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The Preemptive Effect of the OSHA Hazard Communication Standard on State and Community Right to Know Laws

Patrick R. Tyson*

Beginning in the late 1960s and continuing through the present, there has been an increasing awareness of the harmful effects that many commonly used chemicals have on living organisms and the environment. As a result, there has also developed a rising consciousness concerning chemical exposure in the workplace and its effect on employees. In many cases, workers lack knowledge of the chemicals to which they are exposed, the effects of such exposure, or the precautions necessary for safe handling of such chemicals. Furthermore, many manufacturers may be ignorant of the risks involved, as little or no information may have been provided by the chemical suppliers concerning the harmful nature of the chemicals, especially long-term or chronic effects. Consequently, many diseases are never properly attributed to chemical exposure, a fact further exacerbated by the lengthy incubation period of many diseases resulting from chemical exposure, especially cancer.

To further complicate matters, rational business considerations employed by the chemical industry require that specific identities of chemical compounds be kept secret. In many cases, it is the secrecy of chemical elements that allows a manufacturer to gain a competitive advantage in the marketplace.

In 1970, Congress passed the Occupational Safety and Health Act (OSH Act),1 the purpose of which was “to assure so far as possible every working man and woman in the nation safe and healthful working conditions . . . .”2 To greatly compress history, the National Institute for Occupational Safety and Health (NIOSH), an agency created under the OSH Act, recommended that the Secretary of Labor promulgate regulations requiring employers to inform employees of potentially hazardous materials in the workplace.3 The Secretary of Labor created the Occupational Health and Safety Administration (OSHA), an agency charged with drafting and enforcing the necessary regulations. After an extensive rule-making process, OSHA promulgated the Hazard Communication Standard (OSHA Standard) in late 1983, with an effective date of May 25, 1983.

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2 Id. § 651(b).
The purpose of the OSHA Standard is to inform employees of the hazards associated with the chemical substances to which they are exposed in the workplace. Most observers agree that the OSHA Standard represents the most significant regulatory action ever taken by that agency.

Before the agency completed the OSHA Standard, several states passed "right to know" laws, essentially covering the same issue as the OSHA Standard. Under the OSH Act, however, states are only free to "[assert] jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect..." The antithesis of this provision is the more operative law—that states are preempted from asserting jurisdiction over an issue with respect to which a standard is in effect. Congress left the states free to regulate areas beyond the scope of OSHA's authority (e.g., environmental matters outside the workplace, or workplace issues for which no OSHA standard has been promulgated). And therein lies the battle. Promulgation of the OSHA Standard raises the question of whether, and to what extent, the state right to know laws are preempted by the federal regulation. This battle has been vigorously fought by both sides. At stake is the potential for extremely burdensome state regulation balanced against the perceived need for extensive dissemination of information regarding toxic substances. OSHA and industrial interests have emphasized the goal of consistent regulations throughout the states, a lessened burden on interstate commerce, and relief for regulated industries from the burden of unnecessary and redundant regulation. The states and labor organizations have emphasized the traditional states' right to regulate health and safety matters, as well as the states' interest in providing the most protective regulations possible, a policy fully in accord with the purpose of the OSH Act. The conflict is further complicated by the fact that, unlike the OSHA Standard, the state right to know laws may be drafted to protect not only employees in the workplace, but other classes of persons as well.

Congress, in passing the OSH Act, was not concerned with burdening industry, finding that any such burden would be justified in order to provide a safe workplace. Given that OSHA passed a standard involving a particular method (e.g., container labeling) to address a particular problem (e.g., hazard communication), are state and local governments still free under the language of the OSH Act to require additional, different, or even identical container labeling in order to address hazards other than employee safety and health? The following discussion will analyze the viability of the state right to know laws in light of the federal OSHA Standard. Included in the discussion is an examination of the state laws' effect on interstate commerce and an analysis of court decisions on both

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5 Id. The OSHA Standard provides for material safety data sheets (MSDS's), container labeling, and employee training. It is applicable to employers in Standard Industrial Classification Codes 20 through 39 (the manufacturing sector). Id.
7 See United Steelworkers of Am. v. Auchter, 763 F.2d 728, 734 (3d Cir. 1985).
implied and express preemption. This Article concludes that the state right to know laws should, in most cases, be invalidated.

