

Rutgers Law School (Newark)
Faculty Papers

Year 2007

Paper 41

Revitalizing the Presumption Against
Preemption to Prevent Regulatory Gaps: A
Case Study of Judicial Tolerance of Illegal
Railroad Waste Transfer Stations

Carter H. Strickland Jr.*

*Rutgers School of Law, Newark, cstrickland@kinoy.rutgers.edu

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/rutgersnewarklwps/art41>

Copyright ©2007 by the author.

Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: A Case Study of Judicial Tolerance of Illegal Railroad Waste Transfer Stations

Carter H. Strickland Jr.

Abstract

This article addresses the problem of regulatory gaps that are created through imprecise preemption rulings. It begins with a detailed case study of how railroads were able to enter the highly regulated solid waste industry, to claim that all state oversight is preempted by a federal statute intended to deregulate railroad economics, and to obtain the economic benefits of operating in a regulatory gap. The net result of current preemption doctrine in those cases has been to strip citizens of the power to ensure that waste transfer stations are safe, and this fundamental injustice serves as a backdrop to analyzing current preemption jurisprudence. The Court's reliance on a presumption against preemption of state laws to interpret federal statutes has declined over time, and this article provides an additional explanation for the presumption's decline based upon flaws in the original formulation of the doctrine. The article also explores the Court's current use of regulatory gaps as marking the plausible limits of Congressional intent to preempt, particularly when faced with the preclusion of all tort remedies for individual victims, and argues that the Court's concern about regulatory gaps should extend to preventive measures that are also based on the states' police powers and that are the expression of collective rights of self-protection. In addition to the standard federalism concerns that animate restraints on preemption, the article builds on scholarship that suggests additional Constitutional limitations on Congress's powers to strip remedies from citizens. Finally, the article proposes to correct these trends through a revitalized presumption against preemption, whereby courts would consider whether a preemption ruling will create a regulatory gap, and in those circumstances should

require a clear statement that Congress intended to strip remedies designed to prevent the underlying conduct at issue. Such a prudential rule of construction would avoid potential Constitutional issues.

REVITALIZING THE PRESUMPTION AGAINST PREEMPTION TO PREVENT REGULATORY GAPS: A CASE STUDY OF JUDICIAL TOLERANCE OF ILLEGAL RAILROAD WASTE TRANSFER STATIONS

© 2007 by Carter H. Strickland, Jr.*

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

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

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

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

Introduction

Unregulated railroad transfer stations have been opening and operating with impunity over the last few years in densely populated areas on the East and West coasts. Five waste stations that opened in one municipality in New Jersey were little more than open piles of construction and demolition debris that grew to over fifty feet tall. The exposed piles emitted clouds of dust on dry days and leached contaminated water into nearby wetlands and streams on rainy days. State inspectors documented extensive violations of applicable state law, and water

* Associate Clinical Professor, Rutgers-Newark School of Law and Acting Director, Rutgers Environmental Law Clinic; A.B., Dartmouth College, 1990; J.D., Columbia, 1995. E-mail: cstrickland@kinoy.rutgers.edu. The author represents environmental groups in various proceedings against the railroad waste facilities that are discussed in this article. The author thanks John Payne, Julia Huff, Richard Webster, other colleagues at Rutgers Law School, Rachel Godsil, Burke Griggs and Andrew Wetzler for reading earlier drafts of this article. The author especially thanks Nicole Guéron for her invaluable insights and patience.

¹ Tom Moran, Railroads Just Dump on Their Neighbors, Star-Ledger, July 27, 2005, at NJ 13.

samples from standing pools at three of the transfer stations found elevated levels of mercury, arsenic, and lead. Despite these conditions, state officials have been unable to shut down the facilities. Instead, courts have blocked the clean up efforts as preempted by a Federal railroad rate deregulation statute. Citizens are left with no protections because no federal agency has the authority or inclination to oversee environmental compliance at the facilities.

Along with solid waste, many other contemporary areas of state regulation are more comprehensive than federal regulation. In the air pollution field alone, states have made more progress towards greenhouse gas control regimes than the federal government,² have adopted more stringent mercury control rules,³ and have taken a stronger line towards enforcement of rules that limit the expansion of old, polluting power plants.⁴ Even on an issue as cutting-edge and international as enhanced security against terrorist attacks on chemical plants, the rules of some states are more protective than proposed or existing federal rules.⁵

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

³ Twenty-three states are planning to adopt stricter limits on mercury emissions from power plants in their borders than required by the federal government. 37 BNA Environment Reporter 2381 (Nov. 4, 2006).

⁴ E.g., Casey Roberts, Note, *New York v. EPA: State Response to a Federal Regulatory Rollback*, 33 Ecology Law Quarterly 613, 615-16 (2006).

⁵ For example, New Jersey has adopted emergency rules under the authority of the New Jersey Domestic Security Preparedness Act, N.J.S.A. App. A:9-69.6c and N.J.S.A. App. A:9-74.11.a, the Toxic Catastrophe Prevention Act, N.J.S.A. 13:1k-19 to-32, and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, to assess the vulnerability of chemical facilities to terrorist attack and to encourage the use of inherently safer approaches such as the use of less toxic chemical feedstocks. Domestic Security Preparedness Task Force, *Best Practices Standards at TCPA/DPCC Chemical Sector Facilities* (Nov. 21, 2005), available at <http://www.nj.gov/dep/rpp/download/ChemSectBPStand.pdf> (other security-related orders and best practices guidelines are available at <http://www.nj.gov/dep/rpp/brp/brpPublicNotice.htm>). See generally Congressional Research Serv., *Legislative Approaches to Chemical Facility Security* CRS-4 to CRS-5 (July 12, 2006) (reviewing state laws), available at http://digital.library.unt.edu/govdocs/crs//data/2006/upl-meta-crs-9397/RL33043_2006Jul12.pdf?PHPSESSID=a07381626cc30d9d29fe3fff9360a243. Proposed federal legislation and rules on the topic

Preemption doctrine is a potentially great obstacle to these progressive state policies. There are almost no limits on Congress's power to preempt state laws under the Supremacy Clause⁶ should it intentionally choose to do so. Congress's regulatory powers under the Commerce Clause can reach almost all intrastate issues, and the preemptive effect of those powers is generally thought to be limited only by the intent of Congress⁷ and thus any self-restraint exercised by that body for political or other reasons.⁸ Preemption will displace even those non-discriminatory state policies that otherwise pass muster under the Dormant Commerce Clause.

The stakes are particularly high where the displacement of state law is not filled in by any corresponding federal law, thereby leaving a regulatory gap.⁹ The risk of gaps is significant because state and federal governments have asymmetric abilities to provide or to deny remedies to the public. Where state regulations are inadequate to address societal problems, the federal

would preempt more stringent state standards. Department of Homeland Security, Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78276 (Dec. 28, 2006); Chemical Facility Anti-Terrorism Act of 2006, H.R. 5695, Sect. 1807. Unlike New Jersey's rules, the proposed federal laws would not explicitly encourage the use of less toxic chemicals and other inherently safer approaches.

⁶“This Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land” U.S. Const. art. VI, cl.2.

⁷ E.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

⁸ See generally, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 544-45 (1954).

⁹ This article uses the plain meaning of the term “regulatory gap” to describe matters of public concerns that are not addressed at any level of government, with the added sense that governmental bodies are prevented from addressing the problem. One of the few scholarly treatments of the concept similarly defines the term as describing unaddressed social ills, but then develops the concept in the context of incentives not to regulate that are entirely self-imposed because of the inability to claim exclusive credit for taking action. William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 *Iowa L. Rev.* 1, 5 (2003) (observing, at 47, that “[s]ins of omission, in contrast, are far less visible and arguably far more pervasive [than overregulation.]”); see also Susan Bartlett Foote, *Regulatory Vacuums: Federalism, Deregulation, and Judicial Review*, 19 *U.C. Davis L. Rev.* 113, 115 (1985).

government can enter the field and fill any voids in government oversight, as happened in the modern wave of federal social and environmental regulation in the 1960s and 1970s. But where federal regulations are inadequate or non-existent, states may fill gaps only if not preempted by Congressional action that triggers the Supremacy Clause (or if not prohibited by the Dormant Commerce Clause, which is not the focus of this article).

Of course it is not Congress but the courts that determine whether state laws are preempted.¹⁰ Empirical studies show that courts invoke preemption with greater frequency than in the past.¹¹ In many different areas of law, federal courts are interpreting vague or general commands in federal statutes as intend to nullify protective state laws.¹² Preemption doctrine is

¹⁰ The common view of nearly all courts, including the Supreme Court, is that preemption is based upon the Supremacy Clause. Recent scholarship has argued that preemption is a judicial concept that is separate from and unrelated to the original understanding of the Supremacy Clause, which announced only a rule of decision in the event of true conflicts between state and federal law. Stephen A. Gardbaum, *The Nature of Preemption*, 79 *Cornell L. Rev.* 767, 785, 803-04 (1994) (tracing preemption to judicial doctrines developed in the 1910s and 1920s). This analysis, while a persuasive reading of history, has not been adopted by courts

¹¹ See Rep. Henry Waxman, *Congressional Preemption of State Laws and Regulations* (June 2006) (finding that the House and Senate had voted 57 times in the previous five years to preempt state laws and regulations, and 27 of the bills were enacted as statutes), available at <http://www.democrats.reform.house.gov/bills.asp> (visited on November 24, 2006). Rep. Waxman has provided a publicly accessible database of preemptive legislation passed by the House and Senate since January 2001. *Id.* See also U.S. Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* at 6-8 and Table 1-1 (Sept. 1992) (finding that of 439 preemption statutes between 1789 and 1991, 30 were enacted from 1789 to 1899 and 233 were enacted between 1969 and 1991). The report notes that the fear of increasing Federal power led President Eisenhower to appoint a temporary commission to study the federal system from 1953 to 1955, and the Kestnbaum Commission recommended limitations on Federal preemption. *Id.* at 12.

¹² E.g., *supra* nn. 155-159. For example, mortgage lending companies have sought exemptions from state consumer protection laws because federal laws provide little or no protection for consumers. *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), cert. granted, ___ U.S. ___, 126 S. Ct. 2900 (2006); see Amici Curiae brief of Trial Lawyers for Public Justice, the Center for Responsible Lending and others in *Watters v. Wachovia Bank, N.A.*, No. 05-1342, available at http://www.tlpj.org/briefs/watters_amici_090106.pdf (noting that the federal Office of the Comptroller of the Currency has brought only a handful of consumer protection or anti-

therefore worth monitoring for any signs of a return to *Lochner*-era laissez faire social policy where states are barred from exercising their police powers to protect citizens, even in the absence of action by the federal government.¹³

Our concerns here have to be heightened by evidence that there is no principled federalism explanation for the recent surge in preemption rulings, which in a sense betrays conservative principles.¹⁴ Empirical studies show that judges' policy preferences and politics partly, if not fully, explain the outcomes of preemption cases.¹⁵ Rather, courts' increased use of preemption has been documented to work almost universally to the disadvantage of environmental,¹⁶ labor,¹⁷ civil rights and other laws intended to protect citizens.¹⁸ One

discrimination enforcement cases in several decades, and has insufficient staff to handle such cases).

¹³ *Lochner v. New York*, 198 U.S. 45 (1905), struck down maximum hours regulations for bakers, and the due process jurisprudence it spawned caused the Court to invalidate many state and federal laws for nearly thirty years. During much of this period, the Court also prevented Congress from acting by adopting a limited view of what could be considered interstate commerce. E.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The combination of these limitations on both state and federal government created the conditions for regulatory gaps.

¹⁴ See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism*, 69 U. Chi. L. R. 429 (2002).

¹⁵ David B. Spence and Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 Cal L. Rev. 1125 (1999); see generally Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 343, 343, 345-57 (2002) (noting "selective judicial passivity" in subconstitutional decision-making).

¹⁶ Richard J. Lazarus, *Restoring What's 'Environmental' About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. Rev. 703 (2000) (empirical study of cases shows a bias against environmental law, and conservative Justices will abandon their core principles to get rid of state laws); see also Richard Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 19 Pace Env. L. R. 619 (2002).

¹⁷ Nathan Newman, *Workers' Rights: Federalist Hypocrisy and the Preemption of State Labor Laws*, collected in *Awakening from the Dream: Civil Rights Under Siege and the New Struggle for Equal Justice* (Morgan, Godsil, and Moses, ed.) (2006), at 251-266.

¹⁸ Herbert Semmel, *It's Not About States' Rights: Double Talk by the Activist Supreme Court Majority*, collected in *Awakening from the Dream: Civil Rights Under Siege and the New Struggle for Equal Justice* (Morgan, Godsil, and Moses, ed.) (2006), at 239-250.

commentator has noted that the Bush administration is aggressively pushing preemption as a means of overturning state laws that provide a remedy for individuals against corporations, and it has taken the unprecedented step of siding with companies in such seemingly private disputes as suits by farmers that were injured by pesticide mislabeling or by individuals injured by defective pacemakers.¹⁹ The administration has also extended the reach of administrative preemption by, for example, issuing predatory lending regulations that cut off state remedies, without explicit Congressional authorization,²⁰ and proposing to preempt state laws to reduce the risk from terrorism attacks on chemical plants.²¹ Legal realism, if not cynicism, may best explain the sudden prevalence of preemption cases.

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

¹⁹ David Vladeck, Preemption and Regulatory Failure, 33 Pepp. L. Rev. 95 (2005).

²⁰ Id.

²¹ See supra, n. 5.

The creation of regulatory gaps through imprecise preemption rulings is not just a theoretical problem. Part I of this article is a detailed analysis of how railroads were able to enter the highly regulated solid waste industry, claim exemption from all state oversight under a federal statute intended to deregulate railroad economics, and obtain the economic benefits of operating in a regulatory gap. The net result of current preemption doctrine in those cases has been to strip citizens of the power to ensure that waste transfer stations are safe. This fundamental injustice serves as a backdrop to analyzing current doctrine.

Part II explores relevant trends in the Supreme Court's preemption jurisprudence. The Court's reliance on a presumption against preemption of state laws to interpret federal statutes has declined over time, and this article provides an additional explanation for the presumption's decline based upon flaws in the original formulation of the doctrine. Part II also explores the Court's current use of regulatory gaps as marking the plausible limits of Congressional intent to preempt, particularly when faced with the preclusion of all tort remedies for individual victims. The article argues that the Court's concern about regulatory gaps should extend to preventive measures that are also based on the states' police powers and that are the expression of collective rights of self-protection. In addition to the standard federalism concerns that animate restraints on preemption, Part II builds on scholarship that suggests additional Constitutional limitations on Congress's powers to strip remedies from citizens.

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

I. A Case Study of How Preemption Doctrine Leaves a Regulatory Gap Concerning Railroad Waste Transfer Facilities

This article uses railroad facilities that process solid waste as a case study to explore more general problems and solutions in preemption doctrine. A confluence of circumstances has created a regulatory gap: solid waste transfer stations are regulated solely by the states and the federal government has no regulatory apparatus to oversee railroads' operation of such facilities. Railroads claim they are exempt from many types of state regulation because of Congress's unrelated efforts to deregulate railroad economics in the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").²² Statutory ambiguity regarding the scope of preemption under ICCTA generally has led to a split between a broad view of ICCTA preemption in the Second and Ninth Circuits and a narrow view of preemption in the Third, Sixth, Eighth, and Eleventh Circuits.²³

As a result, in cases involving railroad waste stations, lower courts have found state solid waste laws preempted by ICCTA. In their analyses, the courts have not applied any presumption against preemption of traditional state regulation of solid waste. The courts have also failed to weigh the fact that their decisions may leave the public without any effective recourse for public health and environmental problems. Instead, the courts have relied on a general interest in uniformity and a general federal interest protecting railroads as a quintessential form of interstate commerce, and have ignored the nuances of the statutory text, Congressional intent, and the practical consequence of preempting state laws where there is no federal counterpart.

²² The 1995 amendments are commonly known as the Interstate Commerce Commission Termination Act, Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995).

²³ See *infra*, nn. 59-65.

A. ICCTA Rail Deregulation Created Unclear, Inconsistent Preemption Rulings

Many layers of regulations had accumulated after the passage of the Interstate Commerce Act and the creation of the Interstate Commerce Commission in 1887.²⁴ By 1970, seven major railroads were bankrupt, and railroad bankruptcies continued through the remainder of the decade.²⁵ Congress responded to this crisis by enacting deregulatory reforms designed to lower shipping rates and to loosen market exit and entrance restrictions so that the railroad industry could compete with the trucking and shipping industries. Congress began its reform efforts by limiting the Interstate Commerce Commission to its core mission of policing rates and other closely related economic issues.²⁶ In 1980, Congress adopted more comprehensive economic reforms in the Staggers Rail Act.²⁷ That act displaced state jurisdiction over general and inflation-based rate increases and fuel surcharges, and limited state powers over any “intrastate

²⁴ See Interstate Commerce Act of 1887, Pub. L. 49-104, 24 Stat. 379. In considering the 1995 ICCTA, the Senate summed up the history of ever-broadening railroad regulation as follows:

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

S. Rep. 104-176 at 2-3. See generally James W. Ely, Jr., “The Railroad System Has Burst Through State Limits”: Railroads and Interstate Commerce, 1830-1920, 55 Ark. L. Rev. 933 (2003) (reviewing history of rail regulation and deregulation).

²⁵ S. Rep. 104-176 at 3.

²⁶ In 1966, Congress transferred certain non-price related oversight responsibilities to the newly-created Department of Transportation, and in 1970 transferred the authority to develop and oversee rail safety regulations to the Federal Rail Administration. Federal Rail Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971. In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act to allow rail carriers to earn “adequate revenues” by allowing them to seek approval of rates based, to a degree, on market forces. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 144.

²⁷ Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

rate, classification, rule, or practice” except under standards and procedures approved by the Commission,²⁸ and “began the substantial economic deregulation of the surface transportation industry and the whittling away of the size and scope of the ICC.”²⁹

That process was completed in the 1995 ICCTA, which significantly expanded upon Congress’s earlier economic reform efforts, and freed railroads to set rates and make operational decisions about the opening, closing and maintenance of rail lines based on economic considerations alone. ICCTA substantially overhauled the Interstate Commerce Act and the economic regulation of rail transportation³⁰ as well as motor carriers³¹ and pipeline carriers.³² Patterned on other deregulatory statutes, ICCTA sought to substitute market forces for rate and operational regulations whenever possible to increase the overall efficiency of transportation.³³ Congress sought to regulate indirectly through market forces and thereby create an environment for “effective competition among rail carriers and with other modes.”³⁴ ICCTA’s legislative purpose section, for example, singles out the historic restriction on abandoning unprofitable tracks and lines as a particularly inefficient federal “regulatory barrier” that prevented rail from effectively competing with other transport modes.³⁵ Congress was careful, however, to state that reform efforts must ensure that railroads would “operate transportation facilities and equipment

²⁸ Id., Section 214, amending 49 U.S.C. §§ 10501 and 11501. The Staggers Act also partially deregulated rates for firms without market dominance, subjected collective ratemaking to generally applicable antitrust laws, encouraged railroad mergers, and eased the ability of railroads, particularly short-line railroads, to abandon lines and service.

²⁹ H.R. Rep. No. 104-311, at 82 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 794.

³⁰ Part A, Subtitle IV, Title 49.

³¹ Part B, Subtitle IV, Title 49.

³² Part C, Subtitle IV, Title 49.

³³ See generally 49 U.S.C. § 10101(1).

³⁴ 49 U.S.C. § 10101(4); see also id. § 10101(5).

