

THE PREEMPTIVE EFFECT OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT AND OSHA'S HAZARD COMMUNICATION STANDARD

American corporations use over 575,000 hazardous substances in their daily operations,¹ posing significant health risks to employees and the surrounding community.² The federal government has acknowledged the rights of both employees and the public to obtain information regarding toxic chemicals. Federal law, however, regulates worker and community right-to-know separately. In 1984, the Occupational Safety and Health Administration (OSHA), acting pursuant to the Occupational Safety and Health Act of 1970 (the OSH Act),³ promulgated the Hazard Communication Standard (the OSHA Standard) to govern hazardous substance communication to workers.⁴ Initially, the OSHA Standard protected only employees in the manufacturing sector;⁵ OSHA amended the standard in 1987 to cover all employees.⁶ In 1986, Congress enacted

1. 52 Fed. Reg. 31,852, 31,852 (1987). 86,000 trade name products comprise 70% of recorded exposure to hazardous chemicals. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DHEW, Pub. No. 78-114, NATIONAL OCCUPATIONAL HAZARD SURVEY 7 (1977). For a detailed discussion of the categories of hazardous chemicals, see *infra* note 44 and accompanying text.

2. A recent study indicates that approximately 59% of American workers are exposed to dangerous chemicals for at least four hours each working day. Oleinick, Fodor, & Susselman, *Risk Management for Hazardous Chemicals: Adverse Health Consequences of Their Use and the Limitations of Traditional Control Standards*, 9 J. LEGAL MED. 1, 9, 18 n.33 (1988) [hereinafter *Risk Management I*]. An estimated 97 of 100,000 workers experience acute disabling illness or injury due to hazardous chemical exposure. *Id.* at 14 (Table 2). The study concludes that worker morbidity and mortality caused by hazardous chemicals is significant. *Id.* at 102.

Causation is a significant problem in determining the risks attendant to hazardous substances. Many effects of hazardous chemical exposure occur with similar frequency in the general public, making causality difficult to establish. See *id.* (giving the example of lung disease). In fact, most physicians have difficulty diagnosing an illness or injury as occupational in origin. See *Risk Management I, supra*, at 22 n.37. Moreover, little or no data exists concerning the health effects of some chemicals. 29 C.F.R. § 1910.1200 (Appendix A) (1988). The OSHA Standard's definition of "health hazard" ignores direct causation, requiring only that effects "may occur in exposed employees." *Id.* See *infra* note 44.

3. Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678 (1982)).

4. OSHA Hazard Communication Standard, 29 C.F.R. § 1910.1200 (1988). See Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 LAW & CONTEMP. PROBS. 612, 616 (1974) for a synopsis of employees' common-law rights to a safe workplace.

5. 29 C.F.R. § 1910.1200(c) (1984). The manufacturing sector includes all employers in Standard Industrial Classification (SIC) codes 20 through 39. See *infra* note 42. For a discussion of the OSHA Standard as originally enacted, see *infra* notes 40-58 and accompanying text.

6. 29 C.F.R. § 1910.1200(b), (c) (1988). See *infra* notes 114-22 and accompanying text.

the Emergency Planning and Community Right-to-Know Act (EPCRA), which requires employers to disclose hazardous substance information to local public protection agencies and the community.⁷

State and municipal right-to-know laws coexist with the federal hazard communication scheme.⁸ Many of these laws impose different or stricter

7. Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11,001-50 (Supp. V 1987). Congress enacted EPCRA as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, §§ 300-330, 100 Stat. 1613, 1728-58 (1986) (codified in scattered sections of the I.R.C. and titles 10, 29, 33, and 42 of U.S.C.). Although the amendments fall within the regulatory scope of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (Supp. V 1987), EPCRA is independent of CERCLA.

8. The following is a summary of state worker and/or community right-to-know laws and regulations: ALA. CODE §§ 22-33-1 to -15 (Supp. 1988); ALASKA STAT. §§ 18.60.030, 18.60.065-.068, 18.60.075, 18.60.105, 18.70.310, 29.35.500-.590 (1986); ALASKA ADMIN. CODE tit. 8, §§ 61.010-.960 (Oct. 1988); ARIZ. REV. STAT. ANN. § 26-341 (1986); 1988 Cal. Adv. Legis. Serv. 558 (Deering); CAL. HEALTH & SAFETY CODE §§ 25,500-25,541 (West Supp. 1989); CAL. LAB. CODE §§ 6360-6399.5 (West 1989); CAL. ADMIN. CODE tit. 8, § 5194 (1985); CONN. GEN. STAT. ANN. §§ 29-307a, 31-40a to -40p (West 1987 & Supp. 1989); DEL. CODE ANN. tit. 16, §§ 2401-2417 (Supp. 1988); FLA. STAT. ANN. §§ 442.101-.127 (West Supp. 1989); FLA. ADMIN. CODE ANN. r. 38F-41.01 (Supp. 1985); GA. CODE ANN. §§ 45-22-1 to -12 (Supp. 1989); HAW. REV. STAT. § 396-7 (1985); HAW. ADMIN. R. §§ 12-203-1, -202-8 (1986); ILL. REV. STAT. ch. 48, para. 1401-1420 (1986 & Supp. 1989); *id.* ch. 111 1/2, para. 1003.14, 1003.48, 1004, 1007, 1007.1-2, 1025b-1 to b-5 (1988 & Supp. 1989); ILL. ADMIN. CODE tit. 56, § 205.20 (1985); IND. CODE ANN. §§ 22-8-1.1-1 to -7 (Burns 1986); IND. ADMIN. CODE tit. 620, r. 1-1-1 to -27 (1988); IOWA CODE ANN. §§ 89B.12-.17 (West Supp. 1989); KAN. STAT. ANN. § 65-5701 (Supp. 1988); KY. REV. STAT. ANN. §§ 39.800-.990 (Michie/Bobbs-Merrill Supp. 1988); *id.* §§ 338.011-.991 (Michie/Bobbs-Merrill 1983 & Supp. 1988); LA. REV. STAT. ANN. § 30:2361 (WEST 1986); ME. REV. STAT. ANN. tit. 22, § 1696-A to -F (Supp. 1988); *id.* tit. 26, §§ 1709-1725 (1988); MD. ANN. CODE art. 89, §§ 32A-320 (1986); MD. ENVTL. CODE ANN. §§ 6-501 to -504 (1987 & Supp. 1989); MD. REGS. CODE tit. 9, § 12.33.01 (1986); MASS. GEN. LAWS ANN. ch. 111F, §§ 1-21 (West 1985 & Supp. 1988); MASS. REGS. CODE tit. 105, § 670.001 (1984); *id.* tit. 441, § 21.01 (1984); MICH. COMP. LAWS ANN. §§ 408.1005, .1011, .1014, .1014a-m, .1031, .1063 (West 1985 & Supp. 1989); MINN. STAT. ANN. §§ 182.65-.675 (West Supp. 1989); MO. REV. STAT. §§ 292.600-.620 (1986); MONT. CODE ANN. §§ 50-78-101 to -402 (1989); NEV. REV. STAT. §§ 618.365-.395 (1987); N.H. REV. STAT. ANN. ch. 277-A:1 to :10 (1987); N.H. CODE ADMIN. R. [Lab.] 1403.33 (Supp. 1989); N.J. STAT. ANN. §§ 34:5A-1 to -31 (West 1988); N.J. ADMIN. CODE tit. 7, §§ 1G-1.1 to -7.10 (Supp. 1984 & 1988); *id.* tit. 8, §§ 59-1.1 to -10.3 (Supp. 1984 & 1986); N.M. STAT. ANN. §§ 50-9-1 to -25 (1978 & Supp. 1988); N.Y. LAB. LAW §§ 875-883 (McKinney 1988); N.Y. COMP. CODES R. & REGS. tit. 10, §§ 72.1-6 (1982); *id.* tit. 12, §§ 800.1-4 (1988); N.C. GEN. STAT. §§ 95-173 to -218 (1988); N.C. ADMIN. CODE tit. 13, r. 7c.0101(a)(99) (June 1989); N.D. CENT. CODE §§ 18-01-34, 65-14-01 to -05 (Supp. 1989); OHIO REV. CODE ANN. §§ 3716.01-.99 (Page 1988); OKLA. STAT. ANN. tit. 40, §§ 401-424 (West 1986 & Supp. 1989); OR. REV. STAT. ch. 453.307-.372 (1987); *id.* ch. 654.194-.196 (1989); OR. ADMIN. R. 437-155-001 (1985); PA. STAT. ANN. tit. 35, §§ 7301-7320 (Purdon Supp. 1989); R.I. GEN. LAWS §§ 23-24.4-1 to -9, 28-21-1 to -16 (1985); S.C. CODE ANN. §§ 41-15-80 to -100, -210 (Law. Co-op. 1986); TENN. CODE ANN. §§ 50-3-2001 to -2019 (Supp. 1989); TENN. COMP. R. & REGS. tit. 6, ch. 0800-1-1 to -9 (1986); TEX. REV. CIV. STAT. ANN. art. 5182b, §§ 1-19 (Vernon 1986 & Supp. 1989); TEX. ADMIN. CODE tit. 25, §§ 295.1-9 (1989); UTAH CODE ANN. §§ 35-9-1 to -22 (1988 & Supp.

obligations on employers than federal law.⁹ Some states, however, do not distinguish between employee and community right-to-know as the federal scheme does. In fact, in several states, one law may regulate both employee and community hazard communication.¹⁰

The impact of the federal structure on state and local laws is not entirely clear. While the OSHA Standard purports to preempt all employee right-to-know laws,¹¹ EPCRA expressly does not preempt or

1989); *id.* §§ 63-5-5, -6 (1989); VT. STAT. ANN. tit. 18, §§ 1721-1731 (Supp. 1989); VA. CODE ANN. §§ 40.1-51, -51.1, -51.2, -51.4:1 (1986); WASH. REV. CODE ANN. §§ 49.70.010-.905 (Supp. 1989); W. VA. CODE §§ 16-31-1, 21-3-18 (1988); WIS. STAT. ANN. §§ 101.58-.599 (West 1988); WIS. ADMIN. CODE § [ILHR] 101.58 (Nov. 1986); WYO. STAT. §§ 27-11-101 to -114 (1987).

In addition to state laws, local ordinances regulate hazard communication in several states, including Alaska, California, Connecticut, Florida, North Carolina, Ohio, and Pennsylvania.

Six states and the District of Columbia have neither employee nor community right-to-know legislation: Arkansas, Colorado, District of Columbia, Idaho, Mississippi, Nebraska, and South Dakota. Three states have no employee right-to-know provisions: Kansas, Missouri, and Ohio. Nine states do not regulate community right-to-know: Georgia, Hawaii, Indiana, Nevada, New Mexico, Oklahoma, South Carolina, Virginia, and Wyoming. In addition, the Alabama state legislature has refused to enact funding measures for the enforcement of its community right-to-know provisions.

For information concerning a particular right-to-know law, see Susser, *The OSHA Standard and State 'Right-to-Know' Laws: The Preemption Battle Continues*, 10 EMPLOYEE REL. L.J. 615 (1985) (Illinois, Massachusetts, New Jersey, and Pennsylvania); Note, *Employee Right to Know: Should the Federal Government or the States Regulate the Dissemination of Hazardous Substance Information to Protect Employee Health and Safety?*, 19 SUFFOLK U.L. REV. 633 (1985) [hereinafter Note, *Employee Right to Know*] (Massachusetts); Note, *The Right to Know: Does OSHA's Toxic Hazard Communication Rule Preempt State Statutes Requiring Public Disclosure of Workplace Toxics?*, 62 U. DEL. L. REV. 463, 476-80 (1985) [hereinafter Note, *The Right to Know*] (comparison of New Jersey, Massachusetts, and Michigan right-to-know statutes).

The number of right-to-know laws has increased annually since 1980: four in 1980, two in 1981, eight in 1983, fourteen in 1984, twenty-two in 1985, and three in 1986. See *Risk Management I*, *supra* note 2, at 5 n.8.

