Comments

The Intrinsic Flaws of Contemporary Railroad Nuisance Jurisprudence in Terms of the Public Good

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I. INTRODUCTION

In the last decade, the nation's interstate railroads have quietly orchestrated a remarkable resurgence in both freight and passenger traffic. Aggressive investment by railroad management into physical and human capital has increased market shares in shipping sectors previously dominated by other forms of transportation.[1] Mergers between the na-

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1. *See* William C. Vantuono & Gus Welty, *The World's Best Freight Railroad and the Man at the Top: David R. Goode: Railway Age's Railroader of the Year,* RAILWAY AGE, Jan. 1, 1998, at 33 ("[W]e should not lose sight of the fact that our industry is poised to go into the next century as the basis of transportation in this country."); *see also* Christopher Dinsmore, *Norfolk Southern Rolls Right on Past a Slowing Economy*, VA.-PILOT & LEDGER-STAR, Oct. 26, 1995, at D3 (noting that Norfolk Southern, a railroad operating 14,500 miles of track in 20 states, had earned more in the first nine months of 1995 than it had in every year except the past two); *see also* Steve Glischinski, *Kansas City Southern Fights Back,* TRAINS, June 1, 1997, at 60 (explaining that Kansas City Southern captured traffic from other carriers by stricking a deal with trucking company J.B. Hunt to move highway trailers by rail on its north-south corridor); Don Phillips, *Railroad Customers are Just so Lucky,* TRAINS, Feb. 1999, at 15 (commenting that "for many years the railroads have use cost-cutting and downsizing to keep profits strong.").

tions largest railroads have drawn traffic from other carriers while consolidating redundant operations into efficient transportation systems.[2] The railroads' remarkable growth has translated into longer and more frequent trains plying their way through the nation's towns and cities.

As 'quiet' as the recent upturn in business has been for the railroads in terms of national attention, citizens everywhere have expressed outrage over 'nuisances' generated by revitalized railroad operations.[3] The majority of public complaints are brought by homeowners who live within earshot of railroad rights-of-way.[4] A Massachusetts resident who has lived near the tracks for 30 years explains that, "her windows rattle and her china shakes when some of the trains go by."[5] New Jersey residents living adjacent to a rail yard complain of, "[s]hifting wall hangings. A constant hum that incites migraine headaches."[6] A local transit agency recently inaugurated direct service from Northern New Jersey into New York City and other parts of New Jersey.[7] The service expansion has resulted in a total of one hundred and twenty trains a day traveling through many upscale suburban neighborhoods.[8]

Citizens' complaints brought directly to the railroads regarding noise and other nuisances rarely produce any relief for local landowners.[9] As a result, municipalities have enacted legislation placing time and manner

2. *See* Russell Grantham, *Transportation- Rail Merger Would Bring Jobs*, COM. APPEAL, July 17, 1998, at B4 ("[T]he merger will add about $90 million in new revenues annually by drawing traffic from other carriers and result in about $137 million in annual savings from consolidated facilities and longer, more efficient hauls."); *see also* Mark W. Hemphill, *Opportunity Lost: Tennessee Pass and the Royal Gorge Route,* TRAINS, Mar. 1, 1997, at 34 (explaining that when Union Pacific Railroad recently abandoned 281miles of mountainous track in Colorado in favor of a parallel route they realized savings in maintenance costs).

3. *See* Suzanne Espinosa Solis, *Lawsuit Over BART Noise,* S. F. CHRON., June 19, 1996, at A13; *see also* Sheila McLaughlin, *Rail Yard Riles Mariemont Village May File Charges Over Excessive Machinery Noise,* CIN. ENQUIRER, Jan. 22, 1997, at B3 (stating that railroad nuisances can include any noise, vibration, odor, or other noisome product generated by railroad sources that arouse citizen complaints).

4. *See* Solis, *supra* note 3 (discussing two instances of complaints brought by individuals living near railroad rights-of way).

5. Roberta Holland, *Making a Point on Noise: Complaints Voiced at Rail Station,* PATRIOT LEDGER, Oct. 15, 1997, at 15C.

6. Eleanor Barrett, *Rail Yard Noise Torments Residents at End of the Line,* STAR-LEDGER, Mar. 8, 1998, at 44 (discussing noise increases associated with Massachusetts Bay Transportation Authority operations).

7. *See* Lawrence Ragonese, *Morris Asked to Wait for Feds' Rail Noise Report,* STAR-LEDGER, Apr. 9, 1998, at 46 (discussing citizen complaints regarding noise created from increased train frequency).

8. *See id.*

9. *See* Barrett, *supra* note 6 (pointing out that local coalition groups have been formed to combat the noise from the rail yard and citizens have been ineffective in their efforts to limit the 700 train whistles recorded in a 24 hour period in the town).

constraints upon railroad operations.[10] The most common form of regulation prohibits locomotives from sounding a warning whistle as they approach highway grade crossings.[11]

In recent years, both federal and state courts struggled to determine the legitimacy of both local ordinances and individual claims which directly or indirectly constrain railroad operations.[12] At issue in the courts' analyses is the inherent tension between the rights of the individual to enjoy property free of disturbance and the broader notion that interstate commerce should move unimpeded by means of the nation's interstate rail network. This conflict governs nuisance claims brought in tort by individual homeowners and statutory claims adjudicated on behalf of towns and municipalities. In specific terms, nuisance claims against railroads commonly arise out of complaints over noise, vibration, and fumes.[13] Closely related to these traditional nuisance claims are actions brought against railroads under the theories of attractive nuisance and ordinary negligence.[14]

State courts recently adjudicated several cases where the close proximity of residential homes to railroad rights-of-way gave rise to tort claims against the railroads.[15] As previously mentioned, municipalities sought to legislatively remedy railroad nuisances.[16] In determining the legitimacy of the statutory regulations, courts often refer to the touchstone doctrine of federal preemption.[17] Myriad federal statutes contain

10. *See Appellate Summaries: Transportation – ICC Jurisdiction,* CHI. DAILY L. BULL., Feb. 12, 1998, at 1 (explaining that citizens of Antioch, Illinois attempted to enforce a local ordinance prohibiting the Wisconsin Central Railroad and the Metra commuter railroad from sounding horns as their train approached grade crossings in the city); *see also* discussion *infra* Part III.C. (concerning the legitimacy of South Bend and Mishawaka whistle bans).

11. *Appellate Summaries, Transportation – ICC Jurisdiction, supra* note 10.

12. *See* McClaughry v. Village of Antioch, 695 N.E.2d 492 (Ill. App. Ct. 1998), *appeal denied,* 699 N.E.2d 1032 (1998); Consolidated Rail Corp. v. City of Dover, 450 F. Supp. 966 (D. Del. 1978); Rushing v. Kansas City S. Ry., 14 F. Supp.2d 869 (S.D. Miss. 1998), *rev'd,* 185 F.3d 496 (5th Cir. 1999), *petition for cert. filed,* No. 99-1090 (Dec. 28, 1999); Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. 595 (N.D. Ind. 1995).

13. *See Rushing,* 14 F. Supp.2d at 869.

14. *See* Gage v. City of Westfield, 532 N.E.2d 62 (Mass. App. Ct. 1988) (focusing on the close proximity of a local playground to railroad tracks in deciding whether the railroad owed a duty to individuals who used the railroad right of way as walking path to reach the recreational area); *see also* Lopez v. Union Pac. R.R. Co., 932 P.2d 601 (Utah 1997) (finding that the railroad might be liable in tort to trespassers under circumstances where the railroad possesses knowledge that individuals frequently crawled on and over stopped railway equipment).

