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FEDERALISM ISSUES RELATED TO THE PROBABLE EMERGENCE OF THE TOXIC SUBSTANCES CONTROL ACT

JIM FLORIO*

I. INTRODUCTION

This Article examines how the Toxic Substances Control Act (TSCA) affects the regulation of chemical substances at the state level. Emphasis is placed on TSCA's preemption over local laws, particularly in the context of regulations of Polychlorinated Biphenyls (PCBs). While federalism issues have not been a major part of TSCA analysis, there has been recent congressional interest in making TSCA a more "effective," and thereby more expansive, law. In fact, the United States General Accounting Office released a report in September 1994 outlining several legislative changes that could expand TSCA's regulatory control.¹ Moreover, the New Jersey state legislature is considering changes in the Pollution Prevention Act, the act which regulates the use of toxic substances in New Jersey.²

Having served as a Congressman during TSCA's enactment and then having attempted, as the Governor of the State of New Jersey, to abide by this federal mandate, I can appreciate the conflict embodied in TSCA. This law pits a federal environmental regulation against a state's interest in protecting the economic and social welfare of its residents.

A. General TSCA Discussion

The Toxic Substances Control Act³ was enacted by Congress in 1976 to "regulate commerce and protect health and the environment by requiring testing and necessary restrictions on certain chemical

* Partner in the New Jersey office of Mudge, Rose, Guthrie, Alexander & Ferdon; Governor of the State of New Jersey, 1990 to 1994; United States Congressman, 1974 to 1990. I was assisted in preparing this Article by Glenn A. Clouser and Fernando E. Linhares, both Environmental Associates at the New Jersey office of Mudge, Rose, Guthrie, Alexander & Ferdon.


2. A. 903/S. 308 (1995). On January 23, 1995, the State Assembly passed bill A. 903, which would curtail the Pollution Prevention Act, by a margin of 50 to 30. The Senate version, S. 308, will be considered by the Senate Environmental Committee.

substances." Specifically, TSCA regulates the manufacture, use, and disposal of chemicals that pose a significant risk of injury to the environment and human health. TSCA has been referred to as "perhaps the most complex, confusing, and ineffective of all our federal environmental protection statutes."

1. **Historical Developments 1970-1976.**—Commencing with the enactment of the National Environmental Policy Act and the creation of the Environmental Protection Agency (EPA), both of which occurred in 1970, Congress passed several major pieces of environmental legislation prior to TSCA. Congress enacted TSCA, in part, to remedy the lack of health and safety information concerning chemical substances and mixtures and to prevent unreasonable risk of injury to human health and the environment from harmful chemicals. Thus, TSCA authorizes EPA "to collect information about the hazards posed by chemical substances and to take action to control unreasonable risks by either preventing dangerous chemicals from making their way into use or placing restrictions on those already in commerce."

Because TSCA "does not clearly articulate what EPA is to achieve through the use of its regulatory authorities," there has been a continuing debate between regulators and the regulated community as to whether TSCA is intended to be a comprehensive, umbrella law or an attempt at filling gaps left by other health and environmental laws.

October 11, 1976, and became effective on January 1, 1977. Regulations promulgated pursuant to the Act are found at 40 C.F.R. Parts 702 through 775.

9. GAO, supra note 1, at 9.
10. Id. at 15.
11. Id.
2. The "Gap-Filler" Objective.--Comments in the Senate Report on TSCA provide an excellent illustration of congressional intent in enacting TSCA. According to the Senate,

[T]he proposed Toxic Substances Control Act would close a number of major regulatory gaps, for while certain statutes . . . may be used to protect health and the environment from chemical substances, none of these statutes provide the means for discovering adverse effects on health and environment before manufacture of new chemical substances.

Therefore, in light of the fragmented and inadequate federal programs protecting against the adverse effects of toxic chemicals, TSCA was meant to “fill the gap” by preventing the introduction of unreasonably hazardous chemical substances into commerce. Because of TSCA’s gap-filling approach, its goals are accomplished in conjunction with other federal environmental laws. Thus, issues of preemption and federalism are often obfuscated or limited by the expansive nature of the other applicable environmental law. In many instances, EPA or the courts will choose to regulate chemical substances under environmental laws other than TSCA.

For instance, under TSCA section 9, EPA is authorized to refer a matter to another agency if that agency would prevent or reduce the risk of injury to a sufficient extent. EPA may also transfer a matter for regulation under other EPA administered laws. An analogous situation occurred in *Sed, Inc. v. City of Dayton*. In *Sed*, a company storing PCBs in its warehouse challenged the constitutionality of Dayton’s ordinances restricting storage of PCBs, arguing that TSCA preempted local regulation of toxic chemicals. The court, however, found that TSCA preemption was not an issue because the locality enacted its ordinance under the authority of the Clean Water Act, which permitted such local regulation.

