Tailor-Made: State Regulation at the Periphery of Federal Law

Zachary Smith*

> Toward the end of the trip, he [Theodore Roosevelt] came squarely with this declaration: "I believe the time has come when we must have Federal supervision or Federal control of railroads. I am utterly opposed to the Government ownership of railroads. However, I believe that, if we do not get Government supervision or control, the radical demand for Government ownership will come with force and, perhaps, sweep the people along with it."

Interview by Forrest Crissey with H.H. Kohlsaat, recalling Theodore Roosevelt's opinion on the railroad trust, reproduced in N.Y. TIMES, July 6th, 1907.

INTRODUCTION

Over the last several years, legal scholars have documented the increased reluctance of courts to invoke the presumption against preemption.[1] Instead, empirical studies show courts now invoke preemption

* Zachary Smith graduated from the University of Denver Sturm College of Law, in 2009. He writes water policy for the City of San Diego when he's not climbing in the Californian desert.

1. *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 (2007); Howard A. Learner, *Ordering State-Federal Relations through Federal Preemption Doctrine: Restraining Federal Preemption when there is an "Emerging Consensus" of State Environmental Law and Polices*, 102 Nw. U.L. REV. 649 (2008); Shata L. Stucky, *Protecting Commu-*

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more often than before.[2] In general, these rulings decrease the power of the states; chipping away at the traditional state police power through which states regulate health, safety, and public welfare.

In no other context is this growth of the preemption defense clearer than in the context of railroads. Traditionally, railroads have asked courts to exempt the industry from state regulations, like local land use laws and road crossing regulations, on the basis that major federal railroad regulating statues have either occupied the field or have express grants of preemption.[3] The new tactic of the railroad industry, however, is to claim that laws like the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") preempt states from regulating railroads based on the cooperative nature of federal environmental laws, such as the Clean Air Act ("CAA"), the Clean Water Act ("CWA"), and the Comprehensive Environmental Response, Compensation and Recovery Act ("CERCRA"). Even though states are fulfilling federal government-mandated objectives, the railroads argue laws such as the ICCTA preempt these landmark environment laws. The railroad's position, this paper argues, violates the Supremacy Clause, the presumption against preemption, and the doctrine requiring courts to harmonize co-equal federal statutes.

However, an opportunity to end judicial acquiescence to this faulty line of logic has arisen. The Ninth Circuit will examine *Association of American Railroads v. South Coast Air Quality Management District* ("SCAQMD"), a case in which a local air quality district passed three very specific rules to clean the air around urban rail yards in Los Angeles.[4] The railroads challenged the rules, claiming that the district: (1) either acted without authorization from the CAA, and thus the ICCTA preempted rules based solely on the state police power; or (2) that even if the district acted appropriately, that the ICCTA preempts any regulation of the railroads except that authorized by the ICCTA.[5] The District Court wrongly found the air quality district was not acting under the CAA cooperative federalism mandate.[6] The Ninth Circuit can fix that error by properly considering how the ICCTA and the CAA can interrelate.

The case is monumentally important to reestablish a presumption

nities from Unwarranted Environmental Risks: A NEPA Solution for ICCTA Preemption, 91 MINN. L. REV. 836 (2007).

2. Strickland, *supra* note 1, at 1152.

3. Stucky, *supra* note 1, at 836-37. The major federal railroad regulatory statutes include the Interstate Commerce Commission Termination Act ("ICCTA"), the Federal Railroad Safety Act ("FRSA"), and the Federal Locomotive Boiler Inspection Act ("FLBIA").

4. Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist., No. CV 06-01416-JFW(PLAx), 2007 WL 2439499 (C.D. Cal. April 30, 2007).

5. *Id.*

6. *Id.* at *6.

against preemption, and a return to harmonizing co-equal federal statutes. This article examines previous arguments scholars have made suggesting courts should return to the presumption against preemption and for the harmonization of conflicting statutes. While those arguments are compelling, they offer little practical advice for state regulators. Instead, this article examines how SCAQMD offers innovative techniques in defeating preemption claims.

Part I focuses on the railroads as the key to the growth of the commerce clause. Part II examines the law and policy of preemption and harmonization. Part III examines the case *Association of American Railroads v. SCAQMD* in which SCAQMD promulgated three air emissions rules, which targeted railroads.

PART I: RAILROADS AND THE EXPANSION OF THE COMMERCE CLAUSE: A BACKGROUND

Association of American Railroads v. SCAQMD is not the first time railroads have argued railroad-specific federal laws preempt general-applicability federal laws. In the midst of the anti-trust fervor that brought William McKinley and his Vice-Presidential running mate, Theodore Roosevelt, to the White House in March of 1901, the railroads were busy looking for a way to avoid dissolution, having witnessed the populist wrath embodied in the passage of Sherman Anti-Trust Act of 1890. The state of Ohio had already successfully sued another industry giant – Standard Oil – on anti-trust grounds, but the state suit only applied to Standard's possessions in Ohio, so Standard simply spun off Standard Oil of Ohio (now a part of BP).[7] So, it was clear at the turn of the century that the pressure was rising on the railroads. Moreover, given the nature of railroad operations, state-by-state evasion (like with Standard Oil) could not possibly succeed.

When the U.S. finally brought an anti-trust action in federal court in Kansas against eighteen railroads that had signed onto a rate-setting agreement,[8] it was clear that the railroads needed a new litigation strategy. Accordingly, the railroads collectively chose to examine how Congress already regulated them.[9] The railroads argued that in the Interstate Commerce Act of 1887 ("ICA"), Congress had created such a broad regulatory scheme that any rate-setting agreements had the implicit permission of the railroad regulatory body, the Interstate Commerce Commission ("ICC").[10] Thus, the railroads believed the ICA shielded

7. *See* State v. Standard Oil Co., 30 N.E. 279, (Ohio 1892).
8. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
9. *Id.* at 341.
10. *Id.* at 364.

them from the Sherman Anti-Trust Act.