15. *See Gage,* 532 N.E.2d at 62; *see also Lopez,* 932 P.2d at 601.

16. *See McClaughry,* 695 N.E.2d at 492; Consolidated Rail Corp. v. City of Dover, 450 F. Supp at 966; *Rushing,* 14 F. Supp.2d at 869; Civil City of South Bend v. Consolidated Rail Corp., 880 F. Supp. at 595.

17. *See* Southern Pac. Transp. Co. v. Public Util. Comm'n, 9 F.3d 807 (9th Cir. 1993) (discussing the preemptive effect of several federal regulatory statutes in reference to a whistle ordinance).

express language prohibiting a state from regulating certain railroad uses where the specific use has been previously regulated through federal legislation.[18] This Note explores the courts' use of federal preemption as a limit on municipal involvement in the movement of railroad commerce.

This is not to say, however, that railroads enjoy complete immunity from local regulation. Judicial discretion ultimately determines the scope of the preemptive language of each federal statute.[19] Although the results in nuisance related litigation appear skewed in favor of the railroads, the nation's courts are not, as some allege, 'paternalistic guardians' of the railroad industry.[20] Rather, courts adjudicate nuisance claims against railroads in light of a notion of public good.[21] The public good, however, may not necessarily be served by protecting the interests of individual homeowners. The courts' decisions should serve a broader understanding of the public good derived from a utilitarian notion of allocating costs and benefits. In certain instances, the courts consider the public good best served by the unimpeded movement of interstate commerce via the railroads.[22] In other cases, the burdens imposed upon individual homeowners by railroads justify either judicial or statutory limitations to regulate the debilitating railroad use.[23] Where courts allocate burdens to the railroads, however, they often miscalculate the aggregate effect of their intervention, thereby undermining the broader public good.[24] An examination of the sweeping effects of the imposed constraints upon railroads often reveals unintended consequences that actually impair the public good.[25]

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18. *See id.* (discussing the preemptive effect of the Noise Control Act and the Federal Railroad Safety Act).

19. *See* Rushing v. Kansas City S. Ry., 14 F. Supp.2d 869 (S.D. Miss. 1998), *rev'd,* 185 F.3d 496 (5th Cir. 1999), *petition for cert. filed,* No. 99-1090 (Dec. 28, 1999).

20. *See* Al Rinkerman, Editorial, *Think Lawnmowers Pollute? Try Living Near Tracks,* BUFFALO NEWS, May 24, 1994, at B2 (contending that "[i]f the U.S. Environmental Protection Agency is truly concerned about air quality, it need only turn to one of the government's sacred cows: the railroads") The author admitted that he, "knew full well when I bought my home that the railroad ran through the backyard" but he continues to complain about the noise and other emissions of the trains. *Id.*

21. *See* discussion *infra* Part II.A.

22. *See Rushing,* 14 F. Supp.2d at 869.

23. *See* Southern Pac. Transp. Co. v. Public Util. Comm'n, 9 F.3d 807 (9th Cir. 1993) (analyzing the preemptive effect of several federal statutes concerning railroad regulations, the court ultimately concludes that municipalities in Oregon may limit the railroads' ability to sound whistles at grade crossings).

24. *See id.* (holding that local municipalities may curb railroad whistle noise, even when statistical data exists that suggests that whistles save lives); Fed. R.R. Admin., U.S. Dep't of Transp., Florida's Train Whistle Ban (1990), which studied the effects of whistle bans enacted by Florida towns. The study projected a 25% increase in accidents in towns where whistle bans were enacted.

25. *See generally* Mark A. Stein & Hugo Martin, *Horns of a Dilemma: Rail Officials Try to*

In Part I, this Note considers historical railroad nuisance jurisprudence and its application to current situations. With the unprecedented growth of railroads, and the corresponding increase in nuisance complaints, courts endeavor to maintain a cohesive analytical framework for the adjudication of nuisance claims. Through examination of case law and corresponding literature, Part II of the Note demonstrates that the courts' attempts to safeguard the public good by limiting obnoxious railroad practices actually undermines a broader notion of the public good embodied in the unimpeded movement of interstate commerce. Parts III and IV of this Note discuss the practical results of the courts' current railroad nuisance jurisprudence by examining its negative consequences to the nation's economic well being. This Note will focus on municipal whistle bans, the most controversial and litigation-creating response to railroad nuisances, as the test cases to demonstrate the imperfections of the courts' current approach

II. Railroads and Nuisance Law

The Historical Jurisprudence of Railroad Nuisance Law

While today's railroads enjoy unprecedented financial success, the nation's earliest railroads provided the means for American expansion and economic growth.[26] Railroads provided the impetus for commercial and residential development in several areas of the country.[27] Railroads expanded to serve burgeoning population centers with viable transportation.[28] An unfortunate byproduct of the railroad's early successes, however, were the nuisances created by the railroad's operations in residential neighborhoods.[29]

On May 14, 1914, the United States Supreme Court decided *Richards v. Washington Terminal Co.*[30] In setting forth fundamental guidelines for the application of nuisance law to railroads, the Court

Figure Out How to Reduce Train Noise Levels, L. A. Times, Nov. 23, 1992, at B1. (discussing that the transportation commission spent $500,000 studying methods to reduce noise emissions).

26. *See* Jessica Gleich, *Railroads Helped Springs Gain Steam as Resort Town,* Colo. Springs Gazette, July 31, 1997, at 17. The author describes how the "[r]ailroads opened the west." *Id.* Railroads also provided the first opportunity for individuals from cities to visit distant locales. *See id.*

27. James Robinson, Editorial, *Railroads Began North Carolina Development,* The Richmond News Leader, May 8, 1991, at 21. According to the author, "no industry more hastened [our] settlement and progress . . . than the North Carolina Railroad." *Id.* The description of the 223-mile railroad indicates the significant economic and cultural gains brought about by the nations early railroads. *See id.* During the 19th century, for instance, the North Carolina Railroad was the State's single largest source of income. *See id.*

28. *See id.*

29. *See* Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

30. *See id.*

considered the degree to which local railroad operations constituted an impermissible taking of an individual's property.[31] The plaintiff in the case owned property near, but not directly abutting, railroad property.[32] The railroad operated thirty trains a day through a tunnel located roughly one hundred and fourteen feet from the plaintiff's home.[33] Often trains would stop and idle outside of the tunnel as they waited at switches.[34] The railroad also installed a tunnel ventilation fan near the plaintiff's property that expelled large amounts of fumes from the tunnel.[35] The plaintiff's property was subsequently damaged by large quantities of dense smoke and dirt emitted from the trains and the ventilation fans.[36] The plaintiff's personal and real property depreciated substantially in value as a result of the railroads construction and use of the nearby tunnel.[37]

In determining whether the railroad worked an uncompensated taking of plaintiff's property, the Court posited a fundamental rule regarding the use of nuisance law to regulate railroads in general.[38] The Court stated that because railroads are constructed for public use, they "are not subject to the actions of neighboring property owners for the ordinary damages attributable to the operation of the railroad, in the absence of negligence."[39] The seemingly broad standard articulated by the Court is actually self-limiting. The ordinary damages, which in this case included smoke, vibration, and dirt were the direct result of the railroads normal operation of steam engines.[40]

The Court did not, however, completely absolve the railroad from all liability.[41] With regard to the noxious emissions from the tunnel ventilation system, the Court held that the railroad might be subject to nuisance liability.[42] The Court distinguished between the damaging tunnel fumes

31. *See id.* at 553.