⁹ Almost every state law contains requirements supplemental to or different from the federal scheme, particularly concerning worker right-to-know. For example, several states use hazardous substance lists compiled by state agencies: Alabama, Florida, Illinois, Maine, and New Hampshire. In addition, the federally required material safety data sheet may not satisfy the requirements under a few states' laws: Alabama, Florida, New Hampshire, New York, and Vermont. At least three states require the labeling of substances shipped into the state: Massachusetts, New Jersey, and Pennsylvania. See *supra* note 8. For a summary of state right-to-know requirements, see *Chart of State Community Right-To-Know Requirements*, [Tab 800] COMMUNITY RIGHT-TO-KNOW MANUAL (Thompson Publ. Group, Inc.) ¶ 820, at 21-29 (Feb. 1989) [hereinafter MANUAL]; *Chart of State Title III Programs*, [Tab 800] MANUAL ¶ 821, at 31-35 (Mar., Apr. 1989); *Chart of State Worker Right-To-Know Requirements*, [Tab 800] MANUAL ¶ 822, at 41-51 (Dec. 1988).

¹⁰ Alabama, Delaware, Florida, Louisiana, Maine, Montana, New Hampshire, New Jersey, Pennsylvania, Tennessee, and Texas have combined employee and community right-to-know laws. In addition, the Illinois, Iowa, Massachusetts, and Rhode Island community and worker right-to-know laws contain interdependent requirements. See *supra* note 8.

¹¹ 29 C.F.R. § 1910.1200(a)(2) (1988). See *infra* notes 50-51, 115 and accompanying text. 29

otherwise affect state or local community right-to-know legislation.¹² Before the enactment of EPCRA and the amendment of the OSHA Standard, courts held that the OSHA Standard partially preempted combined right-to-know laws.¹³ Two preemption analyses developed. The Third Circuit employed a "primary purpose" test, under which the OSHA Standard preempted only provisions for which the state asserted an employee protection purpose, as opposed to a public safety purpose.¹⁴ The Sixth Circuit, cognizant of the laws' dual nature, instead deferred almost entirely to OSHA's determination of the standard's preemptive scope.¹⁵

Because federal preemption presents a question of congressional intent,¹⁶ EPCRA and the amended OSHA Standard play important roles in preemption analysis. This Note examines the extent to which OSHA's Hazard Communication Standard preempts state and local, right-to-know laws in light of this recent federal action. Part I reviews the status of the preemption issue prior to the enactment of EPCRA and the amendment of the OSHA Standard. Part II interprets these changes in the federal scheme in light of congressional intent. Part III analyzes the ramifications of EPCRA and the OSHA Standard's amendment on the federal preemption question.

I. PREEMPTION BACKGROUND

A. Federal Preemption Doctrine

The federal preemption doctrine originates from the supremacy clause of the United States Constitution, which provides that federal laws enacted within the scope of Congress' powers supersede state laws.¹⁷ Be-

U.S.C. § 657(a) (1982) authorizes OSHA to preempt state and local law. *See infra* note 31 and accompanying text.

12. EPCRA § 321(a), 42 U.S.C. § 11,041(a) (Supp. V 1987). *See infra* note 138 and accompanying text.

13. *See infra* notes 59-107 and accompanying text.

14. *See New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985); *infra* notes 60-88 and accompanying text.

15. *See Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824 (6th Cir. 1986), *appeal dismissed*, 108 S. Ct. 44 (1987); *infra* notes 89-96 and accompanying text.

16. *See infra* notes 18-19 and accompanying text. In each of the three methods by which Congress preempts state laws, *see infra* note 22, the ultimate determination hinges on congressional intent.

17. The supremacy clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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.

cause legislative intent is the "touchstone" of federal preemption,¹⁸ preemption analysis requires judicial inquiry of congressional intent¹⁹ and state legislative purpose.²⁰ The factual nature of this inquiry war-

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

18 As the Supreme Court has noted, "[t]he purpose of Congress is the ultimate touchstone" for preemption analysis. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

19 Courts will not readily infer that Congress intended to preempt state law. In fact, preemption analysis "starts with the basic assumption that Congress did not intend to displace state law." *Penn Terra Ltd. v. Department of Envtl. Resources*, 733 F.2d 267, 272-73 (3d Cir. 1984).

If Congress intends to preempt state law, it must clearly indicate this intention. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146-47, *reh'g denied*, 374 U.S. 858 (1963) (unambiguous); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (clear and manifest); J. NOWAK, R. ROTUNDA & J.N. YOUNG, *CONSTITUTIONAL LAW* § 9.4, at 298 (3d ed. 1986). But see Powell, *Current Conflicts Between the Commerce Clause and State Police Powers 1922-27*, 12 MINN. L. REV. 321, 327 (1928) (court, not Congress, is actually "doing the intending"); Note, *Federal Pre-emption: Time to Reestablish an Old Doctrine*, 12 NOVA L.J. 1331, 1339 (1988) [hereinafter Note, *Federal Pre-emption*] (Supreme Court abandoned clear intent requirement in 1941); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 210 (1959) [hereinafter Note, *Preferential Ground*] (most courts give "lip service" to intent inquiry). One commentator suggests that the Court's reluctance to infer federal preemption is unnecessary because the federal process adequately protects state sovereignty. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25, at 480 (2d ed. 1988).

20. If federal and state objectives coincide, state law must yield to federal law. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 260-61 (1984) (Blackmun, J., dissenting) (federal law preempts state law with identical purpose); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 213 (1983) (necessary for court to determine whether state law has rationale other than federal purpose); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 164 (1978) (federal law does not preempt state laws "having other purposes"); Note, *The Right to Know, supra* note 8, at 487-88. But see *Florida Lime & Avocado Growers*, 373 U.S. at 142 (state objectives irrelevant); Tyson, *The Preemptive Effect of the OSHA Hazard Communication Standard on State and Community Right to Know Laws*, 62 NOTRE DAME L. REV. 1010, 1018 (1987) (practical impact, not purpose, of state law should be controlling).

The Supreme Court has indicated, however, that an inquiry of state purpose is inappropriate for certain lines of preemption analysis. See, e.g., *Pacific Gas & Elec.*, 461 U.S. at 216 n.28 (distinguishing *Perez*) (purpose inquiry inapposite in actual conflict cases); *Perez v. Campbell*, 402 U.S. 637, 651 (1971) (state purpose analysis is "aberrational doctrine"—state law preempted on actual conflict grounds regardless of its purpose).

Because the inquiry into actual state legislative intent is an "unsatisfactory venture," the Court has shown great willingness to accept a state's asserted purpose as the motivation behind state law. See *Pacific Gas & Elec.*, 461 U.S. at 216 (accepted asserted purpose of utility regulation as opposed to nuclear safety); *New York Tel. Co. v. New York Labor Dep't*, 440 U.S. 519, 533 (1979) (accepted avowed purpose of securing employment rather than regulating collective bargaining).

Combined with this convoluted doctrine is a presumption against federal preemption of laws whose purpose lies within the state's traditional police power. See *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 715 (1985) (blood plasma); *Pacific Gas & Elec.*, 461 U.S. at 206 (electrical utilities); *McCarty v. McCarty*, 453 U.S. 210 (1981) (family law); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 164 (1978) (vessel safety); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525. (food labeling), *reh'g denied*, 431 U.S. 925 (1977); *Florida Lime & Avocado Growers*, 373 U.S. at 144-

rants a case-by-case approach to the federal preemption issue.²¹

A federal statute may preempt state and local laws in one of three ways.²² First, express preemption arises when Congress states its intent to preempt state law on the face of a federal act.²³ Second, absent such explicit language, a federal statutory scheme may be so comprehensive as to permit an inference that Congress intended to foreclose state participa-

46 (avocado marketing law); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (utilities); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79, 85 (1939) (safety regulation); *L. TRIBE*, *supra* note 19, § 6-26, at 489; *NOWAK, ROTUNDA & YOUNG*, *supra* note 19, § 9.3, at 297; *Tyson*, *supra*, at 1017; Note, *The Extent of OSHA Preemption of State Hazard Reporting Requirements*, 88 COLUM. L. REV. 630, 646 (1988) [hereinafter Note, *OSHA Preemption*] (great deference to state police powers). *Cf. Silkwood*, 464 U.S. at 251, 253-55; *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (preempting state regulation in field of alien registration). *But see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (state community property law preempted).

21. See *NOWAK, ROTUNDA & YOUNG*, *supra* note 19, § 9.1, at 296, § 9.2, at 297 (case-by-case approach; ad hoc balancing); *Tyson*, *supra* note 20, at 1023 (facts and court's philosophy); Note, *OSHA Preemption*, *supra* note 20, at 645; Note, *Federal Pre-emption*, *supra* note 19, at 1335.

22. The Supreme Court explained the ways in which federal law preempts state and local law:

It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a " 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because the Act 'of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (citations omitted).

23. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982). Courts generally defer to an express preemption provision contained in a federal law. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (Scalia, J., concurring) (refusal to look beyond statutory preemption clause); *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 12 (1983) (plain language controls); *Jones v. Rath Packing Co.*, 430 U.S. 519, 539, *reh'g denied*, 431 U.S. 925 (1977); *L. TRIBE*, *supra* note 19, § 6-26, at 483 n.8 (beyond judicial authority to ignore preemption clause); *Tyson*, *supra* note 20, at 1023 (language of federal Act dispositive). *Cf. Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (threshold determination of whether provision covers particular state law). *But see Guerra*, 479 U.S. at 283-85 (resorting to legislative history and historical context to determine congressional intent); Note, *Preferential Ground*, *supra* note 19, at 211, 215 (preemption clause begs the question and is not solely determinative).

A generally recognized principle of statutory construction is that unambiguous language controls. At least one commentator, however, has suggested that this presumption applies only to specific preemption language. See Note, *The Right to Know*, *supra* note 8, at 493 (no deference to general preemption provisions).

tion.²⁴ Third, when neither of these factors is present, but state and federal laws conflict, a court will find implied preemption.²⁵ A state statute will be implicitly preempted if it renders compliance with a federal law impossible²⁶ or stands as an obstacle to the fulfillment of federal objectives.²⁷

24 The pervasiveness of a federal scheme signals that Congress contemplated preemption of state law. *Michigan Cannery & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *L. TRIBE*, *supra* note 19, § 6-27, at 498. Federal occupation of a portion of a regulatory field may produce the same preemption analysis. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190 (1983) (federal occupation of field of nuclear safety, rather than entire field of nuclear regulation).

An accepted test for federal occupation of the field is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Santa Fe Elevator Corp.*, 331 U.S. at 236. If the subject of regulation is particularly national in character, the Court may be more willing to find federal dominion. *See, e.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (alien registration closely connected with national foreign policy powers). *But see De Canas v. Bica*, 424 U.S. 351, 355 (1976) (not all state laws regulating aliens are preempted).

The Supreme Court also has recognized a regulatory field in which it was "inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue" to regulate in the area. *Pacific Gas & Elec.*, 461 U.S. at 207-08 (federal regulation of nuclear safety does not constitute occupation of field of economic utility regulation). *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (no federal occupation of avocado marketing field), *reh'g denied*, 374 U.S. 858 (1963). Conversely, Congress may choose not to regulate in a particular field, intentionally leaving a regulatory vacuum. If enunciated clearly, this decision equally would preempt state and local laws. *Cf. Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n.*, 461 U.S. 375, 384 (1983) (dictum) (federal decision to forego regulation in given area may imply "authoritative federal determination that the area is best left unregulated").

25 *Perez v. Campbell*, 402 U.S. 637 (1971); *McDermott v. Wisconsin*, 228 U.S. 115, 132 (1913); *Savage v. Jones*, 225 U.S. 501, 533 (1912). *Cf. L. TRIBE*, *supra* note 19, § 6-25, at 481 n.14 (federal preemption when state and federal laws conflict).

26. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984) (state law requiring judicial review inconsistent with Federal Arbitration Act); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Florida Lime & Avocado Growers*, 373 U.S. at 142-43 (compliance with state law regarding avocado oil content and federal law regulating size, weight and date not impossible); *Free v. Bland*, 369 U.S. 663 (1962) (state law designating different beneficiary from federal law preempted).

27 The Supreme Court has stated that federal law preempts state law to the extent the state law is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *Accord Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Savage v. Jones*, 225 U.S. 501, 533 (1912).

Mere discouragement of state regulation may be insufficient to establish preemption. The Supreme Court has imposed a limit on federal purpose, declaring it "not to be accomplished at all costs" *Pacific Gas & Elec. Co.*, 461 U.S. at 222 (state moratorium on nuclear power plants does not frustrate federal goal of promoting nuclear power). *But see L. TRIBE*, *supra* note 19, § 6-26, at 482-83 (state discouragement of federally encouraged conduct obstructs federal purpose). According to one commentator, federal law preempts state laws conflicting with either the narrow purpose of a federal statute or its broader, more abstract goals. *Id.* § 6-26, at 485.

