TSCA REFORM AND THE NEED TO PRESERVE STATE CHEMICAL SAFETY LAWS

CHRIS HASTINGS*

I. INTRODUCTION

The United States Congress is considering a reform to the Toxic Substances Control Act, under which the United States Environmental Protection Agency (EPA) has not issued a rule since the 90s, with three bills currently in the committee stage. Scholars agree that a federal reform needs to be made. The issue actually crosses political boundaries, as well, which is why two bills have bipartisan support. However, any reform to the Act will need to account for state-level regulation that has filled the regulatory void by either preempting state law or by co-regulating with it. The first bill to be introduced, the Safe Chemicals Act, would preserve state laws unless there is an actual conflict. Two of the bills, The Chemical Safety Improvement Act and its Senate counterpart, would invalidate states' preexisting rules for certain chemicals once EPA issues a rule for that chemical (regardless of whether the rules actually conflict). Additionally, once EPA prioritizes a chemical for analysis, a state would be forbidden from promulgating a new rule for that chemical. This Note advocates against the preemption of state laws because some states have a history and tradition of regulating toxic substances to protect

* J.D. 2015, *cum laude*, Certificate in Environmental, Land Use, and Energy Law, Florida State University College of Law. I would like to thank Professor Shi-Ling Hsu for proposing this paper and for his assistance in researching. I would also like to thank Edward Grodin for lending me his editing support.

children and pregnant women. Additionally, The Chemical Safety Improvement Act does not have sufficient safeguards for children and pregnant women because it does not require EPA to undertake a cumulative effects analysis. Due to the localized nature of some toxic chemical health effects, a state-federal cooperative regulatory system is best suited to protect the public health.

II. TOXIC CHEMICAL SAFETY REFORM

The Toxic Substances Control Act[1] ("TSCA") was originally passed in 1976 to regulate the manufacture, use, and sale of toxic substances.[2] Before the legislation was passed, toxic substances were only regulated by remedying the after-the-fact harm.[3] TSCA, on the other hand—by requiring testing on some chemicals before they were manufactured, used, or sold—anticipated and addressed health concerns over toxic chemicals beforehand. Both environmental groups and industries have advocated for a reform to TSCA, a statute which has remained unchanged since its initial passage.[4] Specifically, there have been four difficulties in implementing TSCA that have led to a need for reform: "(1) prioritizing chemicals of concern; (2) establishing a minimum chemical data set for new and existing chemicals; (3) providing access to chemical information; and (4) taking appropriate and timely action on chemicals."[5] Moreover, while environmentalists have criticized TSCA for its lack of "sufficiently stringent standards to ensure chemicals are safe before they enter the marketplace," industry advocates would prefer a reform that "focus[es] on improving consumer confidence and simplif[ies] toxics regulation."[6]

The Fifth Circuit's invalidation of EPA's regulation of asbestos under Section 6 of TSCA, despite ten years' worth of studies and

---

1. Toxic Substances Control Act, Pub. L. No. 94–469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601–2692 (2012)).

2. David L. Markell, *An Overview of TSCA, Its History and Key Underlying Assumptions, and Its Place in Environmental Regulation*, 32 WASH. U. J.L. & POL'Y 333, 336 (2010); *see* S. Rep. No. 698, 94th Cong., 2d Sess. (1976).

3. Markell, *supra* note 2, at 344.

4. *Vitter Eyes Piecemeal TSCA Reform to Counter Democrats' Overhaul Bill*, INSIDE EPA (Feb. 20, 2013), http://insideepa.com/Inside-EPA-General/Public-Content-ACC/vitter-eyes-piecemeal-TSCA-reform-to-counter-democrats-overhaul-bill/menu-id-1026.html [hereinafter INSIDE EPA].

5. Jessica N. Schifano, Ken Geiser, & Joel A. Tickner, *The Importance of Implementation in Rethinking Chemicals Management Policies: The Toxic Substances Control Act*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10527, 10528–29 (2011).

6. INSIDE EPA, *supra* note 4*; see also TSCA Modernization*, AM. CHEMISTRY COUNCIL, http://www.americanchemistry.com/Policy/Chemical-Safety/TSCA (last visited Mar. 14, 2014) (supporting reformation of toxics regulation due in part to the "fractured and contradictory" regulatory landscape created from state regulations).

findings, bolstered criticism of the existing regulatory scheme.[7] In *Corrosion Proof Fittings*, the EPA "reviewed over one hundred studies of asbestos and conducted several public meetings" and "concluded that asbestos [was] a potential carcinogen at all levels of exposure"; therefore asbestos posed an unreasonable risk to human health at all levels of exposure.[8] The EPA's final rule "prohibit[ed] the manufacture, importation, processing, and distribution in commerce of most asbestos-containing products."[9] The EPA used a cost-benefit approach, finding that its regulation would have the benefit of saving 202 or 148 lives (depending on how benefits are calculated) at the cost of approximately $450 million to $800 million.[10]

The asbestos rule was challenged for exceeding statutory authority, and it was subsequently invalidated because the EPA did not have a reasonable basis for banning asbestos based on the available evidence in light of its statutory requirement to impose the "least burdensome, reasonable regulation required . . . ."[11] The court reasoned that a complete ban on manufacturing was the *most* burdensome regulation and therefore could not be the *least* burdensome.[12] The court, while stating that the EPA need not strictly rely on cost-benefit findings, found that the EPA acted unreasonably by failing to consider whether it could reach a comparable benefit (lives saved) at a lower cost (manufacture restrictions short of a complete ban). Since the decision in *Corrosion Proof Fittings*, the EPA never again regulated toxic substances under TSCA.[13] Additionally, due to federal inaction, many states have adopted their own protective regulations, particularly for children and pregnant women.[14]

The late Senator Frank Lautenberg (D-N.J.) initially introduced a bill called the "Safe Chemicals Act,"[15] which was a broader approach to TSCA reform favored by Democrats and environmentalists.[16] The Safe Chemicals Act would preserve all

---

7. Granta Y. Nakayama, Corrosion Proof Fittings v. EPA*: No Death Penalty for Asbestos Under TSCA*, 1 GEO. MASON INDEP. L. REV. 99, 100 (1992).

8. Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1207 (5th Cir. 1991).

9. *Id.* at 1207-08.

10. *Id.* at 1208.

11. *Id.* at 1215.

12. *Id.* at 1216.

13. Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 VAND. L. REV. 1817, 1830 (2009).

14. Letter from Kamala D. Harris et al., California Attorney General, to Sen. Barbara Boxer, Chairwoman, Subcomm. on Env't & Pub. Works. (July 31, 2013) (on file with author), *available at* http://oag.ca.gov/system/files/attachments/press_releases/TSCA%20Multistate%20Letter%20_FINAL_.pdf.

