Vanderbilt Law Review

Volume 51
Issue 5 *Issue 5 - October 1998*

Article 4

10-1998

The Nexus of Federal and State Law in Railroad Abandonments

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NOTES

The Nexus of Federal and State Law in Railroad Abandonments

I. INTRODUCTION

The United States Congress embarked on a new era in the regulation of interstate commerce when it created the Interstate Commerce Commission ("ICC") in 1887 to regulate railroad traffic.[1] A major purpose of the ICC regulatory framework, as amended by the Transportation Act of 1920,[2] was to preempt actions by state and local authorities that prevented railroads from abandoning unprofitable

1. *See* Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. §§ 10101-11901 (1994)).
2. Pub. L. No. 91-152, 41 Stat. 456 (1920).

lines.[3] When Congress passed the Transportation Act, 252,588 miles of track criss-crossed the United States;[4] by 1990 the number of railway miles had decreased by almost half.[5]

Although the relative ease with which railroads abandoned unprofitable lines augmented their profitability, state and local governments realized that corridors assembled in the mid-nineteenth century were extremely expensive to reassemble once abandoned.[6] Local authorities began considering other public uses for railroad rights-of-way, such as roads or highways, the placement of utility lines, or recreational trails.[7]

In an effort to conserve railway corridors as a national resource, both for future transportation use and for current use as recreational trails, Congress included unique provisions within the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act")[8] and the National Trails Systems Act Amendments of 1983 ("Rails-to-Trails Act").[9] Specifically, the Rails-to-Trails Act asserted federal control over the disposition of abandoned railroad rights-of-way and promoted alternative uses for railway corridors.[10]

The abandonment of rail service on a railway line requires the approval of the Surface Transportation Board ("STB"), the successor to the ICC.[11] Until the STB grants such approval, the railway line is considered part of the national transportation system.[12] The requirement of STB approval can present a direct conflict with state property law. What is the result when a railroad right-of-way, held by the railroad in the form of an easement, has purportedly been abandoned under state property law before the STB has given permission to abandon rail service? Does the easement terminate, thereby dispossessing the railroad (or the railroad's successor) of its property interest, or does federal law perpetuate the easement under the jurisdic-

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3. *See* 1 I.L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 6 (The Commonwealth Fund 1969) (1931) (discussing purpose of ICC).

4. *See* MICHAEL CONANT, RAILROAD MERGERS AND ABANDONMENTS 113 (1964) (using ICC statistics).

5. Justice Brennan estimated that 272,000 miles of track existed in 1920, and that the total amount in use had shrunk to 141,000 by 1990. *See* Preseault v. ICC, 494 U.S. 1, 5 (1990).

6. *See* Charles H. Montange, *Conserving Rail Corridors*, 10 TEMP. ENVTL. L. & TECH. J. 139, 139-40 (1991) (discussing the abandonment process and the possibility of preserving rail corridors).

7. *See id.*

8. Pub. L. No. 94-210, § 17, 90 Stat. 31, 144-46 (1976).

9. Pub. L. No. 98-11, § 208, 97 Stat. 42, 48 (1983) (codified as amended at 16 U.S.C. § 1247(d) (Supp. II 1996)).

10. *Id.*

11. *See* 49 U.S.C § 10903 (1994).

12. *See* Preseault v. ICC, 494 U.S. 1, 5 n.3 (1990).

tion of the STB, thus preserving the right-of-way for future transportation use? If the easement continues to exist, does the establishment of a recreational trail upon the railroad easement constitute a taking under the Fifth Amendment?

This Note addresses these questions and advocates, despite a recent Federal Circuit Court of Appeals decision to the contrary,[13] that railroad rights-of-way should not be considered abandoned pursuant to state property law while the rail corridor is still subject to the jurisdiction of the STB. The proposition that federal law preempts state law in this situation is supported by explicit congressional intent to subordinate state property law, and is founded on the Supremacy Clause and the federal government's power to regulate interstate commerce under the Commerce Clause. In addition, this Note concludes that the perpetuation by federal law of an easement underlying a railroad right-of-way—and the establishment of a recreational trail upon the easement—should not constitute a taking of property from the owner of the servient estate under the Fifth Amendment.

Part II.A of this Note briefly presents the history of railroad abandonments and the extent to which federal law regulates the abandonment of rail service and rights-of-way, specifically addressing the preemption of state law by federal railroad regulation. Part II.B discusses the federal efforts to preserve railway corridors for future transportation use that culminated in the Rails-to-Trails Act in 1983. Part II.C discusses the effect of the Rails-to-Trails Act on state property law and outlines current takings jurisprudence under the Fifth Amendment, examining both the traditional physical occupation analysis under *Loretto* and regulatory takings under the *Penn Central* test.

Part III examines the conflict between federal and state law within the context of a recent railroad abandonment case. This section describes the misapplication of federal and state law by the Federal Circuit Court of Appeals in *Preseault v. United States*, specifically addressing the court's analysis of the abandonment issue and the takings claim. Part IV advocates a more consistent approach, in line with express statutory language, congressional intent, and the Constitution, to determine when abandonment occurs and whether the result is a taking. Part V concludes the discussion.

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13. *See* Preseault v. United States, 100 F.3d 1525, 1545-47 (Fed. Cir. 1996) (en banc) (discussed *infra*).

II. FEDERAL RAILROAD REGULATION

A. *Federal Regulation of Railroad Abandonments*

Congress first asserted control over railroad abandonments to prevent states from forcing railroads to maintain unprofitable lines. Although Congress likely did not contemplate that state law would be used to force railroads to abandon unprofitable lines at the time it conferred on the ICC the power to regulate abandonments, the same authority that precludes state law from *hindering* abandonments should also apply to efforts under state law *forcing* abandonments. Courts faced with the issue have so held.[14] A contrary conclusion would be inconsistent with the federal government's power to regulate interstate commerce.

Prior to 1920, railroad operators desiring to vacate service on an unprofitable line were faced with numerous obstacles to abandonment, including contractual obligations, limitations imposed by state railroad charters, and restrictive laws imposed by state legislatures.[15] Railroads were effectively compelled to maintain unprofitable lines as a result of the myriad difficulties encountered at the state level, forcing many into financial straits and limiting access to needed capital.[16] As a partial remedy, Congress included provisions within the Transportation Act of 1920 expanding the power of the federal government through the ICC to regulate railroad abandonments.[17] Under the power of the Commerce Clause[18] and the

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14. *See* National Wildlife Fed'n v. ICC, 850 F.2d 694, 704 (D.C. Cir. 1988) ("Nor may state law cause a reverter of a right-of-way prior to an ICC-approved abandonment."); Louisiana & Arkansas Ry. Co. v. Bickham, 602 F. Supp. 383, 384 (M.D. La. 1985), *aff'd*, 775 F.2d 300 (5th Cir. 1985) (noting that state common law is not operable prior to ICC abandonment).

15. *See* Steven R. Wild, *A History of Railroad Abandonments*, 23 TRANSP. L.J. 1, 2-4 (1995) (examining challenges te railroad abandonments).

16. *See id.* at 4.

17. *See* Transportation Act of 1920, ch. 91, § 402, 41 Stat. 456, 477 (1920) ("[N]o carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or operation therof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such an abandonment.").