When Congress attempts to establish national uniformity, a finding of preemption of different state

When Congress delegates authority to a federal agency to promulgate regulations, the regulations have the same preemptive effect as federal law.²⁸ As long as administrative preemption falls within the scope of statutory authority to preempt, the agency's determination merits judicial deference.²⁹ Thus, the intent of the appropriate administrative agency is relevant in determining the preemptive scope of federal regulations.

B. OSHA's Hazard Communication Standard

In 1970, Congress enacted the Occupational Safety and Health Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."³⁰ OSHA, the agency created by the act, received authority to

laws usually follows. *See, e.g.*, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (Ports and Waterways Act established uniform federal standard); *Jones v. Rath Packing Co.*, 430 U.S. 519 (federal uniformity in food labeling), *reh'g denied*, 431 U.S. 925 (1977). *See also* L. TRIBE, *supra* note 19, § 6-26, at 486 (implied preemption of state laws undermining federal uniformity policy); NOWAK, ROTUNDA & YOUNG, *supra* note 19, § 9.4, at 299. If Congress, on the other hand, intended only to create a regulatory floor, stricter state laws are free from preemption. *See Hillsborough County v. Automated Medical Labs*, 471 U.S. 707 (1985) (because Congress did not intend uniformity, federal blood donation regulations only set floor for state regulation).

28. *See City of New York v. Federal Communications Comm'n*, 486 U.S. 57 (1988); *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 713 (1985); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982) ("Federal regulations have no less preemptive effect than federal statutes"); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) (National Labor Relations Board); L. TRIBE, *supra* note 19, § 6-26, at 481.

29. *See de la Cuesta*, 458 U.S. at 153-54 (administrator's exercise of discretion "subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily"); NOWAK, ROTUNDA & YOUNG, *supra* note 19, § 9.4, at 299 n.5 (deference unless Congress clearly would not have sanctioned preemption); Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395, 408 (1986) (administrative agency has superior expertise, information, political accountability, and express congressional mandate); *id.* at 409 (strong presumption against preemption if agency is silent); Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1 (1985) (delegation by Congress is basis of administrative deference); Note, *Preferential Ground*, *supra* note 19, at 211 (scope of agency preemption dependent on policy and authority of Act). *Cf.* L. TRIBE, *supra* note 19, § 6-28, at 502 n.1 (court must decide whether Congress clearly delegated preemption issue to agency); *id.* (agency presence not determinative of conflict or occupation of the field analysis). *But see* Tyson, *supra* note 20, at 1016 (no deference to preemption determination; courts should apply own analysis); Note, *OSHA Preemption*, *supra* note 20, at 638 (deferring to administrative determination permits agency to define scope of its own authority).

30. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651(b) (1982). Congress also explained the several means by which it sought to achieve these goals. 29 U.S.C. § 651(b)(1)-(13) (1982). The legislative history of the Act contains only one reference to community health and safety. *See* S. REP. NO. 1282, 91st Cong., 2d Sess. 1, 4 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5177, 5180.

promulgate regulations and standards thereunder.³¹ Congress expressly preserved state laws “relating to an occupational safety or health issue with respect to which no standard is in effect.”³² The corollary of this proviso suggests that duly promulgated OSHA standards preempt state laws.³³ Conversely, the provision’s language demonstrates that Congress did not intend to occupy the entire field of occupational safety and health.³⁴ Rather, Congress provided that standards preempt state law

31 Section 655(b) of the OSH Act provides that “[t]he Secretary [of Labor] may by rule promulgate . . . any occupational safety or health standard . . .” 29 U.S.C. § 655(b) (1982). While the provision regarding promulgation of new standards is permissive, the act requires the Secretary to promulgate any national consensus standards and any established federal standards deemed helpful. 29 U.S.C. § 655(a) (1982). See *id.* § 652(9), (10). Congress explained that “authorizing the Secretary of Labor to set mandatory occupational safety and health standards” would further Congress’ stated purposes. *Id.* § 651(b)(3) (1982).

The OSH Act defines “occupational safety and health standard” as “a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” *Id.* § 652(8).

Unlike a regulation, which targets general health and safety problems, a standard must be “reasonably necessary” to reduce a “significant risk of harm” to employees. 29 U.S.C. § 652(8) (1982). See also *id.* § 655(b)(5) (standard “based upon research, demonstrations, experiments” and other appropriate information). See *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 614-15, 639 (1980).

32 Congress expressly intended that “[n]othing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.” 29 U.S.C. § 667(a) (1982). States may regulate an area “relating to any occupational safety and health issue” only upon approval of the Secretary of Labor. *Id.* § 667(b). See *infra* note 36.

The Employee Retirement Income Security Act (ERISA) also contains the phrase “relating to” in its preemption clause. See 29 U.S.C. §§ 1001-1461 (1982). ERISA preempts state laws to the extent that they “relate to any employee benefit plan.” *Id.* § 1144(a). Courts have interpreted this language as representing a broad preemptive scope. See *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983); *American Progressive Life & Health Ins. Co. v. Corcoran*, 715 F.2d 784, 786 (2d Cir. 1983); *Buczynski v. General Motors Corp.*, 616 F.2d 1238, 1250 (3d Cir. 1980), *aff’d sub nom. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-25 (1981).

33 The OSH Act’s preemption provision is phrased in the negative. It preserves state laws only if no standard is in effect. The necessary implication is that no state may assert jurisdiction if a standard is in effect. OSHA’s regulations, on the other hand, have no such preemptive effect. The OSH Act reserves preemption to the sole province of standards, not regulations. 29 U.S.C. § 667(a) (1982).

34 Congress specifically refused to exercise authority over workmen’s compensation and both common-law and statutory employment rights and duties. See 29 U.S.C. § 653(b) (1982). See also S. REP. NO. 1282, 91st Cong., 2d Sess. 1, 22, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5177, 5199 (Secretary of Labor retains no authority over “particular working conditions regarding which another Federal agency exercises statutory authority”); Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535, 548 (1987) (OSH Act does not occupy occupational health and safety field).

only on individual issues of worker health or safety.³⁵

Once a standard takes effect, the only permissible state regulation is through a state plan approved by the Secretary of Labor.³⁶ Indeed, even a valid state plan must be at least as effective as the federal standard.³⁷ If a state plan regulates employers in interstate commerce, the OSH Act requires a compelling local interest and no undue burden on interstate commerce.³⁸ When a state regulation is not approved as a state plan, even meeting these requirements will not bar preemption.³⁹ The OSH

35. An "occupation safety and health issue" is "an industrial or hazard grouping contained in any of the subparts to the general industry standards." M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 32 (2d ed. 1983).

In revising the OSHA Standard in 1987, the agency went to great lengths to define explicitly hazard evaluation and communication to workers as an occupational safety and health issue. See *infra* note 116 and accompanying text.

36. The state plan provision requires that:

[a]ny State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (1982). The Act sets forth the conditions under which the Secretary "shall approve" state plans. *Id.* § 667(c).

The Secretary may approve state plans only if, in his judgment, they "are or will be at least as effective in providing safe and healthful employment as [the Federal standard]." *Id.* § 667(c)(2). Twenty-five state worker right-to-know laws have received OSHA approval under section 667: Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. 29 C.F.R. § 1952 (1987). For a more specific discussion of state plans, see Brown, *State Plans Under the Occupational Safety and Health Act of 1970*, 38 LAW & CONTEMP. PROBS. 745 (1973-74).

37. 29 U.S.C. § 667(c) (1982). In fact, right-to-know legislation in several states contains stricter requirements than the OSHA Standard: Alaska, California, Iowa, Maryland, Michigan, Minnesota, and Washington. Tennessee's right-to-know law may be less stringent than the federal standard. See *supra* note 8.

38. Approved state plans, "when applicable to products which are distributed or used in interstate commerce," must be "required by compelling local conditions and [must] not unduly burden interstate commerce." 29 U.S.C. § 667(c)(2) (1982).

39. Congress explicitly rejected proposals to limit the OSH Act's preemptive effect to state laws "not in conflict with" and "at least as effective as" federal law. See SEN. COMM. ON LABOR AND PUBLIC WELFARE, 92nd Cong., 1st Sess., cited in 52 Fed. Reg. 31,860 (1987). See also 116 CONG. REC. 38,385 (1970) (statements of Rep. Dent) (OSH Act does not preempt stricter state laws); Note, *OSHA Preemption*, *supra* note 20, at 642-44 (state plan provision, legislative history, and uniformity policy support preemption of stricter state laws). Although Congress, in passing the Act, showed a desire to establish uniformity in regulation, see, e.g., 29 U.S.C. §§ 657(d), 667(c)(2); S. REP. NO. 1282, 91st Cong., 2d Sess. 1, 17, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 5177, 5193-94; 116 CONG. REC. 38,394-404, and to decrease the onus of varied state laws, the primary motivation behind the OSH Act is employee safety. See *supra* note 30 and accompanying text. Congress viewed existing state laws as ineffective in achieving worker health and safety. See *id.*

Act's preemption clause thus contemplates preemption of any unapproved state or local law relating to an issue covered by a standard, regardless of its stringency.

In 1984, OSHA promulgated the federal Hazard Communication Standard⁴⁰ to ensure both chemical hazard evaluation and communication of that information to workers.⁴¹ The relatively great number of hazardous substance incidents occurring in the manufacturing sector induced OSHA initially to limit the OSHA Standard's coverage to manufacturing employers.⁴²

The standard sets forth requirements for the identification and disclosure of hazardous materials to employees.⁴³ To identify hazardous

40 OSHA Hazard Communication Standard, 29 C.F.R. § 1910.1200 (1988).

41 OSHA's stated purpose was "to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees." *Id.* § 1910.1200(a)(1).

There is some evidence that OSHA considered national uniformity a goal in promulgating the standard. *See* 29 U.S.C. §§ 657(d), 664, 667(c)(2); 52 Fed. Reg. 31,852, 31,857 (1987) (extension to nonmanufacturing sector decreases state law compliance costs); *id.* (uniform standard preempts different local laws); 48 Fed. Reg. 53,280, 53,282-83 (1983) (various state laws burdensome); *id.* at 53,328 (national standard saves one billion dollars over 40 years); 29 C.F.R. § 1910.1200 (b)(2) (1988). *But see* Tyson, *supra* note 20, at 1011; Note, *OSHA Preemption*, *supra* note 20, at 645 (unclear whether uniformity was OSHA goal).

Regardless of OSHA's goals, the boundaries set by Congress limit the agency's administrative authority. Although Congress did perceive uniformity as a possible benefit of the OSH Act, its stated purpose contains no reference to this goal. *See supra* notes 30, 40 and accompanying text. *See also* Note, *The Right-to-Know*, *supra* note 8, at 483 (uniformity goal inconsistent with the OSH Act's purpose).

42 29 C.F.R. § 1910.1200(c) (1988). The OSHA Standard originally defined "employer" as "a person engaged in a business within [Standard Industrial Classification] codes 20 through 39 where chemicals are either used, or are produced for use or distribution." 29 C.F.R. § 1910.1200(c) (1984). SIC codes 20-39 define the manufacturing division of the economy. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 5-7, 59 (1972). The manufacturing sector represents approximately 30% of employment in the United States. 52 Fed. Reg. 31,852, 31,853 (1987).

OSHA based its decision to limit the standard's coverage upon illness and injury data compiled by the Bureau of Labor Statistics (BLS). OSHA intended that the standard's narrow scope be temporary, the agency "merely exercised its discretion to establish rulemaking priorities, and chose[] to first regulate those industries with the greatest demonstrated need." 48 Fed. Reg. 53,286 (1983). According to the BLS data, approximately 48.4% and 47.1% of chemical related injuries and illnesses occurred in the manufacturing industry in 1976 and 1977, respectively. (The services industry ranked second with only 13.4% and 14.6% of all injuries and illnesses). 48 Fed. Reg. 53,280, 53,285 (Table I) (1983).

43 For a concise table outlining the standard's requirements, see Oleinick, Fodor & Susselman, *Risk Management for Hazardous Chemicals: OSHA's Hazard Communication Standard and EPA's*

chemicals,⁴⁴ OSHA relies on independently published lists and evaluations by chemical manufacturers and importers.⁴⁵ The OSHA Standard requires that manufacturers and importers place warning labels on hazardous substance containers.⁴⁶ Manufacturers and importers also must

Emergency Planning and Community Right-to-Know Regulations, 9 J. LEGAL MED. 179, 204-05 (1988) [hereinafter *Risk Management II*].

