



# **The Truth About Torts: Regulatory Preemption at the Federal Railroad Administration**

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## Executive Summary

The Federal Railroad Administration (FRA), an agency of the Department of Transportation charged with making and enforcing rail safety regulations, oversees 686 railroads employing about 235,000 people, 219,000 miles of track, 24,000 locomotives, 1.6 million cars, 158,000 signals and switches, and 240,000 highway-rail grade crossings.<sup>1</sup> Although rail safety has improved since the 1980s, declines in the accident rate leveled off in the 1990s and several catastrophic accidents in the first half of this decade have raised serious concerns.<sup>2</sup>

In the spring of 2007, the FRA faced scrutiny for deficiencies in its safety program at a series of hearings before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the U.S. House of Representatives Committee on Transportation and Infrastructure. One of the leading witnesses, Rep. Earl Pomeroy (D-ND), testified to the striking facts of a dramatic train derailment in Minot, North Dakota, on January 18, 2002, in which 31 freight cars flew off the tracks, one person was killed, and 1,442 more were injured. The impact of the crash caused the release of more than 220,000 gallons of anhydrous ammonia, exposing the nearby town to a cloud of toxic vapors. An investigative report into the incident by the National Transportation Safety Board (NTSB) faulted the railroad's maintenance of the railway line, identifying nearly 2,000 defects along the route.<sup>3</sup>

Despite the apparent violations of federal regulations, a Federal District Court in North Dakota dismissed a class action suit brought by several of the injured residents of Minot, threatening to prevent a jury from hearing their claims that the railroad was negligent in causing the derailment. The railroad's negligence was irrelevant, said the court, because the plaintiffs' claims were preempted by safety regulations promulgated by the FRA.<sup>4</sup> Other courts have followed the North Dakota ruling, finding that the mere existence of a federal railroad safety regulation trumped an individual's right to sue, regardless of whether the regulated railroad followed the regulations or not.<sup>5</sup>

Recognizing the importance of access to the courts, Congress addressed the inability of those injured in the Minot derailment to seek legal recourse by amending the law governing railway safety to make clear that the Minot case and cases like it were *not* preempted by federal regulation. In July 2007, as part of the "Implementing Recommendations of the 9/11 Commission Act of 2007" (the 9/11 Act), Congress explicitly preserved an injured person's right to sue when a railway fails to comply with a federal standard, its own standard created pursuant to a federal regulation, or a state standard not in conflict with the federal standard pertaining to rail safety.<sup>6</sup> Yet, in the early months of the Obama Administration, when the top political posts still had not been filled, the FRA continued to write broad preemption language into the preambles to its rules asserting that injured parties have no ability to seek compensation for their injuries or loss of loved ones.<sup>7</sup> Some courts have deferred to this expansive preemption language finding no substantive change to FRA's

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power to preempt and construing Congress' clarifying language in the 9/11 Act very narrowly.<sup>8</sup>

Recently, President Obama issued two executive memoranda addressing the process by which agencies develop regulations. The first directs the Office of Management and Budget (OMB) to consult with agency heads to develop a set of recommendations for a new Executive Order on regulatory review, and the second, directly addressing preemption, explicitly calls for executive departments and agencies to include statements of preemption in regulations only when such statements have a legal basis and to abide by the requirements of Executive Order 13132, which instructs agencies on federalism and preemption principles.<sup>9</sup> The second memorandum also prohibits federal agencies from including preemptive language in a regulatory preamble unless such language is also included in the regulation. Finally, the second memorandum requires federal agencies to review regulations issued within the past 10 years that contain preemptive language to assess whether such provisions are legally justified.

President Obama's Preemption Memorandum echoes several of the solutions proposed in the Center for Progressive Reform's "Truth about Torts" series, of which this paper is the seventh installment. The sixth, *Rethinking Regulatory Preemption and its Impact on Public Health* (CPR White Paper 902, March 2009)—developed with the input of experts in the academic, public interest, government and private sectors—proposed both legislative and executive branch solutions. The series began with *Using Agency Preemption to Undercut Consumer Health and Safety* (CPR White Paper 704, Sept. 2007), a broad overview of preemption, explaining how the courts have ruled on the issue, and how key health and safety agencies—the Consumer Product Safety Commission (CPSC), the FRA, the Food and Drug Administration (FDA), and the National Highway Traffic Safety Administration (NHTSA)—departed from their position of either opposing preemption or taking a neutral stance to actively advocate preemption in their rulemakings during the Bush Administration. Our examination has included separate, in-depth analyses of the CPSC, NHSTA, and with this paper, the FRA, to gain a better understanding of the dangers of this arrogation of power by these different agencies.

This paper's examination of the FRA begins with a short background of the growth of the railroad industry and the creation and structure of the FRA and its regulatory authority. It will take a closer look at congressional changes to the controlling statute and the judicial opinions interpreting the statute before and after the changes.

The second half of the paper discusses the reasons why a complementary system of federal regulatory standards and state common law is the best way to achieve railroad safety for passengers and railroad employees. In brief, it argues that a complementary tort system should be retained because:

- *The FRA is a resource-starved agency unable to prevent accidents:* State common law provides a backstop for the failure of the agency to adequately investigate accidents or enforce its regulations.

- *The FRA is captured by industry:* Because the agency has placed so much responsibility with industry to regulate itself, the tort system is needed to serve as an independent monitor of industry's activities to ensure they are undertaken with safety in mind.
- *The FRA is unable to hold railroads accountable for improving safety:* The agency relies on the railroad industry as a partner in doing its job, which hinders its ability to spur the railroad industry into taking appropriate measures to prevent railway accidents.
- *State common law preserves corrective and protective justice:* A person's right to seek redress for harm inflicted on him or her should never be obliterated by federal preemptive power.

Finally, this paper offers recommendations for how the FRA and Congress can each promote the complementary roles that federal regulation and state common law can play in ensuring greater railroad safety.