18. The Commerce Clause states: "The Congress shall have the power . . . te regulate commerce . . . among the several States." U.S. CONST. art. I, § 8. Thus, interstate transportation facilitating commerce falls within congressional power:

> Within its own sphere . . . the Commission, like the Congress to which it owes its existence and authority, is supreme: its powers over interstate commerce are plenary and exclusive. Because the identical instruments of transportation serve both local and national needs, and because the flow of traffic is not guided by the artificial political lines which separate the states, the effective regulation of interstate commerce has necessitated increasingly frequent incursions upon the rights of states.

Supremacy Clause,[19] the Transportation Act of 1920 preempted existing state law. As a result, railroads could abandon unprofitable lines, with the authorization of the ICC, despite the protests of local authorities.[20] The Supreme Court has justified federal preemption on the theory that the costs associated with maintaining and operating unprofitable intrastate lines stifled interstate commerce by raising rates across the board.[21] Presumably, Congress recognized that state restrictions prevented railroads from efficiently allocating their limited capital, thereby harming rail operators and shippers alike. As a result of the Transportation Act of 1920, state law impacting railroads is subordinate to the federal duty of interstate railroads to efficiently "render transportation services in interstate commerce."[22]

Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.[23] best illustrates the preemption doctrine in the context of

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SCHARFMAN, *supra* note 3, at 5.

19. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State te the Contrary notwithstanding.

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

The Supremacy Clause mandates the preemption of state laws that "interfere with, or are contrary to the laws of Congress." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). However, the Court does not favor preemption of state law unless either "the nature of the regulated subject matter permits no other conclusion, or . . . Congress has unmistakably so ordained." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). Thus "[w]hen Congress has chosen te legislate pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the challenged state statute 'stands as an obstacle te the accomplishment and execution of the full purposes and objectives of Congress.'" Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (quoting Perez v. Campbell 402 U.S. 637, 649 (1971)).

20. *See* SHARFMAN, *supra* note 3, at 6; *see also* Missouri Pac. R.R. Co. v. Stroud, 267 U.S. 404, 408 (1925) ("there can be no divided authority over interstate commerce . . . the acts of Congress on that subject are supreme and exclusive.").

21. The Supreme Court has stated that:

> One way [to inhibit interstate commerce] is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier te raise reasonable interstate rates, or to abstain from making an appropriate reduction of such ratos, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected hy continued operation of an intrastate branch in intrastate commerce at a large loss.

Colorado v. United States, 271 U.S. 153, 163 (1926).

22. *Id.* at 165.

23. 450 U.S. 311 (1981).

railroad abandonments. After a mudslide damaged a 5.6 mile branch line, the rail carrier applied for and received a certificate of abandonment for the branch line from the ICC.[24] Kalo Brick, the only shipper still using the line, objected and commenced an action in state court alleging that the railroad had violated both Iowa statutes regulating railroads and state common law by refusing to provide cars on the branch line, failing to maintain the line, and tortiously interfering with contractual relations.[25] Overruling the state's highest court, the Supreme Court disallowed the claims under state law and concluded that state laws in conflict with federal railroad regulation were inapplicable because the ICC had exclusive jurisdiction over railroad abandonments.[26] Logically, state property law that encroaches on the authority of the federal government to regulate interstate commerce should be subject to the same principle the Supreme Court applied to state railroad and tort law in *Kalo Brick*.

Preemption of state restrictions greatly benefited railroad operators and facilitated the abandonment of thousands of miles of track; between 1920 and 1963 the ICC permitted the abandonment of almost 50,000 miles of track, approximately one-fifth of the total miles of track existing in 1920.[27] Rising labor costs and increased competition from truckers, however, continued to push many railroads towards bankruptcy.[28] The government responded with the 4-R Act[29] and the Staggers Rail Act of 1980,[30] streamlining the abandonment process while retaining the ICC's ultimate authority over abandonments.

Under current law, a railroad may not abandon a railway line or discontinue service on the line[31] without requesting and receiving

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24. *See id.* at 313-14.

25. *See id.* at 314-15.

26. *See id.* at 323 ("In sum, the construction of the applicable federal law is straightforward and unambiguous. Congress granted to the Commission plenary authority to regulate, in the interest of intorstate commerce, rail carriers' cessations of service on their lines. And at least as to abandonments, this authority is exclusive.").

27. *See* CONANT, *supra* note 4, at 113.

28. *See id.* at 116 (discussing labor costs); Wild, *supra* note 15, at 6-7 (discussing competition).

29. Pub. L. No. 94-210, § 17, 90 Stat. 31, 144, 146 (1976).

30. Pub. L. No. 96-448, 94 Stat. 1895 (1980).

31. *See* Preseault v. ICC, 494 U.S. 1, 5 n.3 (1990), stating:

> There is an important distinction in the Interstate Commerce Act between "abandonment" of a rail line and "discontinuance" of service.... Once a carrier "abandons" a rail line pursuant to authority granted by the Interstate Commerce Commission, the line is no longer part of the national transportation system, and although the Commission is empowered to impose conditions on abandonments, ... as a general proposition ICC jurisdiction terminates.... In contrast, "discontinuance"

the approval of the STB.[32] Approval by the STB requires a finding that "present or future public convenience and necessity require or permit the abandonment or discontinuance."[33] In making the finding, the STB will take into account "whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development."[34] Thus, almost 80 years after the enactment of the Transportation Act of 1920, abandonment of a rail line still requires a definite, affirmative act by the operator and approval by the federal government.

B. Federal Efforts to Preserve Rail Corridors

Concerned with the shrinking number of rail miles resulting from the relentless pace with which railroads continued to abandon rail lines,[35] Congress included within the 4-R Act several provisions aimed at preserving rail corridors, including: (1) the requirement that the Secretary of Transportation prepare a report on the alternative uses of abandoned railroad rights-of-way; (2) authorization for the Secretary of the Interior to encourage conversion to recreational uses; and (3) authorization for the ICC to delay disposition of abandoned corridors unless the property has first been offered on reasonable terms for public purposes, including recreational uses.[36]

Congress further strengthened the federal government's ability to preserve abandoned corridors by enacting the National Trails

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authority allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future.

Id.

32. *See* 49 U.S.C. § 10903 (1994).

33. 49 U.S.C. § 10903(d).

34. *Id.*

35. *See* Preseault v. ICC, 494 U.S. at 5 (discussing Congress's concern with "shrinking rail trackage").

36. *See* 49 U.S.C. § 10905 (1994). This provision states:

When the Board approves an application to abandon or discontinue under section 10903, the Board shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Board finds that the rail properties proposed to be abandoned are appropriato for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

Systems Act Amendments of 1983.[37] Known as the Rails-to-Trails Act (or as the federal railbanking statute), the statute continues where the 4-R Act leaves off, encouraging local entities "to establish trails on abandoned railroad corridors in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use."[38] The statute prohibits the STB from permitting abandonment inconsistent with interim trail use if a public or private organization is willing to assnme management responsibility and legal liability for a corridor.[39] Thus, Congress has shifted the cost of maintaining railroad corridors for "future reactivation of rail service" from railroad operators to trail users.[40] Implicitly, the trail user is further obligated to "maintain the linear integrity of the corridor" so that reactivation of rail service is possible.[41]

Significantly, the statute provides that "*such interim use shall not be treated, for the purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.*"[42] Whereas earlier statutes regulating railroad abandonments focused exclusively on preempting state law governing the abandonment of rail service, the clear language of the Rails-to-Trails Act indicates

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Id.

