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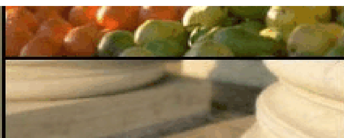

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Pre-empting Apples with Oranges: Federal Regulation of Organic Food Labeling

by

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NOTES

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I. INTRODUCTION

The federal government and the states have never uniformly administered food labeling regulations.[1] The disparity between the regulations of the federal and state governments obstructs the two important functions served by food labeling: providing consumers with information necessary to protect the public health, safety,

1. Mitchell, *State Regulation and Federal Pre-emption of Food Labeling*, 45 FOOD DRUG COSM. L.J. 123, 124 (1990). *See infra* notes 19-27 and accompanying text.

and welfare, and promoting fair trade practices in food marketing.[2] The variation of authority between the states and the federal government has not been deliberate, but instead is a result of governments reacting to the way the food industry developed.[3] The current growth of the organic food market introduces yet another facet of disparity between the federal and state regulatory systems; a problem that can be overcome by a proactive approach to the new federal regulations.

Certified organic food is grown without the use of synthetic chemical fertilizers, pesticides, herbicides, or growth hormones.[4] Although farmers have marketed organic food since the early 1970s, the federal government has refused to establish standards for certified organic food.[5] Federal inaction prompted states to begin regulating organic food labeling, with the first such legislation passed by Oregon in 1973.[6] By 1991, a total of twenty-two states were regulating organic food labeling in various ways.[7] The federal government has recently acted, however, to regulate this area[8] with inclusion of the Organic Foods Production Act (OFPA) in the 1990 Farm Bill.[9] The OFPA regulates the production, marketing, and labeling of organic food.[10] This Note examines the potential for federal pre-emption of existing state

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2. T. BURKE & D. DAHL, FEDERAL REGULATION OF THE U.S. FOOD MARKETING SYSTEM 1-2 (1985).

3. Nyberg, *The Need for Uniformity in Food Labeling*, 40 FOOD DRUG COSM. L.J. 229, 233 (1985) (describing the state labeling laws that developed when states began exporting salt pork, beef, flour, fish, and other foods to other states and foreign countries); Kirschbaum, *Role of State Government in the Regulation of Food and Drugs*, 38 FOOD DRUG COSM. L.J. 199 (1983) (noting that the increasing movement of food between the states created additional problems for state agencies).

4. J. WARD, F. BENFIELD & A. KINSINGER, REAPING THE REVENUE CODE: WHY WE NEED SENSIBLE TAX REFORM FOR SUSTAINABLE AGRICULTURE 51 (1989) (stating that organic food is one of several food production systems, including "low-input" and "sustainable" agriculture, that is based on reducing significantly or entirely the application of synthetic inputs). *See also* S. REP. NO. 357, 101st Cong., 2d Sess. 289, 292 (1990) (stating that organic food is "produced using sustainable production methods that rely primarily on natural materials," but also noting that "[o]rganically produced food defies simple definition"); H.R. CONF. REP. No. 916, 101st Cong., 2d Sess. 1175 (1990) (adopting the Senate bill's definition of "organically produced" food).

5. Mitchell, *supra* note 1, at 133 (stating that in the absence of a Food and Drug Administration (FDA) issued regulation, there is no demonstration of an intent to pre-empt unless the FDA expressly refuses to issue regulations, as it did for organic foods).

6. OR. REV. STAT. § 632.925 (1973) (stating that "[t]he State Department of Agriculture shall develop guidelines for certification of organic food") (Oregon's organic certification law is now at OR. REV. STAT. § 616.406 (1991)). *See also* Fishman, *Laws Proliferate for Organic Foods*, 1990 ORGANIC FARMER 22 (Winter 1990) (describing the development of state organic food labeling regulations).

7. *See infra* note 53; S. REP. No. 357, *supra* note 4, at 289.

8. *See also* USDA Agricultural Marketing Service, Modification of Grade Requirements for Organically Grown Pears in 1990, 55 Fed. Reg. 25,956 (1990) (to be codified at 7 C.F.R. § 917.461). This amendment tacitly recognized organic food certification by relaxing the grade requirements for California organically grown pears. *Id.* Organic pears can not be produced without russeting, a harmless brown roughening of the pear skin. *Id.* The USDA agreed to amend its grading requirements, which are based on cosmetic appearance of the fruit, so that organic producers would not be penalized with a lower price for their pears. *Id.*

9. Organic Foods Production Act of 1990, Pub. L. No. 101-624, §§ 2101-2123, 1991 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 3935 (to be codified at 7 U.S.C. §§ 6501-6522) [hereinafter OFPA].

10. S. REP. No. 357, *supra* note 4, at 288-89. For further information concerning the OFPA, see

food labeling regulations created by this legislation in light of two major problems. The first problem is the unresolved allocation of labeling authority between the state and federal governments which presents an obstacle to the application of the OFPA provisions.[11] The second problem is the division of food labeling regulatory power, between the Food & Drug Administration (FDA) and the United States Department of Agriculture (USDA),[12] which creates uncertainty as to whether the OFPA is consistent with prior labeling regulations. The uncertainty arises because the OFPA regulates food labeling issues that already fall under the auspices of prior labeling legislation.

First, this Note explores existing state labeling regulation of organic foods and the federal goal of national uniformity.[13] This Note then considers the unknown extent of pre-emption under the OFPA and how this ambiguity should be resolved in favor of a strong federal system.[14] Third, the Note analyzes the potential conflict of the OFPA with current state regulatory systems and existing federal labeling regulations.[15] An examination of the advantages and disadvantages of a strong federal food regulatory system is then presented.[16] This Note concludes with the recommendation that the OFPA should pre-empt state labeling regulation via strong federal regulations to ensure that interstate commerce is not unduly burdened[17] and to ensure that consumers receive consistent information when shopping for organic foods.[18]

II. Background

As refrigeration and other food preservation methods were developed, so were the transportation systems needed to move food throughout the country.[19] States, by exercising their police powers, attempted to regulate the increasingly interstate food industry beginning in the early 1890s.[20] The United States Supreme Court, however, struck down most state food standards and labeling requirements[21] because

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Bones, 68 N.D. L. Rev. (forthcoming article on OFPA in symposium issue from American Agricultural Law Association). For an excellent comprehensive guide to the provisions of the OFPA, see Fishman, The Guide to the U.S. Organic Foods Production Act of 1990 (1990) (prepared for the Organic Foods Production Association of North America).

11. *See infra* notes 99-143 and accompanying text.

12. Nyberg, *supra* note 3, at 230-31 (noting that although Congress has recognized the need for uniformity, it has taken a nonuniform approach by dividing regulatory authority between the FDA and the U.S. Department of Agriculture (USDA)).

13. *See infra* notes 57-143 and accompanying text.

14. *See infra* notes 144-86 and accompanying text.

15. *See infra* notes 187-263 and accompanying text.

16. *See infra* notes 309-46 and accompanying text.

17. *See infra* notes 343-56 and accompanying text.

18. *See infra* notes 357-64 and accompanying text.

19. Jesse, *Links that Make Up the Marketing Chain*, in The 1982 Yearbook of Agriculture: Food From Farm to Table 137-39 (J. Hayes ed. 1982).

20. T. Burke & D. Dahl, *supra* note 2, at 1-2.

21. *See infra* notes 22-23.

of the authority granted to Congress in the Commerce[22] and Supremacy Clauses.[23] As a result of the Court's broad interpretation of interstate commerce, any regulation of food products and labeling by the states was significantly limited.[24] Although Congress ratified some forms of state labeling regulations expressly struck down by the Supreme Court,[25] federal regulation of the food industry and of labeling in particular advanced slowly.[26] The federal regulatory effect was often insufficient, however, to satisfy the desired goals of the states.[27]

The federal government has been hesitant to impose stringent food labeling requirements,[28] and has prevented the states from enacting substantive labeling regulation.[29] Federal inaction is clearly within congressional prerogative, but several

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22. U.S. CONST. art. I, § 8, cl. 3 (providing Congress with the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). *See also* Leisy v. Hardin, 135 U.S. 100 (1890) (invalidating an Iowa law prohibiting the sale of intoxicating beverages as applied to beer brewed in Illinois and sold in Iowa in its "original packaging"). Chief Justice Fuller's opinion in *Leisy* recognized the need for national uniformity, stating that "as interstate commerce [is] national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled." *Id.* at 109-10.

23. U.S. CONST. art. VI, cl. 2 (providing in relevant part "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary"). *See also* Rhodes v. Iowa, 170 U.S. 412 (1898) (invalidating an Iowa law that required a state issued permit for any transport of intoxicating beverages because the law infringed on congressional regulation of interstate commerce in violation of the supremacy clause).

24. T. BURKE & D. DAHL, *supra* note 2, at 1 (noting that state attempts to deal with food regulatory problems were circumscribed by early Supreme Court rulings on the relationship between federal and state authority).

25. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-33, at 524 n.23 (2d ed. 1988). After the Court struck down the Iowa liquor law in Leisy v. Hardin, 135 U.S. 100 (1890), Congress passed a statute which ratified that same law. The Court upheld that statute a year later. *In re* Raher, 140 U.S. 545 (1891).

26. Nyberg, *supra* note 3, at 230-31 (noting that the first federal label requirements in 1906 targeted misrepresentations as to type, source, amount, or quality, and that positive production information was not required until further legislation was enacted in 1938). *See also* T. BURKE & D. DAHL, *supra* note 2, at 3 (identifying federal government officials' dissatisfaction with the constant amending of the Federal Food and Drug Act of 1906 as the reason for enactment of an entirely revised statute in 1938).

27. Nyberg, *supra* note 3, at 230-31 (stating that compliance with federal food labeling laws was not difficult for many companies, and that companies most often found the label with the least information was the safest in the eyes of the law).

28. T. BURKE & D. DAHL, *supra* note 2, at 2 (stating that prior to enactment of the Federal Food and Drugs Act of 1906, 103 bills of a similar nature were proposed and rejected); W. WELLFORD, THE ADVOCACY GAP IN GOVERNMENT REGULATION OF FOOD AND CHEMICALS 4 (1988) (noting that Congress passed the Meat Inspection Act of 1906 in response to public concern and a secret study of the meat industry commissioned by President Roosevelt). *See also* Mitchell, *supra* note 1, at 125 (noting that the FDA never issued general regulations for label claims construing food as high fiber, low fat, lite, natural or organic); Taylor, *Federal Pre-emption and Food and Drug Regulation: The Practical, Modern Meaning of an Ancient Doctrine*, 38 FOOD DRUG COSM. L.J. 306, 308 (1983) (stating that the FDA has the power to regulate in many areas that it cannot practically regulate because of limited resources and political opposition).

29. *See* Grocery Mfrs. of Am. v. Gerace, 581 F. Supp. 658 (S.D.N.Y. 1984), *aff'd* 755 F.2d 993

possible reasons underlie the lack of federal response.[30] The federal government may lack the necessary resources to regulate label claims, or it may believe a particular labeling issue does not yet require regulation.[31] The most current example of this pre-emptive uncertainty concerns the labeling of organic foods.[32]

Certified organic food is produced and processed without the use of synthetic, as opposed to naturally occurring, chemical fertilizers, pesticides, herbicides, or growth hormones under an approved production plan.[33] For example, instead of conventional agricultural production methods, such as application of anhydrous ammonia for a nitrogen source,[34] the producer[35] provides nitrogen from natural sources,[36] such as animal manure. Similarly, when organic foods are handled[37] and

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(2d Cir. 1985), *cert. denied* 474 U.S. 820 (1985) (striking down a New York law requiring any substitute food products to be labeled "imitation" regardless of nutritional equivalence because the law infringed on federal regulatory powers); Committee for Accurate Labeling & Mktg. v. Brownback, 665 F. Supp. 880 (D. Kan. 1987) (invalidating a Kansas law requiring substitute dairy products to be labeled "artificial" because the requirement interfered with the federal label standards for "imitation"). *See also* Nyberg, *supra* note 3, at 233-34 (describing the fragmentary pre-emptive effect of federal statutes and amendments on state labeling laws).

30. Taylor, *supra* note 28, at 308 (noting that the FDA is given wider powers to regulate label claims but does not exercise such power because it lacks sufficient resources); Mitchell, *supra* note 1, at 125 (describing how states and industries approached the FDA for labeling regulation, but the FDA declined absent a showing of scientific or market significance).

31. *See* Brown, *General Principles of Regulation: Food and Beverages*, in INTERNATIONAL FOOD REGULATION HANDBOOK 217, 226 (1989) (noting the reasons for the government's reluctance to "condone health claims for food").

32. Mitchell, *supra* note 1, at 125-26 (noting that some states have adopted their own organic food standards because the FDA has refused to issue its own regulations).

33. Bones, *State and Federal Organic Food Certification Laws: Coming of Age*, 7 AGRIC. L. UPDATE 4, 5 (Oct. 1990) (describing the meaning of organically produced food as defined in Texas, California, and federal organic certification legislation). *See also* Comment, *State Mandated Pesticide Application and the Due Process Rights of Organic Farmers*, 17 PAC. L.J. 1301, 1304-07 (1986) (describing the California definition of certified organic food); *Alternatives in Agriculture*, ECOL NEWS, Jan. 1988, at 2. Organic farming is defined as:

> A production system which avoids or largely excludes the use of synthetically compounded fertilizers, pesticides, growth regulators, and livestock feed additives. To the maximum extent feasible, organic farming systems rely upon crop rotations, crop residues, animal wastes, legumes, green manures, off-farm organic wastes, mechanical cultivation, mineral-bearing rocks, and aspects of biological pest control to maintain soil productivity and tilth, to supply plant nutrients, and to control insects, weeds and other pests. The concept of soil as a living system which must be "fed" in a way that does not restrict the activities of beneficial organisms necessary for recycling nutrients and producing humus is central to this definition.

Id. (quoting the *1980 USDA Report and Recommendation on Contemporary Organic Farming*).

34. *See* UNIVERSITY OF WISCONSIN-EXTENSION, BEST MANAGEMENT PRACTICES FOR WISCONSIN FARMS 27-29 (1989) (describing anhydrous ammonia as a common source of nitrogen for corn production; its use must be carefully managed because of its high volatility).

35. OFPA, *supra* note 9, § 2103(18) (defining a producer as "an individual who engages in the business of growing or producing food or feed").

36. *See* Oklahoma Organic Food Act, OKLA. STAT. ANN. tit. 2, § 5-303(3) (West 1989) (stating that " 'organic farming' means production of crops based upon a system of ecological soil management that relies on building humus levels through crop rotations, recycling organic wastes, and applying

processed,[38] certain techniques are used that minimize the content of synthetic chemicals in the food.[39] These organic production and processing techniquės yield food that consumers prize for its nutritional value and its reduced environmental impact.[40] In a 1989 Harris poll, eighty-four percent of the respondents noted that given a choice, they would purchase organic food.[41] Almost half of the respondents also noted they would be willing to pay more for food produced without the use of agri-chemicals.[42]

The consumer perception that organic foods are better than conventionally produced foods and the fact that consumers are willing to pay more for organic foods[43] has led to problems of labeling misrepresentation in the food market. Although both intentional misrepresentation and unintentional misrepresentation occurred,[44] no federal regulations were offered to overcome consumer confusion and market misrepresentation.[45] Without federal labeling regulation, unscrupulous

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balanced mineral amendments and that uses, when necessary, mechanical, botanical, or biological controls").

37. *See* OFPA, *supra* note 9, § 2103(8) (stating that "the term 'handle' means to sell, process or package agricultural products"). *See also* OFPA, *supra* note 9, § 2103(9) (stating that a 'handler' does not "include final retailers of agricultural products that do not process agricultural products").

38. OFPA, *supra* note 9, § 2103(17) (defining the term 'processing' to mean "cooking, baking, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, or otherwise manufacturing, and includes the packaging, canning, jarring, or otherwise enclosing food in a container").

39. *See* Cook, *Alternative Agriculture*, in THE 1987 YEARBOOK OF AGRICULTURE: OUR AMERICAN LAND 244, 245-46 (W. Whyte ed. 1987) (noting that organic foods are processed and stored without artificial preservatives and additives). *See also* Stolfa, *Food Safety from Farm to Market*, in THE 1982 YEARBOOK OF AGRICULTURE: FOOD FROM FARM TO TABLE 291 (J. Hayes ed. 1982) (describing how innovations in food processing technologies have made protecting food safety much more complex and difficult).

40. *See* Bellafante, *Organic Foods: Are You Getting What You Pay For?*, GARBAGE, Nov./Dec. 1989, at 38 (describing consumer concern about the effects of pesticides and other chemical residues in their food).

41. CENTER FOR RESOURCE ECONOMICS, FARM BILL 1990: AGENDA FOR THE ENVIRONMENT AND CONSUMERS 23 (1989). The poll asked "Would you buy organically-grown fruits and vegetables if they cost the same as other fruits and vegetables?" *Id.* Eighty-four percent responded "yes," twelve percent responded "no," and the remaining four percent responded "not sure." *Id.*

42. *Id.* at 23. The poll asked "Would you still buy them if they cost more, or not?" Forty-nine percent responded "yes," forty-one percent responded "no," and ten percent responded "not sure." *Id.* *See also* Kuepper, *Thoughts on the High Cost of Organic Foods*, KERR CENTER NEWSLETTER (Kerr Center for Sustainable Agriculture, Poteau, Okla.), Dec. 1989, at 1, 3 (noting that organic food is priced higher because of scare supply tied to rising demand, high input costs, high marketing costs, and the scale of production on most organic farms).

