

THE GRAVES AMENDMENT: PUTTING TO DEATH FLORIDA’S
STRICT VICARIOUS LIABILITY LAW

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I. INTRODUCTION

Ethan Ruby, a twenty-five-year-old Wall Street trader and former college athlete, was crossing Delancy Street in Manhattan when the driver of a Budget rental vehicle ran a red light.¹ The Budget vehicle struck a van, which subsequently plowed into Ruby,² hurling him into the windshield of another vehicle fifty feet away and paralyzing him from the chest down.³ In December 2003, a jury awarded Ruby \$24.5 million in damages, holding Budget Rent A Car liable under New York’s strict vicarious liability law.⁴

* J.D. 2010, University of Florida Levin College of Law; B.S. 2007, University of Florida. I would like to thank my parents and my fiancé Tara for their endless encouragement, love, and support.

1. Ralph Vartabedian, *Who’s Liable in Rental Cars?*, L.A. TIMES, May 18, 2005, at G1, available at 2005 WLNR 23356194.

2. Jim Abrams, *Auto Rental Companies Shielded from Liability in Accidents*, AP ALERT-POLITICAL, Dec. 1, 2005, available at WL 12/1/05 APALERTPOLITICS 17:19:51.

3. Richard C. Dujardin, *Alum to Moses Brown Grads: “Make the Most of It,”* PROVIDENCE J., June 13, 2008, at C1, available at 2008 WLNR 11190956.

4. Press Release, The Auto Channel, New York State Court of Appeals Denies Motion by

The jury verdict was one of the highest ever returned in a New York state court; however, it is unlikely that New York or any other state will ever again see such a mammoth judgment against a car rental agency.⁵

In August 2005, Congress passed and President Bush signed into law a comprehensive transportation bill titled Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).⁶ Included in the bill was an amendment sponsored by Representative Samuel Graves (R-Missouri) now known as the “Graves Amendment.” The amendment called for preemption and abolition of any state statute or common law precedent that held rental or leasing agencies vicariously liable for their driver’s negligence, except when the owner itself was negligent or engaged in criminal wrongdoing.⁷ Multiple Florida courts and federal district courts held the Graves Amendment unconstitutional, stating that Congress exceeded its authority granted to it by the Commerce Clause.⁸ However, in August 2008, the Court of Appeals for the Eleventh Circuit was the first federal appellate court to weigh in on the issue, reaffirming the Graves Amendment’s constitutionality and leaving little doubt that Florida’s statutory and common law had been preempted.⁹

The Graves Amendment annulled nearly ninety years of Florida jurisprudence and revolutionized Florida’s tort law.¹⁰ It also serves as another poignant example of lobbyists’ influence and of Congress’ increasing encroachment into areas traditionally reserved for state police power regulations.¹¹ More importantly, under Florida’s current statutory scheme, individuals may be without adequate recourse if injured by the

Budget Rent A Car Corporation, Upholding Highest Future Pain and Suffering Award (May 3, 2006) [hereinafter Court Denies Motion], <http://www.theautochannel.com/news/2006/05/03/005552.html>; see N.Y. VEH. & TRAF. LAW § 388(1) (McKinney 2007). Included in the judgment was a record-setting \$10 million award for Ruby’s future pain and suffering. Court Denies Motion, *supra*. After appeals for remittitur, the final amount awarded to Ruby was approximately \$18 million. Ruby v. Budget Rent A Car Corp., 2006 WL 5110571, at *6 (N.Y. Sup. Ct. Feb. 2, 2006).

5. Court Denies Motion, *supra* note 4.

6. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144 (2005).

7. Act of Aug. 10, 2005, Pub. L. No. 109-59, Title X, § 10208(a), 119 Stat. 1935 (codified as amended at 49 U.S.C.A. § 30106 (2006)).

8. See, e.g., Vanguard Car Rental USA, Inc. v. Drouin, 521 F. Supp. 2d 1343, 1351 (S.D. Fla. 2007); Vanguard Car Rental USA, Inc. v. Huchon, 532 F. Supp. 2d 1371, 1382 (S.D. Fla. 2007); Brookins v. Ford Credit Titling Trust, No. 4D07-2010, 2008 WL 2744335 (Fla. 4th DCA July 16, 2008), *reh’g granted en banc, withdrawn on other grounds*, Brookins v. Ford Credit Titling Trust, 993 So. 2d 178, 178 (Fla. 4th DCA 2008).

9. Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1253 (11th Cir. 2008).

10. See S. Cotton Oil Co. v. Anderson, 86 So. 629, 636 (Fla. 1920) (holding that automobiles operated on public highways are dangerous instrumentalities and that owners are vicariously liable for injuries caused by the negligence of a person entrusted with such instrumentality); see also *infra* Part II.A.

11. For further discussion, see *infra* Part II.B.

driver of a rented vehicle.¹²

This Note analyzes and explores the effects of the Graves Amendment on Florida law and suggests legislative responses. Part II examines the development of and rationale behind both Florida's strict vicarious liability law and the Graves Amendment. In Part III, this Note focuses on the conflict between Florida tort law and the Graves Amendment, thoroughly examining the Eleventh Circuit's reasoning in *Garcia v. Vanguard*, the amendment's constitutionality under the Commerce Clause, and the amendment's possible preemption of Florida Statutes § 324.021(9)(b)2. Part IV recommends the Florida Legislature take action to provide sufficient remedy to individuals injured by drivers of rented vehicles.

II. HISTORY OF VICARIOUS LIABILITY LAW

A. *Evolution of the Dangerous Instrumentality Doctrine and Vicarious Liability in Florida*

The dangerous instrumentality doctrine developed as “a concept for fastening liability upon the keeper of a dangerous instrument or agency without any necessity for a showing of negligent conduct on the part of the defendant.”¹³ Historically, this doctrine has “applied to agency relationships involving firearms, boilers, and explosives.”¹⁴ However, Florida courts have extended the dangerous instrumentality doctrine to impose strict vicarious liability on automobile owners.¹⁵ In *Southern Cotton Oil Co. v. Anderson*, the Florida Supreme Court recognized that an automobile operated on public highways was a dangerous instrumentality because of the large number of deaths that resulted from automobile accidents.¹⁶ Thus, the court held that an automobile owner is vicariously

12. For further discussion, see *infra* notes 213–35 and accompanying text.

13. A. Eugene Carpenter, Jr., Note, *The Dangerous Instrumentality Doctrine: Unique Automobile Law in Florida*, 5 U. FLA. L. REV. 412, 413 (1952) (citation omitted).

14. *Id.* at 414 (citations omitted). More recent Florida decisions have extended the dangerous instrumentality doctrine to apply to golf carts, *Meister v. Fisher*, 462 So. 2d 1071, 1073 (Fla. 1984), and forklifts, *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107, 108 (Fla. 2d DCA 1990). George N. Meros, Jr. & Chanta G. Hundley, *Florida's Tort Reform Act: Keeping Faith with the Promise of Hoffman v. Jones*, 27 FLA. ST. U. L. REV. 461, 483 (2000).

15. Todd LaDouceur, Comment, *Tort Law: Florida's Liability "Airbag" for Automobile Owners*, 46 U. FLA. L. REV. 335, 336 (1994) (citing *Hertz Corp. v. Jackson*, 617 So. 2d 1051, 1052 (Fla. 1993)).

16. *S. Cotton Oil Co. v. Anderson*, 86 So. 629, 633–34 (Fla. 1920). The court noted that automobiles had already required stringent regulation in the interest of public safety. *Id.* at 634. Automobiles were not divested of their dangerous character in actions for damages caused by the negligence of an automobile operator. *Id.* at 636. Since the dangerous instrumentality doctrine had already been applied to railroad and trolley cars and since automobile deaths were becoming increasingly prevalent at a rate that would soon surpass deaths from railroad or trolley cars, the court held that the doctrine should be applied to automobiles operated on public highways. *Id.* at 632, 636.

liable for damages caused by a permissive user's operation of the owner's vehicle.¹⁷ Likewise, Florida courts have held car rental companies liable for the negligence of their lessees.¹⁸

The dangerous instrumentality doctrine hypothesizes that "one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation."¹⁹ Florida is the only state that imposes strict vicarious liability on the owner of an automobile when the owner entrusts it to another.²⁰ Hence, under the doctrine of vicarious liability, the negligence of the active tortfeasor is imputed upon a party that is otherwise free of legal fault.²¹ One common justification for this doctrine is that by holding an automobile owner vicariously liable, a financially responsible party will cover damages.²² Accordingly, the vicariously liable party bears the entire share of the costs of harm assigned to the tortious actor.²³ This justification comports with the notion that the vicariously liable party is usually better equipped to absorb and distribute the losses caused by the active tortfeasor.²⁴

Furthermore, scholars hypothesize that assigning liability to an automobile owner may reduce the prevalence of such accidents.²⁵

17. *Id.* at 636; *see also* *Hertz Corp. v. Jackson*, 617 So. 2d 1051, 1053 (Fla. 1993); *Fischer v. Alessandrini*, 907 So. 2d 569, 570 (Fla. 2d DCA 2005).

18. Sarah E. Williams, Comment, *Florida's Dangerous Instrumentality Doctrine*, 25 STETSON L. REV. 177, 180–81 (1995); *see also* *Susco Car Rental Sys. of Fla. v. Leonard*, 112 So. 2d 832, 835 (Fla. 1959); *Lynch v. Walker*, 31 So. 2d 268, 271–72 (Fla. 1947).

19. *Kraemer v. Gen. Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990).

20. *Fischer*, 907 So. 2d at 570; *see also* FLA. STAT. § 324.021(9)(b)3 (2009).

21. *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 468 (Fla. 2005); *see* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 (2000) ("A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury.").

22. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 cmt. b (2000) (stating that the costs of an agent's tortious conduct should be borne by the enterprise); *see also* William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584, 585 (1929) ("Compensation for an injured party comes first, but that cannot be considered separately from the capacities of the parties, to whom the loss is allocated, to bear it.").

23. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 cmt. b (2000). Of course, Florida law recognizes a right of indemnification from the active tortfeasor when one is vicariously liable in tort because of the active tortfeasor's negligence. *See, e.g., Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490, 493 (Fla. 1979).

24. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 500–01 (5th ed. 1984) ("What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of risk. The losses caused by the torts of employees . . . are placed upon that enterprise itself, as a required cost of doing business. . . . [The employer] is better able to absorb them, and distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.").

25. *See id.* at 501.

Arguably, the owner is in a better position to prevent accidents than the driver who negligently causes a car accident because the owner does not have to permit a careless, negligent driver to operate the vehicle. Therefore, “an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.”²⁶

The dangerous instrumentality and vicarious liability doctrines have been cornerstones of Florida tort law since 1920.²⁷ However, the perceived inequities of vicarious liability schemes have been widely criticized.²⁸ As far back as 1916, critics questioned the doctrine’s imposition of liability for damages to the “master” ““for offences done by a man’s servant without his assent.””²⁹ Support for this “deep pockets” practice waned in the 1980s, culminating in the Florida Legislature’s decision to put limits on the financial liability of lessors and owners who lease or lend their cars to permitted users.³⁰ Traditionally, a state legislature would have been the final authority on the issue of vicarious liability and damage caps. However, the Graves Amendment broke with tradition. As the Eleventh Circuit noted, the Graves Amendment is novel, as its sole purpose was to preempt state law claims that Congress deemed burdensome to interstate commerce.³¹

26. *Id.*

27. *See* S. Cotton Oil Co. v. Anderson, 86 So. 629, 636 (Fla. 1920).

28. *See* Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973) (stating that the equation of liability with fault produces the most equitable result). *See generally* Pamela Burch Fort et al., *Florida’s Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U. L. REV. 505 (1986) (concluding that the Tort Reform and Insurance Act of 1986 was the culmination of the Florida Legislature’s decade-long attempt to remedy deficiencies and balance the competing interests of the borders they place on society); LaDouceur, *supra* note 15 (discussing how Florida’s dangerous instrumentality doctrine became more flexible after the Florida Supreme Court’s decision in Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993)); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984) (discussing the shortcomings of vicarious liability law and how modifications could enhance the efficiency of resource allocation).

29. T. BATY, VICARIOUS LIABILITY 154 (1916) (citation omitted). Baty concluded that the real reason for the imposition of vicarious liability was to obtain damages from a “deep pocket,” opining that “a return to simpler manners will probably bring with it a return to saner views of liability.” *Id.*

30. Susan Lorde Martin, *Commerce Clause Jurisprudence and the Graves Amendment: Implications for the Vicarious Liability of Car Leasing Companies*, 18 U. FLA. J.L. & PUB. POL’Y 153, 157 (2007); *see also* Act of July 1, 1999, ch. 99-225 § 28 (Fla. 1999) (codified as amended at FLA. STAT. § 324.021(9) (1999)). In *Hoffman v. Jones*, the Florida Supreme Court stated that in tort law, equating liability with fault was the most equitable result. 280 So. 2d at 438. The Florida Supreme Court had also previously created an exemption to the dangerous instrumentality doctrine by holding that leasing companies were not vicariously liable for any accidents involving vehicles in which the company only held bare legal title, but no right of control. *Kraemer v. Gen. Motors Acceptance Corp.*, 572 So. 2d 1363, 1366–67 (Fla. 1990).

31. *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1252 (11th Cir. 2008).

