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ABSTRACT

Justice Ginsburg argued that the displacement of state tort law "with no substantive federal standard of conduct to fill the void" creates an outcome that "defies common sense and sound policy." The preemptive power of the Interstate Commerce Commission Termination Act (ICCTA) creates such an outcome.

To ensure the Surface Transportation Board (STB) has exclusive regulatory control over railroads, the ICCTA preempts any local or state laws that have a regulatory impact on railroads. If a railroad's activity causes harm to a plaintiff, the plaintiff will likely bring a state tort cause of action against the railroad. Railroads argue that these tort claims have a regulatory impact on their activities and are thus preempted. Plaintiffs, in turn, believe that such claims have only an incidental impact on railroads. Courts have not reached a consensus on whether state tort causes of action are preempted by the ICCTA.

When plaintiffs' tort claims are preempted, individuals are left without any remedy. These individuals enter a legal limbo where their state tort claims are preempted by the ICCTA, but where no substitute federal causes of action exist. Consequently, railroads are not held accountable for their tortious behavior, and plaintiffs are left without any legal recourse. The key issue for analysis, then, is how to correct this injustice in the face of the ICCTA's preemptive power.

This Comment argues that the legal limbo created by the ICCTA must be corrected. In the past, when a statute had this unjust effect on

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innocent plaintiffs, Congress amended the statute and reined in the statute's preemptive force. The ICCTA needs similar amending. Alternatively, courts should focus on notions of equity and fairness rather than quibbling over congressional intent. A focus on fairness aligns with the Supreme Court's view of tort preemption and ensures that plaintiffs can seek justice.

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I. INTRODUCTION

The Interstate Commerce Commission Termination Act (ICCTA)[1] was passed in 1995. As its name suggests, the ICCTA dissolved the Interstate Commerce Commission (ICC), the long-standing federal body that regulated surface transportation.[2] Before the ICCTA was passed, an

1. ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803, 804 (1995).
2. ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803, 804–05 (1995).

intermingling of local, state, and federal laws regulated railroads.[3] In passing the ICCTA, regulation of the railroad industry was weakened.[4] The ICCTA created the Surface Transportation Board (STB), which was to have exclusive jurisdiction over surface transportation matters.[5]

Besides giving the STB exclusive regulatory power, the ICCTA also preempts any laws that attempt to regulate rail transportation.[6] The language of the ICCTA leaves little doubt as to whether the ICCTA has preemptive power.[7] In fact, 49 U.S.C. § 10501(b) states that the remedies and laws under the ICCTA "with respect to regulation of rail transportation . . . preempt the remedies provided under Federal or State law."[8] However, the language of § 10501(b) fails to clarify which laws regulate rail transportation and which laws merely relate to rail transportation without having a regulatory effect.[9]

If a state law or local ordinance, for example, required a railroad to construct its tracks in a certain way or to schedule its transit during specific times, that law would seem to have a regulatory impact on railroads, thereby prompting preemption. Unfortunately, whether a law impacts railroads in a way that rises to such a level of regulation is not always clear. This lack of clarity is perhaps most vexing in the context of state law tort claims brought by plaintiffs against railroads.

For example, if a railroad's activities cause noise and pollution that damage a neighboring property, that property owner may be inclined to bring a negligence or nuisance cause of action against the railroad. The owner may seek an injunction against the tortious behavior, or monetary damages for the injury suffered.[10] Railroads would argue that these tort claims have a regulatory impact on their activities and economics, and thus, that such claims are preempted.[11] Plaintiffs, in turn, would argue that bringing such claims has only an incidental impact on railroads.[12] Thus, the ICCTA provides little clarity in the context of such claims.

3. *See* Paul S. Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path From Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1152 (2012).

4. *See* Norfolk S. Ry., No. FD 35701, slip op. at 4, 6 n.14 (Surface Transp. Bd. Nov. 4, 2013) (citing H.R. Rep. No. 104-311, at 95–96 (1995)).

5. *See* 49 U.S.C. § 10501(b) (2012 & Supp. 2017).

6. *See id.*

7. *See id.*

8. *Id.*

9. *See id.*

10. *See* Pace v. CSX Transp., 613 F.3d 1066, 1068–70 (11th Cir. 2010).

11. *See, e.g.*, *id.* at 1069–70.

12. *See, e.g.*, *id.* at 1069.

Most importantly, when plaintiffs' tort claims are preempted, these individuals are left without any remedy.[13] Preempted plaintiffs enter a legal limbo where their state tort claims are preempted by the ICCTA, but where no substitute federal causes of action exist.[14] Thus, railroads are not held accountable for their injurious behavior, and plaintiffs are left without any legal recourse.[15] The key issue for analysis, then, is how to correct this legal limbo in the face of the ICCTA's preemptive power.

Part II of this Comment details the ICCTA's history and preemption law generally, and examines how courts have approached ICCTA tort preemption in the past.[16] The injustice that results from such preemption is highlighted.[17] Part III then analyzes the legal justifications for correcting the legal limbo that results from ICCTA tort preemption and calls for Congress to amend the ICCTA, or alternatively, for courts to place more emphasis on notions of equity and fairness.[18] Finally, Part IV offers concluding statements on the issues raised by the Comment.[19]

II. BACKGROUND

The emergence of the ICCTA stemmed from a widespread desire to deregulate surface transportation and enact a uniform set of federal regulations to control surface transportation sectors like railroads.[20] As a result, the ICCTA now exclusively regulates the railroad industry through its governing body, the STB.[21] As part of its regulatory scheme, the ICCTA preempts state laws that interfere with railroad activity.[22] Therefore, a discussion of general preemption law and the ICCTA's preemptive force is necessary.[23] The ICCTA's preemptive power in the context of tort claims will also be examined, and case law both favoring and disfavoring tort preemption will be highlighted.[24]

13. *See, e.g.*, Maynard v. CSX Transp., 360 F. Supp. 2d 836, 842–43 (E.D. Ky. 2004) (holding that plaintiffs' tort claims against a railroad were preempted, thereby leaving the plaintiffs, whose land was being polluted and damaged by the railroad's coal loading operation, without any legal remedy to address the tortious behavior).

14. *See id.* at 843.

15. *See* Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 142 (2011).

16. *See infra* Part II.

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See* Dempsey, *supra* note 3, at 1152.

21. *See* 49 U.S.C. § 10501(b) (2012 & Supp. 2017).

22. *See id.*

23. *See infra* Sections II.B–.C.

24. *See infra* Section II.D.