The railroads were surprised when the U.S. Supreme Court ruled in favor of the government:[11]

> Does, therefore, the implication irresistibly srise that Congress intended in the act of 1890 to abrogate, in whole or in part, the provisions of the Act of 1887, regulating interstate commerce? It seems to me that the nature of the two enactments clearly demonstrates that there was no such intention. The act to regulate interstate commerce expressed the purpose of Congress to deal with a complex and particular subject which, from its very nature, required special legislation. That act was the initiation of a policy by Congress looking to the development and working out of a harmonious system to regulate the highly important subject of interstate transportation.[12]

The Supreme Court explicitly acknowledged that Congress must act at different times on different issues; however, that does not imply that Congress writes one federal law into a vacuum, preempting other federal laws. Instead, as the court writes plainly, different laws work in a "harmonious system," and that it is the Court's province to sort out any inconsistencies.[13]

Before Congress passed the ICA of 1887, railroads were chartered under state law and—early on—entirely state regulated.[14] Predictably, as railroads expanded and became interstate entities, incompatible and onerous regulations at each state boundary created the need for federal regulation.[15]

States did regulate railroads under their police power to protect their citizens' health, safety, and welfare. In an early example of local environmental regulation, the City of Richmond, Virginia, banned steam engines from city streets.[16] Steam engines posed a number of hazards in urban areas, from creating fire-starting sparks to producing excessive soot.[17] In this case, the Supreme Court weighed the authorization granted to the railroad under its charter for laying line, against the inherent police powers of the city.[18] The Court determined that the city had neither overstepped its authority nor infringed on the railroad's charter.[19] "The power to govern implies the power to ordain and establish suitable police regulations."[20] This ruling, however, pre-dated the ICA.

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11. *See* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 100 (2001).
12. *Trans-Missouri*, 166 U.S. at 358 (sic).
13. *Id.* at 358.
14. *See* ELY, *supra* note 11, at 78.
15. *See id.* at 106.
16. Richmond, F. & P.R. Co. v. Richmond, 96 U.S. 521 (1877).
17. ELY, *supra* note 11, at 131.
18. *Richmond*, 96 U.S. at 527.
19. *Id.* at 529.
20. *Id.* at 528.

As railroads grew, they began to cross state boundaries, creating problems for each company to comply with the different laws that lay along the same line of track. The creation of dormant commerce clause jurisprudence gave railroads a useful tool to quash burdensome state regulations.[21] In the Supreme Court decision *Wabash, St. Louis & Pacific Railway v. Illinois,* the Court struck down an Illinois state law that deemed some rebates as unjust discrimination.[22] The Court held the Commerce Clause:

> would be a very feeble and almost useless provision . . . if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarressing [sic] this commerce.[23]

Thus, the judicial branch was already invalidating state laws which "unreasonably burdened" interstate commerce just as Congress created a federal regulatory framework. However, states retained the power to enforce regulations that only incidentally touched commerce absent federal legislation, such as minimum requirements for train drivers.[24]

As the railroads continued to grow a patchwork of state regulations, hampered by the dormant commerce clause, proved ineffective.[25] In response to growing reports of monopoly-like corruption and contract rate fixing, Congress passed the ICA and created the ICC, a regulatory body charged with applying the ICA.[26] The ICA made rebates and pooling unlawful;[27] forced the railroads to publish fares; and required fees to be "reasonable and just."[28] Notably, all of the ICA's provisions addressed activities of an economic nature. The ICA could issue orders, but relied on federal courts for enforcement.[29]

Many felt the ICC's powers were too limited, so Congress amended the ICA several times: once in 1906 under the Hepburn Act, allowing the ICC to determine a numerically just and reasonable rate; and again in

21. *See* Wabash, St. L. & P. Ry. v. Illinois, 118 U.S. 557 (1886).

22. *Id.* at 576-77.

23. *Id.* at 573.

24. *See* ELY, *supra* note 11, at 110-11.

25. *Id* at 110-15.

26. *Id.* at 90-93.

27. *See* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1039-40 (1988) (discussing that railroads created pools—contracts to share traffic and fees—to reduce the negativities of competition).

28. *See* ELY, *supra* note 11, at 91, (Congress did not originally give the ICC any parameters for a "reasonable and just" determination, a lack of guidance, critics say, which rendered the early ICC impotent).

29. *Id.* at 93.

1910 under the Mann-Elkins Act, which allowed the ICC to alter rates and suspend new, but suspect rates.[30] Through this amendment process, Congress gradually gave the ICC enough teeth to clamp down on the perceived corruption in the railroad industry. It is important to note that the ICC's powers were focused largely on rate fixing.

The ICC regulated railroads until 1995.[31] Congress, in response to seven major recent railroad bankruptcies, ditched the ICC entirely in the ICCTA.[32] The ICCTA attempted to "unpeel the many layers of regulations that had accumulated after the passage of the [ICA]," and make railroads competitive with the trucking and shipping industries again.[33] The ICCTA abolished the ICC in favor of the Surface Transportation Board ("STB").[34] In sum, ICCTA "consolidated the few remaining economic regulations in the Board [STB] and preempted conflicting state *economic* regulations."[35] The contentious jurisdictional and preemption clause of the ICCTA comes in § 10501:

> **(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 transportation are exclusive and preempt the remedies provided under Federal or State law.[36]

The extent of preemption Congress intended from this paragraph is at the heart of *Association of American Railroads v. SCAQMD* and nearly every other case involving a local or state government's attempt to regulate railroads in any capacity, because preemption based on this section is the railroad industry's first line of defense. This article will examine the validity of those arguments in Part III, but first a discussion of preemption and harmonization is necessary.