15. Safe Chemicals Act of 2013, S. 696, 113th Cong. (2013).

16. *See* INSIDE EPA, *supra* note 4.

state toxics laws not in direct conflict with it.[17] After the introduction of the bill, Lautenberg also signed on to co-sponsor "The Chemical Safety Improvement Act"[18] ("CSIA"), which takes a narrower approach to toxics regulation and has bipartisan support.[19] Reactions to the new approach of CSIA are mixed, with some environmental groups supporting the proposed legislation because it " 'has a higher likelihood of passing' " and " 'improves EPA's ability to work relative to current [law],' "[20] while others state the bill " 'scales back safety standards from the Lautenberg legislation, fails to give U.S. EPA firm deadlines or enough funding to review potentially harmful chemicals and doesn't do enough to protect children and other at-risk populations . . . .' "[21] Meanwhile, house republicans, not wanting to feel left out, have also introduced a bill; the bill is sponsored by Rep. John M. Shimkus (R-Ill.) and titled the Chemicals in Commerce Act ("CCA").[22] The bill shares many similarities with CSIA: both bills would preempt state laws and require the EPA to classify chemicals as either a high priority or low priority for regulation.[23]

---

17. Safe Chemicals Act of 2013, S. 696, 113th Cong., § 18 (2013) (stating that "[n]othing in this Act affects the right of a State or a political subdivision of a State to adopt or enforce any regulation, requirement, or standard of performance that is different from, or in addition to, a regulation, requirement, liability, or standard of performance established pursuant to this Act unless compliance with both this Act and the State or political subdivision of a State regulation, requirement, or standard of performance is impossible, in which case the applicable provision of this Act shall control").

18. Chemical Safety Improvement Act, S. 1009, 113th Cong. (2013).

19. Jason Plautz, *How Lautenberg and Vitter Found Common Ground*, E&E DAILY (May 23, 2013), http://www.eenews.net/stories/1059981681.

20. *Id.* (quoting Richard Denison, Environmental Defense Fund).

21. *Id.* (quoting Ken Cook, Environmental Working Group).

22. *Chemicals in Commerce Act (CICA)*, ENERGY & COM. COMMITTEE (Feb. 27, 2014), https://energycommerce.house.gov/fact-sheet/chemicals-commerce-act-cica; *see* Chemicals in Commerce Act, H.R. __, 113th Cong. (2014) (in discussion draft form as of Mar. 15, 2014). Many commentators have already begun expressing their discontent with the Chemicals in Commerce Act. *See* SAFER CHEMICALS HEALTHY FAMILIES, THE CHEMICALS IN COMMERCE ACT: UNDERMINING PUBLIC HEALTH AND SAFETY IN THE NAME OF REFORM, *available at* http://www.saferchemicals.org/PDF/chemicals_in_commerce_act_factsheet.pdf (last visited Mar. 15, 2014) (stating that the Chemicals in Commerce Act rolls back state health protections and shields many chemicals from review indefinitely); Letter from Sharon Rosen, Bd. Chair, Envtl. Health Strategy Ctr., to John Shimkus, Chairman, Subcomm. on Env't and the Econ. (Mar. 10, 2014) (on file with author), *available at* http://www.saferchemicals.org/PDF/letters_of_opposition/ehsc_letter_in_opposition_to_cica.pdf (stating that the Chemicals in Commerce Act would violate states' rights to protect their people and shield many chemicals from review indefinitely).

23. Cheryl Hogue, *Reforming the Toxic Substances Control Act*, CHEMICAL & ENGINEERING NEWS (Feb. 28, 2014), https://cen.acs.org/articles/92/web/2014/02/Reforming-Toxic-Substances-Control-Act.html. *Compare* H.R. __, §§ 6, 17, *with* S. 1009, §§ 4(e), 15.

III. THE NATURE OF PREEMPTION

Any reform to toxics legislation will have to accommodate state toxics laws or preempt them. The power of the federal government to preempt laws of the several states must necessarily have its roots in the Constitution. The Supremacy Clause states that federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [24] While normally the Supremacy Clause is interpreted as the symbolic foundation for the law, Caleb Nelson has argued that the text of the Supremacy Clause itself provides a substantive test for preemption.[25]

> It requires courts to ignore state law if (but only if) state law contradicts a valid rule established by federal law, so that applying the state law would entail disregarding the valid federal rule. In this respect, questions about whether a federal statute preempts state law are no different from questions about whether one statute repeals another.[26]

Nelson's formulation of the Supremacy Clause test mirrors the judge-made test of express preemption. A state law is expressly preempted if the legislature has manifested its intent to preempt state law by expressly stating so.[27] It follows that if the legislature has expressly stated its intent to preempt state law, in much the same way that a federal law overrules a prior law, then following the preempted state law would entail disregarding the valid federal rule.[28] It also follows that if Congress decided to expressly preempt state laws or individual provisions of state laws, then it must not have intended to preempt other unexpressed laws or separate provisions of those laws.[29] However, if there is any ambiguity as to whether Congress intended to preempt state law or ambiguity concerning the scope of preemption, then the

---

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

25. Caleb Nelson, *Preemption*, 86 VA. L. REV. 224, 234–35 (2000); *see also* Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 372–81 (2011) (describing the three policy considerations of preempting state laws: federalism, corrective justice, and regulatory efficiency).

26. *Id.* at 234.

27. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992).

28. Nelson, *supra* note 25, at 234.

29. *Id.* (noting that "the familiar principle of *expression unius est exclusio alterius* [provides that] Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted").

ambiguity is resolved to preserve the state law due to the presumption against preemption. [30] The presumption against preemption is strongest when the legislature has intervened in a field traditionally occupied by the states.[31]

A brief history of regulations of toxics chemicals is pertinent to determine whether toxics regulation is a field traditionally regulated by the states. While the first law to regulate toxics was TSCA, passed in 1976, [32] the EPA was rendered virtually powerless to implement it after the ruling of *Corrosion Proof Fittings v. EPA* in 1991.[33] Even before the ruling of *Corrosion Proof Fittings*, the state of California began regulating toxics with its flagship state-regulation: Proposition 65, in 1986.[34] After which, from 2001 to 2010, eighteen states passed seventy-one chemical safety laws with bipartisan support.[35]

States were able to pass these laws because TSCA preserved the states' role in protecting public health[36] by including a savings clause. [37] Therefore, Proposition 65 was then the first state regulation to grant toxic chemicals regulating authority, after which the majority of other states began to significantly regulate

30. *See Medtronic*, 518 U.S. at 485.

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

32. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601–2692 (2012)).

33. *See supra* notes 7–10 and accompanying text.

34. OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, *Proposition 65*, CA.GOV (last updated Feb. 2013), http://oehha.ca.gov/prop65/background/p65plain.html.

35. MIKE BELLIVEAU, HEALTHY STATES: PROTECTING FAMILIES FROM TOXIC CHEMICALS WHILE CONGRESS LAGS BEHIND 6 (Sarah Doll et al. eds., 2010).

36. *See* Barnes v. Glen Theatre, 501 U.S. 560, 560-61 (1991) (holding that protecting health, safety, and morals of citizens is within the police powers of the state); People of State of Ill. v. Electrical Utilities, 41 B.R. 874, 876 (N.D. Ill. 1984) (stating in dicta that protecting the public from PCBs regulated under TSCA is within a state's police power).