³⁵ See id. § 10101(7); see generally Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1338 (11th Cir. 2001) (noting that the ICCTA sought to minimize general federal rail regulations).

without detriment to the public health and safety.”³⁶ In connection with this change in regulatory philosophy, Congress eliminated the Interstate Commerce Commission and created the Surface Transportation Board (the “Board”) to oversee the economic deregulation of railroads.

ICCTA consolidated the few remaining economic regulations in the Board and preempted conflicting state economic regulations. This changed the federal government’s relationship with the states, which had previously played a meaningful role in regulating railroad rates and operations,³⁷ and ICCTA was intended “to reflect the direct and complete preemption of state economic regulation of railroads.”³⁸

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

(b) The jurisdiction of the Board over—

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

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

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.³⁹

³⁶ Id. § 10101(8).

³⁷ See 49 U.S.C. §§ 10501(b)-(d) and 10907(b)(1) (1988) (pre-ICCTA statutes providing for concurrent Federal-State jurisdiction or exclusive State jurisdiction over certain aspects of rail regulation); Fla. E. Coast Ry. v. City of W. Palm Beach, 110 F. Supp. 2d 1367, 1373-74 (S.D. Fla. 2000) (discussing history of railroad regulation), aff’d, 266 F.3d 1324 (11th Cir. 2001).

³⁸ H.R. Rep. No. 104-311, at 95-96 (Nov. 6, 1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08 (emphasis added).

³⁹ 49 U.S.C. § 10501(b) (emphasis added)

This section contains two important textual limitations upon the scope of the Board's ability to preempt other laws. First, preemption is to occur only for "remedies provided under" the railroad part of the statute and, furthermore, will displace only other remedies that relate to "regulation of rail transportation."⁴⁰ Board "remedies" in Part A of ICCTA do not overlap with generally applicable environmental laws.⁴¹ Instead, the Board's substantive powers relate to economic regulations or core operational decisions about opening and shutting lines, and circumscribe the enforcement sections in Part A of ICCTA.⁴²

⁴⁰ This qualifying language significantly narrows the scope of preemption from the initial House bill, which had stated in its entirety that "Except as otherwise provided in this part, the remedies provided under this part are exclusive and preempt the remedies provided under Federal or State law." Section 10103, discussed in H. Rep. 104-311, 1995 U.S.C.C.A.N. 793. See generally *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443-448 (2005) (parsing language of preemption provision); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (reviewing court must give effect to every clause and word of statute); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used.").

⁴¹ See *infra* nn. 123-134 and accompanying text.

⁴² Chapter 117, 49 U.S.C. §§ 11701-07, and Chapter 119, 49 U.S.C. §§ 11901-11908. For example, The remedies available to the Board under Part A cover such matters as rate levels and economic discrimination, Chapter 107, 49 U.S.C. §§ 10701-47; the licensing, abandonment and sale of railroad property, Chapter 109, 49 U.S.C. §§ 10901-07; operations, open track rights and common accounting standards, Chapter 111, 49 U.S.C. §§ 11101-64; financial matters, including mergers and acquisitions, Chapter 113, 49 U.S.C. §§ 11301-28; and taxes, Chapter 115, 49 U.S.C. §§ 11501-02. The Board also enforces the uniform, strict liability scheme for liability for goods in transit, which preempts state common law rules to the contrary. 49 U.S.C. § 14706. The provision survives from the liability provisions of the Hepburn Act of 1906, originally known as the Carmack Amendment, and provides strict liability starting only at acceptance of goods for interstate shipment under a bill of lading, and includes carrier services related to the movement of goods, such as deliver, transfer, and loading. It was clearly these specific kind of inconsistent state remedies, and not state law generally, to which one Senator referred to in his separate statement that "recent court decisions have allowed actions against carriers to proceed under other laws . . . exclusive remedies are needed to provide a consistent method of resolving disputes and prevent needless litigation." S. Rep. 104-176 (additional views of Senator John Ashcroft not part of official committee report).

The Board can hear complaints and provide administrative and regulatory relief regarding rates and prescribe maximum rates, grant approval to exemptions from antitrust laws, authorize or deny certificates of construction for new railroad lines, and require protection of employees as condition of abandonment. See, e.g., 49 U.S.C. § 10901(a).

Second, ICCTA preempts laws only “with respect to regulation of rail transportation,” which is a narrower class of state laws than those “‘with respect to’ rail transportation.”⁴³ Congress’s intentional use of the former, narrower phrase meant that it intended to preempt laws that “have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail transportation . . . while permitting the continued application of laws having a remote or incidental effect on rail transportation.”⁴⁴

The statutory text is supported by the legislative purpose and history of ICCTA, which show no overlap with the goals of environmental laws regulating waste, and shows that Congress intended ICCTA to co-exist with many other generally-applicable federal acts, including criminal, securities, and environmental laws.⁴⁵ A House report on the initial bill emphasized “the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system” but continued on to state that “States retain the police powers reserved by the Constitution.”⁴⁶ Similarly, a Senate report stated that its purpose was to create a “nationally

⁴³ Florida East Coast Railway, 266 F.3d at 1331. It is interesting to note that the Supreme Court has broadly interpreted clauses that preempt all state laws that “relate to” a federal area of control, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992), *Boggs*, but has narrowly construed clauses that preempt state laws only when they “cover” the subject matter of specific federal regulations, *CSX v. Easterwood*, 507 U.S. 658, 662 (1993).

⁴⁴ Florida East Coast Railway, 266 F.3d at 1331. Other courts have adopted this reasoning to uphold the application of police power laws to railroads. *Iowa, Chicago & E. R.R. Corp. v. Washington County*, 384 F.3d 557, 561 (8th Cir. 2004) (holding that state law requiring railroad bridge replacement was not preempted); *Home of Economy v. Burlington N. Santa Fe R.R.*, 694 N.W.2d 840 (N.D. 2005) (examining the remedies available under Part A to hold that ICCTA does not preempt state law regarding grade crossings); *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001) (holding that nuisance claim related to damage from stormwater runoff from railroad property is not regulation of rail transportation and is not preempted); *Native Village of Eklutna v. Alaska R.R. Corp.*, 87 P.3d 41, 57 (Alaska 2004) (upholding state conditional use permit for quarry operated by railroad).

⁴⁵ See H.R. Conf. Rep. No. 104-422, at 167 (Dec. 18, 1995), reprinted in 1995 U.S.C.C.A.N. 850, 852; see also the discussion in the text of Part III.C., *supra*.

⁴⁶ *Id.* at 96, reprinted in 1995 U.S.C.C.A.N. at 808 (emphasis added). Similarly, Congress stated that “It is not consistent with the intent to have all economic regulation of rail transportation governed by uniform Federal standards for State securities laws to be employed as a means of reasserting pre-empted forms of economic regulation,” *id.*, and that preemption was meant to “encompass all statutory, common law, and administrative remedies addressing the rail-related

uniform system of economic regulation.”⁴⁷ Thus, the joint conference committee report describing the final bill explained that the Board would be an exclusive forum for remedies concerning economic issues and certain operational matters,⁴⁸ but that “exclusivity is limited to remedies with respect to rate regulation – not State and Federal law generally” because such laws “do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation.”⁴⁹ ICCTA’s dichotomy between preempted economic regulations and non-

subject matter jurisdiction of the Transportation Adjudication Panel.” *Id.*, 1995 U.S.C.C.A.N. at 807.

⁴⁷ S. Rep. No. 104-176, at 6 (Nov. 21, 1995). In relevant part, this section of the report states that Section 10501(b) had the purpose of “The exclusive nature of the Board’s regulatory authority under Part A would be clarified (paragraph 1).”

⁴⁸ H.R. Conf. Rep. No. 104-422, at 167 (Dec. 18, 1995), reprinted in 1995 U.S.C.C.A.N. 850, 852. The report stated that:

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

The preemption standard that was carried over from Staggers Act had partially displaced state economic regulation over intrastate rail; under the scheme of that earlier act, the scope of preemption was co-extensive with the Commission’s remedies concerning rates and service. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). Among other things, the Staggers Act added the following subsection to 49 U.S.C. § 10501:

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

⁴⁹ H.R. Conf. Rep. No. 104-422, at 167 (Dec. 18, 1995), reprinted in 1995 U.S.C.C.A.N. 850, 852. As an example of limited scope of preemption, which Congress intended to encompass only those regulations directly focused on economic, not all general regulations that might have some economic effect, as all inevitably do, the conference committee report cited that “criminal statutes governing antitrust matters not preempted by this Act, and laws defining such criminal offense as bribery and extortion, remain fully applicable unless specifically displaced.” *Id.*

preempted general regulations (regardless of any tangential economic effects) continues the historic concurrent jurisdiction of states to regulate the non-economic aspects of railroad service,⁵⁰ and the general rule that preemption does not deprive the states of the “power to regulate where the activity regulated [is] a merely peripheral concern” of federal law.⁵¹

However, these textual limitations are in some conflict with the preceding sentence on the Board’s exclusive jurisdiction, which is seemingly very broad. ICCTA states that the Board’s “jurisdiction . . . over . . . transportation . . . and . . . facilities . . . is exclusive.”⁵² The expansive reach of this sentence is reinforced by Congress’s definition of “transportation,” which includes the physical apparatus of railroad operations (locomotives, cars, rails and terminals and the like that are owned by rail carriers) and services related to the movement of passengers or property

⁵⁰ That states had been able to regulate railroads concurrently with the federal government until Congress had taken some positive action that would create a conflict between Federal and State law is demonstrated by *Nashville, Chattanooga & St. Louis Railway v. Alabama*, 128 U.S. 96, 99-100 (1888):

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

See also *Smith v. Alabama*, 124 U.S. 465 (1888) (upholding state statute regarding licensing of locomotive engineers, where Congress had not enacted any conflicting law); *Hennington v. Georgia*, 163 U.S. 299 (1896) (upholding state statute banning operation of freight trains on Sunday under reserved, concurrent powers); *New York, New Haven & Hartford Railroad Co. v. New York* (upholding state’s ability to regulate the heating of cars by stoves or furnaces in the absence of Federal legislation); *Missouri, Kansas & Texas Railway v. Haber*, 169 U.S. 613 (1898) (upholding state regulation of cattle for contagious disease because it did not conflict with the federal Animal Industry Act of 1893). That early emphasis on actual conflict was lost as the court began to hold that Congress had broad, preemptive powers over interstate rail generally as it took action to occupy the field of rate and operational regulation. Stephen A. Gardbaum, 79 *Cornell L. Rev.* 767, 803-05 (1994). Nevertheless, the Court still required some relevant action by Congress. *Id.* (citing cases); e.g., *Napier v. Atlantic Coast Line Co.*, 272 U.S. 605 (1926) (holding that Boiler Inspection Act occupied the field of regulating locomotive equipment).

⁵¹ *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

⁵² 49 U.S.C. § 10501(b).

by rail.⁵³ The broad definition of “transportation,” taken in isolation, would seem to provide the Board with “jurisdiction” over any facilities or equipment owned by railroads without regard to any nexus with rail transportation or common carrier services.⁵⁴

There must be some logical limit to the exclusivity of the Board’s powers. To take an extreme example, Congress surely did not intend to allow railroads to open gambling or prostitution businesses that are exempt from generally-applicable state laws, and subject only to Board supervision.⁵⁵ In fact, the term “transportation” is explicitly linked with the remedies available to the Board,⁵⁶ meaning that states cannot regulate matters that the Board can and, conversely, that states are free to regulate matters that the Board cannot.

Nevertheless, there is some room to argue that the juxtaposition of the clause granting the Board “exclusive” jurisdiction over “transportation” with the clause preempting certain remedies creates ambiguity within Section 10501(b). (Again, ICCTA’s legislative history shows that Congress itself thought that there was no ambiguity and that the preemption clause was so clear that it rendered a savings clause “unnecessary.”⁵⁷)

Based on this seeming ambiguity, railroads, the Board, and ultimately several courts have conflated the first sentence on jurisdiction of the Board with the last sentence on the preemptive effect of Board remedies. Ignoring the distinct functions and scope of exclusive jurisdiction and

⁵³ 49 U.S.C. § 10102(9).

⁵⁴ 49 U.S.C. § 10501(b).

⁵⁵ In a preemption case under another section of ICCTA dealing with towing, one lower court has identified the shortcomings of textualism by posing the question as when “by its words, Congress cast its net wider than it intended, should the court give effect to the text as cast, leaving it incumbent upon Congress to amend the statute, or does the court have a responsibility to hem the net back to where Congress intended it to fall?” *Bloomfield Ave. Corp. v. City of Newark*, 904 F. Supp. 364, 371 (D.N.J. 1995).

⁵⁶ 49 U.S.C. § 10501(b).

⁵⁷ H.R. Rep. No. 104-311, at 96.

preemption,⁵⁸ this view holds that the preemptive scope of ICCTA should be coextensive with the broadest possible reading of the exclusive jurisdiction clause.⁵⁹

In general ICCTA preemption cases, the Circuit Courts of Appeal have split, with the Second,⁶⁰ Ninth,⁶¹ and District of Columbia⁶² Circuits adopting a broad view of ICCTA

⁵⁸ As a general matter, exclusive jurisdiction is generally considered to be a form of primary jurisdiction that provides for the initial evaluation of an issue by an agency; it does not necessarily trigger preemption, or the inability of states to legislate in a field. *Holland v. Delray Connecting Railroad Co.*, 311 F. Supp. 2d 744, 747 (N.D. Ind. 2004) (holding that Section 10501(b) raises primary jurisdiction issues only and did not preempt state law); *Harris v. Union Pacific R.R.*, 141 F.3d 740, 744 (7th Cir. 1998) (holding that Board's "exclusive jurisdiction" over rail mergers is matter of primary jurisdiction that does not divest courts of power to apply generally applicable laws); *Norfolk Southern Ry. Co. v. City of Austell*, 1997 WL 1113647 (N.D. Ga. Aug. 19, 1997) (citing the exclusive jurisdiction sentence only as support to show that its preemption decision was consistent with that separate provision); cf. *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, 215 F.3d 195, 204 (1st Cir. 2000) (Section 10501(b) does not divest the district courts of jurisdiction in favor of Board jurisdiction); see generally *Arsberry v. Ill.*, 244 F.3d 558, 563 (7th Cir. 2001). In one limited sense, preemption, like primary jurisdiction and exclusive jurisdiction (the most extreme version of primary jurisdiction), may be considered a threshold issue because it "transfers from court to agency the power to determine" certain questions before courts can even take up a case. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 65 (1956) (quoting Jaffe, *Primary Jurisdiction Reconsidered*, 102 *Univ. Pa. L. Rev.* 577, 583-584 (1954)).

⁵⁹ ICCTA decisional law has overwhelmingly relied on analysis of the "exclusive jurisdiction" language of Section 10501(b) rather than the preemption language. One oft-quoted dictum from an early judicial decision is that "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than the exclusive jurisdiction sentence of ICCTA. *CSX Transp. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996); see also *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (relying on exclusive jurisdictional sentence of Section 10501 of ICCTA to preempt state claims); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000) (relying on jurisdictional provision to hold that that ICCTA precludes "all state efforts to regulate rail transportation."). The unsettled basis for these decisions is confirmed by *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836 (E.D. Ky. 2004). Many of the ICCTA cases cited by the Maynard court, *id.* at 840, preempt state laws by reference to the exclusive jurisdiction sentence of Section 10501(b). E.g., *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (citing whole section and rejecting plaintiffs attempt to escape the jurisdiction of the Board); *Guckenberg v. Wisconsin Central Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001) (referring to both exclusive jurisdiction and preemption sentences); *Rushing v. Kansas City Southern Ry. Co.*, 194 F. Supp. 2d 493, 500 (S.D. Miss. 2001) ("state law has been preempted by the ICCTA which vests exclusive jurisdiction in the STB over such matters."). *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, 215 F.3d 195 (1st Cir. 2000), is distinguishable because that cases concerned damage actions against carriers pursuant to 49 U.S.C. § 11101(a) and the explicit right of action at 49 U.S.C. § 11704(c).

preemption to displace many non-economic state laws, even where the Board does not regulate in that area, and therefore preempting almost all state and local permitting programs. The Third,⁶³ Sixth,⁶⁴ Eighth,⁶⁵ and Eleventh⁶⁶ Circuits have adopted a narrower interpretation of

⁶⁰ *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005). The Second Circuit held that a shed for the storage of such materials was integral to railroad operations and preempted a state land use pre-construction permit and mandatory set-back from the Connecticut River. Like courts before it, the Second Circuit reasoned that a permit requirement would unduly interfere with interstate commerce by giving the local body veto power or, at a minimum, would involve delay, *id.* at 643. The Second Circuit also cited dictum from an early case that ICCTA preemption is as broad as could be imagined. *Id.* at 645. The Second Circuit did not examine the environmental impacts of the operations or the protective rationale of the state law, and obviously did not have any reason to examine the issues specific to waste handling operations.

⁶¹ *City of Auburn v. STB*, 154 F.3d 1025 (9th Cir. 1998). The Ninth Circuit adopted the agency's broad dicta and held that environmental permitting regulations "will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Id.* at 1029-31. The Ninth Circuit's theory presupposes that the accumulated aggregation of local and state permitting laws will be fatal to the rail industry, and therefore tolerates no law with a pre-clearance element.

⁶² *CSX Transp. Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (applying preemption provisions of other federal acts, not ICCTA, to strike down local rule regarding the movement of hazardous waste by rail); but see *Boston and Maine Corp. v. STB*, 364 F.3d 318, 321 (D.C. Cir. 2004) (recognizing overlap between ICCTA and FRSA and need for implementing agencies to coordinate and cooperate).

⁶³ *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004). The Third Circuit agreed with the Board that state waste laws are not preempted when a non-carrier operates on railroad property. Assuming for the sake of argument that loading activities can be part of ICCTA "transportation," the Third Circuit nonetheless found that the activities did not involve "transportation by a rail carrier" as required by ICCTA but rather transportation to a rail carrier, and therefore that state solid waste laws were not preempted. *Id.* at 308 (emphasis added).

⁶⁴ *Tyrell v. Norfolk S. Ry. Co.*, 248 F.3d 517 (6th Cir. 2001). In *Tyrell*, the Sixth Circuit rejected a railroad's argument that ICCTA preempted the FRSA and a state law implementing that act related to minimum track clearances. The Sixth Circuit noted that while ICCTA is an extensive economic regulatory scheme administered by the Board, FRSA is an extensive rail safety regulatory scheme placed by Congress in the very next subtitle of Title 49 (Subtitle V), which is administered by the Federal Rail Administration (now consolidated with the Transportation Security Administration under the Department of Homeland Security). The state track clearance law at issue related to safety rather than economics. For those reasons, the state law was properly measured against the preemption clause of FRSA rather than against the preemption clause in ICCTA, and was upheld. In reaching that holding, the Sixth Circuit rejected the railroad's claim that ICCTA's economic deregulatory scheme repealed FRSA or any other federal law that touches upon the rail industry.

ICCTA that largely limits preemption to economic laws and not to state safety and environmental laws.⁶⁷

ICCTA caselaw was anticipated by (and shaped by) early declaratory orders of the Board stating that general state permitting laws are preempted by the statute.⁶⁸ In several of these decisions the Board asserted its ability to declare⁶⁹ the scope of preemption even where it acknowledged that it lacked licensing or regulatory authority over railroad facilities and would not conduct any environmental review.⁷⁰ The Board also developed the notion that any “state or local permitting process for prior approval of [a] project, or of any aspect of it related to

⁶⁵ Iowa, Chicago & E. R.R. Corp. v. Washington County, 384 F.3d 557 (8th Cir. 2004) (holding that state law requiring railroad bridge replacement was not preempted).

