

Federal Preemption of State Food Standards: The Egg Products Inspection Act as a Case in Point

This article examines the constitutional doctrines of Congress' power of exclusive regulation in the context of federal and state regulation of egg standards. It focuses on California's regulation of egg standards and concludes that the Egg Products Inspection Act should preempt California's standards for all eggs which move in interstate and intrastate commerce.

Prior to the passage of the Egg Products Inspection Act,¹ two problems concerned the nation's egg industry. First, the lack of nationwide uniform egg² standards³ forced producers⁴ to segregate their eggs according to the state where they would be sold and grade each group

1. Egg Products Inspection Act, §§ 1-28, 21 U.S.C. §§ 1031-1056 (1970).

2. "Egg" means the shell egg of a domesticated chicken hen. Federal and California quality standards only apply to this class of eggs. 7 C.F.R. § 56.200(a) (1963); CAL. ADMIN. CODE, tit. 3, § 1354(a). Only this class of eggs may be sold to consumers in California. CAL. ADMIN. CODE, tit. 3, § 1353.

3. "Standards" means standards applicable to consumer eggs that are equal to or higher than either the minimum federal wholesomeness standard, U.S.D.A. grade B, *see* 7 C.F.R. § 59.100(a), or the minimum California standard, a California grade B, CAL. ADMIN. CODE, tit. 3, § 1353. Standards applicable to these eggs include standards of quality, condition, weight, quantity and grade. *See* 7 C.F.R. §§ 56.201-218 (1973); CAL. ADMIN. CODE, tit. 3, §§ 1354-1355.3. The only difference between federal and California standards are those of quality *set forth* in note 24 *infra*. Quality standards are used to determine an egg's relative degree of excellence, that is its palatability, as compared to its wholesomeness which is reflected by the minimum federal standard, U.S.D.A. grade B. Interview with Georgia Reese, Chief of the California Egg & Poultry Quality Control Program, in Sacramento, Cal. (Oct. 14, 1977).

Grades reflect the quality of eggs. Since an egg's quality reflects its taste and appearance, characteristics which have an economic value, the higher the quality the more an egg costs. *See* E. BENJAMIN, J. GIVIN, F. FABER, & W. TERMOLLEN, *MARKETING POULTRY PRODUCTS* 66-67 (5th ed. 1960). The difference in price between a grade AA carton and a grade A carton of eggs is approximately three cents. *Egg Market News* Dec. 23, 1977, at 1.

4. "Producer" means any person who engages in the business of producing or packing eggs for sale in retail stores to consumers.

under the standards of that state.⁵ The time and energy wasted in segregating and grading eggs increased producers' marketing costs⁶ and discouraged them from selling their eggs interstate.⁷ Second, the lack of uniform wholesomeness requirements⁸ also concerned the nation's egg industry. Some states did not have any wholesomeness requirements.⁹ Processors of egg products, the largest purchasers of eggs, often patronized sources of unwholesome eggs because unwholesome eggs cost less to market.¹⁰ Thus, producers who sold unwholesome eggs¹¹ placed producers who sold only wholesome eggs at a competitive disadvantage by limiting their market. Additionally, consumers possibly reduced consumption because they feared food poisoning from unwholesome eggs.¹²

Concerned with the barriers to interstate egg commerce created by nonuniform standards¹³ as well as the health hazards and market limitations created by the use of unwholesome eggs,¹⁴ Congress passed the

5. H.R. REP. NO. 1670, 91st Cong., 2d Sess. (1970) & S. REP. NO. 639, 91st Cong., 2d Sess. 14-15 (1970), *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 5242, 5251.

6. The House Report does not document the costs of nonuniformity, H.R. REP. NO. 1670, 91st Cong., 2d Sess. 5-6 (1970), and documentation of the costs of grading eggs under two sets of standards to California producers is unavailable. Letter from George Reese, Chief of the California Egg & Poultry Quality Control Program, to author (Apr. 5, 1978). However, for a discussion of the economic impact that egg production inefficiency causes, *see generally* E. CLAYTON, *THE ECONOMICS OF THE POULTRY INDUSTRY* 1-37 (1967).

7. H.R. REP. NO. 1670, 91st Cong., 2d Sess. 6 (1970).

8. "Wholesomeness requirements" means not only that eggs sold to consumers meet a minimum federal wholesomeness standard, U.S.D.A. grade B, but also that producers' plants be subject to federal inspections and regulations to ensure that they are not selling unwholesome eggs.

9. H.R. REP. NO. 1670, 92nd Cong., 2d Sess. 4 (1970).

10. H.R. REP. NO. 1670, 91st Cong., 2d Sess. 3 (1970); *Egg Inspection: Hearings on H.R. 14687, 16092, 17338, & S. 2116 before the Subcomm. on Dairy & Poultry of the House Comm. on Agric.*, 91st Cong., 2d Sess. 29, 30, 33 (1970) (statement of Harold E. Ford) [hereinafter cited as *1970 Hearings*]; *EGG PRODUCTS INSPECTION ACT: HEARINGS ON S. 2116 BEFORE THE COMM. ON AGRIC. & FORESTRY*, 91st Cong., 1st Sess. 31 (1969) (statement of George Aiken) [hereinafter cited as *1969 Hearings*].

11. "Unwholesome" eggs mean eggs which do not meet the minimum federal wholesomeness standard, U.S.D.A. grade B. These eggs are subject to federal wholesomeness regulation. *See* 7 C.F.R. § 59.100(a) (1975).

12. *See 1970 Hearings, supra* note 10, at 35-36 (statement of James K. Presnal); *1969 Hearings, supra* note 10, at 31 (statement of George D. Aiken).

13. Congress' declaration of policy states:

It is hereby declared to be the policy of the Congress to provide for the inspection of certain egg products, restriction upon the disposition of certain qualities of eggs, and *uniformity of standards of eggs*, and otherwise regulate the processing and distribution of eggs and egg products as hereinafter prescribed to prevent the movement or sale for human food, of eggs and egg products which are adulterated or misbranded or otherwise in violation of this chapter.

Egg Products Inspection Act, § 3, 21 U.S.C. § 1032 (1970) (emphasis added).

14. This concern is set forth in the legislative findings:

Lack of effective regulation for the handling or disposition of unwholesome,

Egg Products Inspection Act.¹⁵ Regulations promulgated under the Act successfully eliminated the health hazards and market limitations caused by sales of unwholesome eggs.¹⁶ Egg producers and processors now are subject to mandatory federal inspections which ensure compliance with uniform federal wholesomeness requirements.¹⁷

Although Congress purported to remove barriers to interstate egg commerce under the Act,¹⁸ the additional marketing costs created by nonuniform standards still exist.¹⁹ One provision prohibits states from using nonfederal standards when inspecting eggs moving in interstate commerce.²⁰ A few states, however, have not interpreted this provision to preempt state standards. For example, California,²¹ which is the

otherwise adulterated, or improperly labeled or packaged egg products and certain qualities of eggs is injurious to the public welfare and destroys markets for wholesome, not adulterated, and properly labeled and packaged eggs and egg products and results in sundry losses to producers as well as injury to consumers. Unwholesome, otherwise adulterated, or improperly labeled or packaged products can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged products, to the detriment of consumers and the public generally.

Egg Products Inspection Act, § 2, 21 U.S.C. § 1031 (1970).

15. 21 U.S.C. §§ 1031-1056 (1970).

