

# Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations

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*Railroads are operating waste transfer stations in their rights of way without any governmental oversight, despite the fact that solid waste management and disposal has long been regulated at the state and local level. This incongruous situation is the result of railroads' aggressive litigation campaign to preempt generally applicable laws under a federal statute designed to deregulate rail economics. This phenomenon illustrates new uses of preemption doctrine by regulated entities, and some agencies, as a shield against state regulation even when there is no effective federal regulation to fill the gap. Restrained preemption*

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*jurisprudence is a necessary counterweight to regulatory voids, as Congress cannot anticipate all creative legal arguments that urge preemption based on unclear statutory language, is often imprecise when defining the scope of preemption provisions, and does not readily revise statutes to correct erroneous judicial interpretations. Courts must therefore have a primary role to ensure that preemption is not unintentionally overextended to the detriment of health and safety regulations. However, the courts' declining use of a presumption against preemption of police power laws has upset the delicate balance between federal and state interests. With a view towards restoring the presumption against preemption, this Article criticizes past attempts to ground it upon historical areas of state regulation, and suggests grounding it upon a line of Supreme Court cases that use regulatory gaps to mark the plausible limits of congressional intent to preempt. This proposed revival of the presumption against preemption also draws support from constitutional limitations on Congress's powers to veto state laws.*

*George Parisek wonders what's in the dust clouds that spew from the giant trash heap near his home in North Bergen.*

*"There are times it looks like a fire, there's so much dust," says Parisek, a retired mechanic. "I grow tomatoes and peppers, and this stuff is all over them. This drives me crazy."*

*He and the neighbors constantly hose down their houses, their cars and their gardens to wash away the grime.*

*And they wonder: Is it dangerous to breathe this stuff? Should they let their kids play in the yard? Should they eat the vegetables they grow in their gardens?<sup>1</sup>*

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#### INTRODUCTION

Unregulated railroad transfer stations have been opening and operating with impunity over the last few years in densely populated areas on the East and West Coasts. In an extreme example, five waste stations that were little more than fifty-foot high open piles of construction and demolition debris opened in one New Jersey municipality. The piles emitted clouds of dust on dry days and leached contaminated water into nearby wetlands and streams on rainy days. State inspectors documented extensive violations of state law, and water samples from standing pools at three of the transfer stations demonstrated elevated levels of mercury, arsenic, and lead. Despite these conditions, state officials have been unable to shut down the facilities. Instead, courts have blocked the clean-up efforts as preempted by a federal railroad rate deregulation statute.

Neighbors and other concerned citizens are left without any protections because no federal agency has assumed responsibility for overseeing environmental compliance at transfer facilities once state and local regulations are preempted. This is not an isolated phenomenon. Along with solid waste, many other contemporary areas of state regulation are more comprehensive than federal regulation. In the air pollution field alone, states have made more progress towards greenhouse gas control regimes than the federal government,<sup>2</sup> have adopted more stringent mercury control rules,<sup>3</sup> and have more vigorously enforced rules that require pollution controls on old power plants.<sup>4</sup> Even with respect to securing chemical plants against terrorist attacks—an

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2. See Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 720–21 (2006); Michael H. Wall, *The Regional Greenhouse Gas Initiative and California Assembly Bill 1493: Filling the American Greenhouse Gas Regulation Void*, 41 U. RICH. L. REV. 567 (2007).

3. Twenty-three states are planning to adopt stricter limits on mercury emissions from power plants in their borders than required by the federal government. *Air Toxics: 23 States Pursuing Stricter Mercury Controls Than Required Under EPA Clean Air Rules*, 37 Env't Rep. (BNA) 2381 (Nov. 24, 2006).

4. *E.g.*, Casey Roberts, Note, *New York v. EPA: State Response to a Federal Regulatory Rollback*, 33 ECOLOGY L.Q. 613, 615–16 (2006).

issue that has obvious international aspects—the rules of some states are more protective than proposed or existing federal rules.<sup>5</sup>

Preemption doctrine is potentially a great obstacle to progressive state policies. There is almost no limit on Congress's power to preempt state laws under the Supremacy Clause<sup>6</sup> should it intentionally choose to do so, because Congress's regulatory powers under the Commerce Clause can reach almost all intrastate issues.<sup>7</sup> Congress may displace even those nondiscriminatory state policies that would otherwise pass muster under dormant commerce clause limitations.<sup>8</sup> In short, Congress's ability to preempt is generally thought to be limited only by its intent,<sup>9</sup> or, stated differently, the self-restraint that it exercises for political or other reasons.<sup>10</sup> Any such restraint that existed has declined in the past few decades.<sup>11</sup>

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5. For example, New Jersey has adopted emergency rules under the authority of the New Jersey Domestic Security Preparedness Act, N.J. STAT. ANN. § APP. A:9-69.6c (2006) and N.J. STAT. ANN. § APP. A:9-74.11.a; the Toxic Catastrophe Prevention Act, N.J. STAT. ANN. § 13:1k-19 to -32; and the Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11, to assess the vulnerability of chemical facilities to terrorist attack and to encourage the use of inherently safer approaches such as the use of less toxic chemical feedstocks. See generally Dana D. Shea, Legislative Approaches to Chemical Facility Security 4–5 (Cong. Research Serv., CRS Report for Congress Order Code RL33043, July 12, 2006) (reviewing state laws), available at <http://www.ncseonline.org/NLE/CRSreports/06May/RL33043.pdf>. Proposed federal legislation and rules on the topic would preempt more stringent state standards. Chemical Facility Anti-Terrorism Act of 2006, H.R. 5695, 109th Cong. § 1807 (2006); Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276 (Dec. 28, 2006) (proposed rules). Unlike New Jersey's rules, the proposed federal laws would not explicitly encourage the use of less toxic chemicals and other inherently safer approaches.

6. "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . ." U.S. CONST. art. VI, cl. 2.

7. E.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). But see *United States v. Lopez*, 514 U.S. 549 (1995) (suggesting that the Court will closely scrutinize Congress's articulated reasons for invoking its powers under the Commerce Clause because it does not grant unlimited regulatory powers).

8. The courts have interpreted the Commerce Clause of the U.S. Constitution as including a dormant power to prevent certain state actions in order to effectuate the clause's explicit grant of power over interstate commerce to the federal government. Since many if not most state laws may affect interstate commerce, courts will only declare a Commerce Clause violation if the laws facially discriminate against out-of-state entities or if the putative local benefits are outweighed by an undue burden on interstate commerce. E.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

9. E.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

10. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544–45 (1954).

11. See U.S. HOUSE OF REPRESENTATIVES COMM. ON GOV'T REFORM, MINORITY STAFF SPECIAL INVESTIGATIONS DIV., CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS (June 2006) (finding that the House and Senate had voted fifty-seven times in the previous five years to preempt state laws and regulations, and twenty-seven of the bills were enacted as statutes), available at <http://oversight.house.gov/documents/20060606095331-23055.pdf>. Rep. Waxman has provided a publicly accessible database of preemptive legislation passed by the House and Senate since January 2001. *Id.*; see also U.S. ADVISORY COMMISSION

The stakes are particularly high where the displacement of state law is not filled in by any corresponding federal law, thereby leaving a regulatory gap.<sup>12</sup> The risks presented by gaps are significant because state and federal governments have asymmetric abilities to provide or to deny remedies to the public. Where state regulations are inadequate to address societal problems, the federal government can enter the field and fill any voids in government oversight, as happened in the modern wave of federal social and environmental regulation in the 1960s and 1970s. But where federal regulations are inadequate or nonexistent, states may fill gaps only if not preempted by congressional action that triggers the Supremacy Clause (or if not prohibited by the dormant commerce clause, a matter that is outside the scope of this Article).

It is the courts, not Congress, that determine whether state laws are preempted once a federal law is enacted.<sup>13</sup> Empirical studies show that courts now invoke preemption with greater frequency than they did in the past.<sup>14</sup> In many different areas of law, federal courts are interpreting vague or general commands in federal statutes as nullifying protective state laws.<sup>15</sup> Preemption doctrine is therefore worth monitoring for any

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ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES 6–8, tbl.1-1 (Sept. 1992), *available at* <http://www.library.unt.edu/gpo/acir/Reports/policy/a-121.pdf> (finding that of 439 preemption statutes between 1789 and 1991, 30 were enacted from 1789 to 1899 and 233 were enacted between 1969 and 1991). The report notes that the fear of increasing federal power led President Eisenhower to appoint a temporary commission to study the federal system from 1953 to 1955, and the Kestnbaum Commission recommended limitations on federal preemption. *Id.* at 12.

12. This Article uses the plain meaning of the term “regulatory gap” to describe matters of public concern that are not addressed at any level of government, with the added sense in the preemption context that governmental bodies are frustrated from filling the void and addressing the problem. Most scholarly treatments of regulatory gaps assume that the term is well understood and do not discuss its definition at length. *E.g.* Susan Bartlett Foote, *Regulatory Vacuums: Federalism, Deregulation, and Judicial Review*, 19 U.C. DAVIS L. REV. 113, 115 (1985). One of the few scholarly treatments defining regulatory gaps uses the term to describe unaddressed social ills, and adds the gloss of self-imposed restraints on regulation due to the inability to claim exclusive credit for taking action. William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 5, 47 (2003) (observing that “[s]ins of omission, in contrast, are far less visible and arguably far more pervasive [than overregulation]”). Buzbee describes the phenomena wherein competing entities want to regulate in a certain field but allocate their resources elsewhere because of their fear of sharing political credit, a much milder obstacle to regulation than the active preclusion of state action through preemption.

13. The common view of nearly all courts, including the Supreme Court, is that preemption is based upon the Supremacy Clause. Recent scholarship has argued that preemption is a judicial concept that is separate from and unrelated to the original understanding of the Supremacy Clause, which announced only a rule of decision in the event of true conflicts between state and federal law. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785, 803–04 (1994) (tracing preemption to judicial doctrines developed in the 1910s and 1920s). This analysis, while a persuasive reading of history, has not been adopted by courts.

14. *See infra* notes 17–21.

15. *E.g., infra* notes 187, 189. For example, mortgage-lending companies have sought exemptions from state consumer protection laws because federal laws provide little or no

signs of a return to *Lochner*-era laissez-faire social policy, under which courts would bar states from exercising their police powers to protect citizens, even in the absence of action by the federal government.<sup>16</sup>

Such concerns should be heightened by evidence that there is no principled federalist or structural explanation for the recent surge in preemption rulings.<sup>17</sup> Rather, empirical studies show that judges' policy preferences and politics partly, if not fully, explain the outcomes of preemption cases.<sup>18</sup> Thus courts' increased use of preemption has been documented to work almost universally to the disadvantage of environmental,<sup>19</sup> labor,<sup>20</sup> civil rights and other laws intended to protect citizens.<sup>21</sup> One commentator has noted that the Bush administration is aggressively pushing preemption as a means of overturning state laws that provide a remedy for individuals against corporations, and it has taken the unprecedented step of filing amicus briefs urging preemption in lawsuits involving such seemingly private disputes as farmers injured by pesticide mislabeling, patients injured by defective pacemakers,<sup>22</sup> and

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protection for consumers. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); see Brief of AARP et al. as Amici Curiae at 12, *Watters*, 127 S. Ct. 1559 (2007) (No. 05-1342), 2006 WL 2570989, available at [http://www.tlpj.org/briefs/watters\\_amici\\_090106.pdf](http://www.tlpj.org/briefs/watters_amici_090106.pdf) (noting that the federal Office of the Comptroller of the Currency has brought only a handful of consumer protection or antidiscrimination enforcement cases in several decades, and has insufficient staff to handle such cases).

16. *Lochner v. New York*, 198 U.S. 45 (1905) struck down maximum hours regulations for bakers, and the due process jurisprudence it spawned caused the Court to invalidate many state and federal laws for nearly thirty years. During much of this period, the Court also prevented Congress from acting by adopting a limited view of what could be considered interstate commerce. *E.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The combination of these limitations on both state and federal government created the conditions for regulatory gaps.

17. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism*, 69 U. CHI. L. REV. 429 (2002).

18. David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 (1999). See generally Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343, 345-57 (2002) (noting "selective judicial passivity" in subconstitutional decisionmaking).

19. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000) (empirical study of cases shows a bias against environmental law, and conservative Justices will abandon their core principles to get rid of state laws). Lazarus' article takes for granted that preemption disadvantages the environment and notes the trend in voting records on preemption. *Id.*; see also Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 19 PACE ENVTL. L. REV. 619 (2002).

20. Nathan Newman, *Workers' Rights: Federalist Hypocrisy and the Preemption of State Labor Laws*, in *AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE* 251-66 (Denise C. Morgan, Rachel D. Godsil & Joy Moses eds., 2006).

21. Herbert Semmel, *It's Not About States' Rights: Double Talk by the Activist Supreme Court Majority*, in *AWAKENING FROM THE DREAM*, *supra* note 20, at 239-50.

22. David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95 (2005).

consumers harmed by mislabeled drugs.<sup>23</sup> The current federal administration has also extended the reach of administrative preemption by, for example, issuing predatory lending regulations that cut off state remedies;<sup>24</sup> stating in the preamble to new prescription drug regulations that an agency's approval of labels preempts failure to warn tort claims;<sup>25</sup> and proposing to preempt state laws intended to protect chemical plants from terrorist attacks.<sup>26</sup> Legal realism, if not cynicism, may best explain the sudden prevalence of preemption in caselaw and regulations.

Significant issues of social policy therefore hinge on preemption jurisprudence. This Article develops a new theoretical foundation from which to revitalize the presumption against preemption. That doctrine, which required a clear statement from Congress before the Supreme Court would interpret a statute to displace states from regulating in areas in which they historically operated, has fallen into disuse and is now moribund. By examining the conceptual underpinnings of the presumption in light of the existence of regulatory gaps that affect the people's right to self-protection, this Article seeks to establish a more flexible and protective doctrine that is not limited to historic exercises of the police power. This Article necessarily relies upon the institutional competence of the judiciary to ensure that Congress does not unintentionally create gaps in social and environmental regulations. Courts should ensure that the displacement of state laws is a deliberate choice by Congress as an integral part of affirmative federal policies. Only then will regulatory voids be the subject of public disclosure and debate. The courts can readily discharge their institutional obligation by requiring that any social and environmental regulatory gaps left by preemption rulings are supported by clear statements in federal statutes.

The creation of regulatory gaps through judicial preemption rulings is not just a theoretical problem. Part I of this Article is a detailed analysis of how railroads were able to enter the highly regulated solid waste industry, claim exemption from all state oversight under a federal statute intended to deregulate railroad economics, and obtain the

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23. *E.g.*, Brief for Amicus Curiae United States, *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006) (No. 05-CV-05500-MMB). The court granted the manufacturer's motion to dismiss for implied preemption under the Food, Drug and Cosmetic Act, *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006), and the case is now on appeal in the U.S. Court of Appeals for the Third Circuit. *Colacicco, appeal docketed*, No. 06-3107 (3d Cir. June 21, 2006) (argued Dec. 10, 2007).

24. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) (final rule); *see also* Preemption Determination and Order, 68 Fed. Reg. 46,264 (Aug. 5, 2003) (issuing an order, at the request of a bank, that preempts application of the Georgia Fair Lending Act).

25. Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934-36 (Jan. 24, 2006) (final rule) (summarizing the agency's view of the law as reflected in numerous amicus briefs filed in private cases).

26. *See supra* note 5.



economic benefits of operating in a regulatory gap. The net result of current preemption doctrine in those cases has been to strip citizens of the power to ensure that waste transfer stations are safe. This fundamental injustice serves as a backdrop to analyzing current doctrine.

Part II explores relevant trends in the Supreme Court's preemption jurisprudence. The Court's reliance on a presumption against preemption of state laws to interpret federal statutes has declined over time, and this Article provides an additional explanation for the presumption's decline based upon flaws in the original formulation of the doctrine. Part II also explores the implications of the Court's recognition, in cases involving the potential elimination of all remedies for compensatory tort victims, that regulatory gaps mark the plausible limits of congressional intent to preempt. This Article argues that the Court's concern about regulatory gaps should extend to collective rights of self-protection that prevent harm, which are even more central to core notions of states' police powers. In addition to the standard federalism concerns that animate restraints on preemption, Part II builds on scholarship that suggests constitutional limitations on Congress's powers to strip remedies from citizens.

Part III proposes a change to preemption doctrine that reflects the analysis in Part II. Under the proposed revitalized presumption, courts should consider whether a preemption ruling will create a regulatory gap, and in those circumstances should require a clear statement that Congress intended to strip remedies designed to prevent the underlying conduct at issue. Such a prudential rule of construction would avoid potential constitutional issues.

I. PREEMPTION AND REGULATORY GAPS: A CASE STUDY OF HOW THE PUBLIC IS STRIPPED OF PROTECTIONS AGAINST THE ENVIRONMENTAL HAZARDS OF UNREGULATED RAILROAD WASTE TRANSFER STATIONS

This Article uses railroad facilities that process solid waste as a case study to explore preemption doctrine. A confluence of circumstances has created a regulatory gap: solid waste transfer stations are regulated solely by the states, and the federal government has no regulatory apparatus to oversee railroads' operation of such facilities.<sup>27</sup> Railroads claim they are exempt from many types of state regulation because of Congress's unrelated efforts to deregulate railroad economics in the Interstate Commerce Commission Termination Act of 1995 (ICCTA).<sup>28</sup> Statutory ambiguity regarding the scope of preemption under ICCTA has led to a split between a broad view of ICCTA preemption in the Second, Ninth,

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27. Neither the U.S. Environmental Protection Agency nor the Surface Transportation Board regulate waste transfer stations. See *generally infra* notes 151–162 and accompanying text.

28. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered sections of 49 U.S.C. (2006)).

and District of Columbia Circuits and a narrow view of preemption in the Third, Sixth, Eighth, and Eleventh Circuits.<sup>29</sup>

As a result, in cases involving railroad waste stations, lower courts have found state solid waste laws preempted by ICCTA. In their analyses, the courts have ignored the nuances of the statutory text and congressional intent and have failed to apply any presumption against preemption of traditional state regulation of solid waste. The courts have also failed to weigh the fact that their decisions may leave the public without any effective recourse for public health and environmental problems. Instead, the courts have relied on a general interest in uniformity and a general federal interest in protecting railroads as a quintessential form of interstate commerce.

*A. Pollution from Unregulated Waste Transfer Facilities in North Jersey*

The actions of one railroad, the New York, Susquehanna & Western Railway (Susquehanna & Western) illustrate the full implications of ICCTA preemption of environmental laws. Susquehanna & Western is a Class II, or “regional” railroad that operates a 400-mile line between northern New Jersey and central New York, where it transfers railcars to a national Class I railroad for delivery to the ultimate destination.<sup>30</sup> Around 2003, Susquehanna & Western opened five solid waste handling facilities along its existing tracks in North Bergen, New Jersey. Susquehanna & Western entered the waste business quickly by contracting with existing, traditional waste handling firms to do the work; these arrangements purported to leave the railroad in charge of the facilities and operations while the so-called independent contractors undertook all of the real loading and transfer activities.<sup>31</sup>

Susquehanna & Western allowed the contractors to dump construction and demolition debris in open piles that grew to over fifty feet tall. After operators sorted the debris to remove recyclable metals

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29. See *infra* notes 142–149.

30. Railroads are classed by the Association of American Railroads according to their operating revenue. Class I railroads have an operating revenue of at least \$319.3 million (in 2005) and are between 3,200 and 32,000 miles in length, while regional railroads are at least 350 miles long or have an operating revenue between \$40 million and the Class I threshold. See ASS'N OF AMERICAN RAILROADS, OVERVIEW OF U.S. FREIGHT RAILROADS (Jan. 2007), <http://www.aar.org/PubCommon/Documents/AboutTheIndustry/Overview.pdf>.

31. See *N.Y., Susquehanna & W. Ry. Corp. v. Jackson*, No. 05-4010, 2007 WL 576431, at \*7–8 (D.N.J. Feb. 21, 2007), *vacated*, 500 F.3d 238 (3d Cir. 2007); see also Declaration of Harley A. Williams et al., *N.Y., Susquehanna & Western*, No. 05-4010, 2007 WL 576431 (on file with author). Elsewhere, railroads established business relationships with many existing waste operators, some of whom had extensive violations and had been shut down. See Robert Moran, *Codey Opposes Waste Station*, PHILA. INQUIRER, May 26, 2005, at B4 (discussing Southern Railroad).

and material that could not be disposed of in the receiving landfills, they used heavy machinery to crush the waste and to push it into piles for loading on railcars.<sup>32</sup> Other solid waste processing activities performed at the sites included the grinding of tires and wood pallets into chips and the sorting of recyclable metal, presumably for resale.<sup>33</sup> These activities caused emissions of dust into a nearby bus maintenance depot and other businesses, as well as runoff of contaminated stormwater into nearby wetlands and streams.<sup>34</sup>

State waste inspectors found extensive violations of state laws, including operations conducted outside of an enclosed building and the absence of waste water or dust control systems.<sup>35</sup> They sampled standing pools of water at three of the transfer stations and found mercury, arsenic, and lead in excess of regulatory standards.<sup>36</sup> Fire inspectors observed flammable acetylene bottles and paint, piles of waste tires, hydraulic fluid in puddles on the ground, missing or inoperable fire extinguishers, improper dispensing of fuel, and the use of equipment close to high-voltage power lines, all of which created an extreme fire danger.<sup>37</sup> At another of the sites, officials found eighty 7,000-pound containers of phosphorus pentasulfide, a flammable chemical that can ignite or explode on contact with water and release toxic fumes; the company routinely left the gates to the facility open and had not reported the chemical to local emergency services, which might have unwittingly attacked any fire with water.<sup>38</sup> The construction and demolition debris waste pile at another site was so high that one crane came in contact with overhead high-voltage wires, short-circuiting the lines and causing a

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32. See Declaration of David Mercado, *N.Y., Susquehanna & Western*, No. 05-4010, 2007 WL 576431 (on file with author).

33. See Declaration of James Scully, *N.Y., Susquehanna & Western*, No. 05-4010, 2007 WL 576431 (on file with author); see also Declaration of Bahram Salahi, *N.Y., Susquehanna & Western*, No. 05-4010, 2007 WL 576431 (on file with author).

34. See Declaration of David Mercado, *supra* note 32; photographs on file with the author; see also *Garbage Growing Near Train Tracks*, N. BERGEN J., Jan. 16, 2005.

35. Zinnia Faruque, *Debris Piles at Railroad Yards Pose a Hazard*, *Pols Say*, HERALD NEWS (Passaic County, N.J.), May 27, 2005, at C1.

36. Facsimile and attached laboratory reports from John Zuzek, N.J. Dep't of Environmental Protection, Northern Bureau of Water Compliance and Enforcement, to James K. Hamilton, same (Nov. 4, 2005) (on file with author).

37. Memorandum from William Kramer, Jr., Deputy Director, N.J. Dep't of Community Affairs, Division of Fire Safety, to Susan Bass Levin, Commissioner, N.J. Dep't of Community Affairs (Jan. 20, 2005) (on file with author).

