WHO'S DRIVING THE TRAIN? RAILROAD REGULATION AND LOCAL CONTROL

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INTRODUCTION

Imagine a corporation coming into a small town and beginning development of a 3,000-car parking lot directly over the town's aquifer. The corporation tells the town that it does not have to comply with the town's permitting, zoning, or environmental regulations. Furthermore, the corporation claims that it is exempt from the federal Clean Water Act and Safe Drinking Water Act. In effect, even though run-off from the car storage area could pollute the town's drinking water source with petrochemicals, the town may not take proactive steps to prevent such pollution. Would you be surprised to learn that the corporation may be correct, as long as it is associated with a railroad? Recent decisions by the Surface Transportation Board (STB), a federal agency charged with regulating the railroad industry, have interpreted federal statutes in just such a broad fashion.

The predicament of the Town of Ayer in northern Massachusetts is a prime example of the problem caused by the STB's interpretation of the federal statute regulating railroads. In particular, it highlights the issue of so-called "ancillary facilities"—construction or maintenance projects that are associated with, but not part of, the railroad itself. When a local automobile shipping company decided to expand an auto unloading facility in town, located directly over the town's aquifer, city council members became alarmed.[1] The town sought to restrict the development and imposed permitting requirements aimed

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1. C. David Gordon, *Ayer Files Court Appeal of Guilford Transportation Ruling: Guilford Transportation Given Permission to Build Proposed Second Unloading Facility*, AYER PUBLIC SPIRIT, April 26, 2002.

at protecting the water supply.[2] In doing so the town inadvertently stepped into a federal preemption case that pitted local zoning, environmental, and safety regulations against the railroad industry.

In October 2000, Guilford Transportation, the owner of the auto facility and adjacent land, and Boston & Maine Railroad brought suit in federal district court to enjoin the town from enforcing the permit restrictions on the new construction.[3] The case was referred to the STB for a declaratory order regarding the rights of the town to require permits for the new facility.[4] The STB determined that because the STB itself did not have regulatory authority over the expansion of the auto facility under the Interstate Commerce Commission Termination Act (ICCTA), it could not require an Environmental Impact Statement for the site. Nevertheless, it also declared that the town's permitting requirements were preempted by the ICCTA.[5]

The Interstate Commerce Commission Termination Act was passed in 1995 to deregulate the rail and motor carrier industries.[6] It amended the Interstate Commerce Act of 1978.[7] The primary purpose of the ICCTA was to ensure the economic viability of the rail and trucking industries by eliminating federal economic regulation.[8] Motivated by increased competition in surface transportation, Congress terminated the 108-year-

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2. Boston & Maine Corp. v. Town of Ayer, STB Finance Docket No. 33971, 2001 WL 458685, at *9–12 (May 1, 2001) [hereinafter *Town of Ayer III*]. Guilford Transportation originally brought suit in federal district court. Upon agreement of both parties, the question regarding preemption was sent to the STB. The STB considered the question in *Boston & Maine Corp. v. Town of Ayer*, STB Finance Docket No. 33971, 2000 WL 1868768, at *1 (Dec. 22, 2000) [hereinafter *Town of Ayer II*], and made a final determination in *Town of Ayer III*, 2001 WL 458685 at *9. The town returned to federal court to protest the outcome at the STB, but was denied relief based upon a statute of limitations problem. Thus the STB decision was accepted as final and binding on the federal court. Boston & Maine Corp. v. Town of Ayer, 191 F. Supp. 2d 257 (D. Mass. 2002) [hereinafter *Town of Ayer I*]. Hereinafter, all references to the entire suite of cases will be called *Town of Ayer*. Footnotes will indicate which specific document contains the cited material.

3. *Town of Ayer I*, 191 F. Supp. 2d at 257.

4. *Town of Ayer II*, 2001 WL 1868768 at *1.

5. *Town of Ayer III*, 2001 WL 458685 at *1, 4.

6. ICC Termination Act of 1995, Pub. L. No. 104–88, 109 Stat. 803 (codified as amended in scattered sections of 49 U.S.C. (1997)).

7. Interstate Commerce Act of 1978, Pub. L. No. 95-473, 92 Stat. 1371 (codified as amended in scattered sections of 49 U.S.C. (1978)). The 1978 Act amended earlier versions of the Interstate Commerce Act first passed in 1887. *See id.*

8. H.R. REP. NO. 104-311, at 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 793–94.

old Interstate Commerce Commission, substantially eliminated most rate and other economic regulations, and set up the Surface Transportation Board to have licensing and environmental review authority over most railroad operations in all states.[9] The Act also provided that its remedies with respect to regulation of rail transportation are "exclusive and preempt the remedies provided under Federal or State law."[10]

The STB has interpreted this language to preempt state and local zoning and permitting requirements, even for facilities that are considered "ancillary" to railroad operations and thus *not* under STB licensing and regulatory authority. Ancillary refers to any operation or facility not specifically identified in the Act as within STB authority and regulatory control. For example, the ICCTA grants jurisdiction and control to the STB for rates, railroad classifications, railroad operations, line extensions or cancellations, and "transportation by rail carrier."[11] However, the STB can only require licenses and environmental review for line extensions, new lines, and line acquisitions.[12] The STB cannot exercise environmental review over things it does not license. Despite this shortcoming, the STB claims that local control efforts are preempted. Examples of ancillary facilities and activities include a storage facility for autos, major construction to upgrade existing lines, bulk cement transfer stations, timber distribution yards, and more. The implication of this broad interpretation of the ICCTA preemption provision has profound effects on efforts by states and local municipalities to protect the local environment.

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9. *Id.* at 82–85, 95–96, *reprinted in* 1995 U.S.C.C.A.N. 793, 793–97, 807–08; H.R. CONF. REP. NO. 104–422, at 165 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 850.

10. 49 U.S.C. § 10501(b) (2000).

> The jurisdiction of the Board over . . . 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 . . . 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.

Id.

11. 49 U.S.C. § 10501(a)(1) (2000).

12. 49 U.S.C. § 10901(a) (2000).

The Circuits and the federal agency are split as to how broadly to interpret ICCTA's preemption of local authority. Under the STB's, the Ninth Circuit's, and other courts'[13] interpretations of the ICCTA preemption provisions, a regulatory void exists with regards to ancillary facilities and activities. The Eleventh Circuit Court of Appeals views the preemption language of the ICCTA in a more restrictive light. The court read the words "regulation of rail transportation," narrowly, and found that the ICCTA did not preempt local zoning laws when applied to a lessee of railroad property.[14] This narrow interpretation of the ICCTA protects against the creation of regulatory voids and preserves state and local government interests in protecting local communities' traditional exercise of police powers. This comment will examine the broad and narrow views of the ICCTA preemption provisions and show that a more restrictive reading of the preemption language results in fewer regulatory gaps and better reflects the intent of Congress to free the railroad industry from economic burdens alone.[15]

Part I discusses preemption analysis generally, and the rules used by the Supreme Court to determine both the existence and scope of federal-state preemption. Part II discusses the history of the ICCTA and the intent of Congress in passing the act. Part III analyzes the broad view of ICCTA preemption, including STB decisions, court cases, the resulting regulatory gap, and potential alternatives available under the broad view of preemption. Part IV analyzes the narrow view of preemption, based on court cases. Part V explores two possible remedies for the regulatory gap—an expansion of STB jurisdiction or a narrow reading of the preemption language.

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13. City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998); CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (finding broad preemption even in the absence of a federal remedy); Norfolk S. Ry. v. City of Austell, 1997 WL 1113647 (N.D. Ga. 1997) (town zoning ordinance and permitting requirements for an intermodal transfer facility preempted by ICCTA); Columbiana County Port Auth. v. Boardman Township Park Dist., 154 F. Supp 2d 1165 (N.D. Ohio 2001) (ICCTA preempts all state regulation of rail transportation).

14. Fla. E. Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001).

15. H.R. REP. NO. 104-311, at 82, *reprinted in* 1995 U.S.C.C.A.N. at 793, 793–794.

I. PREEMPTION ANALYSIS GENERALLY

Federal law preempts state law based on the Supremacy Clause of the Constitution, which states that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[16] A finding of preemption can be heavily fact-dependent and swing on issues of congressional intent, always a tricky judicial inquiry. This part will explain the different types of preemption and the analysis the courts use to determine if preemption has occurred.

Generally, there are three broad categories of preemption.[17] First, express preemption occurs when Congress states explicitly that a federal law preempts state laws.[18] For example, the Employee Retirement Income Security Act (ERISA) states that the act preempts "any and all State laws" relating to employee benefit plans.[19] The other two types of preemption are implied, not express. Field preemption occurs when state law intrudes in an area that Congress intended the federal government to control exclusively.[20] A finding of field preemption is often heavily dependent on the subject matter of the law. For example, nuclear power developed almost entirely from federal programs. As a result, federal law occupies the entire field of nuclear safety, except for limited powers expressly granted to the states.[21] Courts are more hesitant to find field preemption in areas that have traditionally been governed by state law.[22] Finally, conflict preemption exists when federal and state or local law directly conflict. This occurs when it is physically impossible for a party to comply with both laws, or when the state or local law stands as an obstacle to accomplishing the goal and purpose of the federal law.[23] Within the regime of conflict preemption, courts consider not only state laws that directly interfere with the goals of a federal statute,

16. U.S. CONST. art. VI, cl. 2.
17. English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990).
18. *Id.* at 78.
19. 29 U.S.C. § 1144(a) (2000).
20. *English*, 496 U.S. at 79.
21. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983).
22. *Id.*
23. Maryland v. Louisiana, 451 U.S. 725, 746–47 (1981).

but also laws that interfere with the methods used by the federal law to reach its goal.[24]

While the basic rules of preemption seem straightforward, in practice the preemption doctrine has spawned numerous lawsuits and a plethora of Supreme Court interpretations.[25] The Supreme Court has emphasized the importance of state sovereignty and a cautious approach when the preemption involves areas of "historic police powers of the states."[26] Generally, there must be a very clear expression by Congress of its intent to preempt historic state powers, such as the regulation of health and safety.[27] In comparison, courts find preemption more readily in areas that have been traditionally federal, like navigation in U.S. waters.[28] Even given these classifications (traditionally state or traditionally federal), when there are overlapping considerations it remains difficult to determine whether a presumption in favor of the state or federal law should prevail. For example, in *English v. General Electric Co.*,

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24. Gade v. Nat'l Solid Waste Mgmt. Ass'n., 505 U.S. 88, 102–04 (1992). In *Gade*, the Supreme Court analyzed the Occupational Safety and Health Act (OSHA) and determined that Congress intended to avoid subjecting workers to duplicative regulation. *Id.* Thus, state licensing requirements for hazardous materials workers were preempted because the state program interfered with the operation of the federal law. *Id.* at 103–04.

25. *E.g.* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (preemption of state regulations regarding warehouse storage); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) (ERISA preempted NY human rights law); *English*, 496 U.S. at 72 (Energy Reorganization Act did not preempt state law emotional distress claim); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (state law claims against tobacco company not completely preempted); *Gade*, 505 U.S. 88 (federal law preempts state law regarding hazardous waste handling); Medtronic, Inc. v Lohr, 518 U.S. 470 (1996) (defective design claim not preempted).

