

# THE GREAT TRAIN ROBBERY THAT WASN'T: PRACTICAL IMPLICATIONS OF *CSX v. EASTERWOOD*

## I. INTRODUCTION

In *CSX Transportation, Inc. v. Easterwood*,<sup>1</sup> the United States Supreme Court articulated a test for federal preemption of claims brought by plaintiffs injured at railroad crossings. These "crossing signalization" claims are based on state tort laws.<sup>2</sup> At first glance, the Supreme Court's decision may appear to be a conservative compromise that limits federal preemption to situations in which federal action can be found at the railroad crossing. However, as this Recent Development demonstrates, the Supreme Court's holding has broad implications and may ultimately preempt nearly all state tort claims regarding the duty of railroads to implement warning and safety devices at railroad crossings.<sup>3</sup>

In the Federal Railroad Safety Act of 1970 (FRSA),<sup>4</sup> Congress attempted to address the increase in railroad crossing injuries and fatalities<sup>5</sup> by transforming the antiquated and inconsistent regulatory system into a system of national uniformity.<sup>6</sup> Congress directed the Secretary of Transportation (the Secretary) to study the problems associated with railroad crossing safety<sup>7</sup> and to develop and implement rules and regulations designed to solve these problems.<sup>8</sup> In order to achieve the national uniformity deemed essential to railroad crossing safety, Congress specifically preempted state laws which covered the same "subject matter" as any

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1. 113 S. Ct. 1732 (1993).

2. State tort crossing signalization claims arise when a plaintiff is injured by a train at a railroad crossing. Typically, a plaintiff brings a common law tort claim against the railroad alleging that the railroad negligently failed to provide adequate safety or warning devices at the crossing.

3. This Recent Development does not contend that the Federal Railroad Safety Act (FRSA) preempts the entire field of state tort law claims against railroads. Rather, it argues that by enacting the FRSA, Congress transferred the duty to maintain adequate warning and safety devices from the railroads to the states. Thus, the preemption issue discussed below affects only claims arising out of the railroads' common law duty to install and maintain warning and safety devices.

4. 45 U.S.C. §§ 421-447 (1970).

5. The number of fatalities arising from crossing accidents involving trains and vehicles rose significantly in the 1960-1970 period. FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSPORTATION, RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK 5 tbl. 5 (1992) [hereinafter HANDBOOK].

6. 45 U.S.C. §§ 421, 434 (1988).

7. 45 U.S.C. § 433 (1988).

8. 45 U.S.C. § 431(a) (1988).

“rule, regulation, order, or standard” promulgated by the Secretary.<sup>9</sup>

In 1973, pursuant to the Highway Safety Act, the Secretary implemented regulations that conditioned federal funding for railroad crossings on state adoption of a federally approved highway safety program.<sup>10</sup> Additionally, the Secretary adopted the Manual on Uniform Traffic Control Devices (MUTCD),<sup>11</sup> which set forth various orders, standards, and regulations for the states to follow.<sup>12</sup> Part VIII of the MUTCD specifically addressed railroad safety.<sup>13</sup>

Although Congress specifically preempted state laws on the same subject as federal regulations, and the Secretary implemented a system that virtually stripped the railroads of any control over the construction of safety devices at crossings, a three-way split developed among the circuits regarding federal preemption of state laws governing a railroad's duty to

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9. 45 U.S.C. § 434 (1988). This section provides in full:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

*Id.*

10. See 23 U.S.C. § 130(d), which provides in part: “Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose.” 23 U.S.C. § 130(d) (1988). See also 23 U.S.C. § 130(a), (g) (1988).

11. FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSPORTATION, MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES vii. (1988 ed.) [hereinafter MUTCD]. The MUTCD is a manual prescribing the uniform standards for all signs, signals, markings, and devices with which the authority with jurisdiction must comply. The MUTCD has been published and periodically revised since 1935 by a joint committee of the American Association of State Highway and Transportation Officials and the National Conference on Street and Highway Safety. *Id.*

12. See 23 C.F.R. § 655.601(a) (1983). See also 23 C.F.R. §§ 646.200-.220 (1975).

13. Part VIII of the MUTCD provides in pertinent part:

8A-1 Functions. The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation, and operation shall be in accordance with the national standards contained herein.

8D-1 Selection of Systems and Devices. The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations. . . . Based on an engineering and traffic investigation, a determination is made whether any active control system is required at a crossing and, if so, what type is appropriate.

MUTCD, *supra* note 11, at Part VIII.

maintain safe and adequate railroad crossings.<sup>14</sup> In *CSX Transportation, Inc. v. Easterwood*, the Supreme Court addressed the FRSA's preemption clause in the context of a signalization claim and adopted a "federal funding" approach.<sup>15</sup> The Court found that the FRSA's preemption clause covered the subject matter of state regulations when federal funds "participated" in a project to install warning devices and the Federal Highway Administration subsequently approved the project.<sup>16</sup> The Court also left open the possibility that federal preemption would occur when the crossing was at or near the terminus of a federally funded roadway improvement project.

This Recent Development discusses the broad impact that the Supreme Court's decision in *Easterwood* will have on the preemption of state tort signalization claims at railroad crossings. Part II examines the traditional common law duty of railroads to maintain crossing safety, the legislative history of the Federal Railroad Safety Act, and the federal railroad crossing regulations implemented by the Secretary of Transportation in 1973. Part III enunciates the Supreme Court's general tests for finding federal preemption under the Supremacy Clause. Part IV analyzes judicial interpretations of federal preemption under the FRSA before *Easterwood*. Part V discusses the Supreme Court's decision in *Easterwood*. Finally, Part VI argues that *Easterwood's* bright-line test will broadly insulate railroads from signalization claims at railroad crossings. This Recent Development concludes that preemption will be found at a predominant number of crossings. This result, which is an inevitable consequence of the Supreme Court's "federal funding" approach and the backdrop of federal involvement in railroad safety against which the rule was announced, appropriately encourages the creation of a nationally uniform safety system for railroad crossings.

