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I. Introduction

"We are the people of Benicia. We have mobilized."[1] As local activist Andrés Soto spoke these words, a petition unfurled behind him containing the signatures of 4,081 concerned citizens—a quarter of them Benicia residents—opposed to the construction of a facility that would allow crude oil to be delivered into the town by railcar.[2] This meeting kicked off three consecutive nights of City Council meetings concerning the crude-by-rail project.[3] On each night, the chambers were packed with concerned residents, officials from other cities, and literally buses full of loosely organized activists generally opposing the construction the crude oil offloading facility.

Benicia—pronounced "Ben-Ē-sha" by visitors, but "Ben-ISH-a" by locals—is an idyllic bedroom community located in the crowded San Francisco Bay Area. The town was once, perhaps surprisingly, one of California's first capitals.[4] Historically, its location on the Carquinez Strait made it a perfect location to develop ports and nurture California's nascent industries.[5] As the "tanning capital of the west" and home to arsenals and shipyards, Benicia contributed greatly to California's economic and military development.[6] Even as the town's wartime uses became less

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1. *Video of Benicia City Council Continued Regular Meeting* (April 4, 2016), https://benicia.granicus.com/MediaPlayer.php?view_id=1&clip_id=60&autostart=0&embed=1 (last visited Feb. 11, 2017) (on file with the Washington and Lee Law Review).

2. *Id.*

3. *See generally Agendas, Minutes, and Videos*, CITY OF BENICIA, http://www.ci.benicia.ca.us/agendas (last visited Feb. 27, 2017) (containing the minutes and video of the April 4, 5, and 6, 2017 Benicia City Council meetings) (on file with the Washington and Lee Law Review).

4. *See Benicia's History*, VISIT BENICIA, http://www.visitbenicia.org/content/benicias-history (last visited Jan. 9, 2017) ("Just a few years after its founding, Benicia was the third site selected to serve as the California state capital . . . .") (on file with the Washington and Lee Law Review).

5. *See* CITY OF BENICIA, HISTORIC CONTEXT STATEMENT 35 (2010), http://ohp.parks.ca.gov/pages/1054/files/benicia%20context%20.pdf [hereinafter HISTORIC CONTEXT STATEMENT] (describing shipping and the arsenal's contribution to the choice of Benicia as a state capital).

6. *See id.* at 67–72 (detailing Benicia's economic contributions in early-statehood-California).

relevant, Benicia continued to evolve, and new industry sustained the town.[7] Importantly for this Note, in 1966, Benicia successfully attracted its largest employer—now known as Valero Refining Company.[8]

As is often the case, Benicia's industrial development came with an environmental price tag. Increasing awareness of environmental issues, like air pollution and climate change, resulted in increased scrutiny for the refinery.[9] Local entities soon formed in opposition to the refinery and stymied any new efforts by the refinery to expand.[10]

In December 2012, to the dismay of a number of residents, Valero submitted a land-use permit application to construct a crude offloading facility—a necessity for offloading crude shipped in railcars—and expand the refinery's capacity to receive domestic crude oil shipments.[11] Currently, Valero receives almost all of its crude oil via "marine vessel from Alaska and foreign sources," along with some from California producers.[12] With an eye to opening up the domestic market, the refinery hoped to construct a

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7. *See id.* at 158 (listing new industries that took the place of the foreclosed arsenal).

8. *See id.* (describing the refinery as the "most important" industrial park tenant and stating that the revenues earned by the new refinery "helped stabilize Benicia's economy").

9. *See, e.g.*, Denis Cuff, *Valero Refinery Faces $197,500 Fine for Fouling Suisun Bay*, E. BAY TIMES (Oct. 17, 2016), http://www.eastbaytimes.com/2016/10/17/benicia-valero-refinery-faces-197500-for-fouling-suisun-bay/ (last updated Oct. 18, 2016) (last visited Jan. 9, 2017) ("State water pollution regulators propose to fine the Valero oil refinery $197,500 for discharging more than a million gallons of partially treated plant wastewater . . . .") (on file with the Washington and Lee Law Review); *Valero Refinery in Benicia to Pay $122,500 in Air Pollution Penalties*, E. BAY TIMES (June 25, 2015) http://www.eastbaytimes.com/2015/06/25/valero-refinery-in-benicia-to-pay-122500- in-air-pollution-penalties/ (last updated Aug. 15, 2016) (last visited Jan. 9, 2017) ("The Valero oil refinery has agreed to pay $122,500 in civil penalties for air pollution violations during 2011 . . . .") (on file with the Washington and Lee Law Review).

10. *See, e.g.*, *Home*, BENICIANS FOR A SAFE & HEALTHY COMMUNITY, http://www.safebenicia.org (last visited Oct. 14, 2017) (on file with the Washington and Lee Law Review).

11. *See* Valero Refining Co.—Petition for Declaratory Order, FD 36036, slip op. at 2 (STB served Sep. 20, 2016) (recapping the events leading up to the Declaratory Order).

12. *Id.*

crude-by-rail offloading facility capable of receiving two fifty-car unit-trains per day.[13]

Valero's proposal to construct the crude offloading facility touched off a firestorm in Benicia,[14] as well as in California generally.[15] Valero's application was fraught with roadblocks, ultimately requiring one land-use permit application submission, two Environmental Impact Reports, two separate Planning Commission denials, and four years.[16] In the end, Valero changed direction in the face of stiff opposition to its proposal.[17] Instead of going through the city, Valero attempted to chart a course around the local government, completely ousting the city from the decision-making process.[18]

On May 31, 2016, Valero petitioned the Surface Transportation Board (STB), a federal agency, for a Declaratory Order clarifying and limiting Benicia's authority to deny Valero's permit application.[19] Valero argued that the Interstate Commerce Commission (ICC) Termination Act preempted the City of Benicia Planning Commission's decision removing, or severely limiting, the town's ability to deny these permits as an undue interference on railroads.[20]

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13. *Id.*

14. *See* Rye Druzin, *Valero Decides Not to Sue Benicia Over Crude-by-Rail Denial*, SAN ANTONIO EXPRESS-NEWS (Dec. 23, 2016), http://www.expressnews.com/business/eagle-ford-energy/article/Valero-decides-not-to-sue-Benicia-over-10816140.php (last visited Jan. 9, 2017) ("The fight over the crude-by-rail project opened up rifts in [Benicia] where the Valero refinery is a major employer . . . .") (on file with the Washington and Lee Law Review).

15. *See* Tony Bizjak, *Crude Oil Train Protests Planned in Sacramento, Davis*, SACRAMENTO BEE (July 8, 2014), http://www.sacbee.com/news/local/article71926902.html (last visited Jan. 9, 2017) (describing protests across California regarding Valero's crude by aril project) (on file with the Washington and Lee Law Review).

16. *See Valero Refining Co.*, slip op. at 2–3 (recapping the events leading up to the Declaratory Order).

17. *Id.*

18. Pet. for Declaratory Order, Valero Refining Co., FD 36036 (May 31, 2016).

19. *Id.*

20. *See Valero Refining Co.*, slip op. at 1 (seeking a declaration that "denying Valero's conditional use permit for a crude oil off-loading facility [is] preempted by 49 U.S.C. § 10501(b)").

Preemption is a constitutional doctrine drawn from the dictate that the "Constitution, and the Laws of the United States . . . [are] the supreme Law of the Land . . . ."[21] So long as Congress acts under an enumerated or implied power, it theoretically has the authority to preempt any state or local regulation it sees fit.[22] Historically, a clear statement from Congress has been required before an act is considered preemptive due to preemption's potentially expansive impact and interference with state sovereignty.[23]

California communities and industries both weighed in on this fight. Refineries and railways asserted that the ICC Termination Act preempts local permitting power when the proposed project involves the shipment or receipt of crude oil via railcar.[24] Whereas localities—and the state of California[25]—asserted that denying use permits is well within traditional police powers, particularly the power to create regulations impacting public health, safety, and welfare.[26]

STB jurisdiction encompasses those activities considered "transportation" and those "performed by, or under the auspices of,

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

22. *See* Carter J. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L.Q. 1147, 1151 (2007) [hereinafter Strickland, *Revitalizing the Presumption*] (describing the potential scope of preemption doctrine).

23. *See id.* at 1154 (explaining that the presumption against preemption "required a clear statement from Congress before the Supreme Court would interpret a statute to displace states from regulating in areas in which they historically operated").

24. *See* Pet. for Declaratory Order at 3, Valero Refining Co., FD 36036 (May 31, 2016).

> Valero maintains that the Planning Commission's refusal to certify the EIR and denial of the land use permit are federally preempted under § 10501(b) because they prevent rail transportation of crude oil to the refinery, deny Valero its right to receive rail service, and prevent [Union Pacific] from providing such rail service.

25. *See* Letter from Kamala Harris, Att'y Gen., State of California, to Amy Million, Principal Planner, City of Benicia (Apr. 14, 2016) (opposing Valero's argument that Benicia was preempted from denying Valero's conditional use permit for construction of a crude oil offloading facility) (on file with the Washington and Lee Law Review).

26. *See* Benicia, Cal., Res. 16-150 (Oct. 13, 2016) (asserting the City's authority over public health, safety, and welfare).

a 'rail carrier.'"[27] Yet, the scope of "permissible indirect rail regulation" remains unclear.[28] In the *Valero* case, the STB issued a surprising decision, holding that the city's permitting authority was not preempted "because the Planning Commissions decision [did] not attempt to regulate transportation by 'rail carrier'" and the refinery did not present facts indicating they were operating "under the auspices of a rail carrier."[29] This is the only STB decision dealing with the precise question and the federal courts have yet to take it up.

After Benicia's successful rejection of crude-by-rail, multiple localities have become emboldened and also denied refinery permit applications for the construction of offloading facilities.[30] The fruits of local activism, both up-rail and down-rail, have hindered crude-by-rail expansion plans across the West, but refiners, crude oil producers, and rail carriers have significant incentive to push back.[31] As discussed below, there are significant competitive advantages and financial incentives for railroads and refineries, especially on the West Coast, to import crude via railcar.[32] Given the high stakes for both localities and corporations, the preemption issue is far from settled.

The question explored in this Note is whether, or perhaps to what extent, the ICC Termination Act preempts localities from using land-use permitting authority to deny a refinery's permit application for construction of a crude offloading facility. The scope

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27. *Valero Refining Co.*, slip op. at 4.

28. *Id.* at 3.

29. *Id.* at 4.

30. *See, e.g.*, Tony Bizjak, *Oil Company Dealt Another Blow on Plan to Ship Crude by Train*, SACRAMENTO BEE, Oct. 6, 2016, http://www.sacbee.com/news/local/article106475912.html (last visited Oct. 14, 2016) (explaining that the San Luis Obispo County Board of Supervisors recently denied Phillips 66 a permit to build a crude offloading facility at its refinery) (on file with the Washington and Lee Law Review); Donna Beth Weilenman, *Council Denies Valero Crude-By-Rail Project*, BENICIA HERALD, Sep. 22, 2016, http://beniciaheraldonline.com/council-denies-valero-crude-by-rail-project/ (last visited Oct. 14, 2016) (identifying the Benicia City Council as the first local authority to deny a refinery a permit to construct a crude offloading facility) (on file with the Washington and Lee Law Review).

31. *See infra* Part II.A (discussing the economics of crude-by-rail).

32. *See infra* Part II.A (same).

of the ICC Termination Act's Preemption Clause depends largely upon the answer to two questions. First, whether Congress intended the ICC Termination Act to cover local regulations, such as land-use permits. And second, whether Congress intended refineries to be among the covered parties under the Act. To analyze these questions, this Note investigates how the ICC Termination Act's textual definitions, legislative intent, and judicial application combine to create an unclear mandate that could threaten local control over matters of genuine local import.

This Note proceeds in the following course: Part II explores refiner and producer motives to expand crude-by-rail into the Western market.[33] The California market creates significant incentives and opportunities for crude producers, refiners, and railroad companies, but it also poses political risks and structural challenges. Part III evaluates the ICC Termination Act's language and the relevant legislative history.[34] This history demonstrates that, in an attempt to deregulate the railroad industry, Congress sought to draft a preemption clause that covered all "economic regulation," but with room for preservation of some traditional local police powers. Part IV evaluates the broad, and sometimes incongruous, application of the ICC Termination Act in federal courts and the STB.[35] Lastly, using the text, legislative history, and jurisprudence as a guide, Part V argues that under no circumstances should a refinery be considered a "rail carrier," and therefore, the ICC Termination Act should not preempt local zoning laws impacting refineries.[36] Ultimately, this Note counsels against a broad reading of ICC Termination Act preemption. Any preemptive result would dangerously threaten local autonomy and open every community in the United States to crude-by-rail delivery, no matter the concerns of the local government and the people.

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33. *See infra* Part II (providing an overview of the economic justification for crude-by-rail on the West Coast).

34. *See infra* Part III (exploring the legislative history of the ICC Termination Act).

35. *See infra* Part IV (evaluating the judicial application of the ICC Termination Act).

36. *See infra* Part V (concluding that the ICC Termination Act Preemption Clause should not apply to crude-by-rail offloading facilities).