37. Pub. L. No. 98-11, § 208, 97 Stat. 42, 48 (1983) (codified as amended at 16 U.S.C. § 1247(d) (Supp. II 1996)).

38. 16 U.S.C. § 1247(d) (Supp. II 1996) states in full:

> The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C.A. § 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such intorim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assnme full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

39. *See id.* The application process for interim trail use and maintenance of a railbanked line under the jurisdiction of the ICC are set out in ICC regulations at 49 C.F.R. § 1152.29 (1997).

40. *Id.*

41. Montange, *supra* note 6, at 155.

42. 16 U.S.C. § 1247(d) (Supp. II 1996) (emphasis added).

Congress's intent to preempt state property law governing the abandonment of right-of-way easements. The legislative history establishes that the purpose of the Rails-to-Trails Act is to prevent the operation of state law from destroying railroad corridors originally established by easement.[43]

C. *The Effect of the Rails-to-Trails Act on State Property Law*

The Fifth Amendment to the Constitution prohibits the taking of private property for public use without just compensation.[44] The Supreme Court has stated that the purpose of the Takings Clause is to prevent the government from shifting public burdens onto private landowners.[45] In implementing the Takings Clause, however, the Supreme Court has developed two strands of analysis depending upon whether the claim is one for a permanent physical taking (also known as a *per se* taking) or for a regulatory taking.[46]

A permanent physical taking is any permanent occupation of private property by the government or any permanent occupation facilitated by the government for which compensation is not paid.[47] The modern case defining a permanent physical taking is *Loretto v. Teleprompter Manhattan CATV Corp.*, which concerned a New York City ordinance requiring apartment building owners to allow installation of cable television lines in return for the payment of one

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43. *See* H.R. REP. NO. 98-28, at 8-9 (1983), *reprinted in* 1983 U.S.C.C.A.N. 112, 119-20. The report notes:

> The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would ensure that potential interim trail use will be considered prior to abandonment. If interim use of an established railroad right-of-way consistent with the National Trails System Act is feasible . . . then the route will not be ordered abandoned.

Id.

44. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

45. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (noting that Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

46. *See* Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and the Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185 (1997) (describing the two branches of takings analysis and advocating the recognition of a third branch of temporary physical takings).

47. The Supreme Court first recognized permanent physical takings in *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 176-78 (1871).

dollar per apartment.[48] Despite the minimal invasion of private property, the Court found a permanent physical taking and required the payment of compensation.[49] In addition to actual physical occupation, government actions that "eliminate an essential element of property ownership" may also be per se takings.[50]

Regulatory takings, on the other hand, lack clear definition and afford greater deference to government actions. Regulatory takings were not recognized by the Court until Justice Holmes declared in *Pennsylvania Coal Co. v. Mahon* that while government regulation of private property is generally permissible, "if regulation goes too far it will be recognized as a taking."[51] The Court defined "too far" in *Penn Central Transportation Co. v. New York City* through a three-prong balancing test focusing on the following factors: (1) the character of the governmental action; (2) the economic impact on the property owner; and (3) the interference with the landowner's distinct investment-backed expectations.[52] The Supreme Court has also found regulatory takings in cases involving the forced granting of easements pursuant to land use regulations.[53] Moreover, the Court has held that when extreme regulation of private property results in almost complete destruction of the economic value of the property (a confiscatory regulatory taking), the Court will treat the deprivation as a per se taking.[54]

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48. 458 U.S. 419, 421-24 (1982).

49. *See id.* at 434-38. The point was reiterated by the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), when the Court stated that "[i]n general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."

50. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 149 (2d ed. 1998).

51. 260 U.S. 393, 415 (1922).

52. 438 U.S. 104, 124 (1978).

53. Two cases involving regulatory exactions are worth noting because they show that the Court will find regulatory takings when easements are taken for public use. In both *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), regulations forcing landowners to grant an easement for public purposes in return for building permits without compensation were found unconstitutional. For three reasons, however, the analysis is not helpful in the context of establishing recreational trails under the Rails-to-Trails Act. First, both cases arose in the context of local land use regulation as opposed to federal regulation of interstate commerce under the Constitution. Second, both cases involved a quid pro quo, in which the landowners were asked to relinquish exclusive control over portions of their property in return for the right to utilize their land, something they arguably already had the right to do. Third, the cases involved the dedication of new easements for public use, as opposed to the maintenance of an already existing easement under federal jurisdiction.

54. *See Lucas*, 505 U.S. at 1027. Justice Scalia also noted, however, that "[w]here 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved . . . though we assuredly *would* permit the government to assert a permanent ease-

Because of the inherent conflict between federal and state law, controversy frequently surrounds the status of an abandoned railway corridor when potential trail operators seek to preserve the corridor. Federal jurisdiction over the property interest underlying the railroad right-of-way is important, however, only when the railroad holds the right-of-way in the form of an easement. When railroads (or their successors) hold railway corridors in fee simple, railroads abandoning service on their lines can dispose of their property as they wish, including selling or leasing the corridor for trail use. An owner in fee simple cannot abandon her property interest, no "reversion" of property to the previous property owners can occur, and no issue of a taking under the Fifth Amendment arises. Problems often arise, however, when the railroad seeks to dispose of a right-of-way held in the form of an easement.[55]

Under state common law, express easements are nonpossessory interests in land owned by another, created by a granting document such as a deed.[56] The owner of the land subject to the easement is the holder of the servient estate.[57] Although generally granted in perpetuity,[58] easements are often granted for a particular purpose. Easements granted for a particular purpose will normally terminate when the purpose for which the easement was granted no longer exists, eliminating "meaningless burdens" on land.[59] Easements will also terminate when they are abandoned by the easement holder. Courts applying state common law will find abandonment, however, only when the clear intent to abandon the easement is coupled with

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ment that was a pre-existing limitation upon the landowner's title." *Id.* at 1028-29. This language seems to indicate that further restrictions on land due to a preexisting easement would not be a taking.

55. *See, e.g.*, Preseault v. United States, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc). The court stated:

> Clearly, if the Railroad obtained fee simple title to the land over which it was to operate, and that title inures, as it would, to its successors, the Preseaults today would have no right or interest in those parcels and could have no claim related to those parcels for a taking. If, on the other hand, the Railroad acquired only easements for use, easements imposed on the property owners' underlying fee simple estatos, and if those easements were limitod to uses that did not include public recreational hiking and biking trails . . . or if the easements prior to their conversion to trails had heen extinguished by operation of law leaving the property owner with unfettered fee simples, the argument of the Preseaults [that a taking has occurred] hecomes viahle.

Id.

56. *See* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND, ¶¶ 1.01, 3.04 (rev. ed. 1995 & Supp. 1998) (defining an easement and describing an express grant).

57. *See id.* at ¶ 2.02 (describing servient estato).