## Background

With very few roads in the new nation during the 1820s, the Allegheny Mountains in the Eastern United States posed a significant barrier to East-West commerce. Railroads already existed in England, and the citizens in Baltimore, Maryland, brought the idea of railway transportation to America to promote westward expansion of commerce from the eastern seaboard.<sup>10</sup> The Baltimore & Ohio Railroad was an immense success and grew to interlace with railroads from other towns and cities during the 1850s. Safety at railroad crossings quickly became an issue and, in an 1888 opinion, the U.S. Supreme Court recognized the need for legislation to address railroad safety.<sup>11</sup> One hundred years later, with the advent of a massive interstate highway system in the 1950s and 1960s, different problems demanded attention.<sup>12</sup>

### Preemption Under the Federal Railroad Safety Act

Congress created the FRA in 1966 as one of several agencies concerned with transportation issues under the Department of Transportation, and four years later enacted the Federal Railroad Safety Act (FRSA) to “promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents.”<sup>13</sup> As originally enacted, the FRSA included a provision addressing federal preemption of state law.<sup>14</sup> The introductory language of the provision generally called for the uniformity of safety regulation, but it then expressly authorized states to adopt laws, regulations, and orders with respect to subject matters not covered by federal regulation.<sup>15</sup> It also expressly authorized states to adopt laws, regulations, and orders that were more stringent than federal regulation of a subject matter, so long as the state regulation was necessary to address a local problem, was not incompatible with federal regulation, and did not unreasonably burden interstate commerce.<sup>16</sup>

As has been the case under other safety statutes, an issue arose as to whether the reference to state “laws, regulations, and orders” included state tort law. The Supreme Court answered that question in *CSX Transp., Inc. v. Easterwood*,<sup>17</sup> in which it held, over the contrary arguments of the United States as *amicus curiae*, that state common law fell within the terms “law, rule, regulation, or order related to railroad safety,” relying on its earlier preemption decision in *Cippollone v. Liggett Group, Inc.*<sup>18</sup> The effect of that decision was to preempt most state tort law claims resulting from injuries caused by railroads. Nevertheless, despite that opinion, the United States continued to assert via *amicus curiae* briefs that the preemption provision of the FRSA should be read narrowly with respect to state common law claims.<sup>19</sup> Not until the administration of George W. Bush did the FRA aggressively push the idea that the FRSA’s preemption provision reached beyond state positive law to also encompass state common law. Following a trend begun in other agencies, the FRA included language in the preambles of its regulations purporting to preempt all “state requirements covering the same subject matter,” including common law.<sup>20</sup> This practice continued up until the last days of the administration, injecting the preemption claims into several FRA rules finalized late in 2008 and early in 2009.<sup>21</sup>

In 2002 a train derailed in Minot, North Dakota, releasing more than 220,000 gallons of anhydrous ammonia and exposing the town to a toxic cloud. A subsequent NTSB investigation revealed that joints used to temporarily repair a portion of the railroad had fractured. The fractures had caused the rails to break apart, thereby leading to the train's derailment. FRA regulations mandate that temporary joints can be in place for only a couple of months, but the joints involved were 22 months old at the time of the accident. The injured parties claimed that the railroad's inspection and maintenance program failed to detect the old and deteriorated temporary joints, which allowed the rails to break. In one of the state proceedings brought after the derailment, the defendant railroad company even admitted liability. However, two federal district courts hearing the cases of people injured in the incident ruled that precedent dictated that the FRSA preempted state tort law claims.<sup>22</sup> They held that state common law negligence claims were preempted regardless of whether the railroad met the requirements of the regulations, because the FRA had promulgated regulations establishing inspection protocol.<sup>23</sup>

## Congress Rejects the Courts' Expansive Preemption Interpretation

### Section 20106 of the FRSA - Preemption Provision

Displeased with the court rulings displacing state negligence law, Congress adopted Section 1528 of the 9/11 Act<sup>24</sup> to clarify its “intent and interpretations of the existing preemption statutes and to rectify the Federal court decisions related to the Minot, North Dakota accident.” Before the 2007 amendment of the 9/11 Act, Section 20106 of the FRSA read:

#### § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

- (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.<sup>25</sup>

Section 1528 of the 9/11 Act amended the title of § 20106 from “National Uniformity of Regulation” to “Preemption”, moving the section quoted above to subsection (a) and adding subsection (b), titled “Clarification regarding State law causes of action” providing for a separate savings clause provision for state tort law:

(b) Clarification regarding State law causes of action.--(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party--

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;



(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.<sup>26</sup>

Subsection (b) clearly addresses the rail accident that occurred on January 18, 2002, in Minot, North Dakota, but it also applies to any state-based negligence claim brought against a railroad following the Minot derailment. Congress explained that the provision was intended to clarify “what State law causes of action for personal injury, death or property damage are not preempted.”<sup>27</sup>

The FRA recorded these changes in new federal regulations that took effect on April 14, 2008.<sup>28</sup> Contrary to what would be inferred from a plain reading of Section 1528, in the final regulations, the FRA summarized Congress’s clarifying amendment as having “broad” preemptive effect with “exceptions rare,” and generally preempting “any State law – whether statutory or common law – and any State regulation, rule, or order, that concerns the same subject matter as the regulations in the rule.”<sup>29</sup> Instead of heeding congressional instructions, the FRA promoted preemption as the presumptive course of action.