38. HUDSON REGIONAL HEALTH COMMISSION, INVESTIGATION (2005) (on file with author); NORTH HUDSON REGIONAL FIRE & RESCUE, CORRESPONDENCE REPORT (July 2005) (on file with author); Jarrett Renshaw, *Explosive Chemical in Rail Yard called Recipe for Disaster*, STAR-LEDGER (Newark, N.J.), July 15, 2005, at 25; Peter J. Sampson, *Sticking Point in Chemical Dispute*, RECORD (Bergen County, N.J.), July 21, 2005, at L1; Peter J. Sampson, *Toxic Hazard Sitting at N. Bergen Rail Site*, RECORD (Bergen County, N.J.), July 14, 2005, at 1.

power outage.<sup>39</sup> And after one carload of waste caught fire and was extinguished, Susquehanna & Western refused to allow the firefighters to inspect the waste, based on the railroad's belief that federal law preempted local fire controls.<sup>40</sup>

These deplorable conditions are all the more remarkable because solid waste activities have been subject to state and local controls long before the rise of the modern, federal regulatory state.<sup>41</sup> The controls rest on the strong foundation of states' general police power, which is "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people."<sup>42</sup> States' ability to exercise such police powers cannot in principle be taken away because such powers are inextricably intertwined with states' continuing sovereignty.<sup>43</sup> This quintessential type of self-policing is a keystone of our democratic system of government.<sup>44</sup> For that reason the Court's dormant

39. N.Y., *Susquehanna & W. Ry.*, No. 05-4010, 2007 WL 576431, at \*7-8 (D.N.J. Feb. 21, 2007) (citing declaration of Joshua Lazarus, on file with author), *vacated*, 500 F.3d 238 (3d Cir. 2007). *Susquehanna & Western* did not report that incident to the power company that operates the lines or to local authorities. Declaration of Michael Kayes, N.Y., *Susquehanna & Western*, No. 05-4010, 2007 WL 576431 (on file with author).

40. John A. Gavin, *Railcars Worry Towns*, RECORD (Bergen County, N.J.), May 31, 2006, at L1.

41. See, e.g., *AGG Enters. v. Washington County*, 281 F.3d 1324, 1328 (9th Cir. 2002) ("One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community.").

42. *Manigault v. Springs*, 199 U.S. 473, 480 (1905); see also *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("[t]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (internal quotation omitted)); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 719 (1985) ("the regulation of health and safety matters is primarily, and historically, a matter of local concern").

43. See *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. (5 How.) 504, 583 (1847) (Taney, C.J.) ("the police powers of a State . . . are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions"); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) ("The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208 (1824) (referring to "[t]he acknowledged power of the State to regulate its police, its domestic trade, and to govern its own citizens"); cf. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1046-49 (3d ed. 2000) (citing these cases, and discussing evolution of the concept of state police powers, at least insofar as it is used to resolve dormant commerce clause cases).

44. For example, the dissenting Justices in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting), in discussing an earlier opinion they would have followed, emphasized the close link between democratic principles of government and state police powers:

In National League of Cities, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government. In emphasizing the need to protect

commerce clause jurisprudence has long tolerated state enactments that are legitimately designed to protect the public, even where they have a greater effect on out-of-state entities than on in-state entities.<sup>45</sup> This Article discusses how and why federal courts have prevented the exercise of such seemingly inviolable state powers in the instance of railroad waste stations.

*B. Congress Passes ICCTA to Deregulate Railroad Economic Decisions that Touch upon Rates, Market Entry and Exit, and Core Operations*

The rise of unregulated waste stations was not an anticipated consequence of Congress's deregulation of rail economics in the Interstate Commerce Commission Termination Act of 1995. That law instead sought to unpeel the many layers of regulations that had accumulated after the passage of the Interstate Commerce Act and the creation of the Interstate Commerce Commission in 1887.<sup>46</sup> By 1970,

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traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee. We recognized that "it is functions such as these which governments are created to provide . . ." and that the States and local governments are better able than the National Government to perform them. 426 U.S. at 851.

469 U.S. at 575–76 (internal footnotes omitted).

45. See generally *TRIBE*, *supra* note 43, at 1045 n.11 (citing concurring opinion in *The License Cases*, 46 U.S. at 631), 1046–49 (citing *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851) and other cases). Compare *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding state ban on the import of baitfish because the state had no other way to prevent the spread of nonnative parasites that would threaten to devastate its unique and fragile native fishery), with *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (striking down Oklahoma law that prohibited the export of natural minnows, where the ban was not a necessary part of a regime to conserve a natural resource). The Court has summarized the rule as follows: "As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. at 151 (internal citation omitted).

46. See Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379. In considering the 1995 ICCTA, the Senate summed up the history of ever-broadening railroad regulation as follows:

Various subsequent Acts through 1920 broadened and strengthened the ICC's regulatory authority over railroads. The ICC's regulatory authority also expanded to other modes, including pipeline transportation by the Hepburn Act of 1906. Responding to railroad complaints about unfair competition, Congress brought the nascent truck and bus industries under the ICC's regulatory authority by the Motor Carrier Act of 1935. In 1940, inland and coastal water carriers were brought under the jurisdiction of the ICC, which then consisted of eleven members. At one point, the ICC even regulated telegraph, telephone, cable and radio communications, as well as standard time.

S. REP. NO. 104-176, at 2–3 (1995). See generally James W. Ely, Jr., "The Railroad System Has Burst Through State Limits": *Railroads and Interstate Commerce, 1830–1920*, 55 ARK. L. REV. 933 (2003) (reviewing history of rail regulation and deregulation).

seven major railroads were bankrupt, and railroad bankruptcies continued through the remainder of the decade.<sup>47</sup> Congress responded to that crisis by enacting deregulatory reforms designed to lower rates and to loosen market exit and entrance restrictions so that the railroad industry could compete with the trucking and shipping industries. Congress began its reform efforts by limiting the Interstate Commerce Commission to its core mission of policing rates and other closely related economic issues.<sup>48</sup> In 1980, Congress adopted more comprehensive economic reforms in the Staggers Rail Act.<sup>49</sup> That act displaced state jurisdiction over general and inflation-based rate increases and fuel surcharges and limited state powers over any “intrastate rate, classification, rule, or practice” except under standards and procedures approved by the Commission.<sup>50</sup>

Congress completed those reforms with the 1995 ICCTA, which freed railroads to set rates and make operational decisions about the opening, closing and maintenance of rail lines based on economic considerations alone. ICCTA substantially overhauled the Interstate Commerce Act and the economic regulation of rail transportation,<sup>51</sup> as well as of motor carriers<sup>52</sup> and of pipeline carriers.<sup>53</sup> Patterned on other deregulatory statutes, ICCTA sought to substitute market forces for rate and operational regulations whenever possible to increase the overall efficiency of transportation.<sup>54</sup> Congress thereby sought to regulate indirectly through market forces and to create an environment for “effective competition among rail carriers and with other modes.”<sup>55</sup> ICCTA’s legislative purpose section, for example, states that it is intended “to reduce regulatory barriers to entry into and exit from the

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47. S. REP. NO. 104-176, at 3.

48. In 1966, Congress transferred certain non-price related oversight responsibilities to the newly-created Department of Transportation, and in 1970 transferred the authority to develop and oversee rail safety regulations to the Federal Rail Administration. Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971. In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act to allow rail carriers to earn “adequate revenues” by allowing them to seek approval of rates based, to a degree, on market forces. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 144.

49. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

50. *Id.* § 214 (amending 49 U.S.C. §§ 10501, 11501). The Staggers Act also partially deregulated rates for firms without market dominance, subjected collective ratemaking to generally applicable antitrust laws, encouraged railroad mergers, and eased the ability of railroads, particularly short-line railroads, to abandon lines and service. The Staggers Act “began the substantial economic deregulation of the surface transportation industry and the whittling away of the size and scope of the ICC.” H.R. REP. NO. 104-311, at 82 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 793, 794.

51. 49 U.S.C. § 10501(a)(1) (2006).

52. *Id.* § 13501.

53. *Id.* § 15101.

54. *See generally id.* § 10101(1).

55. *Id.* § 10101(4); *see also id.* § 10101(5).

industry,”<sup>56</sup> almost certainly a reference to the prior rules that had prevented railroads from abandoning unprofitable tracks and lines that had prevented rail from effectively competing with other transport modes. Congress was careful, however, to state that reform efforts must ensure that railroads “operate transportation facilities and equipment without detriment to the public health and safety.”<sup>57</sup>

Consistent with this change in regulatory philosophy, Congress eliminated the Interstate Commerce Commission and created the Surface Transportation Board (the Board) to oversee the economic deregulation of railroads. ICCTA consolidated the few remaining economic regulations in the Board and preempted conflicting state economic regulations. This changed the federal government’s relationship with the states, which had previously played a meaningful role in regulating railroad rates and operations.<sup>58</sup> In its own words, Congress intended ICCTA “to reflect the direct and complete preemption of state *economic* regulation of railroads.”<sup>59</sup>

### *C. ICCTA’s Exclusive Jurisdiction and Preemption Clause and Congressional Intent Regarding the Scope of Preemption*

As codified at 49 U.S.C. § 10501, a single subsection in ICCTA does double-duty, addressing both the jurisdiction of the Board and the preemptive effect of its decisions and remedies:

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail

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56. See *id.* § 10101(7). See generally *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1338 (11th Cir. 2001) (noting that ICCTA sought to minimize general federal rail regulations).

57. 49 U.S.C. § 10101(8) (2006).

58. See 49 U.S.C. §§ 10501(b)–(d), 10907(b)(1) (1988) (pre-ICCTA statutes providing for concurrent federal-state jurisdiction or exclusive state jurisdiction over certain aspects of rail regulation); *Fla. E. Coast Ry. v. City of W. Palm Beach*, 110 F. Supp. 2d 1367, 1373–74 (S.D. Fla. 2000) (discussing history of railroad regulation), *aff’d*, 266 F.3d 1324 (11th Cir. 2001).

59. H.R. REP. NO. 104-311, at 95–96 (1995), as reprinted in 1995 U.S.C.C.A.N. 793, 807–08 (emphasis added).

transportation are exclusive and preempt the remedies provided under Federal or State law.<sup>60</sup>

This subsection contains two important textual limitations upon the scope of the Board's ability to preempt other laws. First, preemption is to occur only for "remedies provided" under the railroad part of the statute.<sup>61</sup> Board "remedies" in ICCTA do not overlap with generally applicable environmental laws.<sup>62</sup> Instead, the Board's substantive powers relate to economic regulations or core operational decisions about opening and shutting lines and circumscribe the enforcement sections in Part A of ICCTA.<sup>63</sup> By the terms of the statute, it is only these "remedies" that preempt.

Second, ICCTA preempts laws only "with respect to *regulation of rail transportation*," which is a narrower class of state laws than those "'with respect to' rail transportation."<sup>64</sup> Congress's intentional use of the former, narrower phrase meant that it intended to preempt laws that

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60. 49 U.S.C. § 10501(b) (2006).

61. *Id.* This qualifying language significantly narrows the scope of preemption from the initial House bill, which had stated in its entirety: "Except as otherwise provided in this part, the remedies provided under this part are exclusive and preempt the remedies provided under Federal or State law." H. REP. NO. 104-311, at 3 (discussing 49 U.S.C. § 10103). *See generally* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 443-48 (2005) (parsing language of preemption provision); Bennett v. Spear, 520 U.S. 154, 173 (1997) (reviewing court must give effect to every clause and word of statute); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

62. *See infra* notes 159-167 and accompanying text.

63. 49 U.S.C. §§ 11701-11707, 11901-11908. For example, the remedies available to the Board under Part A cover such matters as rate levels and economic discrimination, *id.* §§ 10701-10747; the licensing, abandonment and sale of railroad property, *id.* §§ 10901-10907; operations, open track rights and common accounting standards, *id.* §§ 11101-11164; financial matters, including mergers and acquisitions, *id.* §§ 11301-11328; and taxes, *id.* §§ 11501-11502. The Board also enforces the uniform, strict liability scheme for liability for goods in transit, which preempts state common law rules to the contrary. *Id.* § 14706. The provision survives from the liability provisions of the Hepburn Act of 1906, originally known as the Carmack Amendment, and provides strict liability starting only at acceptance of goods for interstate shipment under a bill of lading, and includes carrier services related to the movement of goods, such as delivery, transfer, and loading. It was clearly these specific kind of inconsistent state remedies, and not state law generally, to which one senator referred to in his statement that "recent court decisions have allowed actions against carriers to proceed under other laws . . . [and] exclusive remedies are needed to provide a consistent method of resolving disputes and prevent needless litigation." S. REP. NO. 104-176, at 57 (1995) (statement of Sen. John Ashcroft). The Board can hear complaints, provide administrative and regulatory relief regarding rates, prescribe maximum rates, grant approval to exemptions from antitrust laws, authorize or deny certificates of construction for new railroad lines, and require protection of employees as condition of abandonment. *See, e.g.*, 49 U.S.C. § 10901(a).

64. Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1330 (11th Cir. 2001) (emphasis added). The Supreme Court has broadly interpreted statutory clauses preempting all state laws that "relate to" a federal area of control without regard to whether any federal standard exists, but has narrowly construed preemptions clauses that require overlap between state law and federal law applicable to the specific facts of the case. *Compare* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383-84 (1992), with CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 662 (1993).



“have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail transportation . . . while permitting the continued application of laws having a remote or incidental effect on rail transportation.”<sup>65</sup>

The statutory text is supported by the legislative purpose and history of ICCTA, which show that Congress intended the statute to coexist with many other generally applicable federal acts, including criminal, securities, and environmental laws.<sup>66</sup> A House report on the initial bill emphasized “the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system” but continued on to state that “States retain the police powers reserved by the Constitution.”<sup>67</sup> Similarly, a Senate report stated that its purpose was to create a “nationally uniform system of economic regulation.”<sup>68</sup> Thus, the joint conference committee report describing the final bill explained that the Board would be an exclusive forum for remedies concerning economic issues and certain operational matters,<sup>69</sup> but that “exclusivity is

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65. *Fla. E. Coast Ry.*, 266 F.3d at 1331. Other courts have adopted this reasoning to uphold the application of police power laws to railroads. *Iowa, Chi. & E. R.R. Corp. v. Washington County*, 384 F.3d 557, 561 (8th Cir. 2004) (holding that state law requiring railroad bridge replacement was not preempted); *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001) (holding that nuisance claim related to damage from stormwater runoff from railroad property is not regulation of rail transportation and is not preempted); *Native Vill. of Eklutna v. Ala. R.R. Corp.*, 87 P.3d 41, 57 (Alaska 2004) (upholding state conditional use permit for quarry operated by railroad); *Home of Econ. v. Burlington N. Santa Fe R.R.*, 694 N.W.2d 840 (N.D. 2005) (examining the remedies available under Part A to hold that ICCTA does not preempt state law regarding grade crossings).

66. See H.R. REP. NO. 104-422, at 167 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 850, 852.

67. H.R. REP. NO. 104-311, at 96 (1995), as reprinted in 1995 U.S.C.C.A.N. 793, 808 (emphasis added). Similarly, Congress stated that “It is not consistent with the intent to have all economic regulation of rail transportation governed by uniform federal standards for State securities laws to be employed as a means of reasserting pre-empted forms of economic regulation,” and that preemption was meant to “encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the Transportation Adjudication Panel.” *Id.* at 95, 96.

68. S. REP. NO. 104-176, at 6 (1995). In relevant part, this section of the report states that section 10501(b) had the purpose of clarifying “[t]he exclusive nature of the Board’s regulatory authority under Part A.”

69. H.R. REP. NO. 104-422, at 167. The report stated that:

Also integrated into the statement of general jurisdiction is the delineation of the exclusivity of Federal remedies with respect to the regulation of rail transportation. Former section 10103 dealt with remedies in all modes of transportation regulated by the ICC, but since 1980 [the year of the Staggers Rail Act], former section 10501(d) and 11501(b), with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act. The Conference provision retains this general rule . . .

The preemption standard that was carried over from the Staggers Act had partially displaced state economic regulation over intrastate rail; under the scheme of that earlier act, the scope of preemption was coextensive with the Commission’s remedies concerning rates and service.

limited to remedies with respect to rail regulation—not State and Federal law generally,” because such laws “do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation.”<sup>70</sup> ICCTA’s dichotomy between preempted economic regulations and nonpreempted general regulations (regardless of any tangential economic effects) extends the historic concurrent jurisdiction of states to regulate the noneconomic aspects of railroad service,<sup>71</sup> and conforms to the general rule that preemption does not deprive the states of the “power to regulate where the activity regulated [is] a merely peripheral concern” of federal law.<sup>72</sup>

However, the textual limitations of the preemption language of section 10501(b) are in some conflict with the preceding exclusive jurisdiction sentence, which is seemingly very broad: “The jurisdiction of

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). Among other things, the Staggers Act added the following subsection to 49 U.S.C. § 10501:

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

*Id.* § 10501(d) (emphasis added).

70. H.R. REP. NO. 104-422, at 167. As an example of the limited scope of preemption, which demonstrates Congress intended to encompass only those regulations directly focused on direct economic effects, the conference committee report cited that “criminal statutes governing antitrust matters not preempted by this Act, and laws defining such criminal offense as bribery and extortion, remain fully applicable unless specifically displaced.” *Id.*

71. That states had been able to regulate railroads concurrently with the federal government until Congress had taken some positive action that would create a conflict between federal and state law is demonstrated by *Nashville, Chattanooga & St. Louis Railway v. Alabama*, 128 U.S. 96, 99–100 (1888):

It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits.

*See also* *Mo., Kan. & Tex. Ry. v. Haber*, 169 U.S. 613 (1898) (upholding state regulation of cattle for contagious disease because it did not conflict with the federal Animal Industry Act of 1893); *N.Y., New Haven & Hartford R.R. Co. v. New York*, 165 U.S. 628 (1897) (upholding state’s ability to regulate the heating of cars by stoves or furnaces in the absence of federal legislation); *Hennington v. Georgia*, 163 U.S. 299 (1896) (upholding state statute banning operation of freight trains on Sunday under reserved, concurrent powers); *Smith v. Alabama*, 124 U.S. 465 (1888) (upholding state statute regarding licensing of locomotive engineers, where Congress had not enacted any conflicting law). That early emphasis on actual conflict was lost as the Court began to hold that Congress had broad, preemptive powers over interstate rail generally as it took action to occupy the field of rate and operational regulation. Gardbaum, *supra* note 13, at 803–05. Nevertheless, the Court still required some relevant action by Congress. *Id.* (citing cases); *e.g.*, *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926) (holding that the Boiler Inspection Act occupied the field of regulating locomotive equipment).

72. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

the Board over transportation . . . and facilities . . . is exclusive.”<sup>73</sup> The expansive reach of this language is reinforced by Congress’s definition of “transportation,” which includes the physical apparatus of railroad operations (locomotives, cars, rails and terminals and the like that are owned by rail carriers) and services related to the movement of passengers or property by rail.<sup>74</sup> The broad definition of “transportation,” taken in isolation, would seem to provide the Board with “jurisdiction” over any facilities or equipment owned by railroads without regard to any nexus with rail transportation or common carrier services.<sup>75</sup>

There must be some logical limit to the exclusivity of the Board’s powers. To take an extreme example, Congress surely did not intend to allow railroads to open gambling or prostitution businesses that are exempt from generally applicable state laws, and subject only to Board supervision.<sup>76</sup> A more reasonable reading is that the term “transportation” is explicitly linked with the remedies available to the Board,<sup>77</sup> meaning that states cannot regulate matters that the Board can and, conversely, that states are free to regulate matters that the Board cannot.

ICCTA’s legislative history shows that Congress itself thought that there was no ambiguity between the two sentences in section 10501(b). Congress considered the preemption clause to be so clear that a savings clause protecting state police powers was “unnecessary.”<sup>78</sup> Nevertheless, the juxtaposition of the clause granting the Board “exclusive” jurisdiction over “transportation” with the clause preempting certain remedies creates some ambiguity within the section.

#### *D. Courts and the Board Interpret ICCTA as Broadly Preempting State Police Powers*

Based on this seeming ambiguity, railroads, the Board, and ultimately several courts have conflated the broad jurisdiction of the Board with the preemptive effect of Board remedies. Ignoring the distinct functions and scope of exclusive jurisdiction and preemption,<sup>79</sup> this line of

73. 49 U.S.C. § 10501(b) (2006).

74. *Id.* § 10102(9).

75. *See id.* § 10501(b).

76. In a preemption case under another section of ICCTA dealing with towing, one lower court has identified the shortcomings of textualism by posing this question: When, “by its words, Congress cast its net wider than it intended, should the court give effect to the text as cast, leaving it incumbent upon Congress to amend the statute, or does the court have a responsibility to hem the net back to where Congress intended it to fall?” 426 Bloomfield Ave. Corp. v. City of Newark, 904 F. Supp. 364, 371 (D.N.J. 1995).

77. 49 U.S.C. § 10501(b).

78. H.R. REP. NO. 104-311, at 95, *as reprinted in* 1995 U.S.C.A.N. 793.

79. As a general matter, exclusive jurisdiction is generally considered to be a form of primary jurisdiction that provides for the initial evaluation of an issue by an agency; it does not

cases holds that the preemptive scope of ICCTA should be coextensive with the broadest possible reading of the exclusive jurisdiction clause. These courts have overwhelmingly relied on recitation of the “exclusive jurisdiction” language of section 10501(b) rather than any analysis of the preemption language.<sup>80</sup>

In general ICCTA preemption cases, the Circuit Courts of Appeal have split, with the Second,<sup>81</sup> Ninth,<sup>82</sup> and District of Columbia<sup>83</sup> Circuits

necessarily trigger preemption, or the inability of states to legislate in a field. *Harris v. Union Pac. R.R.*, 141 F.3d 740, 744 (7th Cir. 1998) (holding that the Board’s “exclusive jurisdiction” over rail mergers is a matter of primary jurisdiction that does not divest courts of power to apply generally applicable laws); *Holland v. Delray Connecting R.R. Co.*, 311 F. Supp. 2d 744, 747 (N.D. Ind. 2004) (holding that section 10501(b) raises primary jurisdiction issues only and did not preempt state law); *Norfolk S. Ry. Co. v. City of Austell*, No. CIV1:97-CV-1018-RLV, 1997 WL 1113647, at \*6 (N.D. Ga. Aug. 18, 1997) (citing the exclusive jurisdiction sentence of ICCTA only as support to show that its preemption decision was consistent with that separate provision); *cf. Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195, 204–05 (1st Cir. 2000) (holding that section 10501(b) does not divest the district courts of jurisdiction in favor of Board jurisdiction). *See generally* *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001). In one limited sense, preemption, like primary jurisdiction and exclusive jurisdiction (the most extreme version of primary jurisdiction), may be considered a threshold issue because it “transfers from court to agency the power to determine” certain questions before courts can even take up a case. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 65 (1956) (quoting Louis L. Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws*, 102 U. PA. L. REV. 577, 583–84 (1954)).

