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Airbags[1] have probably received more attention in recent years than any other single device for motor vehicle safety.[2] The United States Department of Transportation has promulgated, modified, revoked, and reinstated various Federal Motor Vehicle Safety Standards (FMVSS) concerning airbags.[3] Congress,[4] the Executive,[5] and federal courts,[6] including the United States Supreme Court,[7] have considered and taken action on various aspects of the question of automotive passenger restraint, including airbags. The result of all this attention is FMVSS 208,[8] which governs "Occupant Crash Protection" by "specifying equipment requirements for active and passive restraint systems."[9]

FMVSS 208 has never required airbags to be installed, but instead has allowed the manufacturer to satisfy the standard by use of a variety of types of seatbelts. The National Highway Traffic Safety Administration (NHTSA), the branch of the United States Department of Transportation responsible for FMVSS, has repeatedly been urged to require installation of airbags. Until recently, NHTSA has generally favored passive restraints in theory, but has consistently refused to mandate the actual installation of airbags. In reaching its most recent decision on the airbag issue, NHTSA engaged in "a thorough review of the issue of automobile occupant protection,"[10] considering nearly 8,000 public comments, testimony from 152 hearing participants, and the results and analyses of extensive studies from technical and social perspectives.[11] NHTSA

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1 While this article focuses on airbags, the points it raises are equally applicable to other passive restraint devices such as automatic seatbelts.

2 *See* Hricko, *T.J. Hooper and the Air Bag*, 27 FEDERATION OF INS. COUNS. Q. 233 (1977).

3 *See* text accompanying notes 24-49 *infra*.

4 *See* note 30 *infra*.

5 *See* Nader v. Volpe, 466 F.2d 261 (D.C. Cir. 1972) (denying injunction which would have required that rumored communications from the Office of the President of the United States to NHTSA be made part of the agency's public docket).

6 *See* notes 16, 28, and 31 *infra*.

7 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

8 49 C.F.R. § 571.208 (1984).

9 *Id.* at S2.

10 49 Fed. Reg. 28,962 (1984).

11 *See generally* 49 Fed. Reg. 28,962 (1984). The report of this 1984 NHTSA decision,

determined that passive restraint systems alone are less effective than the currently required seatbelts, *when those seatbelts are used.*[12] For this reason, NHTSA has expressed a preference for mandatory seatbelt use laws over passive restraints.[13] The current version of FMVSS 208 therefore will require the installation of passive restraints in the future, but that requirement is to be rescinded if a sufficient number of states pass mandatory seatbelt use laws.[14]

Airbag proponents have been disappointed by NHTSA's consistent refusal to mandate installation of airbags, and the latest NHTSA decision has caused them to develop a new strategy and to seek a new forum.[15] They have shifted their efforts to the courts, not in an effort to review directly the administrative proceedings and determinations,[16] but rather to set a new product liability rule under state tort law authorizing juries to award damages from manufacturers to any driver or passenger injured in a collision in which an airbag might have reduced the plaintiff's injuries.[17] In the past few years since the first appearance of the claim, manufacturers

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which summarizes the study undertaken by NHTSA, covers 48 pages in the Federal Register.

12 49 Fed. Reg. at 28,984-86.

13 "[Mandatory seatbelt use laws] will result in a more substantial reduction in deaths and injuries more quickly and at a lower cost than any other practical alternative." 49 Fed. Reg. at 28,998.

14 49 Fed. Reg. at 28,962-63, 29,009-10.

15 *See The Air Bag Goes to Court*, N.Y. Times, Oct. 29, 1984, at D1, col. 4:

> [A] small group of trial lawyers from around the nation has quietly developed a new strategy that they hope will move the airbag question out of the regulatory agencies and into the courts . . . . "We are trying to use economic pressure to force them to offer air bags," said Joan Claybrook . . . one of the leading forces behind the campaign.

16 Direct judicial review of the administrative agency's decisions has in the past been pursued by airbag advocates with varying degrees of success. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (NHTSA decision to rescind passive restraint requirement vacated as not supported by adequately articulated rationale); Pacific Legal Found. v. Department of Transp., 593 F.2d 1338 (D.C. Cir. 1979) (NHTSA decision to allow four years lead time before mandatory installation of passive restraints upheld). Airbag proponents have also challenged the latest NHTSA ruling on restraints directly in State Farm Mut. Auto. Ins. Co. v. Dole, *appeal docketed*, No. 84-1301 (D.C. Cir. July 11, 1984).

17 *See* Brief for the Air Bag Information Center, Inc. at 5, Evers v. General Motors Corp., 770 F.2d 984 (11th Cir. 1985) (amicus curiae):

> General Motors and its associates have succeeded in containing, indeed, paralyzing the executive and legislative processes. In our tripartite form of government, only the judiciary remains. If Judges turn their heads away from those in need of justice, they will have closed the loop.
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> The quality of mercy should never be strained in the name of justice. Justice is not served by judicial rulings favoring an irresponsible defendant at the expense of a plaintiff in need. Justice is supposed to remedy wrongs, not perpetuate them. We, therefore, implore this Honorable Court to let the fate of the parties rest with the time-honored traditions of our Constitution.
>
> Let the jury decide.

have seen the "no airbag" assertion of liability, even involving automobiles that are eight or nine years old, with increasing frequency.

This shift in battleground from federal administrative agency to state tort law raises serious issues of federalism. This article will first briefly recount the history of the airbag, from a technological, marketing, and regulatory perspective, and will describe the tort law theory asserting liability for failure to supply airbags in motor vehicles. The article then analyzes the effect of two doctrines of federalism: preemption and comity. The article concludes first that federal law and FMVSS 208 preempt the state common law of torts to the extent that the state tort standard is not identical to the standard of FMVSS 208, so that a state may not allow liability on the "no airbag" claim. Second, the article concludes that even if state law were not preempted, principles of comity require that states shape their tort law with deference to the federal administrative decisions embodied in FMVSS 208 and hold that the absence of airbags in a vehicle does not constitute an actionable defect as a matter of state law.

I. The History of Airbags and Federal Regulations

In 1953, the United States Patent Office granted John W. Hetrick a patent for a prototype airbag system, a safety cushion that automatically inflated when the car decelerated rapidly.[18] By the early 1960's the major automobile manufacturers were engaged in research and development programs for airbags.[19] Papers in engineering journals were optimistic about the effectiveness and feasibility of airbag systems,[20] and in 1968 the government and manufacturers were unanimous in supporting efforts to develop workable airbag systems.[21] In 1969, the National Highway Traffic

18 Teret & Downey, *Air Bag Litigation: Promoting Passenger Safety*, TRIAL, July 1982, at 93, 93-94. Apparently the first patent on a proposed airbag system was issued in 1935 to F.G. Manson; *see* Snyder, *A Survey of Automotive Occupant Restraint Problems: Where We've Been, Where We Are, and Our Current Problems*, SAE 690243, at 1019 (1969) (Society of Automotive Engineers publication, hereinafter cited as SAE), and a prototype was developed in Czechoslovakia during World War II. *Id.*

19 Teret & Downey, *supra* note 18, at 94.

20 *See, e.g.*, Clark, Blechtschmidt & Gordon, *Impact Protection with the "Airstop" Restraint System*, PROCEEDINGS OF THE EIGHTH STAPP CAR CRASH CONFERENCE 79 (1964); Clark & Blechtschmidt, *Human Transportation Fatalities and Protection Against Rear and Side Crash Loads by the Airstop Restraint*, PROCEEDINGS OF THE NINTH STAPP CAR CRASH CONFERENCE 19 (1966); Snyder, Young & Snow, *Experimental Impact Protection with Advanced Automotive Restraint Systems: Preliminary Primate Tests with Air Bag and Inertia Reel/Inverted-Y Yoke Torso Harness*, PROCEEDINGS OF THE ELEVENTH STAPP CAR CRASH CONFERENCE 271 (1967); Kemmerer, Chute, Hass & Slack, *Automatic Inflatable Occupant Restraint System*, SAE 680033 (1968); Snyder, *supra* note 18, at 1019; Roberts, *Motor Vehicle Restraints*, SAE 700418, at 985 (1970).

21 Teret & Downey, *supra* note 18, at 94.

Safety Administration published an Advance Notice of Proposed Rulemaking, requesting information on the merits of airbags.[22] This was to be the first of approximately 60 NHTSA rulemaking notices imposing, amending, twice rescinding, and twice reimposing a passive restraint requirement.[23]

In 1970, NHTSA amended Federal Motor Vehicle Safety Standard 208 to require[24] the installation of passive restraints. The requirement was to be effective July 1, 1973, for front seat occupants and effective July 1, 1974, for all other occupants.[25] NHTSA was criticized by many airbag experts for adopting this new passive restraint requirement. Some critics voiced safety concerns over the then existing airbag system, arguing that further testing and development was necessary before a workable airbag system would be available.[26] Others argued that even the best designed airbag system provided less overall safety than the conventional lap and shoulder belt system when used.[27] In addition, the major auto

22 34 Fed. Reg. 11,148 (1969).

23 *See* Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983).

24 Making airbags available as an optional feature has not proven feasible. FMVSS 208 has for many years given manufacturers the *option* to restrain occupants with airbags or other passive restraints instead of manual seat belts. In 1971, General Motors announced its intention to make airbags available as optional equipment on some 1974, 1975, and 1976 luxury model cars. The company's goal was to sell approximately one hundred thousand airbag-equipped cars over the three year period. *See The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection* 4 (Dec. 6, 1976) (hereinafter cited as *The Secretary's Decision*). At a price of $225 to $315, General Motors was able to sell only ten thousand airbag-equipped cars. *See* Martin, *Automatic Restraints—A Ten Year Learning Curve*, PROCEEDINGS OF THE INT'L SYMP. ON OCCUPANT RESTRAINT 151, 155 (June 1-3, 1981); *The Secretary's Decision* at 4; 42 Fed. Reg. 34,289-90 (1977).

The 1977 NHTSA decision to suspend the passive restraint requirement was based in part on the lack of public acceptance of airbags. *See The Secretary's Decision* at 11-12:

> Every sampling of public opinion which has been brought to my attention, including the analysis of the docket for the public hearing, indicates that a substantial majority of Americans oppose the Federal government's mandating passive restraints.
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> . . . .
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> There is widespread and serious concern among members of the public with respect to the likelihood and consequences of inadvertent air bag deployment, the possibility that air bags may cause or exacerbate injuries, and the question of whether air bags will deploy properly in situations in which they are needed.