### Preemption in the Courts After Congressional Clarification

After the enactment of the preemption clarification in the 9/11 Act, railroad attorneys mounted a broad attack on the legislation, designed to protect their clients from potential liability for negligence. Immediately following passage of the preemption amendment, attorneys representing the railroad in the Minot accident asserted that Congress’ amendment of the FRSA’s preemption provision was unconstitutional.<sup>30</sup> The Eighth Circuit rebuffed this argument and instead remanded the claims to the lower courts, allowing the injured parties the right to be heard. The court explained, “Victims of railroad accidents must still prove their cases in court. Prior to the amendment, Section 20106 had been interpreted in such a way that an injured person was denied the mere chance to hold a railroad accountable when its negligence not only violated state common law standards, but the very federal laws and regulations approved by Congress in an effort to further railroad safety.”<sup>31</sup> The Supreme Court denied hearing an appeal, so in subsequent cases, railroad attorneys have advanced the narrower argument that Section 1528 did not effect a substantive change, nor did it overrule the preemption analysis in *Easterwood*.<sup>32</sup> Several lower court decisions have followed this line of reasoning, finding that if Congress had wanted to overrule the two landmark Supreme Court cases, it would have done so expressly or chosen to adopt in the final bill a proposal advanced in the House of Representatives to eliminate all federal preemption of state law claims except in the case of impossibility.<sup>33</sup> The railroads may have scored another victory

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with the Tenth Circuit's 2008 decision in *Henning v. Union Pac. R. R. Co.*, in which the court acknowledged that even though there was a federal requirement pertaining to protective devices to be installed at crossings, that requirement did not impose a federal standard of care under which the railroad had to comply.<sup>34</sup> The impact of the case, which seems to misinterpret the *Easterwood* holding, is not clear.

These decisions call into question the effect of Section 1528 of the 9/11 Act in protecting public safety. In the next section, we discuss why it is important to keep tort law.

## Railroad Safety Is Best Achieved by a Complementary System of Tort Law and Regulatory Standards

Rail safety is a huge job that affects not only railway employees and passengers, but also the communities through which the track passes. The complementary system of federal regulations and enforcement, state and local laws, including enforcement under state control, and the industry's own monitoring are necessary for a comprehensive safety program. State common law is an essential component of this safety scheme. As the FRA tackles the mandate for augmented passenger and high speed railways in the coming years, stress on the system will undoubtedly increase, demanding the broadest possible system of public protection. But, by its own admission, the FRA has pursued a very limited course of regulation, relying on industry to carry out appropriate operating rules and stating in only the broadest terms how railroads should train their employees and create and administer safety plans.<sup>35</sup> Below, we explain why common law provides a necessary complement to FRA regulation.

### A Resource-Starved Agency

The FRA is a relatively small agency compared to the industry that it regulates. As of July 2006, the FRA employed 657 full-time and part-time safety staff, including approximately 400 inspectors in its regional, district, and local offices. In contrast, the railroad industry employs about 235,000 people.<sup>36</sup>

Due to resource constraints, inspections by the FRA cover only about two percent of railroads' operations each year.<sup>37</sup> Often, local police investigators and the attorneys for the accident victims investigate grade crossing accidents more thoroughly than the FRA or railroad investigators.<sup>38</sup> Inspections are normally conducted only at specific sites in limited, identified safety areas.

The FRA primarily takes a "cooperative" approach to regulatory enforcement. Its policy has been simply to encourage railroads to come into compliance voluntarily whenever an inspector discovers a "defect"—that is, a violation of some regulatory requirement.<sup>39</sup> For instances when a railroad fails to come into compliance or an identified defect is serious, the FRA has developed "focused enforcement" methods, which target areas with the greatest potential safety benefits, considering a number of factors such as the seriousness of the violation, potential safety hazard, and the railroad's overall compliance.<sup>40</sup> The FRA is authorized to negotiate civil penalties with the railroads, and uses these penalties as its primary enforcement tool, settling claims annually.<sup>41</sup> A minimum civil penalty is \$500. The statutory fine for rail safety violations was just increased to \$25,000. And penalties for grossly negligent or repeated violations are capped at \$100,000. Both penalties pale in comparison to the railroads' billions of dollars of operating revenue,<sup>42</sup> and an oversight audit completed in November of 2005 counseled the FRA to consider whether the small

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number of violations recommended for civil penalties and the low amount of collected fines sufficiently encourage railroads to better comply with federal safety regulations.<sup>43</sup>

Enforcement can only occur when a violation or deficiency is detected, but FRA inspections are significantly under-resourced, too. For track conditions, FRA inspectors conduct the inspections on foot or with its three automated track inspection vehicles. But even with all of these functioning optimally, the FRA estimates that it can inspect only about 100,000 miles of track annually — less than half the nation's total.<sup>44</sup> The FRA also relies on the railroads to assist in inspecting track for compliance. However, the railroad industry's motives may not always put safety first: One railway's accident investigation manual cautioned investigators to limit the degree and extent to which they document "inflammatory evidence."<sup>45</sup>

The Rail Safety Improvement Act of 2008 brings hope that more governmental resources will be devoted to rail safety, as it calls for an increase of 200 FRA employees from 2009 through 2013, clarifies that the primary mission of the FRA is to ensure safety on the nation's railways, creates a new Chief Safety Officer, increases penalties for violations of safety laws, and gives the FRA more enforcement tools.<sup>46</sup> The FRA continues to face serious challenges in improving rail safety, yet at the same time it shuts out a key partner in protecting citizens when it preempts state law.

### **An Agency Captured**

Lacking the resources it needs to adequately regulate the railroad industry, the FRA often behaves more like an equal partner with industry than a regulator. Consensus approaches designed to improve rulemaking serve instead as roadblocks. The problem of the "revolving door" is rampant at the FRA, as officials hired to regulate the industry position themselves to get lucrative positions within it once they leave public service. Meanwhile, safety rules languish, and the industry stagnates instead of leading the way with technological innovation.