80. One oft-quoted dictum from an early judicial decision is that “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations” than the exclusive jurisdiction sentence of ICCTA. *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996); *see also* *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (relying on exclusive jurisdictional sentence of section 10501 of ICCTA to preempt state claims); *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000) (relying on jurisdictional provision to hold that that ICCTA precludes “all state efforts to regulate rail transportation.”). The unsettled basis for these decisions is confirmed by *Maynard v. CSX Transportation, Inc.*, 360 F. Supp. 2d 836 (E.D. Ky. 2004). Many of the ICCTA cases cited by the *Maynard* court preempt state laws by reference to the exclusive jurisdiction sentence of section 10501(b). *Id.* at 840; *e.g.*, *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (citing whole section and rejecting plaintiffs attempt to escape the jurisdiction of the Board); *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 500 (S.D. Miss. 2001) (“state law has been preempted by the ICCTA which vests exclusive jurisdiction in the STB over such matters.”); *Guckenberg v. Wis. Cent. Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001) (referring to both exclusive jurisdiction and preemption sentences). *Pejepscot Industrial Park*, 215 F.3d 195, is distinguishable because that case concerned damage actions against carriers pursuant to 49 U.S.C. § 11101(a) and the explicit right of action at 49 U.S.C. § 11704(c).

81. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005).

82. *City of Auburn*, 154 F.3d 1025. The Ninth Circuit adopted the agency’s broad dicta and held that environmental permitting regulations “will in fact amount to ‘economic regulation’ if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.” *Id.* at 1031. The Ninth Circuit’s theory presupposes that the accumulated aggregation of local and state permitting laws will be fatal to the rail industry, and therefore tolerates no law with a pre-clearance element.

83. *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (applying preemption provisions of other federal acts, not ICCTA, to strike down local rule regarding the movement of hazardous waste by rail). *But see* *Boston & Me. Corp. v. Surface Transp. Bd.*, 364 F.3d 318, 321

adopting a broad view of ICCTA preemption. These courts have displaced many noneconomic state police power laws and permitting programs, even where there are no applicable Board or other federal regulations. For instance, in *Green Mountain Railroad Corp. v. Vermont* the Second Circuit found that a shed for the storage of materials was integral to railroad operations, and held that state requirements for a land use permit and a mandatory setback from the Connecticut River were preempted.<sup>84</sup> The court reasoned that a permit requirement would unduly interfere with interstate commerce by giving the local body the power to delay or even block the railroad's planned project,<sup>85</sup> and supported that reasoning by citing dictum from an earlier case to the effect that ICCTA preemption is supposed to be very broad.<sup>86</sup> Accordingly, the court did not examine the environmental impacts of the operations or the protective rationale of the state law.

The Third,<sup>87</sup> Sixth,<sup>88</sup> Eighth,<sup>89</sup> and Eleventh<sup>90</sup> Circuits have adopted a narrower interpretation of ICCTA, which largely limits preemption to economic laws and not to state safety and environmental laws. For instance, in *Tyrell v. Norfolk Southern Railway Co.* the Sixth Circuit rejected a railroad's argument that ICCTA preempted a state law related to minimum track clearances.<sup>91</sup> The court distinguished the extensive

(D.C. Cir. 2004) (recognizing overlap between ICCTA and FRSA and need for implementing agencies to coordinate and cooperate).

84. *Green Mountain*, 404 F.3d at 644.

85. *Id.* at 643.

86. *Id.* at 644 (citing *City of Auburn*, 154 F.3d at 1031).

87. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004). The Third Circuit held that state waste laws are not preempted when a non-carrier operates on railroad property. Assuming for the sake of argument that loading activities can be part of ICCTA "transportation," the Third Circuit nonetheless found that the activities did not involve "transportation *by* rail carrier" as required by ICCTA but rather transportation *to* a rail carrier, and therefore that state solid waste laws were not preempted. *Id.* at 308 (emphasis added). Although not part of the holding of the case, the court went on to reject any reading of ICCTA that would mean that "any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a railcarrier." *Id.* at 309.

88. *Tyrell v. Norfolk S. Ry. Co.*, 248 F.3d 517 (6th Cir. 2001).

89. *Iowa, Chi. & E. R.R. Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004) (holding that state law requiring railroad bridge replacement was not preempted).

90. *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001). The Eleventh Circuit rejected a railroad's argument that ICCTA preempts the application of local zoning and occupational laws to an aggregate distribution business that was located on land the railroad leased to a nonrail entity, where the aggregate was delivered by the railroad and unloaded, stockpiled, organized and reloaded by a nonrail business. The court held that ICCTA preemption does not extend to nonrail entities simply because they are under a lease to a railroad; it did not need to reach the question of whether the railroad itself could engage in that particular aggregate business free of local regulation. *Id.* at 1332. However, the court parsed ICCTA and rejected sweeping preemption of any state regulation that touches upon rail activities, as explained *supra* notes 64–65 and in the accompanying text.

91. *Tyrell*, 248 F.3d 517.

economic regulatory scheme administered by the Board under ICCTA from the extensive rail safety regulatory scheme administered by different federal agencies and the states under different laws.<sup>92</sup> Because the state track clearance law at issue related to safety rather than economics, it was properly measured against the preemption clause of the Federal Rail Safety Act (FRSA) rather than against the preemption clause in ICCTA, and was upheld.<sup>93</sup> In reaching that holding, the Sixth Circuit rejected the railroad's claim that ICCTA's economic deregulatory scheme broadly repealed FRSA or any other federal law that touches upon the rail industry.<sup>94</sup> As one lower court succinctly concluded, ICCTA cannot preempt all regulations that might impose costs, because that "reasoning, taken to its logical conclusion, could mean that railroads cannot be required to put postage on their mail."<sup>95</sup>

One of the courts that had narrowly interpreted ICCTA preemption, the Third Circuit, recently rejected a distinction between economic and safety regulations as a rationale for deciding ICCTA preemption cases. The decision, however, was not necessarily favorable to railroads or other proponents of broad preemption, as the court held that preemption will apply only when a state law places an undue burden on interstate commerce activities, and it imposed a high evidentiary threshold on railroads to prove any undue burden.<sup>96</sup>

ICCTA case law was anticipated by (and shaped by) early declaratory orders of the Board stating that the statute preempted general state permitting laws.<sup>97</sup> In several of these decisions the Board aggressively asserted its ability to declare the scope of preemption even where it acknowledged that it lacked licensing or regulatory authority over railroad facilities and would not conduct any environmental

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92. 49 U.S.C. § 20101–20155 (2006). FRSA was placed by Congress in the very next subtitle of Title 49 (Subtitle V) after ICCTA. The FRSA is administered by the Federal Rail Administration, which is now consolidated with the Transportation Security Administration under the Department of Homeland Security. Under FRSA's preemption scheme, "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the state requirement." 49 U.S.C. § 20106.

93. *Tyrell*, 248 F.3d at 523–24.

94. *Id.* at 523. This narrow reading of ICCTA preemption was independently reached by the Third and Eleventh Circuits. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3rd Cir. 2004); *Fla. E. Coast Ry.*, 266 F.3d at 1338. Since those courts disposed of the cases on the grounds that ICCTA preemption cannot be claimed by nonrailroads, however, their more general reading of the statute was dicta.

95. *Holland v. Delray Connecting R.R. Co.*, 311 F. Supp. 2d 744, 757 (N.D. Ind. 2004).

96. *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252, 257 (3d Cir. 2007). The author argued on behalf of amici curiae environmental groups.

97. See Maureen E. Eldredge, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. COLO. L. REV. 549, 573–75 (2004) (outlining problems related to broad ICCTA preemption in the context of facilities other than waste stations).

review.<sup>98</sup> The Board's laissez-faire philosophy is reflected in its remarkable statement that "literal compliance with state or local laws often may be impractical in cases involving railroad facilities."<sup>99</sup>

The Board has implemented this philosophy through regulatory-like pronouncements buried within incremental, case-by-case adjudications. The Board states its task as determining whether the state or local action would have the effect of preventing or unreasonably interfering with railroad transportation.<sup>100</sup> However, factual development is often lacking in Board preemption proceedings, and the Board frequently resolves disputes through the issuance of declaratory orders<sup>101</sup> decided on paper submissions. Moreover, the Board has adopted a general policy that ICCTA "categorically" preempts two types of state and local actions.<sup>102</sup> The first type of categorical preemption is not controversial: states or localities cannot regulate matters directly regulated by the Board, such as railroad rates or service or the construction, operation, and abandonment of rail lines.<sup>103</sup> The second type of categorical preemption, however, is an extension of the statute: the Board asserts that any "state or local permitting process for prior approval of [a] project, or of any aspect of it related to interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted."<sup>104</sup> It is this second category that the Ninth and Second Circuits extended and expanded in *City of Auburn v. United States*<sup>105</sup> and

98. Borough of Riverdale, 4 S.T.B. 380 (1999) (decision on a petition for a declaratory order on the extent to which facilities constructed and operated by the New York, Susquehanna and Western Railway Corporation are covered by a federal preemption provision); see also *Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000); *Nicholson v. Interstate Commerce Comm'n*, 711 F.2d 364 (D.C. Cir. 1983); *Friends of the Aquifer*, Finance Dkt. 33966 (Surface Transp. Bd. Aug. 10, 2001), 2001 WL 928949; *Boston & Me. Corp. & Town of Ayer*, Finance Dkt. No. 33971, 2001 Fed. Carr. Cas. (CCH) ¶ 38,352 (Surface Transp. Bd. Apr. 30, 2001), 2001 WL 458685 (joint petition for declaratory order).

99. *Boston & Maine*, 2001 Fed. Carr. Cas. (CCH) ¶ 38,352.

100. *Impacts of Railroad-Owned Waste Facilities: Hearing Before the Subcomm. on Railroads of the H. Comm. on Transportation and Infrastructure*, 109th Cong. 34–35 (2006) (Testimony of W. Douglas Buttrey, Chairman of the Surface Transportation Board) [hereinafter *Railroad Hearing*].

101. Agencies have the discretion to issue declaratory orders where necessary to resolve controversies under their general discretionary authority. The Administrative Procedure Act contains general authorization for declaratory orders to resolve controversies at 5 U.S.C. § 554(e) (2006), and the Board has specific authority to use that mechanism. 49 U.S.C. § 721(b) (2006).

102. *Railroad Hearing*, *supra* note 100, at 10.

103. *Id.*

104. *Cities of Auburn and Kent*, 2 S.T.B. 330 (1997) (decision on a petition for a declaratory order to establish that state and local permitting authority can be imposed on the Burlington Northern Railroad Company and are not preempted by federal law), *clarifying* *King County*, 1 S.T.B. 731 (1996) (decision on a petition for a declaratory order to determine whether the County is preempted from requiring the Burlington Northern Railroad Company to obtain permits), *aff'd*, *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).

105. 154 F.3d 1025 (9th Cir. 1998); see also *supra* note 82.

*Green Mountain*,<sup>106</sup> respectively, thereby undermining state permit programs and opening up regulatory gaps.<sup>107</sup>

*E. Railroads Exploit the Uncertainty Surrounding ICCTA Preemption to Build Solid Waste Transfer Stations that are Entirely Unregulated*

These Board and court rulings, originally based on a slight statutory ambiguity about the scope of ICCTA preemption, were in turn exploited and expanded by railroads. They argued that the statute preempts all state laws that apply to any terminal or other facility owned by a railroad, no matter how distant the activities are from actual railroad operations or how attenuated the state laws are from economic regulation. In the case study explored in this Article, railroads argued that state environmental laws cannot apply to solid waste handling and transfer activities conducted on railroad property.<sup>108</sup>

By this regulatory manipulation, railroads seek an advantage in the increasingly interstate market for waste transportation and management.<sup>109</sup> By some accounts, regulatory compliance accounts for fifteen to twenty dollars of each ton of waste shipped out by transfer stations,<sup>110</sup> and some companies seek to boost their profits by avoiding those costs.<sup>111</sup>

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106. 404 F.3d 638 (2d Cir. 2005); see also *supra* notes 84–86 and accompanying text.

107. The Board has attempted to minimize the impact of the broad “per se” rule preempting state permits by adopting, at least in theory, three exceptions where state regulation is permissible. First, federal environmental and safety statutes may apply if they can be “harmonized” with ICCTA. *Railroad Hearing*, *supra* note 100, at 34; Friends of the Aquifer, Finance Dkt. 33966 (Surface Transp. Bd. Aug. 10, 2001), 2001 WL 928949. Second, states may apply “direct” regulations that prevent the discharge of harmful material. *E.g.*, *Cities of Auburn & Kent*, 2 S.T.B. 330 (“a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project.”). Third, state and local government may enforce building, fire and electrical codes. Borough of Riverdale, Finance Dkt. 33466 (Surface Transp. Bd. Feb. 23, 2001), 2001 WL 192584 (petition for declaratory order); Borough of Riverdale, 4 S.T.B. 380 (1999).

108. See 36 N.J. Reg. 5098(b) (Nov. 15, 2004).

109. Older urban areas in the Northeast generate a great amount of solid waste from human activities including the destruction and rehabilitation of older structures. Yet these same areas have limited disposal capacity after the closure of landfills in the region. This imbalance has created a lucrative opportunity to transport waste to landfills in the Midwest, where disposal costs are much cheaper. See Patricia-Anne Tom, *All Aboard!*, WASTE AGE, July 1, 2007, available at [http://wasteage.com/Collections\\_And\\_Transfer/waste\\_aboard](http://wasteage.com/Collections_And_Transfer/waste_aboard).

110. See *Federal Agency Blocks Rail Transfer Station*, CONSTRUCTION & DEMOLITION RECYCLING MAG., May 13, 2005, available at <http://www.CDRrecycler.com/news/news.asp?ID=2016>.

111. The possibility of saving fifteen to twenty dollars per ton of waste by ignoring regulations has attracted the attention of financiers. Although information about private equity firms is hard to gather, one leading law firm has stated that it assists such firms in investing in “operators of solid waste transfer station on federally regulated railroad property” and helps them “navigate federal and state environmental regulations and federal pre-emption issues.”



1. *Solid Wastes are Regulated by the States, Primarily through Interlocking Permits*

Federal regulation of the interstate market in construction and demolition debris and other solid wastes is minimal.<sup>112</sup> Generally speaking, solid waste is regulated by states, which have historically addressed the public health problems associated with uncontrolled garbage disposal.<sup>113</sup>

From basic garbage control ordinances, states have developed extensive statutory and regulatory schemes to control the generation, handling, and disposal of solid waste, particularly the great amount of waste that is gathered and processed at centralized waste transfer stations.<sup>114</sup> With greater scientific understanding of the potentially hazardous characteristics of wastes such as construction and demolition debris,<sup>115</sup> states adjusted their regulatory regimes to encompass these and other wastes. Preconstruction and operating permits implement facility design, registration, waste manifest, inspection and monitoring requirements.<sup>116</sup> The environmental permitting of new solid waste

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HERRICK, FEINSTEIN LLP, HALFTIME REPORT 2006 at 5, available at [http://www.herrick.com/home/HerrickHalfTimeReport\\_06.pdf](http://www.herrick.com/home/HerrickHalfTimeReport_06.pdf).

112. See *infra* notes 151-158 and accompanying text.

113. *Id.*; see also *supra* note 41, *infra* note 116.

114. Long-range transportation and disposal has forced the solid waste industry to evolve to a system of "transfer stations" whereby waste and recyclable materials are brought to intermediate hubs close to urban and residential areas. At these hubs or transfer stations, waste is dumped, sorted, processed, consolidated and loaded onto tractor-trailers, containers or railcars for shipping to nearby recycling or incinerator facilities, or to landfill sites in other states. *Railroad Hearing*, *supra* note 100, at 72 (testimony of Bruce J. Parker, President and Chief Executive Officer, National Solid Wastes Management Association). The extensive handling of waste at transfer stations creates the potential to emit significant amounts of dust, leachate and other waste, and for that reason these facilities are highly regulated. See Declaration of John Castner, N.Y., *Susquehanna & W. Ry.*, No. 05-4010, 2007 WL 576431 (D.N.J. Feb. 21, 2007) (on file with author) (explaining the health and safety purposes of N.J. ADMIN. CODE 7:26-2D.1 and the evolution of those regulations); Second Declaration of John Castner, N.Y., *Susquehanna & Western*, No. 05-4010, 2007 WL 576431 (on file with author) (explaining the health and safety purposes of N.J. ADMIN. CODE § 7:26-2D.1).

115. In older urban areas, construction and demolition debris may include asbestos insulation and lead paint from the older structures, as well as all-weather wood treated with arsenic. See Declaration of John Castner, *supra* note 114; Second Declaration of John Castner, *supra* note 114; IFC CORP., CONSTRUCTION AND DEMOLITION WASTE LANDFILLS: REPORT PREPARED FOR U.S. EPA tbs. 2-1, 2-3, 3-3, 3-4 (Feb. 1995); U.S. EPA, NO. EPA 530-R-98-010, CHARACTERIZATION OF BUILDING-RELATED CONSTRUCTION AND DEMOLITION DEBRIS IN THE UNITED STATES 1-10 (June 1998).

116. *E.g.*, N.J. ADMIN. CODE § 7:26-1.4 (2007). In New Jersey, for example, the New Jersey Department of Environmental Protection and the New Jersey Meadowlands Commission have authority over solid waste transfer stations across the state and in the Meadowlands area of North Jersey, respectively. Like most states, New Jersey has waste station design standards that require all transfer operations to occur in enclosed structures with concrete tipping floors, misting systems and runoff collection equipment. *Id.* § 7:26-2B.5. In addition to design and operational controls, any new or expanded solid waste facility must seek inclusion in a county

facilities is expensive, and it may take three to four years to obtain a permit for the first time.<sup>117</sup>

## 2. *Courts Invoke ICCTA Preemption to Block State Permits for Railroad Waste Transfer Facilities*

Despite the obvious risks to public health and the environment from the deplorable conditions at unregulated railroad solid waste facilities, federal courts have preempted state solid waste laws under ICCTA. The absurd result of these decisions is that truck-to-truck and truck-to-barge transfer stations remain highly regulated, but truck-to-rail transfer stations are completely unregulated.

In the first wave of railroad waste station decisions, railroads attempted to lease their land to traditional solid waste management firms, and states sought to continue regulating the waste activities. Reviewing courts held that waste handling activities conducted by these noncarriers were not integrally related to interstate rail transportation and could be regulated by states.<sup>118</sup>

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solid waste plan through extensive planning and negotiations with the host community to alleviate traffic and other concerns as well as the overall waste burden borne by that community. *Id.* §§ 7:26-6.10, 7:26-2.4; Reg'l Recycling, Inc. v. Dep't of Env'tl. Prot. & Energy, 606 A.2d 815 (N.J. 1992). New Jersey has additional screening regulations that are designed to exclude members of organized crime syndicates from infiltrating back into the solid waste industry after decades of enforcement efforts. N.J. STAT. ANN. § 13:1E-126 (2007); N.J. ADMIN. CODE § 7:26-16.3 (2007). The transfer of different kinds of waste is strictly controlled through a detailed inspection regime to ensure that hazardous waste is sent to proper facilities and is not intermingled with other wastes. These controls are particularly important for the handling of construction and demolition debris, a regulatory category that includes treated and untreated wood scrap, concrete, asphalt, plaster, wallboard, roofing materials, cardboard, metal, insulation, plastic scrap and other materials that may contain some traces of hazardous waste. N.J. STAT. ANN. § 13:1E-4, -5; N.J. ADMIN. CODE § 7:26-1.4. In addition, all solid waste landfill facilities are required to obtain a permit pursuant to the New Jersey Water Pollution Control Act, N.J. STAT. ANN. §§ 58:10A-1, 58:10A-6., and the implementing regulations at N.J. ADMIN. CODE § 7:14A. New Jersey attempted to maintain the substantive protections in its solid waste regulations necessary to protect public health and safety while eliminating the permitting or pre-clearance requirements that state courts thought to be unduly burdensome for railroads. The rules were proposed at 35 N.J. Reg. 4405(a) (Oct. 6, 2003), adopted at 36 N.J. Reg. 5098(b) (Nov. 15, 2004), and are codified at N.J. ADMIN. CODE § 7:26-2D.1.

117. *Railroad Hearing*, *supra* note 100, at 73 (Testimony of Bruce J. Parker, President and CEO, National Solid Wastes Management Association).

118. For example, in *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004), the Third Circuit agreed with the Board that state waste laws are not preempted when a non-carrier operates on railroad property. Assuming for the sake of argument that loading activities can be part of ICCTA "transportation," the Third Circuit nonetheless found that the activities did not involve "transportation by a rail carrier" as required for ICCTA to apply, but rather transportation to a rail carrier, and therefore that state solid waste laws were not preempted. *Id.* at 308 (emphasis added).

A district court in New Jersey also rejected ICCTA preemption claimed by a notorious hauler who had pled guilty to illegal dumping, had over a million dollars in unpaid fines, and had been banned from the industry. *J.P. Rail, Inc. v. N.J. Pinelands Comm'n*, 404 F. Supp. 2d 636

In reaction, railroads then created new business arrangements—on paper, at least—to again try to obtain ICCTA preemption. These second generation cases have taken one of two forms. Existing solid waste hauling firms have attempted to establish themselves as short line railroads, an easy process that simply involves filing a “notice of exemption” with the Board.<sup>119</sup> Alternatively, existing railroads purport to enter into the solid waste business by building waste processing and transfer yards, which they can do without any approval from the Board because these are “ancillary” facilities. For example, Susquehanna & Western adopted this strategy when it entered into a web of contracts with various entities it calls “loaders” (the operators of the processing

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(D.N.J. 2005). The author filed an amicus brief and argued on behalf of an environmental group in that action. The hauler had entered into contractual arrangements that purported to give a railroad more of an oversight role than was involved in the *Hi Tech* case. However, the railroad did not even have trackage rights, purported to lease an existing waste handling facility for one dollar a year from the hauler, and then hired the hauler to conduct all the waste handling activities. The court rejected the preemption claim. *Id.* at 652.

In an analogous case that did not involve a waste hauler but rather a facility for the bulk transfer of aggregate by a nonrailroad on railroad property, the Eleventh Circuit reached a similar decision in *Florida East Coast Railway v. City of West Palm Beach*, 266 F.3d 1336 (11th Cir. 2001); *accord* CFNR Operating Co. v. City of Am. Canyon, 282 F. Supp. 2d 1114, 1118–19 (N.D. Cal. 2003) (denying railroad’s motion for a preliminary injunction against a city resolution affirming denial of land use permit for a bulk transfer operation on property subleased from a railroad because the mere acceptance of materials delivered by rail is not an activity integrally related to rail transportation, and the railroad did not claim that it could not continue to use the tracks).