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30. *Id.* at 226-27.

31. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

32. *See* Strickland, *supra* note 1, at 1159-60 (discussing the "deregulation of rail economies" following the bankrupting of seven railroads).

33. *Id.*

34. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88.

35. Strickland, *supra* note 1, at 1161 (emphasis added).

36. 49 U.S.C. § 10501 (2008).

PART II: CAN THE COURTS NO LONGER SING? FINDING THE HARMONY

A number of commentators have pointed to the increasing willingness of courts to preempt the traditional state police powers of protecting the health, welfare, and safety of the local residents.[37] Empirical evidence also suggests this is true.[38]

Preemption is a doctrine based on the Supremacy Clause of the U.S. Constitution: "[T]he laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or laws of any State to the Contrary notwithstanding."[39] The Supreme Court has delineated three types of preemption: "(1) express preemption where the intent of Congress to preempt state law is clear and explicit; (2) field preemption where state law intrudes in an area that Congress has reserved for federal jurisdiction; and (3) conflict preemption, where enforcement of state law cannot be accomplished while simultaneously complying with federal law."[40] Because Congressional preemption power is limited only by "the self-restraint that it exercises for political or other reasons," the judiciary has carried a presumption against preemption.[41] This presumption, commentators argue, no longer exists in some federal circuits.[42]

A. PREEMPTION BY ICCTA IN PAST RAILROAD CASES

When a municipality or a state concerned with its citizens' well-being passes a law aimed at a railroad, the railroad invariably looks to the ICCTA for protection. *Auburn v. U.S.* is one of the most cited of these cases.[43] In *Auburn*, Burlington Northern announced its intention to refurbish some track, which ran through a mountain pass.[44] Two nearby cities in Washington State, Auburn and Kent, asked the STB for a declaratory order stating that Burlington Northern must abide by local and state environmental, building, and land use permitting authority.[45] Burlington Northern replied that these police-power-derived state laws were just the kinds of laws preempted by the ICCTA's jurisdictional and preemption section, § 10501(b).[46] Because the rail work was either "con-

37. *See* Strickland, *supra* note 1; Learner, *supra* note 1; Stucky, *supra* note 1.

38. Strickland, *supra* note 1, at 1152.

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

40. Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 442 (5th Cir. 2001) (citing English v. Gen. Elec. Co., 496 U.S. 72 (1990)).

41. Strickland, *supra* note 1, at 1151.

42. *See id.* (discussing the decline in Congressional self-restraint in preempting state law).

43. Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998).

44. *Id.* at 1027-28.

45. *Id.* at 1028; Cities of Auburn & Kent, WA v. Burlington N. R.R. Co., 2 S.T.B. 330, S.T.B. Fin. Docket No. 33200 at *1 (July 2, 1997) (Petition for Declaratory Order).

46. *Id.* at *3.

struction" or "operation," only the STB has jurisdiction over their work, thus preempting any remedies provided by other state or federal law.[47] The STB agreed:

> Local law also is preempted where there is a compelling need for uniformity. We believe that there is such a need in connection with the interstate rail system, which spans every state in the continental United States.
>
> As a result, we believe that state or local laws that would impose a local permitting or environmental process on BN's operations on, or maintenance or upgrading of [the line] are preempted to the maximum extent permitted by the Constitution.[48]

The STB, however, qualified the language by adding some important statements regarding agency discretion to their holding. While referring to the CAA, the STB held "[n]othing in . . . this decision is intended to interfere with the roles of the states and local entities in implementing these [CAA] federal laws."[49] The STB understood the overlapping Congressional purposes between the ICCTA and the CAA. Moreover, the STB understood the cooperative federalism component inherent in major federal environmental laws: states have the responsibility to implement federal law, so any preemption of that implementation is not preemption of a state law, but a preemption of federal law. As discussed later, when two federal laws are seemingly in conflict, a court is required to harmonize rather than preempt.

STB seemingly used a hybrid dormant commerce clause/preemption analysis, perhaps to protect its own jurisdiction, by adding a 'reasonableness' element:

> not all state and local regulations that affect interstate commerce are preempted. A key element in the preemption doctrine is the notion that only "unreasonable" burdens, *i.e.,* those that "conflict with" Federal regulation, "interfere with" Federal authority, or "unreasonably burden" interstate commerce, are superseded. The courts generally presume that Congress does not lightly preempt state law.[50]

The local cities appealed the STB decision to the Ninth Circuit.[51] The Ninth Circuit upheld the STB's holding, but articulated a different, slightly more ambiguous test:

> the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute.

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47. *Id.* at *4.
48. *Id.* at *5 (citations omitted).
49. *Id.* at *4.
50. *Id.* at *5.
51. *Auburn*, 154 F.3d at 1027.

> . . . For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.[52]

The Ninth Circuit did, however, reiterate the authority of a state agency regulating a railroad under delegated federal law.[53]

Armed with *Auburn*, the railroads found sympathetic courts across the United States. In *Seattle v. Burlington Northern Railroad*,[54] Seattle passed two ordinances regulating train crossings at busy streets. The Washington Court of Appeals overturned the ordinances, holding that Seattle drafted the ordinances too broadly.[55] The court understood the city passed the ordinances under the police power as general welfare statutes, but held they still overly restricted railroad operations.[56] However, like in *Auburn*, the court saw an opportunity for local regulation: "we could foresee properly drafted ordinances which serve to prohibit the intentional and unnecessary blocking of the roadways as a valid police power."[57] Thus, the court suggested a carefully crafted local regulation might slip through a crack in the bulky ICCTA.