B. *The Graves Amendment*

State vicarious liability laws have had tremendous economic ramifications for car leasing and rental companies. For instance, as of 2004, under New York's unlimited vicarious liability law, leasing companies were forced to pay out more than an estimated \$130 million per year in court judgments, allegedly leading to a 36% decrease in the number of vehicles leased statewide.³² "Connecticut and Rhode Island repealed similar vicarious liability laws in 2003,"³³ leaving New York, after numerous unsuccessful attempts to repeal the law,³⁴ as one of only three states with unlimited vicarious liability for both short-term and long-term lessors.³⁵

The Graves Amendment,³⁶ which was inserted into a \$286.4 billion,³⁷ 834-page federal transportation bill,³⁸ eliminated and preempted any state law that held lessors vicariously liable for lessees' negligence.³⁹ With only twenty minutes of discussion in the House of Representatives,⁴⁰ Congress decided to preempt the vicarious liability laws of at least fifteen states, including Florida.⁴¹ The Graves Amendment, enacted as "Rented or leased

32. *N.Y.'s Vicarious Liability Costly for Consumers and Auto Dealers*, INS. J., July 19, 2004, <http://www.insurancejournal.com/magazines/east/2004/07/19/features/44590.htm> (noting nineteen automakers had reportedly stopped or curtailed their leasing programs); *see also* Michael Cooper, *Federal Bill Wipes out a State Law and Makes It Easier to Lease Cars*, N.Y. TIMES, Aug. 4, 2005, at B1, available at West 2005 WLNR 12248539; *supra* text accompanying notes 1–5.

33. *N.Y.'s Vicarious Liability Costly for Consumers and Auto Dealers*, *supra* note 32. *See* CONN. GEN. STAT. ANN. §14-154a (2003); R.I. GEN. LAWS § 31-34-4 (2003 (repealed 2006)). However, the Rhode Island statute that had limited lessors' vicarious liability was repealed after only three years. *See* Martin, *supra* note 30, at 158 n.29.

34. Martin, *supra* note 30, at 156 (citing S.B. 2477, 2003-2004 Gen. Assem., 226 Legis. Sess. (N.Y. 2003); Assem. B. 1042, 2003-2004 Gen. Assem., Legis. Sess. (N.Y. 2003)).

35. Martin, *supra* note 30, at 157. Maine and Rhode Island's state laws currently hold all lessors jointly and severally liable for the negligence of lessees. *Id.*; *see also* R.I. GEN. LAWS § 31-34-4(a) (2009) and ME. REV. STAT. ANN. tit. 29-A, § 1652(1) (2009). Connecticut limits only the vicarious liability of long-term lessors. *See* CONN. GEN. STAT. ANN. §14-154a (2009).

36. 49 U.S.C. § 30106 (2006).

37. Cooper, *supra* note 32, at B1.

38. SAFETEA-LU, Pub. L. No. 109-59, 119 Stat. 1144 (2005).

39. SAFETEA-LU, 49 U.S.C. § 30106 (2006).

40. Martin, *supra* note 30, at 164 (citing 151 CONG. REC. H1199-1200 (daily ed. Mar. 9, 2005) (instructions by Rep. LaHood, Acting Chairman)); *see also* Vartabedian, *supra* note 1, at G1 (stating that there were no congressional hearings and only a very brief debate on the House floor). Senator Santorum also made a brief statement on the floor of the Senate. *See* 151 CONG. REC. S5433-34 (daily ed. May 18, 2005) (statement of Sen. Santorum). However, three failed bills introduced during the 106th Congress had previously sought to directly eliminate the vicarious liability of long-term and short-term lessors. *See* Rental Fairness Act of 2000, H.R. 1954, 106th Cong. (2000); Motor Vehicle Rental Fairness Act of 1999, S. 1130, 106th Cong. (1999); Rental Fairness Act of 1999, H.R. 1954, 106th Cong. (1999); *see also* H.R. Rep. No. 106-774, pt. 1, at 3-5 (2000) (stating the purpose, summary, background and need for the legislation).

41. Martin, *supra* note 30, at 164 (citing 151 CONG. REC. H1200 (daily ed. Mar. 9, 2005))

motor vehicle safety and responsibility,” provides as follows:

(a) IN GENERAL.—An owner of a motor vehicle that rents or leases the vehicle to a person . . . shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle . . . for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—

- (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and
- (2) there is no negligence or criminal wrongdoing on the part of the owner⁴²

Thus, the plain language of this preemption clause clearly indicates that Congress superseded any state law that held short and long-term lessors vicariously liable.⁴³ However, the statute also contains a savings clause, which states:

(b) FINANCIAL RESPONSIBILITY LAWS.—Nothing in this section supersedes the law of any State or political subdivision thereof—

- (1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or
- (2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.⁴⁴

Because Congress made no official findings or reports, the stated purpose of the bill must be ascertained from statements made on the House floor.⁴⁵

(statement of Rep. Nadler)). According to a December 2005 article by the Associated Press, seventeen U.S. jurisdictions had full or limited vicarious liability statutes preempted: Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Idaho, Iowa, Maine, Michigan, Minnesota, Nevada, New York, Oklahoma, Pennsylvania, Rhode Island, and Wisconsin. Abrams, *supra* note 2, at 1.

42. SAFETEA-LU, 49 U.S.C. § 30106(a) (2006).

43. *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1246 (11th Cir. 2008).

44. SAFETEA-LU, 49 U.S.C. § 30106(b) (2006). For a discussion of whether the Florida vicarious liability statute falls within this savings clause, see *infra* Part III.D.

45. *Cf. Vanguard Car Rental USA, Inc. v. Drouin*, 521 F. Supp. 2d 1343, 1349 (S.D. Fla. 2007) (“Although several Representatives debated the bill and discussed the impact of vicarious liability statutes on car rental companies doing business in multiple states, no official Congressional findings were made.”).

Representative Graves, whose top contributor for his 2006 congressional campaign was Enterprise Rent-A-Car, sponsored the bill.⁴⁶ He stated that the Amendment would “correct an inequity in the car and truck renting and leasing industry . . . [by] restor[ing] fair competition to the . . . industry[,] . . . lower[ing] costs[,] and increas[ing] choices for all consumers.”⁴⁷ Representative Graves stated that rental costs were increased for all consumers by states holding rental and leasing companies vicariously liable for their renters’ actions.⁴⁸ Representative Blunt also argued that the “arbitrary regulation” of vicarious liability cost consumers more than \$100 million annually, stressing the need for Congress to establish a “fair national standard for liability. . . .”⁴⁹ Representative Graves stated that as a result, smaller companies were being driven out of business, limiting competition and consumer preference.⁵⁰

Opponents of the amendment argued that the Graves Amendment was “nothing more than a special interest sham”⁵¹ that would leave innocent victims without recourse.⁵² It is not uncommon for companies to rent cars to uninsured motorists, and notably absent from the amendment was a provision that would require uninsured drivers to purchase insurance from the car rental companies.⁵³ One congressman suggested that lessees’

46. Ctr. for Responsive Politics, Sam Graves Member Profile: 2006 Profile, <http://www.opensecrets.org/politicians/summary.php?cid=N00013323&cycle=2006> (last visited Feb. 20, 2010) (stating that Enterprise Rent-A-Car contributed \$37,800 during the 2005–06 election cycle, which was \$24,700 more than the second biggest contributor); Ctr. for Responsive Politics, Sam Graves Member Profile: 2004 Profile, <http://www.opensecrets.org/politicians/summary.php?cycle=2004&type=I&cid=N00013323&newMem=N> (last visited Feb. 20, 2010) (stating that Enterprise Rent-A-Car contributed \$20,000 during the 2003–04 election cycle, making them the second biggest contributor). Enterprise Rent-A-Car Company’s principle place of business is in Representative Graves’ home state of Missouri. ENTERPRISE RENT-A-CAR CO., 2008 ANNUAL REGISTRATION REPORT 1 (2008), available at <https://www.sos.mo.gov/BusinessEntity/soskb/Filings.asp?86344>. Representative Graves also received substantial contributions from other leasing or rental companies. Martin, *supra* note 30, at 164. For instance, during a six-month period ending in Sept. 30, 2005, Representative Graves received twenty-five of fifty-two campaign contributions from executives of car or truck leasing or rental companies for a sum of \$25,300, which was 43% of the total receipts during that period. *Id.* at 164 n.72.

47. 151 CONG. REC. H1200 (daily ed. Mar. 9, 2005) (statement of Rep. Graves). *But see infra* note 187.

48. *Id.*

49. *Id.* (statement of Rep. Blunt). It is unclear from the legislative history how the \$100 million figure was determined. *See generally* 151 CONG. REC. S5433 (daily ed. May 18, 2005) (statement of Sen. Santorum) (providing no explanation or analysis of the computation of the \$100 million figure on the floor of the Senate); 151 CONG. REC. H1199-1202 (daily ed. Mar. 9, 2005) (House Debate on Graves Amendment) (providing no explanation or analysis of the computation of the \$100 million figure on the floor of the House).

50. 151 CONG. REC. H1200 (daily ed. Mar. 9, 2005) (statement of Rep. Graves).

51. *Id.* at H1201 (statement of Rep. Conyers).

52. *Id.* at H1200 (statement of Rep. Nadler).

53. *See id.* In a tourism-heavy state like Florida, it is possible that foreign drivers, who lack automobile insurance, frequently rent automobiles. If a foreign motorist driving a rented vehicle

inadequate levels of insurance were the cause of the rental companies' substantial actual liability.⁵⁴ Hence, by imposing liability solely on active tortfeasors, opponents argued that the amendment protected big rental and leasing companies at the expense of injured motorists.⁵⁵

The Graves Amendment passed in the House by a 218 to 201 vote margin, primarily on party lines.⁵⁶ The full version of the SAFETEA-LU bill passed overwhelmingly because of the billions of dollars of transportation projects that both parties wanted for their congressional districts.⁵⁷ After the Graves Amendment passed in the House, a spokesperson for Representative Graves called it a "common-sense tort reform" that was a "big win for consumers" who could expect a decrease in automobile rental and leasing prices.⁵⁸ Such a statement is striking since tort laws had traditionally been left to states' police power "in all but the most exceptional cases."⁵⁹ This abridgment of the principles of federalism is also noteworthy because the Supreme Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action."⁶⁰ While Congress' reasons for permitting the Graves Amendment's preemption of state laws may be novel,⁶¹ federal preemption, in general, is among the most frequently used doctrines in constitutional law practice.⁶²

strikes a pedestrian and subsequently leaves the country, the injured individual may be left without adequate recourse. *Id.* Hence, the Graves Amendment could ultimately shift the responsibility of support from a car rental company (and its insurers) onto taxpayers. *Id.*; see also *infra* Part IV.

54. See 151 CONG. REC. H1201 (daily ed. Mar. 9, 2005) (statement of Rep. DeFazio).

55. *Id.* (statement of Rep. Conyers).

56. Cooper, *supra* note 32, at B1. Republican majorities controlled both the U.S. House of Representatives and the Senate when the Graves Amendment was passed in 2005. Robin Toner, *A Loud Message for Bush*, N.Y. TIMES, Nov. 8, 2006, at A1.

57. Cooper, *supra* note 32, at B1. Among the numerous earmarks in the SAFETEA-LU was the now infamous Gravina Island Bridge in Alaska, which has been dubbed the "Bridge to Nowhere." See, e.g., Michael Grunwald, *Pork by Any Other Name . . .*, WASH. POST, Apr. 30, 2006, at B01.

58. Michael Cooper, *Congress Passes Bill Nullifying a State Law, and Making It Easier to Lease Cars in New York*, N.Y. TIMES, Aug. 4, 2005, at B1. *But see infra* note 187.

59. 151 CONG. REC. at H1201 (daily ed. Mar. 9, 2005) (statement of Rep. Conyers); see also *Graham v. Dunkley*, 827 N.Y.S.2d 513, 522 (N.Y. Sup. Ct. 2006) (overturned on other grounds) (stating that substantivetort law has traditionally been part of the common law of the states).

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

61. *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1252 (11th Cir. 2008).

62. Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 2 (2001) (citing Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994)); see also *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions* [hereinafter *New Evidence*], 120 HARV. L. REV. 1604, 1611 (2006–2007) (noting that "the broad trend in Congress since 1960 has been toward massive federal preemption of state law"). Although case analysis of federal preemption may be instructive in determining how the Supreme Court would ultimately construe the Graves Amendment, this Note does not fully address the trend of congressional preemption of state tort laws. However, numerous scholarly works have focused on this issue. See generally Michael P. Allen, *A Survey and Some Commentary on Federal "Tort Reform,"* 39 AKRON L. REV.

III. THE CONFLICT BETWEEN FLORIDA'S "FINANCIAL RESPONSIBILITY" LAWS AND THE GRAVES AMENDMENT

A. Long-term Lessors' Liability under Florida Statutes § 324.021(9)(b)1

In 1986, the Florida Legislature partially abrogated the dangerous instrumentality doctrine by eliminating long-term automobile lessors' vicarious liability in certain circumstances.⁶³ Lessors of vehicles leased one year or more were no longer deemed the "owner" of the motor vehicle as long as lessees obtained acceptable insurance that met statutory insurance coverage minimums.⁶⁴ Hence, by ensuring the lessee maintained minimum insurance coverage, long-term lessors could insulate themselves from vicarious liability. The Florida Legislature further amended this statute in 1996 to allow either lessors or lessees to obtain adequate insurance coverage.⁶⁵ Under the current statute, long-term lessors are exempt from vicarious liability if either: (1) lessees provide insurance that covers liability of at least \$100,000 bodily injury to one person, \$300,000 bodily injury in one occurrence, and \$50,000 property damage;⁶⁶ (2) lessees provide at least \$500,000 combined coverage for bodily injury and property damage liability; or (3) the lessor provides at least \$1,000,000 combined coverage for bodily injury and property damage liability in its blanket policy.⁶⁷

The Florida Supreme Court held this legislation constitutional, reasoning that "[l]imiting the liability of one vicariously liable does not

909 (2006) (discussing the broad scope and many types of federal tort reform); Erwin Chemerinsky, *Empowering States When It Matters A Different Approach To Preemption*, 69 BROOK. L. REV. 1313 (2004) (arguing for broader federal powers and that federalism should be reconceptualized as empowering government at all levels, rather than limiting power); Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475 (2002) (examining recent developments in the battle between exponents of federalization and protectors of state interests by evaluating the competing considerations that govern the constitutionality of modern day tort reform); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231–32, 276 (2000) (arguing that the modern doctrine of obstacle preemption "has no place as a doctrine of constitutional law" because the Supremacy Clause only requires preemption when the federal and state laws explicitly conflict with one another).