32. *See id.* at 548-49.

33. *See id.* at 549-50 (explaining that soot and other emissions damaged the plaintiff's property).

34. *See id.* at 549.

35. *See id.*

36. *See id.* at 550 (noting that during the era, railroads operated locomotives which used coal to generate steam to produce power and the steam engines emitted large amounts of contaminants into the air).

37. *See id.*

38. *See id.* at 553.

39. *Id.* (recognizing that railroads are essentially public entities in spite of the fact that they are often privately owned and operated for individual profit).

40. *See id.*

41. *See id.*

42. *See id.* at 556 (explaining that "with respect to so much of the damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel . . . [there is no] real necessity existing for such damage").

and smoke generated by the idling locomotives on the basis of the necessity of the railroad use creating each respective nuisance.[43] That is, because there was no real necessity, in terms of railroad use, for the damage to plaintiff's property resulting from the ventilation fan, the Court approved plaintiff's claim for these damages alone.[44] The Court expresses the distinction in terms of costs and benefits.[45] If the railroad could have prevented the damage without incurring unreasonable expenses, the railroad may not unlawfully burden the plaintiff's free enjoyment of her property.[46]

For purposes of modern railroad nuisance jurisprudence, the Court's opinion drastically restricts the scope of potential claims against railroads.[47] Underlying the decision itself is the Court's unwillingness to exact any burden upon the railroad where, "the practical result would be to bring the operation of railroads to a standstill."[48] This theory remains the fundamental touchstone of railroad jurisprudence. Railroad immunity from nuisance, however, is conditional upon a tenuous distinction fabricated by the Court. The Court presumes that a distinction can be drawn between those railroad uses that are necessary and those that might be amended without seriously undermining the ability of the railroads to operate efficiently.[49] As mentioned earlier, the court sets forth a cost/benefit test to distinguish between uses that the courts may or may not regulate.[50]

In determining whether individuals and municipalities may lawfully regulate the operation of railroads, modern courts struggle to distinguish between acceptable railroad uses and unnecessary nuisances.[51] The inability of courts to recognize the subtle differences between valid uses and excessive railroad noise often results in the courts improperly allocating the burdens of the offensive use to the party who cannot practically shoulder the increased costs.[52]

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43. *See id.* at 554.

44. *See id.*

45. *See id.* at 557.

46. *See id.*

47. *See id.* at 554 (explaining that by prohibiting the regulation of necessary railroad uses, the Court grants railroads immunities which permit them to conduct business without fear of certain legislative or judicial limits).

48. *See id.* at 555.

49. *See id.* (setting forth a cost/benefit test to practically distinguish between uses which the courts may or may not regulate).

50. *See id.* at 557.

51. *See, e.g.*, Southern Pac. Transp. Co. v. Public Util. Comm'n, 9 F.3d 807 (9th Cir. 1993) (discussing the legitimacy of whistle bans enacted by a Oregon municipality); Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. 595 (N.D. Ind. 1995) (discussing the validity of a similar whistle ban).

52. *See* discussion *infra* Part III.B.

THE MODERN APPROACH TO RAILROAD NUISANCE LAW

Plaintiffs' difficulty in prevailing against railroads under the stringent *Richard's* standard, and the seemingly unjust conditions being imposed on homeowners, caused a subtle shift in the nature of railroad regulatory efforts.[53] Today, the number of common law nuisance claims brought on behalf of individual landowners are dwindling while local political entities seek more effective means to curtail railroad noise, smoke, and vibration.[54] In some respects, therefore, the nexus of railroad nuisance jurisprudence shifted from individual common law claims to those concerning statutory validity.[55] The fundamental issues and difficulties faced by the courts, however, are unchanged.[56]

In *State of New Jersey v. New York Central Railroad Co.,* the New Jersey Supreme Court considered the validity of a municipal noise ordinance as applied to an interstate rail carrier.[57] Such local noise regulations represent a legislative effort to effectuate the rights of individuals to freely use and enjoy their property.[58] As such, they closely resemble, in analytical terms, common law nuisance claims.[59] The Borough of Dumont enacted an ordinance mandating that, "[w]hatever loud and unnecessary noise which disturbs the public peace, between the hours of Eleven

53. *See Richards,* 233 U.S. at 556-58. The inability of the Court to directly compensate plaintiff for the substantial harm caused to his property by cinders and smoke emitted by the railroad prompted the Court to distinguish between the ventilation fan emissions and locomotive smoke. *See id.* The Court itself acknowledges the limits of its doctrine:

> No doubt there will be some practical difficulty in distinguishing between that part of the damage which is attributable to the gases and smoke emitted from the locomotive engines while operated upon the railroad tracks adjacent to plaintiff's land, and with respect to which we hold there is no right of action, and damage that arises from the gases and smoke that issue from the tunnel, and with respect to which there appears to be a right of action.

Id.

54. *See generally,* Joe Strupp, *Railroad Told Not to Park at Siding Colton Residents Had Complained of Fumes,* PRESS-ENTERPRISE, July 24, 1998, at B1 (explaining that when homeowners complained and enlisted the help of local politicians that were successfully in enjoining Union Pacific's use of its siding).

55. *See* Consolidated Rail Corp. v. City of Dover, 450 F. Supp. 966 (D. Del. 1978). *But see* Rushing v. Kansas City S. Ry., 14 F. Supp.2d 869 (S.D. Miss. 1998), *rev'd,* 185 F.3d 496 (5th Cir. 1999) (considering a nuisance claim bought by a homeowner living adjacent to the railroad right of way).

56. *See* Consolidated Rail Corp. v. City of Dover, 450 F. Supp. at 966; *Rushing,* 14 F. Supp.2d at 869. Both cases indirectly considered the necessity of the railroad use with regard to the costs imposed upon local citizens.

57. *See* State v. New York Cent. R.R. Co., 116 A.2d 800, 801 (N.J. 1955) (stating that most of the witnesses in the case were local residents who complained of loud noise which was both aggravating and annoying).

58. *See id.* at 803.

59. *See* Richards v. Washington Terminal Co., 233 U.S. 546, 556 (1914) (explaining that the court will engage in the same cost benefit analysis employed in a traditional nuisance claim brought on behalf of a aggrieved homeowner).

o'clock P.M. and Seven o'clock A.M. is hereby declared a nuisance and is prohibited."[60] The New York Central Railroad maintained a yard in the town where it parked idling locomotives between assignments.[61]

In determining the railroad's liability under the ordinance, the court considered both the constitutional validity of the ordinance and whether the railroad noise was necessary within the meaning the statute.[62] Despite the statute's use of abstract terms such as "loud and unnecessary noise", the court recognized the legitimacy of the ordinance in due process terms.[63] In preserving the overall intent of the statute, the court noted that even if terms such as 'loud' could only be defined relative to the circumstances, this fact alone was not sufficient to hold the language ambiguous.[64]

The *New York Central* court refused to expressly consider the necessity of the railroad's practice of parking locomotives on a siding adjacent to local homeowner's property.[65] The court avoided the complexities inherent in the test by retrospectively shifting the burden of production to the railroad.[66] Because the charge in the case "includes a negative averment, the truth or falsity which lies peculiarly within the knowledge of the defendant, the burden of evidence . . . rests with the defendant."[67] In defense of the alleged statutory violation, the New York Central railroad posited no affirmative evidence establishing the necessity of the contested railroad use.[68] Instead the railroad merely attempted to impeach the testimony of homeowners who asserted that the railroad had other tracks in the subject yard where they could store locomotives.[69] Accordingly, the court convicted the railroad under the ordinance.[70]

The result in the *New York Central* case is exclusively a function of the court's analytical framework for determining a 'necessary use' within the meaning of the city's ordinance. The court did not engage in the requisite balancing test mandated by the *Richards* court. Instead, the court implied an unnecessary railroad use from the defendant's failure to pro-

60. State v. New York Cent. R.R. Co., 116 A.2d at 802.

61. *See id.*

62. *See id.*

63. *See id.* at 805 (arguing that the court found that such terms as "loud and unnecessary" have acquired specific meaning at common law through nuisance doctrine and the terms were not, therefore, vague or ambiguous when utilized in a criminal statute).