58. *See id.* at ¶ 10.01 (describing duration of easements).

59. *Id.* at ¶ 10.03 (describing cessation of purpose doctrine).

acts that clearly evidence the intent to abandon; mere non-use of an easement will not amount to abandonment.[60]

The Rails-to-Trails Act prevents the termination of railroad easements in two ways. First, by stipulating the continuation of the purpose for which the easement was created (future railroad use), the Rails-to-Trails Act prevents termination through the cessation of purpose doctrine. Second, by stating that interim trail use will not constitute abandonment of the easement, the Act prevents termination through abandonment.[61]

Two points concerning the nature of easements in general and of railroad easements in particular are important to the analysis of whether the Rails-to-Trails Act effects a taking without just compensation. First, contrary to the language used in many decisions on rails-to-trails conversions,[62] there is no "reversionary" interest in an easement.[63] Unlike a leasehold, life estate, fee simple determinable, or fee simple subject to a condition subsequent—where the estate created is granted for a limited time or is terminated upon the occurrence or nonoccurrence of a specified event, and is granted simultaneously with a future interest[64]—easements are generally granted in perpetuity.[65] Easements are nonpossessory interests in land that do not create simultaneous future interests in the grantor or a third party. An easement does not "revert" to the owner of the servient estate by operation of law in the same manner as a future interest.[66] The perpetuation of an easement pursuant to federal law, therefore, does not destroy or "take" a future interest without just compensation. Instead, the owner of the servient estate continues to hold the land in fee simple subject to an easement for railroad purposes.

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60. *See id.* at ¶ 10.05 (describing termination by abandonment).

61. *See* 16 U.S.C. § 1247(d) (Supp. II 1996).

62. *See, e.g.*, Preseault v. ICC, 494 U.S. 1, 8-10 (1990) (discussing reversionary interests); *id.* at 20 (O'Connor, J., concurring) (same); Lawson v. State, 730 P.2d 1308, 1316 (Wash. 1986) (en banc) (holding unconstitutional a statute enabling a government to acquire existing "reversionary" rights without compensation).

63. *See* National Wildlife Fed'n v. ICC, 850 F.2d 694, 703 n.13 (D.C. Cir. 1988) (noting that because an easement is a "servitude," it is inaccurate to speak of an easement as "reverting").

64. The future interest created by a leasehold is known as a reversion. The future interest in a life estate is typically known as the reversion or remainder interest, depending on whether the future interest will pass to the original owner or a third party. The future interest created by a fee simple determinable is known as a possibility of reverter, while the future interest created by a fee simple subject te a condition subsequent is known as a right of entry or power of termination. *See* JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW 268-71 (3d ed. 1994).

65. *See* BRUCE & ELY, *supra* noto 56, at ¶ 10.01 (describing duration of easements).

66. *See* Preseault v. United States, 100 F.3d 1525, 1533-34 (Fed. Cir. 1996) (en banc) (explaining the difference between reversion and relief from the burden of an easement).

The second point to consider is the specific nature of a railroad easement. Normally, an easement granted at common law allows the servient owner to utilize the easement as long as she does not interfere with the use of the easement by the dominant owner.[67] Thus, for example, both a landowner and her neighbor can utilize a right-of-way granted to the neighbor to cross the owner's land, as long as the landowner does not interfere with her neighbor's use.

A railroad easement is different. In the interest of safety, among other reasons, a railroad easement is an exclusive use easement. In other words, a railroad right-of-way easement granted by a landowner cannot be used by the landowner for any reason, even if the use does not interfere with the use by the easement holder.[68] Servient owners, for example, cannot build a grade-level driveway across a railroad easement without permission from the easement holder.[69] Thus, railroad easements are among the most burdensome of easements, especially as compared to easements used for interim recreational trails, where the owner can use her land.[70] Arguments that interim trail use of an easement held for future railroad purposes is more burdensome than the original railroad easement are not persuasive, especially given the additional danger of rail traffic.[71] Before and after conversion to trail use, the servient landowners own their land in fee simple subject to a railroad easement under the jurisdiction of the STB.

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67. *See* BRUCE & ELY, *supra* note 56, at ¶ 1.01 (discussing use of an easement).

68. *See* State v. Preseault, 652 A.2d 1001, 1003 (Vt. 1994) ("It is well settled under Vermont law that the holder of a railroad easement enjoys the right to the exclusive occupancy of the land, and has the right to exclude all concurrent occupancy in any mode and for any purpose.... Indeed, the right of a railroad to the exclusive occupancy of a railroad easement is said to he virtually the same as that of an owner in fee.") (citations omitted).

69. *See* Danaya C. Wright, *Private Rights and Public Ways: Property Disputes and Rails-To-Trails in Indiana*, 30 IND. L. REV. 723, 759 n.149 (1997) (noting Preseault's required approval of easement holder to build driveway). *See also* Anna Wilde Mathews, *Safety: Railroads Take Heat for Pedestrian Fatalities*, WALL ST. J., Feb. 20, 1998, at B1 (noting that rail lines are private property and pedestrians are trespassers).

70. *See* State v. Preseault, 652 A.2d at 1004 (noting that servient owners can use a nature trail to the same extent as the general public).

71. *See* Mathews, *supra* note 69 (noting that trains killed 539 pedestrians in 1997, more deaths than in U.S. plane crashes, and that an additional 510 pedestrians were injured). The article does not include the additional people killed crossing tracks in their automobiles. *See also* Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543, 547 (Minn. 1983) (finding that trail use imposes no additional burden); Montange, *supra* note 6, at 158 (1991) (arguing trail use less burdensome); Roger M. Stahl, Comment, *Smoke Along the Tracks: The Constitutionality of Converting Rails-To-Trails Under 16 U.S.C. § 1247(d)*, 16 WM. MITCHELL L. REV. 861, 895 (1990) (arguing no taking if trail use imposes no burden beyond the terms of the easement).

III. *PRESEAULT V. UNITED STATES*

A. Background

Preseault v. United States[72] presents a unique set of facts within which to examine the nexus of federal and state law in the operation of the Rails-to-Trails Act. The issue of abandonment especially depends on the correct application of federal law, while the takings issue is a separate, but derivative, problem.

