TSCA Reform and Preemption: A Walk on the Third Rail

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Over the last thirty months, an impressive array of public-sector, private-sector, and nongovernmental organizations (NGOs) have endorsed the need for federal chemical control and product safety reform. Most of this attention has focused on the 1976 federal Toxic Substances Control Act (TSCA), the nation's primary (but hardly the only) statute regulating the manufacture, import, and use of chemicals in the United States. The White House has released "principles" for reform. Committees in the House and Senate have introduced bills, held hearings, and conducted stakeholder meetings on many key issues. Stakeholders from industry, the NGO community, and academia have conferred, written, and opined extensively on the substantive merit and political likelihood of new chemical control legislation.

This article cannot capture, let alone resolve, the full range of chemical control policy issues that have consumed stakeholders in the TSCA reform debate. Instead, it focuses on one issue largely absent from the current discussion: how a strengthened federal statute should balance the powers of federal and state regulators to protect the health, safety, and environmental, economic, and social welfare of the U.S. population. It focuses on preemption. More specifically, it argues that any modernized statute should include clear and express language on how key elements of the law—testing requirements, use restrictions, labeling and notice requirements, and statutory or common-law liability—will reconcile federal and state programs.

This discussion is necessary for three reasons. First, one of the major arguments proffered by supporters of TSCA reform is that the lack of federal leadership in managing chemical risks is prompting states to act in the breach. These state and local regulations are subjecting manufacturers and retailers to an ever-evolving and often scientifically questionable quilt of use restrictions, labeling requirements, and point-of-sale warning requirements across the fifty states that confuse consumers, reduce public confidence in federal safety standards, and obstruct and interfere with the smooth flow of interstate and international commerce. To the extent this is the case, one test for any "reformed" statute would be whether it includes provisions to prevent, or at least manage, inconsistent state regulations in the future.

Second, preemption is rarely a "yes or no" proposition. Most, if not all, environmental policy issues have local, regional, and national dimensions, and will require some level of action and cooperation by regulators at each level of government, as well as by citizens and businesses. Left unchecked, however, competing federal, state, and local programs could bring both interstate commerce and environmental protection efforts to a grinding halt. Given the nation's complex economy (and its equally complex political environment), it is critical that federal legislation anticipate and address the potential points of conflict between these levels in a manner that protects the public interest.

Finally, if there is any one takeaway from the last thirty years of murky U.S. Supreme Court jurisprudence on federal/state preemption, it is that reliance on implied principles of preemption, or even on generally worded express statements of preemption, will doom TSCA stakeholders to decades of federal court litigation over the proper limits and reaches of federal and state law. Preemption, like so many other aspects of contemporary law and policy, has many layers and facets, and only a careful, thorough, and express articulation of congressional intent will ensure that elected lawmakers, not judges, dictate the outcome.

The Faces of Federal Preemption

Tension between federal and state powers is hardly a novel dynamic in American governance. Indeed, the U.S. Constitution not only foresaw the potential for clashes between federal and state policies, but incorporated specific provisions to address such situations. Article 1, Section 8 of the Constitution enumerates a variety of specific powers granted to Congress, including, inter alia, the power to "regulate Commerce with foreign Nations, and among the several States" and to "make all Laws which shall be necessary and proper for carrying [such powers] into Execution." Conversely, the Tenth Amendment ensures that "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." In the case of a direct conflict with a state law or constitution, the federal Constitution's "Supremacy Clause" resolves the tension in the favor of the federal government, dubbing federal laws and treaties "the supreme Law of the Land." Const. Art. VI, Par. 2.

The challenge for policymakers is that more often than not the actions needed to solve major environmental challenges implicate both federal *and* state-specific interests and powers. Thus, while the Constitution may give the federal government the legal authority to "go it alone," freezing out state lawmakers and regulators is rarely the best political or policy option. Conversely, while many environmental issues may seem well-suited to management at the local level, the inextricable

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ecological, economic, and social interconnections between and across jurisdictional boundaries often lead to actions in one state having direct impacts on another.

