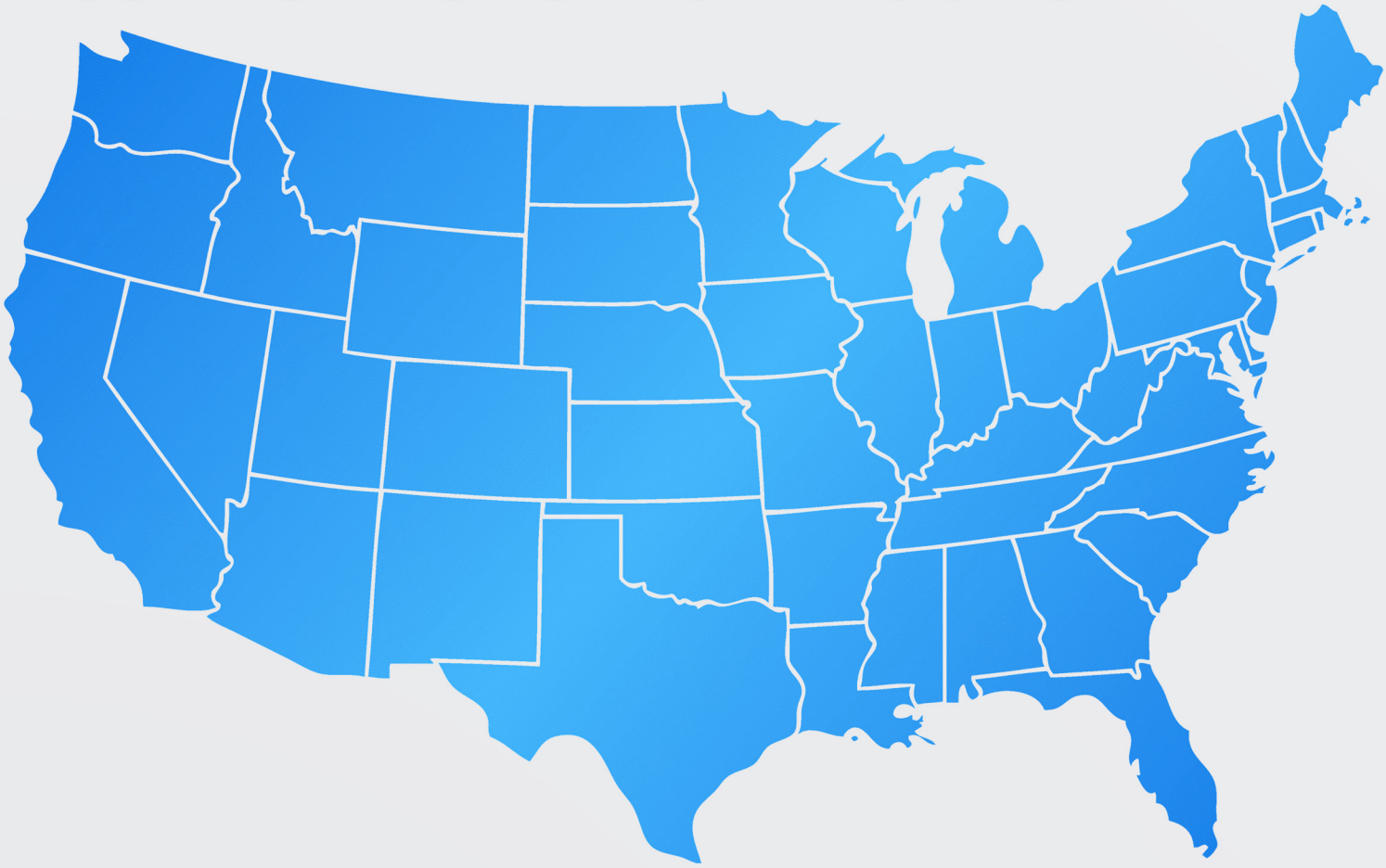
Reducing Our Exposure to Toxic Chemicals:



Stronger State Health Protections at Risk in Efforts to Reform Federal Chemical Law

Center for EFFECTIVE GOVERNMENT

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ABOUT THE CENTER FOR EFFECTIVE GOVERNMENT

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

IN 1976, THE UNITED STATES ENACTED THE TOXIC SUBSTANCES CONTROL ACT (TSCA) TO ADDRESS PUBLIC CONCERNS ABOUT THE IMPACT OF A GROWING NUMBER OF UNTESTED CHEMICALS ON HUMAN HEALTH.

The law tasks the U.S. Environmental Protection Agency (EPA) with identifying potentially dangerous chemicals, gathering information from the manufacturers of chemicals in commercial use, and issuing rules to reduce or eliminate their risks to human health and the environment.

For almost 40 years, this federal law has been the lynchpin of our nation's chemical safety policy, and it has failed to protect the American people from being exposed to thousands of chemicals in commercial use that are known to cause harm to humans.

At least 84,000 chemicals are registered for commercial use in the U.S. today. EPA has required testing for only about 250 of them and has banned or placed restrictions on only nine, despite a growing body of research indicating that even modest exposure to many chemicals can increase the risks of developmental delays, neurological diseases, and cancer – especially among infants and children. The law was written and interpreted by the courts in a way that severely limits EPA's ability to regulate chemicals. And even the modest work EPA has done is constantly opposed and challenged in court by large chemical companies and their trade associations.

In the face of this inability of EPA to act, state and local governments have stepped in: 38 states have established more than 250 laws or rules regulating the use of toxic substances. And 20 state legislatures are currently considering almost 75 new proposed chemical safety policies. State and local governments have taken the lead in regulating and even prohibiting the use of potentially dangerous chemicals. But testing and restricting chemicals is resource-intensive work, and many states do not have the funds, expertise, or will to do it. More federal oversight is needed.

Over the past two years, some members of Congress have been pushing for reforms of TSCA, but from two different perspectives. Recently, two bills demonstrating these different approaches were introduced in the Senate. A bill introduced by Sens. Barbara Boxer (D-CA) and Edward Markey (D-MA) would attempt to fix the barriers to effective regulation built into TSCA and allow the adoption of new state policies. The bill introduced by Sens. Tom Udall (D-NM) and David Vitter (R-LA) would override and undermine the ability of states to establish new policies and enforce public health protections while providing only modest improvements to national chemical policy. The first approach has been lauded as a step forward by public interest groups, the Center for Effective Government included. The second approach is supported primarily by the chemical industry and its lobbyists.

> **"84,000 CHEMICALS ARE REGISTERED FOR COMMERCIAL USE IN THE U.S. TODAY. EPA HAS REQUIRED TESTING OF ONLY 250. BANS OR RESTRICTIONS ARE IN PLACE ON ONLY 9.**

This paper examines (a) the shortcomings of the current Toxic Substances Control Act, (b) the range of state laws that have been passed over the last several decades to compensate for ineffective federal oversight of hazardous chemicals, and (c) the potential impact of recently proposed legislation on state public health and safety standards and rules.

We conclude that the Udall-Vitter legislation presents a grave threat to the system of chemical protections that state and local governments have been establishing over three decades. Any revision to TSCA must preserve the traditional role states and localities have played in protecting the health and safety of their residents. Federal health and safety regulations should never *reduce* the standards that state residents have asked their representatives to establish. The federal government should establish minimum standards on which states can build. Anything less would undermine our national commitment to protect the health and welfare of the American people.

CHEMICAL SAFETY STANDARDS: AN INEFFECTIVE FEDERAL SYSTEM SPURS STATE ACTION

In 1971, the Council on Environmental Quality (CEQ) issued a report estimating that hundreds of new chemicals were entering into commerce every year in the U.S. and noting that "[i]ncreasingly, all forms of life are being exposed to potentially toxic substances."[1] The report warned that existing laws were inadequate to address the severe problems associated with the rapid growth in the use of toxic chemicals. Building on this report, CEQ drafted legislation that would regulate the manufacture, importation, and use of toxic chemicals in the U.S.

Contested Terrain

For the next five years, members of Congress struggled over the content of the bill. Public awareness of the health risks of exposure to chemicals like polychlorinated biphenyls (PCBs), fluorocarbons, and vinyl chloride was growing, but the chemical industry fought hard against any restrictions on the use of its products.[2]

In early 1976, an insecticide manufacturer in Virginia exposed dozens of workers to dangerous levels of kepone, causing them to suffer severe neurological disorders.[3] The visible evidence of the impact of this chemical on human beings and the public outcry it elicited finally forced Congress to act, and President Gerald Ford signed the Toxic Substances Control Act (TSCA) into law later that year.

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1 *See* Council on Envtl. Quality, Toxic Substances (1971), *reprinted in* Staff of House Comm. on Interstate & Foreign Commerce, 94th Cong., Legislative History of the Toxic Substances Control Act 757-88 (1976), *available at* https://ia601702.us.archive.org/18/items/leehisto00unit/leehisto00unit.pdf.

2 Office of Pollution Prevention & Toxics, U.S. Envtl. Prot. Agency, EPA 744-R-97-003, Chemistry Assistance Manual for Premanufacture Notification Submitters app. (1997), *available at* http://www.epa.gov/oppt/newchems/pubs/chem-pmn/appendix.pdf.