43. *See supra* notes 40-42 and accompanying text. *See also* Knox, *Take It On Faith*, FARM J., Mid-Feb. 1991, at 23. The health and natural food market, estimated at $2.7 billion, grew by 7.5% in 1990. *Id.* Although the advantages of these foods are difficult to substantiate, this market is still expected to expand by 6-7% over the next five years. *Id.*

44. *See, e.g.*, CALIFORNIA CERTIFIED ORGANIC FARMERS, INC., 1989 CERTIFICATION HANDBOOK v, vi (1989) (noting that as California was beginning to enforce its organic food law, many examples of "unsubstantiated and incorrect claims of 'organically grown'" foods were appearing on the market).

45. *Id.* (noting that foods labeled "organic," "natural," "no preservatives," "wild," "ecologically grown," or "chemical-free" commanded premium prices, but on the federal level the labels offered no

marketers could make any representation they felt would make their product more desirable.[46] In addition, consumers may be mislead by the lack of a uniform definition of what methods will qualify as organic and what label information should appear on organic foods.

State governments realized the need to regulate this segment of the food market, but the first efforts were few and problematic.[47] Oregon passed the first organic certification law in 1973, responding to complaints of consumer fraud and food industry inconsistency.[48] The California legislature used Oregon's organic certification statute as a model for its Organic Food Act of 1979.[49] The California Organic Food Act presents a good example of a strong state organic labeling regulation. The California system establishes specific label language for organic foods and divides the spectrum of organic foods into three categories: raw agricultural food products, processed food products, and a third category encompassing meat, poultry, fish, and milk.[50] Although this legislation did much for the interests of California consumers and producers, it has since been entirely replaced by the Organic Food Act of 1990.[51]

The next state legislative activity did not occur until 1986, when several other states introduced and passed organic certification legislation.[52] Presently twenty-two states regulate organic food labeling and production,[53] but no two programs are

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uniform meaning, leaving consumer interests to be protected through the developing patchwork of state regulations).

46. *See* Shirley, *Rules to Grow By*, NEW FARM, Sept./Oct. 1991, at 31, 33 (noting that the OFPA is the first federal effort to certify the food "handlers," including the processors, manufacturers, packagers, and wholesalers). *See also* Traupman, *Congress Eyes National Organic Law*, NEW FARM, Feb. 1990, at 40. When Senator Leahy introduced the first version of the OFPA he stated that there was a need for a label that "distinguishes phony organic food—items with a natural image but uncertain production methods—from the real thing born out of ingenious, nonchemical farming." *Id.*

47. Bones, *supra* note 33, at 4-5. The California system made no effort to fund enforcement and very few cases of violations were prosecuted. *Id.* at 5. A weakness in the Texas system was that organic farms were not subject to formal inspection prior to being certified. Fishman, *supra* note 6, at 23. Oregon's law prohibited the use of synthetic pesticides and fertilizers, but set no minimum transition period of abstinence from the use of such synthetic materials. *Id.*

48. OR. REV. STAT. § 632.925 (1973) (Oregon's organic certification law is now at OR. REV. STAT. § 616.406 (1991)). *See also* Fishman, *supra* note 6, at 22-23 (describing the Oregon regulatory system).

49. CAL. HEALTH & SAFETY CODE § 26569.13 (a)(1), (2), (3) (Deering 1982) (setting the recommended organic label language for raw agricultural food products, processed food products, and meat, poultry, fish, or milk).

50. *Id.*

51. CAL. HEALTH & SAFETY CODE § 26569.13 (West 1990).

52. Fishman, *supra* note 6, at 22. Legislatures in Iowa, Minnesota, Montana, Nebraska, New Hampshire, South Dakota, and Wisconsin passed organic food standard laws in 1986.

53. ALASKA STAT. § 3.58 (1990) (Sale of Organic Foods); CAL. HEALTH & SAFETY CODE § 26569.20 (Deering 1991) (California Organic Food Act); CAL. AGRIC. CODE § 14904 (Deering 1991) (Adoption and Enforcement of Regulations Regarding Organic Food); COLO. REV. STAT. § 35-11.5-101 (1990) (Organic Certification Act); CONN. GEN. STAT. § 21a-80 (1989) (Natural or Organically Grown Foods; Requirements); IDAHO CODE § 22-1101 (1990) (Organic Food Products); IOWA CODE § 190B.1 (1989) (Organic Food); LA. REV. STAT. ANN. § 40:608.3 (West 1990) (Labeling of Organic Food); ME. REV. STAT. ANN. tit. 7, § 551 (1989) (Foods Labeled as Natural or Organic); MINN. STAT. § 31.92 (1990) (Organic Food); MONT. CODE ANN. § 50-31-221 (1989) (Montana Truth in Labeling Act for

identical.[54] The differences between the state organic food laws create considerable interstate commerce problems,[55] as well as consumer confusion.[56]

A. *Overview of Existing State Labeling Regulations*

Currently, the twenty-two state organic certification programs[57] can be divided into three nonexclusive types of regulation. First, three states, Colorado, Texas, and Washington, operate their own certification programs.[58] These programs, supervised by state administrative agencies, certify producers and retailers to ensure compliance with organic food production and processing methods.[59] Second, four states cooperate with independent certification organizations.[60] These independent organizations oversee the certification process and approve labeling requirements for organic food.[61] Third, a majority of the states, including California and Iowa, define

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Organic Foods); NEB. REV. STAT. § 81-2,234 (1989) (Organic Food); N.H. REV. STAT. ANN. § 426.6 (1989) (Organic Food Labeling and Advertising); N.M. STAT. ANN. § 76-22-2 (1990) (Organic Commodity Act); N.D. CENT. CODE § 4-38-01 (1987) (Organic Food Certification); OHIO ADMIN. CODE § 901:3-8-01 (1990) (Standard of Identity for Organic Foods); OKLA. STAT. tit. 2, § 5-301 (1989) (Oklahoma Organic Food Act); OR. REV. STAT. § 616.406 (1989) (Organic Food Regulation); S.D. CODIFIED LAWS ANN. § 39-23-1 (1990) (Organic Food); TEX. AGRIC. CODE ANN. § 12.0175 (Vernon 1990) (Organic Certification); VA. CODE ANN. § 3.1-385 (1990) (Virginia Organic Food Act); WASH. REV. CODE § 15.86.010 (1990) (Organic Food Products); WIS. STAT. § 97.09 (1987-88) (Rules for Organic Food Certification). *See also* Gates, *Organic Certification*, NATIONAL AGRIC. LIBRARY SPEC. REF. BRIEF: SRB 90-04 9 (1990). States with organic labeling regulations include California, Colorado, Connecticut, Idaho, Iowa, Kansas, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Vermont, Washington, and Wisconsin.

54. S. REP. NO. 357, *supra* note 4, at 289.

55. CENTER FOR RESOURCE ECONOMICS, *supra* note 41, at 22. This lack of state uniformity gives rise to several problems. First, it breeds uncertainty for consumers who lack the knowledge to assess label information. *Id.* Second, it chills the incentive for producers and marketers to provide organic food because they do not have a guaranteed market identity. *Id.* Third, the lack of a national organic food standard limits U.S. export opportunities. *Id. See also* McDonald, *Organic Goes National*, BEEF TODAY, Feb. 1991, at 64. Mel Coleman, a regional marketer of organic beef, believes that the uniform national organic certification will reduce his operating costs. *Id.* Certification by the state requires Coleman to use the state brand inspection agency, ear tag monitoring, a veterinarian's affidavit, and a shipper's agreement. *Id.* The OFPA, through a single certifying agent, would permit him to reduce the certification expenses by half. *Id.*

56. McDonald, *supra* note 55, at 64.

57. *See supra* note 53.

58. COLO. REV. STAT. § 35-11.5-101 (1990); TEX. AGRIC. CODE ANN. § 12.0175 (Vernon 1990); WASH. REV. CODE § 15.86.010 (1990). *See also* Fishman, *supra* note 6, at 22-23.

59. *See* COLO. REV. STAT. § 35-11.5-104 (1990); TEX. AGRIC. CODE ANN. § 12.0175 (Vernon 1990); WASH. REV. CODE § 15.86 (1989).

60. Fishman, *supra* note 6, at 22. The independent organizations are producer groups that developed out of a need for self-regulation in Minnesota, New Hampshire, Ohio, and Vermont. Examples of these groups include the Minnesota Organic Growers and Buyers Association, the New Hampshire Natural Organic Farmers' Association, and the California Certified Organic Farmers. *Id. See* USDA APPROPRIATE TECHNOLOGY TRANSFER FOR RURAL AREAS, ORGANIC CERTIFICATION INFORMATION SHEET 5, 8 (1990).

61. USDA ATTRA, ORGANIC CERTIFICATION INFORMATION SHEET 1-2 (1990).

organic foods and specify permitted production techniques, but do not provide any means of achieving organic certification.[62] The lack of a certification structure is the factor that sets the third group apart from the first group of state regulatory schemes.[63] In most states with this type of law, either the attorney general or the state's department of agriculture is charged with enforcement.[64] Finally, a number of states have no official involvement with organic food certification, but in these states, independent producer groups still offer certification systems.[65]

Disparities exist between the three categories of regulatory schemes, and the fact that they are not mutually exclusive leads to further inconsistencies.[66] For instance, Washington operates a state certification program, but also has a state law in place to define organic foods.[67] The New Hampshire government contracts with an independent organization for certification, while its legislation provides requirements for labels that organic growers may use.[68]

Even within each of these three groups, however, the operation of these programs varies widely from state to state.[69] For example, in California, the Department of Health Services may investigate violations of the certification law, but it must refer violations to the attorney general for prosecution.[70] Under Oregon's law, which is used as the model for California's legislation, the state department of agriculture may assess and collect fines, while the attorney general is relegated to a minimal enforcement role.[71]

The lack of uniformity in the state laws creates a corresponding potential for restricted interstate commerce in the growing market for organic foods.[72] California,

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62. *Id.*

63. *Id.*

64. Fishman, *supra* note 6, at 23.

65. Bellafante, *supra* note 40, at 41 (noting that many, but not all, of the twenty-six states without legislation for organic food certification rely on independent producer groups). *See* USDA APPROPRIATE TECHNOLOGY TRANSFER FOR RURAL AREAS, ORGANIC CERTIFICATION INFORMATION SHEET 2. Some of these independent certification organizations include the state chapters of the Organic Foods Production Association of North America (OFPANA), the Natural Organic Farmers Association (NOFA), the International Federation of Organic Agriculture Movements (IFOAM), Americans for Safe Food (ASF), and the International Alliance for Sustainable Agriculture (IASA). *Id.*

66. Bellafante, *supra* note 40, at 41 (stating that only the regulatory schemes in Colorado, New Hampshire, Oklahoma, Texas, and Washington actually certify that organic foods have been grown in accordance with state-approved standards). The inconsistency within the systems is borne out in another example. In Texas, the state certifies organic produce and actively participates in marketing. *Id.* In Minnesota, an independent organization certifies organic foods according to state law, but the state does not assist directly in marketing. *Id.* In a trade dispute between the two states, Texas might be a biased source in serving the role of certification authority because it also has a vested interest in produce sales.

67. Fishman, *supra* note 6, at 22-23 (listing the current types of regulatory schemes for the states with organic food regulations).

68. *Id.* at 22.

69. *Id.* at 23.

70. *Id.*

71. *Id.*

72. Bellafante, *supra* note 40, at 38. The article lists the factors that point to enormous growth in the business of organic foods. First, organic foods often command twice the price of conventionally produced foods. *Id.* Second, although organic foods currently comprise about 1% of the annual U.S. food

Florida, and Texas provide the majority of the nation's fruit and vegetables, yet their respective organic certification laws do not technically permit any of the three states to ship organic produce to the other states[73] because each program is designed to afford that state's own producers and consumers certain advantages. Concerned about the infringement on interstate commerce, Congress passed the OFPA to provide a uniform federal certification law[74] that partially pre-empts current state laws, but arguably provides enough flexibility to allow the states to continue to serve their own interests.[75]

B. Federal Pre-emption and the Need for Uniformity

In 1989 three congressional bills[76] included language offering a federal certification law to provide consistency for consumers, retailers, and producers. When Senate Agriculture Committee Chairman Patrick Leahy introduced the first version of the OFPA,[77] he acknowledged that the food labeling scheme in the United States resembled a "Tower of Babel."[78] Senator Leahy also recognized the inherent disparities of existing state organic regulations and the two problems that they caused: consumer confusion and restrained interstate commerce.[79] After hearings and mark-

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production, the *Wall Street Journal* predicts a nine-fold increase in organic foods production over the next ten years. *Id.* Finally, large processors such as Dole and Sunkist have set aside land for growing organic produce. *Id. See also* Sinclair & Eustis, *So You Want to Sell Organic Grains*, NEW FARM, Sept./Oct. 1991, at 28 (noting that marketers often pay farmers a price premium of 30-70% for organic grains compared to the price paid for conventionally produced grains).

73. *Id.* at 41 (describing the interaction of various state organic foods regulation).

74. OFPA, *supra* note 9, § 2102 provides:

> It is the purpose of this title—
> (1) to establish national standards governing the marketing of certain agricultural products as organically produced products;
> (2) to assure consumers that organically produced products meet a consistent standard; and
> (3) to facilitate interstate commerce in fresh and processed food that is organically produced.

Id.

See also Cramer, *What's So Great About Organic Farming*, NEW FARM, Sept./Oct. 1991, at 2 (quoting Kathleen Merrigan, an aide to Senator Leahy, stating that the OFPA "was fueled by an unstoppable combination of progressive farmer groups, consumer interests, and environmentalists").

75. OFPA, *supra* note 9, § 2108 (describing the limitations and requirements of state organic certification programs). *See also* S. REP. NO. 357, *supra* note 4, at 295 (discussing the reasons why states may desire different or more stringent certification regulations, including health concerns and different regional production practices).

76. S. 1063, 101st Cong., 1st Sess. (1989), Conservation Enhancement and Improvement Act of 1989; H.R. 3950, 101st Cong., 1st Sess. (1989), DeFazio Amendment to the 1990 Farm Bill Reauthorization Act; S. 1896, 101st Cong., 1st Sess. (1989), Organic Foods Act of 1989. *See also* S. 1505, 101st Cong., 1st Sess. § 403(r) (1989) (specifying that "organic" could not be used on a label unless approved by the Secretary of the Food and Drug Administration).

77. S. 1896, 101st Cong., 1st Sess §§ 101-116 (the Organic Foods Act of 1989).

78. Traupman, *Congress Eyes National Organic Law*, NEW FARM, Feb. 1990, at 40.

79. *Id.* (noting that "[a] national organic certification program will ease problems in interstate commerce [and further, that l]arge supermarket chains concerned about verifying the authenticity of organic items . . . will more readily purchase organic food if federal standards are in place").

up by both the Senate and the House agriculture committees, both versions of the Act included language that regulated organic foods labeling.[80]

Congress designed the OFPA to establish consistent treatment of organic foods[81] regarding production,[82] processing,[83] marketing, and retailing.[84] The OFPA grants the Secretary of the USDA the power to establish a national certification program, but allows the states to implement their own certification programs.[85] Next, the OFPA sets out the compliance requirements for labels,[86] but makes two

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80. H.R. CONF. REP. NO. 916, *supra* note 4, at 1175-76. *See generally* S. 1896, *supra* note 77, § 103 (providing that "[t]he Secretary shall establish a label to be affixed to agricultural products that have been produced on organically certified farms and have been handled by organically certified handlers"); § 111 (providing that "[a] processed agricultural product labeled as organically produced under this title shall not be sold or distributed for sale unless such product contains a label setting forth each ingredient contained in such product and the approximate percentage component of each such ingredient"); H.R. 4156, 101st Cong., 2d Sess. § 103 (providing an amendment offered by Representative DeFazio to the House version of the 1990 Farm Bill that would adopt the core components of S. 2108, which was the updated version of S. 1896).

81. *See* OFPA, *supra* note 74, § 2102.

82. OFPA, *supra* note 9, § 2103(14). The OFPA defines organically produced food as "an agricultural product that is produced and handled in accordance with this title." *Id.* This means the food must be produced on a certified organic farm according to a organic management plan and processed in compliance with organic regulations.

83. OFPA, *supra* note 9, § 2103.

84. Bones, *supra* note 33, at 5-6 (describing the basic provisions of the OFPA). *See also* S. REP. No. 357, *supra* note 4, at 291-306 (describing the goals, need, implementation, and scope of the OFPA).

85. OFPA, *supra* note 9, § 2104. In relevant part, the OFPA states:

> (a) IN GENERAL.—The Secretary [of the Department of Agriculture] shall establish an organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this title.
> (b) STATE PROGRAM.—In establishing the program under subsection (a), the Secretary shall permit each state to implement a State organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this title.
>
> . . . .
>
> (d) CERTIFICATION.—The Secretary shall implement the program established under subsection (a) through certifying agents. Such certifying agent may certify a farm or handling operation that meets the requirements of this title and the requirements of the organic certification program of the State (if applicable) as an organically certified farm or handling operation.

Id.

86. OFPA, *supra* note 9, § 2106(a). The relevant compliance requirement language states:

> (1) On or after October 1, 1993—
>
> (A) a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this title; and
>
> (B) no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except as produced in accordance with this title.
>
> (2) A label affixed, or other market information provided, in accordance with paragraph (1) may indicate that the agricultural product meets Department of Agriculture standards for organic production and may incorporate the Department of Agriculture seal.

exceptions to those requirements.[87] Under the general requirements of the OFPA, states are permitted to add their own guidelines to the regulatory scheme.[88] This provision for states to continue or start their own certification and labeling program permits states to submit their own plan for organic certification programs to the Secretary of Agriculture who must approve it, as long as the plan is consistent with the goals and purpose of the OFPA.[89] Under the OFPA, the state programs can be

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Id.