63. Meros & Hundley, *supra* note 14, at 484; *see also* Tort Reform and Insurance Act, ch. 86–160, 1986 Fla. Laws 695. Note, however, that the issue of whether long-term lessors were vicariously liable under the dangerous instrumentality doctrine was somewhat "unsettled at the time of the enactment" of the statute. *Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330, 333 (Fla. 1991).

64. Act of July 1, 1986, ch. 86-229, sec. 3 (codified as FLA. STAT. § 324.021(9)(b) (1986)).

65. Act of June 1, 1996, ch. 96-362, sec. 1 (codified as FLA. STAT. § 324.021(9)(b) (1996)).

66. The shorthand notation for this split-limit coverage is 100/300/50. This Note will use this shorthand notation to signify the limits of "bodily injury to one person / bodily injury in one occurrence / property damage".

67. FLA. STAT. § 324.021(9)(b)1 (2009).

equate to denial of access to court. . . .”⁶⁸ The limitations of Florida Statutes § 324.021(9)(b) are not an absolute bar to recovery beyond the amount of the insurance policy limits; injured parties may still seek additional damages from the negligent driver because there is no cap on the negligent driver’s direct liability.⁶⁹ Further, courts have construed the statute narrowly, calling for strict compliance with the statutory requirements.⁷⁰ However, this elimination of long-term lessors’ vicarious liability was the first of multiple significant departures from Florida’s strict adherence to dangerous instrumentality liability for automobile owners.⁷¹ In the interests of equity, Florida courts have increasingly deemed that liability should be linked with actual fault.⁷²

B. *Short-term Lessors’ Liability under Florida Statutes § 324.021(9)(b)2*

Under Florida common law, a car rental company was vicariously liable for any damages resulting from the operation of its vehicle, even if someone other than the person to whom the vehicle was rented operated

68. Meros & Hundley, *supra* note 14, at 484 (quoting *Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330, 333 (Fla. 1991)). The court stated that there was a rational basis for the legislation since long-term leases were an “alternative method of financing the purchase of a motor vehicle to take advantage of certain tax considerations. . . .” *Abdala*, 583 So. 2d at 334; *see also* *Enter. Leasing Co., Inc. v. Hughes*, 833 So. 2d 832 (Fla. 1st DCA 2002) (holding that Florida Statutes § 324.021(9)(b)1 did not violate the right to a trial by jury or the right to fully recover from the vehicle’s operator).

69. *Lewis v. Enter. Leasing Co.*, 912 So. 2d 349, 351–52 (Fla. 3d DCA 2005).

70. *See* *Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996) (stating that the court would not presume an alteration of the common law beyond what was explicitly stated in the statute); *Dearing v. GMAC*, 758 So. 2d 1236, 1238–39 (Fla. 5th DCA 2000) (holding that a twelve-month lease agreement that permitted a lessee to terminate the lease for any reason after six months was not deemed a period of one year or longer for the purposes of Florida Statutes § 324.021(9)(b)1); *Lavado v. Gen. Elec. Capital Auto Fin. Servs., Inc.*, 711 So. 2d 1237, 1238 (Fla. 3d DCA 1998) (holding that a 300/300/100 policy was insufficient because the single limit coverage would permit one person to exhaust the entire occurrence limit).

71. *See* *Fischer v. Alessandrini*, 907 So. 2d 569, 570–71 (Fla. 2d DCA 2005) (noting that the real and perceived inequities of imposing strict vicarious liability on automobile owners prompted the legislature to limit the dangerous instrumentality doctrine as applied to long-term automobile lessors). In 1999, the legislature added Florida Statutes §§ (9)(b)2 and (9)(b)3 to § 324.021, further limiting the application of the dangerous instrumentality doctrine. *Id.* at 571.

72. *See* *Hoffman v. Jones*, 280 So. 2d 431, 438 (1973). The Florida Supreme Court has further weakened the viability of the dangerous instrumentality doctrine by adopting the common law tort of negligent entrustment. *See* Meros & Hundley, *supra* note 14, at 484. In *Kitchen v. K-Mart Corp.*, the Florida Supreme Court stated that by negligently leasing or loaning a dangerous instrumentality to an individual who poses foreseeable risks, an owner or lessor could be liable for injuries to third parties. 697 So. 2d 1200, 1208 (Fla. 1997). Although *Kitchen* involved a gun dealer who sold a firearm to an intoxicated man, it is well established that the tort of negligent entrustment applies to any supplier of a dangerous instrumentality, including an automobile, if the risks are foreseeable. *See* RESTATEMENT (SECOND) OF TORTS § 390 cmt. b, illus. 2–6 (1965).

the vehicle at the time of the accident.⁷³ However, consistent with the trend of limiting the dangerous instrumentality doctrine's harsh effects, the Florida Legislature capped⁷⁴ the financial liability of short-term lessors and owners who rented or lent their vehicles to permissive users.⁷⁵ As long as the lessee or operator has insurance coverage of \$500,000 combined for bodily injury and property damage, short-term lessors' liability is limited to \$100,000 per person, \$300,000 per occurrence, and \$50,000 for property damage.⁷⁶ However, this statute does not apply to "an owner of motor vehicles that are used for commercial activity in the owner's ordinary course of business, other than a rental company that rents or leases motor vehicles."⁷⁷

73. *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832, 836–37 (Fla. 1959). Generally only a breach of custody amounting to a conversion or theft will relieve an automobile owner of dangerous instrumentality liability. *Id.* at 835–36. Florida courts recognize three additional exceptions for certain leased or rented automobiles. First, under the "shop" exception, an owner is exempt from vicarious liability if the vehicle is negligently used during its servicing, service-related testing, or service-related transport. *Estate of Villanueva v. Youngblood*, 927 So. 2d 955, 958 (Fla.2d DCA 2006). Second, under the "naked title" exception, an individual that merely holds naked title, if able to demonstrate the absence of beneficial ownership of the vehicle, is not vicariously liable for the tortious action of another. *Aurbach v. Gallina*, 753 So. 2d 60, 63 (Fla. 2000). Finally, a lessor may be exempt from vicariously liability where the operator uses the vehicle "in a weapon-like manner with the intent to inflict physical injury. . . ." *Burch v. Sun State Ford, Inc.*, 864 So. 2d 466, 472 (Fla. 5th DCA 2004).

74. *But see infra* notes 158–59 and accompanying text.

75. *Meros & Hundley, supra* note 14, at 484–85. As amended, Florida Statutes § 324.021(9)(b)2 provides as follows:

The lessor, under an agreement to rent or lease a motor vehicle for a period of less than 1 year, shall be deemed the owner of the motor vehicle for the purpose of determining liability for the operation of the vehicle or the acts of the operator in connection therewith only up to \$100,000 per person and up to \$300,000 per incident for bodily injury and up to \$50,000 for property damage. If the lessee or the operator of the motor vehicle is uninsured or has any insurance with limits less than \$500,000 combined property damage and bodily injury liability, the lessor shall be liable for up to an additional \$500,000 in economic damages only arising out of the use of the motor vehicle. The additional specified liability of the lessor for economic damages shall be reduced by amounts actually recovered from the lessee, from the operator, and from any insurance or self-insurance covering the lessee or operator. Nothing in this subparagraph shall be construed to affect the liability of the lessor for its own negligence.

FLA. STAT. § 324.021(9)(b)2 (2009).

76. FLA. STAT. § 324.021(9)(b)2 (2009). Florida Statutes § 324.021(9)(b)3 imposes similar limitations upon any owner who is a natural person that loans a motor vehicle to a permissive user. However, since the Graves Amendment does not affect this right, this Note will not address this subsection.

77. FLA. STAT. § 324.021(9)(c)1 (2009). Nor does the statute apply to a commercial motor vehicle that is transporting a hazardous material at the time of the incident. FLA. STAT. § 324.021(9)(c)2 (2009).

A Florida district court of appeal held that this statutory limitation of short-term lessors' liability was constitutional because the statute did not violate a plaintiff's right to: (1) access the courts, (2) a jury trial, (3) due process, or (4) equal protection.⁷⁸ Furthermore, the court recognized that the Florida Legislature had a legitimate purpose, to which the statute was rationally related, for shifting liability from one without fault to the active tortfeasor.⁷⁹ Critics have characterized Florida Statutes § 324.021(9)(b)2 as "a windfall at the expense of the injured"⁸⁰ while supporters championed the legislation as "a natural extension of the movement toward limiting, if not abrogating, the dangerous instrumentality doctrine in Florida."⁸¹ However, this debate over the appropriateness of the state legislation has become moot in light of Congress' 2005 decision to preempt and abrogate Florida law.⁸²

C. *Garcia v. Vanguard: An Authoritative Guide*

The Graves Amendment purports to eliminate the vicarious liability of any owner that leases or rents a vehicle to another person.⁸³ Hence, under 49 U.S.C. § 30106(a), the Graves Amendment purportedly nullifies Florida laws that limit, but do not eliminate, long-term and short-term lessors' vicarious liability under the dangerous instrumentality doctrine.⁸⁴ Florida appellate courts⁸⁵ and federal district courts in the Eleventh Circuit⁸⁶

78. *Sontay v. Avis Rent-A-Car Systems, Inc.*, 872 So. 2d 316, 318–19 (Fla. 4th DCA 2004) (stating that the court found *Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330 (Fla. 1991) as controlling and undistinguishable).

79. *Id.* at 319.

80. Robert S. Peck et. al., *Tort Reform 1999: A Building Without A Foundation*, 27 FLA. ST. U. L. REV. 397, 414 (2000).

81. Meros & Hundley, *supra* note 14, at 485.

82. See Pub. L. No. 109–59, 119 Stat. 1935 (2005) (codified as amended at 49 U.S.C.A. § 30106 (2006)).

83. SAFETEA-LU, 49 U.S.C. § 30106(a) (2006).

84. See FLA. STAT. §§ 324.021(9)(b)1, (b)2 (2009). Florida Statutes § 324.021(9)(b)1 *exempts* long-term lessors from vicarious liability if certain conditions are met. See *supra* Part III.A. Thus, since the long-term lessor statute *does not impose vicarious liability* on the lessor of the car, it does not conflict with the Graves Amendment; rather, Florida's dangerous instrumentality jurisprudence is the source of conflict with respect to long-term lessors. Technically, the Graves Amendment has mooted, rather than preempted, Florida Statutes § 324.021(9)(b)1. Nevertheless, the courts have not recognized this distinction and are imprecise when stating that Florida Statutes § 324.021(9)(b)1 has been preempted. See *Rosado v. DaimlerChrysler Financial Servs. Trust*, 1 So. 3d 1200, 1205–06 (Fla. 2d DCA 2009).

85. In *Brookins v. Ford Credit Titling Trust*, the Fourth District Court of Appeal certified a conflict on the same point of law with Florida's Third District Court of Appeal. No. 4D07-2010, 2008 WL 2744335 at *5 (Fla. 4th DCA 2008). However, after the Eleventh Circuit's decision in *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008), Florida's Fourth District Court of Appeal granted a rehearing en banc and withdrew its former opinion, noting that because the lessor maintained a \$1 million blanket policy of liability insurance coverage, it met the requirements of Florida Statutes § 324.021(9)(b)1. *Brookins v. Ford Credit Titling Trust*, 993 So.

conflicted over whether the Graves Amendment was constitutional during the three-year period that immediately followed its passage. Most of these challenges involved car rental companies and thus focused solely on short-term lessors' liability under Florida Statutes § 324.021(9)(b)2.⁸⁷ Florida and Eleventh Circuit decisions have generally addressed two issues: first, whether Florida Statutes § 324.021(9)(b) qualifies as a financial responsibility or insurance standard under the Graves Amendment's savings clause;⁸⁸ and second, in passing the Graves Amendment, whether Congress unconstitutionally exceeded its powers granted by the Commerce Clause.⁸⁹

To date, the most definitive guidance on these issues came from the Court of Appeals for the Eleventh Circuit in August 2008. In *Garcia v. Vanguard Car Rental USA, Inc.*, the court held that the Graves Amendment preempted Florida's vicarious liability law and that Congress' promulgation was constitutional.⁹⁰ The relevant facts in *Garcia* were undisputed.⁹¹ Vanguard,⁹² without negligence or fault, rented a vehicle to Gregory Davis in Orlando.⁹³ While driving in Marion County, Florida, Davis allegedly caused a three-car accident that resulted in two deaths and another severely injured person.⁹⁴ Anticipating a suit that alleged vicarious

2d 178, 178 (Fla. 4th DCA 2008). Thus, on rehearing, the court refrained from addressing whether the Graves Amendment preempted Florida Statutes § 324.021(9)(b)1. *See id.*

86. *Compare* Vanguard Car Rental USA, Inc. v. Drouin, 521 F. Supp. 2d 1343, 1350–51 (S.D. Fla. 2007), *with* Garcia v. Vanguard Car Rental USA, Inc., 510 F. Supp. 2d 821, 833 (M.D. Fla. 2007).