## II. HISTORICAL BACKGROUND

### A. History and Common Law of Railroad Crossings

The tremendous increase in automobile usage during this century set the stage for the current tension between the railroad industry and the state

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14. For a discussion of the dispute between the circuits, see *infra* Part IV.

15. 113 S. Ct. at 1740-41.

16. See discussion *infra* Part V. The Court also recognized preemption of claims against railroads based on excessive train speed. 113 S. Ct. at 1742-44.

agencies regarding remedies for signalization claims. Historically, railroads often ran directly over highways because these roadways provided the most efficient and direct route.<sup>17</sup> As more highways developed, the country saw a dramatic increase in crossing accidents and fatalities.<sup>18</sup>

Initially, the railroads shared with travelers the responsibility of maintaining safe crossings. Individuals crossing a railroad track had the duty to "stop, look and listen" for approaching trains, and the railroad was required to give a reasonable and timely warning.<sup>19</sup> As conflicts between railroads and automobiles continued to increase, however, it became apparent that the railroads were not the best party to maintain and ensure crossing safety. As early as 1935, the Supreme Court observed that the railroads were no longer the main cause of railroad crossing accidents and that, in fact, the railroads needed protection from the increase in crossing accidents.<sup>20</sup>

### *B. Federal Railroad Safety Legislation and the Beginnings of Preemption*

In 1970, Congress enacted the FRSA in an attempt to curb the increase in railroad-related accidents and to advance safety measures in all areas of railroad operations.<sup>21</sup> The FRSA directed the Secretary of Transportation

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17. HANDBOOK, *supra* note 5, at 14 (reporting that railroads were allowed to build tracks across existing roads to avoid high capital construction costs).

18. *Id.* at 15. Initially, state legislatures responded by relieving automobile operators of their duty to stop, look, and listen. Thus, the railroads had the duty to maintain crossings in a reasonable manner to avoid injury to those individuals using the crossing regardless of the individual's contributory negligence. Travelers who were injured at the crossing could seek recovery through a common law tort suit.

19. *Continental Improvement Co. v. Stead*, 95 U.S. 161, 164 (1877). The Court held that the duties of the traveler and the railroad were "mutual and reciprocal." *Id.* at 165. Additionally, the Court held that, due to the nature and character of the train, the train had the right of way at railroad crossings. *Id.* at 164.

20. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 422-23 (1935). The Court stated: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Id.*

21. Pub. L. No. 91-58, 84 Stat. 971 (1970). Specifically, Congress promulgated the FRSA "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons . . ." 45 U.S.C. § 421 (1988). Congress did not believe that "safety in the nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. REP. NO. 1194, 91st Cong., 2d Sess. 11, *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

Congress had initially addressed the highway safety problem by providing states with funds "for the elimination of hazards of railway-highway crossings." HANDBOOK, *supra* note 5, at 9 (quoting Federal-Aid Highway Act of 1944, ch. 626, 58 Stat. 838 (codified as amended at 23 U.S.C. § 130(a) (1988))).

to study the railroad safety problem and devise appropriate guidelines in all areas of railroad safety.<sup>22</sup> The FRSA also expressly preempted state laws covering the same subject matter as any "rule, regulation, order or standard adopted by the Secretary."<sup>23</sup> Under the FRSA's preemption clause, states could adopt more stringent requirements when necessary to eliminate local safety hazards, so long as the state standards did not directly conflict with federal laws or regulations.<sup>24</sup>

As required by the FRSA,<sup>25</sup> the Secretary of Transportation submitted a detailed, two-part report to Congress on the railroad crossing safety problem, and suggested several possible solutions. In the Secretary's first report, he addressed the pre-automobile history of railroads and the problems caused by the emergence of the automobile.<sup>26</sup> In his second report, the Secretary criticized the division of responsibility for safety of railroad crossings between railroads and state agencies.<sup>27</sup> The Secretary

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In order to supplement the costs of the safety devices, Congress directed the Secretary of Transportation to determine the benefit that the railroads received from the installation of safety devices. The railroads were then required to pay a corresponding portion of the cost of improving the railroad crossings. 23 U.S.C. § 130(b), (c) (1988). The Secretary subsequently concluded that the net benefit of railroad crossing improvement to the railroads was zero, 23 C.F.R. § 646.210(b)(1)-(4) (1992), and eliminated the contribution requirement.

Over time, the Secretary realized that the mere allocation of funds was an insufficient answer to the problem of railroad crossing safety. As a result, the Secretary organized a task force to address the problem. HANDBOOK, *supra* note 5, at 15. Despite "the continuing efforts to improve" railroad safety, crossing fatalities rose significantly from 1960-1970. *Id.* at 5 tbl. 5.

22. See 45 U.S.C. §§ 431(a), 433 (1988). Congress ordered the Secretary to make "a comprehensive study of the problem of eliminating and protecting railroad grade crossings" and to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem . . ." 45 U.S.C. § 433(a) (1988). The Secretary was authorized to act "insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction . . ." 45 U.S.C. § 433(b) (1988).

The Secretary has promulgated rules that touch upon the area of train speed, track and equipment safety regulations, and control devices at railroad crossings. See 49 C.F.R. §§ 209-221, 223, 225, 228, 230, 232, 233, 235, 236 (1992); 23 C.F.R. §§ 625, 646, 655, 924, 1204 (1992).

23. 45 U.S.C. § 434 (1988). For the full text of this provision, see *supra* note 9.

24. See *id.*

25. 45 U.S.C. § 433 (1988).

26. In the Secretary's 1970 Report, he stated: "Nearly all grade crossing accidents can be said to be attributable in some degree to "driver error." Thus, any effective program for improving [crossing] safety should be oriented around the driver and his needs in approaching, traversing, and leaving the crossing site as safely and efficiently as possible." U.S. DEP'T OF TRANSPORTATION, RAILROAD-HIGHWAY SAFETY, PART I: A COMPREHENSIVE STATEMENT OF THE PROBLEM (1971).