87. OFPA, *supra* note 9, § 2106(c) & (d). The relevant language provides:

> (c) EXEMPTIONS FOR PROCESSED FOOD.—Subsection (a) shall not apply to agricultural products that—
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> (1) contain at least 50 percent organically produced ingredients by weight, excluding water and salt, to the extent that the Secretary, in consultation with the National Organic Standards Board and the Secretary of Health and Human Services, has determined to permit the word 'organic' to be used on the principal display panel of such products only for the purpose of describing the organically produced ingredients; or
>
> (2) contain less than 50 percent organically produced ingredients by weight, excluding water and salt, to the extent that the Secretary, in consultation with the National Organic Standards Board and the Secretary of Health and Human Services, has determined to permit the word 'organic' to appear on the ingredient listing panel to describe those ingredients that are organically produced in accordance with this title.
>
> . . .
>
> (d) SMALL FARMER EXCEPTION.—Subsection (a)(1) shall not apply to persons who sell no more than $5,000 annually in value of agricultural products.

Id.

88. OFPA, *supra* note 9, § 2107(c). The relevant language states that "a state organic certification program approved under this title may contain additional guidelines governing the production or handling of products sold or labeled as organically produced in such state as required in section 2108." *Id.*

89. OFPA, *supra* note 9, § 2108. The relevant language of the state organic certification program states:

> (a) IN GENERAL.—The governing State official may prepare and submit a plan for the establishment of a State organic certification program to the Secretary for approval. A State organic certification program must meet the requirements of this title to be approved by the Secretary.
>
> (b) ADDITIONAL REQUIREMENTS.—
>
> (1) AUTHORITY.—A State organic certification program established under subsection (a) may contain more restrictive requirements governing the organic certification of farms and handling operations and the production and handling of agricultural products that are to be sold or labeled as organically produced under this title than are contained in the program established by the Secretary.
>
> (2) CONTENT.—Additional requirements established under paragraph (1) shall—
>
> (A) further the purposes of this title;
>
> (B) not be inconsistent with this title;
>
> (C) not be discriminatory towards agricultural commodities organically produced in other states in accordance with this title; and
>
> (D) not become effective until approved by the Secretary.

more restrictive than the federal program, but they can not inhibit interstate commerce of products from other states that do meet the federal standards.[90]

The OFPA also provides for the establishment of a National Organic Standards Board.[91] The Board is charged with several functions, including the development of specific standards, oversight of enforcement of the Act, and assisting the Secretary with the implementation of the Act.[92] Finally, the OFPA sets civil penalties for violations of the Act.[93] The entire OFPA is designed to provide consistency but, in contrast to existing state laws, the federal legislation may do more to upset the current field rather than to stabilize it.[94]

III. Probable Extent of Federal Pre-emption in Organic Food Labeling Under the Organic Food Production Act

The language of the OFPA and its legislative background do not indicate how much power is reserved to the states for organic food certification.[95] Although the OFPA is not designed to pre-empt the states entirely,[96] the legislative history does indicate limits on how much authority the states may exercise.[97] The resolution of this conflict will depend on the existing case law of pre-emption in food labeling[98] and a comparison of existing federal and state labeling schemes.

A. Ambiguity of the Extent of Federal Pre-emption

Much of U.S. constitutional law development has focused on the division of regulatory powers between the federal and state governments.[99] Using the Supremacy Clause and the Commerce Clause as a foundation, the Supreme Court fashioned the pre-emption doctrine which determines when the federal government

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Id.

90. *See* OFPA, *supra* note 89, § 2108(b).

91. *See* OFPA, *supra* note 9, § 2119(a). The relevant language states: "[t]he Secretary shall establish a National Organic Standards Board . . . to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of this title." *Id.*

92. OFPA, *supra* note 9, § 2119(a).

93. OFPA, *supra* note 9, § 2120(a) (providing that "[a]ny person who knowingly sells or labels a product as organic, except in accordance with this title, shall be subject to a civil penalty of not more than $10,000").

94. *See infra* notes 187-302 and accompanying text.

95. *See generally* OFPA, *supra* note 9; S. Rep. No. 357, *supra* note 4.

96. S. Rep. No. 357, *supra* note 4, at 295 (noting that it is the intention "that States may enact a State Organic Certification Program in addition to the national program" and further that Congress intends to "preserve the rights of States to develop standards particular to their needs that are additional and complementary to the Federal Standards").

97. S. Rep. No. 357, *supra* note 4, at 295 (noting that the committee was "most concerned that State action not disrupt interstate commerce [and therefore] the title limits state action in three ways").

98. *See infra* notes 99-141 and accompanying text.

99. L. Tribe, *supra* note 25, § 6-1, at 401 (stating that "[f]or the very reason that [the commerce clause and the supremacy clause] are constitutionally indispensable, judicial review of state and local actions alleged to violate them is necessarily robust").

may pre-empt the states' regulatory powers.[100] Generally, the federal government may pre-empt state regulation of a given activity under one of five general theories.[101] This author believes that the new federal statute for organic foods labeling does not fit squarely into any of the five theories, but instead qualifies indirectly under several of the theories.

Pre-emption under the first theory occurs when Congress, acting within the powers granted under Article I of the U.S. Constitution, expressly pre-empts existing state law.[102] If federal legislation contains language that specifically prevents the state from promulgating its own regulations, little doubt remains that the state cannot play any substantial regulatory role.[103] The language in the OFPA does not expressly pre-empt state labeling regulation,[104] but current conflicting federal labeling regulations could alternatively be cited to support pre-emption or lack of pre-emptive effect.[105] For example, current federal labeling requirements for meat,[106] poultry,[107] and eggs[108] contain language that expressly prohibits any additional or different labeling requirements than those contained in the federal

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100. L. TRIBE, *supra* note 25, § 6-1, at 402 (noting that "[t]he central thrust of the Supreme Court's work in federal-state relations has been to put the inertia on the other side—on the side of the centralizing forces of nationhood and union").

101. Hillsborough County v. Automated Medical Labs, 471 U.S. 707, 712-13 (1985) (stating that the Court recognized "five circumstances under which federal law" may supersede state law: where pre-emption is expressly provided by Congress; where the scheme of federal regulation is sufficiently comprehensive to leave no room for supplementary state regulation; where the field is one in which the federal interest is inherently dominant; where the state law conflicts with the federal law so that compliance with both is impossible; and where state law stands as an obstacle to the accomplishment and execution of federal objectives). *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 86 (1983) (holding that pre-emption occurs when federal legislation contains an implicit barrier to state regulation); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (holding that pre-emption occurs when Congress expresses a clear intent to pre-empt state law when enacting a federal statute); Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (holding federal pre-emption occurs when compliance with both federal and state law is physically impossible); Free v. Bland, 369 U.S. 663, 666 (1962) (holding that the federal law pre-empts state law when there is an outright or actual conflict between federal and state law); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding that pre-emption occurs when Congress legislates comprehensively within a field leaving no room for the state to supplement the regulatory scheme); Hines v. Davidowitz, 312 U.S. 52, 66 (1941) (holding that pre-emption occurs when the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress). *See also* Mitchell, *supra* note 1, at 128-32.

102. *Hillsborough County*, 471 U.S. at 713.

103. *Id.*

104. *See generally* OFPA, *supra* note 9, §§ 2104-2112.

105. *See Florida Lime and Avocado Growers, Inc.*, 373 U.S. at 144 (noting that the Supreme Court was unwilling to give over complete regulatory power to the federal government for food safety because "readying foodstuffs for market has always been deemed a matter of peculiarly local concern [and] States have always possessed a legitimate interest in the protection of people against fraud and deception in the sale of food products at retail markets within their borders"); Mitchell, *supra* note 1, at 139 (discussing the lack of an explicit goal of uniformity in food labeling in the Food, Drug and Cosmetic Act or the FDA's interpretation of it).

106. Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 (1988).

107. Poultry Products Inspection Act, 21 U.S.C. §§ 451-470 (1988).

108. Egg Products Inspection Act, 21 U.S.C. §§ 1031-1056 (1988).

guidelines.[109] In contrast, the Federal Food, Drug, and Cosmetic Act[110] and the Fair Packaging and Labeling Act[111] do not expressly pre-empt state regulation of food labels for foods other than meat, poultry, and eggs.[112] Because organic foods fall under the jurisdiction of all three acts, it is difficult to discern any clear authority on which to predict the pre-emptive effect of the OFPA.[113]

The second theory of pre-emption is that the impact of the federal regulation is so comprehensive that a pre-emptive effect can be inferred.[114] For example, if Congress passed an amendment to the Food, Drug, and Cosmetic Act that set comprehensive label requirements for fiber content, it may be inferred that the states are entirely foreclosed from additional regulation of fiber claims on labels.[115] If the regulations were applicable to "all food for sale in retail outlets" and provided exactly what fiber information could and could not appear on the label, the comprehensiveness of the regulations would preclude further state action. In an analysis of the regulatory scheme, it must appear that the federal interests are so pervasive that the state is effectively kept out of the regulatory sphere.[116]

Again, the language of the OFPA does not give explicit guidance in this area, but it does limit states' regulatory powers.[117] States must have extra label requirements approved by the Secretary of Agriculture,[118] and states may not bar the import of any organic foods from other states that meet the federal certification requirements.[119] The Committee Report for the OFPA noted that "[s]tates may have a State organic label only if it is in addition to the USDA label approved by the Secretary."[120] Later in that same report, though, the Committee indicated that any state labeling must be consistent with federal label requirements, and such labels can not make any claims of superior quality.[121] Thus, the language does not

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109. 21 U.S.C. § 457(b) (1988) (providing for "appropriate consultation" among federal and state agencies to avoid inconsistencies between federal and state poultry labeling standards); 21 U.S.C. § 607(c) (1988) (providing the same for meat product labeling); 21 U.S.C. § 1052(b) (1988) (providing the same for egg labeling). *See also* 21 U.S.C. § 467e (1988) (prohibiting state poultry labeling requirements that are "in addition to or different" from the federal labeling requirements, but granting the states concurrent jurisdiction for inspecting those products that are "adulterated or misbranded"); 21 U.S.C. § 678 (1988) (providing the same for meat product labeling).

110. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-393 (1988).

111. Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1461 (1988).

112. *See* Mitchell, *supra* note 1, at 129.

113. *See* Mitchell, *supra* note 1, at 129 (discussing the contrast in general pre-emption effect between the Food, Drug, and Cosmetic Act and the Meat, Poultry, and Egg Products Inspection Acts because the latter contain expressly pre-emptive language and the former does not address pre-emption).

114. *Hillsborough County*, 471 U.S. at 713.

115. *See* Mitchell, *supra* note 1, at 131 (modifying an example provided for demonstrating specific pre-emption because of the physical impossibility of compliance with federal and state law).

116. Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 191 (1983) (holding that the federal government's regulation of nuclear safety was so pervasive as to exclude state regulation, but noting that states could still regulate the economics of nuclear energy).

117. OFPA, *supra* note 89, § 2108 (b)(2)(A-D).

118. OFPA, *supra* note 89, § 2108(a).

119. OFPA, *supra* note 89, § 2108(b)(2)(C).

120. S. REP. NO. 357, *supra* note 4, at 293.

121. S. REP. NO. 357, *supra* note 4, at 295. The report states:

pervasively pre-empt the state's role in label regulation, but conversely, it does not make clear what aspects of organic food labeling the state may regulate. This effect of federal organic foods labeling requirements must come within the *Hillsborough County*[122] presumption that "state and local regulation of health and safety matters can constitutionally coexist with federal regulation."

The third pre-emption theory applies when the federal interest is dominant over the state interest.[123] As under the second pre-emption theory, the states may not infringe on federal regulation when the federal government can demonstrate that it has a dominant interest. The federal government does not claim a dominant interest in food labeling nor does it offer any reasons for changing this policy.[124] This pre-emption theory is inapplicable to the OFPA, since the federal government does not have a dominant interest in organic foods any more than it has a dominant interest in conventional foods.[125]

The fourth pre-emption theory is demonstrated when the federal regulation selectively pre-empts state regulation, eliminating only those portions of the state regulatory scheme that directly conflict with the federal provisions.[126] This form of pre-emption, also known as "specific pre-emption,"[127] arises when the federal law proscribes exactly what the state law prescribes, or vice versa. For example, a federal labeling regulation requires that cheese substitutes which are nutritionally equivalent to real cheese be labeled "substitute," while a state statute requires the same product to be labeled "imitation."[128] Since compliance with both the federal and state requirements was impossible, the federal requirements pre-empted the state requirements.[129] Generally, federal label regulations set minimum require-

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> Second, labeling must be consistent. An additional organic label indicating the State of origin and the certifying agent of such product is allowed to be affixed on the product in addition to the USDA "organically produced" label. Many States have advised the Committee that they desire a State organic label in order to indicate the origin of the product in their efforts to promote home-grown products. However, the State label may not carry claims of superior quality: It is up to the State to promote its own products in consumer education campaigns rather than by label claims.

Id.

122. Hillsborough County v. Automated Medical Labs, 471 U.S. 707, 716 (1985).

123. *Pacific Gas and Elec. Co.*, 461 U.S. at 218-19 (1983) (noting that the federal government's interest in nuclear safety was dominant).

124. Mitchell, *supra* note 1, at 127 (discussing the FDA policy that approaches total pre-emption of state labeling regulations as the exception rather than the rule).

125. *Hillsborough County*, 471 U.S. at 719-20.

126. *Id.* at 713 (noting that pre-emption occurs "[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law [where] compliance with both . . . is a physical impossibility").

127. Mitchell, *supra* note 1, at 131 (discussing specific pre-emption due to "physical impossibility" of compliance with both state and federal regulations).

128. Grocery Mfrs., Inc. v. Gerace, 581 F. Supp. 658, 661 (S.D.N.Y. 1984), *aff'd* 755 F.2d 993 (2d Cir 1985), *cert. denied*, 474 U.S. 820 (1985) (describing the legislation passed by the New York legislature at the behest of the state's dairy lobby to notify consumers when any food product contained substitute dairy products, regardless of nutritional equivalence).

129. *Id.* at 668 (holding that since food manufacturers could not comply with both the federal and state label requirements, the state requirements were pre-empted).

ments and permit the states to enact more stringent requirements.[130]

The OFPA arguably fits into this category of pre-emption because it appears to set minimum federal label requirements and permits states to make additional label requirements.[131] However, this conclusion is uncertain because the USDA has yet to promulgate the regulations for the OFPA. Without available federal regulations, it is not possible to predict accurately how much more stringent the state regulations may be without infringing on the federal government's interest.

The fifth means of pre-emption, which is really a variation on the fourth pre-emption theory, occurs when the state law is an obstacle to accomplishing federal objectives.[132] This theory of pre-emption is the most ambiguous,[133] yet it offers the most potential for favoring pre-emption because it is open to a wide spectrum of judicial interpretation.[134] For example, under the Constitution, states have the authority to regulate areas that fall within their police power, such as ensuring that food is free from carcinogenic substances.[135] Using the police power, a state can regulate food safety and labeling as an issue that affects the public health and welfare of its citizens.[136] Judicial interpretation requires balancing the state police power authority against the necessity and value of the federal objectives.[137] If the

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130. *See* Jones v. Rath Packing Co., 430 U.S. 925 (1977) (holding that state regulations that made no allowance for reasonable variations from the label's stated weight resulting from moisture loss while the product was in transit were not pre-empted by the federal label regulations because the state regulations were more stringent); T. BURKE & D. DAHL, *supra* note 2, at 13 (describing the operation of § 1468 of the Fair Packaging and Labeling Act (FPLA) for state label requirements that are more stringent than federal label requirements).

131. OFPA, *supra* note 89, § 2108 (describing federal and state roles for organic foods labeling).

132. Hines v. Davidowitz, 312 U.S. 52 (1941). *See also* Mitchell, *supra* note 1, at 131-32 (discussing previous attempts to use this pre-emption theory to overcome state food labeling regulations).

133. Mitchell, *supra* note 1, at 132-41 (describing the difficulty in ascertaining clear federal objectives from statutes, agency regulations, agency inaction on given issues, and long-term goals that change from administration to administration over time). *See also* Silverglade, *Current Issues in Food Labeling—An Overview*, 44 FOOD DRUG COSM. L.J. 231, 233 (1989) (describing three factors that appear to cloud FDA's earlier attempt to comprehensively revise food label requirements: public opinion that demands increasing state regulation of food safety problems if they perceive federal inaction; states' improved monitoring and enforcement of food safety issues; and Ronald Reagan's Executive Order 12,612, issued in 1987, that instructs federal agencies to leave regulatory matters to states whenever possible).

134. Mitchell, *supra* note 1, at 132-33.

135. U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (upholding a Pennsylvania law that required ships within the port of Philadelphia to hire local pilots because the law served a safety concern that was inherently local). *See also* L. TRIBE, *supra* note 25, § 6-4, at 406 (describing the *Cooley* doctrine wherein states are free to regulate the aspects of interstate commerce that are local in nature, such as health and safety); Taylor, *Federal Pre-emption and Food Regulation: Where We Go from Here*, 40 FOOD DRUG COSM. L.J. 221 (1985).

136. Taylor, *supra* note 135, at 221 (describing the basic issue of allocating regulatory power between the federal and state government).