16. The Director of the Poultry Division of the Agricultural Marketing Service of the United States Department of Agriculture claims that federal regulations under the Egg Products Inspection Act, 21 U.S.C. §§ 1031-1056 (1970), are responsible for the decrease in food poisoning caused by unwholesome eggs. Kennett, *Egg Products Inspection: Five Years Later*, EGG INDUSTRY, October 1976, at 15.

17. The Act's wholesomeness provisions applicable to producers require that producers be licensed; that they allow federal inspectors to spotcheck their eggs to ensure they meet the wholesomeness requirements and to inspect their premises, facilities, operations and records for violation of the Act; and that producers not sell unwholesome eggs. Egg Products Inspection Act, § 5, 21 U.S.C. § 1034(d) (1970). The inspection of eggs does not include a determination of their quality above the minimum wholesomeness standard and the inspection of the plant does not include sanitary conditions. Kennett, *supra* note 16, at 14-15. The Act also authorizes cooperation between state and federal inspection agencies to enforce federal wholesomeness requirements. Egg Products Inspection Act, § 9, 21 U.S.C. § 1038 (1970). The Secretary of Agriculture has promulgated regulations for cooperation with states to enforce the Act's wholesomeness requirements. This program does not encompass the Act's egg standards regulations. Interview with George Reese, Chief of the California Egg & Poultry Quality Control Program, in Sacramento, Cal. (Apr. 19, 1978); *1970 Hearings, supra* note 10, at 32 (statement of Harold E. Ford); *1969 Hearings, supra* note 10, at 39 (statement of Richard E. Lyng).

18. H.R. REP. NO. 1670, 91st Cong., 2d Sess. 5-6 (1970).

19. See text accompanying notes 56-58 *infra*.

20. Egg Products Inspection Act, § 23(b)(1), 21 U.S.C. § 1052(b)(1) (1970), set forth in text accompanying note 116 *infra*.

21. This article focuses on California's regulation of egg standards because California has the largest egg marketing program in the nation. *Egg Research & Consumer Information Act: Hearings on H.R. 12000 Before the Subcomm. on Agric. Research & General Legislation of the Senate Comm. on Agric. & Forestry*, 93d Cong., 3d Sess. 23 (1974) (statement of Maurice Pickler).

largest egg marketing state,²² still uses nonfederal²³ standards when inspecting interstate and intrastate eggs at retail markets.²⁴

California's use of nonfederal standards creates impediments to interstate egg commerce because producers must incur additional marketing costs²⁵ from grading their eggs under different sets of standards. California's egg standard regulations thus appear to interfere with Congress' power to regulate egg commerce. The commerce clause and federal

22. *Id.*

23. California quality standards appear in CAL. ADMIN. CODE, tit. 3, §§ 1354-1355.3. Federal quality standards appear in 7 C.F.R. §§ 56.201-.218 (1973). The difference between California and federal standards for consumer eggs are:

	Grade	Federal	California		
Air Cell	AA.....	1/8 in.	3/16 in.		
	A.....	3/16 in.	1/4 in.		
	B.....	3/8 in.	3/8 in.		
Yolk	AA.....	indistinctly indicated	discernible but not clearly outlined		
	A.....	discernible but not clearly outlined	discernible but not clearly outlined		
	B.....	definite and distinct	definite and distinct		
Shell	AA.....	usual shape or good texture and strength and free from rough areas or spots	none		
	A.....	"	"		
	B.....	may become somewhat unusual	"		
Tolerances within 20%		origin	destination	origin	destination
	AA.....	5% C/check	5% C/check	5% check 1% C	5% check 1% C
	A.....	"	"	.5% leaker/dirty	"
	B.....	10% check	10% check	10% check	10% check .5% leaker/dirty

The following regulatory provisions spell out these differences: 7 C.F.R. §§ 56.201-203 (air cell depth), § 56.211(a)-(c) (yolk description), § 56.208(c)-(d) (shell description), and §§ 56.215-.217 (tolerances) (1977) and CAL. ADMIN. CODE tit. 3, § 1354(b)-(d) (air cell depth), § 1354.4(a)-(b) (yolk definition), § 1354.1 (shell description), and § 1355.2 (tolerances) (1974).

24. Interview with George Reese, Chief of the California Egg & Poultry Quality Control Program, in Sacramento, Cal. (Oct. 14, 1977). Apparently, California is the only state which uses nonfederal standards when inspecting eggs shipped into California for market. See Kennett, *supra* note 16, at 15.

25. These impediments are discussed in the text accompanying notes 157-58 *infra*.

preemption are doctrines²⁶ which empower Congress to exclude state egg regulation²⁷ that interferes with Congress' power to regulate commerce. This article examines these doctrines and discusses their impact on California's regulation of egg standards.

I. FEDERAL POWER TO REGULATE EGG COMMERCE EXCLUSIVELY

The commerce clause empowers Congress to regulate commerce among the several states.²⁸ Courts have interpreted the commerce clause expansively, holding that congressional power to regulate commerce extends to any activity that has an appreciable effect upon interstate commerce.²⁹ The use of nonuniform egg quality standards and the sale of unwholesome eggs appreciably affect interstate commerce³⁰ because they increase marketing costs and discourage interstate egg commerce.³¹ Congress, therefore, should be able to regulate egg standards under the commerce clause.

Once a court determines that Congress has the power to regulate egg commerce, it must decide whether Congress has the power to exclude state regulation of egg commerce. In the absence of federal legislation, courts can exclude state egg regulation if it interferes with Congress' commerce power under the commerce clause. The preemption doctrine also empowers Congress to exclude state egg regulation through the enactment of federal legislation.³² Congress' power to exclude state regulation under the commerce clause or the federal preemption doctrine is then effectuated by the supremacy clause.³³

The commerce clause is unlikely, however, to be a basis for invalidating state regulation of egg standards. California's regulation of egg

26. In recent years, courts have failed to make the fine distinction between Congress' power to proscribe state regulation and the supremacy clause's effectuation of Congress' commerce power. *Southern Pac. v. Arizona*, 325 U.S. 761, 768 (1945). For a case which makes this distinction, see *Hall v. Decuir*, 95 U.S. 485, 490 (1878). For a discussion of this doctrine, see Bikle, *The Silence of Congress*, 41 HARV. L. REV. 200 (1927).

27. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 & 148 (1963).

28. U.S. CONST. art. VI, § 8.

29. In *Wickard v. Filburn*, 317 U.S. 111 (1942), for example, the United States Supreme Court upheld federal regulation of a farmer's crop intended solely for on-farm consumption. The court found that even though one producer's contribution to the demand for wheat may be trivial, the aggregate impact of all producers' demands for wheat would have a substantial influence on the market price and thus have an appreciable effect on interstate commerce. *Id.* at 128.

30. See, e.g., *Wallace v. Curran*, 95 F.2d 856 (4th Cir. 1938), *aff'd* 306 U.S. 1 (1938) (tobacco standards); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (eggs).