Today only Mercedes-Benz offers airbags as an optional feature to the public. *See* 49 Fed. Reg. 28,965 (1984). The government has purchased, by special contracts, a number of airbag-equipped cars over the years for its own use. *See* Hricko, *supra* note 2, at 233-34 (831 1972 Mercurys, 1000 1973 Chevrolets, 75 1975 Volvos); 49 Fed. Reg. at 28,965 (5000 cars on order from Ford for G.S.A.).

25 35 Fed. Reg. 16,927 (1970).

26 *See, e.g.*, Clark, *Human Head Linear and Angular Accelerations During Impact*, SAE 710857 (1971); Campbell, *Air Cushion Restraint Systems Development and Vehicle Application*, SAE 720407 (1972); Klove & Oglesby, *Special Problems and Considerations in the Development of Air Cushion Restraint Systems*, SAE 720411 (1972).

27 *See, e.g.*, Pulley, *Starter-Interlock Systems as Passive Restraints*, SAE 720437 (1972); Pat-

manufacturers except for General Motors challenged NHTSA's legal authority to issue a passive restraint standard.[28]

NHTSA responded to the first of these concerns, the inadequacy of the current systems, with a series of postponements of the effective date for compliance. After a short postponement to August 15, 1973,[29] NHTSA next set August 15, 1975,[30] as the date for implementation of the passive restraint requirement. Subsequent postponements moved the requirement back in increments of one to four years.[31] The current date for installation of the first mandatory passive restraints, unless the requirement is rescinded or suspended again, is September 1, 1986.[32]

In 1981, NHTSA rescinded the passive restraint requirement.[33] NHTSA concluded that manufacturers would comply with the requirement by installing detachable automatic seatbelts rather than airbags, and that the incremental safety benefits of these easy to defeat devices would be insignificant.[34] The Supreme Court, in

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rick, *Passive and Active Restraint Systems—Performance and Benefit/Cost Comparison*, SAE 750389 (1975); Ventre, Rullier, Tarriere, Hartemann & Fayon, *An Objective Analysis of the Protection Offered by Active and Passive Restraint Systems*, SAE 750393 (1975).

28 Chrysler Corp. v. Department of Transp., 472 F.2d 659 (6th Cir. 1972). The court rejected the manufacturers' challenge to NHTSA's authority, but held that the measuring standard for compliance was not sufficiently objective, so the requirement was effectively suspended.

29 36 Fed. Reg. 4600 (1971).

30 37 Fed. Reg. 3911 (1972). This postponement prompted the only direct action by Congress on the issue of passenger restraint. NHTSA included an option to substitute a device to compel the passengers to use the manual seatbelts—an ignition interlock system. Public outcry over the ignition interlock system soon prompted Congress to void the ignition interlock requirement by statute. 15 U.S.C. § 1410b(b) (1974). This statute also provided for a 60-day period during which Congress could disapprove, by means of a concurrent resolution, any standard which required an occupant restraint system other than seatbelts. 15 U.S.C. § 1410b(d) (1974). This congressional veto, however, is undoubtedly unconstitutional after Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). Finally, the statute stated that no safety standard could require any occupant restraint other than seatbelts unless NHTSA followed special procedures for promulgating the rule. 15 U.S.C. § 1410b(c) (1974).

31 40 Fed. Reg. 33,977 (1975) (postponed until August 31, 1976); 41 Fed. Reg. 36,494 (1976) (postponed until August 31, 1977); 42 Fed. Reg. 5071 (1977) (suspended indefinitely); 42 Fed. Reg. 34,289 (1977) (reimposed, to be phased in between September 1, 1981, and September 1, 1984); 46 Fed. Reg. 21,172 (1981) (postponed to September 1, 1982); 46 Fed. Reg. 53,419 (1981) (rescinded); 48 Fed. Reg. 39,908 (1983) (suspended requirement until September 1, 1984 after recission was judicially reversed).

In response to the 1977 decision to reimpose the passive restraint requirement but allow four to six years lead time for implementation, Ralph Nader and the Center for Auto Safety obtained judicial review of the lead time provision. The court held the lead time decision, founded on the need for additional time to develop a safe and reliable airbag system, *see* 42 Fed. Reg. 61,466 (1977), to be reasonable and supported by the record. Pacific Legal Found. v. Department of Transp., 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

32 49 Fed. Reg. at 29,009-10 (1984).

33 46 Fed. Reg. 53,419 (1981).

34 *Id.* at 53,423.

reviewing the decision, held that NHTSA should have considered mandating airbags or nondetachable seatbelts, which were not subject to the same objections as detachable automatic seatbelts, and that NHTSA's failure to do so rendered its decision unsupported by its articulated reasons.[35]

In response to this decision, NHTSA undertook its most thorough review of the passive restraint issue, holding hearings in three cities and reviewing nearly 8000 public comments during the nine month study period.[36] NHTSA engaged in a sophisticated analysis of the costs and effectiveness of various restraint systems. NHTSA estimated that a full front (driver and front seat passenger) airbag system would cost an additional $364.[37] The three major manufacturers, however, indicated costs of $800-$838 for a full front airbag system, and some manufacturers estimated as high as $1800.[38]

The more surprising findings, however, related to effectiveness. First, airbags by themselves are effective only in frontal collisions. Rear or side impact collisions or rollovers will not activate the airbag because it has no capability to restrain the occupant from the forces generated by these types of collisions.[39] For this reason, a lap belt or three point seatbelt[40] must be worn to provide complete protection.[41]

Second, the three point seatbelt currently provided in most cars, when it is worn, provides substantially greater protection than an airbag alone, and equal protection to an airbag/lapbelt combination.[42] If only 70% of the driving public wore their seatbelts, the reduction in the fatality rate would be equivalent to the reduction resulting from equipping the entire fleet of vehicles in the United States with airbags. The reduction of moderate to critical injuries would be substantially better for 70% belt usage than for 100% airbag-equipped vehicles.[43]

Finally, the effectiveness figures must be adjusted by the time needed to get the equipment to the public. Almost every car on the road today already has the three point seatbelt, so this means of

35 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

36 *See* 49 Fed. Reg. 28,962, 28,963-64 (1984).

37 *Id.* at 28,989. This cost is the incremental cost, that is, the excess of the cost of airbags over seatbelts and includes both manufacturing costs and the increased fuel use of the heavier system.

38 *Id.* The Mercedes-Benz optional airbag, a driver-only system rather than a full front system, is actually priced at $880. *Id.*

39 *Id.* at 28,973, 28,986.

40 The "three point" seatbelt is a lap and shoulder belt combination anchored to the vehicle at three points.

41 49 Fed. Reg. 28,962, 28,984, 29,001.

42 *Id.* at 28,985.

43 *Id.* at 28,986, using the mid-point range of Table 5.

restraint could be effective immediately.[44] NHTSA assumed that it would take at least ten years from the initial installation until a new safety device would be installed in the entire fleet of automobiles.[45] For this reason, the benefits of passive restraints would not be felt for many years.[46] NHTSA therefore concluded that mandatory seatbelt use laws "will result in a more substantial reduction in deaths and injuries more quickly and at a lower cost than any other practical alternative."[47]

Lacking power to enact mandatory seatbelt use laws itself, NHTSA decided to require installation of passive restraints on a phased-in basis beginning on September 1, 1986, and becoming applicable to all automobiles manufactured after September 1, 1989.[48] This requirement will be rescinded, however, if states accounting for two-thirds of the United States population pass mandatory seatbelt use laws by April 1, 1989.[49]

Throughout this period, therefore, NHTSA has consistently refused to require immediate installation of airbags, opting instead for a phase-in system at some point in the future for safety and economy reasons. NHTSA has now indicated its preference for mandatory seatbelt use laws as the best means of passenger restraint.

II. Product Liability Law and Airbags

Product liability law generally proceeds under one of two theories, negligence or strict liability.[50] Negligence doctrine requires that the manufacturer or seller act in a reasonably prudent fashion in the design, manufacture, and sale of the product.[51] If a breach of that duty proximately causes injury, the tort is complete. Strict liability, whether it proceeds on a tort or warranty theory,[52] focuses

44 *Id.*

45 *Id.*

46 *Id.* at 28,986-87. NHTSA estimates that if 67% of the population is covered by mandatory seatbelt use laws, and if there is 70% compliance with that law, in the first year 4,100 more lives would be saved than by an airbag and lapbelt requirement with the estimated 12.5% lapbelt usage. As more airbags are installed, the death gap narrows until by the ninth year enough airbags are in place to save as many lives as a seatbelt law with two-thirds coverage and 70% compliance. Over the first ten years, such seatbelt laws would save an estimated 16,530 more lives than airbags. *See id.*, Table 6.

47 *Id.* at 28,998.

48 *Id.* at 28,963.

49 *Id.*

50 *See* W. PROSSER, THE LAW OF TORTS 641 (4th ed. 1971).

51 *See id.* at 644-45.

52 Strict liability in tort is described by RESTATEMENT (SECOND) OF TORTS § 402A (1965). Many states proceed instead on a warranty theory, reading the implied warranty of merchantability in § 2-314 of the Uniform Commercial Code to be coextensive with the standards under Restatement § 402A, and rejecting any requirement for privity of contract in such an implied warranty. The two theories, therefore, become identical in practice. *See*

on the product itself rather than the producer, and imposes liability when that product is "defective" and "unreasonably dangerous,"[53] and causes injury to a user. In the case of a manufacturing defect, the product may be unreasonably dangerous because of an error in production, even though the manufacturer took reasonable care to guard against such an error. In such a situation the manufacturer would not be liable in negligence, but would be subject to strict product liability.[54] In a design defect case, however, where the design is the result of a conscious choice, the negligence and strict liability standards are functionally identical: the manufacturer is negligent if it designs a product that is unreasonably dangerous.[55]

In deciding whether a product is unreasonably dangerous and therefore negligently designed, the courts make use of two tests, the consumer expectation test and the risk-utility analysis. Under the former, the product is unreasonably dangerous if it is "dangerous to an extent beyond that which is contemplated by the ordinary consumer who purchases it . . . ."[56] The latter test, probably the majority rule,[57] requires the balancing of a variety of factors to determine whether any alternative design would have provided substantially greater protection from the risk of injury without a substantial sacrifice in the utility of the product or a substantial increase in its cost.[58]

As a starting point in this analysis, the product itself must be reasonably safe for its intended uses. As of 1966, the law indicated that a collision was not the use for which automobiles were intended.[59] Thus, manufacturers had to design automobiles to drive reasonably safely, but not to crash reasonably safely. Under this analysis a manufacturer would be liable if a defect in the car caused the initial collision, but it would not be liable for the enhanced injuries resulting from the failure of the vehicle to protect the occupant in a collision that was caused by someone or something else.[60]

By 1968, however, another view had emerged,[61] a view that is

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W. PROSSER, *supra* note 50, at 658. *See, e.g.*, Swartz v. General Motors Corp., 375 Mass. 628, 629-31, 378 N.E.2d 61, 63-64 (1978).