I. Commerce Clause Analysis

The primary criterion for evaluating the validity of a state law under the Commerce Clause is its discriminatory impact on interstate commerce. State laws which are facially discriminatory are those which explicitly favor in-state interests over those of other states. These statutes will have an unconstitutional impact on interstate commerce where the effect of any such statute is discriminatory. Only two Supreme Court cases have invalidated facially nondiscriminatory state laws. In both cases the Court found that the laws simply placed too heavy a burden on interstate commerce.

The first case, Southern Pacific Co. v. Arizona, involved a state law limiting the length of trains operated within the state. The Court recognized that states have the power to regulate matters of local concern, provided that no conflicting Congressional legislation exists and that the impact on interstate commerce is slight. State statutes, however, may not cause “substantial” interference with interstate commerce, nor regulate areas in which there is a need for national uniformity. Such a determination would be based on the competing demands of state and national interests. Under this rule of law, the Court held that the “decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect . . . .” The Court stressed the need for a sufficient factual basis to determine “the relative weights of the state and national interests involved” and to “afford a sure basis for an informed judgment.”

On the facts before it, the Court found the “safety measure [of the state law] at most slight and dubious.” In fact, the Court noted evidence that the state regulation actually increased accidents because of the increase in the number of trains that had to be run through the state. The statute’s impact on interstate commerce was also extensive,

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8 The commerce clause analysis is based on Professor Sedler’s article, The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure, 31 Wayne L. Rev. 885 (1985).
9 Aside from the two cases cited, the Supreme Court has upheld every facially nondiscriminatory state regulation which has been challenged.
10 325 U.S. 761 (1944).
11 Id. at 767.
12 Id.
13 Id. at 770 (quoting Terminal R.R. Ass’n v. Brotherhood of R.R. Trainmen, 318 U.S. 8 (1942)).
14 Id. at 775-76.
15 Id. at 779.
16 Id. The Court distinguished prior cases involving state regulations which required full train crews. The Court found that such regulations did not create an adverse impact on interstate commerce. Cases involving highway regulation concerned regulation of a “field over which the state has a far more extensive control than over interstate railroads.” Id. at 783 (citing Chicago, R.I. & P. Ry.
both in terms of cost and effect beyond the state borders. Ninety-three percent of the freight trains and ninety-five percent of the passenger trains moving through Arizona and affected by its laws were moving interstate. The Arizona statute, therefore, impacted far more on interstate than intrastate commerce. Consequently, it was struck down as an impermissible burden on interstate commerce.

The second case in which the Court invalidated a facially nondiscriminatory state regulation was Bibb v. Navajo Freight Lines. The Court held that an Illinois requirement that trucks have contoured mudflaps was an unconstitutional burden on interstate commerce. The Court found that the requirement substantially burdened interstate commerce not only by greatly increasing the cost of doing business but also by conflicting with the requirements of other states, "making it necessary, say, for an interstate carrier to shift its cargo to differently designed vehicles once the state line was reached." Indeed, at the time Arkansas required a mudflap design incongruous with the Illinois requirement. Thus, truck owners travelling through both states had to change flaps or vehicles every time one or the other state border was crossed, necessitating additional time, labor, and expense.

The Court paid particular attention to the statute's interference with "interlining" operations, by which through freight is transferred from one shipper to another by transferring the entire trailer. The Court found that the Illinois statute would seriously disrupt this process, nearly an exclusive interstate practice. The failure of Illinois to establish that the state requirement conclusively promoted safety and the existence of a compelling special local condition was a determining factor in the Court's invalidation of the statute.