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13. Id. at 5 (emphasis added).
16. See id.
18. Id. at 981.
3. **Umbrella Objective.**—Because there is arguably much latitude under TSCA to regulate chemical substances during the premanufacture, manufacture, use and disposal stages, Congress should revisit the issue of TSCA's scope.\(^2\) The chemical industry's continued growth and the inherent benefits of regulating industrial chemicals during production, use and disposal\(^1\) also increases the likelihood that Congress will redefine TSCA's scope in the foreseeable future. The 1994 GAO report on TSCA concurred, concluding that legislation changing TSCA to an umbrella environmental law would better and more fully utilize EPA's authority over chemicals from production to disposal.\(^2\)

Of course, the primary reason why federalism has not been an issue under TSCA is the statute's "gap-filling" character. If TSCA is expanded into an umbrella law, it is likely that the express preemption provision of TSCA section 18 will be more readily enforced and federalism issues will be more clearly delineated. Under section 18, a state or locality is preempted from regulating chemical substances if the state or locality plans to establish or retain any requirement for testing chemical substances or mixtures that is similar to a requirement promulgated under section 4 of TSCA.\(^2\) Moreover, a state or locality is preempted from establishing or retaining a rule regulating chemical substances or mixtures that are subject to EPA regulation under section 5 or section 6 of TSCA unless the state or local law is identical to the EPA prescribed requirement, the law is adopted pursuant to another federal law, or it prohibits the end use of such substances or mixtures in that state or political subdivision.\(^2\)

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A.F. L. Rev. 117, 127 (1989) (collecting cases). With an expanded TSCA, EPA likely will deal with more of these issues and delegate its authority with less regularity.

20. Senator Harry Reid (D-Nev.), former chairperson of the Environmental and Public Works Committee, which deals with toxic substances issues, had planned to propose legislative discussion directed at reforming TSCA during the fall of 1994. *TSCA Reform Bill Would Revamp "Antique" Statute, EPA Officials Said, Toxics L. Rep. (BNA) No. 5, at 140 (July 6, 1994).* However, a bill was never proposed. In fact, no major environmental legislation was enacted during the last Congress.

21. This comprehensive regulation is frequently referred to as "cradle to grave" legislation.

22. *TSCA Might Be Better as "Umbrella" Statute, GAO Tells Congress in Report Criticizing EPA, Toxics L. Rep. (BNA) No. 24, at 661 (Nov. 16, 1994).* The GAO also noted that EPA has only issued regulations on 9 chemicals in 18 years. See GAO, supra note 1, at 15. As an example of EPA's sporadic utilization of TSCA and that agency's view that TSCA is subordinate to other laws, the GAO report noted that asbestos regulation is accomplished through the Occupational Safety and Health Administration. *Id.* at 15.


24. *Id.* Section 18 of TSCA establishes a procedure through which a state or locality may petition EPA for an exemption for those situations where preemption would apply. See *id.* § 2617(b).
II. ASSESSING CHEMICALS UNDER TSCA

EPA regulates chemicals under TSCA through a variety of mechanisms. Section 4 authorizes the EPA Administrator to establish regulations that govern the testing of chemical substances and mixtures.\[^{25}\] These regulations assess the risk that chemicals may pose to health and the environment. TSCA also establishes premanufacture notification requirements for new chemical substances\[^{26}\] and for significant new uses of existing substances;\[^{27}\] the regulation of hazardous chemical substances and mixtures which pose an imminent hazard;\[^{28}\] the reporting and retention of information, including an inventory of chemical substances;\[^{29}\] and regulation of the import and export of toxic substances.\[^{30}\] Thus, TSCA is designed and intended to protect public health and the environment from hazardous chemicals at all commercial stages, from premanufacture to disposal.\[^{31}\]

According to the GAO report, approximately 72,000 substances are in EPA's inventory of TSCA chemicals and 62,000 of these substances "were already in commerce when EPA began to review new chemicals in 1979."\[^{32}\] Because the compilation of data on chemical substances is both costly and time consuming, EPA has managed to review the risks of only about two percent of these 62,000 chemicals.\[^{33}\] Additionally, "more than 7 million chemicals are in existence, and approximately 80,000 of them are in common use worldwide . . . [and] about a thousand new chemicals are developed and added to the inventory each year."\[^{34}\] Because TSCA permits comprehensive regulation of these chemical substances and given that the chemical industry