53 RESTATEMENT (SECOND) OF TORTS § 402A (1965).

54 *See* W. PROSSER, *supra* note 50, at 650-51, 661.

55 *See id.* at 644-45, 659 n.72.

56 RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). *See also* W. PROSSER, *supra* note 50, at 659 ("The prevailing interpretation of 'defective' is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety.").

57 *See* Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 777 (1979).

58 *See* Note, *The Relationship Between Federal Standards and Litigation in the Control of Automobile Design*, 57 N.Y.U. L. REV. 804, 815-17 (1982).

59 *See* Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966).

60 *See* W. PROSSER, *supra* note 50, at 646.

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

dominant today.[62] That view held manufacturers liable if they failed to design a vehicle that was reasonably "crashworthy" so that the risk of injury from a collision was minimized within reasonable limits. Under this view, the intended use was not so important as what foreseeable uses would be made of the product and in what type of environment it should be expected to operate. Manufacturers have a duty under this doctrine to design their vehicles prudently so that they will not be unreasonably dangerous to the user, taking account of the likelihood of collision.

The earliest mention of a duty to install airbags under this product liability standard appears to be in 1977, when the General Counsel of the Insurance Institute for Highway Safety warned manufacturers that by their opposition to airbags, they "may be subjecting themselves to a flood of tort litigation in the near future."[63] In an article published in the *Federation of Insurance Counsel Quarterly*, the General Counsel argued that the majority of courts require a vehicle to be crashworthy and that the foreseeability of users failing to use the manual seatbelts makes the choice to provide such seatbelts rather than airbags an unreasonable design choice.[64] The article apparently was not widely read by plaintiffs' personal injury lawyers,[65] and no such claims were filed against manufacturers until some years later when another article making this argument appeared in *Trial*,[66] the journal of the Association of Trial Lawyers of America. An increasing number of "no airbag" product liability claims have been filed against automobile manufacturers since that time, including one class action against all the major automakers for dam-

62 *See* Comment, *Occupant Protection in Automobiles—Air Bags and Other Passive Restraints: The State of the Art, the Federal Standard, and Beyond*, 27 AM. U.L. REV. 635, 639 (1978).

63 Hricko, *supra* note 2, at 238. *See also* Comment, *supra* note 62, at 671 ("The current technology also supports a claim of liability against a manufacturer who fails to utilize passive restraints.").

64 It would seem unjust to hold a manufacturer responsible for an occupant's injuries for failing to supply one type of safety device when the injuries would probably have been prevented by the occupant's use of another, equally effective safety device which was supplied. Nevertheless, only a minority of jurisdictions currently recognize the "seatbelt defense," even in crashworthiness cases, though that minority may be expanding. *See* Note, *Oklahoma and the Seat Belt Defense: Should* Fields *be Reconsidered?*, 10 OKLA. CITY U.L. REV. 153 (1985).

65 *See* Teret & Downey, *supra* note 18, at 128 n.9.

66 Teret & Downey, *supra* note 18.

The Association of Trial Lawyers of America (ATLA) has continued to advocate the position that manufacturers should be strictly liable for failure to install airbags. *See* Coben, *Building a Crashworthy Car*, TRIAL, July 1985, at 28. In addition, ATLA has lent its resources to the movement to avoid the regulatory process and force installation of airbags through product liability damages actions, and makes available to plaintiffs' lawyers a file with factual and legal research and the names of other lawyers handling no-airbag cases. *See* Column, *Products Liability*, TRIAL, July 1985, at 74, 75-76.

ages on behalf of all front seat passengers injured in front end collisions in Florida.[67]

The only case to have considered the legal validity of a "no airbag" claim is *Evers v. General Motors Corp.*[68] In *Evers*, the plaintiff was injured when a drunk driver ran a stop sign and crashed into her car.[69] She sued General Motors alleging that her 1977 Pontiac was negligently designed and unreasonably dangerous because it did not include an airbag restraint system.[70] The court entered summary judgment for General Motors, holding that as a matter of Florida tort law, absence of an airbag did not make an automobile unreasonably dangerous or negligently designed. The court noted that mandatory installation of airbags had been the subject of federal study and regulation:

> Such a [no airbag] claim is admittedly controversial as use of the "air bag" restraint system has been strongly urged in recent years and is also under consideration presently by the Department of Transportation.[71]

The court also noted the enormous liability that recognition of such a claim would create,[72] and held:

> Notwithstanding the safety benefits which would attain from mandatory use of the airbag system, this Court is unwilling to declare such a requirement as a new basis for tort liabilty [sic].[73]

The plaintiff appealed to the United States Court of Appeals

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67 Taylor v. Ford Motor Co., No. 84-6467 (S.D. Fla. filed May 18, 1984). Defendants include Ford Motor Company, General Motors Corporation, Chrysler Corporation, American Motors Corporation, Motor Vehicles Manufacturers Association, Honda Motor Company, Ltd., American Honda Motors, Inc., Volkswagen of America, Inc., Toyota Motor Sales, U.S.A., Inc., and Nissan Motor Corp., in U.S.A.

The class is defined as:

> . . . all frontseat passengers and drivers who were citizens and residents of the State of Florida, and whose injuries were enhanced by the uncrashworthiness of passenger automobiles manufactured, designed, and/or distributed by the defendants since 1972, and who were involved in front-end collisions in the State of Florida within the last four years from the institution of this suit against each defendant.

Fourth Amended Complaint, Taylor v. Ford Motor Co., *supra*.

68 No. 81-1108 (M.D. Fla. Aug. 3, 1984) (unpublished opinion); *aff'd on other grounds*, 770 F.2d 984 (11th Cir. 1985). *See also* Kern v. General Motors Corp., No. 83-CV9111 (D. Colo. July 9, 1985) (unpublished opinion) (manufacturer has no duty to supply passive seatbelts).

69 Evers v. General Motors Corp., *supra* note 68, slip op. at 1-2.

70 *Id.* at 2.

71 *Id.* at 4.

72 *Id.* at 5. Presumably manufacturers would be liable to all front seat passengers injured in frontal or near frontal collisions since the date when airbags were, according to a jury's determination, technologically feasible. Statutes of limitations would cut off many older claims, but the potential liability remains staggering.

73 *Id.*

for the Eleventh Circuit,[74] and was supported in her efforts to have lack of airbags declared an actionable defect by amicus briefs from the Association of Trial Lawyers of America, Trial Lawyers for Public Justice, P.C., the Airbag Information Center, Inc., the American Public Health Association, and the National Association for Public Health Policy. The case was to be the first test of a strategy to force manufacturers to install airbags through the financial pressure of personal injury damages actions.[75] The Court of Appeals, however, affirmed the District Court on the narrower ground that the plaintiff's affidavits did not show that an airbag would have been effective in the circumstances of this accident.[76]

This strategy raises questions about the proper relation between a federal regulatory agency's decisions and state tort law. When a federal regulatory agency has studied the very device at issue and has promulgated a standard balancing the various interests, should state tort law remain available as an alternative route to undercut that federal decision? To what extent should the federal standard have preemptive effect on the state tort law? To what extent should the state court defer in the interests of comity to the federal agency's standard?[77]

74 770 F.2d 984 (11th Cir. 1985).

75 The idea of using product liability damage actions to force manufacturers to install airbags in light of NHTSA decisions not to mandate immediate airbag installation was presented in Teret & Downey, *supra* note 18, at 93, 99:

> The failure to make available the most effective method of reducing motor vehicle deaths and injuries can be an actionable wrong, and the initiation of airbag litigation may be the most effective way of getting air bags in cars.
>
> . . . .
>
> Product liability law fosters injury prevention by creating a financial incentive to design safe products. The importance of this function of product litigation becomes even greater when the executive and administrative offices of government choose not to regulate industry for the benefit of public health and safety. The message of large verdicts for the failure to make air bags available can be loudly heard by automobile manufacturers, and has the potential for being more effective than the attempts to regulate over the past dozen years.

After the most recent NHTSA decision, the idea developed into a campaign by airbag advocates, led by former NHTSA director Joan Claybrook, to press numerous "no airbag" product liability lawsuits in an effort to "move the airbag question out of the regulatory agencies and into the courts" and to use "economic pressure to force [manufacturers] to offer air bags." *See The Air Bag Goes to Court*, *supra* note 15.

76 Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985).

77 Other constitutional issues may be raised as well, including federalism questions. For example, Michael Hoenig argues that state tort product liability claims for defective design raise not only preemption problems, *see* Hoenig, *Resolution of "Crashworthiness" Design Claims*, 55 ST. JOHN'S L. REV. 633, 706-18 (1981), but also constitute an impermissible burden on interstate commerce, *see id.* at 718-22, and violate the due process clause, *see id.* at 722-25.

III. Preemption in "No Airbag" Tort Claims

A. *Federal Preemption Doctrine*

The supremacy clause[78] of the United States Constitution dictates that when Congress has enacted legislation which is "necessary and proper"[79] to implement one of its plenary powers, any state law which comes into conflict with the federal law is preempted.[80] Preemption occurs under two circumstances. First, Congress may, through comprehensive regulation[81] or through a specific statutory declaration,[82] "occupy the field" so that the states are powerless to enforce *any* state law on the subject. If federal law has so occupied the field, even state laws which are consistent with or supplementary to the federal law are invalid, because Congress has impliedly taken exclusive control of the subject.[83] In addition, when Congress has so occupied the field but failed to legislate concerning a particular aspect of the field, a state may not, consistent with preemption doctrine, legislate on that aspect. Under these circumstances, Congress has implicitly evidenced a desire that that aspect remain unregulated; any regulation by the state conflicts with the federal law and is preempted. This type of preemption may be called "type 1 preemption."

Congressional legislation may not always occupy the field. Congress may instead only regulate a particular aspect, leaving the states free to regulate other aspects. When a state law conflicts with a federal statute which is on-point, or if the state law frustrates the purposes and objectives of Congress in enacting the federal law, the state law will be preempted by the federal law under the supremacy clause.[84] The federal statute will not preempt state law on other parts of the field, but will preempt any state law on the particular subject to which the federal statute is directed. This second type of preemption may be called "type 2 preemption." In a sense, Congress in a type 2 preemption situation has occupied the

78 U.S. CONST. art. VI, cl. 2.

79 U.S. CONST. art. I, § 8, cl. 18.

80 *See generally* G. GUNTHER, CONSTITUTIONAL LAW 317-27 (11th ed. 1985); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 292-96 (2d ed. 1983).