II. Crude-by-Rail: The Most Economically and Competitively Feasible Method of Domestic Crude Shipment to the West

To understand why crude-by-rail is important to domestic oil producers, oil refiners, and the railroad industry, it is important to understand the economic and strategic incentives for expanding and developing crude-by-rail facilities. As discussed below, oil production is increasing in the United States, yet there are few shipment methods available for domestic oil producers seeking to market their product on the West Coast. While crude-by-rail is the one economically feasible strategy to ship the crude, it is politically difficult. Nonetheless, moneyed interests have significant incentives to move crude from domestic producers to Western refiners and pursue the fight in the courts.

A. Oil Production and Transportation in the United States

In the United States, domestic crude oil production is increasing at a dramatic rate.[37] Currently, domestic crude oil production—at 9.4 million barrels per day—is rapidly approaching its historic peak—9.6 million barrels per day.[38] A significant portion of the increased production is due to North Dakota's booming crude oil industry centered in the Bakken Shale Formation.[39] Additionally, crude oil production has increased in areas such as the Eagle Ford Group in Texas, the Marcellus Formation in Pennsylvania and Ohio, and the Niobrara Formation in Wyoming.[40]

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37. *See* ASS'N OF AM. R.RS., U.S. RAIL CRUDE OIL TRAFFIC 1 (2015) https://www.aar.org/BackgroundPapers/US%20Rail%20Crude%20Oil%20Traffic.pdf [hereinafter AAR, CRUDE OIL TRAFFIC] (indicating that U.S. crude production increased from 5.0 million barrels per day in 2008 to 9.4 million barrels per day in 2015).

38. *See id.* (displaying historical data regarding historic levels of U.S. crude oil production).

39. *See id.* at 2 (demonstrating that production of crude oil in North Dakota rose by 982% in 12 years to 1.2 million barrels per day).

40. *See id.* at 1 (listing the locations of large shale deposits in the contiguous United States).

Transportation of crude oil by railroad is a relatively recent phenomenon. The practice's popularity peaked in 2014 when it was used to transport 382 million barrels of crude within the United States.[41] Today, crude-by-rail moves 319 million barrels of crude per year[42]—most frequently between North Dakota producers and refineries on the East Coast.[43]

Crude oil must be processed at refineries in order to be made useful as gasoline, jet fuel, asphalt, or a litany of other byproducts.[44] Ideally, these refineries should be located near water for two important reasons: (1) water is used in the refining process,[45] and (2) nearby ports make importing crude and exporting refined oil easier.[46] Midwestern geography and infrastructure make the region inadequate to refine the massive amounts of oil produced in North Dakota.[47] Therefore, crude producers in the Bakken must outsource refinement to any of three destinations better suited for these requirements—the Gulf Coast,

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41. *See* U.S. ENERGY INFO. ADMIN., MOVEMENTS OF CRUDE OIL AND SELECTED PRODUCTS BY RAIL (2016), http://www.eia.gov/dnav/pet/pet_move_railNA_a_EPC0_RAIL_mbbl_a.htm (last visited Jan. 7, 2017) (displaying data regarding the amount of crude transported via railroad between each Petroleum Administration for Defense District) (on file with the Washington and Lee Law Review).

42. *Id.*

43. *Id.*

44. *See* AAR, CRUDE OIL TRAFFIC, *supra* note 37, at 3 ("Crude oil has little value unless it can be transported to refineries . . . .").

45. *See* Eve Troeh, *An Oil Refinery Secures an Essential Material: Water*, MARKETPLACE (Aug. 21, 2012), https://www.marketplace.org/2012/08/21/sustainability/oil-refinery-secures-essential-material-water (last visited Jan. 7, 2017) ("To turn crude oil into car-ready gas, you need a lot of water.") (on file with the Washington and Lee Law Review).

46. *See* Daniel Gross, *The Great Oil Refinery Shortage*, SLATE (June 8, 2004), http://www.slate.com/articles/business/moneybox/2004/06/the_great_refinery_shortage.html (last visited Jan. 9, 2017) (explaining the various reasons oil is often produced near the coast) (on file with the Washington and Lee Law Review).

47. *See Rail Transportation Today*, AM. PETROLEUM INST., http://www.api.org/oil-and-natural-gas/wells-to-consumer/transporting-oil-natural-gas/rail-transportation/rail-transportation-today (last visited Jan. 9, 2017) ("Because of [the Bakken's] geographic location and lack of energy infrastructure, operators have been transporting crude oil from production areas to refineries by rail.") (on file with the Washington and Lee Law Review).

the East Coast, or the West Coast.[48] Crude producers, however, have extraordinarily limited access to the West.

B. The Size of the California Crude Oil Market Provides Significant Incentives and Opportunity for Investment

The Western states, while ideal for refineries, are not readily accessible to domestic crude oil producers, especially compared to the Southern and Eastern states. Although pipelines are by far the nation's most heavily utilized transportation method for crude oil,[49] very few pipelines lead to Western states.[50] Therefore, Western states like California are heavily reliant on foreign crude oil shipments.[51] In an effort to expand the domestic crude oil market in the West, producers, railroads, and refiners are attempting to exploit crude-by-rail.[52] Although "[r]ail is a relatively high-cost method of transportation,"[53] a unique confluence of circumstances make crude-by-rail a compelling option for producers seeking to reach the California, Oregon, and Washington markets.

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48. *See* AAR, CRUDE OIL TRAFFIC, *supra* note 37, at 3 ("[M]ost U.S. refineries are located in traditional crude oil production areas (Texas, Oklahoma, Louisiana) or on the coasts . . . rather than near new production areas like North Dakota.").

49. *See* John Frittelli et al., *U.S. Rail Transportation of Crude Oil: Background Issues for Congress*, *in* TRANSPORTING CRUDE OIL BY RAIL 1, 4 (Rosario S. McLaughlin ed., 2014) [hereinafter Frittelli, *U.S. Transportation of Crude Oil*] ("[P]ipelines and oceangoing tankers have delivered the vast majority of crude to U.S. refineries, accounting for approximately 93% of total receipts . . . .").

50. One need only view a map of crude pipelines on the West Coast to see the infrastructure's insufficiency. *See Where Are Liquids Pipelines Located?*, PIPELINES 101, http://www.pipeline101.com/where-are-pipelines-located (last visited Jan. 9, 2017) (displaying a map of crude oil pipelines in the United States) (on file with the Washington and Lee Law Review).

51. *See* W. STATES PETROLEUM ASS'N, OIL AND GAS IN CALIFORNIA: THE INDUSTRY AND ITS ECONOMIC CONTRIBUTION IN 2012 6 (2014), https://www.wspa.org/sites/default/files/uploads/O%26G_Contribution_20140418.pdf (estimating that California imports 50.7% of crude oil supply from foreign sources).

52. *See Rail Transportation Today*, AM. PETROLEUM INST., *supra* note 47 ("Domestic deliveries from shale plays to West Coast refineries have also offset declining production in California and Alaska.").

53. Frittelli, *U.S. Transportation of Crude Oil*, *supra* note 49, at 6.

The most important factor driving crude producers to reach the Western states is opportunity, specifically the opportunity to capitalize on the California market. The most recent U.S. Energy Information Administration (EIA) estimates show California consuming nearly 630 million barrels of petroleum per year.[54] This makes California one of the largest consumers of such products on the planet.[55] Yet, of the 163,600 train shipments of crude originating in North Dakota in 2012, only 2,000 shipments (1%) were sent to California.[56] Again, this enables domestic California oil producers and foreign producers to dominate the California crude market.[57]

Beyond the size of the market, other factors help justify the use of crude-by-rail in the West. First, Bakken crude oil sells for $4 to $28 less per barrel than other crude oil.[58] Although rail transportation costs are approximately $5 to $10 higher than pipeline transportation,[59] the lower cost of Bakken crude allows refiners to recoup the higher transportation costs.

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54. *Total Petroleum Consumption Estimates, 2014*, ENERGY INFO. ADMIN. https://www.eia.gov/state/seds/data.cfm?incfile=/state/seds/sep_fuel/html/fuel_use_pa.html&sid=US&sid=CA (last visited Oct. 14, 2016) (on file with the Washington and Lee Law Review).

55. *See* Pet. for Declaratory Order at 8, Valero Refining Co., FD 36036 (May 31, 2016) (identifying California as one of the largest consumers of gasoline "in the world"); *International Energy Statistics*, ENERGY INFO. ADMIN., http://www.eia.gov/beta/international/data/browser/#/?pa=0000001&c=ruvvvvvfvtvnvv1urvvvvfvvvvvvfvvvou20evvvvvvvvvvnvvuvo&ct=0&tl_id=5-A&vs=INTL.5-2-AFG-TBPD.A&ord=SA&vo=0&v=H&start=2013&end=2014 (last visited Jan. 7, 2017) (comparing the annual petroleum consumption of different countries) (on file with the Washington and Lee Law Review).

56. US Gov't Accountability Office, *Oil and Gas Transportation: Department of Transportation Is Taking Action to Address Rail Safety, but Additional Actions Are Needed to Improve Pipeline Safety*, *in* OIL AND GAS TRANSPORTATION: PIPELINE AND RAIL INFRASTRUCTURE SERIES 1, 30 Figure 7 (Elton Simmons ed., 2015) [hereinafter GAO, *Oil and Gas Transportation*].

57. *See supra* note 51 and accompanying text (providing an overview of California's oil importation).

58. *See* Frittelli, *U.S. Transportation of Crude Oil*, *supra* note 49, at 6 (evaluating the economic incentives for using crude-by-rail).

59. *See id.* at 8 ("Railroad transport costs in the neighborhood of $10 to $15 per barrel compared to $5 per barrel for pipeline.").

Railroads also offer producers and refiners significant flexibility.[60] It is exceedingly difficult to construct new refining facilities[61] and exceedingly expensive to construct new pipelines.[62] Railroads are administratively more efficient to build than pipelines and cost less to construct.[63] Additionally, the national railroad infrastructure vastly exceeds pipeline infrastructure.[64] While there are 57,000 miles of crude oil pipelines,[65] there are 140,000 miles of railroad track, enough for U.S. tracks to circle the earth nearly six times.[66] Other factors making railroads competitive, despite the increased cost, include higher quality transportation, shorter contract terms than pipeline transportation (ten to fifteen years shorter), and shorter overall transportation timelines (five to seven days compared to forty days).[67]

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60. *See id.* at 7 ("Railroads are a viable alternative to pipeline transportation largely because they offer greater flexibility.").

61. *See id.* at 4 ("The last entirely new petroleum refinery in the United States opened in 1976.").

62. *See id.* at 4–5 (discussing the cost of constructing pipelines compared to the cost of building railroads).

63. *See id.* at 7 ("Railroads can increase capacity relatively cheaply and quickly by upgrading tracks . . . [and] do not require approval to make improvements of existing lines.").

64. *See* Tim Meko, *Six Maps that Show the Anatomy of America's Vast Infrastructure*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/graphics/national/maps-of-american-infrastrucure/ (last visited Feb. 4, 2017) (visualizing America's pipeline and railroad infrastructure) (on file with the Washington and Lee Law Review).

65. Frittelli, *U.S. Transportation of Crude Oil*, *supra* note 49, at 7.

66. *See* ASS'N OF AM. R.RS., TOTAL 2013 ANNUAL SPENDING (2013), https://www.aar.org/Infographics/Economic/High%20Resolution%20Images/AAR_Spending_Infographic.pdf ("Railroads own 140,000 miles of track, enough to circle the earth 5.6 times.").

67. *See* Frittelli, *U.S. Transportation of Crude Oil*, *supra* note 49, at 8–9 (expanding of the advantages of rail transportation of crude, as opposed to pipeline).

C. The West Lacks Both the Political and Structural Capacity Necessary to Accommodate Crude-by-Rail Shipments

For the above reasons, refineries consider rail carriage the only economically and competitively feasible method to ship crude oil from Midwestern producers to Western refiners.[68] Even so, the West Coast lacks the structural capacity (i.e., offloading facilities) and the political will (i.e., many communities, like Benicia, do not want them) to allow crude-by-rail to take hold as an effective transportation modality.[69]

As discussed, local refiners lack offloading equipment, causing a significant impediment to the expansion of crude-by-rail.[70] This offloading equipment is necessary to transfer crude oil from the tank cars to the refinery for processing.[71] Currently, refineries and producers alone have borne the cost of construction of these offloading facilities, not the railroads.[72] Railroad companies' hands-off approach strengthens the hand of local activists, as it is more difficult for refineries than railroad companies to argue for

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68. *See* Valero Refining Co.—Petition for Declaratory Order, FD 36036, slip op. at 2 (describing the Bakken crude as "economically and competitively" accessible to California only by rail).

69. Crude-by-rail offloading facilities were recently considered or are currently pending at Valero Refinery, in Benicia, CA; Alon Bakersfield Refinery, in Kern County, CA; Phillips 66 Refinery, San Luis Obispo, CA; Shell Oil Puget Sound, in Skagit, WA; Tesoro Savage Vancouver Refinery, in Vancouver, WA; and Buckeye Terminal, in West Sacramento, CA. Pet. For Declaratory Order at 3–7, Valero Refining Co., FD 36036 (May 31, 2016).