64. *See id.* at 803.

65. *See id.* at 805.

66. *See id.* (referring to the burden upon the railroad to produce evidence demonstrating the necessity of the railroad use).

67. *Id.*

68. *See id.*

69. *See id.* at 802.

70. *See id.* at 805.

duce evidence to establish such a necessary use.[71]

The court's application of the ordinance to the relevant facts demonstrates the inherent difficulties associated with the practical application of the *Richards* standard. Because the city ordinance is derived from common law nuisance doctrine, the court must consider the facts in terms of nuisance law in determining culpability under the statute.[72] The interaction between the criminal statute and ordinary nuisance law implicates the rules established in *Richards* for determining a railroad's civil liability.[73]

The *New York Central* court impliedly recognizes the inadequacies of the *Richards* standard for determining railroad liability.[74] For both common law nuisance and statutorily imposed noise regulations, the court must make a determination as to the necessity the noise generated by the railroad use.[75] Requiring the courts to distinguish between necessary and superfluous railroad activity might undermine the efficacy of the standard itself.[76] In *Richards*, the court presumed that significant differences existed between necessary railroad uses and that those practices that could be modified without significant cost or inconvenience to the railroad.[77] To determine liability under the ordinance in *New York Central*, the court was forced to draw the same distinction between necessary and unnecessary railroad uses.[78]

More importantly, the *New York Central* court's analysis undermined the notion of the public good which ultimately governs both common law and statutory railroad nuisance claims.[79] The court's decision essentially decided that the public good would best be served by burdening the railroad at the expense of local homeowners. The court reached this conclusion by implicating a procedural failure on behalf of the railroad without

71. *See id.*

72. *See id.* at 803-04 (discussing the common law origin of the terms used in the city's noise control regulation).

73. *See id.* (explaining the necessity of the noise in terms of the costs of reasonable adjustment to accommodate the needs of the listener).

74. *See id.* at 805 (stating that the facts regarding the needs of the company lie within the knowledge of the company alone, they are required to produce evidence demonstrating such necessity and the measure attempted to shift the burden of determining necessity from the court to the defendant).

75. *See* Richards v. Washington Terminal Co., 233 U.S. 546, 555 (1914) (setting forth a cost/benefit test to distinguish between uses which the courts may or may not regulate).

76. *See* discussion *infra* Part III.C.

77. *See* State v. New York Cent. R.R. Co., 116 A.2d at 805 (noting that there is a burden upon the railroad to produce evidence demonstrating the necessity of the railroad use).

78. *See id.*

79. *See id.* at 805 (weighing the necessity of the railroad use against the ill-effects created for local citizens by the use).

considering the necessity of the railroad use.[80] A determination of necessity must be made in considering which party should bear the burden of the alleged nuisance.[81] This is not to say that the court might have derived a result which adequately serves the public good if they had performed the proper balancing test, as mandated by *Richards.* The *New York Central* court makes a more fundamental error in presuming the most beneficial result without balancing the interests involved.[82]

III. Federal Preemption: The Railroads' Weapon Against Local Law?

The Origin of Federal Preemption

Pursuant to the Supremacy Clause of the Constitution, federal law may preempt state and local regulations under certain circumstances.[83] In instances where Congress expressly defines the extent to which federal law preempts state law, or where state law regulates conduct in a field that Congress intended the federal government to occupy exclusively, or where it is impossible to comply with both state and federal requirements, or where state law poses an obstacle to the accomplishment and execution of Congressional purposes, state or local law shall be preempted.[84] Railroads implicate several of the above criteria when challenging the applicability of local and state regulations of railroad uses.[85] Federal preemption issues most often arise when municipalities, through legislation, attempt to curb railroad noise.[86] Locally enacted whistle ordinances, which either entirely prohibit railroads from sounding locomotive horns, or place time constraints upon the lawful use of whistles, prompted the railroads to argue for preemption by way of the Supremacy Clause of the Constitution.[87]

Several federal statutes regulating railroads contain express or im-

80. *See id.*

81. *See id.* (discussing the need for the court to determine necessity to allocate the burden of the alleged nuisance).

82. *See id.* (shifting the burden of evidentiary production to the railroad so as to avoid making a judicial determination regarding the necessity of the use).

83. *See* U.S. Const. art. VI.

84. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516-17 (1992) (setting forth practical guidelines for operation of the Supremacy Clause).

85. *See* discussion *infra* p.17.

86. *See* McClaughry v. Village of Antioch, 695 N.E.2d 492 (Ill. App. Ct. 1998); Consolidated Rail Corp. v. City of Dover, 450 F. Supp. 966 (D. Del. 1978); Rushing v. Kansas City S. Ry., 14 F. Supp.2d 869 (S.D. Miss. 1998); Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. 595 (N.D. Ind. 1995).

87. *See, e.g.*, Southern Pac. Transp. Co. v. Public Util. Comm'n, 9 F.3d 807 (9th Cir. 1993) (noting that the Southern Pacific Railroad responded to a whistle ban enacted by a local Oregon town by initiating litigation).

plied language setting forth Congressional intent that federal guidelines should supercede local ordinances.[88] The Locomotive Boiler Inspection Act ("LBIA") allocates power to the United States to regulate all parts and appurtenances of railroad locomotives.[89] The Supreme Court interpreted the LBIA to regulate the design, construction, and materials of every locomotive.[90] In terms of efficiency, by mandating a national standard for locomotive design, the LBIA subjects railroads to a single equipment standard as their locomotives travel interstate.[91]

The Ninth Circuit Court of Appeals, however, recently questioned the preemptive effecting of the LBIA.[92] In considering the validity of a local Oregon ordinance that prohibited railroads from sounding horns, the court concluded that the state regulation did not require certain types of equipment on locomotives.[93] As a result, the railroads could not establish that the local regulations interfered with the administration or implementation of the LBIA.[94] With the preemptive effect of the LBIA curtailed by the courts in reference to whistle bans, the railroads have sought protection from other federal legislation containing explicit preemption language.[95]

The Noise Control Act ("NCA") of 1972 directs the Environmental Protection Agency ("EPA") to create standards for railroad noise.[96] States may regulate the noise of railroad equipment but only insofar as the state standard is identical to that set forth by the EPA.[97] The Ninth Circuit Court of Appeals similarly limited the preemptive effect of the NCA with regard to whistle bans.[98] Because the EPA has not expressly enacted regulations concerning railroad noise emissions from locomotive horns, state and municipal noise ordinances cannot conflict with the NCA itself.[99] Accordingly, the local regulation represents a valid exercise of a state's police power and may operate free of federal preemption.[100]

The Federal Railroad Safety Act ("FRSA") maintains that railroad

88. *See id.* at 811-12 (discussing examples of statutes with explicit preemption language).