37. The preemption section in TSCA begins by explicitly stating that nothing in the act shall affect the regulation of any chemical substance under state or local law, subject to specific exceptions. 15 U.S.C. § 2617(a)(1) (2012). TSCA excepts instances when the EPA requires by rule the testing of any chemical, upon which "no State or political subdivision may . . . establish or continue in effect a requirement for the testing of such substance or mixture for purposes similar to those for which testing is required under such rule." *Id.* § 2617(a)(2)(A). TSCA also excepts instances when the EPA by rule regulates a chemical substance to protect health and the environment, upon which no State or political subdivision may establish or continue a rule applicable to the same chemical, or article containing a chemical, unless the rule is the same as that established by the EPA, the rule is adopted under the authority of a federal law, or the rule prohibits the use of the chemical. *Id.* § 2617(a)(2)(B).

toxic chemicals to fill the regulatory void,[38] especially to protect children.[39] However, TSCA a federal law, was still the first law to begin regulating toxic chemicals. In most cases with an express preemption issue, courts analyze the extent of federal regulation in a field to determine whether it has been traditionally regulated by the federal government or the states. For example, in *English v. General Electric Co*, the Court determined that the federal government exclusively occupied the field of nuclear safety (as opposed to regulation of nuclear generation or sales) because the federal government began regulating in 1954 with the passage of The Atomic Energy Act of 1954, continued regulating with the Energy Reorganization Act in 1974, and had routinely amended both statutes. [40] The Court concluded that "'the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.' "[41] The specific limited powers ceded to the States by The Atomic Energy Act include "regulation of the 'generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission.' "[42] Additionally, the Atomic Energy Act's second savings clause "provides that the Atomic Energy Act shall not 'be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.' " [43] Therefore, the regulated field, nuclear safety, was completely occupied by the federal government, not just because of its history of regulation, but because it expressly preempted the states from regulating within that field.

In contrast, as opposed to the federal government's continued expansion and modification of nuclear safety law in *English*,[44] TSCA has remained unaltered since its initial passage. Moreover,

---

38. BELLIVEAU, *supra* note 35, at 18 (The state survey from 2010 found that three main factors drove states to develop their own toxics laws in recent years: "growing scientific evidence of harm, the resulting strong public outcry, and frustration with the failure of Congress to act."). Of the seventy-one different laws passed by states in recent years, sixty-six of them were single-focus laws focusing on specific chemicals (such as banning BPA's or flame retardants), as well as single-focus policies focusing on green cleaning or safe cosmetics for example. *Id.* at 14. The state laws and regulations have been for an increased protection to children by phasing out harmful chemicals. *Id.* at 6.

39. *Id.* (Additionally, a recent poll found that seventy-eight percent of Americans are seriously concerned with the threat to children's health from toxic chemicals in consumer products.).

40. English v. Gen. Elec. Co., 496 U.S. 72, 80–82 (1990).

41. *Id.* at 82 (quoting Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983)).

42. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 410 (2012) (quoting 42 U.S.C. § 2018 (2006)).

43. *Id.* (quoting 42 U.S.C. § 2021(k) (2006)).

44. English v. Gen. Elec. Co., 496 U.S. 72, 80–82 (1990).

from a more pragmatic standpoint, the federal government has not regulated toxics under TSCA since *Corrosion Proof Fittings v. EPA* in 1991.[45] Additionally, and in contrast to the express preemption of nuclear safety in *English*, TSCA did not expressly preempt states from regulating toxic chemicals manufacturing.[46] In fact, TSCA expressly permits states to ban a chemical even if the EPA has issued a requirement on the chemical.[47] Therefore—because of the absence of federal toxics regulations, TSCA's savings clause for state toxics regulation, and because of the many laws passed by states in recent years—states have traditionally regulated the field of chemical safety. Because states have traditionally regulated the field of chemical safety, federal laws should not preempt them cavalierly, without regard to existing safeguards for at-risk subpopulations. The presumption against preemption, in reference to CSIA, would likely not foreclose preemption due to the express, explicit nature of the preemption provision.[48] However, the presence of the presumption, in the context of this note, is not an argument that CSIA will not preempt state laws, but instead, should convey the reasoning for the existence of the presumption against preemption in the first place: courts attempt to limit Congress's expansion of laws when it enters a field traditionally regulated by states.

IV. THE STATES' CURRENT ROLE IN REGULATING TOXIC CHEMICAL SAFETY

The Safer Chemicals, Healthy Families coalition surveyed the different state toxics laws to elucidate their benefits for public health and to advocate for TSCA reform that preserved state laws.[49] While initially written in support of proposed TSCA reform in 2010, its findings are relevant to show why and how states have taken a more active role in regulating toxic chemicals. Over eighty-nine percent of the roll-call votes by state legislatures were for toxics regulations more protective than their federal counterparts, especially when designed to protect children.[50] The state law expansion has been in reaction to TSCA's current unsatisfactory regulatory scheme because it is insufficient to protect children from toxic chemicals.[51] Other drivers of state-

45. Sachs, *supra* note 13, at 1830.
46. *See supra* note 37.
47. 15 U.S.C. § 2617(a)(2)(B) (2012).
48. *See infra* Part III(A).
49. BELLIVEAU, *supra* note 35, at 6.
50. *Id.*
51. *Id.* at 7.

action include "growing scientific evidence of harm, the resulting strong public outcry, and frustration with the failure of Congress to act."[52] The survey also suggests that the state-action expansion will cease once TSCA is reformed to provide greater protection to children and other at-risk groups.[53]

In light of concerns over inadequate federal toxics regulation, the survey recommended that states continue to pass their own legislation to offer better protection to people, especially children.[54] State-action expansion coupled with industry frustration over differing state laws will help drive federal reform and, eventually, industry acceptance.[55] However, even with federal reform, the survey recommends that states continue to adopt more stringent laws if states determine that existing restrictions are inadequate to protect people.[56] Allowing for state laws to offer greater protection will legitimize Congress's credibility on seeking to provide greater protection to consumers and children.[57]

A. The Preemption by CSIA

Subsections 4(e)(1)(A)(i)-(ii) of CSIA will require the EPA to designate each chemical as either a high or low priority.[58] A chemical should be designated as high priority if it has the "potential for high hazard or high exposure . . . ."[59] A chemical should be designated as a low priority if it is likely safe for its intended use.[60] If a chemical is designated as a low priority, EPA cannot perform a safety assessment (determining the risk of a substance)[61] until it has been reprioritized as a high priority.[62] These new safety determinations should require the EPA to regulate more chemicals overall, as well as requiring the labeling of or phase-out of high priority chemicals.[63] Instead of a definite deadline for making safety determinations, the EPA is only required to make them in "a timely manner."[64] However, if the EPA is unable to make the determination with existing data, Section 4(f) allows the EPA to require the development of new

52. *Id.* at 18.
53. *See id* at 7.
54. *Id.* at 19.
55. *Id.*
56. *Id.*
57. *See id.*
58. Chemical Safety Improvement Act, S. 1009, 113th Cong. § 4(e)(1)(A)(i)-(ii) (2013).
59. *Id.* § 4(e)(3)(E)(i).
60. *Id.* § 4(e)(3)(F).
61. *Id.* § 3(4).
62. *Id.* § 4(e)(3)(H)(ii).
63. *Id.* § 6(c)(9)(A)(i), (c)(9)(B)(i); Plautz, *supra* note 19.
64. S. 1009, § 4(e)(1)(C)(ii).

testing data by promulgating a rule, entering into a testing consent agreement, or by issuing an order.[65]

CSIA's section on preemption begins with "no State or political subdivision of a State may establish or continue to enforce" a law requiring the testing of a chemical for data when it is reasonably likely to produce the same data.[66] Because preemption of testing hinges on reasonable likelihood of producing "the same results or information required," state testing requirements may not be preempted if there is a chance that a state requirement may produce different results.[67]