\[^{25}\] Id. § 2603.
\[^{26}\] Id. § 2603(g).
\[^{27}\] Id. § 2604.
\[^{28}\] Id. §§ 2605-2606.
\[^{29}\] Id. § 2607.
\[^{30}\] Id. §§ 2611-2612.
\[^{31}\] Id. § 2601. TSCA also has a provision regarding the manufacturer's right of confidentiality. Id. § 2613. Section 2613 protects from disclosure any confidential business information, such as trade secrets and privileged financial data. Id. Nevertheless, health and safety studies that have been submitted under the Act may be subject to disclosure, although in limited circumstances. Id. § 2613(b). Additionally, EPA employees are subject to criminal sanctions for the willful disclosure of confidential business information. Id. § 2613(d). This right of confidentiality may be curtailed in the future. The GAO report proposes making "TSCA's information on chemical risks publicly available by reducing the amount of information that the industry claims as confidential." GAO, supra note 1, at 2.
\[^{32}\] GAO, supra note 1, at 2.
\[^{33}\] Id. at 3.
\[^{34}\] Id. at 8.
is among the largest industries in the United States,\(^{35}\) TSCA's regulatory emergence and expansion is likely.

III. **Controlling Chemicals**

A. **Regulation of Harmful Chemicals**

EPA is empowered to take a wide variety of regulatory actions under TSCA section 6.\(^{36}\) First, however, EPA must show that there is a reasonable basis to conclude that a chemical substance or mixture "presents or will present an unreasonable risk of injury to human health or the environment."\(^ {37}\) Upon that showing, EPA can restrict or prohibit the manufacture or distribution in commerce of such a substance or mixture;\(^ {38}\) regulate the manner of disposal of the substance or mixture;\(^ {39}\) or impose quality control procedures,\(^ {40}\) in addition to several other regulatory options.\(^ {41}\)

B. **Excluded Chemicals**

Chemical substances are defined to include "any organic or inorganic substance of a particular molecular identity, including: (1) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature and (2) any element or uncombined radical."\(^ {42}\) This expansive definition is subject to only a few exclusions. For example, TSCA does not regulate tobacco and tobacco products;\(^ {43}\) source material, special nuclear material, or byproduct material;\(^ {44}\) firearms and ammunition;\(^ {45}\) or foods, food additives, drugs, cosmetics, or devices, when manufactured, processed, or distributed in commerce for use as a food, food additives, drugs, cosmetics, or devices.\(^ {46}\) TSCA also does not regulate pesticides.\(^ {47}\) Pesticides are defined in the Federal Insecticide, Fungicide,

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\(^{35}\) *Id.* The United States chemical production industry employs approximately 850,000 workers in manufacturing, and boasts $85 million in chemical sales. *Id.*


\(^{37}\) *Id.* § 2605(a).

\(^{38}\) *Id.* § 2605(a)(1).

\(^{39}\) *Id.* § 2605(a)(6)(A).

\(^{40}\) *Id.* § 2605(b).

\(^{41}\) See *id.* § 2605(a).

\(^{42}\) *Id.* § 2602(2)(A).

\(^{43}\) *Id.* § 2602(2)(B)(iii).

\(^{44}\) *Id.* § 2602(2)(B)(iv).

\(^{45}\) See *id.* § 2602(2)(B)(v) (exempting such items subject to taxes imposed by § 4181 of the Internal Revenue Code).

\(^{46}\) *Id.* § 2602(2)(B)(vi).

\(^{47}\) *Id.* § 2602(2)(B)(ii).
and Rodenticide Act (FIFRA)48 and are exempted if the chemical substance is "manufactured, processed, or distributed in commerce for use [solely] as pesticides."49 Pesticides will be subject to TSCA regulations until "their manufacturers or importers demonstrate an intent to create a pesticide by submitting an application for an experimental use permit . . . or an application for registration under [FIFRA].”50

C. TSCA's Inventory Under TSCA Section 8

Under TSCA section 8(b), EPA is to "compile, keep current, and publish a list of each chemical substance which is manufactured or processed in the United States."51 The initial TSCA Chemical Substance Inventory was published on June 1, 1979 and included about 62,000 chemicals.52 TSCA empowers EPA to require that the chemical industry maintain records and submit reports necessary for compilation of the chemical substance inventory.53

TSCA section 8(c) requires that any entity which “manufactures, processes, or distributes in commerce any chemical substance or mixture shall maintain records of any significant adverse reactions to human health or the environment . . . alleged to have been caused by [exposure to] the substance or mixture.”54 Section 8(e) requires the immediate reporting of information that can reasonably support the conclusion that a chemical substance or mixture “presents a substantial risk of injury to health or the environment.”55

D. Test Rules Under TSCA Section 4

TSCA requires the testing of new and existing chemical substances or mixtures that may present an unreasonable risk to health or the environment if available data on such substances or mixtures is inadequate to determine the risk.56 This review process is set forth in

48. See 7 U.S.C. § 136(u) (1988) (defining a pesticide as "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or instigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant").
49. 15 U.S.C. § 2602(2) (B) (ii).
52. GAO, supra note 1, at 11. The initial TSCA inventory was supplemented on November 9, 1979, by substances which were reported too late for inclusion in the June inventory. 44 Fed. Reg. 28,558, 65,180 (1979).
54. Id. § 2607(e).
55. Id.
56. Id. § 2603(a).
detail under TSCA section 4(a) and includes several mandatory levels of testing and corresponding findings. Upon completion of the review process, and a corresponding finding of potential adverse environmental and health effects, EPA will order testing and issue a rule requiring the manufacturer to specify the form of testing, and upon approval, to perform that testing. Testing pursuant to section 4(a) has been quite extensive.