⁶⁶ Florida East Coast Railway v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001). The Eleventh Circuit rejected a railroad’s argument that the ICCTA preempts the application of local zoning and occupational laws to an aggregate distribution business that was located on land the railroad leased to a non-rail entity, where the aggregate was delivered by the railroad and unloaded, stockpiled, organized and reloaded by a non-rail business. Florida E. Coast R.R., 266 F.3d 1324. The court held that ICCTA preemption does not extend to non-rail entities simply because they are under a lease to a railroad; it did not need to reach the question of whether the railroad itself could engage in that particular aggregate business free of local regulation. *Id.* at 1332.

⁶⁷ In one court’s succinct phrasing of the limited view of ICCTA preemption, railroads cannot preempt all regulations that impose costs, because that “reasoning, taken to its logical conclusion, could mean that railroads cannot be required to put postage on their mail.” *Holland v. Delray Connecting RR*, 311 F. Supp. 2d 744, 757 (N.D. Ind. 2004).

⁶⁸ See Maureen E. Eldredge, *Who’s Driving the Train? Railroad Regulation and Local Control*, 75 U. Colo. L. Rev. 549, 573-75 (2004) (outlining problems related to broad ICCTA preemption in the context of facilities other than waste stations).

⁶⁹ Agencies have the discretion to issue declaratory orders where necessary to resolve controversies under their general discretionary authority to issue declaratory orders as necessary to resolve controversies. The Administrative Procedures Act contains general authorization for declaratory orders to resolve controversies at 5 U.S.C. § 554(e), and the Board has specific authority to use that mechanism at 49 U.S.C. § 721.

⁷⁰ *Borough of Riverdale Petition for Declaratory Order the New York Susquehanna and Western Railway Corporation*, STB Finance Dkt. No. 33466, 4 S.T.B. 380, 1999 WL 715272 *4 (STB served September 10, 1999). See also *Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Dkt. 33971, 2001 WL 458658 at *4-*5 (STB served May 1, 2001); *Friends of the Aquifer et al.*, STB Finance Docket No. 33396 (STB served Aug. 15, 2001); *Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000).

interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted.”⁷¹ The Board’s laissez-faire philosophy is summed up by its remarkable statement that “literal compliance with state or local laws often may be impractical in cases involving railroad facilities.”⁷²

B. Railroads Exploit the Uncertainty Surrounding ICCTA Preemption and Build Unregulated Solid Waste Transfer Stations at Railheads

Lingering uncertainty about the scope of ICCTA preemption allowed railroads to argue that the statute preempts all state laws that apply to any terminal or other facility owned by a railroad, no matter how distant the activities are from actual railroad operations or how attenuated states laws are from economic regulation. In particular, railroads argued that state environmental laws cannot apply to solid waste handling and transfer activities conducted on railroad property, even though such laws apply to similar facilities where waste ultimately leaves by truck or barge.

The railroads were seeking advantage in the new market for interstate waste transportation.⁷³ Despite this interstate market, solid waste is not regulated by the federal government⁷⁴ but by states, which have extensive statutory and regulatory schemes to control the

⁷¹ City of Auburn, 1997 STB LEXIS 143, *13. King County, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line, STB Finance Docket No. 33095 (STB served Sept. 25, 1996), clarified, Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line, STB Finance Dkt. No. 33200 (STB served July 2, 1997), aff’d City of Auburn v. STB, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999).

⁷² Boston and Maine, 2001 WL 458685.

⁷³ Older urban areas in the Northeast generate a great amount of solid waste from human activities including the destruction and rehabilitation of older structures. Yet these same areas have limited disposal capacity after the closure of landfills in the region, including the closure of the massive Fresh Kills landfill in New York City in 1997. This imbalance has created a lucrative opportunity to transport waste to landfills in the Midwest, where disposal costs are much cheaper.

⁷⁴ See infra nn. 115-132 and accompanying text.

generation, handling, and disposal of solid waste, particularly the great amounts of waste that are gathered and processed at centralized waste transfer stations.⁷⁵ By some accounts, regulatory compliance accounts for \$15 to \$20 of each ton of waste shipped out,⁷⁶ and companies seek creative ways to avoid these costs and boost their profits.⁷⁷

States' strong regulatory presence reflects their historic management of solid waste to avoid public health problems associated with uncontrolled garbage disposal. With greater scientific understanding of the potentially hazardous characteristics of other wastes such as construction and demolition debris,⁷⁸ states adjusted their regulatory regimes to encompass these and other wastes. Facility design, registration, waste manifest, inspection and monitoring

⁷⁵ Long-range transportation and disposal has also forced the solid waste industry to evolve to a system of "transfer stations" whereby waste and recyclable materials are brought to intermediate hubs close to urban and residential areas. At these hubs or transfer stations, waste is dumped, sorted, processed, consolidated and loaded onto tractor-trailers, containers or railcars for shipping to nearby recycling or incinerator facilities, or to landfill sites in the Midwest. The extensive handling of waste at transfer stations creates the potential to emit significant amounts of dust, leachate and other waste, and for that reason these facilities are highly regulated. Bruce J. Parker, President and Chief Executive Officer, National Solid Wastes Management Association, The Problem of Unregulated Waste Management Facilities on Rail Property, testimony before the Committee on Transportation & Infrastructure, Subcommittee on Railroads, U.S. House of Representatives, at 1 (May 23, 2005) (available at <http://wastec.isproductions.net/webmodules/webarticles/articlefiles/255-STB%20TestimonyFinal2.pdf> (visited on Nov. 26, 2006), and on file with the author).

⁷⁶ See <http://www.CDRecycler.com/news/news.asp?ID=2016>.

⁷⁷ The possibility of saving \$15 to \$20 per ton of waste by ignoring regulations has attracted the attention of financiers. Although information about private equity firms is hard to gather, one leading law firm has stated that it assists such firms in investing in "operators of solid waste transfer station on federally regulated railroad property" and helps them "navigate federal and state environmental regulations and federal pre-emption issues." (available at www.herrick.com/home/HerrickHalfTimeReport_06.pdf, visited on November 14, 2006).

⁷⁸ In older urban areas, construction and demolition debris may include asbestos insulation and lead paint from the older structures, as well as all-weather wood treated with arsenic. See Criteria for Classification of Solid Waste Disposal Facilities and Practices and Criteria for Municipal Solid Waste Landfills: Disposal of Residential Lead-Based Paint Waste, 68 Fed. Reg. 117 (June 18, 2003).

requirements are all implemented through pre-construction and pre-operation permits.⁷⁹ The environmental permitting of new solid waste facilities is expensive, and it may take three to four years to obtain a permit for the first time.⁸⁰

The actions of one railroad, the New York Susquehanna & Western Railroad (“Susquehanna & Western”) illustrate the strategic use of ICCTA to obtain preemption of laws regulating solid waste. Susquehanna & Western is a limited Class II railroad that operates a 400-mile line between northern New Jersey and central New York, where it transfers railcars to a

⁷⁹ E.g., N.J.A.C. 7:26-1.4. In New Jersey, for example, the New Jersey Department of Environmental Protection (“NJDEP”) and the New Jersey Meadowlands Commission, have authority over solid waste transfer stations across the state and in the Meadowlands area of North Jersey, respectively. Like most states, New Jersey has waste station design standards that require all transfer operations to occur in enclosed structures with concrete tipping floors, misting systems and runoff collection equipment. N.J.A.C. 7:26-2B.5. In addition to design and operational controls, any new or expanded solid waste facility must seek inclusion in a county solid waste plan through extensive planning and negotiations with the host community to alleviate traffic and other concerns as well as the overall waste burden borne by that community. N.J.A.C. 7:26-6.10; N.J.A.C. 7:26-2.4; *Regional Recycling, Inc. v. State Department of Environmental Protection*, 606 A.2d 815 (N.J. 1992). New Jersey has additional screening regulations that are designed to exclude members of organized crime syndicates from infiltrating back into the solid waste industry after decades of enforcement efforts. N.J.S.A. 13:1E-126 et seq.; N.J.A.C. 7:26-16.3. The transfer of different kinds of waste is strictly controlled through a detailed inspection regime to ensure that hazardous waste is sent to proper facilities and is not intermingled with other wastes. These controls are particularly important for the handling of construction and demolition debris, a regulatory category that includes treated and untreated wood scrap, concrete, asphalt, plaster, wallboard, roofing materials, cardboard, metal, insulation, plastic scrap and other materials that may contain some traces of hazardous waste. N.J.S.A. 13:1E-4, -5; N.J.A.C. 7:26-2 et seq. In addition, all solid waste landfill facilities are required to obtain a permit pursuant to the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the implementing regulations at N.J.A.C. 7:14A. New Jersey attempted to maintain the substantive protections in its solid waste regulations necessary to protect public health and safety while eliminating the permitting or pre-clearance requirements that state courts thought to be unduly burdensome for railroads. The rules were proposed 35 N.J.R. 4405(a) (Oct. 6, 2003), adopted at 36 N.J.R. 5098(b) (Nov. 15, 2004) and are codified at N.J.A.C. 7:26-2D.1.

⁸⁰ Bruce J. Parker, President and CEO, National Solid Wastes Management Association, *The Problem of Unregulated Waste Management Facilities on Rail Property*, testimony before the Committee on Transportation & Infrastructure, Subcommittee on Railroads, U.S. House of Representatives, at 2 (May 23, 2005) (available at <http://wastec.isproductions.net/webmodules/webarticles/articlefiles/255-STB%20TestimonyFinal2.pdf> (visited on Nov. 26, 2006), and on file with the author).

national Class I railroad for delivery to the ultimate destination. At some point around 2003, Susquehanna & Western unilaterally opened five solid waste handling facilities along its existing tracks in North Bergen, New Jersey. Susquehanna & Western entered the waste business quickly by contracting with existing, traditional waste handling firms to do the work; these arrangements purported to leave the railroad in charge of the facilities and operations while all of the real loading and transfer activities were undertaken by so-called independent contractors.⁸¹

Susquehanna & Western allowed construction and demolition debris to be dumped in open piles that grew to over fifty feet tall. After the debris was sorted to remove recyclable metals and material that could not be disposed of in the receiving landfills, operators used heavy machinery to crush the waste and to push it into piles for loading on railcars.⁸² Other solid waste processing activities performed at the sites included grinding tires and wood pallets into chips and separating out recyclable metal, presumably for resale.⁸³ These activities caused emissions of dust into a nearby bus maintenance depot and other businesses, as well as runoff of contaminated stormwater into nearby wetlands and streams.⁸⁴

⁸¹ See *New York Susquehanna and Western Ry Corp. v. Jackson*, 2007 WL 576431 *7-*8 (D.N.J. Feb. 21, 2007); see also Declaration of Harley A. Williams Certifying to Authenticity of Contracts Between Susquehanna & Western and its Operators and Loaders, dated September 23, 2005, and attachments, filed in *Susquehanna & Western v. Campbell et al.*, No. 05-4010 (D.N.J.) (on file with author). Elsewhere, Railroads established business relationships with many existing waste operators, some of whom had extensive violations and had been shut down. See Codey Opposes Waste Station, *Philadelphia Inquirer* (May 26, 2005) (discussing Southern Railroad).

⁸² See Declaration of David Mercado Concerning Conditions and Operations at the Facilities Between December 10, 2004, and September 13, 2005, dated Sept. 22, 2005, filed in *Susquehanna & Western v. Campbell et al.*, No. 05-4010 (D.N.J.) (on file with author).

⁸³ See Declaration of James Scully Concerning 2D Violations Observed on January 4, 2005, and Prior Similar Conduct at Facilities Between May 11, 2004 and January 4, 2005, dated September 22, 2005, filed in *Susquehanna & Western v. Campbell et al.*, No. 05-4010 (D.N.J.) (on file with author); See Declaration of Bahram Salahi Concerning 2D Violations Observed Between July 6, 2005 and August 25, 2005, dated September 22, 2005, filed in *Susquehanna & Western v. Campbell et al.*, No. 05-4010 (D.N.J.) (on file with author).

⁸⁴ See Declaration of David Mercado Concerning Conditions and Operations at the Facilities Between December 10, 2004, and September 13, 2005, dated Sept. 22, 2005, filed in

State waste inspectors found extensive violations of state laws, including operations conducted outside of an enclosed building and the lack of systems to collect waste water or control dust.⁸⁵ They took samples from standing pools of water at three of the transfer stations and found elevated levels of mercury, arsenic, and lead in excess of regulatory standards.⁸⁶ Fire inspectors observed flammable acetylene bottles and paint, piles of waste tires, hydraulic fluid in puddles on the ground, missing or inoperable fire extinguishers, improper dispensing of fuel, and the use of equipment close to high-voltage power lines, all of which create an extreme fire danger.⁸⁷ At another site, officials found eighty 7,000-pound containers of phosphorus pentasulfide, a flammable chemical that can ignite or explode on contact with water and release toxic fumes; the company routinely left the gates to the facility open and had not reported the chemical to local emergency services, which might have unwittingly attacked any fire with water.⁸⁸ The construction and demolition debris waste piles were so high that one crane came in contact with overhead high-voltage wires, short-circuiting the lines and causing a power outage.⁸⁹ After one carload of waste caught fire and was extinguished, Susquehanna & Western

Susquehanna & Western v. Campbell et al., No. 05-4010 (D.N.J.) (on file with author); photographs on file with the author; see also Garbage Growing Near Train Tracks, North Bergen Journal (Jan. 16, 2005).

⁸⁵ Debris piles at Railroad Yards Pose a Hazard, Pols Say, Herald News (May 27, 2005).

⁸⁶ Facsimile and attached laboratory reports from John Zuzek, NJDEP Northern Bureau of Water Compliance and Enforcement, to James K. Hamilton, Water Compliance and Enforcement (Nov. 4, 2005).

⁸⁷ Memorandum from William Kramer, Jr., Deputy Director, Department of Community Affairs, Division of Fire Safety, to Susan Bass Levin, Commissioner (Jan. 20, 2005) (on file with author).

⁸⁸ North Hudson Regional Fire & Rescue Correspondence Report (July 11, 2005) (on file with author); Hudson Regional Health Commission, Investigation (July 6, 2005) (on file with author); Angry Officials Aim to Force Removal of Chemical Stockpile, Bergen Record (July 14, 2005); Explosive Chemical in Rail Yard called Recipe for Disaster, Jersey Journal at 25 (July 15, 2005).

⁸⁹ Declaration of Joshua Lazarus Concerning Violations of the New Jersey Uniform Fire Code, dated September 22, 2005 (cited in New York Susquehanna and Western Ry Corp. v. Jackson, 2007 WL 576431 (D.N.J.)).

refused to allow the firefighters to inspect the waste based on the railroad's belief that federal law preempted local fire controls.⁹⁰

C. Courts Response to the Railroads' Efforts

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

The first wave of railroad waste station decisions did not have to construe the scope of ICCTA preemption. Railroads attempted to lease their land to traditional solid waste management firms, and courts held that waste handling activities, when conducted by non-carriers, are not integrally related to interstate rail transportation, are not entitled to ICCTA preemption, and may be regulated by states.⁹¹

Feb. 21, 2007) (on file with author). Susquehanna & Western did not report that incident to the power company that operates the lines or to local authorities.

⁹⁰ Justo Bautista and Yung Kim, Nine Freight Cars Derail in Paterson, Bergen Record (May 31, 2006); John A. Gavin, Railcars Worry Towns, North Jersey Media Group (May 31, 2006).

⁹¹ For example, in *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004), the Third Circuit agreed with the Board that state waste laws are not preempted when a non-carrier operates on railroad property. Assuming for the sake of argument that loading activities can be part of ICCTA "transportation," the Third Circuit nonetheless found that the activities did not involve "transportation by a rail carrier" as required by ICCTA but rather transportation to a rail carrier, and therefore that state solid waste laws were not preempted. *Id.* at 308 (emphasis added).

A district court in New Jersey also rejected ICCTA preemption claimed by a notorious hauler who had plead guilty to illegal dumping, had over a million dollars in unpaid fines, and had been banned from the industry. *J.P. Rail, Inc. v. New Jersey Pinelands Comm'n*, 404 F. Supp. 2d 636 (D.N.J. 2005). The author filed an amicus brief and argued on behalf of an environmental group in that action. The hauler had entered into contractual arrangements that purported to give a railroad more of an oversight role than was involved in the Hi Tech case. However, the railroad did not even have trackage rights, purported to lease an existing waste handling facility for \$1 a year from the hauler, and then hired the hauler to conduct all the waste handling activities. The Court rejected the preemption claim.

Railroads then created new business arrangements – on paper, at least – to try again to obtain ICCTA preemption. These second generation cases have taken one of two forms. Existing solid waste hauling firms may attempt to establish themselves as short line railroads, an easy process that simply involves filing a “notice of exemption” with the Board.⁹² Alternatively, existing railroads purport to enter into the solid waste business by building a waste processing and transfer yard, which they can do without any approval from the Board because it is an ancillary facility. Susquehanna & Western adopted the latter strategy when it entered into a web of contracts with various entities it calls loaders (i.e., the operators of the processing and loading equipment) and shippers (local waste hauling companies who dump waste in open piles on railroad property). Courts have failed to contain the second generation of railroad waste cases,

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

⁹² Exemptions are easy to obtain. See generally Stephen M. Richmond and Marc J. Goldstein, *Collision Course: Rail Transportation and the Regulation of Solid Waste*, ABA Natural Resources & Environment, Vol. 21, No. 2 (Fall 2006). To start up a railroad, a firm need only acquire or lease a short piece of tract and enter into an interchange agreement with the railroad to move railcars. *Id.* at 9 (reviewing start up requirements and noting that the Board maintains a “how to” manual on its website entitled “So You Want to Start a Small Railroad”). Large projects must then obtain a certificate of public convenience and necessity from the Board. 49 U.S.C. § 10901. If the project involves annual operating revenues of less than \$20 million, firms need only file a “notice of exemption” with the Board, and these are routinely granted. See 49 U.S.C. § 10502; *New England Transrail – Notice of Exemption*, 2006 WL 560754 STB Finance Dkt. No. 34797 (STB served March 3, 2006) (pending application to open a rail waste station). The Board has indicated that even exempt spur or industry yard tracks may be a rail line. *Effingham Railroad Co. – Petition for Declaratory Order – Construction at Effingham, IL*, STB Dkt. No. 41986 (Decision served September 12, 1997 and September 18, 1998). The Board has extended the time it takes to obtain a notice of exemption from seven days to 30 days, a rather meaningless reform.

despite the fact that they are different only in form from simply the lease of property to waste firms in the first generation cases.

District Courts in New Jersey,⁹³ New York,⁹⁴ and Michigan⁹⁵ have granted preliminary injunctions against the enforcement of state solid waste laws. Ruling in the context of preliminary injunctions, some of these courts may have been influenced by the perceived need to allow railroads to operate on an interim basis for equitable reasons unrelated to the merits of the preemption claims.⁹⁶

With regard to the North Bergen facilities described above, Susquehanna & Western sued in New Jersey District Court to prevent state oversight of its facilities⁹⁷ after receiving an

⁹³ New York, *Susquehanna & Western Ry. Corp. v. Campbell, et al.*, Civ. Action No. 05-4010 (D.N.J.).

⁹⁴ *Coastal Distribution, LLC v. Town of Babylon*, 2006 WL 270252 (E.D.N.Y., Jan. 31, 2006); see also *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241 (S.D.N.Y. 2006) (granting preliminary injunction against village's commencement of eminent domain proceedings against proposed rail waste station and concluding that action was preempted by ICCTA)

⁹⁵ *Canadian National Ry v. City of Rockwood*, 2005 WL 1349077 (E.D. Mich. June 1, 2005).