26. *Medtronic*, 518 U.S. at 485; *Rice*, 331 U.S. at 230. *Rice* is one of the earliest preemption cases in which the Supreme Court laid out a description of field and conflict preemption. 331 U.S. at 230. The Court appeared to give deference to state control over warehouse storage of grain as a traditional operation of state power and also acknowledged that the state regulatory system could operate simultaneously with the federal system. *Id.* at 231–32. However, the Court went on to invalidate the state's program based on the legislative history of the federal act, which showed Congress's intent to supersede all state programs. *Id.* at 234. Here, as in later cases, the intent of Congress was ultimately the deciding factor. *See Medtronic*, 518 U.S. at 485 (requiring a "clear and manifest" intent of Congress to preempt state law) (quoting *Rice*, 331 U.S. at 230).

27. *Medtronic*, 518 U.S. at 485.

28. United States v. Locke, 529 U.S. 89, 99 (2000) ("The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic.").

although the broad subject matter was nuclear power plants, an area almost entirely within the federal realm, the Court held that a state tort claim was not preempted because state law traditionally controls tort cases.[29]

Ultimately, congressional intent is the deciding factor in a question of preemption.[30] The statutory language itself, the structure of the statute, and the legislative history may indicate such intent.[31] It is important to note that it is the purpose of *Congress* in enacting the *federal law* that controls, not the purpose of the state in enacting its potentially preempted law. The courts will look beyond the express intent of a state law to see its actual effects when deciding a preemption question.[32] In examining statutory language, the presumptions for or against preemption will also come into play. For example, if legislative language expressly preempts state law, the Supreme Court will construe its scope narrowly to limit the preemption of traditional state police powers.[33]

To complicate an already difficult matter, Commerce Clause implications can also play a role in determining the validity of state versus federal law. Only activities properly within the scope of the Commerce Clause can be legislated by Congress. Although modern congressional power to regulate under the Commerce Clause is exceedingly broad,[34] the Supreme Court has recently expressed some limitations.[35] In

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29. *English*, 496 U.S. at 87. The Court observed that existence of a federal regulatory scheme alone does not require preemption of state remedies. Every area that is subject to national legislation is by definition federal but it does not follow that all state law is then pre-empted. *Id.*

30. *Medtronic*, 518 U.S. at 485. "'[T]he purpose of Congress is the ultimate touchstone in' every preemption case." (quoting Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96, 103 (1963)).

31. *Cipollone*, 505 U.S. at 516–17 (considering the statutory language and the statute as a whole); *Shaw*, 463 U.S. at 99 (1983) (discussing floor statements during bill's passage); *Gade*, 505 U.S. at 102 (reviewing changes in the statute during its enactment which indicate the intent of Congress).

32. *Gade*, 505 U.S. at 105.

33. *Cipollene*, 505 U.S. at 517–18.

34. United States v. Lopez, 514 U.S. 549, 552–557 (1995) (discussing the evolution of the Commerce Clause from earlier cases such as *Gibbons v. Ogden*, to later cases in which Congress's power under the Commerce Clause was greatly expanded).

35. *Lopez*, 514 U.S. at 558 (invalidating a congressional act prohibiting the possession of guns near schools); United States v. Morrison, 529 US 598, 609 (2000) (invalidating the civil remedy provision of the Violence Against Women Act).

United States v. Morrison, the Supreme Court clarified that Congress has authority only over activities in three main categories: (1) regulation of the use of the channels of interstate commerce, (2) regulation of the instrumentalities of interstate commerce, and (3) regulation of activities that have a substantial relation to interstate commerce.[36] Preemption cannot occur if Congress did not have the authority to regulate the activity in the first place.[37]

Many preemption questions arise when a federal law affects local land-use planning because such planning traditionally has been considered a state function. For example, local attempts to restrict or prevent storage and disposal of nuclear or hazardous waste have been preempted by federal environmental and energy acts.[38] The ICCTA exemplifies the problems that arise when a law intended to affect one industry also has consequences for local governments. The federal government has regulated railroads since the 1880s.[39] Despite the prevalence of federal law in the field of railroad operations, great debate continues over the extent of federal preemption of traditional state activities such as zoning and land-use planning in areas owned or associated with the railroads.

II. HISTORY OF RAILROAD REGULATION AND THE ICCTA

Although the railroad industry developed differently east of the Mississippi than it did in the West, railroad development was always heavily dependent on federal and state subsidies. In the 1820s and 1830s, railroad companies in the East were

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36. *Morrison*, 529 U.S. at 608–09 (quoting *Lopez*, 514 U.S. at 558–59).

37. A Commerce Clause analysis must be distinguished from a *dormant* Commerce Clause problem. When analyzing the validity of a federal law under the Commerce Clause, courts look to whether Congress had the original authority to regulate in an area. By contrast, the dormant Commerce Clause arises when a *state* impermissibly attempts to regulate interstate commerce or impermissibly imposes a significant burden on interstate commerce. *See, e.g.* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). The power to regulate interstate commerce rests only in the federal government, not the states. *See* Gibbons v. Ogden, 9 Wheat. 1 (1824).

38. Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985) (preemption of rule against nuclear waste transport based on the Atomic Energy Act claiming the field); Ensco, Inc. v. Dumas, 807 F.2d 743 (8th Cir. 1986) (preemption of ordinance against hazardous waste storage based on the Resource Conservation and Recovery Act).

39. H.R. REP. NO. 104-311, at 90, *reprinted in* 1995 U.S.C.C.A.N. 793, 802.

largely short-line carriers promoted by states and local governments for intrastate commercial interests.[40] State governments chartered in-state railroad companies and in some cases actively resisted the expansion of railroad lines from other "foreign" states crossing state lines.[41] However, even before the Civil War, state impediments to access fell in the face of economic incentives for an interconnected line system.[42] In the West, railroad companies began with long-haul lines crossing several states, rather than short, intrastate lines. Western railroad expansion began in 1860 with the construction of the first transcontinental railroad, actively promoted by the federal government.[43] By 1887, railroads were the primary, and in some areas, only, method of economical interstate commerce.[44] Shippers had to use railroads and were at the mercy of the rates set by the line that serviced their locality.

Railroad financing both in the East and West relied on large state and federal government subsidies. Generally, large grants of federal or state land were given to railroad companies, which then sold the land to generate funds for rail line construction.[45] Railroads also received eminent domain powers to facilitate land acquisition for expansion.[46] In the East, the economic benefits accruing to the retained lands compensated for giving away the land for free.[47] In the West, transcontinental rail lines were made possible by massive land grants from the federal government.[48] However, westerners were much less welcoming because they wanted the land themselves for homesteading.[49]

Public attitudes towards the railroads soured by the late nineteenth century due to cutthroat practices among eastern

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40. James W. Ely, Jr., *"The Railroad System has Burst through State Limits": Railroads and Interstate Commerce, 1830–1920*, 55 ARK. L. REV. 933, 934 (2003).

41. *Id.* at 934–35.

42. *Id.* at 935.

43. *Id.* at 936.

44. *Id.* at 965.

45. Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 366 (2000).

46. *Id.* at 368.

47. *Id.* at 366.

48. *Id.* at 372.

49. *Id.* at 373.

lines, as different lines battled each other.[50] Rail lines regularly engaged in rate discrimination, price fixing, and rebating.[51] When lines that were financed by state or local promoters failed, disappointed expectations also created disenchantment. In the West, the near-monopoly power of rail lines generated hostility. As a result there was an overall push for federal regulation of railroads in an attempt to control rates and stabilize the industry.[52] The Interstate Commerce Commission was created in 1887 to regulate rail rates and prohibit discriminatory rate practices. It federalized the system and created a national railroad network.

A. A Brief History of Railroad Deregulation

The ICCTA was the culmination of a long series of efforts to deregulate the rail industry. The Interstate Commerce Commission (ICC) was established in 1887 to counteract widespread concerns regarding railroad rate setting and monopolistic behavior.[53] The ICC acted to regulate rates and to prevent the exit of rail service from areas that would have been crippled by such a withdrawal.[54] However, regulation eventually prevented railroads from operating at maximum efficiency. Since the Great Depression, the advent of other forms of transportation services like trucking left the railroad industry in the grip of a regulatory structure that threatened its economic survival.[55]

Deregulation began in 1980 with the Staggers Rail Act, which deregulated most railroad rates and made it easier for railroads to abandon service lines and operations.[56] Some protections were left in place, administered by the ICC, to ensure service for remote areas with limited access to other transportation services. In the 1980s, the Reagan administration attempted to terminate the ICC and transfer its remaining func-

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50. *Id.*

51. South Dakota v. Burlington N. & Santa Fe Ry. Co., 280 F. Supp. 2d 919, 929 (D. S.D. 2003).

52. Wright & Hester, *supra* note 45, at 373.

53. H.R. REP. NO. 104-311, at 90, *reprinted in* 1995 U.S.C.C.A.N. 793, 802.

54. *Id.*, *reprinted in* 1995 U.S.C.C.A.N. 793, 802.

55. *Id.*, *reprinted in* 1995 U.S.C.C.A.N. 793, 802; *see also* Wright & Hester, *supra* note 45, at 374–75.

56. *Id.*, *reprinted in* 1995 U.S.C.C.A.N. 793, 802. The Staggers Rail Act is Pub. L. No. 96-448, 94 Stat. 1895 (1980).

tions to other parts of the government, but was unable to get Congressional approval.[57] Finally the Clinton administration submitted legislation, which evolved into the ICCTA. The ICCTA passed in 1995 and went into effect the following year.[58] The STB replaced the now-defunct ICC.

1. The Role of the STB

The President appoints the members of the STB and the Senate approves them.[59] The ICCTA specifically describes the parameters of STB jurisdiction.[60] The STB has authority to adjudicate disputes and issue regulations for interstate surface transportation, and in general the STB acts as the administrative judge over a wide variety of railroad activities.[61] The Act requires railroads to obtain permits from the STB prior to taking certain actions; however, the STB has licensing authority only over a limited subset of railroad activities.[62] Railroads must obtain STB licenses only for new rail line construction and operation. Remedies in the act include the ability of the Board to hear complaints regarding rates and prescribe the maximum rate,[63] grant approval to exemptions from the antitrust laws,[64] authorize or deny certificates of construction for railroad lines,[65] require protection of employees as a condition of rail abandonment,[66] and other administrative and regulatory types of relief.[67]

STB administrative remedies augment but do not eliminate the role of federal and state courts. Parties can bring suits for violations of the ICCTA itself in federal court or before

57. H.R. REP. NO. 104-311, at 82, *reprinted in* 1995 U.S.C.C.A.N. 793, 794.
58. *Id.*, *reprinted in* 1995 U.S.C.C.A.N. 793, 794.
59. STB Mission Statement, *at* http://www.stb.dot.gov/publications/whoswho.htm.
60. 49 U.S.C. § 10501(a)(1) (1997). "[T]he Board has jurisdiction over transportation by rail carrier that is (A) only by railroad; or (B) by railroad and water . . . ." Earlier in the ICCTA "railroad" is defined as including, among other things, intermodal equipment, roads used by the carrier, and facilities and depots used or necessary for transportation. 49 § 10102(6).
61. *Id.*
62. 49 U.S.C. § 10901 (1997).
63. 49 § 10704(a)(1).
64. 49 § 10706(a)(2)(A).
65. 49 § 10901(a).
66. 49 § 10903(b)(2).
67. *See* 49 U.S.C. § 10901(a) (1997).

the STB.[68] If a complaint is filed with the STB itself, the Board's decisions are binding on the parties. If brought in federal court, that court can stay the claim and refer the issue to the STB for a determination.[69] Parties may also bring civil actions in state courts on state law issues even if railroad corporations are parties. For example, in *Town of Ayer*, the town sought to enjoin construction of the auto facility until the railroad met permit conditions. Although this action implicated the ICCTA, it did not involve a violation of the ICCTA itself. State courts can also refer issues to the STB or parties can request such a referral.[70] A federal or state court referring an issue to the STB retains exclusive jurisdiction to enforce or set aside any determinations by the STB.[71] However, a party opposing the STB determination must bring an action in the referring court within ninety days or the determination becomes binding.[72] Even if an STB determination is not binding, it nonetheless strongly influences courts, as the STB has considerable expertise with regards to the ICCTA and the railroad industry.