31. H.R. REP. No. 1670, 91st Cong., 2d Sess. 3, 6 (1970).

32. See, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).

33. The supremacy clause provides that the "constitution and the laws of the United States which should be made in pursuance thereof, . . . shall be the supreme law of the land." U.S. CONST. art. VI, § 8.

standards could interfere with Congress' power to regulate interstate egg commerce in three ways. First, state regulation may regulate a national rather than a local concern.³⁴ The United States Supreme Court, however, has held that regulation of food standards is not a national concern.³⁵ A court is unlikely, therefore, to hold that California's regulation of egg standards is the regulation of a national concern. Second, state regulation may burden interstate commerce³⁶ unreasonably. However, courts unanimously have held that state regulation which prohibits marketing food below a designated quality does not unduly burden interstate food commerce.³⁷ California's regulation merely prohibits marketing eggs below California's standards; it does not prohibit marketing eggs which meet higher standards.³⁸ A court, therefore, probably will not hold that California's regulation of egg standards unduly burdens interstate egg commerce. Third, state regulation may discriminate against interstate commerce by placing greater burdens on interstate commerce than on intrastate commerce.³⁹ With passage of the Egg Products Inspection Act,⁴⁰ Congress, not the states, placed a discriminatory burden on interstate eggs by requiring them to meet more rigorous federal standards. California's regulation of egg standards does not discriminate between interstate and intrastate eggs because California merely requires that all eggs meet a minimum standard.⁴¹ Thus, a court should not find that California's use of less stringent standards discrimi-

34. The United States Supreme Court in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), defined "national concern," as:

[t]he power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. . . . whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

Id. at 319.

35. *See, e.g.*, *Parker v. Brown*, 317 U.S. 341, 362-63, 368 (1943) (raisin standards).

36. *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (state safety standards for railway carriers).

37. *See, e.g.*, *Sligh v. Kirkwood*, 237 U.S. 52 (1915) (citrus fruit); *General Mills, Inc. v. Jones*, 530 F.2d 1317, 1322-23 (9th Cir. 1975) (flour standards); *Canton Poultry, Inc. v. Conner*, 278 F. Supp. 822, 825 (N.D. Fla. 1968) (poultry standards).

38. *See* CAL. ADMIN. CODE, tit. 3, § 1353. State standards which prohibit marketing food above a particular standard may interfere with the commerce power. *See* *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

39. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (local ordinance prohibiting sale of milk not processed within five miles of city). *Accord.* *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (state law prohibiting sale of higher quality apples than state produced).

40. 21 U.S.C. § 1052(b)(1) (1970), *set forth in text accompanying note 116 infra.*

41. CAL. ADMIN. CODE, tit. 3, § 1354.

nates against interstate egg commerce.⁴² Since state regulation of egg standards is not a national concern and does not unduly burden or discriminate against interstate commerce, the commerce clause does not appear to provide a basis for proscribing California's regulation of egg standards.

Another doctrine that allows Congress to exclude state regulation is federal preemption. Courts invoke the federal preemption doctrine to invalidate state regulation when it is inconsistent⁴³ with a congressional exercise of power to regulate an area exclusively.

II. EXERCISING THE POWER TO REGULATE EXCLUSIVELY: THE FEDERAL PREEMPTION DOCTRINE

Congress may exercise its power to regulate an area exclusively in three ways. First, if Congress imposes requirements in a federal law that directly conflict with requirements in a state law, under the supremacy clause, federal law automatically prevails over state law.⁴⁴ Second, Congress simply may *express* in the law itself an intent to regulate a subject exclusively.⁴⁵ Third, circumstances surrounding the legislation may *imply* Congress' intent to regulate a subject exclusively.⁴⁶

A. Direct Conflict

The simplest form of preemption is when a federal law directly conflicts with a state law. Direct conflict occurs when both state and federal law apply to the same set of facts and one law requires what the other prohibits.⁴⁷ For example, a federal law that forbids marketing avocados with more than seven percent oil directly conflicts with a state law that prohibits marketing avocados with seven percent or less oil.⁴⁸ When compliance with both federal and state laws is impossible, the

42. *See, e.g.*, *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (congressional regulation of only interstate egg products valid).

43. The courts do not always use the term "inconsistent" in their preemption decisions. The United States Supreme Court in *Hines v. Davidowitz*, 312 U.S. 52 (1941), stated:

This Court, in considering the validity of state laws in light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference.

Id. at 67.

44. *See, e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

45. *See, e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-32, (1977).

46. *See, e.g.*, *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625, 633-34 (1973).

47. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1962).

48. *Id.*

federal law prevails over the state law because the supremacy clause mandates federal supremacy.⁴⁹ Cases of direct conflict, however, are rare.⁵⁰

B. Express Preemption

Congress may express an intent to preempt state law in the federal law itself.⁵¹ Congress' intent usually is embodied in an express preemption provision which prohibits state regulation of a particular subject or area.⁵²

The courts' role in determining whether Congress expressly preempted an area or a subject is to construe the meaning of the preemption provision⁵³ by determining Congress' intent.⁵⁴ This intent may be evident in the language of the provision.⁵⁵ Often, however, Congress' intent is ambiguous⁵⁶ because the meaning of the provision's language is unclear⁵⁷ or surrounding circumstances suggest that Congress did not intend to give the language its plain meaning.⁵⁸

When ambiguity exists, courts look to various sources to determine what Congress intended the preemption language to mean. Courts

49. *Id.*

50. Engdahl, *Consolidation by Compact: A Remedy for Preemption of State Food and Drug Laws*, 14 J. PUB. LAW 277, 280 (1965).

51. *See, e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977).

52. An example of an express preemption provision appears in the Wholesome Meat Act:

Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter 1 of this chapter.

Wholesome Meat Act, § 408, 21 U.S.C. § 678 (1968).

53. *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977).

54. Congress may intend a preemption provision to preempt an entire area, *see e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977) (express preemption of both interstate and intrastate meat standards), or only some aspects of an area, *see, e.g.*, *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 236-38 (1947). Moreover, courts do not always reach the same conclusion about the meaning of a particular preemption provision. In *Armour & Co. v. Ball*, 468 F.2d 76, 85 (6th Cir. 1972), for example, the Court of Appeals found that Congress intended the Wholesome Meat Act, § 408, 21 U.S.C. § 678 (1967), to preempt only interstate meat standards. The United States Supreme Court in *Jones v. Rath Packing Co.*, 430 U.S. 519, 532 (1977), however, found that Congress intended the same provision to preempt both interstate and intrastate standards.

55. When Congress' intent is evident on the face of a preemption provision, courts generally base their decision on express preemption. *See, e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-32, (1977).

56. *See generally* Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209-10 (1959).

57. *See, e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977).

58. The meaning of the provision may be unclear because the legislative history suggests a contrary meaning, *see, e.g.*, *Armour & Co. v. Ball*, 468 F.2d 76, 85 (6th Cir. 1972), or because the regulations suggest the provision was not intended to have its plain meaning, *see, e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 232-34, 238 (1947).

often examine the legislative history for statements made by the authors or committee chairpersons that might explain the provision's meaning.⁵⁹ Courts also may rely on the subsequent interpretation by the federal agency entrusted with administration of the law.⁶⁰

Even an unambiguous expression that Congress intended to preempt in the language of the statute itself, however, may not be dispositive of the preemption issue.⁶¹ Most courts treat express preemption provisions as merely one indication of Congress' intent and look for other indications to determine whether and to what extent Congress intended to preempt state law.⁶² Not all courts, however, make this additional inquiry since it can be argued that if a preemption provision does not mention a particular area, Congress did not intend to preempt that area.⁶³ But, since Congress is unable to assess and address all the problems that exclusive or joint regulation of an area may create in one statute, courts should look beyond the language of an express preemption provision.⁶⁴ The United States Supreme Court has adopted such an approach, looking beyond preemption provisions for additional indications of Congress' intent.⁶⁵ Further examination may reveal that Congress intended the preemption provision to resolve the preemption issue completely.⁶⁶ Alternatively, further examination may reveal that Congress did not intend the provision to be dispositive of the preemption

59. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (interpretation of provision based on House Committee Report); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 232-34 (1947) (interpretation based on House Committee Report).

60. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 539 (1977) (because federal agency was not concerned with preventing state enforcement of state standards more rigorous than federal standards, court concluded provision only meant to prohibit any stringent flour standards).

61. See generally Note, *supra* note 64, at 211-15, for a discussion of courts' inattention to express preemption provisions in determining whether Congress intended to preempt state regulation.

62. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-30 (1947). *Accord*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-41 (1977).

63. In *Mintz v. Baldwin*, 289 U.S. 346 (1933), for example, the United States Supreme Court based its decision that Congress had not preempted state regulation of nonfederally inspected meat on the ground that Congress easily could have provided for preemption if it saw fit to do so. Failure to extend the express prohibition of state regulation of federally inspected meats to nonfederally inspected meat indicated that Congress did not intend to preempt state regulation of nonfederally inspected meat. *Id.* at 351.

64. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 240 (1959).

65. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977).

66. In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), for example, section 9 of the United States Warehouse Act contained an express preemption provision which provided that "the power, jurisdiction and authority conferred by this Act . . . shall be exclusive." 7 U.S.C. § 269 (1931). The United States Supreme Court looked beyond the preemption provision for indications of Congress' intent not to preempt state regulation. The Court found no such indications and invalidated state regulation, thus giving effect to the express preemption provision.

issue.⁶⁷ A court then may base a preemption decision on the ground that Congress *implied* its intent to preempt.⁶⁸

C. Implied Preemption

Implied preemption occurs when circumstances infer Congress' intent to exclude state regulation. The United States Supreme Court has designated several circumstances⁶⁹ which courts should consider in determining whether Congress impliedly intended to preempt state regulation.⁷⁰ Generally, courts consider the following circumstances: 1) whether the federal law regulates an area of traditional state concern, which indicates an intent *not* to preempt; 2) whether the federal law touches a dominant federal interest, which indicates an intent to preempt; 3) whether the federal law creates a pervasive regulatory scheme, which indicates an intent to preempt; and 4) whether state regulation interferes with the accomplishment of the federal law's objectives, which indicates an intent to preempt. A case may present more than one of these circumstances,⁷¹ which can result in contradictory indications of Congress' intent existing in a particular case. When this situa-

67. See, e.g. *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-43 (1977).

68. *Id.* at 543.

69. The writer uses the term "circumstances" because the guidelines which the Court uses describe circumstances which imply or negate Congress' intent to preempt state regulation. Other writers have described these circumstances as "standards," "tests," or "presumptive considerations." See, e.g., Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 536.

70. The United States Supreme Court articulated the circumstances which courts are to use to determine whether implied preemption exists in a given case:

(1) Congress legislated here in a field which the states have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. (2) The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. (3) Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. (4) Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. (5) Or the state policy may produce a result inconsistent with the objective of the federal statute.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted). *Accord*, *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625, 633 (1973). For simplification, the fourth and fifth circumstances have been combined in this article because when the fifth circumstance exists, the fourth circumstance necessarily exists; when Congress' objective indicates preemption, state regulation is always inconsistent with the federal objective.

71. See, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444-45 (1960) (pervasive federal regulatory scheme and regulation of air pollution, a traditional state concern); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963) (congressional objective to promote orderly marketing through federal regulation and avocado standards regulation, a traditional state concern).

tion occurs, unarticulated considerations seem to influence whether courts find implied preemption.⁷²

1. Traditional State Concerns.

Courts recognize as traditional state concerns those areas which states historically have regulated under their police power to protect the public health, safety and welfare.⁷³ The states' control of local violence to protect community peace, for example, is a traditional state concern.⁷⁴ Because the problems that arise in these areas are peculiar to the locality, local knowledge and experience are necessary to regulate these areas effectively.⁷⁵ The constitutional division of power between state and federal governments creates a strong presumption that Congress did not intend to preempt areas of traditional state concern.⁷⁶ Such a presumption ensures that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.⁷⁷

2. Dominant Federal Interests.

This same principle of federal-state relations, on the other hand, implies Congress' intent to preempt state regulation when the federal law touches an area of dominant federal interest.⁷⁸ Courts recognize as dominant federal interests those areas which historically have been characterized as national concerns.⁷⁹ Dominant federal interests include areas where state regulation is expressly precluded by the United States Constitution⁸⁰ or where exclusive or uniform regulation is vital to the public interest.⁸¹ Patent issuance, for example, is a dominant federal interest. States cannot enact separate, yet effective, provisions for patents because problems arising from the issuance of patents have effects beyond an individual state's jurisdiction. Uniformity is also necessary because maintaining the delicate balance between promoting invention and preserving competition requires that a single authority regulate the area.⁸²

72. For a discussion of these unarticulated considerations, *see* text accompanying notes 106-115, *infra*.

73. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

74. *See, e.g., Plumbers' Union v. Borden*, 373 U.S. 690, 693-94 (1963).

75. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

76. *United States v. Bass*, 404 U.S. 336, 349 (1971).

77. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

78. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

79. *See, e.g., Zschernig v. Miller*, 389 U.S. 429, 433-34 (1968) (foreign affair a national concern); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (foreign affairs a dominant federal interest).

80. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

81. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-44 (1963).

82. *See Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 228-31 (1964).

When federal legislation touches an area of dominant federal interest, no other indications of Congress' intent to preempt need exist for courts to find implied preemption.⁸³ Characterization of an area as a dominant federal interest creates such a strong presumption that Congress intended to preempt that this circumstance alone can imply preemption.⁸⁴ However, because few areas historically have been recognized as dominant federal interests,⁸⁵ preemption usually is implied from the existence of other circumstances.

3. Pervasive Federal Regulatory Schemes.

Another circumstance which may imply preemption is whether the federal law creates a pervasive regulatory scheme.⁸⁶ A regulatory scheme is pervasive if it intensively regulates an area, leaving no room for state regulation because any state regulation is likely to overlap or interfere with federal regulation.⁸⁷ Since "no room" exists for state regulation, a pervasive regulatory scheme implies Congress' intent to preempt the area.⁸⁸ On the other hand, where a critical gap exists in federal regulation of an area, the scheme is not pervasive enough to imply Congress' intent to preempt state regulation of the area within the gap.⁸⁹

4. State Interference with the Accomplishment of Federal Objectives.

To determine whether Congress intended to preempt state regulation, courts also consider whether state regulation interferes with the accomplishment of the federal law's objective.⁹⁰ The existence of a federal regulatory system requires that Congress be supreme within its sphere,⁹¹ and thus implies preemption. The balance of power would become dis-

83. Where the constitution precludes state regulation, no inquiry need be made into congressional intent to find preemption. With dominant federal interests, the issue is whether the court will characterize a new area as such. Once characterized as a dominant federal interest, the fact the federal legislation touches that area gives rise to the presumption of preemptive intent. This circular reasoning has led commentators to conclude that courts, in an attempt to avoid addressing the constitutional issue of whether states have the power to regulate, rely on preemption which only requires "statutory construction." *See generally* Note, *supra* note 64.