Under CSIA's preemption, a state may also not establish or continue to enforce a prohibition or restriction on the manufacturing, processing, distribution, or the use of chemicals after issuance of a completed safety determination.[68] However, a state agency may submit information and safety assessments of its own to facilitate the EPA's safety assessment of a high priority substance.[69] The prohibition on state or local establishment or enforcement of a prohibition or restriction on the manufacturing, processing, distribution in commerce, or use of a chemical after issuance of a completed safety determination unambiguously preempts state law.[70] Therefore, existing state restrictions on chemicals would be preempted once safety determinations are issued, and similarly, no requirements on other chemicals could be established once that chemical is prioritized by the EPA.[71]

The only state laws that would not be preempted by CSIA's broad preemption provision are those listed in subsection 15(c).[72] CSIA first exempts any state law adopted under the authority of federal law.[73] Second, any "reporting or information collection requirement" not already provided for in CSIA is exempt.[74] Third, any regulation related to "water quality, air quality, or waste treatment or disposal that does not impose a restriction on the manufacture, processing, distribution in commerce, or use of a chemical" is exempt.[75] Other laws can work in tandem with the state law. For example, a state law can require reporting of toxic-chemical manufacturing and the federal law can actually restrict

65. *Id.* § 4(f)(1)-(2).
66. *Id.* § 15(a)(1).
67. *Id.*
68. *See id.* § 15(a)(2).
69. *Id.* § 6(b)(2)(B)(i)(III).
70. *Id.*
71. *Id.*
72. *Id.* § 15(c).
73. *Id.* § 15(c)(1).
74. *Id.* § 15(c)(2).
75. *Id.* § 15(c)(3)(A)-(B).

the manufacturing of the chemical.[76] There is no reason why a prioritization of a chemical for regulation should prevent a state from regulating an aspect of that chemical that does not interfere with the federal regulation. In fact, in the past, the EPA has encouraged states to regulate chemicals.[77]

B. California's Safer Products Regulations: Innovative Lawmaking

Even as TSCA reform progressed, California's Department of Toxic Substances Control issued new regulations.[78] The goal of the new Safer Products Regulations (SPR) is to reduce toxic chemicals in consumer products by comparing and considering the use of less dangerous alternative chemicals.[79] The SPR "Alternatives Analysis" framework requires manufacturers, or other "responsible entit[ies]," to weigh factors including "[a]dverse environmental impacts," "[a]dverse public health impacts," "[a]dverse waste and end-of-life effects," "[e]nvironmental fate," "[m]aterials and resource consumption impacts," "[p]hysical chemical hazards," and "[p]hysiochemical properties" against factors such as the product's intended use and various economic factors.[80] In weighing these factors, the responsible entity is not required to undergo any specific testing requirements. Instead, the responsible entity must prepare a more holistic Alternatives Analysis report to explain their overall process and their choice of chemical.[81] The SPR provides a unique alternative to toxics regulation by relying on procedural requirements rather than traditional command-and-control regulation under TSCA/CSIA. Because the Alternatives Analysis sections of the SPR do not mandate testing or result in any restrictions of chemicals, CSIA should not preempt them.[82] However, California can restrict the use of a chemical and its distribution in commerce if the toxic

---

76. *See* Jim Florio, *Federalism Issues Related to the Probable Emergence of the Toxic Substances Control Act*, 54 MD. L. REV. 1354, 1370–71 (1995) (providing an example of how New Jersey's Pollution Prevention Act would fulfill the reporting requirements of TSCA).

77. *See* Tracy Daub, *California—Rogue State or National Leader in Environmental Regulation?: An Analysis of California's Ban of Bromated Flame Retardants*, 14 S. CAL. INTERDISC. L.J. 345, 352 (2005).

78. Ronnie Green, *California Bypasses Feds, Presses Ahead on Regulation of Toxic Chemicals*, THE CTR. FOR PUB. INTEGRITY (Oct. 1, 2013), http://www.publicintegrity.org/2013/10/01/13480/california-bypasses-feds-presses-ahead-regulation-toxic-chemicals.

79. CAL. CODE REGS. tit. 22, §§ 69501(a), 69501.01(a)(10), 69505.5(a)-(f) (2013).

80. *Id.* §§ 69505.5(c)(2)(A)-(G), 69505.6(2)(A)-(C), (3).

81. *Id.* § 69505.7(f), (g)(2), (h), (j)(2).

82. *See* Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(a)(2), (b) (2013) (Any preexisting requirement by a state would be preempted by § 15(a)(2) after issuance of a completed safety determination, whereas a state would be foreclosed from issuing a new requirement after a chemical is prioritized, per § 15(b).)

chemical is not replaced with a safer alternative chemical,[83] which would be preempted by CSIA.[84]

The preservation of the existing federal-state relationship is best justified by the states' innovative role in rulemaking because it has been used in the past to remedy one of the existing faults with TSCA: protecting subclasses and hot spots.[85] Subclasses include children and pregnant women who are more susceptible to harm from toxic chemicals.[86] Hot spots are highly polluted areas (typically from greater-than-average concentrations of air pollutants in urban areas) that experience a greater cumulative impact from toxic chemicals.[87] Studies have found that hazardous- and toxic-emission facilities are often sited in racial communities:[88] the ethnic majority of a community is among the factors associated with increased-exposure to pollution.[89] The impacts on these areas are often site-specific due to both the cumulative impact of toxics and the subclasses' susceptibility. Without knowledge of the bioaccumulation of health-impairing toxics on a particular community, the EPA will not know how the chemical will affect that community more than the average community. A law that requires the EPA to assess the cumulative impacts of toxics on communities would best resolve this deficiency.[90] The National Academy of Sciences recommends "considering aggregate risks of exposure to the same chemical from multiple sources, as well as cumulative risks from simultaneous exposure to multiple chemicals and other risk factors."[91] However, neither TSCA

---

83. CAL. CODE REGS. tit. 22, § 69506.4 (2013).

84. *See* S. 1009, § 15(a).

85. Harris et al., *supra* note 14; *see also* BELLIVEAU, *supra* note 35.

86. *See* Sarah Bayko, *Reforming the Toxic Substances Control Act to Protect America's Most Precious Resource*, 14 SOUTHEASTERN ENVTL. L.J. 245, 256–62 (describing children's and fetuses' unique susceptibility to toxic chemicals).

87. *See* Wendy Wagner & Lynn Blais, *Children's Health and Environmental Exposure Risks: Information Gaps, Scientific Uncertainty, and Regulatory Reform*, 17 DUKE ENVTL. L. & POL'Y F. 249, 257–59 (2007) (providing an example of greater motor vehicle emissions in highly-urban areas, creating a hot spot).

88. *See, e.g.*, James L. Sadd et al., *"Every Breath You Take . . .": The Demographics of Toxic Air Releases in Southern California*, 13 ECON. DEV. Q. 107 (1999).

89. LINDA S. ADAMS & JOAN E. DENTON, CUMULATIVE IMPACTS: BUILDING A SCIENTIFIC FOUNDATION 2 (2010).

90. *See* Letter from Pamela K. Miller et al., Exec. Dir., Alaska Cmty. Action on Toxics, to Sen. Barbara Boxer, Chairwoman, Subcomm. on Env't & Pub. Works and to Sen. David Vitter, Ranking Member, Subcomm. On Env't & Pub. Works, (June 12, 2013) (on file with author), *available at* http://static.ewg.org/pdf/Combined-CSIA-Letters-2013.pdf.