27. U.S. DEP'T OF TRANSPORTATION, RAILROAD-HIGHWAY SAFETY, PART II: RECOMMENDATIONS FOR RESOLVING THE PROBLEM (1972). The report stated that because of the historic division of responsibility over traffic controls at grade crossings, these crossings were "the only places along the highway where the state authorities do not have total responsibility for and control over the installation

recommended that Congress amend the Federal Highway Safety Act to shift the primary responsibility for railroad-highway crossing protection to state and federal agencies.<sup>28</sup>

### C. Federal Regulation of Railroad Crossings

In response to the Secretary's Report, Congress amended the Federal Highway Safety Act in 1973.<sup>29</sup> Congress implemented a novel approach to rail safety that required the public agency with jurisdiction,<sup>30</sup> rather than the railroads, to provide any necessary improvements to safety devices at railroad crossings as a precondition to receiving federal highway funds.<sup>31</sup> Specifically, the states were required to conduct and systemati-

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. . . of traffic control devices." *Id.* at 33-34. The Secretary expressed concern over the railroads' inability to solve the grade crossing problem alone and recognized that the public authorities were the best entities to control and insure railroad safety. *Id.*

The Secretary's report relied on the Interstate Commerce Commission's decision that, because the increase in accidents was directly related to the increase in highway traffic, the cost of additional crossing protection should be borne by the public. Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles, 322 I.C.C. 1 (1964) (suggesting that the cost of improving grade crossing safety either be assessed against the principal users or be allocated among those who benefit from the improvements).

28. The Secretary specifically recommended:

[T]hat the Department of Transportation, in cooperation with the railroad industry and appropriate State agencies, develop a national inventory of crossings and a uniform national numbering system of crossings. In addition, the Secretary recommended that railroad-highway grade crossing safety research be emphasized and that efforts to educate drivers regarding the potential hazards of crossings be furthered.

HANDBOOK, *supra* note 5, at 10.

29. The relevant amendments are codified at 23 U.S.C. § 130 (1988).

30. 23 U.S.C. § 130(d) (1988). Jurisdiction resides primarily with the state:

Within some States, responsibility is divided among several public agencies and the railroad. In a number of States, jurisdiction over the crossing is assigned to a regulatory agency referred to as a Public Utilities Commission, Public Service Commission, or similar designation. In other States, the authority is divided among the public administrative agencies of the State, county, and city having jurisdiction for their respective highway systems. State highway agencies are responsible for the implementation of a program that is broad enough to involve any public crossing within the State.

HANDBOOK, *supra* note 5, at 19.

31. 23 U.S.C. § 130(d) (1988). In order for states to receive federal funds, they must "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Id.* Each state is also required to make an annual progress report on the effectiveness of its railway-highway grade crossings improvements. 23 U.S.C. § 130(g) (1988). Congress intended that "every railroad crossing in America [would] be provided with modern, up-to-date adequate protection to the risks of each crossing." H.R. REP. NO. 118, 93d Cong., 1st Sess., reprinted in 1973 U.S.C.A.N. 1859, 1892. Congress intended to create a grade crossing program that was part of the larger transportation system. HANDBOOK, *supra* note 5, at 85.

cally maintain a survey on the safety of all highway crossings and to implement a ranking system of such sites<sup>32</sup> for the purpose of determining the need for additional traffic control devices.<sup>33</sup>

The Secretary implemented the Federal Highway Safety Act in 1973 by adopting several regulations pertaining to the railroad system.<sup>34</sup> Initially, states were required to develop programs for improving the safety of railroad crossings based on federal requirements and to report the findings and progress to the Secretary annually.<sup>35</sup> The Secretary also mandated that, in order to receive federal funds, all safety devices must conform with the federally written MUTCD.<sup>36</sup> Part VIII of the MUTCD specifically

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32. In addition to the requirements of § 130(d) and (g) discussed *supra* note 31, other sections of the Highway Safety Act have parallel provisions requiring that state highway safety programs include grade crossings. For example, 23 U.S.C. §§ 152 and 402 require that railway-highway crossings be included in each state's highway hazard elimination programs and highway safety programs. Section 152(a) provides:

(a) Each state shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

23 U.S.C. § 152(a) (1988).

Section 402 provides in relevant part: "Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injury and property damage resulting therefrom. Such programs shall be in accordance with uniform guidelines promulgated by the Secretary . . ." 23 U.S.C. § 402(a) (1988).

33. 23 U.S.C. § 130(d) (1988). Section 212.101 of the accompanying regulations provides: "It is the policy of the FRSA to maintain direct oversight of railroad conditions and practices relevant to safety by conducting inspections and investigations throughout the national railroad system in coordination with participating state agencies." 49 C.F.R. § 212.101(c) (1992). An attempt to amend this provision to permit oversight by persons other than specified railroad personnel was rejected in 1988 by the Conference Committee. H.R. CONF. REP. NO. 637, 100th Cong., 2d Sess. 30, *reprinted in* 1988 U.S.C.C.A.N. 708, 709.

34. See 23 C.F.R. §§ 646, 655, 924, 1204 (1992).

35. See 23 C.F.R. §§ 924.1-15 (1992). Each state receiving federal funds is required to establish a program that establishes priority ranking of highway hazards and prescribes the procedure for implementing and evaluating safety devices. Section 924.5 requires the state to develop a highway safety program. 23 C.F.R. § 924.5. Section 924.9 requires the plan to include procedures to collect data and establish a system of prioritization. 23 C.F.R. § 924.9. Section 924.11 requires the state to develop a process for scheduling the installment of traffic devices according to their prioritization in section 924.9. 23 C.F.R. § 924.11. Section 924.15 requires annual reports to the Secretary on the State's progress of implementing safety mechanisms. 23 C.F.R. § 924.15.

