional standard, which the claim either satisfies or does not satisfy. Currently, six out of the eight states that specifically regulate green marketing have adopted the FTC's *Green Guides* and, under current state law, would enforce a federal green-marketing law as state law.[223] Forty-two other states prosecute deceptive green-marketing claims through their little FTC acts,[224] which means that they would regulate green-marketing claims by applying the federal uniform definitions just like the FTC.[225] Thus, under the current state laws, forty-eight states would automatically and uniformly apply the federal definitions without any further regulations on the *use* of green-marketing terms.

National uniformity would not, however, be completely achieved under the uniform definitions model. States that choose to regulate the *use* of green-marketing terms, either by banning the use of certain terms or requiring adequate facilities to exist for a certain term to be used, would obviously create inconsistencies that would trigger the problems of nonuniformity. If more states choose to actively regulate the use of green-marketing terms, then it would result in less national uniformity. Currently, however, most states only require that green-marketing claims not be deceptive.[226] Only five states have chosen to implement any additional requirements beyond the FTC's *Green Guides*, despite the fact that every state is completely free to regulate green marketing however it sees fit.[227] Thus, while a lack of national uniformity due to state regulation of the use of certain green-marketing terms remains probable after the adoption of uniform federal definitions, experience dictates that very few states would choose to impose additional regulations on the use of the green-marketing terms, meaning that national uniformity would only be decreased by a handful of state regulations.

However, even assuming that every state implements limitations on the use of specific green-marketing terms, uniformity under the uniform definitions model would be notably better than uniformity without preemption. Without preemption, two similar products on the very same shelf could employ two different definitions of the exact same green-marketing term,[228] whereas under the uniform definitions model, every state would at least adhere to the same definitional standards, and could only implement one of two possible limitations per green-marketing term. Thus, the uniform definitions model would at least ensure some improvement in uniformity and would, most likely, result in a significant increase in uniformity since most states are not likely to impose any limitations on the use of green-marketing terms.

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223. *See supra* note 94 and accompanying text.

224. *See supra* text accompanying notes 52–61.

225. *See supra* note 55 and accompanying text.

226. Forty-two states do not have any form of specific green-marketing regulations, thus green marketing would be regulated by their general consumer protection acts. *See supra* notes 53–61 and accompanying text.

227. *See supra* note 85. California is counted as one of the five states that implements additional requirements beyond the *Green Guides* even though it currently only implements additional requirements for terms that are not covered by the *Green Guides*.

228. *See supra* notes 115–121 and accompanying text.

B. Evaluating the Potential Problems of Complete Preemption under the Uniform Definitions Model

Despite the improbability that states would choose to impose additional limitations on the use of federally defined green-marketing terms, the states' *ability* to do so is extremely important. Such ability resolves or at least improves most of the problems of complete preemption discussed in Part II.B by preventing interest group capture, allowing more local democracy, permitting some state experimentation, and enabling states to address local issues.[229]

The states' ability to limit the use of the federally defined green-marketing terms in their jurisdictions makes interest group capture much less likely to occur.[230] This is the case because even if an interest group successfully lobbies the federal government for a lenient definition of a green-marketing term, not every state must allow the use of that green-marketing term within its jurisdiction.[231] If a state believes that a certain green-marketing term's definition is too lenient and thus inadequate, the state can simply ban that term's use within the state.

The state's ability to ban the term's usage decreases the chances of interest group capture in two ways. First, the companies that lobby for a lenient definition of a green-marketing term most likely want to use that green-marketing term when they market their products. It would do no good for a company to lobby for a lenient definition of a term if states will not allow the term's use because it is too lenient.[232] To ensure that they can use the term universally, the companies would also have to successfully lobby fifty state legislatures to allow the use of the term as defined. The odds of securing the universal acceptance of a leniently defined term decrease as the number of legislatures that must be convinced of the definition's propriety increases.[233] Second, if a state does ban a term because it is too lenient, then the federal government will be more likely to revise that term's uniform definition because of the political pressure created as a result of the state's ban.[234]

Allowing states to limit the use of green-marketing terms would also protect fundamental democratic principles. Local environmental advocacy groups could request that their state government either ban certain green-marketing terms or require adequate facilities to exist before allowing certain terms to be used.[235] The citizens

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229. For a discussion of the potential problems of complete preemption, see *supra* notes 162–200 and accompanying text.

230. *See supra* text accompanying notes 164–69 (discussing how interest group capture is most likely to occur when regulatory power is given to only one level of government).

231. *See* Engel, *supra* note 150, at 185 (noting that interest groups lobby for preemptive lenient standards so as to "limit the venues where less powerful groups can lobby with competing agendas").