One such local regulation did pass the muster, oddly, in the context of terrorism.[58] Following the September 11th attack on the Pentagon, the District of Columbia passed the Terrorism Prevention Act, which prohibited the transport of ultra-hazardous materials within 2.2 miles of the U.S. Capitol.[59] CSX sued, claiming preemption under a number of federal laws, including the ICCTA.[60] The court disposed of the ICCTA preemption claim briskly, holding "[t]he flaw in plaintiff's argument is that it interprets the ICCTA in a 'contextual vacuum,' completely ignoring the existence of the surrounding statutory framework. . . . This court cannot blindly apply the ICCTA preemption clause without also considering the purpose, structure, and application of the well-established federal-state rail safety framework."[61] Because CSX ignored the federal-state relationship present in the applicable Federal Railroad Safety Act ("FRSA"),

52. *Id.* at 1031.

53. *Id.*

54. Seattle v. Burlington N. R.R. Co., 22 P.3d 260, 261 (Wash. Ct. App. 2001).

55. *Id.* at 263.

56. *Id.* at 262-63.

57. *Id.* at 263.

58. CSX Transp., Inc. v. Williams, No. Civ.A. 05-338EGS 2005 WL 902130 (D.C.C. April 18, 2005). CSX appealed to the Court of Appeals and won a preliminary injunction. CSX Transp., Inc. v. Williams, 406 F.3d 667 (D.C. Cir. 2005). The District Court then demanded more factual investigation. CSX Transp., Inc. v. Williams, 231 F.R.D. 42 (D.D.C. 2005).

59. *CSX*, 2005 WL 902130, at *1.

60. *Id.* at *6.

61. *Id.* at *12.

the court found no ICCTA preemption.[62]

Interestingly, the DC court did comment on *Auburn*, saying that if "there existed a federal law preserving an explicit sphere of state authority for railroad *environmental* laws, as the FRSA does in the area of rail safety, the *City of Auburn* case may have come out differently."[63] Additionally, the court commented on the curious hybrid test the STB created in *Auburn*.[64] The Court held "[t]he Board also seems to engraft a 'reasonableness' inquiry (which does not appear in the text of the ICCTA) into the STB Order's analysis of state legislative actions under section 10501(b);" suggesting the STB may be applying the wrong test to ICCTA preemption claims.[65]

Clearly, as recognized by the DC court, a niche must remain for some state or local authority in regulating railroads and other industries that have large federal regulatory schemes. The size of that niche, however, is unclear. *Auburn* suggests it may be quite small. But that case, coming just a couple of years after the passage of the ICCTA, seems to have interpreted the breadth of the ICCTA's preemption clause much more than necessary to fulfill Congressional intent in passing ICCTA, and certainly broader than other circuits.[66]

Auburn holds that any environmental regulation is essentially economic in nature because environmental regulation could change the way the railroad must operate. At its core, the holding is not a 'test' in the traditional sense. Under *Auburn*, if a regulation is of an environmental nature, then it is an economic regulation subject to ICCTA preemption. Two points undermine this brash preemption test.

First, while the *Auburn* court could find no distinction between environmental and economic regulation, Congress certainly could, and did, regarding the ICCTA. As the legislative history states:

> The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive.[67]

62. *Id.* at *13.
63. *Id.* at *12 n.20.
64. *Id.* at *17.
65. *Id.*
66. *See* Strickland, *supra* note 1, at 1167. Strickland notes that the Third, Sixth, Eight, and Eleventh Circuits have ruled more narrowly than the Ninth. *See id.*; *see also* Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3rd Cir. 2004); Tyrell v. Norfolk S. Ry. Co., 248 F.3d 517 (6th Cir. 2001); Iowa, Chi. & E. R.R. v. Wash. County, 384 F.3d 557 (8th Cir. 2004); Fla. E. Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001).
67. H.R. Rep. No. 104-311, § 10301 (1995).

The *Auburn* court dismissed the legislative history in a technical construction argument, giving it no actual consideration.[68] Congress understood and articulated that the ICCTA preempted economic regulation only. Congress explicitly drew the line between state police powers of non-economic regulation, and preempted state powers of economic regulation.[69] If Congress wanted to preempt environmental regulation as well, it would have either included that desire within § 10501 or left some clue in its legislative history. It did neither.

Second, assuming *Auburn* is correct in holding there really is no distinction between environmental and economic regulation, is the U.S. Environmental Protection Agency's ("EPA") role in regulating railroads then impermissible? In 1997, the EPA finalized rules that finally regulated locomotive emissions, one of the last remaining unregulated sources of nitrogen oxide ("NOx") emissions.[70] The CAA required the EPA to regulate emissions as part of this environmental statutory scheme.[71] Is *Auburn* suggesting that the EPA's own direct regulation of locomotives is void or repealed because the EPA-forced manufacturing changes upon the railroad industry are also economic? Obviously not, clearly Congress endowed the EPA with that authority under the CAA.[72] It is beyond elementary that Congress regulates different topics under different laws. Nevertheless, if *Auburn* is correct, then the CAA is actually an economic regulation. Thus, the STB, not the EPA, should regulate railroads. This leads to an absurd result, an interpretation courts must strive to avoid.[73]

In the future, courts must draw a line on ICCTA 'economic preemption,' because, as one court pointed out, that "reasoning, taken to its logical conclusion, could mean that railroads cannot be required to put postage on their mail."[74] Whatever strange result might come from the *Auburn* ruling, nothing affects a court's duty, when faced with co-equal federal statutes to harmonize.

B. Finding the Harmony

In the case *Iowa, Chicago & Eastern Railroad v. Washington County*,

68. Auburn v. United States, 154 F.3d 1025, 1029-30 (9th Cir. 1998).

69. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803

70. Environmental Protection Agency, Regulatory Announcement, Final Emissions Standards for Locomotives, (1997), http://www.epa.gov/otaq/regs/nonroad/locomotv/frm/42097048.pdf (hereinafter Final Emissions Standards for Locomotives).

71. 42 U.S.C. § 7547(a)(5).