89. 45 U.S.C § 22 – 43(a) (1994).

90. *See* Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605, 611 (1926) (holding that Congress intended the LBIA to include whistles as locomotive appurtenances regulated by the legislation).

91. *See Southern Pac. Transp. Co.*, 9 F.3d at 811.

92. *See id.* at 810-11.

93. *See id.* at 811.

94. *See id.*

95. *See id.* at 811-13 (discussing railroad use of the Noise Control Act ("NCA") and the Federal Railway Safety Act ("FRSA")).

96. *See* 42 U.S.C. § 4916(a) (1994).

97. *See id.* at § 4916(c)(1).

98. *See Southern Pac. Transp. Co.*, 9 F.3d at 811.

99. *See id.*

100. *See id.* at 811-12.

safety laws should be nationally uniform to the extent practicable.[101] A state may, in turn, enforce a standard involving railroad safety until the Secretary of Transportation has adopted a rule covering the same subject matter of the state rule.[102] The enactment appears to provide the courts with extensive power to strike burdensome local regulations by way of federal preemption. The U.S. Supreme Court, however, has interpreted the statutory language to limit the preemptive effect of the FRSA.[103] To exercise the broad preemptive powers of the FRSA, the Court required plaintiffs to demonstrate that the federal regulation "substantially subsumes" the subject matter of the state law.[104]

With regard to the "substantially subsumes" standard, federal regulations govern virtually all aspects of railroad operations in the interest of safety.[105] Under the FRSA, each federal mandate would preempt conflicting state orders.[106] Some lower courts, however, have curtailed the preemptive effect of the FRSA by giving a narrow reading to the Supreme Court's requirement that the federal law "substantially subsumes" state regulation of the same railroad use.[107]

For example, the District Court for the Northern District of Indiana recently considered the railroads' ability to use the FRSA to strike whistle bans in two northern Indiana communities.[108] The cities of Mishawaka and South Bend, Indiana enacted measures to prevent Conrail and Grand Trunk Western Railroad from sounding whistles at local grade crossings.[109] The railroads relied on specific federal legislation that required a lead locomotive to have an audible warning device of specified capabilities.[110] The court held that the federal statue cannot "substantially subsume" the local whistle ban because it does not directly address the issue of the warning devices.[111] The Court reasoned that "one can

101. 45 U.S.C. § 434 (1994).

102. *See id.*

103. *See* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (explaining that for the railroads to rely upon federal preemption, the state regulations must do more than merely 'touch upon' or 'relate to the subject matter' of the federal regulation).

104. *See id. (*explaining that the "substantially subsumes" standard requires that the federal regulation governs virtually all aspects of railroad operations).

105. *See, e.g.,* 49 C.F.R. § 229.129 (1998) (mandating that every lead locomotive be equipped with an audible warning device capable of producing a minimum level of sound 100 feet forward of the locomotive).

106. *See* 45 U.S.C. § 434 (1994).

107. *See* Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. 595 (N.D. Ind. 1995).

108. *See id.* at 597-98.

109. *See id.*

110. *See* 49 C.F.R. § 229.129(a) (1998).

111. *See* Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. at 601.

possess an audible warning device without sounding it."[112] The failure of the railroads to establish a conflict between the federal legislation and local whistle bans rendered the FRSA's preemptive language inapplicable.[113]

The Constitution of the United States offers railroads a direct remedy to overcome intrusive local regulations by means of federal preemption.[114] The standard established by Article 1 sec. 8, cl. 3 prohibits states from imposing excessive burdens upon the movement of interstate commerce.[115] The United States Supreme Court interpreted this constitutional provision to allow states limited leeway in regulating interstate commerce.[116] The Court held that states may enact evenhanded regulations in the public interest that affect interstate commerce only incidentally.[117]

Certain courts have interpreted the constitutional standard to permit a wide range of local regulations.[118] The lower courts purport to consider the actual effect of state or local enactments upon interstate commerce.[119] For example, in *Civil City of South Bend, Indiana v. Consolidated Rail Corp.,* the court reasoned that because a local ordinance whistle ban did not forbid the railroads from traveling through the cities or charge them a tariff for doing so, the ordinance did not exact an undue burden upon the movement of interstate commerce.[120] Under the *Civil City of South Bend* Court's broad standard of review, few local regulatory statutes would 'unduly burden' interstate commerce.[121]

In response to the excessive judicial limitations imposed upon the preemptive effect of the FRSA and other federally created railroad regulatory statutes, Congress enacted the High-Speed Rail Development Act of 1994.[122] The legislation directs the Secretary of Transportation to "prescribe regulations requiring that a locomotive horn should be sounded while each train is approaching and entering upon each public

112. *Id.* at 601-02 (indicating the local regulations would not govern the horn as hardware of the locomotives, but only the use of the horns under certain circumstances).

113. *See* Southern Pac. Transp. Co. v. Public Util. Comm'n, 9 F.3d 807 (9th Cir. 1993) (describing the difficulties for railroads in invoking federal preemption to combat local rules).

114. *See* U.S. CONST. art. 1, § 8, cl. 3.

115. *See id.*

116. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (setting forth the fundamental doctrine concerning the inability for states' to directly regulate interstate commerce).

117. *See id.*

118. *See* Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. 595, 602 (N.D. Ind. 1995) (holding that few local regulations constitute an burden upon interstate commerce).

119. *See id.* at 602-03.

120. *See id.* at 603.

121. *See id.* (suggesting that only the most stringent local ordinances, such as those taxing the railroads, would constitute an undue burden on the movement of interstate commerce).

122. High-Speed Rail Development Act of 1992, 49 U.S.C. § 20153 (1994).

highway-rail grade crossing."[123] However, any local whistle ban would conflict with the Secretary's mandates, implicating the preemptive effect of the new legislation.[124] In compliance with the Act, final regulations by the Secretary of Transportation will be issued by November 2, 1998.[125]

Although, in *Civil City of South Bend,* Conrail and Grand Trunk Western argued that the High Speed Rail Act should preempt whistle bans enacted by the cities of South Bend and Mishawaka, the Court was unwilling to recognize the preemptive effect of the legislation as the Secretary of Transportation had yet to promulgate its grade crossing regulations.[126] Despite the imminent passage of the Secretary's individualized provisions for grade crossing safety, the Court would not allow the railroads to invoke a future regulation as the basis for preemption.[127]

PREEMPTION AND THE PUBLIC GOOD: THE *RICHARDS* STANDARD REVISITED

Municipal whistle bans, like other statutory nuisance regulations, implicate the traditional common law adjudicative rules governing railroad noise emissions.[128] In the *Richards* case, the United State Supreme Court posited a fundamental distinction to serve as the touchstone for railroad nuisance jurisprudence.[129] The Court required a determination of the necessity of each alleged obnoxious railroad use.[130] 'Necessity' involves an examination of what limitations might prevent the railroad from operating efficiently.[131] In terms of costs and benefits, the Court sought to allocate the damages associated with the use or its regulation to the party better able to absorb such social and economic costs.[132]

Unlike common law nuisance claims, challenges brought against lo-

123. *Id.* at § 20153(b).