2. NEPA Review Under the STB

Construction of new rail lines can have significant environmental impacts from both the construction itself and from disturbance of ecologically important areas such as wetlands, that a line may cross. For this reason, the STB's granting of a license for new rail line construction or operation is considered a major "federal action" that triggers review under the National Environmental Policy Act (NEPA).[73] NEPA is a federal

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68. Pejepscot Industr. Park, Inc. v. Maine Cent. Ry. Co., 215 F.3d 195, 204–05 (1st Cir. 2000) (finding concurrent jurisdiction for failure to provide service in violation of the ICCTA).

69. *Id.* at 205–06 (referring the issue to the STB under the doctrine of primary jurisdiction).

70. Boston & Maine Corp. v. Town of Ayer, 191 F.Supp.2d 257, 259 (D. Mass. 2002) (parties suggested referral to the STB).

71. 28 U.S.C. § 1336(b) (1995) states that "when a district court . . . refers a question or issue to the STB for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the STB arising out of such referral."

72. 28 U.S.C. § 1336(c) (1995).

73. 42 U.S.C. § 4332(2)(C) (2003). The National Environmental Policy Act requires an environmental review of major federal actions "significantly affecting

statute that requires environmental impact statements (EIS) or environmental assessments (EA) whenever there is a major federal action that impacts the environment.[74] Railroad activities outside the STB's licensing jurisdiction are not considered major federal actions, so are not subject to NEPA and do not require an environmental review. This determination is based on the legal classification of the activities, not on the size or environmental impact of such projects, which can be significant. In various opinions the STB has determined that it is able to demand NEPA compliance only for projects and facilities that require a federal license, such as line extensions, new lines, and acquisition of lines by non-rail carriers.[75] Those projects outside STB licensing jurisdiction are considered "ancillary" to railroad operations. They can include transfer facilities, weigh stations, and even line upgrades involving substantial construction.[76] The STB believes that such ancillary facilities, not within its licensing jurisdiction, are nevertheless still exempt from state and local regulatory control.

3. Congressional Intent in Railroad Deregulation (ICCTA)

Congressional intent provides a key to understanding the role of the STB and whether the ICCTA preempts state law. Congress wanted to deregulate the railroad industry to make it more economically competitive in the modern age.[77] The goal behind all deregulation efforts was to eliminate *economic* impediments to the rail industry. This is evident in the policy provisions of the ICCTA, which focus on competition, rate structure, and efficiency in creating a streamlined federal regu-

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the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2003). If the environmental impacts are expected to be slight, a simple Environmental Assessment (EA) may be conducted. 40 C.F.R. § 1508.9(a)(1) (2003). If the EA results in a finding of limited environmental impact, the process stops there. If impacts are likely large, a full-scale Environmental Impact Statement must be done. *Id.*

74. *Id.*

75. 49 U.S.C. § 10901(a) (1995).

76. Borough of Riverdale v. New York Susquehanna & W. Ry. Corp., STB Finance Docket No. 33466 (Sept. 10, 1999), 1999 WL 715272 at *4 (petition for declaratory order) [hereinafter *Borough of Riverdale I*]. *See also Town of Ayer III*, 2001 WL 458685 at *4.

77. H.R. REP. NO. 104-311, at 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 793–94.

latory structure.[78] The House Conference Report language on the preemption provisions clarifies that state and federal law are not generally preempted.[79] The ICCTA preempts only those regulations that "collide with the scheme of economic regulation . . . of rail transportation."[80] The Report states that the changes imposed by the ICCTA will result in the "complete pre-emption of State *economic* regulation of railroads."[81] Although the ICCTA eliminated previous language that specifically reserved residual powers to the states, the Report repeatedly inserted the modifier "economic" into all mentions of the preemption of state authority.[82]

Congressional efforts to provide an economic boost to the railroad industry were not equivalent to a free pass for railroads from all other types of regulation. It is true that any regulation can have economic consequences for an industry. It is a radical extrapolation, however, to infer from congressional desire to protect the railroads from state operational and rate regulations that Congress intended to insulate the industry from all local efforts at land-use planning and environmental protection. The broad view of the ICCTA preemption language makes this leap with unsettling consequences for local communities.

III. BROAD VIEW OF ICCTA PREEMPTION

The STB and several courts have taken the position that the express language of the ICCTA preempts almost all regulatory efforts by state and local governments, even where states

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78. The ICCTA states that it is the policy

> (1) to allow . . . competition and the demand for services to establish reasonable rates . . .; (2) to minimize the need for Federal regulatory control over the rail transportation system . . .; (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes; (9) to encourage honest and efficient management of railroads . . . .

Other policy sections refer to health and safety and labor standards. Only one policy provision, number seven, could implicate concerns about local regulations. It states "[it is the policy] . . . (7) to reduce regulatory barriers to entry into and exit from the industry." 49 U.S.C. § 10101 (1997).

79. H.R. CONF. REP. NO. 104-422, at 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. at 852.

80. *Id.*

81. *Id.* at 95, *reprinted in* 1995 U.S.C.C.A.N. at 807 (emphasis added).

82. *Id.* at 95–96, *reprinted in* 1995 U.S.C.C.A.N. at 807–08.

are exercising traditional police powers of zoning and health protection. In addition, the broad view holds that ancillary facilities, which include anything not covered by the STB's licensing requirements for line extensions, new lines, or line acquisitions, are exempt from state and local control, despite the fact that they are not within the STB's regulatory authority.[83] The STB contends that it does not have jurisdiction to regulate such facilities. As a result, ancillary facilities potentially remain completely unregulated at either the federal or state level. To fully develop the issues surrounding the broad view of preemption, section A of this part will first analyze current STB decisions on preemption. Next, section B will discuss court cases dealing with this issue, and section C will explain the problems associated with the broad view of preemption, in particular the creation of regulatory gaps. Finally, section D will address other avenues suggested by the STB to allow local government input on railroad activities.

A. Surface Transportation Board Decisions

The STB itself has the broadest view of preemption, in its determination that industries only tangentially associated with a railroad are not subject to state or local regulations. This view can have a great impact on the outcome of cases, even in federal court, as the determinations of the STB, if not always binding, can strongly influence the courts.[84] For example, in *Town of Ayer*, the STB found that the ICCTA preempted the town's permit process, nuisance ordinance, and the requirement for Conservation Commission approval for an automobile storage facility.[85] The storage facility would be located directly above the town's aquifer.[86] The town sought permit require-

83. Ancillary facilities, such as the automobile parking and storage facility mentioned in the Introduction, *supra*, are outside STB licensing and regulatory control. Thus, the STB cannot require an Environmental Impact Statement or other environmental reviews before construction, nor must the company seek STB approval prior to construction. Such facilities can be designed and constructed entirely without federal or local permitting. *See infra* Part II.A and *infra* Part III.C.

84. *See supra* Part II.A.1.

85. *Town of Ayer III*, 2001 WL 458685 at *1. This determination eventually became binding on the town, because the town failed to file a new lawsuit opposing the determination within the 90 days required by the ICCTA. *See* Boston & Maine Corp. v. Town of Ayer, 191 F. Supp. 2d 257, 261 (D. Mass. 2002). For a complete description of the facts, *see supra*, Introduction.

86. *Town of Ayer III* at *2.

ments based on the need to protect its water supply under the Safe Drinking Water Act (SDWA) and the Clean Water Act (CWA).[87]

Because it was not a line extension or a new railroad line, the automobile facility in question was considered ancillary to the railroad. Thus, according to the STB, it was outside of its regulatory authority.[88] Therefore, the STB could not require a NEPA review of the facility nor did it have the authority to require a certificate or license for the expansion.[89] Despite these jurisdictional shortcomings, the STB found that the ICCTA nevertheless preempted local laws, leaving the local government powerless to regulate the parking facility itself.

The STB based its extraordinarily broad view of preemption on the language of the ICCTA and its concerns about undue interference by local entities over railroad operations.[90] The STB used agency and court interpretations of the statutory preemption language to craft its broad vision of preemption.[91] It seemed to find that because any local regulation can have an economic impact, all such regulations were per se invalid.[92]

The STB views this broad preemption regime as necessary to prevent state and local regulatory actions from interfering with railroad operations and "unduly interfer[ing] with interstate commerce."[93] It fears that local permitting or zoning requirements would give local entities the ability to prevent construction of new facilities or stop railroad operations, and thereby unreasonably burden interstate commerce.[94] Without much explanation, the STB in this case appeared to rely on a dormant Commerce Clause rationale rather than the express language or legislative history of the ICCTA itself. No effort was made to determine if local environmental and zoning laws

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87. 42 U.S.C. § 300(f) (2003) (SDWA); 33 U.S.C. § 1311 (2001) (CWA); *Town of Ayer III*, 2001 WL at 458685 *3.

88. *Town of Ayer III*, 2001 WL 458685 at *4.

89. *Id.* at *5.

90. *Id.* at *4–5. The STB points to 49 U.S.C. § 10501(b) (1997) and the language stating that the "remedies provided . . . are exclusive and preempt the remedies provided under Federal or State law." *Id.* at *4. *See also Borough of Riverdale I*, 1999 WL 715272 at *4 (petition for declaratory order).

91. *Town of Ayer III*, 2001 WL 458685 at *5.

92. *See generally Borough of Riverdale I*, 1999 WL 715272 at *5–7.

93. *Town of Ayer III*, 2001 WL 458685 at *5.

94. *Id.*; Cities of Auburn & Kent v. Burlington N. R.R. Co. Stampede Pass Line, STB Finance Docket No. 33200 (July 1, 1997), 1997 STB Lexis 143 at *5–6 [hereinafter *Stampede Pass*].

did in fact pose a threat to interstate commerce. The STB considered State and local permitting requirements a threat "by their nature," without any review of actual impacts.[95]

The STB also applied a per se rule that the ICCTA preempts zoning and permitting requirements whenever these requirements are applied to activities or facilities that are an "integral part of the interstate operations" of the railroad.[96] Although the "integral part of the operations" test seems flexible, its vague definition opens it to overbroad use. Just as any regulation can have economic consequences, so too can any facility become "integral" to a railroad operation. The STB did not give guidance on what criteria was used to define "integral." In *Town of Ayer*, the STB found that an auto storage facility was integral to railroad operations.[97] Yet an auto storage facility is not required to run a railroad. It is unclear whether ownership by a railroad company alone suffices to confer "integral" status on such operation.[98] The STB has stated that manufacturing or production operations, if used only for manufacturing (i.e. a corn processing plant), are not integrally related to transportation services.[99] However, even though the auto facility was found integral to railroad operations, legally it still was an ancillary facility and thus not subject to STB regulatory control.