81 *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

82 *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977).

83 *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956); Campbell v. Hussey, 368 U.S. 297 (1961).

84 Such a conflict exists not only when compliance with both state and federal law is impossible, *cf.* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), but more frequently when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *See also* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984).

limited field of the aspect the statute regulates, and any state laws affecting that aspect are therefore preempted.

B. *Preemption Under the Vehicle Safety Act*

In the National Traffic and Motor Vehicle Safety Act of 1966,[85] Congress established a uniform comprehensive regulatory scheme governing the safety design features of motor vehicles. The Act intended to place "primary responsibility" for setting safety standards "squarely upon the Federal Government."[86] Recognizing the states' past contributions to safety regulation, Congress relegated the states to "a *consultive* role in the setting of standards."[87] To carry out this federal responsibility, the Act directs the Secretary of Transportation or his delegate to issue motor vehicle safety standards applicable to all motor vehicles manufactured for sale or imported into the United States.[88] The Secretary of Transportation has delegated this authority to promulgate safety standards to the Administrator of the National Highway Traffic Safety Administration. Hundreds of Federal Motor Vehicle Safety Standards directed at countless aspects of motor vehicle safety performance and design have been promulgated by NHTSA under this authority.[89]

If Congress had been silent as to the preemptive effect of this Act, it is possible that the courts might have determined that Congress had occupied the entire field of motor vehicle safety. Thus, through type 1 preemption, any state statutory or common law pertaining to motor vehicle safety would be invalid. This interpretation of the preemptive intent of Congress might then have nullified any state's product liability law, leaving those injured by safety defects in motor vehicles to pursue their remedies exclusively under the federal regulatory scheme. If no express private cause of action for damages was created by the Act, the courts might have determined that Congress, by occupying the field of vehicle safety regulation, by creating a scheme of public regulatory enforcement of the standards, and further by creating no private right of action, had

85 15 U.S.C. §§ 1381-1431 (1966).

86 S. REP. No. 1301, 89th Cong., 2d Sess. 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2709, 2712.

87 *Id.* (emphasis added).

88 15 U.S.C. §§ 1392, 1397 (1982).

89 Federal regulations have the same effect as a federal statute in preemption doctrine. If federal regulations occupy a field, or evidence an intent to foreclose state regulation of a particular aspect of a field, or if the state law would conflict with the requirements, purposes or objectives of a federal regulation, then the state law is preempted. *See* Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982); Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984); Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 105 S. Ct. 2371 (1985).

purposefully deprived individuals of the ability to recover privately for injuries caused by safety design defects.[90]

In enacting this comprehensive federal regulatory scheme, Congress faced three choices: (1) allowing the risk that injured individuals might be deprived of their cause of action; (2) creating a private federal cause of action for motor vehicle safety defects; or (3) expressing a more limited preemptive intention which would allow the continued existence of state law, including the state law cause of action for damages, so long as that state law did not conflict in some way with the federal regulations. Congress chose to express a limited preemption:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.[91]

In essence, rather than occupying the entire field of automobile safety through type 1 preemption, Congress has chosen to implement type 2 preemption: state safety standards or any state common or statutory law which is "applicable to the same aspect of performance" as the federal regulation, and which is "not identical" to the federal regulation, is preempted.[92]

It is noteworthy that the National Traffic and Motor Vehicle Safety Act of 1966 is unlike other federal regulatory schemes, which set minimum standards[93] and allow states to impose more stringent requirements.[94] The key to the difference in preemptive effect of

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90 *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), holding that Congress, through the National Labor Relations Act, had occupied the field of labor management relations, preempting a state tort claim for damages based on a union's organizational picketing. *Cf.* Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984), holding that the Atomic Energy Act did not preempt a state tort claim for damages based on a violation of the federal standards. Despite the "tension" between exclusive federal regulation and the "regulatory consequence" of an award of damages under state tort law, the Court held that because Congress had clearly expressed its intent, through other legislation, to tolerate that tension, such tort claims were not preempted.

91 15 U.S.C. § 1392(d) (1982).

92 When the state acts as a consumer and buys vehicles for its own use, the statute allows it to require higher safety standards. 15 U.S.C. § 1392(d) (1982).

93 Occasional references to FMVSS as "minimum standards" refer to the fact that manufacturers may exceed the standards if they choose to. *See* 15 U.S.C. § 1391(2) (1982). The standards are not "minimum standards" with regard to the states, however; no state may enforce a higher standard or any standard "not identical" to the FMVSS. 15 U.S.C. § 1392(d) (1982).

94 *See, e.g.*, Bruce v. Martin-Marietta Corp., 544 F.2d 442, 446 (10th Cir. 1976) (Civil Aeronautics Authority only empowered, by terms of statute, to establish minimum standards governing aircraft design); Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402,

various federal regulatory schemes is the intent of Congress as expressed or implied in the statutes. For example, in *Raymond v. Riegel Textile Corp.*,[95] the court rejected an argument that compliance with the Federal Flammability Act barred liability in tort. The plaintiff suffered injuries when her flannelette nightgown, manufactured in conformance with the standards of flammability established by the Act, was ignited by a hot grill on an electric range. The plaintiff brought suit under New Hampshire tort law and the defendant raised a preemption argument. The Act was "intended to supersede any [state] law . . . inconsistent with its provisions."[96] The Court of Appeals reviewed the legislative history of the Act and concluded that Congress did not intend to preempt tort law recovery. The court determined that the phrase "inconsistent with its provisions" referred to the underlying policies of the Act to increase the safety of consumers, particularly the young and aged. Accordingly, the court found that "New Hampshire's application of its strict liability standard in tort actions is not 'inconsistent with [the] provisions' of the Flammable Fabrics Act."[97]

The National Traffic and Motor Vehicle Safety Act of 1966, on the other hand, declares its regulations to be totally preemptive with regard to the aspect of performance that they govern. States may enforce only "identical" regulations under 15 U.S.C. § 1392(d), not ones which are less or even more demanding.[98] The choice of the word "identical" rather than "inconsistent" manifests an apparent intent to preempt all state regulations which do not mirror the precise requirements of federal regulations promulgated under the Act, rather than merely those state regulations which do not comport with the general policies underlying the Act.

This unusually strong preemption clause in the statute was intended to express serious congressional concern for the need for uniformity in safety standards for the sake of both the automobile industry and the driving public:

> The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong

405 (1st Cir. 1965) (federal labeling requirements imposed on manufacturers of poisonous insecticides constitute minimum standards only for shipping in interstate commerce; no evidence of congressional intent to preempt field of negligence); Rucker v. Norfolk & Western Ry., 77 Ill. 2d 434, 440, 396 N.E.2d 534, 537 (1979) (despite some federal standards relative to construction of LPG tank cars, no congressional intent to preempt state tort law).

95 484 F.2d 1025 (1st Cir. 1973).

96 15 U.S.C. § 1203(a) (1970).

97 484 F.2d at 1027. *Accord* American Apparel Mfrs. Ass'n. v. Sargent, 384 F. Supp. 289 (D. Mass. 1974).

98 *See* Boating Industry Ass'n v. Boyd, 409 F.2d 408, 410 (7th Cir. 1969); Chrysler Corp. v. Tofany, 419 F.2d 499, 513 (2d Cir. 1969) (Friendly, J., concurring).

> and adequately enforced, but that they be uniform throughout the country.[99]
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> * * *
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> Basically this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.[100]

In light of this strong need for national uniformity of standards, courts have held that federal regulations preempt non-identical state standards,[101] and have even declared invalid state pre-sale approval processes which required greater proof of compliance with federal safety standards than did the federal scheme.[102] On the other hand, courts have held that where the FMVSS does not govern "the same aspect of performance" as the state standard, 15 U.S.C. § 1392(d) does not require preemption.[103] 15 U.S.C. § 1392(d), therefore, represents a strong type 2 preemption statute, prohibiting enforcement of any state safety standard which is not identical to an on-point federal standard.

In one of its most recent cases on preemption doctrine, the Supreme Court contrasted a federal concern for setting *minimum* standards with the federal concern for setting *uniform* standards.[104] If a federal regulatory scheme's interest is in setting minimum standards, then a state standard will conflict with that purpose only if it is lower than the federal one;[105] a higher or equally strict state standard does not in any way undercut the federal interest. Even a state standard which is merely different, which cannot be said to be

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99 S. REP. No. 1301, *supra* note 86, at 2720.

100 H.R. REP. No. 1776, 89th Cong., 2d Sess. 17 (1966).

101 *See, e.g.*, Vehicle Equipment Safety Comm'n v. National Highway Traffic Safety Admin., 611 F.2d 53 (4th Cir. 1979).

102 *See, e.g.*, Juvenile Prods. Mfrs. Ass'n v. Edmisten, 568 F. Supp. 714 (E.D.N.C. 1983); Truck Safety Equipment Inst. v. Kane, 466 F. Supp. 1242 (M.D. Pa. 1979). *See also* National Ass'n of Motor Bus Owners v. Brineger, 483 F.2d 1294, 1308 (D.C. Cir. 1973) (Robinson, J., concurring in part and dissenting in part) (strongly emphasizing the extensive preemption effect intended by Congress).

103 *See, e.g.*, Chrysler Corp. v. Rhodes, 416 F.2d 319 (1st Cir. 1969); Chrysler Corp. v. Tofany, 419 F.2d 499 (2d Cir. 1969); Commonwealth v. Guest, 12 Mass. App. Ct. 941, 425 N.E.2d 779 (1981).

104 Hillsborough County v. Automated Med. Lab., Inc., 105 S. Ct. 2371, 2380 n.5 (1985):

> Two of the amici argue the county ordinances interfere with the federal interest in uniform plasma standards. There is no merit to that argument. The federal interest at stake here is to ensure minimum standards, not uniform standards. Indeed, the FDA's 1973 statement makes clear that additional, nonconflicting requirements do not interfere with federal goals, and we have found no reason to doubt the continued validity of that statement.