124. *See* Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. at 600 (admitting that "[t]he railroads may well be correct with respect to the inevitability of future preemption [under the High Speed Rail Development Act]").

125. *See* Cheryl A. Greene, *An End to Quiet Neighborhoods or Improved Public Safety: The Collision Course Between Local Train Whistle Bans and the Swift Rail Development Act,* 22 J. LEGIS. 223, 228 (1996) (discussing the issuance of orders by the Secretary of Transportation).

126. *See* Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. at 599-600.

127. *See id.*

128. *See* Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (explaining that over the past 80 years, railroad nuisance law has grown to incorporate common law claims brought on behalf of individuals, municipal regulations aimed at placing time and manner constraints upon railroad noise, and whistle bans which attempt to prevent railroads from sounding locomotive horns at highway grade crossings).

129. *See id.* at 555 (referring to the Court's requirement that necessity be determined for each railroad use).

130. *See id.*

131. *See id.* at 554-55.

132. *See id.* (discussing the allocation of costs and benefits in railroad nuisance cases).

cal whistle bans usually involve issues of federal preemption. Consider, for example, an Oregon statute that permitted city commissioners to ban whistles at any grade crossing already equipped with automatic gates, flashing lights, and audible protective devices.[133] In *Southern Pacific Transportation Co. v. Public Utilities Commission*, the railroad objected to the legislation claiming that the local ordinances were preempted under the LBIA, FRSA, and NCA.[134] In finding for the state, the Ninth Circuit rejected each of the railroad's arguments for federal preemption.[135] In *Civil City of South Bend*, a District Court similarly dismissed each of Conrail and Grand Trunk Western's argument for preemption of a similar whistle ban.[136]

Application of the *Richard's* framework to the courts' preemption analysis demonstrates the notion of the 'public good' underlying railroad nuisance jurisprudence. Whistle bans appear to effectuate the public interest.[137] In *Southern Pacific,* the court reasoned, vis-a-vis its preemption analysis, that the city of Eugene was entitled to ban whistles between 10 p.m. and 6 a.m. .[138] The regulation would afford local residents an eight hour respite from railroad noise.[139] The preemption analysis serves as a proxy for the cost/benefit test required by the *Richards* Court. In *Southern Pacific*, for example, the court rejected the railroad's attempt to utilize the preemptive language of the FRSA to invalidate the Eugene whistle ban.[140] Southern Pacific claimed that Federal Railroad Administration guidelines requiring that locomotives be equipped with audible warning devices preempted state whistle bans.[141] The court held, however, that the municipal whistle ban dealt with the use of the locomotive whistles, as opposed to their noise making capacity.[142] Because the federal and state statutes govern fundamentally different aspects of the railroad use, the court held that Southern Pacific could not utilize the FRSA's preemptive effect.[143] The court fabricates this tenuous distinction between the state and federal regulations to eliminate preemption as

133. *See* Southern Pac. Transp. Co. v. Public Util. Comm'n, 9 F.3d 807, 809 (9th Cir. 1993).
134. *See id.* at 809-13.
135. *See id.*
136. *See* Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. at 595, 600-02. The court found that LBIA offered no preemptive effect as locomotives could still possess a horn without sounding it. *See id.* The NCA could not apply because the EPA offered noise regulations which might preempt local law. *See id.* The court found only a minimal effect on interstate commerce and therefore refused to strike the state ordinance. *See id.*
137. *See Southern Pac. Transp. Co.*, 9 F.3d at 809-13.
138. *See id.*
139. *See id.*
140. *See id.* at 812.
141. *See id.*
142. *See id.*
143. *See id.*

a potential means for railroads to strike burdensome local legislation.[144]

In consistently rejecting the use of federal preemption, however, the courts have actually undermined the public good. Judicial validation of local whistle bans certainly serves the public interest in a narrow sense. Citizens of affected municipalities enjoy quieter nights while the railroads suffer few impediments to the efficient movement of their trains. After all, the Oregon statute only permitted the whistle ban at crossings which had other protection such as gates or audible warning devices.[145] With other warning devices in place to warn drivers of approaching trains, whistles noise appears superfluous as a means of preventing grade crossing accidents.

Judicial rejection of federal preemption, however, is tantamount to a determination that the railroads should always bear the social and economic costs of curbing the alleged nuisance. In terms of the *Richards* framework, the courts effectively recognize that the practice of sounding locomotive horns in approach of highway grade crossings is not a necessary railroad use; in rejecting federal preemption of whistle bans, courts presume, in essence, that the public good would best be served by accommodating local homeowners at the expense of interstate rail carriers.

In considering a broader, utilitarian notion of the public good, however, whistle bans run contrary to the public interest. In 1984 the Federal Railway Administration commissioned a study of Florida East Coast Railway's right-of-way to determine the effects of whistle bans on grade crossing safety.[146] They government study solely considered crossings otherwise equipped with warning devices such as gates, flashing lights, or bells.[147] The study revealed that nighttime train accidents tripled at grade crossings with whistle bans.[148] Quantitatively, thirty-nine grade crossing accidents occurred in the five year period prior to Florida's adoption of whistle ban statutes.[149] During the five year period after the whistle ban went into effect, there were one hundred and fifteen reported accidents.[150] The Federal Railroad administration attributed the accidents to the whistle bans and issued an Emergency Order requiring the Florida East Coast Railway to sounds whistles at every grand crossing.[151] On the national level, Congress enacted the High Speed Rail Act to enable the

144. *See* discussion *infra* p. 19 (concerning the Court's unwillingness to recognize the preemptive effect of the FRSA).

145. *See Southern Pac. Transp. Co.,* 9 F.3d at 811.

146. *See* Fed. R.R. Admin., *supra* note 24.

147. *See id.* at 2.

148. *See id.* at 1.

149. *See id.* at 10-11.

150. *See id.*

151. *See id.; see also* Emergency Order Requiring Use of Train Borne Audible Warning Devices, 56 Fed. Reg. 36,190 (1991).

Secretary of Transportation to override municipal whistle bans at unsafe railroad grade crossings.[152]

The Practical Effects of Whistle Bans in Terms of the Public Good

Legislative determinations concerning grade crossing safety, unlike judicial interpretation of the validity of whistle bans, recognize a more general notion of the public good. Despite the clear safety threats posed by whistle bans and the imminent implementation of federal whistle ban prohibitions, the court in *Civil City of South Bend* upheld noise bans in South Bend and Mishawaka, Indiana.[153] In protecting the autonomy of each municipality, the court ignored the dangers associated with whistle bans. A close examination of railroad operations reveals the perils of highway grade crossings. The average one hundred car freight train weighs nearly ten thousand tons.[154] The same train, traveling at 50 miles-per-hour requires nearly one and one-third miles to stop.[155] With trains unable to stop at grade crossings, the vehicle operator solely controls her own safety.[156] Any additional warning that an approaching train might provide by sounding a whistle, therefore, might save the life of an unwary motorist.[157]

It terms of the public good, legislative efforts to improve grade crossing safety better serve utilitarian notions of public health and safety.[158] By focusing on state regulatory rights and individual interests in curbing excessive railroad noise, the federal circuit courts ignore the wider ranging, practical dangers of allowing whistle bans.[159] The distinction between the legislative approach, embodied in the Congressional enactment of the High Speed Rail Development Act virtually eradicating whistle bans, and the judicial viewpoint, manifest in the circuit courts' approval of municipal whistle regulations, is easily recognized through a cost/benefit analysis.[160]

152. *See* Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. 595, 602 (N.D. Ind. 1995) (holding that few local regulations constitute a burden upon interstate commerce).