Over the years, EPA has made significant progress in developing testing programs for existing chemicals under Section 4. EPA has issued detailed regulations governing development of test rules, negotiation of enforceable testing consent agreements, and compliance with testing requirements under test rules and consent orders. The Agency also has developed regulations governing laboratory practices, test methodologies, and the sharing of test costs for Section 4 rules. Several thousand chemicals have been screened for possible testing, and considerable testing has been completed or is underway on many chemicals.

The testing of chemical substances or mixtures may scrutinize health and environmental effects, such as carcinogenesis, chronic toxicity, behavioral disorders, cumulative effects or synergistic effects, or other effects that may present an unreasonable risk of injury to health or the environment. EPA sets the standards for the tests and the manufacturers and processors of chemical substances or mixtures have the burden of performing the required tests in accordance with either a consent agreement or applicable testing regulations. EPA has established detailed procedures for implementing testing consent agreements. The purpose of the consent agreement is to offer all affected parties, including manufacturers, processors, and the relevant public, an opportunity to develop a consensus and enter into an enforceable testing consent agreement. The consent agreement serves to establish procedural safeguards similar to those estab-

57. Id.
58. Id. § 2603(a)(2). The finding is satisfied if "the manufacture, distribution in commerce, processing, use, or disposal of a chemical substance or mixture . . . may present an unreasonable risk of injury to health or the environment." Id. § 2603(a)(1)(A)(i).
60. Id. at 10,209-13.
63. Id. § 790.1(c).
lished by the rule. Some of the procedures EPA follows when negotiating, formulating, and accepting consent agreements include public notice, negotiation with affected parties, circulation of meeting minutes and testing proposals, and upon reaching a consensus, publication in the Federal Register.

EPA allows exemption from a test rule under limited conditions. As with testing consent agreements, EPA also has promulgated detailed regulations for pursuing the exemption from test rules. An exemption will be allowed if the chemical substance or mixture proposed is equivalent to a substance already tested under a TSCA section 4 test rule; in such a case, further testing would be duplicative. EPA denies exemption applications when the applicant fails to meet approval requirements or has failed to perform a test rule obligation. Judicial review is available within sixty days after the date of the promulgation of a rule under TSCA section 4(a).

IV. PREMANUFACTURE AND NEW USE ISSUES: TSCA SECTION 5

Manufacturers of new chemical substances and manufacturers and processors of existing chemical substances earmarked for significant new uses must notify EPA ninety days before proceeding with the manufacture or processing of such substances. The notification must include the chemical identity and structure of the substance. Additionally, the manufacturer or processor must disclose the proposed uses, production volumes, anticipated byproducts, and other facts that EPA may require. EPA may limit the production or even prohibit the manufacture, processing, or distribution of a chemical substance that presents—or that, in the absence of sufficient information, may present—an unreasonable risk of injury to human health or

64. Id. § 790.1(b).
65. Id. § 790.22(b)(1); see also Hathaway et al., supra note 59, at 10,295-97.
67. 40 C.F.R. § 790.80 to .99.
68. Id. § 790.87(a).
69. Id. § 790.87(a)(1).
70. Id. § 790.88(a).
71. 15 U.S.C. § 2618(a)(1)(A). Judicial review is also available under other TSCA sections. See id. §§ 2604(a)(2), 2604(b)(4), 2605(a), 2605(e), 2607; see also id. § 2618(a)(1)(A) ("Any person may file a petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or the circuit in which such person resides or in which such person's principal place of business is located."). A court reviewing a rule promulgated under § 4(a) will uphold the rule if the rule-making record is supported by substantial evidence. Id. § 2618(c).
72. Id. § 2604(a)(1).
73. Id. § 2604(a)(2).
the environment. A substance is considered a new chemical substance, and therefore subject to regulation under section 5, if it is not included in the public or confidential inventory of chemical substances compiled by EPA pursuant to TSCA section 8(b). Use of an inventory-listed chemical is not a significant new use unless EPA has promulgated a regulation that identifies specific uses for a particular chemical substance or category of chemical substances and the planned use of the chemical varies from the listed uses.