87. Many cases have also addressed the conflict between the Graves Amendment and Florida's long-term lease provision of Florida Statutes § 324.021(9)(b)1. *See, e.g.*, St. Paul Fire and Marine Ins. Co. v. Lee, No. 6:07-cv-756-Orl-22GJK, 2008 WL 1897602, at *6 (M.D. Fla. Apr. 28, 2008); Liberty Mut. Ins. Co. v. TCF Equipment Fin., Inc., No. 6:06-cv-1567-Orl-19UAM, 2007 WL 4557204, *3 (M.D. Fla. Dec. 20, 2007); Rosado v. DaimlerChrysler Fin. Servs. Trust, 1 So. 3d 1200, 1202 (Fla. 2d DCA 2009) (addressing long-term leases under Florida Statutes § 324.021(9)(b)1); Brookins v. Ford Credit Titling Trust, No. 4D07-2010, 2008 WL 2744335 (Fla. 4th DCA Jul. 16, 2008), *reh'g granted en banc, withdrawn*, Brookins v. Ford Credit Titling Trust, 993 So. 2d 178 (Fla. 4th DCA 2008). However, neither the Eleventh Circuit nor the Florida Supreme Court has addressed this specific issue. The seminal case, *Garcia v. Vanguard* addresses short-term leases; hence, the bulk of this Note focuses on the conflict between the Graves Amendment and Florida Statutes § 324.021(9)(b)2. *See* 540 F.3d 1242, 1245 (11th Cir. 2008).

88. *See* 49 U.S.C. § 30106(b) (2006).

89. *See* U.S. CONST. art. I, § 8, cl. 3.

90. *Garcia*, 540 F.3d at 1253.

91. *Id.* at 1245.

92. Vanguard Car Rental USA, Inc. operates both National Car Rental and Alamo Rent A Car. Vanguard Car Rental USA, Inc., <http://www.vanguardcar.com> (last visited Feb. 4, 2010).

93. *Garcia*, 540 F.3d at 1245.

94. *Id.* Interestingly, the accident occurred on February 2, 2005, which was approximately six months before the Graves Amendment became effective. *Id.*; Pub. L. No. 109-59, § 10208(a), 119 Stat. 1935 (2005). However, subsection (c) of the Graves Amendment stated that it applied to any action commenced on or after the date of enactment, even if the conduct that caused the harm occurred before the date of enactment. 49 U.S.C. § 30106(c) (2006).

liability for Davis' negligence, Vanguard moved for a declaratory judgment in federal district court against the decedents' estates and surviving spouses.⁹⁵ The district court granted a motion for summary judgment, holding that the Graves Amendment validly preempted all the vicarious liability claims against Vanguard.⁹⁶

The Eleventh Circuit began its analysis by addressing whether the Graves Amendment explicitly preempted wrongful death actions against the rental company.⁹⁷ It noted that Florida Statutes § 324.021(9)(b)2 addressed the specific types of lawsuits at which the Graves Amendment took aim, whereby a car rental company was held liable for its lessee's negligent acts.⁹⁸ Because "a valid federal statute preempts any state law with which it actually conflicts,"⁹⁹ the court held that unless the actions fell within the statute's savings clause, the Graves Amendment preempted the wrongful death actions against Vanguard.¹⁰⁰

The savings clause of the Graves Amendment states that it will not supersede a state law that imposes "financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle."¹⁰¹ However, the Graves Amendment does not define the term "financial responsibility."¹⁰² This statutory ambiguity gave the Eleventh Circuit wide discretion to elucidate Congress' intent. Foremost, the court construed the terms employing the canon of *noscitur a sociis*, in which the court considered the meaning of the proximate terms in light of one another.¹⁰³ The court also stated that it would seek to avoid surplusage by giving meaning to each word in the statute.¹⁰⁴ Finally, the court stated it could resort to the Graves Amendment's legislative history but would refrain from doing so if the statutory text was otherwise unambiguous.¹⁰⁵ Employing the aforementioned interpretive principles, the court determined that Congress used the term "financial responsibility" to refer to "insurance-like requirements on owners or operators of motor vehicles," such as a state's permission to carry bond or self-insurance in lieu of liability insurance.¹⁰⁶ Thus, the court reasoned that the Graves Amendment's savings clause contemplated situations in which states

95. *Garcia*, 540 F.3d at 1245.

96. *Id.*; see also *Garcia v. Vanguard Car Rental USA, Inc.*, 510 F. Supp. 2d 821, 837 (M.D. Fla. 2007).

97. *Garcia*, 540 F.3d at 1245.

98. *Id.* at 1246.

99. *Id.* at 1245 (citing *Foley v. Luster*, 249 F.3d 1281, 1286 (11th Cir. 2001)).

100. *Id.* at 1246.

101. 49 U.S.C.A. § 30106(b)(1) (2006).

102. *Garcia*, 540 F.3d at 1246.

103. *Id.* at 1247.

104. *Id.*

105. *Id.*

106. *Id.*

required “either liability insurance or a functionally equivalent financial arrangement.”¹⁰⁷ Florida’s vicarious liability regime was not, however, considered a financial responsibility regulation.¹⁰⁸

The court held that neither Florida common law nor § 324.021(9)(b) qualified as a financial responsibility law that would avoid the Graves Amendment’s preemption.¹⁰⁹ It reasoned that if § 324.021(9)(b) fell within the Graves Amendment’s savings clause, the statutory terms of 49 U.S.C. § 30106(a) would be superfluous¹¹⁰ and the exception would swallow the rule.¹¹¹ Because § 324.021(9)(b)2 merely induces but does not require car rental companies to ensure that lessees have the requisite amount of insurance coverage, the court held that § 324.021(9)(b)2 did not qualify as a “financial responsibility law” under the Graves Amendment.¹¹²

Although the *Garcia* court only explicitly addressed the viability of the short-term lessee statute, the preemption analysis should be nearly identical when applied to the long-term lessee statute.¹¹³ When concluding its preemption analysis, the *Garcia* court spoke broadly: “neither the common law imposition of vicarious liability on rental car companies, nor the

107. *Id.*

108. *Id.* at 1249.

109. *Id.* The court reached this decision despite the fact that Florida Statutes § 324.021(9)(b) falls within the chapter entitled “Financial Responsibility” and the section entitled “Definitions; minimum insurance required.” The Florida Supreme Court has previously noted that the title of a chapter reflects legislative intent. *See, e.g., Horowitz v. Plantation Gen. Hosp. Ltd. P’ship*, 959 So. 2d 176, 182 (Fla. 2007). *But see infra* Part III.D.

110. *Garcia*, 540 F.3d at 1248. Courts are generally hesitant to treat statutory terms as surplusage by interpreting a provision in a manner that would render superfluous another portion of that same law. *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837, 837 n.11 (1997). The appellants had argued that the Graves Amendment’s preemption clause would not be superfluous because it would still outlaw unlimited vicarious liability schemes while allowing for statutes, like Florida, that capped the amount of vicarious liability damages. *Garcia*, 540 F.3d at 1248. In support of this contention, the appellants cited legislative history that indicated the Graves Amendment’s sponsors were concerned with unlimited vicarious liability schemes. *Id.*; *see also* 151 CONG. REC. H1201 (daily ed. Mar. 9, 2005) (statement of Rep. Boucher); *id.* at 1202 (Statement of Rep. Graves). However, the court rejected this argument, stating that the Graves Amendment did not provide textual support for a distinction between limited and unlimited vicarious liability. *Garcia*, 540 F.3d at 1248 (stating further that “concern with unlimited vicarious liability [does] not manifest any approval, explicit or implicit, of limited vicarious liability”).

111. *Garcia*, 540 F.3d at 1248. The Court stated that if Florida Statutes § 324.021(9)(b)2 fell within the Graves Amendment’s savings clause, it would effectively nullify the preemption clause. *Id.* “Every vicarious liability suit would be rescued because it could result in a judgment in favor of an accident victim, even though the judgment is premised on the very vicarious liability the Amendment seeks to eliminate.” *Id.*

112. *Id.*

113. The Graves Amendment purports to preempt “the law of any state” that imposes vicarious liability on an owner “engaged in the trade or business of renting or leasing motor vehicles.” SAFETEA-LU, 49 U.S.C. § 30106(a) (2006). *See Rosado v. DaimlerChrysler Fin. Servs. Trust*, 1 So. 3d 1200, 1205–06 (holding that the plain language of the Graves Amendment preempts Florida Statutes § 324.021(9)(b)1).

Florida legislature's endorsement of and limitations on such vicarious liability, constitutes a "financial responsibility" requirement" as contemplated by the Graves Amendment's savings clause.¹¹⁴ Since §324.021(9)(b)1 can be construed as imposing vicarious liability on long-term lessors, *Garcia* should serve as an authoritative guide until a Florida court deems otherwise.¹¹⁵

After determining that the Graves Amendment preempted Florida law, the Eleventh Circuit examined the Amendment's constitutionality under the Commerce Clause.¹¹⁶ The Supreme Court has identified three broad categories of activity that Congress may regulate under its commerce power: (1) the use of channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce.¹¹⁷ The *Garcia* court stated that the Graves Amendment clearly does not regulate the channels of interstate commerce,¹¹⁸ but it did consider whether the Amendment regulates the instrumentalities of commerce.¹¹⁹ Ultimately, the court rejected the first two prongs of the Commerce Clause analysis and examined the amendment's constitutionality under the third prong: whether the elimination of vicarious liability for car rental companies substantially affected interstate commerce.¹²⁰

Relying primarily on the Supreme Court's decision in *Gonzales v. Raich*,¹²¹ the Eleventh Circuit held that the aggregate effects of imposing vicarious liability on car rental companies had a substantial effect on interstate commerce.¹²² The court stated that the Graves Amendment

114. *Garcia*, 540 F.3d at 1249. Lower federal courts have also employed similar analyses when explicitly addressing the long-term lessor statute. *See, e.g.*, *St. Paul Fire & Marine Ins. Co.*, No. 6:07-cv-756-Orl-22GJK, 2008 WL 1897602, at *6 (stating that § 324.021(9)(b)1, like § 324.021(9)(b)2, "does not mandate that the lessor purchase insurance, or maintain a certain level of coverage, and it does not penalize the lessor for failure to comply with Florida's ordinary financial responsibility requirements").

115. *But see supra* note 84.

116. *Garcia*, 540 F.3d at 1249. The Commerce Clause states that "[t]he Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

117. *See* *United States v. Morrison*, 529 U.S. 598, 608–09 (2000); *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir. 2005).

118. *Garcia*, 540 F.3d at 1250.

119. *Id.* Some authority supports the proposition that cars are per se instrumentalities of commerce, regardless of whether the car has crossed state lines. *See* *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995). If that was the case, the *Garcia* court noted that Congress would have a plenary power to regulate not only the car rental market, but also many aspects of automobile use. *Garcia*, 540 F.3d at 1250. Because the implications of construing all automobiles as per se instrumentalities would be far-reaching, the court decided it would be more prudent to examine the Graves Amendment's constitutionality under the third prong of the Commerce Clause power. *Id.*

120. *Garcia*, 540 F.3d at 1250–51.

121. 545 U.S. 1, 25 (2005).

122. *Garcia*, 540 F.3d at 1251–52.

protects car rental markets by eliminating state-imposed vicarious liability laws that Congress deemed burdensome to the car rental industry.¹²³ Because the state tort law and resulting lawsuits were a “burden on an economic activity with substantial effects on commerce,” the Graves Amendment’s effect, through federal preemption, was to deregulate the car rental market.¹²⁴ Since “it has long been understood that the commerce power includes not only the ability to regulate interstate markets, but [also] the ability to facilitate interstate commerce by removing intrastate burdens and obstructions to it,”¹²⁵ Congress’ method of protecting the entire car rental market through deregulation was deemed permissible.¹²⁶ The court held that this “novel”¹²⁷ method of federal regulation was constitutional, stating that “Congress may choose any ‘means reasonably adapted to the attainment of the suited end, even though they involved control of intrastate activities.’”¹²⁸

Garcia v. Vanguard will not be the last major constitutional challenge to the Graves Amendment,¹²⁹ and the issue could eventually make it to the Supreme Court.¹³⁰ While it remains to be seen how the Florida Supreme

123. *Id.* at 1252.

124. *Id.*

125. *Id.* (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31–32 (1937)). Note that the tortfeasor in *Garcia* never left the state of Florida and the record did not indicate whether he intended to do so. *Garcia*, 540 F.3d at 1245.

126. *Id.* at 1253. One should note that the Graves Amendment’s legislative history is devoid of any evidence that deregulation or market protection were motives for its passage. *See generally* 151 CONG. REC. H1199-1202 (daily ed. Mar. 9, 2005). Nor did members of Congress ever discuss Congress’ authority to enact the legislation under the Commerce Clause. *See id.*

127. Congress had only once previously enacted a federal statute with the sole purpose and effect of preempting “burdensome suits” based on state law. *Garcia*, 540 F.3d at 1252. The Protection of Lawful Commerce in Arms Act (PLCAA) preempts certain tort suits against gun manufacturers. *See* 15 U.S.C. §§ 7901–03 (2006). This statute has also been widely criticized as an unconstitutional exercise of Congressional power. *See, e.g.*, Jenny Miao Jiang, *Regulating Litigation Under the Protection of Lawful Commerce in Arms Act: Economic Activity or Regulatory Nullity?*, 70 ALB. L. REV. 537, 542–43 (2007). However, as of the date of this Note, the statute has withstood constitutional challenges. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) (upholding the constitutionality of the statute). *See generally* 17 A.L.R. FED. 2D § 167 (2008) (collecting and analyzing cases that “have determined issues concerning the validity, construction or application of the PLCAA”).