3 *Id.*

The goal of TSCA is to protect the health of the American people and the environment from harm caused by dangerous chemicals. The law tasks the U.S. Environmental Protection Agency (EPA) with (1) examining research findings to identify potentially dangerous chemicals, (2) gathering information from manufacturers about these chemicals, and (3) issuing rules to reduce unreasonable risks to human health and the environment from their use in commercial products and enterprises.

Defective from the Start

Under pressure from the chemical industry, the 1976 law "grandfathered in" over 62,000 chemicals already in commerce without requiring manufacturers to prove their safety. Moreover, instead of requiring manufacturers to prove their chemicals are safe before they are allowed on the market (as the U.S. Food and Drug Administration (FDA) requires for new drugs), TSCA allows chemicals to continue to be used in production processes and consumer products unless EPA can prove, based on "substantial evidence," that a chemical poses an "unreasonable risk." This places a huge research and evidentiary burden on EPA, especially since chemical manufacturers often hire their own scientists to produce studies designed to cast doubt on research findings showing detrimental health effects from chemical exposure.[4]

UNDER TSCA, EPA MUST PROPOSE THE LEAST COSTLY SOLUTION FOR THE CHEMICAL INDUSTRY, EVEN IF ANOTHER APPROACH WOULD PROVIDE GREATER NET BENEFITS TO PUBLIC HEALTH.

Under TSCA, EPA cannot *require* a manufacturer to develop and submit information needed to determine whether the chemical presents an unreasonable risk unless the agency *already has information* that documents the chemical's potential risk. But if EPA can show that extensive exposure is occurring, it does not need early documentation of the chemical's risk.

4 *See generally* David Michaels, Doubt is Their Product: How Industry's Assault on Science Threatens Your Health (2008).

When EPA *does* find that a chemical presents an unreasonable risk of harm, the agency must take into consideration the benefits of the substance for various uses, the availability of substitute chemicals for those uses, and the economic consequences of any potential restrictions on the use of the chemical. The agency must then select the "least burdensome" requirement. In other words, EPA must propose *the least costly solution for the chemical industry*, *even if a slightly costlier approach would provide greater net benefits to public health.*

Because of these analytic and procedural hurdles, companies have largely been free to produce and use almost any chemical grandfathered in under the law. EPA has banned or restricted only five chemicals that were in commercial use at the time of TSCA's enactment.[5]

Further Incapacitated by the Courts

A federal court decision further eroded EPA's ability to restrict or ban dangerous chemicals. In 1989, after EPA completed a ten-year review of more than 100 studies of the health risks of asbestos and considered comments from the public and the asbestos industry, the agency determined that asbestos is a carcinogen for which there is no safe level of exposure. EPA sought to prohibit any future manufacture, importation, processing, and distribution of asbestos in nearly all products. The asbestos industry successfully challenged the law in court.[6]

The court overturned major portions of the rule banning asbestos on the grounds that EPA lacked substantial evidence that the health problems could not be addressed by a less restrictive means than a complete prohibition of its use. The court asserted that the agency did not consider all necessary evidence, failed to perform cost-benefit analyses of all the possible alternatives to a complete ban, and did not show that the ban was the "least burdensome" rule (to industry) that would adequately protect human health. Because of the court decision, EPA has not been able to take any action to ban asbestos, and numerous asbestos-containing products are commercially available today.

5 EPA has banned or restricted only five chemicals in commercial use at the time TSCA was adopted: polychlorinated biphenyls, fully halogenated chlorofluoroalkanes, dioxin, asbestos (struck down in court), and hexavalent chromium. 40 C.F.R. §§ 749, 761, 763, 766 (2015); 60 Fed. Reg. 31,917, 31,919 (June 19, 1995) (deleting EPA's prohibition on fully halogenated chlorofluoroalkanes for use in aerosols from 40 C.F.R. § 762 because it was superseded by a ban imposed under the Clean Air Act); *see also* U.S. Government Accountability Office, GAO-05-458, Chemical Regulation: Options Exist to Improve EPA's Ability to Assess Health Risks and Manage Its Chemical Review Program app. V (2005), *available at* http://www.gao.gov/assets/250/246667.pdf.

6 Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991) (vacating EPA's asbestos ban, except to the extent it bans products that were no longer produced in the U.S. at the time EPA finalized the rule, and remanding the rule back to the agency).

Only Four of the 20,000 Chemicals Introduced Since 1976 Have Been Restricted

Of the over 20,000 new chemicals that have entered into commercial use since TSCA's enactment, EPA has required testing for only about 250 of them[7] and has placed restrictions on only four.[8] In total, the agency has been able to ban or restrict the use of only nine chemicals to date.

Almost 40 years after its enactment, TSCA is the primary national law that is supposed to protect the public from exposure to toxic substances. It is clearly failing in its mission.

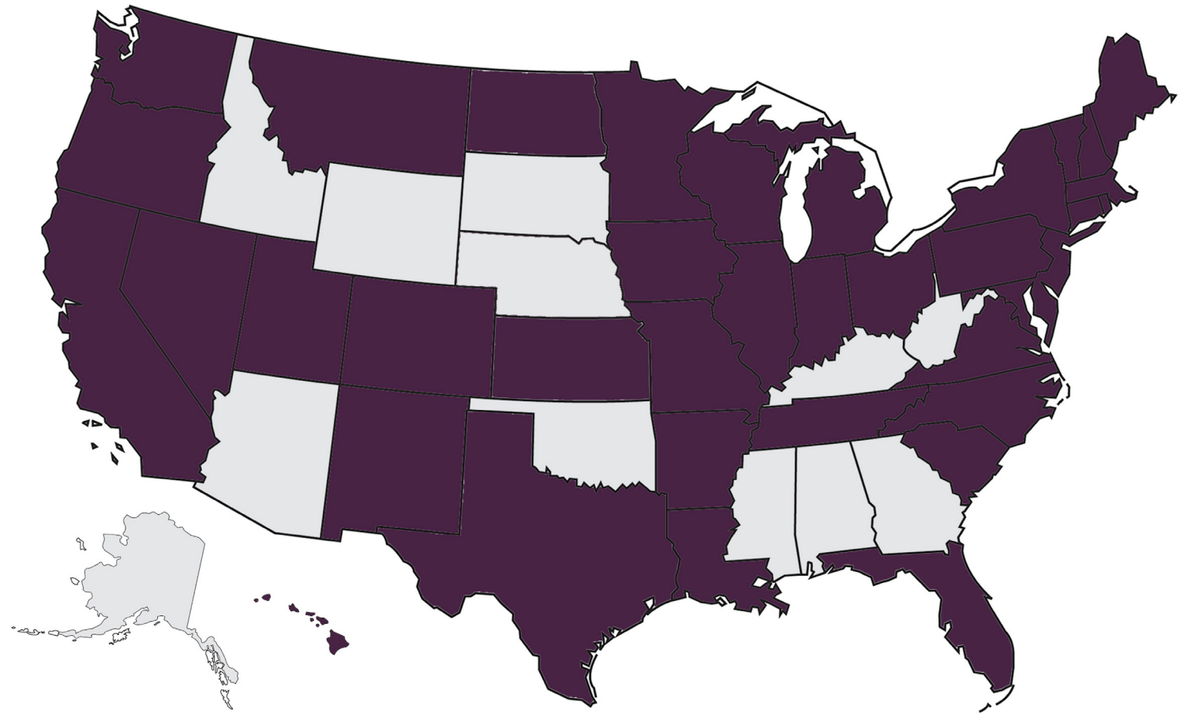
The U.S. government, the public, and often the companies that produce and use chemicals know very little about their risks before they enter the marketplace. EPA does not have the authority to require information from manufacturers so that it can protect the public from harm, and the agency faces a nearly impossible hurdle for effective action, even when scientific evidence has established health impacts.

States Take the Lead

Because our federal system of oversight has proven so inadequate, states have stepped up to regulate dangerous chemicals. California, Maine, Vermont, and Washington State have passed comprehensive chemical laws and safer alternative substance mandates. Other states have restricted or banned chemical classes, such as flame retardants, and individual chemicals (e.g., mercury, the flame retardant Tris, cadmium, and formaldehyde) in various products. In total, 38 states have adopted more than 250 policies to reduce the public health risks from exposure to toxic chemicals.[9]

7 U.S. Government Accountability Office, GAO-13-249, Toxic Substances: EPA has Increased Efforts to Assess and Control Chemicals but Could Strengthen Its Approach 13 (2013), *available at* http://www.gao.gov/assets/660/653276.pdf.
8 40 C.F.R. § 747 (2015) (providing specific use requirements for mixed mono and diamides of an organic acid, triethanolamine salt of a substituted organic acid, triethanolamine salt of tricarboxylic acid, and tricarboxylic acid); *see also* U.S. Government Accountability Office, *supra* note 5, at app. V.
9 *See Bill Tracker*, Safer States, http://www.saferstates.com/bill-tracker (last visited Mar. 16, 2015); *Preventing Toxic Chemical Exposures: States Leading the Way*, Ctr. for Effective Gov't, http://bit.ly/1wsASj0 (last updated Mar. 16, 2015).