During the initial ninety-day review period, EPA must evaluate the proposed new chemical substance, or new use of the substance, to decide if regulatory action is necessary to prevent an unreasonable risk of injury to health or the environment. TSCA authorizes EPA to extend this ninety-day review period, thereby postponing manufacture and processing of the chemical upon a showing of good cause. Otherwise, a manufacturer or processor may commence use of the chemical substance upon the expiration of the initial ninety-day review period. Exemption from premanufacture regulation is available for chemical substances used for research, development, and test marketing, and for substances EPA has determined will not present an unreasonable risk of injury to health or the environment.

V. TSCA AND FEDERALISM

The Commerce Clause of the United States Constitution grants Congress the power "to regulate commerce . . . among the several states." Therefore, Congress has the power to regulate chemicals traveling in the stream of interstate commerce, and any state law

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74. Id. § 2604(f)(1); see also Hathaway et al., supra note 59, at 1209-13.
75. 15 U.S.C. § 2602(9).
76. Id. §§ 2604(a)(1)(B), 2604(a)(2).
77. Id. § 2604(a).
78. Id. § 2604(c). EPA may seek an extension under this section in order to obtain additional information about, and permit further review of, chemical substances that may present a § 2604(a)(2) risk. Hathaway et al., supra note 59, at 10,216. Reasons for the extension must be published in the Federal Register. 15 U.S.C. § 2604(c).
79. Hathaway et al., supra note 59, at 10,216.
81. U.S. CONST. art. I, § 8, cl. 3.
82. Cf. Wickard v. Filburn, 317 U.S. 111 (1942) (holding that Congress may regulate any activity having a substantial effect on interstate commerce). In Unites States v. Lopez, 115 S. Ct. 1624 (1995), the Supreme Court held that the Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause powers. Id. at 1635-34. The Lopez decision, however, does not affect the broad Commerce Clause powers enjoyed by Congress in the realm of economic legislation. See id. at 1637 (Kennedy, J., concurring) (stating that "stare decisis operates with great force in counseling us not to call in question . . . congressional power to regulate transactions of a commercial nature").
conflicting with this exercise of congressional power is unconstitutional by virtue of the Supremacy Clause. Moreover, because of the need for uniformity in interstate trade standards, the Commerce Clause also prohibits state regulation of interstate trade even where Congress has not legislated. Although the Constitution severely restricts the states’ power to regulate chemical manufacture, there are two means by which the states constitutionally can regulate chemicals. First, states have the power to regulate the disposal of chemicals within their borders. Second, and perhaps more significantly, states can regulate commerce to the extent authorized by congressional legislation, even if the Commerce Clause would prohibit state regulation in the absence of such enabling legislation.

While many environmental programs are intended to operate in conjunction with state laws, and therefore expressly permit state environmental regulation, TSCA does not promote an integrated relationship between federal and state regulatory authorities. Accordingly, section 18 of TSCA prohibits states from being significant regulators of the manufacture and use of chemical substances. The preemption provision of TSCA states specifically:

[I]f the Administrator prescribes a rule or order under section 2604 or 2605 of this title no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect any requirement which is applicable to such substance or mixture, or an article contain-

83. U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme law of the land . . . .”).
84. See Leisy v. Hardin, 135 U.S. 100, 109-10 (1890) (“[I]nasmuch as interstate commerce . . . is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled.”).
86. See In re Rahrer, 140 U.S. 545 (1891) (upholding constitutionality of statute permitting states to regulate liquor in interstate commerce when the liquor physically was present in that state).
88. 15 U.S.C. § 2617(a)(1). In effect, the preemption clause prohibits state regulation after EPA concludes regulation under its testing, notice, or TSCA § 6 “regulation of mixtures” provisions.
ing such substance or mixture, and which is designed to protect against such risk . . . .

There are three methods by which states can escape TSCA preemption. TSCA does not preempt state law identical to EPA's rule, state laws enacted under the authority of another federal law, or state laws completely prohibiting the use of a chemical within that state. Furthermore, even if a state law does not fall into one of these three exceptions, EPA may, by rule, exempt state laws from TSCA preemption when the law is significantly more protective of health and the environment and provided the state law does not burden interstate commerce unduly. TSCA's preemption provision has been criticized in that section 18 states a general rule of nonpreemption, but then obscures that principle through myriad exceptions.

Although TSCA limits state power in the name of federal uniformity, in some instances TSCA allows state law to limit the reach of federal regulation. For example, TSCA authorizes EPA to regulate the disposal of hazardous chemicals, including PCBs. Section 6 states that EPA can prohibit or otherwise regulate "any manner or method of disposal of such substance or mixture, or of any article containing such substance or mixture, by its manufacturer or processor or by any other person who uses, or disposes of, it for commercial purposes." EPA's disposal regulations, however, may not violate any state or local requirements.