70. *See* Frittelli, *U.S. Transportation of Crude Oil*, *supra* note 49, at 9 ("One hindrance to the expansion of crude-by-rail has been the lack of tank cars and loading and unloading infrastructure.").

71. Construction of these offloading sites often involves: (1) construction of the offloading rack, (2) installation of a floating-roof-tank to store the crude, (3) installation of additional track and rail spurs, and (4) construction of additional pipeline to transport the crude from the offloading facility to the refinery. *See* Land Use Permit Application Crude-by-rail Project, Valero Benicia Refinery at 1 (Dec. 2012) (supplying an overview of the permit request).

72. *See* Frittelli, *U.S. Transportation of Crude Oil*, *supra* note 49, at 9 ("[I]nvestment is being made by the oil industry or by rail equipment leasing companies, not railroads.").

preemption.[73] Thus, as local refineries apply for permits to build these facilities, localities are successfully denying their requests.[74]

Crude-by-rail also faces significant political opposition in Western states. California in particular is reticent to support any industry that may impact carbon emissions, like transportation and crude oil production.[75] Moreover, recent derailments resulting in death and environmental destruction, though rare, weigh heavily on localities' minds when considering the land-use permits for offloading facilities.[76] Some activists have even gone so far as to draft "blast zone" maps that predict the effects of a train explosion on local communities considering the construction of facilities required for crude-by-rail transportation.[77] Whether these localities have the authority to deny these permits is a more complicated question, and is the main focus of this Note.

III. ICC Termination Act: A Legislative History

The question of whether the ICC Termination Act preempts local authority over traditional land-use permitting in situations like the one presented in this Note makes more sense when the Act is placed in its historical context. To understand the Act's intended preemptive effect, the long history of railroad over-regulation must be taken into account. Ultimately, the ICC Termination Act arises out of this history as the capstone of a larger deregulatory effort

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73. *See supra* Part V.B (arguing that refineries should be unable to receive the preemptive protections of the ICC Termination Act).

74. *See supra* note 30 (discussing recent instances of permit denials).

75. *See Assembly Bill 32 Overview*, CAL. ENVTL. PROT. AGENCY, https://www.arb.ca.gov/cc/ab32/ab32.htm (last visited Mar. 1, 2017) (reviewing the features of the California Global Warming Solutions Act of 2006); *see also* GAO, *Oil and Gas Transportation*, *supra* note 56, at 17–18 (discussing risks to local air quality).

76. *See* GAO, *Oil and Gas Transportation*, *supra* note 56, at 18–19 (providing details about crude-by-rail derailments occurring between 2013 and 2014 in Lac Mégantic, Quebec; Gianford, Alberta; Aliceville, Alabama; Casselton, North Dakota; Plaster Rock, New Brunswick; and Philadelphia, Pennsylvania).

77. *See, e.g.*, NAT'L RES. DEF. COUNCIL, CRUDE OIL TRAIN DERAILMENT RISK ZONES IN BENICIA, CA (2014) https://www.nrdc.org/sites/default/files/ca-crude-oil-by-rail-Benicia.pdf. (diagraming the neighborhoods and schools endangered by a crude-by-rail explosion in Benicia).

that includes a number of other laws. The Act's Preemption Clause, viewed in the light of "total economic deregulation," takes on more force than might otherwise be presumed by the text alone.

The ICC Termination Act is a comprehensive regulatory statute, made especially relevant because the STB operates by terms prescribed therein.[78] To understand the ICC Termination Act's full significance, it is important to understand the context in which the Act arose.

A. Pendular Railroad Regulations: From Highly Permissive, to Highly Restrictive, and Back Again

Prior to 1870, Congress intended most laws regarding railroads to encourage their establishment and success.[79] But, as the railroads gained a foothold—eventually becoming massively successful commercial enterprises[80]—they began to leverage their market share and wield coercive market power over their consumers and the towns in which they operated.[81] Railroads' market dominance profoundly affected many freight customers.[82] Anticompetitive behavior caused significant antagonism between "eastern financial interests" and the rural communities in which the railroads operated, and contributed to railroad companies' increasingly negative image.[83] Freight customers and local

78. *See infra* Part III.B (reviewing the relevant provisions of the ICC Termination Act).

79. *See* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 71 (2002) (examining the railroad regulatory landscape in the nineteenth century).

80. *See* James W. Ely, Jr., *"The Railroad System Has Burst Through State Limits": Railroads and Interstate Commerce, 1830–1920*, 55 ARK. L. REV. 933, 933 [hereinafter Ely, *Railroads and Interstate Commerce*] (describing the railroads as "America's first big business").

81. *See* H.R. REP. NO. 104-311, at 90 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 164, 802 ("Because railroads possess certain characteristics of natural monopolies, in the absence of competition from other modes of transportation, railroads were able to wield enormous power over the shippers and communities they served.").

82. *See id.* at 91 ("[S]ome shippers and communities continue to be dependent upon a single rail carrier and may not have access to alternative modes of transportation . . . .").

83. *Id.* at 90.

communities raised a litany of complaints against the railroads, but the railroads' high and regularly fluctuating shipping rates were of particular concern.[84] Ultimately, these complaints were too vociferous and persistent for local governments to ignore.[85]

In response to these concerns, states passed a patchwork of laws attempting to reel in the rail industry's abuses.[86] Starting in the 1870s, various Midwestern states passed "Granger Laws," the first of many laws regulating the railroad industry.[87] Generally, this patchwork of state regulations required railroads to charge uniform rates for carriage—addressing freight shippers' largest complaint.[88]

As the public began to recognize the danger railroads posed to surrounding communities,[89] localities began to enact more and more punitive regulations. For example, while farmers had no recourse at common law when trains killed animals wandering onto the tracks,[90] states passed Railroad Fence laws to impose liability on railroads for these losses.[91] States also passed laws regulating railroad crossing and safety[92] and laws enumerating railroad passenger rights.[93] Increasing state regulation, however, began to have a negative financial impact on the railroads.[94]

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84. ELY, *supra* note 79, at 82–83.

85. *See id.* at 71 ("Although questions of safety and service were important, unhappiness with rates was the principal force behind the push for more vigorous railroad regulation.").

86. *See id.* at 86–87 (listing the various states that passed Granger Laws and their impacts).

87. *See id.* (same).

88. *See id.* at 81 ("The chronic complaint against the carriers, therefore, was not exorbitant charges but unequal treatment of shippers and communities.").

89. *See id.* at 117 ("Locomotives killed livestock, started fires, and collided with vehicles at highway intersections.").

90. *See id.* at 118 ("In short, under common law, owners allowed livestock to wander at their peril and had no recourse if the animals were killed on the tracks.").

91. *See id.* at 117–19 (recounting litigation regarding Railroad Fence laws).

92. *See id.* at 126 (describing laws requiring railroads to ring bells and give warning at crossings or be subject to liability for harm to individuals).

93. *See id.* at 132–33 (describing efforts to encourage railroads to stick to schedules and deal with passengers fairly).

94. *See* Ely, *Railroads and Interstate Commerce*, *supra* note 80, at 942 (2003) ("[S]tate regulations 'had contributed significantly to the railroads' financial

The railroads' unpopularity also made them an easy target for congressional action. The federal government, recognizing the administrative difficulty of myriad state regulations on railroads, began to preempt local laws and establish uniform railroad regulation.[95] In 1887, Congress passed the Inter-State Commerce Act (ICA).[96] The ICA's most important provision established the ICC, which had "full control over interstate railroad charges"[97] and power to approve or disapprove railroad mergers and acquisitions.[98] Additionally, Congress passed the Railway Labor Act which, in an effort to "promote the peaceful resolution of rail labor conflicts,"[99] guaranteed the "right of [railroad] workers to organize without employer interference."[100] Congress also enacted the Transportation Act of 1940, making the rail industry the first industry required to guarantee income to displaced workers.[101]

The simultaneous operation of federal regulations and those state regulations not fully preempted by federal law caused significant uncertainty and inefficiency.[102] By the 1970s, these regulations' cumulative effects resulted in a weakened and uncompetitive railroad industry.[103] Ultimately, seven major railroads and multiple other companies descended into

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troubles.'" (quoting HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937 137 (1991))).

95. *See id.* at 962 ("Congress in the first two decades of the twentieth century enacted a comprehensive scheme of federal railroad regulation, one consequence was increased displacement of state regulatory authority over the rail industry.").

96. *See* ELY, *supra* note 79, at 91 (providing information regarding the passage of the ICA).

97. Ely, *Railroads and Interstate Commerce*, *supra* note 80, at 967.

98. *See* ELY, *supra* note 79, at 91–92 (describing the establishment and authority of the ICC).

99. *Id.* at 258.

100. *Id.* at 259.

101. *See id.* at 263 (stating that the Transportation Act "directed the ICC to include compensatory wage payments for four years in any merger approvals").

102. *See* Ely, *Railroads and Interstate Commerce*, *supra* note 80, at 967 ("This regulatory confusion clearly burdened the railroads as instruments of interstate commerce.").

103. *See* Strickland, *Revitalizing the Presumption*, *supra* note 22, at 1159–60 (detailing the precipitating events which led to the passage of the ICC Termination Act).

bankruptcy.[104] This crisis even brought a rare moment of bipartisan agreement between the major political parties, President Jimmy Carter, and then-candidate Ronald Reagan.[105] All agreed that the railroad industry was in dire need of deregulation.[106]

In one of its first forays into deregulation, Congress enacted the Staggers Rail Act of 1980 (Staggers Act).[107] The Staggers Act deregulated most railroad rates, legalized previously illegal railroad shipping contracts, and simplified abandonment proceedings.[108] According to the ICC Termination Act's drafters, the Staggers Act "stimulated an explosion of service and marketing alternatives that would not have been possible under the Kafkaesque regulatory regime of the pre-Staggers era."[109] But the Staggers Act was only the first step in a larger effort to deregulate the railroad industry.

Concerns over bloated government and the growing regulatory state put pressure on Congress and multiple Presidents to deregulate the transportation industry.[110] In his January 1995 State of the Union address, President William J. Clinton called on Congress to continue its deregulatory efforts specifically, by terminating the ICC.[111] The waste represented by the ICC was so

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104. *Id.*

105. *See* S. REP. NO. 104-176, at 3 (1995) ("In 1977, citing the ineffectiveness of the ICC, President Carter created a task force that was charged with streamlining the ICC and reducing regulation.").

106. *Id.*

107. *See* Strickland, *Revitalizing the Presumption*, *supra* note 22, at 1160 (providing that Congress enacted "deregulatory reforms designed to lower rates and to loosen market exit and entrance restrictions").

108. *See* H.R. REP. NO. 104-311, at 91 (1995), *as reprinted in* 1995 U.S.C.C.A.N. at 803 (enumerating the goals and provisions of the Staggers Rail Act).

109. *Id.*

110. *See* U.S. DEP'T OF TRANSP., MOVING AMERICA NEW DIRECTIONS, NEW OPPORTUNITIES: A STATEMENT OF NATIONAL TRANSPORTATION POLICY STRATEGIES FOR ACTION (1990) 6 ("Economic regulation of trucking and other transportation industries should be eliminated where regulation is unnecessary and outmoded.").

111. *See* Statement on Signing the ICC Termination Act of 1995 H.R. 2539, 32 WEEKLY COMP. PRES. DOC. 1 (Dec. 29, 1995) [hereinafter Signing Statement] (stating that the President had called on Congress to eliminate the ICC and

absurd to the administration that it was one of two departments—alongside the Helium Reserve Program—to be comically paired as examples of "programs we do not need."[112] The line received bipartisan applause, and even a few shouts.[113] Congress quickly heeded the President's call by passing the ICC Termination Act.[114]

B. The ICC Termination Act of 1995

Congress viewed the ICC Termination Act as a natural extension of the Staggers Act and "the final chapter on deregulation."[115] The drafters in the House held the Staggers Act in high regard, considering it an important piece of legislation that was essential to save the dying railroad industry.[116] The House Report even described the Staggers Act as producing a "renaissance in the railroad industry,"[117] one which the House hoped to propel forward with the ICC Termination Act.

True to its name, one of the ICC Termination Act's main purposes was to dismantle the ICC.[118] In the initial draft of the Act,

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further reduce "unnecessary regulations" in the State of the Union address).

112. *See State of the Union Address (January 24, 1995)*, MILLER CTR., U. VA., http://millercenter.org/president/clinton/speeches/speech-3440 (last visited Nov. 28, 2016) ("We propose to cut $130 billion in spending by shrinking departments . . . [and] getting rid of over 100 programs we do not need, like the Interstate Commerce Commission and the Helium Reserve Program.") (on file with the Washington and Lee Law Review).

113. *See* clintonlibrary42, *The 1995 State of the Union (Address to a Joint Session of the Congress)*, YOUTUBE (Apr. 11, 2012), https://www.youtube.com/watch?v=7hSBtgugeUk (last visited Nov. 28, 2016) (on file with the Washington and Lee Law Review).

114. *See generally* Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101–16106 (2012).