137. *Id. See also* Stone, *The Federal-State Relationship Concerning USDA Regulated Foods—Advertising, The FTC, the States, and Others*, 44 FOOD DRUG COSM. L.J. 315, 316-18 (1989) (describing how the legal challenges to California's Proposition 65—which requires a food label to indi-

federal objectives are sufficiently important, the state is pre-empted from regulatory activity.[138]

The OFPA does not cleanly fit this final theory of pre-emption because nothing in the language of the OFPA indicates that state regulation of organic foods labeling will frustrate federal purposes.[139] Instead, it notes that a state may not permit the use of labels that have not been approved by the Secretary of Agriculture.[140] Aside from that limitation, the OFPA appears to tolerate and even encourage state regulation to further the federal policy of organic foods labeling.[141] The OFPA does not expressly pre-empt the states regulatory powers. The federal scheme is not so comprehensive, nor is its interest so dominant in organic foods, that states would be precluded from regulating organic foods; therefore, it is not inherently impossible to comply with existing state laws and the OFPA. Consequently, state laws do not serve as an obvious barrier to the federal objectives of the OFPA. Absent the regulations which will accompany the OFPA[142] or any judicial interpretations of its provisions, it does not appear that any state regulation would inherently stand as an obstacle to the federal objectives of the OFPA.[143]

B. The Goal of Uniformity in Organic Food Labels

National uniformity in food labeling has been an enduring goal of both government and private industry organizations,[144] but it has never been achieved.[145]

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cate the food contains certain levels of carcinogens and reproductive toxicants—may provide further judicial interpretation of the balance of federal and state power in the area of food labeling). *See, e.g.*, Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941 (9th Cir. 1992) (holding that neither the Federal Insecticide, Fungicide and Rodenticide Act nor the Federal Hazardous Substances Act pre-empts the labeling provisions of California's Proposition 65).

138. Taylor, *supra* note 135, at 222-23.

139. Mitchell, *supra* note 1, at 132 (stating that "[t]his theory [of pre-emption] will invalidate state regulation only in those particular, rare instances where the [federal agency] has unmistakably indicated that state regulation would defeat some specific federal policy embodied in [the legislation]").

140. OFPA, *supra* note 86, § 2106(a).

141. S. REP. NO. 357, *supra* note 4, at 295 (stating that "the Committee clearly intends to preserve the rights of States to develop standards particular to their needs that are additional and complementary to the Federal standards").

142. *See generally* Shirley, *supra* note 46, at 31-33, 47 (discussing the current efforts to implement OFPA, including USDA's goal of issuing regulations by the end of May 1992).

143. The federal goals of a consistent approach to labeling and defining organic foods could be impeded by state regulations that are squarely in conflict with the federal legislation. However, the OFPA draws largely from approaches developed by the states and had the support of many state agricultural organizations. *See* Institute for Alternative Agriculture, *Organic Certification Victory*, 8 ALTERNATIVE AGRIC. NEWS 1 (Sept. 1990) (noting that OFPA was supported by the National Association of State Departments of Agriculture and several state Farm Bureaus).

144. Nyberg, *supra* note 3, at 230 (noting that "[u]niformity in law governing food labeling is a constant and continuing goal of food producers, processors, and the organizations that represent them"). *See also* Taylor, *supra* note 135, at 222 (stating that "goals [of the federal government] should be to have nationwide uniformity in most areas of food regulatory policy—especially regarding safety standards and labeling issues").

145. Taylor, *supra* note 135, at 222 (finding that the lack of a clear congressional or agency statement on the amount of federal pre-emption in food labeling results in the uncertainties and attendant

Instead, the federal government has permitted the states to develop a patchwork of different labeling regulations.[146] Nevertheless, the passage of the OFPA and the impending promulgation of companion regulations makes the goal of food labeling uniformity achievable.[147]

1. The Need for National Uniformity

The need for national uniformity in food safety and labeling was recognized in the early 1960s[148] and was endorsed by the White House Conference on Food, Nutrition, and Health in 1969.[149] Reaching the goal of national uniformity in food regulation has not been readily attainable for several reasons. First, Congress did not use a uniform approach towards food regulation in the creation of administrative agencies.[150] The primary statutory authority for regulation of food products sold in interstate commerce is split between the FDA[151] and the USDA.[152] This split of authority for food labeling resulted in a variety of pre-emptive yardsticks depending on which agency was regulating and on the type of food being regulated.[153] Some

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costs of case-by-case judicial resolution).

146. Nyberg, *supra* note 3, at 233 (noting that the states developed various types of food labeling laws and enforced them with varying degrees of vigor). *See also* Kirschbaum, *supra* note 3, at 199 (stating that "the lowered priority given by the FDA to economic program activities, particularly labeling . . . has led to an increased role for state agencies").

147. Bones, *supra* note 33, at 5.

148. REPORT OF THE NATIONAL COMMISSION ON FOOD MARKETING, FOOD FROM FARMER TO CONSUMER 112 (1966) (indicating that "a concerted effort should be made to effect uniformity among state regulations that obstruct trade in food across state lines").

149. Nyberg, *supra* note 3, at 230 (recognizing that the primary barrier to food product innovation and technology advancement were the inconsistencies of the regulatory policies of the federal and state governments with regard to the best interests of consumers or the food industry) (citing FINAL REPORT OF THE WHITE HOUSE CONFERENCE ON FOOD, NUTRITION, AND HEALTH, at 117 (1970)).

150. *See* Nyberg, *supra* note 3, at 230 (describing the relationship between the FDA, which has jurisdiction over food labeling generally, and the USDA, which has jurisdiction over labeling of meat, poultry, and egg products); Stone, *supra* note 137, at 315-16 (describing how the USDA requires pre-approval of labels for meat, poultry, and egg products, while the FDA and the Federal Trade Commission (FTC) only seek to regulate labels after the products have been on the market).

151. *See* 21 U.S.C. § 343 (1988) (granting the FDA the power to promulgate and enforce food labeling rules); 15 U.S.C. §§ 1451-1461 (1988) (authorizing the FDA to enforce the Fair Packaging and Labeling Act provisions for foods, drugs, and cosmetics, while reserving jurisdiction for the FTC over all other product labels).

152. *See* Federal Meat Inspection Act, 21 U.S.C. § 678 (1988); Poultry Products Inspection Act, 21 U.S.C. § 467(e) (1988); Egg Products Inspection Act, 21 U.S.C. § 1052 (1988). These three statutes grant the USDA the authority to pre-approve, monitor, and enforce label regulations for meat, poultry, and eggs. The OFPA aggravates this split of authority because it gives the USDA all regulatory power over organic foods other than meat, poultry, and eggs—foods traditionally within the jurisdiction of the FDA. For a history and description of the FDA and USDA, see T. BURKE & D. DAHL, *supra* note 2, at 1-19.

153. Nyberg, *supra* note 3, at 233 (noting that federal recognition of state health interests does not justify a system of label regulation that provides for strong pre-emption of state activity for meat, poultry, and eggs, and a much weaker and less intensive degree of pre-emption for other foods, stating that "[t]here is no compelling historical evidence of an intent by Congress to justify pre-emption on the basis of different types of food products").

federal legislation expressly pre-empts state regulation,[154] while other federal legislation merely sets a low minimum standard permitting extensive state discretion.[155]

Second, national uniformity has not been attained because states were afforded more power to regulate food safety compared with other issues. The state's authority was not pre-empted because traditionally food was locally produced and consumed.[156] The federal government's initial inertia[157] concerning food regulation gave states an incentive to develop their own food safety laws.[158] For example, many food products still carry the "Reg. Penna. Dept. Ag." label that indicates compliance with Pennsylvania's food safety regulations.[159] Once states developed these regulations, the federal government was less likely or willing to expressly pre-empt them.[160]

The Senate unsuccessfully tried to legislate label uniformity through the Consumer Food Act of 1975.[161] The bill expressly pre-empted the states from regulating food labels when the information was in addition to, or different from, the federal label requirements.[162] The bill provided an appeal process to states and other

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154. *See* 21 U.S.C. § 678 (1988) (explicitly pre-empting state labeling regulations under the Wholesome Meat Act).

155. *See* 9 C.F.R. § 319.600. This regulation, promulgated by USDA, defines cheese pizza, but does not stipulate a minimum amount of natural cheese that must be used nor does it preclude the use of imitation cheese. *Id. But cf.* Kirschbaum, *supra* note 3 at 202-03 (describing the federal efforts to preclude Wisconsin from making any additional regulations defining cheese pizza).

156. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963) (describing the "peculiarly local concern" inherent to regulation of food production and processing that justified a greater local interest in such regulation); L. TRIBE, *supra* note 25, § 6-13, at 437 (stating that "[s]tate regulations seemingly aimed at furthering public health or safety . . . are less likely to be perceived as undue burdens on interstate commerce than are [other state regulations]").

157. J. YOUNG, PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906 98-113 (1989) (describing the problems and reasons for not passing a comprehensive federal food safety law until 1906); Nyberg, *supra* note 3, at 233 (noting that prior to the passage of the Pure Food and Drugs Act of 1906, over 100 similar bills had been introduced in Congress).

158. *See* Nyberg, *supra* note 3, at 233 (describing how, beginning with Massachusetts in 1785, states passed a variety of laws regulating labels to protect their products in other markets and to protect their own producers, processors, and marketers).

159. 7 PA. CODE § 31.34(b) (1989). The relevant language states: "All products, whether packaged in the bakery or by a packer, processor, wholesale dealer or a distributor, shall bear the words 'Registered with the Pennsylvania Department of Agriculture'. The following abbreviation shall be acceptable: 'REG. PENNA. DEPT. AGR.' " *Id.*

160. Silverglade, *Pre-emption—The Consumer Viewpoint*, 45 FOOD DRUG COSM. L.J. 143, 144-45 (1990) (describing some of the underlying reasons for a federal policy that encourages continued state regulatory action for food labeling). Such reasons include federal agencies' reliance on the cooperative efforts of state agencies to carry out programs; cycles of federal deregulation that encourage states to strengthen their own laws; state agencies' superior response time and ability to tailor regulatory programs to unique local needs; and consumers and producers greater opportunity to participate and affect regulatory policy at the state and local level than at the federal level. *Id.*

161. S. 641, 94th Cong., 1st Sess. (1975).

162. S. REP. NO. 684, 94th Cong., 2d Sess., 72 (1976) (attempting to amend the Federal Food Drug and Cosmetic Act). The report states:

> It is declared to be the express intent of Congress to supersede any and all laws of the states and territories and of the political subdivisions thereof insofar as they may now or

local government bodies to have their own label regulations approved by the Secretary of Health and Human Services.[163] In essence, the Secretary of Health and Human Services would conduct a balancing test, between the interests of consumers and the potential burden of the state label regulation on interstate commerce, to decide whether to grant an exception to the federal legislation.[164] Although this bill would not have been a complete cure for conflicting federal and state label regulations,[165] it was an attempt to resolve the inconsistencies that have been exacerbated in the last fifteen years. The bill passed in the Senate, but failed in the House.[166]

In spite of the logical considerations supporting consistent state and federal food labeling regulations, uniformity may not be as important a goal as some legal authorities suggest.[167] State and federal labeling regulations may adequately serve the public safety and interstate commerce interests without necessarily being completely uniform.[168] Unfortunately, the OFPA sends mixed signals on the degree of importance ascribed to uniform organic foods labeling.[169] The consistency required under the OFPA may refer to the label information itself or to the regulatory scheme.[170] The OFPA language is not clear on this distinction.[171]

> hereafter require information on the label or notification of any food which is *in addition to, or different from*, information required under Sections 403 and 407 of this Act or by regulations promulgated under any such provision, except as provided in Subsection (B) of this section.

Id. (emphasis added).

163. *Id.* at 73 (stating that "the Secretary shall grant the proposed exemption if [there is a finding] that the state law or regulation involved will likely promote the interests of consumers within the applicants' jurisdiction without unduly burdening interstate commerce or otherwise adversely affecting the interests of all consumers").

164. *Id.*

165. Nyberg, *supra* note 3, at 235.

166. *Id.* at 236.

167. *See generally* Nyberg, *supra* note 3. *But cf.* Mitchell, *supra* note 1, at 138-39 (pointing out that the federal policy does not embody a separate goal of uniformity for food labeling and that allowing states to regulate in this area is not always a demonstrable burden on interstate commerce). *See also* Kirschbaum, *supra* note 3, at 202 (suggesting that a better solution to strong federal pre-emption would be for the regulated industry to work closely with the state regulatory agencies to produce uniform labeling requirements).

168. *See* Mitchell, *supra* note 1, at 139-40; Silverglade, *supra* note 160, at 148-49 (describing how federal pre-emption of California's Proposition 65, an effort to label all food with trace amounts of carcinogens, would be detrimental to California consumers because it would ensure that they are subject to the lowest common denominator in food safety for the sake of national uniformity). *See, e.g.*, Chemical Specialties Mfrs Ass'n v. Allenby, 958 F.2d 945 (9th Cir. 1992) (holding that neither the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) nor the Federal Hazardous Substances Act pre-empts the labeling provisions of California's Proposition 65 because compliance with all three laws is possible).

169. *Compare* OFPA, *supra* note 89, § 2108(b)(1) (providing that states may affix labels of their own design on organic foods to convey information such as the state of origin and certifying agency) *with* S. REP. NO. 357, *supra* note 4, at 295 (noting that state labeling must be consistent with federal labeling to ensure that interstate commerce is not hindered).

170. Mitchell, *supra* note 1, at 139.

171. OFPA, *supra* note 9, §§ 2102-2116. *But see* H.R. CONF. REP. NO. 916, *supra* note 4, at 1178 (mentioning the OFPA, in addition to the Egg Products Inspection Act, the Meat Inspection Act, and

2. *The Need for International Uniformity*

The growing international market for organic foods creates a further need for uniformity in food labeling.[172] The recent controversy over the European Economic Community's (EEC) refusal to accept U.S. beef[173] because some of the beef is produced with growth hormones is an indication of international sensitivity[174] to our food labeling regulatory system. Not all U.S. beef is produced with growth hormones; however, this difference in production techniques is not widely acknowledged through food labels.[175] The USDA now offers a "natural" label that indicates the meat was raised without the use of synthetic compounds such as hormones.[176] Most of the state organic certification regulations provide labeling for beef produced without growth hormones.[177] Yet, even with the existing federal and state labeling provisions for hormone-free beef, the EEC chose to boycott U.S. beef rather than require that it be labeled with regard to whether growth hormones were used.[178]

United States organic foods could fall prey to the same type of international discrimination if the United States does not adopt a uniform labeling system. As the EEC considers a proposal for uniform organic inspection and labeling requirements,[179] it probably will turn its attention towards imported American organic foods because of the growth of this market.[180] Without a reliable and uniform

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the Poultry Products Inspection Act, for accepting certification at the point of slaughter).

172. Nyberg, *supra* note 3, at 234 (describing recent efforts to reconcile the differing international views on what information food labels should contain).

173. *See Beef: More at Stake than Steak*, ECONOMIST, August 26, 1989, at 31. The European Economic Community banned the import of American beef because some beef is produced with the use of artificial growth hormones. *Id.* Since the USDA refused to certify beef as having been grown without hormones, and refused to permit the states to do so, the EEC simply banned all American beef on the basis that the hormones constituted a health risk to their consumers. *Id.* The USDA later allowed Texas to certify, label, and ship hormone-free beef to Europe, permitting them to exploit that market. *Cooking Up a Beef Deal*, TIME, Feb. 20, 1989, at 75.

174. *See* Hamilton, *The Role of the Law in Shaping the Future of American Agriculture*, 38 DRAKE L. REV. 573, 582 (1988-89) (noting that this example of consumer health concern, despite scientific assurances that the hormones presented no health risks, should be heeded as a lesson for the U.S. food industry).

175. *See* Brewington, *Labeling Claims for Meat and Poultry Products*, 44 FOOD DRUG COSM. L.J. 325, 329-30 (1989) (describing the natural terms and animal production claims for meat labels).

176. *Id.*

177. *See* Bones, *supra* note 33, at 5-6 (describing California and Texas provisions for labeling organically produced meat).

178. *Cooking Up a Beef Deal*, *supra* note 173, at 75 (noting that faced with the U.S. threat of 100% tariffs on European foods, the European Economic Community still refused to accept U.S. beef imports, the single exception being several small shipments of certified hormone-free beef from Texas).

179. S. REP. NO. 357, *supra* note 4, at 290 (describing the efforts of the International Federation of Organic Agricultural Movements to standardize worldwide organic food standards and labeling requirements).

180. *See* Knox, *supra* note 43 (describing growth in U.S. organic foods market). *See also* Kraus, *Organic Farming Moves South of the Border*, NEW FARM, July/Aug. 1989, at 30-31 (describing efforts of Mexican farmers to grow organic produce for sale to the U.S.); Rodale, *A Warming Time*, NEW FARM, Mar./Apr. 1990, at 11, 14 (describing the efforts of the Rodale Institute to supply the Russian demand for information on organic farming techniques).

labeling system, the EEC and other foreign countries may find it easier to ban United States organic foods than to struggle with the inconsistencies of federal and state regulations.

Unfortunately, the goal of uniformity in the international legal arena is as far from reality as it is within the United States[181] As a means to the uniformity goal, the International Codex Alimentarius Commission has been charged with the duty to provide international guidelines for uniform food labeling.[182] The Commission adopted basic nutrition labeling guidelines that require the inclusion of energy value, protein, carbohydrates, and fat content on labels.[183] Although the Commission was able to establish a uniform international labeling requirement, the United States offered significant exceptions and modifications to the standards.[184] These modifications were made an optional part of the Codex regulations over the United States protest that they should be mandatory.[185] As is the case in much treaty law, the enforceability and status of the Codex Alimentarius is unclear.[186] Nonetheless, it is imperative that the United States have a uniform organic food labeling regulation so that when the topic of international organic food trade is negotiated, United States organic food interests will not be excluded solely on the basis of this divided federal and state labeling authority that currently exists and is furthered by the OFPA.