89. Id. § 2617(a)(2)(B).
90. Id.
91. Id. § 2617(b).
92. One eminent commentator has noted:

The basic design of Section 18 of TSCA is nonpreemptive, with qualified invitations to states and political subdivisions to regulate disposal or impose bans even in the presence of an EPA initiative on the subject matter. There is an exception for the testing rules that are explicitly made preemptive, and one can sympathize with the desire to keep intact federally designed testing regimes that represent a consensus of professional scientific opinion. Section 18 also is highly convoluted, in ways that make mute the no-preemption message, and it contains an exemption procedure that suggests inferentially that local government is expected to beat a path to EPA's door to ask whether the latest ordinance will survive a federal test of acceptability.

94. Id. § 2605(a)(6)(B). Specifically, TSCA provides that EPA may not require any person to take any action which would be in violation of any law or requirement of, or in effect for, a State or political subdivision, and shall require each person subject to it to notify each State and political subdivision in which a required disposal may occur of such disposal.

Id.
Therefore, section 6(a)(6)(A) and (B) may be understood as a federalism compromise. It allows the federal government to regulate the manufacturing and processing of chemical substances, and thereby ensuring national uniformity, while deferring to the states on disposal of these chemical substances. This facilitates the flow of interstate commerce, while allowing the states to protect their residents from the dangers associated with the improper disposal of chemicals.

Beyond states' right to regulate chemical disposal, TSCA makes other federalism compromises that return to the states powers ceded to the federal government by the Commerce Clause. The many exceptions to federal preemption contained in section 18 all reflect congressional recognition that state regulation should prevail over federal uniformity in some cases.95

Judicial interpretation of TSCA preemption has been inconsistent, both in analysis and result. In Farley-Northwest Industries, Inc. v. New Jersey Department of Environmental Protection,96 the plaintiffs specifically alleged that the NJDEP's cleanup standards were preempted by TSCA. The court noted that federal courts were split as to whether PCB regulation under TSCA97 preempted state regulation of PCBs.98 Nevertheless, the court held that the state regulation was not preempted by TSCA, noting that "Congress intended to allow states and localities some leeway to approve more stringent PCB disposal regulations than those established by the EPA."99

In Rollins Environmental Services, Inc. v. Township of Logan,100 the issue was whether a locality was precluded by state or federal law from placing PCBs in areas locally designated as environmentally sensitive.101 The state superior court held that the Logan Township ordi-

95. See supra notes 88-92 and accompanying text.
97. The Farley court was referring to EPA's subsequent promulgation under TSCA of regulations for the disposal of PCBs. Id. at 12 (citing 40 C.F.R. § 761.1 to .218).
98. Id. at 12-13.
99. Id.
101. Id. at 259. PCBs are used as cooling liquids in electrical conductors. The only toxic substances specifically addressed in TSCA are PCBs. Because of their extreme toxicity, and their pervasive and persistent presence in the environment, PCBs are considered carcinogens and dangerous to human health. See William L. Andreen, Defusing the "Not In My Back Yard" Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Siting of PCB Disposal Facilities, 63 N.C. L. Rev. 811 nn.3-5 (1985). TSCA's regulatory scheme provides specific requirements and restrictions on all aspects of PCB regulation. Under 15 U.S.C. § 2605(c), EPA promulgates regulations prescribing the disposal and labelling of
nance was not preempted by federal law. Although the state appellate court reversed the trial court, holding that state law preempted local regulation of PCBs, it did not disturb the trial court's finding of an absence of federal preemption. Similarly, in Chappell v. SCA Services, Inc., a federal district court held that TSCA does not preempt state laws relating to the disposal of chemical substances, including PCBs.
The Fifth Circuit, however, has construed TSCA section 18 to preempt state and local PCB disposal bans. In Rollins Environmental Services (FS), Inc. v. Parish of St. James, the Fifth Circuit found that under the Supremacy Clause of the United States Constitution, Congress "may, within constitutional limits, absolutely preempt state and local rulemaking authority in a given area." Furthermore, the court stated that even if Congress had not absolutely preempted an area, Congress still may preempt state action where state or local laws conflict with or are obstacles to the execution and accomplishment of congressional legislation.

Rollins Environmental Services (FS), Inc. v. Parish of St. James involved a local ordinance that severely restricted PCB disposal. The plaintiff argued that the local ordinance violated the Supremacy Clause; the district court dismissed the suit due to lack of subject matter jurisdiction. The Fifth Circuit agreed with the plaintiff and held that

PCBs. EPA can also prohibit the manufacturing, processing, distribution in commerce, and use of PCBs under certain conditions. Id.

102. 488 A.2d at 260. The court reasoned that the town's ordinance was within the language provided by 15 U.S.C. § 2605(a)(6). The court also examined whether the town's ordinance was preempted by state law. Id. at 261. The court determined that, while states have the power to override local authority in the regulation of PCBs, the state had not done so.