Of the many cases upholding nondiscriminatory local laws that burden interstate commerce, Huron Portland Cement Co. v. Detroit is exemplary. When the City of Detroit instituted proceedings against the defendant's ships for violation of its Smoke Abatement Code, the shipowners appealed on grounds of preemption and the impermissible bur-

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17 Id. at 774-75. The Court noted that compliance with the Arizona law frequently required trains to be broken up and reformed far outside Arizona's border.
18 Id. at 771.
19 The Court further noted the potential for multitudinous and conflicting state legislation, which would interfere with the Congressional goal of promoting adequate, economical, and efficient railway transportation service. Id. at 773 (citing Interstate Commerce Act, preamble, 54 Stat. 898, 899 (1940)).
21 Id. at 530. Changing mudflaps would require two to four hours labor. Moreover, since welding would be required, trailers with explosive or flammable material would have to be unloaded. Id. at 527.
22 Id. at 526.
23 Id. The Court stated: "If we had here only a question whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly burden interstate commerce, we would have to sustain the law.... The same results would obtain if we had to resolve the much discussed issues of safety presented in this case." Id.
24 Id. at 527-28.
25 Id. at 528-29. Indeed, there was evidence of its creating safety problems.
The Court began its Commerce Clause analysis by recognizing that the City of Detroit, pursuant to its police power, had a legitimate interest in implementing the ordinance. The Court also noted that the exercise of a state's police power may be permissible even though such exercise indirectly affects interstate commerce. The Court stated, however, with citations to *Bibb*, *Southern Pacific*, and *Hall v. De Cuir*, that "a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." State regulation, based on its police power, which does not excessively burden interstate commerce or disrupt uniformity may stand. The Court found that such were the facts before it, characterizing the statute as one "of general application, designed to better the health and welfare of the community." Because the record contained no evidence of the existence of competing or conflicting local regulations with which to link a burden on interstate commerce, the Court upheld the regulation as constitutionally permissible.

Several of the Commerce Clause cases make reference to finding nondiscriminatory alternatives to particular state regulations which will be less burdensome on interstate commerce. However, these cases depend on a threshold finding of discrimination against interstate commerce. Absent this showing, the courts have not interfered with the legislative judgment. The articulated balancing of putative local benefit against burdens on interstate commerce simply does not happen under the Commerce Clause where the statute in question is truly nondiscriminatory, either facially or in effect.

The state right to know laws at issue are clearly not facially discriminatory. However, in spite of the goals advanced by the state governments in promulgating the regulations, a finding of an unconstitutional discriminatory impact is possible. Unfortunately, although they address the principle, the legacy of *Southern Pacific* and *Bibb* offers little real hope in the way of precedents, as the regulations in both cases were particularly nonsensical. The facts revealed that the regulations might well have contravened their stated goals of improving railroad and highway safety; at best, they did little or nothing to improve it. Instead, the success of a commerce clause argument is contingent upon counsel's ability to produce facts sufficient to establish that the statutes have the effect of discriminating against interstate commerce. For example, such a factual basis could be developed by demonstrating the costs and negative impact of the state law on out-of-state companies subject to dissimilar labeling.

27 The Smoke Abatement Code was a precursor to modern environmental regulations.
28 *362 U.S.* at 442.
29 *Id.* at 444.
30 *95 U.S.* 485 (1877) (holding state regulation of passenger placement aboard riverboats in interstate commerce impermissible).
31 *362 U.S.* at 444.
32 *Id.* at 448.
33 *Id.*
34 *Id.*
36 *Id.* at 336 (citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)).
requirements of various states, as well as the confusion it may cause employees who must interpret the differing federal and state required labels on a particular container.\textsuperscript{37} Many of the arguments derived from an analysis of the preemption issues will also be applicable.\textsuperscript{38}

II. Implied Preemption

Congress promulgated the OSH Act specifically to address health and safety issues in the workplace; it did not \textit{expressly} preempt other health and safety measures enacted by the states clearly unrelated to the workplace, such as housing codes.\textsuperscript{39} A state law can be preempted by a federal law or regulation either expressly or impliedly. Express preemption occurs when Congress, by legislating comprehensively, occupies an entire field of regulation and has thereby "left no room for the states to supplement" federal law.\textsuperscript{40} Implied preemption occurs when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{41}