A. The History and Function of the Interstate Commerce Commission Termination Act

In 1995, Congress passed the ICCTA.[25] The ICCTA dissolved the Interstate Commerce Commission,[26] a nearly 100-year-old agency that regulated various sectors of surface transportation, including railroads, trucking, water carriers, and buses.[27] The ICC was born out of widespread government disdain for many railroad practices, and, for much of its existence, the ICC was a powerful force that regulated most aspects of rail transit.[28] Often, ICC regulations were not the exclusive regulatory tools affecting railroads because a patchwork of local and state intrastate regulations also controlled or influenced railroad activity.[29]

By 1970, concerns over competition in the railroad industry had subsided, and an ideological shift favoring the deregulation of railroads emerged.[30] This shift away from intense federal regulation culminated in the termination of the ICC and the creation of the STB.[31]

The ICCTA gave the STB exclusive jurisdiction and control over most railroad issues and other surface transportation regulatory matters.[32] Though the STB was a regulatory replacement for the ICC, the STB flexes a weaker regulatory muscle.[33] Unlike the ICC's broad regulatory authority, the ICCTA states that, "[i]n regulating the railroad industry, it is the policy of the federal government to *minimize the need for federal regulatory control* over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required."[34] The STB thus lacks the regulatory power of its predecessor.

Despite its weakened regulatory power, the STB remains the controlling body for economic matters affecting railroads.[35] Under the

25. ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803, 804(1995).

26. *Id.*

27. 49 U.S.C. §§ 10101–16106 (2012 & Supp. 2017).

28. See Dempsey, *supra* note 3, at 1169–70. Before the creation of ICC, issues like rate discrimination and attempts by railroads to obtain influence over state and government officials were common. *Id.* at 1169. Moreover, railroads often significantly lowered rates in areas where they had market power, thus increasing the likelihood of monopolies, and making growth for smaller railroads near impossible. *Id.* at 1069–70. The ICC was created to monitor and stop these practices, specifically by regulating rates and corruption. *Id.*

29. *See id.* at 1171.

30. *See id.* at 1173 ("By the mid-1970s, the political mood in Washington had shifted against economic regulation. Regulatory failure took much of the blame for the anemic state of the rail industry.").

31. 49 U.S.C. §§ 10101–16106.

32. *See* 49 U.S.C. § 10501(b).

33. *See* 49 U.S.C. § 10101(2).

34. *Id.* (emphasis added).

35. *See generally* 49 U.S.C. § 10501(b).

ICC, local and state regulations intermingled with federal laws and overwhelmed the railroad industry with regulation.[36] With the STB acting as the exclusive regulatory body for railroads, however, state and local regulations no longer have the effect of interfering with interstate commerce.[37] The net effect is ultimately less regulation on the industry.[38]

The express language of the ICCTA reflects Congress's desire to weaken regulatory control by giving exclusive regulatory power to the STB:

> 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 transportation *are exclusive and preempt the remedies provided under Federal or State law*.[39]

In addition to giving the STB exclusive regulatory power, § 10501(b) contains a preemption clause.[40] Any law that has the effect of regulating rail transportation is preempted by the ICCTA because such regulatory power is exclusively reserved for the STB.[41] The inclusion of this preemption clause is consistent with the congressional desire to reduce regulatory control by providing a uniform body of law for railroads to follow.[42]

B. The Law of Preemption

An examination of general preemption law in the United States is necessary before exploring the preemptive effect of the ICCTA. The preemption doctrine is based on the Supremacy Clause in the United States Constitution, which states that federal law "shall be the supreme law of the

36. *See* Dempsey, *supra* note 3, at 1171, 1173.
37. *See* Norfolk S. Ry., *supra* note 4, at 4, 6 n.14 (citing H.R. Rep. No. 104-311, at 95–96 (1995)).
38. *See* Dempsey, *supra* note 3, at 1173.
39. 49 U.S.C. § 10501(b)(emphasis added).
40. *See id.*
41. *See id.*
42. *See id.*; *see also* Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1330-31 (11th Cir. 2001).

land."[43] Alternatively, the Supremacy Clause can be viewed as a "choice of law" provision that ensures only that federal law prevails if a state law conflicts with it,[44] and that congressional power to preempt comes from Congress's enumerated powers.[45] Both interpretations likely have merit and are plausible justifications for preemption.[46] Whatever the constitutional origin, Congress certainly has the power to preempt both state common law and state statutory law through federal legislation.[47]

Through its preemptive power, Congress can "prohibit the states from regulating in certain areas and, where the states are allowed to regulate, to assert primacy in a conflict between state and federal regulatory schemes."[48] Accordingly, two types of preemptive power are generally recognized by courts: complete preemption and ordinary preemption.[49]

Complete preemption reflects the doctrine that "in certain matters Congress so strongly intended an exclusive federal cause of action that what a plaintiff calls a state law claim is to be recharacterized as a federal claim."[50] If, for example, a claim is removed to federal court because the claim falls under federal question jurisdiction,[51] that claim has been completely preempted.

Complete preemption has been applied in only a limited number of contexts,[52] and the Supreme Court has established two criteria that must be met for a finding of complete preemption to be proper.[53] The first requirement is the exclusive federal regulation of the claim's subject matter.[54] Typically, if Congress has indicated an intent to completely occupy the relevant field, this requirement will be satisfied.[55] The second requirement is the existence of an alternative federal claim that allows the state claim to be transformed into a federal cause of action.[56] Courts are

43. U.S. CONST. art. VI, cl. 2; *see also* Fid. Fed. Sav. & Loan Ass'n v. Cuesta, 458 U.S. 141, 152 (1982) (explaining that preemption "has its roots in the Supremacy Clause").

44. Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 KY. L.J. 913, 918–19 (2003).

45. *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088 (2000) (declaring that "it is critically important to note [that] the Supremacy Clause itself does not authorize Congress to preempt state laws").

46. *Id.*

47. *Fidelity*, 458 U.S. at 151–52.

48. Ausness, *supra* note 44, at 917.

49. *See, e.g.*, Fayard v. Ne. Vehicle Servs., 533 F.3d 42, 45 (1st Cir. 2008).

50. *Id.*

51. *See* 28 U.S.C. § 1331 (2012 & Supp. 2017).

52. *See Fayard*, 533 F.3d 42 at 45.

53. *See id.* at 46.

54. *See, e.g.*, Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968).