72. Final Emissions Standards for Locomotives, *supra* note 70, at 1.

73. *See* United States v. Turkette, 452 U.S. 576, 580 (1981) (arguing that absurd administrative results should be avoided).

74. Strickland, *supra* note 1, at 1168 (citing Holland v. Delray Connecting R.R. Co., 311 F. Supp. 2d 744, 757 (N.D. Ind. 2004)).

the Eighth Circuit provided a better-reasoned discussion of the limits to the ICCTA's preemptive effect.[75] In the case, the court thoroughly explored other applicable federal statutes and concludes that choosing one statute to override the rest does not follow Congressional intent nor is judicially appropriate.

Washington County, Iowa, requested that the railroad company pay for replacing old, substandard railroad bridges.[76] The railroad refused, and then argued the County had no authority to force the railroad to pay because of preemption by the ICCTA.[77] Upon hearing the case, the Eight Circuit began by explaining that:

> Congress in ICCTA occupied the field of economic and facilities regulation of railroads. The argument is simple, but it is deceptively simple, for it ignores relevant federal statutes that were enacted before ICCTA, that are administered by one or more agencies other than the ICC or the STB, and that Congress left intact in enacting the ICCTA.[78]

Because the bridges were a matter of safety, the court looked at FRSA, and determined that the two statutes must be applied *in pari materia*, or together.[79] Without expressly saying it, the court endorsed the presumption against preemption, leading the court to a harmonization analysis of conflicting or related federal statutes.[80] The court determined that, in fact, FRSA's preemption clause was the correct law to follow.[81] Because neither the district court nor the appellate briefs brought up the FRSA, the court did nothing more. In parting, however, the court did opine that if the "ICCTA preempted this type" of state regulation, that holding would consist of an implied repeal of the FRSA.[82]

When two statutes appear to be in conflict, "[i]t is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal "must be clear and manifest."[83] And as legal commentators have noted, "Congress acts with the knowledge that it never writes on a clean slate."[84] Moreover, the Supreme Court has held, "[w]here provisions in the two acts are in irrec-

75. *See* Iowa, Chi. & E. R.R. v. Wash. County, 384 F.3d 557 (8th Cir. 2004).
76. *Id.* at 558.
77. *Id.*
78. *Id.* at 559.
79. *Id.* at 560 (citing Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 522 (6th Cir. 2001)).
80. *See id.* at 560.
81. *Id.*
82. *Id.* at 561.
83. United States v. Borden Co., 308 U.S. 188, 198 (1939).
84. Amanda L. Tyler, *Continuity, Coherence and the Canons*, 99 Nw. U.L. REV. 1389, 1439 (2005); *see also* Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A*

oncilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one."[85] Thus, the first line of inquiry is to determine if the conflict is in fact irreconcilable.[86] If not, then according to Professor Bernadette Bollas Genetin, "the courts must give effect to both statutes if the provisions can coexist even if the result is a strained interpretation of the provisions."[87] The courts must push for harmonization, and as implied, courts must disfavor repeal.

A recent Supreme Court case provides a good example of judicial restraint in implied repeals. In *National Association of Home Builders v. Defenders of Wildlife* ("NAHB"), the Court faced conflicting provisions of the CWA and the Endangered Species Act ("ESA").[88] CWA § 402(b) provides that the EPA "shall approve" transfer of discharge permitting authority to a state, providing the state has met nine specific criteria.[89] Section 7(a)(2) of the ESA requires federal agencies to consult with the Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service to "insure" that a proposed agency action is unlikely to jeopardize a threatened or endangered species.[90] When the EPA decided to transfer certain permitting powers to the state of Arizona, the FWS objected, claiming the EPA had not yet done a jeopardy analysis.[91] The Court contemplated whether the jeopardy analysis was in fact, a tenth criterion that should be included in the EPA's analysis.[92] The Court characterized the action of adding a criterion as essentially repealing the exclusive list of nine.[93] Because implied repeals are disfavored, the Court declined to add the ESA requirement to the CWA.[94] Instead, the Court relied on an FWS regulation, which stated ESA § 7 would apply "to all actions in which there is *discretionary* Federal involvement or control."[95]

The Court held the regulation "harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors."[96] The Court then held the FWS met the *Chevron*

New Framework for Resolving Conflicts between Congressional Statutes and Federal Rules, 51 EMORY L.J. 677 (2002).

85. Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936).
86. *See* Genetin, *supra* note 84, at 704.
87. *Id.* at 703.
88. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).
89. 33 U.S.C. § 1342(b) (2008).
90. 16 U.S.C. § 1536(a)(2) (1988).
91. *Nat'l Ass'n of Home Builders,* 551 U.S. at 653.
92. *Id.* at 656.
93. *Id.* at 662-64.
94. *Id.* at 664.
95. *Id.* at 665 (citing 50 C.F.R. § 402.03 (2007) (emphasis added by the Supreme Court)).
96. *Id.*

deference test.[97] An ironic result, as the FWS disputed the final ruling.

The dissent found that the majority opinion simply cut away at the ESA, violating *TVA v. Hill*.[98] The dissent suggested two alternative harmonization strategies that would better preserve each act: (1) the ESA consultation process could move forward, allowing the agencies to work out the differences; or (2) the EPA could bind the new permitting authority with an MOA ("Memorandum of Agreement") to protect endangered species at a later time.[99]

In sum, NAHB provides two tools for state and local regulations: the doctrine of no implied repeal and agency deference. As the next section will show, SCAQMD must rely on both above-mentioned doctrines to overcome ICCTA preemption.