⁹⁶ See, e.g., *Coastal Distribution*, 2006 WL 270252, where the court stated that the facility receives, "handles," stores and loads freight at one part in the opinion, but elsewhere states that there was no evidence on the record that any activities occur other than the loading of waste. *Id.* at *10. Acknowledging this uncertainty, the court relied on the lower burden of proof on a preliminary injunction. *Id.* at *10. Moreover, the unreported report and recommendation of the magistrate that preceded the decision contained conflicting evidence on the amount of processing that takes place at the facility. *Coastal Distribution, LLC et al. v. Town of Babylon et al.*, No. CV 05-2032, slip op. at 6 (E.D.N.Y. July 15, 2005) (Report and Recommendation of U.S. Magistrate Judge Thomas Boyle) (on file with the author). Venturing deep into the creation of substantive policy and away from the purposes of ICCTA, the court concluded, without apparent factual support, that "[w]ithout an injunction, hundreds of trucks will be forced onto the Long Island Expressway and other already-congested highways and roads," and therefore concluded that an injunction against local zoning laws "serves the public interest of minimizing highway congestion due to trucks by preliminarily enjoining the Town from enforcing the Stop Work Order." *Id.* at *4.

⁹⁷ New York, *Susquehanna & Western Ry. Corp. v. Campbell, et al.*, Civ. Action No. 05-4010 (D.N.J.), filed on August 16, 2005. Elsewhere, *Susquehanna & Western* had earlier obtained an injunction against the City of Paterson's zoning laws so that it could construct a waste station in a residential area. *New York, Susquehanna & Western v. City of Paterson*, Civ. Action No. 05-

administrative notice of penalty from the state and a citizen suit notice letter from environmental groups.⁹⁸ Susquehanna & Western obtained temporary restraints in August 2005 that prevented the State from enforcing its solid waste laws, despite an extensive factual record showing violations of state laws. The court left the temporary restraints in place, strongly urged the parties to conduct settlement discussions, and finally allowed the parties to submit summary judgment and preliminary injunction briefs more than a year after the start of the litigation. Over this extended time, Susquehanna & Western was able to continue its waste operations and refused to comply with state solid waste regulations governing the design and operation of transfer facilities, although the railroad did eventually enclose the waste piles within sheet metal structures. Finally, in February 2007, the New Jersey District Court resolved the pending cross-motions for summary judgment and declared the state solid waste laws preempted by ICCTA.⁹⁹ As with the other courts preempting state solid waste laws, the court relied on the broad “exclusive jurisdiction” sentence of 49 U.S.C. § 10501(b) and the fact that the state law would have some effect on railroad operations¹⁰⁰ (although no greater than upon other non-railroad solid waste operators).

The railroad waste station caselaw is not yet definitive. Some federal and state courts have held that states or citizen groups are able to hold railroad waste stations accountable to

2338 (JAP) (D.N.J.) (preliminary injunction against enforcement of local zoning laws issued on July 18, 2005).

⁹⁸ The author filed the notice letter and is litigating a separate case against Susquehanna & Western. The notice letter is on file with the author.

⁹⁹ New York, Susquehanna and Western Ry Corp. v. Jackson et al, Civ. Action No. 05-4010 2007 WL 576431 (D.N.J. Feb. 21, 2007)

¹⁰⁰ Id. *17.

general environmental standards.¹⁰¹ And to date, no Federal Court of Appeals has yet ruled on ICCTA preemption in a second generation waste case.¹⁰²

In general, however, the lower courts' acquiescence in the railroads' aggressive interpretation of ICCTA preemption manifests larger problems in preemption doctrine.

D. The Railroad Waste Cases Reflect Larger Trends in Preemption Doctrine

1. Findings of Broad Field Preemption Without Sufficient Attention to the Scope of Intended Preemption

Within the standard nomenclature of preemption law, lower courts have preempted state solid waste laws using a blend of "express preemption" and broad "field" or "obstacle"

¹⁰¹ In the only second generation decision to the contrary, a District Judge in New Jersey rejected Susquehanna & Western's preemption defense and held that environmental groups could sue under RCRA to close open waste piles. *Hackensack Riverkeeper, Inc. et al. v. Delaware Otsego Corp. et al*, 450 F. Supp. 2d 467 (D.N.J. 2006). The author represents the plaintiffs in that action. The Court later reconsidered its decision in light of parallel litigation raising state law claims, and deferred deciding whether ICCTA could preempt RCRA on any set of facts. *Hackensack Riverkeeper, Inc. et al v. Delaware Otsego Corp. et al*, 2006 WL 3333147 (D.N.J. Nov. 16, 2006). Other successful efforts have included the enforcement of a consent decree against Susquehanna & Western in State court, which held the railroad to its voluntary undertaking, memorialized in a consent decree, that it would provide information to the State for the purposes of ascertaining compliance with fire, health, plumbing and safety codes, in a case involving a proposed waste station above an underground oil pipeline. *New Jersey Meadowlands Commission v. The New York Susquehanna and Western Railway Corp.*, Dkt. No. C-13606 (Ch. Ct. Hudson Co.) (Olivieri, P.J. Ch.) (injunction issued on July 21, 2006); Justo Bautista, Judge Blocks North Bergen Solid-Waste Station, *Bergen Record* (July 22, 2006). But even that state court effort is hampered by the terms of the consent decree, which require some degree of agreement between the railroad and the State about the level of information required. Personal communication between the author and state attorneys.

¹⁰² The *Hi Tech* decision, while involving a first generation factual scenario, contained reasoning that should also deny preemption in second generation cases. The Third Circuit held that "[t]he mere fact that the [railroad] ultimately uses rail cars to transport the [construction and demolition] debris [the waste company] loads does not morph [the waste company's] activities into 'transportation by rail carrier'" because under that reasoning "any nonrail carrier's operations would come under the exclusive jurisdiction of the Board if, at some point in the chain of distribution it handles products that are eventually shipped by rail . . ." *Hi Tech Trans*, 382 F.3d at 309. Moreover, the Third Circuit recognized that there is a "well-recognized compelling state interest in the enforcement of its own environmental laws especially as to the uniquely vexing problem of solid waste facilities in a densely populated state that has suffered the scourge of unregulated solid waste facilities for decades." *Id.* (quoting District Court decision).

preemption theories.¹⁰³ This approach is problematic because it allows for a selective, non-rigorous interpretation of the field in which preemption applies. For example, railroads were allowed to define the field of inquiry as railroad transportation writ large, and pointed to the fact that the Federal government has promoted railroads since the mid-1800s and regulated railroads since the 1880s.¹⁰⁴ That history is selective – among other things, it would ignore the early and extensive involvement of states in promoting and regulating railroads, particularly in the East and Mid-West states,¹⁰⁵ and the extensive state involvement in regulating intrastate rates¹⁰⁶ – and it demonstrates that field definitions do not provide principled boundaries.

Moreover, the rail-centric framing of the dispute ignores the fact that the conduct complained of is illegal under solid waste laws, regardless of whether it is a railroad company, a trucking company, or some other company that is responsible for the violations. The field might be more properly defined as solid waste, a category that cuts across all modes of transportation

¹⁰³ See generally Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 *Vand. L. Rev.* 1149 (1998) (reviewing categorical approaches to preemption).

¹⁰⁴ A similar argument was relied upon by the Court in *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 687-88 (1982), to support its holding that the Railway Labor Act could apply to a government-owned commuter rail service); see generally Herbert Hovencamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *Yale L.J.* 1017, 1061, 1067--70 (1978-88).

¹⁰⁵ E.g., *Illinois Cent. R. Co. v. Chicago*, 176 U.S. 646, 647 (1900) (reciting facts about state's significant role in setting up and promoting railroad). *The Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387 (1892). See generally, James W. Ely, Jr., "The Railroad System has Burst through State Limits": Railroads and Interstate Commerce, 1830-1920, 55 *Ark. L. Rev.* 933, 934-35 (2003) (reviewing early history of railroads, when states viewed firms as serving local, intrastate interests only, and barred the operation of out-of-state railroads); Hovencamp, *supra* n. 104 at 1057, 1059-60 (noting state rate regulation was written into corporate charters); Eldredge, 75 *U. Colo. L. Rev.* at 556-57, 590 (reviewing history of state subsidies to promote rail in the East and Federal subsidies to promote rail in the West); Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *Transp. L. J.* 235, 251 (2003) (noting that States granted 17 million acres of land to the railroads between 1862 and 1871).

¹⁰⁶ *Texas v. United States*, 730 F.2d 339 (5th Cir. 1984); cf. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (holding that the Interstate Commerce Act preempted the common law with respect to interstate rates).

and shows no special favor for railroads, and is one that is squarely within “traditional” state powers.

2. Courts Do Not Defer to State Police Powers, But Instead Defer to Corporate Interests and Generalized Notions of Uniformity

Regardless of the field definition, it is clear that the rulings involve solid waste regulations derived from states’ police power. Yet none of the rail waste station decisions apply or discuss the presumption against preemption, which is intended to protect against overly broad displacement of sovereign state interests.¹⁰⁷ (The presumption is discussed in Part II below.) In ignoring the presumption, the courts have departed from caselaw under earlier federal rail statutes that applied the presumption against preemption.¹⁰⁸ Perhaps they have assumed that the doctrine is defunct or that the statute is not ambiguous on the point of preemption.

Courts’ lack of deference to state interests stands in marked contrast to their deference towards railroad interests, or at least to railroads’ invocation of a general need for national uniformity in all regulations that touch upon railroad operations, no matter how incidental. Railroads may obtain a somewhat more sympathetic hearing to their claims for uniformity, as they are an instrumentality of interstate commerce; the clash between railroads and state laws has played an historic role in creating our modern understandings of Congress’s national powers

¹⁰⁷ Interestingly, the presumption has been applied by state courts, *Village of Ridgefield Park v. New York, Susquehanna & Western Ry.*, 750 A.2d 57, 61 (N.J. 2000) (reciting presumption against preemption), and the Board, *Cities of Auburn and Kent, WA – Petition for Declaratory Order-Burlington N. RR Co. – Stampede Pass Line*, 2 S.T.B. 330, 1997 WL 362017 *5 (STB July 1, 1997), but not in a railroad waster transfer station case.

¹⁰⁸ E.g., *Texas v. United States*, 730 F.2d 339, 346-48 (5th Cir. 1984) (in facial challenge to the 1980 Staggers Act and provisions limiting state rate regulation, applying presumption and seeking a clear statement to preempt, which it found in language that preempted all state jurisdiction over general rate increases, inflation-based rate increases, and fuel adjustment surcharges, and required ICC approval of other intrastate rate increases) (citing 49 U.S.C. § 11501(b)(6) and § 11501(b)(1)-(3) (1983)).

under the Commerce Clause.¹⁰⁹ But until now, no one has understood railroads to have the power to exempt themselves from all state laws, no matter how incidental to the interstate or intrastate movement of goods.

The railroad waste station courts have relied upon early Board and court decisions that oversimplified ICCTA as intending to relieve railroads from all economic effects of regulations. In the railroads' view, all regulations, no matter how generally applicable to other firms or incidental to core railroad functions, are economic threats to their continued existence; thus, all environmental rules must be preempted "economic" regulations because they impose any additional costs on railroads. This argument does not fit easily with the statutory text or legislative history, which emphasized the narrow preemption of certain economic regulations only. But courts have seemingly accepted the factual argument that profitable railroad operations cannot withstand environmental oversight.

Moreover, there is little evidence that state waste regulations have imposed unreasonable burdens on railroads, and the notion that a national market trumps police power protections is unnecessary.¹¹⁰ Dual compliance is possible, as demonstrated by Susquehanna & Western's belated half-measures to comply with state laws. At least one existing rail-haul waste operation in New York and four in California have obtained waste hauling permits and comply with laws

¹⁰⁹ See authorities cited at supra nn. 104-105.

¹¹⁰ See Paul Wolfson, Preemption and Federalism: The Missing Link, 16 *Hastings L. Q.* 69, 106-109 (1988) (criticizing reliance on need for uniformity to preempt state laws, when dormant commerce clause jurisprudence does not go that far); Foote, *Regulatory Vacuums*, 19 *U.C. Davis L. Rev.* at 145-46, and 151 ("when federal health and safety agencies use this device, they are generally overstepping their statutorily authorized powers."); but see Barry Friedman, *Valuing Federalism*, 82 *Minn. L. Rev.* 317, 350-58 (1997) (noting Court's emphasis on protecting the uniformity of the national market).

requiring loading and hauling waste in sealed containers,¹¹¹ and other rail operations in New Jersey handle only sealed containers of waste in compliance with state laws.

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

Courts' failure to distinguish between economic and environmental regulations also belies a fundamental misunderstanding of economic deregulation. Congress did not choose to leave the field completely unregulated, but rather made a conscious decision that market forces will result in efficient pricing and levels of service. Competition might create the right incentives for optimum haulage rates. But by definition competition will also create incentives to escape regulatory requirements that have any costs. Laws that eliminate such externalities must be left in place in order to create functioning and efficient markets and a level playing field between railroads and non-railroads that are in the waste handling business.

3. Courts Have Not Considered the Effects of Leaving Regulatory Gaps

Courts that have preempted state solid waste regulations have not considered that the absence of a corresponding federal regulatory scheme means that the effect of their rulings is to strip all remedies that might prevent pollution from railroad waste facilities.¹¹²

¹¹¹ See Railhaul Status Report, California Integrated Waste Management Board (Nov. 1998) (detailing four proposed projects for landfills in desert areas of California that are capable of receiving waste via railway from urban areas). In 1998 at least, these projects were undergoing the state's permitting and environmental review process. The California proposals are slightly different than the operations discussed in this article, because they involve the transport of waste in sealed and locked intermodal containers.

¹¹² The courts have noted the theoretical availability of Clean Water Act and Clean Air Act remedies to address pollution after the fact, *New York Susquehanna and Western Ry Corp. v. Jackson*, 2007 WL 576431 (D.N.J. Feb. 21, 2007), but this theory is largely untested and the railroads are arguing in at least one case that Federal environmental laws are also preempted,

States' predominant role in solid waste management reflects the fact that the Federal government has largely abandoned the field of solid waste regulation. In the first few years of the modern era of environmental law, the Federal government was instrumental in setting minimum standards for state programs. In 1965, Congress first recognized the national threat to public health and welfare posed by the problems of solid waste and enacted the Solid Waste Disposal Act,¹¹³ and in 1976, Congress enacted the Resource Conservation and Recovery Act ("RCRA"), which deals with the management of hazardous and solid wastes.¹¹⁴ RCRA established national minimum standards and permits for the handling, transfer, and disposal of solid waste, as well as enforcement of those standards by the U.S. Environmental Protection Agency ("EPA"), state agencies and citizens.¹¹⁵ Congress explicitly stated that RCRA applies to the rail industry and other transportation industries.¹¹⁶ RCRA created incentives for the creation

Hackensack Riverkeeper, Inc. et al v. Delaware Otsego Corp. et al, 2006 WL 3333147 (D.N.J. Nov. 16, 2006) (deferred deciding whether ICCTA could preempt RCRA on any set of facts). The author represents the plaintiffs in the latter action. Certainly, ICCTA speaks of the preemption of state and federal law on the same terms. 49 U.S.C. § 10501(b).

¹¹³ Pub. L. No. 89-272, 79 Stat. 992 (1965); see 42 U.S.C. § 6901(a)(4) ("[T]he problems of waste disposal . . . have become national in scope and in concern . . ."); see H.R. Rep. No. 89-899 (1965), reprinted in 1965 U.S.C.C.A.N. 3608, 3614 (noting problems associated with billions of tons of discharged materials and solid waste management methods that "contribute to air, water, and soil pollution and create breeding places for disease-carrying insects and rodents. Accumulations of [waste] cause fire hazards, contribute to accidents and destroy the beauty of cities and the countryside.").

¹¹⁴ Pub. L. No. 94-580, 90 Stat. 2795 (1976), codified at 42 U.S.C. §§ 6901-91 ("RCRA"). Subchapter III of RCRA deals with hazardous waste and Subchapter IV deals with solid waste.

¹¹⁵ See 42 U.S.C. §§ 6907, 6912, 6923, 6926, 6928, 6972. RCRA vested the U.S. Environmental Protection Agency ("EPA") with the power to regulate practices related to the transfer, storage, handling and disposal of solid and hazardous waste Id. at §§ 6901(a)(4), 6902(b) Among other things, the statutory minimum standards required states to close open dumps and directly prohibited activities that amount to the open dumping of solid waste. Id. at §§ 6944, 6945. RCRA separately authorized federal standards for the siting of waste facilities in order to prevent the contamination of groundwater, wetlands and surface waters from waste leachate and the pollution of wetlands, and these standards include consideration of "regional, geographic, demographic, and climatic factors." 42 U.S.C. § 6907(a); see generally 40 C.F.R. Part 257.

¹¹⁶ See 42 U.S.C. § 6923; 40 C.F.R. § 263.10.

of state or regional solid waste plans, and provided the EPA with the secondary role of approving state plans as well as issuing guidelines for best solid waste management practices.¹¹⁷ Other than those minimum standards, however, Congress indicated that “the collection and disposal of solid waste should continue to be primarily the function of State, regional, and local agencies.”¹¹⁸ Thereafter, Congress and the EPA have focused on hazardous waste and other matters that it deemed more technologically complex.¹¹⁹ Accordingly, the EPA has not substantially updated its regulations dealing with the open dumping of solid waste since 1979.¹²⁰

The Board does not fill in this gap at the federal level, for ICCTA explicitly removes many railroad activities from Board licensing review (and, therefore, its regulatory reach).¹²¹ The Board’s “jurisdiction” over “transportation by rail carriers” is limited to facilities and activities that are necessary for interstate rail transportation, such as rail line extensions, the construction of new rail lines, and the acquisition of new lines, each of which triggers the need for Board licenses and environmental review.¹²² The Board does not have licensing authority over the “construction, acquisition, operation, abandonment, or discontinuance of spur,

¹¹⁷ 42 U.S.C. §§ 6929, 6941.

¹¹⁸ 42 U.S.C. § 6901(a)(4). In contrast, the Federal government has a greater role in hazardous waste management and is obligated to adopt a program to identify and list hazardous wastes and a permitting program for the treatment, storage or disposal of hazardous waste 42 U.S.C. §§ 6921, 6925. State programs are tightly controlled through a formal delegated program under Subchapter III of RCRA. 42 U.S.C. § 6926.

¹¹⁹ In 1984, Congress again strengthened RCRA, particularly the federal oversight and regulation of hazardous waste by passing the Hazardous and Solid Waste Amendments, Pub. L. 98-616, 98 Stat. 3221 (1984), 42 U.S.C.A. §§ 6991 to 6991(i).

¹²⁰ See 40 C.F.R. Part 257.

¹²¹ E.g., 49 U.S.C. § 10906 (“The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks.”).

¹²² Id.

industrial, team, switching, or side tracks.”¹²³ Without licensing authority over “ancillary” but otherwise major facilities such as auto storage facilities, major construction to upgrade existing lines, bulk cement transfer stations and, of course, waste transfer stations, the Board cannot oversee a significant portion of railroad activities.

The Board also lacks the authority and capability to provide remedies for most environmental harms.¹²⁴ The Board’s promulgated rules¹²⁵ only provide for review of the environmental impacts of its regulatory decisions under the National Environmental Policy Act of 1969 (“NEPA”).¹²⁶ If any review occurs, it is done before projects are undertaken and does not have anything to do with railroads’ ongoing compliance with environmental laws. NEPA does not mandate any particular result, and once the adverse environmental effects of a proposed action have been identified and evaluated, the Board may decide to subvert environmental values to other considerations. Moreover, the Board lacks inspectors and environmental staff in the field necessary to regulate ongoing operations; its overall staff is limited to no more than 150 employees by appropriation, and only a small number of these employees are responsible for NEPA review.¹²⁷ The Board does not and cannot regulate discharges from ongoing railroad

¹²³ 49 U.S.C. § 10906; rail carriers need approval to construct a new rail line under 49 U.S.C. § 10901.