Evidence of the OSHA Standard's effectiveness is currently not well documented. Two studies based on Ford Motor Company's hazard communication program indicate some degree of success in informing workers. See Robins, Klitzman & Alcer, *Evaluation of the Ford Motor Company/United Automobile Workers Hazard Communication Training Program, Progress Report*, Department of Environmental and Industrial Health, School of Public Health, University of Michigan (1986); Robins, Byosier, Hugentobler, Kaminski & Klitzman, *Evaluation of the Ford Motor Company/United Automobile Workers Hazard Communication Program, Interim Report*, Department of Environmental and Industrial Health, School of Public Health, University of Michigan (1988). Between 66% and 75% of Ford's employees observed labeled containers, warning signs, and MSDSs, up to 85% of which did not exist prior to the program. *Id.* at Figure 16. For a discussion of the results of these studies, see *Risk Management II, supra*, at 226-27 (suggesting that the "profound impact" supported by the studies is the OSHA Standard's maximum level of effectiveness).

44. OSHA defines a "hazardous chemical" as either "a physical hazard or a health hazard." 29 C.F.R. § 1910.1200(c) (1988). "Physical hazard," in turn, is defined as "[any] chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive." *Id.* A health hazard is "a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees." *Id.* See *supra* note 2. Appendix A of the OSHA Standard defines a health hazard in greater detail. 29 C.F.R. § 1910.1200 app. A (1988). Appendix B contains the criteria necessary for making a hazardous chemical determination. *Id.* § 1910.1200 app. B.

45. "Chemical manufacturers and importers shall evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 C.F.R. § 1910.1200(d)(1) (1988). Manufacturers and importers are subject to the mandatory definitions and criteria set forth in Appendices A and B of the OSHA Standard. *Id.* § 1910.1200 apps. A & B. Employers may rely on manufacturer and importer evaluations or conduct their own hazard evaluations. *Id.* § 1910.1200(d)(1). For a helpful diagram of the hazard determination process, see *Risk Management II, supra* note 43, at 190-91 (Figure I).

In addition to manufacturer and importer evaluations, hazardous chemicals are defined in OSHA's *List of Toxic or Hazardous Substances*, Subpart Z of 29 C.F.R. § 1910. The standard relies on the International Agency for Research on Cancer and National Toxicology Program's *Annual Report on Carcinogens* and the U.S. Department of Transportation's chemical list contained in 49 C.F.R. Part 173, app. A. See 29 C.F.R. § 1910.1200 app. A (1988).

46. The OSHA Standard imposes upon chemical manufacturers, importers and distributors the initial duty of labeling hazardous chemical containers with warnings. 29 C.F.R. § 1910.1200(f)(1) (1988). The standard also requires the employer to guarantee that all workplace hazardous chemical containers are properly labeled. *Id.* § 1910.1200(f)(5). OSHA provides two exceptions to the employer's labeling duty: (1) when the employer uses other written material "readily accessible" to employees containing the information required on a label, and (2) when an employee transfers chemicals from a labeled container into a portable container for his immediate use. *Id.* § 1910.1200(f)(6)-(7).

A label must include chemical identities and appropriate hazard warnings. *Id.* § 1910.1200(f)(5)(i)-(ii). OSHA refused to adopt a specific standardized labeling system. The agency reasoned

provide employers with a Material Safety Data Sheet (MSDS) containing chemical names and safety instructions for each substance produced or imported.⁴⁷ Employers, in turn, must make the hazardous substance information available to employees⁴⁸ and provide employees with hazardous chemical training.⁴⁹

The OSHA Standard contains a general preemption clause that defines the rule's effect on state law. As originally promulgated, the provision expressed OSHA's intent to "address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject."⁵⁰ The current preemption clause explicitly states that "no state or political subdivision of a state may adopt . . . any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan."⁵¹

This preemption clause parallels the preemption section in the OSH

that no particular system is most effective and, in any event, employers must explain their labeling procedures to employees during the hazard training program. 48 Fed. Reg. 53,301 (1983). See 29 C.F.R. § 1900.1200(h) (1988). Labeling provisions serve as an "immediate warning and as a reminder of the more detailed information provided in other forums . . ." 48 Fed. Reg. 53,301 (1983). A label is targeted only at "reasonably foreseeable" or "frequent" hazard risks. *Id.* (statements of Conservation Foundation, Exhibit 18-2). For a criticism of OSHA's "minimum" labeling system, see *Risk Management II*, *supra* note 43, at 206-11.

47. 29 C.F.R. § 1910.1200(g) (1988). The MSDS is the backbone of the federal hazard communication scheme. Specifically, an MSDS provides the identity, physical and chemical characteristics, physical and health hazards, primary entry routes, any relevant exposure limits, safety measures, and control measures for each hazardous chemical. The MSDS also expresses whether the chemical has been declared a carcinogen. *Id.* § 1910.1200(g)(2). The OSHA Standard permits the omission of a specific chemical identity from an MSDS if the information is a trade secret. *Id.* § 1910.1200(i)(1). Other information regarding a chemical's characteristics and hazardous effects may not be withheld. Many industries voluntarily maintained material safety data sheets containing variable information before OSHA promulgated the standard. 48 Fed. Reg. 53,306 (1983); 47 Fed. Reg. 12,104 (1982).

48. The employer must maintain copies of required MSDSs in its establishment and make them "readily accessible" to employees during work shifts. 29 C.F.R. § 1910.1200(g)(8) (1988). In addition, the employer may keep the MSDS in a central location for workers who travel between workplaces. *Id.* § 1910.1200(g)(9). Employees must be informed of the location of MSDSs. *Id.* § 1910.1200(h)(1)(iii).

49. To satisfy the OSHA Standard's training requirements, the employer must explain to employees the available methods for detecting hazardous chemicals, the physical and health hazards of the chemicals, various protective measures, the labeling system and the location of MSDSs. 29 C.F.R. § 1910.1200(h)(2) (1988).

50. 29 C.F.R. § 1910.1200(a)(2) (1984).

51. 29 C.F.R. § 1910.1200(a)(2) (1988). OSHA revised the provision in 1987 to define the parameters of its intended preemption. See *infra* notes 115-16 and accompanying text.

Act itself.⁵² First, OSHA promulgated its hazard communication rule as a “standard” and not a “regulation.” This procedure gives the rule the full preemptive effect contemplated by Congress.⁵³ Congress granted OSHA authority to establish both regulations and standards,⁵⁴ by properly promulgating a standard, the agency legitimately can preempt state law.⁵⁵ Second, OSHA defined as occupational safety and health issues the evaluation of hazardous substances and the communication of such information to employees.⁵⁶ Finally, the agency expressly determined that the OSHA Standard preempts state law “relating to”⁵⁷ hazard evaluation and communication. The scope of preemption under the standard is thus as broad as permitted under the OSH Act.⁵⁸

C. Judicial Interpretation

1. Express Preemption: The Primary Purpose Test or Deference to OSHA

Two federal circuit courts have addressed the preemptive effect of the original OSHA Standard on state and local laws concerning worker and

52. Compare 29 C.F.R. § 1910.1200(a)(2) (1988) (the OSHA Standard preemption clause) with 29 U.S.C. § 667(a) (1982) (the OSH Act).

53. See *supra* notes 32-33 and accompanying text.

54. See *supra* note 31 and accompanying text.

55. Courts uniformly have approved of OSHA’s promulgation of the hazard communication rule as a standard. See, e.g., *New Jersey Chamber of Commerce v. Hughey*, 868 F.2d 621 (3d Cir. 1989); *United Steelworkers of Am. v. Auchter*, 763 F.2d 728 (3d Cir. 1985).

One commentator argues that the Hazard Communication Standard is not a “standard” because it fails to correct an identified risk. He points out that many occupational risks regulated under the standard have yet to be defined. Having a distinctly informational function, the standard is more properly labeled a “regulation.” Note, *Employee Right to Know*, *supra* note 8, at 665.

56. See *supra* notes 34-35 and accompanying text.

57. See *supra* notes 32-33 and accompanying text. The difference between “relating to” and “pertaining to” is merely semantic. The purpose of the 1987 amendment was not to alter the meaning of the phrase “pertaining to,” but to extend preemption to local laws. See *New Jersey Chamber of Commerce v. Hughey*, 868 F.2d 621, 625 (3d Cir. 1989) (“the language ‘relating to’ does not sweep much more broadly, if at all, than ‘pertaining to.’”).

58. See *supra* note 32. Because the OSH Act contemplates preemption of state and local laws imposing stricter obligations on employers, the OSHA Standard similarly preempts stricter state and local laws. See *supra* note 39 and accompanying text. Prior to the standard’s revision, some commentators questioned whether OSHA intended to preempt stricter state standards. See, e.g., Note, *OSHA Preemption*, *supra* note 20, at 642-44 (preempts stricter state laws); Note, *Employee Right to Know*, *supra* note 8, at 663 (stricter state regulations not preempted). In 1987, however, the agency made clear its intent to preempt *all* state laws. See *infra* note 115.

The standard also reflects the OSH Act’s exception to general preemption for those “federally-approved state plan[s].” See *supra* notes 36, 51 and accompanying text.

community hazard communication.⁵⁹ Although employing slightly different tests, both circuits focused primarily on the states' asserted purpose. Consequently, the courts found no preemption of state provisions having any nexus to community health.

The Third Circuit, in *New Jersey State Chamber of Commerce v. Hughey [Hughey I]*,⁶⁰ adopted a "primary purpose" test to evaluate a New Jersey worker and community right-to-know law.⁶¹ Under the New Jersey scheme, state agencies compiled lists identifying workplace and environmental hazardous substances.⁶² The state defined an environmental hazard as any substance that "may pose a threat to the public health and safety."⁶³ The workplace hazardous substance list included chemicals regulated under the OSHA Standard,⁶⁴ environmental hazardous substances, and substances that "pose[] a threat to the health or safety of an employee."⁶⁵ The statute required employers to complete surveys on hazardous substances in their establishments and send copies to state agencies and local public protection departments.⁶⁶ The public

⁵⁹ See *infra* notes 60-107. While these courts interpreted the standard's original preemption language, the 1987 amendment did not materially alter that language. See *supra* notes 50-51 and accompanying text. For a discussion of material changes under the amendment, see *infra* notes 115-22 and accompanying text.

Florida's Department of Labor is currently reviewing the issue of federal preemption over its Employee Right-to-Know Act, which contains several provisions not found in the federal standard. For example, the Florida statute requires employers to post a notice of employee rights, submit information to local fire departments, and provide annual hazard training to employees. In addition, employees in Florida may refuse to work or may sue their employers for right-to-know violations. Finally, Florida's hazardous substance list covers different substances than the OSHA Standard. While the Department considers the validity of these provisions, it has advised employers to maintain compliance with the state law and will consider compliance with the federal standard to be substantial compliance with state requirements. Telephone interview with Reinaldo Manzo, Florida Department of Labor and Employment Security, Tallahassee, Florida (Sept. 13, 1989). If the Department concludes that provisions of the Florida law are invalid, the state legislature will decide whether to amend the statute or continue its enforcement. *Id.*

⁶⁰ 774 F.2d 587 (3d Cir. 1985)

⁶¹ The New Jersey statute regulated hazard communication to both workers and the community. N.J. STAT. ANN. §§ 34:5A-1 to -31 (West 1986).

⁶² 774 F.2d at 591. The New Jersey Department of Environmental Protection was responsible for compiling an environmental hazardous substance list. New Jersey's Department of Health developed the workplace hazardous substance list. See N.J. STAT. ANN. §§ 34:5A-4(a), -5(a) (West 1986)

⁶³ 774 F.2d at 591. The environmental hazardous substance list also contained substances connected to specific diseases and malfunctions. See N.J. STAT. ANN. § 34:5A-4(a) (West 1986).

⁶⁴ See *supra* notes 44-46 and accompanying text.

⁶⁵ 774 F.2d at 591.

⁶⁶ *Id.* Employers submitted workplace and environmental surveys to the New Jersey Departments of Health and Environmental Protection, respectively. Local fire and police departments re-

could obtain information on both types of substances upon request to the appropriate state agency.⁶⁷ The New Jersey statute also mandated that employers make hazardous substance information accessible to employees,⁶⁸ establish employee hazard communication training programs,⁶⁹ and label hazardous substance containers in the workplace.⁷⁰

The court in *Hughey I* found that the federal standard expressly preempted only those sections of the New Jersey statute that had as their "primary purpose" the promotion of occupational health or safety in the manufacturing sector.⁷¹ In determining the primary purpose of a provision, the court deferred entirely to the state's characterization.⁷² Thus,

ceived both workplace and environmental surveys from employers. See N.J. STAT. ANN. § 34:5A-7 (West 1986). After receiving a workplace survey, the Department of Health provided the employer with a hazardous substance fact sheet. *Id.* § 34:5A-5(d).