PART III: DOES A NICHE EXIST: CAN A STATE FILL THE FEDERAL REGULATORY GAPS WITH CAREFUL DRAFTING? A CASE STUDY

The Los Angeles basin, and California in general, have long been testing grounds for new ideas in pollution control.[100] The California Air Resources Board ("CARB"), in search of ways to further reduce pollution from railroad yards in Los Angeles, entered into a Memorandum of Mutual Understandings and Agreements ("MOU") in 1998 with the two largest freight railroads in the U.S.: Union Pacific and Burlington Northern.[101] Later, in 2005, the same railroads entered into another voluntary MOU with CARB in which the railroads entered into several agreements, most importantly, adding idling reduction devices on intrastate lo-

97. *Id.* at 666-67. In *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) the Court developed the *Chevron* deference test. According to the Court

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the state, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

98. *Nat'l Ass'n of Home Builders,* 551 U.S. at 678 (Stevens, J., dissenting) (citing TVA v. Hill, 437 U.S. 153 (1978)).

99. *See id.* at 684-90.

100. *See* 42 U.S.C. § 7543 (1990). Clean Air Act exempts California from national car emissions standards, allowing California to create more vigorous emission controls. Other states can adopt either the national or California standard.

101. Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist., No. CV 06-01416-JFW(PLAx), 2007 WL 2439499, at *2 (C.D. Cal. April 30, 2007); John Hoggan & Thomas Anderson, *Update on Clean Air Act Issues Affecting Railroads*, 21 NAT. RESOURCES & ENV'T 51, 52. (2006).

comotives and limiting "non-essential" idling to not more than sixty minutes.[102] SCAQMD objected to the MOU for two reasons. First, it left the definition of "non-essential" to the railroads, allowing them to determine when a locomotive should cease idling.[103] Second, because the MOU contained a release clause allowing the railroads to back out under certain circumstances, SCAQMD felt it was entirely unenforceable.[104]

A. SCAQMD Effort and the Subsequent District Court Ruling

SCAQMD publically objected to the terms CARB and the railroads set.[105] SCAQMD then promulgated three rules ("the Rules") between 2005 and 2006 aimed to strengthen control of air pollution from locomotives. SCAQMD Rule 3503 requires railroads to calculate and disclose the public health risks associated with rail yard operations.[106] Rule 3501 requires railroads to submit basic information about the locomotives operated in the Basin. Beginning in August, 2006, railroads must record instances of locomotives idling for 30 minutes or more.[107]

The most important, and controversial of the rules, however, is Rule 3502, which prohibits idling in the Basin in certain specific circumstances starting in August, 2006, if:

> (1) the crew of the locomotive "consist" (*i.e.* group of locomotives) has been relieved and the relief crew has not arrived; (2) the crew has left for a meal or personal break or for personal reasons; (3) the locomotive is within the rail yard; (4) the locomotive is queuing for fueling, maintenance, or servicing; or (5) maintenance or diagnostics being conducted on the locomotive do not require the engine's operation.[108]

In addition, Rule 3502 prohibits trailing locomotives (locomotives other than the lead locomotive in a group) from idling for more than 30 minutes if either (1) "the dispatcher or yardmaster notifies the operator of a delay that will exceed 30 minutes, or (2) a locomotive failure or breakdown will result in a delay of more than 30 minutes."[109] Alternatively, the railroad can equip its locomotives with anti-idling devices or

102. Hoggan & Anderson, *supra* note 101, at 52.

103. *Id.*

104. *Id.*

105. *Id.* at 53.

106. *See* Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction at 3-6, Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist., No. CV06-1416 JFW(PLAx), 2006 WL 4700625 (C.D. Cal. April 17, 2006).

107. *Id.*

108. *Id.*

109. *Id.*

submit an emissions plan.[110]

One can infer quite readily that SCAQMD understood the STB hybrid test of the "unreasonable burden to interstate commerce." Indeed, SCAQMD narrowly crafted Rule 3502 in order to avoid burdening railroad operations.[111] Rule 3502 only requires a locomotive to be off when the railroad itself it not using it. In fact, many times when Rule 3502 requires a locomotive to be shut off, no railroad employee is even inside or operating the locomotive. Under the slippery-slope *Auburn* test,[112] however, practically any environmental regulation can be expanded to an economic regulation, and thus fall under ICCTA preemption. Again, the rules require nothing of the railroad when the railroad is actively doing a railroad-related activity. Only during queuing or nonoperational times must the railroad shut off its engines. Thus, arguably, no operation is regulated.

The Association of American Railroads, a railroad industry group, along with Union Pacific and Burlington Northern, sued SQAQMD in the U.S. District Court of the Central District of California in 2006.[113] Shortly thereafter, SCAQMD agreed not to enforce the contested Rules until the district court made its judgment.[114]

The railroads' first claim of relief was that ICCTA § 10501(b) preempted SCAQMD's rules.[115] The court laid out the preemption rule, cited *Auburn*'s recognition of long-standing Congressional intent to regulate railroads, and pointed to § 10501(b)'s preemption and jurisdiction clauses.[116] The court quoted *Friberg* as holding "[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of [the Railroads'] train operations . . . is under the exclusive jurisdiction of the STB."[117]

Next, the court reaffirmed that the CAA does delegate rule adoption: "[t]he CAA also requires each state to adopt 'state implementation plans' which contain enforceable measures to attain the NAAQS [National Ambient Air Quality Standards]."[118] This delegation of power represents the CAA approach to cooperative federalism. However, the

110. *See* Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist., No. CV 06-01416-JFW(PLAx), 2007 WL 2439499, at *3 (C.D. Cal. April 30, 2007).

111. *See id.*

112. Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998).

113. *Ass'n of Am. R.R.*, 2007 WL 2439499, at *1.

114. *Id.*

115. *Id.* at *4.

116. *Id.*; *see also* 49 U.S.C. § 10501(b) (2008) (BOARD'S JURISDICTION OVER TRANSPORTATION RAIL CARRIERS AND THE PREEMPTION CLAUSE).