Preemption policies offer a variety of ways of slicing and dicing federal and state (or state and local) power allocations to obtain the right mix of uniformity and flexibility. The issue is rarely whether any form of preemption may apply but rather what scale and scope the preemption policy should assume. One way to analyze preemption is in terms of the relative degree of authority allocated to, or withheld from, the subordinate level of government. A 1992 Report by the Federal Advisory Commission on Intergovernmental Relations (ACIR) created an inventory of 439 federal statutes passed between 1780 and 1992 that incorporated preemption provisions, dividing them into three general preemption categories: "dual sovereignty," "partial preemption," and "total preemption." ACIR, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues*, A-121, (Sept. 1992), at iii (ACIR Study). Under a "dual sovereignty" regime, preemption is limited to cases of direct conflict between a state law and a federal law on the same subject. *Id.* at 15. Thus, for example, the 1968 Gun Control Act expressly reserved the right of states to regulate on similar matters, "unless there is a direct and positive conflict between such provision and the law of the state so that the two cannot be reconciled or consistently stand together." *Id.* at 16 (citing 18 U.S.C. § 927). The National Environmental Policy Act (NEPA), one of the first of the modern federal environmental statutes, has many characteristics of a dual sovereignty regime. NEPA imposes specific procedural requirements on federal agencies undertaking major federal actions (federal funding or federal approvals), including requirements to conduct detailed reviews of the project's environmental impact. 42 U.S.C. §§ 4321 *et seq*. While states cannot exempt qualifying projects or actions from undergoing the federal NEPA review process, they retain the authority to impose separate state-level environmental review requirements, as illustrated by the powerful programs under California and New York state law. Cal. Pub. Res. Code §§ 21000 *et seq.*; N.Y. Comp. Codes R. & Regs. tit. 6 §§ 617 *et seq*.

Under "partial preemption" regimes, Congress or regulators establish minimum "floor" standards applicable in every state but allow individual states to seek authority to implement and enforce the program on the condition that the state standard is *at least as stringent* as the federal floor. ACIR Study at 16–17. This "partial preemption" approach has been the default standard for most contemporary federal environmental statutes, particularly with respect to regulating pollution from geographically fixed "stationary sources" of pollution and other commercial and industrial activities commonly regulated at the state level. The Clean Air Act and Clean Water Act both require the US. Environmental Protection Agency (EPA) to set minimum standards for various types of air and water pollutants released from factories and other stationary sources but allow individual states to seek delegated authority for equivalent or more stringent state programs. *See also* the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq*.; Safe Drinking Water Act (SDWA), 42 U.S.C. § 300; Comprehensive Environmental Response, Compensation, and Recovery Act (CERCLA), 42 U.S.C. §§ 9601 *et seq*. These partial preemption approaches are highly effective where the activity being regulated and the specific costs of the applicable regulations both fall within the same specific and discrete state or local jurisdictions.

There are cases, however, where federal policymakers will deem the need for national or regional uniformity and policy consistency to trump the benefits of a delegated or bifurcated regulatory approach. Under the third category of preemption programs, "total preemption," Congress can prohibit state regulation of any kind, reserving specific issues—if not the entire regulatory field—to federal lawmakers and regulators. ACIR Study at 18. Classic examples of total preemption regimes include the federal bankruptcy code and U.S. patent law, both fundamental pillars of interstate commerce where inconsistent state programs could undermine the proper functioning of national markets and the federal economy. *Id*.

Blanket "total preemption" is rare in the federal environmental policy context. Most environmental regulations cover issues with a significant local dimension, from land-use policies governing specific localities to the commercial, agricultural, industrial, or extractive activities that occur there. There is precedent, however, for Congress imposing limits on state programs for environmental regulatory areas implicating products in interstate commerce. The Clean Air Act, for example, preserves the right of states to regulate the use, operation, or movement of registered or licensed motor vehicles but restricts most states from setting different motor vehicle exhaust-emission standards for new cars and car engines or from requiring state certification, inspection, or other emission control approvals prior to the retail sale of new cars and engines. 42 U.S.C. § 7543. In recognition of the state of California's long leadership with respect to regulating automotive emissions and its unique political and geographic legacy, however, Congress included one exception to this preemption rule, establishing a process by which California could seek a waiver from EPA to allow a more restrictive California-derived standard. *Id.* Other states, in turn, could then select the California automotive standard in lieu of the federal standard, resulting in what is, essentially, a "total preemption" scheme providing states with two, rather than one, federally approved options. This compromise helped impose a greater level of predictability and uniformity in the domestic regulatory environment for new cars and car engines, while recognizing the unique and historic role of California as an early advocate for tighter standards and providing states with a perception of choice in implementing the program.