FOR AN INTERACTIVE VERSION OF THIS MAP, VISIT bit.ly/state-policy-map



38 STATES HAVE ADOPTED MORE THAN 250 POLICIES DESIGNED TO REDUCE PUBLIC EXPOSURE TO DANGEROUS CHEMICALS.

More states are stepping up to reduce toxic chemicals within their borders. Legislators in 20 states have proposed almost 75 policies that are currently being considered. These state-level policies are stronger than federal standards, often covering toxic chemical issues not addressed by the federal government and offering better protection of the health of state residents and natural resources.

Because TSCA has proved ineffective in protecting public health from toxic chemicals, the public and most public interest organizations have called for reform of TSCA for over a decade. As the states have become increasingly active in filling the gap to provide improved public protections, chemical industry lobbyists have encouraged members of Congress to pass federal legislation to reform TSCA. In the 113th and 114th sessions of Congress, legislation has been introduced by allies of industry and defenders of consumer rights. The central controversy has been whether states will be allowed to continue their traditional role in setting and enforcing health and environmental protections for their residents or whether federal legislation will override state and local laws and regulations and impose lower national standards.

Chemical industry interests prefer national standards that lock in weaker requirements than state policies provide. Right now, California, Maine, New York, Oregon, Vermont, and Washington State are identifying especially toxic chemicals and essentially setting national standards by restricting the use of these hazardous chemicals in consumer products and requiring that manufacturers switch to safer alternatives.

IN RECENT FEDERAL DEBATES, THE CENTRAL CONTROVERSY HAS BEEN WHETHER STATES WILL BE ALLOWED TO CONTINUE THEIR TRADITIONAL ROLE IN SETTING AND ENFORCING HEALTH AND ENVIRONMENTAL PROTECTIONS FOR THEIR RESIDENTS OR WHETHER FEDERAL LEGISLATION WILL OVERRIDE STATE AND LOCAL LAWS AND REGULATIONS AND IMPOSE LOWER NATIONAL STANDARDS.

I. CURRENT FEDERAL LAW AND STATE CHEMICAL PROTECTIONS

States' Rights Under Current Law

The Toxic Substances Control Act (TSCA) allows states to broadly legislate and regulate chemicals, except in limited instances expressly spelled out in the law.[10] These are described below.

Testing and Data Development

Once EPA issues a rule requiring chemical testing, a state cannot establish or enforce a testing requirement for that same chemical if its purpose is similar to EPA's.[11] TSCA permits the agency to require testing to develop data on the health and environmental effects of a chemical if there is insufficient information to determine whether the chemical presents an unreasonable health or environmental risk.[12] In other words, a state can require testing by manufacturers or do its own testing of a chemical – unless EPA has issued a rule requiring testing of said chemical.

Restrictions and Bans

TSCA also allows state and local governments to regulate a chemical if EPA has not developed a rule or order imposing restrictions or prohibitions on the manufacture, processing, distribution, or use of the chemical.[13] Once EPA issues a rule or order and it takes effect, a state can no longer restrict that chemical if the restriction is designed to protect against the same risk as EPA's rule. For example, a federal court overturned an ordinance adopted by a Louisiana parish that would have prohibited *any* disposal of polychlorinated biphenyls (PCBs) within its borders because EPA has already adopted rules addressing PCBs.[14]

10 15 U.S.C. § 2617 (2012). The Supremacy Clause of the U.S. Constitution declares that federal laws shall be the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. This means that when a state law conflicts with federal law, federal law will supersede or preempt state law. There are two types of preemption—express and implied. Express preemption occurs when a federal statute expressly prohibits states from enacting certain laws. Implied preemption occurs when a federal law is silent on its effect on states, but it nevertheless preempts state action. One form of implied preemption is "field preemption," which occurs when Congress intended to cover a broad area of law and exclude states from adopting laws or rules involving that subject matter. Another type of implied preemption is "conflict preemption," which occurs when a state and federal law directly conflict, making it impossible to comply with both, or when a state law presents an obstacle to the objectives put forth by Congress in the federal law.

11 15 U.S.C. § 2617(a)(2)(A).

12 15 U.S.C. § 2603.

13 15 U.S.C. § 2617(a)(2)(B).

14 Rollins Envtl. Servs., Inc. v. Parish of St. James, 775 F.2d 627 (5th Cir. 1985).

However, state laws or rules addressing the way a chemical is disposed of are allowed.[15] **States may also establish or enforce a rule if it is identical to EPA's requirement, is adopted under the authority of another federal law (such as the Clean Air Act), or if the state completely bans the use of the chemical.**[16] For example, a district court has upheld a Dayton, Ohio ordinance pertaining to disposal of PCBs because the city adopted it under the authority of another federal law.[17]

Exemptions and Waivers

TSCA allows a state to apply to EPA for an exemption from its override provisions.[18] EPA's administrator may grant an exemption for a state rule designed to prevent injury to health or the environment if three criteria are satisfied: (1) compliance with the state regulation would not violate a federal rule governing the same risk, (2) **the state regulation provides a significantly higher degree of protection than EPA's rule provides**, and (3) the state rule would not place an undue burden on interstate commerce. Because EPA has taken so little action under TSCA, there is little need for states to request waivers and to the best of our knowledge, no state has ever submitted such a request.

Disclosure and Labeling

TSCA allows EPA to require warning labels for a chemical with instructions regarding its use, distribution, and disposal. EPA may also establish recordkeeping, monitoring, and testing requirements to ensure compliance. Manufacturers or processors can be required to notify distributors, persons who are in possession of or exposed to a chemical, or the public of an unreasonable risk of injury associated with a chemical.

If EPA has issued a disclosure or labeling requirement for a chemical, a state labeling or disclosure requirement designed to protect against the same risk would be overridden.[19] Even when a state disclosure or labeling requirement is designed to protect against a different risk than EPA's requirement, it can be ruled invalid under the U.S. Constitution's Supremacy Clause if the state requirement makes it impossible to comply with the federal rule.[20]

15 15 U.S.C. § 2617(a)(2)(B)(i)-(iii).
16 The exception provided in 15 U.S.C. § 2617(a)(2)(B)(iii) applies to a complete ban on the use of the chemical in the state (other than its use in the manufacture or processing of other substances or mixtures).
17 SED, Inc. v. City of Dayton, 519 F. Supp. 989 (S.D. Ohio, July 30, 1981).
18 15 U.S.C. § 2617(b).
19 15 U.S.C. § 2617(a)(2)(B); 15 U.S.C. § 2605(a).
20 *See supra* note 10.

Because EPA has regulated so few chemicals under TSCA, states have enacted strong laws and regulations over the past 30 years to address chemical risks without any real threat of invalidation. Efforts to reform TSCA should allow these protections to stand and permit future action by states to address new or better-understood chemical risks and to impose restrictions that meet or exceed federal minimum requirements.

BECAUSE EPA HAS REGULATED SO FEW CHEMICALS UNDER TSCA, STATES HAVE ENACTED STRONG LAWS AND REGULATIONS OVER THE PAST 30 YEARS TO ADDRESS CHEMICAL RISKS WITHOUT ANY REAL THREAT OF INVALIDATION.

Public health will not be protected and natural resources will not be preserved by federal legislation that strikes down effective state and local chemical laws and regulations. But recent proposals to reform TSCA would do exactly this, increasing risks to public health and natural resources.

Proposed Federal Reforms Would Override State Chemical Safety Policies

Over the past decade, several members of Congress have developed legislative proposals to "reform" TSCA. Big chemical companies and their lobbyists and trade associations are pushing for federal reform because they are worried about increased state-level action to restrict the chemicals they have spent years developing and integrating into products and production processes.

The American Chemistry Council, the trade association of the U.S. chemical industry, has spent more than $51 million lobbying Congress over the last five years.[21] Forty-eight of the 71 lobbyists they employed in 2013-2014 walked through the revolving door from government to serve the industry they were previously responsible for regulating.[22] The nation's three largest chemical companies – Dow, DuPont, and Monsanto – together spent nearly $100 million lobbying Congress between 2010 and 2014.[23] Chemical companies have spent tens of millions more dollars sponsoring research to cast doubt on whether the chemicals they hold patents on are actually causing cancer or other health problems (think of the tobacco industry's efforts).[24] When EPA does finally issue a rule, companies spend millions to sue, arguing that the agency has not

21 *See* Ctr. for Responsive Politics, *Lobbying Database*, OpenSecrets.org, http://www.opensecrets.org/lobby/clientsum.php?id=D000000365&year=2014 (last visited Mar. 14, 2015).
22 *See* Ctr. for Responsive Politics, *American Chemistry Council*, OpenSecrets.org, http://www.opensecrets.org/orgs/summary.php?id=D000000365 (last visited Mar. 14, 2015).
23 *See* Ctr. for Responsive Politics, *Lobbying Database*, OpenSecrets.org, http://www.opensecrets.org/orgs/summary.php?id=D000000188 (Dow Chemical); *id.*, at http://www.opensecrets.org/orgs/summary.php?id=D000000495 (DuPont Co.); *id.*, at http://www.opensecrets.org/orgs/summary.php?id=D000000055 (Monsanto Co.).
24 *See generally* Michaels, *supra* note 4.

conducted cost-benefit analyses on all possible approaches to reduce health risks. (For example, if EPA wants to ban a dangerous chemical, industry lawyers can demand that the agency produce expensive and time-consuming cost-benefit analyses on all other ways of reducing harm, short of banning the use of the chemical).