153. *See id.* at 600.

154. *See* Fed. R.R. Admin., *supra* note 24, at 2-3.

155. *See id.* at 2.

156. *See id.* (finding the inference follows logically from the locomotive engineer's inability to stop her train).

157. *See id.* (deducing from the two preceding assertions regarding the motorists and grade crossing accidents).

158. *See* discussion *infra* Part III.B.

159. *See id.*

160. *See* Richards v. Washington Terminal Co., 233 U.S. 546, 551 (1913) (explaining that the courts utilize a cost/benefit test to determine the necessity of a railroad use in the context of nuisance jurisprudence).

A close analysis of the costs and benefits associated with whistle ban legislation reveals a significant disparity between the good realized in the judicial and legislative treatment of whistle bans. In *Southern Pacific,* the Ninth Circuit court favored the interests of local homeowners over those of the railroad and the public in general.[161] In upholding City of Eugene whistle bans, the court implicitly recognized that the benefits realized by the public in prohibiting the sounding locomotive horns outweighed the costs that the railroad might incur in not sounding whistles.[162] The primary benefits obtained include the quiet use and enjoyment of property owned by the citizens of Eugene and other municipalities.[163]

The court underestimated, however, the costs to the general public in allowing whistle bans. In light of the information published by the Federal Railway Administration concerning grade crossing safety, whistle bans detract from public safety.[164] The costs of permitting whistle bans are borne not only by the railroads, but by the public themselves. Given the safety improvements realized when locomotives sound their horns while approaching grade crossings, every member of the public stands to suffer when towns impair the useful warning devices.[165]

From a utilitarian perspective, therefore, legislative treatment of municipal whistle bans better protects the public interest.[166] In terms of the public good, serious safety considerations, like those implicit in the grade crossing whistle ban analysis, outweigh concern for citizens who might be stirred from their sleep by a shrill locomotive horn.

The public good, however, goes beyond notions of safety for highway travelers and regulation of excessive aural nuisances. Also at issue in railroad nuisance jurisprudence are secondary and tertiary concerns which contribute to and shape the public good. Courts often ignore these indirect effects in allocating the costs and benefits associated with regulation of obnoxious railroad uses. In order to correctly and efficiently serve the

161. *See* Southern Pac. Transp. Co. v. Public Util. Comm'n, 9 F.3d 807, 809 (9th Cir. 1993).

162. *See id.* (explaining that the local ordinance did not impair the railroad's ability to operate its locomotives any manner).

163. *See id.*

164. *See* Fed. R.R. Admin., *supra* note 24.

165. *See id.* at 2-3 (showing that the Federal Railway Administration's findings clearly demonstrate that a higher incidence of accidents occur at grade crossings with whistle bans in effect).

166. *See* Greene, *supra* note 125 (indicating that Legislative remedies include congressional enactment of the High-Speed Rail Development Act which afforded the Secretary of Transportation ultimate authority to determine which municipalities can maintain whistle bans); *see* Emergency Order Requiring Use of Train Borne Audible Warning Devices, 56 Fed. Reg. 36,190 (1991) (stating that the emergency order eradicating all whistle bans in communities along the Florida East Coast Railway in response to the Federal Railway Administration's grade crossing safety study, represents an additional legislative measure concerning the legitimacy of whistle bans).

public good through their nuisance jurisprudence, however, the courts should consider these derivative factors relevant to a utilitarian notion of the good.

One such collateral concern, the serious economic repercussions that might result from a train derailment at a highway grade crossing accident, demonstrates the need for consideration of indirect factors in determining the public good. As mentioned earlier, whistle bans dramatically increase the incidence of train-car grade crossing accidents.[167] The higher accident rate, in turn, severely the railroad's ability to operate its trains in an efficient manner.[168] Railroads have undergone a significant resurgence in the past decade.[169] The railroads' revival has also resulted in a substantial increase in the number of trains plying the nation's railroad right-of-ways.[170] Every grade crossing becomes in and of itself more dangerous because of increased train frequency. Whistle bans in municipalities with busy railroad lines further increase the probability of a grade crossing accident.[171]

The utilitarian notion of the good, in recognizing the necessity of whistle bans with regard to the safety of the public, should also take into account extended economic costs resulting from an increased incidence of grade crossing accidents. Grade crossing accidents, in impeding the ability of the railroads to operate efficiently, might create substantial and widespread financial difficulties for both the railroads and the public at large. To remain competitive with over-the-road truck carriers, several railroads have adopted novel shipment philosophies emphasizing just-in-time delivery.[172] Because large shippers no longer store materials at manufacturing locations, trains became rolling warehouses.[173] Similarly, "just in time delivery has a slim margin for error: If a shipment is late, the automaker risks the shutdown of an assembly line."[174] The emergence of just-in-time delivery as the new standard for large customers exacts a de-

167. *See* Fed. R.R. Admin., *supra* note 24.

168. *See* discussion *infra* note 178 (concerning the crippling effects of a derailment upon the physical operation of the railroad).

169. *See supra* note 1 (discussing several aspects of the railroads economic revival).

170. *See* Bill Stephens, *Automobile Artery,* TRAINS, June, 1996, at 45. On one main line between Chicago and central Ohio, for example, Norfolk Southern increased the number of trains it operated from 15 to 22 per day in the past five years. *See id.* On its Illinois Division, the railroad operated 27 trains per day in 1991. *See id.* In 1996 it had increased the number of trains to 42 per day on the same trackage. *See id.*

171. *See* Fed. R.R. Admin., *supra* note 24.

172. *See* Stephens, *supra* note 170, at 45. (indicating that when the automobile industry, a significant rail shipper, faced competitive pressure, it began using just-in-time delivery to avoid costs associated with pre-production, on-site storage or materials).

173. *See id.*

174. *Id.*

manding standard upon the nations' railroads.[175] Precise scheduling and movement of time sensitive shipments, therefore, play a large role in the railroads' ability to operate profitably and efficiently.[176]

The increased rate of grade crossing accidents, boosted by municipal whistle bans, pose a significant threat to railroads economic viability in terms of their capacity to make just-in-time deliveries. Vehicle-train accidents inevitably disturb scheduled railroad operations. In many cases, grade crossing accidents result in costly derailments. A 1995 collision between a sixteen car train and a truck stopped on a highway grade crossing resulted in the derailment of two locomotives and fourteen cars.[177] Derailments, in turn, can result in astronomical costs and delays for the railroads. In a 1997 derailment at Kelso, CA, a Union Pacific freight train derailed sixty-eight cars and several locomotives.[178] In addition to nearly three million dollars of damage to equipment, the derailment wrecked havoc on Union Pacific's physical plant.[179] The accident damaged both the track infrastructure and signal system, severely curtailing railroad operations in the area.[180] In the case of a derailment, railroads cannot meet customer demand as trains carrying time sensitive goods must often wait for damaged track to be repaired. With regard to large customers, such as automobile manufacturers, delayed shipments undercut efficient production.[181] Unable to provide just-in-time delivery, railroads risk losing lucrative shipping contracts. Large manufacturing corporations, devoid of raw materials, must shut down their production facilities and lose substantial profits. Similar costs and losses trickle down to the market consumer. To remain competitive, producers must pass on additional costs to consumers.