In \textit{Chemical Specialties Manufacturers Association, Inc. v. Lowery},\textsuperscript{42} a case involving the Federal Hazardous Substance Act (FHSA), Judge Friendly predicted that the preemptive effect of federal regulations would increase. "[W]ith federal laws taking over many fields previously regulated by the states or not regulated at all, it is quite conceivable that, in order to avoid undue burdens on interstate commerce, the Supreme Court may move toward a somewhat broader position on preemption."\textsuperscript{43} This language is certainly pertinent to the OSH Act and the field which it covers; the applicable federal regulation concerns safety and health matters, an area historically left to state control. This historic deference to the states, however, arose at a time when there were few hazardous chemicals shipped in interstate commerce and there were few, if any, state regulations in existence. As such, neither potential nor actual burdens on interstate commerce were a problem with regard to chemicals.. In contrast, today scores of hazardous chemicals move in interstate commerce, to such extent that any state regulating these chemicals is apt to impose some burden on interstate commerce.

According to OSHA, the purpose of the Hazard Communication Standard is to ensure that the hazards of all chemicals produced or imported in any OSHA-regulated state or territory is communicated to employers and employees within the manufacturing sector "by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning . . . ."\textsuperscript{44}

State laws which require hazard labeling for reasons different from those articulated by OSHA (\textit{e.g.}, notifying fire fighters of container's con-
tents) but apply to containers covered by the OSHA Standard can be an obstacle to effectuating the federal protections. The effect of the proliferation of required labels on a given container is that employees suffer from an "information overload," and consequently are less likely to receive an adequate warning than under a single labeling scheme.\textsuperscript{45}

To ensure a more effective method to communicate hazards, OSHA promulgated a hazard communication program consisting of three interdependent provisions: Labeling of workplace containers, material safety data sheets (MSDS's), and employee training. Each of the provisions is integrated with the others "to ensure that employees will receive as much information as needed concerning hazards in their workplaces and that this information will be presented to them in a usable, readily accessible form."\textsuperscript{46} The label requirement is intended to provide an immediate warning, while the MSDS provides more detailed information regarding the hazard.\textsuperscript{47} OSHA selected an approach by which the "employer could use common terms [on the labels], familiar to employees, while still providing them with more extensive information, including specific chemical identities, on the material safety data sheet."\textsuperscript{48} OSHA's concern that employees would not be able to assimilate all the chemical names or identification numbers if they were included on the labeling led to abbreviated labeling requirements, thus avoiding the danger of information overload.\textsuperscript{49}

To establish implied preemption, it is necessary to prove that the different labeling schemes in force cause conflict and confusion. Such arguments are then weighed against the goals sought to be advanced by the state laws (e.g., protecting the public and the environment as opposed to protecting employees in the workplace). The Supreme Court, in analyzing federal regulations, will examine the federal enforcement agency's position on preemption, especially where the agency opines that the federal regulations were not intended to preempt state law.\textsuperscript{50} Indeed, in this situation the Court has characterized an agency's position as "dispositive."\textsuperscript{51} An agency's stand on preemption may not be considered as equally dispositive, however, where the agency favors preemption.\textsuperscript{52}

Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. . . . If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the

\textsuperscript{45} 48 Fed. Reg. 53,301 (1983). Recognizing the consequences of information overload, OSHA considered and rejected a plan which would have required "chemical identity" labeling listing either specific elements of a chemical or the chemical identity of hazardous substances in a container and their Chemical Abstract Service (CAS) numbers. \textit{Id.} at 53,291-92 & 53,302.
\textsuperscript{46} \textit{Id.} at 53,281-82.
\textsuperscript{47} \textit{Id.} at 53,301.
\textsuperscript{48} \textit{Id.}
\textsuperscript{50} Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985).
\textsuperscript{51} \textit{Id.} at 714 (held in favor of a state health regulation; prevailing presumption in favor of state health and safety laws).
\textsuperscript{52} \textit{Id.} at 714-15 (citing Chevron U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984)).
statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.\textsuperscript{53}

Congress unquestionably granted OSHA the power to act to assure safe working environments; equally apparent is that such was OSHA's intent in promulgating the Hazard Communication Standard. OSHA has stated its intention that the OSHA Standard preempt state law. The justification is to lessen the confusion multiple labeling causes employees and the needless regulatory burden on employers. State laws which impose greater burdens on the agency's enforcement mechanism clearly contravene this administrative judgment.