55. *Id.*

56. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10 (2003).

more inclined to completely preempt a state claim if a substitute federal cause of action exists for the plaintiff to subsequently pursue.[57]

In contrast to complete preemption, ordinary preemption most commonly applies when a state claim conflicts with a federal statute.[58] Unlike complete preemption, which prompts removal to federal court due to federal question jurisdiction, ordinary preemption is a defense to a state claim and is not a ground for removal.[59] Ordinary preemption is more common than complete preemption and can be present even when a conflict with state law is not present.[60] For example, ordinary preemption exists not just when a conflict with state law arises, but also when Congress strongly intended to occupy an entire legal field or regulatory scheme; one can then infer from this intent that Congress did not wish state law to supplant the relevant scheme.[61] Moreover, ordinary preemption can occur when the statute expressly states an intent to displace state law.[62]

C. The Preemptive Power of the ICCTA

Federal preemption provides a powerful bar to plaintiffs asserting state law claims.[63] In the context of the ICCTA, preemption means that plaintiffs may not have the ability to seek redress under state law for injuries caused by railroad activities.[64] Arguments have been made that support and oppose ICCTA preemption, but courts are still in disagreement as to whether the ICCTA preempts state law.[65]

1. Framing the ICCTA Preemption Arguments

Most commonly, ICCTA preemption is brought as a defense on the merits, making ordinary preemption the relevant doctrine.[66] Defendants often claim that the state or local law at issue deals with matters expressly and exclusively reserved for the STB by the ICCTA.[67] Other times, defendants will raise ordinary preemption as a defense because the law,

57. *Id.*

58. *See Fayard*, 533 F.3d at 45. Preemption in this context is often referred to as conflict preemption. *Id.*

59. *See id.*

60. *See id.* at 44; *see also* AUSNESS, *supra* note 44, at 919.

61. *See, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988). Preemption in this context is often referred to as implied preemption. *Id.*

62. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 243 (1947).

63. *See* Ausness, *supra* note 44, at 919.

64. *See, e.g.*, Maynard v. CSX Transp., 360 F. Supp. 2d 836, 842–43 (E.D. Ky. 2004).

65. *Compare id.*(holding that plaintiffs' tort claims preempted by the ICCTA), *with* Guild v. Kan. City S. Ry., 541 F. App'x 362, 365 (5th Cir. 2013)(finding that plaintiffs' state tort claims were not preempted by the ICCTA).

66. *See, e.g.*, Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1133 (10th Cir. 2007).

67. *See* New Orleans & Gulf Coast Ry. v. Barrois, 533 F.3d 321, 332 (5th Cir. 2008).

regulation, or cause of action "could be used to deny [the] railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized."[68] Even if the preemption defense does not fit perfectly into one of these situations, the defense can still be appropriate if the cause of action "would have the effect of preventing or unreasonably interfering with railroad transportation."[69] Therefore, federal circuit courts tend to apply an "unreasonable-burden-or-interference-test" in determining whether preemption is appropriate.[70]

Complete preemption under the ICCTA is less common, and defendants often fail to persuade courts to find that the ICCTA completely preempts the state law claim.[71] Courts reject complete preemption under the ICCTA because no substitute or superseding federal cause of action or remedy is available for the injured party.[72] Interestingly, though, plaintiffs whose claims fail because of a successful ordinary preemption defense are often left without a subsequent remedy anyway.[73] Regardless of whether complete preemption or ordinary preemption is adopted then, courts risk allowing the injured plaintiffs to enter a legal limbo where they cannot be made whole.

2. The Reach of ICCTA Preemption

Courts have analyzed the ICCTA's preemptive power in the context of local ordinances, permit requirements, state and local environmental laws, and local laws regulating the construction, maintenance, and removal of bridges and culverts.[74] Additionally, courts have analyzed the

68. *Id.*

69. *Id.* at 332 ("For state or local actions that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation."). State actions that foreclose or restrict a railroad from conducting any of its operations are said to unreasonably interfere with interstate commerce. *Id.*

70. *See* Tubbs v. Surface Transp. Bd., 812 F.3d 1141, 1146 (8th Cir. 2015); *see also* Pace v. CSX Transp., 613 F.3d 1066, 1069 (11th Cir. 2010); Island Park, LLC v. CSX Transp., 559 F.3d 96, 103 (2d Cir. 2009); PCS Phosphate Co. v. Norfolk S. Corp., 559 F.3d 212, 220–21 (4th Cir. 2009); Adrian & Blissfield R. Co. v. Vill. of Blissfield, 550 F.3d 533, 540 (6th Cir. 2008); New York Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 254 (3d Cir. 2007).

71. *See, e.g.*, Allied Indus. Dev. Corp. v. Ohio Cent. R.R., No. 4:09-CV-01904, 2010 WL 987156, at *3 (N.D. Ohio Mar. 15, 2010); *see also* Fayard v. Ne. Vehicle Servs., 533 F.3d 42, 44 (1st Cir. 2008).

72. *See Fayard*, 533 F.3d at 49 ("[A]bsent a clear cut federal cause of action, a danger exists of creating gaps in protection by categorically supplanting state claims with non-existent federal remedies.").

73. *See id.*

74. *See generally* Norfolk S. Ry Co. v. City of Alexandria, 608 F.3d 150 (4th Cir. 2010) (holding that permit requirements and laws are preempted); Green Mountain R.R. v. Vermont, 404 F.3d 638 (2d Cir. 2005) (holding that environmental laws are preempted);

ICCTA's preemptive power in the context of tort claims related to noise, vibrations, smoke, odors, and other disagreeable aspects of increased railroad traffic or other activity.[75] Whether or not an existing state or local law, regulation, or a particular cause of action is preempted by § 10501(b) often turns on how courts interpret the intent of Congress and the purpose of the ICCTA.[76]

Both the language and the legislative history of the statute suggest that Congress meant to preempt only the laws and causes of action that directly impacted the management or governance of railroads.[77] Traditional state police powers were not to be affected, and those laws that had only incidental impacts on the economics and operations of railroads were not subject to preemption.[78]

Though congressional intent seems to suggest reining in the ICCTA's preemptive power, courts disagree on whether certain laws or causes of action directly impact railroads in a way that treads on STB jurisdiction.[79] These cases are fact dependent, and the way in which the relevant law impacts the railroad is key.[80] A court may interpret the ICCTA preemption clause narrowly, allowing preemption only when the state law regulates in a way that interferes with STB regulation.[81] In contrast, a court may adopt a broad interpretation of ICCTA preemption and choose to preempt laws that merely relate, rather than regulate, railroad activity.[82] Even the courts applying preemption narrowly, though, have found that laws, ordinances,

Ga. Pub. Serv. Comm'n v. CSX Transp., 484 S.E.2d 799 (1997) (holding that construction laws are preempted).

75. *See generally* Emerson v. Kan. City S. Ry., 503 F.3d 1126 (10th Cir. 2007) (holding that tort claims are not preempted).

76. *See id.* at 1129.

77. *See* 49 U.S.C. § 10501(b) (2012 & Supp. 2017); *see also* Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001).

78. *See* N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252–54 (3d Cir. 2007).