115. *See Disposition of the Railroad Authority of the Interstate Commerce Commission Before the Subcomm. on R.Rs. of the H. Comm. on Transp. and Infrastructure*, 104th Cong. 6 (1995) [hereinafter *Disposition of Railroad Authority of the I.C.C.*] (statement of Frank E. Kruesi, Assistant Secretary for Transportation Policy, U.S. Department of Transportation).

116. *See* H.R. REP. NO. 104-311, at 90, *as reprinted in* 1995 U.S.C.C.A.N. at 802 (listing a number of measures Congress took to "salvage" the railroad industry).

117. *Id.* at 90–91, *as reprinted in* 1995 U.S.C.C.A.N. at 802–03.

118. *See Overview of the STB*, SURFACE TRANSP. BOARD, https://www.stb.gov/stb/about/overview.html (last visited Nov. 28, 2016)

the House of Representatives did not replace the ICC with any particular body, but rather retained the Transportation Adjudication Panel to resolve disputes.[119] However, during conference, Congress decided to create a replacement body for the ICC: the Surface Transportation Board, then housed in the Department of Transportation (DOT).[120] Ironically, in 2015, the STB was elevated to an independent federal agency, much like the ICC.[121]

Beyond simply paring down a top-heavy federal agency, the ICC Termination Act continued the overhaul of federal regulation of transportation systems generally.[122] One of the ICC Termination Act's main functions was retooling the economic regulation of railroads in the United States;[123] however, the Act also addressed the regulation of transportation by motor carriers[124] and pipelines.[125]

The Act's railroad-specific provisions address a number of regulatory issues. For example, the Act frees railroads to set their

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("Created on January 1, 1996 by the ICC Termination Act of 1995, the Board is the successor to the former Interstate Commerce Commission . . . .") (on file with the Washington and Lee Law Review).

119. *See* H.R. REP. NO. 104-422, at 230 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 164, 915 ("Section 701 delineates the organizational powers of the Transportation Adjudication Panel, including legal representation and budget matters.").

120. *See id.* at 231, *as reprinted in* 1995 U.S.C.C.A.N. at 916 ("The Conference adopts a compromise provision. A three-member Surface Transportation Board is established within the Department of Transportation.").

121. *See Overview of the STB*, SURFACE TRANSP. BD., https://www.stb.gov/stb/about/overview.html (last visited Oct. 14, 2017) ("The STB Reauthorization Act of 2015 established the STB as a wholly independent federal agency on December 18, 2015.") (on file with the Washington and Lee Law Review).

122. *See* Strickland, *Revitalizing the Presumption*, *supra* note 22, at 1160 ("[The] ICCTA substantially overhauled the Interstate Commerce Act and the economic regulation of rail transportation . . . .").

123. *See* 49 U.S.C. §§ 10101(1)–(15) (2012) (listing the enacted rail transportation policy relating to railroad industry regulation).

124. *See id.* § 13501 ("The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation . . . .")

125. *See id.* § 15301 ("The Board has jurisdiction over transportation by pipeline . . . .")

own rates,[126] exempts the railroad industry from traditional antitrust enforcement and review,[127] and contains provisions removing barriers to competitive operation of railroads.[128]

C. The ICC Termination Act Preemption Clause

Most importantly for the purposes of this Note, the Act also grants "exclusive" jurisdiction to the STB over regulation of transportation by rail carriers and preempts conflicting regulations.[129]

Specifically, the ICC Termination Act contains a statement of general jurisdiction, codified at 49 U.S.C. § 10501(b) (the Preemption Clause). This jurisdictional statement provides that the Surface Transportation Board's jurisdiction over:

> (1) *transportation by rail carriers, and* the remedies provided in this part with respect to rates, classification, rules (including car service, interchange, and other operation rules), practices, routes, *services and facilities of such carriers*; *and*
>
> (2) *the construction*, acquisition, operation, abandonment, or discontinuance *of* spur, industrial, team, switching or side tracks, or *facilities*, even if the tracks are located, or intended to be located, entirely in one State,
>
> *is exclusive*. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive *and preempt the remedies provided under Federal or State law*.[130]

To understand the Preemption Clause's reach, it is important to define the terms "transportation" and "rail carrier," as well as to

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126. *See id.* § 10701 (providing standards, rules, and practices for rate setting).

127. *See id.* § 10706 (exempting the railroad industry from traditional application of antitrust laws).

128. *See, e.g.*, *id.* § 11121 (creating standards for efficient use of and service by rail cars).

129. *See id.* § 10501(b) (describing the STB's jurisdiction of railroads).

130. *Id.* (emphasis added).

assess their scope when used together. Per the Act, "transportation" includes: (a) "locomotive, car, . . . property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property;" and (b) "services related to that movement," including receipt, delivery, and handling of the property being transported.[131] The crude offloading rack likely constitutes "equipment . . . related to the movement of . . . property," as its sole purpose is to offload rail freight. Therefore, it should be considered "transportation" under the Act.

The definition of "rail carrier" is slightly more fraught. While potentially expansive, it has never been applied to its maximum breadth.[132] Per the Act, "rail carrier" is defined as "a *person* providing common carrier *railroad* transportation for compensation."[133] A "person" can be an "assignee or personal representative" of a rail carrier,[134] whereas the definition of "railroad" includes "intermodal equipment used by or in connection with" rail transportation or a facility "used or necessary for transportation."[135] This definition is potentially quite broad. While a refinery seems not to be a "rail carrier" at first blush, it very well could be "a [personal representative] providing common carrier [intermodal equipment used in rail transportation] for compensation."

D. The Preemption Clause's Application to Refineries' Crude Offloading Rack Building Permits

"[S]tates cannot regulate matters that the [STB] can, and, conversely, . . . states are free to regulate matters that the [STB] cannot."[136] Therefore, as an initial matter, crude-by-rail offloading facilities at refineries must properly fall within the definition of "transportation" and "rail carrier" in order to fall under STB

131. *Id.* §§ 10102(9)(A)–(B).

132. *See infra* Part IV.C (providing an overview of the use of the term "rail carrier" in case law).

133. *Id.* § 10102(5) (emphasis added).

134. *Id.* § 10102(4).

135. *Id.* §§ 10102(6)(A), (C).

136. Strickland, Revitalizing the Presumption, *supra* note 22, at 1165.

jurisdiction and benefit from preemption.[137] A cold, textual reading of these definitions demonstrates their breadth and weighs in favor of preemption.

The first inquiry is whether crude offloading facilities meet the Act's definition of "transportation." Refinery crude offloading sites facilitate the removal of crude oil from tank cars.[138] Once offloaded from the cars, the oil is transferred to a pipeline that moves the oil a relatively short distance to the refinery.[139] These offloading facilities consist of steel racks, approximately twenty-three feet in height, connected by a cross-track walkway.[140] Generally, these racks are placed on parallel rail spurs and capable of offloading two tank cars simultaneously.[141] As discussed, this process seems to fall well within the Act's definition of transportation as it is a "service[] related to" the receipt of freight by railcar.[142] Without the crude offloading facility, a refinery cannot transfer freight from the tank car to the refinery.

Second, the Preemption Clause is only applicable if the transportation—in this case offloading—is "by rail carrier."[143] If a refinery does not qualify as a "rail carrier," or service or facility of such a carrier, under the Preemption Clause, then the ICC Termination Act alone can not preempt a city's denial of a refinery's land-use permit as the STB would have no jurisdiction.[144] Read broadly, a crude offloading facility run by a "personal representative" of a railroad might fall under the Preemption Clause. As discussed later in this Note, this broad

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137. *See supra* Part III.C (providing the requirements for ICCTA application).

138. *See generally* VALERO REFINING CO., VALERO CRUDE BY RAIL PROJECT DESCRIPTION (2013), http://www.ci.benicia.ca.us/vertical/Sites/%7B3436CBED-6A58-4FEF-BFDF-5F9331215932%7D/uploads/Valero_CBR_Project_Description.pdf (describing the construction process and uses for a crude offloading facility).

139. *See id.* at 12 ("Two pumps, operating in parallel, would pump the crude oil from the unloading rack header via a new 16-inch pipeline to [a tank].").

140. *See id.* at 7 (describing the crude offloading rack).

141. *Id.*

142. *See infra* Part III.D (applying the ICC Termination Act definition of "transportation" the crude offloading rack).

143. 49 U.S.C. § 10501(b)(1).

144. *See id.* § 10501(b) (describing the STB's jurisdiction).

reading has little basis in the legislative history and is not supported by the case law.[145]

Ultimately, the text alone is not enough to determine whether, or under what circumstances, a refinery petitioning to build a crude offloading facility could be considered "transportation by rail carrier." It is also essential to review the history surrounding the ICC Termination Act's adoption and subsequent court interpretation of the Preemption Clause. To fully understand scope of these terms, one must understand the types of regulation the Act was indented to preempt. Additionally, it is important to explore how this coverage determination might change depending on the circumstances under which a refinery is applying for the land-use permit—i.e., whether it acts independently, acts as the railroad's agent, or acts in concert with the railroad in some other capacity.

E. ICC Termination Act Preemption Clause: Drafting and Legislative History

1. How Far Does the ICC Termination Act's Preemption Clause Reach?

It appears that Congress intended the Preemption Clause to have far-reaching implications.[146] In fact, the House Report specifies that the clause represents the "direct and complete preemption of State economic regulation of railroads."[147] Confusingly, the Report also purports to eliminate the "former disclaimer regarding residual State police powers" as Congress considered it "unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system."[148] It is unclear whether Congress considered this clause

145. *See infra* Part III.E (providing an overview of the ICC Termination Acts legislative history and judicial application); Part IV (same).

146. *See* H.R. REP. NO. 104-311, at 95, *as reprinted in* 1995 U.S.C.C.A.N. at 807 (providing the rationale and purpose of the Preemption Clause).

147. *Id.*

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

"unnecessary" because the statute clearly preempted state police powers or because it clearly did not. However, scholars have generally presumed the latter, inferring that the Act meant to leave some room for state regulation.[149]

The House Report recognizes that, at a minimum, "[s]tates retain the police powers reserved by the Constitution."[150] However, the Report follows by immediately asserting "the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive."[151] To reinforce the Preemption Clause's importance, the Report warns that any interference by the States would endanger and subvert the "Federal scheme of minimal regulation . . . ."[152] For these reasons, courts and scholars have had difficulty identifying precisely where "completely exclusive" federal preemption should begin and state police powers end.

Congress focused specifically on the preemption issue when it conducted hearings regarding the "sunset" of the Interstate Commerce Commission.[153] In fact, Congress devoted a significant portion of testimony to whether federal railroad regulations should preempt state and local regulations.[154] The majority of those testifying believed that local regulation should be preempted.[155] Again, Congress, having witnessed the economic disintegration caused by patchwork local regulations in the 1800s, did not wish to repeat history in this respect.[156]

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149. *See* Strickland, *Revitalizing the Presumption*, *supra* note 104, at 1165 ("Congress considered the preemption clause to be so clear that a savings clause protecting state police powers was 'unnecessary.'").

150. H.R. REP. NO. 104-311, at 96, *as reprinted in* 1995 U.S.C.C.A.N. at 808.

151. *Id.*

152. *Id.*

153. *See generally Disposition of the Railroad Authority of the I.C.C.*, *supra* note 115 (containing testimony regarding the then-potential elimination of the I.C.C.).

154. *See id.* (discussing the importance, scope, and application of federal preemption of state and local economic regulations).

155. *See id.* at 43–44 (statements of Robert D. Krebs, President, Chairman, & CEO, Santa Fe Pacific Corporation; James A. Hagen, Chairman & CEO, Consolidated Rail Corporation; and Drew Lewis, Chairman & CEO, Union Pacific Corporation) (agreeing that preemption of local and state regulation of railroads is necessary for an efficient rail network).

156. *See id.* at 42 (statements of Drew Lewis, Chairman & CEO, Union Pacific

After the hearings and Conference Committee, Congress expanded further on the meaning and intent behind the general jurisdiction provision. Exclusive jurisdiction, Congress explained, is "limited to remedies with respect to rail regulation—not State and Federal law generally."[157] So, for example, criminal laws remain un-preempted.[158] Congress also specified that laws should remain valid "unless specifically displaced, because they . . . generally collide with the scheme of economic regulation."[159] Therefore, it seems the Act is intended to preempt this type of "economic regulation."

The congressional framework of "complete preemption" of economic regulation along with some carve-out for traditional police powers gives only a vague notion about the kind of regulations Congress hoped to preempt. The question is whether land-use permitting schemes, intended to protect local residents' health and safety, are examples of such regulations. If Congress did not intend to preempt these regulations, then it does not matter whether refineries constitute "transportation by rail carrier," as the Act is inapplicable.

2. What Qualifies as an "Economic Regulation"?

By 1995, the nation's railroad system was already on a trajectory toward complete deregulation.[160] As described in the

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Corporation) (noting his belief that "we have to have preemption, . . . without preemption, we could and would be subject to a myriad of [*sic*] State laws" opening railroad companies up to lawsuits and other financial obstacles); *id.* at 109 (statements of Hon. Gail McDonald, Chairman, ICC) ("Absent such preemption, there would be great potential for interference in rail consolidation efforts.").