Public health and consumer safety advocates, by contrast, have been pushing for TSCA reforms that would raise national standards and allow EPA to restrict and ban chemicals that cause cancer, neurological disorders, and other health problems. We know that exposure to lead reduces the mental capacities of children, but American children continue to be exposed to products that contain the toxic metal. Asbestos is a known cancer-causing agent, but its use has not been nationally prohibited. A growing body of evidence is demonstrating that exposure to toxic chemicals *in utero* or in the first three years of life can have lasting effects.[25] Yet we have banned or restricted the use of only nine dangerous chemicals in nearly 40 years under our federal chemical safety law.

The following TSCA reform measures were proposed and debated in the 113th session of Congress:

- In 2013, the late Sen. Frank Lautenberg (D-NJ) and Sen. Kirsten Gillibrand (D-NY), along with 27 other Democratic co-sponsors, introduced the Safe Chemicals Act, a bill that would have substantially improved existing law and preserved state or local policies that do not directly conflict with federal law.[26] Unfortunately, this bill did not gain bipartisan support.

- A month later, Sen. Lautenberg and Sen. David Vitter (R-LA) introduced the Chemical Safety Improvement Act (CSIA) in an attempt to attract bipartisan cosponsors.[27] This bill would have weakened existing law by prohibiting states from regulating chemicals even when EPA had not yet issued any rules. In response to the Lautenberg-Vitter CSIA, attorneys general from several states, including California, Oregon, Vermont, and Washington State, sent a letter to Sen. Barbara Boxer (D-CA), then-Chair of the Senate Environment and Public Works Committee, expressing strong objections because the legislation would have undermined effective state regulations.[28]

25 *See* Elizabeth Grossman, *What are We Doing to our Children's Brains?*, Ensia (Feb. 16, 2015), http://ensia.com/features/what-are-we-doing-to-our-childrens-brains/; *see also* Phillippe Grandjean & Phillip Landrigan, *Neurobehavioral Effects of Developmental Toxicity*, Lancet Neurology (2014), http://www.thelancet.com/pdfs/journals/laneur/PIIS1474-4422%2813%2970278-3.pdf.
26 Safe Chemicals Act of 2013, S. 696, 113th Cong. (2013).
27 Chemical Safety Improvement Act, S. 1009, 113th Cong. (2013).
28 Letter from State Attorneys General to Chairwoman and Majority Committee Members of Senate Env't & Pub. Works Comm. (July 31, 2013), *available at* http://www.healthandenvironment.org/docs/TSCA_Multistate_Letter_FINAL.pdf.

- When Sen. Lautenberg passed away in June 2013, Sen. Tom Udall (D-NM) took his place as a lead co-sponsor of the CSIA with Sen. Vitter. In mid-2014, the senators revised the bill, retaining its overly broad preemption provisions, but they never formally introduced this legislation.[29]

- TSCA reform proposals also emerged in the House of Representatives. Rep. John Shimkus (R-IL) drafted the Chemicals in Commerce Act (CICA) in February 2014 (and revised the draft in April 2014) but never formally introduced the bill.[30] The draft CICA was designed to override state and local chemical policies; the only exception would be that a state law or regulation addressing a chemical substance could only be adopted under the authority of another federal law. A new version of this House bill is expected to be introduced soon.

- In September 2014, Sen. Boxer revised and improved the Udall-Vitter CSIA, replacing the damaging preemption language with provisions that would preserve the ability of state and local governments to adopt chemical policies.[31]

Two pieces of TSCA-related legislation have been introduced so far in the 114th Congress:

- In early March 2015, Sens. Udall and Vitter introduced another revised version of their bill, which they claim would improve current law by eliminating the "least burdensome" alternative requirement (although it does require that EPA analyze "primary alternatives") and saying that EPA does not have to consider costs when determining the safety of a chemical.[32] The bill also requires protections for "vulnerable populations" (pregnant women and children) and strengthens deadlines for EPA to evaluate a first batch of 25 high-priority chemicals. However, it would still preclude state and local governments from adopting new chemical policies and potentially invalidate some existing ones.

29 Udall-Vitter Draft Revisions to S. 1009, 113th Cong. (2014), http://blogs.cq.com/cqblog-assets/govdoc-4555767.
30 Discussion Draft of Chemicals in Commerce Act, H.R. __, 113th Cong. (Feb. 2014), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CICADD.pdf; Redline Comparison of Discussion Draft of Chemicals in Commerce Act, H.R. __, 113th Cong. (Apr. 2014), http://docs.house.gov/meetings/IF/IF18/20140429/102160/BILLS-113pih-DraftsComparisonofTheChemicalsinCommerceAct.pdf.
31 Sen. Boxer Staff Working Draft CSIA Revisions Part 1, 113th Cong. (2014), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=55202dfb-9a1c-45b5-8eb2-dff2ee414606; Sen. Boxer Staff Working Draft CSIA Revisions Part 2, 113th Cong. (2014), http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=3865eedd-aa32-47da-9d6a-17fd277a1d7b; *see also* Press Release, U.S. Senate Comm. on Env't & Pub. Works, Senator Boxer's Statement on Current TSCA Reform Efforts (Sept. 18, 2014), http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=69343ad5-ff65-15c3-6d34-53c14f435018.
32 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. (2015). The legislation is being pushed as a tribute to the late Frank Lautenberg, but the Environmental Defense Fund is the only public interest organization supporting the bill.

- Sens. Boxer and Markey then introduced the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act, a revised version of legislation Boxer proposed in 2014 that would require a stronger standard by which to judge whether chemicals are safe, faster review of more priority chemicals, swift action on asbestos, and preservation of state legislative and enforcement authority on chemical safety.[33]

Given the composition of the 114th Congress, we expect the 2015 chemical safety debate in the Senate to revolve around the new Udall-Vitter bill and a more conservative House alternative. If the House passes a version of the Shimkus CICA legislation, a combined bill could further weaken the ability of state and local governments to issue or enforce laws and regulations to protect the public from significant chemical risks. These bills would represent huge steps *backward* for effective chemical regulation. They fail to make critical improvements to the current federal law, and in some cases would further weaken it.

Only the Boxer-Markey bill would preserve states' ability to enforce existing laws and adopt new policies to protect their residents while also significantly improving our federal toxic chemical law.

"ONLY THE BOXER-MARKEY BILL WOULD PRESERVE STATES' ABILITY TO ENFORCE EXISTING LAWS AND ADOPT NEW POLICIES TO PROTECT THEIR RESIDENTS WHILE ALSO SIGNIFICANTLY IMPROVING OUR FEDERAL TOXIC CHEMICAL LAW.

33 Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act, S. __, 114th Cong. (2015).

COMPARATIVE TABLE OF OVERRIDE PROVISIONS IN THE TOXIC SUBSTANCES CONTROL ACT AND REFORM PROPOSALS

The table below compares the state law override (preemption) language of the Toxic Substances Control Act (TSCA) with provisions in four TSCA reform proposals: the Lautenberg-Vitter Chemical Safety Improvement Act (CSIA) (S. 1009), Rep. Shimkus' discussion draft of the Chemicals in Commerce Act (CICA), Sens. Udall and Vitter's 2015 bill (S. 697), and the Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act recently introduced by Sens. Boxer and Markey.

	TSCA	Lautenberg-Vitter CSIA	Shimkus CICA (April 2014 draft)	2015 Udall-Vitter Bill	2015 Boxer-Markey Bill
Testing	States cannot adopt or enforce a testing requirement for a chemical if EPA requires testing of that chemical for similar purposes.	States cannot adopt or enforce a testing or information requirement if it is likely to produce the same data or information EPA requires.	States cannot adopt or enforce a testing or information requirement if EPA requires it, if it relates to a chemical for which EPA has completed a risk evaluation, or if, prior to enactment of the bill, EPA issued a rule or allowed a significant new use review period to expire.	After Jan. 1, 2015, states cannot adopt or enforce a requirement for the development of information for a chemical that is likely to be the same information that EPA requires, unless the state's requirement is authorized by a state law in effect on Aug. 31, 2003.	States may establish and enforce any requirement that does not directly conflict with federal law.
Notification of New Chemicals & New Uses	States cannot adopt or enforce a requirement for notification of a new chemical or significant new use if EPA requires notification.	States cannot adopt or enforce a requirement for notification of a new chemical or significant new use if EPA requires notification.	States cannot adopt or enforce a requirement for notification of a new chemical or significant new use if EPA requires notification, or if, prior to enactment of the bill, EPA issued a rule or allowed a significant new use review period to expire.	After Jan. 1, 2015, states cannot adopt or enforce a requirement for notification of a new chemical or significant new use if EPA requires notification, unless the state's requirement is authorized by a state law in effect on Aug. 31, 2003.	States may establish and enforce any requirement that does not directly conflict with federal law.
Disclosure & Labeling	States cannot adopt or enforce disclosure and labeling requirements if they constitute a restriction or ban that is also prohibited.	States cannot adopt or enforce disclosure and labeling requirements if they constitute a restriction or ban that is also prohibited.	States cannot adopt or enforce disclosure and labeling requirements if, prior to enactment of the bill, EPA issued a rule or allowed a significant new use review period to expire, or if the requirement constitutes a state restriction that is also prohibited.	After Jan. 1, 2015, states cannot adopt or enforce disclosure and labeling requirements if they constitute a state restriction or ban that is also prohibited, unless the state's requirements are authorized by a state law in effect on Aug. 31, 2003.	States may establish and enforce any requirement that does not directly conflict with federal law.