119. *E.g.*, Ashland R.R., Finance Dkt. No. 34986 (Surface Transp. Bd. Feb. 26, 2007), 2007 WL 586583 (decision granting a lease and operation exemption); New England Transrail, Finance Dkt. No. 34797 (Surface Transp. Bd. Mar. 2, 2006), 2006 WL 560754 (application to open a rail waste station); Ne. Interchange Ry., Finance Dkt. No. 34734 (Surface Transp. Bd. Nov. 17, 2005), 2005 WL 3090145 (decision on application for exemption to lease and operate a portion of rail line); Hainesport Indus. R.R., Finance Dkt. No. 34695 (Surface Transp. Bd. May 10, 2005), 2005 WL 1169054 (application for exemption to acquire and operate a portion of rail line); N.J. Rail Carrier, Finance Dkt. No. 34392 (Surface Transp. Bd. Jan. 16, 2004), 2004 WL 84843 (decision on application for exemption to acquire and operate a portion of rail line); Northern & Bergen R.R., LLC, 72 Fed. Reg. 26,865-02 (Surface Transp. Bd. May 11, 2007) (notice of acquisition exemption).

In general, such exemptions are easy to obtain. *See generally* Stephen M. Richmond & Marc J. Goldstein, *Collision Course: Rail Transportation and the Regulation of Solid Waste*, 21 NATURAL RES. & ENV’T 3 (2006). To start up a railroad, a firm need only acquire or lease a short piece of tract and enter into an interchange agreement with the railroad to move railcars. *Id.* at 9 (reviewing start-up requirements and noting that the Board maintains a “how to” manual on its website entitled “So You Want to Start a Small Railroad”). Large projects must then obtain a certificate of public convenience and necessity from the Board. 49 U.S.C. § 10901(c) (2006). If the project involves annual operating revenues of less than twenty million dollars, firms need only file a “notice of exemption” with the Board, and these are routinely granted. *See id.* § 10502. The Board has indicated that even exempt spur or industry yard tracks may be a rail line. *See* Effingham R.R., 2 S.T.B. 606 (1997), *reconsideration denied*, Docket No. 419861 (Surface Transp. Bd. Sept. 17, 1998), 1998 WL 645535 (petition for declaratory order). The Board has extended the time it takes to obtain a notice of exemption from seven days to thirty days, a rather meaningless reform.

and loading equipment) and “shippers” (local waste hauling companies who dump waste in open piles on railroad property).<sup>120</sup>

Courts have failed to contain these second generation railroad waste cases, despite the fact that they are different only in form from simply the lease of property to waste firms. District Courts in New Jersey,<sup>121</sup> New York,<sup>122</sup> and Michigan<sup>123</sup> have granted preliminary injunctions against the enforcement of state solid waste laws. Ruling in the context of preliminary injunctions, some of these courts may have been influenced by the perceived need to allow railroads to continue waste operations on an interim basis for equitable reasons unrelated to the merits of the preemption claims.<sup>124</sup> Similarly, on appeal from one of these decisions, the Second Circuit upheld a preliminary injunction against the enforcement of zoning laws against waste stations, based on equitable considerations.<sup>125</sup>

For example, with regard to the North Bergen facilities described in the Introduction and Part I.A of this Article, Susquehanna & Western

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120. See Declaration of Christine Lewis, *N.Y., Susquehanna & Western*, No. 05-4010, 2007 WL 576431 (on file with author); Declaration of Harley A. Williams, *N.Y., Susquehanna & Western*, No. 05-4010, 2007 WL 576431 (on file with author); Expert Report of Philip H. Burriss, *N.Y., Susquehanna & Western*, No. 05-4010, 2007 WL 576431 (on file with author).

121. The preliminary injunction was made permanent on February 21, 2007. *N.Y., Susquehanna & W. Ry. Corp. v. Jackson*, No. 05-4010, 2007 WL 576431 (D.N.J. Feb. 21, 2007). The order was vacated on appeal but the Circuit Court explicitly held out the possibility of further injunctions. *N.Y., Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 257 (3d. Cir. 2007).

122. *Coastal Distrib., LLC v. Town of Babylon*, No. 05 CV 2032 JS ETB, 2006 WL 270252 (E.D.N.Y., Jan. 31, 2006), *aff'd*, 216 Fed. Appx. 97 (2007); see also *Buffalo S. R.R., Inc. v. Vill. of Croton-on-Hudson*, 434 F. Supp. 2d 241 (S.D.N.Y. 2006) (granting preliminary injunction against village's commencement of eminent domain proceedings against proposed rail waste station and concluding that action was preempted by ICCTA).

123. *Canadian Nat. Ry. Co. v. City of Rockwood*, No. COV/ 04-40323, 2005 WL 1349077 (E.D. Mich. June 1, 2005).

124. See, for example, *Coastal Distribution*, 2006 WL 270252, where the court stated in one part of the opinion that the facility receives, “handles,” stores and loads freight, but elsewhere in the opinion states that there was no evidence on the record that any activities occur other than the loading of waste. *Id.* at \*10. Acknowledging this uncertainty, the court relied on the lower burden of proof on a preliminary injunction. *Id.* Moreover, the unreported report and recommendation of the magistrate that preceded the decision contained conflicting evidence on the amount of processing that takes place at the facility. *Coastal Distrib., LLC v. Town of Babylon*, No. CV 05-2032, 2005 U.S. Dist. LEXIS 40795, (E.D.N.Y. July 15, 2005) (Boyle, Mag.), *adopted by* No. 05 CV 2032 JS ETB, 2006 WL 270252 (E.D.N.Y., Jan. 31, 2006), *aff'd*, 216 Fed. Appx. 97 (2007). Venturing deep into the creation of substantive policy and away from the purposes of ICCTA, the court concluded, without apparent factual support, that “[w]ithout an injunction, hundreds of trucks will be forced onto the Long Island Expressway and other already-congested highways and roads,” and therefore concluded that an injunction against local zoning laws “serves the public interest of minimizing highway congestion due to trucks by preliminarily enjoining the Town from enforcing the Stop Work Order.” 2006 WL 270252, at \*4.

125. *Coastal Distribution*, 216 Fed. Appx. 97. This is an unreported decision on summary order, which has limited precedential authority. As the court's order notes, “Rulings by Summary Order Do Not Have Precedential Effect.” *Id.*; see also FED. R. APP. P. 32.1.

sued in New Jersey District Court to prevent state oversight of its facilities<sup>126</sup> after receiving an administrative notice of penalty from the state and a citizen suit notice letter from environmental groups.<sup>127</sup> Susquehanna & Western obtained temporary restraints that prevented the state from enforcing its solid waste laws, despite an extensive factual record showing violations of state laws. The court left the temporary restraints in place for over a year while urging the parties to conduct settlement discussions. Over this extended time, Susquehanna & Western was able to continue its waste operations and refused to comply with state solid waste regulations. It did eventually enclose the waste piles within sheet metal structures, but did not address all the environmental affects from ongoing or past activities. After a year and a half, the court declared the state solid waste laws preempted by ICCTA and issued a preliminary injunction.<sup>128</sup> As with the other courts reading ICCTA to preempt state solid waste laws, the court relied on the broad “exclusive jurisdiction” sentence of 49 U.S.C. § 10501(b) and the fact that the state law would have some effect on railroad operations (although no greater a burden than upon all the other solid waste operators that had to comply with regulations).<sup>129</sup>

The railroad waste station case law is not yet definitive. A minority of federal<sup>130</sup> and state<sup>131</sup> courts have ruled that states or citizen groups

126. N.Y., *Susquehanna & W. Ry. Corp. v. Jackson*, No. 05-4010, 2007 WL 576431 (D.N.J. Feb. 21, 2007) (filed Aug. 16, 2005), *vacated*, 500 F.3d 238 (3d Cir. 2007). Elsewhere, Susquehanna & Western had earlier obtained an injunction against the City of Paterson’s zoning laws so that it could construct a waste station in a residential area. N.Y., *Susquehanna & W. Ry. v. City of Paterson*, No. 05-2338 (D.N.J. July 18, 2005) (order granting preliminary injunction against enforcement of local zoning laws).

127. The author filed the notice letter and litigated a separate case against Susquehanna & Western. Notice letter on file with author.

128. N.Y., *Susquehanna & Western*, 2007 WL 576431.

129. *Id.* at \*17.

130. In the only second generation decision to the contrary, a district judge in New Jersey rejected Susquehanna & Western’s preemption defense and held that environmental groups could sue under RCRA to close open waste piles. *Hackensack Riverkeeper, Inc. v. Del. Otsego Corp.*, 450 F. Supp. 2d 467 (D.N.J. 2006). The author represented the plaintiffs in that action. The court later reconsidered its decision in light of parallel litigation raising state law claims and deferred deciding whether ICCTA could preempt RCRA on any set of facts. *Hackensack Riverkeeper, Inc. v. Delaware Otsego Corp.*, No. 05-4806, 2006 WL 3333147 (D.N.J. Nov. 16, 2006).

131. Another successful suit involved the enforcement of a consent decree against Susquehanna & Western in state court, which held the railroad to its voluntary undertaking, memorialized in a consent decree, that it would provide information to the state for the purposes of ascertaining compliance with fire, health, plumbing and safety codes, in a case involving a proposed waste station above an underground oil pipeline. N.J. *Meadowlands Comm’n v. N.Y., Susquehanna & W. Ry.*, No. C-13606 (N.J. Super. Ct. Ch. Div. July 21, 2006) (Olivieri, J.) (order granting injunction); Justo Bautista, *Judge Blocks Railroad’s Plan for N. Bergen Waste Station*, RECORD (Bergen County, N.J.), July 22, 2006, at A1. But even that state court effort is hampered by the terms of the consent decree, which require some degree of agreement between

may hold railroad waste stations accountable to general environmental standards. This countervailing view has been greatly strengthened by a recent Third Circuit case that eschewed any broad preemption of solid waste laws under ICCTA.<sup>132</sup> Although the court held that ICCTA preemption is not limited to “economic” regulations and may extend to generally applicable state laws if they place an undue burden on the interstate commerce activities of railroads, it also adopted a high evidentiary threshold for railroads to prove the undue burden.<sup>133</sup>

### 3. *The Board’s Application of ICCTA Preemption in Solid Waste Cases*

In a recent decision on the proposed construction of a railroad waste station, the Board retreated from some of the more sweeping language in its earlier preemption decisions.<sup>134</sup> To be sure, that particular administrative proceeding was higher profile than most, with both federal and state officials testifying against the railroad and for the application of state permitting laws.<sup>135</sup> Thus the Board reiterated the boilerplate from earlier decisions stating that “the states’ police powers are not preempted entirely” and that federal environmental statutes are to be “harmonized so that each is given effect where possible.”<sup>136</sup> But on the specific jurisdictional matter before it, the Board ignored the existing regulatory matrix and the possible health or safety effects of its decision, and instead limited its discussion to the nature of the railroad operations at issue. Because the Board considered the extensive handling of construction waste to be closer to manufacturing than transportation, it held that states could regulate those activities.<sup>137</sup> However, the Board found that bales of garbage dumped directly onto flat cars could not be regulated by state or local governments, despite the arguably greater public health or safety issues involved in those activities.<sup>138</sup> On the latter point, one of the

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the railroad and the state about the level of information required. Personal Communication with New Jersey state attorneys (May 2007).

132. *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007). The author argued on behalf of amici curiae environmental groups.

133. *Id.* at 257.

134. *New England Transrail*, Finance Dkt. No. 34797 (Surface Transp. Bd. Mar. 2, 2006), 2006 WL 560754 (application to open a rail waste station).

135. *See id.* (transcript of oral argument available at [http://www.stb.dot.gov/FILINGS/all.nsf/odac4d2ccb50935b852573590056e898/f0ed2c41f951da3a8525731c005507bd/\\$FILE/219781.pdf](http://www.stb.dot.gov/FILINGS/all.nsf/odac4d2ccb50935b852573590056e898/f0ed2c41f951da3a8525731c005507bd/$FILE/219781.pdf)).

136. 2006 WL 560754.

137. *Id.* at 2. The railroad had proposed shredding of construction and demolition debris and the extraction of metals and other recyclables before the waste was loaded onto railroad cars.

138. *Id.* at 4. The specific operation at issue in this portion of the decision involved the baling and wrapping of municipal solid waste, which contains food scraps and other waste that can rot. Such waste can therefore be the source of odors and vermin.

commissioners vigorously dissented and pointed out that the inherently polluting qualities of municipal solid waste required some level of reasonable, nondiscriminatory state regulation.<sup>139</sup>

#### *F. General Flaws in the Preemption Analysis of the Railroad Waste Cases*

Courts may eventually reach a consensus about ICCTA preemption that is narrower than the present interpretations. Nevertheless, the results of the prevailing railroad waste cases manifest larger problems in preemption doctrine.

##### *1. Use of a Highly Malleable and Outcome-Driven Field Preemption Analysis*

Lower courts have preempted state solid waste laws using a blend of “express preemption” and broad “field” or “obstacle” preemption theories.<sup>140</sup> This approach is problematic because it allows for a selective, non-rigorous interpretation of the field in which preemption applies. For example, courts have accepted railroads’ definition of the field as “railroad transportation” rather than “solid waste”, as well as the railroads’ contention that the field is imbued with an overwhelmingly federal interest.<sup>141</sup> But the history of state versus federal involvement in railroads is more complicated than that contention: while the federal government has promoted railroads since the mid-1800s and regulated railroads since the 1880s, before then it was the states that promoted and regulated railroads, particularly in the East and Midwest states.<sup>142</sup> Indeed,

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139. *Id.* at 19. Vice Chairman Mulvey reinforced his point by asking the rhetorical question, “Who looks out for the public health and safety when federal preemption deprives state and local governments from doing so?” *Id.* at 20 n.4.

140. See generally Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149 (1998) (reviewing categorical approaches to preemption). “Congress impliedly preempts state law through federal legislation that occupies a field . . . or when state law stands as an obstacle to the full purposes and objectives of Congress.” *Id.* at 1150–51, 1162.

141. A similar historical argument was relied upon by the Court in *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 687–88 (1982), to support its holding that the Railway Labor Act could apply to a government-owned commuter rail service. For an analysis that relies more upon structural needs of the interstate rail market than upon historical sources, see generally Herbert Hovencamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1061, 1067–70 (1988). While railroads—and courts—may and often do support preemption by claiming that interstate commerce would be hampered by state regulation, that claim is more speculative than justified by historical experience. From an advocacy point of view, appeals to history are concrete, seemingly authoritative and carry a sense of inevitability, and courts may prefer to base their decisions upon historical grounds than often overblown claims that regulation will threaten interstate commerce.

142. *E.g.*, Ill. Cent. R.R. Co. v. City of Chicago, 176 U.S. 646, 647 (1900) (reciting facts about states’ significant role in setting up railroads); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

the extensive state regulation of intrastate rates charged by interstate railroads throughout this period gave rise to a rich common law.<sup>143</sup>

Moreover, the rail-centric framing of the dispute ignores a central fact—the unauthorized handling of solid waste is illegal whether the violator is a railroad company, a trucking company, or some other company. The regulated field might be more properly defined as solid waste, a category that cuts across all modes of transportation and shows no special favor for railroads, and one that is squarely within “traditional” state powers.

The imprecision of field definitions is heightened where courts take an overly broad view of deregulatory laws as creating a laissez-faire bubble around the chosen field. Congress is typically more discriminating, and does not leave a field completely unregulated. Rather, ICCTA and other deregulatory laws reflect the consensus view that market forces will result in efficient pricing and levels of service, consistent with mainstream economic theory that market discipline is generally the most efficient “regulator” of price and service. ICCTA puts this into practice by undoing most state and federal rate regulation and allowing competition and other market forces to set optimum haulage rates. Mainstream economic theory, however, also holds that market forces will not efficiently “regulate” pollution or other social costs that are externalized to the public. Congress is aware that unfettered competition will also create incentives for firms to escape regulatory requirements. Accordingly, ICCTA and other deregulatory statutes leave alone noneconomic laws directed to controlling externalities rather than price and service. Indeed, such noneconomic laws must be left in place in order to create functioning and efficient markets and a level playing field between railroads and non-railroads that are in the waste handling business.

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*See generally* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *TRANSP. L.J.* 235, 251 (2003) (noting that states granted 17 million acres of land to the railroads between 1862 and 1871); Eldredge, *supra* note 97, at 556–57 (reviewing history of state subsidies to promote rail in the East and federal subsidies to promote rail in the West); Ely, *supra* note 46, at 934–35 (reviewing early history of railroads, when states viewed firms as serving local, intrastate interests only, and barred the operation of out-of-state railroads); Hovencamp, *supra* note 141, at 1057, 1059–60 (noting state rate regulation was written into corporate charters).

143. *E.g.*, *Texas v. United States*, 730 F.2d 339 (5th Cir. 1984); *cf.* *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (holding that the Interstate Commerce Act preempted the common law with respect to interstate rates).



## 2. *The Lack of Deference to States' Police Powers is in Marked Contrast to the Deference Given to Railroads' Unsupported Need for Uniform Regulations*

Regardless of the field definition, it is clear that the underlying conduct by the railroads involves solid waste regulations derived from states' police power. Yet none of the rail waste station decisions apply or discuss the presumption against preemption, which is intended to protect against overly broad displacement of sovereign state interests.<sup>144</sup> Even the recent Third Circuit decision, which indicated that generally applicable state regulations are likely reasonable and not an undue burden on interstate commerce, completely ignores the presumption against preemption. This omission departs from case law that applied the presumption with respect to earlier federal rail statutes.<sup>145</sup> But, as shown in Part II, the omission is consistent with Supreme Court jurisprudential trends.

Courts' lack of deference to state interests stands in marked contrast to their deference towards railroad interests and the invocation of a general need for national uniformity in all matters that touch upon railroad operations. To be sure, railroads are an instrumentality of interstate commerce, and the clash between railroads and state laws has played an historic role in creating our modern understandings of Congress's national powers under the Commerce Clause.<sup>146</sup> But until now, no one has understood railroads to have the power to exempt themselves from all state laws, no matter now incidental to the core railroad functions of interstate or intrastate movement of goods.

Yet the railroad waste station courts have relied upon early Board and court decisions, which in turn oversimplified ICCTA as intending to relieve railroads from all economic effects of regulations. In that view, all regulations, no matter how generally applicable to other firms or incidental to core railroad functions, are economic threats to their continued existence. Thus, all environmental rules must be preempted as "economic" regulations because they impose additional costs on

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144. Interestingly, the presumption has been applied by state courts, *Vill. of Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 61 (N.J. 2000) (reciting presumption against preemption), and the Board, *Cities of Auburn and Kent*, 2 S.T.B. 330 (1997) (decision on a petition for a declaratory order to establish that state and local permitting authority can be imposed on the Burlington Northern Railroad Company and are not preempted by federal law), but not in a railroad waste transfer station case.

145. *E.g., Texas v. United States*, 730 F.2d at 346–48 (in facial challenge to the 1980 Staggers Act and provisions limiting state rate regulation, applying presumption and seeking a clear statement to preempt, which it found in language that preempted all state jurisdiction over general rate increases, inflation-based rate increases, and fuel adjustment surcharges, and requiring ICC approval of other intrastate rate increases (citing 49 U.S.C.A. § 11501(b)(1)–(3), (6) (1983)).

146. *See generally* Ely, *supra* note 46; *see also supra* notes 71, 141–142.

railroads. This argument does not fit easily with the ICCTA statutory text or legislative history, which emphasized only the narrow preemption of certain economic regulations.

While courts have seemingly accepted the factual argument that profitable railroad operations cannot withstand environmental oversight, there is little evidence that state waste regulations have imposed unreasonable burdens on railroads, or that a national market cannot coexist with police power protections.<sup>147</sup> At least one existing rail-haul waste operation in New York and four in California have obtained waste hauling permits and comply with laws requiring loading and hauling waste in sealed containers,<sup>148</sup> and other rail operations in New Jersey handle only sealed containers of waste in compliance with state laws.<sup>149</sup> Even Susquehanna & Western belatedly has undertaken half-measures to comply with state laws at its New Jersey waste stations, demonstrating the feasibility of compliance.

Certainly there is no legal conflict presented by compliance with state laws because the Board does not have any regulatory authority over any ancillary operations, including waste operations. Indeed it is hard to avoid the conclusion that the railroads are attracted to the economics of the waste transfer business precisely because they have been able to maintain a regulatory gap.

### 3. *Little or No Consideration Given to the Existence of Regulatory Gaps*

The greatest flaw from a citizen's point of view is that the courts reviewing the application of state laws to railroad waste stations have not considered the practical effect of their rulings. The effect of preemption in those circumstances is to remove all remedies for the prevention of

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147. See Foote, *supra* note 12, at 145–46, 151 (“when federal health and safety agencies use this device, they are generally overstepping their statutorily authorized powers”); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 106–09 (1988) (criticizing reliance on need for uniformity to preempt state laws, when dormant commerce clause jurisprudence does not go that far). *But see* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 350–58 (1997) (noting Supreme Court’s emphasis on protecting the uniformity of the national market).

148. See CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD, RAILHAUL STATUS REPORT (1998) (detailing four proposed projects for landfills in desert areas of California that are capable of receiving waste via railway from urban areas). These ongoing projects are part of an integrated system for the movement of solid waste from urban areas to remote landfills through fully-permitted facilities. See Sanitation Districts of Los Angeles County, Waste-by-Rail, [http://www.lacsd.org/info/waste\\_by\\_rail/default.asp](http://www.lacsd.org/info/waste_by_rail/default.asp) (last visited Jan. 1, 2008). The California proposals are slightly different than the operations discussed in this Article because they involve the transport of waste in sealed and locked intermodal containers. *Id.*

149. Personal Communication, Kevin Auerbacher, N.J. Deputy Attorney General (July 2007); Personal Communication, Thomas Maturano, N.J. Meadowlands Commission (May 2007).

pollution from railroad waste facilities, for it is the states that have a predominant role in solid waste management.<sup>150</sup>

The federal government has largely abandoned the field of solid waste regulation. In the first few years of the modern era of environmental law, the federal government was instrumental in setting minimum standards for state programs. In 1965, Congress first recognized the national threat to public health and welfare posed by the problems of solid waste and enacted the Solid Waste Disposal Act.<sup>151</sup> In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA), which deals with the management of hazardous and solid wastes.<sup>152</sup> RCRA established national minimum standards and permits for the handling, transfer, and disposal of solid waste, enforced by the U.S. Environmental Protection Agency (EPA), state agencies and citizens.<sup>153</sup>

150. The courts have noted that ICCTA does not preempt the Clean Water Act and Clean Air Act. *See Ass'n of Am. R.R.s v. S. Coast Air Quality Dist.*, No. CV 06-01416-JFW, 2007 WL 2439499, at \*5 (C.D. Cal. Apr. 30, 2007) (citing *Cities of Auburn & Kent*, 2 S.T.B. 330 (1997) and *Boston & Me. Corp. & Town of Ayer, Mass.*, Finance Dkt. No. 33971, 2001 Fed. Carr. Cas. (CCH) ¶ 38,352 (Surface Transp. Bd. Apr. 30, 2001), 2001 WL 458685, at \*5 (joint petition for declaratory order)), *appeal docketed*, No. 07-5804 (9th Cir. June 13, 2007); *N.Y., Susquehanna & W. Ry. Corp. v. Jackson*, No. 05-4010, 2007 WL 576431, at \*11 (D.N.J. Feb. 21, 2007), *vacated*, 500 F.3d 238 (3d Cir. 2007); *Holland v. Delray Connecting R.R. Co.*, 311 F. Supp. 2d 744, 757 (N.D. Ind. 2004) (citing *Cities of Auburn & Kent*, 2 S.T.B. at 330 n.7). It is untested whether the Clean Water Act or Clean Air Act remedies could, in theory, be available to address pollution after the fact, as suggested by some courts. *See Green Mountain R.R. Corp. v. Vermont*, No. Civ.1:01-CV-00181JGM, 2003 WL 24051562, at \*8 (D. Vt. Dec. 15, 2003), *aff'd on other grounds*, 404 F.3d 638 (2d Cir. 2005); *Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000). Moreover, the railroads are arguing in at least one case that federal environmental laws are also preempted. *Hackensack Riverkeeper, Inc. v. Del. Otsego Corp.*, No. 05-4806, 2006 WL 3333147 (D.N.J. Nov. 16, 2006) (deferring decision on whether ICCTA could preempt RCRA on any set of facts). The author represented the plaintiffs in the latter action. Certainly, ICCTA speaks of the preemption of state and federal law on the same terms, 49 U.S.C. § 10501(b) (2006), so there is no principled reading that would preempt the former but save the latter.