84. *See, e.g.,* *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

85. *See generally* Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630, 632-37 (1972).

86. *See, e.g.,* *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625, 633-34 (1973).

87. *See, e.g.,* *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 169 (1942) (butter production).

88. *See* *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625, 633-34 (1973).

89. *See, e.g.,* *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 13-14 (1937) (no pervasive regulatory scheme so as to preempt state safety inspection where tugs were exempted from federal safety inspection).

90. *See, e.g.,* *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

91. *See* *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405-06 (1819).

torted in favor of the states if states had the power to defeat the objectives of Congress' enactments.

State regulation may interfere with the federal law's objectives in either of two ways. First, state regulation may interfere with federal regulations promulgated to enforce the federal law.⁹² Second, although state regulation does not interfere with federal regulations, it may frustrate a congressional policy underlying the Act.⁹³ To determine Congress' policy objectives, courts examine congressional declarations of policy in a statute and its legislative history.⁹⁴ The problems⁹⁵ that prompt Congress to pass a law often will reveal Congress' policy objectives.⁹⁶

Before courts find that state regulation frustrates a policy objective, however, federal regulations which promote that policy must already exist. Congress often passes broad enabling legislation which allows administrative agencies to develop their own policy regarding regulated activities. In regulating such activities, however, agencies do not always exercise the full scope of their power. State regulation which appears to frustrate a broad congressional policy, therefore, in fact may not interfere with the implementation of that policy and courts will not find implied preemption in such a situation.⁹⁷

5. Unarticulated Considerations which Influence Courts' Implied Preemption Findings.

Courts consider the above circumstances to guide them in determining whether Congress intended to impliedly preempt state regulation.

92. In *McDermott v. Wisconsin*, 228 U.S. 115 (1913), for example, state regulation prohibited marketing food with certain labels. Federal regulations required the presence of these labels during interstate commerce, but not during intrastate commerce. The state's removal of the labels was found to interfere with federal regulations because it deprived federal agents of the evidence necessary to convict violators.

93. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-41 (1977) (state flour standards which were more stringent than federal standards interfered with Congress' policy to facilitate value comparisons even though federal agency did not prohibit more rigorous standards); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231-36 (1947) (state regulation which fixed warehouse rates interfered with Congress' policy to exempt federally licensed warehouse operators from state regulation even though the federal regulations did not prescribe rates).

94. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147-50 (1963).

95. A court's examination of the legislative history to determine Congress' objective may overlap its examination to determine the meaning of an express preemption provision. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 210, 232-34 (1947).

96. See, e.g., *Campbell v. Hussey*, 368 U.S. 297, 301 (1961).

97. See, e.g., *Parker v. Brown*, 317 U.S. 341, 348 (1943) (nonfederal raisin standard regulation held not to interfere with congressional objective to promote orderly marketing of federally regulated raisins because federal agency had developed diverse standards throughout country).

These circumstances, of course, are merely indications from which it is logical to infer that Congress did or did not intend to preempt. Because fictions are used to determine Congress' intent, the possibility always exists that presumptions that preemption is intended or not may not accord with Congress' actual intent.⁹⁸ Thus, contradictory indications of Congress' intent can exist when two or more circumstances are present. For example, contradictory indications of Congress' intent exist when the regulated area is a traditional state concern⁹⁹ but federal regulation is pervasive or state regulation interferes with Congress' objective.¹⁰⁰ When contradictory indications of Congress' intent exist, courts seem to rely on two unarticulated considerations in reaching their decision to preempt or not. Both considerations reveal the courts' deference to principles of federal-state relations even though such deference is not expressly articulated.

First, courts give different weight to the presumptions created by the various circumstances. For example, characterization of an area as a traditional state concern¹⁰¹ appears to weigh most heavily in courts' determination of Congress' implied intent.¹⁰² The greater weight courts give to such characterization derives from their desire not to disturb the federal-state balance of power.¹⁰³ Courts generally find no implied preemption when federal law regulates a traditional state concern even though facts reveal that state regulation interferes with Congress' objectives or that a pervasive regulatory scheme exists.¹⁰⁴

Second, courts balance state and federal interests in regulating an area. When federal regulation fails to adequately protect the states' po-

98. For example, in response to a court's finding that Congress did not intend to preempt state regulation of federally licensed warehouses under the United States Warehouse Act, ch. 313, 39 Stat. 286 (1916), Congress amended the Act to preempt state regulations, 7 U.S.C. § 269 (1931). *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 223-24 & n.4 (1947).

99. Contradictory indications of Congress' intent cannot exist when the area is a dominant federal interest because the other two circumstances that could exist imply an intent to preempt also.

100. *See, e.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625, 633-34 (1973) (regulation of noise pollution, a traditional state concern, and pervasive federal regulatory scheme, implying Congress' intent to preempt).

101. The court characterizes an area as either a traditional state concern or a dominant federal interest. Characterization of an area as a traditional state concern or as a dominant federal interest in preemption cases is the same characterization that courts make to determine whether a subject is a local or a national concern in commerce clause cases. *See, e.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625, 633-34 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1962).

102. *See, e.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625 (1973); *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

103. *See United States v. Bass*, 404 U.S. 336, 349 (1971).

104. *See, e.g., Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 147 (1963) (congressional policy to establish uniform standards to promote order in marketing); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444 (1960) (pervasive federal regulation of sea going vessels).

lice power interests,¹⁰⁵ courts generally find no implied preemption because the states' interest in protecting the general welfare of its citizens outweighs the federal interest in being supreme within its sphere of regulation.¹⁰⁶ On the other hand, when federal regulation adequately protects the states' police power interests, the federal interest in being the exclusive regulator outweighs the states' interest in regulating the area.¹⁰⁷

Courts' deference to principles of federalism may play an important role in a preemption case. To predict the impact that characterization of an area and the balancing of state and federal interests may have on a court's preemption decision, however, a case first must be examined in light of the traditional legal principle of federal preemption.

III. FEDERAL PREEMPTION OF CALIFORNIA EGG STANDARDS

One of the problems that prompted Congress to pass the Egg Products Inspection Act (the Act)¹⁰⁸ was the barrier to interstate egg commerce that nonuniform standards created. Congress sought to eliminate this barrier by providing uniform federal standards.¹⁰⁹ Currently, however, California uses nonfederal standards when inspecting both interstate and intrastate eggs at retail markets.¹¹⁰ Thus, California's regulation of egg standards appears to interfere with Congress' regulation of egg standards. To eliminate such interference, a court must find that California's use of nonfederal standards when inspecting both interstate and intrastate eggs is preempted by the Act. This section analyzes federal and state regulation of egg standards in light of the principles of federal preemption to determine whether a court could find that Congress preempted California egg standards under the Act.

105. Courts do not seem to give any consideration to the states' economic interest. *See, e.g.,* *City of Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942).

106. *See, e.g.,* *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 145 (1963) (no preemption implied where federal regulation provided only minimum standards and no market inspections for avocados); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (no preemption implied where federal regulation did not require air pollution control on federally regulated ships).

107. *See, e.g.,* *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625 (1971) (preemption implied where federal regulation provided standards for highest degree of public safety); *Campbell v. Hussey*, 368 U.S. 297 (1961) (preemption implied where federal regulation provided standards as high as state standards and market inspection for tobacco).

108. 21 U.S.C. §§ 1031-1056 (1970).