105 Indeed a real conflict will arise only if the state standard *requires* lower performance than the federal one, or penalizes performance which exceeds the lower state standard. A lower state standard which may be exceeded with impunity has no effect on compliance with a higher federal standard.

higher or lower, will not impose upon the federal interest if both the federal minimum and the state standard can be complied with.[106] If the federal interest is in setting uniform standards, however, then any state standard which is different from the federal standard, whether it is higher or lower or uses a different measure, would conflict with that policy of uniformity.[107] 15 U.S.C. § 1392(d) and its legislative history indicate that once NHTSA has set a safety standard on a particular "aspect of performance," while it is a minimum standard in the sense that the manufacturer may exceed it, it is meant to be a uniform national standard. No state may enforce a non-identical safety standard applicable to the same aspect of performance.

C. *Preemption of Common Law Remedies*

State safety standards have the potential to be enforced through a variety of methods, including jury verdicts in common law actions. If those state standards are not identical to existing on-point federal regulations, however, jury verdict enforcement of them should not be allowed.[108] The United States Supreme Court has recognized that a verdict in a state common law action has the effect of formal state regulation:

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.[109]

In *San Diego Building Trades Council v. Garmon*,[110] the Court held

106 *See, e.g.*, Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963) (federal avocado ripeness regulations set "minimum" not "uniform" standards and do not preempt California avocado ripeness requirements based on different measure).

107 *See, e.g.*, Campbell v. Hussey, 368 U.S. 297 (1961) (federal tobacco identification standards preempt complementary but non-identical state standards).

108 *See* Hoenig, *supra* note 77, at 706-18 (state tort claims on crashworthiness theory based on standards not identical with FMVSS may be preempted).

This aspect of *preemption* doctrine should not be confused with the issue in *tort* doctrine as to the effect of compliance with governmental regulations, state or federal, on the question of negligence. Some states hold, as a matter of tort doctrine, that compliance with either type of governmental regulation is evidence of due care but not conclusive on the question. On the other hand, many commentators suggest it should be conclusive, at least in certain circumstances. *See* text accompanying notes 172-77 *infra*. This resolution of the tort issue, however, has no effect on the preemption issue raised when the regulation is a federal one.

109 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) (citation omitted).

110 359 U.S. 236 (1959).

that the National Labor Relations Act preempted a state law tort claim for damages caused by a union's picketing. Since Congress had regulated the subject of labor relations, the state was powerless to regulate the same subject through its common law of torts. Similarly, in *Sears, Roebuck & Co. v. Stiffel Co.*,[111] the Court held that a state may not, through a common law damage claim for unfair competition, enforce a state common law standard which "clashes with the objectives of the federal patent laws."[112] State tort law is thus the equivalent of state statutes or regulations in setting and enforcing state standards. When the state tort standard conflicts with the federal regulation, it is preempted.

More recently, in *Silkwood v. Kerr-McGee Corp.*,[113] the Supreme Court reaffirmed this analysis. Prior to *Silkwood*, the Supreme Court held that Congress occupied the field of nuclear energy safety in enacting the Atomic Energy Act,[114] thus preempting all state regulation through type 1 preemption.[115] *Silkwood* presented the question of whether the federal standards also preempted a state common law award of damages for violation of those standards. The Court looked to the intent of Congress and found evidence that, in the atomic energy field, Congress intended to allow private tort remedies for violation of federal standards to remain in effect.[116] The Court was careful to note, however, that while Congress did not intend to preempt all state tort law with type 1 preemption in this case, enforcement of state tort standards which are in conflict with the federal regulatory standards would not be allowed because of type 2 preemption.[117]

Since Silkwood's claim was that Kerr-McGee had not complied with federal standards, the state tort standards and federal regulations did not conflict, and thus Silkwood's claim was not preempted. *Silkwood* specifically recognized that state law tort claims

111 376 U.S. 225 (1964).

112 *Id.* at 231.

113 104 S. Ct. 615 (1984).

114 42 U.S.C. §§ 2011-2284 (1982).

115 Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 212-13 (1983).

116 104 S. Ct. at 623-26. Congress had passed the Price-Anderson Act, an amendment to the Atomic Energy Act, creating an indemnification scheme for state law tort suits against nuclear power plant operators.

117 According to the court:

> [I]nsofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

Id. at 626.

can establish and enforce regulatory standards and ruled that such claims will be allowed so long as they are consistent with federal regulations. However, state claims which conflict with or frustrate the objectives of the federal regulatory scheme will be preempted.[118]

In two recent product liability tort cases, however, lower federal courts have rejected preemption defenses based on federal labeling requirements. In *Ferebee v. Chevron Chemical Co.*,[119] the plaintiff sued for injuries sustained because of exposure to paraquat, alleging that the warning on the label, which had been approved by the federal Environmental Protection Agency, was inadequate. In *Cipollone v. Liggett Group, Inc.*,[120] the plaintiff sued for damages from the lung cancer she allegedly contracted by smoking cigarettes. The defendants argued that the federally mandated warning of the health hazards from smoking cigarettes preempted the state tort claim.

In both *Ferebee* and *Cipollone*, the courts rested their decisions on two bases. First, these courts stated that setting a tort standard for liability was not the equivalent of state regulation because the manufacturer need not change his conduct; he could comply with the federal regulation and pay damages for violating the state tort standard. The same could be said, however, for traditional state regulations which conflict with federal regulations. The manufacturer could always follow the federal standard and pay the fine for violating the state one. The preemption question is properly whether the manufacturer can comply with both state and federal standards, not whether he can comply with one and pay the price for resulting noncompliance with the other. Thus 15 U.S.C. § 1392(d) forbids the *setting* of a non-identical *standard*. Whether or not a tort judgment "regulates" by requiring a change in conduct, it is clear that a tort judgment must be based on some legal standard. 15 U.S.C. § 1392(d) requires that standard to be identical to the federal standard.

The second basis for the *Ferebee* and *Cipollone* decisions was a purported distinction between the "purposes" of the federal regulations—to protect the environment or to regulate cigarette advertising and labeling—and the "purpose" of state tort law—to compensate injured claimants. Again this analysis misconstrues preemption doctrine. The Supreme Court has specifically held that the *effect* of the state rule, not its *purpose*, will govern its validity in

118 *See also* Howard v. Uniroyal, Inc., 719 F.2d 1552, 1561-62 (11th Cir. 1983) (state common law remedies were preempted because they conflicted with the purposes of the federal regulatory scheme).

119 736 F.2d 1529 (D.C. Cir. 1984).

120 593 F. Supp. 1146 (D.N.J. 1984).

preemption analysis.[121] The proper question, therefore, is not whether the purposes of the state and federal systems are in conflict, but rather whether the effect of the state rule is to frustrate the purpose of the federal scheme. The *Ferebee* and *Cipollone* position would mean that state tort law, with its compensatory purpose, would *never* be preempted by a federal regulatory scheme with its regulatory purpose, a result clearly rejected by the Supreme Court.

Congress and the Department of Transportation, through NHTSA, have struggled to achieve the proper balance between considerations of safety, cost, effectiveness, and personal convenience in occupant restraint systems. This balancing is required by 15 U.S.C. § 1392(f), which requires that in prescribing FMVSS, the Secretary shall "consider whether any such proposed standard is reasonable, practicable and appropriate . . . ." In striking this balance, NHTSA has given intense scrutiny to the use of seatbelts of various types and to passive restraints, including airbags, and has refused to require immediate installation of airbags.[122] Instead, NHTSA has consistently permitted manufacturers to satisfy federal occupant restraint requirements by any of several approved methods, including a seatbelt system.

If a state allowed a jury to hold a manufacturer liable and award damages for failure to install airbags, it would effectively set a state safety standard requiring airbags. Manufacturers would be required, despite the NHTSA decision to the contrary, to install airbags immediately or face substantial damage awards.[123] A ruling allowing an allegation of lack of airbags to constitute a claim for relief under state law would impermissibly "establish or continue in effect . . . [a] safety standard applicable to the same aspect of performance [as the FMVSS] . . . which is not identical to the Federal Standard."[124]

D. *Effect of the Vehicle Safety Act's Savings Clause*

At the same time it enacted the preemption clause, Congress enacted a general savings clause providing that compliance with FMVSS will not necessarily provide an exemption from liability

121 Perez v. Campbell, 402 U.S. 637, 651-52 (1971).

122 *See* 42 Fed. Reg. 61,466 (1977) (rationale for lead time requirements); Pacific Legal Found. v. Department of Transp., 593 F.2d 1338, 1348 (D.C. Cir. 1979) (lead time requirements upheld).

123 Indeed, even immediate installation would be too late. Manufacturers would be exposed to enormous liability in connection with the millions of vehicles already on the roads. *See* note 72 *supra*.

124 15 U.S.C. § 1392(d) (1982).

under state common law.[125] Although this section might be read in simplistic fashion to provide that the FMVSS does not affect state common law, such a reading is clearly illogical and unsupported by the case law. A better reading of the savings clause would construe it consistently with the rest of the Act. The clause would then defeat the type 1 preemption argument that compliance with FMVSS automatically exempts the manufacturer from liability on all safety defects, even those not covered by an on-point FMVSS. The clause would not, however, allow a state to set a tort standard different from a FMVSS directed to the particular claimed defect at issue in the case.

The Supreme Court has repeatedly emphasized that savings clauses similar to section 1397(c) may not be applied literally so as to permit any state common law remedies, even those which conflict with the federal scheme. Rather, such savings clauses should be read to permit only state common law remedies which do not frustrate the purposes and objectives of the federal regulatory system.[126] The Supreme Court has consistently interpreted savings clauses, no matter how broadly written, to apply only when the state common law was not in conflict with the regulatory scheme.[127]

The logic of these cases is compelling. If the savings clause

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125 The savings clause provides:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. § 1397(c) (1982).

126 In Texas and Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), for example, the Court held that the Interstate Commerce Act preempted a state common law claim despite a savings clause in the Act which provided:

> Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

Id. at 446.

The Court refused to apply this savings clause literally, but ruled instead that the statute must be construed to apply only to state common law remedies which do not conflict with the federal regulatory scheme:

> This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.

Id.

As recently as 1981, the Supreme Court reemphasized that the broad savings clause of the Interstate Commerce Act could not be read to allow state common law remedies which conflicted with the federal regulatory system. In Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981), an Iowa common law damage claim was preempted because it allowed recovery of damages in tort for abandonment of a rail line when that abandonment had been approved by the Interstate Commerce Commission. The Court rejected the plaintiff's argument that the savings clause allowed state tort remedies to continue.