151. Pub. L. No. 89-272, 79 Stat. 992 (1965); *see* 42 U.S.C. § 6901(a)(4) (“the problems of waste disposal . . . have become national in scope and in concern”); *see also* H.R. REP. NO. 89-899 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 3608, 3614 (noting problems associated with billions of tons of discharged materials and solid waste management methods that “contribute to air, water, and soil pollution and create breeding places for disease-carrying insects and rodents. Accumulations of [waste] cause fire hazards, contribute to accidents and destroy the beauty of cities and the countryside”).

152. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901–6991). Subchapter III of RCRA deals with hazardous waste and Subchapter IV deals with solid waste.

153. *See* 42 U.S.C. §§ 6907, 6912, 6923, 6926, 6928, 6972. RCRA vested the EPA with the power to regulate practices related to the transfer, storage, handling and disposal of solid and hazardous waste. *Id.* §§ 6901(a)(4), 6902(b). Among other things, the statutory minimum standards required states to close open dumps and directly prohibited activities that amount to the open dumping of solid waste. *Id.* §§ 6944–6945. RCRA separately authorized federal standards for the siting of waste facilities in order to prevent the contamination of groundwater, wetlands and surface waters from waste leachate and the pollution of wetlands, and these

Congress explicitly stated that RCRA applied to the rail industry and other transportation industries.<sup>154</sup> RCRA created incentives for the creation of state or regional solid waste plans and provided the EPA with the secondary role of approving state plans as well as issuing guidelines for best solid waste management practices.<sup>155</sup> Other than those minimum standards, however, Congress indicated that “the collection and disposal of solid waste should continue to be primarily the function of State, regional, and local agencies.”<sup>156</sup> Thereafter, Congress and the EPA have focused on hazardous waste and other matters deemed more technologically complex.<sup>157</sup> For example, the EPA has not substantially updated its general regulations for the open dumping of solid waste since 1979<sup>158</sup> and does not regulate transfer stations.

The Board does not fill in this gap at the federal level, for ICCTA explicitly removes many railroad activities from Board licensing review (and, therefore, from its regulatory reach).<sup>159</sup> The Board’s jurisdiction over “transportation by rail carriers”<sup>160</sup> is limited to facilities and activities that are necessary for interstate rail transportation, such as rail line extensions, construction of new rail lines, and acquisition of new lines, each of which triggers the need for Board licenses and environmental review.<sup>161</sup> But the Board does not have licensing authority over the “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”<sup>162</sup> Without licensing authority over “ancillary” but otherwise major facilities such as auto storage facilities, major upgrades to existing lines, bulk cement transfer stations and, of course, waste transfer stations, the Board cannot oversee a significant portion of railroad activities.

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standards include consideration of “regional, geographic, demographic, and climatic factors.” 42 U.S.C. § 6907(a). *See generally* 40 C.F.R. § 257 (2007).

154. *See* 42 U.S.C. § 6923; 40 C.F.R. § 263.10.

155. *See* 42 U.S.C. §§ 6929, 6941.

156. *Id.* § 6901(a)(4). In contrast, the federal government has a greater role in hazardous waste management and is obligated to adopt a program to identify and list hazardous wastes and a permitting program for the treatment, storage or disposal of hazardous waste. *See id.* §§ 6921, 6925. State programs are tightly controlled through a formal delegated program under Subchapter III of RCRA. *Id.* § 6926.

157. In 1984, Congress again strengthened RCRA, particularly the federal oversight and regulation of hazardous waste by passing the Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, 98 Stat. 3221.

158. *See* 40 C.F.R. § 257. EPA regulations do impose minimum standards for municipal and other solid waste landfills, but do not govern the handling of waste before disposal. *See* 40 C.F.R. § 258.

159. *E.g.*, 49 U.S.C. § 10906 (“The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks.”).

160. *Id.* § 10501(b).

161. *Id.* § 10906.

162. *Id.* §§ 10901 (rail carriers need approval to construct a new rail line), 10906 (2006).

The Board also lacks the authority and capability to provide remedies for most environmental harms.<sup>163</sup> The Board's promulgated rules<sup>164</sup> only provide for review of the environmental impacts of its regulatory decisions under the National Environmental Policy Act of 1969 (NEPA).<sup>165</sup> If any review occurs, it is done before projects are undertaken and does not have anything to do with railroads' ongoing compliance with environmental laws. As a procedural statute, NEPA does not mandate any particular result, and once the adverse environmental effects of a proposed action have been identified and evaluated, the Board may decide to subordinate environmental values to other considerations. Even if the Board were to experiment with oversight of environmental management by imposing conditions on NEPA approval, as it recently suggested,<sup>166</sup> it lacks inspectors and environmental staff in the field necessary to regulate ongoing operations. Its overall staff is limited by appropriation to no more than 150 employees, and only a small number of these are responsible for NEPA review.<sup>167</sup> The Board does not and cannot regulate discharges from ongoing railroad terminal operations to air, water, or soil. Other entities must regulate the rail waste station facilities if they are to be regulated at all. For these reasons, the suggestion by one commentator that Congress can resolve the problem of ICCTA preemption by expanding the Board's NEPA review authority and by relying upon mitigation measures is insufficient and unworkable.<sup>168</sup>

In fact, the Board's powers over safety and other aspects of the railroad industry are quite limited, and the Board does not have general authority to address safety issues, which is reserved for the Department

163. *Cf. CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (finding preemption of state hazardous waste regulation where there was an extensive federal agency presence in the field of hazardous waste transportation).

164. *See* 49 C.F.R. §§ 1105.1–1105.12 (2007) (entirety of Board's environmental rules).

165. 42 U.S.C. §§ 4333–4335 (2006).

166. *See* *New England Transrail*, Finance Dkt. No. 34797 (Surface Transp. Bd. Mar. 2, 2006), 2006 WL 560754 (application to open a rail waste station).

167. *Economics, Service, and Capacity in the Freight Railroad Industry: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 2 (June 21, 2006) (Testimony of W. Douglas Buttrey, Chairman, Surface Transportation Board), available at [http://commerce.senate.gov/public/\\_files/Buttrey062106.pdf](http://commerce.senate.gov/public/_files/Buttrey062106.pdf). The Board has even adopted a policy to contract out its minimal preconstruction review activities to third parties paid for by railroad applicants because it “does not have, and likely will never have, funding available to it to increase its staff sufficiently” and “lacks the broad range of in-house technical experts that third-party contractors can tap.” Policy Statement, 66 Fed. Reg. 15,527, 15,530 (Mar. 19, 2001).

168. *See* Shata L. Stucky, Note, *Protecting Communities From Unwarranted Environmental Risks: A NEPA Solution for ICCTA Preemption*, 91 MINN. L. REV. 836 (2007). For other reasons, the Note proposes that Congress impose NEPA-like obligations upon the railroads themselves. *Id.* at 860. While that might not drain the Board's resources, it would ask the railroads to do the impossible, to regulate themselves. That is unworkable.

of Transportation's (DOT) Federal Railroad Administration (FRA) under the Federal Railroad Safety Act (FRSA).<sup>169</sup> For example, the FRA recently addressed the problem of overloaded cars carrying municipal solid waste.<sup>170</sup> ICCTA is certainly not the primary federal rail law governing solid and hazardous waste handled by railroads. Courts have already recognized that ICCTA must coexist with other federal laws that directly regulate hazardous materials, including the Hazardous Materials Transportation Act,<sup>171</sup> the FRSA, and DOT regulations<sup>172</sup> governing hazardous materials transportation by rail.<sup>173</sup> For that reason, recent antiterrorism concerns led Congress to amend those other statutes, not ICCTA, to provide the DOT with additional authority to address railroad safety and hazardous materials transportation.<sup>174</sup> That result conforms to decisions holding that ICCTA did not preempt all other laws that touch upon railroad operations.<sup>175</sup>

In sum, the Board is unable to provide any "remedies" for railroads' solid waste activities. Yet, no court has limited preemption due to the limited scope of those remedies, and that failure has left a regulatory gap.

*G. The Railroad Waste Cases Portend Wider-Scale Attacks on State Waste Management and Environmental Laws*

The majority view of ICCTA preemption will destroy the level playing field for traditional solid waste firms that comply with public safety and health laws. If this trend is not checked, unregulated solid waste stations will proliferate across the country. Already, two other short-line railroads have attempted to arrange for unregulated waste facilities in South Jersey, and there are similar arrangements or proposals in New York, Massachusetts and Rhode Island.<sup>176</sup> The State of California has identified nine proposed rail waste facilities.<sup>177</sup>

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169. Federal Railroad Safety Act, Pub. L. No 91-458, 84 Stat. 971 (1970) (codified as amended at 49 U.S.C. §§ 20101-20153 (2006)).

170. The Federal Railroad Administration has issued a safety advisory for railroad cars used to haul municipal solid waste to landfill sites after at least four incidents involving cracking of the long spine that runs along the underside of a railroad car. See Safety Advisory 2006-06, 72 Fed. Reg. 842 (Jan. 8, 2007). One incident occurred in North Bergen, New Jersey on May 18, 2006. *Id.*

171. 49 U.S.C. §§ 5101-5127.

172. 49 C.F.R. §§ 171-174, 178-180 (2007).

173. See generally *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (applying preemption provisions of other federal acts, not ICCTA, to strike down local rule regarding the movement of hazardous waste by rail).

174. See Homeland Security Act of 2002, Pub. L. 107-296, §§ 1710-1711, 116 Stat. 2135, 2319-20 (codified in scattered sections of 49 U.S.C.).

175. See *Tyrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001).

176. See *Coastal Distrib., LLC v. Town of Babylon*, No. 05 CV 2032 JS ETB, 2006 WL 270252 (E.D.N.Y., Jan. 31, 2006), *aff'd*, 216 Fed. Appx. 97 (2007); *New England Transrail, Finance Dkt. No. 34797* (Surface Transp. Bd. Mar. 2, 2006), 2006 WL 560754 (seeking exemption to start a railroad for the purpose of entering the rail waste business); *Ne. Interchange Ry.*,

Given their success in preempting state laws, railroads can be expected to continue their attempts to evade otherwise applicable environmental laws. Some railroads now claim the power to operate hazardous waste facilities and landfills on railroad property free of any meaningful oversight. For example, Susquehanna & Western has claimed in regulatory filings that it can operate hazardous waste facilities and landfills on railroad property on the theory that “preemption applies equally to hazardous waste, medical waste and recycling facility permits and approvals.”<sup>178</sup> Others have sought to extend ICCTA preemption to the cross-country rail transportation of spent nuclear fuel and high level radioactive waste.<sup>179</sup> And railroads recently blocked California regulations limiting locomotive idling that were adopted to control the Los Angeles Basin’s notorious air pollution.<sup>180</sup>

## II. REGULATORY GAPS ARE THE INEVITABLE RESULT OF TRENDS IN PREEMPTION DOCTRINE

The railroad waste cases provide a vivid example of how the public can be affected by seemingly abstract trends in preemption jurisprudence. State and local governments have important residual powers to address

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Finance Dkt. No. 34734 (Surface Transp. Bd. Nov. 17, 2005), 2005 WL 3090145 (noticing intent to purchase all the assets of Metro Enviro, a construction and debris hauler and processor that lost its permit to operate in Croton-on-Hudson, New York, including a lease of 1,600 feet of track that connects with the CSX line, and thereby to become a common carrier by rail); *Railroad Hearing*, *supra* note 100, at 78–80 (Comments of N.Y. Rep. Maurice Hinchey) (describing efforts of an investment company named Chartwell International, Inc. to purchase a controlling interest in the Middletown and New Jersey Railroad for the express purpose of constructing and operating a solid waste transfer station on its property adjoining the rail lines in the City of Middletown, New York, and the claim of Chartwell executive that ICCTA would preempt state environmental or site reviews).

177. See CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD, *supra* note 148.

178. 36 N.J. Reg. 5098(b), 5101 (Nov. 15, 2004) (cmt. 16).

179. Comments of Brotherhood of Locomotive Engineers and Trainmen at 2, New England Transrail, Finance Dkt. No. 34797 (Surface Transp. Bd. Mar. 2, 2006), 2006 WL 560754 (on file with author) (application to open a rail waste station).

180. Ass’n. of Am. R.R.s v. S. Coast Air Quality Mgt. Dist., No. CV 06-01416-JFW, 2007 WL 2439499 (C.D. Cal. April 30, 2007), *appeal docketed*, No. 07-5804 (9th Cir. June 13, 2007). That decision turned on unique facts, including that the California Air Resources Board (CARB) had entered into 1998 and 2005 memoranda of agreement with railroads to limit nonessential idling in locomotives and to conduct emissions audits in their rail yards. The memoranda were the subject of extensive public meetings and notice and comment. *E.g.*, California Air Resources Board, Public Meeting Agenda and Proposed Memoranda of Agreement (Oct. 27, 2005), *available at* <ftp://ftp.arb.ca.gov/carbis/board/books/2005/102705/start.pdf>. The South Coast Air Quality District, a subunit of the state-wide CARB, unsuccessfully sought rescission of the memoranda and promulgated its own set of regulations directed to railroad operations and facilities. Although the District Court preempted the District’s regulations under ICCTA, it also relied heavily on the District’s limited authority and the exclusive grant of vehicle emissions controls to CARB under California law in order to rebut the District’s claim that the regulations were implementing the Clean Air Act. As there was no clash between ICCTA and CAA, the decision explicitly leaves open the possibility that ICCTA would not preempt a state’s implementation of a delegated federal program.

problems not addressed by the federal government, and preemption removes those protections. Courts' use of a presumption against preemption of state laws has weakened in recent years, creating the danger that courts will create regulatory gaps not contemplated by Congress. This Article argues that preemption doctrine must adopt additional safeguards to retain necessary state and local protections.

Any search for a new doctrine might profitably focus on the effects of preemption in particular cases. This Article contends that the presence of a post-ruling regulatory gap should mark the plausible limits of congressional intent to preempt, as it does in Supreme Court decisions in certain individual tort cases where the Court has been skeptical about claims that Congress intended to remove all remedies. States' regulatory police powers are, after all, the vehicle for individuals to protect themselves through collective remedies, and those remedies should be protected at least as well as individual tort remedies.

#### A. *The Decline of the Presumption against Preemption*

When deciding whether to preempt state police powers, courts traditionally resolved ambiguities in favor of state law. The theory behind that rule of construction was that Congress should be forced to speak clearly on important federalism issues. The standard, modern statement of that rule is credited to the Court's decision in *Rice v. Santa Fe Elevator Corp.*, where it said "Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>181</sup> In other words, if a statute is ambiguous, courts should not preempt state laws, and the matter becomes one that Congress can choose to take up in later legislation. The Court created this doctrine as a counterweight to implied preemption theories, which expanded along with the federal powers after the New Deal.<sup>182</sup>

The presumption against preemption was grounded in the concept of political federalism. As the theory goes, state interests are represented in Congress through individual members, who are politically accountable to their in-state constituents.<sup>183</sup> If a proposed bill frames preemption and

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181. 331 U.S. 218, 230 (1947) (internal citation omitted).

182. See Gardbaum, *supra* note 13, at 806 (arguing that a focus on congressional intent in preemption cases is a necessary and ongoing accompaniment to the expansion of Commerce Clause powers into intrastate matters after the New Deal because "the new constitutional strategy replaced a strict division of powers version of federalism with a new version embodying the presumption that state powers, though no longer constitutionally guaranteed, survive unless clearly ended by Congress").

183. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554–56 (1985); Wechsler, *supra* note 10, at 544–45. In developing a "civic republican" theory of federalism and



other federalism issues clearly and explicitly through the use of unambiguous text, then members interested in defending state interests will be capable of doing so in the legislative process. If members fail to protect state interests held dear to their constituents, they will be held accountable at the polls.<sup>184</sup> The clear statement rule was designed to force Congress to carefully weigh the abrogation of state interests against the political consequences.<sup>185</sup> Without a clear statement rule, the conditions for political federalism may not exist.

There is strong disagreement about whether the force of these arguments in the preemption context has declined because of various developments that have weakened the representation of states qua states in Congress, including the direct popular election of Senators and the rise of national political parties.<sup>186</sup> Other commentators have noted that the presumption's emphasis on a distinction between protected and unprotected state police powers is inconsistent with the Supreme Court's recognition that it is impossible to draw any meaningful line around core attributes of state sovereignty.<sup>187</sup> And perhaps textualist methods of interpretation, which discount legislative history and other nontextual indications of congressional intent, have conditioned courts to conclude too quickly that statutes express a clear choice to consolidate policy, when nontextual evidence shows that Congress intended a more targeted scope of preemption.

Moreover, it is far from clear that public scrutiny will always create incentives for the clear drafting of statutes. Members of Congress might

preemption, Candice Hoke criticizes *Garcia's* rationale as "relegat[ing] the states to a status no greater than that occupied by traditional interest groups clamoring for congressional largesse." S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 702 (1991).

184. Wolfson, *supra* note 147, at 98, 100.

185. See TRIBE, *supra* note 43, at 873–76, 1176 (reviewing differing views of members of the Court on judicial versus political safeguards of federalism in the context of the Court's holding that the Tenth Amendment did not provide an independent limitation on Congress's Commerce Clause powers in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551 (1985)).

186. Recent scholarship has also attacked this accountability rationale as illogical and opportunistic, as the political safeguards of federalism have presumably done their work during the passage of statutes and cannot be affected by post-enactment interpretations; these safeguards may affect policy choices, but do not speak to interpretive rules. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 300–01 (2000). See generally TRIBE, *supra* note 43, at 852–53; Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. R. 91, 93–97 (2003) (reviewing disagreement in the academic literature about the need for political or judicial safeguards of federalism).

187. Calvin Massey, *Joltin' Joe has Left and Gone Away: The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 763 (2003) (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 530–31 (1985), but noting the Court's "enthusiasm" for clear statement rules for the abrogation of state sovereign immunity); Wolfson, *supra* note 147, at 95–96 (arguing that federal courts are not competent to make judgments about essential and traditional state interests).

use ambiguous text to defer unpopular federalism decisions to agencies, knowing that preemptive regulations will likely be upheld under the *Chevron* doctrine if they represent a reasonable construction of the statute.<sup>188</sup> Intentional obscurity would weaken the theory of political federalism that underlies the clear statement rule.<sup>189</sup> Indeed, for that very reason some members of the Court have argued that preemption is a special power and that agencies should not enjoy any prerogative to decide upon the preemptive scope of their governing statutes,<sup>190</sup> and some commentators have echoed that criticism.<sup>191</sup>

Regardless of whether we can pinpoint the exact cause, there is no question that the presumption against preemption has weakened considerably, if not disappeared entirely.<sup>192</sup> Over the past few decades, the Court has issued a series of divided decisions in preemption cases involving the presumption against preemption, particularly in tort and ERISA cases. The traditional rule survived largely intact to the early 1990s; as late as 1993, the Court applied the traditional presumption

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188. *E.g.*, *Geier v. Am. Honda Motor Co. Inc.*, 529 U.S. 861 (2000) (federal regulations preempted state tort claim premised on failure to install); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (OSHA training standards preempted state training regulations for hazardous waste); *City of New York v. FCC*, 486 U.S. 57, 6364 (1988); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978) (comprehensive federal regulations preempted state tanker safety regulations).

189. Wolfson, *supra* note 147, at 101–02 (citing, as an example of agency preemption that failed to adequately consider state law, *Fidelity Federal Savings and Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982), which federalized the terms of mortgage notes).

190. Compare *Geier*, 529 U.S. at 883 (“[w]e place some weight upon DOT’s . . . conclusion . . . that a tort suit such as this one would stand as an obstacle to the accomplishment and execution of those objectives” (citation and internal quotation omitted, alteration in original)), with *id.* at 908 (Stevens, J., dissenting) (“unlike Congress, administrative agencies are clearly not designed to represent the interests of states, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law.”). See also *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1584 (2007) (Stevens, Roberts & Scalia, JJ., dissenting) (“when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference”); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 387 (1998) (Brennan, J., dissenting) (arguing that “agencies can claim no special expertise in interpreting a statute confining its jurisdiction. Finally, we cannot presume that Congress implicitly intended an agency to fill ‘gaps’ in a statute confining the agency’s jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power.” (citations omitted)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O’Connor, J., dissenting) (“[i]t is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference”); *Norfolk S. Ry. Co. v. City of Austell*, No. CIV1:97-CV-1018-RLV, 1997 WL 1113647, at \*7 n.7 (N.D. Ga. Aug. 18, 1997) (no deference to Board interpretation of ICCTA preemption because the statute is unambiguous).

191. *E.g.*, Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274 (2004).

192. See Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968–72 (2002); Massey, *supra* note 187; Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 B.Y.U. J. PUB. L. 1, 27–30 (2002).

against preemption to hold that federal rail crossing regulations did not preempt a state tort claim.<sup>193</sup> Strains in the presumption appear in the 1992 *Cipollone v. Liggett Group Inc.* decision<sup>194</sup> and deepened in the 1996 *Medtronic Inc. v. Lohr* decision.<sup>195</sup>

More recently, however, the Court has dealt with the presumption against preemption doctrine in a variety of ways, including: holding that the presumption does not apply to save state laws where there is a history of significant federal presence in the field of maritime commerce;<sup>196</sup> failing to explicitly discuss the presumption in a tort case concerning defective automobile design;<sup>197</sup> preempting state family and probate law even though it found a federal statute to be ambiguous;<sup>198</sup> and suggesting that the presumption does not apply where Congress makes clear its desire for some preemption of indefinite scope.<sup>199</sup> In a fairly recent environmental case, the Court preempted California's requirement to purchase clean cars and specifically declined to use the presumption to inform its interpretation of arguably ambiguous statutory text that limited preemption to "standard[s] relating to control of emissions from new

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193. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 668 (1993); *see also* *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (holding that a town was not preempted from regulating the use of pesticides because the federal statute was not comprehensive and did not exhibit a clear and manifest intent to preempt local authority).

194. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), was a watershed case for the presumption against preemption and textualist theories of interpretation. A split decision with different voting lineup on each of its six parts, *Cipollone* started a conversation on the Court that continues to this day. The portion of the opinion garnering a seven-member majority stated the traditional "clear and manifest" statement rule at the outset of the opinion and applied the presumption against preemption to support its holding that a 1965 labeling act did not preempt state tort claims. *Id.* at 518. A portion of the opinion that attracted only a four-member plurality, however, held that the 1969 labeling act had broader preemptive effect because its ban on "requirement[s] or prohibition[s]" unambiguously applied to certain common law tort claims. *Id.* at 520–22. Justice Blackmun believed that the phrase was not clear enough to preempt long-standing state tort law and wrote a separate concurring opinion lamenting what he viewed as the demise of the presumption doctrine. *See id.* at 535–42. Justice Scalia's dissent agreed about that demise but thought it a good development; he would have taken a stronger position than the Court plurality by dispensing altogether with the presumption as a guide to interpreting express preemption clauses. *Id.* at 545–46.

195. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), was another split decision written by Justice Stevens which held that federal standards for medical devices do not preempt state tort claims arising from a defective pacemaker. The majority reaffirmed the use of the presumption as an interpretive guide in cases involving express preemption clauses, at least with respect to the scope of intended preemption. *Id.* at 485.

196. *United States v. Locke*, 529 U.S. 89 (2000).

197. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (failing to discuss the presumption in the majority opinion); *see also* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (failing to address the presumption despite lengthy discussion in the parties' briefs).

198. *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001) (admitting that an ERISA section purporting to preempt all state laws that "relate to" federal benefits plan is boundless and cannot be interpreted literally).

199. *Id.* at 151; *cf. id.* at 153 (Breyer, J., dissenting).

motor vehicles.”<sup>200</sup> While the trend is not completely uniform,<sup>201</sup> there is no question that the presumption against preemption has weakened considerably.

The decline of the presumption is curious because during the 1990s the Court developed clear statement rules of great vitality and stability in its jurisprudence concerning the Tenth Amendment, the Eleventh Amendment, the Fourteenth Amendment, the Commerce Clause, the Guarantee Clause, and conditions on monies disbursed pursuant to the Spending Clause.<sup>202</sup> Contemporary decisions in those areas of law reflect the Court’s continuing federalist concerns about protecting state sovereignty. The Court’s clear statement test for the abrogation of Eleventh Amendment immunity is explicitly based on its concerns about the sanctity of state sovereignty.<sup>203</sup> The Court also selectively defers to state corporation law when interpreting federal remedial programs.<sup>204</sup> And the Court’s continuing use of field preemption theories—even when express preemption clauses are not present<sup>205</sup>—means that some counterweight to judicial overreaching is as necessary as it was when the presumption was created to balance post-New Deal preemption jurisprudence.

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200. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004).

201. Recently, the Court used the presumption to support its conclusion that the federal pesticide statute does not preempt tort claims brought by peanut farmers against a pesticide manufacturer, *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 448 (2005), but even then two dissenters stated their contrary belief that the presumption is inapplicable in express preemption cases. *Id.* at 457 (Thomas & Scalia, JJ., concurring in part and dissenting in part)). A similar split in the Court occurred in a case arising under the separate part of ICCTA that deals with motor carriers, with the majority relying on a clear statement rule to uphold local towing laws. *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 442 (2002). The Court considered a general canon of construction requiring a “clear and manifest purpose of Congress” to preempt police powers, as well as conference committee reports and other legislative history demonstrating that the purpose of the motor carrier legislation was economic deregulation. *Id.* at 438–41. Finally, Justice Stevens continues to proclaim that the presumption against preemption is alive and well. *See Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1585–86 (2007) (Stevens, J., dissenting).

202. *See generally* TRIBE, *supra* note 43, at 551–52, 853–57; Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1 (1996).

203. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55–56 (1996).

204. Bernadette Bollas Genetin, *The Powers That Be: A Reexamination of the Federal Courts’ Rulemaking and Adjudicatory Powers in the Context of a Clash of a Congressional Statute and a Supreme Court Rule*, 57 BAYLOR L. REV. 587, 674 n.348 (2005) (reviewing cases where the Court has held that interstices in federal statutes are filled with state corporate law).

205. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

*B. The Presumption against Preemption Needs a Stronger Foundation*

Noting these discrepancies, many academics have argued for the revival of the presumption against preemption of state law.<sup>206</sup> This Article agrees with that goal, but does not agree that it can be realized without a stronger foundation for its (re)adoption.

This Article departs from most commentary in recognizing some validity in the reasons for the presumption's decline. In its standard formulation, the presumption was triggered only by "traditional" state police powers, which could have been understood as synonymous with "longstanding." Both terms would have accurately described the state laws at issue in *Rice*, because the state warehousing laws at issue were longstanding and had been upheld by the Court seventy years beforehand.<sup>207</sup> Indeed, one can imagine that the Court would have seen a distinct strategic advantage in portraying the then newly created clear statement rule as reflecting a well-known principle of construction that Congress must have taken into consideration when passing the federal warehousing law. From time to time, the Court continues to conceptualize the presumption as one involving longstanding state police powers.<sup>208</sup>

However, despite its continued application by some courts, the concept of "longstanding" state powers is a weak basis for a presumption that would protect states' ability to enact police power protections. There are several problems with an interpretation that clear statement rules apply only to specific areas of state interests or remedies that have existed for many years. If only historical areas of state interest are protected, then classification is devoid of any guiding principle. Should the Court classify a tort claim arising from a malfunctioning pacemaker as a variant of medical negligence (a longstanding state interest) or one concerning medical device design (arguably not a longstanding interest)?<sup>209</sup> Should a federal regulation that prevents doctors from prescribing drugs in a certain way be viewed as intruding upon state oversight of the medical profession (longstanding) or in the field of assisted suicide (not longstanding)?<sup>210</sup>

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206. *E.g.*, KENNETH STARR ET AL., *THE LAW OF PREEMPTION* 56 (1991); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 622 (1997); Wolfson, *supra* note 147, at 112 (1988).

207. *Munn v. Illinois*, 94 U.S. 113 (1876).

208. For example, in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), the Court upheld a state tort suit brought by farmers injured by pesticides because such remedies have been available for a long time. *But see* *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (rejecting private suit premised on deception of an agency registering orthopedic bone screws because states do not have a longstanding interest in enforcing fraud against federal agencies).

209. *E.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

210. *E.g.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006).

If the presumption were to apply only to “traditional” or “longstanding” areas of state concern, states would remain frozen in time, unable to adopt their police powers to modern conditions without risking preemption. To take but one example, if state torts that address misapplications of nanotechnology could be portrayed as an entirely new field, rather than the new application of an old area of law, they might be more vulnerable to preemption from ambiguous statutes. Indeed, the notion that certain fields have been “traditionally occupied” on the basis of states’ “historic police powers” has less force today than when *Rice* was adopted in 1947. In the intervening years, Congress has enacted numerous federal consumer safety, product design, public health, environmental, and criminal laws, all of which effectively overlap with state police powers. The historical distinctions between federal and state spheres of influence that underlay the original statement of the presumption are anachronisms now.<sup>211</sup> Whether the police powers are historical is a subjective inquiry to a degree, and there are few rigorous or clear standards to determine whether Congress’s ambiguous text expresses more or less respect for state laws. In short, historical areas of state regulation are a very rough guide to congressional intent.

On the other hand, the *Rice* formulation is sometimes described as applying to all possible expressions of the larger, general category of states’ “traditional” police power.<sup>212</sup> This interpretation raises the issue of whether there are workable limits for applying the clear statement rule. Almost any public welfare regulation derived from that residual, general power could be labeled “traditional.”<sup>213</sup> Without a limiting principle, the Court is unlikely to revive the presumption. In sum, the presumption is too narrow (if interpreted as “historical” or “longstanding”) or too broad (all police powers) or both.

Finally, proponents of states’ freedom to experiment with social policy want to consider whether a presumption as originally conceived sets up a weak defense against preemption. For in reducing a case to the question of field definition the presumption invites evidence that the *federal* government has had a traditional presence in that field, even though that fact is unrelated to whether Congress intended to preempt state law or preferred dual oversight. In *Ray v. Atlantic Richfield Co.* and

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211. Cf. Wolfson, *supra* note 147, at 92–94 (suggesting that the Framers believed that state and federal governments would act in distinct spheres, but that the expansion of congressional power and state commercial regulations has blurred the distinction). It is interesting to consider *Reid v. Colorado*, 155 U.S. 137 (1902), which relied on the reserved powers in the Tenth Amendment to state the rule that “[it] should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.” The Tenth Amendment has little doctrinal force today, except in limited circumstances.

212. E.g., *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

213. See TRIBE, *supra* note 43, at 1045 n.11 (noting plastic concept of police powers).

*United States v. Locke*, for example, the Court accepted the government's argument that the proper field for analysis was interstate navigation rather than public safety from oil spills; that framework made it inevitable that the longstanding federal presence in the navigational field would preempt most of the state safety laws at issue.<sup>214</sup>

But a longstanding federal presence has not always been dispositive. For example, in a case involving the very modern field of nuclear energy, the Court acknowledged the federal prerogative starting with the Manhattan Project and continuing regulation of civilian nuclear power, but then somehow ignored that history by defining the relevant field as tort law or utility economics within longstanding state control.<sup>215</sup> Using the federal government's historical presence or absence in a field to resolve preemption cases does not clarify the doctrine or make it more predictable. Moreover, the federal government's historical presence or absence in a particular field is irrelevant, since the expansive notion of Congress's Commerce Clause powers means that it can generally regulate intrastate activities.

*C. The Presumption against Preemption Should be Grounded on the Need to Avoid Regulatory Gaps unless Such Gaps are Clearly and Explicitly Intended by Congress*

A key question is how to revitalize the clear statement rule for preemption without the presumption's logical and historical baggage. One possibility may lie in Supreme Court cases that consider whether the effect of preemption is to leave a regulatory gap. That analysis occurs within the framework of a search for congressional intent to preempt, and in many cases, gaps mark the outer limits of plausible intent. In noting this pragmatic guide to preemption, the Court has repeatedly warned against lightly inferring congressional intent to create regulatory gaps. Although these pronouncements have been isolated and sporadic, and no formal doctrine has yet formed around the presence of regulatory gaps, a close examination of the Court's decisions and rationale shows that it has effectively adopted a narrow clear statement rule where congressional action will strip certain tort remedies.

Thus, the Court has been especially wary of interpretations of preemption provisions that would have left an injured individual without a remedy. In *Medtronic*, for example, the Court rejected an interpretation of a federal law governing the design of medical devices that would have "wip[ed] out the possibility of [a] remedy for the . . .

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214. *United States v. Locke*, 529 U.S. 89 (2000); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

215. *English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Develop. Comm'n*, 461 U.S. 190 (1983).

injuries.”<sup>216</sup> Similarly, even where the narrow issue before the court was the availability of noncompensatory punitive damages arising out of the escape of plutonium, and there was an exclusive federal franchise over nuclear safety, the Court held that a state tort suit against the operator of a nuclear facility could proceed because it would be “difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”<sup>217</sup> Of course, Congress may strip remedies with respect to safety matters; an affirmative congressional determination that state regulations are inappropriate will preempt state laws, at least when coupled with some federal regulations on the matter.<sup>218</sup> But where the federal government has not taken any action on an issue such as safety, the Court has closely scrutinized arguments that states should be prevented from filling regulatory gaps.<sup>219</sup>

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216. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488–89 (1996); *see also* *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 450 (2005) (holding tort claims not preempted because, in part, “it seems unlikely that Congress considered a relatively obscure provision . . . to give pesticide manufacturers virtual immunity from certain forms of tort liability”); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 541 (1992) (Blackmun, J., concurring in part and dissenting in part) (“there is absolutely no suggestion in the legislative history that Congress intended to leave plaintiffs who were injured as a result of cigarette manufacturers’ unlawful conduct without any alternative remedies; yet that is the regrettable effect of the ruling today that many state common law damages claims are pre-empted.”).

217. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Ms. Silkwood died in a car accident before trial. *Id.* at 242. While she had been contaminated with plutonium, missed seven days of work for decontamination, and the jury found actual damages of \$500,000, this award was apparently based upon exposure only, and there was no proof that she had suffered any actual damages from exposure to plutonium. *Id.* at 245–46. The dissenters would have distinguished compensatory damages from noncompensatory punitive damages and would have preempted the latter category. *Id.* at 263–64, 274–75 (Blackmun & Marshall, JJ., dissenting).

218. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (preempting state tort claim premised on failure to install airbags because federal regulations adopted graduated schedule for installation of passive safety restraints); *Gade v. Nat’l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88 (1992) (preempting state training regulations for hazardous waste workers that exceeded detailed OSHA training standards, where state had not exercised option to obtain federal approval of exclusive state system); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978) (holding that state tanker safety regulations were preempted where federal agency promulgated regulations that it considered to be comprehensive).

219. *Medtronic*, 518 U.S. 470 (1996) (upholding state tort claims against pacemaker manufacturer where federal agency ruled only that the device was “substantially equivalent” to pre-existing devices and had not undertaken detailed and rigorous “premarket approval” or any significant analysis of product safety); *Freightliner v. Myrick*, 514 U.S. 280 (1995) (holding that common law claims related to failure to install anti-lock brakes were not preempted because there was no express federal standard in place to trigger the preemption clause in the federal act); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (where the federal statute required affirmative actions to trigger preemption, upheld state tort claims imposing duty to maintain warning devices at railroad crossing because the federal government made only “elliptical reference” to limited aspects of the signals, but preempted tort claims based on excessive speed because federal regulations governed track speeds). The Court’s concern for creating regulatory gaps can be traced at least as far back as to *United Construction Workers v. Labrunum Construction Corp.*, 347 U.S. 656 (1954), when it held that state law claims for tortious



The Court's reluctance to create voids when faced with tort remedies should be even stronger when it faces prospective public health regulations such as solid waste regulations.<sup>220</sup> These concepts are on a continuum, of course. Tort remedies are not limited to monetary damages, and the Court has explicitly recognized that tort claims can be the equivalent of regulations because they provide incentives to change behavior.<sup>221</sup> Conversely, health and safety regulations serve some of the same functions as tort claims by providing remedies to prevent harm. The difference between the two approaches is that tort claims arise in individual cases after harm has occurred and can only compensate an individual victim; whereas regulations represent a more systematic approach, consistent with our complex society, to anticipate the causes of harm to many people and to prevent harmful behavior before it occurs.<sup>222</sup>

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interference with a contract in connection with a union organizing drive was not preempted because the National Labor Relations Board did not have the authority to order similar relief. The Court's concern about regulatory voids is by no means uniform. This term, the Court declined to review a railroad dispute that would have provided an opportunity to resolve a split in the lower courts on the issue of when a federal law that does not itself authorize a lawsuit to enforce it can be the basis for preempting any state law on the same subject. *Lundeen v. Canadian Pacific Ry. Co.*, 127 S. Ct. 1149 (2007). The case grew out of the derailment of a train that sent a cloud of toxic ammonia over a city, injuring plaintiffs. *See Lundeen v. Canadian Pac. Ry. Co.*, No. Civ.04-3220, 2005 WL 563111 (D. Minn. March 9, 2005). The Eighth Circuit found that state tort claims based on negligent inspection were completely preempted by the Federal Railroad Safety Act, which does not directly provide a right of action to injured parties. *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606 (8th Cir. 2006).

220. *Cf. Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (holding that town was not preempted from regulating the use of pesticides because federal statute did not comprehensively occupy the field, did not establish a permitted schedule for the use of pesticides, and therefore did not exhibit a clear and manifest intent to preempt local authority).

221. *E.g., English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting).

222. Despite his hostility to environmental regulation, Justice Scalia has articulated a useful description of precautionary state police powers in the context of explaining the nuisance exception to regulatory takings:

It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . . .

On this analysis, the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

*Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027, 1029-30 (1992).

In that sense, both tort claims and public health and safety regulations are manifestations of states' police powers, and express the people's fundamental right to self-protection from bodily harm.<sup>223</sup> As the people are the ultimate sovereign in our system of government,<sup>224</sup> courts should be wary of applying preemption in a manner that strips away effective means of self-protection, whether adopted through individual tort suits or collectively-enacted regulation. It is not the "traditional" roots of such protections that give them their power. Rather, it is the inherent legitimacy in allowing the people to protect themselves by duly enacted means at the local, state or federal level (or on all three levels). Regulatory gaps that effectively destroy all avenues of redress are contrary to the imperative for self-protection, and thus to the fundamental nature of democratic government.

The Court has, in fact, recognized the rights of states to prevent collective harm through regulation without interference from federal law. Remarkably, these decisions came about in the context of state economic regulations, where there is a greater theoretical basis for Congress to create regulatory voids than in social regulations. In *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, for example, the Court refused to preempt state regulation of utility economics despite the exclusive federal franchise over nuclear safety issues, reasoning that it "is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the states to continue to make these judgments [on the economic feasibility of nuclear power plants]."<sup>225</sup> Since the federal government would not address whether ratepayers would face economic liabilities, the states could continue to do so.<sup>226</sup> Similarly, in other utility regulations cases, the Court has used the presence or absence of regulatory gaps to bolster its analysis of congressional intent.<sup>227</sup> The Court

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223. See Richard A. Epstein, *In Defense of the "Old" Public Health: The Legal Framework for the Regulation of Public Health*, 69 BROOK. L. REV. 1421, 1443-44 (2004) (describing expansion of public health regulations to cover matters that affect large number of individuals, and, for reasons of social wealth and freedom, arguing for a return to traditional forms of public health law that were directed to externalities that could not be addressed by market solutions or private torts).

224. The Constitution famously starts with the words "We the People" and both legal scholars and historians have noted that this founding document of our government represented a fundamental shift away from prior, formalistic notions of sovereignty to a democratic based theory of sovereignty. See BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

225. 461 U.S. 190, 207-08 (1983). This point was an especially strong one for the concurring Justices as well. See *id.* at 225 (Blackmun, J., concurring).

226. *Id.* at 212 (majority opinion).

227. *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 87 (1990) (Stevens, J., concurring) (agreeing with decision because the lower court's interpretation would "create a gap in the regulatory scheme that Congress could not have intended"); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 380 (1988) (Scalia, J., concurring in judgment) (agreeing that state law

has held that while an “authoritative federal determination that [an] area is best left *unregulated*” may preempt state laws in that area, there must be a strong affirmative indication of that intent.<sup>228</sup> Where gaps will otherwise persist, the Court will reject preemption where statutory interpretation shows that Congress’s intent “was to fill a regulatory gap, not to perpetuate one.”<sup>229</sup> The Court has found that Congress intended to create a regulatory void and to allow market forces to set the price of commodities,<sup>230</sup> and in another case the Court upheld state economic regulations where Congress was apparently indifferent to the matter.<sup>231</sup> In any event, the Court said that Congress cannot make a decision to displace all state regulations, even on economic matters, “subtly” or through “deliberate federal inaction.”<sup>232</sup>

Concern for citizens’ self-protective powers and sovereignty compel the conclusion that the courts should bolster the safeguards shielding public health and safety remedies. If the people have chosen to protect themselves by enacting a health, safety, environmental or other public welfare law, then courts must ensure that Congress must have a very good reason to upset those self-protective measures.<sup>233</sup> As one commentator noted, “Federal preemption decisions impede the ability of those governmental bodies that are structured to be most responsive to citizens’ public values and ideas—state and local governments—and have concomitantly undermined citizens’ rights to participate directly in

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is preempted because, in part, there is “no regulatory gap for the States to fill”); *Fla. Lime & Avocado Growers, Inc v. Paul*, 373 U.S. 132, 166–67 (1963) (White, J., dissenting) (stating that dissenters would strike down the state laws as preempted because, in part, “[n]o gap exists in the regulatory scheme which would warrant state action to prevent the evils of a no-man’s land”); *N. Natural Gas Co. v. State Corp. Comm’n of Kan.*, 372 U.S. 84, 95 (1963) (stating that “the invalidation of this particular form of state regulation does not result in a regulatory ‘gap’ of the sort which the Act was designed to prevent”).

228. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983).

229. *Id.*

230. *Transcon. Gas Pipeline Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 422 (1986).

231. *P.R. Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) (holding that passage and repeal of comprehensive federal statutes providing for allocation and price controls on petroleum productions did not manifest intent to preempt territorial gasoline price regulation); *Ark. Elec. Coop. Corp.*, 461 U.S. 375.

232. *P.R. Dep’t of Consumer Affairs*, 485 U.S. at 500, 503; *see also* 426 Bloomfield Ave. Corp. v. City of Newark, 904 F. Supp. 364, 374 (D.N.J. 1995) (holding that a different section of ICCTA does not preempt city regulations over nonconsensual towing where Congress has not adopted a federal consumer protection scheme).

233. *Cf.* Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 *VILL. L. REV.* 1219, 1238–39 (2001) (states provide “an additional layer of regulatory protection against concentrations of private power and wealth, which pose an enormous threat to personal freedom in contemporary society. . . . A central reason for the magnitude of the private sector threat to personal freedom is that corporations, although enabled by government through the corporate form, are not subject to the individual rights guarantees by which the Constitution constrains government. Only the people, through their political institutions, can check corporate power.” (footnotes omitted)).

governing themselves.”<sup>234</sup> Any federal limitations on police powers must be well considered, for states and their citizens have inherent, sovereign police powers that cannot be stripped away; that prerogative power is only temporarily suppressed when superseded by the exercise of Congress’s expressly delineated powers to enact legislation.

Furthermore, states’ ability to provide retroactive and prospective relief to their citizens is at least as central to sovereignty as the retention of immunity defenses in federal court.<sup>235</sup> Inattention to the effects of preemption rulings is inconsistent with courts’ continuing, professed concern for state sovereignty in Eleventh Amendment immunity and other cases.<sup>236</sup>

#### *D. Regulatory Gaps and Constitutional Limits on Congressional Vetoes of State Laws*

Any effort to reform preemption jurisprudence should also be consistent with an often-ignored limitation on Congress’s preemption powers, one that was central to the creation of the Supremacy Clause.<sup>237</sup> The Framers denied Congress the ability to veto state laws, a power then known as the legislative negative.<sup>238</sup> It follows that Congress is at the

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234. Hoke, *supra* note 183, at 689 (arguing that overly broad preemption harms “civic republicanism”); *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (discussing participatory values in decentralized government); Friedman, *supra* note 147, at 386–403 (summarizing the arguments for virtues of state authority as increased public participation in democracy, greater accountability to the electorate, laboratories for experimentation, more comprehensive protection of public health, safety and welfare, increased cultural diversity, and diffusion of power to protect liberty); Magarian, *supra* note 233 (arguing that the value of state prerogatives lies in the people’s opportunities to create governmental institutions and their ability to use those institutions to fulfill the popular will).