36. The MUTCD has been incorporated into the federal regulations. See 23 C.F.R. §§ 646.214(b)(1), 655.603(b)(1) (1992). The regulations specify the particular warning devices that are required: (1) when the crossing is near the terminus of a federal-aid project, 23 C.F.R. § 646.214(b)(2), or (2) when federal funds participate in the installation of the warning device 23 C.F.R. § 646.214(b)(3)-(4). Section 646.214(b)(3) describes conditions in which automatic gates are required:

(3)(i) Adequate warning devices under § 646.214(b)(2) or on any project where federal aid

addressed the requirements for safety devices at railroad crossings.<sup>37</sup>

As a result of the Secretary's mandates, states have created a system of hazard indexing and prioritization based on the data received from surveys, reports, schedules, and lists.<sup>38</sup> The railroads only participate in this system as part of the diagnostic team that surveys the railroad crossings. After the diagnostic team identifies potentially dangerous crossings, the state ranks the crossing on a priority basis. The state then determines the safety device to be installed.<sup>39</sup> If the state uses federal funding in the installation of the traffic device, the state is required to obtain approval and authorization from the Federal Highway Administration (FHWA).<sup>40</sup> Since the passage of the Intermodal Surface Transportation Efficiency Act

funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

23 C.F.R. § 646.214(b)(3) (1992). If automatic gates are not required at a particular crossing, then the warning device installed must receive FHWA approval. 23 C.F.R. § 646.214(b)(4) (1992).

37. For the relevant text of Part VIII of the MUTCD, see *supra* note 13.

38. Many agencies and interested parties provide data to the state Departments of Transportation through the use of diagnostic teams and the USDOT Grade Crossing Index Form. The team's function is to prescribe a survey procedure. The team consists of representatives from all groups that have responsibility over the safety and maintenance of railroad crossings. HANDBOOK, *supra* note 5, at 79.

39. *Id.*

40. 23 C.F.R. § 646.214 (1992). Section 646 specifically addressed the procedure, standards and application of active and passive safety devices required at railroad crossings, while section 924 addressed the highway safety improvement program.

The petitioner in the Easterwood case summarized the success of the program:

The Secretary's integrated approach to improving grade crossing safety has been extraordinarily effective. Since the start of the Rail-Highway Crossings program in 1974, the federal government has spent more than \$2.4 billion to support over 26,000 projects to improve safety at grade crossings. These projects, together with the Secretary regulations, have reduced the rate of fatal injuries at grade crossings by 88 percent since 1974. Nonfatal injuries have been reduced by 60 percent. By contrast, "[i]n the 9 years between 1958 and 1967 the casualty ratio remained almost constant." Accordingly the Secretary has estimated that "the program has prevented over 6,800 fatalities and 28,500 nonfatal injuries since 1974."

Brief for Petitioner at 70-71 (citations omitted), *CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732 (1993).

(ISTEA) in 1991, states may obtain blanket federal approval for railroad safety projects.<sup>41</sup>

### III. THE SUPREME COURT'S FEDERAL PREEMPTION DOCTRINE

Although the FRSA expressly preempted state laws attempting to regulate the subject matter of any federal regulations, the issue of preemption remains hotly contested. Preemption analysis requires an examination of state and federal authority under the United States Constitution. The Supreme Court has articulated three tests for determining when federal law preempts state law. However, due to the FRSA's express preemption clause, only one of these tests applies to preemption of crossing signalization claims.

The doctrine of preemption derives its authority from the Supremacy Clause of the United States Constitution.<sup>42</sup> Under the Supremacy Clause, state laws that interfere or conflict with federal laws are invalid.<sup>43</sup> In deference to states' police power, however, courts maintain a presumption against preemption when the federal statute impinges upon an area traditionally governed by state law.<sup>44</sup> Because preemption will not be found unless it is the unqualified motive of Congress,<sup>45</sup> the crucial inquiry for the court is whether Congress intended to exclude state law.<sup>46</sup>

The Supreme Court has traditionally recognized preemption when: (1) Congress occupies an entire field traditionally regulated by the states; (2) federal law conflicts with state law to the extent that harmonious coexistence is impossible; or (3) Congress explicitly preempts state authority.<sup>47</sup> Under the "occupation of the field" analysis, federal law preempts state law when the federal regulation is so pervasive that it precludes the enforcement of state laws.<sup>48</sup> The Supreme Court also has held that if the area regulated is one traditionally within the province of the state, the congressional intent to preempt must be clear and manifest.<sup>49</sup> Courts applying the

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41. Pub. L. No. 102-240, § 1077 (1991).

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

43. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

44. *Easterbrook*, 113 S. Ct. at 1737. See *California v. ARC America Corp.*, 490 U.S. 93 (1989).

45. 113 S. Ct. at 1737 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

46. See e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

47. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983).

48. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).

49. *Id.*

second test, a “direct conflict” analysis, inquire whether it is impossible for a private party to comply with both federal and state law.<sup>50</sup> In the alternative, the Court looks to whether the state requirement acts as a substantial obstacle to carrying out congressional objectives.

Finally, under an “explicit” preemption analysis, the court must interpret the scope and the meaning of the statutory preemption clause. When Congress explicitly preempts state authority, a court is not required to inquire into the other two preemption tests; rather, the court’s objective is to determine the breadth and scope of the preemption clause.<sup>51</sup> Thus, a court must only look to the explicit statutory language to determine whether Congress intended the preemption of a body of state law. Three of the four courts that have applied the Supreme Court’s preemption doctrine to signalization claims have applied this test in deference to the FRSA’s explicit preemption clause.<sup>52</sup>

#### IV. PREEMPTION BEFORE *EASTERWOOD*

Although the FRSA expressly preempts state law in any area of rail safety covered by the United States Department of Transportation regulations,<sup>53</sup> debate continues on the issue of preemption. Before *CSX Transportation, Inc. v. Easterwood*, conflicting federal court decisions created a three-way split regarding federal preemption of state tort claims arising from railroad crossings injuries.<sup>54</sup> Courts ruling on the issue adopted one of the following positions regarding preemption: (1) total preemption of all claims following the United States Department of Transportation’s adoption of the MUTCD; (2) contingent preemption depending on whether the state authority had made an affirmative decision regarding a specific railroad crossing; or (3) no preemption based on a determination that the railroad had a continuing duty to maintain a safe crossing.

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50. *Id.* In *Karl v. Burlington N.R.R.*, 880 F.2d 68, 76 (8th Cir. 1989), the Eighth Circuit applied this test to determine the railroad’s liability in a grade crossing accident. For a discussion of that case, see *infra* notes 62-73 and accompanying text.

51. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

52. See *infra* Part IV.

53. See discussion *supra* Part II.

54. Only the preemption of claims deriving from allegations that the railroad should have improved the safety of the particular crossing is in dispute. Courts acknowledge that the railroad is still liable for other state common law tort claims such as failure to blow horn, failure to proceed within the speed limit, or failure to maintain the crossing in a safe condition.

### A. Total Preemption

In *Hatfield v. Burlington Northern Railroad Co.*,<sup>55</sup> the Tenth Circuit held that state common law tort claims against railroads based on an alleged state law duty to upgrade and improve railroad crossings were preempted. To reach this result, the Tenth Circuit relied on and applied the explicit preemption test.<sup>56</sup> First, the court looked to FRSA's express preemption clause, which requires preemption of state law when the state purports to regulate subject matters also covered by federal regulations.<sup>57</sup> The court held that the MUTCD, by prescribing rules, regulations, standards, and orders that the states were required to follow, covered the subject matter of the state regulation. Thus, the Tenth Circuit concluded that preemption of the state regulations had occurred when the U.S. Department of Transportation adopted the MUTCD.<sup>58</sup>

The court held that the FRSA's preemption clause relieved the railroads of any duty under state law to install railroad safety devices.<sup>59</sup> The court reasoned that, because the MUTCD required approval from the state agency with jurisdiction before any warning device could be installed,<sup>60</sup> the federal regulations actually prohibited a railroad from acting on its own initiative to install or select a safety device.<sup>61</sup> To buttress its argument, the court looked to the intent behind the promulgation of the FRSA. The court noted that the basic purpose of the FRSA was to create a uniform system of safety standards for railroad crossings to replace the antiquated

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55. 958 F.2d 320 (10th Cir. 1992).

56. See *supra* notes 51-52 and accompanying text.

57. 958 F.2d at 321.

58. *Id.* at 324. See 23 C.F.R. § 646.214 (1992). See also *Reno v. Consolidated Rail Corp.*, 797 F. Supp. 700 (S.D. Ind. 1992). The *Hatfield* court summarized the preemptive effect as follows: Congress expressed an intent to invade the field of grade crossing safety devices, postponing that invasion only until the Secretary of Transportation adopted a rule, regulation, order, requirement, or standard relating to that field. The Secretary has responded by adopting the MUTCD and making it applicable to grade crossings . . . . Having adopted the MUTCD, the Secretary prescribed the standard required by 45 U.S.C. § 434, and any state law relating to grade crossing safety devices was then superseded.

958 F.2d at 323-24.

59. *Id.*

60. Section 8D-1 of MUTCD provides: "The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations . . . ." MUTCD, *supra* note 11, at 8D-1. Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given state. *Id.*

61. *Hatfield*, 958 F.2d at 323.

common law system.<sup>62</sup> The court stated that Congress intended to transform the ad hoc system to a "prospective-looking" system based on a rational scheme of surveys and planned prioritization that would limit hazardous sites around the country.<sup>63</sup> This goal of uniformity could not be accomplished if varying state laws remained in effect.

### B. *Contingent Preemption*

In *Marshall v. Burlington Northern Railroad Co.*,<sup>64</sup> the Ninth Circuit also applied the explicit preemption test, but found preemption only under certain limited circumstances. The court interpreted the FRSA's preemption clause to mean that federal regulations "covered" the subject matter of state rules, standards, orders, and regulations when the state authority with jurisdiction over the crossing affirmatively acted at a particular railroad crossing. In essence, the court held that for purposes of preemption, federal and state regulations covered the same subject matter only when there was actual state action, rather than potential state power. Specifically, the court held that state tort claims for failure to install an appropriate warning

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62. *Id.* at 324. See also discussion *supra* Part II.

63. 958 F.2d at 324. Specifically, the court stated:

Continuing resort to common law standards after a state adopts MUTCD disrupts a basic purpose of FRSA as it is implemented by the provision of funding, namely, recognition of priorities. FRSA contemplates that some sites are more dangerous than others and that resources should first be put to use on the more dangerous ones, all in accordance with a rational scheme based on surveys. This is a prospective-looking system. Jury verdicts based on common law standards, which are of a high degree of abstraction and generality, are retrospective-looking and are addressed to only one crossing rather than a system of crossings. The hit-or-miss common law method runs counter to a statutory scheme of planned prioritization.

*Id.*

In *Duncan v. Union Pacific*, 842 P.2d 832 (Utah 1992), the Utah Supreme Court held that state authorities have total discretion regarding warning devices at crossings. As a result, the court declined to impose a duty on the railroads to petition the state to upgrade certain crossings. The court reasoned that to do so would disrupt the orderly approach to solving safety problems at crossings and would disrupt the system that insures safety of crossings over the entire state. *Id.* at 834-35.

In *Armijo v. Atchison, T. & S.F. Ry.*, 754 F. Supp. 1526 (D.N.M. 1990), the United States District Court for the District of New Mexico also held that claims against the railroad for negligently failing to maintain a safe and adequate crossing were totally preempted. *Id.* at 1531. The court employed reasoning similar to that used by the *Hatfield* court. The court held that because of the broad language of 45 U.S.C. § 434, state laws were preempted whenever they "related to" railroad safety. The court found that the use of the phrase "relating to" was indicative of Congress's broad intention to regulate and control the safety of railroad crossings. *Id.* The court stated: "The FRSA does not merely preempt those state laws which impair or are inconsistent with federal regulations. It preempts all state regulations aimed at the same safety concerns addressed by federal regulations." *Id.*

64. 720 F.2d 1149 (9th Cir. 1983).

device were only preempted when the local authorities had issued an affirmative determination that additional safety devices were or were not needed at the crossing.<sup>65</sup> The court reasoned that although the Secretary delegated authority to regulate crossings to the entity with jurisdiction, railroads had a duty to maintain a "good and safe" crossing until the public entity made an affirmative decision regarding the crossing.<sup>66</sup>

### C. No Federal Preemption

In *Karl v. Burlington Northern Railroad, Co.*,<sup>67</sup> the Eighth Circuit applied direct conflict preemption analysis,<sup>68</sup> despite the FRSA's explicit preemption clause. Under this test, the court found that the FRSA does not preempt state law crossing signalization claims regarding the safety of railroad crossings.<sup>69</sup> The court held that even if the railroad operated within the federally prescribed standards, the railroad retained a common law duty to maintain a reasonably safe crossing.<sup>70</sup> The court stated that

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65. *Id.* at 1154.