67. 774 F.2d at 591. "Any person" had access to environmental surveys upon written request to the appropriate department. See N.J. STAT. ANN. § 34:5A-9, -10 (West 1986).

68. 774 F.2d at 591. The statute required employers to file workplace hazardous substance fact sheets, which they received from the Department of Health, in a central location at the facility and to notify employees of the location. See N.J. STAT. ANN. § 34:5A-12 (West 1986).

69. 774 F.2d at 591. See N.J. STAT. ANN. § 34:5A-13 (West 1986).

70. 774 F.2d at 591. See N.J. STAT. ANN. § 34:5A-146 (West 1986). Subsection 14(a) required the labeling of certain environmental and workplace hazardous chemicals, while subsection 14(b) governed the labeling of every container in a facility.

71. 774 F.2d at 595. The court reasoned that the federal standard preempts New Jersey's right-to-know law "only insofar as the New Jersey Act pertains to protection of employee health and safety in the manufacturing sector." *Id.* at 593. The Supreme Court has used the "primary purpose" language in applying the express preemption doctrine. See, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) ("primary purpose" of state law is utility regulation and therefore not preempted by federal law regulating nuclear safety).

Two courts that addressed the preemption of state asbestos laws under OSHA's Asbestos Standard have questioned the Third Circuit's primary purpose test. In *New Jersey State Chamber of Commerce v. New Jersey*, 653 F. Supp. 1453 (D.N.J. 1987), the court interpreted *Hughey I* and *Knepper* as having two possible effects on a state law with dual purposes. First, the court reasoned that a state law may have two primary purposes. Because one of the primary purposes is occupational health and safety, this reading renders all dual purpose provisions preempted. *Id.* at 1465. Alternatively, the court posited that neither purpose of the law clearly can be the law's primary purpose. Thus, federal law would preempt no provisions of dual purpose state laws. *Id.*

The Second Circuit implicitly rejected the primary purpose test to determine the degree of preemption of a city asbestos program. *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988). The court stated that "'primary' is an ambiguous word and to adopt its use leads down an unmarked avenue of inquiry into legislative motive." *Id.* at 57. Rather than apply the primary purpose rationale, the Second Circuit required a "legitimate and substantial purpose apart from the promotion of occupational safety and health." *Id.*

72. 774 F.2d at 590. See N.J. STAT. ANN. § 34:5A-2 (West 1986). The Third Circuit's deference to New Jersey's asserted purpose is consistent with the Supreme Court's preemption analysis. Particularly in the realm of express preemption, the Court usually accepts a state's asserted purpose as the actual motivation behind state law. See *supra* note 20.

the court invalidated the state's requirements for workplace hazardous substance reporting, employee disclosure, and container labeling.⁷³ In the process, the court rejected the argument that public availability of the information necessitated a finding of a nonoccupational purpose.⁷⁴

Nevertheless, because New Jersey relied on state agencies, rather than chemical manufacturers, to identify hazardous substances, the *Hughey I* court concluded that federal law did not expressly preempt workplace hazardous substance lists.⁷⁵ The court also found that the OSHA Standard did not preempt any provisions that referred to environmental hazardous substances.⁷⁶

One year after *Hughey I*, the Third Circuit more clearly articulated its primary purpose test in *Manufacturers Association of Tri-County v. Knepper*.⁷⁷ The Pennsylvania statute⁷⁸ contained hazard communication re-

73. *Id.* at 595. The Third Circuit found the labeling provisions invalid only as applied to workplace hazards in the manufacturing sector. The *Hughey I* court, however, remanded to the district court for a determination of whether the labeling requirements not expressly preempted were nevertheless impliedly preempted. *Id.* See *infra* notes 97-107 and accompanying text for a discussion of the implied preemption issue in *Hughey I*.

Severability is a threshold issue in determining the extent to which state law is preempted. If a state statute is not severable, a finding that one provision is preempted necessitates invalidating the entire statute. Severability is a question of state law. *Watson v. Buck*, 313 U.S. 387, 395-96 (1941). Because New Jersey specifically had provided for severability, the Third Circuit invalidated only the preempted provisions of the state's Right-to-Know Act. 774 F.2d at 596-98. See N.J. STAT. ANN. § 1:1-10 (West 1984) (severability of statutes).

74. 774 F.2d at 595. The court noted that the submission of workplace hazardous substance surveys to public protection agencies represents a "broader purpose" than purely employee protection. *Id.* Nevertheless, the court found the New Jersey statute's "primary purpose" to be "the promotion of occupational safety and health through hazard communication." *Id.*

75. *Id.* at 594-95. Despite OSHA's reliance on chemical manufacturers to identify hazardous substances, the court reasoned that "New Jersey's undertaking to develop its own list of hazardous substances . . . will in no way inhibit the implementation of the federal standard." *Id.* See *Risk Management I*, *supra* note 2, for a comparison of government agency lists and chemical manufacturer lists.

76. 774 F.2d at 594-96.

77. 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 108 S. Ct. 66 (1987). The Supreme Court denied Pennsylvania's request for certiorari. In an amicus curiae brief, the Solicitor General opposed granting certiorari. Solicitor General's Amicus Curiae Brief, *Knepper v. Manufacturers Ass'n of Tri-County*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 108 S. Ct. 66 (1987). The Solicitor General argued that "[t]he Third Circuit's decision is troublesome" and that the primary purpose test is "indeterminate." *Id.* at 9, 15. According to the Solicitor General, the federal standard preempts provisions whose primary purpose or effect is the regulation of hazard communication or evaluation. *Id.* at 13. The Solicitor General based his request to deny certiorari on the hope that, in light of the OSHA Standard's extension and the enactment of EPCRA, states would remove themselves from the sphere of OSHA regulation. *Id.* at 14-15.

78. PA. STAT. ANN. tit. 35, § 7301 (Purdon 1986). Following the *Knepper* decision, Penn-

quirements substantively similar to the New Jersey right-to-know law at issue in *Hughey I*.⁷⁹ The Pennsylvania law, however, established a comprehensive scheme that did not regulate “workplace” and “environmental” hazardous substances separately. The statute’s general “hazardous substances” category included substances on OSHA’s list, as well as substances deemed hazardous to the environment.⁸⁰

Relying on its decision in *Hughey I*, the Third Circuit in *Knepper* focused on the primary purpose of the Pennsylvania law to determine the degree of federal preemption.⁸¹ Under this test, the court required the state to show a purpose other than hazard communication to employees in the manufacturing industry.⁸² According to the court, a state statute’s primary purpose may include occupational health and safety as long as it also serves a “broader” goal.⁸³

Applying its primary purpose test, the *Knepper* court held that the OSHA Standard did not preempt provisions requiring the general disclosure of hazardous substance information.⁸⁴ The court left intact all identification and survey report requirements concerning both workplace and environmental hazards.⁸⁵ Additionally, because the MSDS and labeling provisions “facilitate[d] compliance with” nonpreempted provisions, the

sylvania’s Department of Labor and Industry proposed revising its right-to-know legislation. *See* 42 Pa. Bull. 4027 (Oct. 18, 1986).

79. *See supra* notes 60-70 and accompanying text. Like the New Jersey right-to-know law, Pennsylvania’s statute required that the state’s Department of Labor and Industry compile hazardous substance lists and that employers submit hazardous substance surveys to emergency health and safety agencies, label all hazardous substance containers, and post the surveys for employees. 801 F.2d at 136-38.

80. 801 F.2d at 136. Pennsylvania’s “hazardous substance” list included chemicals on OSHA’s list, environmental hazardous substances, and substances with “known or probable adverse human or environmental effects.” *Id.* The district court defined a “workplace hazardous substance” as a substance included on the general hazardous substance list but not categorized as an environmental hazardous substance. *Id.* at 134 n.6. The state law, however, did not use the term “workplace hazardous substance.”

81. 801 F.2d at 138-39. The Third Circuit concluded that the hazardous substance survey provision “does not have as its primary purpose the promotion of occupational health and safety through hazard communication.” *Id.* at 138.

82. *Id.* at 138. The court found that both the survey provision and the MSDS provision serve purposes other than hazardous substance communication to workers. *Id.* at 138, 141.

83. *Id.* at 136, 138. The court recognized that all of the substances contained on the general hazardous substance list, including nonenvironmental substances, “may pose hazards not only to workers, but also to the environment if they escape.” 801 F.2d at 138. This public health nexus, representing broader concerns than workplace safety, saved the survey and labeling provisions from federal preemption. *Id.* at 138, 139.

84. *Id.* at 138.

85. *Id.* at 137 (hazardous substance list), 138 (survey).

court reasoned that they too served a broader purpose than employee health and safety.⁸⁶ The Third Circuit thus invalidated only the employee training and education provisions.⁸⁷ The court distinguished the Pennsylvania statute from the New Jersey statute at issue in *Hughey I* solely on the comprehensive nature of the Pennsylvania scheme.⁸⁸

Shortly after the Third Circuit's *Knepper* decision, the Sixth Circuit employed a different preemption analysis of a local right-to-know law in *Ohio Manufacturers Association v. City of Akron*.⁸⁹ Similar to the state laws in *Hughey I*⁹⁰ and *Knepper*,⁹¹ the Akron city ordinance regulated container labeling, hazardous substance reporting, MSDS preparation, employee training, and communication to local public protection agencies.⁹²

In determining the scope of federal preemption, the *Akron* court deferred to the OSHA Standard's explicit language.⁹³ The court recognized that the ordinance had two purposes—regulating both

86 *Id.* at 139-41.

The presence of the required labels on all hazardous-substances containers will facilitate employer compliance with general hazardous substance survey obligations and employer compliance with the more specific environmental hazard survey obligations Thus it cannot be said that the primary purpose of the supplier's labeling requirement, even with respect to manufacturing-sector customers, is hazard communication to employees.

Id. at 139 (citations omitted). The court similarly found that the MSDS requirements facilitate preparation of hazardous substance survey provisions. *Id.* at 141.

87 *Id.* at 142.

88 The court characterized the differences in the hazard identification processes as "significant" *Id.* at 138

89 801 F.2d 824 (6th Cir. 1986), *appeal dismissed*, 108 S. Ct. 44 (1987).

90. *See supra* notes 60-70 and accompanying text.

91. *See supra* notes 77-80 and accompanying text.

92. 801 F.2d at 826. Akron's ordinance, like the New Jersey and Pennsylvania right-to-know laws, combined regulation of worker and community hazard communication. Akron's Health Commission was responsible for compiling a hazardous substance list, including chemicals found on OSHA's list, the U. S. Department of Transportation list, and specific cancerous and toxic chemical lists. *Id.* at 825-26. The labeling provision included not only the chemical name, but also applicable Department of Transportation labels, cancer warnings, and reproductive warnings. *Id.*

93. *Id.* at 831-32. Although the OSHA Standard referred specifically to preemption of state law only, the Sixth Circuit concluded that it preempts local law as well. As promulgated in 1984, the standard's preemption clause explicitly preempted only state laws. 29 C.F.R. § 1910.1200(a)(2) (1984) When OSHA revised the standard, the agency incorporated local law within its express preemptive scope. 29 C.F.R. § 1910.1200(a)(2) (1988). Based on the legislative history and purposes of the OSHA Standard, the court found the omission of the term "local" from the standard's preemption clause to be of little significance. 801 F.2d at 828-31. A literal reading of the preemption provision would conflict with OSHA's intent to create a national occupational safety and health standard. *See id.* at 831.

occupational and community health and safety⁹⁴—and found it unnecessary to adopt a “primary purpose” test. Consequently, the court invalidated the ordinance “to the extent that it attempt[ed] to regulate employee safety” in the manufacturing sector.⁹⁵ The Sixth Circuit, however, remanded the case to the district court for a factual determination of which specific provisions the OSHA Standard preempted.⁹⁶

2. *Implied Preemption*

The Third Circuit in *Hughey I* also set forth a standard for determining implied preemption of nonfederal community and worker right-to-know laws.⁹⁷ According to the court, implied preemption exists if compliance with both state and federal laws proves impossible or if state law thwarts the federal purpose.⁹⁸ A finding that a state provision merely increases the regulatory burden on employers is insufficient to establish implied preemption.⁹⁹ The court found neither the environmental nor workplace hazardous substance lists of the New Jersey law impliedly preempted as applied to nonmanufacturing employers.¹⁰⁰

Because of the limited factual nature of the appeals in *Hughey I*, the

94. *Id.* at 834. The Sixth Circuit recognized that the Akron ordinance not only regulated occupational health and safety, but that “[it] also had as its purpose protection of the public and the providing of information to city fire fighters and public health officials.” *Id.* The court effectively refused to label either of these purposes as the primary purpose of the ordinance.