117. *Ass'n of Am. R.R.*, 2007 WL 2439499, at *4 (quoting Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 443 (5th Cir. 2001)).

118. *Id.* at *5.

court held, after reviewing the California Health and Safety Code ("CHSC"), that CARB was the state agency to which this delegated authority belongs, not SCAQMD.[119] Thus, the CAA and ICCTA required no harmonization because SCAQMD acted *ultra vires*, deriving its authority from something other than the CAA.[120]

The court then ruled that if, in fact, SCAQMD is acting under state police power (instead of the CAA for which it lacked authority under state law), those rules must fall into a category of rules applicable to all businesses, "including the railroads, such as building and electrical codes."[121] SCAQMD's three rules, the court found, were not similar types of regulations because the rules intended to regulate railroads directly.[122] Additionally, the court brushed aside the STB balancing tests of "undue restriction" and "unreasonable burden."[123] As "the Rules directly regulate rail operations such as idling, they are preempted without regard to whether they are undue or unreasonable."[124] Because the court ruled on the first claim of relief, it did not address any dormant commerce clause issues or other federal railroad statutes.[125] SCAQMD has appealed the ruling, and the case now sits before the Ninth Circuit.

B. Analysis of the Court's Ruling: Suggestions for the Ninth Circuit

The court misread SCAQMD authority, and thus escaped the importance of this case. The Ninth Circuit's duty is to close that escape hatch and grapple with how the ICCTA and CAA *must* be harmonized.

1. The District Court misread the California Code, which does grant this authority to SCAQMD

The railroads relied heavily on CHSC § 40702 to argue CARB, not SCAQMD, is the appropriate state agency to promulgate air quality rules for locomotives. "No order, rule, or regulation of any district shall, however, specify the design of equipment, type of construction, or particular method to be used in reducing the release of air contaminants from railroad locomotives."[126] On its face, this regulation would only pass the jurisdiction of Rule 3502 to CARB. Rules 3501 and 3503 only require

119. *Id.*
120. *Id.* at *6.
121. *Id.* at *7.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at *8.
126. Cal. Health & Safety Code § 40702 (West 2009).

information from the railroads.[127] Thus, the District Court erred in invalidating all three rules, because 3501 and 3503 cannot at all be considered a regulation under CHSC § 40702.

Furthermore, Rule 3502 prescribes no particular method to the railroads for reducing emissions.[128] Instead, the Rule requires that in lieu of complying with the Rule's idling requirements, an operator may submit an Emissions Equivalency Plan demonstrating that there is no increase in the total cancer potency-weighted emissions in the air contaminants, and demonstrating that any reductions will be greater than or equal to the annual emission reductions contained within the rule.[129] Prescribing a particular method is discouraged because it monopolizes one technology and inhibits innovation. However, because the railroads have a choice, SCAQMD has not prescribed a particular method.

Regardless, even if the Ninth Circuit affirms the District Court's ruling in total, states should be heartened because it means that the Ninth Circuit implicitly agreed that CARB has the authority to regulate locomotives, pursuant to any future rulings which might harmonize the CAA and ICCTA.[130] That ruling would give state agencies permission to begin to plug federal regulatory gaps without fear of industry preemption challenges.

2. *In disfavoring implied repeals, what is the result of harmonization of the ICCTA and the CAA?*

The District Court itself said that the ICCTA did not preempt the CAA.[131] This holding is consistent with *Auburn* and the opinion of the *STB*.[132] Thus, the Ninth Circuit must embark on an analysis of two seemingly conflicting statutes, the ICCTA and the CAA.

The CAA makes a regulatory distinction between the EPA's authority regarding new vehicles and vehicles "in use."[133] Section 209(a) states "[n]o political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emission from new motor vehicles or

127. Recordkeeping for Locomotive Idling, R. 3501 (February 3, 2006), *available at* http://www.aqmd.gov/rules/reg/reg35/r3501.pdf; Emissions Inventory & Health risk Assessment for Railyards, R. 3502 (Oct. 7, 2005), *available at* http://www.arb.ca.gov/drdb/sc/curhtml/r3503.pdf.

128. Minimization of Emissions from Locomotive Idling, R. 3502 (Feb. 3, 2006), *available at* http://www.arb.ca.gov/drdb/sc/curhtml/r3502.pdf.

129. *Id.*

130. *Ass'n of Am. R.R.*, 2007 WL 2439499, at *5 ("state law dictates that CARB is the entity with authority over locomotives.").

131. *Id.* at *7-*8.

132. *See* Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998); King County, WA—Petition for Declaratory Order—Burlington N. R.R. Co., STB Finance Docket No. 33095, 1 S.T.B. 731, 1996 WL 545598 (Sept. 25, 1996).

133. *See* 42 U.S.C. §7543(d) (1990).

new motor vehicle engines."[134] Standards are emission controls that manufacturers include on new vehicles.[135] However, Section 209(d) states "nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."[136] Thus, "Congress specifically refused to interfere with local regulation of the use or movement of motor vehicles after they have reached their ultimate purchasers."[137]

While the CAA does not include locomotives in the "motor vehicles" definition,[138] the 1990 amendments created the same distinction for railroads:

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles . . . .
>
> . . . (b) New locomotives or new engines used in locomotives.[139]

As with cars, Congress authorized the EPA to set standards for *new* locomotives, but this time remained silent on whether states could regulate "in use" locomotives. The EPA interpreted the silence in the statute and concluded that state could, an interpretation upheld by the courts.[140] Thus, the CAA allows states under EPA delegated authority to regulate locomotives "in use."