66. *Id.* The Eleventh Circuit addressed the preemption issue in *Mahony v. CSX Transportation, Inc.*, 966 F.2d 644 (11th Cir. 1992). The majority in *Mahony* merely remanded the claims for negligence against the railroad to the district court for reconsideration in light of the Eleventh Circuit's intervening decision in *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548 (11th Cir. 1991). *Mahony*, 966 F.2d at 645. However, in a special concurring opinion, Judge Birch adopted and explained the contingent preemption theory.

Judge Birch interpreted the FRSA's preemption clause to cover the subject matter of state regulation only when there was actual state action, *id.* at 647 (Birch, J., concurring), as opposed to the potential state power that the Tenth Circuit found sufficient in *Hatfield*, see discussion of *Hatfield supra* notes 55-63 and accompanying text. Judge Birch posited that plaintiff's crossing signalization claim should not be preempted under the federal regulations if no state decision had been made concerning the particular crossing at issue. 966 F.2d at 647 (Birch, J., concurring). He reasoned that because the FRSA and the MUTCD required state and local authorities to determine the appropriate safety devices at a crossing, it was implausible to hold the railroad liable in negligence for failing to usurp the state and local jurisdiction. Judge Birch stated that holding the railroad liable under these circumstances would interfere with the congressional intent to create a safe and uniform system. *Id.* Finally, Judge Birch expressed concern that if railroads were held liable even after state and local authorities had determined the adequate safety device, the railroads might reach independent determinations concerning the appropriate safety measures. *Id.*

67. 880 F.2d 68 (8th Cir. 1989). The Supreme Court later rejected the reasoning of the *Karl* court by holding that preemption of crossing signalization claims by the FRSA could be found under some circumstances. See *CSX Transportation, Inc. v. Easterwood*, 113 S. Ct. 1732 (1993).

68. See discussion *supra* text accompanying note 50.

69. *Karl*, 880 F.2d at 76. The court's analysis was faulty on two counts. First, the court used a "conflict" analysis and ignored the FRSA's explicit preemption clause. Second, the Court erroneously applied the "conflict" test. The court asked whether it was impossible for the plaintiff to comply with both federal and state regulations. *Id.* at 76. The appropriate analysis under the "conflict" test was whether it was impossible for the railroad to comply with both federal and state law.

70. 880 F.2d at 76.

adherence to a legislative enactment does not absolve the train operator from acting as a reasonably prudent person would under the circumstances.<sup>71</sup> Because the train operator could comply with both statutory and common law duties, the court reasoned that the duties did not conflict. Furthermore, the court stated that the test for preemption was whether state law *actually* conflicted with federal regulation.<sup>72</sup> However, the court focused on the conflict that the decedent faced and not the conflict that the railroad faced. The court held that since Karl was not forced to choose between federal or state law, a direct conflict between state and federal law did not exist and preemption was not required.<sup>73</sup>

#### V. THE *EASTERWOOD* DECISION

In *CSX Transportation, Inc. v. Easterwood*,<sup>74</sup> the Supreme Court decided the question of federal preemption of crossing signalization claims by adopting a federal action approach similar to the state action approach used by the Ninth Circuit.<sup>75</sup> The Court rejected the approach of the Tenth and Eighth Circuits,<sup>76</sup> and held that preemption occurred when federal funds “participated” in the installation of warning devices that subsequently received federal approval. The Court also suggested, but did not determine, that preemption might occur when a crossing is located near a federal highway project.<sup>77</sup> The Court applied explicit preemption analysis and held that because of the FRSA’s preemption clause, the appropriate inquiry was whether the state law “covered the subject matter” of the federal regulation.<sup>78</sup> The Court held that federal regulations under the FRSA “substantially subsume[d]” the subject matter of the state law when the

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71. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 288C (1965)). Once again the court’s reasoning was erroneous. Crossing signalization claims are based on the failure of the railroad to maintain an adequately safe railroad crossing. They are not based on the train operator’s negligence under certain circumstances. The railroad did not argue that its common law duty to act reasonably was preempted, but rather argued for preemption of its duty to install warning and traffic safety devices at railroad crossings.

72. *Karl*, 880 F.2d at 76.

73. *Id.* The court erroneously focused on the conflict from Karl’s vantage point. *Id.* at 76. Because Karl had no responsibility for the installation of safety devices, the court’s focus was misplaced. The issue in this case should have been whether the *railroad*, not the person injured at the crossing, was faced with irreconcilable rules and regulations.

74. 113 S. Ct. 1732 (1993).

75. See *supra* notes 64-66 and accompanying text.

76. See *supra* notes 55-63, 67-73 and accompanying text.

77. 113 S. Ct. at 1741.

78. *Id.* at 1737. The Court held that to establish preemption, “the regulations . . . must establish more than that they ‘touch upon’ or ‘relate to’ that subject matter.” *Id.*

MUTCD specifically prescribed the devices to be used and federal funds participated in the installation of these devices.<sup>79</sup>

In *Easterwood*, Lizzie Easterwood brought a diversity action against CSX Transportation seeking damages for the death of her husband under Georgia's wrongful death statute. The plaintiff alleged that the auto-train collision that killed her husband resulted from CSX's failure to maintain adequate warning devices at the crossing, and its operation of the train at an excessive rate of speed.<sup>80</sup> The Court, adopting a federal action approach, held that when federal funds had "participated" in the installation of warning devices at a particular crossing, the railroad's duty to maintain a safe crossing at that site would be preempted.<sup>81</sup> Thus, preemption is contingent on the participation of federal funds in the installation of the safety device, and on subsequent federal approval of the installation. The Court reasoned that because the Secretary determined both the devices to be installed and the means for the railroads to participate in their selection, the regulations concerned the same subject matter as state tort laws that independently required railroads to identify and repair dangerous crossings.<sup>82</sup> In addition, the Court left open the possibility that negligence claims against the railroad would also be preempted if the crossing were located in or near a federal-aid project.<sup>83</sup>

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79. 113 S. Ct. at 1738, 1741.