In 1996, to assist it with its rulemaking, the FRA created the Railroad Safety Advisory Committee (RSAC), adopting a consensus-based approach to rulemaking that has resulted in slowing down the rulemaking process. The RSAC membership comprises representatives from a variety of different stakeholders interested in U.S. railroad safety, including the U.S. federal government, state and local government agencies, agencies responsible for railroad safety in Mexico and Canada, the railroad industry, manufacturers of chemicals and other potentially hazardous cargo, labor unions, and passenger safety advocates.<sup>47</sup> The RSAC rulemaking process seeks to include all segments of the rail community in developing safety regulations and early in its existence received favorable assessments for being more inclusive with its collaborative approach. But more recently, the FRA has been criticized for its inconsistency in using the RSAC process to address safety issues and, when it does, for not having the resources to support the extensive, time-consuming consensus-based process.<sup>48</sup>

Since its creation, RSAC has only taken on 30 “tasks” related to rulemaking and has completed just over half.<sup>49</sup> RSAC Working Group recommendations proceed to the full RSAC committee only with consensus among stakeholders—a process that is often lengthy.<sup>50</sup> For example, RSAC received the task to reduce human factor-caused train accident/incidents on May 18, 2005; the FRA did not issue the final rule until more than three years later, on June 16, 2008.<sup>51</sup> During this three-year period, however, the RSAC Working Group failed to reach a consensus recommendation, and the FRA developed a final rule only after it had elected to forge ahead with traditional rulemaking proceedings. As this example illustrates, rather than assisting with rulemaking process, it appears that RSAC frequently serves as little more than a way station where stakeholders wrangle to achieve consensus, permitting the FRA to proceed slowly on an issue when it wants. It also appears that RSAC is not living up to its promise of making the FRA’s rulemaking process more participatory. The FRA may choose to listen to RSAC recommendations or not. Moreover, the FRA has undertaken several other significant regulatory actions without involving RSAC at all.<sup>52</sup>

RSAC’s Working Groups focus on select issues and rarely, if ever, take on broad analysis of the rule (*e.g.*, its federalism implications). For example, during deliberation on the rule on human factor-caused train accident/incidents, the only two RSAC voting members with a state connection—the American Association of State Highway & Transportation Officials and the Association of State Rail Safety Managers—did not raise concerns about preemption during the RSAC consultation process, because the focus of the deliberation was very narrow. Nor did state and local governments file formal comments when the rule was proposed almost two year earlier.<sup>53</sup> Meanwhile, for another rule being finalized at approximately the same time, the FRA chose not to consult RSAC, but instead sought the opinion of OMB as to the rule’s preemptive effect. The FRA’s attorneys exchanged several emails with OMB seeking approval of the preemption language it included in the preamble.<sup>54</sup> These examples suggest that the RSAC rulemaking process, which creates a dangerous avenue for potential agency capture, is not even a useful tool for reaching consensus on the difficult policy questions that it was designed to answer.

Recent instances of high-level FRA officials joining the industry they once regulated are also troubling. In 2004, the FRA’s Chief Safety Official accepted a position with a railway company for \$324,000 in salary, bonuses, and stock options just days after visiting its headquarters to discuss its continuing safety problems.<sup>55</sup> More recently, Joseph H. Boardman left his post as the FRA Administrator to become president and CEO of Amtrak where he already served as a director on its board.<sup>56</sup> Even before he left the public sector though, Boardman gave testimony at a March 5, 2008, congressional subcommittee hearing that was more befitting of a railroad CEO than the FRA Administrator. In his testimony, Boardman touted the value of voluntary private investment by industry for achieving greater railroad safety, while simultaneously downplaying the role that regulation had to play.<sup>57</sup>

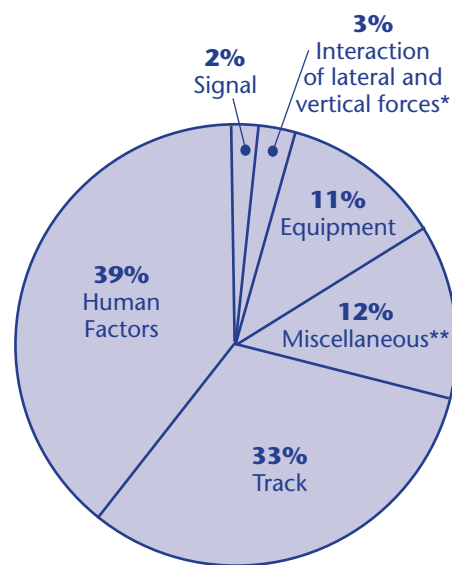
The strategy of waiting for industry to invest in railroad safety technology has proved largely ineffective, however. Without the FRA prodding it along, industry has failed to

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implement relatively well-established safety technologies such as “positive train control” (PTC technology), much less “lead the way” with newer safety technology innovations. Many experts believe that PTC technology—a sort of auto-pilot system that is designed to take over if a railroad operator fails to slow or stop when a signal indicates that such action is necessary—could have prevented the deadly train crash in Los Angeles on September 11, 2008, when a commuter train and freight train collided.<sup>58</sup> The FRA touts its “accelerated efforts” to deploy PTC use since 2001, but not until 2005—the first time in 20 years—did it rewrite the regulation covering signals and train controls.<sup>59</sup> PTC technology now sits with RSAC; the FRA assigned it as a task at the end of 2008, and it was assigned to an RSAC Working Group in April 2009.

Human error and track defects cause the majority of all train accidents. Over the last few years though, human error has caused most of the serious accidents involving the release of hazardous material. Accordingly, safety demands greater acceleration in implementing PTC technology, which, as explained above, can be used to avert accidents that result from human error. Barry Sweedler, a former Director of the NTSB Office of Safety Recommendations and Accomplishments, commented on the Los Angeles crash, blaming the lack of progress in PTC Technology on political pressure brought by railroads on Congress and the FRA.<sup>60</sup>

**FIGURE 1:**  
**Primary causes of train accidents (2005)**



Source: GAO analysis of FRA data.

\*Interaction of lateral and vertical forces refers to a specific type of accident that occurs when a lateral, or sideways, force exceeds vertical force, or gravity, by 50% or more. Lateral force may be caused by travel through curves and alignment imperfections in the track.

\*\*This miscellaneous category of accidents causes a number of subcategories, none of which exceeds 1.5 percent.

Sweedler bemoaned, “There are railroad executives and Federal Railroad Administration people who are in effect willing to accept a number of these types of crashes each year.”<sup>61</sup> Without the overseeing agency or Congress pushing the railroad industry to modernize its safety technology, only the litigation related to these catastrophic accidents is likely to spur such advancements.