¹²⁴ Cf. *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (finding preemption of state hazardous waste regulation where there was an extensive federal agency presence in the field of hazardous waste transportation).

¹²⁵ See 49 C.F.R. Part 1105 (entirety of Board’s environmental rules).

¹²⁶ 42 U.S.C. §§ 4333-4335.

¹²⁷ Testimony of W. Douglas Buttrey, Chairman of the Board, Senate Committee on Commerce, Science, and Transportation, Subcommittee on Surface Transportation and Merchant Marine, Hearing on Economics, Service and Capacity in the Freight Railroad Industry at 2 (June 21, 2006). The Board has even adopted a policy to contract out its minimal pre-construction review activities to third parties paid for by railroad applicants, because it “does not have, and likely will never have, funding available to it to increase its staff sufficiently” and “lacks the broad range of in-house technical experts that third-party contractors can tap.” 66 Fed. Reg. 15527, 15530 (Mar. 19, 2001).

terminal operations to air, water, or soil. Other entities must regulate the rail waste station facilities if they are to be regulated at all.

In fact, the Board's powers over safety and other aspects of the railroad industry are quite limited, and the Board does not have general authority to address safety issues, which are reserved for the Department of Transportation's ("DOT's") Federal Railroad Administration ("FRA") under the Federal Rail Safety Act ("FRSA"); for example, the FRA has just addressed the problem of overloaded cars carrying municipal solid waste.¹²⁸ ICCTA is certainly not the primary federal rail law governing solid and hazardous waste handled by railroads. Courts have already recognized that the ICCTA must co-exist with other federal laws that directly regulate hazardous materials, including the Hazardous Materials Transportation Act,¹²⁹ the FRSA, and DOT regulations¹³⁰ governing hazardous materials transportation by rail.¹³¹ For that reason, recent anti-terrorism concerns led Congress to amend those other statutes, not ICCTA, to provide the DOT with additional authority to address railroad safety and hazardous materials transportation.¹³² That result conforms to decisions holding that ICCTA did not preempt all other laws that touch upon railroad operations.¹³³

In sum, the Board is unable to provide any "remedies" for activities that would trigger preemption according to the terms of the Act.

¹²⁸ The Federal Railroad Administration has issued a safety advisory for railroad cars used to haul municipal solid waste to landfill sites, after at least four incidents involving cracking of the long spine that runs along the underside of a railroad car. Safety Advisory 2006-06, 72 Fed. Reg. 842 (Jan. 8, 2007). The most serious incident occurred in North Bergen, New Jersey on May 18, 2006. *Id.*

¹²⁹ 49 U.S.C. §§ 5101-5127.

¹³⁰ 49 C.F.R. Parts 171-174, 178-180.

¹³¹ See generally *CSX Transp. Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (applying preemption provisions of other federal acts, not ICCTA, to strike down local rule regarding the movement of hazardous waste by rail).

¹³² See Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, §§ 1710-1711 (2002).

¹³³ See *Tyrell*, 248 F.3d at 523.

E. The Railroad Waste Cases Portend the Preemption of Other Laws

If this trend is not checked, unregulated solid waste stations will proliferate across the country, and will destroy the level playing field with traditional solid waste firms that comply with public safety and health laws. Already, two other short-line railroads have attempted to arrange for unregulated waste facilities in South Jersey, and there are similar arrangements or proposals in New York, Massachusetts and Rhode Island.¹³⁴ The State of California has identified nine proposed rail waste facilities.¹³⁵

Given their success in preempting state laws, railroads can be expected to continue their attempts to evade otherwise applicable environmental laws. Some railroads now claim the power to operate hazardous waste facilities and landfills on railroad property free of any meaningful oversight. For example, Susquehanna & Western has claimed in regulatory filings that it can operate hazardous waste facilities and landfills on railroad property on the theory that “preemption applies equally to hazardous waste, medical waste and recycling facility permits

¹³⁴ See Comments of Representative Maurice Hinchey submitted to the Subcommittee on Railroads, House Committee on Transportation & Infrastructure, Hearings on Local Impact of Railroad-owned Waste Facilities, (May 23, 2006) (describing efforts of an investment company named Chartwell International, Inc. to purchase a controlling interest in the Middletown and New Jersey Railroad for the express purpose of constructing and operating a solid waste transfer station on its property adjoining the rail lines in the City of Middletown, New York, and the claim of Chartwell executive that ICCTA would preempt state environmental or site reviews); Northeast Interchange Railway, Notice of Exempt Transaction, STB Finance Dkt. No. 34734 (Aug. 1, 2005) (noticing intent to purchase all the assets of Metro Enviro, a construction and debris hauler and processor that lost its permit to operate in Croton-on-Hudson, New York, including a lease of 1,600 feet of track that connects with the CSX line, and thereby to become a common carrier by rail); New England Transrail LLC – Construction Acquisition and Operation Exemption – In Wilmington and Woburn, MA, STB Finance Dkt. No. 34797 (seeking exemption to start a railroad for the purpose of entering the rail waste business); Coastal Distribution, LLC v. Town of Babylon, 2006 WL 270252 (E.D.N.Y. 2006).

¹³⁵ See Railhaul Status Report, California Integrated Waste Management Board (Nov. 1998) (detailing four proposed projects for landfills in desert areas of California that are capable of receiving waste by rail from urban areas). In 1998 at least, these projects were undergoing the state’s permitting and environmental review process. The California proposals are slightly different than the operations discussed in this article, because they involve the transport of waste in sealed and locked intermodal containers.

and approvals.”¹³⁶ And railroads recently filed suit to block California regulations concerning locomotive idling times that were adopted to control the Los Angeles Basin’s notorious air pollution.¹³⁷

II. Regulatory Gaps Are The Inevitable Result of Trends In Preemption Doctrine

A. The Decline of the Presumption Against Preemption

When deciding whether to preempt state police powers, courts have traditionally resolved ambiguities in favor of state law. The theory behind that rule of construction is that Congress should be forced to speak clearly on important federalism issues. The standard, modern statement of that rule is credited to the Court’s decision in *Rice v. Santa Fe Elevator Corp*, where it said “Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”¹³⁸ In other words, if a statute is ambiguous, courts will not preempt state laws, and the matter becomes one that Congress can choose to take up in later legislation. The Court created this doctrine as a counterweight to implied preemption theories, which expanded along with the federal powers after the New Deal.¹³⁹

The presumption against preemption is grounded in the concept of political federalism. As the theory goes, state interests are represented in Congress through individual members, who

¹³⁶ 36 N.J.R. 5098(b), 5101 (Nov. 15, 2004) (Cmt. 16).

¹³⁷ *Assoc. of Am. R.R. v. South Coast Air Quality Management Dist.*, Dkt. No. 06-01416 (C.D. Cal. March 7, 2006), reported in BNA’s Environment Reporter, March 17, 2006, at 550.

¹³⁸ 331 U.S. 218, 230 (1947).

¹³⁹ See Gardbaum, 79 Cornell L. Rev. at 806 (arguing that a focus on Congressional intent in preemption cases is a necessary and ongoing accompaniment to the expansion of Commerce Clause powers into intrastate matters after the New Deal, because “the new constitutional strategy replaced a strict division of powers version of federalism with a new version embodying the presumption that state powers, though no longer constitutionally guaranteed, survive unless clearly ended by Congress.”).

are politically accountable to their in-state constituents.¹⁴⁰ If a proposed bill frames preemption and other federalism issues clearly and explicitly through the use of unambiguous text, then members interested in defending state interests will be capable of doing so in the legislative process. If members fail to protect state interests held dear to their constituents, they will be held accountable at the polls.¹⁴¹ The clear statement rule is designed to provide the proper incentives for making federalism decisions by forcing Congress to carefully weigh the abrogation of state interests based upon political consequences.¹⁴² Without a clear statement rule, the conditions for political federalism may not exist.

There is strong disagreement about whether the force of these arguments in the preemption context has declined because of various developments that have weakened the representation of state qua states in Congress, including the direct popular election of Senators and the rise of national political parties, or whether strong incentives remain for Congress to protect state interests.¹⁴³ Other commentators have noted that the presumption's emphasis on a

¹⁴⁰ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554-56 (1985); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 544-45 (1954). In developing a "civic republican" theory of federalism and preemption, Candice Hoke criticizes Garcia's rationale as "relegat[ing] the states to a status no greater than that occupied by traditional interest groups clamoring for congressional largesse." S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 *B.U. L. Rev.* 685, 702 (1991).

¹⁴¹ Wolfson, 16 *Hastings L. Q.* at 98, 100.

¹⁴² See 1 Laurence H. Tribe, *American Constitutional Law* 1176 (3d ed. 2000), and *id.* at 873-76 (reviewing differing views of members of the Court on judicial versus political safeguards of federalism in the context of the Court's holding that the Tenth Amendment did not provide an independent limitation on Congress's Commerce Clause powers in *Garcia v. San Antonio Transp. Authority*, 469 U.S. 528, 551 (1985)).

¹⁴³ Recent scholarship have also attacked this rationale as illogical and opportunistic, as the political safeguards of federal have presumably done their work during the passage of statutes and cannot be affected by post-enactment interpretations; these safeguards may affect policy choices, but do not speak to interpretive rules. Caleb Nelson, 86 *Va. L. Rev.* at 300-301; see generally, Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 *Geo. Wash. L. R.* 91, 93-97 (2003) (reviewing disagreement about the need for political or judicial safeguards of federalism in the academic literature); Tribe, *supra* n. 142, at 852-53.

distinction between protected and unprotected state police powers is inconsistent with the Supreme Court's recognition that it is impossible to draw any meaningful line around core attributes of state sovereignty.¹⁴⁴ And perhaps textualist methods of interpretation have conditioned courts to find clarity in statutes that would have previously been found to be ambiguous when read along with legislative history.

Moreover, it is far from clear that public scrutiny will always create incentives for the clear drafting of statutes. Members of Congress might use ambiguous text to defer unpopular federalism decisions to agencies, knowing that preemptive regulations will likely be upheld under the *Chevron* doctrine if they represent a reasonable construction of the statute.¹⁴⁵

Intentional obscurity would weaken the theory of political federalism that underlies the clear statement rule.¹⁴⁶ Indeed, for that very reason some members of the court have argued that preemption is a special power and that agencies should not enjoy any prerogative to decide upon the preemptive scope of their governing statutes,¹⁴⁷ and some commentators have echoed that criticism.¹⁴⁸

¹⁴⁴ Calvin Massey, Joltin' Joe has Left and Gone Away: The Vanishing Presumption Against Preemption, 66 Alb. L. Rev. 759 (2003) (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 530-31 (1985), but noting Court's "enthusiasm" for clear statement rules for the abrogation of state sovereign immunity); Wolfson, 16 Hastings L. Q. at 95-96 (arguing that federal courts are not competent to make judgments about essential and traditional state interests).

¹⁴⁵ E.g., *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (Federal regulations preempted state tort claim premised on failure to install); *Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88 (1992) (OSHA training standards preempted state training regulations for hazardous waste); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (comprehensive federal regulations preempted state tanker safety regulations).

¹⁴⁶ Wolfson, 16 Hastings L. Q. at 101-02 (citing, as an example of agency preemption that failed to adequately consider state law, *Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982), which federalized the terms of mortgage notes).

¹⁴⁷ Cf. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000) ("We place some weight upon DOT's . . . conclusion . . . that a tort suit such as this one would "stand as an obstacle to the accomplishment and execution" of those objectives.") (citation omitted, alteration in

Regardless of whether we can pinpoint the exact cause, there is no question that the presumption against preemption has weakened considerably, if not disappeared entirely.¹⁴⁹ Over the past few decades there has been a series of divided decisions in preemption cases involving the presumption against preemption, particularly in tort and ERISA cases. The traditional rule survived largely intact to the early 1990s; as late as 1993, the Court applied the traditional presumption against preemption to hold that Federal rail crossing regulations did not preempt a state tort claim.¹⁵⁰ Strains in the presumption appear in the 1992 *Cipollone* decision¹⁵¹ and deepened in the 1996 *Medtronic* decision.¹⁵²

original) with *id.* at 908 (“unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law.”) (Stevens, J., dissenting). See also *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 387 (1998) (Brennan, J., dissenting) (arguing that “agencies can claim no special expertise in interpreting a statute confining its [sic] jurisdiction. Finally, we cannot presume that congress implicitly intended an agency to fill “gaps” in a statute confining the agency’s jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power.”) (citations omitted); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O’Connor, dissenting) (“[i]t is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference.”); *Norfolk Southern Ry. Co. v. City of Austell*, 1997 WL 1113647, n.7 (N.D. Ga. Aug. 19, 1997) (no deference to Board interpretation of ICCTA preemption because the statute is unambiguous).

¹⁴⁸ E.g., Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U.L. Rev. 2274 (2004).

¹⁴⁹ See Massey, *supra* n. 146; Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967, 968-72 (2002); Susan Raeker-Jordan, *A study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 BYU J. Pub. L. 1, 27-30 (2002).

¹⁵⁰ *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 668 (1993); see also *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) (holding that town was not preempted from regulating the use of pesticides because Federal statute and was not comprehensive and did not exhibit a clear and manifest intent to preempt local authority).

¹⁵¹ As was true with regard to textualist theories of interpretation, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), was a watershed case with regard to the presumption against preemption. A split decision with different voting lineup on each of its six parts, *Cipollone* started a conversation on the Court that continues to this day. The portion of the opinion garnering a seven-member majority stated the traditional “clear and manifest” statement rule at the outset, and applied the presumption to support its holding that the 1965 labeling act did not

More recently, the Court has held that the presumption doctrine does not apply to save state laws where there is a history of significant federal presence in the field of maritime commerce,¹⁵³ did not bother to explicitly discuss the presumption in a tort case concerning defective automobile design,¹⁵⁴ preempted state family and probate law even though it found a federal statute to be ambiguous,¹⁵⁵ and suggested that the presumption does not apply where Congress makes clear its desire for some preemption of indefinite scope.¹⁵⁶ In an environmental case, the Court preempted California from requiring the purchase of clean cars, and specifically declined to use the presumption to inform its interpretation of arguably ambiguous statutory text that limited preemption to “standards relating to the control of emissions from new motor vehicles.”¹⁵⁷

preempt state tort claims. *Id.* at 518. A portion of the opinion that attracted only a four-member plurality, however, held that the 1969 labeling act had broader preemptive effect because its ban on “requirement[s] or prohibition[s]” unambiguously applied to certain common law tort claims. *Id.* at 520-22. Justice Blackmun believed that the phrase was not clear enough to preempt long-standing state tort law, and wrote a separate concurring opinion lamenting what he viewed as the demise of the presumption doctrine. See *id.* at 535-542. Justice Scalia’s dissent agreed about that demise but thought it a good development; he would have taken a stronger position than the Court plurality by dispensing altogether with the presumption as guide to interpreting express preemption clauses. *Id.* at 545-46.

¹⁵² *Medtronic v. Lohr*, 518 U.S. 470 (1996), was another split decision written by Justice Stevens that held that Federal standards for medical devices do not preempt state tort claims arising from a defective pacemaker. The majority reaffirmed the use of the presumption as an interpretive guide in cases involving express preemption clauses, at least with respect to the scope of intended preemption. *Id.* at 485.

¹⁵³ *United States v. Locke*, 529 U.S. 89 (2000).

¹⁵⁴ *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (not discussed in majority opinion); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204 (2006) (opinion does not discuss presumption although it was discussed at length in the briefs).

¹⁵⁵ *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001) (admitting that ERISA section purporting to preempt all state laws that “relate to” federal benefits plan is boundless and cannot be interpreted literally).

¹⁵⁶ *Id.* at 151; cf. *id.* at 157 (dissent).

¹⁵⁷ *Engine Manufacturers Association v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 256 (2004).

This trend is by no means uniform. Recently, the Court used the presumption to support its conclusion that the Federal pesticide statute does not preempt tort claims brought by peanut farmers against a pesticide manufacturer,¹⁵⁸ but even then two dissenters stated their contrary belief that the presumption is inapplicable in express preemption cases.¹⁵⁹ A similar split in the Court occurred in a case arising under the separate part of ICCTA that deal with motor carriers, with the majority relying on a clear statement rule to uphold local towing laws.¹⁶⁰

The decline of the presumption is curious because during the same period the Court developed clear statement rules of great vitality and stability in its jurisprudence concerning the Tenth Amendment, the Eleventh Amendment, the Fourteenth Amendment, the Commerce Clause, the Guarantee Clause, and conditions on monies disbursed pursuant to the Spending Clause.¹⁶¹ Contemporary decisions in these areas of law reflect the Court's continuing federalist concerns about protecting state sovereignty. The Court's clear statement test for the abrogation of Eleventh Amendment immunity is explicitly based on its concerns about the sanctity of state sovereignty.¹⁶² The Court also selectively defers to state corporation law when interpreting federal remedial programs.¹⁶³ And the Court's continuing use of field preemption theories –

¹⁵⁸ Bates, 544 U.S. at 448.

¹⁵⁹ Id. at 456 (JJ. Thomas and Scalia, dissenting).

¹⁶⁰ City of Columbus v. Ours Garage and Wrecker Serv., Inc., 536 U.S. 424, 442 (2002). The Court considered a general canon of construction requiring a “clear and manifest purpose of Congress” to preempt police powers, 536 U.S. at 438-440, as well as conference committee reports and other legislative history demonstrating that the purpose of the motor carrier legislation was economic deregulation. id. at 440-441.

¹⁶¹ See generally Tribe, *supra* note 142, at 551-52, 853-57; Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1 (1996).

¹⁶² See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-56 (1996).

¹⁶³ Bernadette Bollas Genetin, *The Powers that Be: A Reexamination of the Federal Courts' Rulemaking and Adjudicatory Powers in the Context of a Clash of a Congressional Statute and a Supreme Court Rule*, 57 Baylor L. Rev. 587, 674 n. 348 (2005) (reviewing cases where the Court has held that interstices in federal statutes are filled with state corporate law).

even when express preemption clauses are not present¹⁶⁴ – means that some counterweight to judicial overreaching is as necessary as it was when the presumption was created to balance post-New Deal preemption jurisprudence.

Noting these discrepancies, many academics have argued for the revival of the presumption against preemption of state law.¹⁶⁵ I agree with that goal, but don't agree that it can be realized without a stronger foundation for its (re)adoption.

I depart from most commentators in noting that there is some justification for the presumption's decline. In its standard formulation, the presumption was triggered only by "traditional" state police powers, which could have been understood as synonymous with "longstanding." Either meaning would have been accurate in *Rice*, for the state warehousing laws at issue were in fact longstanding, having been upheld by the Court seventy years beforehand.¹⁶⁶ Indeed, one can imagine that the Court would have seen a distinct advantage in portraying the then newly-created clear statement rule as reflecting well-known facts against which Congress had legislated. The Court continues to use the "longstanding" meaning of the presumption from time to time. For example, in *Bates v. Dow Agrosiences LLC*¹⁶⁷ the Court upheld a state tort suit brought by farmers injured by pesticides because such remedies have been available for a long time.¹⁶⁸

¹⁶⁴ *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

¹⁶⁵ E.g., Kenneth Starr et al., *The Law of Preemption* 56 (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 *Hastings Const. L.Q.* 69, 112 (1988); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 *B.U. L. Rev.* 559, 622 (1997).

¹⁶⁶ *Munn v. Illinois*, 94 U.S. 113 (1876).

¹⁶⁷ 544 U.S. 431 (2005).