The Sixth Circuit recognized that it should accord “[c]onsiderable weight” to an administrative agency’s statutory interpretation. *Id.* at 833. The court declared OSHA’s exercise of administrative power in preempting local laws entirely within the congressional delegation of authority under the OSH Act. *Id.* at 834.

95. *Id.*

96. *Id.* The trial court’s failure to determine the severability of the Akron ordinance necessitated further findings concerning each provision of the ordinance.

97. *Hughey I*, 774 F.2d 587, 593-94 (3d Cir. 1985). While inquiring into the implied preemptive effect of a statute containing an express preemption provision might appear problematic, the Third Circuit in *Hughey I* performed just such an analysis.

98. *Id.*

99. *Id.* at 593. According to the *Hughey I* court, “the mere fact that a state law provision increases the regulatory burden on employers does not make the state law provision contrary to congressional intent.” *Id.* The Third Circuit also refrained from denying the theory that confusion of workers by environmental hazardous substance labels might constitute an obstacle to the federal purpose. *Id.* at 596. See also *infra* note 104 and accompanying text.

100. 774 F.2d at 595. The court determined that New Jersey’s hazardous substance lists and OSHA’s hazardous substance list “comfortably coexist.” *Id.* The Third Circuit remanded to the district court for a finding of whether the environmental hazardous substance labeling provision is implicitly preempted. *Id.* at 596, 598. The Third Circuit reaffirmed this position in *Knepper*, finding no implied preemption of Pennsylvania’s hazardous substance survey provision. *Knepper*, 801 F.2d at 135.

court remanded to the district court for a determination of whether the universal labeling provision was impliedly preempted.¹⁰¹ On appeal after remand, the Third Circuit in *New Jersey Chamber of Commerce v. Hughey [Hughey II]*¹⁰² considered the implied preemption of this labeling provision.¹⁰³ The plaintiffs argued that the existence of two labeling systems would confuse and overwhelm workers to the extent that it would undermine the federal labeling scheme.¹⁰⁴ Under a clearly erroneous standard of review, the Third Circuit upheld the district court's finding that the state's universal labeling requirements did not thwart the purposes of the federal standard.¹⁰⁵ The court in *Hughey II* explained that OSHA's labeling requirements "may reasonably be construed to require that the hazard information be presented in such a way as to prevent unnecessary worker confusion"¹⁰⁶ The court indicated that worker training and label formatting and positioning can assist workers in distinguishing the OSHA label from other labels.¹⁰⁷

101 774 F.2d at 596.

102 868 F.2d 621 (3d Cir. 1989).

103 The universal labeling requirements contained in N.J. STAT. § 34:5A-14(b) (West 1988) mandate the labeling of all containers that are not statutorily excepted. 868 F.2d at 624. On remand, the Third Circuit addressed the threshold issue of the extent to which *Hughey I* held the universal labeling provision expressly preempted. Because the court in *Hughey I* characterized section 14(b) as a community right-to-know provision, only the implied preemption question remained open for the Third Circuit in *Hughey II*. *Id.* at 626-28.

104 *Id.* at 628. Specifically, plaintiffs argued that confusion would arise from

- (i) the very existence of two labeling systems and the inability of workers to determine which one pertains to worker hazards;
- (ii) the multiplicity of labels, tending to overwhelm the OSHA hazard labels;
- (iii) the labeling of hazardous components of mixtures on containers which do not require an OSHA hazard label;
- (iv) the labeling of a non-hazardous component of a mixture which is in fact hazardous and must carry an OSHA hazard label;
- and (v) the existence of different numbering systems which will make it difficult for a worker to find the appropriate [OSHA material safety data sheets].

Id. at 628-29 (quoting Dist. Ct. Op. at 29).

105 *Id.* at 629. The court, however, exercised plenary review over the district court's legal conclusion that the federal standard implicitly preempts the labeling provision. *Id.*

106 *Id.* at 630.

107 *Id.* at 629. The Third Circuit adopted the district court's reasoning concerning worker training and labeling methods. The district court enumerated the following justifications for upholding the provision: 1) OSHA did not intend that its label be the only label on containers because containers typically contain many labels, 2) worker training can help employees identify the OSHA label, 3) the labels required under New Jersey law "would not change the situation materially," 4) proper formatting and positioning can allow employees to distinguish the OSHA label from others, 5) informing workers of hazardous substances is in the manufacturers' best interests, 6) OSHA contemplated proper formatting and positioning, and 7) "there is no reason to believe that proper and effective formatting and positioning will not be the rule." *Id.* (quoting the Dist. Ct. Op. at 29). The Third Circuit thus concluded that no worker confusion would occur "if employers took such easy-to-implement steps as boxing off the New Jersey information or providing headings to inform the

II. RECENT FEDERAL DEVELOPMENTS

The only challenges to state and local right-to-know laws arose before the expansion of the federal OSHA Standard or the enactment of EPCRA.¹⁰⁸ Both the amended standard and EPCRA, however, play important roles in determining the validity of state and local right-to-know statutes. The amended OSHA Standard clarifies OSHA's position on the standard's preemptive effect. EPCRA similarly indicates the extent to which Congress intended to preempt state and local laws.

A. *Expansion of the Hazard Communication Standard*

The 1984 promulgation of the OSHA Standard created a dual system of state and federal hazard communication regulation. The Third and Sixth Circuit decisions, *Hughey I*, *Hughey II*, *Knepper*, and *Akron*, reinforced the notion that states were free to regulate hazardous substance communication to workers in the nonmanufacturing industry.¹⁰⁹ The existing scheme subjected nonmanufacturing companies engaged in interstate commerce to multiple state regulation.¹¹⁰ Selective preemption also proved burdensome for nonmanufacturing employers doing business with federally regulated manufacturers.¹¹¹ As a separate concern, nearly half of all hazardous substance incidents were occurring in the nonmanufacturing sector.¹¹²

reader whether the information under the headings was required by the federal standard or New Jersey law." *Id.* at 630.

108. The final decisions in *Knepper*, decided on September 12, 1986, and *Akron*, decided on September 17, 1986, postdated the August 1986 enactment of EPCRA by only one month. Two actions have been brought since 1987. The construction industry sought a review of the OSHA Standard's expansion to the nonmanufacturing sector in *American Builders & Contractors, Inc. v. Brock*, 862 F.2d 63 (3d Cir. 1988) (denying petition for review). *See infra* note 113. Additionally, two chemical industry groups have challenged California's Proposition 65, which requires employee warning hazards not contained in the federal standard. The case is currently pending in district court. *Chemical Mfrs. Ass'n v. California Health & Welfare Agency*, No. Civ.-s-88-1615-Lkk (E.D. Cal. Dec. 16, 1988).

109. *See supra* notes 59-107 and accompanying text. Twelve states regulated hazard communication to nonmanufacturing employees prior to 1987. 52 Fed. Reg. 31,852, 31,855 (1987).

110. 52 Fed. Reg. 31,852, 31,857 (1987). Nonmanufacturing employers engaged in interstate commerce were subject to regulation in more than one state. For example, some states required the labeling of substance containers shipped from out of state. This prescription mandated knowledge of and compliance with many different requirements. Manufacturers also had to comply with different state requirements regulating environmental hazards. *See supra* note 8 (state statutes).

111. Even within a single state, manufacturers regulated by the federal standard had to be aware of different state obligations imposed on nonmanufacturers with whom they did business. 52 Fed. Reg. 31,852, 31,861 (1987).

112. *See* 48 Fed. Reg. 53,280, 53,285 (Table I) (1983).

In litigation that raised these observations, the Third Circuit in 1985 ordered OSHA to expand the standard's reach.¹¹³ In 1987, OSHA extended its regulation to nonmanufacturing employers,¹¹⁴ and amended the OSHA Standard to indicate clearly an intent to preempt state and local laws.¹¹⁵ The agency included in the standard's preemption clause a definition of the occupational safety and health issue it regulates. The revised standard provides that hazard evaluation and communication "may include . . . but is not limited to" the compilation of workplace hazardous substance lists, distribution of MSDSs to employees, employee training programs, and container labeling requirements.¹¹⁶

In explaining the change in the OSHA Standard's preemption clause, OSHA cited *Hughey I* and *Knepper*.¹¹⁷ Although OSHA did not ex-

113 *United Steelworkers of Am. v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) (*USWA III*); *United Steelworkers of Am. v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*); *United Steelworkers of Am. v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*USWA I*). The court in *USWA I* ordered expansion of the OSHA Standard to the nonmanufacturing sector unless OSHA could show it would be technically and economically infeasible to expand. 763 F.2d at 739. By 1987, OSHA had not fully complied with the expansion order and the court in *USWA II* ordered promulgation of a revised standard within 60 days. 819 F.2d at 1270. The court in *USWA III* enforced the previous *USWA* judgments. 855 F.2d at 113-14.

114 *See* 29 C.F.R. § 1910.1200(b) (1988); 52 Fed. Reg. 31,852 (1987). Under the extended standard, chemical manufacturers, importers and distributors were required to supply MSDSs to nonmanufacturing customers by September 23, 1987. The deadline for nonmanufacturer compliance was May 23, 1988. Before the extension of the OSHA Standard, thirteen states had incorporated nonmanufacturing employers into their worker right-to-know laws. *Id.* at 31,870.

The extent of regulation over the construction industry, however, proved difficult to define. The Secretary of Labor temporarily postponed enforcement in the construction sector. The construction industry has proposed a separate hazard communication standard for regulation of its members. OSHA consequently has recognized that modification of the rule may be necessary in the construction industry. *Id.* at 31,859 (1987).

115 *Id.* at 31,860 (1987). OSHA revised the preemption clause "to more explicitly state the Agency's position regarding preemption based on the provisions of the Act and related legal actions." *Id.*

116 The preemption provision currently reads:

This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject. Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals in the workplace, as well as of containers of chemicals being shipped to other workplaces, preparation and distribution of material safety data sheets to employees . . . and development and implementation of employee training programs . . .

29 C.F.R. § 1910.1200(a)(2) (1988)

117 52 Fed. Reg. 31,852, 31,860 (1987)

pressly adopt the Third Circuit's analysis, the agency borrowed its "primary purpose" language. OSHA expressed an intent that the standard preempt any state or local provision enacted "for the primary purpose of assuring worker safety and health."¹¹⁸ OSHA's definition of "primary purpose," however, includes exceptions that distinguish it from the Third Circuit's. Contrary to the decisions in *Hughey I* and *Knepper*,¹¹⁹ OSHA explicitly placed hazardous substance lists within its preemptive scope.¹²⁰ In addition, unlike the Third Circuit's decision in *Knepper*,¹²¹ the agency intended to preempt local MSDS requirements.¹²²

B. *The Emergency Planning and Community Right-to-Know Act*

The 1984 hazardous chemical release incident in Bhopal, India, sent Congress a message of the importance of toxic chemical disclosure to the public.¹²³ After surveying the "patchwork" of state and local community right-to-know laws, Congress proposed a comprehensive federal program.¹²⁴ Just one month before the Third Circuit's decision in *Knepper*,¹²⁵ Congress enacted the Emergency Planning and Community Right-to-Know Act.¹²⁶ Subchapter I of EPCRA regulates local emergency response planning.¹²⁷ Subchapter II contains reporting require-

118. OSHA stated that "any State or local government provision requiring [hazardous substance communication or evaluation] . . . for the primary purpose of assuring worker safety and health, would be preempted by the [OSHA Standard]." *Id.* at 31,861.

119. See *supra* notes 60-88 and accompanying text.

120. See 29 C.F.R. § 1910.1200(a)(2) (1988); *supra* note 116. OSHA, in using permissive language, did not necessarily preempt all hazardous substance lists. However, directly following its discussion of *Knepper*, the agency recognized hazardous substance lists as subject to preemption. See 52 Fed. Reg. 31,852, 31,860-61 (1987). Because the Third Circuit found no preemption of state hazardous substance list provisions, the agency's inclusion of such lists in its definition of hazardous substance evaluation implicitly rejects the *Knepper* court's holding.

121. See *supra* notes 84-88 and accompanying text.

122. 29 C.F.R. § 1910.1200(a)(2) (1988). See *supra* note 116.