	TSCA	Lautenberg-Vitter CSIA	Shimkus CICA (April 2014 draft)	2015 Udall-Vitter Bill	2015 Boxer-Markey Bill
Restrictions & Bans	States cannot adopt or enforce a requirement for a chemical if EPA has adopted a rule or order for that chemical.	For high-priority chemicals, states cannot adopt or enforce restrictions or bans for a chemical once EPA completes a safety determination. States cannot adopt new restrictions or bans once EPA publishes a schedule for a safety assessment and determination. For low-priority chemicals, states cannot adopt new restrictions or bans once EPA designates it as low priority.	States cannot adopt or enforce restrictions or bans once EPA finds that a new chemical does not warrant regulation or an existing chemical does not present a significant risk of harm, has adopted a rule or order related to a new or existing chemical, or after EPA has allowed a significant new use review period to expire. For low-priority chemicals, states cannot adopt new state restrictions or bans once EPA designates it as low priority.	For high-priority chemicals, state restrictions or bans adopted between Jan. 1, 2015 but before enactment of the bill are overridden once EPA: (a) finds that a chemical does not pose an unreasonable risk, or (b) finds that it does pose an unreasonable risk and adopts a rule, unless the state's restriction or ban is authorized by a state law in effect on Aug. 31, 2003. States cannot adopt new restrictions or bans once EPA begins a safety assessment, unless the state's restriction or ban is authorized by a state law in effect on Aug. 31, 2003. States may restrict or ban low-priority chemicals after notifying EPA.	States may establish and enforce any requirement that does not directly conflict with federal law.
Exceptions	States are free to adopt or enforce a requirement that is identical to EPA's requirement, is authorized by another federal law, or bans the use of the chemical in the state.	A state requirement is allowed if it: (1) is adopted under another federal law; (2) requires reporting or information collection that is not required by EPA or another federal law; or (3) is adopted under a state law on water quality, air quality, or waste treatment or disposal that does not restrict the manufacture, processing, distribution, or use of a chemical, and is not required by or inconsistent with an EPA action under the proposed sections on new chemicals or safety assessments and determinations.	States are free to adopt or enforce a requirement that is authorized by another federal law.	A state requirement is allowed if it: (1) is authorized by another federal law; (2) requires reporting, monitoring, or information collection that is not required by EPA or another federal law; or (3) is adopted under a state law on water quality, air quality, or waste treatment or disposal that does not restrict the manufacture, processing, distribution, or use of a chemical, and is not required by, inconsistent with, or in violation of an EPA action under the proposed sections on new chemicals or safety assessments and determinations.	Not applicable.

	TSCA	Lautenberg-Vitter CSIA	Shimkus CICA (April 2014 draft)	2015 Udall-Vitter Bill	2015 Boxer-Markey Bill
Exemptions & Waivers	EPA may grant an exemption for a state requirement if compliance would not cause a violation of an EPA requirement, it provides a higher degree of protection than EPA's requirement, and it does not burden interstate commerce.	EPA may grant an waiver for a state requirement (other than a new state restriction or ban on a low-priority chemical) if EPA finds either: (1) compelling state conditions warrant a waiver, the state policy would not burden interstate commerce or violate other federal requirements, and the state policy would be based on the best available science or supported by the weight of the evidence; or (2) EPA's safety assessment or determination has been unreasonably delayed, and the state certifies that it has a compelling local interest, its policy would not burden interstate commerce or violate other federal requirements, and it would be grounded in reasonable scientific concern.	None.	EPA may grant a waiver for a state to establish or enforce a testing requirement, a restriction or ban, or a notification requirement, if EPA finds: compelling state conditions warrant a waiver, the state policy would not burden interstate commerce or violate other federal requirements, and in the judgment of the EPA administrator, the state requirement is consistent with sound objective scientific practices, the weight of the evidence, and the best available science. Alternatively, EPA may grant a waiver for a state to adopt a new restriction or ban if EPA finds: the state has a compelling local interest that warrants granting a waiver, the state policy would not burden interstate commerce or violate other federal requirements, and the state requirement is grounded in reasonable scientific concern.	Not applicable.

II. WHAT WOULD BE LOST IF FEDERAL LEGISLATION OVERRIDES STATE POLICIES?

State actions on chemical safety have ranged from narrow restrictions on specific chemicals to comprehensive policies.[34] California, Maine, Vermont, and Washington State have implemented comprehensive chemical risk management frameworks to safeguard the health of their residents.[35] These state programs share several major components: listing and prioritizing chemicals most in need of testing; supporting research, testing, and data collection; requiring that companies use safer chemical alternatives when they are available; requiring labeling and disclosures; and restricting and prohibiting particular chemicals.

Another 34 states have restricted the use of specific chemicals or required warning labels on them. Altogether, at least 250 laws or state rules have been established over the past 30 years, restricting the use of more than a dozen chemicals or groups of chemicals. The changes in TSCA could put pieces of this policy infrastructure at risk.

How the Udall-Vitter Bill (S. 697) Could Override State Laws

While the 2015 Udall-Vitter bill backs away from provisions in the 2014 proposal that would override all state chemical policies, it would preclude states from adopting ***new*** policies to address chemicals of high concern once EPA begins an assessment.

It can take EPA up to seven years to complete a review and assessment of the scientific literature concluding that exposure to a chemical presents "an unreasonable risk of harm" to humans and the environment. More years of delay can occur if industry challenges the assessment with industry-sponsored private research. And when EPA finalizes a rule to address the exposure risks from the chemical, industry can again challenge the agency for failing to conduct cost-benefit analyses of every possible alternative way industry could reduce the risk, thus slowing down federal rulemaking for months or years more. States can take no action while this federal process is underway.
The Udall-Vitter bill would also prohibit states from adopting laws and regulations that are identical to any federal regulations issued by EPA. This is significant because it means if EPA

34 Ross Strategic, State Chemicals Policy: Trends and Profiles 4-6 (2013); *U.S. State Chemicals Policy Database,* Interstate Chemicals Clearinghouse, http://theic2.org/chemical-policy (last visited Mar. 16, 2015); *Bill Tracker*, Safer States, http://www.saferstates.com/ bill-tracker (last visited Mar. 16, 2015); *Preventing Toxic Chemical Exposures: States Leading the Way*, Ctr. for Effective Gov't, http://bit.ly/1wsASj0 (last updated Mar. 16, 2015).
35 Ross Strategic, *supra* note 34, at 11; Liz Edsell, *Victory for Public Health: Toxic-Free Families Wins Final Passage*, Vt. Pub. Interest Res. Group (May 12, 2014), http://www.vpirg.org/news/victory-for-public-health-toxic-free-families-wins-final-passage/.

chooses not to *enforce* a federal rule, the state has no authority to step in to fill the gap and protect its residents and the environment. Ambiguity in the text of the bill offers substantial opportunity for legal challenges, meaning that courts will ultimately decide how the law operates in practice.

Restrictions on State Testing and Information Requirements

Several states require manufacturers to provide information, including toxicity data, about the chemical substances they produce and use in their products. This allows state programs to identify and prioritize toxic chemicals like cadmium, formaldehyde, hexavalent chromium, and perchloroethylene (a dry cleaning chemical) for potential bans or restrictions.

State programs may differ in scope, but they typically require manufacturers to report the presence of specific chemicals in their products and, in some states, to evaluate and report on potentially safer available alternatives that could be used in those products.

For example, Washington State's Children's Safe Products Act focuses primarily on gathering test data and other information about chemicals in commercial products. The information collected provides the basis for future policies to reduce the use of toxic chemicals in commerce. Manufacturers are also required to perform assessments of safer alternatives. California has also developed an extensive program mandating the use of safer available alternatives. The Safer Consumer Products program requires manufacturers to use less dangerous alternatives in their products when feasible.[36] Connecticut, Maine, New York, Oregon, Vermont, and more than 20 other states employ other means to ensure the use of safer alternatives to dangerous chemicals – for example, requiring environmentally friendly cleaning products to be used in schools, establishing green product purchasing programs, and requiring public entities to make environmentally friendly purchases.[37] Similar policies have recently been proposed by legislators in more than half a dozen states.

While state-level testing and data development requirements have provided state governments with critical information needed to effectively reduce public health and environmental risks from exposure to toxic chemicals, the 2015 Udall-Vitter bill would bar states from adopting new policies after Jan. 1, 2015 that require chemical manufacturers to develop information about a chemical if the information is "reasonably likely" to be the same as required by EPA.[38]

36 Cal. Code Regs. tit. 22 §§ 69501-10 (2012); *see, e.g.*, Ross Strategic, *supra* note 34, at 17.
37 Ross Strategic, *supra* note 34, at 12.
38 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. § 18(a)(1)(A) (2015).