The community right to know laws which call for essentially the same information as the OSHA Hazard Communication Standard are of dubious benefit. When these state laws call for an entirely different labeling requirement than that imposed by the OSHA Standard, without requiring dissimilar information, such laws impose a heavy burden on the manufacturer which must comply with both. This extra burden is needless when the community agencies concerned could acquire the same information through the OSHA Standard. Even though the OSHA Standard is expressly intended to protect employees from hazards in the workplace, it nevertheless accomplishes, in a wider sense, just what its name implies: hazard communication. The information required by the OSHA Standard is available not only to employees, but also to fire fighters and concerned neighbors alike. The OSHA Standard must be complied with regardless of state law. Where state law and the OSHA Standard overlap, the benefit conferred by the state law is meaningless, irrespective of the burden it creates.

The issue, therefore, more accurately stated, is the extent to which the benefit conferred by the state law above and beyond the OSHA Standard outweighs the burden such law imposes on interstate commerce. Courts which have resolved challenges to overlapping state right to know laws created presumptions in favor of upholding the state laws. The courts have refused to address a claim that the state laws impermissibly burden interstate commerce where no factual evidence was presented to substantiate such claim.\textsuperscript{54} Interestingly, the same courts have found that the benefit of the state law to the community is "direct and obvious," notwithstanding the absence of empirical data. In fact, the "direct and obvious" benefits of the states' overlapping laws are likely not substantially more beneficial than the federal OSHA Standard already in effect. It seems that the courts have analyzed the state right to know laws as if the federal OSHA Standard had no effect on the area which it regulates.

Admittedly, the OSHA Hazard Communication Standard addresses workplace rather than environmental problems. If the analysis of the right to know laws focuses solely on this intent, then the OSHA Standard


has no effect on the right to know laws. However, "when considering the purpose of a challenged statute, a court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law."\(^{55}\) Where the OSHA Standard and the state law require substantially the same disclosure from a manufacturer by means of two different labeling schemes, listing requirements, and the like, the courts should require the states to incorporate the OSHA Standard into their right to know laws. Such a ruling would avoid redundancy in regulation and uphold the Supreme Court's mandate that if "a legitimate local purpose is found, then the . . . extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."\(^{56}\)

Although many states argue that their own laws provide more protection than that provided by the OSHA Standard, the argument ignores the balancing test articulated by the courts. No state has mounted empirical evidence which establishes that a separate state labeling scheme for hazardous substances will result in more protection for communities or the environment surrounding chemical plants than would simply legislating that the information required by the OSHA Standard shall be provided to members of the community. Absent such proof, the increased burden on interstate commerce should outweigh the local interest in providing information on hazardous substances through the state right to know laws.

When OSHA promulgated the Hazard Communication Standard the agency expressly stated its intent to deal comprehensively with the issue of hazard communication and to preempt all state right to know laws addressing the same subject. The question of whether OSHA has the authority to preempt such state laws was initially decided by the Third Circuit in *United Steelworkers of America v. AucHer*.\(^{57}\) The court ruled that the Hazard Communication Standard, to the extent that it was valid as a section 6 standard,\(^{58}\) applied "to the exclusion of state disclosure laws


\(^{57}\) 763 F.2d 728 (3d Cir. 1985).

\(^{58}\) As the petitioners had challenged the court of appeals jurisdiction over the judicial review of the OSHA Standard, it was necessary for the court to determine whether the Hazard Communication Standard was a § 6 standard or a § 8 regulation. Jurisdiction over challenges to the validity of § 6 standards is vested in the courts of appeals. 763 F.2d at 733 (citing 29 U.S.C. § 655(f) (1982)). Section 8 regulations are reviewable in the district courts. *Id.* (citing 5 U.S.C. § 703 (1982)). The court noted that a § 6 standard will preempt a state law until the state obtains approval of the law from the Secretary of Labor. Because the grant of such approval shifts the financial burden of enforcement from the federal government to the state, it is unlikely that states would seek approval. *Id.* at 734 (citing 29 U.S.C. § 667(a)(5) (1982)). In contrast, a § 8 regulation does not necessarily preempt state laws.