123. In December 1984, hazardous gas leaked from a Union Carbide plant in Bhopal, India. The catastrophe was one of the worst hazardous substance incidents ever. See OSHA, SYSTEMS SAFETY EVALUATIONS OF OPERATIONS WITH CATASTROPHIC POTENTIAL CPL 2-2 (1987). In 1985, the Indian government brought suit against Union Carbide on behalf of all Indian victims. *Bhopal: Legislative Fallout in the United States*, CHEMICAL WEEK, Feb. 6, 1985, at 26.

124. H.R. REP. NO. 253(V), 99th Cong., 2d Sess. 1, 97, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3124, 3220.

125. See *supra* notes 77-88.

126. Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11,001-11,050 (Supp. V 1987).

127. Subchapter I, entitled "Emergency Planning and Notification," requires the governor of each state to establish a state emergency response commission (SERC). 42 U.S.C. § 11,001(a) (Supp. V 1987). The SERC receives information requests from the public and designates emergency plan-

ments for disclosure of hazardous substance information to the public.¹²⁸

EPCRA's scheme is based on three reporting mechanisms: material safety data sheets, emergency and hazardous chemical inventory forms, and toxic chemical release forms. Employers who must maintain an MSDS under the OSHA Standard¹²⁹ must provide the information contained therein¹³⁰ and a completed chemical inventory form to local emergency planning committees, state emergency response commissions and local fire departments.¹³¹ Employers must also submit toxic chemical

ning districts. *Id.* § 11,001(a), (b). The SERC is also required to appoint local emergency response committees (LERCs) which are responsible for the creation and implementation of comprehensive emergency response plans. *Id.* § 11,001(c), (d).

Subchapter I also directs the Environmental Protection Agency (EPA) to publish an extremely hazardous substance list and establish threshold substance amounts for the enforcement of reporting provisions. *Id.* § 11,002(a)(2), (a)(3). The EPA has proposed regulations setting forth data sheet and inventory reporting requirements. *See* 52 Fed. Reg. 31,852, 31,860 (1987). At least two commentators, however, have questioned the EPA's commitment and effectiveness in promulgating regulations. *See* Berkowitz, *The Law & the Promise*, 5 ENVTL. F. 24, 28 (1988); Bromberg, *Right-to-Know: Much Pain, Little Gain*, 5 ENVTL. F. 24, 24 (1988).

All fifty states have formed SERCs and over 3500 localities have established LERCs. Makris, *Now It's Everybody's Job*, 5 ENVTL. F. 25, 25 (1988). Twenty-five states have enacted community right-to-know legislation pursuant to EPCRA. *Id.* Many state and local governments, however, may not have reserved enough resources to administer community right-to-know programs effectively. Matsumoto, *Confrontation or Compromise?*, 5 ENVTL. F. 25, 25 (1988); Solyst, *When the Going Got Tough . . .*, 5 ENVTL. F. 26, 26 (1988).

128. 42 U.S.C. §§ 11,021-11,023 (Supp. V 1987). Subchapter II, entitled "Reporting Requirements," creates the employer's duty to submit material safety data sheets, emergency and hazardous chemical inventory forms, and toxic chemical release forms to local public protection agencies. *See infra* notes 130-32 and accompanying text.

129. *See* 29 C.F.R. § 1910.1200(g) (1988); *supra* note 47 and accompanying text.

130. 42 U.S.C. § 11,021(a)(1). Instead of submitting an MSDS, an employer may submit a list of chemicals for which an MSDS is required under the OSHA Standard, the chemical or common names of such chemicals, and the hazardous components of such chemicals. 42 U.S.C. § 11,021(a)(2)(A) (Supp. V 1987).

When Congress enacted EPCRA, the MSDS provisions applied only to manufacturing employers. With the OSHA Standard's expansion to the nonmanufacturing sector, however, EPCRA requirements apply to all employers. Some argue that application of EPCRA to nonmanufacturers presents a "paperwork nightmare" not intended by Congress. *See* Bromberg, *supra* note 127, at 29.

131. 42 U.S.C. § 11,022(a)(1) (Supp. V 1987). Employers may choose between two reporting methods for compiling emergency and hazardous inventory forms: Tier I and Tier II reporting. *Id.* § 11,022(a)(2). Tier I reporting allows an employer to group chemicals into five "hazard" categories. *Id.* § 11,022(d)(1). An employer using Tier II, on the other hand, provides information on individual substances. *Id.* § 11,022(d)(2). Tier II reporting creates a greater burden for employers, particularly small businesses not subject to the OSHA Standard. However, the aggregation of substances into hazard groups may serve as a disincentive for some employers who choose the less burdensome Tier I option. *See* Bromberg, *supra* note 127, at 24. The EPA has considered accepting more easily compilable forms as substitutes for Tier I or Tier II information for certain chemicals (e.g., petroleum stored in underground tanks). *Id.* at 29.

release forms to both the Environmental Protection Agency and state officials.¹³² The information provided under EPCRA is available to the community.¹³³

EPCRA and the OSHA Standard overlap considerably.¹³⁴ With few exceptions, EPCRA's definition of "hazardous chemical" wholly incorporates OSHA's hazardous substance list.¹³⁵ Moreover, two reporting requirements in EPCRA apply only to employers covered by the OSHA Standard.¹³⁶ In fact, Congress considered EPCRA's community right-to-know program as simply "an extension of the OSHA Hazard Communication Standard."¹³⁷

EPCRA and the OSHA Standard differ significantly, however, in the degree to which they preempt state law. EPCRA contains a savings clause, section 321, which broadly provides that "[n]othing in this chapter shall preempt any state or local law."¹³⁸ Nevertheless, Congress did not entirely preclude preemption. An exception to the general an-

132. 42 U.S.C. § 11,023 (Supp. V 1987). A toxic chemical release form must be submitted only for chemicals specifically designated as toxic in quantities exceeding the established toxic chemical threshold level. *Id.* § 11,023(a)(1), (c), (f). Sections 11,021 and 11,022 specifically require that MSDS and Tier II information, respectively, be available to the public through either local emergency planning committees or state emergency response commissions. *Id.* §§ 11,021(c)(2), 11,022(e)(3).

133. EPCRA also contains a general requirement that "[e]ach emergency response plan, material safety data sheet, list described in section 11021(a)(2) of this title, inventory form, toxic chemical release form, and followup emergency notice shall be made available to the general public . . . during normal working hours" at a designated location. 42 U.S.C. § 11,044(a) (Supp. V 1987). In addition, "[e]ach local emergency planning committee shall annually publish a notice in local newspapers that the emergency response plan, material safety data sheets, and inventory forms have been submitted under this section." *Id.* § 11,044(b).

134. For a comparative analysis of EPCRA and the OSHA Standard, see generally *Risk Management II*, *supra* note 43.

135. EPCRA provides that "the term 'hazardous chemical' has the meaning given such term by [29 C.F.R. § 1910.1200(c)] . . ." 42 U.S.C. § 11,021(e). See *supra* note 44. EPCRA excepts three types of chemicals found on OSHA's list: (1) food, food additives, drugs, color additives, and cosmetics regulated by the Food and Drug Administration; (2) solid substances present in manufactured items which do not pose exposure threats; and (3) substances used by the general public for personal or household use. *Id.* § 11,021(e)(1)-(3).

136. 42 U.S.C. §§ 11,021, 11,022 (Supp. V 1987). See *supra* notes 129-31 and accompanying text.

137. H.R. REP. NO. 253(1), 99th Cong., 2d Sess. 1, 111, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2893. According to the House Energy and Commerce Committee, EPCRA expands OSHA's principle of employee right to know in that members of the community "have access to the same information as do workers under the OSHA standard." *Id.* at 110-11.

138. EPCRA § 321, 42 U.S.C. § 11,041(a)(1) (Supp. V 1987). States and localities remain free to adopt and enforce laws. *Id.* § 11,041(a)(2).

tipreemption clause exists for states requiring preparation of MSDSs.¹³⁹ Under the exception, a state-required MSDS must be identical to the federal MSDS in content and form.¹⁴⁰ A state, however, may demand the submission of information “supplemental” to the federal requirements.¹⁴¹

In designing section 321, the Senate and the House defined the legislation’s preemptive effect somewhat differently. A Senate amendment proposed specific language retaining only those nonfederal laws that require “submission of information related to hazardous substances, toxic chemical substances, pollutants or contaminants or other materials, or [that] require the submission or distribution of information related to hazardous substances.”¹⁴² The House, preferring a more general savings provision, revised section 321 to preserve all state and local laws “relating to the submission of information related to hazardous chemicals.”¹⁴³ The House also proposed an exception for preempting state laws requiring the submission of MSDS forms and supplemental information.¹⁴⁴ The Joint Conference Committee interpreted the final version of the provision as “[r]eflecting the policy” of both the House and Senate amendments.¹⁴⁵

Section 321’s legislative history supports a broad reading of its scope. One member of the House Committee on Public Works and Transportation explained that “[i]t makes inherently good sense to let communities have the final say in designing community right to know programs.”¹⁴⁶ Even those legislators dissatisfied with EPCRA agreed that it should pre-

139. *Id.* § 321(b), 42 U.S.C. § 11,041(b). This exception applies only to state or local laws enacted after August 1, 1985.

140. State or local law requiring the submission of a material safety data sheet “shall require that the data sheet be identical in content and form to the data sheet required under subsection (a) of section 11,021 of this title.” *Id.* See *supra* note 130 and accompanying text.

141. In addition, a state or locality may require the submission of information that is supplemental to the information required on the data sheet (including information on the location and quantity of hazardous chemicals present at the facility) through additional sheets attached to the data sheet or such other means as the state or locality considers appropriate. 42 U.S.C. § 11,041(b) (Supp. V 1987)

142. H.R. REP. NO. 962, 99th Cong., 2d Sess. 183, 302, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3395 (joint explanatory statement of conference committee).

143. *Id.* While this limiting language is not present in the law as passed, see *supra* text accompanying note 138, it is unlikely that the House’s version would have had any greater preemptive effect because of it.

144. *Id.*

145. *Id.*

146. H.R. REP. NO. 253(V), 99th Cong., 2d Sess. 1, 97, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3124, 3220.

serve all nonfederal right-to-know laws.¹⁴⁷ Consistent with the common concern for local law, these dissenters also recommended a narrow construction of the MSDS exception to the savings clause.¹⁴⁸

EPCRA's legislative history also indicates that a presumption of reasonableness underlay Congress' desire to preserve state law. Congress paid considerable attention to protecting employers from varied regulation.¹⁴⁹ The House Energy and Commerce Committee was concerned that "the public's ability to learn about hazardous chemicals . . . [not] become impaired because of a plethora of inconsistent, impractical State and local requirements."¹⁵⁰ The close parallel between EPCRA and the OSHA Standard was specifically designed to prevent "needless duplication."¹⁵¹ As the Committee explained, "[b]ecause a great deal of the hazardous chemicals covered by this title will be travelling in interstate commerce . . . Federal law should control in this area."¹⁵² Indeed, some members of Congress interpreted EPCRA's savings clause as creating a floor below which states and municipalities may not regulate.¹⁵³ The potential burden on employers served as the primary motivation behind the MSDS exception to section 321. The House committee proposed the exception to "create national uniformity in hazardous chemical reporting that should minimize costs."¹⁵⁴ Although this provision permits supplemental information requirements, Congress expected that such informa-

147. Dissenters from the passage of EPCRA confessed that "[t]he clear intent of this provision is to protect from preemption all state and local community right-to-know laws . . ." H. REP. NO. 253(I), 99th Cong., 2d Sess. 1, 296, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2971 (separate and dissenting views).

148. "Given the overriding intent to preserve state and local community right-to-know laws, this exception [to section 321] should be narrowly construed and should apply only to state and local provisions that specifically call for a 'material safety data sheet.'" *Id.*

149. An important goal of EPCRA was to reduce the possible costs on employers. *See id.* at 59-60. Congress estimated that EPCRA would save money for employers already subject to state and local community right-to-know regulation.

150. *Id.* at 115. The Committee thus hoped that "[s]tates and localities will follow the Federal program closely." *Id.*

151. *Id.* at 111.

152. *Id.* at 115.

153. Several congressmen suggested that "[t]he clear intent of this provision is . . . to ensure that the federal community right-to-know program sets a floor, rather than a ceiling for hazardous chemical information." *Id.* at 296 (dissenting views). The Committee on Public Works and Transportation agreed that "any Federal right to know law should establish a floor rather than a ceiling to State and local efforts . . ." H.R. REP. NO. 253(V), 99th Cong., 2d Sess. 1, 97, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3124, 3220.