109. H.R. REP. NO. 1670, 91st Cong., 2d Sess. 6 (1970).

110. The differences between California and federal standards are *set forth in* note 23 *supra*.

A. Direct Conflict

A court will consider any direct conflict between federal egg standard requirements and state standards in determining whether Congress preempted California standards.¹¹¹ The Act requires states to use federal standards when inspecting eggs which move in interstate commerce.¹¹² The federal standards generally are more rigorous than California standards,¹¹³ but California does not prohibit the marketing of eggs that meet the higher federal standards.¹¹⁴ By meeting federal standards, producers are able to comply with both federal and state standards. Since producers can comply with both standards, the Act does not conflict directly with California egg standards regulation.¹¹⁵ Thus, the Act probably would not preempt California standards on the theory of direct conflict.

B. Express Preemption

The Act contains an express preemption provision which provides: “[f]or eggs which have moved or are moving in *interstate* or foreign commerce, no state or local jurisdiction may require the use of standards of quality, condition, weight, quantity, or grade which are in addition to or *different from* the official federal standards.” (emphasis added)¹¹⁶ This provision appears to indicate Congress’ express intent to preempt states from imposing nonfederal standards on eggs moving in interstate commerce. However, the provision is ambiguous because the meaning of the phrase “different from” is not clear.¹¹⁷ Congress may have intended the phrase to mean only standards less stringent than federal standards. Or, Congress may have intended the phrase to mean *any* standards that were different than federal standards.

To resolve this ambiguity, a court should examine the legislative history and current federal regulations.¹¹⁸ Neither the House Report nor committee hearings contain any congressional statements that explain the meaning of the phrase.¹¹⁹ The United States Department of Agricul-

111. See, e.g., *Florida Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142-43 (1963).

112. 21 U.S.C. § 1052(b)(1) (1970), set forth in text accompanying note 116 *infra*.

113. Set forth in note 23 *supra*.

114. CAL. ADMIN. CODE, tit. 3, § 1353.

115. See, e.g., *Florida Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142-43 (1963).

116. 21 U.S.C. § 1052(b)(1) (1970) (emphasis added).

117. *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977).

118. See, e.g., *id.* at 539 (interpretation based on federal agency’s interpretation); *Rice v. Santa Fe Elevator Corp.* 531 U.S. 218, 232-34 (1947) (interpretation based on House Committee Report).

119. See generally, H.R. REP. NO. 1670, 91st Cong., 2d Sess. 6 (1970); *1970 Hearings, supra* note 10; *1969 Hearings, supra* note 10.

ture (USDA) interprets the phrase to mean standards which are either more or less rigorous than federal standards.¹²⁰ Since courts have relied on federal agencies' interpretations of preemption provisions, the USDA's interpretation of this provision should lead a court to conclude that Congress intended to expressly preempt California from using any nonfederal standard when inspecting *interstate* eggs. Preemption of California's standards for interstate eggs would enable out-of-state producers shipping their eggs into California to avoid unnecessary marketing costs since all their interstate eggs could be graded under federal standards.¹²¹

The question remains, however, whether the Act preempts California from using nonfederal standards when inspecting *intrastate* eggs. In the Act, Congress expressed an intention to preempt state standards for *interstate* eggs, but did not state specifically an intention to preempt state standards for *intrastate* eggs as well. This omission might infer that Congress did not intend to preempt state standards for *intrastate* eggs. A court could give this inference conclusive effect, which would preclude further inquiry into whether Congress impliedly preempted California's standards for *intrastate* eggs.¹²² Courts should look beyond the express preemption provision, however, because other indications of Congress' intent may imply preemption of a broader or narrower scope.

In a recent case involving uniform flour standards,¹²³ the United States Supreme Court faced the issue of whether a provision which expressly preempted only a limited scope of flour standards precluded a finding that Congress impliedly intended to preempt a broader scope of flour standards. The Court found that the preemption provision¹²⁴ precluded only state flour standards which were less stringent than federal regulations.¹²⁵ The issue of whether Congress impliedly intended to preempt all state flour standards, however, was left unanswered. The Court went beyond the terms of the preemption provision to resolve this

120. See Kennett, *supra* note 16, at 15 (requires states use standards "identical" to federal standards).

121. See H.R. REP. NO. 1670, 91st Cong. 2d Sess. 6 (1970).

122. See, e.g., *Mintz v. Baldwin*, 289 U.S. 346, 351 (1933) (express exclusion of state regulation of federally inspected meat found to indicate Congress did not intend to preempt meat not federally inspected).

123. *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-41 (1977).

124. The provision stated:

[I]t is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this Act which are less stringent than or require information different from the requirements of section 4 of this Act or regulations promulgated pursuant thereto.

15 U.S.C. § 1461 (1966).

125. *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977).

issue and found that a broader scope of state regulations was impliedly preempted.¹²⁶ Similarly, the provision in the Egg Products Inspection Act¹²⁷ preempts only a limited scope of state egg standards. The express provision preempts only state standards for *interstate* eggs. The issue of whether Congress impliedly intended to preempt state standards for *intrastate* eggs, therefore, still must be addressed.¹²⁸

C. Implied Preemption of California Standards

Whether a court finds that the Act impliedly preempts California standards for *intrastate* eggs depends on whether any of the circumstances which may imply or negate Congress' intent to preempt exist and how the principles of federal-state relations will affect a court's finding.

1. Characterization of Egg Regulation as a State or Federal Concern.

To determine whether Congress impliedly intended to preempt California egg standard regulation, a court first will characterize the area of egg regulation as a traditional state concern or a dominant federal interest. If regulation of egg standards is a traditional state concern, this circumstance indicates Congress' intent not to preempt state regulation.¹²⁹ On the other hand, if regulation of egg standards is a dominant federal interest, this circumstance indicates Congress' intent to preempt state regulation.¹³⁰

Regulation of food production and marketing is considered an area of traditional state concern. In *Florida Lime & Avocado Growers, Inc. v. Paul*,¹³¹ the United States Supreme Court held that the regulation of avocado standards was a traditional state concern since states have a valid interest in providing consumers with food of a particular degree of excellence and in protecting consumers from fraud in the sale of food. The Court's decision rested on the rationale that states traditionally and more effectively have regulated the readying of foodstuffs for market to protect these interests.¹³²

The rationale of *Florida Lime* applies to the regulation of egg standards as well. The federal government only recently has undertaken the

126. *Id.* at 543.

127. 21 U.S.C. § 1052(b)(1) (1970).

128. *See, e.g.,* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (meat & flour standards).

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

130. *Id.*

131. 373 U.S. 132, 144 (1963).

132. *Id.*

regulation of eggs.¹³³ Historically, the states rather than the federal government have regulated the marketing of eggs. States regulate egg standards to provide consumers with eggs which meet at least a particular degree of excellence and to protect them from fraud in the sale of eggs.¹³⁴ Also, effective regulation of eggs requires that states control egg marketing. Since eggs are a perishable commodity, local market inspection is essential to ensure that eggs comply with their grades when sold.¹³⁵ Thus, because states traditionally and more effectively have regulated egg standards, a court should find that the subject of the Egg Products Inspection Act¹³⁶ is a traditional state concern.