91. *Hearing on the Chemicals in Commerce Act before the Subcomm. on the Env't and the Econ. of the H. Comm. on Energy. and Commerce*, 113th Cong. (2014) (footnotes omitted) (statement of Michael Belliveau, President and Executive Director of the Environmental Health Strategy Center) ("Without adhering to modern principles of risk assessment, EPA's safety determinations, when they are able to make them under the constraints of the House bill, will likely be 'wrong,' that is they won't be fully protective of the health of vulnerable populations." (footnotes omitted)); *see also id.* (statement of Phillip J. Landrigan, M.D.,

nor CSIA require a cumulative impact analysis. In contrast, The Safe Chemicals Act would require the EPA to measure the bioaccumulation of toxics in a community and to rely on that data when making a safety determination.[92] Additionally, the state of California's Office of Environmental Health Hazard Assessment ("OEHHA") published a report to guide agencies to consider the cumulative effects of toxic and hazardous pollutants from multiple sources.[93] The report found that the factors influencing increased exposure to toxic chemicals included socioeconomic factors such as income (both individual and community-wide), access to healthcare, and the race or ethnicity of the community.[94] Additionally, SPR requires OEHHA to consider the cumulative effect and aggregate effect of a chemical when listing a chemical as a Chemical of Concern, i.e., a chemical requiring an alternatives analysis.[95] While CSIA cannot preempt the alternatives analysis process, it would preempt any restriction on a Chemical of Concern's manufacture, use, or distribution in commerce.[96] Therefore, the assessment of a chemical's cumulative effect on health would be rendered useless to protect the public health if state-issued requirements, like those under the SPR, are preempted.

If a state's action cannot fit within the narrow exceptions within subsection 15(c), a state may apply for a waiver under certain conditions.[97] A state may be granted a waiver if it cannot wait for the scheduled deadline under which the EPA will complete its safety evaluation; if there are compelling "state or local conditions [that] warrant granting the waiver to protect human health or the environment"; the rule will not unduly burden interstate and foreign commerce; the rule does not violate any federal law, rule, or order; and the rule is "based on the best available science and is supported by the weight of the evidence."[98] CSIA does, however, recognize the importance of at least not further extending the unreasonable delay. Instead of the usual 180-day time period to grant or deny the waiver based on the

---

Dean for Global Health, Icahn School of Medicine at Mount Sinai) ("One critical component of a new, health-based chemical policy in the United States must be a legally enforced requirement that chemicals already on the market be systematically examined for potential toxicity beginning with those chemicals that are found through biomonitoring to be most widespread in the American population, those for which there is evidence of toxicity, and those that are persistent and bioaccumulative.").

92. Safe Chemicals Act of 2013, S. 696, 113th Cong., § 7(d)(2)(B)(ii) (2013).
93. ADAMS & DENTON, *supra* note 89.
94. *Id.* at 2.
95. CAL. CODE REGS. tit. 22, § 69502.2(b)(2)(A) (2013).
96. *See supra* notes 83–84 and accompanying text.
97. *See* Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(c) (2013).
98. *Id.* § 15(d)(1)(B)(i)-(iv).

requirements in paragraph (1),[99] the EPA only has ninety days to grant or deny the waiver in the case of an unreasonable delay.[100] Additionally, all waivers are subject to notice and comment requirements.[101]

As long as the claims of hot spots requiring state intervention are based on the best available science, are supported by the weight of evidence, and do not unduly burden interstate foreign commerce—states may be able to use the waiver provision of CSIA to provide greater protection to hot spots.[102] Vulnerable subpopulations may qualify as a compelling local or state reason to issue a waver to continue a requirement. However, the waiver would likely not be available when state officials determine that the state as a whole needs protection from a particular chemical substance.[103] The burden of proving that these state-wide bans are needed to protect localized subclasses and communities may be difficult for a state to justify, especially when it must survive the second prong: "compliance with the proposed requirement . . . does not *unduly* burden interstate and foreign commerce . . . ."[104] It may be easier for a local political subdivision to show that subclasses within its community require greater protection than the national standard because the vulnerable subclass will make up a greater percentage of the area and the stricter requirement will be localized. However, even local regulations can still violate the dormant commerce clause.[105] The waiver provision, were it not for the potentially stifling language referring to the burden on interstate and foreign commerce, may provide relief for states to continue their own innovative toxic chemical laws.[106]

---

99. *Id.* § 15(d)(3)(A).

100. *Id.* § 15(d)(3)(B).

101. *Id.* § 15(d)(4).

102. Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(d)(1)(B)(i)-(iv) (2013); *see supra* text accompanying notes 86–97.

103. Harris et al., *supra* note 14.

104. S. 1009, § 15(d)(1)(B)(ii) (emphasis added).

105. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkston, N.Y., 511 U.S. 383, 390–91 (1994) (holding that a town's ordinance requiring that all solid waste processed or handled in the town be processed at the town's transfer station violated the dormant commerce clause because it discriminated based on where the service is provided). A regulation requiring that a product be manufactured without a toxic chemical within a city, county, or state, may also unduly burden interstate commerce by discriminating against manufacturing occurring outside of the state or political subdivision. *See id.* However, if the state or political subdivision can show that, under rigorous scrutiny, it has no other means to advance a legitimate state interest, even a discriminatory regulation will be upheld. *See* Maine v. Taylor, 477 U.S. 131, 148-49 (1986) (holding that Maine's ban on the import of shellfish did not violate the dormant commerce clause because it was the only way to prevent the spread of disease).

106. *See generally* Jonathon H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Regulation*, *in* JIM CHEN, THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION 262, 272-81 (2003) (advocating for ecological forbearance where a state can petition the EPA to be exempt from a requirement so it may issue its own regulations).

C. Objections to Preemption

The Attorney Generals' offices of nine states wrote a letter to the Senate Environment and Public Works Majority Committee to express their concerns over CSIA's preemption.[107] The letter stated that CSIA would "seriously jeopardize public health and safety by preventing states from acting to address potential risks of toxic substances and from exercising state enforcement powers" by preempting state laws.[108] States have traditionally occupied the field of protecting individual's health and safety.[109] In support, the attorney general offices cite several different chemical requirements they have issued,[110] and in support of the states' argument of occupying toxics regulation, no chemicals that have been banned or regulated under state programs have also been banned or regulated under Section 6 of TSCA.[111] The existing federal-state relationship of regulating toxic substances should remain unchanged due to the forty-year history where state and federal governments have regulated toxic chemicals side-by-side and to preserve the states' role in attempting new and innovative

107. Harris et al., *supra* note 14.

108. *Id.* at 1.

109. *Id.* at 2 (stating that "protection of children's health from harmful chemicals has been a particular focus of the states, and many laws in this area have been enacted with strong bipartisan support"); *see also* text accompanying notes 32–49 (discussing the significance of a federal and state presence in a field).