The Preseaults owned a piece of land in Vermont in fee simple.[73] A railroad right-of-way ran over the tract, which was comprised of three previously distinct parcels.[74] The right-of-way was initially acquired by the Rutland-Canadian Railroad in 1899.[75] Both the underlying properties and the rights-of-way passed through several subsequent owners.[76] The Preseaults purchased the property in two separate transactions, the first in 1966 and the second in 1980.[77] In 1962 the State of Vermont acquired the right-of-way from the Rutland Railway Corporation (the successor to the Rutland-Canadian Railroad) when the company was liquidated, and leased the right-of-way to the Vermont Railway, Inc.[78] By 1970, the Vermont Railway ceased all transport activities over the rails and utilized the right-of-way only for the storage of railroad cars.[79] In 1975, the Vermont Railway removed all switches and tracks from the portion of the right-of-way crossing the land owned by the Preseaults.[80]

In 1981, in proceedings that eventually reached the Supreme Court of Vermont, the Preseaults sued for quiet title to the land underlying the railroad right-of-way.[81] The Vermont Supreme Court held that the ICC had exclusive jurisdiction over the Vermont Railway due to the pervasive federal regulation of interstate railroads by the ICC, and therefore the court did not have subject matter jurisdiction to decide the case.[82] In effect, the court recognized that

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72. 100 F.3d 1525 (Fed. Cir. 1996).
73. *See id.* at 1531.
74. *See id.*
75. *See id.*
76. *See id.*
77. *See id.* at 1537.
78. *See* Trustees of the Diocese v. State, 496 A.2d 151, 152 (Vt. 1985).
79. *See* Preseault v. United States, 100 F.3d at 1545.
80. *See id.*
81. *See Trustees of the Diocese*, 496 A.2d at 152.
82. *See id.* at 152-53. "[C]ourts are not empowered te make any determination regarding the issue of abandonment, as such would interfere with the ICC's plenary authority in this

Congress's power to regulate railroad activity under the Commerce Clause preempted competing claims under state property law. The Vermont Supreme Court's decision supports the approach towards abandonment advocated by this Note.

Unable to obtain relief in state court, the Preseaults then filed a petition with the ICC seeking a certificate of abandonment.[83] The Vermont Railway and the state of Vermont responded by asking for discontinuance of rail service (as opposed to abandonment) and the approval by the ICC of an agreement with the city of Burlington to lease the right-of-way for interim trail use pursuant to the Rails-to-Trails Act.[84] The ICC approved the state's request and simultaneously rejected the Preseaults' petition for a certificate of abandonment in January of 1986.[85]

In 1988, the Preseaults appealed to the United States Court of Appeals for the Second Circuit, contending that the Rails-to-Trails Act was unconstitutional. The Second Circuit held that the Act was a valid exercise of congressional authority under the Commerce Clause, and that the statute did not effect a taking of property without just compensation under the Takings Clause.[86] Specifically, the court held that the operation of the Rails-to-Trails Act did not effect a taking because the landowner's "reversionary interest, if any, [was] not postponed any more by the operation of § 1247(d) [establishing a trail] than it could otherwise be affected by the ICC's continuing jurisdiction."[87] The court refused to find any distinction between a present "railroad purpose" and a future purpose, holding that the ICC retained jurisdiction in either case.[88] Thus the Second Circuit appears to agree with the Supreme Court of Vermont, finding that while ICC jurisdiction continued the property interests of the Preseaults were frozen. Only after the ICC released jurisdiction pursuant to an abandonment proceeding would state law determine the disposition of the property interests. The Second Circuit's approach also is consistent with the approach advocated by this Note.

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area." *Id.* at 154. "The State action here is an attempt to enforce an alleged common law right, which in this instance would interfere with the laws of Congress. The action thus cannot be sustained, and the motion to dismiss was properly granted." *Id.*

83. *See* Preseault v. ICC, 853 F.2d 145, 147 (2d. Cir. 1988).

84. *See id.* at 147-48. The agreement between the State of Vermont and the Vermont Railway as lessors and the City of Burlington as lessee was executed in June of 1985. *See* Preseault v. United States, 100 F.3d at 1549.

85. *See* Preseault v. ICC, 853 F.2d at 148.

86. *See id.* at 151.

87. *Id.*

88. *See id.*

On certiorari from the Second Circuit, the Supreme Court affirmed the constitutionality of the Rails-to-Trails Act under the Commerce Clause, and held that even if exercise of the Act effected a taking (which the Court did not address), the Act would not be unconstitutional under the Fifth Amendment because it did not prohibit a remedy under the Tucker Act.[89] The majority's decision as to the abandonment was clearly and succinctly stated by Justice Brennan: "State law generally governs the disposition of reversionary interests, subject of course to the ICC's 'exclusive and plenary' jurisdiction to regulate abandonments."[90] The Court found that the Rail-to-Trails Act met the rational basis test; both encouraging trail use and preserving established railroad rights-of-way were reasonably adapted to congressional objectives.[91] Addressing the takings issue, Justice Brennan compared the Rails-to-Trails Act to the alternative of direct federal purchase, construction, and maintenance of recreational trails, and stated that the Act was less costly to the federal government because "under any view of takings law, only some rail-to-trail conversions will amonnt to takings. Some rights-of-way are held in fee simple."[92] Though essentially dicta, this statement of Congress's intent as to cost leaves open the possibility that the Court would find a taking under the Rails-to-Trails Act. Justice Brennan (the author of *Penn Central*) did not intimate, however, whether takings claims under the Act would be analyzed as per se takings or regulatory takings.

Justice O'Connor's concurring opinion, joined by Justices Scalia and Kennedy, also affirmed the Second Circuit, but, unlike the majority, addressed the takings issue directly. In effect, Justice O'Connor argued that any modification of state law property rights by federal regulation would be a taking under the restrictive "permanent physical occupation" standard.[93] Where the Second Circuit held that ICC jurisdiction prevented the vesting of any property interests in the Preseaults, Justice O'Connor argued that the Preseaults' property

89. *See* Preseault v. ICC, 494 U.S. 1, 15-18 (1990). The Tucker Act, 28 U.S.C. § 1491(a)(1) (1994), provides that any claim founded on federal law against the federal government to recover damages is within the jurisdiction of the Court of Federal Claims. The Little Tucker Act, 28 U.S.C. § 1346(a)(2) (1994), creates concurrent jurisdiction in the district courts for claims not exceeding $10,000.

90. Preseault v. ICC, 494 U.S. at 8 (citing Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321 (1981)).

91. *See id.* at 17-18.

92. *Id.* at 15-16.

93. *Id.* at 24 (O'Connor, J., concurring).

interests were determined without regard to federal law.[94] According to Justice O'Connor, any action by the ICC that delays the enjoyment of a property interest destroys that interest, because "any other conclusion would convert the ICC's power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment."[95] By implication, any action by the ICC delaying abandonment, not just the establishment of a trail, would constitute a taking. Clearly, Justice O'Connor was unwilling to defer to Congress's power under the Commerce Clause to retain jurisdiction over a railroad right-of-way preserved for future transportation use.

The Preseaults next sought compensation for a taking under the Tucker Act. On cross-motions for summary judgment, the United States Claims Court granted partial summary judgment for the Preseaults, holding that the ICC's exclusive regulatory authority over abandonment of railroad lines did not preclude abandonment of the property interest under state property law.[96] But the final judgment of this court (renamed the Court of Federal Claims in the time between the two judgments) denied the Preseault's claim for compensation under the Fifth Amendment due to an inability of the Preseaults to develop an "historically rooted expectation" of compensation, and dismissed the complaint.[97] Thus, in a seemingly inconsistent result, the court found abandonment pursuant to state law, but no taking upon the establishment of the recreational trail on the abandoned easement.

The decision of the Court of Federal Claims denying recovery to the Preseaults was initially affirmed by a three judge panel of the United States Court of Appeals for the Federal Circuit.[98] The Federal

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94. "Although the Commission's actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests." *Id.* at 22.

95. *Id.* (indicating that the interest is destroyed, as opposed te merely suspending or deferring the vesting of the property rights).