Future testing and data development policies authorized by a state statute that was in effect before Aug. 31, 2003 would not be banned.[39] That date was chosen as a compromise to ensure that California's chemical labeling and disclosure law, Prop 65, would not be preempted by the proposed legislation. But most states would no longer be able to develop new policies that require manufacturers to develop information about chemical risks or to assess safer alternatives.[40]

The bill would also prevent states from adopting policies after Jan. 1, 2015 that require manufacturers to submit notifications (called pre-manufacture notices) to the state before manufacturing a new a chemical or putting a chemical to a new use. If EPA designates a new use as "significant" and issues a rule requiring the manufacturer to submit a notification, the state could not do the same unless it had a statute that was in effect on Aug. 31, 2003.[41]

According to the sponsors and supporters of the bill, the new federal law would not override any state actions taken prior to Jan. 1, 2015, but this is limited to actions "taken under the authority of a State law that prohibits or otherwise restricts manufacturing, processing, distribution in commerce, use, or disposal of a chemical substance."[42] A state policy adopted prior to Jan. 1, 2015 could be preempted if it was neither authorized by a state law meeting the conditions noted above nor authorized by a state law in effect on Aug. 31, 2003. If the drafters of the bill intended to safeguard *all* state policies adopted prior to the start of 2015, they should revise this ambiguous language.

Restrictions on New State Disclosure and Labeling Laws

Disclosures and warning labels on products allow people to make informed decisions about the products they purchase and avoid those containing chemicals linked to serious health effects like cancer, neurotoxicity, and reproductive harm. In the interest of ensuring residents have information to make healthy choices, several states have enacted labeling and disclosure requirements through "Right-to-Know" programs that require manufacturers to provide information about exposure risks of chemicals to the state or the public, or both.[43]

39 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. § 18(e)(1)(B) (2015).
40 *See* Am. Bar Ass'n, Section of Env't, Energy & Res., TSCA Preemption of State Laws and Regulations Briefing Paper 13-15 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/whitepapers/tsca/TSCA_paper_state_law_preemption.pdf (discussing the effects of the 2014 Udall-Vitter Chemical Safety Improvement Act (CSIA)).
41 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. §§ 18(a)(1)(C), (e)(1)(B) (2015).
42 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. § 18(e)(1)(A) (2015).
43 Ross Strategic, *supra* note 34, at 14.

CALIFORNIA'S PROP 65 REQUIRES WARNINGS BE PROMINENTLY DISPLAYED ON PRODUCTS THAT CONTAIN ANY OF THE OVER 700 CHEMICALS LISTED BY THE STATE AS CAUSING CANCER OR REPRODUCTIVE HARM.

Udall-Vitter would prevent states from adopting new laws or regulations after Jan. 1, 2015 that require manufacturers to disclose information about chemical risks or to label consumer products. Only state policies adopted under the authority of a state law that was in effect on Aug. 31, 2003 would be permitted.

California's Safe Drinking Water and Toxic Enforcement Act, also known as Prop 65, is an excellent example of effective labeling legislation. Prop 65 requires manufacturers to prominently display warnings on products that contain any of the over 700 chemicals listed by the state as causing cancer or reproductive harm.[44] Since Prop 65 was adopted by the state in 1986, the Udall-Vitter bill would not preempt existing or future state actions authorized by this law.

44 Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§ 25180.7, 25192, 25249.5-25249.13 (West Supp. 1989).

Disclosure policies have recently been proposed by legislators in seven states, which would be preempted if enacted after Jan. 1, 2015.

The preservation of state disclosure laws is also ambiguous. It is unclear whether some state disclosure and labeling requirements adopted prior to Jan. 1, 2015 could be preempted.

Additionally, it is unclear whether other, less direct warnings or disclosures, such as point-of-sale signs, would trigger the override provisions. For example, a court might find that a state law requiring a warning label directing consumers to only use a product in a well-ventilated area restricts the "use" of a chemical and would be invalid under the proposed law.[45] *This override could also apply to pending or future state and local laws that require companies to disclose chemicals they use in hydraulic fracturing (or "fracking") operations.*[46] This would undermine the efforts of public officials to ensure people have the information they need to make key decisions on what products to buy, where to live, and where to send their children to school.

Serious Constraints on the Ability of States to Restrict or Prohibit Toxic Chemicals

States have broad authority to directly regulate and restrict toxic chemicals in the manufacturing, processing, distribution, use, and disposal stages under TSCA's current state preemption provisions. California's Green Chemistry program and Vermont's Toxic Free Families Act are examples of broad approaches to such efforts.

Other states have restricted the use of chemicals in certain consumer products or banned the use of specific chemicals. For instance, Maine, Minnesota, New York, Oregon, and Vermont have restricted harmful chemicals including bisphenol-A (BPA), cadmium, formaldehyde, hexavalent chromium, lead, mercury, nonylphenol and nonylphenol ethoxylates (potential endocrine disruptors), perchloroethylene, and polybrominated diphenyl ether flame retardants.[47] Legislators in more than a dozen states have recently proposed similar policies.

45 Am. Bar Ass'n, *supra* note 40, at 10-13 (discussing the effects of the 2014 Udall-Vitter CSIA).
46 *Hearing on Discussion Draft on The Chemicals in Commerce Act Before the Subcomm. on Env't & the Econ. of the H. Comm. on Energy & Commerce*, 113th Cong. 31-33 (2014) (statement of Rep. Richard Tonko), *available at* http://docs.house.gov/meetings/IF/IF18/20140429/102160/HHRG-113-IF18-Transcript-20140429.pdf (discussing with Jim Jones, Assistant Administrator of EPA, the impact of the preemption language in the discussion draft of the Chemicals in Commerce Act, which would have a comparable effect as the Udall-Vitter CSIA on many state and local laws and regulations).
47 Ross Strategic, *supra* note 34, at 8-9; *Bill Tracker*, Safer States, http://www.saferstates.com/ bill-tracker (last visited Mar. 16, 2015); *U.S. State Chemicals Policy Database,* Interstate Chemicals Clearinghouse, http://theic2.org/chemical-policy (last visited Mar. 16, 2015).

New York has adopted a strong, comprehensive policy banning chlorinated Tris, a flame retardant, and restricting the use of other flame retardants known to pose cancer risks and to have serious negative neurological and reproductive effects. State restrictions also apply to specific types of products. Many state chemical regulations are aimed at protecting vulnerable populations, predominantly pregnant women and children. States have restricted, and in some cases banned, the use of chemicals like BPA, cadmium, and phthalates in products including baby bottles, children's toys, school supplies, paint, jewelry, and packaging based on studies showing strong links to negative developmental, reproductive, and neurological effects.

The 2015 Udall-Vitter bill provides multiple scenarios in which a state would be prevented from restricting or banning the manufacturing, processing, distribution, use, or disposal of a high-priority chemical. If enacted, the legislation would prohibit states from establishing a new law or administrative action that restricts or bans a chemical as soon as EPA begins its safety assessment on that substance (unless the restriction or ban is authorized by a state law that was in effect on Aug. 31, 2003).[48]

Currently, EPA takes an average of three to five years to develop and finalize a new testing requirement, and companies then take an additional two to two-and-a-half years to provide the requested data to the agency.[49] The Udall-Vitter bill would allow EPA up to seven years to complete a safety assessment and adopt a rule. Several additional years of delay could result if industry challenged the agency's assessment or regulation in court. In the meantime, states could take no action to reduce the risks of the chemicals most likely to be dangerous to the health of their residents.

In other words, if it took EPA seven to ten years to issue a rule restricting use of a chemical ***of high concern***, states could do nothing while waiting. EPA has completed an initial assessment of BPA (a ubiquitous chemical found to cause reproductive and developmental harm), but the agency has not yet taken action to regulate this toxic chemical.[50] If EPA were to designate BPA as a high-priority chemical, the Udall-Vitter bill would prevent states from enacting any new laws or regulations restricting the use of BPA unless the state law qualified under one of the narrow preemption exceptions (*i.e.*, the state action was authorized under another federal law).

48 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. §§ 18(b), (e)(1)(B) (2015).
49 U.S. Government Accountability Office, *supra* note 7, at 13.
50 *Bisphenol A (BPA) Action Plan Summary*, U.S. Envtl. Prot. Agency, http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/bpa.html (last updated Jan. 8, 2015).

Other scenarios would also undermine state restrictions passed between Jan. 1, 2015 and the date of the enactment of the Udall-Vitter bill:

- Once EPA determines that a chemical *does not* present an "unreasonable risk to human health or the environment," *the legislation would override any state policies on that chemical* (unless authorized by a state law that was in effect on Aug. 31, 2003).[51]

- If EPA finds a chemical *does* present an unreasonable risk, federal rules would override state polices when the agency restricts or prohibits that chemical (unless the state action was authorized by a state law that was in effect on Aug. 31, 2003).

Thus, even when a federal rule places only minimal restrictions on a dangerous chemical, a state would be prohibited from imposing identical or more stringent restrictions on the chemical.[52] For example, an Albany County, New York law banning the use of six toxic metals and benzene in children's products or apparel, adopted on Jan. 7, 2015, could potentially be preempted by a less stringent federal EPA rule on the use of these toxic chemicals in children's products or apparel.

It is unclear whether some state restrictions or bans adopted prior to Jan. 1, 2015 would be invalidated.