C. *Mixed Signals in the Organic Food Production Act*

The labeling provisions of the OFPA create conflicts of law in two general areas. First, the OFPA's labeling requirements conflict with the twenty-two existing state labeling programs.[187] Unlike the current federal regulatory scheme, which relies on some state participation,[188] the OFPA does not provide guidelines that give

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181. Nyberg, *supra* note 3, at 234 (stating that international attempts to find uniformity are hampered by many different interpretations of what "uniformity" should mean).

182. *See* R. MIDDLEKAUF & P. SHUBIK, INTERNATIONAL FOOD REGULATION HANDBOOK 250-51 (1989) (describing the basic functions of the Codex Alimentarius Commission as charged by the 121 member countries that belong to the Codex); Y. HUI, 1 UNITED STATES FOOD LAWS, REGULATIONS, AND STANDARDS 346 (1986) (describing the USDA's role as the U.S. coordinator for the Codex Alimentarius Commission and the specific standards promulgated by the Commission).

183. Nyberg, *supra* note 3, at 234 (citing the report from the 17th Session of the Codex Committee on Food Labeling, Ottawa, Canada, October 12-21, 1983).

184. Nyberg, *supra* note 3, at 234.

185. Nyberg, *supra* note 3, at 234.

186. *See* Y HUI, *supra* note 182, at 349 (noting that Codex member countries may accept Codex standards in one of three ways: full acceptance, target acceptance, and acceptance with specified deviations).

187. *See supra* note 53 and accompanying text. Upon closer examination of the OFPA, this Note will show that the federal legislation sends mixed signals regarding the extent of state control over organic foods labeling. *See infra* notes 193-234 and accompanying text.

188. *See* Stone, *supra* note 137, at 316, 322 (describing the interrelationship of the state and federal regulatory spheres for label advertising); Kirschbaum, *supra* note 3, at 201-02 (describing contracts for joint regulation between the FDA and state agencies); Y. HUI, *supra* note 182, at 199-200. Hui describes the cooperative regulatory agreements between the USDA, the FDA, and each of the states under the Egg Products Inspection Act. *Id.* One such agreement is the State Trust Fund, wherein

clear expectations of permissible state participation in label regulation.[189]

Second, OFPA creates conflicts with existing federal food labeling regulations.[190] The OFPA language does not carve out a special regulatory niche for organic food, so all other applicable federal regulations still apply to organic foods labels.[191] Because the federal food labeling authority is vested in two different agencies,[192] the potential for further legal conflict is increased by the OFPA.

1. *Conflict with State Labeling Regulation*

The OFPA fails to adequately describe the content and permissible information on the label for organic foods. The label on any food that is grown organically will include the phrase "organically produced"[193] and may include the USDA seal.[194] A state may add its own label indicating the state where the food was produced and the name of the party responsible for certification.[195] Otherwise, the OFPA is silent about what may or may not be included on the federal label of certified organic food. Furthermore, the OFPA contains no indication of what may or may not appear on the state label.

The legislative history does provide a better indication of the label content,[196] but it does little to clarify the division of regulation authority between the USDA and the states. The committee report notes that the law would make specific excep-

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the state collects fees for its inspection services under the federal act and holds the fees in trust. *Id.* Applications for service are then made to the state by the individual firms. *Id.*

189. Kirschbaum, *supra* note 3, at 200 (noting that the patchwork of current federal and state food regulatory authority results from a lack of clear expectations in the adopted legislation).

190. *See infra* notes 236-301 and accompanying text (describing the current inconsistencies in federal labeling regulations).

191. S. REP. NO. 357, *supra* note 4, at 293 (pointing out that "nothing in this title exempts organically produced food from other food laws, [and that o]rganically produced food must, like all other food products, meet certain grading, quality, and food safety standards").

192. Nyberg, *supra* note 3, at 230 (stating that the federal food labeling authority is split between the USDA and the FDA, an agency of the Department of Health and Human Services; and that a third agency, the Federal Trade Commission, has authority over food labeling to the extent the labeling is considered advertising). *See also* Y. HUI, *supra* note 182, at 201 (describing the federal division of authority for food labeling regulation).

193. OFPA, *supra* note 9, § 2103(14).

194. OFPA, *supra* note 86, § 2106(a)(1) & (2). The language states that a "person may . . . label an agricultural product as organically produced only if such product is produced and handled in accordance with this title" and further states that label "may indicate that the agricultural product meets Department of Agriculture standards for organic production and may incorporate the Department of Agriculture seal." *Id.* The section makes no mention of what additional information may appear either on the federal label or on state mandated labels. ***But see*** H.R. CONF. REP. NO. 916, *supra* note 4, at 1176 (noting that the Conference Committee rejected the Senate version of the bill that established the specific content of a national label in favor of the House version that did not). The Conference Committee also encouraged the Secretary to implement the label flexibility for processed food to "allow for continued trade of such products." H.R. CONF. REP. NO. 916, *supra* note 4, at 1176.

195. *See supra* notes 85-90 and accompanying text (describing the additional regulations states may impose for organic food, including the labeling of such products).

196. *See generally* S. REP. NO. 357, *supra* note 4, at 291-95.

tions regarding state labels,[197] and further describes the approval process for state organic certification programs.[198] In addition, under the OFPA the USDA has review and approval authority over state programs for the primary purpose of ensuring that interstate commerce is not disrupted.[199] In analyzing the division of regulatory authority between the state and federal agencies, three requirements enumerated in the OFPA committee report should be examined.[200]

First, any state label regulation must be approved by the Secretary of Agriculture as part of the overall state organic certification program.[201] The state organic certification program must be approved if it is "reasonable" and "meets the requirements" of the federal regulation.[202] Nothing in the legislation or the report indicates what is "reasonable" for the overall program, nor does the committee make any mention of criteria for state label requirements. Unless the regulations promulgated under the OFPA explain what is meant by "reasonable," it will be left to the courts to decide whether state labeling requirements meet the federal standards.

Second, the report asserts that "labeling must be consistent."[203] Assuming that "consistent" refers to the federal goal of uniformity in food labeling,[204] producers, processors, marketers, and consumers may understand that the state-developed label regulations have to conform with federal and other state label requirements. Unfortunately, this statement does not specify how closely the state must conform with federal or other state labeling requirements. This silence relegates the resolution of the states' regulatory power to the courts.[205]

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197. S. REP. NO. 357, *supra* note 4, at 292. The report states that "[a]fter September, 1992 no other label will be allowed that claims that food is in any way organic or organically produced, with specified exceptions regarding state labels and small farmers." *Id.*

198. S. REP. NO. 357, *supra* note 4, at 295. The report states that "the Secretary must approve state organic certification programs to ensure that such programs are consistent with the goals of the [legislation]." *Id.*

199. S. REP. NO. 357, *supra* note 4, at 304 (describing the scope of enforcement duties given to the USDA under this legislation). *See also* OFPA, *supra* note 74, § 2102(3) (stating that the purpose of the OFPA is "to facilitate interstate commerce in fresh and processed food that is organically produced").

200. S. REP. NO. 357, *supra* note 4, at 295 (describing the three ways that the OFPA limits state action in label regulation: state label regulations must be approved by the Secretary of Agriculture; state labels must be consistent with federal label requirements; and states may not discriminate against organic foods from other states as long as those foods bear the federal label).

201. S. REP. NO. 357, *supra* note 4, at 295.

202. S. REP. NO. 357, *supra* note 4, at 295.

203. S. REP. NO. 357, *supra* note 4, at 295. *But see* H.R. CONF. REP. NO. 916, *supra* note 4, at 1176 (rejecting certain portions of the Senate labeling provisions in the OFPA in favor of the House version)

204. Nyberg, *supra* note 3, at 230.

205. *See* Taylor, *supra* note 135, at 226 (stating that "as on labeling issues, courts would be left to the kind of uncertain, case-by-case analysis in the cases cited here"). *See also* Jones v. Rath Packing Co., 430 U.S. 519 (1977) (finding that the California minimum weight label requirement was impliedly pre-empted because it would frustrate the federal regulatory policy as construed in the Fair Labeling and Packaging Act, but finding no pre-emption merely on the basis that California had used a different approach to the problem); Committee for Accurate Labeling & Mktg. v. Brownback, 665 F. Supp. 880, 894 (D. Kan. 1987) (holding that Kansas law requiring substitute dairy products to be labeled "artificial" was an unconstitutional state interference with the accomplishment and execution of the full

The OFPA legislation is not entirely lacking in guidance for resolution of the legal conflict between the state and federal label regulations. The report states that "[a]n additional organic label indicating the State of origin and the certifying agent[206] of such product is allowed to be affixed on the product in addition to the USDA 'organically produced' label."[207] It also proscribes any state labels that contain information relating to the superior quality of the product.[208] These two parameters do little to give the states a framework within which they may regulate organic food labeling. A state could reasonably require additional label information not related to "superior quality," yet neither the OFPA nor the report expressly permits or prohibits any such additional information.[209] For instance, a California certifying agent might seek to include label information about the type of pest control used in growing organic lettuce.[210] Although the OFPA does not expressly prohibit California from adding that information to its organic food label, it also does not expressly provide for inclusion of that information.

The committee report asserts that a state must promote its own organic products through "consumer education campaigns rather than by label claims."[211] This provision, however, does not clarify the division of regulatory power between the

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purposes and objectives of federal regulation); Grocery Mfrs., Inc. v. Gerace, 581 F. Supp. 658, 688 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 993, 1001 (2d Cir. 1985), *cert. denied*, 474 U.S. 820 (1985) (striking down a New York statute that required substitute food products to be labelled "imitation" regardless of nutritional equivalence on the grounds the law was an obstacle to the federal regulatory scheme); Grocery Mfrs., Inc. v. Dept. of Public Health, 393 N.E.2d 881 (Mass. 1979) (finding that Massachusetts open date label regulation did not sufficiently conflict with federal label regulations).

206. OFPA, *supra* note 9, § 2103(3). The relevant language states that:

> The term "certifying agent" means the chief executive office of a state or, in a state that provides for the statewide election of an official to be responsible solely for the administration of the agricultural operations of the state, such official, and any person (including private entities) who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as an organically certified farm or handling operation in accordance with this title.

Id.

207. S. REP. NO. 357, *supra* note 4, at 295.

208. S. REP. NO. 357, *supra* note 4, at 295.

209. *Compare* OFPA, *supra* notes 83-90, §§ 2106-2108 *with* S. REP. NO. 357, *supra* note 4, at 295-96.

210. *Compare* Cramer, *Fighting Pests with 'Pests'*, NEW FARM, July/Aug. 1989, at 14 *with* DeVault, *Bug-Eating Machines Clobber Chemicals*, NEW FARM, July/Aug. 1989, at 9. The typical organic lettuce grower might use either a biological or a physical control for insect pests. The biological control might be *Bacillus thuringiensis* (*Bt*), a naturally occurring and organically acceptable insecticide. Cramer, *supra* at 14-15. The physical control might be a field vacuum, a large vacuum device mounted on a tractor that sucks insects off the lettuce and blows them through a screen. DeVault, *supra* at 9. The insects are killed when they are blown through the screen at seventy miles per hour. *Id.* The California certifying agent may find that consumers have a valid interest in knowing which technique is used, and that such information should appear on the label. *Id.* Indeed, Tanimura & Antle, a California lettuce grower that uses the field vacuum, labels its nationally distributed lettuce with "SALAD VAC—Grown Chemical Insecticide Free." *Id. See also* Altieri et al., *Some Agroecological and Socioeconomic Features of Organic Farming in California*, 1 BIOLOGICAL AGRIC. AND HORTICULTURE 97, 103 (1983).

211. S. REP. NO. 357, *supra* note 4, at 295.

federal and state governments because of the ambiguity surrounding the definitions of consumer education campaigns versus label claims. Current regulations and case law are unclear as to whether written materials describing food products qualify as labeling or advertising or both.[212] Not surprisingly, the bulk of the legal controversy surrounds point-of-purchase displays and materials,[213] exactly the type of material a state would likely use in promoting its own organic foods.

Generally, courts have held that most point-of-purchase materials are considered labeling.[214] Additionally, courts also recognize the commonality of advertising and labeling, and have held the two are not mutually exclusive.[215] Within its regulatory sphere, the USDA believes it has jurisdiction "over any informational materials that accompany or are applied to products, or any of their containers or wrappers, at the point-of-purchase."[216] An alternative line of reasoning followed in *American Meat Institute v. Ball*[217] finds that some point-of-purchase materials are not considered labeling. The particular details of this case are worth examination because analogous problems may arise under the OFPA.

Prior to *American Meat Institute*, Michigan law required grocery stores to place a small sign above refrigerator cases containing sausage and other processed meats.[218] The sign indicated that although the sausage in the case met federal standards, the product did not meet Michigan's safety standards for sausage.[219] The sign, required by state law, was prepared by the grocery store and not the sausage producer.[220] The district court held that the Michigan state law requiring this sign was an impermissible burden on interstate commerce.[221] The judge found that the state could not verify any increased risk to the consumer if the sign requirement was

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212. Stone, *supra* note 137, at 319. The trend in court decisions is that any written materials that leave the distribution point with the food and reach the point of consumer purchase simultaneously therefore "accompany the product" and are construed as labeling. *Id. See also* United States Department of Agriculture, Policy Memo 114 (July 6, 1988) (stating the USDA's belief that it has regulatory jurisdiction over any informational materials that accompany the food products at the point of purchase).

213. *See* Stone, *supra* note 137, at 319-20.

214. *Id.* at 320. *See* Kordel v. United States, 335 U.S. 345 (1948) (holding that any information on a food label constitutes a form of advertising); United States v. Research Laboratories, Inc., 126 F.2d 42, *reh'g denied* (9th Cir. 1942) (finding that most labeling can be construed as advertising).

215. *Kordel*, 335 U.S. at 351 (holding that "[e]very labeling is in a sense an advertisement"); *Research Laboratories, Inc.*, 126 F.2d at 45 (holding that "most, if not all labeling is advertising").

216. Stone, *supra* note 137, at 320.

217. 550 F. Supp. 285 (W.D. Mich. 1982), *aff'd on other grounds sub. nom.*; American Meat Institute v. Pridgeon, 724 F.2d 45 (6th Cir. 1984) (holding that a placard required by Michigan law indicating the potential for bacterial contamination in meat products does not further any legitimate state interest and therefore is pre-empted by the federal Wholesome Meat Act).

218. MICH. STAT. ANN. § 12.964(4.1) (Callaghan 1980); MICH. COMP. LAWS ANN. § 289.584(a) (West 1981). The relevant language of the statute states: "The identification shall consist of a sign . . . with the heading to read 'The following products do not meet Michigan's high meat ingredient standards but do meet lower federal standards', printed in letters not less than 1-½ inches high." *Id.*

219. MICH. STAT. ANN. § 12.964(4.1) (Callaghan 1980); MICH. COMP. LAWS ANN. § 289.584(a) (West 1981).

220. *American Meat Institute*, 550 F. Supp. at 288.

221. *Id.*

abolished.[222] Furthermore, the court found that the state had reasonable nondiscriminatory regulatory alternatives available to it that would protect the state's interest in consumer safety.[223] This decision suggests that courts will construe more stringent state labeling requirements as impermissible burdens on commerce and will sustain such statutes only with a verified showing of legitimate state health and safety concerns.[224]

Finally, the committee report notes that a state may not discriminate against the organic foods of another state if the latter's product meets the federal organic labeling requirements.[225] This provision of the OFPA is the most important to the federal goal of ensuring that state regulations do not impede the interstate commerce of organic food.[226] As previously noted,[227] the twenty-two states with organic certification programs already impede some commerce,[228] and the potential for further conflict only increases as states continue to legislate in this area.[229] Notably, however, this provision of the report contains an exception for health and safety issues that further clouds the issue of when state regulations will be preempted under the OFPA.[230]

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222. *Id.* at 294 (stating that "[d]efendants have not shown any adverse impact on public health under federal regulation, or that Michigan products pose less risk to the consumer").

223. *Id.* The judge did not elaborate on what alternatives the state might use. *Id.*

224. *Id.*

225. S. REP. NO. 357, *supra* note 4, at 295. The report states that "most importantly, a state is prohibited from discriminating against another state's organic products if those products bear the USDA 'organically produced' label." *Id.*

226. S. REP. NO. 357, *supra* note 4, at 289-91, 295 (describing the need to have unrestricted interstate commerce because of the growth potential shown for the organic food market).

227. *See supra* notes 187-226 and *infra* notes 228-35 and accompanying text. *See also* S. REP. NO. 357, *supra* note 4, at 289.

228. *See supra* notes 52-53 and accompanying text. *But see* OR. REV. STAT. § 616.416 (1991). This provision of the Oregon organic food labeling law states that "[a]ll complying foods must be labeled with a federal Food and Drug Administration code of food requirements, Title 21, part 101 [sic]." *Id.* The Oregon statute refers to 21 C.F.R. §§ 101.1 to 101.18 (1991) (describing the general provisions for the federal food labeling laws). *See also* OR. REV. STAT. § 616.416(2) (1991) (setting allowable organic food pesticide residues based on the lowest of three tolerance levels, one of which is the federal EPA tolerance level and another which is the action level of the federal FDA).

229. Bones, *supra* note 33, at 5 (describing the two primary purposes of California's new Organic Foods Act of 1990: to enforce the existing state standards, and to clarify the enforcement roles and authority of the California Department of Health Services and the California Department of Food and Agriculture).