96. *See* Preseault v. United States, 24 Cl. Ct. 818, 830-31 (1992). The court quoted extensively from Justice O'Connor's concurring opinion in *Preseault v. ICC*, 494 U.S. 1, 22-24 (1990), criticizing the "flawed analysis" of the Second Circuit. *Id.*

97. Preseault v. United States, 27 Fed. Cl. 69, 89 (1992). The court stated:

> A question of first impression therefore is presented by this case—whether, given long-standing, pervasive, and specific federal limitations on rights created by state law in respect of property burdened by a private easement for a public purpose, a landowner could have developed a historically rooted expectation of compensation for postponement of those rights when state law does not recognize the rights independent of federal regulation. The court rules in the negative.

Id.

Circuit subsequently vacated the panel decision, however, and ordered that the case be heard *en banc*.[99] The *en banc* decision, decided November 5, 1996, is the touchstone of this Note; the legal analysis embodied in this opinion by the Federal Circuit Court of Appeals[100] will be examined below.

B. The Court's Analysis

The Federal Circuit Court of Appeals, in an opinion without a clear majority,[101] identified three distinct issues relevant to determining whether a taking had occurred: (1) the nature of the right-of-way, whether it was in the form of an easement or a fee simple estate; (2) if an easement, whether the scope of the easement permitted use as a recreational trail; and (3) whether the easement had been abandoned.[102] The first issue is exclusively one of state law.[103] Without the finding of an easement under Vermont law, the second and third issues are moot; an entity that owns a railroad right-of-way in fee simple is not subject to the claims of adjacent landowners and can dispose of its property as it chooses.[104] The court found the right-of-way to be in the form of an easement.

The court also resolved the second and third issues, concerning the scope and abandonment of the easement, by reference to state

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98. *See* Preseault v. United States, Nos. 93-5067, 5068, 1995 WL 544703, at *1 (Fed. Cir. Sept. 14, 1995), vacated and withdrawn, 66 F.3d 1190, 1190 (Fed. Cir. 1995). The three judge panel stated:

> We hold appellants' interests will become possessory only if and when the ICC approves abandonment of the rights-of-way, thereby releasing them from the national railbank, regardless of when physical abandonment as a railroad occurred.... Underlying our holding is our legal conclusion that appellants' possessory rights in the rights-of-way are defined, inter alia, by federal statutes in effect at the time of their purchase.

Id. at *19.

99. *See* Preseault v. United States, 66 F.3d 1190, 1190 (Fed. Cir. 1995).

100. *See* Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (en banc).

101. Judge Plager wrote the plurality opinion for the court, joined by three judges; Judge Rader filed a concurring opinion joined by one judge; and Judge Clevenger filed a dissent joined by two judges. *See id.* at 1528.

102. *See id.* at 1533.

103. *See id.* at 1534. As te the interests created by the original transfers to the railroad in 1898, the court held that the rights-of-way were indeed easements. Despite a lack of documentation for two of the three parcels and what appears te be a warranty deed conveying a fee simple estate for a right-of-way over the third parcel, the court found that:

> With few exceptions the Vermont cases are consistent in holding that, practically without regard to the documentation and the manner of acquisition, when a railroad for its purposes acquires an estate in land for laying track and operating railroad equipment thereon, the estate acquired is no more than that needed for the purpose, and that typically means an easement, not a fee simple estate.

Id. at 1535.

104. *See id.* at 1533.

law, without regard to the question of federal preemption. As to whether the scope of the easement contemplated recreational trails, the plurality and the dissent sharply disputed the existence in Vermont of the "shifting public use doctrine," which allows a change in the use of a public easement (such as a railroad easement) to another public use (such as a recreational trail).[105] The plurality held that the doctrine did not exist in Vermont and as a matter of law the use of a railroad easement for a nature trail did not fall within the scope of an easement for railroad purposes.[106] As for the supposed abandonment of the easement, the court held that as a matter of state common law the easement was abandoned in 1975 when the tracks were removed.[107] Thus, according to the Federal Circuit, a taking occurred when the state reentered the property to establish a bicycle and pedestrian path in 1985 over the long-abandoned railroad easement.

The concurring opinion, like Justice O'Connor's opinion in *Preseault v. ICC*, began with the undisputed assertion that the analysis of a takings claim under the Rails-to-Trails Act starts with state-defined property rights.[108] Again mirroring Justice O'Connor's opinion, the concurring opinion implicitly argues for a per se analysis.[109] In fact, the concurrence found that in addition to the Rails-to-Trails Act, both the 4-R Act and the Transportation Act of 1920 countenance takings.[110]

Like the plurality opinion, the concurrence found that abandonment was a question of fact under state law, and therefore federal law was irrelevant to the analysis. Similarly, based on the facts, the concurring opinion found abandonment when the Vermont Railway

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105. *See id.* at 1541-44 (Plager, J.), 1568-75 (Clevenger, J., dissenting). For a discussion of the shifting public use doctrine, see sources cited in the opinion; *see also* Jeffery Alan Bandini, Comment, *The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis*, 75 N.C. L. REV. 1989, 2026-28 (1997); Wright, *supra* note 69, at 755-57.

106. *See* Preseault v. United States, 100 F.3d at 1541-44.

107. *See id.* at 1544-49. In focusing on the removal of the tracks, the court ignored explicit language in the House Report accompanying the Rails-te-Trails Act providing that the "right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed." H.R. REP. NO. 98-28, at 9 (1983), *reprinted in* 1983 U.S.C.C.A.N. 112, 120.

108. *See* Preseault v. United States, 100 F.3d at 1552 (Rader, J., concurring).

109. *See id.* at 1553.

110. *Id.* This Author believes that Judge Rader is the first judge in the almost 80 years since the Transportation Act of 1920 was enacted te find that it violates the Fifth Amendment. Although this is a surprising conclusion, it is the logical extension of Justice O'Connor's concurring opinion in *Preseault v. ICC*, 494 U.S. 1, 22-24 (1990) (O'Connor, J., concurring).

removed the tracks and a taking upon the establishment of a recreational trail.[111]

The dissenting opinion, though reaching a contrary conclusion on the abandonment issue and the takings claim, is equally unpersuasive. By finding that the state did not abandon the easement under state law, the dissent ignored the federal role in regulating interstate commerce.[112] After finding that the easement continued to exist, the dissent applied both the "shifting public use doctrine" under Vermont common law and a state preservation statute to conclude that no taking occurred.[113]

IV. ACHIEVING CONSTITUTIONAL CONSISTENCY

A. The Abandonment

In short, the court in *Preseault v. United States* held that the Vermont Railway abandoned the state's easement for railroad purposes under state law ten years before Vermont established a trail on the right-of-way. Thus, the court did not specifically address whether the Rails-to-Trails Act could prevent abandonment without violating the Fifth Amendment. Instead, the court found that reestablishment of the easement after ten years constituted a taking. The court decided that abandonment occurred under state law despite exclusive federal jurisdiction over railroad abandonments under the Transportation Act of 1920, the language in the Rails-to-Trails Act evidencing congressional intent to delay abandonment of railroad rights-of-way, and the scope of congressional power under the Commerce and Supremacy Clauses. The court also ignored numerous federal decisions finding federal preemption of state law, including one recent case finding "consummation of abandonment" of a railroad easement only after the ICC had approved the abandonment and the railroad manifested its intent to abandon the easement, despite cessation of operations six years earlier and the removal of tracks.[114]

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111. *See* Preseault v. United States, 100 F.3d at 1554.