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

158. *See* Strickland, *Revitalizing the Presumption*, *supra* note 22, at 1165 ("Congress surely did not intend to allow railroads to open gambling or prostitution businesses that are exempt from generally applicable state laws, and subject only to [STB] supervision.").

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

160. *See* H.R. REP. NO. 104-311, at 90 ("Since 1980, with the enactment of the Staggers Rail Act, the railroad industry has operated in an essentially deregulated environment.").

preceding section, the railroads were simply unable to compete with other burgeoning methods of transportation.[161] One of the important purposes behind the ICC Termination Act was to make the railroad industry more competitive with trucks, pipelines, and barges.[162] In fact, by eliminating economic regulations, Congress hoped the ICC Termination Act would "further foster" intermodal transportation—the transportation of freight via multiple modes, including vessel, rail, and pipeline—by "remov[ing] all existing restrictions that specifically limit or preclude intermodal . . . operations."[163]

A policy supporting the use of intermodal transportation suggests that Congress contemplated the notion of nonrail facilities—like crude offloading facilities—being used to transport freight—like crude oil—and ultimately favored it. Historically, the use of transloading facilities—those facilities used to "[transfer] goods from one mode of transportation to another in order to have the goods reach their final destination"[164]—has been a major subject of litigation.[165] Offloading facilities, on the other hand, have not. While courts generally treat transloading facilities as falling within the Preemption Clause's coverage,[166] it is unclear whether an offloading facility would be treated in the same manner. Crude offloading facilities, however, do share some resemblance to traditional conceptions of intermodal transportation.[167]

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161. *See supra* Part III.A (presenting a brief history of railroad deregulation).

162. *See* H.R. REP. NO. 104-311, at 90 (explaining that deregulation efforts are made more necessary because of "the emergence of the trucking industry, as well as the pipeline and barge industries" and the increased competition therefrom).

163. S. REP NO. 104-176, at 13 (1995).

164. *Transloading*, INVESTOPEDIA, http://www.investopedia.com/terms/t/transloading.asp (last visited Feb. 5, 2017) (on file with the Washington and Lee Law Review).

165. *See infra* notes 263–273 and accompanying text (describing cases involving transloading facilities).

166. *See infra* Part IV.C (reviewing case law surrounding transloading facilities).

167. *Compare Maschine zum Übersetzen der Diligencen auf Eisenbahnwaggons,* WIKIMEDIA COMMONS (1884), https://de.wikipedia.org/wiki/Datei:Maschine_zum_Übersetzen_der_Diligencen_auf_Eisenbahnwaggons.JPG (last visited Mar. 1, 2017) (portraying a stagecoach being transferred onto a railcar via a contraption not dissimilar to a crude offloading rack) (on file with the

Congress also specifically discussed the importance of complete federal control over remedies.[168] Congress intended the Preemption Clause to insulate the railroads from liability, as "[e]xclusive preemption of other remedies would prevent a confusing situation where legal actions are instituted under a variety of laws."[169] According to some scholars, the ICC Termination Act's preemptive effect should be felt most strongly in cases "related to the movement of goods, such as delivery, transfer, and loading."[170] These statements support the idea that offloading facilities are precisely the types of facilities Congress hoped to protect from local intrusion.

Further examination of changes in the bill and congressional testimony helps clarify the meaning of "economic regulation." Specifically, the Committee, and those testifying before it, focused heavily on preempting state and local interference with mergers, labor restrictions, and other economic regulations.[171] Many of those testifying called on Congress to enact preemptive regulations similar to the legislation passed during the previous year that prevented localities from regulating motor carriers.[172] The motor carrier regulations significantly curtailed local interference by

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Washington and Lee Law Review), *with* Maria Gallucci, *US Oil Book 2014: US Railroads Are Moving Greater Volumes of Crude Oil This Year Amid Bakken Drilling Boom*, INT'L BUS. TIMES (Aug. 28, 2014), http://www.ibtimes.com/us-oil-boom-2014-us-railroads-are-moving-greater-volumes-crude-oil-year-amid-bakken-1672564 (last visited June 1, 2017) (portraying a crude-by-rail trail stationed at an offloading rack) (on file with the Washington and Lee Law Review).

168. *See* S. Rep. No. 104-176, at 57 (1995) (statement of Sen. John Ashcroft) ("[R]ecent court decisions have allowed actions against carriers to proceed under other laws, . . . [and] exclusive remedies are needed to provide consistent methods of resolving disputes and prevent needless litigation.").

169. *Id.*

170. Strickland, *Revitalizing the Presumption*, *supra* note 22, at 1162 n.63.

171. *See Disposition of the Railroad Authority of the I.C.C.*, *supra* note 115, at 109 (statement of Hon. Gail McDonald, Chairman, Interstate Commerce Commission) (stating that without preemption "[s]tates and localities could attempt to impose locally-oriented conditions on rail consolidations that could effectively block a transaction or dilute its more general public benefits").

172. *See id.* at 223 (statement of Joseph Canny, Deputy Assistant Secretary of Transportation Policy, U.S. Department of Transportation) ("We believe that state authority should be preempted by statute, as was recently done with motor carrier regulation . . . .").

preempting any regulation impacting the price of bus transportation by interstate carriers.[173]

Regarding mergers, those testifying before Congress extensively discussed whether to remove antitrust enforcement authority from the DOT and give it to the Department of Justice (DOJ).[174] Two important considerations animated congressional thinking regarding this transfer of power: (1) whether the openness of the pre-merger review proceedings would be compromised; and (2) whether regulatory attempts by states and localities would continue to be sufficiently preempted if antitrust enforcement authority was transferred to the DOJ.[175] Erring on the side of preemption, Congress decided to house antitrust review authority with the STB, rather than the DOJ, and to generally exempt railroads from most traditional antitrust laws.[176] Even for antitrust enforcement, Congress desired STB dominance.

Congress also used the ICC Termination Act to insulate Class II and Class III railroads from more onerous regulation.[177] Over the objections of a strong pro-labor contingent,[178] Congress relaxed

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173. *See* FAA Authorization Act of 1994, Pub. L. No. 103-311, § 211 (1994) (codified at 49 U.S.C. § 10936 (2012))

> A State or political subdivision of a State may not enforce any law or regulation relating to interstate fares for the transportation of passengers by bus by an interstate motor carrier of passengers over routes authorized by the Commission.

174. *See Disposition of the Railroad Authority of the I.C.C., supra* note 115, at 5–61 (containing the testimony of multiple parties regarding antitrust enforcement and the railroads).

175. *See id.* at 31–33 (statement of Hon. Gail McDonald, Chairman, Interstate Commerce Commission) (discussing the advantages of keeping antitrust and merger review authority housed in the DOT).

176. *See* 49 U.S.C. § 10706(a)(2)(A) ("[T]he Sherman Act . . . , the Clayton Act . . . , the Federal Trade Commission Act . . . , sections 73 and 74 of the Wilson Tariff Act . . . , and the Act of June 19, 1936 . . . do not apply to parties and other persons with respect to making or carrying out the agreement.").

177. *See, e.g.*, 49 U.S.C. § 10902 (2012) (promoting the "clearer and more expeditious handling" of transactions by Class II and Class III rail carriers in order); H.R. REP. NO. 104-422, at 180 (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. at 865 ("Class II rail carriers acquiring a line under this section are subject to a mandatory [one]-year severance pay requirement . . . . No protection is imposed on Class III rail carrier line acquisitions.").

178. *See* H.R. REP. NO. 104-422, at 524 (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. at 849 ("I strongly object to the manner in which this bill treats

labor protections for Class II and III railroads as part of an effort to make rail carriage more competitive with pipeline and motor transportation.[179] In its report, the House reinforced the idea that the "Committee consider[ed] [the less stringent protections] crucial to avoid imposing the large and potentially fatal costs of unfunded labor protection benefit mandates on on Class II and Class III transactions."[180]

It appears Congress favored regulation of Class II and III railroads even less than Class I railroads.[181] Importantly, Class II and III railroads are the most frequently utilized railroad systems for freight shipping.[182] They provide freight carriers access to a large network of towns and ports inaccessible to Class I railroads.[183] Therefore, local permitting requirements for the construction of crude offloading facilities are more likely to impact Class II and III railroads, as opposed to Class I railroads.[184]

Lastly, knowing what is not included within the umbrella term "economic regulation" can be just as helpful as knowing what is included. For example, the House Report specifically allows for two exemptions from the expansive deregulation effort. First, the Report provides that state and federal securities laws are not necessarily preempted.[185] Second, the House Report states that the Committee "does not intend for this section to alter any existing law . . . governing railroad retirement benefits and railroad

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railroad labor.").

179. *See* 49 U.S.C. § 10902(d) (providing that labor protections for Class II and Class III railroads are lower than those of Class I railroads).

180. H.R. REP. NO. 104-311 at 102, *as reprinted in* 1995 U.S.C.C.A.N. at 814.

181. *See* Frittelli, *U.S. Rail Transportation of Crude Oil*, *supra* note 49, at 20 (stating that "[m]embers of Congress have been concerned with preserving short line rail service" and providing multiple measures Congress enacted to aid in their preservation).

182. *See* H.R. REP. NO. 104-422, at 524–25 (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. at 864–65 (explaining that the statutory divisions between Class I and Class II and III railroad were intended to "promote clearer and more expeditious handling" of freight).

183. *See* Frittelli, U.*S. Rail Transportation of Crude Oil*, *supra* note 46, at 20 (describing the use of "shortline" tracks for crude-by-rail delivery).

184. *Id.*

185. *See* H.R. REP. NO. 104-311, at 96, *as reprinted in* 1995 U.S.C.C.A.N. at 808 (stating that the abolition of the ICC "places the railroad industry for securities purposes in the same position as other industries").

unemployment insurance."[186] In providing these specific exemptions, Congress sets some boundary lines, as presumably, laws regulating securities and retirement pensions would otherwise be included within the umbrella of "economic regulation."

Overall, the ICC Termination Act's legislative history emphasizes economic preemption. The contours of this economic preemption are shaped by congressional testimony and the statements of congressmen and senators. Congress not only favored intermodal transportation options, but it also hoped that lowering barriers to competition would increase the railroads' competitiveness with trucks and pipelines.[187] However, it is still important to observe how the federal courts have applied the Act in order to fully understand the Act's scope.

3. Who is a "Rail Carrier"? What Constitutes "Services and Facilities" of Such Carriers?

There is almost no mention of the definition of the term "rail carrier" or the rationale behind its drafting in the legislative history. The lone mention of the definition of "rail carrier" appears in the Senate Report.[188] The Report requests that the Conference Committee "update and clarify the term 'rail carrier'" and "remove references to passenger transportation."[189] The final Act specified that the definition "does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation," but does not exempt passenger lines entirely.[190] Whether the definition is "clarified," however, is an open question.

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186. *Id.*

187. *See* S. Rep. No. 104-176, at 6 (1995) (describing negatively patchwork regulations that would "weaken the [railroad] industry's efficiency and competitive viability").

188. *See id.* at 29 (1995) (discussing Senate concerns with the definition of "rail carrier" provided in the House Report).

189. *Id.*

190. 49 U.S.C. § 10102(5).

In the absence of legislative history, it is useful to look at precedent acts that define the terms of art used in the ICC Termination Act. The ICC Termination Act departs from prior acts in two important ways. First, the Act redefines the term "railroad" from its original meaning in the Inter-State Commerce Act of 1887 (ICA). Under the ICA, "railroad" is defined as "all bridges and ferries used or operated in connection with any railroad" and any "road in use by any corporation operating a railroad . . . ."[191] No other act redefined this term. Rather than replace the definition, both the Railroad Revitalization and Regulatory Reform Act (4R Act), passed in 1976, and the Staggers Act, passed in 1980, simply refer back to the definition used in the ICA.[192]

It makes some sense that Congress would seek to replace the ICA's definition of "railroad," as the ICA was the act that created the ICC, the agency Congress now sought to to disband.[193] Moreover, it appears that the ICC Termination Act's definition of "railroad" is in fact much broader than the ICA's.[194] This may be a function of technological innovations that occurred between 1887 and 1995, or perhaps Congress's general goal of fewer regulations.

The second distinction is that the ICC Termination Act creates two separate definitions for "rail carrier" and "railroad."[195] This fact is not addressed in the legislative history either. However, it seems safe to assume that "rail carrier" is a broader term than "railroad," as the latter term is used in the definition of the former.[196] It is difficult to divine why exactly Congress redefined

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191. Inter-State Commerce Act of 1887, ch. 104, sec. 1, 24 Stat. 379, 379 (1887).

192. *See* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 102(7), 90 Stat. 31, 34 (1976) (referring to the Interstate Commerce Act for the definition of "railroad"); *see, e.g.*, Staggers Rail Act of 1980, Pub. L. No. 96-448, §§ 201(a), 203(b)(1), 90 Stat. 1895, 1898, 1900 (providing that the Act references back to ICC jurisdiction in defining "railroad").

193. *See* Inter-State Commerce Act of 1887, ch. 104, sec. 11, 24 Stat. 379, 383 (1887) ("[A] Commission is hereby created and established to be known as the Inter-State Commerce Commission . . . .").