230. S. REP. NO. 357, *supra* note 4, at 295-96. The report states:

> The only exception to the above rule concerns state public health and safety actions. Nothing in this title should be construed as pre-empting a state's right to protect its citizens from health and safety threats. For example, the committee intends [that] when a state determines that a substance is dangerous and prohibits the use of that substance in all food production—conventional or organic—then such state action applies to organic food.
>
> The committee believes that this title strikes a delicate balance between a state's right to develop its own organic program and the national need for consistency in labeling and standards.

Id.

Further resolution of the federal pre-emption issue may be possible by examining the congressional findings included with the OFPA.[231] The findings included in the Senate version of the OFPA, however, are not conclusive or even suggestive about the extent of state authority to promulgate label regulations.[232] The problems of consumer confusion and burdens on interstate commerce are both described,[233] but the language does not elaborate on how these two issues should be used to divide regulatory power between the federal and state governments.

Since Congress did not express the desired extent of federal pre-emption under the OFPA, the USDA should promulgate regulations under the OFPA that strongly pre-empt state regulations. Pursuing the goal of strong pre-emption will give the USDA the lead it needs to assure uniform organic food labeling.[234] Strong OFPA regulations will ensure a proper balance between the states and the federal government that will dictate the requisite elements for labels while still protecting consumers and interstate commerce.[235]

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231. Mitchell, *supra* note 1, at 139 (stating that the legislative history, including the findings of Congress, identified that the primary purpose of the Food, Drug, and Cosmetic Act was the protection of consumers).

232. S. 2830, 101st Cong., 2d Sess. § 1602 (a)(1)-(5). The relevant language of the OFPA's precursor states that:

> Congress finds that-
> (1) consumers are demanding fresh and processed foods produced using organic methods;
> (2) organic farming methods may promote sustainable agricultural practices;
> (3) existing rules that govern the labeling of fresh and processed food do not provide national standards for organic food production;
> (4) while some regional variation is necessary and desirable, current State and private organizations have such differing organic definitions, standards, and certification procedures that interstate commerce is hampered; and
> (5) there is a need for national program designed to standardize and promote the production of food through organic, sustainable farming methods.

Id.

Note that these findings were not recorded in the final version of the OFPA. *See generally* H.R. CONF. REP. NO. 916, *supra* note 4, at 1174-75.

233. *Id.*

234. *See* Taylor, *supra* note 28, at 308. Taylor notes that another federal agency, the FDA, realizes the value of state cooperation in label regulation, but also recognizes the value of national uniformity. *Id.* First, uniformity guarantees a consistent level of protection for consumers regardless of state regulations. *Id.* Second, the food industry's costs of compliance are minimized and sales are not discouraged due to different regulations. *Id.* Finally, strong pre-emption of state regulations insures that the federal agency will have the final jurisdiction on labeling issues. *Id. See also* Nyberg, *supra* note 3, at 236. Nyberg likens the entire federal food labeling regulatory system to an unstable canoe. *Id.* The suggested solution is to strengthen the entire system by adopting the strong pre-emptive language of the Federal Meat Inspection Act, which expressly prohibits the states from adopting any language that is "in addition to or different from" the federal requirements, into both the Food Drug and Cosmetic Act and the Fair Labeling and Packaging Act. *Id.*

235. *See* Mitchell, *supra* note 1, at 141. State action is not only allowed when the federal government has failed to regulate an area, but is "essential to consumer protection." *Id. See also* Stone, *supra* note 137, at 323. State and federal regulation is complementary in some situations, and an "[i]nformal division of labor often occurs in an effort to adequately monitor food labeling and advertising practices."

2. *Conflict with Other Federal Labeling Regulations*

In addition to the state pre-emption conflict created by the OFPA, the legislation also perpetuates legal conflicts between the proposed duties of federal agencies and the existing federal labeling requirements.[236] Under the OFPA, the USDA has the sole federal authority for regulation, review, and enforcement of the organic food labels.[237] For all other foods, however, the labeling regulatory authority[238] is shared between the USDA and the FDA.[239] The USDA has authority over labels on meat under the Federal Meat Inspection Act,[240] over labels on poultry under the Poultry Products Inspection Act,[241] and over labels on eggs under the Egg Products Inspection Act.[242] In contrast, the FDA regulates the labels on all other foods.[243] For the purpose of understanding the limits of the FDA's regulatory scope, it is instructive to examine the labeling covered by the Federal Food, Drug, and Cosmetic Act[244] and the Fair Packaging and Labeling Act.[245] Both Acts designate the FDA as the enforcement agency for "foods."

The Federal Food, Drug, and Cosmetic Act defines food as "(1) articles used as food or drink for man or other animals, (2) chewing gum, and (3) articles used for components for any such article."[246] Further, the Act defines raw agricultural commodities as "any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing."[247] Given the level of technology of modern food processing[248] and the increasing level of biotechnology[249] used in food production, such a broad definition of food gives the FDA ample authority to regulate food products. Because organic

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Id.

236. *See supra* notes 151-55 and accompanying text.

237. OFPA, *supra* note 85, § 2104(a)-(d) (describing the powers of the Secretary of Agriculture to implement the OFPA).

238. T. BURKE AND D. DAHL, *supra* note 2, at 30 (noting that the definitions for label and labeling are "virtually the same" in both the Federal Meat Inspection Act (enforced by the USDA) and the Federal Food, Drug, and Cosmetic Act (enforced by the FDA)).

239. T. BURKE & D. DAHL, *supra* note 2, at 7-19 (describing basic operation of USDA and FDA regulation of food safety under consumer-oriented legislation).

240. 21 U.S.C. §§ 601-695 (1988).

241. 21 U.S.C. §§ 451-470 (1988).

242. 21 U.S.C. §§ 1031-1056 (1988).

243. 21 U.S.C. §§ 301-393 (1988) (the Federal Food, Drug, and Cosmetic Act is administered by the FDA); 15 U.S.C. §§ 1451-1461 (1988) (the Fair Packaging and Labeling Act is enforced by the FDA). *See also* Nyberg, *supra* note 3, at 230 (describing the division of authority between the FDA and the USDA and noting that this bifurcated regulatory system defeats the congressionally recognized goal of uniformity in food labeling).

244. 21 U.S.C. §§ 301-393 (1988).

245. 15 U.S.C. §§ 1451-1461 (1988).

246. 21 U.S.C. § 321(f) (1988).

247. 21 U.S.C. § 321(r) (1988).

248. T. BURKE & D. DAHL, *supra* note 2, at 32.

249. Hamilton, *supra* note 174, at 579 (describing biotechnology and genetic engineering for food production as one of the most significant areas for legal development in the future, primarily because of the blurred line between natural and artificial components that biotechnology can create).

foods fall within this definition, the FDA has apparent jurisdiction over organic label regulation. The OFPA mentions only a limited role, however, for the FDA.[250] This omission can be remedied by the USDA promulgation of regulations empowering the FDA with a significant role in the enforcement of OFPA provisions.

The goal of uniformity is further undercut because the current USDA and FDA regulations for approval of food labels are not consistent.[251] The USDA requires pre-approval of all labels within its regulatory sphere.[252] Thus, for any meat,[253] poultry,[254] or egg product[255] the accompanying label must be approved by the USDA Food Safety and Inspection Service before the food can be sold. Conversely, the FDA may only review labels after the food product is marketed.[256] Some of this inconsistency may be eliminated by changes in label regulation as the FDA revises its own regulatory scheme, but the inconsistency should nonetheless be addressed in the OFPA regulations.[257]

Although the omission of the FDA from the OFPA and the difference in procedures weakens the pre-emptive effect of a uniform federal regulatory system, this difference could be used to support strong federal pre-emption under the OFPA if the regulations were drafted correctly. Under regulations contemplating federal cooperation, the USDA would retain its power to review all organic labels, allowing it to screen any state labels before approving them.[258] The regulations would grant the FDA the authority to enforce the federal label requirements for organic foods, much as it does now for other foods. Because the FDA already has the authority to

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250. OFPA, *supra* note 87, § 2106(c)(1) & (2). The only mention of potential FDA involvement, albeit in an indirect manner, is in the exemption for processed foods wherein the Secretary "in consultation with . . . the Secretary of Health and Human Services" decides whether the word organic may appear on the label or ingredient panel of processed foods containing at least 50% organically produced ingredients. *Id.*

251. Nyberg, *supra* note 3, at 230 (describing the bifurcation of jurisdiction and label approval process between the USDA and the FDA). *See, e.g.*, FDA Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421 (1991) (to be codified at 21 C.F.R. pts. 5, 101, 105) (proposed Nov. 27, 1991) (outlining FDA proposal to revise substantially its food labeling regulations, including regulations for the term "natural").

252. Stone, *supra* note 137, at 315 (describing in brief the process for label approval for USDA regulated foods, including meat, poultry, and eggs).

253. 9 C.F.R. § 317.4 (1990) (defining the Federal Meat Inspection Act labeling approval process).

254. 9 C.F.R. § 381.132 (1990) (defining the Poultry Products Inspection Act labeling approval process).

255. 7 C.F.R. § 59.411 (1990) (defining the Egg Products Inspection Act labeling approval process).

256. *See* T. Burke & D. Dahl, *supra* note 2, at 13 (describing the enforcement authority of the FDA under the Fair Packaging and Labeling Act).

257. Precedent exists for long term cooperative efforts between the USDA and the FDA. *See, e.g.*, Notice of Ten-Year Comprehensive Plan for the National Nutrition Monitoring and Related Research Program, 56 Fed. Reg. 55,716 (1991) (request from both the USDA and the FDA/Dept. of Health & Human Services for comments on the multi-agency program).

258. *See* OFPA, *supra* note 89, § 2108(a) & (b). Such a construction would be in keeping with the provisions of subsections (a) and (b). These provisions require that any state labeling requirements must be approved by the Secretary of Agriculture.

investigate and prosecute label violations for all foods, it is a logical progression to give that agency the same power for organic food.[259] This system would strengthen the federal regulation of organic foods labeling, and would give states, consumers, and industry groups recourse to the FDA's enforcement infrastructure to pursue alleged violations of the OFPA.[260]

Although the inconsistencies between the regulatory powers of the FDA and the USDA may be reconciled by properly drafting the regulations, the potential for conflict remains even within the USDA's regulatory scope.[261] Currently, the USDA has regulatory jurisdiction over meat, poultry, and egg products,[262] but some of this labeling authority law conflicts with the OFPA. Although only one example of this type of inherent contradiction is described in the following section,[263] the USDA must scour its current regulations for other possible conflicts. Only by removing such inconsistencies will the USDA be able to create a strong regulatory system for organic foods labeling.

3. *The USDA's "Natural" Label*

Prior to the passage of the OFPA, the USDA was the only federal agency that

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259. *See* Nyberg, *supra* note 3, at 236 (noting that since 1983 the USDA has moved toward the FDA procedures of investigating and prosecuting label violations, instead of requiring pre-approval of labels as it has in the past). *See also* 21 U.S.C. § 607(a) (1988). The relevant language provides:

> There shall be consultation between the [Secretary of Agriculture] and the Secretary of Health & Human Services prior to the issuance of such standards under [either the Federal Meat Inspection Act or the Food Drug and Cosmetic Act] relating to articles subject to this chapter to avoid inconsistency in such standards and possible impairment of the coordinated effective administration of these Acts.

Id.; 21 U.S.C. § 457(b) (providing the same for the poultry product regulation regime).

260. Nyberg, *supra* note 3, at 236 (stating that the USDA's gradual adoption of procedures like those used by the FDA for investigating and prosecuting label violations furthers the goal of national uniformity). Note that other labeling statutes have specifically addressed the concurrent jurisdiction. *See* 21 U.S.C. § 467(a) (1988), which provides:

> Poultry and poultry products shall be exempt from the provisions of the Federal Food Drug and Cosmetic Act to the extent of the application or extension thereto of the provisions of this chapter, except that provisions of this chapter shall not derogate from any authority conferred by the Federal Food Drug and Cosmetic Act prior to August 18, 1968 [the date of this amendment to the Poultry Products Inspection Act].

Id. See also 21 U.S.C. § 679(a) (1988) (providing the same for the Meat Inspection Act). *But see* 21 U.S.C. § 1052(c) (stating that the provisions of the Egg Products Inspection Act do not affect the applicability of the Food Drug and Cosmetic Act or the Fair Packaging and Labeling Act, nor do the provisions affect the authority of other federal agencies to regulate labeling).

261. *See, e.g.*, Shirley, *supra* note 46, at 31. The article notes that pheromones, which are synthetic replicas of naturally occurring substances, are widely accepted and will probably be allowed for organic producers because they are not applied directly to the food. *Id.* Nonetheless, pheromones may be subject to other USDA biotechnology regulations because they are manufactured. Fry, *Plant Microbes: Beneficial and Detrimental*, in RESEARCH FOR TOMORROW 125-26 (J. Crowley ed. 1986).

262. *See supra* notes 235-37, 247-50 and accompanying text.

263. *See infra* notes 264-300 and accompanying text.

regulated labels for naturally produced foods.[264] The USDA recognized a label category for organic-type foods when it promulgated rules for "natural" meat and poultry products.[265] A "natural" meat or poultry product is free from artificial ingredients, including chemical preservatives, artificial colorings, artificial flavorings, and other synthetic ingredients, and is only minimally processed.[266] Additionally, any label using "natural" must include the phrases "no artificial ingredients" and "only minimally processed."[267] The legal intent of this language requirement was to further consumer knowledge, but the "natural" label was not designed to co-exist with the organic label. Consumer confusion over natural and organic foods will only increase after implementation of the OFPA labeling requirements if this inconsistency is not resolved in the regulations.[268]

The OFPA applies to the same meat and poultry products that qualify for the "natural" label,[269] and it applies to some of the same types of production techniques.[270] Conflict arises because a single food product could carry both the organic

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264. Mitchell, *supra* note 1, at 125 (noting that the FDA never issued and refused to issue general label regulations for foods that were "natural" or "organic"). *See also supra* note 8 (describing the USDA's tacit recognition of organic food certification by modifying pear grading requirements so that California organic pear producers would not be forced to take a lower price for their pears that suffered from harmless discoloration).

265. Brewington, *supra* note 175, at 329 (describing the USDA's approach to labeling for meat and poultry products promoted as "lean," "lite," "natural," and produced using drug-free and humane methods).

266. Brewington, *supra* note 175, at 329 (noting that neither the product as a whole nor its ingredients may be more than minimally processed, with 'minimal processing' defined as the traditional processes used to make a food edible or safe for human consumption, and includes smoking, cooking, freezing, drying, or fermenting, and physical processes that do not fundamentally alter the raw product, such as grinding and crimping; minimally processed does not include techniques such as solvent extraction, acid hydrolysis, and chemical bleaching) (citing Standards and Labeling Div., Food Safety and Inspection Serv., Policy Memo 55 (Nov. 22, 1982)).

267. Brewington, *supra* note 175, at 329.

268. McDonald, *supra* note 55, at 64. Mel Coleman, a marketer planning to distribute both natural and organic beef in twenty-four states, complained that natural no longer carries any significant meaning for the consumer. *Id.* Coleman fears that regulations could be diluted so much that organic would lose its meaning for the consumer, yet he also fears an organic labeling requirement that is too stringent. *Id.*

269. OFPA, *supra* note 9, § 2110(a). The livestock provision states that "[a]ny livestock that is to be slaughtered and sold or labeled as organically produced shall be raised in accordance with this title." *Id.*

270. OFPA, *supra* note 9, § 2110(c) & (d). The production practices and health care practices are outlined as:

> (c) PRACTICES.—For a farm to be certified under this title as an organic farm with respect to the livestock produced by such farm, producers on such farm—
> (1) shall feed such livestock organically produced feed that meets the requirements of this title;
> (2) shall not use the following feed—
> (A) plastic pellets for roughage;
> (B) manure refeeding; or
> (C) feed formulas containing urea; and
> (3) shall not use growth promoters and hormones on such livestock, whether

and the "natural" labels, either individually or in combination.[271] Hypothetically, an organically produced turkey could carry the federal organic label, but not qualify for the "natural" label because the processor used more than "minimal processing" on the turkey. Similarly, ground beef could carry the federal "natural" label, but not the organic label because the producer fed the steer a non-registered compound.[272] Nothing in the current version of the OFPA addresses this conflict between labels,[273] yet the bill purports to seek consistency in consumer information.[274]

The committee report only mentions this potential conflict in a tangential manner.[275] Unless the USDA simultaneously undertakes an extensive consumer education campaign with the OFPA, the inconsistency is likely to create more problems for consumers and marketers alike.[276] Furthermore, state organic label requirements will exacerbate the problem. A meat or poultry product could carry both federal labels, as well as the state organic label.[277] Nothing in the OFPA proposes a clear means of resolving this conflict of labels. In previous federal food

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> implanted, ingested, or injected, including antibiotics and synthetic trace elements used to stimulate growth or production of such livestock.
>
> (d) HEALTH CARE.—
>
> (1) PROHIBITED PRACTICES.—For a farm to be certified under this title as an organic farm with respect to the livestock produced by such farm, producers on such farm shall not—
>
> (A) use subtherapeutic doses of antibiotics;
>
> (B) use synthetic internal paraciticides on a routine basis; or
>
> (C) administer medication, other than vaccinations, in the absence of illness.
>
> (2) STANDARDS.—The National Organic Standards Board shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced.

Id.

271. *See* McDonald, *supra* note 55, at 64 (stating that Coleman's Natural Meats sells both natural and organic beef in California, Colorado, Massachusetts, Oklahoma, and Texas, and that plans are underway to sell both types of meat in twenty-four more states).