112. *See id.* at 1558-75 (Clevenger, J., dissenting).

113. *See id.* at 1566-76.

114. *See* Fritsch v. ICC, 59 F.3d 248, 252-53 (D.C. Cir. 1995); *see also* Grantwood Village v. Missouri Pac. R.R. Co., 95 F.3d 654, 657 (8th Cir. 1996) (holding that federal law preempts state law on question of abandonment); National Wildlife Fed'n v. ICC, 850 F.2d 694, 704 (D.C. Cir. 1988) (holding that state law cannot cause reverter of railroad right-of-way prior to ICC-approved abandonment); Schneider v. Union Pac. R.R. Co., 864 F. Supp. 120, 123 (D. Neb. 1994)

The court confused its analysis of the impact of federal legislation on the alleged taking with the impact of federal legislation on abandonment of the easement. The two are separate issues. In fact, the court admitted as much in its opinion.[115] While citing dicta from Justice O'Connor's concurrence in *Preseault v. ICC* for the proposition that state law defines the property interest in a *takings* claim,[116] the court without analysis ignored the impact of federal legislation on *abandonment* of the easement, assuming without explanation that state law controlled.[117] Thus, the court ignored the conclusion that within the federal regulatory scheme under the Constitution, federal law controls the issue of abandonment. By forcing the square peg of state law into the round hole of federal railroad regulation in the interest of interstate commerce, the court avoided unambiguous congressional language prohibiting abandonment of the right-of-way.[118]

The court's holding that state law controls the issue of abandonment of the right-of-way is contrary to Congress's power to regulate interstate commerce and preempt state law nnder the Constitution. As noted above, Congress enacted the Transportation Act for the specific purpose of preempting any state law that interferes with interstate commerce—that is, to preempt laws that prevent railroads from abandoning rail service.[119] The purpose of the Transportation Act would be subverted unless federal law also preempted state property law that interferes with interstate commerce by forcing railroads or their successors to abandon rail corridors still subject to future reactivation as part of the national transportation system; federal jurisdiction over rail service is

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(holding that federal law preempts state law in context of Rails-to-Trails Act); Chevy Chase Land Co. v. Unitod Statos, 37 Fed. Cl. 545, 580 (1997) (finding ahandonment on date of ICC approval). *But see* McKinley v. Waterloo R.R., 368 N.W.2d 131, 134 (Iowa 1985) (holding that federal law regulating railroad abandonments does not preempt state law); Lawson v. State, 730 P.2d 1308, 1316-17 (Wash. 1986) (en banc) (finding that federal law regulating railroad abandonments does not preempt state law).

115. *See* Preseault v. Unitod Statos, 100 F.3d at 1537 (en banc) ("[H]aving and exercising the power of preemption is one thing; being free of the Constitutional obligation to pay just compensation for the state-created rights thus destroyed is another.").

116. *See id.* at 1537.

117. *See id.* at 1544-49 (discussing abandonment).

118. By finding ahandonment of the easement before the right-of-way was converted to a trail, the court avoided applying the provision of the Rails-to-Trails Act that states "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d) (Supp. II 1996).

119. *See* SHARFMAN, *supra* note 3, at 6 (discussing authority of ICC over abandonments).

meaningless without concurrent jurisdiction over the underlying property interest.

Allowing railroad easements to be abandoned under state property law effectively takes the rail corridor out of the national transportation system without the consent of the STB. Permitting state law to determine the disposition of property interests denies the federal government its ability to determine which lines are necessary for present and future rail use. The result is the loss of "valuable national asset[s]"[120] in the face of increasing population density and urban areas literally choking on traffic congestion. The same problem of state interference with efficient transportation that Congress faced in 1920 is just as relevant today. Any doubt as to the congressional intent behind the Rails-to-Trails Act is removed by the clear language of the Act and the accompanying legislative history.[121] Perhaps through confusion, the Federal Circuit did not consider the impact of Congress's power under the Commerce Clause in deciding the issue of abandonment.

This Note advocates an analysis of abandonment that is consistent with the Commerce Clause and the Fifth Amendment. The analysis begins with state property law, but does not end there. The first step should be a determination of the property interest at issue. If the right-of-way is a fee simple estate, the analysis ends, because ouly one party, the owner, has an interest in the land. On the other hand, if a court finds that the right-of-way is an easement, the determining factor in light of federal railroad regulation would be whether the STB has granted a certificate of abandonment with respect to the rail line. If the STB has not done so, the right-of-way is still a part of the national transportation system, subject to reactivation for future use, even if the interim use is for a bicycle and pedestrian trail pursuant to the Rails-to-Trails Act. Conversely, if abandonment has been sought by any interested party and approved by the STB after the requisite determination of public necessity and convenience, courts should consider the line to be outside the jurisdiction of the federal government and no longer part of the national transportation system. State law would then determine the disposition of the rail corridor. A contrary conclusion denies the federal government its ability to effectively regulate interstate commerce and ignores the plain language of the Rails-to-Trails Act. Under the court's holding in *Preseault v. United States*, railbanking is impossible; presently unused rail corri-

120. Preseault v. ICC, 494 U.S. 1, 19 (1990).

121. *See supra* notes 35-43 and accompanying text.

dors cannot be maintained except by incurring the huge expense of leaving valuable equipment and track in place.

Since the power to regulate abandonments of rail service would be incomplete without the concomitant power to regulate the property interest upon which present or future rail service depends, the proposition that state law determines the disposition of rail corridors still within the jurisdiction of the STB is incompatible with the STB's responsibility to effectively regulate the nation's rail system. The Supreme Court has found this to be within Congress's power.[122] Because Congress has expressed its will in unambiguous language, and clearly has the power under the Commerce and Supremacy Clauses, state law should simply be inoperative until the federal government terminates jurisdiction over the rail corridor pursuant to the Transportation Act.

B. The Taking

The Federal Circuit's finding of an abandonment under state law enabled the court to avoid applying the Rails-to-Trails Act. By iguoring the federal role in regulating abandonments, the Federal Circuit found that a taking occurred when the state reentered the property to establish a recreational trail ten years after the Vermont Railway abandoned the easement under state law.[123] Thus, by applying state law to find an abandonment well before the establishment of the trail, the court was able to ignore express congressional intent and statutory language providing that "interim use [as a trail] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."[124] According to the Federal Circuit, reestablishment of a previously abandoned right-of-way constituted the taking, not the interim trail use of a viable rail corridor still under the jurisdiction of the ICC.[125]

By finding the establishment of a new easement, the Federal Circuit characterized the occupation by the state as a permanent physical taking, and applied the per se rule of *Loretto*, rather than the

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122. *See* Preseault v. ICC, 494 U.S. at 17-19.

123. *See* Preseault v. United States, 100 F.3d 1525, 1544-45, 1549 (Fed. Cir. 1996) (en banc).

124. 16 U.S.C. § 1247(d) (Supp. II 1996).