79. *See, e.*g., *Emerson*, 503 F.3d at 1129 (finding that plaintiffs' tort claims that railroad's failure to maintain tracks and drains resulted in flooding of their property were only incidentally impactful to the railroad and were not preempted). *But see* Tubbs v. Surface Transp. Bd., 812 F.3d 1141, 1146 (8th Cir. 2015) (finding that plaintiffs' tort claims for failure to maintain flood prevention system impacted railroads and acted as a regulatory measure, thereby requiring preemption).

80. *See Emerson*, 503 F.3d at 1129–30.

81. *See, e.g.*, Griffioen v. Cedar Rapids & Iowa City Ry., 785 F.3d 1182, 1192 (8th Cir. 2015). In *Griffioen*, Plaintiffs brought negligence claims against a railroad after the railroad parked loaded railcars on a bridge in anticipation of a flood in hopes that the cars would keep the tracks from being impacted by the flood waters. *Id.* at 1185. Instead, the weight of the cars caused the bridge to collapse, leading to intensified flooding and other damage to plaintiffs' property. *Id.* The court held the claims were not preempted because bringing this suit and allowing recovery for such egregious behavior did not significantly impede STB regulatory power or significantly impact railroad activity. *Id.* at 1192.

82. See Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L.Q. 1147, 1167 (2007).

or causes of action that economically impact railroads are preempted by the ICCTA.[83]

Irrespective of how courts interpret the ICCTA preemption clause, the determinative issue is whether the state law or cause of action regulates the rail industry.[84] The laws that do are preempted.[85] Courts grapple with deciding whether a law has this regulatory effect, or alternatively, whether the law has only an incidental impact on railroads that does not rise to the level of regulation.[86]

The predominant way in which a law or cause of action regulates railroads is by increased economic burden. If, for example, a state law requires a railroad to change its facilities or alter its operation to comply with a state environmental statute, then that state law appears to economically impact the railroad and is thus preempted.[87] Economic impact is less obvious when, for example, a cause of action is brought against a railroad because the railroad's activity tortiously impacted another party.[88]

D. Tort Preemption and the ICCTA

When a state tort cause of action is brought against a railroad, the court must decide whether the cause of action is interfering with railroad activities in such a way that the ICCTA requires preemption of the tort claim.[89] Courts must consider this question because potential damages that can result from a tort claim may act as a form of regulation on railroads.[90] The damages or relief, if severe enough or if cumulated, could economically impact railroads, which is forbidden by the ICCTA.[91] Moreover, tort suits that relate to the operation, design, construction, or maintenance of a railroad may seek injunctive relief to force the railroads to change.[92] This type of injunctive relief can have an economic impact on

83. *Id.*

84. *See* 49 U.S.C. § 10501(b) (2012 & Supp. 2017) (stating unambiguously that ICCTA remedies "with respect to *regulation* of rail transportation" are exclusive and have preemptive power) (emphasis added).

85. *Id.*

86. *See, e.g.*, Guild v. Kan. City S. Ry., 541 F. App'x 362, 368 (5th Cir. 2013) (holding that plaintiff's negligence claims were not so burdensome as to "regulate" the railroad defendant's activity).

87. Green Mountain R.R. v. Vermont, 404 F.3d 638, 644 (2d Cir. 2005).

88. *See, e.g.*, *Guild*, 541 F. App'x at 367.

89. Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 410 (5th Cir. 2010).

90. Pace v. CSX Transp., 613 F.3d 1066, 1071 (11th Cir. 2010).

91. *Id.*

92. *See, e.g.*, Maynard v. CSX Transp., 360 F. Supp. 2d 836, 842–43 (E.D. Ky. 2004).

railroads and act as a private form of regulation and governance that is reserved by the ICCTA for the STB.[93]

If, however, courts determine that the impact of bringing a tort claim is only incidental and does not act as a de facto form of regulation, then the claim will not be preempted.[94] Tort claims serve a critical function in keeping railroads accountable.[95] Often, these claims are the sole means for an injured party to receive compensation and restitution.[96] As such, sometimes courts will require the railroads to demonstrate not just that the tort claim interferes with the railroad, but that it unreasonably interferes.[97] When courts apply this heightened standard, preemption is less likely.[98]

1. Case Law Disfavoring Tort Preemption

Courts rule against preempting state law tort claims when the cause of action has only an incidental impact on railroads and does not unreasonably interfere with railroad activity.[99] For example, in *Guild v. Kansas City Southern Railway*,[100] the plaintiffs claimed that the railroad was negligent when it allegedly damaged a non-mainline track on which the plaintiffs had allowed the railroad to store cars.[101] The court held that the plaintiffs' negligence claims were not preempted, primarily because the railroad failed to explain how the plaintiffs' claims would interfere with rail transportation.[102]

In addition, in *Emerson v. Kansas City Southern Railway*,[103] plaintiff land-owners claimed that the railroad had discarded railroad ties and debris into a drainage ditch, which caused flooding on their neighboring property.[104] The court reasoned that the railroad's actions were not part of rail transportation and that the claim would have only an incidental impact on the railroad's activities and economics.[105] The court thus concluded that the plaintiffs' claims were not preempted.[106]

93. *Id.*
94. *See, e.g.*, Guild v. Kan. City S. Ry., 541 F. App'x 362, 367, 368 (5th Cir. 2013).
95. *See* Geistfeld, *supra* note 15, at 142.
96. *See, e.g.*, *Maynard*, 360 F. Supp. 2d at 843.
97. *See* N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252–54 (3d Cir. 2007).
98. *See, e.g.*, *New Orleans & Gulf Coast Ry.*, 533 F.3d at 332.
99. *See, e.g.*, *Guild*, 541 F. App'x at 368.
100. Guild v. Kan. City S. Ry., 541 F. App'x 362 (5th Cir. 2013).
101. *Id.* at 364–65.
102. *Id.* at 367.
103. Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1133 (10th Cir. 2007).
104. *Id.* at 1128.
105. *Id.* at 1131–32.
106. *Id.* at 1132.