In resolving the issue, the court adopted the test set forth in *Louisiana Chem. Ass'n v. Bingham*, 657 F.2d 777, 782-83 (5th Cir. 1981) for identifying standards: "[W]hether the challenged rule reasonably purports to correct a particular significant risk or instead is merely an enforcement or detection procedure designed to further the goals of the Act generally." 763 F.2d at 735. The court observed that the OSHA Standard is aimed at "eliminating the specific hazard that employees handling hazardous substances will be more likely to suffer impairment to their health if they are ignorant of the contents of those substances." *Id.* The court also noted the Secretary of Labor's finding
which have not been approved in accordance with [the OSH Act].”

The express language of section eighteen of the OSH Act mandated the conclusion. The court also found that the issue of the OSHA Standard’s preemptive effect outside the manufacturing sector was not ripe for review and it limited its holding to state disclosure laws concerning employees in the manufacturing sector.

The Auchter court next addressed the validity of the OSHA Standard itself. The court held that the Secretary’s decision to limit the OSHA Standard’s application to only the manufacturing industries was not supported by the factual record. The court found that one employee might receive the same toxic exposure as another, and yet be denied any warning under the OSHA Standard simply because he worked in a nonmanufacturing sector industry. The court rejected the Secretary’s argument that section 6(g) of the OSH Act gave him absolute discretion in rule-making priorities. The court held that the Secretary’s priority setting was reviewable under section 6(f) of the act and found that “once a standard had been promulgated, . . . the Secretary may exclude a particular industry only if he informs the reviewing court, not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards.” The court’s difficulty with the Secretary’s decision arose from the failure to explain why coverage of workers outside the manufacturing sector would have seriously impeded the rule-making process. The court directed the Secretary to reconsider the ap-

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that risk of harm can be greatly reduced by direct warning to employees who are in the best position to assure that dangerous substances are handled in the safest possible manner. *Id.* (citing 47 Fed. Reg. 12,122 (1982)). The court also relied on the actual language of § G of the Act, which directs the Secretary of Labor to promulgate “standards” which “prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed . . . .” 29 U.S.C. § 655(b)(7) (1982). Finally, the court stated that the interpretation by the agency charged with its implementation should be afforded some degree of deference. The Secretary of Labor classified the OSHA Communication Standard as a § 6 standard. After reviewing the factors, the court concluded that the Hazard Communication Standard was a § 6 standard. 763 F.2d at 735.

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59 763 F.2d at 735.
60 *Id.* at 734 (citing 29 U.S.C. § 667(c)(5) (1982)).
61 The court cited the five step analysis it had earlier established for reviewing standards promulgated pursuant to § 6(f) of the OSH Act, but failed to specifically apply the approach. *Id.* at 736 (citing Synthetic Organic Chem. Mfrgr. v. Brennan, 503 F.2d 1155, 1160 (3d Cir.), *cert. denied*, 420 U.S. 973 (1975)). The five point analysis can be summarized as follows:

(a) determining whether the Secretary’s notice of the proposed rule-making adequately informed interested persons of the action taken;

(b) determining whether the Secretary’s promulgation adequately sets forth reasons for his action;

(c) determining whether the statement of reasons reflects consideration of factors relevant under the statute;

(d) determining whether presently available alternatives were at least considered; and

(e) if the Secretary’s determination is based in whole or in part on factual matters subject to evidentiary development, whether the substantial evidence in the record as a whole supports the determination.

62 763 F.2d at 736-37.
63 *Id.* at 737-38.
64 *Id.* (citing United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1309-10 (D.C. Cir.), *cert. denied*, 453 U.S. 913 (1981)).
65 *Id.* at 739.
plication of the OSHA Standard to nonmanufacturing industries and to order that its scope be expanded unless he could show cause why such industries could not or should not be covered.66