105. Id. at 1098-99. Trost notes that the Chappell court "relied heavily on EPA's then current opinion that state and local laws regulating, but not necessarily banning, PCB disposal were not pre-empted. This issue came up in the context of whether TSCA preempted state tort actions, which the court held it did not." Trost, supra note 19, at n.134.
106. 775 F.2d 627 (5th Cir. 1985).
107. Id. at 634.
108. Id.
109. Id. at 630. The ordinance, entitled "An Ordinance Regulating Hazardous Wastes and PCBs in St. James Parish," provided that "the treatment, storage, and disposal of [PCBs] at commercial waste disposal facilities within the Parish of Saint James is hereby prohibited." Id.
110. Id. Because the locality was concerned with the potential constitutional challenge to its original ordinance banning PCB disposal, it rescinded the original ordinance and enacted an alternative ordinance which was designed to regulate commercial solvent cleaning businesses.
111. Id. at 631.
PCB disposal regulations were only to be issued pursuant to TSCA section 6(e)(1), the specific provision allowing EPA to promulgate regulations governing PCB waste disposal. Because the local ordinance either prohibited or unduly burdened PCB disposal, TSCA, in conjunction with the Supremacy Clause, preempted the local ordinance.

This court ruling treats TSCA as preempting local regulation of PCB disposal and, aside from the exception set out in section 18, any local or state law on PCB disposal would be a violation of the Commerce Clause. The Rollins v. Parish of St. James rationale has been criticized as misread[ing] Subsection 18(b) as imposing a preclearance regime for state or local bans and steer[ing] a meticulous course through the language of Subsection 18(a) to discover a local authority to regulate the disposal of any chemical substance other than PCBs. The court was inclined to resist the "not-in-my-backyard" syndrome, but was hard put to discover preemption absolutism in Section 18.

Several district courts have passed on the constitutionality of local PCB disposal bans; unfortunately, there has been no consensus as to whether TSCA preempts such local regulation. To harmonize these conflicting holdings and rationales, courts have focused on which environmental statute the locality has used in enacting its PCB disposal ban. For example, a North Carolina district court held

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112. Id. at 636; see also 15 U.S.C. § 2605(e)(1).
114. Id. at 635.
115. 3 Rodgers, supra note 92, § 6.11.
117. 3 Rodgers, supra note 92, § 6.11.

Section 18 appears in the case law as one implement among many put to service in pursuit of a preemption strategy, and as a fleeting proposition in ongoing judicial struggles over hazardous waste management choices. As always, the preemption decisions show the wide mood shifts of the courts, particularly in the options to proceed by hard look or deferential glance, and the assumptions to view the measure attacked in isolation or as the first manifestation of a trend. The local laws most likely to survive preemption objections are those related to personal injury claims. These include nuisance claims, actions for indemnity and restitution, cleanup initiatives, and confrontations over citizens attempts to learn about the risks.

Id. (citations omitted) (emphasis added).
that the local ordinance violated TSCA's PCB preemption clause, stating rhetorically that

it is clear that Congress intended to give states and localities some leeway to impose more stringent disposal requirements than those provided for by federal regulation. However, the issue for determination here is whether Congress intended to confer upon counties and other local governments the authority to totally frustrate the PCB disposal program through the implementation of total disposal bans.\textsuperscript{118}

Some courts have upheld a local PCB disposal ban because the locality enacted the ban under other federal laws. The most common examples are local ordinances enacted under the Clean Water Act, where the locality passed the ordinance in order to prevent water pollution by PCB disposal.\textsuperscript{119}

This myriad of arguably conflicting cases demonstrates that TSCA does not necessarily provide complete preemption on PCB disposal nor do the states or localities enjoy the power to ban PCB disposal.

[T]he legislative history of TSCA demonstrates that Congress intended the federal PCB disposal rule to set minimum standards for safe disposal, thereby preempting by implication less stringent state and local requirements. Congress, however, preserved the power of state and local governments to tailor more stringent requirements that are consistent with the goal of safe disposal. Nevertheless, total bans—and those requirements that impose practically unattainable conditions, resulting in constructive bans—obstruct the national goal of safely disposing of PCBs; consequently, they ordinarily are preempted by implication. Such bans, constructive or actual, may be saved from preemption only when they serve to ensure safe PCB disposal. Realistically, therefore, a ban may be given effect only on a showing that some unique local geological or physical condition justifies a ban on safety grounds.\textsuperscript{120}

This approach is the most rational manner of analyzing the ambiguities of TSCA's PCB disposal regulations. Courts continue to strain to find the congressional intent behind the PCB disposal clause in TSCA but

\[\text{[u]nfortunately the compiled legislative history of the TSCA does not clearly indicate whether Congress intended that lo-}\]
cal PCB disposal requirements be expressly preempted by section [18] of the TSCA. In fact, the relationship of the specific PCB requirement of section [6(e)], with the more general disposal requirements of section [6(a)(6)] and the statutory preemption clause, was not addressed at any point in the legislative reports or debates.\textsuperscript{121}