110. *Id.* at 4–5 California regulations include a state-wide bans on different products; Proposition 65, a right to know law; and the state's Green Chemistry Program. *Id.* Maryland regulations include regulations and bans on certain chemicals in children's products. *Id.* Massachusetts's regulations include bans on certain mercury-added products, bans on different chemicals, a comprehensive chemicals management scheme, and children's' products containing a hazardous substance. *Id.* Oregon's regulations include bans on products containing more than one-tenth of certain chemical substances, including flame retardant chemicals, and any toxic substance identified by regulation; bans on any products that make hazardous substances accessible to children; and a ban on mercury use. *Id.* Vermont's regulations include a ban on lead in consumer products, a ban on brominated and chlorinated flame retardants, a ban on phthalates, and a ban on bisphenol. *Id.* Washington's regulations include bans on products containing bolybrominated diphenyl ethers, bans on sports bottles, sports bottles, or children's bottles, cups, or containers that contain bisphenol A, and a ban on the distribution or sale of children's products containing lead, cadmium, and phthalates above certain concentrations. *Id.* For comparison, chemicals banned or regulated by the EPA include polychlorinated biphenyls (PCBs), fully halogenated chlorofluoroalkanes, dioxin, asbestos, hexavalent chromium, mixed mono and diamides of an organic acid, triethanolamine salts of a substituted organic acid, triethanolanime salt of tricarboxylic acid, and tricarboxylic acid. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-458, CHEMICAL REGULATION: OPTIONS EXIST TO IMPROVE EPA'S ABILITY TO ASSESS HEALTH RISKS AND MANAGE ITS CHEMICAL REVIEW PROGRAM 58–61 (2005).

111. *See* Harris et al., *supra* note 14.

protective rules.[112] States have passed innovative laws aimed at reducing pollution through multi-media efforts, as opposed to the checkerboard system of federal, medium-specific regulations.[113] The EPA's checkerboard regulations have led to a gap in the regulation of toxic chemicals; this gap has been filled by state laws that regulate from cradle to grave.[114] California's innovative alternatives analysis system is also an example of how states' environmental regulation is better suited to adapt and how state agencies revisit and improve their regulatory structure.[115] The toxics-regulation renaissance is not limited to those states described in note 113, *supra*; altogether, at least thirty-three states plan to expand their regulation of toxic chemicals in 2014,[116] which is more than the twenty-six states that considered toxics regulations in 2013[117] and the twenty-eight states that considered toxic regulations in 2012.[118] Four states, thus far, have developed

112. *Id.* For instance, California's new alternatives-analysis law is a first of its kind attempt at regulating toxic chemicals by putting manufacturer's in the position of developing safer alternatives to avoid the traditional command and control requirements by TSCA. *See* CAL. CODE REGS. tit. 22, §§ 69501–505.7 (2013). Additionally, a bill from Massachusetts also would require an alternatives analysis similar to California's. S. 387, 188th General Court, § 6 (Mass. 2013) ("seek[ing] to reduce the presence of priority chemical substances in consumer products and the workplace by promoting safer alternatives to such substances"). Other states have also introduced alternatives analysis bills. *See, e.g.,* H. 744, 2013–2014 Leg. Sess. (Vt. 2014) ("It is the policy of the State of Vermont to protect public health and the environment by reducing exposure of its citizens and vulnerable populations such as children, from exposure to toxic chemicals when safer alternatives exist."). Other state bills include a ban on flame-retardants in children's products in Maryland, *see* H.R. 0229, 2014 Reg. Sess. (Md. 2014), and a bill requiring the development of a toxic chemicals reduction strategy in Oregon, *see* H.R. 3257, 76th Leg. Assembl., Reg. Sess. (Or. 2011).

113. *See* David L. Markell, *States as Innovators: It's Time for a New Look to our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 362 (1994).

114. *Id.* at 366-67 (describing Massachusetts's pollution management system that aims to reduce toxic waste by also reducing the use of toxic substances at the manufacturing stage); *see also supra* note 67 (describing the alternatives analysis laws that would similarly prevent toxic wastes by encouraging manufacturers to use safer alternatives that would not produce toxic wastes).

115. *See id.*, at 380-82 (describing New York's executive order requiring the Department of Environmental Conservation to "reevaluate regulations to ensure that they adequately protected public health, safety, and welfare, but also did not create undue regulatory burdens").

116. *At Least 33 States to Consider Toxics Policies in 2014*, SAFERSTATES (Jan. 28, 2014), http://safehealthyct.org/2014/01/28/at-least-33-states-to-consider-toxics-policies-in-2014/.

117. *26 States to Consider Toxic Chemicals Legislation in 2013*, SAFERSTATESK (Jan. 24, 2013), http://thedakepage.blogspot.com/2013/01/26-states-to-consider-toxic-chemicals.html.

118. *28 States to Consider Toxics Chemicals Legislation in 2012*, WASH. TOXICS COALITION, http://watoxics.org/toxicswatch/28-states-to-consider-toxic-chemicals-legislation-in-2012 (last visited Mar. 17, 2014).

comprehensive chemical management laws.[119] These laws, and Maine's Kid Safe Products Act in particular, are innovative to the extent that they strive to protect children while conserving fiscal resources:[120]

> These comprehensive state chemical policies generate multiple outcomes. They authorize regulatory action to prevent exposure to dangerous chemicals in specific products, avoiding chemical-by-chemical legislative fights. By formally listing chemicals of high concern and priority chemicals, they incentivize voluntary actions in the marketplace to move toward safer alternatives. Through chemical use reporting requirements, they begin to fill critical gaps.[121]

Additionally, these innovative environmental laws have taken the form of a capital asset due to the long time in which they've been in place and the investments that interest groups and the state governments have made in implementing and improving them.[122] Preempting states laws like California's would be wasteful. California's constantly-evolving Proposition 65, in place since 1986,[123] is one such example of a long-term investment. By issuing regulations from Proposition 65 since 1986, the state of California has gained expertise in regulating toxic chemicals.[124] Additionally, the state of California has also developed a long-term contractual relationship with different interest groups (both

---

119. Michael E. Belliveau, *The Drive for a Safer Chemicals Policy in the United States*, 21 NEW SOLUTIONS 359, 372 (2011); *see also* Proposition 65, CAL. HEALTH & SAFETY CODE §§ 25249.5–25249.14 (West 2013) (regulating toxic chemicals by requiring warnings of toxicity and allowing for prohibitions); Kid Safe Products Act, ME. REV. STAT. tit. 38 §§1691–1699-B (2013) (regulating toxic chemicals in children's products); Toxic Free Kids Act, MINN. STAT. §§ 116.9401–116.9407 (2013) (requiring the Minnesota Department of Health to create two lists of chemicals: chemicals of high concern and priority chemicals – as well as revisit the chemicals of high concern list every three years); Children's Safe Products Act, WASH. REV. CODE §§ 70.240.010–70.240.060 (2013) (requiring the department of health to categorize high priority chemicals). *See generally* Belliveau, *supra*, at 373 (comparing the four state comprehensive chemical management laws).

120. Belliveau, *supra* note 119, at 372; *see also* Kid Safe Products Act, ME. REV. STAT. tit. 38 §§1691–1699-B (2013) (regulating toxic chemicals in children's products by prioritizing them to save fiscal resources).

121. Belliveau, *supra* note 119, at 373.

122. *See* Jonathan R. Macey, *Federal Deference to Local Regulators: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 272–73 (1990).

123. *See* OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, *supra* note 34.