With both the CAA provisions and the ICCTA now detailed, the Ninth Circuit must determine if Congress, when passing the ICCTA, intended to repeal this section of the CAA. Two strong points indicate Congress did not wish to repeal these sections of the CAA: (1) Congress is presumed to have been aware of the CAA when it passed the ICCTA, yet modified neither the CAA nor the EPA's interpretation;[141] and (2) in the ICCTA legislative history, Congress spoke only of economic preemption.[142] As discussed above, without facial or legislative history to sup-

134. *Id.* § 7543(a).

135. *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 253 (2004) (holding the CAA preempted District's rules as 'standards').

136. 42 U.S.C. §7543(d).

137. Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972), *aff'd* 468 F.2d 624 (2nd Cir. 1972).

138. *See* 42 U.S.C. § 7550 (1990).

139. 42 U.S.C. § 7543(e)(1).

140. *See* Engine Mfr. Ass'n v. Envtl. Prot. Agency, 88 F.3d 1075 (D.C. Cir. 1996); *see also* 40 C.F.R. Part 89, Subpt. A, App. (1997) ("EPA believes that states are not precluded under Section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass mission limits, or sulfur limits on fuel").

141. *See* NORMAN J. SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION, §23:10 (6th ed. 2002).

142. *See* H.R. REP. NO. 104-311, at 95-96 (1995).

port repeal, only the disfavored implied repeal is left to consider.[143] If the statutes are irreconcilable, then an implied repeal must take place, but "the courts must give effect to both statutes if the provisions can co-exist even if the result is a strained interpretation of the provisions."[144]

Here, the Ninth should follow the Supreme Court's roadmap from *NAHB*.[145] The Supreme Court confronted two conflicting statutes and settled the discrepancy by examining the appropriate regulations.[146] Moreover, it rejected the dissents ideas to simply have the opposing agencies work out a solution or attach a MOU.[147] This recent and related precedent should then guide the Ninth Circuit to look at the EPA's interpretation of CAA § 209 and the STB's opinion that "[n]othing in . . . this decision is intended to interfere with the role of states and local entities in implementing these [CAA] federal laws."[148] By giving the same agency deference as the Supreme Court did in NAHB, the Ninth Circuit should hold that the ICCTA does not prevent local and state regulation of railroads if it is properly pursuant to federal law.

After the Ninth Circuit reaches that conclusion, it must revisit SCAQMD's rules. Two rules only require the railroad to collect, analyze and transmit information regarding locomotive emissions. Certainly, there is no conflict between the ICCTA and the CAA in promulgating those Rules. SCAQMD carefully drafted Rule 3502 to fit on the outsides of § 10501:

> (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.[149]

Nothing in Rule 3502 requires anything related to spur construction and related activities to be laid out in (2). Likewise, by definition, Rule 3502 requires nothing of railroad operators in "transportation."[150] Any time an operative locomotive is transporting, Rule 3502 does not apply.

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143. *See* Genetin, *supra* note 84, at 703.

144. *Id.*

145. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

146. *Id.* at 663-65.

147. *See id.* at 673.

148. Cities of Auburn & Kent, WA v. Burlington N. R.R. Co., 2 S.T.B. 330, S.T.B. Fin. Docket No. 33200 at *4 (July 2, 1997) (Petition for Declaratory Order).

149. 49 U.S.C. § 10501 (2008).

150. *See* Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist., No. CV 06-01416-JFW(PLAx), 2007 WL 2439499, *3 (C.D.Cal. April 30, 2007).

Some instances do trigger Rule 3502, such as when a locomotive is *unable* to transport for a given amount of time. Thus, because SCAQMD's rules are carefully tailored, no overlap with the ICCTA § 10501 exists. Moreover, the court, in the interest of fulfilling both instances of Congressional intent, should allow the Rules to stand.

CONCLUSION

The Ninth Circuit must realize that *Auburn*'s test,[151] while misguided in its own right, is not even applicable to this set of facts. Furthermore, it should not give any weight to the STB's illogical amalgamation of the dormant commerce clause analysis with the preemption analysis. Instead, the court should focus on reapplying the correct tests to ensure the court does not judicially preempt one instance of Congressional intent by another instance. Otherwise, the court will get lost in some *Auburn*-like maze of reasonableness determinations.[152]

As Professor Howard Leaner has pointed out, increased federalism in courts has impeded the cooperative federalism schemes that defined the nature of the major environmental laws of the 1970s.[153] For example, the CAA authorizes states to develop and enforce federally approved plans (State Implementation Plans, or SIPs) to meet federally determined emission levels.[154] Likewise, the CWA authorizes the appropriate state agency to issue pollution discharge permits, as long as total discharges are below the EPA-approved level.[155] Moreover, in the redevelopment of brownfields, property owners likely subject to CERCLA (Comprehensive Environmental Response, Compensation and Liability Act) liability may enter into voluntary clean-up agreements with state agencies to minimize that liability.[156]

Congress has determined that states must play a significant role in the protection of the national environment. When courts inhibit the cooperative nature of federal environmental laws, they are arbitrarily choosing one federal regulatory scheme over another. However, when courts realize they must harmonize federal statutes, it is imperative for local officials to draft regulations carefully—to attempt only to regulate

151. *See* Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998).

152. For examples of "reasonableness" tests in a wide variety of contexts *see generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (deciding an undue burden test problem based on state's interest and women's liberty); Wisconsin v. Yoder, 406 U.S. 205 (1972) (balancing an individual's First Amendment rights against the state's interest in education); Saratoga Fishing Co. v. Marco Seattle Inc., 69 F.3d 1432, 1440 (9th Cir. 1995)(holding that reasonableness in tort law involves a cost determination).

153. *See* Learner, *supra* note 1, at 663.

154. 42 U.S.C. § 7410 (1990).

155. 33 U.S.C. § 1251(g) (1987).

156. 42 U.S.C. §9601 (2002).

at the outer edge of major federal regulatory laws like the ICCTA. If successful, state and local regulatory bodies can reassert a measure of local control.