Exceptions to the Udall-Vitter Bill

Under the 2015 Udall-Vitter bill, states can adopt or enforce a law, administrative action, regulation, performance standard, safety determination, scientific assessment, or any protection for public health or the environment only if the action: (1) is authorized under another federal law; (2) implements a reporting, monitoring, or information collection requirement that is not already required by EPA or any other federal law; or (3) is adopted under the authority of a state law related to air or water quality or waste treatment or disposal that does not restrict the manufacture, processing, distribution, or use of a chemical; is not required by, inconsistent with, or in violation of an EPA action under the proposed sections of Udall-Vitter pertaining to new chemicals and significant new uses or safety assessments and determinations.[53]

51 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. §§ 18(a)(1)(B)(i), (e)(1)(B) (2015).
52 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. §§ 18(a)(1)(B)(ii), (e)(1)(B) (2015).
53 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. § 18(d) (2015).

Unfortunately, the 2015 Udall-Vitter bill does not define what is meant by a "reporting, monitoring, or information collection requirement," creating ambiguity about when this exemption would apply. Similarly, defining what state actions would be allowed under the third category would probably require court rulings that could substantially limit the type of actions that would qualify for this exemption.[54]

States Unlikely to Qualify for Waivers Under Udall-Vitter

The Udall-Vitter bill includes provisions for a state to apply for a waiver that would allow it to continue to enforce its own laws and rules relating to testing and data collection, notification of a significant new use, and restrictions and prohibitions on high-priority chemicals. However, such a waiver can only be granted if the EPA administrator finds all of the following:[55]

- Compelling state or local conditions warrant a waiver to protect human health or the environment;

- Compliance with the state requirement would not unduly burden interstate commerce;

- Compliance with the state requirement would not violate any federal laws, rules, or orders; and

- Based on the EPA administrator's judgment, the state requirement is consistent with sound objective scientific practices, the weight of the evidence, and the best available science.

Under the legislation, the administrator must decide whether to grant the waiver within 180 days from the date it was submitted. If the deadline passes without any action, the waiver cannot be granted.

A waiver from the preemption provisions related to new state laws or regulations that restrict or ban a high-priority chemical may only be granted if the EPA administrator finds:

- The state has a compelling local interest that warrants a waiver to protect human health or the environment;

54 Am. Bar Ass'n, *supra* note 40, at 16 (discussing the effects of the 2014 Udall-Vitter CSIA).
55 Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, 114th Cong. § 18(f) (2015).

- Compliance with the state requirement will not burden interstate commerce;

- Compliance with the state requirement would not violate any federal laws, rules, or orders; and

- The state requirement is grounded in reasonable scientific concern.

The administrator must decide whether to grant the waiver within 90 days from the date it was submitted. As above, if the deadline passes with no action, the waiver cannot be granted. Waivers granted under this provision remain in effect until the date that EPA completes its safety assessment and determination for a high-priority chemical, or the date that companies have to begin complying with an EPA restriction or ban on a high-priority chemical, whichever is later.

Meeting any of these requirements sets a high bar for states, and few will have the resources necessary to apply for a waiver. If they do, the waiver is judicially reviewable and will likely be challenged by chemical companies or industry groups seeking to prevent state waivers or block laws that result from them. Ambiguous terms in the waiver provisions would likely be subject to lawsuits, leaving the courts to decide how the law will be interpreted. The California Office of the Attorney General has noted that the requirement that states seeking a waiver demonstrate a compelling local interest is an "unduly burdensome test" that was retained from the 2014 Udall-Vitter bill.[56]

56 Letter from Brian Nelson, Gen. Counsel, State of Cal. Office of the Attorney Gen., to Senator Barbara Boxer (Mar. 5, 2014), *available at* https://s3.amazonaws.com/s3.documentcloud.org/documents/1682314/2015-3-5-calif-ag-letter.pdf.

III. IF THE GOAL IS REDUCED EXPOSURE TO TOXIC CHEMICALS, FEDERAL LAW SHOULD PRESERVE STRONG STATE AND LOCAL CHEMICAL SAFETY STANDARDS

The federal Toxic Substances Control Act of 1976 was supposed to protect public health and the environment from dangerous chemicals. It has failed to do so. A new federal chemical safety law should reflect and uphold the principles adopted by the states that have been leaders in protecting their residents and natural resources from the risks of exposure to toxic chemicals.[57] A new federal law should:

- Require manufacturers to report health and exposure information about the chemicals they use to regulators, businesses, and the public;

- Require manufacturers to provide the information regulators need to determine if the chemicals in their products are safe;

- Enable government to identify and prioritize chemicals of concern and establish its authority to regulate the most problematic chemicals;

- Design chemical regulations to protect the most vulnerable populations, including pregnant women and children;

- Promote the use of safer chemicals and products by requiring manufacturers to assess and identify safer alternatives to problematic chemicals of concern;

- Assess emerging chemicals of concern, such as nanomaterials, for public and environmental safety before they go into widespread use;

- Strengthen federal law but **preserve the right of state and local governments to regulate chemicals of concern**; and

- Provide sustained funding for state reporting, testing, and enforcement programs.

57 Cal. Envtl. Prot. Agency et al., States' Principles on Reform of the Toxic Substances Control Act (2009), *available at* http://www.calepa.ca.gov/PressRoom/Releases/2009/Dec02Sig.pdf.

Provisions in recent TSCA reform bills that allow for broad preemption of state laws that meet or exceed federal minimum requirements are a major step backward in the struggle to improve public health and to preserve our natural resources. **If the broad preemption provisions in current reform proposals are adopted, states would be prohibited from protecting children and other residents from unnecessary exposure to toxic chemicals.**

For most environmental laws, the federal government sets ***minimum*** standards, but states are not prohibited from taking action that meets or exceeds those minimums.[58] The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act set minimum standards that states may not fall below, but states have the authority to enact more stringent laws should they decide to do so.[59] Other environmental statutes, like the Endangered Species Act and the Surface Mining Control and Reclamation Act, set both minimum and maximum standards that states may not legislate beyond, but they have either limited preemptive scope or exceptions to preemption.[60]

Recently proposed chemical safety reform bills break from this tradition. They would significantly limit the ability of states to adopt stronger health and environmental standards, even standards that have broad public support.

Federal chemical standards should serve as a floor, not a ceiling, for efforts to protect vulnerable Americans from being exposed to toxic chemicals and the risk of deadly diseases. The broad preemption provisions in Udall-Vitter will prevent state and local governments from taking action when they identify serious health risks. This is wrong. In our system of federalism, states have traditionally played an essential role in ensuring the health and well-being of their residents, with the federal government establishing minimum standards. Reform of the Toxic Substances Control Act or any other public protections should not override the safety standards that state residents demand that are identical to, or stronger than, federal standards.

58 *Constitutional Considerations: States vs. Federal Environmental Policy Implementation: Hearing Before the Subcomm. On Env't & the Econ. of the H. Comm. on Energy & Commerce*, 113th Cong. (2014) 12-13 (statement of Sen. Henry Waxman), *available at* http://docs.house.gov/meetings/IF/IF18/20140711/102452/HHRG-113-IF18-Transcript-20140711.pdf.
59 *See, e.g.*, Paul Weiland, Comment, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 Harv. Envtl. L. Rev. 237, 256-57 (2000).
60 *Id.* at 257-58.

APPENDIX: STATE CHEMICAL LAWS AND THE CONSTITUTION'S COMMERCE CLAUSE

As state chemical laws and regulations develop and become more effective in protecting the public from dangerous chemical exposure, the chemical industry has and will continue to employ strategies and raise bogus arguments that undercut state chemical management efforts. Where federal law has not preempted state action, an increasingly common strategy employed by the chemical industry is alleging that state chemical laws and regulations are unconstitutional because they violate the Commerce Clause of the U.S. Constitution.

However, 38 states now have over 250 laws, regulations, or policies in place to protect their residents and the environment from exposure to toxic substances. To date, none of these laws or regulations has been overturned by courts as violating the Commerce Clause. Using these existing laws and regulations as a guide, and considering the tips provided below, states looking to enact new laws or regulations can minimize the risk that the action can be challenged as violating the commerce clause.

The Commerce Clause: The Supreme Court's Tests for Reviewing State Laws

The U.S. Constitution's Commerce Clause empowers Congress to regulate interstate commerce.[61] Even when Congress has not exercised this power, the commerce clause prohibits states from enacting laws and regulations that *discriminate against* or *unreasonably burden* interstate commerce. These limits are not found in the text of the Constitution, but rather, the U.S. Supreme Court has ruled that they are implied.[62] When referring to these implied limits on states, this provision is often called the "dormant" or "negative" commerce clause.

The Supreme Court's legal test for reviewing state laws challenged on dormant commerce clause grounds begins with the question of whether the state law discriminates against interstate commerce *on its face* or *in effect*. A state law that is found to be discriminatory is presumed to be invalid.[63]

61 US Const. art. I, sec. 8, cl. 3 ("The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").
62 *E.g.*, Gen. Motors Corp. v. Tracy, 419 U.S. 278, 287 (1997).
63 *E.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978). The Supreme Court has only upheld a facially discriminatory law in one instance, where the state of Maine demonstrated that its law prohibiting the import of live baitfish into the state served a legitimate local purpose and no other nondiscriminatory means exist to achieve that purpose. Maine v. Taylor, 477 U.S. 131 (1986).