194. *See supra* notes 190–191 and accompanying text (listing the ICA's definition of "rail carrier" and the ICC Termination Acts definition of "rail carrier").

195. *See* 49 U.S.C. §§ 10102(5), (6) (defining "rail carrier" and "railroad" respectively).

196. *See id.* § 10102(5) ("'[R]ail carrier' means a person providing common

"railroad" and added "rail carrier," but the result is likely a broader term than was originally meant.

IV. ICC Termination Act Preemption: Judicial Application and Analysis

Neither the STB nor the courts seem to have adopted Congress's more limited view of ICC Termination Act preemption. Whereas both the congressional record and the text of the Act itself focus on total economic freedom for the railways,[197] Congress and the President hoped the Act would be interpreted more broadly and enforced more vigorously than the legislative history might suggest.[198]

One axiomatic line that appears in much ICC Termination Act litigation captures the courts' broad jurisprudential approach well: "[The Inter-State Commerce Act is] among the most pervasive and comprehensive of federal regulatory schemes."[199] In fact, many courts find it "difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than the one in Section 10501(b).[200] This is evident from the overview of ICC Termination Act's preemption jurisprudence that follows.

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carrier railroad transportation for compensation . . . .").

197. *See supra* Part III.E.2 (exploring the meaning of economic regulation in terms of the ICC Termination Act).

198. *See* Signing Statement, *supra* note 111, at 933-1 ("[The President] call[ed] upon the board to use this authority to the fullest extent to benefit consumers and facilitate economic growth.").

199. Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981).

200. City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

A. The General ICC Termination Act Preemption Rule

1. Categorical Preemption

The federal courts and the STB have interpreted Section 10501(b) as preempting two broad groups of direct regulation: preclearance and matters directly regulated by the STB. First, the Act preempts any form of local permitting or preclearance over railroad activity.[201] The ICC Termination Act affirmatively preempts any direct regulation over railroad practices and operations, regardless of whether it is discriminatory or unreasonable.[202] For example, federal courts have consistently struck down laws regulating railroad crossings, train speed, and other operating requirements.[203]

The scope of the categorical preclearance preemption changes slightly depending upon the case and the Circuit.[204] Even so, most courts "recognize[] that requiring a rail carrier to obtain a locally issued permit before conducting rail operations . . . will impose an unreasonable burden on rail transportation."[205] The STB went even further when it provided that "any form of state or local permitting or preclearance that, by its nature, could be used to

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201. *See* Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005) ("We need not draw a line that divides local regulations between those that are preempted and those that are not, because in [the] case [of pre-construction permit requirements] preemption is clear."); DesertXpress Enterprises, LLC—Petition for Declaratory Order, FD 34914, slip op. at 3 n.4 (STB served June 27, 2007) (providing that preclearance is one of two broad categories of preempted state and local action).

202. *See* Burlington N. & Santa Fe Ry. Co. v. Dep't of Transp., 227 Or. App. 468, 473–74 (Or. Ct. App. 2009) (distinguishing between laws of general applicability and those that specifically target railroad operations).

203. *See* Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 453 (5th Cir. 2001) ("Regulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length and scheduling, the way a railroad operates its trains . . . ."); *Burlington Northern*, 227 Or. App. at 474 (concluding that "[d]ictating where and for how long a train may stop . . . [is] a regulation of railroad operations" and is therefore preempted).

204. *See* Strickland, *Revitalizing the Presumption*, *supra* note 22, at 1166–67 (providing that the 2nd, 9th, and D.C. Circuits have adopted a broader view of preemption than the 3rd, 6th, 8th, and 11th Circuits).

205. Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150, 160 (4th Cir. 2010).

deny the railroad the ability to conduct its operation or to proceed with activities that the Board has authorized" is preempted by Section 10501(b).[206] This ruling suggests that local regulation of third parties that "could be used" to impede railroad operations may be preempted. However, no subsequent STB ruling has suggested that Section 10501(b) should be applied with this level of breadth.[207] Overall, most cases deal with preclearance for railroad projects, not third party projects that may impact the railroads.[208]

The second type of regulation categorically preempted includes "state or local regulation of matters directly regulated by the Board."[209] In other words, the ICC Termination Act preempts state laws when they "may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation."[210] The Act replaces state and local remedies with those provided under the STB's exclusive jurisdiction,[211] thereby excluding local regulations providing alternative requirements.[212]

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206. *DesertXpress*, FD 34914, slip op. at 3 n.4.

207. *See* Norfolk S. Ry. Co.—Petition for Declaratory Order, FD 35701, slip op. at 4 (STB served Nov. 4, 2013) (explaining that nuisance claims are preempted because they "directly result from . . . rail operations").

208. *See generally supra* Part IV (reviewing case law applying the ICC Termination Act Preemption Clause).

209. *Norfolk S. Ry. Co.*, FD 35701, slip op. at 3.

210. Burlington N. & Santa Fe Ry. Co. v. Dep't of Transp., 227 Or. App. 468, 472–73 (Or. Ct. App. 2009) (quoting N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007)).

211. *See* 49 U.S.C. § 10501(b)(1) (providing that the "remedies provided in this part" are exclusive).

212. *See* Cities of Auburn & Kent, WA, 2 S.T.B. 330, 1997 WL 362017, at *6 (1997) ("[W]here the local permitting process could be used to frustrate or defeat an activity that is regulated at the Federal level, the state or local process is preempted.").

2. As-Applied Preemption

Some local actions, rather than being categorically preempted, are simply preempted as applied.[213] Federal railroad law does not preempt state law where rail activities are "merely a peripheral concern" of the regulations at issue.[214] Local regulations are only preempted when applied in a manner that: (1) "unreasonably burden[s] or interfere[s]" with rail transportation,[215] or (2) discriminates against rail carriage.[216]

The determination of whether a regulation unreasonably interferes with rail operations "is a fact-specific one" in which the court exercises its "policy-based judgment."[217] The "most obvious" element used to determine if a regulation is unreasonably burdensome is whether the regulation is "so draconian that it prevents the railroad from carrying out its business in a sensible fashion."[218] For example, when a locality's apparent goal is to constrain, rather than render safe, rail operations, the locality is likely regulating in an unreasonably burdensome manner.[219]

Furthermore, generally applicable permitting and land-use requirements are not significant oversteps of local authority,

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213. *See* Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) ("[I]t is well settled that states cannot take an action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct any part of operations . . . .").

214. San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 243 (1959).

215. *See* Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1095, 1097–98 (9th Cir. 2010) ("Generally speaking, ICCTA does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce."); New England Transrail, LLC—Petition for Declaratory Order, FD 34797 (STD served July 10, 2007) ("Other state or local requirements are not preempted unless, as applied, they would have the effect of preventing or unreasonably interfering with interstate commerce.").

216. *See* N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 254 (3d Cir. 2007) ("[A] state law that affects rail carriage survives preemption if it does not discriminate against rail carriage . . . .").

217. Norfolk S. Ry. Co.—Petition for Declaratory Order, FD 35701, slip op. at 3 (STB served Nov. 4, 2013).

218. *New York Susquehanna*, 500 F.3d at 254.

219. *See* Cities of Auburn & Kent, WA, 2 S.T.B. 330, 1997 WL 362017, at *6 (finding that the city's "admitted goal is to constrain [the rail carrier's] train operations," and therefore, the locality is preempted).

unless they discriminate against rail carriage.[220] Some cases suggest that only regulations not involving "the exercise of discretion on subjective questions" are permissible,[221] while other courts have insisted that this interpretation is far too generous.[222] In *Green Mountain Railroad Corp. v. Vermont*,[223] the court provides additional factors to help determine whether a town's exercise of traditional police powers is acceptable.[224] These include: (a) "the extent that the regulations protect public health and safety," (b) whether they "are settled and defined," (c) whether they "can be obeyed with reasonable certainty," and (d) whether they "entail no extended or open-ended delays."[225]

Local land-use ordinances are often broadly applicable and applied with some degree of objectivity. Therefore, it might be hard to find a circumstance where a locality denying a crude offloading facility permit based on one of these ordinances is acting "discriminatorily" toward rail carriers. However, some courts have recognized a pretext-based argument that would allow a refinery to argue that these objective regulations were being discriminatorily applied.[226]

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220. *See New York Susquehanna*, 500 F.3d at 253 ("[E]ven pedestrian regulations like building codes must be applied in a manner that does not discriminate against railroad operations to avoid preemption."); Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005) ("Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption."); CXS Transp., Inc., 2005 WL 584026, at *8 (S.T.B. 2005) (declaratory order) (invalidating a law attempting to prevent terrorism on the ground that it was unreasonably burdensome and discriminatory toward rail transportation).

221. *Green Mountain*, 404 F.3d at 643.

222. *See, e.g.*, *New York Susquehanna*, 500 F.3d at 254 (stating that generally applicable regulations must be "settled," "definite," "avoid open-ended delays," "clear," and not able to be used as a "pretext" for interfering with rail service).

223. 404 F.3d 638 (2d Cir. 2005).

224. *See id.* at 643.

225. *Id.*

226. *See infra* Part IV.A.3 (providing an overview of pretextual regulation).

3. Pretextual Regulations

Even regulations that appear facially nondiscriminatory per the *Green Mountain* factors might still be invalidated for a more tacit form of discrimination: pretext. While courts have not frequently utilized a pretextual analysis, the court in *New York Susquehanna & Western Railway Corp. v. Jackson*,[227] required that the regulations be "clear enough that the rail carrier can follow them and that the state cannot easily use them as a pretext for interfering with or curtailing rail service."[228]

STB filings show that localities typically preemptively defend against the argument that an otherwise objectively broad ordinance is simply pretext for discrimination against railroads.[229] Generally, local arguments in favor of land-use permit denials contain three elements: (1) the effects of the planned construction, not of the railroad, caused the permit denial; (2) the facility is still able to receive rail service; and (3) local ordinances are not a pretext for regulating the railroad.[230]

Some cases have suggested that a rail carrier, too, can be subject to pretextual limitations. The ICC Termination Act defines the term "rail carrier" as a "person providing common carrier railroad transportation,"[231] where a "person" can be a "trustee, receiver assignee, or personal representative."[232] This indicates that agents and those "acting under the auspices of a rail carrier" are sometimes covered by the Act.[233] However, the STB has stated that this fact does not "suggest that a party can contractually determine its status as a railroad carrier for regulatory

227. 500 F.3d 238 (3d Cir. 2007).

228. *New York Susquehanna*, 500 F.3d at 254 (emphasis removed).

229. *See* SEA-3—Petition for Declaratory Order, FD 35853, slip op. at 3 (S.T.B. served Mar. 17, 2015) (recounting the city of Portsmouth's argument defending their permit denial); Reply to Pet. for Declaratory Order at 12–13, City of Benicia, FD 36036 (July 7, 2016) (providing an overview of the city's reasons for denying Valero's land-use permit application).

230. *Id.*

231. 49 U.S.C. § 10102(5).

232. *Id.* § 10102(4).

233. SEA-3, FD 35853, slip op. at 6.

purposes."[234] In other words, "railroads and loaders may not change by contract what in practice is a substantially different relationship."[235]

B. The Scope of "Economic Regulation" in the Case Law

The case law is not quite as categorical in its distinctions between economic and non-economic regulation as the ICC Termination Act's drafters might have envisioned. In fact, some courts flagrantly flout the legislative history, with one court stating "there is nothing in the case law that supports [the city's] argument that, through the ICC [Termination Act], Congress only intended preemption of economic regulation of the railroads."[236] Yet, this statement is contradicted by the House Report, which argues for the "direct and complete pre-emption of State economic regulation of railroads."[237]

Neither the STB nor the courts have developed any comprehensive rule to determine whether a regulation is economic or non-economic, perhaps because they do not see the distinction as determinative. Rather, these determinations are made on a "case-by-case" basis.[238] For example, the courts and the STB have found the following types of regulations to be preempted: nuisance claims,[239] zoning regulations that prevent the use of freight yards,[240] regulations limiting the use of "integral" transloading

234. Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308 n.19 (3d Cir. 2004).

235. N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 250 (3d Cir. 2007).

236. City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998).

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

238. City of Alexandria, VA—Petition for Declaratory Order, FD 35157, slip op. at 2 (S.T.B. served Feb. 17, 2009).

239. *See* Norfolk S. Ry. Co.—Petition for Declaratory Order, FD 35701, slip op. at 1 (S.T.B. served Nov. 4, 2013) (finding claims for damages caused by "noise and vibration as well as the discharge of smoke, dust, dirt and other particulates" preempted).

240. *See* Bo. & Me. Corp. & Springfield Terminal R.R. Co.—Petition for Declaratory Order, FD 35749, slip op. at 4 (S.T.B. served July 13, 2013) (stating that "[t]he Town's order prohibiting all rail traffic to the warehouse conflict with the federal right of [Petitioner] to request common carrier service" and are therefore preempted by Section 10501(b)).

facilities,[241] and rules governing the amount of time a train can stop at rail crossings.[242] It is difficult to glean any patterns from this particular set of rulings.