128. *Garcia*, 540 F.3d at 1253 (citing *United States v. Darby*, 312 U.S. 100, 121 (1941)).

129. Trial lawyers have predicted that constitutional challenges will continue unless the Supreme Court addresses the issue. *See, e.g.*, Being Prepared, <http://seitelman.wordpress.com/2008/09/03/car-rental-agencies-win-one-round/> (Sept. 3, 2008, 20:45 EST). New York is a hotbed of judicial activity in this area. *See, e.g.*, *Stampolis v. Provident Auto Leasing Co.*, 586 F.2d 88 (E.D.N.Y. 2008) (upholding the constitutionality of the Graves Amendment); *Graham v. Dunkley*, 852 N.Y.S.2d 169 (N.Y. App. Div. 2008) (upholding the constitutionality of the Graves Amendment and preempting New York’s vicarious liability statute).

130. If federal circuit courts split, or if a state supreme court decision conflicts with the Eleventh Circuit’s ruling in *Garcia v. Vanguard*, the Supreme Court could grant certiorari. ROBERT L. STERN, *SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES*

Court will react to *Garcia v. Vanguard*,¹³¹ the Eleventh Circuit's decision is highly persuasive.¹³² Post-*Garcia*, Florida's Fourth District Court of Appeal, in *Vargas v. Enterprise Leasing Co.*, was the first Florida appellate court to weigh in on the constitutionality of the Graves Amendment.¹³³ After holding the Graves Amendment unconstitutional only a few months prior,¹³⁴ the Fourth District Court of Appeal reversed itself, relying heavily on the *Garcia* decision to hold that the Graves Amendment was constitutional and preempted Florida Statutes § 324.021(9)(b)2.¹³⁵ By the end of 2008, each Florida District Court of Appeal had similarly held that the Graves Amendment was constitutional and preempted Florida law.¹³⁶ Thus, unless the Florida Supreme Court decides otherwise, the district courts of appeal will undoubtedly continue to follow the Eleventh Circuit's holding in *Garcia*, effectively putting to death Florida's vicarious liability law as applied to short-term lessors.¹³⁷

226, 240 (2002). *But see infra* note 180.

131. The Florida Supreme Court has not yet addressed the question of great public importance certified by Florida's Fourth District Court of Appeal in *Vargas v. Enterprise Leasing Co.*, 993 So. 2d 614, 624 (Fla. 4th DCA 2008) ("DOES THE GRAVES AMENDMENT, 49 U.S.C. § 30106, PREEMPT SECTION 324.021(9)(B)2, FLORIDA STATUTES (2007)?"). As of the date of this Note, *Vargas* remains active on the Florida Supreme Court's docket.

132. The Supremacy Clause of the U.S. Constitution states that federal laws "shall be the supreme law of the land; and the judges in every State shall be bound thereby, any[] . . . laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. However, "[s]tate courts . . . are not bound by any federal court regarding the interpretation of state law and only by the United States Supreme Court in regard to interpretations of the United States Constitution and Acts of Congress." Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers v. Blount Int'l, Ltd., 519 So. 2d 1009, 1012 (Fla. 2d DCA 1987); *see also* Johnson v. Fankell, 520 U.S. 911, 916 (1997) (stating that federal courts lack the authority to place a construction on a state statute different from the one rendered by a state's highest court, regardless of whether the state law is procedural or substantive); State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976) (stating that although "lower federal court rulings may be . . . persuasive, such rulings are not binding on state courts"); Exch. Nat'l Bank in Winter Haven v. Sheffield, 166 So. 2d 807, 808, 809 (Fla. 2d DCA 1964) (stating that a federal appellate decision construing a Florida statutes which has not been construed by Florida courts was not conclusive on the district court of appeal but was highly persuasive).

133. 993 So. 2d 614 (Fla. 4th DCA 2008) (en banc) (holding the Graves Amendment within Congress' commerce powers and the state cap on rental car company vicarious liability not a financial responsibility exemption); *see supra* note 131 and accompanying text.

134. *See* Brookins v. Ford Credit Titling Trust, No. 4D07-2010, 2008 WL 2663715 (Fla. 4th DCA July 9, 2008), *corrected and superseded by* No. 4D07-2010, 2008 WL 2744335 (Fla. 4th DCA July 16, 2008), *reh'g granted en banc, withdrawn*, 993 So. 2d 178 (Fla. 4th DCA 2008).

135. *Vargas*, 993 So. 2d at 623.

136. *See Vargas*, 993 So. 2d at 623–24; Karling v. Budget Rent A Car Sys., Inc., 2 So. 3d 354, 355 (Fla. 5th DCA 2008); Kumarsingh v. PV Holding Corp., 983 So. 2d 599, 601 (Fla. 3d DCA 2008); Lucas v. Williams, 984 So. 2d 580, 580 (Fla. 1st DCA 2008); St. Onge v. White, 988 So. 2d 59, 60 (Fla. 1st DCA 2008); Bechina v. Enter. Leasing Co., 972 So. 2d 925, 926–27 (Fla. 3d DCA 2007).

137. Although *Garcia* only explicitly addressed short-term lessors, it is likely that the district courts of appeal will apply the Graves Amendment to long-term lessors. *Garcia*, 540 F.3d at 1245–

D. *Why the Graves Amendment May Not Preempt Florida Law*

Since the Graves Amendment does not define “financial responsibility,”¹³⁸ a court could construe Florida Statutes § 324.021(9)(b)2 to fit within the savings clause of the Graves Amendment.¹³⁹ Florida Statutes § 324.021(9)(b)2 resides in the chapter entitled “Financial Responsibility,”¹⁴⁰ and the title of a chapter generally reflects legislative intent.¹⁴¹ Florida courts have never doubted that Florida Statutes § 324.021(9)(b) is a financial responsibility law for purposes of Florida law.¹⁴² Likewise, before the Eleventh Circuit’s decision in *Garcia*, at least one Florida court, without addressing whether the Graves Amendment was constitutional, ruled that the Graves Amendment did not preempt Florida Statutes § 324.021(9)(b)2.¹⁴³

However, Florida’s opinion of its own law is not the dispositive issue. The question remains whether Congress intended for statutes like Florida Statutes § 324.021(9)(b) to fall within the Graves Amendment’s savings clause. Although the manifest weight of the evidence suggests that the Graves Amendment preempts all Florida law,¹⁴⁴ the issue is not without debate. Historically, an “intention of Congress to exclude states from exerting their police power must be clearly manifested.”¹⁴⁵ The Court has held that a “presumption against the pre-emption of state police power regulations . . . is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.”¹⁴⁶ But

49; *see also supra* notes 113–15 and accompanying text.

138. *Garcia*, 540 F.3d at 1246.

139. *See infra* note 143 and accompanying text; *supra* note 131.

140. *See* FLA. STAT. § 324.021(9)(b) (2009).

141. *See, e.g.,* Aramark Unif. & Career Apparel, Inc. v. Easton, 894 So. 2d 20, 25 (Fla. 2004); City of Boca Raton v. State, 595 So. 2d 25, 29–30 n.3 (Fla. 1992); *see also* FLA. STAT. § 324.011 (2009) (noting that a purpose of the chapter is to “provide financial security requirements for such owners or operators whose responsibility it is to recompense others for injury”). However, “distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would ‘elevate form over substance . . .’” *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 214 (2004).

142. *See, e.g.,* Susco Car Rental Sys. of Fla. v. Leonard, 112 So. 2d 832, 837 n.17 (1959) (citing Florida Statutes Chapter 324 as a provision to assure financial responsibility of owners); *Poole v. Enter. Leasing Co.*, No. 05-2005-CA-008150, 2006 WL 1388442, at *1 (Fla. 18th Cir. Ct. Mar. 9, 2006); *see also supra* note 109 and accompanying text.

143. *See Poole*, 2006 WL 1388442, at *1.

144. *See supra* notes 101–15 and accompanying text. Courts must apply valid rules of federal law when they contradict state laws under the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2.

145. *Allen-Bradley Local v. Wis. Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (quoting *Napier v. Atl. Coast Line R.R.*, 272 U.S. 605, 611 (1926)).

146. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotations omitted). The appropriateness of a presumption against federal preemption has been the subject of much debate. *See generally* Chemerinsky, *supra* note 62 (arguing that recent Supreme Court cases have shifted the presumption in favor of preemption); Scordato, *supra* note 62, at 29 (criticizing the presumption against preemption).

the Court has not reliably applied this presumption, leading critics to accuse the Court of imposing substantive preferences in preemption cases.¹⁴⁷ Given the unpredictability inherent in federal preemption analysis, a court could broadly construe the Graves Amendment's savings clause and find a clear and manifest intent *not* to preempt Florida's financial responsibility law.¹⁴⁸

The savings clause in 49 U.S.C. § 30106(b)(1) contemplates statutes that directly require owners to meet the financial responsibility or insurance standards as a precursor to the registration and operation of a motor vehicle.¹⁴⁹ The *Garcia* court opined that Florida Statutes § 324.021(9)(b)2 does not qualify as a financial responsibility law under 49 U.S.C. § 30106(b)(1) because it merely induces, but does not directly require, car rental companies to ensure that their lessees are fully insured.¹⁵⁰ To date, this first subsection has been the primary focus of Graves Amendment jurisprudence.¹⁵¹ However, 49 U.S.C. § 30106(b)(2) may be broader in effect and thus warrants separate analysis.¹⁵²

The Graves Amendment will not preempt any state law “imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for *failure to meet the financial responsibility or liability insurance requirements* under State law.”¹⁵³ This provision does not refer to any single part of a state's financial responsibility laws or minimum insurance requirements; rather, by referring to state laws generically, Congress could have been referring to the entire class of laws.¹⁵⁴ Hence, 49 U.S.C. § 30106(b)(2) may apply to any state law within

147. *New Evidence*, *supra* note 62, at 1604. “Modern preemption jurisprudence is a muddle” and preemption issues uniquely cut across ideological lines in non-traditional ways, often leading to strange bedfellows in this area. Scordato, *supra* note 62, at 3–4, 8.

148. Before the Eleventh Circuit's decision in *Garcia*, a Florida appellate court reached this conclusion. *Brookins v. Ford Credit Titling Trust*, No. 4D07-2010, 2008 WL 2663715 (Fla. 4th DCA July 9, 2008), *corrected and superseded by* No. 4D07-2010, 2008 WL 2744335 (Fla. 4th DCA Jul. 16, 2008), *reh'g granted en banc, withdrawn*, 993 So. 2d 178 (Fla. 4th DCA 2008).

149. *See* 49 U.S.C. § 30106(b)(1) (2006).

150. *Garcia*, 540 F.3d at 1248. In contrast, the Eleventh Circuit suggested that Florida Statutes § 324.021(7)'s minimum insurance requirements for all vehicle owners, would qualify as a financial responsibility law as contemplated by the Graves Amendment. *See id.* at 1247.

151. The *Garcia* court reasoned that Florida Statutes § 324.021(9)(b)2 could not qualify as a financial responsibility law pursuant to the Graves Amendment's savings clause because in so doing the exception would swallow the rule. *Id.* at 1248.

152. Ironically, by completely neglecting to address the Florida statutes under the second subsection of the savings clause, the *Garcia* court interpreted § 30106(b)(1) to swallow 49 U.S.C. § 30106(b)(2). *Vargas*, 993 So. 2d at 625–26 (Farmer, J., dissenting); *see also Garcia*, 540 F.3d at 1247 (noting that “[b]oth provisions of the savings clause strongly imply that financial responsibility is closely linked to insurance requirements.”).

153. 49 U.S.C. § 30106(b)(2) (2006) (emphasis added).

154. *Vargas*, 993 So. 2d at 626 (Farmer, J., dissenting). Judge Farmer suggested that Congress “intentionally and purposefully omitted any special definition of *financial responsibility* laws of its own because this term is widely used and understood to refer to an entire class of laws.” *Id.*; *see*

the universe of financial responsibility and minimum insurance laws, including Florida's short-term and long-term lease statutes.¹⁵⁵

Additionally, unlike 49 U.S.C. § 30106(b)(1), there is nothing in § 30106(b)(2) that specifies whether the statute must *directly* impose liability for a failure to meet financial responsibility or insurance requirements.¹⁵⁶ Courts have previously interpreted Florida Statutes § 324.021(9)(b)2 as “simply a cap on strict vicarious liability damages and nothing more.”¹⁵⁷ But an alternative interpretation characterizes Florida Statutes § 324.021(9)(b)2 as follows:

Section 324.021(9)(b) fixes financial responsibility through a liability insurance requirement. . . . [and] fixes minimum insurance requirements as the basis for eliminating vicarious responsibility of the [lessors]. They force the [lessor] to place these minimum insurance requirements in every lease or rental contract. If the [lessee] should fail to comply with the contract and have such insurance in effect, then the [lessor] must itself have back-up coverage or face liability for the fault of the operator of the vehicle. Essentially, the [lessor's] only duty under this statute is to see that insurance is actually in effect at all times.¹⁵⁸

Thus, § 324.021(9)(b)2 may actually eliminate lessors' vicarious liability; lessors only have a duty to secure the placement of the minimum insurance amounts as specified in the statute and failure to do so may result in liability for up to \$500,000 in economic damages.¹⁵⁹ Therefore,

also id. at 626–27 n.16 (listing numerous federal statutes that use the term “financial responsibility” and noting that in “every other instance Congress has used the term to refer not to a single statute or particular provision within a statute but only in a general sense to refer to a whole class”).

155. *Id.* at 626.

156. *Id.* Section 30106(b)(2) clearly indicates that lessors are not relieved from all state-imposed insurance responsibilities. 49 U.S.C. § 30106(b)(2).