127 *See, e.g.*, T.I.M.E. Inc. v. United States, 359 U.S. 464, 473 (1959); Arrow Transp. Co. v. Southern Ry., 372 U.S. 658, 671 (1963). *Cf.* Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 298-300 (1976).

were read in literal and simplistic fashion to relieve state common law from normal rules of preemption, the state common law could frustrate the purposes of the federal regulatory scheme and effectively nullify the federal law. Suppose, for example, the alleged defect in a state common law action was the presence of equipment which the FMVSS required. A plaintiff might claim that a car was unreasonably dangerous because the windshield did not pop out in a crash, and when he struck the windshield, he was injured.[128] The FMVSS, however, might provide that windshields must remain in place during a crash so that occupants are not ejected.[129] In this circumstance, where the alleged defect is *required* by federal regulations, preemption doctrine would surely apply to block state common law liability. State law cannot make a manufacturer liable for complying with federal law. The provisions of 15 U.S.C. § 1397(c) may not properly be read in a simplistic way to provide total freedom for state common law to develop, even in a way which conflicts with the federal regulatory scheme. Rather, courts must reconcile the language and spirit of the preemption clause, section 1392(d), and the savings clause, section 1397(c).

In harmonizing preemption doctrine and general savings clauses, the courts have applied a conflict analysis. Under this analysis, common law remedies will not be preempted in their entirety by type 1 preemption, but any remedies which conflict with the purposes of the federal regulatory scheme will be preempted by type 2 preemption. Assume, for example, that NHTSA had promulgated FMVSS regulating the brightness of headlights, and the subject vehicle complied with those regulations. A state law cause of action claiming that the headlights were not bright enough would be preempted by the federal regulation and compliance with the FMVSS would be a complete defense. On the other hand, a state law cause of action claiming that the tail lights, not directly covered by any FMVSS, were not bright enough would not be preempted; NHTSA has not occupied the entire field of "brightness of lights." Compliance with the FMVSS on headlights would thus not exempt the manufacturer from liability for defective design in the tail lights. Similarly, a tort claim that the headlights were not properly located would not be preempted, since the FMVSS does not purport to regulate all aspects of the headlights, only their brightness. Under a conflict analysis, the tort claim conflicts with the federal regulations and is preempted only when it sets a non-identical standard di-

128 This was the claimed defect in Gray v. General Motors Corp., 434 F.2d 110 (8th Cir. 1970). Preemption was neither raised as a defense nor considered by the court.

129 *See* FMVSS 212, 49 C.F.R. § 571.212 (1984).

rected to the "same aspect of performance" as the FMVSS.[130]

This conflict analysis is consistent with both the language and the policies of sections 1392(d) and 1397(c). Determining that a state law cause of action may allege only a defect not specifically addressed by a FMVSS, or which fails to comply with an applicable FMVSS, and may not allege as defective an item permitted by an on-point FMVSS, would enforce the statute's mandate that "[w]henever a Federal motor vehicle safety standard is in effect, no State . . . shall have any authority either to establish, or to continue in effect . . . any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard."[131] This analysis furthers the policy of section 1392(d) to insure nationwide uniformity of safety standards so that manufacturers and consumers can order their lives with some degree of predictability. When federal standards on the subject have been promulgated, they preempt state standards and set the measure for liability so that compliance with the federal standards constitutes a defense. If no FMVSS has been promulgated on the subject, however, the need for uniformity is not substantial. State common law may, under these circumstances, define the standard through its determination of what allegations of a design defect will state a claim for relief under state product liability law.

The common law savings clause, section 1397(c), is best understood as an effort to block the argument that it is NHTSA's exclusive province to define safety standards and unsafe design defects. Such an argument would render states powerless to hold a manufacturer liable for a design defect if the vehicle met the standards established by NHTSA. The savings clause indicates that while NHTSA standards are *exclusive* when they apply, they are not *exhaustive*. NHTSA may not have regulated some safety defects, either because it has not become aware of them or because the required administrative procedures which must be complied with before a regulation becomes effective have not yet been completed. In that case, states should remain free to plug the holes in NHTSA's regulations, either through statutory standards, or through the standards of their common law of product liability. For this reason,

130 Courts have strictly limited the scope of the "aspect of performance" preemption of FMVSS, for example holding that Standard 108 governing "lamps, reflective devices and associated equipment" did not regulate auxiliary lighting, so that states could prohibit use of overly bright auxiliary headlights. *See* Chrysler Corp. v. Rhodes, 416 F.2d 319 (1st Cir. 1969); Chrysler Corp. v. Tofany, 419 F.2d 499 (2d Cir. 1969). *See also* Commonwealth v. Guest, 12 Mass. App. Ct. 941, 425 N.E.2d 779 (1981) (state statute mandating motorcycle helmet use not preempted by FMVSS which sets standards for such helmets).

131 15 U.S.C. § 1392(d) (1982).

Congress noted that "[c]ompliance with . . . [federal safety] standards would thus *not necessarily* shield any person from product liability at common law."[132]

The first several automotive product liability cases decided shortly after NHTSA was created support this interpretation of the savings clause. Manufacturers raised the type 1 preemption argument, asserting that by creating NHTSA and the federal regulatory system governing automotive safety, Congress had occupied the field and all state tort claims alleging unsafe design defects were preempted. The courts uniformly rejected the type 1 preemption argument, citing section 1397(c).

For example, in *Larsen v. General Motors Corp.*,[133] the plaintiff alleged a safety defect in the design of the car's steering system. The manufacturer contended in defense that "any safety standards in design and equipment should be imposed as envisioned by the National Traffic and Motor Vehicle Safety Act of 1966 . . . ."[134] No FMVSS governed the steering assembly, so this contention was an argument for exclusive, type 1 preemption. The court held that section 1397(c) "expressly negatives any intention of Congress to acquire *exclusive jurisdiction* in this field and leaves the common law liability intact."[135]

After a six year lull, in no less than six cases from 1974 to 1976, defendants asserted the type 1 preemption argument, which was uniformly rebuffed.[136] In *Arbet v. Gussarson*,[137] for example, the plaintiff alleged defective design of the gas tank. Again there existed no FMVSS on the subject of gas tank design. The manufacturer argued that despite this lack of federal regulation, Congress had occupied the field through type 1 preemption:

> Finally, defendant argues that the national character of the automobile industry dictates that automobile design not be subject to piecemeal regulation by different juries in different states. Defendant argues that the problem of designing safe cars is for the Congress, not state courts, and that federal safety regulations established by the National Highway Traffic Safety Administration, pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, preempt the field of automobile safety regu-

132 S. REP. No. 1301, *supra* note 86, at 2720.

133 391 F.2d 495 (8th Cir. 1968).

134 *Id.* at 506 (citation omitted).

135 *Id.* (emphasis added).

136 *See, e.g.*, Knippen v. Ford Motor Co., 546 F.2d 993, 999-1000 (D.C. Cir. 1976); Anton v. Ford Motor Co., 400 F. Supp. 1270 (S.D. Ohio 1975); McMullen v. Volkswagen of America, 274 Or. 83, 87-89, 545 P.2d 117, 119-20 (1976); Arbet v. Gussarson, 66 Wis. 2d 551, 562, 225 N.W.2d 431, 438 (1975); Turner v. General Motors Corp., 514 S.W.2d 497, 505-06 (Tex. Civ. App. 1974); Volkswagen of America, Inc. v. Young, 272 Md. 201, 216-19, 321 A.2d 737, 745-46 (1974).

137 66 Wis. 2d 551, 225 N.W.2d 431 (1975).

> lation thus rendering state courts powerless to act in this area.[138]

The court rejected this type 1 preemption argument on the basis of section 1397(c). Furthermore, no issue of the type 2 preemption embodied in section 1392(d) was presented, since no FMVSS existed regulating the same aspect of performance as the claimed defect.

A more subtle type 1 preemption argument appeared in two more recent cases. Rather than arguing that Congress had occupied the field and deprived the state courts of all power to set safety standards through tort doctrine, these defendants, emphasizing the broad range of FMVSS they had complied with, argued that such compliance constituted a defense to the tort claim for defective design. This argument is more properly seen as one of tort doctrine, that compliance with government regulations constitutes due care in design as a matter of law.[139] To the extent it is seen as a preemption argument, however, it is important to note that since no FMVSS was on-point with respect to the alleged defect, the argument must assert type 1 preemption. Thus, the type 1 preemption argument in these cases asserts that by promulgating a series of regulations, NHTSA has occupied the field and impliedly said that no other design standards are necessary for a vehicle to be safely designed. In effect, the defendants were arguing that they complied with all FMVSS, and that no other safety requirements could be placed on the design of a vehicle.

In the first of these cases, *Dawson v. Chrysler Corp.*,[140] the alleged defect was the failure to design reinforcing members in the frame in order to prevent deformation and intrusion into the vehicle in a side impact. While regulations governed crashworthiness through occupant restraint requirements in FMVSS 208 and side door strength in FMVSS 214, no FMVSS directly governed vehicle frame strength or rigidity, the defect alleged.[141] Chrysler's argument that compliance with standards 208 and 214, as well as all the other FMVSS, should relieve it from liability for inadequate frame strength, ungoverned by federal regulation, was rejected. The court ruled that where no federal regulation governed the defect, the preemptive effect of section 1392(d) did not apply, and therefore, section 1397(c) negated the type 1 preemption argument advanced by Chrysler.[142]

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138 *Id.* at 562, 225 N.W.2d at 438 (footnote omitted).

139 *See* text accompanying notes 172-77 *infra*.

140 630 F.2d 950 (3d Cir. 1980).

141 Petition for Certiorari at 12, Chrysler Corp. v. Dawson, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

142 630 F.2d at 957-58.

In *Dorsey v. Honda Motor Co., Ltd.*,[143] the alleged defect was an A-pillar which deformed inward in a front end collision. Honda defended by alleging that its compliance with FMVSS governing seat assemblies, seatbelt assemblies, fuel tank integrity, and displacement of the steering column should preclude an award of punitive damages based on its marketing a car with an A-pillar defect which they knew to exist.[144] The court noted with some emphasis that none of the regulations with which Honda complied governed the strength of the A-pillar, and went on to hold that compliance with these unrelated regulations would not provide a defense to the A-pillar claim.[145]

Thus, section 1397(c) has frequently been used to reject claims of type 1 preemption and, in this respect, state tort law has been saved from preemption. The savings clause has never been applied, however, in a type 2 preemption situation, where an on-point FMVSS governed the same aspect of performance as the alleged defect, and the alleged defect was based on a state tort standard not identical to the federal standard.[146]

Conflict analysis reconciliation of section 1392(d) and section 1397(c) gives effect to the policies of the preemption clause, while allowing the savings clause to serve its traditional function of defeating an argument for type 1 preemption, rather than destroying the act of which it is a part. Under this conflict analysis, "no airbag" tort claims would be preempted. FMVSS 208, governing occupant crash protection and "specifying equipment requirements for active and passive restraint systems,"[147] clearly governs the same aspect of performance as such a tort claim. The federal standard allows the manufacturer to install its choice of different restraint devices. The state tort standard would require installation of airbags rather than manual seatbelts. The two standards are, therefore, not identical, and allowance of the state tort claim would violate section 1392(d).