### **A Lack of Regulatory Accountability**

Inspections and enforcement are not the only areas wanting at the FRA; a failure in accountability begins with the FRA’s regulatory program, which is often ineffective at ensuring that railroad companies take the necessary





PHOTO BY CRAIG WIGGINHORN, USED COURTESY OF WIKICOMMONS.

Firefighters stand near a locomotive on September 12, 2008, after a Metrolink passenger liner collided with a Union Pacific freight train near Chatsworth, California.

steps for achieving greater safety. In developing safety regulations for railroads, the FRA sometimes establishes detailed, prescriptive minimum requirements for track and equipment, such as wheel safety requirements or formulas that determine maximum allowable speeds on curved track. Some other FRA regulations, however, are less prescriptive in nature, allowing railroads greater flexibility to determine how to comply with a given safety standard, provided that they meet certain conditions.<sup>62</sup> For example, FRA regulations permit (but do not require) railroads to employ PTC technology<sup>63</sup> instead of using traditional signaling systems. The railroads must develop a railroad safety program plan demonstrating that the proposed PTC technology will meet or exceed the safety level of a traditional signaling system. They may not implement the PTC technology until the FRA has approved the railroad safety program plan.<sup>64</sup> Similarly, railroads enjoy great flexibility in how they implement certain required safety programs, such as accident reporting programs and roadway worker protection plans.<sup>65</sup> In either case though, the FRA often must depend on companies to achieve compliance with these regulations voluntarily. As explained above, the FRA largely follows a cooperative approach to regulatory enforcement, and, as a result, the FRA's inspectors do not cite these companies for every regulatory defect they discover. Instead, in most cases, they merely try to encourage them to come into compliance voluntarily. The relatively small civil penalties that railroads face for major defects or failing to come into compliance provide them with little incentive to improve their safety records.

As explained above, human error has been responsible for most of the serious accidents involving the release of hazardous material in the last several years. But not until the 2005 catastrophic railway accident in Graniteville, South Carolina, did the FRA take regulatory action. Authorities blamed human error for the accident in which the released chlorine gas killed nine; 5,400 people had to be evacuated from the surrounding area for nine days; 554 people went to the hospital complaining of respiratory difficulties, of which 75 were admitted for treatment; and property damage of track and railway vehicles exceeded

**TABLE 1:**  
**Railroad accident/incident investigations 2000-2004**

Year	TOTAL ACCIDENTS/INCIDENTS			GRADE CROSSING COLLISIONS <sup>a</sup>		
	Number	INVESTIGATED	Percent	Number	INVESTIGATED	Percent
2000	16,918	89	0.5	3,502	12	0.3
2001	16,087	116	0.7	3,237	18	0.6
2002	14,404	100	0.7	3,077	10	0.3
2003	14,239	112	0.8	2,963	4	0.1
2004	13,939	124	0.9	3,045	9	0.3
Total	75,587	541	0.7	15,824	53	0.3

<sup>a</sup>Grade crossing collisions are a subset of total accidents/incidents.

Source: FRA

\$6.9 million. The FRA responded by promulgating railroad operating rules “to remedy shortcomings in the railroads’ rules or to emphasize the importance of compliance and to provide FRA a more direct means of promoting compliance.”<sup>66</sup> The FRA acknowledged that much greater accountability on the part of railroad management was needed because the traditional course of relying upon industry to implement its own suitable railroad operating rules was insufficient.<sup>67</sup>

A more robust regulatory program would promote better accountability, but the FRA also lacks measures to evaluate the effectiveness of its enforcement program, to track broad scale compliance problems, and to determine how well railroads are managing safety risks throughout their systems that could lead to accidents or after an accident has occurred. From 2000 through 2004, the FRA investigated only 13 percent of the most serious crossing collisions—those resulting in three or more fatalities and/or severe injuries. The FRA did not investigate the remaining 329 crossing collisions, which resulted in a total of 159 fatalities and 1,024 injuries.<sup>68</sup> In contrast, the Federal Aviation Administration (FAA) conducted on-site investigations of 1,382, or 93 percent, of the 1,484 general aviation accidents that FAA had responsibility for investigating in 2004.<sup>69</sup> In addition to the inadequate percentage of investigations conducted, there are huge gaps in the actual reporting of accidents and potential safety violations. The FRA rationalizes its record by explaining that the NTSB is the lead agency responsible for investigating railroad accidents. The NTSB, however, typically investigates only the high-profile grade crossing collisions—a total of seven from 2000 through 2004—and the FRA often ignores the NTSB’s recommendations or prolongs related rulemakings for years.<sup>70</sup> These shortcomings in the FRA’s measures for investigating railway accidents will inhibit the agency’s ability to improve safety and forestall repeated mistakes.

The FRA also relies on the railroads to help report accidents to the National Response Center (NRC), but this too is deficient. The Department of Transportation’s Inspector



General found that during a period of a little over 18 months, 21 percent of reportable grade crossing collisions were not reported to the NRC in a timely fashion.<sup>71</sup> These unreported accidents resulted in 116 fatalities, and when they were finally reported to the FRA, it was too late for federal authorities to assess whether they warranted a full investigation.<sup>72</sup> Inadequate information assessing the effectiveness of its current safety regulations or documenting factors in accidents hinders the FRA's ability to develop optimal safety regulations.

### **Corrective and Protective Justice**

The fact that some FRA and railroad officials concede that a number of railway accidents affecting passengers and railroad employees will occur annually should not dictate that those who have been injured or lost loved ones should accept them as an inevitable fact of life. The principle that an injured party has the right to seek remedy from the injurer is part of the American rule of law. This idea is known as “corrective justice.”<sup>73</sup> Corrective justice is the primary function of the common law of torts and is an important consideration in the preemption policy debate.<sup>74</sup>

Before it denies a person's right to present her case in court by preempting her claims, Congress should be absolutely certain that the regulatory agency is meeting its obligations. With its lack of resources and reliance on the industry it regulates, the FRA undoubtedly faces an uphill battle in that regard. Preservation of the corrective justice function of tort law ensures that those who are injured when regulatory gaps occur will have their day in court. The FRA preemption provision does not guarantee compensation to a person claiming injury; it only affords him the right to be heard when he can show that the railroad failed to comply with a federal regulation, one of its own rules made pursuant to a federal regulation, or any noncompeting state law.