124. *See* Macey, *supra* note 122, at 275 ("[O]ver time local regulators may have developed particularized expertise in a specific subject area, or they may have developed a long-term contractual relationship with one or more interest groups through a pattern of repeat dealings. Where these conditions obtain, existing local regulation takes the form of an income-producing capital asset.").

industrial and environmental) due to their repeat dealings.[125] Therefore, California's toxics regulations, like those of many states', should not be preempted because it would dissipate a valuable asset that has been invested in through the implementation of regulations over many years.[126]

Ken Cook of the Environmental Working Group elaborated on the dangers of not providing demographic-specific protection in CSIA. At risk groups, such as children, are harmed greater by toxic chemicals in the aggregate.[127] Mr. Cook advocates for a "reasonable certainty of no harm" approach, such as that utilized in the Food Quality Protection Act of 1996.[128] That approach, Mr. Cook contends, would require the EPA to avoid considering costs in making its safety determinations. Although not formally established within TSCA, the EPA has utilized a cost-benefit approach to regulating toxic substances like it did in *Corrosion Proof Fittings v. EPA*.[129]

A collection of thirty-four law professors, legal scholars, and public interest lawyers further argue that the changes in CSIA's safety determinations do not alter the cost-benefit approach that has persisted since *Corrosion Proof Fittings*.[130] The definition of "safety standard"—the standard to determine whether a chemical is safe for its intended use—under CSIA is an "unreasonable risk of harm."[131] The "unreasonable risk of harm" standard has been interpreted by courts over the years to require a cost-benefit analysis.[132] Therefore, CSIA can still require the EPA to undertake a cost-benefit analysis when determining a chemical's safety

---

125. *See id.*

126. *See id.*

127. *Strengthening Public Health Protections by Addressing Toxic Chemical Threats: Hearing on S. 1009 Before the S. Comm. on Env't & Pub. Works*, 113th Cong. (2013) (statement of Kenneth A. Cook, President of the Environmental Working Group).

128. Food Quality Protection Act of 1996, Pub. L. No. 104–170, § 408(b)(2)(A)(ii), 110 Stat. 1489, 1516 (1996) (codified at 21 U.S.C. § 346(a) (2012)).

129. David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 84 (2005); *see* Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1208 (5th Cir. 1991).

130. Letter from John S. Applegate et al., Professor of Law, Ind. Univ. Maurer Sch. of Law, to The Honorable John Shimkus, Chairman, House Energy & Commerce Comm., Subcomm. on Env't & Econ., and The Honorable Paul Tonko, Ranking Member, House Energy & Commerce Comm., Subcomm. on Env't & Econ. (June 12, 2013) (on file with author), *available at* http://static.ewg.org/pdf/Combined-CSIA-Letters-2013.pdf.

131. Chemical Safety Improvement Act, S. 1009, 113th Cong. § 3(16) (2013).

132. *See, e.g.*, John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 ECOLOGY L.Q. 721, 731-33 (2008); *see also* Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 VAND. L. REV. 1817, 1830 (2009) (finding that ever since the Fifth Circuit rejected the EPA's approach to a cost-benefit analysis in *Corrosion Proof Fittings*, the EPA has never promulgated a rule banning the use of a chemical substance).

standard.[133] The letter to representatives of the Subcommittee on the Environment and Economy also expressed concerns over the expanded preemption of CSIA, alleging that "were [CSIA] to become law, it would perpetuate many of [TSCA's] shortcomings while preventing states from protecting public health and the environment in the absence of a robust federal law—or in the case of a strong federal regulatory framework—from complementing EPA's efforts to achieve this important goal."[134] However, because CSIA may not provide greater protection to children than TSCA due to the "unreasonable risk of harm" definition of the "safety standard," then states will need to continue promulgating rules to protect children and vulnerable populations from toxic chemicals. For instance, the "EPA could simply decide that the serious health risk to vulnerable populations is not 'unreasonable,' considering the lower population-wide risks and the costs to industry of protecting the most vulnerable."[135]

V. THE PREFERRED STATE-FEDERAL COOPERATIVE REGULATORY SYSTEM

Some legal academics, as well as environmental advocates, prefer federal regulation of the environment over state regulation because, they claim, public choice pathologies cause environmental interests to be secondary to business interests.[136] Other justifications for federal environmental regulation include preventing a "race to the bottom" whereby a state will lower its environmental standards to attract businesses that wish to operate without concerns for public health.[137] Competing states, wishing not to lose their businesses, will also lower their

133. Applegate et al., *supra* note 130, at 1.

134. *Id.* at 3.

135. *Chemicals in Commerce Act: Hearing before the Subcomm. on the Env't and the Econ. of the H. Comm. on Energy. and Commerce*, 113th Cong. (2014) (statement of Michael Belliveau, President and Exec. Dir. of the Envtl. Health Strategy Ctr.)

136. Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 555–56 (2001); *see also* Paul Boudreaux, *Federalism and the Contrivances of Public Law*, 77 ST. JOHN'S L. REV. 523, 534 (2003) (describing the phenomenon known as the race to the bottom, whereby business interests overcome environmental interests in an attempt to compete with other states' business interests).

137. Revesz, *supra* note 136, at 556; Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2343 (1996). *Compare* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 *passim* (1992) (using neoclassical economic models to argue that there is no race to the bottom; instead competition among states follows competition among industries, benefitting social welfare), *with* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271 *passim* (1997) (using empirical evidence from surveys of regulators to show that business relocation was a factor considered when making environmental rules and regulations).

environmental standards to keep those businesses in the state. This explanation assumes that only the states regulate to protect an aspect of public health. Alternatively, if the federal government also regulated toxic chemicals, there would not be a race to the bottom. For example, the federal government would establish a national standard that would protect individuals should a state attempt to lower toxics regulation to benefit businesses. Therefore, there is no race to the bottom when the "bottom" is a national standard implemented by the federal government. [138] The federalism relationship in environmental law whereby the federal government sets a standard and a state may supersede that level of protection is therefore the most logical for multiple reasons. It takes the following into account: that there are outside environmental concerns; [139] that the health effects of toxic chemicals occur intrastate, but the regulation of those chemicals has interstate repercussions;[140] that the race to the bottom may or may not actually be occurring;[141] and that states do not face as many fiscal pressures.[142]

The public choice pathologies are said to cause the under-regulation of the environment because at the state level the anti-regulatory group is more cohesive and can easily compete against the diffuse, less-organized, and unfocused group of the environmental advocates.[143] However, there is no reason why the public choice issues would not also exist at the federal level.[144] In fact, on a national scale, it is more likely that the diffuse environmental groups would be even more scattered when the issues are national, not just state-wide:[145]

---

138. *See generally* Tracy Daub, *California–Rogue State or National Leader in Environmental Regulation: An Analysis of California's Ban of Bromated Flame Retardants*, S. CAL. INTERDISC. L.J. 345, 352–53 (2005) ("Normally, states are unimpeded in the direction they would like to take with respect to environmental regulation, as long as they meet the minimum federal guidelines, if any exist, and as long as the regulation does not involve an issue that requires national uniformity.").

139. *See* John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 LAW & CONTEMP. PROBS. 203, 227 (1997).

140. *See id.* (acknowledging that different types of pollution produce different interstate and intrastate effects).

141. *See id.* at 224–26.

142. *See id.* at 228.