The savings clause cannot save this claim under the conflict analysis. A tort standard requiring airbags would conflict with several policies of the Act. First, by its nature as a standard different from the federal standard, it would defeat the strong policy for uni-

143 655 F.2d 650 (5th Cir. 1981).

144 *Id.* at 653-57 (footnote omitted).

145 *Id.* at 657.

146 For the few cases where the claimed defect was governed by a FMVSS other than those where the claim was that the vehicle failed to meet the standard, the courts have discussed the effect of compliance with government regulations on the issue of negligence as a matter of tort doctrine. However, the courts have not discussed the preemption question of whether the state standard may be different from the federal regulation under § 1392(d). *See* text accompanying notes 172-77 *infra*.

147 49 C.F.R. § 571.208(S2) (1984).

formity of standards.[148] Second, the NHTSA decision not to require airbags, but rather to give manufacturers the option to meet the requirement in different ways, serves two specific policy objectives that would be defeated by a state tort standard mandating installation of airbags to avoid liability. The decision not to mandate immediate installation has been NHTSA's consistent response to a continuing concern about the safety of current airbag technology.[149] Moreover, NHTSA's decision to allow a choice of compliance methods was designed to encourage manufacturers to develop new and more effective restraint technologies rather than locking them in to a single device.[150] Therefore, state tort law which allows liability to be assessed for failure to install airbags is not identical to and conflicts with FMVSS 208, and thus should be preempted.

IV. Reciprocal Comity in "No Airbag" Tort Claims

A. *The Doctrine of Comity*

The United States Constitution created a system of government in which the sovereign states granted to a federal government power over certain enumerated aspects of national governmental interest, while retaining power over all other aspects for themselves. Thus the states assigned power to legislate with regard to interstate commerce to the federal government,[151] while retaining the power to legislate to safeguard the health and safety of its citizens. State laws regulating safety, of course, may be applied to and may affect interstate commerce,[152] and federal regulation of interstate commerce may include regulation of local activity to protect the health and safety of state citizens.[153]

When both governments, under their separate powers, have regulated the same thing, the federal regulation preempts the state regulation under the supremacy clause.[154] This article earlier suggested that the federal government has regulated the question of whether to require airbags in motor vehicles, preempting any state regulation through its product liability law. Even if there were no preemption, however, principles of comity and federalism dictate that the state should exercise restraint in establishing safety stan-

148 *See* text accompanying notes 99-107 *supra*.

149 *See* text accompanying notes 26-32 *supra*. *See also* 49 Fed. Reg. 28,962, 28,999-29,001 (1984); 42 Fed. Reg. 61,466 (1977); Pacific Leg. Found. v. Department of Transp., 593 F.2d 1338 (D.C. Cir. 1979).

150 *See* 49 Fed. Reg. 28,962, 29,001 (1984).

151 U.S. CONST. art. I, § 8, cl. 3.

152 *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

153 *See, e.g.*, United States v. Sullivan, 332 U.S. 689 (1948).

154 U.S. CONST. art. VI, cl. 2.

dards through its product liability law so as not to interfere with the comprehensive federal regulatory scheme.

The constitutional division of power between state and federal governments continues to hold substantial force, even if it is not compulsive, preemptive force. The assignment of overlapping powers to separate sovereignties has the potential to generate friction between them. For this reason, both state and federal governments have been cautioned to use restraint in the exercise of their respective powers when operating in areas that the other sovereign has regulated as well. This is the meaning of comity.

The federal judicial system has frequently restrained its exercise of power to prevent interference with the states' exercise of their important judicial and administrative functions, and to promote harmonious relations with the states.[155] The state judiciary should reciprocally honor these federalism principles by insuring that its decisions do not unduly interfere with legitimate federal judicial and administrative functions, though the state might, as a matter of raw power, be authorized to do so. Comity is a joint enterprise. Cooperation between state and federal government and respect by one government for the legitimate interests of the other are crucial to insuring the smooth operation of a federalist republic.[156]

The areas in which federal courts refrain from exercising their

155 In Younger v. Harris, 401 U.S. 37 (1971), for example, the Supreme Court held that a federal court should not ordinarily enjoin a pending state criminal proceeding. Though it expressed no doubt about the constitutional power of the federal courts to act, the Court cautioned that they should refrain from acting, in deference to the states. Moreover, the Court made it clear that the restraints of comity were an obligation of both the state and national governments:

> The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44.

156 As Judge McGowan writes, federalism must be mutual:

> Federalism means many things to many people. In its broadest common meaning, however, it refers to the relations between the states and the general government under our political system. These relations have involved a dual aspect. First, Federalism has meant the desirability and necessity of the general government deferring to the states in order to allow them their proper role over issues of state and local concern. But the other side of federalism is the desirability and necessity of the state governments deferring to the general government in issues of national concern.

McGowan, *Federalism—Old and New—and the Federal Courts*, 70 GEO. L.J. 1421, 1431 (1982).

power in deference to the states are many and varied.[157] Of particular relevance to the "no airbag" tort claim and the federal regulatory scheme is a branch of abstention doctrine known as *Burford* abstention.[158] In *Burford v. Sun Oil Co.*,[159] the Supreme Court, citing "a sound respect for the independence of state action," required the federal courts to refrain from reviewing the reasonableness of issuing a drilling permit because such review would interfere with a state regulatory scheme for the control of oil and gas drilling.[160] The *Burford* doctrine has subsequently been described by the Supreme Court as preventing interference with state administrative agencies.[161] The thrust of the doctrine is to avoid federal interference with areas of strong state concern, where the state has taken administrative steps to regulate the area.[162]

In many situations, therefore, the federal courts have refused to exercise their power in order to avoid friction with state functions, or have acted in ways designed to promote harmonious relations with the state authority. Such deference and restraint is necessary in our constitutional structure in which separate sovereigns may act upon the same issue, albeit with separate sources of power. Such deference should not be expected of the federal sovereign alone. State judiciaries should take equal responsibility for insuring that their decisions do not interfere with legitimate federal concerns, and should reciprocate the deference that the federal courts have shown them. If necessary to avoid conflict with federal concerns, state courts should sometimes refuse to act even though they might possess the raw power to do so; and when they do act, state courts should do so in a way which minimizes the potential for conflict with legitimate federal interests.[163]

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157 The *Younger* doctrine, *see* note 155 *supra*, for example, has been greatly expanded to include strictures against federal injunctions, declaratory judgments, and even actions at law for damages where federal rulings would interfere with state criminal proceedings or state civil or administrative proceedings. *See* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION §§ 4252-4254 (1978 & Supp. 1985). *Cf.* Gibson v. Berryhill, 411 U.S. 564 (1973). *See also* Stone v. Powell, 428 U.S. 465 (1976) (state prisoner may not seek federal habeas corpus relief when the state has provided a full and fair opportunity to be heard); Rizzo v. Goode, 423 U.S. 362 (1976) (mandating restraint where a federal judge interfered with the operations of a city police department); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) (ordering federal district court to refrain from interpreting and determining the constitutionality of an unsettled question of state law).

158 *See* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 157, § 4244.

159 319 U.S. 315 (1943).

160 *Id.* at 334.

161 *See* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959).

162 *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (abstention required when ruling "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."). *See also* C. WRIGHT, FEDERAL COURTS 310-11 (4th ed. 1983).

163 Though some of these suits may be heard in federal court based on diversity of citi-

In particular, principles of comity urge state courts to act in a way which does not interfere with a federal regulatory scheme. The federal courts, in *Burford* abstention, refrain from disrupting a state administrative scheme and state efforts to "establish a coherent policy with respect to a matter of substantial public concern."[164] Similarly, state courts should structure their decisions in a way which does not disrupt a federal administrative scheme designed to establish a coherent policy on a matter of public concern.

B. *The Federal Interest in Vehicle Safety Standards*

Congress created NHTSA for the express purpose of setting uniform national motor vehicle safety standards as a matter of strong federal policy and public concern. The establishment of uniform national safety standards for motor vehicles is a matter most appropriate for federal action.[165] Uniformity of the standards is crucial for the motor vehicle manufacturing industry as well as for the safety of the public. NHTSA is charged to consider a variety of factors in setting safety standards, including the practicability of the design in the real world, the effect of the design on other federal policies such as fuel economy, and the effect of the design on the safety of the entire national fleet of cars, so that one car is not made safer at the expense of the safety of many other cars.[166]

Setting motor vehicle safety standards through state product liability law would be both bad policy and disruptive of the federal administrative scheme. Individual juries are not able to adequately judge the variety of technological factors which must be considered in establishing a safe design. In product liability cases, however, juries are asked to perform the same balancing of factors that NHTSA must perform in establishing a FMVSS.[167] Congress has specifically found that expertise is necessary to perform this balance in a way which is fair to manufacturers and consumers alike.[168]

Even the best trial cannot present a jury with the range of information available to NHTSA. Moreover, a jury inherently lacks the expertise of NHTSA in evaluating that information. Yet juries

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zenship jurisdiction, the federal courts must apply state substantive law and sit functionally as state courts in such circumstances under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938). State law interference with the federal administrative scheme, regardless of whether the court enforcing that law is a federal or a state court, offends the principles of comity.

164 Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976).

165 *See* Reed & Watkins, *Product Liability Tort Reform: The Case for Federal Action*, 63 NEB. L. REV. 389 (1984).

166 *See* 15 U.S.C. § 1392(f) (1982).

167 *Compare* tort standards in Note, *supra* note 58, at 815-17 *with* regulatory standards in 15 U.S.C. § 1392(f) (1982).

168 *See* 1966 U.S. CODE CONG. & AD. NEWS 2709, 2712.

would be asked, in effect, to second guess NHTSA's determination whenever there exists an on-point FMVSS. In addition, juries are likely to focus on the vehicle involved in their particular case, discounting the effect of their decision on other vehicles on the road, and different juries are likely to enforce inconsistent standards. For these reasons, courts[169] and commentators[170] have criticized product liability rules which allow juries to set design standards on an atomized case-by-case basis.