¹⁶⁸ Cf. *Buckman Co. v. Plaintiffs Legal Committee*, 531 U.S. 341 (2001) (rejecting private suit premised on deception of agency registering orthopedic bone screws because states do not have a longstanding interest in enforcing fraud against federal agencies).

There are several problems with an interpretation that clear statement rules apply only to specific areas of state interests or remedies that have existed for many years. If only historical areas of state interest are protected, then classification is devoid of any guiding principle. Should the Court classify a tort claim arising from a malfunctioning pacemaker as a variant of medical negligence (longstanding) or one concerning pacemaker design (not longstanding)?¹⁶⁹ Should a federal regulation that prevents doctors from prescribing drugs in a certain way be viewed as intruding upon state oversight of the medical profession (longstanding) or in the field of assisted suicide (not longstanding)?¹⁷⁰ Reducing a case to the question of field definition invites evidence that the Federal government has had a traditional presence in that field, even though that fact is unrelated to whether Congress intended to preempt state law or preferred dual oversight. In *Ray v. Atlantic Richfield Co.* and *United States v. Locke*, for example, the Court accepted the government's argument that the proper field for analysis was interstate navigation rather than public safety from oil spills, and from that framing of the disputes it followed that the longstanding Federal presence in the navigational field would preempt most of the state safety laws at issue.¹⁷¹ But the classification has not always been dispositive. For example, in a case involving the very modern field of nuclear energy, the Court has acknowledged the Federal prerogative starting with the Manhattan Project and continuing to regulation of civilian use as a power source, but then it somehow ignored that history by defining the relevant field as tort law or utility economics within longstanding state control.¹⁷² Using the Federal government's historical presence or absence in a field to resolve preemption cases does not clarify the doctrine

¹⁶⁹ E.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

¹⁷⁰ E.g., *Gonzales v. Oregon*, 546 U.S. 243 (2006).

¹⁷¹ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *United States v. Locke*, 529 U.S. 89 (2000).

¹⁷² *English v. General Elec. Co.*, 496 U.S. 72, 84 (1990); *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Develop. Comm'n*, 461 U.S. 190 (1983).

or make it more predictable, and is difficult to square with the still expansive notion of Congress's Commerce Clause powers.

Furthermore, if the presumption were to apply only to "traditional" or "longstanding" areas, states would remain frozen in time, unable to adopt their police powers to modern conditions without risking preemption. To take but one example, if state torts that address misapplications of nanotechnology could be portrayed as an entirely new field, rather than the new application of an old area of law, they might be more vulnerable to preemption from ambiguous statutes. Indeed, the notion that certain fields have been "traditionally occupied" on the basis of states' "historic police powers" has less force today than when *Rice* was adopted in 1947. In the intervening years, Congress has enacted numerous federal consumer safety, product design, public health, environmental and criminal laws, all of which effectively overlap with state police powers. The historical distinctions between federal and state spheres of influence that underlay the original statement of the presumption are anachronisms now.¹⁷³ Certainly, the "historical" or "traditional" label is subjective and without rigorous or clear standards to determine whether Congress's ambiguous text expresses more or less respect for state laws. In short, historical areas of state regulation are a very rough guide to Congressional intent.

On the other hand, the *Rice* formulation is sometimes described as applying to all possible expressions of states' "traditional" police power.¹⁷⁴ This interpretation raises the issue of whether there are workable limits to when the clear statement rule should apply. Almost any

¹⁷³ Cf. Wolfson, 16 Hastings L. Q. at 92-94 (suggesting that Framers believed that state and federal governments would act in distinct spheres, but that the expansion of congressional power and state commercial regulations has blurred the distinction). It is interesting to consider *Reid v. Colorado*, 155 U.S. 137 (1902), which relied on the reserved powers in the 10th Amendment to state the rule that "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." The 10th Amendment has little doctrinal force today, except in limited circumstances.

¹⁷⁴ E.g., *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993).

public welfare regulation derived from that residual, general power could be labeled traditional.¹⁷⁵ Without a limiting principle, the contemporary Court is unlikely to revive the presumption.

A key question is how to revitalize the clear statement rule for preemption without the presumption's logical and historical baggage. As currently understood, the presumption is too narrow (if interpreted as "historical" or "longstanding") or too broad (all police powers) or both.

B. Courts Do Not Examine the Effect of Stripping Remedies Except for Retroactive Compensatory Remedies in Individual Cases

Courts do not, as a general matter, consider the effects of their rulings before they determine whether federal laws preempt state laws. This approach may be defensible as a matter of institutional competence, as Congress can, presumably, alter the scope of preemption that it deems to have too broad an effect. And yet courts have not hesitated to err on the side of non-interference with states in any number of areas that raise sovereignty concerns, as noted above.

Inattention to the effects of preemption rulings is inconsistent with courts' continuing, professed concern for state sovereignty in immunity and other cases. States' ability to provide retroactive and prospective relief to their citizens is at least as central to sovereignty as retaining the immunity defenses in federal court. The ability to exercise police powers is an inherent aspect of state sovereignty that cannot be taken away.¹⁷⁶ Such laws represent the will of the

¹⁷⁵ See Tribe, *supra* n. 142, at 1045 n. 11 (noting plastic concept of police powers).

¹⁷⁶ See *The License Cases*, 46 U.S. (5 How.) 504, 584 (1847) (Taney, C.J.) ("...the police powers of a state . . . are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) ("[t]he power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208 (1824) (referring to "[t]he acknowledged power of the State to regulate its police, its domestic trade, and to govern its own citizens."); cf. Tribe, *supra* n. 142, at 1046-49 (citing these cases, and discussing evolution of the concept of state police powers, at least insofar as it is used to resolve Dormant Commerce Clause cases).

people and should be entitled to significant respect in our federal system.¹⁷⁷ Indeed, for this very reason the Court’s Dormant Commerce Clause jurisprudence has long tolerated state enactments that are legitimately designed to protect the public, even where they have a greater effect on out-of-state entities than on in-state entities.¹⁷⁸

In fact, on a sporadic basis the Supreme Court has taken notice of the effect of preemption rulings for the limited purpose of locating the outer limits of plausible Congressional intent to preempt. In so doing, the Court has repeatedly warned against lightly inferring Congress’s intent to create regulatory gaps. Although no formal doctrine has yet formed around the presence of regulatory gaps, a close examination of the Court’s decisions and rationale shows

¹⁷⁷ This truism is captured well in the following passage written by the dissenting Justices in *Garcia*, 469 U.S. at 575-76 (internal citations and footnotes omitted), which discussed an earlier opinion they would have followed:

In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as “typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.” 426 U.S., at 851. Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government. In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee. We recognized that “it is functions such as these which governments are created to provide . . .” and that the States and local governments are better able than the National Government to perform them. 426 U.S., at 851.

¹⁷⁸ See generally *Tribe*, supra n. 142, at 1045 n. 11 (citing concurring opinion in *The License Cases*, 46 U.S. (5 How.) 504, 631 (1847)), and 1046-1049 (citing *Colley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851) and other cases); compare *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding state ban on the import of baitfish because it had no other way to prevent the spread of non-native parasites that would threaten to devastate its unique and fragile native fishery) with *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (striking down Oklahoma law that prohibited the export of natural minnows, where the ban was not a necessary part of a regime to conserve a natural resource). The Court has summarized the rule as follows: “As long as a State does not needlessly obstruct interstate trade or attempt to ‘place itself in a position of economic isolation,’ it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.” *Maine v. Taylor*, 477 U.S. at 151 (internal citation omitted).

that it has effectively adopted a narrow clear statement rule where Congressional action will strip certain tort remedies.

Thus, the Court has been especially wary of interpretations of preemption provisions that will leave an injured individual without a remedy. In *Medtronic v. Lohr*, for example, the Court has rejected an interpretation of a Federal law governing the design of medical devices that would result in “wiping out the possibility of [a] remedy for the . . . injuries.”¹⁷⁹ Even where the narrow issue before the court was the availability of non-compensatory punitive damages arising out of the escape of plutonium, and there was an exclusive Federal franchise over nuclear safety, the Court held that a tort suit against the operator of a nuclear facility could proceed because it would be “difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”¹⁸⁰ Of course, Congress may strip remedies with respect to safety matters; an affirmative Congressional determination that state regulations are inappropriate will preempt state laws, at least when coupled with some federal regulations on the matter.¹⁸¹ But where the federal government has not taken any action on an

¹⁷⁹ *Medtronic*, 518 U.S. at 488-89; see also *Bates*, 544 U.S. at 450 (holding tort claims not preempted because, in part, “it seems unlikely that Congress considered a relatively obscure provision . . . to give pesticide manufacturers virtual immunity from certain forms of tort liability”); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 541 (1992) (Blackmun, J. concurring in part and dissenting in part) (“there is absolutely no suggestion in the legislative history that Congress intended to leave plaintiffs who were injured as a result of cigarette manufacturers’ unlawful conduct without any alternative remedies; yet that is the regrettable effect of the ruling today that many state common law damages claims are pre-empted.”).

¹⁸⁰ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 263 (1984). Ms. Silkwood died in a car accident before trial. *Id.* at 242. While she had been contaminated with plutonium, missed seven days of work for decontamination, and the jury found actual damages of \$500,000, this award was apparently based upon exposure only, and there was no proof that she had suffered any actual damages from exposure to plutonium. The dissenters would have distinguished compensatory damages from non-compensatory punitive damages, and would have preempted the latter category. *Id.* at 263-64, 274-75.

¹⁸¹ *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (preempting state tort claim premised on failure to install airbags because Federal regulations adopted graduated schedule for installation of passive safety restraints); *Gade v. National Solid Wastes Management Assoc.*, 505

issue such as safety, the Court has closely scrutinized arguments that states should be prevented from filling regulatory gaps.¹⁸²

The Court's reluctance to preempt individual, retroactive tort remedies should extend to prospective public health regulations such as solid waste regulations.¹⁸³ Tort remedies are not limited to monetary damages, and the Court has explicitly recognized that torts can be the equivalent of regulations because they provide incentives to change behavior.¹⁸⁴ Conversely, health and safety regulations serve some of the same functions as torts by providing remedies to prevent harm. The difference between the two approaches is that torts arise in individual cases after harm has occurred and can only compensate the victim with damages, whereas regulations

U.S. 88 (1992) (preempting state training regulations for hazardous waste workers that exceeded detailed OSHA training standards, where state had not exercised option to obtain federal approval of exclusive state system); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (holding that state tanker safety regulations were preempted where federal agency promulgated regulations that it considered to be comprehensive).

¹⁸² *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (upholding state tort claims against pacemaker manufacturer where Federal agency ruled only that device was "substantially equivalent" to pre-existing devices and had not undertaken detailed and rigorous "premarket approval" or any significant analysis of product safety); *Freightliner v. Myrick*, 514 U.S. 280 (1995) (holding that common law claims related to failure to install anti-lock brakes were not preempted because there was no express federal standard in place to trigger preemption clause in Federal Act); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) (where federal statute required affirmative actions to trigger preemption, upholding state tort claims imposing duty to maintain warning devices at railroad crossing because the federal government made only "elliptical reference" to limited aspects of the signals, but preempting tort claims based on excessive speed because federal regulations governed track speeds). The Court's concern for creating regulatory gaps can be traced at least as far back as its to *United Const. Workers, Affiliated with United Mine Workers of America v. Labrunum Constr. Corp.*, 347 U.S. 656 (1954), when it held that state law claims for tortious interference with a contract in connection with a union organizing drive was not preempted because the National Labor Relations Board did not have the authority to order similar relief.

¹⁸³ Cf. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) (holding that town was not preempted from regulating the use of pesticides because Federal statute did not comprehensively occupy the field and did not establish a permitted schedule for the use of pesticides, and therefore did not exhibit a clear and manifest intent to preempt local authority).

¹⁸⁴ E.g., *English v. General Elec. Co.*, 496 U.S. 72, 84 (1990); see also *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 263 (1984).

represent a more systematic approach, consistent with our complex society, to understand the causes of harm to many people and to prevent harmful behavior before it occurs. Modern regulatory police powers have built on the foundation of common law torts and nuisance by attempting to prevent injury before it occurs, thereby protecting greater numbers of the public.¹⁸⁵ In that sense, both torts and public health and safety regulations are manifestations of states' police powers, and merely express the people's fundamental right to self-protection from bodily harm.¹⁸⁶ As people are the ultimate sovereign in our system of government,¹⁸⁷ preemption that

¹⁸⁵ Despite his hostility to environmental regulation, Justice Scalia has articulated a useful description of precautionary state police powers in the context of explaining the nuisance exception to regulatory takings:

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

* * *

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

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

¹⁸⁶ See Richard A. Epstein, In Defense of the "Old" Public Health: The Legal Framework for the Regulation of Public Health, 69 Brooklyn L. Rev. 1421, 1443-44 (2004) (describing expansion of public health regulations to cover matters that affect large number of individuals, and, for reasons of social wealth and freedom, arguing for a return to traditional forms of public health law that were directed to externalities that could not be addressed by market solutions or private torts).

¹⁸⁷ The Constitution famously starts with the words "We the People" and both legal scholars and historians have noted that this founding document of our government represented a fundamental shift away from prior, formalistic notions of sovereignty to a true, democratic based theory of sovereignty. See Bruce Ackerman, 1 We the People: Foundations (1991); Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1969).

strips any effort at self-protection – tort or regulation, individual or collective – raises issues of sovereignty.

The Court has, in fact, recognized the rights of states to prevent collective harm through regulations, at least in the economic field. In *Pacific Gas and Electric*, for example, the Court refused to preempt state regulation of utility economics because of the exclusive Federal franchise over nuclear safety issues, reasoning that it “is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the states to continue to make these judgments [on the economic feasibility of nuclear power plants].”¹⁸⁸ Since the Federal government would not address whether ratepayers would face economic liabilities, the states could continue to do so.¹⁸⁹ Similarly, with regard to other state economic regulations, the Court has used the presence or absence of regulatory gaps to bolster its analysis of Congressional intent.¹⁹⁰ The Court has held that while an “authoritative federal determination that [an] area is best left unregulated” may preempt state laws in that area, there must be a strong affirmative indication of that intent.¹⁹¹ The Court has elsewhere summed up its

¹⁸⁸ *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Develop. Comm’n*, 461 U.S. 190, 207 (1983). This point was an especially strong one for the concurring Justices as well. *Id.* at 225.

¹⁸⁹ *Id.*

¹⁹⁰ *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 88 (1990) (Stevens, J., concurring) (agreeing with decision because the lower courts interpretation would “create a gap in the regulatory scheme that Congress could not have intended); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 380 (1988) (Scalia, J., concurring in judgment) (agreeing that state law is preempted because, in part, there is “no regulatory gap for the States to fill”); *Northern Natural Gas Co. v. State Corp. Comm’n*, 372 U.S. 84, 95 (1963) (stating that “the invalidation of this particular form of state regulation does not result in a regulatory ‘gap’ of the sort which the Act was designed to prevent.”); *Florida Lime and Avocado Growers, Inc v. Paul*, 373 U.S. 132, 166-67 (1963) (dissenting opinion) (stating that dissenters would strike down the state laws as preempted because, in part, “[n]o gap exists in the regulatory scheme which would warrant state action to prevent the evils of a no-ma’s land”).

¹⁹¹ *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983) (emphasis in original).

task as determining whether Congress’s intent “was to fill a regulatory gap [or] to perpetuate one.”¹⁹² The Court has found that Congress intended to create a regulatory void and to allow market forces to set the price of commodities,¹⁹³ and in another case the Court upheld state economic regulations where Congress was apparently indifferent to the matter.¹⁹⁴ In any event, the Court said that Congress cannot make a decision to displace all state regulations, even on economic matters, “subtly” or through “deliberate federal inaction.”¹⁹⁵

There are additional reasons to extend the Court’s concern for collective rights in public health and environmental rights. Harmful practices in these fields represent market failure and will not be corrected by competition or other market forces (indeed, competition may lead to widespread harmful practices as more and more entities are pressured to externalize costs to the general public¹⁹⁶). Government action – the expression of citizens’ rights to self-protection – is necessary.

Concerns about sovereignty and the nature of citizens’ self-protective powers compel the conclusion that the courts should bolster the political safeguards of remedies in the public health and safety fields. If people have chosen to protect themselves by enacting a health, safety, environmental or other public welfare law, then Congress must have a very good reason to upset

¹⁹² *Id.*

¹⁹³ *Transcontinental Gas Pipeline Corp. v. State Oil and Gas Bd. of Mississippi*, 474 U.S. 409, 422 (1986)

¹⁹⁴ *Arkansas, supra*; *Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corps*, 485 U.S. 495 (1988) (holding that passage and repeal of comprehensive federal statutes providing for allocation and price controls on petroleum productions did not manifest intent to preempt territorial gasoline price regulation).

¹⁹⁵ *Id.* at 500, 503; see also *Bloomfield Ave. Corp. v. City of Newark*, 904 F. Supp. 364, 374 (D.N.J. 1995) (holding that a different section of ICCTA does not preempt city regulations over non-consensual towing where Congress has not adopted a federal consumer protection scheme).

¹⁹⁶ See Epstein, *In Defense of the “Old” Public Health*, *supra* n. 186, at 1425-26 (public health laws are grounded in the need to prevent communicable diseases, pollution, and other externalities); see generally Ronald Coase, *The Problem of Social Costs*, in *The Journal of Law and Economics* (1960) (discussing externalities generally).

self-protective measures.¹⁹⁷ As one commentator has noted, “[f]ederal preemption decisions impede the ability of those governmental bodies that are structured to be most responsive to citizens’ public values and ideas – state and local governments – and have concomitantly undermined citizens’ rights to participate directly in governing themselves.”¹⁹⁸ Any federal limitations on state police powers must be well-considered, for states have inherent, sovereign police powers that cannot be stripped away, and the expression of that reservoir of prerogative power is only temporarily suppressed when superseded by the exercise of Congress’s limited, delegated powers to enact legislation.

C. The Constitutional Dimensions of Stripping State Remedies and Creating Regulatory Gaps

The Court’s concern about protecting the balance of power between the federal government and states in preemption is grounded in the structure and text of the Constitution, most directly the Supremacy Clause but also the concept of enumerated powers to the Tenth Amendment.

¹⁹⁷ Cf. Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 *Vill. L. Rev.* 1219, 1238-39 (2001) (States provide “an additional layer of regulatory protection against concentrations of private power and wealth, which pose an enormous threat to personal freedom in contemporary society. . . . A central reason for the magnitude of the private sector threat to personal freedom is that corporations, although enabled by government through the corporate form, are not subject to the individual rights guarantees by which the Constitution constrains government. Only the people, through their political institutions, can check corporate power.”) (footnotes omitted).

¹⁹⁸ S. Candice Hoke, 71 *B.U. L. Rev.* 685, 687 (1991) (arguing that overly broad preemption harms “civic republicanism”); see also Magarian, *supra* n. 197 (arguing that the value of state prerogatives lies in the people’s opportunities to create governmental institutions and their ability to use those institutions to fulfill the popular will); Barry Friedman, *Valuing Federalism*, 82 *Minn. L. Rev.* 317, 386- 403 (1997) (summarizing the virtues of state authority as increased public participation in democracy, greater accountability to the electorate, laboratories for experimentation, more comprehensive protection of public health, safety and welfare, increased cultural diversity, and diffusion of power to protect liberty); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (discussing participatory values in decentralized government).

There is an additional, specific limitation on Congress's preemption powers that derives from the Constitution's legislative history rather than from its adopted text or structure.¹⁹⁹ The framers denied Congress the ability to veto state laws, a power then known as the legislative negative.²⁰⁰ It follows that Congress is at the outer limits of its powers under the Supremacy Clause when the effect of preemption is primarily to veto state laws rather than to support some federal policy. In other words, Congress should not wield the power of preemption solely to create regulatory gaps, but rather those gaps must serve some federal policy.