125. *See* Preseault v. United States, 100 F.3d at 1550 (stating that the trail constituted "a new easement for the new use, constituting a physical taking of the right of exclusive possession that belonged to the Preseaults").

Penn Central balancing test applied by the Claims Court.[126] The per se rule, however, is inappropriate for several reasons. First, the easement continued to exist under federal law, and thus the recreational trail did not create a new restriction. Second, the limitation on the disposition of the easement was a by-product of federal railroad regulation, rather than an end in itself. Third, delayed abandonment under the Rails-to-Trails Act would not have been permanent.[127] Fourth, the establishment of a recreational trail did not physically displace the Preseaults; they never actually occupied the land in question. Fifth, the trail was not shown to increase the burden on the servient estate. Finally, even conservatives such as Justice Scalia would not find a per se taking when a preexisting limitation is extended.[128] As a result, *Penn Central* should apply.

Under the first prong of the *Penn Central* test—determining the nature of the government action—the Rails-to-Trails Act clearly meets the standard for a taking because the Act authorizes physical occupation of the right-of-way.[129] Under the second prong of the *Penn Central* test, however, the landowners will almost never be able to show a regulatory taking because pervasive federal regulation of railroad abandonments has left most landowners without any reasonable investment-backed expectations in railroad rights-of-way.[130] The third prong of the test—the economic impact of the government action—would require a further factual inquiry to determine the value of the right-of-way and the diminution of the property value due to the perpetuation of the right-of-way. Doubt exists, however, whether the perpetuation of an already existing easement would diminish the value of the land to any significant extent. Since a plaintiff must prove all three factors to show a taking, delayed abandonment under the Act will almost never be a taking.[131] By applying *Loretto*, as opposed to *Penn Central*, the court in effect decided that investment-backed expectations and diminished value are irrelevant to the determination.

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126. *See id.* at 1544-45 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

127. *See* Preseault v. United States, 27 Fed. Cl. 69, 95 (1992) ("The *Penn Central* approach applies in this case because any taking would not be deemed permanent. Each lease is for five years up te a maximum renewal period of 30 years, and a request to reactivate railroad operations can be made at any time."); *see also* Preseault v. United States, 100 F.3d at 1555 n.1 (Clevenger, J., dissenting) (discussing lease).

128. *See supra* note 54.

129. *See* Preseault v. United States, 27 Fed. Cl. at 95.

130. This is effectively the holding of the Court of Federal Claims that was overruled by the Federal Circuit. *See id.* at 95-96.

131. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (applying *Penn Central*).

Separate from investment-backed expectations and diminished value is the assumption by the court that the Preseaults had a compensable property interest taken. As noted above, the establishment of a trail did not physically displace the Preseaults. In this case, the predecessors to the Preseaults already received compensation for granting the right-of-way over their land either through direct purchase by the Rutland-Canadian Railroad or through eminent domain proceedings.[132] The Preseaults knowingly purchased their land subject to the restriction in the deed, presumably paying less for the land than they would for similar land not subject to a railroad easement. Far from preventing a taking without compensation, the court provided a windfall to the Preseaults.

Another source of confusion is the nature of the property interest held by the servient owner. As noted above, easements do not create a future interest in land; the interest of the easement holder is a present interest in the fee subject to an easement.[133] The Federal Circuit recognized the distinction but, relying on the dicta in Justice O'Connor's minority opinion in *Preseault v. ICC*, came to the conclusion that the present interests of the Preseaults in the easement were destroyed.[134] In reality, the Preseaults maintained the same interest in the land they always had—they still owned their land in fee simple subject to a railroad easement. Moreover, since railroad easements are exclusive occupancy easements, the interim trail use of the rail-banked easement is on its face less burdensome than the continuing present use of the easement for actual railroad operations. Perpetuating an easement under the Rails-to-Trails Act by delaying abandonment actually *maintains* the present interest, rather than effecting a taking by *destroying* a present or future interest.

The court's alternate ground for a taking was that the scope of the easement for railroad purposes did not encompass use of the property for recreational trails, because the "shifting public use doctrine" did not exist under Vermont law.[135] That argument is not convincing, however, once one realizes that the Rails-to-Trails Act includes future railroad use as a railroad purpose and that the establishment of a recreational trail could actually be less burdensome

132. Of the three parcels containing a right-of-way acquired by the Preseaults, two were condemned through eminent domain and one was purchased through contract. *See* Preseault v. United States, 100 F.3d at 1534-37.

133. *See id.* at 1533-34 (explaining the difference between reversion and relief from the burden of an easement).

134. *See id.* at 1550-51.

135. *See id.* at 1550.

than an active railroad easement, most notably because the characteristic of exclusive occupancy disappears. Thus, there is no "shift" in use because the easement is still being used for a railroad purpose, and there is no taking because the additional use is less burdensome than the original use for rail traffic. On the other hand, if the *Penn Central* test is met, and the facts and circumstances of a particular case warrant a finding that a trail is more burdensome than railroad use, landowners are justified in claiming compensation for the increased burden.[136]

Considered objectively, the Rails-to-Trails Act does not attempt to redefine state property rights. Rather, it broadens the definition of railroad purpose to include railbanking and interim trail use in order to regulate interstate commerce. Even before the Rails-to-Trails Act, state law could not affect railroads under the "exclusive and plenary jurisdiction" of the ICC. The broader definition of rail purpose provided in the Act is necessary to accommodate changing transportation priorities in modern America. Interpreted in the context of the Commerce Clause, the Rails-to-Trails Act does not conflict with state property law; easements are still subject to termination under state law once the state regains jurisdiction from the federal government.

V. CONCLUSION

This Note advocates that state law simply cannot operate to terminate a railroad easement while the federal government retains jurisdiction over the rail corridor under the Transportation Act of 1920. Controversy surrounding trail use under the Rails-to-Trails Act should not undermine the responsibility of the federal government to maintain rail corridors for present and future use. Prior to *Preseault v. United States*, states simply accepted the fact that they did not have jurisdiction over rail corridors still subject to ICC control.[137]

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136. *See* I.F. REDFIELD, THE LAW OF RAILWAYS 269 (6th ed. 1888), *quoted in* Wright, *supra* note 69, at 756 ("The mere possibility of reverter te the original owner, or his heirs or grantees, is not regarded . . . as any appreciable interest requiring te be compensated. . . . The most the owner of the fee could claim in such case is to recover compensation for any additional land taken, and for any additional burden imposed upon the land appropriated.").

137. *See, e.g.*, Trustees of the Diocese v. State, 496 A.2d 151, 152 (Vt. 1985) (referring to Vermont's argument that ICC approval was required before a railroad may be abandoned).

Preseault v. United States threatens not only efforts to preserve rail corridors for future use, but also the viability of federal control over interstate commerce.

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* The Author would like to thank the following people for their suggestions, comments, and assistance in preparing this Note for publication: Tonya Gray, Greg Kondritz, Elizabeth Mims, Paul Morris, and Jennifer Shorb. The Author would also like to thank Professor James Ely for suggesting the controversy surrounding rails-to-trails conversions as a topic for research, though he should not be held accountable for the Author's conclusions. Errors and inconsistences should be attributod solely to the Author.