VI. STATE REGULATION OF TOXIC SUBSTANCES

In addition to TSCA's regulation of toxic substances, several federal environmental laws have been used to address industrial chemical concerns.\textsuperscript{122} While New Jersey has regulated toxic substances through these federal programs, New Jersey accomplishes most of its toxic substance regulation objectives through the recently enacted Pollution Prevention Act (PPA).\textsuperscript{123} The New Jersey Department of Environmental Protection, working with industry, developed regulations that require industry to file a pollution prevention plan with the Department of Environmental Protection. The regulations require industries in New Jersey using significant amounts of chemicals and solvents to review their operations carefully and prepare a first-phase plan within eighteen months of the Act's effective date.\textsuperscript{124}

PPA requires businesses to review their plant operation process to achieve maximum efficiency and to reduce environmental violations. The overlap between the prevention plans of TSCA and PPA are limited to that of minimizing waste and preventing environmental and occupational hazards. Ideally, TSCA will regulate the actual manufacturing and processing of chemical substances while PPA will regulate the business plans involved in preparing for manufacturing and processing chemical substances. The increase in regulation and com-

\textsuperscript{121} Miller, \textit{supra} note 87, at 474 (footnotes omitted).

\textsuperscript{122} In general, the Clean Air Act is meant to "protect and enhance air quality to promote public health and welfare." The Clean Water Act restores and maintains "the chemical, physical, and biological integrity of the nation's waters"; the Resource Conservation and Recovery Act regulates "the generation, transportation, treatment, storage, and disposal of hazardous wastes"; the Comprehensive Environmental Response, Compensation, and Liability Act finances "cleanup measures for releases of hazardous substances and leaking hazardous waste dumps"; the Occupational Safety and Health Act allows the development and enforcement of "mandatory job safety and health standards to ensure as far as possible that employees have safe and healthful working conditions"; the Safe Drinking Water Act protects "the quality of all sources of drinking water;" the Marine Protection, Research, and Sanctuaries Act regulates "the dumping of materials into oceans and prevent[s] or strictly limit[s] the dumping of material that adversely affects human health or the marine environment;" and the Consumer Product Safety Act protects "the public against unreasonable risks of injury associated with consumer products." GAO, \textit{supra} note 1, at 64.


\textsuperscript{124} \textit{Id.} § 13:1D-40(b).
pliance costs from the potential expansion of TSCA and with the creation of PPA should be offset by limiting the response costs from spills and other environmental violations.

While these plans are not duplicative, they might raise future preemption issues, especially if Congress expands the scope of TSCA. For instance, the New Jersey Appellate Division recently upheld the pollution prevention regulations against a challenge by the Chemical Industry Council of New Jersey. The Chemical Industry Council argued that the regulations, which were designed to reduce the generation of toxic substances, were invalid because they exceeded the authority granted by the New Jersey legislature under PPA and, therefore, were arbitrary and unreasonable. The Appellate Division found that such challenges were either meritless or rendered moot by the Department of Environmental Protection's 1994 amendments to the regulations.

Therefore, if TSCA and PPA are to protect the public by providing an exhaustive and comprehensive regulation of the chemical industry, while at the same time encouraging commerce by avoiding duplication and inefficiency, state and federal agencies must acknowledge their overlap and allow one regulation to control. Specifically, the reporting and pollution planning requirements of PPA should fulfill chemical industries' reporting requirements under TSCA. Similarly, the confidentiality provision of TSCA should apply to the information provided under PPA. In other words, reporting the use of chemical substances to a state agency should effectuate the reporting of that chemical substance to the federal agency, and that reporting under PPA should enjoy the benefits of TSCA confidentiality.

VII. CONCLUSION

During TSCA's 1976 congressional hearings, Congress recognized the competing federal and state interest at each phase of the product's life cycle. Because of concerns over interstate commerce, Congress generally has preempted states in all phases of TSCA regulation except for disposal. TSCA was meant to create distinctions in health, safety and commerce issues during the manufacture, distribution, use and disposal of toxic substances. States are able to govern disposal issues within state boundaries and are allowed to enact addi-

126. Id.
127. Id.
tional testing requirements if such requirements do not "unduly burden" interstate commerce. States also have the ability to ban the use of any chemical substance within the state.

TSCA presents an interesting balance of federal and state interests. With the growth of the chemical industry, and through emerging technologies, TSCA and its regulations will continue to expand. Environmental practitioners must be prepared to deal with TSCA's comprehensive regulatory and testing processes and understand their applications on state and local entities.