Of even greater concern, the STB appears to hold that federal environmental laws may also be preempted by the ICCTA. While the Board dismissed the Town of Ayer's claim of Safe Drinking Water Act (SDWA) enforcement as mere pretext, it went on to say that application of a federal environmental statute can unreasonably burden interstate commerce and would be invalid if it did.[100] By contrast, in earlier opinions, the STB stated that the railroads must comply with require-

95. *Town of Ayer III*, 2001 WL 458685 at *5.
96. *Id.*
97. *Id.*
98. *See generally Town of Ayer III*, 2001 WL 458685. Guilford Transportation Industries owns the auto parking facility at issue in the case. *Id.* Guilford Transportation Industries is the parent company controlling a large amount of freight rail service in New England. The company also owns Pan American Airways. Guilford Transportation Industries, Inc., Hoover's Online, *at* http://www.hoovers.com.
99. *Borough of Riverdale I*, 1999 WL 715272 at *7.
100. *Town of Ayer III*, 2001 WL 458685 at *6.

ments imposed by other federal environmental statutes.[101] This earlier viewpoint has not been fully accepted by the railroad industry.[102] For example, Guilford Transportation, the operator of the automobile facility in *Town of Ayer*, contends that even if the SDWA and the Clean Water Act apply to its activities, the ICCTA preempts this particular application of those acts.[103]

In *Borough of Riverdale I*, another important case frequently cited to support preemption, the STB stated that Riverdale's zoning ordinance was preempted by the ICCTA because the zoning could interfere with interstate commerce.[104] The railroad sought to construct a truck terminal and corn processing plant in a residential zone. The Riverdale zoning restriction was in place prior to the proposed construction.[105] In addition to the land-use violations, Riverdale was concerned that the new facilities and activities would pose environmental risks from spills and risk of public injury from the proximity of large vehicles to high-tension lines.[106] Riverdale sought a declaratory order from the STB regarding the preemption issue and also filed a civil action for injunctive relief in New Jersey state court.[107]

The state court and the STB both found that the ICCTA preempted the zoning regulations, but the state court upheld the health and safety regulations.[108] In contrast, the STB determined that the ICCTA preempted any building code requirements that required pre-approval prior to construction because such requirements would cause "inherent delay and interference with interstate commerce."[109] Similarly the STB stated that the ICCTA preempts any land-use restrictions (i.e. zoning regulations) that interfere with interstate commerce.[110]

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101. *Stampede Pass*, 1997 STB Lexis 143 at *15; *Borough of Riverdale I*, 1999 WL 715272 at *5 ("Congress did not intend to preempt federal environmental statutes. . . .").

102. *Town of Ayer III*, 2001 WL 458685 at *3.

103. *Id.*

104. *Borough of Riverdale I*, 1999 WL 715272 at *5–6.

105. *Id.* at *2.

106. *Id.*

107. *Id.* at *1 (referring to Borough of Riverdale v. NYSW, No. MRS-L-2297-96, Superior Court of NJ (Morris County, 1996)).

108. *Id.* at *2, 5.

109. *Id.* at *6.

110. *Borough of Riverdale I*, 1999 WL 715272 at *6.

The STB believed that Congress sought to avoid such interference by passing the ICCTA.[111]

The STB went even further in the *Riverdale* case, stating that the ICCTA preempts local environmental and public health and safety laws to the extent that such laws "unreasonably burden interstate commerce."[112] Unlike the test in *Town of Ayer*, where the STB was concerned with whether the *facility* was integrally part of the railroad, this test looked to whether the town's *regulations* would impact interstate commerce generally, when applied to any part of the railroad. In a nod to local government concerns, the STB said that local government could apply non-discriminatory building codes to railroad-related construction.[113] Compliance with electrical and building codes could be required, provided the same codes applied to all other town construction. However, the STB specifically prohibited any permits that required approval *before* the railroad began construction.[114] This limited the town's remedy to post-construction attempts to ensure compliance.

There are several problems with the STB's approach to preemption. First, in *Town of Ayer*, the STB implied that federal environmental laws may unreasonably burden interstate commerce.[115] This suggests that the STB is applying a dormant Commerce Clause analysis to the action of a *federal* law. Unlike the Commerce Clause analysis itself, which examines whether Congress has constitutional authority to regulate in an area, a dormant Commerce Clause analysis looks to whether a state has impermissibly attempted to regulate interstate commerce, a power reserved to the federal government alone.[116] As the dormant Commerce Clause applies to state

111. *Id.* at *4
112. *Id.* at *6
113. *Id.*
114. *Id.* These types of permits are known as "pre-clearance" permits. *Id.*
115. *Town of Ayer III*, 2001 WL 458685 at *6.
116. U.S. CONST. art. I, § 8, cl. 3 states that Congress has authority over "[c]ommerce among the several States." The Commerce Clause has been interpreted to contain a "dormant" function, which prohibits state discrimination against interstate commerce. Oregon Waste Sys. v. Dep't of Env't Quality, 511 U.S. 93, 98 (1994). Such discrimination can occur either by directly favoring in-state commerce over out-of-state, or by unreasonably burdening interstate commerce. *Id.* at 99. The STB seems to be using the latter concept, although it never clarifies this idea directly. *See supra* note 37 and accompanying text.

law, not federal, it is inappropriate to examine whether a *federal* law burdens interstate commerce.[117]

In *Borough of Riverdale*, the STB also appeared to apply a dormant Commerce Clause analysis to preempt local environmental and public health and safety laws.[118] This would be an acceptable application of the dormant Commerce Clause; however, because the STB did not fully clarify the degree of burden on interstate commerce imposed by Riverdale. A valid analysis must explain the nature and magnitude of the burden. Instead, the STB implied a broad protection for the railroad, such that any local or state regulation that would prohibit construction of a facility is preempted.[119]

In addition, both of these STB cases are inconsistent with the legislative history of the ICCTA and leave many railroad activities unsupervised. The legislative record shows that Congress only wanted to avoid state and local economic regulation of the railroad industry, not to release the industry from all regulatory control.[120] The STB's overbroad interpretation of the preemption provision virtually frees the railroads of regulatory control at the state level. The STB's interpretation leaves little ability for local governments to protect their citizens, enforce their building codes, or ensure proper zoning. The sole tool available to concerned localities is ex post facto attempts to compel compliance with town ordinances, but only in ways that do not cause delays to the railroad. In general, the overall view of the STB regarding state and local regulatory control results in a bare minimum of both control and oversight of major railroad construction projects that, if done by any other industry, would require full compliance with local rules.

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117. Federal laws are allowed to burden interstate commerce. Indeed, that is precisely the authority granted to the federal government in the Commerce Clause. Congress can impose laws that restrict or even eliminate certain types of interstate commerce, provided that the subject in question is indeed "commerce" transacted interstate. *See* Gibbons v. Ogden, 9 Wheat. 1 (1824).

118. *Borough of Riverdale I*, 1999 WL 715272 at *6 (preempting laws to the extent that they "unreasonably burden" interstate commerce).

119. *Id.*

120. *See supra* Part II.

B. Court Cases

Several courts have also adopted the broad view of the preemption language in the ICCTA.[121] Generally, they find that the language of the ICCTA expressly preempts local permit requirements. In *City of Auburn v. United States*, Burlington Northern and Santa Fe Railway (Burlington) sought to reopen the Stampede Pass rail line between Seattle and Auburn, located in western Washington.[122] The local county sought to impose permits on the repairs and improvements of the tracks and to conduct a local environmental review.[123] The City of Auburn sought to intervene and also argued that the Environmental Assessment (EA) conducted by the STB was insufficient.[124] The Ninth Circuit Court of Appeals held that the plain language of the ICCTA expressly preempted state and local regulation.[125] The STB had previously issued a declaratory order on the Stampede Pass reopening, stating that the ICCTA preempted the state and local permitting processes because they interfered with the federal licensing program and unreasonably burdened interstate commerce.[126] Although the STB had done an EA for the project, the EA did not address the impacts of upgrading or maintaining the line, as those activities were outside the authority of the STB.[127] The court, in reviewing the STB decision, found that the STB did not abuse its discretion in limiting the scope of its EA.[128]

The court dismissed the plaintiff's argument that Congress only intended to preempt economic regulation of the railroads, observing that environmental regulations would have economic effects if they prevented the construction or operation of rail

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121. Friberg v. Kan. City S. Ry. Co., 267 F.3d 439 (5th Cir. 2001) (preempting negligence claim); City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998) (preempting state and local environmental laws); Burlington N. Santa Fe Co. v. Anderson, 959 F.Supp. 1288 (D. Mont. 1997) (preempting state closure authority); Norfolk S. Ry. Co. v. City of Austell, 1997 WL 1113647 (N.D. Ga. 1997) (preempting zoning regulation); CSX Trans. Inc. v. Ga. Pub. Serv. Comm'n, 944 F.Supp. 1573 (N.D. Ga. 1996) (preempting state closure authority).

122. 154 F.3d 1025, 1027–28 (9th Cir. 1998).

123. *Id.* at 1028.

124. *Id.* at 1032.

125. *Id.* at 1031 (referring to 48 U.S.C. § 10501(b)).

126. *Stampede Pass*, 1997 STB Lexis 143 at *19.

127. *Id.* at *10.

128. City of Auburn v. United States, 154 F.3d 1025, 1033 (9th Cir. 1998).

lines.[129] The court further found that the plain language of the statute expressly preempted state and local regulations, even if such regulations could properly be characterized as within the state's traditional police powers.[130]

In a similar case, the United States District Court for the Northern District of Georgia found that the express language of the ICCTA preempted state attempts to enforce zoning ordinances and permit requirements with respect to construction of an intermodal transfer facility.[131] In *Norfolk Southern Railway Co. v. City of Austell*, the railroad (Norfolk) wished to build the facility on land that was zoned only for commercial operations.[132] Because the City of Austell considered the intermodal facility "light industrial," it required Norfolk to obtain a special land-use permit and petition to rezone the land prior to commencing construction.[133] Although the court recognized the presumption against preemption for historic police powers of the state, it found that the plain language of the ICCTA preempted the zoning ordinance.[134] The court determined that intermodal facilities were within the ICCTA definition of "transportation by rail carriers,"[135] and concluded that preemption was consistent with the deregulatory goal of the ICCTA.[136] It nevertheless left the door open for some regulation, commenting that the construction and operation of the facility would be subject to other valid federal laws and non-preempted state

129. *Id.* at 1031.

130. *Id.*

131. Norfolk S. Ry. Co. v. City of Austell, 1997 WL 1113647 at *5 (N.D. Ga. 1997). An intermodal transfer facility is a place where shipments of good arriving by one means of transportation (e.g. rail lines) can be transferred to the continuation of the shipping service, usually by truck or freighter.

132. *Id.* at *1.

133. *Id.* at *2. It may appear to be excessively bureaucratic to require zoning waivers to build light industrial facilities in areas zoned commercial. However, commercial zoning can include restaurant and shopping districts, which would be inappropriate sites for operations involving heavy trucks, cranes, and other large-scale machinery. A town's zoning plan seeks to achieve certain goals, which would be lost if it were easy to obtain a waiver.

134. *Id.* at *5.

135. *Id.* at *6; 49 U.S.C. § 10102(9)(A) (1997) defines transportation to include "a locomotive, . . . property, facility . . . related to the movement of passengers or property." Subsection (B) further defines transportation to include "services related to that movement, including . . . interchange of passengers and property."

136. *Norfolk S. Ry. Co.*, 1997 WL 1113647 at *7.

laws.[137] It did not provide any guidance as to which of these "other" laws would apply. The court seemed to rely on the fact that the STB has authority over intermodal facilities, thus it automatically preempts any state and local regulations.