157. *Garcia v. Vanguard Car Rental USA, Inc.*, 510 F. Supp. 2d 821, 832 (M.D. Fla. 2007).

158. *Vargas*, 993 So. 2d at 633 (Farmer, J., dissenting). The *Vargas* dissent questioned whether the Graves Amendment actually conflicted with § 324.021(9)(b)2: “How does a State law ending the vicarious liability of [lessors] when they provide security for financial responsibility through minimum insurance requirements have any conflict with a federal law not affecting financial responsibility insurance obligations imposed under State law and which preempts only the vicarious liability of [lessors]?” *Id.* at 625.

159. *Id.* at 633; *see also* FLA. STAT. § 324.021(9)(b)2 (2009). When the lessor fails to ensure that the lessee has an appropriate amount of insurance coverage, the lessor has violated the minimum insurance requirements. *Vargas*, 993 So. 2d at 633 (Farmer, J., dissenting). Although the extent of the lessor's additional liability is contingent upon the injured victim's economic damages, liability is not vicarious; the additional liability penalizes the lessor for its failure to meet the minimum insurance requirements, compensating the victim for the lessor's wrongful conduct and deterring the lessor from engaging in future misconduct. *See* FLA. STAT. § 324.011 (2009).

49 U.S.C. § 30106(b)(2) arguably exempts state laws like Florida Statutes § 324.021(9)(b)2 that *indirectly* impose liability on a motor vehicle owner for failure to meet its financial responsibility or liability insurance requirements.¹⁶⁰

If after employing various canons of construction a court still found ambiguity in the language of the Graves Amendment's savings clause, a court could consult the legislative history to elucidate congressional intent.¹⁶¹ It is clear from the discussion on the House floor that the Graves Amendment was specifically aimed at state statutes that permitted an unlimited amount of vicarious liability damages to be imposed against car rental companies.¹⁶² However, Congress arguably did not intend for the Graves Amendment to eliminate statutory schemes, like Florida Statutes § 324.021(9)(b)2, which limits the amount of vicarious liability damages.¹⁶³

E. *Why the Graves Amendment May Be Held Unconstitutional*

The Eleventh Circuit's decision to analyze the Graves Amendment under the aggregation doctrine was outcome-determinative.¹⁶⁴ Pursuant to *Gonzales v. Raich*'s¹⁶⁵ aggregation analysis, "Congress need only have a rational basis for concluding that the regulated activities, in the aggregate, substantially affect interstate commerce."¹⁶⁶ However, as the Eleventh Circuit noted, the Supreme Court has made clear that aggregation analysis is not appropriate in every context.¹⁶⁷ The fate of the Graves Amendment could be markedly different if a court chooses to interpret the Graves

160. The counterargument is that Florida Statutes § 324.021(9)(b)2 merely caps, and does not impose, liability on lessors (indirectly or otherwise). *Vargas*, 993 So. 2d at 621 (majority opinion). Further, the provision that creates potential liability for an additional \$500,000 when the lessee fails to secure adequate insurance is arguably "a contingency provision, effectively creating a cost-benefit risk analysis for motor vehicle lessors." *Garcia*, 510 F. Supp. 2d at 831.

161. *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008).

162. See 151 CONG. REC. H1201 (2005) (daily ed. Mar. 9, 2005) (statement of Rep. Boucher); *id.* at 1202 (Statement of Rep. Graves).

163. See FLA. STAT. § 324.021(9)(b)2 (2009).

164. See *Garcia*, 540 F.3d at 1251–52.

165. 541 U.S. 1 (2005).

166. *Garcia*, 540 F.3d at 1251 (citing *Raich*, 541 U.S. at 22). In *Raich*, which is the most recent seminal Supreme Court case in Commerce Clause jurisprudence, the Court upheld the constitutionality of a federal statute regulating intrastate manufacture and possession of medicinal marijuana. *Raich*, 541 U.S. at 9; J. Richard Broughton, *The Second Death of Capital Punishment*, 58 FLA. L. REV. 639, 661 (2006); see also Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404(a), 21 U.S.C. §§ 841(a)(1), 844(a) (2006).

167. *Garcia*, 540 F.3d at 1251; see also *United States v. Lopez*, 514 U.S. 549, 561 (1995) (noting that the criminal statute at issue was not an *essential* part of a larger regulatory scheme and hence not subject to aggregation analysis); *United States v. Morrison*, 529 U.S. 598, 599 (2000) (noting that Congress may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce).

Amendment pursuant to the Supreme Court's "significant considerations" analysis in *United States v. Morrison*¹⁶⁸ or *United States v. Lopez*.¹⁶⁹

In 1995, for the first time in nearly six decades, the *Lopez* Court struck down a federal statute on the grounds that Congress unconstitutionally exceeded its Commerce Clause power.¹⁷⁰ At issue was the constitutionality of the Gun-Free School Zones Act of 1990,¹⁷¹ which made it a federal offense for an individual to knowingly possess a firearm within one thousand feet of a school.¹⁷² In a 5 to 4 decision, the Court held that the presence of a gun in a school zone did not have a substantial effect on interstate commerce, thus holding the statute unconstitutional.¹⁷³

Five years later, the Court's decision in *Morrison* demonstrated that *Lopez* was not an aberration, signaling that the Court would scrupulously monitor federal laws that attempted to regulate intrastate activities.¹⁷⁴ The *Morrison* Court held unconstitutional a provision of the Violence Against Women Act¹⁷⁵ that permitted a private civil remedy to victims of gender-based violence, even when no criminal charges were filed.¹⁷⁶ The Court

168. 529 U.S. 598, 609–17 (2000).

169. 514 U.S. 549, 561 (1995). The Eleventh Circuit noted that the *Morrison* and *Lopez* Courts' "significant considerations" analysis is less deferential than the "aggregation analysis" under *Raich. Garcia*, 540 F.3d at 1251. Earlier federal district court rulings highlight the outcome-determinative nature of the choice of what test to apply. Compare *Vanguard Car Rental USA, Inc. v. Drouin*, 521 F. Supp. 2d 1343, 1349–51 (S.D. Fla. 2007) (finding the Graves Amendment unconstitutional after taking into account *Morrison*'s and *Lopez*'s "significant considerations" test) and *Vanguard Car Rental USA, Inc. v. Huchon*, 532 F. Supp. 2d 1371, 1380–82 (S.D. Fla. 2007) (holding the Graves Amendment unconstitutional under the *Lopez* and *Morrison* "significant consideration" four-factor test), with *Garcia v. Vanguard Car Rental USA, Inc.*, 510 F. Supp. 2d 821, 836–37 (M.D. Fla. 2007) (holding the Graves Amendment constitutional under the *Raich* "aggregation analysis" and rejecting the *Morrison* four-factor test).

170. A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL'Y 101, 138 (2007). From 1937 to 1995, the Court took an expansive view of the federal Commerce Clause power, causing a proliferation of federal regulation of conduct and transactions. Cary B. Davis, Comment, *The Commerce Clause: Border Crossing + Church Burning = Interstate Commerce (A Formula for Federalizing Common Law State Crimes)*, 57 FLA. L. REV. 975, 976 (2005).

171. Gun Free School Zone Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844 (codified as amended at 18 U.S.C. §§ 921(a)(25), 922(q), 924(a) (2006)).

172. Erwin Chemerinsky, *Dunwoody Distinguished Lecture in Law: The Values of Federalism*, 47 FLA. L. REV. 499, 518 (1995) (citing 18 U.S.C. § 922(q)(1)(A) (Supp. 1993); *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

173. *Id.* at 520 (citing *Lopez*, 514 U.S. at 567).

174. Kevin M. Shuler, Note, *Is The Endangered Species Act Endangered in the Age of Strict Federalism? A Florida Perspective on the Recent Commerce Clause Challenges to the ESA*, 57 FLA. L. REV. 1135, 1144 (2005).

175. 42 U.S.C. § 13981 (2006).

176. *Morrison*, similar to *Lopez*, was a 5 to 4 decision. *Morrison*, 529 U.S. at 600–02. The Court also decided that Congress lacked constitutional authority to enact the statute under the Enforcement Clause of the Fourteenth Amendment. *Id.* at 627; see also U.S. CONST. amend XIV, § 5 (granting Congress power to enforce the provisions of the Fourteenth Amendment by enacting

stated that Congress could not “regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”¹⁷⁷ Similar to *Lopez*, the *Morrison* Court analyzed the federal statute under the “substantial relation” prong of the commerce clause test.¹⁷⁸ In evaluating a facial challenge to the constitutionality of a federal statute, the Court proffered a four-factor test to determine whether the regulated activity “substantially affected” interstate commerce:

- 1) Whether Congress made findings about the activity’s impact on interstate commerce,
- 2) Whether the federal statute contains an “express jurisdictional element” limiting the statute’s reach,
- 3) Whether the activity is commercial or economic by nature, [and]
- 4) Whether the connection between the activity and its effect on interstate commerce is attenuated.¹⁷⁹

If a court analyzed the Graves Amendment under this four-prong test, it is significantly less likely that the Amendment would pass muster.¹⁸⁰ Foremost, it is uncontroverted that Congress did not make findings about the impact of vicarious liability claims on the interstate car rental and leasing industries,¹⁸¹ nor did Congress include express jurisdictional elements that limited the Graves Amendment’s reach.¹⁸² The statute is

appropriate legislation).

177. *Morrison*, 529 U.S. at 617.

178. *Id.* at 608–09; *see also Lopez*, 514 U.S. at 567.

179. *Vanguard Car Rental USA, Inc. v. Drouin*, 521 F. Supp. 2d 1343, 1349 (S.D. Fla. 2007) (citing *Morrison*, 529 U.S. at 610–12); *Vanguard Car Rental USA, Inc. v. Huchon*, 532 F. Supp. 2d 1371, 1380 (S.D. Fla. 2007) (citing *Morrison*, 529 U.S. at 610–12).

180. *See supra* note 169 and accompanying text. Thus far, the Supreme Court has refused to enter the Graves Amendment debate. *See, e.g., Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 1369 (2009).

181. *Drouin*, 521 F. Supp. 2d at 1349; *Huchon*, 532 F. Supp. 2d at 1380. During debate on the House floor, Representative Graves repeatedly stated that vicarious liability claims cost consumers more than \$100 million annually, but it is unclear how this figure was determined. 151 CONG. REC. H1200 (daily ed. Mar. 9, 2005). There were no hearings. 151 CONG. REC. H1201 (daily ed. Mar. 9, 2005) (Statement of Rep. Conyers). Moreover, no members of Congress even suggested that regulated state-imposed liability claims substantially affected the motor vehicle leasing or rental industry. 151 CONG. REC. S5433 (daily ed. May 18, 2005) (statement of Sen. Santorum); *see also* 151 CONG. REC. H1199-1202 (daily ed. Mar. 9, 2005) (House Debate on Graves Amendment).

182. *Drouin*, 521 F. Supp. 2d at 1349; *Huchon*, 532 F. Supp. 2d at 1380. The immunity protections within the statute clearly apply to wholly intrastate practices. The Graves Amendment applies to motor vehicle owners that are “engaged in the trade or business of renting or leasing motor vehicles.” 49 U.S.C. § 30106(a)(1) (2006). Consider a scenario in which a Florida company rents mopeds on Key West and does not permit lessors to travel off of the island. Assuming motor vehicles are not per se instrumentalities of commerce, the rental company is engaged in a wholly intrastate activity. However, the Graves Amendment would shield that company from vicarious

arguably economic in nature, as rental and leasing companies may pass the expense of satisfying vicarious liability judgments to its customers.¹⁸³

But the strength of the connection between the regulated activity and its effect on interstate commerce is attenuated.¹⁸⁴ Florida Statutes § 324.021(9)(b)2 effectively imposes civil liability on short-term lessors for their lessees' negligence.¹⁸⁵ Car rental companies may choose to respond to that potential liability by passing the potential costs on to their customers, which could affect interstate commerce.¹⁸⁶ It is debatable whether the piling of inferences in this manner is sufficient to justify the regulation. Further, it is unlikely that a single judgment imposing vicarious liability on a car rental company would affect the industry as a whole,¹⁸⁷ as there are an estimated 1.813 million vehicles in service¹⁸⁸ and market industry revenues approximate \$21.88 billion.¹⁸⁹ Even if the estimated cost

liability claims. The Eleventh Circuit compared the Graves Amendment to the PLCAA, a statute that also eliminated state-based tort claims. *See supra* note 127. But unlike the Graves Amendment, a jurisdictional nexus is included with each subsection of the PLCAA, clearly defining which sellers are given qualified immunity. *See* 15 U.S.C. § 7903(6) (2006).

183. *Drouin*, 521 F. Supp. 2d at 1349; *Huchon*, 532 F. Supp. 2d at 1380. However, the Court held in *Lopez* that a criminal statute has nothing to do with “‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Lopez*, 514 U.S. at 561. The question remains whether civil liability for harm, the activity regulated by the Graves Amendment, is economic in nature. *See infra* notes 199–202 and accompanying text.

184. *Drouin*, 521 F. Supp. 2d at 1349; *Huchon*, 532 F. Supp. 2d at 1380; *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (stating that Congressional power to regulate commerce “may not be extended so as to embrace effects upon interstate commerce so indirect and remote that . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government”).

185. FLA. STAT. § 324.021(9)(b)2 (2009); *see also supra* Part III.B.

186. *Drouin*, 521 F. Supp. 2d at 1349; *Huchon*, 532 F. Supp. 2d at 1380.