The 1972 Federal Insecticide Fungicide and Rodenticide Act (FIFRA) is another example of Congress incorporating elements of "total preemption" into portions of the statute where interstate commerce was a concern. FIFRA establishes the federal regulatory framework governing the manufacture, sale, and marketing of pesticides, ranging from pool chemicals to weed killers and kitchen disinfectant sprays, and requires companies to submit detailed health and safety data, use information, and proposed labeling to EPA prior to bringing pesticides, pesticidal products, and new pesticide uses to market. *See* 7 U.S.C. §§ 136 *et seq*. FIFRA allows states to place additional restrictions on the sale or use of federally registered pesticide products but prohibits states from imposing "any requirements for labeling or packaging in addition to or different from those required under [FIFRA]," 7 U.S.C. § 136v(a)–(b).

This labeling restriction reflected the concerns of Congress that imposing disparate state-by-state labeling requirements could constitute a significant impediment to interstate commerce. As with the preemption components of the Clean Air Act, however, the preemption itself was confined to regulatory

actions having the greatest impact on interstate commerce: product labeling and testing requirements.

Both FIFRA and the Clean Air Act illustrate the flexibility lawmakers have in tailoring federal preemption policy to fit the diverse provisions and requirements in a statute. As discussed below, however, such efforts will only be successful if policymakers face preemption questions head on and provide a clear and express articulation of congressional intent regarding the scope and reach of any preemption provision.

Preemption as a Scalpel, Not a Bludgeon

Labels like "total preemption," "partial preemption," and "joint jurisdiction" help illustrate the range of options lawmakers have when developing preemption policy for aspects of a regulation, but they do little to address the complexity of contemporary environmental policy and the variety of governmental actions at issue. Historically, federal and state policymakers have used a number of different governance tools to protect public health and the environment from unsafe products and substances. Four common examples are (1) statutory or regulatory restrictions on the use of a substance (use restrictions); (2) statutory or regulatory requirements to provide labels, warnings, or point-of-purchase notice requirements for products containing specific substances or materials of concern (warning requirements); (3) statutory or regulatory requirements to conduct testing on a product as a condition of market entry or access (testing requirements); and (4) liability under federal or state statutory or common law for unfair trade practices, duty to warn, or other tort theories (tort liability). An effective preemption analysis will consider these actions individually rather than relying upon one general statement of preemption.

Courts have tended to interpret preemption provisions narrowly, declining to preempt state actions not expressly, and quite specifically, identified in the text. For example, in 1992, the Ninth Circuit declined to read FIFRA's prohibition on "any [state] requirement for labeling or packaging in addition to or different from those required [by EPA]" as covering point-of-sale warnings under California's Proposition 65 law, reasoning that point-of-sale signs did not constitute "labeling" or "directions for use." *Chemical Specialties Mfrs. Ass'n Inc. v. Clifford Allenby*, 958 F.2d 941 (9th Cir.), *cert. denied*, 506 U.S. 825 (1992). Similarly, in 1996, the U.S. Supreme Court concluded that state common-law damage claims against a medical device manufacturer were not preempted, despite an express preemption clause in the federal Medical Device Act prohibiting state medical device safety or effectiveness requirements different from federal requirements. *Medtronic v. Lohr*, 518 U.S. 470, 481–82 (1996). The Court concluded that in light of the historic authority granted to state governments in regulating health and safety, the statute should be read as preempting only inconsistent "substantive requirements," rather than potential remedies. *Id.* at 491. And in 2005, the Supreme Court held that state common-law claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not preempted by FIFRA as such claims do not require manufacturers to label or package their products in any particular way. *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 436 (2005). Moreover, the Court held that even state labeling laws might not be preempted if they were "equivalent to, and fully consistent with, FIFRA's misbranding provisions." *Id.* at 436.

Federal preemption case law is complicated and inconsistent; a more detailed analysis could offer a variety of cases where courts came to the opposite conclusions from the cases discussed above regarding express and implied preemption of various state actions. The examples cited, however, illustrate an underlying theme that policymakers and stakeholders should consider: The preemption issues any given piece of legislation may pose are as diverse as the tools federal and state legislators have to address them.

The Press for TSCA Modernization

Critics have advanced a variety of arguments to support the need for TSCA reform. Lisa Jackson, the current administrator of EPA, an early and influential voice for TSCA reform upon her appointment in 2009, has argued that TSCA's "unreasonable risk" safety standard is inadequate and that TSCA fails to give EPA adequate authority to demand the data or impose risk mitigation requirements necessary to regulate new and existing chemicals. Further, she asserts, TSCA inhibits the necessary sharing of critical risk data under its existing confidential business information regulations. U.S. Environmental Protection Agency, "Essential Principles for Reform of Chemicals Management Legislation" (Sept. 2009). These and other weaknesses in TSCA, critics argue, have undermined the federal government's ability to identify and manage chemical risks to public health and the environment and have eroded public confidence in the federal chemical control framework. Moreover, this lack of confidence in the federal system has spurred a patchwork of ballot initiatives, laws, and regulations at the state and