In addition to corrective justice, which seeks to readjust wealth from the injuring party to the injured, protective justice is another important function of the common law of torts. By ensuring that potential defendants consider the prospect of liability in going about their activities, the protective justice function of tort law can deter those defendants from engaging in negligent conduct.<sup>75</sup> When federal regulatory standards preempt the common law, we lose the reinforcing role that state common law provides in deterring preventable train accidents. Preemption of common law assumes that the federal regulation is the best possible safety rule and that it is being properly carried out and enforced. The preceding discussion shows that this is not the case. With the incentive of common law rules, accidents may be prevented before they happen, affording protection that no amount of compensation could match. Certainly, protective justice is a more subtle benefit. Nevertheless, the importance of protective justice is great because it helps to ensure that the railroad industry will not shirk its responsibility to comply with federal requirements.

**As passenger and high speed rail expands in the future, so too will the demand for superior safety.**

## Conclusions and Recommendations

The FRA undeniably has a great responsibility in promoting and regulating safety throughout the railroad industry, an industry that began early in our nation's history and still holds prominence in the transportation field today. As passenger and high speed rail expands in the future, so too will the demand for superior safety. However, railway's importance and size should not dictate that it be an unaccountable to the federal safety agency that oversees it. The FRA will not improve its current failure in oversight without more resources and less reliance on the railroads to be their own regulator. Safety improvement depends upon a state common law as a complement to federal regulation. All three branches of government have reinforced this tenet: Congress with its amendment of the FRSA; the Supreme Court's denial to hear an appeal on allowing the Minot victims to proceed with their claims; and the Executive Branch with its Preemption Memorandum.

With a new presidential administration and a new leader at the agency, the FRA has the opportunity to promote the complementary roles of the tort and regulatory systems by taking the following actions:

- Follow the letter and spirit of the Obama Preemption Memorandum in future rulemaking exercises;
- Insert language in final rules recanting any preemption language in preambles to proposed rules that have not been finalized;
- Revisit every rule in which preemption language was inserted into the preamble and issue a clarifying preamble; and
- Actively assist the courts by filing *amicus curiae* briefs in cases in which the new preemption statute is relevant.

Congress, too, has a role in ensuring that state common law and federal regulation can work together to promote rail safety in the future. Congress should:

- Increase funding for personnel and activities that are essential to the achievement of the FRA's core mission such as inspections and enforcement;
- Eliminate funding for activities that distract or inhibit the FRA from achieving its core mission, including RSAC; and
- Ensure through legislation, oversight, or other interactions with the FRA that the agency abandon the April 14, 2008, regulation that gives inappropriately narrow effect to Congress's clarifying amendment for the preemption provision of the FRSA.

The federal government has erected an elaborate regulatory system to address a multitude of health, safety, and environmental issues. Every regulatory program created to address these issues is well complemented by a vigorous state tort law system, and the program created to promote railroad safety is certainly no exception.

By adopting the reforms suggested above, the FRA and Congress can ensure that state law plays its complementary role in promoting safety on America's railroads. Together, a vigorous FRA complemented by a vigorous state tort law system offers the greatest promise for achieving ever greater railway safety.