272. OFPA, *supra* note 9, § 2118(a). The relevant language states "[t]he Secretary shall establish a National List of approved and prohibited substances that shall be included in the standards for organic production." *Id.*

273. S. REP. NO. 357, *supra* note 4, at 302 (stating, however, that current USDA regulations "explicitly prohibit meat and poultry from being labeled as organically produced" but making no cross reference to the "natural" label provided by the USDA).

274. OFPA, *supra* note 74, § 2102 (reporting that one purpose of the OFPA is to "assure consumers that organically produced products meet a consistent standard").

275. S. REP. NO. 357, *supra* note 4, at 303. The report states "[n]othing in this title should alter or add to the responsibilities of the USDA in regard to meat and poultry inspection." *Id.* This statement apparently came without the knowledge of the conflict created by the OFPA with the USDA's current "natural" label for meat products. *See also* H.R. CONF. REP. NO. 916, *supra* note 4, at 1177-78 (discussing House amendment for the animal production practices regulated by the OFPA).

276. *See* McDonald, *supra* note 55, at 64. The OFPA, if supported by the appropriate regulations, will both "pave the way for companies that are serious about [providing organic foods]" and guarantee the consumer that "the product is documented, certified, and verified by a third party." *Id.*

277. OFPA, *supra* note 89, § 2108(b) (describing the additional label that a state may affix to organic foods under a federally-approved state certification program).

label regulations such an omission led to litigation to resolve the federal/state labeling conflicts.[278] When it promulgates the regulations for the OFPA, the USDA should delineate the interaction of the "natural" and the organic labels to avoid confusion with state organic labels. Such action will also create a stronger preemptive effect, so proponents of state regulation cannot argue that the federal system is weak because of its inconsistencies.[279]

The federal conflict is even more apparent upon examination of another USDA labeling provision regulating animal production claims.[280] Under this provision, the USDA allows livestock and poultry producers to make label claims based on the production techniques employed. The label states that the animals were raised without the use of antibiotics or growth-stimulating hormones.[281] This type of label claim must be supported by testimonials and affidavits to provide assurances of the production practices.[282]

Additionally, the producers must submit detailed and specific information about the production methods to ensure compliance with label claims.[283] The provision allows the label to include information about the non-use of a production practice,[284] but only when that practice is common to the industry. For instance, most commercial beef feedlot operators implant growth hormones in steers and heifers as a standard practice.[285] Therefore, a producer who does not implant growth hormones could disclose that information on the label.

Section 2106(a)(1)(B) of the OFPA prohibits anyone from using a label that "implies, directly or indirectly, that such product is produced . . . using organic methods."[286] The USDA's "natural" label indicates that synthetic chemicals were

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278. *See* Jones v. Rath Packing Co., 430 U.S. 519 (1977) (holding that § 1211 of the California Business and Professions Code and Article 5, § 2930 of Title 4 of the California Administration Code were pre-empted by the Federal Meat Inspection Act); Committee for Accurate Labeling & Mktg. v. Brownback, 665 F. Supp. 880 (D. Kan. 1987) (holding that the Kansas Artificial Dairy Products Act, Kan. Stat. Ann. § 65-761 (1982), violated the Supremacy Clause of the Constitution).

279. *See* Nyberg, *supra* note 3, at 236-37. The USDA and the FDA vary in their procedural requirements for food labeling, in their approach to investigation and enforcement of labeling infractions, and in what information they believe should be on the label. *Id.* The differences result in a weaker federal regulatory system that needs to be strengthened. *Id.* at 237.

280. *See* Shirley, *Where's the Organic Beef*, NEW FARM, Sept./Oct. 1991, at 32. The controversy surrounding the standards for organic livestock production is sufficiently unresolved that regulations under OFPA for livestock may be delayed for several more years. *Id.* Questions concerning livestock feeds, medications, and living standards must be answered before the national standards can be implemented. *Id. See also* Brewington, *supra* note 175, at 329-30 (describing how some livestock and poultry producers proceeded a few steps beyond the basic "natural" labeling requirement by raising livestock with entirely chemical-free diets in humane environments).

281. *See* Jorgensen, *More Money Without Magic*, BEEF TODAY, Oct. 1990, at IRM-15 (describing production practices that rely on implanted hormones and subtherapeutic levels of antibiotics to increase the animal's daily rate of gain).

282. Brewington, *supra* note 175, at 329-30.

283. Brewington, *supra* note 175, at 329-30.

284. For example: "This beef was raised without the use of implanted growth hormones."

285. *See* Jorgensen, *supra* note 281, at IRM-15 (describing commonplace feedlot practices to enhance the rate of gain for every pound of feed the animal consumes).

286. OFPA, *supra* note 86, § 2106(a)(1)(B).

used minimally or not at all.[287] The underlying tenet of organic production practices is minimal or nonexistent chemical use,[288] a production protocol similar to that used for "natural" foods.[289] Given the similarity between the production methods, it is possible that a consumer will assume that the "natural" label implies the meat or poultry was raised using organic methods. Nothing in the current legislation addresses this conflict, but the USDA must clarify the distinction between "natural" and organic to avoid consumer confusion.

The similarity of these two labels is sufficient to permit abuse of the label information in the food industry. This type of abuse and misuse has already occurred at the state level.[290] Because the requirements for the "natural" label are much easier to attain and less expensive[291] than the organic certification requirements,[292] a meat or poultry producer can exploit the similarity for financial benefit. For instance, a beef producer marketing ground beef is faced with the choice of using the USDA natural label or the OFPA organic label. If the producer elects to use the natural label, there are few requirements. The producer must provide an affidavit supporting the production techniques used, supply relevant records, and attest to the fact that the food contains no artificial ingredients.[293] If that same producer wants to label the beef as organically produced, however, the requirements are much more stringent.[294]

In addition to the much narrower range of possible production practices available under the OFPA, the producer must have his plan certified, feed only certified organic grain and forages to the cattle, ship the cattle to a certified organic slaugh-

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287. Standards of Labeling Div., USDA Food Safety and Inspection Serv., Policy Memo 55 (Nov. 22, 1982) (indicating that for use of the "natural" label the food must contain no artificial ingredients and have been subject to only minimal processing).

288. *See supra* note 270 (describing the OFPA provisions for livestock production and health care practices).

289. *See* Bones, *supra* note 33, at 5-6. A principal difference between the "natural" and the organic livestock production protocols concerns feed. *Id.* Organically produced livestock must be fed organically produced grain and feedstuffs [which are also more expensive than regular livestock feedstuffs], while naturally produced livestock may be fed conventionally produced grain and feedstuffs. *Id.* Also, many current state organic labeling requirements allow organic livestock to be fed grains up to 40% of final bodyweight in conventional feed, whereas the federal labeling standard requires 100% organically produced grains and feedstuffs. *Id.*

290. *See* CALIFORNIA CERTIFIED ORGANIC FARMERS, INC., 1989 CERTIFICATION HANDBOOK v, vi (1989) (noting that as California was beginning to enforce its own Organic Food Law, many examples of "unsubstantiated and incorrect claims" appeared on the market).

291. *Compare* FSIS Policy Memo 55, *supra* note 287 (requirements for use of "natural" label) *with* OFPA, *supra* note 9, §§ 2106-2107 (general requirements for use of organic label). The requirements for the "natural" label only need an affidavit that the producer has complied with the production standards, while the organic label program requires much more in the way of certification from the producer.

292. OFPA, *supra* note 9, § 2107(a)(1)-(11). The producer must keep comprehensive records of all production inputs, produce all food in accordance with a certified organic farm plan, test the food for residues of chemicals, and submit to random inspections by the certifying agent. *Id.*

293. *See supra* notes 264-74 and accompanying text.

294. *See supra* note 270 (describing livestock production and health care practices under the OFPA).

tering facility, test the finished carcasses for residues, and submit to an annual USDA inspection of records and facilities.[295] These requirements create extra costs to the organic beef producer that the natural beef producer does not incur.[296] Yet, in the grocery store display case, the natural beef would be sold next to the organic beef for nearly the same price with little consumer realization of the actual differences.[297] The producer can enjoy the price premium for chemical-free food without complying with the more burdensome requirements for the organic label.[298]

The federal legislation does not mention this "free rider" problem, yet it is certain to arise. With a stronger pre-emptive provision in the regulations, the Organic Certification Program could eliminate this type of label confusion problem on the federal level.[299] Moreover, by drawing a clear line between organic and other label claims, the federal government can send a strong signal to the states that it will take the lead role in regulating organic foods labeling.[300] A clear and uniform federal approach to organic foods labeling would preclude states from creating further regulatory confusion.[301] Prior to the passage of the OFPA, the confusion surrounding various health claims on labels led to inquiries from consumer groups and industry representatives,[302] and encouraged state regulation.

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295. OFPA, *supra* note 9, § 2107(a)(1)-(11) (listing the general requirements for an organic certification program).

296. *Organic Beef for Sale, But Don't Call It Organic*, SUCCESSFUL FARMING, Dec. 1990, at C4 (noting that Mel Coleman, who markets both natural and certified organic beef, sets the retail price for organic beef about 15% higher than the price for natural beef because of the higher cost of production).

297. *Id.* Mel Coleman points out that although the Coleman organic beef is priced 15% higher than the Coleman natural beef, there is nothing different in the methods Coleman uses to raise the cattle except the certification process for the organic beef. *Id.* Because no national standards exist, however, it is possible for others to produce natural beef using a different, and less costly, method than that used by Coleman for his natural beef. *See generally* McDonald, *supra* note 55, at 64 (noting that the definition of natural has lost any consistent meaning for the food consumer); Patrico, *Dakota Lean*, TOP PRODUCER, May/June 1991, at 22-24 (describing the production method for the "Dakota Lean" brand of beef).

298. *See generally* OFPA, *supra* note 9, § 2109 (prohibited crop production practices and materials), § 2110 (animal production practices and materials), § 2111 (handling requirements), § 2112 (additional guidelines), and § 2114 (organic farm plan).

299. *See* Kirschbaum, *supra* note 3, at 199 (describing how the FDA's low priority for label regulation has prompted many states to increase their own regulatory activities); Silverglade, *supra* note 160, at 144 (stating that the Reagan administration's general deregulation policy combined with increased consumer anxieties about food safety led to more intensive state regulation of food safety).

300. *See* Mitchell, *supra* note 1, at 125 (noting that one reason underlying state regulation of organic food labeling was the FDA's inaction and its failure to distinguish label requirements for various health claims). *See also* Harrington, *The Promise in Labeling*, BEEF TODAY, Aug. 1991, at 32 (reporting the efforts of the USDA and the FDA to strengthen and harmonize food labeling regulations).

301. *See* Nyberg, *supra* note 3, at 233 (stating that the fragmented development of federal labeling legislation is responsible for the uncertainty about the degree that it pre-empts state regulations). *See also supra* note 277-78 and accompanying text.

302. Brewington, *supra* note 175, at 326 (noting that because the federal government failed to establish standards for these types of label claims, many companies included health, nutrition, and natural claims in an effort to capitalize on a growing segment of the food market).

IV. Resolving the Conflict: Stronger Federal Pre-emption

Congress, responding to pressures from the food industry, consumer protection groups, and several farm production groups, has enacted the OFPA to regulate the growing organic food market.[303] The OFPA permits state regulation of labels,[304] but nothing in the language of the legislation or the accompanying committee report[305] clearly indicates how much regulatory power the states may exercise. In the past, other federal label regulations with similar ambiguities have led to litigation and state uncertainty.[306] The USDA should take these existing regulations into consideration when drafting the new regulations to support the OFPA,[307] and set a goal of strong pre-emption. Because the OFPA has set no definitive limits on the extent of pre-emption, the USDA should use this flexibility to arrive at a strong standard when it promulgates the OFPA regulations. If the federal regulations clearly pre-empt state regulation, the following advantages will be secured.[308]

A. Advantages of Resolving Federal/State Regulatory Conflict in Favor of the Federal Government

The food industry[309] and its consumers[310] will both benefit from strong federal pre-emption of organic foods labeling. Both groups have complained about the lack of national organic foods standards.[311] To ensure that these complaints are

303. S. REP. NO. 357, *supra* note 4, at 290-91 (describing the various producer, industry, and consumer groups that requested Congress implement a national organic foods law, including the National Association of State Departments of Agriculture, the American Farm Bureau Federation, and the Center for Science in the Public Interest).

304. OFPA, *supra* note 89, § 2108 (describing the process through which states may promulgate their own regulations for organic foods under the approval of the Secretary of Agriculture).

305. S. REP. NO. 357, *supra* note 4, at 295-96 (outlining the proposed limitations on state organic foods regulatory systems).

306. Nyberg, *supra* note 3, at 232-33 (discussing the legal issues and problems involving federal pre-emption).

307. OFPA, *supra* note 9, § 2122(a). The relevant language states "[n]ot later than 540 days after the date of enactment of this title, the Secretary shall issue proposed regulations to carry out this title." *Id.* If the money is available to the USDA, the preliminary regulations should be available in May, 1992. Shirley, *supra* note 46, at 31.

308. *See* Nyberg, *supra* note 3, at 237 (concluding that "[s]trong federal pre-emption of all aspects of food labeling regulation would serve the nation's best interests, whether in international, national, state, or local commerce").

309. *See* S. REP. NO. 357, *supra* note 4, at 290-91 (describing how uncertainty about organic label standards has a chilling effect on the incentive for the marketing system, from producers through retailers, to expand the availability of organic foods). *See also* McDonald, *supra* note 55, at 64 (describing one organic producer's estimate that a uniform national certification program will cut his certification expenses by half).

310. *See* Bones, *supra* note 33, at 6 (noting that without reliable standards, consumers question the integrity of labels claiming the food is truly organic).

311. Fishman, *Produce Industry Wants National Organic Law*, NEW FARM, Sept./Oct. 1989, at 34-35 (describing early efforts of the United Fresh Fruit & Vegetable Association to lobby for a national organic food law); Shirley, *supra* note 46, at 31-32 (quoting remarks from Roger Blobaum, director of the safe food program at the Center for Science in the Public Interest).

adequately answered, the USDA must be given the authority to impose strong regulations for the OFPA. With such regulations in place, organic foods will gain greater acceptance from both the food industry and consumers. The food industry will benefit from greater consistency in the standards it must meet by improved interstate commerce.[312] Consumers will buy organic food with a greater sense of confidence when they know that the food certified as organic meets uniform standards regardless of where it was grown.[313]

The food industry, from producers to processors to marketers, will benefit from a strong federal organic labeling scheme by the improved flow of interstate commerce. Some supermarket chains have expressed frustration with marketing organic foods because they can not obtain a sufficiently consistent supply to satisfy consumer demand.[314] Additionally, retail grocers have noted consumer skepticism about what really constitutes organic food, especially in light of the higher prices for these products.[315] A strong federal labeling scheme would allay many of these problems, and provide a consistent means of facilitating the interstate movement of organic foods.

Many of the common questions consumers currently ask—such as "What does organic mean?," "Does organic food spoil faster than conventional food?," and "Why does organic food cost more than conventional food?"[316]—would be answered under a strong labeling scheme. Although the USDA and grocers would still have to undertake consumer education campaigns,[317] a uniform national standard for labels would set the foundation for consumer awareness.[318] Consumers would know more about the definition of organic by the presence of the label issued under consistent production standards. Similarly, consumers would be sure that food carrying the label is genuine organic food and not "natural," "ecologically grown food," or "wild food" as is currently the case.[319] With a strong federal labeling scheme, consumer confidence in organic foods and in the safety of the food supply in general should

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312. *See* Y HUI, 2 UNITED STATES FOOD LAWS, REGULATIONS, AND STANDARDS 605-65 (1986) (describing food industry trade associations and their goals, including the goal of lobbying for consistent standards for the sake of efficiency). *See also* H. GUITHER, THE FOOD LOBBYISTS 53-86 (1980). Many of the agribusiness and food industry lobbying groups oppose regulation in most forms, but when they do face regulation they prefer a uniform standard. *Id.* As one group stated, they wanted the USDA "to establish an evenhanded policy toward all segments of the food and agriculture community." *Id.* at 56.

313. *See* McDonald, *supra* note 55, at 64 (describing consumer perception of what organic means).

314. S. REP. NO. 357, *supra* note 4, at 290-91.

315. *See* Fishman, *supra* note 311, at 34.

316. Kraus, *Basic Questions on Organic Produce*, The San Francisco Chronicle, Sept. 12, 1990, at 7, col. ZZ (outlining many of the common questions consumers ask about organic foods).

317. *See* H. GUITHER, *supra* note 312, at 97 (noting that the USDA Extension Service has been criticized for its ineffective consumer nutrition education, but consumer groups have attempted to improve the USDA efforts).

318. *See* Y. HUI, *supra* note 182, at 73 (noting that labeling requirements help assure consumers that they receive what the label states, but that education is needed to ensure that consumers know the different combinations or recipes that manufacturers may use).

319. S. REP. NO. 357, *supra* note 4, at 289-90 (noting that the national organic label will create consistent expectations for consumers about what organic means, and the legislation will complement other federal efforts to clarify the meanings of label provisions).

improve.[320]

B. Potential Disadvantages of Stronger Federal Pre-emption of Organic Food Labeling

A strong federal regulatory system has some potential disadvantages, or viewed from another perspective, strong state regulations have potential advantages.[321] These possible advantages will not necessarily be lost through a stronger OFPA if the USDA recognizes them while it promulgates regulations for the OFPA. Using this approach, the USDA would not alienate state and local interests that still play a vital role in the regulation of organic food.[322] Because the OFPA permits state involvement in all phases of the program at the discretion of the Secretary of Agriculture,[323] the regulations should be drafted to incorporate the advantages that state involvement would bring.