2. Case Law Favoring Tort Preemption

On the other hand, courts rule that state tort claims against railroads are preempted by the ICCTA when those claims directly interfere with railroad activities or when the damages that could result from the tort causes of action could have a regulatory impact on railroads.[107] For example, in *Pace v. CSX Transportation*,[108] plaintiffs claimed that a railroad's new operation on a sidetrack increased rail traffic and caused noise, smoke, and vibrations that made the plaintiffs' neighboring land virtually uninhabitable and unusable.[109] The court ruled that the plaintiffs' tort claims were preempted because the claims interfered with railroad activities and that Congress intended all claims that had this impact to be preempted.[110]

Similarly, in *Tubbs v. Surface Transportation Board*,[111] plaintiffs' nearby properties were flooded due to a railroad's failure to properly maintain and construct its culverts and drainage system on neighboring tracks.[112] The plaintiffs argued that bringing this cause of action would have only an incidental impact on railroad activity and pointed out that no remedy existed under federal law for the plaintiffs to seek restitution and damages.[113] Plaintiffs cited *Emerson* to support their assertion that bringing a negligence claim against the railroad based on the railroad's flood-causing behavior should not be preempted.[114]

Despite these arguments, the court found that the tort claims were preempted by the ICCTA.[115] The court distinguished *Emerson*, stating that in *Emerson*, the claims were not preempted because requiring railroads to remove materials clogging the drainage system would not have a significant impact on railroad activities and economics.[116] In *Tubbs*, however, the claims could have forced the railroad to adjust its drainage system construction and maintenance practices.[117] The plaintiffs could have brought claims under an alternative safety statute to force construction alteration going forward, but could not gain restitution related to their flooded property because no tort-like substitute existed under federal law.[118]

107. *See, e.g.*, Island Park, LLC v. CSX Transp., 559 F.3d 96, 103 (2d Cir. 2009)
108. Pace v. CSX Transp., Inc., 613 F.3d 1066 (11th Cir. 2010).
109. *Id.* at 1068.
110. *Id.* at 1069.
111. Tubbs v. Surface Transp. Bd., 812 F.3d 1141 (8th Cir. 2015).
112. *Id.* at 1143.
113. *Id.* at 1145.
114. *Id.* at 1146.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 1145.

E. Legal Limbo: The Consequence of ICCTA Tort Preemption

Before analyzing the justifications for closing the legal limbo plaintiffs enter because of ICCTA tort preemption, an example of the injustice that results from courts applying ICCTA preemption too broadly should be highlighted. In *Maynard v. CSX Transportation Inc.*,[119] landowner plaintiffs brought several tort claims such as negligence and nuisance against a railroad.[120] According to the plaintiffs, the railroad's coal loading operation on a sidetrack near the plaintiffs' property blocked the plaintiffs from entering or exiting their land via a normal route.[121] Moreover, the operation caused noise and dust pollution, thus interfering with the plaintiffs' use and enjoyment of their land.[122] The plaintiffs also alleged that by virtue of the side track, the railroad negligently permitted drainage from adjoining properties to escape onto their property, which further diminished the property value.[123] The railroad's activity damaged the land itself, prevented the owners from enjoying that land, and made selling the land for a fair price nearly impossible.[124]

The court held that the plaintiffs' tort claims were preempted by the ICCTA.[125] The court reasoned that the coal loading activity on the nearby side track was operational in nature and that bringing these claims interfered with this railroad activity.[126] Allowing plaintiffs to bring such causes of action would infringe upon regulation reserved for the STB.[127] Plaintiffs alternatively argued that no substitute federal remedy existed and that preemption was therefore not appropriate.[128] The court acknowledged that the plaintiffs lacked recourse under federal law, but asserted that the ICCTA's preemptive force prevailed nonetheless.[129]

Whether Congress intended for the ICCTA to preempt state law that regulated railroads cannot be disputed.[130] As evidenced by cases like *Maynard,* however, courts applying preemption broadly leave injured plaintiffs uncompensated and without means to seek redress.[131] Plaintiffs like those in *Maynard* suffer harm directly because of a railroad's tortious

119. Maynard v. CSX Transp., 360 F. Supp. 2d 836 (E.D. Ky. 2004).
120. *Id.* at 841.
121. *Id.* at 837–38.
122. *Id.* at 838.
123. *Id.*
124. *Id.*
125. *Id.* at 843.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Maynard*, 360 F. Supp. 2d at 843.
130. *See* 49 U.S.C. § 10501(b) (2012 & Supp. 2017).
131. *Maynard*, 360 F. Supp. 2d at 843–44.

conduct.[132] These plaintiffs suffer damage to their property by no fault of their own, and yet, they are unable to seek restitution.[133] Railroads, in turn, are not held accountable and have nothing to deter them from behaving similarly in the future.[134]

III. ANALYSIS

Notions of equity and fairness demand that this legal limbo be closed and that state tort claims brought by plaintiffs should not be preempted by the ICCTA. To correct such injustices, like the outcome in *Maynard*,[135] the ICCTA should be amended. Alternatively, if legislative action is not taken, courts should adjust the way ICCTA tort preemption analysis is approached by placing more emphasis on equity and fairness.

To reach this conclusion, several issues will be analyzed. First, the tort preemption problem that plaintiffs have encountered under a similar piece of legislation, the Federal Railroad Safety Act (FRSA),[136] will be examined.[137] The FRSA's preemption provision also caused various plaintiffs who were harmed by railroads to fall into a legal limbo when trying to bring tort claims.[138] Recognizing this injustice, Congress amended the FRSA so that tort claims were no longer expressly preempted.[139] Congress should similarly amend the ICCTA.

Next, the way in which courts have addressed, or more often, ignored, this legal limbo will be explored.[140] Courts often brush aside the fact that no substitute remedy exists, instead choosing to focus on congressional intent.[141] Finally, the Supreme Court's view on tort preemption will be analyzed.[142] Though the Supreme Court has established the legitimacy of tort preemption,[143] the Court has also acknowledged that equity and fairness should not be ignored.[144]

132. *Id.* at 837–38.
133. *Id.* at 838, 843.
134. *See* Geistfeld, *supra* note 15, at 142.
135. *Maynard*, 360 F. Supp. 2d at 843.
136. 49 U.S.C. § 20101 (2012 & Supp. 2017).
137. *See., e.g.*, Mehl v. Canadian Pac. Ry., 417 F. Supp. 2d 1104, 1110 (D.N.D. 2006).
138. *See infra* Section III.A.
139. 49 U.S.C. § 20106(b) (2012 & Supp. 2017).
140. *See infra* Section III.B.
141. *See infra* Section III.B.
142. *See infra* Section III.C.
143. *See* Cipollone v. Liggett Grp., 505 U.S. 504 (1992); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).
144. *See, e.g.*, Norfolk So. Ry. v. Shanklin, 529 U.S. 344, 360 (2000) (Ginsburg, J., dissenting); Medtronic v. Lohr, 518 U.S. 470, 487 (1996).