187. In spite of the Graves Amendment's shielding of car rental companies, rental costs have spiraled upward in recent years due to higher vehicle costs. Carol Wolf, *Car Rental Costs Spiral Upward*, THE BOSTON GLOBE, Apr. 22, 2007, at D4. In 2009 alone, “the average weekly rate for a compact car rental at an airport jumped 51 percent from 2008 levels, to \$335.05,” while fleet sizes and demand have decreased. *Report: Rental Car Rates Jumped 51 percent in 2009*, PHOENIX BUS. J., Jan. 11, 2010, available at <http://phoenix.bizjournals.com/phoenix/stories/2010/01/11/daily3.html>. Furthermore, rising gas prices have plagued car rental companies; car rental companies have been slow to respond to consumers' demand for fuel-efficient rental vehicles and thus have limited supply. Ken Bensinger, *A 16-mpg Rental Car: That's an Upgrade?*, L.A. TIMES, July 14, 2008, at A1.

188. 2008 U.S. CAR RENTAL MARKET, AUTO RENTAL NEWS (2008), available at http://www.autorentalnews.com/t_pop_pdf.cfm?action=stat&link=http://www.fleet-central.com/resources/ARNFB09UScarrentalMarket.pdf.

189. 2008 RENTAL REVENUE, AUTO RENTAL NEWS (2008), available at http://www.autorentalnews.com/t_pop_pdf.cfm?action=stat&link=http://www.fleet-central.com/resources/ARNFB09UScarrentalRevenue.pdf. Despite a reduction in the total number of rented vehicles from 2007 to 2008, industry revenues increased by approximately \$390 million during that period. *Id.* Over the past decade, the auto rental industry has increased its revenues by approximately \$10 billion. *See* U.S. CENSUS BUREAU, COMPARATIVE STATISTICS: 2002, at 20 (2006), available at <http://www.census.gov/prod/ec02/ec0200ccomp.pdf> (showing that the 2002 annual

of \$100 million annually from vicarious liability judgments was accurate, as advanced by Representative Graves,¹⁹⁰ that figure accounts for less than 0.5% of the car rental industry's total revenue.¹⁹¹ One questions how "substantially" the now preempted state vicarious liability laws affected interstate commerce.

Because a court would likely hold the Graves Amendment unconstitutional under the *Morrison* four-factor test, the dispositive question is whether it is appropriate to use *Raich*'s aggregation analysis.¹⁹² *Lopez* and *Morrison* dictated that aggregation analysis is only appropriate if the regulated activity is truly economic in nature.¹⁹³ Likewise, the Eleventh Circuit has stated that "the comprehensiveness of the economic component of the regulation" is what distinguishes *Raich* from *Morrison* and *Lopez*.¹⁹⁴ The *Garcia* court had no difficulty concluding that "the commercial leasing of cars is, in the aggregate, an economic activity with substantial effects on interstate commerce."¹⁹⁵ It stated that the commercial leasing of cars substantially affected interstate commerce in the aggregate because: (1) the industry is large in size; (2) the industry is national in scope; and (3) rented vehicles are often used as instrumentalities of interstate commerce.¹⁹⁶

This conclusory analysis is unconvincing. While the effects of the Graves Amendment itself could affect interstate commerce, that is not the proper inquiry. Courts must determine whether the *activity being regulated* has a substantial effect on interstate commerce.¹⁹⁷ The Graves Amendment

revenue for passenger car rental was approximately \$18.6 billion and that the 1997 annual revenue for passenger car rental was approximately \$14.8 billion).

190. See *supra* note 49 and accompanying text.

191. Although the \$100 million in costs would decrease the rental companies' profits, as opposed to revenues, the rental companies undoubtedly pass that projected cost onto consumers.

192. See *supra* note 169 and accompanying text. The Eleventh Circuit has previously noted that "potential confusion . . . may arise from the now unclear status of the four *Morrison/Lopez* factors post-*Raich*." *United States v. Maxwell*, 446 F.3d 1210, 1216 n.6 (11th Cir. 2006).

193. Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 22 (2005); see also *United States v. Morrison*, 529 U.S. 598, 613 (2000) ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

194. *Maxwell*, 446 F.3d at 1214. The *Raich* Court went to great lengths to distinguish, rather than overrule, *Lopez* and *Morrison*. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (noting that unlike the statutes in *Lopez* and *Morrison*, the activities regulated by the statute in *Raich* were "quintessentially economic").

195. *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1252 (11th Cir. 2008). However, the Graves Amendment does not directly regulate the commercial leasing of cars. See *infra* note 198 and accompanying text.

196. *Garcia*, 540 F.3d at 1252.

197. See *Morrison*, 529 U.S. at 610 (holding that the regulated activities were non-economic and thus not a part of "commerce," even though the activity had economic effects); *United States v.*

does not directly regulate the auto rental market or its vehicles; it limits the civil liability of lessors for the negligence of their lessees.¹⁹⁸ Arguably, vicarious liability claims are not “economic” even under the expansive definition supplied by *Raich*.¹⁹⁹ Accident victims do not seek damages in furtherance of any cognizable market, and an award of damages cannot be reasonably classified as a commodity.²⁰⁰ Moreover, injured parties do not acquire actual wealth from their vicarious liability claims; they seek recompense for what was lost in the accident.²⁰¹ Thus, because a court

Lopez, 515 U.S. 549, 567 (1995); *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting) (“[A]sk[ing] whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so . . . seems inconsistent with the Supreme Court’s holdings in *United States v. Lopez* . . . and *United States v. Morrison*.”). Of course this inquiry would be much easier had Congress made any findings on the effect of state-based vicarious liability claims on the interstate car rental industry as a whole. See *supra* note 181 and accompanying text.

198. See 49 U.S.C. § 30106(a) (2006). There is no evidence that Congress intended for the Graves Amendment to remove burdens from interstate commerce, nor did Congress even discuss whether such claims substantially affected the interstate auto rental industry. 151 CONG. REC. S5433-34 (daily ed. May 18, 2005) (statement of Sen. Santorum); 151 CONG. REC. H1199-1202 (daily ed. Mar. 9, 2005) (House Debate on Graves Amendment). However, the Eleventh Circuit reasoned that the distinction between a regulation of state tort law and the regulation of the car rental market was irrelevant. *Garcia*, 540 F.3d at 1252. The effect of the statute was to deregulate the car rental market, and “it has long been understood that the commerce power includes not only the ability to regulate interstate markets, but the ability to facilitate interstate commerce by removing intrastate burdens and obstructions to it.” *Id.* But under *Garcia*’s rationale, Congress could preempt any state statute that has the potential to raise the cost of doing business within a particular state. See *Vanguard Car Rental USA, Inc. v. Drouin*, 521 F. Supp. 2d 1343, 1350 (S.D. Fla. 2007).

199. *Raich* defines *economics* as “the production, distribution, and consumption of commodities.” *Raich*, 545 U.S. at 25 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). The Court noted that the prohibition of the medicinal marijuana was proper because “there is an established, and lucrative, interstate market.” *Id.* at 26. Additionally, *Black’s Law Dictionary* defines commerce as “[t]he exchange of goods and services” or “[t]rade and other business activities.” BLACK’S LAW DICTIONARY 304 (9th ed. 2009). If the Court construed the imposition of tort liability as “economic” or commercial, it would require a broader definition than the one supplied in *Raich* or *Black’s Law Dictionary*. However, critics have argued that because almost any human activity could be construed to involve “distribution” or “consumption” of a commodity, a court could classify virtually any non-economic activity as economic. Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules after Gonzales v. Raich*, 2005–06 CATO SUP. CT. REV. 113, 118 (2006); see also *Raich*, 545 U.S. at 48 (O’Connor, J., dissenting) (stating that “the Court’s definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach”).

200. *Black’s Law Dictionary* defines a *commodity* as “[a]n article of trade or commerce,” which “embraces only tangible goods, such as products or merchandise, as distinguished from services.” BLACK’S LAW DICTIONARY 310 (9th ed. 2009).

201. See *Miller v. Robertson*, 266 U.S. 243, 257 (1924) (“Compensation is a fundamental principle of damages whether the action is in contract or in tort.”); *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965) (stating that “the primary basis for an award of damages is *compensation* . . . to make the injured party whole to the extent that it is possible.”); *Hanna v. Martin*, 49 So. 2d 585, 587 (Fla. 1950) (stating that “[t]he fundamental principle of the law of

could determine that the regulated activity should not be classified as “economic” under *Raich*, the Eleventh Circuit’s decision to employ *Raich*’s aggregation doctrine rather than *Morrison*’s substantial factor analysis was questionable.²⁰²

The *Raich* opinion also reaffirmed that regulation of “noneconomic” activity is permissible if the regulated “class of activities” is an “essential part of the larger regulatory scheme.”²⁰³ However, the Graves Amendment is not a part of a comprehensive regulatory scheme.²⁰⁴ Like the challenged statutes in *Lopez* and *Morrison*, it is a brief, single subject statute “with no statutory element requiring proof that particular instances of vicarious liability ‘have any connection to past interstate activity or a predictable impact on future commercial activity.’”²⁰⁵ Concluding that the regulated activity was economic in nature, the court dismissed this argument without sufficiently addressing its merits.²⁰⁶

If a court, similar to *Garcia*, did decide to employ the *Raich* aggregation analysis, it would need to determine whether Congress had a rational basis for enacting the Graves Amendment.²⁰⁷ Admittedly the rational basis test is a very low hurdle to overcome,²⁰⁸ but in the absence of any congressional findings²⁰⁹ or a comprehensive legislative scheme, a court could conclude that the Graves Amendment fails this lowest level of

damages is that the person injured . . . by wrongful or negligent act . . . shall have fair and just compensation commensurate with the loss sustained.”).

202. See *Garcia*, 540 F.3d at 1251–52; *supra* notes 193–94 and accompanying text.

203. *Raich*, 545 U.S. at 26–27. “Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.” *Id.* at 18. See generally *Wickard v. Filburn*, 317 U.S. 111 (1942) (creating and applying aggregate effects doctrine). Critics question whether the *Raich* Court eliminated *Lopez*’s requirement that the regulated activity be an “essential” part of the regulatory scheme. Somin, *supra* note 199, at 119; see also *Raich*, 545 U.S. at 46 (O’Connor, J., dissenting) (noting that “the Court appears to equate ‘essential’ with ‘necessary’”). If that is the case, the regulation of virtually any activity could be claimed to be a part of a broader regulatory scheme. Somin, *supra* note 199, at 119.

204. *Garcia*, 540 F.3d at 1251–52.

205. *Id.* at 1251 (quoting *Raich*, 545 U.S. at 23).

206. *Id.* at 1251–52.

207. See Somin, *supra* note 199, at 119. Although *Raich* allows Congress to regulate purely intrastate activity if failure to do so would undercut the regulation of the interstate market, no member of Congress mentioned the regulation of the interstate car rental market during congressional debate. See *Raich*, 545 U.S. at 18; *supra* note 126 and accompanying text.

208. Critics opine that the rational basis standard eliminates any technical inquiry into whether intrastate activities substantially affect interstate commerce in fact, and reliance on this test has historically led to judicial inaction. David M. Crowell, Note, *Gonzales v. Raich and the Development of Commerce Clause Jurisprudence: Is the Necessary and Proper Clause the Perfect Drug?*, 38 RUTGERS L.J. 251, 307 (2006).

209. See *supra* note 181 and accompanying text. It is difficult to conclude anything about Congress’ intent, other than that it sought to establish a fair national standard for liability. 151 CONG. REC. H1200 (daily ed. Mar. 9, 2005) (statement of Rep. Graves).

scrutiny.²¹⁰ Even if Congress had made any findings, its relevance would depend heavily on the breadth of the “class of activities” being regulated.²¹¹ Judicial interpretation of congressional findings is an arbitrary process under *Raich*, especially considering the reasonableness of *Morrison*’s stricter four-part test.²¹²

IV. PROPOSED LEGISLATIVE ACTION

Florida’s current approach to compensating individuals injured by car rental drivers is unacceptable.²¹³ Consider the following scenario: A 25-year-old stockbroker is paralyzed after his car was struck by a negligent, uninsured, indigent driver of a rented vehicle in Florida.²¹⁴ Before the Graves Amendment, in this example, the car rental company would likely be liable for \$100,000 for the stockbroker’s bodily injuries, up to \$50,000 in property damage, and an additional \$500,000 in other economic damages.²¹⁵ However, after federal preemption of Florida Statutes § 324.021(9)(b)2, the paralyzed man would likely recover from the car rental company’s insurer a mere \$10,000 for his bodily injuries and up to \$10,000 for property damage to his vehicle.²¹⁶ Because short-term lessors are less likely to have automobile insurance than other Florida drivers, it is

210. *See, e.g.*, *Vanguard Car Rental USA, Inc. v. Drouin*, 521 F. Supp. 2d 1343, 1350 (S.D. Fla. 2007); *Vanguard Car Rental USA, Inc. v. Huchon*, 532 F. Supp. 2d 1371, 1381 (S.D. Fla. 2007) (noting that although there was a possible economic impact of increased costs on some small businesses, “there is no rational basis to support a conclusion that vicarious tort liability for car rental or leasing companies substantially affects interstate commerce”).

211. *Crowell*, *supra* note 208, at 308. Clearly, if a court classifies the Graves Amendment as regulating state tort judgments, rather than the national car rental industry, it is more likely to hold that Congress unconstitutionally exceeded its powers granted by the Commerce Clause.

212. *Crowell*, *supra* note 208, at 308 (“Reasonable minds can differ as to what the class of activities will be, just as reasonable minds can differ over whether an activity is economic or noneconomic, or whether an intrastate activity substantially affects interstate commerce.”).