The outcome of these cases is troubling in that the courts either dismissed legislative intent—one of the cornerstones of preemption analysis—or disregarded the regulatory gap created by their approach. The court in *City of Auburn* dismissed the concern that Congress only intended to preempt economic regulations by stating that all regulations have economic impacts.[138] It is overly simplistic to declare that all regulations are potentially economic. Certainly every activity by a state or local government could have some effect on the economic activity of an industry. However, as discussed *infra* Part V.B.4, in *United States v. Morrison*, the Supreme Court rejected this broad characterization of economic regulation with regard to the reach of the Commerce Clause.[139] To stretch the definition of "economic" in this fashion would result in the conclusion that *all* activities have economic impacts, and thus *all* state laws could potentially be preempted under the ICCTA. The court also found express preemption in the plain language of the statute.[140] While the case for express preemption regarding rail line operation and acquisition seems clear,[141] preemption of activities outside of the STB's licensing authority is less certain. The court dismissed the issue of the limited scope of the EA. In doing so, it left unregulated activities like line maintenance and line upgrades, which can involve major construction and potential release of hazardous materials. Finally, the *Norfolk* court found that the ICCTA preempted zoning ordinances over intermodal transfer facilities because the ICCTA includes in-

137. *Id.* at *8.

138. City of Auburn v. United States, 154 F.3d 1025, 1031 (9th Cir. 1998).

139. United States v. Morrison, 529 U.S. 598, 615 (2000). In *Morrison*, the Supreme Court invalidated the civil remedy provision of the Violence Against Women Act, holding that the Commerce Clause does not give Congress power to regulate such violence even if it has economic consequences. All activities have economic consequences, but must meet the economic activity test, in which the activity or the methods of enforcement have a substantial effect on interstate commerce.

140. *City of Auburn*, 154 F.3d at 1031.

141. 49 U.S.C. § 10501(b)(2) (1997) grants jurisdiction to the STB over the "construction, acquisition, operation, abandonment, or discontinuance of... tracks, or facilities...."

termodal facilities in its definition of transportation.[142] This determination only clarified that the STB had authority to regulate the intermodal facility. It did not answer the question of whether the specific local regulation was preempted as applied to this facility. That question can be answered only by analyzing whether such zoning was a "regulation of rail transportation" in light of both the presumption against preemption and the structure of the statute as a whole.

The STB and the aforementioned federal courts believe that even where the STB lacks regulatory authority, the ICCTA still preempts state and local laws.[143] This broad view of the preemption language in the ICCTA generates the perverse outcome that there are some facilities that are completely unregulated. The theories used to support this view—plain language of the statute and dormant Commerce Clause-type analogies—ignore the detailed legislative history of the ICCTA, which emphasized the economic vitality of the railroad industry but did not claim to shield railroads from all state and local control.[144] In particular, it is hard to believe that Congress would limit the STB's authority over certain types of facilities at the same time it preempted all state and local regulation over those same facilities. Furthermore, the STB's use of the dormant Commerce Clause "undue burden" theory is unfounded. Almost any government action can affect industry. Simply having an impact on an industry does not qualify a regulation as either economic or as creating an undue burden. If the undue burden standard, as used by the STB and some courts, prevailed in other types of regulatory situations, every industry would be able to claim that zoning or land-use requirements are an undue burden under a dormant Commerce Clause analysis and thus prohibited. As the prevalence of in-

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142. Norfolk S. Ry. Co. v. City of Austell, 1997 WL 1113647 at *6 (N.D. Ga. 1997).

143. *See* CSX Trans., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). In *CSX Transportation*, the GPSC refused to grant the railroad approval to downscale one of its operations and discontinue others. *Id.* at 1575. The court held that the ICCTA preempted state regulatory control of railroad closings even though the ICCTA provided no federal remedy for such actions. *Id.* at 1583.

144. H.R. REP. NO. 104-311 at 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 793–94; H.R. CONF. REP. NO. 104-422 at 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 852. Congress repeatedly used the word "economic" to describe its approach to regulatory streamlining.

dustrial regulation under the Clean Water Act, the Safe Drinking Water Act, and even the validity of local zoning shows, regulatory authority is not so limited.

C. Regulatory Gap

The overbroad interpretation of the ICCTA preemption provisions results in exemption of a wide variety of facilities and activities from environmental review or approval by any agency, federal or state. Examples of facilities exempted include an auto storage facility, cement transfer facility, timber distribution center, and construction for line upgrades. These types of facilities can have serious environmental consequences. For example, the auto storage facility in *Town of Ayer* could potentially contaminate the town's aquifer with petroleum by-products and impact the ability of the aquifer to recharge. The problem is not simply that the state or local entity has no regulatory oversight, but rather that no one does. This section will discuss how these regulatory gaps are created. First it will analyze unregulated ancillary facilities, and then it will discuss the possible preemption of federal environmental laws.

1. Unregulated Ancillary Facilities

The breadth and diversity of facilities unregulated by the STB that may be exempt from local and state regulation is stunning. Any action that does not need an STB license is considered outside of the STB's authority, yet the STB still asserts that the ICCTA preempts local regulation.[145] Upgrades, maintenance, and refurbishment of tracks—all of which could involve significant amounts of construction—are not subject to the STB or local control.[146] Automobile unloading and storage facilities are similarly exempt.[147] STB review does not cover the extension or addition of railroad lines if those lines do not allow the railroad to enter a new market.[148] STB authority

145. *See* discussion *supra* Part II.A.1 regarding STB authority.

146. *See Stampede Pass*, 1997 STB Lexis 143 at *23–26.

147. *See generally Town of Ayer III*, 2001 WL 458685.

148. Union Pac. R.R. Co. – Rehabilitation of Mo.-Kan.-Tex. R.R. Between Jude & Ogden Junction, Tex., STB Finance Docket No. 33611, 1998 STB Lexis 227 (Aug. 21, 1998) (petition for declaratory order). For example, newly con-

does not cover a transloading facility for bulk cement or space leased to a forest product distribution yard.[149] Citing lack of regulatory authority, the STB refused to conduct an environmental review of a refueling terminal built directly over an aquifer in Idaho.[150] STB authority did not reach construction of a truck terminal and weigh station in a residential zone.[151] The Board declined to rule on whether a corn processing plant would have been exempt due to lack of information regarding the facility. Had it been a transfer facility instead of a manufacturing facility, it would have been exempt.[152] In all of these cases, despite the lack of regulatory authority, the STB found that the ICCTA preempted state and local law.

It is hard to imagine a broader spectrum of facilities, both in quality and quantity, which are not subject to STB review. The broad view of preemption leaves all of these facilities, regardless of scale, outside of both STB oversight and state and local control. As a result, railroads and companies associated with them can act without regard to state and local law. In some instances they may even be able to act without regard to federal environmental law.

2. Possible Preemption of Federal Regulations

The ICCTA specifically states that the remedies it contains are exclusive and preempt both federal and state law.[153] Some railroad companies have interpreted this to mean that the ICCTA preempts federal environmental statutes, even for ancillary facilities that are not otherwise regulated by the STB.[154] Neither the STB nor the courts have ruled on this specific

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structed lines that arguably just serviced the same region as the original line would be "ancillary."

149. Green Mountain R.R. Corp., STB Finance Docket No. 34052, 2002 STB Lexis 322 (May 24, 2002) (petition for declaratory order). The STB declined to issue a declaratory order regarding preemption in this case, but instead provided an analysis of preemption decisions that clearly point to a finding of preemption despite the lack of STB authority to conduct an environmental review. *Id.*

150. Friends of the Aquifer, City of Hauser, Idaho, Hauser Lake Water Dist., Rodgers, Larkin, Kootenai Envtl. Alliance, R.R. & Clearcuts Campaign, STB Finance Docket No. 33966, 2001 WL 928949 (Aug. 10, 2001) (petition for declaratory order) [hereinafter *Friends of the Aquifer*].

151. *Borough of Riverdale I*, 1999 WL 715272 at *6.

152. *Id.* at *7.

153. 49 U.S.C. § 10501(b) (1997).

154. *Town of Ayer III*, 2001 WL 458685 at *3.

claim, as no one has directly brought a case dealing with federal law conflicts regarding ancillary facilities. Nothing in the language of the ICCTA or its legislative history shows that Congress intended to preempt federal laws for those facilities not under STB jurisdiction. A court choosing to interpret the ICCTA in this way would probably rely solely on the fact that it was passed at a later date than the federal environmental laws, an extraordinarily weak basis for a preemption analysis. Moreover, the ICCTA specifically exempts railroad rate agreements from certain antitrust laws, indicating that Congress knew how to preempt other federal laws when it intended to do so.[155]

It seems unlikely that a court would uphold a theory that the ICCTA preempts federal environmental authority over ancillary facilities on a direct challenge. A more likely outcome is that litigation to require an EIS for a line upgrade, for example, based on potential violation of some other act (e.g., the Clean Water Act) could fail if the railroad argued that the ICCTA is exclusive in its list of things requiring both a federal license and EIS analysis.

As a result of the broad view of preemption held by the STB and some federal courts, a large number of ancillary facilities and railroad activities remain unlicensed and unregulated by the STB, but also unreachable by state or local laws and regulations. The STB recognizes this potential problem, but sees it as inconsequential because it believes there are already other avenues available to ensure railroad activities are properly controlled.

D. Other Avenues for Railroad Regulation

Apparently aware of the potential for widespread preemption of state and local law by the broad view, the STB has attempted to identify potential relief available to local governments. These proposed remedies are largely ineffective. Most of them result in after-the-fact remediation of environmental damage, are unenforceable, or depend on bargaining power that local governments are unlikely to possess. This section

155. 49 U.S.C. § 10706 (a)(2)(A) (1997). If the STB approves certain types of rate agreements, they are exempt from the Sherman Act, the Clayton Act, the Federal Trade Commission Act, parts of the Wilson Tariff Act, and the Act of June 19, 1936. *Id.*

will discuss three tools that the STB and courts have identified as already present within the state and local governments' arsenal of regulatory control. Section 1 will discuss existing state police powers; Section 2 will discuss existing federal statutes, and Section 3 will discuss voluntary agreements with the railroad.

1. State Police Powers

The STB has attempted to limit the effects of its broad preemption view by claiming that not all state and local regulations would be preempted.[156] In particular, states and localities retain "certain police powers."[157] These include building, fire, and health codes, as well as requirements for emergency vehicle access.[158] Additionally, a town could enforce ordinances such as a prohibition on dumping earth into local waterways, and could seek recovery of damages for pollution.[159] In *Town of Ayer*, the STB indicated that some of the town's permit conditions might be acceptable. These included requirements for the railroad to share plans with the town, to use best management practices, to implement precautionary measures, to provide representatives to meet with citizen groups, and to submit environmental monitoring information to local government.[160]

The police powers exception has two serious drawbacks. First, it is generally limited to such after-the-fact remedies as damages and remediation, which offer little consolation to a town that may have its drinking water permanently polluted. Since the town is not allowed to require permits prior to construction (pre-clearance permits), the only remedy available would be fines, injunctions, and clean-up requirements *after* the railroad has caused some damage. Second, although the STB and courts may allow some construction and operational restraints, there is no enforcement mechanism for these restraints. A town or city has little power to ensure compliance

156. *Stampede Pass*, 1997 STB Lexis 143 at *19–20 (declining to preempt reasonable exercise of local police power); *Borough of Riverdale I*, 1999 WL 715272 at *6 (declining to preempt electrical and building codes; fire, health, and safety regulations); *Town of Ayer III*, 2001 WL 458685 at *5 (holding that "localities retain certain police powers").

157. *Town of Ayer III*, 2001 WL 458685 at *5.

158. *Borough of Riverdale I*, 1999 WL 715272 at *6.

159. *Stampede Pass*, 1997 STB Lexis 143 at *19–20.