175. *See id.*

176. *See id.* (describing a scenario where Norfolk Southern railroad "lost the battle for time sensitive auto traffic by shoving hi-cubes [boxcars] through every yard in route and showing up late at the customer's door." The railroads failures translated into lost earnings at the expense of trucks who captured the market for movement of the time sensitive traffic.).

177. *See Public Affairs Information for the U.S. Dep't of Transp.* (visited Feb. 6, 2000) <http://www.dot.gov/affairs/fra95/acc.htm>.

178. *See* Nat'l Transp. Safety Bd., *Union Pac. Accidents* (visited Feb. 6, 2000) <http://www.ntsb.gov/events/UP/kelso.htm>.

179. *See id.*

180. *See id.* (stating that the derailment caused 536,000 dollars of damage to track and signal equipment).

181. *See* Stephens, *supra* note 170 (referring to statements made concerning the time sensitive nature of auto shipments).

IV. The Perils of Current Railroad Nuisance Jurisprudence

A Practical Example of Municipal Use of Nuisance Law to Regulate Railroads

In refusing to acknowledge all direct and indirect costs associated with regulation of obnoxious railroad uses, the courts' current nuisance jurisprudence invites unfounded litigation against the railroads.[182] A recent action brought by a New Jersey municipality against the New York Susquehanna and Western Railway ("NYSW") demonstrates the incentives created by a pro-plaintiff analytical framework for railroad nuisance jurisprudence.[183]

The dispute between the Borough of Riverdale and the railroad arose when Pequannock, a neighboring township, agreed to host a truck-to-rail transfer facility for the shipment of thorium-tainted soil from a nearby Superfund cleanup site.[184] The transfer facility, built on NYSW property, would allow the railroad to load cars of the contaminated soil for transportation out of state.[185] The borough of Riverdale, arguing that the rail transfer station presented a health threat to the region, sought an injunction from a local superior court judge.[186]

The suit filed by the Borough of Riverdale represents a substantial expansion of current railroad nuisance jurisprudence. The potential nuisance, the loading facility, was located, not in Riverdale, but in the neighboring town of Pequannock.[187] Riverdale sought injunctive relief, therefore, on the basis that "[r]ail cars carrying thorium-laced soil would pass through Riverdale en route from the depot in Pequannock to Utah."[188] Although Superior Court Judge Reginald Stanton denied the town's request for an injunction, the judge ordered a trial and the railroad ceased operations at the transfer facility for the foreseeable future.[189]

Despite Riverdale's failure to obtan injunctive relief, the municipality effectively gained its desired result in prohibiting shipments from

182. *See, e.g.*, Jenkins v. CSX Transp. Inc. 906 S.W.2d 460, 462 (Tenn. Ct. App. 1995). A homeowner living adjacent to a rail yard filed suit against the railroad alleging that he suffered an allergic condition from the fumes of creosote soaked ties that the railroad transported through its yard. *See id.* The court entered summary judgment in favor of the railroad finding that carrier owed no duty of care to neighbors concerning the ordinary movement of creosoted ties. *See id.*

183. *See* Argelio R. Dumenigo & Lawrence Rangonese, *Riverdale Going to Court to Block Rail Depot*, Star-Ledger, Oct. 7, 1998, at 41.

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *Id.*

189. *See* Argelio R. Dumenigo, *Hearing Ordered in Pequannock Rail Depot Dispute*, Star-Ledger, Oct. 8, 1998, at 44.

site.[190] Riverdale's actions raise fundamental questions regarding the reach of railroad nuisance jurisprudence. Can towns and cities sharing land with railroad rights-of-way survey the cargo of passing trains and object to shipments simply passing through their borders? Can municipalities seek judicial relief from railroad activities that might, but have not yet, threatened citizens health and safety? Affirmative responses to either of the queries, as the Borough of Riverdale would favor, represent a substantial failure in calculation of both the railroad and public's interest in the implicit balance of equities underlying nuisance law.

The Borough of Riverdale's claims against the NYSW embody the flaws inherent in current railroad nuisance jurisprudence. Although Riverdale lost its action for injunctive relief against NYSW, the Borough gained its desired result of closing operations at the transfer facility.[191] The Riverdale case, and the circuit courts' holdings in *Southern Pac. Transp. Co* and *Civil City of South Bend,* create dangerous incentives for litigious parties interested in curbing railroad uses.[192] In failing to consider all direct and indirect costs associated with regulation of railroad uses through nuisance law, courts generate sub-optimal outcomes in terms of the public good.[193] The results in each of the cases; the curbing of an obnoxious use, invites additional litigation to regulate railroads through more aggressive measures.[194]

V. CONCLUSION

Contemporary railroad nuisance jurisprudence, although consistent with traditional nuisance law in balancing costs and benefits in attempting to produce efficient outcomes, fails to safeguard the public good. From a practical standpoint, judicial findings regarding railroad nuisance law often disregard the needs of the interstate rail carrier in favor of those of the individual homeowner. This disposition causes a misallocation of

190. *See id.*

191. *See id.* (explaining that the railroad could no longer operate the facility because, in anticipation of the ordered trial, it required the necessary state and federal agency approval to run the site).

192. *See* Southern Pac. Transp. Co. v. Public Util. Comm'n, 9 F.3d 807 (9th Cir. 1993) (finding for local homeowners in upholding railroad whistle bans); *see also,* Civil City of S. Bend v. Consolidated Rail Corp., 880 F. Supp. 595 (N.D. Ind. 1995) (reaching the same result with regard to whistle bans in recognizing local whistle regulations in Civil City of South Bend, Indiana).

193. *See* discussion *infra* Part III.C. This portion of the Note addresses the social costs often ignored by the courts in assessing benefits and burdens in railroad nuisance jurisprudence. *See id.* Because the courts fail to consider all costs related to regulation of railroad uses, they often impose unintended burdens upon the public at large. *See id.*

194. *See* Dumenigo, *supra* note 189 (explaining how Riverdale seeks to regulate the type of cargo that may pass through that town on an interstate rail network).

costs and benefits associated with obnoxious railroad uses and undermines a utilitarian notion of the public good.

The courts should consider indirect effects, such as derailments and economic loss in determining the public good. By upholding municipal whistle bans, for example, the courts implicitly condone the higher accident rate resulting from the bans themselves. The increased frequency of train-vehicle accidents, in turn, translates into enormous social costs that detract from a utilitarian conception of the public good. Accidents and derailments, for example, have substantial effects upon operation of many of the nation's industries.[195] Such inefficiencies contribute to higher costs eventually realized by the general public.

By considering indirect costs and benefits associated with obnoxious uses, courts can more completely capture the public good in utilitarian terms. Although an analytical framework focused on utilitarian notions of the good seems to mandate resolution of all nuisance claims in favor of the railroads, the ultimate ends of the test remain the product of judicial discretion. This Note suggests however, that the means to this discretionary end require serious expansion to capture notions of the public good underlying nuisance jurisprudence. With regard to railroad nuisances, Courts should consider the widespread practical costs associated with regulation of specific railroad uses. Judicial failure to take into account the complete costs of curtailing railroad operations sets a dangerous precedent concerning the public good.[196] Until the courts begin to adjudicate railroad nuisance claims in light of a broader, utilitarian notion of the public good, they inadvertently create social costs in myriad forms.

195. *See* Stephens *supra* note 170 (discussing the time sensitive nature of automobile parts and the affects of delay shipments on the railroad industry).

196. *See* discussion *infra* Part IV.