213. *See supra* notes 51–55 and accompanying text. Perplexingly, an automobile owner remains vicariously liable for damages caused by the operation of the owner’s vehicle by a permissive user. *See* FLA. STAT. § 324.021(9)(b)3 (2009). Then again, individual automobile owners do not have the benefit of Washington lobbyists.

214. This scenario is unchanged if the car rental driver is a foreign motorist who leaves the country after the accident. Note that the Graves Amendment did not require uninsured drivers to purchase insurance as a prerequisite to renting a car. *See supra* note 53 and accompanying text.

215. *See* FLA. STAT. § 324.021(9)(b)2 (2009). This situation is similar to the case of Ethan Ruby, who recovered approximately \$20 million in New York. *See supra* notes 1–5 and accompanying text.

216. *See* FLA. STAT. §§ 324.021(7), 051(2)(a) (2009) (mandating a minimum of 10/20/10 insurance coverage or else the Department of Highway Safety and Motor Vehicles will suspend “the license of each operator and all registrations of the owner of the vehicles operated by such operator” after an accident); *Kumarsingh v. PV Holding Corp.*, 983 So. 2d 599, 600–01 (Fla. 3d DCA 2008) (recognizing that the statutory minimum financial responsibility requirement of Florida Statutes § 324.021(7) still applied after the codification of the Graves Amendment). Of course, the injured stockbroker would likely be compensated by his own automobile insurance.

more likely that the negligent car rental driver will not have adequate funds to compensate the paralyzed stockbroker.²¹⁷

The Florida Legislature must take legislative action to avoid this undesirable result.²¹⁸ Foremost, the legislature should consider increasing the minimum requirements for proof of financial responsibility for *all* motor vehicles.²¹⁹ As of 2002, Florida had the second highest car rental revenue by state,²²⁰ with California having the highest revenue and Texas having the third highest revenue by state.²²¹ But California and Texas require that all owners carry minimum coverage of 15/30/5²²² and 25/50/25,²²³ respectively. Florida's financial responsibility laws are outdated and the minimum requirements need to be increased to meet current market demands. However, any suggestion to increase these minimum requirements would be controversial.²²⁴ Even if the Florida Legislature raised the minimums of § 324.021(7), the revised statutory scheme would provide far less protection for individuals injured by drivers of rental vehicles than pre-Graves Amendment.²²⁵

In 2009, a bill in the Florida Senate proposed another solution, recommending a simple clarification of the language of Florida Statutes

217. Pursuant to Florida Statutes §§ 324.022, 627.7275, .736, all Florida drivers must obtain and maintain \$10,000 of personal injury protection and \$10,000 property damage coverage. Furthermore, pursuant to Florida Statutes §§ 324.021(7), .051(2)(a), a Florida driver will forfeit his or her license and registration if at the time of an accident his or her liability insurance coverage does not meet the minimum limits of bodily injury liability of \$10,000 per person; \$20,000 per crash; and \$10,000 property damage liability per crash. *See Vargas v. Enter. Leasing Co.*, 993 So. 2d 614, 620 n.5 (Fla. 4th DCA 2008). However, car rental drivers, including those who live out of the United States, do not have to meet any minimum insurance requirements. *See supra* note 53 and accompanying text. It is perplexing why the Florida Legislature requires up to \$20,000 of bodily injury liability for proof of financial responsibility but does not require it otherwise. *See* FLA. STAT. §§ 324.022, 627.7275, .736 (2009).

218. Opponents of the Graves Amendment have suggested that taxpayers could bear the ultimate burden of supporting individuals injured by drivers of rented vehicles. *See supra* note 53.

219. *See* FLA. STAT. § 324.021(7)(a)-(c) (2009). During the 2008 legislative session, two bills called for an incremental increase of the minimum requirements for proof of financial responsibility, over a four-year period, to 25/50/25 coverage. *See* H.R. 729, 110th Leg., Reg. Sess. (Fla. 2008); S. 2258, 110th Leg., Reg. Sess. (Fla. 2008). Not surprisingly, both proposals were short lived. *See Selected Bill Detail; HB 729—Motor Vehicle Insurance*, FLORIDA HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=38145&SessionId=57> (last visited Feb. 27, 2010); *Bill Info; SB 2258: Relating to Motor Vehicle Liability Insurance [EPCC]*, THE FLORIDA SENATE, http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&BillNum=2258 (last visited Feb. 27, 2010).

220. The rental revenue was estimated at \$2.265 billion, or 12.16%, of the nation's overall revenue. *Industry Statistics Sampler; NAICS 532111; Passenger Car Rental*, U.S. CENSUS BUREAU, <http://www.census.gov/econ/census02/data/industry/E532111.HTM> (last visited Feb. 27, 2010).

221. *Id.*

222. *See* CAL. VEH. CODE § 16056 (West 2010).

223. TEX. TRANSP. CODE § 601.072 (Vernon 2009).

224. *See supra* note 219.

225. *See* FLA. STAT. § 324.021(9)(b)2 (2009).

§ 324.021(9)(b)2 to clearly state that short-term lessors “shall be financially responsible” for its lessee’s negligence.²²⁶ This senate bill attempted to avoid preemption by clarifying that Florida intended the short-term lessor statute to fall within the first subsection of the Graves Amendment’s savings clause.²²⁷ One questions whether this remedy would survive the *Garcia* court’s preemption analysis.²²⁸

Another potential solution is to require car rental companies to maintain a specified amount of liability coverage in excess of the minimum requirements set forth in the financial responsibility statute for noncommercial motor vehicles.²²⁹ For instance, the legislature could require car rental companies to provide insurance coverage for all rental vehicles of up to (1) \$100,000 per person for bodily injury; (2) \$300,000 per incident for bodily injury; and (3) \$50,000 for property damage.²³⁰ Because such a law would impose a mandatory minimum as a precursor to the registration and operation of the motor vehicle,²³¹ the statutory scheme would qualify as a “financial responsibility law” in the savings clause of the Graves Amendment,²³² as defined by the Eleventh Circuit in *Garcia*.²³³ However, the car rental industry would undoubtedly mobilize against such

226. Comm. Substitute for Comm. Substitute for S. 422, 111th Leg., Reg. Sess. (Fla. 2009). This bill died in the Committee on Finance and Tax. *Bill Info; SB 0422; Relating to Transportation [CPSC]*, THE FLORIDA SENATE, http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=0422&Chamber=Senate&Year=2009&Title=%2D%3EBill%2520Info%3AS%25200422%2D%3ESession%25202009 (last visited Feb. 27, 2010).

227. Comm. Substitute for Comm. Substitute for S. 422, 111th Leg., Reg. Sess. (Fla. 2009); *see also* 49 U.S.C. § 30106(b)(1) (2006).

228. *See supra* notes 97–112 and accompanying text. It seems unnecessarily risky to amend the statute in this manner. In particular, supporters of the Graves Amendment would argue that the imposition of liability is not tied to the privilege of registering and operating a motor vehicle. However, by making the insurance coverage “mandatory,” the amended statute would arguably fit within § 30106(b)(2). *See Vargas v. Enter. Leasing Co.*, 933 So. 2d 614, 621–22 (Fla. 4th DCA 2008).

229. *See* FLA. STAT. § 324.021(7)(a)-(c) (2009). The legislature has similarly required owners of commercial vehicles and nonpublic-sector buses to maintain specified amounts of liability coverage, as specified in Florida Statutes §§ 627.7415 and 627.742, respectively. *See* FLA. STAT. § 324.021(7)(d) (2009).

230. This could be achieved by amending Florida Statutes § 324.021(7)(d) as follows: “With respect to commercial motor vehicles, nonpublic sector buses, and vehicles that are rented or leased for a period of less than [one] year, in the amounts specified in [Sections] 627.7415, 627.742, and 627.74XX, respectively.” Florida Statutes § 627.74XX could then largely mirror the language of Florida Statutes § 627.742, providing the 100/300/50 coverage requirements.

231. Failure to comply with the mandatory minimums in the financial responsibility statute may result in suspension of “the license of each operator and all registrations of the owner of the vehicles operated by such operator whether or not involved in such crash and, in the case of a nonresident owner or operator, shall suspend such nonresident’s operating privilege in this state.” FLA. STAT. § 324.051(2)(a) (2009).

232. *See supra* note 44 and accompanying text.

233. *See supra* note 150 and accompanying text.

a bill, exerting tremendous influence in the Florida Legislature through campaign donations and lobbying.²³⁴ Even if this bill was enacted, the car rental companies would undoubtedly pass the costs of additional insurance onto all their consumers, thereby defeating a stated purpose of the Graves Amendment.²³⁵

Thus, the most viable solution is to require short-term lessees to obtain liability insurance with limits of 100/300/50 or \$500,000 for combined bodily injury liability and property damage liability. This was the approach advocated by two identical 2009 bills in the Florida House of Representatives and Florida Senate.²³⁶ These bills prohibited car rental companies from renting to any lessee who failed to maintain the minimum levels of insurance.²³⁷ This scheme would also permit any properly licensed²³⁸ rental company to “offer and sell primary motor vehicle liability insurance” meeting the 100/300/50 or \$500,000 combined coverage minimums “together with and incidental to the agreement to rent or lease the motor vehicle” at a fee “not to exceed [thirty-five] percent of the premium for each policy sold.”²³⁹ The bills also immunized car rental companies “from claims based solely upon the dangerous instrumentality doctrine for the use, operation, or ownership of the insured motor vehicle.”²⁴⁰ Although this proposed solution would ultimately drive up rental costs for underinsured lessees,²⁴¹ it would achieve the important policy goal of providing sufficient compensation for tort victims.²⁴² Furthermore, the car rental industry may actually support this proposal because of the potential revenue increase from sales of motor vehicle liability insurance policies and the guarantee of immunity from vicarious

234. During the 2008 election cycle, car and truck rental agencies donated a total of \$109,100 to all candidates running for election in the Florida Legislature. NATIONAL INSTITUTE ON MONEY IN STATE POLITICS (NIMSP), NATIONAL OVERVIEW MAP, [http://www.followthemoney.org/database/nationalview.phtml?l=0&f=0&y=2008&abbr=1&b\[\]=T2500](http://www.followthemoney.org/database/nationalview.phtml?l=0&f=0&y=2008&abbr=1&b[]=T2500) (last visited Feb. 27, 2010). This total was fourth highest of all states. *See id.* Vanguard Car Rental USA, Inc., the defendant in the *Garcia* cases, also employed three Florida lobbyists in 2006 and 2007 and one Florida lobbyist in 2008. NIMSP, LOBBYISTS CLIENT RESULTS, [http://www.followthemoney.org/database/search.phtml?searchbox=&Type\[\]=Contributors&Type\[\]=Candidates&Type\[\]=Committees&Type\[\]=Lobbyists&Type\[\]=Lobbyist+Clients&Type\[\]=Ballot+Measures&Type\[\]=Reports&States\[\]=FL&Years\[\]=2010&Years\[\]=2009&Years\[\]=2008&Years\[\]=2007&Years\[\]=2006&Years\[\]=2005&b\[\]=T2500&CurrentType=Lobbyist%20Clients](http://www.followthemoney.org/database/search.phtml?searchbox=&Type[]=Contributors&Type[]=Candidates&Type[]=Committees&Type[]=Lobbyists&Type[]=Lobbyist+Clients&Type[]=Ballot+Measures&Type[]=Reports&States[]=FL&Years[]=2010&Years[]=2009&Years[]=2008&Years[]=2007&Years[]=2006&Years[]=2005&b[]=T2500&CurrentType=Lobbyist%20Clients) (last visited Feb. 27, 2010); *see also supra* note 92.

235. *See supra* notes 47–50 and accompanying text.

236. H.R. 1289, 111th Leg., Reg. Sess. (Fla. 2009); S. 2622, 111th Leg., Reg. Sess. (Fla. 2009).

237. Fla. H.R. 1289; Fla. S. 2622.

238. For information on licenses, *see* Florida Statutes § 626.321(1)(d) (2009).

239. Fla. H.R. 1289; Fla. S. 2622.

240. Fla. H.R. 1289; Fla. S. 2622.

241. *See supra* note 53 and accompanying text.

242. *See supra* notes 215–17 and accompanying text.

liability claims.²⁴³ Although imperfect, this proposed solution pragmatically balances the policy interests at stake.

V. CONCLUSION

The Graves Amendment infringes upon the principles of federalism and unconstitutionally commandeers state police powers under the false pretense of interstate commerce regulation. The resulting abrogation of Florida's unique dangerous instrumentality doctrine and preemption of Florida Statutes § 324.021(9)(b) have left a gaping void in Florida tort law. Although the policy reasons behind the dangerous instrumentality and vicarious liability doctrines are just as compelling post-Graves Amendment,²⁴⁴ the Florida Legislature has not yet remedied this situation. Thus, it is imperative that the legislature re-examine Florida Statutes § 324.021(9)(b)2 to ensure victims of negligent car rental drivers are adequately compensated for their losses and do not become burdens upon the state.

243. However, Florida H.R. 1289 died in the Insurance, Business & Financial Affairs Policy Committee and S. 2622 died in the Committee on Commerce. *See Selected Bill Detail; HB 1289—Motor Vehicle Short-Term Rental or Lease Insurance*, FLORIDA HOUSE OF REPRESENTATIVES, May 2, 2008, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=41616&SessionId=61>; *Bill Info; SB 2258: Relating to Motor Vehicle Short-term Rental or Lease Insurance [CPSC]*, THE FLORIDA SENATE, May 5, 2008, http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=2622&Chamber=Senate&Year=2009&Title=%2D%3EBill%2520Info%3AS%25202622%2D%3ESession%25202009.

244. *See supra* note 19 and accompanying text.