Given the many dormant Commerce Clause cases limiting state power by implication from the negative and positive aspects of the Commerce Clause, it is surprising that the Court has not developed a parallel limitation on Congressional power centered on the negative predicate of the Framers' rejection of the power to veto state laws.²⁰¹ The absence of any general Congressional power to veto state laws has only been mentioned in a few dissents in the modern

¹⁹⁹ See generally, Wolfson, 16 Hastings Const. L. Q. at 88-91.

²⁰⁰ There is no general Congressional power to invalidate state laws, as the framers explicitly denied Congress the right to veto state laws. See generally Winton U. Solberg, ed., *The Constitutional Convention and the Formation of the Union* (U. Chicago Press 2d ed. 1990) at 116 (Pinckney's proposal for a legislative negative), 137 (Wilson, comparing Virginia and New Jersey plans), 183 (Madison's statement in support of the negative), 225-26 (rejection of the proposal by a 7-3 vote of the Convention, with the Supremacy Clause offered as a replacement), 290 (Pinckney again moved for adoption of the negative, which was rejected by a 6-5 vote of the Convention); Akil Reed Amar, *America's Constitution* 106, 109 (2005) (describing James Madison's attempts in Federalist No.10, and later Charles Pinckney's formal resolution, to add a general veto of state laws to congressional powers, and the conventions definitive rejection of that power) (citing Farrand's Records, 1:164, 165, 172); see also Foote, *Regulatory Vacuums*, 19 U.C. Davis L. Rev. at 121, n.35. The Constitutional Convention separately rejected the Virginia Plan's proposal for a Council of Revision made up of the executive and judges, which would have had the power to review federal and state statutes before they went into effect.

²⁰¹ As one commentator has noted, "[p]reemption . . . implicate[s] controversial issues of power because of its similarity to a power that the Framers denied Congress: the power to veto state laws" and the use of preemption as a surrogate for that power undermines the foundations of the political safeguards of federalism. Wolfson, 16 Hastings Const. L. Q. at 88, 89-91.

era.²⁰² In the early formation of the judicial preemption doctrine, the Court had rejected the notion that Congress had exclusive power over interstate commerce that automatically preempted all state rules, because such a broad standard would have left too many areas unregulated. Instead, the Court developed the notion of latent exclusivity, whereby preemption would only occur upon some Congressional regulation in a field.²⁰³ The requirement for some affirmative expression of Federal power was replaced by field and obstacle-to-federal-purposes implied preemption theories that accompanied the expansion of Federal regulatory power. Those implied theories extended the preemptive range of affirmative federal policies to a significant degree but did not eliminate entirely the need to find some federal purpose and policy before displacing state laws.

The challenge is to distinguish invalid vetoes of state laws from valid Congressional prerogatives to create national policies. One starting point for analysis may be to determine whether there is a nexus between the purpose of the federal law at issue and whether there is a need to create a regulatory gap by displacing all state (and federal) laws.

Congress certainly has the power to create regulatory gaps. Some federal economic policies, for example, seek to deregulate entire business sectors from rules that directly distort economic decisions. Over the past thirty years, Congress has deregulated the transportation, communication, natural gas, pipeline, energy, broadcasting, banking, and other sectors by, in part, extinguishing laws perceived to be onerous or counter-productive. The well-developed theoretical basis for economic deregulation is that consumers will benefit if pricing and other economic decisions are made (or regulated in a sense) solely by competitive forces in a free

²⁰² E.g., *Fed. Energy Reg. Comm'n v. Mississippi*, 456 U.S. 742, 794-96 (1982) (O'Connor, J., dissenting); *South Carolina v. Katzenbach*, 383 U.S. 301, 360-61 (1966) (Black, J., dissenting).

²⁰³ Stephen A. Gardbaum, *The Nature of Preemption*, 79 *Cornell L. Rev.* 767, 801-02 (1994).

market.²⁰⁴ Under these theories, market controls substitute for governmental controls; deregulatory statutes therefore intentionally create gaps in government economic regulations so that the market will be the only regulating force on prices and related terms.²⁰⁵ Preemption is a key element of these reforms, for Congress must protect federally deregulated industries from being re-regulated at the State level.²⁰⁶ The displacement of some state economic laws is therefore necessary to ensure the success of national economic deregulatory policies, and is well within Congress's prerogative to ensure national markets.²⁰⁷ Whether or not deregulatory statutes establish any significant federal program or simply reduce the regulatory apparatus, the acts do establish an affirmative federal standard: economic decisions must be subject to competition and market controls. In that context, economic deregulation does not displace state laws just for the sake of vetoing those laws.

By contrast, when enacting legislation to address social, environmental, and other non-economic issues, Congress generally adopts more overt federal standards for governmental control. In those fields there is no well-developed or accepted theoretical basis analogous to free market theory that would justify regulatory gaps as good policy. For example, in the past year

²⁰⁴ George Stigler, *The Theory of Economic Regulation*, 2 *Bell. J. Econ. and Mgmt Sci.* 1, 5 (1971); Stephen Breyer, *Regulation and Its Reform* 200 (1982); Susan Bartlett Foote, *New Federalism or Old Federalization: Deregulation and the States*, in *Perspectives on Federalism* 41, 43, n. 9 (Schreiber, ed. 1987); see also Guido Calabresi, *The Cost of Accidents: A Legal & Economic Analysis* 83 (1971); Buzbee, *Recognizing the Regulatory Commons*, 89 *Iowa L. Rev.* at 38-40 (reviewing Stigler's and others' public choice scholarship).

²⁰⁵ Foote, *Regulatory Vacuums*, 19 *U.C. Davis L. Rev.* at 115.

²⁰⁶ See, e.g., Robert E. McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers*, 24 *Transp. L.J.* 155 (1997) (reviewing preemptive effect of the Airline Deregulation Act of 1978, the Federal Railway Safety Act of 1970, and the Federal Aviation Administration Authorization Act of 1994).

²⁰⁷ Based upon the Constitution's specific grants in Art. I, § 8, to enact uniform bankruptcy, laws negotiable instruments, weights and measures, currency, and copyright laws, and the economic failure of the Articles of Confederation, Congress has an especially strong mandate to form a national market.

alone, Congress has demonstrated its willingness to preempt state police powers by introducing bills and enacting legislation that addresses a range of social and environmental issues, including food safety and organic food production,²⁰⁸ chemical plant security,²⁰⁹ ballast water,²¹⁰ the siting of liquefied natural gas terminals,²¹¹ and electrical transmission lines.²¹² These federal laws preempt state laws that may be more protective than federal standards, and thus mark an aggressive expansion of the traditional federal role in social policy, which is to protect against harmful regulatory competition between states or interstate pollution by preempting only weak state standards that fall below minimum federal standards.²¹³ But even then, Congress accomplished the complete preemption of state laws in those narrow fields by adopting some

²⁰⁸ National Uniformity for Food Act of 2006, H.R. 4167 (passed in the House on March 8, 2006) (barring states from addressing food-borne hazards and leaving food safety solely to the Food and Drug Administration). On the day it was passed, the House rejected several amendments that were intended to preserve state authority.

²⁰⁹ The Chemical Facility Anti-Terrorism Act of 2006, H.R. 5695, provides that “[a] State or local government may not prescribe, issue, or continue in effect a law, regulation, standard or order that may frustrate the purposes of this title or any regulations or standards prescribed under this title.” (Section 1807). So-called “frustration of purpose” preemption is arguably the broadest category of implied preemption, and would be made explicit through incorporation in the statute.

²¹⁰ Ballast Water Management Act of 2005, S.363; Prevention of Aquatic Invasive Species Act of 2006, H.R. 5030.

²¹¹ Energy Policy Act of 2005, Pub. L. No. 109-58, § 311 (c)(2), 119 Stat. 594, 686 (2005), codified in relevant part at 15 U.S.C. § 717b(e)(1).

²¹² *Id.*, § 1221 (amending Section 216 of the Federal Power Act and codified at 16 U.S.C. § 824p).

²¹³ Some of the classic articles debating the relative merits of environmental federalism are Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 *Mich. L. Rev.* 570 (1996), Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulations*, 67 *N.Y.U. L. Rev.* 1210 (1992), and Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *Yale L.J.* 1196 (1977).

federal standards, however weak they may be, and by offering a reasoned basis for doing so to create a uniform national market.²¹⁴

Sometimes, however, Congress poorly defines the intended scope of economic deregulatory policy, and preemption therefore spills into social, environmental and other areas that primarily deal with non-economic issues. By all evidence these gaps are unintentional and are not the subject of explicit debate or theoretical defense.²¹⁵ The free market rationale for displacing economic laws does not extend to displacing state police powers, because market forces will not control externalities and other market imperfections.²¹⁶ Indeed, controlling social costs in an even-handed way across firms and sectors complements free-market policies by focusing inter-firm competition on price and service rather than regulatory rents.²¹⁷ Selective

²¹⁴ For an overview of the general justifications for regulating at the state or federal level, see Friedman, *supra* n. 110, at 406-408 (national authority is appropriately exercised where regulatory field involves public goods, interstate externalities, the danger of a race-to-the-bottom amongst states, or the need for uniformity); Paul Wolfson, Preemption and Federalism: The Missing Link, 16 *Hastings L. Q.* 69, 106-109 (criticizing reliance on need for uniformity to preempt state laws, when dormant commerce clause jurisprudence does not go that far); see also Exec. Order No. 12612, Federalism (Oct. 26, 1987), Exec. Order 13132, Federalism (Aug. 4, 1999).

²¹⁵ One notable exception is Congress's explicit attempts to prevent States from granting abortion rights, applying land use laws to churches or acting with regard to other religious issues. These efforts benefit from close public scrutiny to say the least, and the public attention and perceived positive political effects may be the only point of these efforts.

²¹⁶ As one leading scholar has summarized the theory,

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

Richard J. Pierce, Jr., *Economic Regulation* 314 (1994).

²¹⁷ See, e.g., Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 *Colum. L. Rev.* 1339, 1390-1430 (1993) (describing link between efforts to control external environmental costs and to start a free market in electricity).

preemption of environmental and social regulations for certain industries would therefore undermine federal policy by introducing market distortions.

The absence of policy justifications for non-economic regulatory gaps would indicate a potential breakdown of political accountability in their creation, and certainly a breakdown in judicial review if preemption is found on scant evidence. The lack of accountability may be at its most pronounced when broad preemption is based upon ambiguous language in deregulatory statutes and is urged by profit-seeking entities that have strong incentives to create regulatory gaps in public health and safety laws. We can expect more attempts by private entities to avoid state regulation as the Federal government withdraws its regulatory presence from a variety of public health and welfare fields for budgetary, ideological, or other reasons.

In sum, regulatory gaps may be the result of federal laws that amount to an improper veto of state laws and, therefore, violate the negative implications of the Supremacy Clause. Any failure of Congress to articulate reasons for preempting state law may also be vulnerable under decisions that require some justification for the exercise of Commerce Clause regulatory powers.²¹⁸ Even with regard to interstate transportation, Congress must articulate the reasons for preempting state laws.²¹⁹ It is not clear that Congress would have a rational basis to conclude

²¹⁸ The Commerce Clause requires that Congress articulate the “substantial effect” that regulated activities have on interstate commerce, and, arguably, that the means adopted is reasonably connected to the goals of the statute. *Hodel v. Virginia Surface Min. & Recl. Ass’n*, 452 U.S. 264, 276, 283 (1981). The Court has recently suggested that it will closely scrutinize Congress’s articulated reasons for invoking its powers under the Commerce Clause, which does not grant unlimited regulatory powers. *United States v. Lopez*, 514 U.S. 549 (1995).

²¹⁹ Cf. *Texas v. United States*, 730 F.2d 339 (5th Cir. 1984) (rejecting facial challenge to the 1980 Staggers Act because intrastate rail substantially affects interstate commerce); *Kelley v. United States*, 69 F.3d 1503, 1508 (10th Cir. 1995), cert. denied, 517 U.S. 1166 (1996) (rejecting constitutional challenge to preemption clause in motor carrier deregulation act because state regulations had a substantial effect on interstate commerce and preemption was reasonably adapted to the ends sought by Congress, but recognizing that some aspect of intrastate truck transportation may not have any effect on interstate commerce); Robert E. McFarland, *The*

that state environmental or other social regulations pose such a threat to the industry that such laws have to be preempted.²²⁰

III. Revitalizing the Presumption Against Preemption of State Law

A. Courts Should Require A Clear Expression of Congressional Intent Before Preempting State Law and Creating Regulatory Gaps

This article proposes that preemption jurisprudence be recast to address underlying flaws in preemption doctrine. These flaws are prominently exposed in courts' analysis of the railroad waste cases. As noted in the preceding section, the Court has looked to whether Congress intended to create regulatory gaps as a convenient tool to assess the plausibility of preemption interpretations.²²¹ This is a clear statement rule in all but name only, and it would take only an incremental step for courts to coalesce the Court's scattered statements on gaps into an interpretive canon. The need to protect the balance between federal and state government, the underlying sovereign interests of the people in self-protection, the ban on naked vetoes of state law, and other Constitutional limitations on Congress's preemption powers all combine to compel a formal interpretive doctrine designed to prevent against the accidental creation of regulatory gaps.

Where the effect of preemption will be to preclude all effective remedies for the prevention of harm in a particular area, Congress should have to make a clear statement that it

Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers, 24 *Transp. L. J.* 155 (1997) (reviewing Kelley decision).

²²⁰ For example, the Federal Railroad Safety Act of 1970 explicitly adopted a default rule whereby state safety rules over such matters as railroad crossings are governed by state laws unless the Secretary of Transportation promulgates rules that displace the specific state law at issue. 49 U.S.C. § 20106; see *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993); *South Dakota R.R. Authority v. Burlington Northern & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 934-935 (S.D. 2003) (discussing *Wolens*, 513 U.S. 219).

²²¹ See *Jordan*, 51 *Vand. L. Rev.* at 1167 ("the Court will seek to narrow the scope of the preemptive field to mitigate against the impact of field preemption" because unduly broad field preemption will lead to a regulatory vacuum, citing the *Pacific Gas & Elec.* case).

intends to prevent any Federal or state authority from addressing environmental or other social problems before courts will find preemption.²²² In other words, reviewing courts should presume that Congress did not intend to prevent authorities from addressing health, safety, and other concerns, especially where federal agencies do not have the authority to provide corresponding remedies. The presumption would address most preemption issues on a prudential level before courts reached the question of whether the federal act in question is an improper veto of state laws or is otherwise Constitutionally infirm. It would be a functional mechanism to force Congress to displace state police powers only in the most transparent fashion, and not accidentally through vague or careless language.²²³ As the presumption could be rebutted by a clear statement from Congress that the gap at issue is intentional, it would not pose an insurmountable obstacle to Congress's deregulatory or other legislative efforts.

One clear advantage to the test is that it would force Congress to speak clearly to the scope of any preemption; it is a matter of continuing debate on the Court about how to proceed to demark the scope of displacement once preemption is found.²²⁴ Deregulatory statutes, for example, are certain to contain a preemption clause but the scope of that displacement is not always clear. The regulatory gap/clear statement rule would force Congress to be more

²²² A similar but much broader proposal was advanced twenty years ago by Susan Bartlett Foote, in *Regulatory Vacuums*, 19 U.C. Davis L. Rev. 113. Professor Foote proposed that reviewing courts should reassert their primacy in federalism and preemption disputes, and should adopt a clear statement rule in all preemption cases in order to ensure that regulatory gaps do not violate constitutional federalism. That article predated jurisprudential changes over the past twenty years, including the decline in the presumption against preemption and the Court's greater inclination to preempt state laws. In addition, the scope of deregulation has expanded, as the former line between economic and social regulations has been intentionally blurred by regulated entities in an attempt to bring all manners of environmental and others laws within the scope of deregulation. The proposal in this article accounts for that development by focusing on the importance of the scope of deregulation.

²²³ See, e.g., Hoke, 71 B.U. L. Rev. at 719 (discussing creation of regulatory vacuum through preemption decisions under the Federal Arbitration Act).

²²⁴ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).; *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

particular about the scope of intended preemption, rather than the mere presence or absence of preemption. With the avoidance of inadvertent gaps at the center of court's preemption analysis, Congress would have to address the scope of preemption with appropriate findings, savings clauses, and other text to support any preemption.

Congress could use the same level of precision that it does when abrogating state sovereign immunity to suit in federal court. Under the first prong of the Eleventh Amendment abrogation test – whether Congress spoke clearly enough – courts have focused on whether Congress has specified the particular remedies that are to apply to states.²²⁵ For example, in the Individuals with Disabilities Education Act, Congress stated that “remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available” against other entities.²²⁶ The same formula has been used in other statutes.²²⁷

Using the likely presence of a regulatory gap to trigger the search for a clear Congressional statement would sidestep one of the problems that bedeviled the traditional presumption against preemption. Unlike subjective classifications of state powers into “historical” or other categories, the presence or absence of a gap is a matter that is readily cognizable by courts, which are institutionally equipped to compare Federal and state laws. Parties can aid that facial inquiry by submitting proof about the effects of potential gaps that would be caused by any preemption. In short, regulatory gaps are a more objective criterion for

²²⁵ See general Meltzer, *supra* note 161, at 32 nn. 148-150. This inquiry is to be distinguished from the second prong on which many abrogation efforts have failed, namely whether abrogation is necessary to remedy a pattern of discrimination covered by Section 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

²²⁶ 33 U.S.C. § 1403. Where courts have held that this section is unconstitutional, e.g., *Bradley v. Arkansas Dept. of Educ.*, 189 F.3d 745 (8th Cir. 1999), they have found that the statement of abrogation was clear enough to satisfy the first prong of the sovereign immunity test but without adequate factual support to meet the second prong of the test.

²²⁷ E.g., 42 U.S.C. § 2000d-7. Here too, courts have held that the section is an unequivocal clear statement of intent to abrogate, even if it fails to satisfy other Constitutional requirements. E.g., *Reickenbacker v. Foster*, 274 F.3d 974, 977, 982-984 (5th Cir. 2001).

a clear statement rule than whether a state is regulating in its traditional area. The more objective nature of the trigger for the presumption and clear statement interpretive rule – i.e., the presence or absence of a regulatory gap – differentiates other proposals for general or specific clear statement rules, which share the goal of checking overbroad preemption.²²⁸ Bypassing the question of historical distinctions would also provide states with the opportunity to regulate non-traditional modern industries or practices. And gap analysis fits well with recent scholarship that argues that the Supremacy Clause operates only to preempt contradictory state laws.²²⁹ State laws that fill a regulatory gap probably do not contradict federal law, unless there is an explicit Congressional statement that the gap is intentional.

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

Any clear statement rule seeks to improve the drafting of statutes. The hope here is that Congress will consider regulatory gaps in its deliberations. But what guarantee is there that Congress will listen? Another way to pose the question is to ask whether courts have a meaningful role in guaranteeing the political safeguards for federalism. This issue has been debated in the courts and in the academic literature.²³⁰

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

Preemption doctrine provides another empirical test. When the Court became more inclined to find that state laws are preempted, over the past decade or more, Congress reacted to

²²⁸ Susan Bartlett Foote, *Regulatory Vacuums*, *supra* n. 9.

²²⁹ E.g., Nelson, 86 Va. L. Rev. at 252, 260; Gardbaum, 79 Cornell L. Rev. 767.

²³⁰ E.g., John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311 (1997); see generally Bradford R. Clark, *supra* n. 145, at 93-97 (reviewing disagreement in the academic literature).

that background “rule” by using its preemptive power more aggressively to limit state innovation in environmental²³¹ and social policy.²³² There is no reason to think that Congress cannot also respond to a rule that presumes non-preemption in a narrow set of gap-creating cases. Congress may react by continuing to preempt state laws, of course, but would have to do so with greater specificity about the scope of remedies to be displaced. Or, Congress may narrow the scope of preemption to avoid any gaps.