232. Rhode Island banned the use of certain environmental-marketing terms in the early 1990s. *See* Howett, *supra* note 42, at 434–35. Rhode Island subsequently repealed its ban in 2000. *See* 2000 R.I. Pub. Laws 1518.

233. *Cf.* Engel, *supra* note 150, at 181 ("[W]hen one level of government is captured by one set of policy proponents, opposing interest groups can always seek policy gains at the other level of government.").

234. *See supra* notes 164–74 and accompanying text.

235. If states do not have the ability to regulate green marketing, these local environmental

could hold their state representatives accountable if the representatives failed to respond to the people's preferences.[236] Moreover, the federal government could "look to the output of the state legislatures,"[237] if any, when revising the federal definitions to ensure that they comport with the preferences of the people.[238] If many states have banned the use of a certain term, then the federal government could discern that the people would prefer a different definition of that term. Finally, state autonomy would be increased because states could still choose to better protect the welfare of their citizens by choosing to ban a specific green-marketing term's use altogether, or by requiring adequate facilities to exist before allowing a specific term to be used.[239]

Additionally, while necessarily preventing states from experimenting with different definitions of green-marketing terms, the uniform definitions model would continue to allow some state innovation. For example, one state could ban the use of all green-marketing terms. A second state could require that appropriate facilities exist within fifty miles of any product being advertised as "recyclable." A third state could require that recycling facilities be readily available to a substantial majority of the population in the area where a "recyclable" product is sold. Based on the various state experiments with limitations, the federal government could infer that it needs to revise a specific definition, or other states could copy a limitation that has improved green marketing.

Finally, the ability of states to limit the use of green-marketing terms addresses local issues in a way that complete preemption cannot. Under the uniform definitions model, a state could address a few local issues. For instance, the state could take into consideration the facilities found within its jurisdiction and disallow the use of a specific green-marketing term where it deems that adequate facilities do not exist and such a claim would be more likely to result in deception.[240] On the other hand, if the state believed that a certain term was inadequately defined or that its use could lead to consumer confusion, it could simply ban that term's use. Thus, each state would have some limited power to control the use of green-marketing terms to address specific issues and preferences unique to its jurisdiction.

CONCLUSION

Over a decade and a half after the FTC first issued its *Green Guides*, greenwashing remains a rampant problem.[241] The *Green Guides* have not been a complete failure, but they also have not provided enough certainty and uniformity to adequately regulate

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groups would be forced to lobby at the federal level against multinational corporations. *See* Engel, *supra* note 150, at 185 ("[F]ederal preemption [may be] . . . part and parcel of an interest group plan to limit the venues where less powerful groups can lobby with competing agendas.").

236. *See supra* text accompanying notes 175–77.

237. Dana, *supra* note 133, at 522.

238. *See supra* text accompanying notes 178–80.

239. *See supra* text accompanying notes 181–83.

240. *See supra* text accompanying notes 196–200. If a state's citizens preferred tougher green-marketing regulations, the state could strengthen its regulations by requiring adequate facilities to exist within a closer proximity to where the product is sold, such as within a twenty-five-mile radius instead of a fifty-mile radius.

241. *See* TERRACHOICE ENVTL. MKTG. INC., *supra* note 9, at 1; TERRACHOICE ENVTL. MKTG. INC., *supra* note 8, at 1 (finding that out of 1018 products reviewed, "all but one made claims that are demonstrably false or that risk misleading intended audiences").

green marketing.[242] Moreover, individual state laws and enforcement actions, although helpful, have been insufficient to curb the occurrence of greenwashing, as evidenced by greenwashing's continued prevalence. Something more than the current non-preemptory regulations are necessary.[243]

The optimal regulatory scheme for green-marketing claims does not, however, involve complete preemption of state green-marketing regulations. Complete preemption sacrifices many fundamental values that could otherwise be preserved through dynamic preemption. A uniform definition model of dynamic preemption as proposed in this Note would, to the greatest extent possible, solve green-marketing regulations' current problems while preserving a significant portion of the benefits of both complete preemption and no preemption.

To achieve this compromise, federal definitions for green-marketing terms that have the force of law and expressly preempt all state definitions should be promulgated, thereby increasing green-marketing regulations' certainty and uniformity. The states, in turn, should have a limited ability to regulate how these green-marketing terms are used to prevent the potential problems associated with complete preemption.

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242. *See supra* text accompanying notes 96–126.

243. Avallone, *supra* note 4, at 685 (titling the comment about green-marketing regulations, "The Urgent Need for Federal Regulation").