235. *E.g.*, Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 751 (1985) (“[t]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons” (internal quotation omitted)); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 955–56 (1982) (stating that a state may enact a comprehensive regulatory system to address an environmental problem or a threat to natural resources within the confines of the Commerce Clause, and holding that a state may adopt regulations to preserve ground water and to prevent the uncontrolled transfer of water out of the state).

236. *See supra* notes 202–203 and accompanying text.

237. *See generally* Wolfson, *supra* note 147, at 88–91.

238. There is no general congressional power to invalidate state laws, as the framers explicitly denied Congress the right to veto state laws. *See generally* AKIL REED AMAR, AMERICA’S CONSTITUTION 106, 109 (2005) (describing James Madison’s attempts in Federalist No.10, and later Charles Pinckney’s formal resolution, to add a general veto of state laws to congressional powers, and the Convention’s definitive rejection of that power (citing Farrand’s Records, 1:164, 165, 172)); THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION 116 (Winton U. Solberg ed., Univ. Ill. Press 2d rev. ed. 1990) (Charles Pinckney’s proposal for a legislative negative); *id.* at 137 (James Wilson, comparing Virginia and New Jersey plans); *id.* at 183 (James Madison’s statement in support of the legislative negative); *id.* at 225–26 (rejection of the proposal by a 7–3 vote of the Convention, with the Supremacy Clause offered as a replacement); *id.* at 290 (Charles Pinckney again moved for adoption of the negative, which

outer limits of its powers under the Supremacy Clause when the effect of preemption is primarily to veto state laws rather than to support federal policy. In other words, Congress should not wield the power of preemption solely to create regulatory gaps and should intentionally create gaps only to support some affirmative federal policy.

This insight is consistent with the regulatory gap cases. Yet the Court has not implied a parallel limitation on Congress's preemptive power from the Framers' rejection of the power to veto state laws and omission of that power from the Supremacy Clause.<sup>239</sup> This is surprising given the Court's willingness to interpret other doctrines by implication from omissions in the Constitution, as it has done in the dormant commerce clause cases. The absence of any general congressional power to veto state laws has only been mentioned in a few dissents in the modern era.<sup>240</sup>

It has not always been necessary to develop an explicit connection between preemption doctrine and the ban on vetoes of states' laws. In the early formation of the judicial preemption doctrine, the Court had rejected the notion that Congress had exclusive power over interstate commerce that automatically preempted all state rules because such a broad standard would have left too many areas unregulated; instead, the Court developed the notion of latent exclusivity, whereby preemption would only occur upon some congressional regulation.<sup>241</sup> Although the New Deal expansion of federal regulatory power overtook the requirement for some affirmative expression of federal power and led to the more general theories of field and obstacle-to-federal-purposes preemption, the extreme effects of those theories were tempered by the presumption against preemption. Courts still strove to find some federal purpose and policy before displacing state laws.

The challenge now is to distinguish invalid vetoes of state laws from valid congressional prerogatives to create national policies. One starting point for analysis may be to determine whether there is a nexus between

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was rejected by a 6–5 vote of the Convention); *see also* Foote, *supra* note 12, at 121 n.35. The Constitutional Convention separately rejected the Virginia Plan's proposal for a Council of Revision made up of the executive and judges, which would have had the power to review federal and state statutes before they went into effect. *See* VII THE CAMBRIDGE MODERN HISTORY 293–95 (Adolphus William Ward, George Walter Prothero & Ernest Alfred Benians eds., 1903); THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION, *supra*, at 97–101, 111.

239. As one commentator noted, “[p]reemption . . . implicate[s] controversial issues of power because of its similarity to a power that the Framers denied Congress: the power to veto state laws.” The use of preemption as a surrogate for that power undermines the foundations of the political safeguards of federalism. Wolfson, *supra* note 147, at 88, 89–91.

240. *E.g.*, *Fed. Energy Reg. Comm'n v. Mississippi*, 456 U.S. 742, 794–96 (1982) (O'Connor, J., dissenting); *South Carolina v. Katzenbach*, 383 U.S. 301, 360–61 (1966) (Black, J., dissenting).

241. Gardbaum, *supra* note 13, at 801–02.

the purpose of the federal law at issue and the creation of a regulatory gap through displacement of state laws (and other federal laws<sup>242</sup>).

Congress certainly has the power to create certain kinds of regulatory gaps. Some federal economic policies, for example, seek to deregulate entire business sectors from rules that distort economic decisions. Over the past thirty years, Congress has deregulated the transportation, communication, natural gas, pipeline, energy, broadcasting, banking, and other sectors by, in part, extinguishing laws perceived to be onerous or counterproductive. The well-developed theoretical basis for economic deregulation is that consumers will benefit if pricing and other economic decisions are made (or regulated in a sense) solely by competitive forces in a free market.<sup>243</sup> Under these theories, market controls substitute for governmental controls; deregulatory statutes therefore intentionally create gaps in government economic regulations so that the market will be the only regulating force on prices and related terms.<sup>244</sup> Preemption is a key element of these reforms, for Congress must protect federally deregulated industries from being regulated again at the state level.<sup>245</sup> The displacement of some state economic laws is therefore necessary to ensure the success of national economic deregulatory policies and is well within Congress's prerogative to ensure national markets.<sup>246</sup> Whether or not deregulatory statutes establish any significant federal program or simply reduce the regulatory apparatus, it is clear that in those statutes Congress has established an affirmative federal standard: economic decisions must be subject to competition and market controls. In that context, economic deregulation does not displace state laws just for the sake of vetoing those laws, but rather provides essential support to affirmative federal policy.

By contrast, when Congress enacts legislation to address social, environmental, and other noneconomic issues, it is not drawing upon any well-developed or accepted theory, analogous to free market theory, that

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242. See *supra* note 150.

243. STEPHEN BREYER, *REGULATION AND ITS REFORM* 200 (1982); Susan Bartlett Foote, *New Federalism or Old Federalization: Deregulation and the States*, in *PERSPECTIVES ON FEDERALISM* 41, 43 n. 9 (Harry N. Schreiber ed., 1987); George Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 1, 5 (1971); see also GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 83 (1971); Buzbee, *supra* note 12, at 38-40 (reviewing Stigler's and others' public choice scholarship).

244. Foote, *supra* note 12, at 115.

245. See generally Robert E. McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers*, 24 *TRANSP. L.J.* 155 (1997) (reviewing preemptive effect of the Federal Railway Safety Act of 1970, the Airline Deregulation Act of 1978, and the Federal Aviation Administration Authorization Act of 1994).

246. Based upon the economic failure of the Articles of Confederation and the Constitution's specific grants to the Legislative branch to enact uniform bankruptcy laws, negotiable instruments, weights and measures, currency, and copyright laws, Congress has an especially strong mandate to form a national market. U.S. CONST. art. I, § 8.

would justify regulatory gaps as good policy. The free market rationale for displacing economic laws does not extend to displacing state police powers because market forces will not control externalities and other market imperfections.<sup>247</sup> Harmful practices in these fields represent market failure and will not be corrected by competition or other market forces (indeed, competition may lead to widespread harmful practices as more and more entities are pressured to externalize costs to the general public).<sup>248</sup> Controlling social costs in an even-handed way across firms and sectors complements free market policies by focusing interfirm competition on price and service rather than regulatory rents.<sup>249</sup> Selective preemption of environmental and social regulations for certain industries would therefore undermine federal policy by introducing market distortions. Government action—the expression of citizens’ rights to self-protection—is necessary.

Congress generally does not preempt state regulation without offering overt federal standards for governmental control to avoid a regulatory void. For example, in the past few years, Congress has demonstrated its willingness to preempt state police powers by introducing bills and enacting legislation that address a range of social and environmental issues, including food safety and organic food production,<sup>250</sup> chemical plant security,<sup>251</sup> ballast water,<sup>252</sup> the siting of

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247. As one leading scholar summarized the theory,

deregulation refers only to elimination of all forms of government intervention that are intended to affect the economic performance of the market, e.g., price controls and restrictions on market entry and exits. The firms in the industry invariably remain subject to regulatory controls designed to further unrelated social goals, e.g., health and safety, employment discrimination, and environmental regulation.

RICHARD J. PIERCE, JR., *ECONOMIC REGULATION* 314 (1994).

248. See Epstein, *supra* note 223, at 1425–26 (public health laws are grounded in the need to prevent communicable diseases, pollution, and other externalities). See generally R.H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960) (discussing externalities generally).

249. See, e.g., Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339, 1390–430 (1993) (describing link between efforts to control external environmental costs and to start a free market in electricity).

250. National Uniformity for Food Act of 2006, H.R. 4167, 109th Cong. (2006) (passed in the House on March 8, 2006) (barring states from addressing food-borne hazards and leaving food safety solely to the Food and Drug Administration). On the day it was passed, the House rejected several amendments that were intended to preserve state authority.

251. The Chemical Facility Anti-Terrorism Act of 2006 provides that “[a] State or local government may not prescribe, issue, or continue in effect a law, regulation, standard or order that may frustrate the purposes of this title or any regulations or standards prescribed under this title.” H.R. 5695, 109th Cong. § 1807 (2006). So-called “frustration of purpose” preemption is arguably the broadest category of implied preemption and would be made explicit through incorporation in the statute.

252. Prevention of Aquatic Invasive Species Act of 2006, H.R. 5030, 109th Cong. (2006); Ballast Water Management Act of 2005, § 363, 109th Cong. (2005).

liquefied natural gas terminals,<sup>253</sup> and electrical transmission lines.<sup>254</sup> These federal laws preempt state laws that may be more protective than federal standards. They thus mark an expansion of the traditional federal role in social policy, which is to protect against harmful regulatory competition between states or to reduce interstate pollution by preempting only weak state standards that fall below minimum federal standards.<sup>255</sup> Yet even in this period, Congress accomplished the complete preemption of state laws in these narrow fields by adopting some federal standards, however weak they may be, and by offering a reasoned basis for doing so to create a uniform national market.<sup>256</sup> Sometimes, however, Congress poorly defines the intended scope of economic deregulatory policy, and preemption therefore spills into social, environmental and other areas. By all evidence these gaps are unintentional and are not the subject of explicit debate or theoretical defense.<sup>257</sup>

The absence of policy justifications for noneconomic regulatory gaps may well indicate a potential breakdown of political accountability. The lack of accountability may be at its most pronounced when broad preemption is based upon ambiguous language in deregulatory statutes and is urged by profit-seeking entities that have strong incentives to create regulatory gaps in public health and safety laws. We can expect more attempts by private entities to avoid state regulation as the federal government withdraws from a variety of public health and welfare fields for budgetary, ideological, or other reasons. Outside of the environmental area, for example, airlines have used one of the first

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253. Energy Policy Act of 2005, Pub. L. No. 109-58, § 311(c)(2), 119 Stat. 594, 686 (2005) (codified in relevant part at 15 U.S.C. § 717b(e)(1) (2006)).

254. *Id.* § 1221 (codified at 16 U.S.C. § 824p) (amending section 216 of the Federal Power Act).

255. Some of the classic articles debating the relative merits of environmental federalism are Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulations*, 67 N.Y.U. L. REV. 1210 (1992); and Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

256. For an overview of the general justifications for regulating at the state or federal level, see Friedman, *supra* note 147, at 406–408 (national authority is appropriately exercised where regulatory field involves public goods, interstate externalities, the danger of a race-to-the-bottom amongst states, or the need for uniformity) and Wolfson, *supra* note 147, at 106–09 (criticizing reliance on need for uniformity to preempt state laws, when dormant commerce clause jurisprudence does not go that far). See also Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987).

257. Some notable exceptions are Congress's explicit attempts to prevent states from granting abortion rights, applying land use laws to churches, or acting on other religious issues.



deregulatory statutes, the Airline Deregulation Act of 1978,<sup>258</sup> to argue for the preemption of a wide variety of tort actions.<sup>259</sup>

Any failure of Congress to articulate reasons for preempting state law may also be vulnerable under decisions that require some justification for the exercise of Commerce Clause regulatory powers.<sup>260</sup> Even when its actions concern interstate transportation, Congress must articulate the reasons for preempting state laws.<sup>261</sup> It is not clear that Congress would have a rational basis to conclude that state environmental or other social regulations pose such a threat to the industry that such laws have to be preempted to protect some federal policy.<sup>262</sup>

In sum, regulatory gaps may be the result of federal laws that amount to an improper veto of state laws and, therefore, exceed the boundaries of congressional power under the Supremacy Clause.

### III. REVITALIZING THE PRESUMPTION AGAINST PREEMPTION OF STATE LAW

This Article proposes that preemption jurisprudence be recast on a stronger foundation in order to revitalize doctrinal protections against overly facile displacement of state law.

#### A. *Courts Should Require A Clear Expression of Congressional Intent before Creating Regulatory Gaps through Preemption*

As noted in the preceding section, in individual cases the Supreme Court has examined whether Congress intended to create regulatory gaps

258. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

259. *See, e.g.,* Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995). *See generally infra* note 295.

260. The Commerce Clause requires that Congress articulate the “substantial effect” that regulated activities have on interstate commerce, and, arguably, that the means adopted is reasonably connected to the goals of the statute. *United States v. Lopez*, 514 U.S. 549, 559–60 (1995); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276, 283 (1981). The Court has recently suggested that it will closely scrutinize Congress’s articulated reasons for invoking its powers under the Commerce Clause, which does not grant unlimited regulatory powers. *Lopez*, 514 U.S. 549.

261. *Cf. Kelley v. United States*, 69 F.3d 1503, 1508 (10th Cir. 1995) (rejecting constitutional challenge to preemption clause in motor carrier deregulation act because state regulations substantially affected interstate commerce and preemption was reasonably adapted to the ends sought by Congress, but recognizing that some aspect of intrastate truck transportation may not affect interstate commerce); *Texas v. United States*, 730 F.2d 339 (5th Cir. 1984) (rejecting facial challenge to the 1980 Staggers Act because intrastate rail substantially affects interstate commerce); *McFarland*, *supra* note 245.

262. For example, the Federal Railroad Safety Act of 1970 explicitly adopted a default rule whereby state safety rules over such matters as railroad crossings are governed by state laws unless the Secretary of Transportation promulgates rules that displace the specific state law at issue. 49 U.S.C. § 20106 (2006). *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *South Dakota ex rel. S.D. R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 934–35 (D.S.D. 2003) (discussing *Am. Airlines Corp. v. Wolens*, 513 U.S. 219 (1995)).

in order to assess the plausibility of preemption.<sup>263</sup> This is a clear statement rule in all but name only. Despite some broadly applicable statements, however, the regulatory gap cases have remained grounded in the specific facts before the Court and not in a well-developed, constitutionally-based theory of construction. This Article has attempted to provide that foundation, and concludes that it would take only an incremental step for courts to coalesce the Court's scattered statements on gaps into an interpretive canon. The need to protect the balance between federal and state government, the underlying sovereign interests of the people in self-protection, the ban on naked vetoes of state law, and other constitutional limitations on Congress's preemption powers all combine to compel a formal interpretive doctrine designed to prevent the accidental creation of regulatory gaps.

Where the effect of preemption will be to preclude all effective remedies for the prevention of environmental or other social harms in a particular area, courts should not hold state laws preempted in the absence of a clear statement by Congress that it intends to prevent *any* federal or state authority from addressing those harms.<sup>264</sup> In other words, reviewing courts should presume that Congress did not intend to prevent authorities from addressing health, safety, and other concerns, especially where federal agencies do not have the authority to provide corresponding remedies. The presumption would address most preemption issues on a prudential level before courts reached the constitutional question of whether the federal act in question is an improper veto of state laws or is otherwise constitutionally infirm. It would be a functional mechanism to force Congress to displace state police powers only in the most transparent fashion, and not accidentally through vague or careless language.<sup>265</sup> As the presumption could be rebutted by a clear statement from Congress that the gap at issue is

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263. See Jordan, *supra* note 140, at 1167 ("the Court will seek to narrow the scope of the preemptive field to mitigate against the impact of field preemption" because unduly broad field preemption will lead to a regulatory vacuum (citing *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983))).

264. A similar but more general proposal was advanced twenty years ago by Susan Bartlett Foote. Foote, *supra* note 12. Professor Foote proposed that reviewing courts should reassert their primacy in federalism and preemption disputes and should adopt a clear statement rule in *all* preemption cases in order to ensure that regulatory gaps do not violate constitutional federalism. That article predated jurisprudential changes over the past twenty years, including the decline in the presumption against preemption and the Court's greater inclination to preempt state laws. In addition, the use of preemption by deregulated entities has expanded since that time. The proposal in this Article accounts for that development by focusing on the importance of the intended scope of deregulation and the presence (or absence) of regulatory gaps.

265. See, e.g., Hoke, *supra* note 183, at 719 (discussing the creation of a regulatory vacuum through preemption decisions under the Federal Arbitration Act).

intentional, it would not pose an insurmountable obstacle to Congress's deregulatory or other legislative efforts.

One clear advantage to the test is that it would force Congress to speak clearly to the *scope* of any preemption; it is a matter of continuing debate on the Court about how to demark the scope of displacement once preemption is found.<sup>266</sup> Deregulatory statutes, for example, typically include a preemption clause, but the scope of the displacement intended by Congress is not always clear. With the avoidance of inadvertent gaps at the center of a court's preemption analysis, Congress would have to address the scope of preemption with appropriate findings, savings clauses, and other textual memorializations of intent.

Congress could employ the same level of linguistic precision it does when abrogating state sovereign immunity to suit in federal court. Under the first prong of the Eleventh Amendment abrogation test—whether Congress spoke clearly enough—courts have focused on whether Congress has specified the particular remedies that are to apply to states.<sup>267</sup> For example, in the Individuals with Disabilities Education Act, Congress stated that “remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available” against other entities.<sup>268</sup> The same formula has been used in other statutes.<sup>269</sup>

Using the likely presence of a regulatory gap to trigger the search for a clear congressional statement would sidestep one of the problems that bedeviled the traditional presumption against preemption. Unlike subjective classifications of state powers into “historical” or other categories, the presence or absence of a gap is a matter that is readily cognizable by courts, which are institutionally equipped to compare the scope of coverage of federal and state laws. Parties can aid that facial inquiry by submitting proof about the effects of any gaps that would be created by preemption. Such proof would consist largely of the potentially preemptive federal law, other potentially applicable federal

266. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

267. See generally Meltzer, *supra* note 202, at 32 nn.148–50. This inquiry is to be distinguished from the second prong on which many abrogation efforts have failed, namely whether abrogation is necessary to remedy a pattern of discrimination covered by section 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

268. 20 U.S.C. § 1403(b) (2006). Where courts have held that this section is unconstitutional, for example, in *Bradley ex rel. Bradley v. Arkansas Department of Education*, 189 F.3d 745 (8th Cir. 1999), they have found that the statement of abrogation was clear enough to satisfy the first prong of the sovereign immunity test but without adequate factual support to meet the second prong of the test.

269. *E.g.*, 42 U.S.C. § 2000d-7 (2006). Here too, courts have held that this section (an amendment to the Civil Rights Act) is an unequivocal clear statement of intent to abrogate, even if it fails to satisfy other constitutional requirements. *E.g.*, *Reickenbacker v. Foster*, 274 F.3d 974, 977, 982–84 (5th Cir. 2001).

laws, and relevant state laws, as well as the submission of briefs on the scope of those laws and any gaps. Courts should be able to resolve quickly and clearly the legal issue of whether there is a gap.

In short, regulatory gaps are a more objective criterion for a clear statement rule than whether a state is regulating in its traditional area. This objective trigger for the presumption and clear statement interpretive rule is distinguished from other proposals for general or specific clear statement rules, which share the goal of checking overbroad preemption.<sup>270</sup> Bypassing the question of historical distinctions would also clarify that states may regulate modern industries or practices. And gap analysis fits well with recent scholarship arguing that the Supremacy Clause operates only to preempt state laws that contradict or conflict with federal law.<sup>271</sup> State laws that fill a regulatory gap probably do not contradict federal law, unless there is an explicit congressional statement that the gap is intentional.

### *B. Are Clear Statement Rules Effective as Background Rules for Legislation?*

Any clear statement rule seeks to improve the drafting of statutes. The hope is that Congress will consider regulatory gaps in its deliberations. But what guarantee is there that Congress will listen? Another way to pose the question is to ask whether courts have a meaningful role in guaranteeing the political safeguards for federalism by encouraging congressional consideration of state interests through presumptions and other interpretive canons. This issue has been debated in the courts and in the academic literature.<sup>272</sup>

One empirical point to consider is that Congress has demonstrated its ability to react to background rules after they are created. One obvious and recent example is presented by the Court's Eleventh Amendment jurisprudence, which has caused Congress to expressly override individual decisions and abrogate state sovereign immunity with a great degree of specificity.<sup>273</sup>

Preemption doctrine provides another empirical test. When the Court became more inclined to find state laws preempted over the past decade or more, Congress reacted to that background "rule" by using its preemptive power more aggressively to limit state innovation in

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270. See, e.g., Foote, *supra* note 12; Grey, *supra* note 206; Hoke, *supra* note 183.

271. E.g., Gardbaum, *supra* note 13; Nelson, *supra* note 186, at 252, 260.

272. E.g., John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997). See generally Clark, *supra* note 186, at 93-97 (reviewing disagreement in the academic literature).

273. See *supra* notes 267-268.

environmental<sup>274</sup> and social policy.<sup>275</sup> There is no reason to think that Congress cannot also respond to a rule that presumes non-preemption in a narrow set of gap-creating cases. Congress may react by continuing to preempt state laws, of course, but would have to do so with greater specificity about the scope of remedies to be displaced. Or Congress may narrow the scope of preemption to avoid any gaps. On the other hand, in the absence of a clear statement rule, errant decisions of the courts are unlikely to be corrected. One recent empirical study found that Congress rarely responds to the Court's preemption decisions in individual cases.<sup>276</sup>

The railroad waste cases also provide empirical evidence that a clear statement rule is a necessary precondition to the political safeguards of federalism.<sup>277</sup> In the absence of a clear statement rule, the courts have allowed railroads to operate waste handling facilities with impunity behind the shield of supposed ICCTA preemption that Congress probably did not actually intend to enact. For years, after the problem of unregulated railroad waste had become well known, Congress was unable to address this situation as a body. To be sure, individual members of Congress from affected states attempted to bring pressure to bear upon the Board (and to a lesser degree the EPA) through letters and other standard oversight mechanisms.<sup>278</sup> Individual members of Congress also inserted nonbinding comments in appropriations bills to induce Board

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Perhaps more than at any time in the last thirty-five years, the states and localities have begun to fulfill their potential as 'laboratories' of experimentation in achieving environmental protection goals. Instead of welcoming this development, however, the federal government, acting again through all three branches, has recognized or imposed limitations on state and local authority to continue with those endeavors.

Glicksman, *supra* note 2, at 720–21 (2006) (footnote omitted); see also Nina Mendelson, *Bullies Along the Potomac*, N.Y. TIMES, July 5, 2006, at A17 (describing congressional efforts to weaken states' efforts to protect health and the environment).