## End Notes

- <sup>1</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, RAIL SAFETY: THE FEDERAL RAILROAD ADMINISTRATION IS TAKING STEPS TO BETTER TARGET ITS OVERSIGHT, BUT ASSESSMENT OF RESULTS IS NEEDED TO DETERMINE IMPACT 28 (2007) (These figures do not include railroad contractor employees or track that is not in use), available at <http://www.gao.gov/new.items/d07149.pdf> [hereinafter GAO, Rail Safety].
- <sup>2</sup> *Id.* at 7.
- <sup>3</sup> *Reauthorization of the Federal Rail Safety Program, Before the H. Subcomm. on Railroads, Pipelines and Hazardous Materials of the H. Comm. on Transportation and Infrastructure*, 110th Cong. (1997) (Testimony of Rep. Earl Pomeroy), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_house\\_hearings&docid=f:34777.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:34777.pdf).
- <sup>4</sup> *See* Mehl v. Canadian Pac. Ry., 417 F. Supp. 2d 1104, 116 (D.N.D. 2006).
- <sup>5</sup> *See* Lundeen v. Canadian Pac. Ry., 507 F. Supp. 2d 1006 (D. Minn. 2007), on remand from, 447 F.3d 606 (8th Cir. 2006), cert. denied, 549 U.S. 1179 (2007).
- <sup>6</sup> 49 U.S.C. § 20106 (2008).
- <sup>7</sup> *See e.g.*, Hours of Service of Railroad Employees, 74 Fed. Reg. 25,330 (May 27, 2009) (codified at 49 C.F.R. pt. 228); Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, 74 Fed. Reg. 1770 (Jan. 13, 2009) (codified at 49 C.F.R. pts. 171, 172, 173, 174 and 179); Qualification and Certification of Locomotive Engineers, 73 Fed. Reg. 80,349 (Dec. 31, 2008) (codified at 49 C.F.R. pt. 240); Track Safety Standards; Continuous Welded Rail, 73 Fed. Reg. 73,078 (Dec. 1, 2008) (codified at 49 C.F.R. pt. 213).
- <sup>8</sup> *See e.g.*, Murrell v. Union Pac. R.R. Co., 544 F. Supp. 2d 1,138 (D. Or. 2008); Crabbe v. Consol. Rail Corp., 2007 U.S. Dist. LEXIS 80895, at \*17 (E.D. Mich. Nov. 1, 2007); Mastrocola v. Se. Pa. Transp. Auth., 941 A.2d 81, 93 (Pa. Commw. Ct. 2008).
- <sup>9</sup> Memorandum for the Heads of Executive Departments and Agencies on Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009); Memorandum for the Heads of Executive Departments and Agencies on Preemption, 74 Fed. Reg. 24,693 (May 20, 2009).
- <sup>10</sup> Fed. R.R. Admin., *History of Railroads*, <http://www.fra.dot.gov/us/printcontent/1399> (last visited Apr. 8, 2009).
- <sup>11</sup> Mo. Pac. Ry. Co. v. Mackey, 127 U.S. 205, 210 (1888).
- <sup>12</sup> THOMAS O. MCGARITY, THE PREEMPTION WAR 67-68 (2008).
- <sup>13</sup> 49 U.S.C. § 20101 (2008).
- <sup>14</sup> *Id.* § 20106.
- <sup>15</sup> *Id.* § 20106(a)(2).
- <sup>16</sup> *Id.*
- <sup>17</sup> 507 U.S. 658 (1993).
- <sup>18</sup> 505 U.S. 504, 522 (1992).
- <sup>19</sup> *See* Norfolk S. Rwy. Co. v. Shankin, 529 U.S. 344 (2000) (brief of the United States amicus curiae).
- <sup>20</sup> *See e.g.*, Passenger Equipment Safety Standards; Front-End Strength of Cab Cars and Multiple-Unit Locomotives, 72 Fed. Reg. 42,016 (Aug. 1, 2007) (codified at 49 C.F.R. pt. 238); Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices, Switches and Derails, 71 Fed. Reg. 60,372 (Oct. 12, 2006) (codified at 49 C.F.R. pts. 217 and 218); ReflectORIZATION of Rail Freight Rolling Stock, 70 Fed. Reg. 144 (Jan. 5, 2005) (codified at 49 C.F.R. pt. 224).
- <sup>21</sup> *See e.g.*, Hours of Service of Railroad Employees, 74 Fed. Reg. 25,330 (May 27, 2009) (codified at 49 C.F.R. pt. 228); Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, 74 Fed. Reg. 1770 (Jan. 13, 2009) (codified at 49 C.F.R. pts. 171, 172, 173, 174, and 179); Qualification and Certification of Locomotive Engineers, 73 Fed. Reg. 80,349 (Dec. 31, 2008) (codified at 49 C.F.R. pt. 240); Track Safety Standards; Continuous Welded Rail, 73 Fed. Reg. 73,078 (Dec. 1, 2008) (codified at 49 C.F.R. pt. 213).
- <sup>22</sup> *See Mehl*, 417 F. Supp. 2d at 1116-17, 1120-21; *Lundeen*, 507 F. Supp. 2d at 1011-12.
- <sup>23</sup> *Lundeen v. Canadian Pac. Ry.*, 447 F. Supp. 2d 606, 614 (8th Cir. 2006).
- <sup>24</sup> 120 CONG. REC. 8589 (2007).
- <sup>25</sup> 49 U.S.C. § 20106(a)(2) (2008).
- <sup>26</sup> *Id.* § 20106(b).
- <sup>27</sup> 120 CONG. REC. 8589 (2007).
- <sup>28</sup> *See* Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails, 73 Fed. Reg. 8442 (Feb. 13, 2008) (codified at 49 C.F.R. pts. 217 and 218).
- <sup>29</sup> *Id.* at 8456.
- <sup>30</sup> *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, (8th Cir. 2008), cert. denied, 129 S.Ct. 2379 (2009).
- <sup>31</sup> *Id.* at 690.
- <sup>32</sup> *See* Murrell v. Union Pac. R.R. Co., 544 F. Supp. 2d 1138 (D. Or. 2008); *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1214 (10th Cir. 2008); *Smith v. Burlington N. & Santa Fe Ry. Co.*, 187 P.3d 639, 644-5 (Mont. 2008).
- <sup>33</sup> *Burlington N. & Santa Fe Ry. Co.*, 187 P.3d at 644-46; *Gauthier v. Union Pac. R.R. Co.*, 2009 WL 812261, \*9 (E.D. Tex. Mar. 25, 2009).
- <sup>34</sup> *Henning*, 530 F.3d at 1215.
- <sup>35</sup> *See* Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails, 73 Fed. Reg. 8442 (Feb. 13, 2008) (codified at 49 C.F.R. pts. 217 and 218).
- <sup>36</sup> GAO, RAIL SAFETY, *supra* note 1, at 15 (official enforcement policy).
- <sup>37</sup> *Id.* at 5.
- <sup>38</sup> MCGARITY, *supra* note 12, at 199; Walt Bogdanich, *In Deaths at Rail Crossings, Missing Evidence and Silence*, N.Y. TIMES, July 11, 2004, at A1.
- <sup>39</sup> GAO, RAIL SAFETY, *supra* note 1, at 12.
- <sup>40</sup> *Id.* at 13.
- <sup>41</sup> *Id.*
- <sup>42</sup> Pub. L. 110-432, 122 Stat. 4877 (2008). For the calendar year ending 2008, the operating revenue for two of the largest railway companies in the U.S. was approximately \$18 billion for Union Pacific and \$11 billion for CSX. *See Union Pacific, Annual Reports*, <http://www.up.com/investors/annuals/index.shtml> (follow hyperlink entitled "2008 Annual Report") (presenting information on Union Pacific's operating revenue for the calendar year ending 2008) (last visited July 10, 2009); CSX, 2008 ANNUAL REPORT (2008) (presenting information on CSX's operating revenue for the calendar year ending 2008), available at [http://media.corporate-ir.net/media\\_files/irol/92/92932/annual\\_reports/2008AR.pdf](http://media.corporate-ir.net/media_files/irol/92/92932/annual_reports/2008AR.pdf).
- <sup>43</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF TRANSP., AUDIT OF OVERSIGHT OF HIGHWAY RAIL GRADE CROSSING ACCIDENT REPORTING, INVESTIGATIONS, AND SAFETY REGULATIONS 16 (2005), available at <http://www.oig.dot.gov/StreamFile?file=/data/pdffdocs/mh2006016.pdf> [hereinafter OIG, AUDIT OF OVERSIGHT].
- <sup>44</sup> GAO, RAIL SAFETY, *supra* note 1, at 22.
- <sup>45</sup> MCGARITY, *supra* note 12, at 196.
- <sup>46</sup> Pub. L. 110-432, 122 Stat. 4877 (2008).
- <sup>47</sup> For a complete list of the RSAC's membership organizations, see Dep't of Transp., Fed. R.R. Admin., R.R. Safety Advisory Comm. (RSAC), *RSAC Members*, <http://rsac.fra.dot.gov/organizations/> (last visited Sept. 16, 2009).