Allowing juries to set a safety standard requiring airbags in motor vehicles would render NHTSA's long hours of work in setting a passenger restraint standard meaningless. Manufacturers would be required, under threat of damages, to install airbags despite NHTSA's decision not to require their installation at this time and to press instead for mandatory seatbelt use laws. Principles of comity dictate that state courts must act in a way to avoid this friction between state courts and the federal administrative scheme. State courts should defer to NHTSA and hold that where the federal administrative agency has promulgated a standard directed at the alleged defect, the FMVSS has set the standard for liability under state law as well.[171]

C. *State Tort Law and Federal Regulatory Standards*

Interpreting state tort standards so as to give proper deference to federal regulations, particularly with regard to passenger restraint, is logical and consistent with the generally accepted standards for defining a defective product. Whether a state employs the "consumer expectation" test or the "risk-utility" analysis, FMVSS 208 should set the standard for liability. As a general rule, when a FMVSS is on point, a consumer should not legally be entitled to expect more from a vehicle. With the extensive publicity the airbag question has generated and the obvious presence of seatbelts and absence of airbags in a vehicle, such an expectation

169 *See, e.g.*, Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980) (allowing juries to establish national automobile safety standards results in incoherent standards and the potential for conflict with other policies); McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D. W.Va. 1971) (automobile design standards are properly developed by the legislature, not the courts); Owens v. Allis-Chalmers Corp., 83 Mich. App. 74, 80-81, 268 N.W.2d 291, 294 (1978) (design standards should not be developed through adjudication because of lack of expertise of jury and influence of sympathy for injured plaintiff); General Motors Corp. v. Turner, 567 S.W.2d 812 (Tex. Civ. App. 1978) (regulatory standards should be developed by experts, not the courts).

170 *See, e.g.*, Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Hoenig, *supra* note 77, at 711-13, 724.

171 *See, e.g.*, Hurt v. General Motors Corp., 553 F.2d 1181 (8th Cir. 1977) (compliance with an on-point FMVSS on seatbelt angle entitled a manufacturer to a directed verdict of non-liability as a matter of state tort law).

would be even more unreasonable. This common sense interpretation of the consumer expectation standard for safety design defects would satisfy the concerns of federalism and comity by supporting rather than undermining the federal regulatory scheme.

Using the risk-utility analysis, the court must balance the safety aspects of the design against other factors in precisely the same way as NHTSA does when promulgating a FMVSS. The difference, however, is that courts must perform this balancing in the context of a trial, while NHTSA has substantially more time, resources, and expertise to do the job. After manufacturers as well as others have presented evidence to NHTSA concerning the risk and utility of safety design features, and after NHTSA has struck the balance and authorized the design, it would then be unreasonable, inefficient, and unjust to require the manufacturer to defend that same design over and over in courts throughout the country with the continuous risk of inconsistent adjudications. The fair way to interpret the risk-utility analysis, particularly with regard to airbags, would be to hold as a matter of state law that the balance struck by NHTSA is the correct balance and sets the standard for state tort liability. This interpretation again supports rather than undercuts the federal regulatory scheme as comity principles demand.

Finally, interpreting state tort law to incorporate an on-point FMVSS as its liability standard is consistent with most commentators' view of the tort defense of compliance with a statute or governmental regulation. As Dean Prosser states the rule:

> Where there is a normal situation, clearly identical with that contemplated by the statute or regulation, and no special circumstances or danger are involved, it may be found, and can be ruled as a matter of law, that the actor has done his full duty by complying with the statute, and nothing more is required . . . . But if there are unusual circumstances, or increased danger beyond the minimum which the statute was designed to meet, it may be found that there is negligence in not doing more.[172]

Many states, however, generally hold that governmental regulations are evidence of an appropriate standard of design, but are not controlling. These states fail to adequately distinguish among the various situations where governmental standards may be relevant to a design defect claim. When the governmental standard ap-

172 W. PROSSER, *supra* note 50, at 203-04 (citation omitted). Prosser uses this example:

> Thus the requirement of a hand signal on a left turn does not mean that the legislature has conferred immunity upon a driver who is otherwise negligent in making the turn, and that he is absolved from all obligation to slow down, keep a proper lookout, and proceed with reasonable care.

Id. Presumably, however, a driver who gives a proper hand signal would be provided by this statute with a defense to a claim that he should have signaled the turn not with his hand but with a light.

plies to a similar product, or to a later model of the product, for example, then it may be relevant to the proper standard of care, though not controlling.[173] This is because the regulation does not apply to the product by operation of law, but only by analogy. In the same vein, when a regulation applies to a certain part of a product, but does not consider the particular defect alleged in that part, the regulation may not control the standard of care.[174] Finally, when the government standard is outdated, then perhaps it should not be dispositive of the current duty of care.[175]

When the federal regulation is on point, applies to the subject vehicle, considers the same problem that a suit asks the jury to consider, and is up to date, however, justice requires that the manufacturer be entitled to rely on that standard as establishing the duty of care.[176] This is particularly true when the regulation has approved specific alternative safety devices, and the plaintiff's claim is that the approved device chosen by the manufacturer is legally inadequate under the law of torts.[177] FMVSS 208, which over its history has

173 *See, e.g.*, Sours v. General Motors Corp., 717 F.2d 1511, 1517 (6th Cir. 1983) (roof crush standard, not applicable to subject vehicle which predated standard, admissible in evidence but not controlling on question of liability); Stonehocker v. General Motors Corp., 587 F.2d 151, 157 (4th Cir. 1978) (same); General Motors Corp. v. Turner, 567 S.W.2d 812, 820 (Tex. Civ. App. 1978) (same), *rev'd on other grounds*, 584 S.W.2d 844 (Tex. 1979); Seese v. Volkswagenwerk A.G., 648 F.2d 833, 846 (3d Cir.) (window retention standard, not applicable to subject vehicle, relevant but not controlling), *cert. denied*, 454 U.S. 867 (1981); Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 540, 132 Cal. Rptr. 605, 609 (1976) (head restraint standard, not applicable to subject vehicle, relevant but not controlling).

174 *See, e.g.*, Huddell v. Levin, 395 F. Supp. 64, 74 (D.N.J. 1975) (where federal headrest standard concerned injury to neck from rearward movement of head rather than nature of impact of head on headrest, suit for insufficient padding on headrest not governed by FMVSS requiring headrest).

175 Congress has charged NHTSA to engage in frequent updating of FMVSS in light of developments in automotive technology. *See* S. REP. No. 1301, *supra* note 86, at 2713 ("[A]t least once every 2 years . . . the Secretary is directed to issue new and revised standards."). Certainly FMVSS 208 governing passenger restraint has been reviewed frequently. *See* text accompanying notes 22-36 *supra*.

176 *See* Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677, 688 (1978) ("If a court finds that a governmental standard is rigorous, up-to-date and directly addresses the defect alleged, compliance with that standard should be dispositive of the manufacturer's due care."); Werber, *The Products Liability Revolution—Proposals for Continued Legislative Response in the Automotive Industry*, 18 NEW ENG. L. REV. 1, 22-23 (1982) ("Where an agency has carefully considered all aspects of the safety issue, as does the National Highway and Traffic Safety Administration (NHTSA), and has the capacity and willingness to make independent tests and obtain independent studies, . . . compliance [with that agency's regulation] . . . should sometimes bar a plaintiff from recovery."). *See, e.g.*, Hurt v. General Motors Corp., 553 F.2d 1181, 1184 (8th Cir. 1977) (compliance with FMVSS governing seatbelt angle satisfied tort duty of care despite claim that seatbelt angle was defectively dangerous). *But see* Roberts v. May, 41 Colo. App. 82, 86, 583 P.2d 305, 308 (1978) (compliance with dashboard rigidity standard did not necessarily satisfy state tort duty of care).

177 *See, e.g.*, Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 327, 364 N.E.2d 267, 273

been frequently reviewed and which was recently amended after exhaustive consideration of the benefits and drawbacks of airbags, and which specifically approved manual seatbelts, is just such a standard. The principles of reciprocal comity dictate that state courts should give proper deference to the federal policies implicated in that regulation and to the expertise of NHTSA, and should hold that compliance with that standard satisfies the state tort law duty of care.

V. Conclusion

NHTSA's latest decision on passenger restraints has generated increased publicity about airbags. As state legislatures debate mandatory seatbelt use laws, the alternative—airbags or other passive restraints—is also spotlighted. Unfortunately, much of this publicity is incomplete and overly optimistic about the benefits of airbags.[178] NHTSA's verdict on airbags is that they have a few problems: they are costly, of limited effectiveness, of questionable reliability, and would require several years before they could be installed in a substantial number of cars in use. NHTSA has never required installation of airbags, but has always, for specific policy reasons, allowed manufacturers the option of satisfying the passenger restraint standard with manual seatbelts.

As a result of the recent airbag publicity, however, and as a result of a concerted campaign to move the airbag question out of the federal regulatory agency and into the courtroom, state tort suits alleging failure to equip a car with airbags have become increasingly common. Many state courts will eventually be forced to rule on the validity of such a claim, and on the question of what effect federal regulation of airbags and passenger restraint should have on the state law tort claim.

Whatever the merits of the airbag debate may be, it is plain that the better forum for resolving the debate is the NHTSA. NHTSA has conducted its own independent tests and studies of airbags, and has the expertise and national perspective to evaluate its own data, the information of others, and the merits of the various arguments in a fair and impartial manner. An inexperienced jury should not be allowed to second guess NHTSA's decision in the context of a trial, because of its limited resources and the necessarily emotion-

(1977) (where power press manufacturer used one of ten safety devices approved by State Industrial Commission, court held this satisfied state tort duty of care as matter of law).

178 *See, e.g.*, Barrett, *The Mandatory Seat-Belt Ploy*, Boston Globe, Feb. 27, 1985, at 15, col. 2 (airbags superior to seatbelts in frontal collisions); Chandler, *Airbags—Life-Saving and Unavailable*, Boston Globe, Mar. 11, 1985, at 41, col. 2 (using outdated NHTSA estimate that airbags would save four times more lives than universal use of seatbelts rather than current estimate that 70% seatbelt usage would save more lives than universal airbag installation).

ally charged atmosphere which surrounds a claim for damages by a severely injured plaintiff.

Dissatisfied with the federal lawmakers' decision, airbag advocates have sought effective reversal of that decision through state tort law. It is precisely this use of state law to frustrate federal policy that the doctrine of preemption is designed to prevent. It is just this sort of friction between state and federal governments that the doctrine of comity seeks to avoid. Whether the ruling is phrased in terms of a contrary state standard being preempted, or in terms of the state tort standard being conformed to the federal standard according to comity principles, state courts should hold that FMVSS 208 sets the standard for passenger restraint, and therefore a tort claim for absence of airbags from a vehicle is not actionable as a matter of law.