The next case dealing with the preemptive effect of the OSHA Standard was New Jersey State Chamber of Commerce v. Hughey.67 The court, in Hughey, held that section 18 of the OSH Act provides both a broad grant of power to the states and a limit on the exercise of that power. Section 18(a) was found to "bar the exercise of state jurisdiction over issues addressed by an OSHA standard, even where the state law may arguably be more stringent or where OSHA has not explicitly addressed a provision."68 The New Jersey right to know law and regulations were designed to protect not only workers but also inhabitants of the state who live near industrial sites or other facilities, and to enable fire and health officials to protect the community from the health risks of hazardous substances. However, the court found that the right to know legislation dealt with precisely the same subjects in the workplace as those regulated by the OSHA Standard and, therefore, clearly asserted jurisdiction over occupational safety and health issues governed by the federal standard. Consequently, section 18(b) of the OSH Act mandated submission of the state law and regulations implementing it to the Secretary of Labor for approval. The district court ruled that the state law was not insulated from the preemptive provisions of the OSH Act simply because it afforded protections beyond health.69

The plaintiffs argued that the nonexclusion of nonmanufacturing sector employers represented a deliberate decision by OSHA that such employers should not be subject to hazard communication regulations, or in the alternative, that the potential issuance of a federal standard regulating such employers should prospectively preempt state regulations. The court found "[n]either argument . . . at all persuasive," ruling that section 18(a) affirmatively confers jurisdiction on the states to deal with any occupational safety or health issue as to which no OSHA standard is in effect.70 Federal approval of state occupational safety and health standards under section 18(b) is required only when a federal standard on the subject "has been promulgated."71 Because no federal standard was in effect governing employers in the nonmanufacturing sectors, the court found that federal approval of state regulation governing such areas was not required.

The court also stated that although New Jersey could enact legislation and regulate employers in order to achieve nonworkplace objectives, the nonworkplace regulatory plan at issue was superimposed upon a regulatory foundation covering precisely the same occupational health and safety issues as are the subject of the OSHA Standard. The court stated: "The workplace and non-workplace regulatory schemes are inextricably

66 Id.
68 Id. at 618.
69 Id. at 618-19 (citing Perez v. Campbell, 402 U.S. 637, 651-52 (1971)).
70 Id. at 621.
71 Id.
intertwined. The fact that this regulatory base also serves other ends does not save it from preemption. To hold otherwise would permit ready nullification of the [section] 18 preemption provision." 72 Thus, the New Jersey right to know act was found preempted in its entirety, as it applied to manufacturing sector employers, but not with regard to other employers. 73

On appeal to the Third Circuit, the district court’s preemption holding was cut down significantly. First, the court of appeals held that the provision of the New Jersey act, which required completion and distribution of environmental hazard surveys, was not preempted by the federal standard insofar as it addressed “reporting of environmental hazards to agencies concerned with public health and safety, a matter not governed by OSHA standards.” 74 The court remanded for trial the issue of whether “New Jersey’s imposition of the environmental hazard labeling requirements in the manufacturing sector, not for the purpose of protecting workers, but in the interest of firefighters, police officers, and the general public, does in fact stand as an obstacle to the accomplishment of the purposes of the federal standard . . . .” 75 The remand was necessary in light of the deficient factual record. The court ruled that the New Jersey law must yield if it was found to so stand as a matter of law.

The next district court to consider the preemptive effect of the OSHA Standard was also in the Third Circuit and was therefore bound by the Hughey ruling. In Manufacturers Association of Tri-County v. Knepper, 76 the court addressed Pennsylvania’s right to know law. The court analyzed not only the preemptive effect of the state law, but also examined whether the state law imposed an excessive burden on interstate commerce. In response to the plaintiff’s contention that the right to know act violated the commerce clause, the court, citing Pike v. Bruce Church, Inc., 77 held that the state law met the Supreme Court’s requirement that a statute “operat[e] evenhandedly.” 78 Additionally, the court found that the plaintiff manufacturers had failed to demonstrate that the state law would burden interstate commerce to such an extent as to outweigh any local benefit. The court also noted such safety regulations are entitled to “a strong presumption of validity.” 79 Because the plaintiffs failed to proffer evidence regarding the state law’s burden on interstate commerce, the court held that the alleged impact was merely speculative. The benefits to the community, to workers, and to others were tangible and direct. The burden, therefore, did not outweigh the benefit. The plaintiff also argued that because the Department of Labor and Industry had been designated to enforce the environmental aspects of the Pennsylvania statute, the state law must have necessarily been intended to reg-

72 Id. at 622.
73 Id. For a discussion of express preemption, see infra notes 81-83 and accompanying text.
74 New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587, 595 (3d Cir. 1985).
75 Id. at 596.
79 Id. (quoting Kassel v. Consolidated Freightways, 450 U.S. 662 (1981)).
ulate occupational health and safety. The law therefore would be preemted. The court disagreed. "[I]t is the purpose of the statute which is critical, not the agency selected to implement the law. Clearly Section 7303(g) is concerned with the protection of the public and is not an attempt to regulate safety."