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local level intended to fill the breach. Indeed, a recent search of the U.S. State-Level Chemicals Policy Database identified more than 1,100 laws or policies in place or under consideration at the state level. *See, e.g.*, Lowell Center for Sustainable Production, *US State-Level Chemicals Policy Database*, www.chemicalspolicy.org/chemicalspolicy.us.state.database.php. These policies range from California's infamous 1987 Proposition 65 law, which requires detailed product labeling or point-of-purchase notice regarding the presence of a long list of chemicals of concern in products or on premises, to a rash of recent state bills banning the use of certain plastic additives, flame retardants, and other consumer and industrial chemicals.

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The scientific rationale and support for such state-level actions vary, and stakeholders continue to dispute whether such actions have resulted in public health improvements or just increased public alarm and distrust. But for companies seeking to compete in national or international markets, the business impact of multiple state standards is clear. In today's economy, national manufacturers and retailers rarely have the flexibility to manufacture and label specific products to fifty different state standards, meaning that product content restrictions or labeling requirements in one state have a cascading impact on the products available in all other states. In some cases, that impact may be companies reformulating products to meet the "common denominator" demands of a fifty-state market, resulting in higher prices and less selection for consumers. In other cases, the burden of complying with so many disparate state-level standards can be enough to force companies out of markets entirely. In either case, the reality of manufacturing and retail economics is that individual states have power to rival federal regulators in shaping national markets. TSCA reform advocates argue that absent efforts to strengthen the federal chemical control framework, the state-by-state balkanization of chemical control and product safety policy will continue, making it harder and harder for U.S. companies to compete locally, nationally, and internationally. Moreover, without a stronger, more trusted federal standard in place, U.S. and overseas consumers will continue to question the safety of U.S. products, and manufacturers and retailers will remain vulnerable to extreme and sometimes scientifically unsubstantiated chemical and product scare tactics made possible in the Internet era.

But if finding fault with current chemical control policy has been easy, crafting legislative solutions has been hard. After three years of House and Senate Committee hearings, multiple draft bills, numerous professional conferences, stakeholder meetings, position papers, and resolutions (including a resolution by the American Bar Association), the parties seem no closer to consensus on a draft bill than when President Obama entered office.

Industry and environmental NGO advocates agree that "TSCA reform" (or "TSCA modernization" as the industry describes it) is important in principle. They remain split, however, on what reform or modernization should look like. Should EPA regulate individual substances or mixtures? Should new chemicals or uses be subject to premarket review and approval? How should EPA prioritize reviews of existing chemicals and uses? Should manufacturers be required to provide standardized minimum data sets to support federal reviews? What safety standard should apply to chemical reviews? How should regulators balance the public's interest in ingredient, manufacturing, and use information relating to products in commerce with the private (and public) interest in protecting intellectual property? Despite repeated efforts by both government and private entities to find common ground on these issues, politically acceptable solutions remain elusive. And for all of the energy public, private, and NGO stakeholders have expended on solving the TSCA reform impasse in recent years, one issue seems strangely absent from the public debate: how a strengthened federal chemical control policy should handle the myriad state and local rules that were supposedly enacted to compensate for prior federal inaction on chemicals and chemical products in interstate commerce. This article cannot answer the question of what preemption should look like under a strengthened federal chemical control statute, but it can speak to what the preemption discussion should include.

Lessons for TSCA Reform

First, if policymakers hope to reduce the tension between federal and state programs, they will have to look beyond the ineffectual preemption approach adopted when TSCA was enacted in 1976. TSCA expressly preserves the right of third parties to seek remedies available under state common law and the right of states and localities to "establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture," except where EPA has issued a rule mandating specific testing requirements for a chemical substance, mixture, or article, or had taken regulatory action to manage the risks from a specific substance, mixture, or chemical-containing product. 15 U.S.C. § 2617. Even then, states can petition EPA for a waiver allowing more restrictive state-level limits on a substance or mixture. *Id.* States may regulate until EPA acts. *See, e.g.*, *Chesapeake v. Sutton Enterprises, Inc.*, 138 F.R.D. 468, 477 (E.D. Va. 1990) ("The statutory scheme starts with the premise that *no state regulation is preempted until the Administrator promulgates a rule governing that substance*."); *Rollins Environmental Services (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 633 (5th Cir. 1985) ("State law is preempted only when the EPA has issued a rule under Section 4, Section 5 or Section 6 [of TSCA]. If the EPA has not acted, the States are free to act."); *SED, Inc. v. Dayton*, 519 F. Supp. 979, 990 (S.D. Ohio 1981) ("[I]f a (hazardous) substance comes within the purview of both the Toxic Substances Control Act and another federal law, the authority of the state or local government . . . is controlled by the other