A. Solving the Tort Preemption Problem under the FRSA

Just as Congress can set forth laws that preempt state tort claims, it can also correct these laws when they result in unforeseen injustice.[145] When Congress aims to federally regulate a field or industry, preemption is often necessary.[146] Preempting ensures that state and local laws do not conflict or otherwise interfere with federal regulation.[147] Exclusive federal control often leads to a more efficient and cohesive system of regulation.[148] However, when preemption leads to inequitable and unjust consequences, Congress should clarify the law and rein in the law's preemptive force. Such action by Congress is not without precedent, even in the railroad context.[149] The FRSA's preemption clause forced plaintiffs into a legal limbo, just as the ICCTA has.[150] Congress, in 2007, amended the FRSA to address this problem.[151]

Whereas the ICCTA gives the STB exclusive regulatory control over railroad economic matters, the FRSA gives the Federal Rail Administration (FRA) control over railroad safety issues.[152] The ICCTA and FRSA thus work in unison to govern the railroad industry.[153] Like the ICCTA,[154] the FRSA contains a preemption provision that makes exclusive the regulations set forth by the FRA.[155] Any state or local law that interferes with or affects railroad safety is preempted by the FRSA.[156]

When railroads violated federal safety standards and caused injuries to individuals, those individuals often brought state tort claims against the railroad.[157] However, these claims were often preempted by FRSA.[158] For example, if a plaintiff sued a railroad for negligence because a train was travelling too fast, that claim would be preempted because the FRA regulates train speed limits.[159] Plaintiffs could sometimes pursue subsequent recourse by bringing a federal claim alleging a safety standard violation;[160] however, the remedies the FRA provided only covered

145. *See* U.S. CONST. amend. V.
146. *See* D*empsey, supra* note 3, at 1173.
147. *See id.*
148. *See id.*
149. *See* 49 U.S.C. § 20106(b)(1)(A) (2012 & Supp. 2017).
150. *See* Mehl v. Canadian Pac. Ry., 417 F. Supp. 2d 1104, 1110 (D.N.D. 2006).
151. 49 U.S.C. § 20106(b)(1)(A).
152. Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001).
153. *Id.*
154. 49 U.S.C. § 10501(b) (2012 & Supp. 2017).
155. 49 U.S.C. § 20106(a).
156. *Id.*
157. *See, e.g.*, Mehl v. Canadian Pac. Ry., 417 F. Supp. 2d 1104, 1109 (D.N.D. 2006).
158. *See id.* at 1120.
159. Easterwood v. CSX Transp., 933 F.2d 1548, 1553–54 (11th Cir. 1991).
160. *See, e.g.*, Lundeen v. Canadian Pac. Ry., 507 F. Supp. 2d 1006 (D. Minn. 2007).

specific safety violations.[161] Most tortious behavior did not have an assigned remedy, and damages for personal injury based on tort were not available.[162] The plaintiffs were thus forced into a legal limbo.[163]

Just prior to the congressional amendment to the FRSA,[164] the court in *Mehl v. Canadian Pacific Railway*[165] tackled this injustice, stating:

> While the Federal Railroad Safety Act does provide for civil penalties to be imposed on non-compliant railroads, the legislation fails to provide any method to make injured parties whole and, in fact, closes every available door and remedy for injured parties. As a result, the judicial system is left with a law that is inherently unfair to innocent bystanders and property owners who may be injured by the negligent actions of railroad companies . . . . Such an unfair and inequitable result should be addressed through legislative action.[166]

In *Mehl*, class action plaintiffs brought several tort claims against the railroad, alleging that the railroad improperly welded and maintained tracks, which caused a train to derail.[167] The derailment caused personal injuries to the plaintiffs and damages to the plaintiffs' properties.[168] Moreover, the train was carrying chemicals that were released into the air when the train derailed.[169] The harm was severe, yet the court was forced to hold that the state tort claims were preempted.[170] The court ruled reluctantly, recognizing the "unduly harsh" outcome.[171]

Congress, facing public pressure, took note and amended the FRSA in 2007.[172] The Amendment reads:

> Nothing in this section shall be construed to preempt an action under *State* law seeking damages for personal injury, death, or property damage alleging that a party—
>
> (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland

161. *See, e.g.*, *Mehl*, 417 F. Supp. 2d at 1110.
162. Norfolk So. Ry. v. Shanklin, 529 U.S. 344, 352 (2000).
163. *Mehl*, 417 F. Supp. 2d at 1110.
164. 49 U.S.C. § 20106(b)(1)(A) (2012 & Supp. 2017).
165. *Mehl*, 417 F. Supp. 2d at 1120.
166. *Id.*
167. *Id.* at 1106–07.
168. *Id.* at 1107.
169. *Id.*
170. *Id.* at 1107, 1121.
171. *Id.* at 1120.
172. 49 U.S.C. § 20106(b)(1)(A) (2012 & Supp. 2017); *see also* Smith v. Burlington N. & Santa Fe Ry., 187 P.3d 639, 644–45 (Mont. 2008) (explaining that Congress amended the FRSA, in part, because plaintiffs were receiving harsh outcomes due to preemption).

> Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;
>
> (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or
>
> (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).
>
> (2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.[173]

Although plaintiffs' tort claims now must be based on a violation of a FRSA standard of care, the claims can nonetheless be brought.[174] Plaintiffs now can seek damages and restitution when a railroad violates a safety standard.[175]

Congress should similarly amend the ICCTA and declare that state tort causes of action are not preempted. Even if the damages that result from tort claims economically impact railroads, the purpose of bringing such claims is not to regulate, but rather, to make the plaintiffs whole.[176] As such, a blanket ban on ICCTA tort preemption is appropriate. If the claims impact railroads in a regulatory way, they do so only because of the railroads' own tortious behavior.[177]

Alternatively, the amendment could clarify that only those tort claims that seek to directly alter railroad operations or behavior are banned. Claims that simply seek damages for tortious behavior should never be preempted by the ICCTA. The paying of such damages should be viewed as a cost of doing business. If such damages serve to incidentally incentivize railroads to change their behavior to avoid causing harm in the future, then the public good will be served.

B. Judicial Treatment of the ICCTA Tort Preemption Problem

If legislative action is not taken, courts should adjust the way they decide ICCTA preemption cases. When deciding whether tort claims are preempted by the ICCTA, courts do sometimes acknowledge and address

173. 49 U.S.C. § 20106(b)(1)(A) (emphasis added).
174. *See id.*
175. *See, e.g.*, MD Mall Assocs. v. CSX Transp., 715 F.3d 479, 488 (3d Cir. 2013).
176. *See* Geistfeld, *supra* note 15, at 142–43.
177. *See, e.g.*, Maynard v. CSX Transp., 360 F. Supp. 2d 836, 842–43 (E.D. Ky. 2004).

the legal limbo plaintiffs could enter if preemption is found.[178] However, the predominant consideration in deciding whether preemption is warranted is the intent of Congress in passing the ICCTA.[179] In other words, when deciding if a tort claim acts as a form of regulation and thus triggers preemption, courts will ask if Congress intended the ICCTA's preemptive power to extend to the law or suit in question.[180] Given the disagreement and uncertainty about what laws Congress intended to preempt because of their regulatory effect, a focus on equity and fairness can guide courts to reach appropriate decisions.[181]