## End Notes

- <sup>48</sup> Am. Pub. Transit Assoc., *Statement of Thomas F. Prendergast, President, Long Island R.R., Before the Subcomm. on Railroads of the H. Comm. on Transportation and Infrastructure* (May 20, 1998), [www.apta.com/government\\_affairs/aptatest/prndtest.cfm](http://www.apta.com/government_affairs/aptatest/prndtest.cfm) (last visited on July 10, 2009).
- <sup>49</sup> Working Group Activity Update, 74 Fed. Reg. 11,404 (Mar. 17, 2009).
- <sup>50</sup> *Id.*
- <sup>51</sup> Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails, 73 Fed. Reg. 33,888 (June 16, 2008) (codified at 49 C.F.R. pts. 217 and 218).
- <sup>52</sup> *See e.g.*, Electronically Controlled Pneumatic Brake Systems, 73 Fed. Reg. 61,512 (Oct. 16, 2008) (codified at 49 C.F.R. pt. 232); Rail Transportation Security, 73 Fed. Reg. 72,130 (Nov. 26, 2008) (codified at 49 C.F.R. pts. 1520 and 1580); Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, 74 Fed. Reg. 1770 (Jan. 13, 2009) (codified at 49 C.F.R. pts. 171, 172, 173, 174, and 179).
- <sup>53</sup> Railroad Operating Rules, 73 Fed. Reg. at 33,888.
- <sup>54</sup> AM. ASSOC. FOR JUSTICE, GET OUT OF JAIL FREE: A HISTORICAL PERSPECTIVE OF HOW THE BUSH ADMINISTRATION HELPS CORPORATIONS ESCAPE ACCOUNTABILITY 9-10 (2008).
- <sup>55</sup> MCGARITY, *supra* note 12, at 193; Walt Bogdanich, *For Railroads and the Safety Overseer, Close Ties*, N.Y. TIMES, Nov. 7, 2004, at A1.
- <sup>56</sup> Amtrak, *Biography of Joseph H. Boardman, President and Chief Executive Officer*, [http://www.amtrak.com/servlet/ContentServer?c=am2Copy&pageName=Amtrak%2Fam2Copy%2FSimple\\_Copy\\_Page&cid=1186723489339](http://www.amtrak.com/servlet/ContentServer?c=am2Copy&pageName=Amtrak%2Fam2Copy%2FSimple_Copy_Page&cid=1186723489339) (last visited on July 10, 2009).
- <sup>57</sup> Statement of Joseph H. Boardman, Administrator, Fed. R.R. Admin., U.S. Dept. of Transp., Before the Subcomm. on Railroads, Pipelines, and Hazardous Materials of the H. Comm. on Transportation and Infrastructure (March 5, 2008), <http://testimony.ost.dot.gov/test/pasttest/08test/boardman1.htm> (last visited on July 10, 2009).
- <sup>58</sup> Matthew L. Wald, *Cause is Offered, but Questions Linger for Inquiry*, N.Y. TIMES, Sept. 4, 2008, <http://www.nytimes.com/2008/09/14/us/14probe.html> (last visited July 10, 2009).
- <sup>59</sup> *Id.*; Fed. R.R. Admin., *Positive Train Control (PTC)*, <http://www.fra.dot.gov/us/content/784> (last visited on July 10, 2009).
- <sup>60</sup> Dan Weikel & Steve Hymon, *Existing Systems Could Have Prevented Metrolink Crash, Experts Say*, L.A. TIMES, September 14, 2008, <http://articles.latimes.com/2008/sep/14/local/me-control14> (last visited on July 10, 2009).
- <sup>61</sup> Wald, *supra* note 58.
- <sup>62</sup> GAO, RAIL SAFETY, *supra* note 1, at 12.
- <sup>63</sup> PTC technology, or “positive train control” technology, describes a computerized system for monitoring and controlling the movement of trains for the purposes of avoiding accidents. The technology delivers information to a train regarding the train’s location and where the train may safely travel. On-board computers analyze this information, and then govern the train’s movement accordingly. In short, PTC technology functions much like an auto-pilot for trains. For more information on PTC technology, see Fed. R.R. Admin., *Positive Train Control Overview*, <http://www.fra.dot.gov/us/content/1265> (last visited Oct. 5, 2009).
- <sup>64</sup> Standards for the Development and Use of Processor-Based Signal and Train Control Systems, 70 Fed. Reg. 11,502 (Mar. 7, 2005) (codified at 49 C.F.R. pts. 209, 234, and 236).
- <sup>65</sup> GAO, RAIL SAFETY, *supra* note 1, at 12.
- <sup>66</sup> *See* Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails, 73 Fed. Reg. 8442 (Feb. 13, 2008) (codified at 49 C.F.R. pts. 217 and 218).
- <sup>67</sup> *See id.*
- <sup>68</sup> OIG, AUDIT OF OVERSIGHT, *supra* note 43, at 13.
- <sup>69</sup> *Id.*
- <sup>70</sup> MCGARITY, *supra* note 12, at 201; OIG, AUDIT OF OVERSIGHT, *supra* note 43, at 7.
- <sup>71</sup> OIG, AUDIT OF OVERSIGHT, *supra* note 43, at 6.
- <sup>72</sup> *Id.*
- <sup>73</sup> MCGARITY, *supra* note 12, at 31; Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1831 (1997).
- <sup>74</sup> MCGARITY, *supra* note 12, at 252.
- <sup>75</sup> Schwartz, *supra* note 73, at 1831.

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