160. *Town of Ayer III*, 2001 WL 458685 at *7.

with local codes, because pre-construction permits, with the attendant regular inspections, are not allowed. It is unclear whether a town could delay construction if it discovered violations of electrical codes. Even if it could, it is doubtful that the town would ever discover such a violation: it certainly could not require a building permit with the requisite regular inspections used to ensure compliance. Without such a permit condition, the town could rely only on spot checks. For example, it could not require the railroad to delay putting up drywall until the inspector was able to check the wiring. Given the inability to ensure compliance with existing codes and zoning and the necessary reliance on post-harm remedies, the police powers exception provides little help to a town trying to protect land or water resources in advance.

2. Federal Statutes

As another potential protection against the regulatory gap, the STB has indicated that the preemption provisions in section 10501(b) of the ICCTA are not intended to interfere with state or local implementation of federal environmental statutes.[161] Undercutting this protection, however, the Board also has indicated that federal environmental laws could be applied in such a way as to unduly burden interstate commerce.[162] The language of the ICCTA itself calls into question whether federal statutes can provide relief when the STB has jurisdiction over the facility. The ICCTA states that remedies in the act are "exclusive and preempt the remedies provided under *Federal* or State law."[163] In *Town of Ayer,* Guilford Transportation argued that the ICCTA preempts the federal SDWA and CWA as applied to its facility.[164] Although the STB did not reach this argument in its decision, a similar argument could be raised in future cases.

Even if federal law is applicable to fill the regulatory gap, the value of this remedy to a small town such as Ayer is unclear. Most local governments do not have CWA or SDWA enforcement responsibility and must rely on state government to

161. *Id.* at *5.

162. *Id.* at *6; *Friends of the Aquifer*, STB Finance Docket No. 33966, 2001 WL 928949 at *5.

163. 49 U.S.C. § 10501(b) (1997) (emphasis added). *See also infra* Part III.C.

164. *Town of Ayer III*, 2001 WL 458685 at *3.

act. The town may not be able to get the state's help, given other pressures on state resources. A local entity like a town generally does not have independent enforcement authority under the CWA. Therefore, the town would need to involve a state agency with CWA enforcement authority and convince such agency to take action, such as refusing to issue a permit to the railroad. The railroad may claim that the requirement for such a permit, even under the CWA, is itself preempted by the ICCTA as a pre-clearance requirement. As a result, the railroad may only face CWA penalties after it has violated the law. Prophylactic measures may be unavailable.

3. Voluntary Agreements

Finally, where the railroad has entered into voluntary agreements to comply with local ordinances, courts can enforce those agreements despite the ICCTA preemption provisions.[165] In *Township of Woodbridge* the STB stated that the ICCTA preemption provisions should not be used as a shield to protect railroads from commitments voluntarily made.[166] To maintain good relations with a town, a railroad may be willing to accept some voluntary restrictions. However, a town would be unable to prevent construction in its entirety, even if such construction violates the town's zoning plan.[167] Faced with the STB's broad view of preemption, and that of several courts, most local governments are unlikely to have sufficient bargaining power with a railroad to gain much in the way of voluntary commitments. Such commitments provide only minimal protection for rail-

165. Township of Woodbridge v. Consol. Rail Corp., Inc., STB Docket No. 42053, 2000 STB Lexis 709 (Dec. 1, 2000).

166. *Id.* at *9–10.

167. In a July 24, 2003 Consent Decree, the federal District Court in *Town of Ayer*, by agreement of the parties, decreed that the town had no authority to regulate either operation or construction of the auto storage facility, but that Guilford Transportation would comply with seventeen terms and conditions. Boston & Maine Corp. v. Town of Ayer, Consent Decree (D. Mass., July 24, 2003). Those conditions include various types of monitoring to detect pollution, compliance with best management practices, and other environmental protections. *Id.* at Exhibit A. However, compliance with building codes was agreed upon only to the extent such compliance did not "unreasonably burden interstate commerce." *Id.* In some sense, this was a victory for the town and does show that voluntary agreements can be reached, albeit after protracted court battles. However, the town still cannot prevent construction of the facility nor can it stop Guilford from changing the type of activity that occurs on the site. *Id.* at Exhibit A, #13.

road activities or construction and do not provide the towns with the ability to make decisions on land use or to stop railroad development in environmentally sensitive areas.

The regulatory gaps left by the broad view of preemption taken by the STB and some courts cannot be fully closed by the very limited role of state police powers allowed by the STB nor by the existence of voluntary agreements between municipal governments and railroads. Yet, under the broad view, a vast number of potentially harmful railroad activities are left without any regulatory control: ancillary facilities and other railroad activities are not subject to STB licensing power, but they cannot be regulated by municipal governments either. Additionally, the broad view implies that the Act may preempt other federal statutes that could provide regulatory coverage.

Although the STB and the courts base their broad view of preemption on statutory language, they do not adequately consider the fact that Congress was concerned about economic regulation of the railroads and did not intend to exempt them from environmental control. Despite the contentions of the STB and the courts, existing local governmental powers are not sufficient to close these gaps if the ICCTA is presumed to preempt other law. An alternative approach taken by some courts to bridge the regulatory gap is to view the preemption language in the ICCTA much more narrowly to preserve local government control.

IV. PREEMPTION LANGUAGE –THE NARROW VIEW

An alternative approach to the ICCTA preemption language limits it to the purposes of the Act. From this perspective, the ICCTA was intended to protect and invigorate the economic viability of the railroad industry, not shield it from all regulatory control. A more limited interpretation of the language of the ICCTA not only preserves the intent of Congress but also protects against the creation of regulatory gaps with regards to ancillary facilities. Section A of this part will discuss court cases taking the narrow view of ICCTA preemption. Section B will discuss the "economically integral" test created by the Eleventh Circuit to determine if the facility/activity in question is of the type intended to be deregulated by the ICCTA.

A. Court Cases

The Eleventh Circuit Court of Appeals has taken an appropriately narrow view of the ICCTA preemption provisions. In *Florida East Coast Railway v. City of West Palm Beach*,[168] the court upheld the application of city zoning and licensing ordinances to a lessee's aggregate distribution operation located on railroad property.[169] Guided by the basic assumption that Congress did not intend for the ICCTA to preempt state law, and recognizing the presumption that federal laws should not preempt the historic police powers of states absent a clear statement by Congress, the court proceeded to a narrow reading of the Act.[170]

Specifically, the court addressed three restrictions, found in the language and structure of the Act. First, section 10501(b) states that *federal* and *state* laws are preempted, without mentioning *municipal* ordinances. Elsewhere in the statute, Congress specifically mentioned municipal law.[171] Given that Congress had the ability to clearly include municipal law when it so chose, the court found that municipal law was not expressly preempted and must be scrutinized further.[172] Second, the express language of section 10501(b) applies to state laws "with respect to *regulation* of rail transportation," not rail transportation alone.[173] Therefore, the term "regulation" has specific meaning in the context of the statute. The court read "regulation" as limited to laws that have the "effect of managing" rail transportation and found that the zoning laws of a city do not have the effect of managing rail transport.[174] Finally, the court analyzed the meaning of the term

168. 266 F.3d 1324 (11th Cir. 2001).

169. *Id.* at 1326, 1339. Aggregate is a component of cement. The lessee used rail service to ship its aggregate from its Miami-Dade quarries to the rail yard located in West Palm Beach. *Id.* at 1326.

170. *Id.* at 1327–28.

171. 49 U.S.C. § 11321(a) (1997) states "A rail carrier . . . is exempt from the antitrust laws and from all other law, including State and municipal law . . . ."

172. *Fla. E. Coast Ry.*, 266 F.3d at 1330–31.

173. *Fla. E. Coast Ry.*, 266 F.3d. at 1331 (quoting 49 U.S.C. § 10501(b) (1997)) (italics in original).

174. *Id.* at 1331. The court limited this finding to the actions of a lessee of railroad property, and declined to comment on its applicability if the railroad itself were conducting the aggregate business. Although the court distinguishes *Town of Ayer III*, this distinction seems unnecessary. *Id.* at 1331 n.5. An activity does not become part of the operations of a railroad, integral to its continued exis-

"transportation" in the Act, which broadly includes not only movement of property but related "services."[175] The railroad argued that ownership of the aggregate business was irrelevant, due to language in the ICCTA that governs transportation regardless of ownership.[176] The court disagreed, finding that the original Interstate Commerce Commission jurisdiction that formed the basis of that language was limited to facilities used in interstate commerce, for benefit of the shipping public or railroads themselves.[177] The lessee's use of the property was exclusively private, thus the court could consider ownership in determining preemption.[178] A railroad company itself has broader protection from state and local regulation than does a private, non-railroad concern.[179]

In addition to relying on the language and structure of the Act, the court also examined congressional intent and the purpose of the ICCTA. It found that the goal of the ICCTA was to remove direct state regulation of railroads, to minimize federal oversight, and to create a uniform scheme of federal *economic* regulation.[180] Local zoning laws such as those applied by West Palm Beach would not threaten the national efficiency of the railroad nor burden it with a patchwork of regulation.[181]

The Vermont Supreme Court came to a similar conclusion regarding the intent of Congress in enacting the ICCTA. In *In re Vermont Railway*, the court upheld the application of zoning regulations to a salt shed facility owned by the railroad.[182] The court relied on the legislative history of the ICCTA to show that Congress intended to supersede only economic regulation by the states, not other areas such as zoning that are historic

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tence, or key to interstate commerce simply by being owned by a railroad company. The "effect of managing" test remains valid, regardless of the nature of the entity operating the ancillary facility.

175. *Id.* at 1332–36. The court engaged in a lengthy discussion of the meaning of the term transportation as informed by a detailed history of rail regulation and efforts to prevent price discrimination.

176. *Id.* at 1332.

177. *Id.* at 1336.

178. *Id.*

179. *Id.* at 1337. However, this distinction will be of little import in cases where the railroad is itself part of a large corporation with several subsidiaries. In those cases, the line between a public railroad and a private, non-railroad concern becomes very blurry. *See* discussion of Guilford Transportation Industries, Inc. *supra* note 98.

180. *Fla. E. Coast Ry.*, 266 F.3d. at 1337–38.

181. *Id.* at 1338–39.

182. 769 A.2d 648 (Vt. 2000).

applications of a state's police powers.[183] Unlike the STB, which limits the use of police powers to after-the-fact remedies, the Vermont court assumed that such powers could apply *prior* to granting a construction permit. The court also presumed that state and local regulation of health and safety can operate at the same time as federal regulation.[184] Furthermore, it dismissed the argument that all regulation of a railroad was necessarily economic.[185] It distinguished between regulations that might affect the operation of the railroad and transport of goods versus storage of materials at the facility, which does not interfere with railway operations.[186] A major consideration for the court was whether the regulated facility in question was "integrally related" to the "provision of interstate rail service."[187] It distinguished *City of Auburn*, noting that the regulated facility in *Vermont Railway* was an ancillary facility (a salt shed), rather than an actual rail line.[188]

An Oklahoma state court also concluded that not all state regulation necessarily constitutes economic regulation of the railroad.[189] The Oklahoma Corporation Commission required the railroad to repair a fence along a right-of-way adjacent to private property.[190] The railroad argued that the ICCTA occupied the field of railroad regulation and preempted any action by the state.[191] The court found that the ICCTA did not preempt the state's historic police power, particularly for an activity such as maintaining a fence, which had little economic impact on the railroad's operation.[192] Other courts have used a similar analysis to uphold local regulations where they do not interfere with a railroad's interstate rail operations.[193] Unlike

183. *Id.* at 651–53.
184. *Id.*
185. *Id.* at 654–55.
186. *Id.* at 655–56.
187. *Id.* at 655 (quoting Fla. E. Coast Ry.v. City of West Palm Beach, 110 F.Supp.2d 1367, 1376–79 (S.D. Fla. 2000)).
188. *Vermont Ry,* 769 A.2d at 654.
189. Oklahoma v. Burlington N. & Santa Fe Ry. Co., 24 P.3d 368, 371 (Okla. Civ. App. 2000).
190. *Id.* at 369.
191. *Id.* at 369–70.
192. *Id.* at 371.
193. *See* Jones v. Union Pac. Ry. Co., 94 Cal. Rptr. 2d 661, 666–67 (Cal. Ct. App. 2000) (allowing an action for nuisance and negligence against the railroad, as state and local regulation did not interfere with the railroad's interstate rail operations); Vill. of Ridgefield Park v. N.Y., Susquehanna, & W. Ry. Corp., 750 A.2d 57 (N.J. 2000) (upholding state police powers where they would not foreclose

the STB, these courts upheld the use of the historic police powers of a state to stop construction associated with a railroad, instead of relying solely on after-the-fact compliance actions to provide relief to towns.