1. A Focus on Congressional Intent

In deciding if the ICCTA preempts a tort claim, courts will often turn to an analysis of congressional intent.[182] Given the express language of § 10501(b)[183] and the history that prompted ICCTA development, Congress seemed to want to ensure that a patchwork of laws did not interfere with STB regulation.[184] Courts disagree about whether Congress meant this preemptive force to apply broadly, or if instead, Congress only meant to preempt laws that directly and clearly impacted railroad operations.[185]

Courts sometimes rule that state tort claims should not be preempted because a "presumption against preemption" exists when intent is unclear.[186] These courts also point to the ICCTA's legislative history, which suggests that Congress only meant to preempt laws that economically impacted railroads directly.[187] Tort law is not aimed at railroads directly; all individuals and companies are subject to tort claims.[188] Torts exist as a means for plaintiffs to seek restitution for harm done to them, not for the purpose of regulating railroads.[189] Torts thus have

178. *See, e.g.*, Emerson v. Kan. City S. Ry., 503 F.3d 1126, 1133 (10th Cir. 2007); Allied Indus. Dev. Corp. v. Ohio Cent. R.R., No. 4:09-CV-01904, 2010 WL 987156, at *3 (N.D. Ohio Mar. 15, 2010).

179. *See, e.g.*, Pace v. CSX Transp., 613 F.3d 1066, 1069 (11th Cir. 2010).

180. *Id.*

181. *See Maynard*, 360 F. Supp. 2d at 842–43.

182. *See* Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 407–08 (5th Cir. 2010).

183. 49 U.S.C. § 10501(b) (2012 & Supp. 2017).

184. *See* D*empsey, supra* note 3, at 1171.

185. *Compare* Pace v. CSX Transp., 613 F.3d 1066, 1069 (11th Cir. 2010)(applying the ICCTA's preemption clause broadly and preempting claims that might have had only minimal impact on railroad activities)), *with* Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1330–31 (11th Cir. 2001) (favoring a presumption against preemption and finding the ICCTA's preemptive power to be limited).

186. *See, e.g.*, *Franks Inv. Co.*, 593 F.3d at 408.

187. *Fla. E. Coast Ry.*, 266 F.3d at 1331.

188. *See* Strickland, *supra* note 82, at 1165; *see also* H.R. Rep. No. 104-311, at 95 (1995) (explaining that Congress meant only to preempt laws that served to economically impact the railroad industry).

189. *See* Geistfeld, *supra* note 15, at 142.

only an incidental impact on railroads, and are therefore not the kind of laws that Congress meant to preempt.[190]

As reasonable and convincing as the narrow interpretation of congressional intent is, most courts still apply the ICCTA preemption provision broadly.[191] These courts believe Congress developed § 10501(b) to ensure the STB had exclusive control over the railroad industry.[192] Congress' goal of uniformity can only be achieved if laws that have a regulatory effect are preempted. Torts, these courts argue, have the same regulatory impact as allowing states to directly impose restrictions on railroads.[193] The absence of a savings clause or prescribed substitute federal remedy is only further evidence of Congress' desire to protect railroads and ensure interstate commerce is not affected.[194]

The merits of these competing interpretations of § 10501(b) are outside the scope of this analysis. More relevant is the large body of conflicting case law which suggests that courts will not reach a consensus in the future. Courts must shift their focus away from statutory interpretation and intent, and towards notions of equity and fairness.

2. A Focus on Equity and Fairness

Justice Ginsburg of the United States Supreme Court argued in her dissent in *Norfolk Southern Railway v. Shanklin*[195] that the displacement of state tort law "with no substantive federal standard of conduct to fill the void" creates an outcome that "defies common sense and sound policy."[196] Courts cannot turn a blind eye at the legal limbo that plaintiffs enter when ICCTA tort preemption is applied. In fact, some courts have chosen to prioritize fairness over uncertain statutory interpretation when deciding if tort preemption is warranted.[197] Such an approach should be uniformly adopted by courts.

For example, in *Emerson*, the Tenth Circuit rejected the argument that torts truly have a regulatory impact on railroads and explained that

190. *Fla. E. Coast Ry.*, 266 F.3d at 1331.

191. *See* Tubbs v. Surface Transp. Bd., 812 F.3d 1141, 1146 (8th Cir. 2015); *see also* Pace v. CSX Transp., 613 F.3d 1066, 1069 (11th Cir. 2010); Island Park, LLC v. CSX Transp., 559 F.3d 96, 103 (2d Cir. 2009); PCS Phosphate Co. v. Norfolk S. Corp., 559 F.3d 212, 220–21 (4th Cir. 2009); Adrian & Blissfield R.R. v. Vill. of Blissfield, 550 F.3d 533, 540 (6th Cir. 2008); New York Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 254 (3d Cir. 2007).

192. Suchon v. Wis. Cent., Ltd., No. 04-C-0379-C, 2005 U.S. Dist. LEXIS 4343, at *8–9 (W.D. Wis. Feb. 23, 2005).

193. *Suchon*, 2005 U.S. Dist. LEXIS 4343, at *9.

194. *See* Strickland, *supra* note 82, at 1165.

195. Norfolk So. Ry. v. Shanklin, 529 U.S. 344 (2000).

196. *Id.* at 360.

197. *See, e.g.*, Emerson v. Kansas City S. Ry., 503 F.3d 1126, 1133 (10th Cir. 2007).

such an argument "has no obvious limit, and if adopted would lead to absurd results."[198] Moreover, in *Fayard v. Northeast Vehicle Services*,[199] the First Circuit found that a plaintiff's tort claims should not be preempted, in part because no substitute federal remedy was available.[200] The court stated that "the critical question is whether federal law provides an exclusive substitute federal cause of action that a federal court (or possibly a federal agency) can employ for the kind of claim or wrong at issue."[201]

Furthermore, courts must also not ignore the critical legal function of torts in ensuring that victims of harmful behavior are left with recourse.[202] Given that the ICCTA provides no adequate remedy for victims of railroad misconduct, torts are the sole mechanism for compensation.[203] Whereas regulations are designed to have a prophylactic effect and encourage specific behavior, torts are brought after harm has already been inflicted. Torts serve to compensate, not regulate.[204] Applying tort preemption liberally thus risks functionally "sweeping away" tort law.[205]

C. The Supreme Court's View on Tort Preemption

The Supreme Court's view on tort preemption also suggests that fairness and equity should be considered when deciding if preemption is appropriate. Numerous times, the Supreme Court has reaffirmed the legitimacy of tort preemption.[206] No doubt exists that such preemption is legal, and in fact, common.[207] Nonetheless, the Court has also recognized that when a statute is ambiguous and when no substitute remedy exists, a presumption against preemption should be applied.[208]

198. *Id.* at 1132.
199. Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42 (1st Cir. 2008).
200. *Id.* at 45, 48.
201. *Id.* at 47.
202. *See* Geistfeld, *supra* note 15, at 141–42.
203. *Id.*
204. *See* Strickland, *supra* note 82, at 1165.
205. Allied Indus. Dev. Corp. v. Ohio Cent. R.R., 2010 WL 987156, at *3 (N.D. Ohio Mar. 15, 2010) (explaining that effect of ICCTA tort preemption could be "staggering, sweeping away state contract, tort, and property law.").
206. *See generally* Cipollone v. Liggett Grp., 505 U.S. 504 (1992); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).
207. *See* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 560–65 (1997).
208. *See, e.g.*, Norfolk So. Ry. v. Shanklin, 529 U.S. 344, 360 (2000) (Ginsburg, J., dissenting).