Regulating in an area of traditional state concern suggests that Congress did not intend to preempt state egg regulation.¹³⁷ Using the presumption against preemption when an area of traditional state concern is affected, courts have found that when Congress imposed food marketing regulations in other areas, it did not intend to preempt state regulation.¹³⁸ Federal regulation of eggs, then, suggests that Congress did not intend to preempt California egg standards. Other indications of Congress' intent to preempt, however, still should be examined to see if preemption of intrastate egg standards could be implied.

2. The Act as Creating a Pervasive Regulatory Scheme.

A court also will consider the pervasiveness of federal egg regulation in determining whether Congress intended to preempt by implication.¹³⁹ The Act establishes two schemes of regulation, production and marketing. Neither of these schemes, however, indicate that Congress intended to preempt California's regulation of intrastate egg standards.

The Act regulates the production stage through the licensing of producers, spotchecking eggs for wholesomeness and inspecting premises, facilities and operations to ensure that unwholesome eggs do not enter consumer channels.¹⁴⁰ Producers who violate these regulations are sub-

133. Federal regulation of egg commerce began with the enactment of the Federal Food, Drug, and Cosmetic Act, § 401 (1938), *as amended*, 21 U.S.C. § 341 (1956).

134. *See* CAL. FOOD & AGRIC. CODE § 27521(a), (c) (West 1971). The California Agriculture Code was renamed the California Food and Agriculture Code by 1972 Cal. Stats. 468.

135. 1970 *Hearings*, *supra* note 10, at 36 (statement of James K. Presnal).

136. 21 U.S.C. §§ 1031-1056 (1970).

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

138. *See, e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1962) (avocado standards); *Parker v. Brown*, 317 U.S. 341 (1943) (raisin standards); *Canton Poultry, Inc. v. Connor*, 278 F. Supp. 822 (N.D. Fla. 1968) (poultry standards).

139. *See, e.g.*, *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625, 633-34 (1973).

140. 21 U.S.C. § 1034(d) (1970); 7 C.F.R. § 59.28(a), 59.690 (1975), H. Kennett, Director of the Poultry Division of the Agricultural Marketing Service of the U.S.D.A. has concisely described the production stage scheme:

ject to fines and penalties.¹⁴¹ Thus, the production stage regulations may constitute a pervasive regulatory scheme.¹⁴²

Although the production stage regulations may be pervasive, they do not necessarily pervasively regulate the marketing stage.¹⁴³ In other words, pervasive federal regulation of the production stage does not imply Congress' intent to preempt state regulation of the marketing stage.¹⁴⁴ Since egg standards are marketing regulations, the Act's production regulations cannot imply Congress' intent to preempt California standards for intrastate eggs.¹⁴⁵ Congress' intent to preempt standards for intrastate eggs can be implied from a pervasive regulatory scheme only if the scheme regulates egg marketing.

The Act's marketing regulations, however, are not so extensive as to imply Congress' intent to preempt California standards for intrastate eggs. The USDA has established detailed regulations for egg standards and regulates the inspection of *interstate* eggs at retail markets to ensure compliance with these standards.¹⁴⁶ Moreover, no critical gap exists in egg standards regulation because the federal scheme still enables states to protect the public welfare. Since the federal scheme only regulates egg standards, states still are able to inspect both interstate and intrastate eggs to protect consumers from fraud.¹⁴⁷ Also, since the federal standards are as high as state standards, states still can provide consum-

This portion of the law controls the disposition of certain undergrade eggs [below the minimum wholesomeness standard] to keep them out of consumer channels. It does not impose sanitary or facility requirements on shell egg plants. . . . All such eggs, except for "checks" and "dirties," must be destroyed for use as human food. They can be used in animal food but must be denatured and properly identified. "Checks" and "dirties" can move to official egg breaking plants where they can be properly segregated, handled, processed, and pasteurized under supervision of an inspector. . . . To determine compliance with this portion of the Act, egg packing plants and hatcheries are inspected at least once a quarter. When making a quarterly visit, the inspectors determine the disposition of restricted eggs, the proper labeling of product, the adequacy of record keeping and whether eggs are being broken illegally. . . . While under federal supervision, this surveillance work is handled primarily by state employees who are reimbursed by U.S.D.A. for their services. . . . About 4,900 egg packers and other egg handlers are registered with the Department and visited quarterly. Last fiscal year about 25,000 inspection and reinspection visits were made.

Kennett, *supra* note 16, at 14-15.

141. Egg Products Inspection Act, § 8(c), 21 U.S.C. § 1037(d)(8) (1970).

142. *See, e.g.*, Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 160-62 (1942) (federal regulation of butter production which ensured wholesomeness of butter).

143. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144-45 (1963).

144. *Id.*

145. *See, e.g.*, Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 144 (1963) (avocado standards).

146. Section 23 of the Egg Products Inspection Act, 21 U.S.C. § 1052 (1970) incorporates by reference the federal egg standards promulgated by the U.S.D.A. in 7 C.F.R. § 56 (1977) and requires states to use federal standards when inspecting eggs.

147. 1969 Hearings, *supra* note 10, at 39 (statement of Richard E. Lyng).

ers with eggs of a particular degree of excellence. Failure to include intrastate eggs in the federal marketing scheme, however, prevents finding that a pervasive regulatory scheme exists. Since the Act limits marketing regulation to interstate eggs, a court would have to interpret the regulatory scheme to encompass intrastate egg standards. Such an interpretation requires bootstrapping to find a pervasive regulatory scheme. A court, therefore, is unlikely to find that the Act's marketing regulations indicate Congress' intent to preempt California's standards for intrastate eggs.¹⁴⁸

3. California Standards Interfere with the Accomplishment of the Act's Objectives.

Another circumstance a court will consider in finding implied preemption is whether California's regulation of intrastate egg standards interferes with the accomplishment of the Act's objectives.¹⁴⁹ The Act's declaration of policy¹⁵⁰ and legislative history¹⁵¹ state that one of the Act's objectives is to promote interstate egg commerce by establishing uniform standards. Prior to the Act, Congress made efforts to obtain uniform standards among the States but such efforts were unsuccessful.¹⁵² A few states failed to adopt federal standards, which forced national producers to grade their eggs under different standards. Intrastate eggs were subject to local standards and interstate eggs were subject to the standards of the destination state.¹⁵³ While only a few states had nonfederal standards, the expense of grading eggs under even two sets of standards discouraged producers from selling their eggs interstate.¹⁵⁴ Congress, in an attempt to promote interstate egg commerce, sought to establish uniform egg standards.¹⁵⁵ In furtherance of this policy, Congress not only established uniform federal standards but also obligated the federal government to regulate interstate egg marketing to ensure the use of uniform standards.¹⁵⁶

148. See, e.g., *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 13-14, (1943); *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933) (pervasive scheme found not to include meat not actually regulated by federal law); *Savage v. Jones*, 225 U.S. 501, 533 (1912) (federal scheme regulating adulterated and misbranded food held not to preempt state regulations dealing with matters not regulated under federal scheme, because Congress' intent to preempt will not be inferred when Congress circumscribes its regulation so as to occupy only a limited field).

149. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 518, 540-41 (1977).

150. 21 U.S.C. § 1032 (1970).

151. H.R. REP. NO. 1670, 91st Cong. 2d Sess. 5-6 (1970).

152. *Id.* at 6.

153. *Id.*

154. *Id.*

155. *Id.*

156. 21 U.S.C. § 1052(b)(1) (1970).