The courts viewing the ICCTA preemption more narrowly, including the Eleventh Circuit, and the Vermont and Oklahoma state courts, looked closely at the congressional intent behind the statute. These courts all considered whether the economic life of the railroad would be harmed by allowing states and local governments to exercise their traditional regulatory powers. In some cases the courts structured this analysis as a formal test to determine the economic relationship between the local law and the railroad.

B. Economically Integral Test

The Eleventh Circuit Court of Appeals and various state courts have created a helpful "economically integral" test to determine when the ICCTA preemption language applies. The test asks whether a specific regulation, law, or zoning provision truly impacts railroad operations in an economically meaningful way. If the local law does not, the ICCTA should not preempt it. For example, a zoning ordinance that did not allow construction of an industrial facility on a certain piece of land would be preempted if the facility in question was one necessary for the maintenance of a switching station for a rail line. Such a facility is important to the physical health of the rail line, and thus its economic health. By contrast, while it may be useful for a storage facility for concrete aggregate to be located near a rail line, its placement has no direct economic link to the railroad and could be regulated or even prohibited by local zoning laws.

It may be useful to consider the "economically integral" test in the way the tax code approaches religious organizations. Under the tax code, the church itself is tax-exempt. However, the church-owned dry-cleaner ten blocks away used to generate revenue for the church is not tax-exempt because dry-cleaning is not "integral" to the mission of the church. Similarly, courts might look at whether the railroad activity was actually related

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railroad's ability to operate).

to the "mission" of a railroad (e.g. transportation of goods), or whether it had some other function.

The "economically integral" test can be difficult to apply and will not provide an answer to the preemption question in close cases. The "economically integral" test also does not assist in the dilemma of facilities that may have economic significance to the railroad but nonetheless are unregulated by the STB. For example, it may not answer the specific question of whether some ancillary facilities unregulated by the STB, such as the proposed car park in *Town of Ayer*,[194] would be preempted. The car park is arguably economically important to the railroad operation, at least in regard to the shipment of automobiles. Even under the narrow view, a court may find that such a facility has significant economic importance to interstate trade. In this case, the "economically integral" test would still not close the regulatory gap: the construction and operation of that facility is not subject to NEPA review because the STB has no authority over it, and state and local controls are preempted because the facility is economically integral to the railroad's functioning. Thus there remains a regulatory void where a company could theoretically act with impunity with no federal or state oversight. The only risk would be the possibility of penalties after the fact, if environmental damage occurred.

Courts taking the narrow view of preemption provide better protection for towns trying to preserve the environment or ensure proper planning for industrial zones. The economically integral test can be used as a helpful guide in determining what types of facilities and activities should be preempted by the ICCTA. However, even within the narrow view a gray area exists with regards to local control over some types of facilities. Solutions to this problem include a narrowed interpretation of preemption or broader regulatory control for the STB.

V. REMEDIES FOR THE REGULATORY GAP

There are two possible options for eliminating the gap in regulatory control over ancillary facilities. Congress could expand the legislative jurisdiction of the STB by broadening its ability to conduct environmental reviews of ancillary facilities.

194. *Town of Ayer III*, 2001 WL 248685 at *1.

A better approach would be to accept a narrow reading of the preemption provisions of the ICCTA and allow local and state regulatory control over ancillary facilities. This latter approach would provide a stronger connection between localized environmental concerns and railroad actions, ensure cooperation on development projects, and preserve state sovereignty. A subset of this approach would clarify that federal environmental statutes are not preempted with regard to railroad operations. Section A of this part will discuss the possibility of expanding STB jurisdiction. Section B will discuss a narrower reading of the preemption provisions, focusing on the legislative history supporting this view, the language and structure of the ICCTA that supports a narrow reading of preemption, field preemption as it applies to the ICCTA, and why recent Commerce Clause interpretation by the Supreme Court should also limit the scope of preemption under the ICCTA.

A. Expand STB Jurisdiction

The first potential remedy for the regulation gap would expand the STB's jurisdiction to cover ancillary facilities. This remedy is not ideal, as it conflicts with the congressional goal of less national regulation[195] and could be unduly cumbersome for the STB. Under 49 U.S.C. § 10501, the STB has jurisdiction over transportation by rail carriers and the "construction, acquisition, operation, abandonment, or discontinuance of. . .[tracks] or facilities."[196] However, railroads need Board licensing only for construction and operation of rail lines,[197] and then only for new lines, not for upgrades of existing lines or the construction of switching tracks.[198] Congress could expand the STB's licensing authority to encompass a broader range of railroad activities. However, this remedy would conflict with Congress's general goals of deregulating the industry, streamlining its operations, and reducing federal oversight.[199] It would require the STB to conduct many more Environmental Impact Statements and Environmental Assessments—difficult tasks

195. *See* H.R. CONF. REP. NO. 104-311, at 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 794.

196. 49 U.S.C. § 10501(a), (b)(2) (1997).

197. 49 U.S.C. § 10901.

198. 49 U.S.C. § 10906; *Town of Ayer III*, 2001 WL 458685 at *4.

199. 49 U.S.C. § 10101 (2000).

for a small agency. It could also cause further delays in railroad operations, which is precisely the outcome that the STB and the courts say they are trying to avoid.

B. Read Preemption Narrowly

The second remedy for the regulatory void is for courts and the STB to read the preemption provisions of the ICCTA narrowly such that local governments could regulate ancillary facilities. All preemption analysis, regardless of the statute, starts with the language of the statute, and uses congressional intent as the "ultimate touchstone."[200] While the ICCTA was a long sought-after attempt to deregulate the rail industry and make it more competitive, neither the language of the Act nor the congressional record shows any intent to preempt all local laws or shield the industry from all oversight for new construction. Furthermore, such expansive preemption might run afoul of Congress's powers under the Commerce Clause.[201] In *Morrison*, the Supreme Court stated that just because an activity has an effect on interstate commerce does not mean that it comes under Congress's Commerce Clause authority to regulate.[202] If courts and the STB do not interpret the ICCTA narrowly, Congress could limit the preemptive effect of the Act by statute. However, given the continued power of the railroads in the legislative arena, congressional action may not be possible.

This section will first examine the legislative history of the ICCTA and its language and structure to show that Congress intended a narrow interpretation of preemption. Then this section will suggest that the regulatory field occupied by the ICCTA should be viewed narrowly, and finally that the courts do not have the power to find broad preemption given the current Supreme Court jurisprudence under the Commerce Clause.

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200. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

201. Article I, § 8, cl. 3 of the Constitution states that Congress has authority over ". . .Commerce among the several States. . . ." Only those activities properly under the Commerce Clause can be legislated by Congress.

202. United States v. Morrison, 529 U.S. 598, 613 (2000).

1. Legislative History

A detailed analysis of the legislative history of the ICCTA reveals that Congress had no intention of allowing the ICCTA to foreclose the application of local police powers. As noted in Part II, the main congressional intent behind the ICCTA was to free the railroad industry from economic impediments. The House report focused on economic deregulation and highlighted the deregulation effort as a policy that promoted the growth and stability of the industry, and retains only such regulation as needed to address rates, facility access, and industry restructuring.[203] The report never mentioned a need for eliminating state and local zoning or environmental protection, nor did it find that local laws impeded a railroad's economic success.

In the House preemption section,[204] the report clarified that the ICCTA preempts state jurisdiction over *economic* regulation of railroads.[205] It further explained that the "state and federal" law preempted included those statutory or common law remedies under the jurisdiction of the STB.[206] The goal of the bill was to "standardize all *economic* regulation" of the industry.[207] The report specifically acknowledged that states retained police powers under the Constitution, but that the federal scheme of "economic regulation" would be exclusive.[208]

The continued and pervasive use of the term "economic" throughout the House report clearly indicates that Congress had a specific type of regulation in mind and did not intend to preempt all state and local regulation of railroads. The conference report on the bill further clarified that the preemption provisions did not apply generally, but only applied to state and federal laws dealing with rail regulation.[209] Other state and federal laws are retained because they "do not generally collide with the scheme of economic regulation (and deregula-

203. H.R. CONF. REP. NO. 104-311, at 82, 90, 93 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 794, 802, 805.

204. § 10103 in the House Bill.

205. H.R. CONF. REP. NO. 104-311 at 95, *reprinted in* 1995 U.S.C.C.A.N. 807.

206. *Id.* The STB replaced the previous name of Transportation Adjudication Panel.

207. *Id.* (emphasis added).

208. *Id., reprinted in* 1995 U.S.C.C.A.N. 808.

209. H.R. CONF. REP. NO. 104-422, at 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 852.

tion) of rail transport."[210] The ICCTA exempts some rate agreements between railroads from various antitrust laws, demonstrating that when Congress wanted to preempt a federal law, it did so explicitly.[211] It is hard to imagine that Congress ever intended preemption of state and local exercise of police powers, never mind federal environmental statutes, when its concern was entirely with economic regulations. The legislative focus on economic impacts shows that preemption should be interpreted narrowly.

2. Language and Structure of the ICCTA

The language and structure of the ICCTA also support a narrow reading of the preemption provisions. The policy section of the ICCTA repeatedly refers to the goal of developing effective competition and is almost entirely devoted to encouraging an economically sound and efficient rail system.[212] The goal was to reduce, but not eliminate, regulatory impediments in the railroad industry.[213] In addition, Section 10101 (8) emphasizes that the policy is to operate a rail transportation industry "without detriment to the public health and safety,"[214] indicating that some regulation must be allowed.

Also, the statute preempts actions that regulate the industry directly, not actions that only affect the industry as a consequence of regulating other activity. The STB has jurisdiction over "transportation by rail carrier that is (A) only by railroad . . . ."[215] The remedies in the Act are exclusive with respect to "*regulation* of rail transportation,"[216] not simply "rail

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210. *Id.*

211. 49 U.S.C. § 10706 (2000).

212. § 10101(1) ("allow[ing] . . . competition and the demand for services to establish reasonable rates"); § 10101(4) ("ensur[ing] . . . continuation of a sound rail transportation system with effective competition"); § 10101(5) ("ensur[ing] effective competition and coordination between rail carriers").

213. *See* Norfolk S. Ry. Co. v. City of Austell, No. CIV.A.97-CV-1018-RLV, 1997 WL 1113647, at *7 (N.D. Ga. Aug. 18, 1997) (emphasizing that the policy goal was to reduce barriers to entry into the industry); 49 U.S.C. § 10101(7) (2000).