Environmental regulations have been a particular problem for the courts. The court in *City of Auburn v. United States*[243] specifically noted that economic and environmental regulation could be one in the same.[244] The court further posited that "if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning or discontinuing a line."[245] In contrast, the *Green Mountain* court called any artificial distinctions between economic and environmental regulations "not useful."[246] Ultimately, courts have focused on the level of "burden" to draw the line between permissible and impermissible regulation rather than focusing on their economic or non-economic qualities, as the legislative history might suggest.[247]

The court in *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*,[248] drew a slightly different line, focusing instead on the considerations the state needed to make in order to approve or not approve a permit.[249] In this case, Dakota, Minnesota & Eastern

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241. *See* Green Mountain R.R. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) (determining that the ICC Termination Acts preempted the pre-construction permit requirement for an integral transloading facility).

242. *See* Friberg v. Kansas City S. Ry. Co., 267 F. 3d 439, 443 (5th Cir. 2001) (providing that "[r]egulating the time a train can occupy a rail crossing impacts . . . the way a railroad operates its trains, with concomitant economic ramifications" and is therefore preempted by Section 10501(b)).

243. 145 F.3d 102 (9th Cir. 1998).

244. *See id.* at 1031 ("[G]iven the broad language of § 10501(b)(2) . . . the distinction between 'economic' and 'environmental' regulation begins to blur.").

245. *Id.*

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

247. *See* N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) ("What matters is the degree to which the challenged regulation burdens rail transportation, not whether it is styled as 'economic' or 'environmental.'").

248. 236 F. Supp. 2d 989 (D.S.D. 2002), *aff'd in part, vacated in part*, 362 F.3d 512 (8th Cir. 2004).

249. *See id.* at 1007 (explaining that the statute was invalid because it "necessitates that the Governor consider economic, environmental, and public

Railroad challenged a South Dakota law that granted railroads eminent domain powers, but placed restrictions on those powers.[250] The restrictions included: (1) requiring the railroad to demonstrate that it had sufficient financial resources to undertake construction and potential mitigation, and (2) requiring the Governor to consider the "economic, environmental, and public safety implications of the [rail] project" before approving a railroad's use of eminent domain.[251] Ultimately, the court struck down Section 49-16A-75.3 reasoning that the state cannot "regulate indirectly . . . what it cannot regulate directly."[252] By doing so, the statute violated Section 10501(b) of the ICC Termination Act.[253]

Dakota demonstrates that courts are willing to look into the decision-making process of a local official (i.e., the Governor) to determine whether the official's considerations are economic in nature. Yet, courts do not seem curtailed by the "economic" confines outlined in the legislative history. In contrast to this broad vison of economic regulation, the courts have trimmed back on the potential scope of the term "rail carrier."

C. The Preemption Clause's Application to Third Parties: Who Is a "Rail Carrier"?

As discussed, the ICC Termination Act only applies to "rail carriers" and the services and facilities of such carriers.[254] While there may be significant wiggle room within this definition, courts have not typically interpreted it too broadly. Instead, courts and the STB have insisted that "facilities not integrally related to the provision of interstate rail service are not subject to our

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safety implications of the . . . project. Yet, state regulation of such areas in the context of railroads is preempted by federal law.").

250. *See id.* (requiring a showing of sufficient financial resource among other things).

251. S.D.C.L. § 49–16A–75.3(2).

252. *Dakota, Minn., & E. R.R.*, 236 F. Supp. 2d at 1007.

253. *See id.* (noting that "state regulation of such areas in the context of railroads is preempted by federal law").

254. *See supra* Part III.C (detailing the ICC Termination Act Preemption Clause).

jurisdiction or subject to federal preemption."[255] Whether a facility is "integrally related" depends on the particulars of the case.[256] Multiple different methods have been utilized in making this determination.

One interesting distinction between the STB and the federal courts is that, while the federal courts typically use the "rail carrier" definition alone,[257] the STB uses the ICC Termination Act's definition of "railroad" rather than "rail carrier" when characterizing Section 10501(b)'s reach.[258] As discussed previously, Section 10501(b) states that the Act's preemptive scope covers "transportation by rail carrier," but the term "railroad" is used in the definition of "rail carrier," potentially broadening the meaning of rail carrier considerably.[259] While this distinction does not seem to impact case outcomes, it lends some support to a broader reading of the term.[260]

In general, courts have relied on a series of factors to help determine whether an entity is a "rail carrier." In *Padgett v. Surface Transportation Board*,[261] the court used the following considerations to classify a liquid petroleum gas transloading facility as a "rail carrier": "(1) whether the rail carrier holds out transloading facilities as part of its business, (2) the degree of control retained by the [rail] carrier, (3) property right and maintenance obligation, (4) contractual liability, and (5) financing."[262] These factors have been replicated and rephrased

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255. Borough of Riverdale, 4 S.T.B. 380, 1999 WL 715272, at 387.

256. *See* SEA-3—Petition for Declaratory Order, FD 35853, slip op. at 5 (S.T.B. served Mar. 17, 2015) ("Whether a particular activity is considered part of transportation by rail carrier under § 10501 is a case-by-case, fact-specific determination.").

257. *See* Green Mountain R.R. v. Vermont, 404 F.3d 638, 640 (2d Cir. 2005) (citing to Section 10102(5)); N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 247 (3d Cir. 2007) (same).

258. *See* Valero Refining Co.—Petition for Declaratory Order, FD 36036, slip op. at 4 (S.T.B. served Sept. 20, 2016) (citing to Section 10102(6)); SEA-3, FD 35853, slip op. at 5 (same).

259. *See* 49 U.S.C. § 10102(5) (emphasis added) ("'[R]ail carrier' means a person providing common carrier *railroad* transportation . . . .").

260. *See supra* Part III.D (discussing the potentially expansive definition of "rail carrier").

261. 804 F.3d 103 (1st Cir. 2015).

262. *Id.* at 108 (quoting Tex. Cent. Bus. Lines Corp. v. MAALT L.P., 669 F.3d

in various ways, but have largely remained the same throughout the case law.[263]

To explore the practical breadth of the term "rail carrier," it is important to investigate which non-traditional rail facilities have been thought to fall within its scope. In a seminal case, the state of New Jersey challenged New York Susquehanna and Western Railway Corporation's (Susquehanna) construction of solid waste transloading facilities.[264] The railroad either owned or leased the land on which these facilities were built.[265] Rather than operating the transloading facility itself, Susquehanna hired a third party to "unload the trucks bringing in the waste, oversee its storage, and load it onto rail cars."[266] The state argued that Susquehanna's waste sorting operations were not "'integrally' or 'closely' related to providing rail service" and therefore should not be considered "transportation" under the ICC Termination Act.[267] Yet, the court held that transloading facilities fall within the scope of "transportation" as defined by the ICC Termination Act.[268]

In determining that New Jersey's complaint was preempted, the *Susquehanna* court identified several attributes that supported the claim that the storage and transloading facility was a "rail carrier": (1) Susquehanna built, owned, and advertised the facility as its own; and (2) Susquehanna's agent operated the

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525, 530–31 (5th Cir. 2012)).

263. *See, e.g.*, City of Alexandria, VA—Petition for Declaratory Order, FD 35157, slip op. at 2–3 (S.T.B. served Feb. 17, 2009)

> [Listing factors such as:] [1] whether the rail carrier holds out transloading as part of its service; [2] whether the railroad is contractually liable for damage to the shipment during loading or unloading; [3] whether the rail carrier owns the transloading facility; [4] whether the third party is compensated by the carrier or the shipper; [5] the degree of control retained by the carrier over the third party; and [6] the other terms of the contract between the carrier and the third party.

264. *See* New York Susquehanna, 500 F.3d at 242 (detailing New Jersey's allegations against New York Susquehanna).

265. *See id.* at 242 ("Susquehanna built these facilities itself and either leased or owned the land.").

266. *Id.*

267. *Id.* at 247.

268. *Id.*

facility.[269] These factors are important because they imply a requirement the rail carrier must assume a certain degree of liability to transpose its preemptive power.[270]

The STB has been more circumspect than the federal courts with regard to transloading and offloading facilities, presuming there is a difference. For example, in *Borough of Riverdale*,[271] the STB was asked to determine whether a particular facility was more corn processing plant—not "integrally related" to transportation and not covered by the ICC Termination Act—or more transloading facility, and therefore covered by the Act.[272] Rather than deciding, the STB, for procedural reasons not relevant here, instead provided general guidance regarding their jurisdiction, suggesting that "manufacturing activities and facilities" are not subject to STB jurisdiction, whereas "facilities that are part of a railroad's ability to provide transportation services" would be.[273]

V. The Preemption Clause Does Not and Should Not Cover Crude-by-Rail Offloading Facilities

Whether the ICC Termination Act preempts local land-use permitting denials over crude-by-rail offloading facilities depends on the two questions explored at length previously in this Note. The first question is whether local permitting requirements for the construction of crude-by-rail offloading facilities are the kind of regulations the Act was intended to preempt. The second is whether refineries can properly be considered "rail carriers" and are therefore subject to STB jurisdiction. Both of these questions

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269. *Id.* at 250.

270. *See id.* ("Susquehanna could be sued for breach of contract (or potentially negligence or some other tort) if something went wrong; the *Hi Tech* railroad could not . . . .").

271. 4 S.T.B. 380, 1999 WL 715272.

272. *See id.* at 387 ("If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation.").

273. *Id.* at 387.

must be answered in the affirmative before the ICC Termination Act can preempt local land-use permit denials.

A. Local Regulations Covering Crude-by-Rail Offloading Facilities Are the "Economic Regulations" Intended to Be Covered by the ICC Termination Act

Local regulations must be "economic regulations" in order for the ICC Termination Act to preempt them.[274] The text of the Act, the legislative history, and the case law are in rare alignment on this point. The first indication that the Act is intended to cover local regulations over crude offloading facilities comes from the very text of the statute. For example, the definition of "rail carrier"—"a person providing common carrier railroad transportation for compensation"—includes the word "railroad."[275] And the scope of the term "railroad" includes "intermodal equipment."[276] The Act also hints at the inclusion of transloading facilities by including "equipment . . . related to the movement of . . . property" within the definition of "transportation."[277]

Crude-by-rail offloading racks bear considerable resemblance both to "intermodal equipment" and to "transloading facilities." The term "intermodal equipment" refers to equipment used to transfer freight from one mode of transportation (i.e., rail) to another (i.e., truck).[278] As a term of art, this generally pertains to shipping containers and the equipment used to transport these containers.[279] Whereas "transload" equipment, or in this case

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274. *See supra* Part III.E.2 (discussing the term "economic regulation" in the ICC Termination Act legislative history).

275. *See supra* note 133 and accompanying text (defining "rail carrier" per the ICC Termination Act).

276. *See supra* note 135 and accompanying text (defining "railroad" per the ICC Termination Act).

277. *See supra* note 131 and accompanying text (defining "transportation" per the ICC Termination Act).

278. *See* ASS'N OF AM. R.RS., RAIL INTERMODAL KEEPS AMERICA MOVING 1 (Apr. 2016), https://www.aar.org/BackgroundPapers/Rail%20Intermodal.pdf (defining "rail intermodal").

279. *See id.* ("Rail intermodal is the long-haul movement of shipping containers and truck trailers by rail, combined with a truck or water movement

"transflow" equipment,[280] is defined as a facility that "accommodate[s] the transfer" of goods between transportation mediums.[281] In this case, the crude offloading rack facilitates the "transflow" of crude from tank car to pipeline to refinery. The distance the crude will travel by pipeline is negligible,[282] yet, even this seems to fit the definition and spirit of the ICC Termination Act.

Moreover, Congress considered both intermodal and transloading equipment use and sought to incentivize and support both.[283] In fact, Congress specifically noted its intention to "further foster" intermodal transportation and increase railroad competitiveness with other modes of transportation.[284] Importantly, Congress sought to "remove all existing restrictions that specifically limit or preclude intermodal . . . operations."[285] It is difficult to imagine a stronger statement in favor of facilities like crude offloading racks.

The case law is no less determinative, regarding regulations impacting transloading and intermodal transportation as economic regulations. Courts have faced situations in which localities sought to regulate transloading facilities, and in some cases, struck these regulations down as preempted.[286] For example, when courts have been presented with environmental

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at one or both ends.").

280. *See* AM. ASS'N OF STATE HIGHWAY & TRANS. OFFICIALS, TRANSPORTATION: INVEST IN AMERICA 20, http://rail.transportation.org/Documents/FreightRailReport.pdf ("'[T]ransflow' facilities accommodate the transfer of liquid or 'flowing' materials (e.g., oils, plastics, pellets, bakery flour, etc.) from carload to truck using specialized pumping equipment.").

281. *Id.*

282. *See* VALERO REFINING CO., VALERO CRUDE BY RAIL PROJECT DESCRIPTION, *supra* note 138, at 8 (proposing the addition of 4,000 feet of pipeline for the installation of a crude-by-rail offloading rack).

283. *See supra* Part III.E.2 (discussing the term "economic regulation" in the ICC Termination Act legislative history).

284. *See supra* notes 162–163 and accompanying text (providing insight into Congress's thinking regarding the use and support of intermodal and transloading facilities).

285. *Supra note* 163 and accompanying text.