154. H. REP. NO. 253(I), 99th Cong., 1st Sess. 1, 59-60, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2841-42.

tion would be "reasonable and concise."¹⁵⁵

In considering EPCRA, Congress made no reference to the Third and Sixth Circuit opinions.¹⁵⁶ Ordinarily, a presumption that Congress knew of prior judicial decisions attaches to federal legislation.¹⁵⁷ However, because enactment of EPCRA so closely followed *Hughey I* and preceded *Knepper* and *Akron* by one month, the presumption may have less merit. At the very least, Congress was aware that the OSHA Standard expressly preempted state worker right-to-know laws in the manufacturing sector.¹⁵⁸ Congress might also have foreseen the standard's impending expansion to nonmanufacturing employers.¹⁵⁹

III. THE EFFECT OF EPCRA AND THE REVISED OSHA STANDARD ON PREEMPTION ANALYSIS

A. *Express Preemption: The Primary Purpose Test*

A court's only responsibility in determining federal preemption is to identify congressional or administrative intent. Courts have no authority to extend preemption beyond a clear congressional or agency mandate.¹⁶⁰ Thus, the only permissible judicial inquiry is whether a particular state provision falls within the established scope of preemption.

1. *The Hazard Communication Standard*

In enacting the OSH Act, Congress manifested an intent to preempt all state and local laws "relating to" an occupational safety and health issue for which OSHA has promulgated a federal standard.¹⁶¹ OSHA similarly intended the Hazard Communication Standard to preempt state and local laws relating to the issue of hazard evaluation and communica-

155. *Id.* at 115, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2897 (House Energy and Commerce Committee).

156. *See generally id.*, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835; H.R. REP. NO. 253(V), 99th Cong., 2d Sess. 1, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3124; H.R. REP. NO. 962, 99th Cong., 2d Sess. 183, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3124; *supra* note 108 and accompanying text.

157. *Shapiro v. United States*, 335 U.S. 1, 16 (presumption that Congress aware of settled judicial construction), *reh'g denied*, 335 U.S. 836 (1948).

158. *See United Steelworkers of Am. v. Aucther*, 763 F.2d 728, 736 (3d Cir. 1985) (OSHA Standard preempts New Jersey right-to-know law "with respect to disclosure to employees in the manufacturing sector").

159. *See supra* notes 113-14 and accompanying text.

160. *See supra* note 23 and accompanying text. *See also* L. TRIBE, *supra* note 19, § 6-26, at 483 n 8

161. *See supra* note 32 and accompanying text.

tion.¹⁶² OSHA's promulgation of the standard and its decision to preempt state and local law fall squarely within the scope of congressionally delegated authority. Courts, therefore, must uphold OSHA's administrative determination regarding the extent to which the OSHA Standard preempts state and local law.¹⁶³

When OSHA revised the OSHA Standard, the agency more clearly defined its preemptive scope. OSHA indicated that the standard preempts all state and local laws whose primary purpose is hazard evaluation and communication to workers.¹⁶⁴ The agency thus expressly sanctioned the Third Circuit's primary purpose test in the administrative history. However, because the agency's primary purpose language does not appear in the standard's preemption clause,¹⁶⁵ the ultimate inquiry remains whether a state provision relates to—or “pertains to”—hazard evaluation or communication to workers. While a state legislature's primary purpose in adopting right-to-know requirements may be one indication whether the provision relates to employee hazard communication, federal preemption under the standard's terms is not expressly limited to provisions whose primary purpose is worker health and safety.

Although OSHA sanctioned the use of a primary purpose analysis, its version of the test is different than the Third Circuit's application. That circuit court in *Hughey I* and *Knepper* ignored Congress' and OSHA's intent that the OSHA Standard have a broad preemptive effect. These decisions accepted as a primary purpose any goal “other than” or “broader than” hazard communication to workers.¹⁶⁶ In *Knepper*, the Third Circuit further stretched the meaning of primary purpose by validating any state provision that merely “facilitate[d] compliance with” a nonoccupational provision.¹⁶⁷ This indeterminate application of the term “primary” removes dual purpose laws from the scope of federal preemption.¹⁶⁸ Under such a bootstrapping rationale, states may avoid federal preemption simply by attaching an environmental nexus in any

162. See *supra* note 51.

163. See *supra* notes 29, 55 and accompanying text.

164. See *supra* note 118 and accompanying text.

165. See *supra* note 116.

166. See *supra* notes 82-83 and accompanying text. See generally notes 71-73 and accompanying text.

167. See *supra* note 86 and accompanying text.

168. This assumes that, under the nonoccupational purpose, the provision is not otherwise preempted by federal law.

way relating occupational health and safety to its right-to-know provisions.

In response to the court of appeals decisions, OSHA redefined the issue of hazard evaluation and communication. The agency specifically included within the standard's scope hazardous substance lists, material safety data sheets, and labeling provisions.¹⁶⁹ Although OSHA did not mandate the preemption of parallel state provisions, the definition is significant in light of the agency's knowledge of the *Hughey I* and *Knepper* opinions.¹⁷⁰ The revised OSHA Standard thus represents the agency's partial disagreement with the Third Circuit's application of the primary purpose test.

In addition to OSHA's reworking of the primary purpose test, the extension of the OSHA Standard to nonmanufacturing employers significantly broadens the standard's effect on state and local laws. The standard now regulates workplace hazard evaluation and communication in both the manufacturing and nonmanufacturing sectors.¹⁷¹ Thus, the OSHA Standard preempts all state and local provisions relating to occupational hazard evaluation and communication. The primary purpose of a state regulatory provision merely indicates whether it pertains to hazard evaluation or communication in the workplace.

2. *Emergency Planning and Community Right-to-Know Act*

EPCRA's broad antipreemption clause shields from preemption all state and local laws.¹⁷² Congress preempted only state and local MSDS provisions requiring unreasonable or burdensome information not required under the OSHA Standard.¹⁷³ While EPCRA evidences congressional acceptance of state community right-to-know laws, it provides little guidance for determining what constitutes a community right-to-know provision. Although EPCRA appears consistent with the holdings in *Hughey I*, *Knepper*, and *Akron*,¹⁷⁴ there is no indication that Congress was aware of this judicial action.¹⁷⁵ Because EPCRA was enacted so close to the timing of these decisions,¹⁷⁶ the ordinary presumption that

169. 29 C.F.R. § 1910.1200(a) (1988). See *supra* note 116 and accompanying text.

170. See *supra* note 117 and accompanying text.

171. 29 C.F.R. § 1910.1200(b) (1988). See *supra* note 114 and accompanying text.

172. 42 U.S.C. § 11,041(a) (Supp. V 1987). See *supra* note 138 and accompanying text.

173. See *supra* notes 139-41 and accompanying text.

174. See *supra* notes 60-96 and accompanying text.

175. See *supra* notes 156-57 and accompanying text.

176. Although Congress enacted EPCRA after the decision in *Hughey I* and just prior to the

Congress knew of the judicial action is inappropriate.¹⁷⁷ Thus, enactment of EPCRA does not necessarily sanction use of the primary purpose test.

EPCRA must be interpreted in light of the OSHA Standard it complements.¹⁷⁸ Congress expressly preserved only those state and local statutes that the standard did not otherwise preempt. Courts should therefore defer to OSHA's explicit definition of hazard evaluation and communication to determine the validity of state and local right-to-know provisions.¹⁷⁹

B. Implied Preemption

1. The Hazard Communication Standard

The expansion of the OSHA Standard to nonmanufacturing employers affects the issue of implied preemption. The breadth of the standard's express preemptive effect¹⁸⁰ suggests that the question of implied preemption of state workplace hazard regulations should not arise. However, as states and localities retain jurisdiction over community right-to-know regulation under EPCRA, implied preemption of these provisions by the OSHA Standard will play a more significant role.

If a state community right-to-know provision renders compliance with the federal standard impossible, state law must yield.¹⁸¹ Impossibility, however, is difficult to establish. For instance, none of the New Jersey, Pennsylvania, or Akron provisions would be invalid under this theory.¹⁸²

The OSHA Standard will have a greater preemptive effect on state and

decisions in *Knepper* and *Akron*, most of EPCRA's legislative history arose before the Third and Sixth Circuit developments. See *supra* note 108 and accompanying text. Congress knew of the Third Circuit's decision in *United Steelworkers of Am. v. Auchter*, 763 F.2d 768 (3d Cir. 1985), which invalidated state worker right-to-know provisions in the manufacturing sector. See *supra* note 113. Thus, Congress must have foreseen the OSHA Standard's inevitable expansion to the nonmanufacturing sector, which the Third Circuit ordered in 1985. See *id.*; *supra* notes 158-59 and accompanying text.

177. See *supra* notes 156-57 and accompanying text.

178. See *supra* note 134 and accompanying text.

179. OSHA's definition of worker hazard communication and evaluation aids in setting the parameters of community right-to-know. The federal standard necessarily does not expressly preempt provisions falling beyond OSHA's explicit definition.

180. See *supra* notes 50-68 and accompanying text.

181. See *supra* note 26 and accompanying text.

182. The Third Circuit found no implied preemption in *Hughey I*, *Hughey II*, or *Knepper*. See *supra* note 100 and accompanying text. The Sixth Circuit, however, refused to address the implied preemption issue. See generally *supra* notes 89-96 and accompanying text.

local provisions that thwart the federal goal of protecting employees.¹⁸³ As the Third Circuit indicated, however, a regulatory burden alone does not constitute preemption.¹⁸⁴ Although Congress and OSHA obviously found some burden on employers acceptable,¹⁸⁵ a comprehensive federal hazard communication scheme necessitates the implied preemption of overly burdensome state laws. Even state plans approved by the Secretary of Labor may not unduly interfere with interstate commerce.¹⁸⁶

The implied preemption analysis set forth in *Hughey II*¹⁸⁷ nearly forecloses the possibility of a court finding implied preemption. Under the Third Circuit's reasoning in that decision, no burden on employees constitutes an obstacle to the federal scheme if employers can lessen the burden through remedial measures.¹⁸⁸ *Hughey II*'s rationale does not address whether a state law interferes with achievement of federal goals, but whether specific persons subject to the law might comply in a manner that reduces interference.¹⁸⁹ For example, after *Hughey II*, the extent to which New Jersey's universal labeling requirements impede OSHA's labeling system will vary greatly with the ability or willingness of each employer to train employees or design more effective labeling methods.¹⁹⁰

2. *Emergency Planning and Community Right-to-Know Act*

Congress clearly contemplated that some state and local right-to-know laws would hamper the effectiveness of the federal hazard communication structure. Although Congress' primary concern in enacting EPCRA was community health and safety, the legislative history of EPCRA demonstrates a generally recognized need for uniform and com-

183. See *supra* notes 27, 30 and accompanying text.

184. See *supra* note 99 and accompanying text.

185. See *supra* note 41 and accompanying text.

186. See *supra* note 38 and accompanying text. In explaining the interstate commerce issue in preemption analysis, one commentator stated that "[t]he validity of state action affecting interstate commerce must be judged in light of the desirability of permitting diverse responses to local needs and the undesirability of permitting local interference with such uniformity as the unimpeded flow of interstate commerce may require." L. TRIBE, *supra* note 19, § 6-4, at 407.

187. See *supra* notes 102-07 and accompanying text.

188. See *supra* note 107.

189. *Id.*

190. See *id.* Cf. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 291 (1987) (even if California law requiring employer to provide favorable benefits to pregnant women conflicts with Title VII, law not preempted because "[e]mployers are free to give comparable benefits to other disabled employees") (alternative holding).

prehensive federal regulation.¹⁹¹ Congress expected EPCRA to regulate in tandem with the OSHA Standard.¹⁹² Thus, any state or local community right-to-know provision that renders compliance with the federal scheme impossible or frustrates its effectiveness must yield to federal law.

IV. CONCLUSION

OSHA's amendment of its Hazard Communication Standard significantly broadened preemption of state and local worker right-to-know laws. Congress, however, expressly preserved nonfederal community right-to-know laws in EPCRA. Both changes call for a stricter application of the primary purpose test and greater deference to congressional and administrative intent than that announced by the Third Circuit in *Hughey I*, *Knepper*, and *Hughey II*. Moreover, the primary purpose test ignores the dual function of many state and local provisions. The Sixth Circuit's deference in *Akron* is more consistent with the appropriate preemption analysis that the amended OSHA Standard and EPCRA necessitate.

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191. See *supra* notes 149-55 and accompanying text.

192. See *supra* note 137 and accompanying text.