The Knepper court, like others, looked at the factual basis for an implied preemption argument and found such facts unsupportive.

III. Express Preemption

The preceding discussion reveals the extent to which a court will ignore the plain language of a statute in order to achieve a desired objective. It is the doctrine of express preemption, however, which logically should govern the Hazard Communication Standard preemption issue. This fact was recognized by the Third Circuit in Auchter and also by the district court in Hughey. The statute expressly provides: "Nothing in this Act shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety and health issue with respect to which no standard is in effect under Section 6." But the OSH Act clearly requires that a state go through a specific process to assert jurisdiction over an issue where a standard is in effect.

The focus would thus be whether the state law under review was "related to" the "issue" addressed by the federal standard. "Issue" has been defined by OSHA as "an industrial, occupational, or hazard grouping which is at least as comprehensive as a corresponding grouping contained in [the Occupational Safety and Health Standards]." The initial question then is whether the "issue" is all of hazard communication, or hazard communication in the manufacturing sector only. If it encompasses all hazard communication, then the resolution is simple. Congress has expressly preempted any state law "related to" the communication of the hazardous effects of chemicals in any workplace covered under the Act. "Related to" clearly implies more than just preemption of parallel coverage. It would be difficult to argue that any state "right to know" law is not related to the communication of hazardous effects of chemicals in the workplace. Therefore, if the "issue" is hazard communication in all workplaces, preemption of state right to know laws is proper. On the other hand, if "issue" is narrowly defined and is limited to the communication in the manufacturing sector, state "right to

80 Id. at 1072-73.
81 29 U.S.C. § 667(a) (1982). In a case involving the preemptive effect of the Federal Hazardous Substance Act (FHSA) hazard labeling, Judge Friendly, for the Second Circuit, held that the FHSA preempted a labeling requirement imposed by the City of New York on pressurized containers which were stored, sold or used there. Chemical Specialties Mfrs. Ass'n, Inc. v. Lowery, 452 F.2d 431 (2d Cir. 1981). The court found the statute to be explicitly preemptive by virtue of an express statement of congressional intent to supersede state and local labeling requirements with the FHSA. Id. at 437. The court based its opinion on the explicit preemption clauses in the statute, but it also noted that varying local and state labeling requirements for the hazardous substances addressed would place a substantial burden on interstate commerce, a fact which was observed in the legislative history of the FHSA. Id.
82 29 C.F.R. § 1902.2(c) (1986).
83 United Steelworkers of Am. v. Pendergrass, 819 F.2d 1263 (3d Cir. 1987).
know” laws would fall only where they were “related to” the specifically enumerated industrial sectors. Such arguments, whatever their merit, will soon become moot, however, as the Third Circuit has ordered OSHA to expand the scope of the current hazard communication standard to include all workplaces.

IV. Conclusion

As the foregoing discussion illustrates, the issue of federal preemption has seldom been one with bright lines and clear legal precedent. The outcome of the various cases where the issue has arisen, it appears, often turned more upon the facts of the case and the philosophy of the court than upon the application of precise legal principles. The Occupational Safety and Health Administration has been one of the most controversial of the various federal regulatory agencies. It is not unlikely that reviewing courts have allowed their own views of the effectiveness or dedication of the agency to influence their interpretation of legal issues which arise in litigation before them. This potential provides an additional basis for viewing the matter from what is perhaps the simplest approach.

The commerce clause arguments are heavily fact dependent, as are, to a lesser extent, those based upon implied preemption. Express preemption requires little factual developments, but does require an interpretation of Congressional intent. While arguably determining what was in the minds of members of Congress may be difficult, the language of the statute itself is fairly clear and should be dispositive.