286. *See supra* Part IV.B (examining how economic regulation has been viewed in the case law).

regulations and safety regulations[287] impacting transloading facilities, these were found to be preempted by the ICC Termination Act. Moreover, in *Valero Refining Co.*, the STB suggests that offloading sites would likely constitute transloading facilities, but noted that these activities would be preempted only if performed by, or under the auspices of, a rail carrier.[288]

For these reasons, the land-use permitting process for crude offloading facilities constitutes economic regulation. Both legislative history and jurisprudence strongly indicate the Act covers these kinds of facilities. Therefore, were a rail carrier, like Union Pacific, constructing this facility on its own land, the ICC Termination Act would undoubtedly preempt local permit denials for the construction of a crude offloading rack at the facility. However, under this circumstance, it is the refinery constructing the offloading facility, not the railroad. The refinery must be within the jurisdictional reach of the STB and be "transportation by rail carrier" to benefit from preemption.

B. Refineries Are Not "Rail Carriers" and Should Not Be Covered by the ICC Termination Act

The next question is whether a refinery could ever fall under STB jurisdiction. In other words, whether a refinery could be a "rail carrier" under any circumstance. There are two distinct scenarios under which this issue could arise. The first is similar to the one in *Valero Refining Co.*, described above. Under this scenario, the refinery itself applies for the permit to build a crude-by-rail offloading facility on its own land. In the second scenario—one not explored directly in any case law—the refinery applies for a land-use permit as the railroad's agent. In both circumstances,

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287. *See* Green Mountain R.R. v. Vermont, 404 F.3d 638, 644 (2d Cir. 2005) (asserting that any distinction between economic and environmental regulation is "not useful"); Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 443 (5th Cir. 2001) (determining that regulations specifying "the time a train can occupy a rail crossing impacts . . . the way a railroad operates its trains, with concomitant economic ramifications" and are therefore preempted).

288. Valero Refining Co.—Petition for Declaratory Order, FD 36036, slip op. at 4 (STB served Sept. 20, 2016).

law and public policy militate against preempting generally applicable land-use permitting processes in favor of crude-by-rail.

1. Refineries Applying for Permits on Their Own Behalf Are Not "Rail Carriers," and Local Permit Denials Are Not Preempted by the ICC Termination Act

The first scenario under which this issue is relevant looks like the situation described in *Valero Refining Co.*[289] As discussed above, Valero applied to the Benicia Planning Commission for a permit on its own behalf and never suggested it was "operating under the auspices of a rail carrier."[290]

The issue is whether a refinery petitioning to build a crude offloading facility should be considered "transportation by rail carrier" for the purposes of the ICC Termination Act. Because the terms "transportation" and "rail carrier" are defined separately under the Act,[291] this issue contains two distinct inquiries: (1) whether the crude offloading facility is "transportation;" and (2) whether the refinery is a "rail carrier." As discussed above, the offloading facility should be considered transportation.[292] Under the ICC Termination Act, transportation includes "equipment . . . related to the movement of . . . property."[293] This includes intermodal and transloading facilities, and crude offloading is similar enough to both forms of transportation.[294]

As discussed above, the definition of rail carrier is potentially quite broad.[295] However, neither the legislative history, the STB, nor the federal courts have viewed it this way.[296] In fact, central to

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289. *See id.* slip op. at 2–3 (providing the background of the dispute between Valero and the city of Benicia).

290. *Id.* slip op. at 5.

291. *Supra* Part III.C.

292. *See supra* Part III.C (assessing the meaning of "transportation" in the ICC Termination Act).

293. 49 U.S.C. § 10102(9)(A).

294. *See supra* Part V.A (describing rail intermodal and transloading facilities).

295. *Supra* Part III.D (analyzing the terms "rail carrier" and "railroad" as used in the ICC Termination Act).

296. *See supra* Part III.E.3 & IV.C (discussing the legislative history and case

the STB's decision in *Valero Refining Co.* is the fact that the Benicia Planning Commission denied "Valero's off-loading facility," not Union Pacific's.[297] Ultimately, generally applicable local land-use regulation is not railroad regulation, unless the party applying is a railroad. In this case, it is not. No courts have gone so far as to impose ICC Termination Act preemption over a facility not owned or operated by a railroad. In this specific situation, the refinery alone cannot be considered a "rail carrier," and therefore, its land-use permit application is not subject to ICC Termination Act preemption.

2. Refineries Applying for Permits as Agents of a Railroad Are Not "Rail Carriers," and Local Permit Denials Are Not Preempted by the ICC Termination Act

In *Valero Refining Co.*, the STB suggests that, were Valero operating "under the auspices of a rail carrier," the STB's declaratory order denying jurisdiction might have had a different outcome.[298] However, it is not so clear that the outcome should be different. First, the jurisprudence is mixed on this question.[299] Second, the legislative history does not suggest that "operating under the auspices of a rail carrier" was ever even considered.[300] On the other hand, the ICC Termination Act's definition of "rail carrier," read broadly, covers an "assignee or personal representative" of a rail carrier—referred to for convenience as an "agent" in this section—operating a facility "used or necessary for transportation."[301] The dichotomy between the practical and textual definition of "rail carrier" makes this scenario more complicated than the previous one.

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law surrounding the definition of "rail carrier" in the ICC Termination Act).

297. Valero Refining Co.—Petition for Declaratory Order, FD 36036, slip op. at 5 (S.T.B. served Sept. 20, 2016).

298. *Id.* (determining that the refinery made "no allegation that it is a rail carrier or that it would be performing offloading under the auspices of rail carrier").

299. *Supra* Part IV.

300. *Supra* Part III.E.3.

301. *See supra* Part III.C (discussing the potentially expansive meaning of "rail carrier" in the ICC Termination Act).

Unlike the first scenario, refineries and railroads have yet to attempt to form an agency relationship for these purposes. The reasons for this are uncertain, but might be a function of two conditions. First, the refineries simply might not have thought they needed to worry about local permit denials. The *Valero Refining Co.* decision upholding Benicia's land-use permit denial was unexpected, and most localities might have assumed they had little choice but to approve the offloading facility permits. Thus, there was no need for refineries to create a "work around."

Second, the agency arrangement is more complex in this situation than in others that courts have considered. As discussed above, while there are factors courts apply to determine whether an agent is operating "under the auspices of a rail carrier," each factor is a circuitous attempt to determine the liability the railroad will be assuming.[302] In this circumstance, rather than the railroads owning the land and leasing it to an agent, as is usually the case,[303] the railroad would presumably need to lease—or buy—the land from the refinery and contract with the refinery to perform offloading services. This makes the arrangement slightly more fraught and less desirable to the railroad.

Contrary to the STB's suggestion in *Valero Refining Co.*,[304] an agency relationship, in and of itself, is not enough to preempt local land-use permitting authority. As discussed in subpart IV.C, courts look to a series of factors to determine whether an agent is "operating under the auspices of rail carrier."[305] These factors involve investigating: (1) whether the railroad "holds out" the facility as part of its business; (2) the degree of control retained by the railroad; (3) which party has the obligation to maintain the

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302. *Supra* note 270 and accompanying text.

303. *See supra* Part IV.C (evaluating cases involving third party non-carriers and agents of rail carriers).

304. *See* Valero Refining Co.—Petition for Declaratory Order, FD 36036, slip op. at 5 (S.T.B. served Sep. 20, 2016) (noting that Valero has made no showing that it was applying "on behalf of" a rail carrier).

305. *See* Padgett v. Surface Transp. Bd., 804 F.3d 103, 108 (1st Cir. 2015) (quoting Tex. Cent. Bus. Lines Corp. v. MAALT L.P., 669 F.3d 525, 530–31 (5th Cir. 2012)) (listing factors the court must consider when determining whether a third party is operating as an agent of a rail carrier).

property; (4) which party is liable for incidents occurring on the property; and (5) the finances of the facility.[306]

In order to "hold out" a facility as being part of its business, the railroad is often expected to build the facility itself, own or lease the property, and advertise the property as its own service.[307] For example, in *SEA-3*,[308] a city denied a transloading company's (SEA-3) permit to expand its facility because it violated a city zoning ordinance.[309] The STB held that the transloading company was not a rail carrier, and therefore, the ICC Termination Act did not preempt city's permit denial.[310] Importantly, the transloading company itself, not the railroad, "built, own[ed], control[led], insure[d], and advertise[d]" the facility.[311]

Conversely, in *City of Alexandria*,[312] the STB found that ICC Termination Act Preemption Clause "shielded [the ethanol transloading facility] from most state and local laws, including zoning laws."[313] The STB considered three determinative factors in its ruling. First, the railroad "own[s] the Facility and constructed it with [its] own funds."[314] Second, the license agreement between the railroad and transloader was not consistent with the transloader conducting its own independent business under the guise of a licensee-licensor relationship.[315] Last, use of the transloading facility was offered as part of the railroad's common

306. *Id.*

307. *See* N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 250 (3d Cir. 2007) (noting the importance of the fact that "Susquehanna, by contracting directly with the shipper, assumed more liability than the *Hi Tech* rail carrier").

308. SEA-3—Petition for Declaratory Order, FD 35853 (S.T.B. served Mar. 17, 2015).

309. *See id.* slip op. at 2 (providing the factual background for the *SEA-3* order).

310. *See id.* slip op. at 6–7 ("Without more, this situation does not reflect undue interference with 'transportation by rail carriers.'" (quoting 49 U.S.C. § 10501(b)).

311. *Id.* slip op. at 3.

312. City of Alexandria, VA—Petition for Declaratory Order, FD 35157, slip op. at 1 (S.T.B. served Feb. 17, 2009).

313. *Id.* slip op. at 1.

314. *Id.* slip op. at 3.

315. *See id.* slip op. at 3–4 (pointing out that the short term of the agreement and 60-day right to cancel cut in favor of preemption).

carrier service and bundled with the shipping services for ethanol producers.[316]

As these cases demonstrate, the determinative factor is not about an "agency relationship" alone. Rather, the inquiry focuses on the amount of liability and ownership responsibility a railroad truly intends to take on regarding the operation of the facility. Presumably, this high bar recognizes that a facility must actually be conducting itself as an arm of the rail carrier, rather than as an independent firm in disguise.

Given the status of the crude-by-rail industry, these requirements will be difficult for railroads to meet under any scenario. As discussed above, at this time, railroads do not invest in crude offloading facilities at all.[317] Therefore, responsibility for building and maintaining them falls on refineries and crude oil producers exclusively. This would obviously need to change were railroads to make an agency-based argument.

Furthermore, some sort of ownership or leasing arrangement of the property would likely be required. However, a short lease term would be nonsensical, as the only party benefiting from the crude offloading facility would be the one refinery in the vicinity. Who else would a railroad practically "lease" to? This would make any showing that the agent is not just an independent firm "in disguise" nearly impossible to make.

With additional degrees of control come additional monetary obligations. The circumstance under which crude-by-rail is profitable are already narrow.[318] These additional requirements may be so costly as to remove the economic incentive for railroads to transport the crude and refineries to receive it. Crude-by-rail is already a more expensive form of transportation than pipeline and tanker.[319] Unless the resale price of oil or the price of foreign crude begins to rise dramatically, crude-by-rail will begin to lose its appeal even if it costs only slightly more.

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316. *See id.* slip op. at 4 ("[The railroad] holds itself out as offering transloading service at the Alexandria terminal as part of its common carrier services . . . .").

317. *See supra* note 72 and accompanying text (discussing the construction of new crude offloading facilities).

318. *See supra* Part II.B (providing the costs of crude-by-rail transportation).

319. *See supra* Part II.B (same).

For these reasons, the "agency theory" of preemption is not feasible for crude-by-rail projects. Therefore, localities should not be preempted from denying land-use permits to refineries, even if they are acting as agents of a railroad.

VI. Conclusion

Crude oil is a massive industry both in the United States, and across the world.[320] Crude oil producers, refineries, and railroad companies all stand to gain considerably by the proliferation of domestic crude throughout the nation by rail car.[321] Therefore, these moneyed interests will continue to pursue favorable preemption rulings in the courts. The consequences of such rulings would be immense. The crude-by-rail industry's ability to preempt local regulations and land-use permit requirements would hang a metaphorical "open for business" sign on every community throughout the entire United States. If preempted, these sites could be built without any input from the very communities who will bear the environmental, safety, and economic downside of a crude-by-rail disaster.

Under no situation should a refinery be considered "transportation by rail carrier" for the purposes of the ICC Termination Act. While Congress intended to draft a broadly applicable deregulatory measure, there is no indication it sought to allow non-rail firms to use railroad legislation as a pretextual cloak to conduct non-rail business with impunity. Even though this is the type of regulation Congress intended to preempt, this is not the type of party the Act was intended to cover. Refineries are not rail carriers under the meaning and subsequent interpretation of the Act, and it is difficult to imagine a situation where refineries could ever be operating "under the auspices" of a rail carrier to the satisfaction of jurisprudential standards.

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320. *See United States Crude Oil Production*, TRADING ECONOMICS, http://www.tradingeconomics.com/united-states/crude-oil-production (last visited Feb. 22, 2017) (listing the United States as the third largest crude producer in the world) (on file with the Washington and Lee Law Review).

321. *See supra* Part II.B (outlining the financial incentive in the crude-by-rail industry).