California's use of less stringent standards for intrastate eggs interferes with the accomplishment of this congressional objective. National producers still are forced to grade their eggs under different sets of standards. Intrastate eggs must be graded under California standards and interstate eggs must be graded under federal standards.¹⁵⁷ Since most national producers graded their eggs under only two sets of standards before the Act,¹⁵⁸ the discouraging effect of nonuniform intrastate egg standards on interstate commerce is substantially the same today. California's use of nonfederal standards for intrastate eggs thus interferes with the accomplishment of the Act's objective to promote interstate egg commerce.

State interference with congressional objectives indicates that Congress intended to preempt state regulation.¹⁵⁹ It is reasonable, therefore, to infer that Congress must have intended to preempt California's standards for intrastate eggs.¹⁶⁰ Preemption would eliminate present barriers to interstate egg commerce which California's standards create. California's national producers would not be faced with the additional costs of meeting different marketing standards since all eggs would be graded under federal standards. Preemption, thus, would accomplish Congress' objective to promote interstate egg commerce through the use of uniform standards.

4. Unarticulated Considerations Which May Influence a Court's Preemption Decision.

Federal and state regulation of egg standards present contradictory indications of Congress' intent. Egg regulation is a traditional state concern yet California's standards interfere with Congress' uniformity objective. Deference to conventional principles of federal-state rela-

157. Theoretically, of course, national producers could avoid the increased marketing costs from grading eggs under two sets of standards by grading all their eggs to meet the federal standards. Congress obviously believed this alternative was not viable or there would have been no reason to establish uniform standards. This alternative is not viable because it ignores economic reality. The very reason national producers are forced to grade under different standards when nonuniformity exists is that national producers are placed at an economic disadvantage with local producers if they do not do so. When both national and local eggs are marketed with the same grade, but the national producers' eggs meet more rigorous standards they suffer economically because higher quality eggs cost more to market. See *1970 Hearings, supra* note 10, at 69 (statement of William L. Harrelson). This economic consideration underlies Congress' uniformity objectives.

158. H.R. REP. NO. 1670, 91st Cong., 2d Sess. 6 (1970).

159. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

160. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 543 (1977) (diverse state flour standards interfered with accomplishment of congressional policy to facilitate value comparisons by consumers through uniform standards); *Campbell v. Hussey*, 373 U.S. 297, 299-303 (1961) (diverse tobacco standards interfered with congressional policy to establish standards for benefit of tobacco industry).

tions, however, should lead a court to find that Congress intended to preempt California's intrastate egg standards.

Regulation of a traditional state concern often leads courts to find no preemption. The state's interest in protecting the public welfare generally outweighs the federal interest in being the exclusive regulator in an area because courts want to maintain a balance of federal-state power.¹⁶¹ Because California's regulation of egg standards is a traditional state concern, a court will be influenced to find that the Act does not preempt California's standards for intrastate eggs.¹⁶²

Since federal regulations adequately protect California's police power interest, however, a court should find that Congress impliedly intended to preempt California's standards.¹⁶³ For example, in a case involving uniform tobacco standards,¹⁶⁴ a traditional state concern, the United States Supreme Court found an implied preemption on the basis of Congress' uniformity objective. The federal regulation adequately protected the state's interest in providing consumers with high quality tobacco and protecting consumers from fraud. Federal standards were as high as the state's standards and tobacco was inspected at the market to ensure compliance with federal standards.¹⁶⁵ Thus while the federal interest in exclusive regulation impinged upon a traditional state concern, the federal interest prevailed because the federal regulation adequately protected the state's interest.¹⁶⁶

161. *United States v. Bass*, 404 U.S. 336, 349 (1971).

162. In *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-50 (1963), a case involving uniform federal avocado standards, the United States Supreme Court found no implied preemption even though Congress' objective was to provide minimum standards of quality and grading to effectuate orderly marketing because the state's interest in protecting the public from fraud and providing them with avocados of a higher quality, traditional state concerns, outweighed Congress' interest in exclusive regulation to accomplish orderly marketing. State regulation required that avocados of federally regulated producers meet the higher state standards. Such regulation interfered with Congress' objective to eliminate disorderly marketing because federally regulated producers could not market their avocados unless they met the state's standards. Similarly, Congress' objective in the Egg Products Inspection Act, 21 U.S.C. § 1032 (1970), is to eliminate disorderly marketing through the use of uniform standards and diverse standards interfere with this objective. California's interests in regulating egg standards are to provide consumers with eggs of at least a particular degree of excellence and to protect consumers from fraud. *See CAL. FOOD & AGRIC. CODE*, § 27521(a), (c) (West Cum. Supp. 1977). Because California's regulation of egg standards is a traditional state concern, then, a court will be influenced to find that the Act does not preempt California's standards.

163. *See, e.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 625 (1973) (federal regulation provided standards for the highest degree of public safety and regulation of noise pollution).

164. *Campbell v. Hussey*, 368 U.S. 297, 299-303 (1961).

165. *Id.*

166. *But see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144-46 (1963) (Court held no implied preemption where federal regulations provided only minimum standards and no market inspection to protect state's public welfare interests).

Federal regulation of egg standards similarly protects California's interest in providing consumers with eggs of a particular degree of excellence and ensuring that eggs meet these standards. Federal egg standards are at least as high as California standards¹⁶⁷ and federal inspection adequately protects the state's interest in preventing fraud in the sale of eggs. Since federal regulation of egg standards adequately protects California's police power interests, the federal interest in exclusive regulation should outweigh the competing state interest. A court, therefore, should find that the Egg Products Inspection Act¹⁶⁸ preempts California standards for intrastate eggs.

IV. CONCLUSION

Congress, in passing the Egg Products Inspection Act¹⁶⁹ appears to have exercised its power to exclude California's regulation of egg standards. The Act does not create a direct conflict with California's regulation of egg standards because producers who market their eggs interstate can comply with both California and federal standards by meeting the higher federal standards. The Act, however, does appear to preempt California egg standards expressly and by implication.

First, the Act appears to expressly preempt California from using standards which are different from federal standards when inspecting *interstate* eggs. Congress' express prohibition includes standards which are either more or less stringent than federal standards. Second, the Act appears to impliedly preempt California from using nonfederal standards when inspecting *intrastate* eggs. The Act regulates egg marketing, a traditional state concern, which indicates Congress did not intend to preempt state standards. California's nonfederal standards, on the other hand, interfere with Congress' objective to provide uniform standards which indicates Congress' intent to preempt state standards. Although federal and state regulation of egg standards give rise to contradictory indications of Congress' intent, a court should find preemption of California's standards because federal regulation of egg standards adequately protect California's interest in regulating egg standards for the public welfare.

Preemption of California standards for both interstate and intrastate eggs will achieve Congress' objective to promote interstate egg commerce through uniform standards. Out-of-state producers shipping their eggs into California will be able to grade all their interstate eggs under federal standards. Also, California's national producers will avoid the increased costs of grading their interstate and intrastate eggs

167. *Set forth in note 23 supra.*

168. 21 U.S.C. §§ 1031-1056 (1970).

169. *Id.*

under two sets of standards since all their eggs will be subject to the federal standards.

A finding of implied preemption also advances California's interest in protecting consumers from fraud in the sale of eggs and providing them with high quality eggs. Because eggs are inspected at retail markets, compliance with federal standards is ensured and thus consumers are protected from fraud in the sale of eggs. Moreover, because the federal standards are at least as high as California standards, preemption will satisfy California's interest in providing consumers with eggs of a particular degree of excellence.

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