Conversely, when a state law is not discriminatory, but only indirectly affects interstate commerce, the Court applies a balancing test, called the *Pike* test, to determine whether the state law unreasonably burdens interstate commerce.[64] Under the *Pike* balancing test, "where a state law regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[65]

Drafting Laws to Overcome Dormant Commerce Clause Violations

1. Draft the law so that it does not *discriminate against* out-of-state commerce on its face or in effect.

The Supreme Court has routinely found state laws that expressly benefit in-state companies to the detriment of out-of-state companies to be clearly discriminatory. For example, the Court has found a New York statute to be discriminatory on its face when it would ban in-state sales of milk purchased outside of the state below a certain fixed price.[66]

State laws that are neutral on their face, but have the effect of discriminating against out-of-state commerce, are also presumed to be invalid. The Supreme Court has found a North Carolina statute to be discriminatory in effect because it prohibited the display of state grades on apple containers shipped into the state.[67] Although the statute applied to both in-state and out-of-state growers and dealers, the Court found it discriminated against Washington State apples that were graded against more stringent criteria than federal grades.[68] The Court found North Carolina's statute would have benefitted in-state apple producers while imposing a significant burden on apple growers and dealers in Washington State.[69]

State chemical laws and regulations that apply equally to in-state and out-of-state manufacturers and only incidentally affect interstate commerce should be reviewed under the *Pike* test. However, the courts have not established a bright line that distinguishes between laws that are discriminatory in effect and those that only incidentally burden interstate commerce. To avoid potential challenges, a state legislature should be careful that the laws it drafts do not directly or indirectly benefit local companies to the detriment of out-of-state companies.

64 *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
65 *Pike*, 397 U.S. at 142 (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)); *see also* Complete Auto Transit v. Brady, 430 U.S. 274 (1977) (upholding a state tax that was fairly apportioned and did not discriminate against interstate commerce).
66 Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).
67 Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977).
68 *Hunt*, 432 U.S. at 350-352.
69 *Hunt*, 432 U.S. at 350-352.

Once a court decides to apply the *Pike* test, the next inquiry is whether the burden imposed on interstate commerce is clearly excessive in relation to the local benefits. In these cases, courts look at the local interest involved, its impact on interstate commerce, and whether the state could have promoted the interest in a less impactful way. The court will uphold the law unless its impact on interstate commerce clearly outweighs its benefits.

2. Design the law to promote a legitimate local public interest.

Public health and the environment are matters of local concern and fall squarely within the bounds of traditional state powers to protect the health, safety, and well-being of their residents. In determining whether a state law was designed to achieve a legitimate local public interest, courts have typically deferred to the legislature and have recognized a wide range of interests, including protections for public health and wildlife and the environment.[70]

While state chemical laws and regulations range from chemical-specific bans to comprehensive frameworks, they all share the important goal of protecting public health and the environment from dangerous substances. Actual proof that the state's concern is warranted is not generally required. Nonetheless, to overcome any questions about the true purpose of the state law, the state should refer to data or other information that shows the chemicals it plans to regulate pose a risk to human health or the environment, and the state should define the law or regulation to reduce that risk.

3. Ensure the putative local benefits outweigh any burden on interstate commerce.

Even if a court finds a state law was designed to achieve a legitimate public interest and only incidentally impacts interstate commerce, it will not uphold the law if the burden on interstate commerce clearly outweighs the putative local benefits.[71] For example, in *Kassel v. Consolidated Freightways Corp. of Delaware*, the Supreme Court struck down an Iowa law prohibiting 65-foot double-tractor-trailers from traveling through the state because it found that the law substantially interfered with interstate commerce and only achieved marginal benefits to public safety.[72]

70 *See, e.g.*, Kathleen Dachille, Tobacco Control Legal Consortium, Regulating Tobacco Advertising and Promotion: A "Commerce Clause" Overview for State & Local Governments 2 (2010), *available at* http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-regadvert-2010.pdf.
71 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Grocery Mfrs. of Am. v. Gerace, 755 F.2d 993 (2d Cir. 1985) (citing Minn. v. Clover Leaf Creamery Co., 449 U.S. 456, 474 (1981)).
72 Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 671 (1981).

Because a reviewing court would apply this balancing test, it is not easy to determine with complete certainty that *any* state law or regulation to restrict or prohibit toxic substances would be upheld. The answer would depend on whether the states' legitimate interest outweighs the burden imposed on interstate commerce.

Examples of State Laws and Regulations Upheld under Balancing Test

***Minnesota v. Clover Leaf Creamery*:** The Supreme Court upheld a Minnesota law banning the sale of milk in plastic nonreturnable, nonrefillable containers.[73] The state's ban sought to address concerns that the packaging caused solid waste management problems, promoted energy waste, and depleted natural resources. The Court found that the ban applied evenhandedly "by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State."[74]

Applying the *Pike* balancing test, the Court found that the burden imposed by the state's ban was "relatively minor" since milk could still move across the state's border and "since most dairies package their products in more than one type of containers, the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight."[75] The Court held that the minor burden the law imposes was far outweighed by the state's interest in conserving energy and natural resources and relieving problems with managing solid waste.

***National Electrical Manufacturers Ass'n v. Sorrell*:** The Second Circuit Court of Appeals upheld a Vermont statute requiring manufacturers of certain products containing mercury, such as fluorescent light bulbs, to label the products and packaging.[76]

The court dismissed an argument that manufacturers would be required to either quit selling their products in Vermont or include the labels on products sold in every other state. In doing so, the court stated, "To the extent the statute may be said to 'require' labels on lamps sold outside Vermont, then, it is only because the manufacturers are unwilling to modify their production and distribution systems to differentiate between Vermont-bound and non-Vermont-bound lamps."[77] The court continued, "[A] decision to abandon the state's market rests entirely with individual

73 Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981).
74 *Minnesota*, 449 U.S. at 471-72.
75 *Minnesota*, 449 U.S. at 472-73.
76 Nat'l Elect. Mfrs. Ass'n v. Sorrell, 272 F. 3d 104 (2d Cir. 2000).
77 272 F.3d at 111.

manufacturers based on the opportunity cost of capital, their individual production costs, and what the demand in the state will bear. Because none of these variables is controlled by the state in this case, we cannot say that the choice to stay or leave has been made for manufacturers by the state legislature, as the Commerce Clause would prohibit."[78]

The court also denied an argument that the Vermont statute would impose burdens on interstate commerce because it could potentially result in manufacturers facing a patchwork of state labeling requirements. The court explained that "It is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be an actual conflict between the challenged regulation and those in place in other states."[79]

***Grocery Manufacturers of America, Inc. v. Gerace*:** In another case before the Second Circuit Court of Appeals, the court upheld a state law requiring labeling of certain food products containing imitation cheese and requiring signage to be posted at establishments that sold imitation cheese.[80] The court noted that a state regulatory scheme is only invalid "if the burden on interstate commerce *clearly outweighs* the State's legitimate purposes." In this case, the state's requirements could lead restaurants and food service establishments to stop using imitation cheeses instead of complying with the sign, menu, and container requirements. Finding this to be a relatively minor burden, the court concluded that it did not clearly outweigh the state's interest in ensuring consumers have accurate information.

***National Kerosene Heaters Ass'n v. Commonwealth of Massachusetts*:** A federal district court upheld a state law banning the sale of unvented kerosene heaters anywhere in the state.[81] Finding the state has a legitimate interest in preventing the risk of fire, the court applied the balancing test. In regard to the putative local benefits side of the scale, the court noted that the state "need not now, nor need they ever demonstrate that UL 647 heaters are unsafe or that the ban is wise." Instead, the state need only show that the "members of the General Court could rationally believe that the heaters are unsafe."

Despite this, the court found there was information available in the record to support the state's legitimate cause for concern. When weighed against the burden, the court explained the ban on kerosene heaters meant only that manufacturers could not sell their unvented heaters in the state, but they are free to sell them in any other state without restriction. The court also dismissed

78 272 F.3d at 111.
79 272 F.3d at 111 (citation omitted).
80 Grocery Mfrs. of Am., Inc. v. Gerace, 755 F. 2d 993 (2d Cir. 1985).
81 Nat'l Kerosene Heaters Ass'n v. Commonwealth of Mass., 653 F. Supp. 1079 (D. Mass. 1987).

claims by the trade association that depriving heaters to consumers was a burden on interstate commerce, explaining that, "Supreme Court dormant Commerce Clause cases make clear that 'burden', in its constitutional sense, refers not to any forced changes in market structure or prices or available products. Burden refers to a hindering of the interstate commercial system. Such hindering will generally only be shown by discrimination – by 'economic protectionism' – or by interference with uniformity, where uniformity has been shown to be necessary."[82]

***Smith v. District of Columbia*:** The Court of Appeals for the District of Columbia upheld a D.C. regulation prohibiting the sale of radar detectors in the district, as well as the possession of a radar detector in a motor vehicle in the district.[83] The court found that the regulation was adopted under the Commissioner's authority to adopt regulations necessary for protecting persons and property and "lesser measures are not available to accomplish the legislative goal of providing safe streets."[84] On weighing the balance between the burden on interstate commerce and the state's putative local interest, the court concluded that "[e]recting a barrier at the border of the District of Columbia against such devices is justified by the benefit which the regulation promotes."[85]

82 653 F. Supp. at 1095 (citing Minn. v. Clover Leaf Creamery, Inc., 449 U.S. 456, 470-75 (1981)).
83 Smith v. District of Columbia, 436 A.2d 53 (D.C. 1981).
84 436 A.2d at 58.
85 436 A.2d at 59.

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