214. § 10101(8).

215. § 10501(a)(1).

216. § 10501(b) (emphasis added). The remedies mentioned in the act include appealing to the STB to adjudicate disputes and are limited to those administrative functions that the STB has, namely authority over new construction licensing, rate disputes, and the like. *See supra* Part II.A.1.

transportation." A cardinal theory of statutory construction is to give effect to every word of a statute.[217] The ICCTA was narrowly drafted to preempt state laws that regulate rail transport, not every state law that might affect rail transport. The court in *Florida East Coast Railway* defined "regulation" as that which manages or governs rail transport.[218] Use of this definition corresponds to the theme present throughout the legislative history of the ICCTA that Congress intended to prevent state economic control of railroads, not other types of oversight.

In addition, section 10501(b) states that:

> [T]he *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, operations, 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.[219]

This portion of the statute refers only to the jurisdiction of the STB, and the remedies regarding conflicts over railroad operation. The statute goes on to say that "the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."[220] The statute distinguishes between those areas under STB jurisdiction (the first part), and those areas—only regulation of rail transportation—that are preempted. Taken together, the language and the structure of the Act indicate that the preemption provisions should be read narrowly. In addition, the general rules regarding field preemption also show that any preemption should encompass only a narrow field of issues.

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217. *See* Bennett v. Spear, 520 U.S. 154, 173 (1997).

218. Fla. E. Coast Ry. v. City of West Palm Beach, 266 F.3d. 1324, 1331 (11th Cir. 2001).

219. 49 U.S.C. § 10501(b) (2000) (emphasis added).

220. *Id.*

3. Field Preemption

Field preemption applies when state laws intrude into an area that the federal law was intended to control exclusively. A finding of field preemption is heavily dependent on the subject matter at issue.[221] Some courts have stated that the federal regulation completely occupies the field of railroad regulation, thus preempting state and local law.[222] However, the regulatory field occupied by the ICCTA should be viewed narrowly because of the strong state interest in and historical control of zoning and land-use planning.

Courts finding field preemption in the ICCTA rely in part on the historical presence of federal regulation in the field of the railroad industry.[223] The history of federal or state action in an area can have a significant effect on a preemption analysis. For example, navigation and shipping are areas of predominately federal control.[224] Some courts have viewed the federal presence in the railroad industry in a similar fashion.[225] However, this view ignores the fact that the federal presence in the rail industry has been almost entirely driven by economic considerations. It also ignores the history of state regulation of railroads during the birth of the industry.[226] In addition, it mischaracterizes the law in question. Federal law regarding railroads has been predominant only in the area of economic regulation. States and local governments are not trying to regulate the railroad industry economically; they are trying to apply local zoning, permitting, and land-use ordinances—areas traditionally under state control.

In the true legislative area in question—zoning and land-use planning—there has been no pervasive incidence of federal

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221. *See supra* Part I.

222. City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998); Burlington N. Santa Fe Corp. v. Anderson, 959 F.Supp. 1288, 1295 (D. Mont. 1997). Field preemption is a type of implied preemption. It exists based on extrinsic factors to the specific legislation in question. Field preemption occurs when the federal law so completely occupies the realm of the regulated subject that there is no room for state action. Generally this occurs in areas that are dominated by a federal presence and a long history of federal action. *See supra* Part I.

223. *City of Auburn*, 154 F.3d at 1029.

224. United States v. Locke, 529 U.S. 89, 99 (2000) (finding that the federal interest in navigation has been in place since the beginning of the Republic).

225. *Burlington N.*, 959 F. Supp. at 1295.

226. *See supra* Section II.

regulation. The Eleventh Circuit Court of Appeals points out that even for economic regulations, the exclusivity of federal regulation in the railroad field is a relatively modern phenomenon.[227] As recently as 1988, the federal government shared jurisdiction with the states over some railroad economic regulation.[228] Prior to the passage of the ICCTA in 1995, states continued to have some authority even over railroad operations.[229] The ICCTA clarifies that Congress intended exclusive federal control over railroad operations. However, states retained those police powers reserved by the Constitution, and could regulate non-economic activities of the railroad.[230] Because the ICCTA covers only the limited area of economic regulation of the railroad industry, the extent of its field preemption should be similarly limited. The scope of other types of preemption should also be narrow because the Supreme Court has recently reined in Congress's Commerce Clause power, thus limiting the areas over which Congress can set federal regulations.

4. Commerce Clause Authority after *Morrison*

An interpretation of the ICCTA as preempting all state and local zoning and land-use planning laws might run afoul of the Commerce Clause, as Congress does not normally have authority to regulate or preempt such strictly *local* concerns. Although congressional Commerce Clause power has traditionally been very broad, in two recent cases, *United States v. Lopez* and *United States v. Morrison*, the Supreme Court invalidated portions of two federal acts, concluding that the acts exceeded congressional power under the Commerce Clause.[231] *Morrison* invalidated the civil remedies portion of the Violence

227. *Fla. E. Coast Ry.*, 266 F.3d. at 1329 n.2.

228. *Id.* at 1329.

229. *Id.*; Fla. E. Coast Ry. v. City of West Palm Beach, 110 F.Supp.2d 1367, 1373 (S.D. Fla.2000).

230. H.R. CONF. REP. NO. 104-311, at 96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 808. "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive." *Id.* "All such regulation" cited above refers to *economic* regulation, indicating that Congress did not intend to preempt all types of state regulation.

231. United States v. Lopez, 514 U.S. 549, 558 (1995); United States v. Morrison, 529 U.S. 598, 609 (2000).

Against Women Act and *Lopez* invalidated the Gun-Free School Zones Act, which criminalized possession of a firearm inside a school zone.[232] In both cases, the Court stated that congressional authority to regulate extended only to three broad categories of activity: (1) regulation of the use of the channels of interstate commerce; (2) regulation of the instrumentalities of interstate commerce; and (3) regulation of activities that have a *substantial relation* to interstate commerce.[233] In *Morrison*, the Court found that the regulations in the Violence Against Women Act did not have a substantial relationship to interstate commerce.[234] That is, the link between violence against women and interstate commerce was too attenuated to support congressional authority to regulate because the activity was not economic in nature.[235] This was true despite the fact that crimes against women could impact women's interest and ability to work or travel.[236] This new limit on congressional authority may impact the preemption analysis of the ICCTA, in so far as it limits the scope of the ICCTA.

The ability of Congress to regulate railroads generally under the ICCTA clearly falls within its Commerce Clause authority as the Act regulates both a channel and an instrumentality of interstate commerce. However, where the link between the scope of the ICCTA and the effect on interstate commerce is weak or too far removed, the legislation may be invalid. Certainly the ICCTA can preempt state laws regarding railroad operations, because such regulation directly relates to an economic activity, affects channels of interstate commerce, instrumentalities of commerce, and substantially affects interstate commerce. However, ancillary facilities might not be classified as channels or instrumentalities of commerce. In addition, depending on its type, the facility may not have a substantial relation to interstate commerce. Given the vagueness of this third element, it is unclear how such facilities would be treated by the courts, and it would likely be highly variable depending on the type of facility. More importantly,

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232. *Morrison*, 529 U.S. at 619; *Lopez*, 514 U.S. at 551.

233. *Morrison*, 529 U.S. at 609 (quoting *Lopez*, 514 U.S. at 558–59).

234. Clearly, the regulations related to civil damages did not involve channels of interstate commerce (e.g. roads, phone lines) or instrumentalities of interstate commerce (e.g. railroads, trucks).

235. *Morrison*, 529 U.S. at 612–13.

236. *Id.*

Congress probably does not have the authority, under *Morrison*, to impose a federal zoning or land-use planning scheme on a local municipality. Therefore it is difficult to see why the ICCTA should be allowed to preempt state and local laws regulating those activities if it could not regulate them directly. Furthermore, state zoning, health, and safety laws do not regulate economic activities even if they have an economic effect. The economic side-effects of a non-economic activity are not sufficient to make the activity subject to federal regulation.[237]

While it is difficult to predict the outcome of a Commerce Clause challenge to the broad view of ICCTA preemption, the current trend is to narrow congressional authority, rather than broaden it. The Court in *Morrison* was concerned about the ability of the Commerce Clause to "obliterate the Constitution's distinction between national and local authority . . ."[238] With regards to railroad regulation, the issue is complex. The railroad industry is clearly an economic activity and is heavily involved in interstate commerce. However, local zoning and health laws are traditional state activities, much like the police power and tort law regarding violent crimes that were found to be of local concern in *Morrison*. Congressional ability to preempt these types of state law, even if in the aggregate such state laws have economic consequences, may be limited under current Supreme Court decisions. It is too simplistic to say that the ICCTA regulates railroads only. The broad view of preemption may not be supportable under a Commerce Clause analysis if courts view ICCTA preemption of local laws regulating ancillary facilities as congressional action in an area traditionally reserved to the states (zoning, health, and safety) and unrelated to interstate commerce.

Possible solutions to the regulatory gaps left by current interpretations of the ICCTA preemption of local control include expanding the scope of the STB's authority to govern such facilities or reading the ICCTA more narrowly to avoid such preemption. Expanding the STB's authority is problematic because the agency is small and unlikely to effectively handle a large increase in responsibility. Restricting the ICCTA preemption to a narrow scope, either through court or congres-

237. *See Id.* (holding that the economic side-effects of violence against women or guns near schools is not sufficient to make them substantially related to economic activity).

238. *Id.*

sional action, is a better solution. The legislative history and language and structure of the Act clearly support a narrow reading of preemption. A narrow view also may comport with recent Commerce Clause analysis regarding the scope of the ICCTA itself. In addition, the narrow view of preemption better supports state sovereignty and local control over issues like land-use and zoning that are clearly best regulated at the local level.

CONCLUSION

The preemption language in the ICCTA can be interpreted in several ways. Some courts and the STB have viewed it as unlimited, preempting all attempts at local control of railroad activities. This view has extended preemption even to those activities and facilities that are not licensed or regulated by the ICCTA. This broad view results in insufficient protection for local environments and communities, as well as regulatory gaps where ancillary facilities can be constructed without any federal or state oversight.

The Supreme Court has cautioned against such broad interpretations of federal preemption. For example, the Employment Retirement Income Security Act (ERISA) includes a clause that preempts "all State laws insofar as they . . . relate to any employee benefit plan."[239] The Supreme Court cautioned that to interpret the term "relate" broadly would "read Congress's words of limitations as mere sham, and to read the presumption against preemption out of the law whenever Congress speaks to the matter generally."[240] Similarly, reading the language of the ICCTA, which preempts state and federal law only "with respect to regulation of rail transportation,"[241] as preempting all state laws, including those that regulate land-use and public safety, disregards the limiting effect of the words of the ICCTA.

A better approach is to read the language of the ICCTA narrowly to avoid preempting state laws that preserve local land-use control and regulation. This is particularly important

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239. Employment Retirement Income Security Act of 1974 § 1144(a), 29 U.S.C. §§ 1001-14611 (2000).

240. N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655–56 (1995).

241. 49 U.S.C. § 10501(b) (2000).

for ancillary facilities, which are not licensed by the STB. Instituting a narrow view of the preemption language will have economic consequences. However, it will merely subject railroads to the same business constraints faced by other industries planning to build or expand facilities within a state. The federal regulatory regime would remain in place for interstate transportation and railroad operation. This alternative approach preserves the ability of local government to protect its land resources and public health and safety, while ensuring railroads continue to benefit from a uniform federal system of operation.