1. Supreme Court Case Law Development: A Bumpy Track

In the 1980's, the Supreme Court refused to apply various preemption provisions broadly because no substitute remedy was available for the injured plaintiffs.[209] Then, in *Cipollone v. Liggett Group*,[210] a plurality of the Court decided that plaintiffs' tort claims against cigarette manufacturers were preempted by a federal statute that regulated safety in the cigarette industry.[211] Despite the Court's limited holding,[212] and despite the Court's hesitation in leaving plaintiffs without a remedy,[213] lower courts took the decision as a signal that tort claims can be preempted if the statute expresses a desire to preempt state law.[214]

In a subsequent case, *Medtronic v. Lohr*,[215] however, the Court ruled that a statute which regulated the medical device industry did not preempt plaintiffs from bringing tort claims against pacemaker manufacturers based on defective products.[216] The Court explained that allowing this statute to have such preemptive force would "have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation . . . ."[217] Thus, the Court in *Lohr* considered equity and fairness in their analysis and once again leaned on the presumption against preemption.[218]

Lohr distinguished, rather than overruled *Cipollone*.[219] The Court in *Lohr* believed the language of the relevant statute in *Cipollone* gave the plaintiff in that case the ability to pursue some common law causes of actions if such claims were framed differently.[220] As such, preemption was

209. *See, e.g.*, International Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987); Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 (1985).
210. Cipollone v. Liggett Grp., 505 U.S. 504 (1992).
211. *Id.* at 508–09, 529.
212. *Id.* at 529.
213. *Id.* at 541 (Blackmun, J., dissenting). Justice Blackmun, writing for the dissent in *Cipollone,* also stated that, "[T]here 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." *Id.*; *see also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984). In *Silkwood*, the Court, in addressing the lack of a substitute legal remedy, found it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.*
214. *See* Grey, *supra* note 207, at 6.
215. Medtronic v. Lohr, 518 U.S. 470 (1996).
216. *Id.* at 475–77, 503.
217. *Id.* at 487.
218. *Id.*
219. *Id.* at 484–85.
220. *Id.* at 485.

not as inequitable.[221] In *Lohr*, however, no such subsequent or alternative remedy was available.[222] Unlike *Cipollone,* preempting in *Lohr* would "require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the Lohr's alleged injuries."[223] *Lohr* thus supports the proposition that equity and fairness be considered when deciding if preemption is proper.[224]

Just like the plaintiffs in *Lohr*, plaintiffs forced into legal limbo by the ICCTA are left without a substitute remedy.[225] Courts are conflicted about the congressional intent of § 10501(b).[226] Some courts view torts as having a regulatory impact on railroads, while other courts see tort impact as merely incidental.[227] Notions of equity and fairness are thus an ideal tiebreaker. Justice demands that courts allow these injured individuals to bring tort claims and hold railroads accountable for their tortious behavior.

D. Recommendation

Congress is in the best position to correct the injustice that results from ICCTA tort preemption. By amending the ICCTA, Congress can rein in the Act's preemptive power. A blanket ban on ICCTA tort preemption is ideal, as innocent victims are owed their day in court. Any concerns over railroad regulation should take a back seat to justice. Alternatively, the amendment could clarify that only those tort claims that seek to directly alter railroad operations or behavior be banned. Claims that simply seek damages for tortious behavior should never be preempted by the ICCTA.

If Congress fails to fill this legal gap, or until Congress acts, courts should correct this injustice. Courts must place more emphasis on equity and fairness when deciding if tort claims are preempted by the ICCTA. If an innocent plaintiff is destined to enter a legal limbo because of preemption, then preemption is not appropriate.

221. *Id.*
222. *Id.*
223. *Id*. at 488.
224. *Id.*
225. *See Lohr*, 518 U.S. at 488; *see also* Maynard v. CSX Transp., 360 F. Supp. 2d 836, 842–43 (E.D. Ky. 2004).
226. *Compare* Pace v. CSX Transp., 613 F.3d 1066, 1069 (11th Cir. 2010)(explaining that Congress intended to broadly preempt laws related to railroads), *with* Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1330–31 (11th Cir. 2001) (explaining that Congress meant to preempt only the limited subset of laws that had an economic and regulatory impact on railroads).
227. *See* Tubbs v. Surface Transp. Bd., 812 F.3d 1141, 1146 (8th Cir. 2015); *see also Maynard*, 360 F. Supp. 2d at 843.

IV. CONCLUSION

The ICCTA's preemption clause gives the STB exclusive jurisdiction over surface transportation matters.[228] In doing so, however, the ICCTA is forcing plaintiffs to enter a legal limbo where their state tort claims are preempted by the ICCTA, but where no substitute federal causes of action exist.[229] Railroads can thus run roughshod, never being held accountable for their tortious behavior.[230] Most importantly, innocent plaintiffs cannot seek recourse for the harm done to them.[231] Such an outcome offends basic notions of equity and fairness.

Congress has amended the FRSA to ensure plaintiffs can bring tort claims when a railroad violates a safety law.[232] The ICCTA needs similar amending. Courts disagree about the congressional intent of 49 U.S.C. § 10501(b).[233] This lack of consensus suggests that a new focus should guide courts in determining if tort preemption is appropriate. By focusing on equity and fairness, just as Supreme Court precedent suggests,[234] courts will ensure a just outcome is reached. Plaintiffs should never be left without a remedy when a railroad behaves tortiously.

228. 49 U.S.C. § 10501(b) (2012 & Supp. 2017).
229. *See, e.g.*, *Maynard*, 360 F. Supp. 2d at 842–43.
230. *See* Geistfeld, *supra* note 15, at 142.
231. *See, e.g.*, *Maynard*, 360 F. Supp. 2d at 842–43.
232. 49 U.S.C. § 20106(b)(1)(A) (2012 & Supp. 2017).
233. *See, e.g.*, Emerson v. Kansas City S. Ry., 503 F.3d 1126, 1128 (10th Cir. 2007).
234. Medtronic v. Lohr, 518 U.S. 470, 487 (1996).