80. *Id.* at 1736. The District Court for the Northern District of Georgia granted CSX's Motion for Summary Judgment on the grounds that both claims were preempted by the FRSA. *See Easterwood v. CSX Transportation, Inc.*, 742 F. Supp. 676, 678 (N.D. Ga. 1990). The Eleventh Circuit affirmed the preemption of the excessive speed claim, but held that the negligence claim for failing to install adequate warning devices was not preempted. *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548, 1553-56 (11th Cir. 1991).

81. 113 S. Ct. at 1741. The Court relied on the directives of 23 C.F.R. § 646.214(b)(3)-(4) to support its finding that state laws in this area are preempted. *Id.*

82. 113 S. Ct. at 1741. The Court did not find preemption in this case because Petitioner had failed to establish that the regulations applied to this crossing. *Id.* The record reflected that although money had been allocated to the crossing to install a gate, the gate was not installed because proper installation required a traffic island which in turn required city approval. The city refused to grant approval because of its concern for the disruption of vehicular traffic, so the "gate was shelved and there were funds allocated for use in another project." *Id.* The Court held that the preconditions for the application of either regulation had not been met because Petitioner had failed to establish that federal funds "participate[d] in the installation of the [warning] devices." *Id.*

83. 113 S. Ct. at 1741 n.10. The Court noted the potential preemption power of 23 C.F.R. § 646.214(b)(2), but did not conclusively decide the issue. Section 646.214(b)(2) provides:

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

23 C.F.R. § 646.214(b)(2) (1992).

However, the Court held that the federal regulations did not “cover the subject matter” so completely as to preempt all state tort claims.<sup>84</sup> Under the Court’s analysis, these regulations merely provided a link between federal and state responsibilities for railroad safety. The regulatory scheme did not, solely by virtue of its enactment, rewrite traditional negligence law.<sup>85</sup> The Court rejected the argument that, because Congress specifically directed the railroads to comply with the MUTCD requirements and the appropriate public agency was to determine the need for and selection of warning devices, state negligence law in this area was preempted. Rather, the Court found that the MUTCD described the division of responsibility for railroad crossing safety; the MUTCD did not relieve the railroad of any duty or control over the safety devices installed at a particular crossing.<sup>86</sup> Thus, the Court approved the current system of dual responsibility between the railroads and the state agencies, a result that directly contravenes the legislative intent underlying of the FRSA.<sup>87</sup>

## VI. RAILROAD LIABILITY AFTER *EASTERWOOD*

In *Easterwood*, the Supreme Court finally articulated a test for federal preemption of signalization claims. Specifically, the Court held that federal regulations “covered the subject matter” of signalization claims when federal funds participated in the installation of warning devices at railroad crossings, and the federal agency had given its approval for the implementation of warning devices at the railroad crossing. The Court also left open

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84. 113 S. Ct. at 1739.

85. *Id.* at 1740.

86. *Id.* at 1740. The Court relied on the language of the MUTCD. Section 1A-4 provides: “It is the intent that the provisions of this Manual be standards for traffic control device installation, but not a legal requirement for installation.” MUTCD, *supra* note 11, at 1A-4.

However, the Court failed to consider that the role that railroads are to play in the federal system is specifically defined. The railroads’ only role is to be a part of a diagnostic team that provides data to the state in order for it to make grade crossing determinations. *See supra* note 38 and accompanying text. The Court did not acknowledge that the railroad is prohibited from implementing any safety devices whatsoever. *See supra* note 60 and accompanying text. In order for a plaintiff to bring a successful tort claim against the railroad, the railroad must have breached a duty of care. Under the federal regulations, the railroad no longer has the duty to maintain a safe crossing. As a result, the Court erred in focusing on whether the regulations “speak” to state tort law rather than whether the federal regulations cover the subject matter of the railroads’ common law duty to maintain an adequate and safe railroad crossing.

87. *Id.* at 1739. *See also* discussion *supra* Part II. The Court reasoned that prior to FRSA, the railroads still were liable for failing to provide a safe crossing regardless of the state’s jurisdiction over the railroad crossing. *Id.* In addition to the error in reasoning discussed *supra* note 86, the Court failed to acknowledge the Secretary’s explicit criticism of the problems inherent in a system with dual responsibility for the safety of railroad crossings. *See supra* notes 27-28 and accompanying text.

the possibility that federal regulations would prevail when the crossing is near the terminus of a federal highway project. The application of the *Easterbrook* test will likely lead to a finding of preemption in a predominant number of cases due to the large-scale federal funding of railroad safety projects, the availability of blanket federal approval through the promulgation of the Intermodal Surface Transportation Efficiency Act (ISTEA) in 1991, and the tremendous number of federal road improvement projects.<sup>88</sup>

First, the *Easterwood* Court held that preemption would occur when federal funds "participated" at the railroad crossing.<sup>89</sup> Since the 1970s, the country has seen increased federal participation in the area of railroad safety. Courts that examine this question will be able to find such participation at virtually every crossing. For example, the federal requirement that a railroad crossing sign, or crossbuck, be installed at every crossing<sup>90</sup> arguably will place federal funds at *all* crossings.

Additionally, federal funds may participate in ways other than actual cash contributions.<sup>91</sup> Federal funds may be considered to participate if federal resources play some role in determining the safety devices used at a railroad crossing. For example, federal funds participate in the installation of warning devices whenever a federal representative on the safety diagnostic team surveys a railroad crossing. Additionally, federal funds participate whenever the funds are allocated to a particular purpose regardless of whether cash is actually expended. This result is reached

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88. The Supreme Court's adoption of the "federal funding" approach in its explicit preemption analysis has broad implications not only for railroad safety issues but also for other areas in which explicit preemption analysis is used. Because the Supreme Court has held that the participation of federal funds is a sufficient connection to transform an otherwise independent state regulation into one within "the subject matter covered" by a federal regulation, the federal funding factor will arguably affect future statutory interpretation of the breadth and coverage of preemption clauses.