The railroad waste cases also provide empirical evidence that a clear statement rule is almost a necessary precondition to the political safeguards of federalism, contrary to the implication of the Court’s reasoning in *Garcia v. San Antonio Metropolitan Transit Authority* that “[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”²³³ The railroad waste station problem shows that, in the absence of a clear statement rule, Congress has not been able to correct railroads’ operation of waste handling facilities with impunity behind the shield of ICCTA preemption. Individual members of Congress have attempted to bring pressure to bear upon the Board (and to a lesser degree the EPA) through

²³¹ See Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutations of Environmental Law and Policy*, 41 *Wake Forest L. Rev.* 719, 720-21 (2006) (“Perhaps more than at any time in the last thirty-five years, the states and localities have begun to fulfill their potential as ‘laboratories’ of experimentation in achieving environmental protection goals. Instead of welcoming this development, however, the federal government, acting again through all three branches, has recognized or imposed limitations on state and local authority to continue with those endeavors.”) (footnote omitted); see also Nina Mendelson, *Bullies Along the Potomac*, *New York Times*, July 5, 2006, at A17 (describing Congressional efforts to weaken states’ efforts to protect health and the environment).

²³² See *supra* n. 11.

²³³ 469 U.S. 528, 551 (1985). The interplay between judicial and political concepts of federalism is demonstrated by several bills and proposals whereby Congress would adopt limitations on preemption doctrine. Patricia L. Donze, *Legislating Comity: Can Congress Enforce Federalism Constraints Through Restrictions on Preemption Doctrine?*, 4 *N.Y.U. J. Legis. & Pub. Pol’y* 239 (2000-2001).

letters and other standard oversight mechanisms.²³⁴ Individual members have inserted non-binding comments in appropriations bills to force Board action.²³⁵ And in hearings on the issue, a House subcommittee closely questioned the chairman of the Board about the reach of the ICCTA preemption provision in general and waste stations in particular.²³⁶

These oversight measures have been ineffective, and Congress has not enacted any legislation to correct the problem. A bill introduced in the Senate would have amended the definition of “transportation” to exempt waste transfer stations and other waste management facilities, and thereby remove them from the Board’s exclusive jurisdiction.²³⁷ Similar bills were

²³⁴ E.g., Letter from U.S. Senators Frank Lautenberg and Jon Corzine to Roger Nober, chairman of the Board (May 2, 2005); Letter from Representatives Robert Menendez and Bill Pascrell, Jr. to Stephen Johnson, EPA Administrator (May 26, 2005). Letter from U.S. Senator Charles Schumer to Roger Nober, chairman of the STB (Aug. 18, 2005).

²³⁵ See H.R. Rep. No. 109-495, 109th Cong., 2d Sess. (June 9, 2006) (a report by the Committee on Appropriations in explanation of H.R. 5576, a bill making appropriations for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia, and independent agencies for the fiscal year ending September 30, 2007). The Report contained the following statement:

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

²³⁶ The House Railroads Subcommittee held a hearing on the bills in May 2005. Subcommittee on Railroads, House Committee on Transportation, Hearing on “Impacts of Railroad-Owned Waste Facilities” (May 23, 2005).

²³⁷ In 2005, Sen. Frank Lautenberg (D-NJ) introduced S.1607, which was referred to the Senate Commerce Committee but was not referred out of committee.

introduced in the House.²³⁸ (None of these bills dealt with the preemption sentence in Section 10501(b), which already has conditions that would protect generally applicable state laws.)

Whether this situation changes with Democratic control of the 110th Congress remains to be seen; the Senate Bill was recently reintroduced by the new Democratic Chairman of the Surface Transportation and Merchant Marine Infrastructure, Safety, and Security Subcommittee of the U.S. Senate's Commerce, Science & Transportation Committee.²³⁹

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

Political safeguards of federalism could in theory apply to the Executive branch as well as the Legislative. But the Board has failed to take decisive action to address the problem of unregulated railroad waste stations despite Congressional pressure. In a House hearing the Board chairman conceded that "there has been a lot of concern lately about the potential for misuse of federal preemption in cases involving facilities on rail lines" but sidestepped any direct resolution of the issue and merely summarized the relevant caselaw and outlined how interested

²³⁸ Then U.S. Representative Robert Menendez (D-NJ) introduced H.R. 3577 in July 2005, and U.S. Representatives Sue Kelly (R-NY), Jim Saxton (R-NJ) and Frank Pallone (D-NJ), and Maurice Hinchey (D-NY) introduced bills in 2006 (H.R. 4870, 4930, and 4821, respectively).

²³⁹ S.719, Cong. Rec., Feb. 28, 2007, pp. S2371-S2372. The bill is co-sponsored by Sen. Frank Lautenberg (D-NJ), Sen. Robert Menendez (D-NJ), Sen. Edward Kennedy (D-MA) and Sen. Jack Reed (D-RI), and on the House side by Rep Maurice D. Hinchey (D-NY) and Rep Frank A. LoBiondo (R-NJ). The bill has been referred the Senate Commerce, Science, and Transportation Committee and House Committee on Transportation and Infrastructure.

parties can raise concerns before the Board or courts.²⁴⁰ With regard to specific cases regarding railroad waste stations, the Board has only managed to make the obvious conclusion that only railroads are entitled to ICCTA preemption, and that waste firms that merely operate on railroad property are not.²⁴¹ The Board has avoided issuing a clear ruling in a second generation waste handling case despite ample opportunities to do so; it has deferred ruling in at least two cases – including one involving Susquehanna & Western’s operations – on procedural grounds,²⁴² and has failed to resolve another long-standing railroad waste station dispute on the merits.²⁴³ The

²⁴⁰ Testimony of W. Douglas Buttery, Chairman of the Surface Transportation Board, before the House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Hearing on Impacts of Railroad-Owned Waste Facilities.

²⁴¹ In one early case, the Board refused to preempt the application of New Jersey’s solid waste laws to a truck to rail transloading facility operated by a waste hauling firm on railroad property. *Hi Tech Trans, LLC, Petition for Declaratory Order* STB Finance Dkt No. 34192 (STB Served Nov. 20, 2002), and STB Finance Dkt No. 34192 (Sub-No. 1) (STB served August 14, 2003). A waste firm called Hi Tech had entered into a series of contracts with the owners or operators of construction sites for the removal of debris to out of state landfills, with haulers to transport the debris from construction sites to a facility at the railyard where Hi Tech loaded the debris onto railcars at its own expense, and with a railroad for the transportation of loaded rail cars. The railroad had minimal involvement with this operation: it disclaimed any responsibility for waste handling, did not charge a fee for use of the loading facility, and described Hi Tech as a merely one of its many shippers. Hi Tech did not seek a permit from the state and, faced with a cease and desist order, initiated a proceeding seeking a declaration that the laws were preempted. The Board held that, at a minimum, ICCTA preemption applies only when activities are “both (1) transportation, and (2) performed by, or under the auspices of, a rail carrier.” *Id.* at 5. As Hi Tech was not a rail carrier, it was not entitled to preemption.

²⁴² In *Northeast Interchange Railway, LLC Lease and Operation Exemption – Line in Croton-on-Hudson, NY*, 2005 WL 3090145, STB Finance Dkt No. 34734 (STB served Nov. 18, 2005) (rejecting the exemption notice because the lease and operation transaction was not appropriate for consideration under the abbreviated class exemption procedures, in part due to controversial nature of proposed waste handling activities); *National Solid Waste Management Association et al., Petition for Declaratory Order*, STB Finance Dkt. No. 34776 (STB served March 10, 2006) (dismissing challenge to one of Susquehanna & Western’s facilities in North Bergen, New Jersey, because it was shut down shortly after the petition (and two cases) were filed, and petitioners failed to point to an alternative site that would warrant continuing with the proceeding).

²⁴³ *New England Transrail, LLC – Construction, Acquisition and Operation Exemption – in Wilmington and Woburn, MA*, STB Finance Dkt. No. 34797. The Board had rejected an early petition because the railroad did not disclose these activities until after the Board issued an Environmental Assessment. *New England Transrail, LLC – Construction, Acquisition and*

delays in resolution have a significant effect. While the Board deliberates the preemption issues, it has continued to issue notices of exemption allowing the start-up of short line railroads that intend to operate waste facilities,²⁴⁴ and courts have enjoined municipalities and states from taking action until the Board makes a decision. This is problematic because, as set forth above, the Board does not and cannot regulate air and water discharges from ongoing railroad terminal operations, let alone the gathering of construction and demolition debris and other solid waste from various sites, the nature of incoming waste, or the transport of waste to truck-rail transfer facilities. In sum, the Board theoretically provides an administrative procedure for resolution of whether preemption applies in a particular case, but its failure to act has meant that this procedure is ineffectual.

C. Application of the Proposed Doctrine in the Railroad Waste Cases: the Need for Jurisprudence to Support Political Safeguards of Federalism

Would the proposed presumption have changed the outcome of the railroad waste cases? Courts should have been able to establish that the preemption of state solid waste laws would leave a regulatory gap, simply by investigating the paucity of Board (and EPA) regulations that apply to solid waste handling at railroad waste stations. With regard to the second step, Congress did not speak clearly enough to preempt state regulations that prevent harm from solid

Operation Exemption – in Wilmington and Woburn, MA, STB Finance Dkt. No. 34391 (STB decided May 3, 2005). In New England Transrail a short-line terminal railroad seeks authority to acquire, construct and operate as a rail common carrier 7,500 feet of track for the transportation of commodities. The railroad plans to engage in waste processing activities such as sorting, grinding, crushing, aggregating, segregating and baling solid waste and construction and demolition debris before loading it onto railcars for shipment to the Midwest. The Board has invited comment on whether these activities would normally be associated with transloading and thus are part of rail transportation qualifying for exemption. STB Finance Dkt. No. 34797, STB order dated June 12, 2006. The author has submitted comments on behalf of environmental groups.

²⁴⁴ Hainesport Industrial Railroad, LLC – Acquisition and Operation Exemption – Hainesport Industrial Park Railroad Assoc., Inc., 2005 WL 1169054, STB Finance Dkt. No. 34695 (STB Served May 18, 2005).

waste practices. It makes little difference in this case whether courts subscribe to strict textualism or consider legislative history to illuminate Congressional intent; both the textual and contextual evidence shows that Congress clearly intended the preservation of such state laws.

Textualists should find that the preemption clause itself – “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”²⁴⁵ – contains two important limitations. First, by specific language Congress limited the Board’s preemptive powers to situations where there are other remedies under Part A of Subtitle IV, Title 49, which is the portion of ICCTA that covers rail matters.²⁴⁶ The limited, economically-oriented remedies set out in Part A are the “remedies provided under this part”²⁴⁷ Second, Congress limited ICCTA’s preemption of federal and state laws to those “with respect to regulation of rail transportation.”²⁴⁸ As the Eleventh Circuit has pointed out, this phrase means something different from all general laws that have an affect on rail; it means that laws to be preempted must, at a minimum, be directed to rail regulation.²⁴⁹ These two conditions mean that ICCTA does not preempt state solid waste laws, because (1) the Board cannot order any remedy to address problems from solid waste handling activities at ancillary facilities and (2) solid waste laws are generally applicable to all companies, and do no regulate railroads qua railroads.

Why isn’t the exclusive jurisdiction clause itself a clear statement of Congress’s intent to preempt? The “exclusive” jurisdiction sentence, like the preemption sentence that follows, is explicitly linked to the concept of whether there are applicable Board remedies. At best, the

²⁴⁵ 49 U.S.C. § 10501(b).

²⁴⁶ See *supra*, nn. 40-42.

²⁴⁷ 49 U.S.C. § 10501(b).

²⁴⁸ 49 U.S.C. § 10501(b).

²⁴⁹ *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1338 (11th Cir. 2001).

exclusive jurisdiction sentence creates some ambiguity on the issue of preemption, and ambiguous direction from Congress should not be sufficient to preempt state police powers. In any event, ICCTA's preemption clause should prevent courts from finding a clear statement to preempt state remedies based on the exclusive jurisdiction clause.

Courts that dug deeper into Congressional intent would find even more reasons to conclude that there is no clear statement for preempting state solid waste and other environmental regulations.²⁵⁰ The opposite is true; Congress distinguished between state laws that directly regulate railroad rates and operations and state laws of general applicability that have an incidental effect on railroads (and all other businesses). ICCTA's legislative history therefore clearly resolves any ambiguity in the text of the statute. Congress's distinction between economic and other laws was somewhat lost when the conference committee moved the preemption language, originally in Section 10103 of the House bill, to the section dealing with jurisdiction.²⁵¹ But this is where the proposed presumption would guard against the unintended preemption of state law. Congress cannot be said to have clearly intended a regulatory gap concerning solid waste handled by railroads. Therefore, state solid waste laws are not preempted.

Further contextual clues are provided by the structure of other federal rail statutes, where courts require some corresponding federal action before preempting state law.²⁵² And ICCTA's

²⁵⁰ See *Texas v. United States*, 730 F.2d 339, 347-48 (5th Cir. 1984) (in preemption case under the 1980 Staggers Rail Act, examining legislative history). E.g., *Arkansas Electric*, 461 U.S. at 386-89 (in deregulatory statute, examining Congressional and administrative action, legislative history, and published policy statements).

²⁵¹ H.R. Conf. Rep. 104-422, 1995 U.S.C.C.A.N. 850.

²⁵² The Courts seem to have reserved this question. For example, with regard to another railroad-related act at issue in *Civil City of South Bend v. Conrail*, 880 F. Supp. 595 (N.D. Ind. 1995), the court observed that

Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but the High-Speed Rail

rail preemption clauses is similar to “price, route and service” preemption clauses in other deregulatory statutes and was clearly intended to have the same effect.²⁵³ Under clauses using that construction, the Supreme Court and lower courts have not preempted state safety laws with an entirely different purpose from economic deregulation.²⁵⁴

Development Act discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same as preempting the field; here, Congress has done only the former.

Id. at 600.

²⁵³ *South Dakota R.R. Authority v. Burlington Northern & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 934-935 (S.D. 2003) (discussing *Wolens*, 513 U.S. 219).

²⁵⁴ The Supreme Court has construed a similar preemption clause in ICCTA Part B, the motor carrier portion, which bars states from enacting or enforcing “a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property,”²⁵⁴ but allows states to enforce “safety regulatory authority . . .”*Id.* § (c)(2)(A). The Part B clause calls for the preemption of a broader swath of state laws than the Part A rail preemption clause. Nevertheless, the Supreme Court held that ICCTA Part B does not preempt city licensing and equipment regulations for tow trucks because the goal of the Federal law is economic deregulation, not the preemption of local safety regulations. *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 442 (2002). The Court considered a general canon of construction requiring a “clear and manifest purpose of Congress” to preempt police powers, 536 U.S. at 438-440, as well as conference committee reports and other legislative history demonstrating that the purpose of the motor carrier legislation was economic deregulation. *id.* at 440-441. Given these considerations, the Court held that regulations that were “genuinely responsive to safety concerns” would not be preempted by the ICCTA. *Id.* at 441-42; see also *Galactic Towing v. City of Miami Beach*, 341 F.3d 1249, 1252-53 (11th Cir. 2003) (holding ICCTA does not preempt ordinance requiring local permit, proof of insurance, background investigation, written authorization to tow and local storage facilities); *Cole v. City of Dallas*, 314 F.3d 730, 735 (5th Cir. 2002) (holding that ICCTA does not preempt regulation requiring criminal history); *Ace Auto Body & Towing, Ltd. v. City of N.Y.*, 171 F.3d 765, 779 (2d Cir. 1999) (holding that ICCTA did not preempt laws requiring licensing, display of information, reporting, record keeping, disclosure of criminal history, insurance, posting of bond, and maintaining local storage and repair facilities).

This is consistent with earlier cases construing an airline deregulatory statute also barring state laws relating to “price, route and service,” which the Supreme Court held preempted only laws that are “obviously” related to rates, such as guidelines on fare advertising based on state consumer protection laws, and not generally applicable criminal or other laws that are “too tenuous, remote or peripheral” to the economic intent of the deregulatory statute. *Morales v. Trans World Airlines*, 504 U.S. 374, 390 (1992) (quoting in part *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 100, n. 21 (1983)). See also *American Airlines v. Wolens*, 513 U.S. 219 (1995) (preempting deceptive business practices claims but not breach of contract claims); *CSX v. Transp. v. Easterwood*, 507 U.S. 658 (1993); *McFarland*, 24 *Transp. L. J.* at 159-63 (reviewing

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

Some of the general ICCTA preemption cases would not have reached the same outcomes if courts had inquired into whether Board remedies apply. For example, because the Board does not have licensing authority over sheds and other ancillary facilities, let alone the authority or manpower to issue a remedy to protect sensitive riparian areas, ICCTA should not preempt generally applicable state land use laws that govern riverside activities, and the Second Circuit’s decision in *Green Mountain R.R. Corp. v. Vermont*,²⁵⁵ would be incorrect. On the other hand, the Board does have the power to order a remedy with respect to construction and railroad activities on track by conditioning its approval of a merger, and should preempt at least some state and local activities that would undo the environment analysis of the merger; consequently, the Ninth Circuit reached the correct result in *City of Auburn v. United States*,²⁵⁶ despite the overly broad dicta in the decision. All of the specific railroad waste cases finding preemption of state solid waste laws by ICCTA would have reached different outcomes because Congress has not clearly stated its intent to preempt state solid waste laws.

later lower court decisions holding that certain tort claims were too tenuously related to the purpose of the deregulatory statute to be preempted, but that state compensation, unfair competition, employee training, rate dispute and loss of cargo claims were related to the purposes of the federal statute and, therefore, were preempted).

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

²⁵⁶ 154 F.3d 1025 (9th Cir. 1998).

Conclusion

It would be impossible to demand that Congress anticipate every future problematic or unconstitutional application of its statutes, let alone the myriad and changing state laws that legislation might affect. For that reason, the judicial branch will always have a significant role in interpreting the scope of preemptive statutes and mediating federal-state conflicts.

The railroad waste cases demonstrate that present judicial inquiry may be too reliant on general statutory text that speaks of some displacement of state law. As Congress often fails to provide sufficient information for reviewing courts to determine the scope of any intended preemption, new tools are needed to guard against overly broad preemption, which may lead to the unintentional creation of regulatory gaps. I have argued that the judiciary should refocus on the larger question of whether Congress intended to create a gap itself. Doing so would reinstate important federalism safeguards for democratically-enacted health and safety laws, and therefore the people's inherent sovereign right to self-protection.

Close analysis of the flaws in the railroad waste cases provides a basis to develop a more general recalibration of preemption doctrine. The need to protect the balance between federal and state government, the underlying sovereign interests of the people in self-protection, the ban on naked vetoes of state law, and other Constitutional limitations on Congress's preemption powers all combine to compel a formal interpretive doctrine designed to prevent against the accidental creation of regulatory gaps.

This article would have the courts revamp the presumption against preemption by recognizing that clear statement safeguards should apply whenever the effect of preemption would be to deny the people's sovereign right to self-protection. Congress could replace state environmental, public health, and other police power laws with federal standards, without triggering the presumption, because in those instances there would be no regulatory gap. But

Congress would have to state clearly its intention to preempt state social and environmental laws without enacting a federal counterpart, and would have political incentives to define the contours of deregulation with clarity so that regulated entities cannot open unintended loopholes. This interpretive rule would limit displacement of state law as a default setting, and would protect the public interest in maintaining police power protections.