First, state regulation of food labeling may originate in various offices, agencies, and commissions, each with different objectives.[324] Compared to the federal govern-

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320. Allen, *An Examination of U.S. Agricultural Policy Goals*, in AGRICULTURAL POLICIES IN A NEW DECADE 15 (1990) (noting that the most intense focus for consumer interests will likely be on food safety and chemical residues).

321. Silverglade, *supra* note 133, at 233-34 (discussing the states' better ability to regulate labeling). *See also* Salatin, *Profit by Appointment Only*, NEW FARM, Sept./Oct. 1991, at 12 (contending that federal organic certification may undermine regional food production).

322. *See* Silverglade, *supra* note 133, at 235. State regulatory actions will continue "because federal agencies do not have the resources necessary to do the entire job, and because state agencies have proven that they can handle many matters normally considered to be the sole purview of federal regulatory officials." *Id. See also* Mitchell, *supra* note 1, at 141 (stating that state regulatory action for food labeling is "essential to consumer protection"); Taylor, *supra* note 135, at 224 (noting that if there is a trend in the case law of pre-emption, "it is toward greater deference to exercise by states of their police powers"); Shirley, *supra* note 46, at 31 (reporting that developing the regulations of the OFPA is leading to cooperative efforts by many different groups, including farmer associations, processors, environmental organizations, government officials, and consumer groups).

323. OFPA, *supra* note 89, § 2108 (describing the state organic certification program allowed under the Secretary of Agriculture's discretion). Analogous statutory provisions exist for cooperative federal/state efforts. *See* 21 U.S.C. § 1038 (1988). The relevant language of the Egg Products Inspection Act provides:

> The Secretary shall, whenever he determines that it would effectuate the purposes of this chapter, cooperate with appropriate state and other governmental agencies, in carrying out any provisions of this chapter. In carrying out the provisions of this chapter, the Secretary may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of any such agency commissioned by him for such purpose. The Secretary shall reimburse the states and other agencies for the costs incurred by them in such cooperative programs.

Id. See also 21 U.S.C. § 454(a)-(b) (1988) (discussing state cooperation in the Poultry Products Inspection Act); 21 U.S.C. § 661(a)-(c) (1988) (discussing state cooperation in the Meat Inspection Act).

324. *See* Silverglade, *supra* note 133, at 233-34. Silverglade lists five advantages inherent to state regulation of food labeling. *Id.* These advantages include: the fact that state actions may arise out of different offices; that states are not limited to case-by-case enforcement, but may also involve legislative initiatives; that several states may work together for common regulation; the fact that state actions are often stricter than parallel federal actions; and that states often focus enforcement on labeling and adver-

ment's decreasing interest in agriculture,[325] the states have a seemingly broader interest that can be addressed through a greater regulatory base.[326] For example, the organic labeling issue may be addressed by the state attorney general, the state consumer protection agency, the state commerce promotional board, local district attorneys, the local water conservation board, or the state livestock commission.[327] With more state agencies than federal agencies available to regulate the issues, fewer problems are likely to slip through than with the federal system's regulatory authority vested in two agencies. This argument can be partially refuted by noting that some food labeling issues are so pervasive as to warrant a uniform national level of consumer protection.[328] This contention is especially valid when some states have no regulatory provisions for organic food while others have extensive regulations in place. The current patchwork of state programs creates the need for uniform federal regulations.

Second, state actions are not limited to enforcement through case-by-case judicial enforcement, but can include innovative legislative efforts with less effort than Congress requires.[329] Because state legislatures are not as diverse in their representation as Congress, they may be more willing to act if they recognize a legitimate state interest in need of protection. However, this advantage is largely displaced because the federal legislation is a comprehensive effort to regulate organic foods labeling. A state legislature could act in a contrary manner to a comprehensive federal effort only if it had a legitimate local health or safety issue at stake.[330]

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tising simultaneously, in contrast to the bifurcated federal approach. *Id.*

325. *See* Batie, *Introduction to Special State Programs in Agriculture*, in THE ROLE OF STATE GOVERNMENT IN AGRICULTURE 71 (1988). Batie notes that besides the declining federal constituency of agricultural interests, two factors have led to an increased role for state governments using existing agencies to address agricultural regulatory problems. *Id.* First, the federal government has cut funding to many of the federal agencies that would ordinarily prescribe the regulations, such as the Farmers' Home Administration, Tennessee Valley Authority, Appalachian Regional Commission, and Economic Development Administration. *Id.* Second, the federal government has reduced the funding it used to share with state agencies, a move that states have used to develop their own initiatives. *Id.*

326. *See* Stone, *supra* note 137, at 322 (stating that a large number of state statutes are enforceable by the state's attorney general or other state officials, in addition to private rights of action). Stone notes that state regulatory statutes involve many alternatives, including providing for a private right of action for enforcement, granting broader rulemaking authority to state agencies, and providing for criminal penalties in addition to the civil remedies of damages and injunctions. *Id.*

327. *See* Silverglade, *supra* note 133, at 233 (pointing out that "state [regulatory] actions may originate out of numerous different offices, such as attorney general offices, local district attorney offices, and state food and drug agencies"). *See generally* Gunderson & Ospina, *The Role of State Government in Agriculture*, in THE ROLE OF STATE GOVERNMENT IN AGRICULTURE 5-12 (1988) (describing the state regulation of food and food production).

328. Taylor, *supra* note 135, at 308 (stating that consumer advocacy groups often emphasize the need for a strong uniform federal system of regulation).

329. Silverglade, *supra* note 133, at 233. Silverglade notes that the New York legislature was considering legislation to regulate natural, lite, and tropical oil information on food labels. *Id.* This innovation is also evident in the varied approaches that states have already employed to regulate organic food certification and labeling. *See supra* notes 57-73 and accompanying text.

330. S. REP. NO. 357, *supra* note 4, at 295 (stating that "[n]othing in this title should be construed as pre-empting a State's right to protect its citizens from health and safety threats").

Furthermore, it can be argued that Congress itself took an innovative approach in passing the OFPA as part of the Farm Bill. Generally, the Farm Bill has been a five year plan granting the USDA authority to govern only the initial production of food, with a lesser emphasis on the consumer concerns of food safety. With the OFPA, Congress set a new precedent by giving the USDA jurisdiction over the entire spectrum of organic food, from production to consumption.

Third, actions at the state level can and have involved multistate cooperative efforts to fill regulatory gaps created by federal inaction.[331] Although states could have acted cooperatively to regulate organic foods, they showed no interest or intent to do so. Twenty-two states regulate organic foods in some manner, yét none of the systems are identical.[332] Given this lack of state interest in regional cooperative efforts, it seems safe to assume that the USDA does not have to consider additional provisions for multistate efforts when it promulgates the regulations. The provisions of section 2108 allow sufficient leeway for the Secretary to approve regional regulatory programs that complement the federal minimum.[333]

Fourth, state actions are in many cases more stringent than corresponding federal actions and may better serve the producers' and consumers' interests.[334] Some argue that a state with sufficient political and market influence can serve the entire nation by enacting stricter regulations than those mandated by the federal government.[335] With that type of influence, a state with higher regulatory standards can effectively bring the rest of the nation up to its standards.[336] For instance, California's Proposition 65 requires that food containing certain levels of cancer-causing substances or reproductive toxicants must carry a label warning.[337] Because so many

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331. Silverglade, *supra* note 133, at 233-34 (reporting that the cooperative efforts of fifteen states led to McDonald's and other fast-food chains providing nutrition and ingredient information to consumers); McKinney, *The Impact of Federalism on Operating a Business*, 44 FOOD DRUG COSM. L.J. 119, 120 (1989) (describing how the proponents of California's Proposition 65 were actively encouraging other state legislatures to pass similar laws). *See* In the Matter of SaraLee Corp., No. 89-5060 (Mass. Super. Ct. Aug. 31, 1989) (a nine state lawsuit that forced the SaraLee Corp. to use the 'light' description for its foods only when the food contained one-third fewer calories).

332. *See supra* notes 57-73 and accompanying text (describing the three types of state certification programs). *See also* Salatin, *supra* note 321, at 12 (arguing that certification as a minimum standard is not in itself a measure of quality because organic certification is analogous to an "A" student settling for a Pass/Fail grade).

333. OFPA, *supra* note 89, § 2108 (describing the state organic certification program allowed under the Secretary of Agriculture's discretion).

334. Silverglade, *supra* note 133, at 234.

335. Silverglade, *supra* note 160, at 148-49 (noting that so many companies may have to comply with California's Proposition 65 that it will in effect become a national norm for label information). This argument also ties in with the "race to the bottom" offered by proponents of states' rights. *See* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1271 (6th Cir. 1991). If the federal regulation pre-empts state action, then it has set the lowest common denominator, and all states with higher levels of regulation will abandon that regulation (and correspondingly their interests in health and safety) to conform with the floor set by the federal government.

336. *See* Silverglade, *supra* note 133, at 234. Silverglade notes that because of California's suit against Procter & Gamble, the company changed its labeling and product formulation for the nation. *Id.*

337. CAL. HEALTH & SAFETY CODE § 25249.5-.13 (Deering 1988) (listing the requirements of Proposition 65, also known as the Safe Drinking Water and Toxic Enforcement Act of 1986).

national food firms sell in California, overwhelming compliance with the California regulatory system may effectively make California's standard the national standard. Also, the state may have a legitimate interest in more stringent regulations because the consequences of less stringent federal regulations fall upon the state rather than upon the federal government.[338] This advantage can be secured through the state program provisions in the OFPA; thus, it should be a significant part of the USDA regulations.

States may also want to keep their regulatory power to overcome federal regulations imposed as a result of international agreements which the federal government may enter. If the federal government enters into an international agreement regarding organic foods, the states, without any regulations in place, may be obliged to accept those standards.[339] A current example of such a situation is the proposed harmonization of pesticide residue standards under consideration by the United States.[340] As part of trade negotiations, the United States would accept the pesticide standards of the Codex Alimentarius in an effort to harmonize worldwide trade standards.[341] The current Codex Alimentarius standards permit DDT residues in food, while the United States has banned them entirely.[342] However, the agreement to harmonize the standards may result in the United States accepting imported food with these pesticide residues. Although the effect of international trade agreements on state law is not clear,[343] a state with its own organic food regulations in place would be in a stronger position to refuse such food. The regulations would allow the state to assert that the higher standards are necessary to protect the health, safety, and welfare of its consumers.

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338. *See* Kirschbaum, *supra* note 3, at 202 (noting that both state officials and industry representatives become frustrated when the federal government fails to regulate in an area that states perceive should be regulated).

339. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 167-68 (1978). The Supreme Court held that a Washington statute regulating the design and performance standards of oil tankers was invalid. *Id.* The Court stated:

> Congress expressed a preference for international action and expressly anticipated that foreign vessels would or could be sufficiently safe for certification by the [federal agency] if they satisfied the requirements arrived at by treaty or convention: it is therefore clear that the [federal law] leaves no room for the states to impose different or stricter design requirements than those which Congress has enacted with the hope of having them internationally adopted or has accepted as the result of an international accord. A state law in this area
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> . . .
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> would frustrate the congressional desire of achieving uniform, international standards.

Id.

340. Anthan, *Trade Reform Could Permit DDT on Food*, Des Moines Register, Mar. 31, 1991, at 1A, col. 6.

341. *Id.*

342. *Id.* The Codex also permits food to contain aldrin and dieldrin, while the U.S. has banned these pesticides. *Id.* The Codex permits 50 parts per million (ppm) of permethrin, a potential carcinogen, while the U.S. only permits .05 ppm of residue in food. *Id.* at 7A, col. 5. The Codex standard is 1000 times greater than the current U.S. standard. *Id.*

343. *See* J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 306-10 (2d ed. 1986) (discussing the validity of GATT in U.S. law and domestic law).

Finally, state actions can simultaneously affect both advertising and labeling issues, unlike the federal government which splits the authority to regulate these issues among the Federal Trade Commission, the FDA, and the USDA.[344] Although some state authority for labeling and advertising may be bifurcated, most states have not recognized a difference between the two.[345] Furthermore, a single state agency may have a broader base of law to challenge a mixed labeling and advertising problem.[346] A state's comprehensive regulatory authority is a decided advantage, but if the OFPA regulations are drafted as recommended, the federal split between advertising and labeling authority will be resolved.

V. Conclusion

The OFPA sets a new trend because it attempts to regulate labels for a type of food that the federal government has previously refused to regulate.[347] Of all food produced in this country, organic food makes up only two percent of the total production.[348] In spite of this low percentage, Congress believes it has a need to regulate organic food for three reasons.[349] First, evidence suggests that the organic food market is growing exponentially.[350] The federal government perceives a need to enact uniform regulation before the market becomes too large.[351] Second, the organic certification law would be complementary to other current government efforts to clarify food labeling requirements.[352] In recent years, health claims offered food producers have come under closer scrutiny by the government and by consumers, and the organic food certification law is consistent with that effort. Finally, a uniform organic certification law will provide a level playing field for

344. *See* Stone, *supra* note 137, at 315-19 (comparing the federal and state efforts to regulate advertising and labeling of food).

345. *See* Cal. Health & Safety Code § 25249.11(f) (Deering 1988) (providing that the information about carcinogens in food may appear on the label itself, on placards near the food, in newspaper advertising, or in any other means that will reasonably convey the information required by Proposition 65); N.H. Rev. Stat. Ann. § 426:6-9 (1989) (providing for regulation of organic food labeling and advertising); Me. Rev. Stat. Ann. tit. 7, § 553 (1989) (providing for jurisdiction over both labeling and advertising of organic food).

346. *See* Stone, *supra* note 137, at 319 (noting that a state may use the common law of unfair competition, antifraud and deception acts, consumer protection acts, and false advertising acts).

347. S. Rep. No. 357, *supra* note 4, at 290 (stating that the USDA does not permit references to the term "organic" on animal product labels); Mitchell, *supra* note 1, at 125 (stating that "the FDA has never issued general regulations regarding 'high fiber,' 'low fat,' 'lite,' 'natural,' or 'organic' claims").

348. S. Rep. No. 357, *supra* note 4, at 290.

349. S. Rep. No. 357, *supra* note 4, at 290 (stating that there is a three-pronged answer to the question of why the government should undertake a regulatory program: (1) the organic market is growing exponentially, (2) the need is apparent and such regulation would complement other similar government efforts, and (3) a national program would provide a level playing field for those farmers trying to operate in this market).

350. *See supra* notes 40-43; Shirley, *supra* note 46, at 33 (reporting that "interstate shipping and wholesaling of organics is increasing" and that marketers are "seeing a large increase in orders from abroad").

351. *See supra* notes 144-86 and accompanying text.

352. *See supra* notes 300-02 and accompanying text; *supra* notes 340-42 and accompanying text.

producers, processors, and marketers engaged in interstate commerce.[353]

The OFPA permits states to establish their own state organic certification programs to operate concurrently with the federal program.[354] If a state chooses to operate its own program, the primary federal concern is that state action does not disrupt interstate commerce.[355] The law includes three specific limitations on state label regulations,[356] but it does not clearly indicate the degree of federal pre-emption.

First, each State Organic Certification Program (SOCP) must be approved by the Secretary of Agriculture.[357] The criteria for approval is only that the plan must be "reasonable" and that the plan must meet the requirements of the federal legislation. Second, labeling must be consistent with federal requirements.[358] State labels cannot make claims of superiority or quality, but no set standards guide what additional information may appear on state labels. Finally, one state cannot prohibit the sale of another state's organic produce as long as that state complies with the federal certification law.[359] Even if the state's current regulatory program has much higher standards than other states or the federal government for organic production, it must allow the sale of federally certified organic food. However, this element has an important exception. This part of the title cannot be construed as pre-empting a state's right to protect its citizens from health and safety threats.[360] Whether organic food produced in another state constitutes a potential "health and safety threat" will be a matter for the courts to decide after the law becomes operational.

The best summary of the need for strong regulation is found in the committee report to the OFPA.[361] The OFPA was adopted with a delayed implementation schedule, with one of the primary reasons being "that much of this title breaks new ground for the federal government and will require the development of a unique regulatory scheme."[362] Part of this "unique regulatory scheme" should include a stronger degree of federal pre-emption for organic foods labeling.[363] The OFPA gives the Secretary of Agriculture the responsibility of promulgating regulations,[364] and this provision should be used to give the OFPA a strong and uniform federal regulatory approach to organic foods labeling. Stronger federal regulation of organic food labeling will assure that interstate commerce is not impeded, that consumers have uniform label information that they may trust when purchasing organic foods,

353. *See supra* notes 302-20 and accompanying text.

354. OFPA, *supra* note 89, § 2108.

355. S. REP. NO. 357, *supra* note 4, at 295.

356. S. REP. NO. 357, *supra* note 4, at 295.

357. S. REP. NO. 357, *supra* note 4, at 295.

358. S. REP. NO. 357, *supra* note 4, at 295.

359. S. REP. NO. 357, *supra* note 4, at 295 (stating that "a State is prohibited from discriminating against another State's organic products if those products bear the USDA 'organically produced' label").

360. S. REP. NO. 357, *supra* note 4, at 295. This is the most specific information regarding the degree of pre-emption of the OFPA that the federal government offers.

361. S. REP. NO. 357, *supra* note 4, at 293.

362. S. REP. NO. 357, *supra* note 4, at 293.

363. *See supra* notes 308-319 and accompanying text.

364. OFPA, *supra* note 9, § 2122.

and that the food industry can rely on uniform definitions, requirements, and interpretation when selling organic foods.