89. The Tenth Circuit is the only court to address this problem since the Supreme Court's decision in *Easterbrook*. See *Hatfield v. Burlington N.R.R.*, 1 F.3d 1071, 1072 (10th Cir. 1993) (remanding to the trial court for determination whether federal funds participated at the crossing).

90. The MUTCD specifically provides: "At a minimum, one crossbuck sign shall be used on each roadway approach to every grade crossing, alone or in combination with other traffic control devices." MUTCD, *supra* note 11, at 8B-2.

91. In its most recent *Hatfield* decision, the Tenth Circuit agreed with this interpretation by indicating that it would give a very liberal construction to the meaning of "participated." 1 F.3d at 1072. The court held that because of the "generic significance" of the word "funds," federal aid did not have to be cash or the actual construction of a warning device. Thus, participation of federal funds takes place whenever *any* federal resources are expended under the federal regulations. *Id.* The court held that if Congress had intended that the participation of funds be cash or the installation of the project, the language of 23 C.F.R. § 646.214(b)(3) would have been explicit. *Id.* The court also held that the funds did not have to be earmarked for a specific project. *Id.* See 23 C.F.R. § 1.11(a) (1992), which provides for "federal participation" in the costs of engineering services.

when, for instance, a state diagnostic team recommends that gates and flashing lights be installed at a particular crossing, and the Federal Highway Administration subsequently approves the upgrade and cost estimates. From the moment that the federal agency has allocated the federal funds, federal funds "participate" and preemption occurs at that particular railroad crossing.<sup>92</sup>

The implementation of the ISTEA will also contribute to an increase in preemption by granting blanket federal approval to state railroad safety projects. The Supreme Court in *Easterwood* required, in addition to participation of federal funds, federal approval of the implementation of the safety devices.<sup>93</sup> Congress implemented ISTEA in 1991 in order to create the option for states to receive blanket federal approval for implementation of safety device projects that cost less than one million dollars.<sup>94</sup> This decision is important for three reasons. First, federal approval will be found in a large number of circumstances. Second, a finding that funds were allocated to a project, and thus, that federal funds "participated" in the project, is no longer contingent on actual federal approval of the specific crossing program. Third, state agencies are recognized as entities with discretion regarding railroad crossings, thus discrediting the Supreme Court's statement that the MUTCD merely delineates the separate responsibilities of the state and the railroad.<sup>95</sup>

In addition to the reasons for preemption discussed above, the Supreme Court indicated in a footnote that it might consider finding preemption when the railroad crossing was near a road or highway that had received federal funds.<sup>96</sup> Under the FRSA, a federally funded road or highway located near a railroad crossing may not be opened unless the Federal Highway Administration approved the safety devices located at that crossing. Consequently, preemption would occur whenever a crossing is

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92. See, e.g., *St. Louis S.W. Ry. Co. v. Malone Freight Lines, Inc.*, No. J-C-91-136 (E.D. Ark. Oct. 18, 1993).

93. *Easterwood*, 113 S. Ct. at 1741.

94. Section 1077 of ISTEA provides:

Not later than 90 days after the date of the enactment of this Act, the Secretary shall revise the Manual of Uniform Traffic Control Devices and such other regulations and agreements of the Federal Highway Administration as may be necessary to authorize States and local governments, at their discretion, to install stop or yield signs at any rail-highway grade crossing without automatic traffic control devices with 2 or more trains operating across the rail-highway grade crossing per day.

Pub. L. No. 102-40, § 1077 (1991).

95. See *Eldridge v. Missouri Pac. R.R.*, 832 F. Supp. 328 (E.D. Okla. 1993); *Southern Pac. Transp. Co. v. Builders Transp.*, Civ. A. No. 90-3177, 1993 W.L. 185620 (E.D. La. May 25, 1993).

96. 113 S. Ct. at 1741 n.10 (citing 23 C.F.R. § 646.214(b)(2) (1992)).

within the terminus of a highway project that has received federal funds, because the Federal Highway Administration has either explicitly or implicitly approved the safety devices at that particular situs. Because a great number of roads near railroad crossings receive federal funds, this second source of preemption, if adopted by the Court, could lead to a tremendous number of preempted claims.

## VII. CONCLUSION

Although the Supreme Court found that the FRSA's preemption clause "covered the subject matter" of the state regulations only when federal action is involved, the application of this test will almost certainly lead to a finding of preemption at nearly all railroad crossings. This result is inevitable in light of the broad interpretation of "participating" federal funds, the implementation of ISTEA and its grant of blanket federal approval to state railroad safety projects, and the great number of federally funded highway and road projects.<sup>97</sup>

Although the Supreme Court appeared hesitant to find absolute federal preemption of a railroad's duty to maintain and upgrade warning devices at railroad crossings, the Court's articulated test will lead to just such a result in practice.<sup>98</sup> Ultimately, however, this result is the only logical one if the congressional intent underlying the enactment of the FRSA—to implement a uniform system that would ensure the safety of individuals at railroad crossings—is to be realized.

*Kara M. Turner*

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97. As discussed above, broad application of the Supreme Court's decision in *Easterwood* is appropriate in light of Congress's intent to create a uniform system, the FRSA's express preemption clause, state and local jurisdiction over grade crossings, federal adoption of the MUTCD, and required FHWA approval of the installation and maintenance of safety devices at grade crossings.

98. This result is appropriate for a number of reasons. The Court in *Easterwood* argued that the railroad is the best-positioned party to determine the safety of particular railroad crossings. 113 S. Ct. at 1739. However, this position is erroneous because under the federal system: (1) jurisdiction has been placed in the hands of state or local authorities; (2) railroads are precluded from making informed decisions because, under the current system, all the data regarding railroad crossings is in the hands of the state; (3) railroads have a specific role—to take part in diagnostic teams—under the federal system; and (4) all decisions regarding the implementation of safety devices require federal approval, or under ISTEA, state approval.