275. See *supra* note 11.

276. Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604 (2007).

277. This is contrary to the implication of the majority's reasoning in *Garcia v. San Antonio Metropolitan Transit Authority*, that "[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. 528, 551 (1985). The interplay between judicial and political concepts of federalism is demonstrated by several bills and proposals whereby Congress would adopt limitations on preemption doctrine. Patricia L. Donze, *Legislating Comity: Can Congress Enforce Federalism Constraints Through Restrictions on Preemption Doctrine?*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 239 (2001).

278. E.g., Letter from U.S. Senators Frank Lautenberg and Jon Corzine, to Roger Nober, Chairman, Surface Transportation Board (May 2, 2005); Letter from U.S. Representatives Robert Menendez and Bill Pascrell, Jr., to Stephen Johnson, EPA Administrator (May 26, 2005), available at [http://village.croton-on-hudson.ny.us/Public\\_Documents/CrotonHudsonNY\\_Board/10066FE66](http://village.croton-on-hudson.ny.us/Public_Documents/CrotonHudsonNY_Board/10066FE66).

action.<sup>279</sup> And in hearings on the issue, a House subcommittee closely questioned the chairman of the Board about the reach of the ICCTA preemption provision in general and waste stations in particular.<sup>280</sup> These oversight measures, however, were ineffective in stemming the proliferation of railroad waste stations, did not change the STB's position on preemption, and could not substitute for the amendment of ICCTA.

After several years, Congress was finally able to pass a temporary measure in a one-year spending bill for transportation and housing programs that will allow states to regulate some solid waste processing facilities on railroads.<sup>281</sup> The White House had issued a rare threat to veto

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279. See H.R. REP. NO. 109-495 (2006) (report by the Committee on Appropriations in explanation of H.R. 5576, a bill making appropriations for the Department of Transportation, Department of Treasury, Department of Housing and Urban Development, the Judiciary, the District of Columbia, and independent agencies for the fiscal year ending September 30, 2007). The Report contained the following statement:

Waste transfer and sorting facilities—The Committee recognizes that a growing number of certain waste haulers and rail companies have sought to exploit a potential loophole in the Interstate Commerce Commission Termination Act in order to construct and operate unregulated waste transfer and sorting facilities on railroad properties. The developers of these types of facilities are claiming that ICCTA grants federal preemption from local, state and certain federal regulations that protect the public interest with respect to solid waste. The Committee disagrees with this interpretation of ICCTA preemption since the operation of solid waste facilities is not integral to transportation by rail. The Committee encourages the STB to clarify that these types of facilities are indeed subject to the same local, state, and federal laws and regulations as other solid waste facilities.

280. *Railroad Hearing*, *supra* note 100.

281. Consolidated Appropriations Act, 2008, Pub. L. 110-161, 121 Stat. 1844 (2007). The relevant portion of the bill is section 193 of Division K (the Transportation, Housing and Urban Development and Related Agencies Appropriations Act, 2008). 121 Stat. at 2408. That section reads as follows:

- (a) None of the funds appropriated or otherwise made available under this Act to the Surface Transportation Board of the Department of Transportation may be used to take any action to allow any activity described in subsection (b) in a case, matter, or declaratory order involving a railroad, or an entity claiming or seeking authority to operate as a railroad, unless the Board receives written assurance from the Governor, or the Governor's designee, of the State in which such activity will occur that such railroad or entity has agreed to comply with State and local regulations that establish public health, safety, and environmental standards for the activities described in subsection (b), other than zoning laws or regulations.
- (b) Activities referred to in subsection (a) are activities that occur at a solid waste rail transfer facility involving—
  - (1) the collection, storage, or transfer of solid waste (as defined in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903)) outside of original shipping containers; or
  - (2) the separation or processing of solid waste (including baling, crushing, compacting, and shredding).

the spending bill because, in part, it objected “to allowing States to regulate solid waste stored along rail property,” which would “preempt[] authority granted to the Surface Transportation Board,”<sup>282</sup> but President Bush signed the spending bill into law on December 26, 2007.

Reformers have been unable to enact a long-term amendment to ICCTA. In 2005, a bill introduced in the Senate would have amended the definition of “transportation” to exempt waste transfer stations and other waste management facilities, and thereby remove them from the Board’s exclusive jurisdiction.<sup>283</sup> Similar bills were introduced in the House in that year.<sup>284</sup> After a change in control of the Senate to the Democrats in the 110th Congress, an amendment to ICCTA was reintroduced in that body and is currently pending.<sup>285</sup>

It is not surprising that Congress is not able to act as a body to correct the flawed interpretation of one law given the competing demands for legislative time presented by new initiatives as well as more sweeping annual measures such as budget bills. Inertia in legislative affairs, however, should give pause to those who would rely on the political safeguards of federalism. These political safeguards are unlikely to be effective without supporting judicial doctrines to ensure that the legislative body considered the effects of preemption before enacting legislation, not afterwards.

Senator Lautenberg had introduced a more stringent measure into the Senate’s precursor bill, the Departments of Transportation, Housing and Urban Development and Related Agencies Appropriations Act, 2008, S.1789, 110th Cong. (2007). Section 191 of that bill read as follows:

Out of funds appropriated or otherwise made available under this Act to the Surface Transportation Board of the Department of Transportation, when considering cases, matters, or declaratory orders before the Board involving a railroad, or an entity claiming or seeking authority to operate as a railroad, and the transportation of solid waste (as defined in section 1004 of 42 U.S.C. 6903), the Board shall consider any activity involving the receipt, delivery, sorting, handling or transfer in-transit outside of a sealed container, storage other than inside a sealed container, or other processing of solid waste to be an activity over which the Board does not have jurisdiction.

282. OFFICE OF MANAGEMENT AND BUDGET, STATEMENT OF ADMINISTRATION POLICY: S.1789 (Sept., 2007), *available at* [www.whitehouse.gov/OMB/legislative/sap/110-1/s1789sap-s.pdf](http://www.whitehouse.gov/OMB/legislative/sap/110-1/s1789sap-s.pdf).

283. In 2005, Sen. Frank Lautenberg (D-NJ) introduced S. 1607, 109th Cong., which was referred to the Senate Commerce Committee but was not referred out of committee.

284. Then-U.S. Representative Robert Menendez (D-NJ) introduced H.R. 3577 in July 2005, and U.S. Representatives Maurice Hinchey (D-NY), Sue Kelly (R-NY), and Jim Saxton (R-NJ) and Frank Pallone (D-NJ) introduced bills in 2006 (H.R. 4821, 4870, 4930, respectively). None of these bills dealt with the *preemption* sentence in section 10501(b) of ICCTA, which already has conditions that would protect generally applicable state laws.

285. Clean Railroads Act of 2007, S. 719, 110th Cong. (2007); 153 CONG. REC. S2355-02 (Feb. 28, 2007). The bill is co-sponsored by Sen. Frank Lautenberg (D-NJ) (new Democratic Chairman of the Surface Transportation and Merchant Marine Infrastructure, Safety, and Security Subcommittee of the U.S. Senate’s Commerce, Science & Transportation Committee), Sen. Robert Menendez (D-NJ), Sen. Edward Kennedy (D-MA), and Sen. Jack Reed (D-RI), and on the House side by Rep. Maurice D. Hinchey (D-NY) and Rep. Frank A. LoBiondo (R-NJ). The bill has been referred to the Senate Commerce, Science, and Transportation Committee and House Committee on Transportation and Infrastructure.

Political safeguards of federalism could also in theory motivate the Executive branch to address regulatory gaps. But the Board has failed to take decisive action to address the problem of unregulated railroad waste stations despite congressional pressure. The delays in resolution have a significant effect. While the Board deliberates the preemption issues, it has continued to issue notices of exemption allowing the start-up of short line railroads that intend to operate waste facilities,<sup>286</sup> and courts have enjoined municipalities and states from taking action until the Board makes a decision. In sum, the Board theoretically provides an administrative procedure for resolution of whether preemption applies in a particular case, but its failure to act has meant that this procedure is ineffectual.

*C. Application of the Proposed Doctrine in the Railroad Waste Cases Shows that the Political Safeguards of Federalism Need Support from Preemption Jurisprudence*

A goal of the presumption, as with any other interpretive canon, is to reach the correct reading of congressional intent by clearing out irrelevant or distracting policy arguments and other interference in the adjudicatory process. As a test of the proposed presumption against preemption, one can ask whether it would change the outcome of the railroad waste cases to the correct reading of Congress's intent. This Article argues that the textual and contextual evidence shows that Congress did not intend the scope of preemption to encompass generally applicable state laws that regulate the effect of solid waste activities and that protect the public.

Under the first step of the test proposed in this Article, it is clear that the presumption would apply. Courts should be able to establish that the preemption of state solid waste laws would leave a regulatory gap simply by investigating the paucity of Board (and EPA) regulations that apply to solid waste handling at railroad waste stations.

The burden would then shift to the railroads to overcome the presumption by showing that Congress clearly intended the scope of preemption to encompass state solid waste laws. To meet their burden, railroads could not simply mine language from the jurisdictional section of ICCTA and submit selective parts of the statute in combination with broad policy arguments about how environmental laws are equivalent to economic regulation, as they have done to date. Even on its own terms, the exclusive jurisdiction clause alone is not a clear statement of Congress's intent to preempt because it is explicitly linked to the concept

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286. Hainesport Indus. R.R., Finance Dkt. No. 34695 (Surface Transp. Bd. May 10, 2005), 2005 WL 1169054 (application for exemption to acquire and operate a portion of rail line).



of whether there are applicable Board remedies. At best, the exclusive jurisdiction language of ICCTA creates some ambiguity on the issue of preemption, and ambiguous direction from Congress is not sufficient to preempt state police powers.

Moreover, to establish the requisite clear statement, railroads would have to show that their reading is consistent with every aspect of ICCTA, and the preemption clause should prevent courts from finding a clear statement to preempt state remedies. That clause—“[t]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law”<sup>287</sup>—contains two important limitations that reject any clear statement to preempt environmental laws. First, by specific language Congress limited the Board’s preemptive powers to situations where there are other remedies under Part A of Subtitle IV, Title 49, which is the portion of ICCTA that covers rail matters. The limited, economically-oriented remedies set out in Part A are the “remedies provided under this part.”<sup>288</sup> Second, Congress limited ICCTA’s preemption of federal and state laws to those “with respect to regulation of rail transportation.”<sup>289</sup> As the Eleventh Circuit has pointed out, this phrase means something different from all general laws that have an effect on rail; it means that laws to be preempted must, at a minimum, be directed to rail regulation.<sup>290</sup> These two conditions mean that ICCTA does not preempt state solid waste laws because (1) the Board cannot order any remedy to address problems from solid waste handling activities at ancillary facilities, and (2) solid waste laws are generally applicable to all companies, and do not regulate railroads qua railroads.

The presumption should eliminate the need for courts to delve into non-textual clues of congressional intent, although that is still a valid interpretive guide when the clear statement might lie outside of statutory text.<sup>291</sup> In the case of ICCTA, the full legislative history did not support preemption of state solid waste laws; Congress distinguished between state laws that directly regulate railroad rates and operations and state laws of general applicability that have an incidental effect on railroads (and all other businesses). It is true that Congress’s distinction between economic and other laws was somewhat lost when the conference

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287. 49 U.S.C. § 10501(b) (2006).

288. *Id.*

289. *Id.*

290. Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1338 (11th Cir. 2001).

291. See, e.g., Texas v. United States, 730 F.2d 339, 347–48 (5th Cir. 1984) (examining legislative history in preemption case under the 1980 Staggers Rail Act); Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n, 461 U.S. 375, 386–89 (1983) (examining congressional and administrative action, legislative history, and published policy statements in deregulatory statute).

committee moved the preemption language to the section dealing with jurisdiction.<sup>292</sup> But this is where the proposed presumption would guard against the unintended preemption of state law. Congress cannot be said to have clearly intended a regulatory gap concerning solid waste handled by railroads. Therefore, state solid waste laws are not preempted.

That ICCTA lacks any clear statement to preempt general state health and safety laws is entirely consistent with the structure of other federal rail statutes, where courts require some corresponding federal action before preempting state law.<sup>293</sup> And ICCTA's rail preemption clause is similar to "price, route and service" preemption clauses in other deregulatory statutes and was clearly intended to have the same effect.<sup>294</sup> Under clauses using that construction, the Supreme Court and lower courts have not preempted state safety laws that have an entirely different purpose from economic deregulation.<sup>295</sup>

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292. See H.R. REP. NO. 104-422 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 850.

293. For example, in another railroad-related act at issue in *Civil City of South Bend v. Consolidated Rail Corp.*, 880 F. Supp. 595 (N.D. Ind. 1995), the court observed that

Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but the High-Speed Rail Development Act discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same as preempting the field; here, Congress has done only the former.

*Id.* at 600.

294. South Dakota *ex rel.* S.D. R.R. Auth. v. Burlington N. & Santa Fe Ry. Co., 280 F. Supp. 2d 919, 934-35 (D.S.D. 2003) (discussing *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995)).

295. The Supreme Court has construed a similar preemption clause in ICCTA Part B, the motor carrier portion, which bars states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," but allows states to enforce "safety regulatory authority . . ." 49 U.S.C. § 14501(c)(1), (2)(A) (2006). The Part B clause calls for the preemption of a broader swath of state laws than the Part A rail preemption clause. Nevertheless, the Supreme Court held that ICCTA Part B does not preempt city licensing and equipment regulations for tow trucks because the goal of the federal law is economic deregulation, not the preemption of local safety regulations. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 442 (2002). The Court considered a general canon of construction requiring a "clear and manifest purpose of Congress" to preempt police powers, *id.* at 438-40, as well as conference committee reports and other legislative history demonstrating that the purpose of the motor carrier legislation was economic deregulation. *Id.* at 440-41. Given these considerations, the Court held that regulations that were "genuinely responsive to safety concerns" would not be preempted by ICCTA. *Id.* at 441-42; see also *Galactic Towing v. City of Miami Beach*, 341 F.3d 1249, 1252-53 (11th Cir. 2003) (holding ICCTA does not preempt ordinance requiring local permit, proof of insurance, background investigation, written authorization to tow and local storage facilities); *Cole v. City of Dallas*, 314 F.3d 730, 735 (5th Cir. 2002) (holding that ICCTA does not preempt regulation requiring criminal history); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 779 (2d Cir. 1999) (holding that ICCTA did not preempt laws requiring licensing, display of information, reporting, record keeping, disclosure of criminal history, insurance, posting of bond, and maintaining local storage and repair facilities).

This is consistent with earlier cases construing an airline deregulatory statute that bars state laws relating to "price, route and service," which the Supreme Court has held preempts only laws that are "obviously" related to rates, such as guidelines on fare advertising based on

Economic regulations are another matter under ICCTA. Here, Congress clearly stated that state economic regulations are preempted, because the remedies available to the Board touch upon economic issues and other matters that amount to the “regulation of rail transportation” rather than the incidental application of general laws.<sup>296</sup>

The presumption would also have changed the outcome of other ICCTA preemption cases that did not involve waste transfer stations. For example, because the Board does not have licensing authority over sheds and other ancillary facilities, let alone the authority or manpower to issue a remedy to protect sensitive riparian areas, ICCTA should not preempt generally applicable state land use laws that govern riverside activities. Under this remedy-centric interpretation of the statute, the Second Circuit’s decision in *Green Mountain*<sup>297</sup> would be incorrect. On the other hand, the Board does have the power to order a remedy with respect to on-track construction and railroad activities by conditioning its approval of a rail merger, and ICCTA should preempt at least some state and local activities that would contradict any such remedy. Thus the Ninth Circuit reached the correct holding in *City of Auburn*,<sup>298</sup> even if its overly broad dicta created mischief in other cases, because the Board had jurisdiction over the line construction activities at issue in that case and had imposed remedies through conditions in environmental review documents. All of the specific railroad waste cases finding that ICCTA preempts state solid waste law would have reached different outcomes because Congress has not clearly stated its intent to preempt state solid waste laws.

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state consumer protection laws, and not generally applicable criminal or other laws that are “too tenuous, remote or peripheral” to the economic intent of the deregulatory statute. *Morales v. Trans World Airlines*, 504 U.S. 374, 390 (1992) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)); see also *Wolens*, *supra* note 294, at 219 (preempting deceptive business practices claims but not breach of contract claims); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *McFarland*, *supra* note 245, at 159–63 (reviewing later lower court decisions holding that certain tort claims were too tenuously related to the purpose of the deregulatory statute to be preempted, but that state compensation, unfair competition, employee training, rate dispute and loss of cargo claims were related to the purposes of the federal statute and, therefore, were preempted).

296. See 49 U.S.C. §§ 10501(b) (preemption section, explaining remedies available to the Board); see also *supra* note 63.

297. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005). The Second Circuit held that a shed for the storage of such materials was integral to railroad operations and preempted a state land use pre-construction permit and mandatory set-back from the Connecticut River. Like courts before it, the Second Circuit reasoned that a permit requirement would unduly interfere with interstate commerce by giving the local body veto power or, at a minimum, would involve delay. *Id.* at 643. The Second Circuit also cited dictum from an early case that ICCTA preemption is as broad as could be imagined. *Id.* at 645.

298. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).

## CONCLUSION

It is not realistic to demand that Congress anticipate every future problematic or unconstitutional application of its statutes, let alone the myriad and changing state laws that legislation might affect. For that reason, the judicial branch of government will always have a significant role in interpreting the scope of preemptive statutes and mediating federal-state conflicts.

The railroad waste cases demonstrate that current preemption doctrine may too easily allow courts to displace state law based on unclear statutory text. Close analysis of the flaws in the railroad waste cases provides a basis to develop a more general recalibration of preemption doctrine. As Congress often fails to provide sufficient information for reviewing courts to determine the scope of any intended preemption, new tools are needed to guard against overly broad preemption that may lead to the unintentional creation of regulatory gaps.

This Article has argued that the judiciary should refocus on the larger question of whether Congress intended to create a gap itself. Doing so would reinstate important federalism safeguards for democratically enacted health and safety laws, and therefore the people's inherent sovereign right to self-protection. Moreover, focusing on gaps would protect the balance between federal and state government, the underlying sovereign interests of the people in self-protection, the ban on naked vetoes of state law, and other constitutional limitations on Congress's preemption powers. These all combine to compel a formal interpretive doctrine designed to prevent against the accidental creation of regulatory gaps.

This Article would have the courts revamp the presumption against preemption by recognizing that clear statement safeguards should apply whenever the effect of preemption would be to deny the people's sovereign right to self-protection. Congress could replace state environmental, public health, and other police power laws with federal standards without triggering the presumption because in those instances there would be no regulatory gap. The presumption would also not prevent Congress from purposefully creating regulatory gaps where there is a nexus between the purpose of the federal law at issue and the creation of the regulatory gap—for example, in economic deregulation, Congress could decide that states must be preempted from re-regulating an area of the economy that it is trying to open up to market forces.

But courts would not interpret statutes as creating a regulatory gap in the areas of environmental protection, public health, and other areas subject to states' police powers unless the statute clearly stated such intent. At the same time, Congress would have political incentives to

define the contours of deregulation with clarity so that regulated entities could not open unintended loopholes. This interpretive rule would place realistic boundaries on preemption in order to protect the public interest in maintaining police power protections.

#### ADDENDUM

As this Article was going to the printer, the Supreme Court issued several preemption decisions. Several cases concerned the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act, which bars “any requirement” related to a medical device that is “different from, or in addition to” a federal requirement.<sup>299</sup> The Bush Administration reversed federal policy in 2004, urging preemption based on that provision.<sup>300</sup> In *Riegel v. Medtronic, Inc.*, the Court held that the Federal Drug Administration’s (FDA’s) premarket approval of design, labeling and manufacturing specifications for advanced medical devices such as defibrillators, heart pumps, and replacement joints preempts most state tort claims against manufacturers, which are not based on violations of federal standards.<sup>301</sup> The Court reached this holding despite the fact that federal law does not provide for tort suits to compensate parties injured by the devices,<sup>302</sup> and peer-reviewed studies question whether the review process is sufficiently protective<sup>303</sup>—a fact not mentioned in the Court’s conclusion that the review process was “rigorous.”<sup>304</sup> This term, the Court will hear arguments in another FDA preemption case, *Warner-Lambert Co. v. Kent*,<sup>305</sup> which concerns a state tort case premised on fraud in the approval process. And the Court has accepted another FDA preemption case for next term, *Wyeth v. Levine*,<sup>306</sup> which presents the issue of whether state law personal injury suits are preempted by FDA approval of drugs under the Food, Drug and Cosmetic Act of 1938, which in turn does not contain a preemption clause. There were two other preemption cases of note decided on the same day as the FDA cases. In

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299. 21 U.S.C. § 360k(a) (2006).

300. See *Reigel v. Medtronic, Inc.*, No. 06-170, 2008 U.S. LEXIS 2013 at \*42–43 & n.8 (U.S. Feb. 20, 2008) (Ginsburg, J., dissenting).

301. *Id.* (majority opinion). The dissenting opinion applied the presumption against preemption. *Id.* at \*35 (Ginsburg, J., dissenting).

302. Cf. 21 U.S.C. § 360h(b) (providing the FDA authority to order repair, replacement, refunds, or recalls of defective devices).

303. See Gardiner Harris, *Justices Add Legal Complications to Debate on F.D.A.’s Competence*, N.Y. TIMES, Feb. 21, 2008, at C4 (stating that the “Institute of Medicine, the Government Accountability Office and the F.D.A.’s own science board have all issued reports concluding that poor management and scientific inadequacies have made the agency incapable of protecting the country against unsafe drugs, medical devices and food.”)

304. *Riegel*, 2008 U.S. LEXIS 2013, at \*9–10.

305. *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006), cert. granted sub nom. *Warner-Lambert Co. v. Kent*, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 06-1498).

306. 2006 Vt. 107, cert. granted, 76 U.S.L.W. 3391 (U.S. Jan. 18, 2008) (No. 06-1249).

*Rowe v. New Hampshire Motor Transport Association*<sup>307</sup> the Court held that a federal law deregulating the trucking industry preempts state laws that require shippers to verify the age of recipients of tobacco products that were ordered over the internet. In *Preston v. Ferrer*,<sup>308</sup> the Court held that the Federal Arbitration Act preempted state statutes that refer certain disputes to administrative agencies in the first instance.

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307. No. 06-457, 2008 U.S. LEXIS 2010 (U.S. Feb. 20, 2008). The federal law in question was the Federal Aviation Administration Authorization Act of 1994, which provides that “a State . . . may not enact or enforce a law . . . related to a price, route or service of any motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1) (2006). The Court rejected Maine’s argument that its public health law was unrelated to the economic purposes of the federal law. 2008 U.S. LEXIS 2010, at \*17. In a separate concurring opinion, Justice Ginsburg noted the “large regulatory gap” left by the decision. *Id.* at \*22.

308. No. 06-1463, 2008 U.S. LEXIS 2011 (U.S. Feb. 20, 2008).