143. Revesz, *supra* note 136, at 559.

144. *See id.* at 559–60.

145. *See id.*, at 559–60; *see also id.* at 563 (explaining that the diffuseness of the groups is due in part because the environmental interests of actors in each state would likely vary as each state is subject to different environmental harms). *But see* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 650 n. 302, 651 (1996) (stating that at the federal level, environmental advocates are better able to reach critical mass and compete on equal footing with industry advocates and that at separate jurisdictions it can be difficult to mobilize people to advocate for environmental protection).

> Moreover, the national aggregation of environmental interests results in the loss of homogeneity of interests, thereby further complicating organizational problems. For example, environmentalists in Massachusetts may care primarily about air quality, whereas environmentalists in Colorado may care more about limitations on logging on public lands. Other things being equal, state-based environmental groups seeking, respectively, better air quality in Massachusetts and more protection of public lands in Colorado are likely to be more effective than a national environmental group seeking both improvements at the federal level.[146]

For example, not all states will have the same vulnerable subclasses in urban areas that require more regulation than a national standard to protect their public health. In fact, the success of state-level campaigns for toxics reform can be attributed to focusing the issue on children's health, not broad public health.[147] Once the national standard of protection is met, more protection for vulnerable subclasses will be difficult to reach on a national level due to the diffuseness of environmental advocates. Additionally, because of business group's expendable resources, they would be more capable of maintaining cohesion when the scale is widened.[148]

The federal government itself is also diffuse. Due to limited resources at the federal level, the EPA cannot gain enough specialized knowledge to regulate localized areas.[149] States often enforce rules more often[150] and have better localized knowledge of community's environmental needs.[151] States should regulate toxic chemicals, especially those of localized concern, due to the ease of enforcing local requirements, and the susceptibility of hot spots to cumulative effects is a local concern better regulated by the states.[152]

The free-rider problem is also more readily apparent at the federal level. Whenever a large group of individuals work together for a common benefit, the natural tendency of each individual is

146. Revesz, *supra* note 136, at 563.
147. Belliveau, *supra* note 119, at 374.
148. *See* Revesz, *supra* note 136, at 559–60.
149. *See* Adler, *supra* note 106, at 266.
150. *See id.* at 270.
151. *See id.* at 266.
152. *See id.*

to expend fewer resources for the desired benefit because she can rely on the rest of the collective group to pay for the benefit.[153] For smaller groups, there is less of an incentive to free ride because each individual will necessarily have to play a larger role in the collective action.[154] Conversely, for larger groups, there is a larger incentive to free ride because the individual has a larger group to rely on.[155] Additionally, for benefits that can be divided among the members, individuals in a smaller group will have a larger piece of the pie, and therefore have a larger stake and incentive to expend resources.[156] Because logically, groups at the state level will be smaller, state-level collective actions to reform environmental laws will have less of a free-rider problem.[157] In fact, the prominence of state-level toxics regulation can be attributed to a cohesive coalition of environmental advocates in each state.[158]

Another common justification for federal regulation is that adversely affected parties have more difficulty avoiding state laws than federal laws.[159] This however would not be the case with

---

153. *See* Revesz, *supra* note 136, at 561.

154. *See id.*

155. *See id.*

156. *See id.*

157. *See* Revesz, *supra* note 136, at 562 ("Nonetheless, it is unlikely that even small groups would provide the optimal amount. At the point at which the optimal amount of the collective good is provided, the marginal cost of providing the good is equal to the marginal benefit obtained by the group's members. That is, the cost of an additional unit of a good must be equal to the benefit derived from that unit. For a group to provide the optimal amount of the good, however, the marginal cost and benefit must be equal not only for the group as a whole, but also for each of its members. Any member facing a marginal cost higher than his marginal benefit would not find it in his interest to contribute to the provision of the good. As Olson explains, 'there is no conceivable cost-sharing arrangement in which some member does not have a marginal cost greater than his share of the marginal benefit, except the one in which every member of the group shares marginal costs in exactly the same proportion in which he shares incremental benefits.' " (footnotes omitted)).

158. Belliveau, *supra* note 119, at 374 ("[D]iverse health-based coalitions were organized with capacity to apply targeted grassroots power, direct legislative advocacy, and strategic communications . . . ."). Other factors leading to state-level toxics reforms include:

a product focus—parents and policymakers easily related to chemical threats in the home from consumer products, which were less politically threatening to in-state industries; a split-the-opposition strategy—the out-of-state chemical companies and their allied national trade groups remained villains, not local businesses and green chemistry entrepreneurs; and bipartisan wins—a series of winning campaigns built confidence and a bipartisan consensus that protecting children's health from the chemical industry was good politics. *Id.*

159. Macey, *supra* note 122, at 272–73; *see also* Dwyer, *supra* note 139, at 218–19 ("Macey argues that Congress is more likely to delegate political power to states when (1) states have established a system of regulation that federal law would disrupt, (2) wide variations in conditions makes a one-size-fits-all statute less than optimal, and (3) Congress wants to avoid responsibility for regulatory policies. Macey's model may be untestable; it may be much too difficult to ferret out the precise relationship between the vague notion of political support and a particular allocation of power in a regulatory statute. Nevertheless, at a minimum Macey offers a useful way to structure our thinking about the allocation of regulatory authority between federal and state governments.").

toxics regulation because a business would lose the opportunity operate if it moved its practice instead of substituting a safe chemical for a toxic chemical. Even if a business moved its manufacturing of a product to another state, it would lose the chance to do business with the regulating state because its products would likely be banned. This is one way in which state toxics law can actually drive industry reform: industries do not want to lose business in a state.[160] The recognition of businesses wishing to stay in operation is also another reason why California's alternative analysis law makes sense and is innovative: it encourages companies to use safer chemicals so that they may remain in business while still protecting people.[161]

VI. CONCLUSION

Lax federal toxics regulation has stimulated states into regulating toxics primarily to protect children and other vulnerable subclasses. Additionally, the state-level regulations can act as a driver for both federal laws and industry reform. However, a federal law that continues the same deficiencies as TSCA could require the same rigorous cost-benefit analysis, the lack of which invalidated a ban on asbestos in *Corrosion Proof Fittings v. EPA*. CSIA and CIC will likely not sufficiently protect children and vulnerable subpopulations because the definition of a safety standard is an unreasonable risk of harm, which has been interpreted by courts in the past to require a cost-benefit analysis.[162] Additionally, EPA may not consider a regulation to protect a vulnerable subclass or hot spot to be worth the cost to the entire country. With a federal law that will likely not sufficiently protect children and vulnerable subpopulations, state laws are still needed. State-level campaigns for protection from toxics are best situated to protect children because not all states have similar conditions necessitating the same stronger regulations and because different communities in different states are plagued by different cumulative effects. Additionally, CSIA and CIC do not require the EPA to undergo a cumulative effects analysis when completing a safety assessment for a chemical. Therefore, states are in the best position to regulate for the protection of children and vulnerable subclasses. The preemption scheme in the Safe Chemicals Act, which would allow state laws

160. Belliveau, *supra* note 119, at 378.
161. *See supra* Part III.B.
162. *See supra* notes 133–46 and accompanying text.

to continue regulating so long as they do not directly conflict with a rule for a toxic chemical issued by the EPA is therefore better suited to protect people from toxic chemicals.