law and not the Toxic Substances Control Act."); *Chappell v. SCA Services, Inc.*, 540 F. Supp. 1087, 1100 (C.D. Ill. 1982) ("TSCA does not preempt state common law nuisance actions for damages."). In summary, TSCA's current preemption language, as interpreted by courts, has done little to limit the growth of state and local restrictions, labeling requirements, and testing requirements.

Second, policymakers should avoid reliance on implied preemption doctrines and instead evaluate and articulate, in clear and express terms, how the revised statute would defer regulatory power to, share regulatory power with, or preempt the regulatory authority of state and local governments. Absent a clear indication of congressional intent, courts have tended to reject calls to infer preemption under the principle that Congress knows how to draft legislation and that if and when it intends to limit states authority to act it will do so in a clear manner. *See, e.g.*, *Bates v. Dow Agrosciences*, 544 U.S. at 449 ("If Congress had intended to deprive injured parties of a long available form of [tort] compensation, it surely would have expressed that intent more clearly.").

Third, federal preemption can be a very political issue, creating unusual and inconsistent preemption bedfellows depending on whether federal involvement will raise or lower the resulting national standard. Historically, when the federal government appeared likely to regulate businesses more aggressively than state counterparts, Republicans tended to embrace the concept of states' rights, while Democrats would argue for an overarching minimum federal standard. *See, e.g., Fracturing Regulations are Effective in State Hands Act*, S. 2248/H.R. 4322, 112th Cong. (introduced Mar. 28, 2012). Conversely, where states have tended to regulate businesses more stringently than federal regulators, the positions of the two parties have often flipped, with Republicans arguing for a single standard and Democrats emphasizing the need for state choice. *See, e.g., National Uniformity for Food Act of 2005*, H.R. 4167, 109th Cong. (introduced Oct. 27, 2005). Thus, in the recent public debate over improving federal chemical control law, Democrats have tended to oppose efforts to preempt state and local regulatory authority, with Republicans arguing for a single federal standard. *See, e.g.*, U.S. House of Representatives, Committee on Government Reform—Minority Staff, Special Investigations Division, *Congressional Preemption of State Laws and Regulations*, prepared for Rep. Henry A. Waxman (June 2006). In short, neither party can claim clean hands with respect to concepts of federalism or federal supremacy; any preemption dialogue should avoid recourse to such concepts as a cover for short-term politics.

Finally, policymakers need to approach preemption analysis through a case-by-case assessment of each of a statute's key provisions, not as a monolithic, one-size-fits-all political or policy principle. Starting with the regulatory issues that have caused tension under the current TSCA, independent strands of a preemption analysis should address: (1) restrictions on the manufacture and import of chemical substances, generally; (2) restrictions on the formulation use of chemical substances within specific commercial, industrial, and consumer products or articles; (3) mandatory notice, disclosure, and warning requirements associated with substances or products and articles containing such substances, including product labeling, point-of-sale notice requirements, and other print or electronic media requirements; (4) reporting requirements associated with import, manufacture, or use of regulated substances in international commerce; (5) confidential business information or trade secret protections, as well as policies intended to mandate disclosure of such materials in the name of public-right-to-know; and (6) indirect regulation of substances and products through state common-law tort liability or consumer protection statutes providing alternative remedies under state or local law.

Looking forward in 2012, most stakeholders agree that any meaningful push for legislative TSCA reform will have to wait until after the November elections, both to avoid the politically toxic scrutiny and rhetoric of a presidential campaign and to allow stakeholders on all sides to reassess their political strength with a reshuffled House, Senate, and, potentially, White House. But, while a vote on TSCA legislation is unlikely, that does not mean that congressional staff, select elected officials, and stakeholders should stand idle. Industry reform advocates consider Senator Lautenberg's (NJ-D) Safe Chemicals Act dead, both as a concrete legislative proposal and even as a starting framework for discussions. NGO advocates are unlikely to treat an industry-sponsored bill with any greater trust. Thus, if TSCA reform advocates hope to position a bill for consideration in the next Congress, they will need to maintain a robust cross-stakeholder dialogue on key obstacles to a consensus bill.

And, yes, that dialogue should include the issue of preemption.