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Cover Page Footnote

The author is a member of the board of directors to Rails to Trails Conservancy, a non-profit public interest corporation dedicated to fostering the conservation of abandoned railroad rights-of-way for public purposes, including future rail use and recreational trails.

FIXING THE UNBROKEN IN THE FEDERAL RAILBANKING AND TRAIL USE STATUTE: A REJOINDER TO "UNHAPPY TRAILS"

CHARLES H. MONTANGE*

"The reports of my death are greatly exaggerated."[1]

I. INTRODUCTION

The fifth amendment to the United States Constitution bars any governmental taking of private property without payment of just compensation.[2] Many state constitutions contain similar provisions.[3] Such constraints on takings are frequently invoked to limit or invalidate governmental regulation aimed at achieving environmental, conservation, or health and safety objectives.[4] The tension between governmental regulation and the takings clause has resulted in a kind of "cold war between environmental policy and private property rights."[5] This conflict has been met on the one hand with calls for redressing the balance through new ethics,[6] perhaps mediated by a

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1. Samuel Langhorne Clemens (Mark Twain), Cable from London to the Associated Press (1897).

2. "No person shall be . . . deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

3. *E.g.*, FLA. CONST. art. X, § 6; MD. CONST. art. III, § 40.

4. *E.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

5. *And Now, for a Look Forward: What's Your Best Hope for the 1990s?*, Wall St. J., Dec. 27, 1989, at A1 (quoting Fred L. Smith, policy analyst for the Competitive Enterprise Institute); *see* Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988).

6. *See generally* Karp, *Aldo Leopold's Land Ethic: Is an Ecological Conscience Evolving in Land Development Law?*, 19 ENVTL. L. 737, 738 (1989) (citing A. LEOPOLD, A SAND COUNTY ALMANAC 237 (1949) (lamenting that land, like Odysseus's slave girls, is treated as property to be thoughtlessly destroyed)).

constitutional amendment to guarantee a sound environment,[7] and on the other hand with hopes for "[a] new perestroika that expands our market system to encompass ecological values."[8]

The market approach has many commendable features that may self-correct environmental injuries, as well as help secure environmental opportunities.[9] Of course, there are circumstances in which a market will not properly reflect environmental costs and benefits, such as where certain costs are "externalized" to people who are not purchasing the product or service with which the costs are associated, or where the beneficiaries of a product or service are too diffuse a group to constitute a market capable of purchasing the optimal amount of the product or service. In those cases, a key objective of environmental policy should be to assure, through regulation or taxation, that externalized costs are fully reflected in the prices charged for products or services. In addition, similar public action should ensure that environmental opportunities benefiting a diffuse group are secured. Another way to accommodate ecology in a market system is to lessen the tension between property rights and the environment. Property rights

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7. J. Hair, The 1990's: The Decade of the Environment—Time for Constitutional Action 9 (Aug. 27, 1989) (copies of this speech are available from the National Wildlife Federation).

8. *And Now, for a Look Forward: What's Your Best Hope for the 1990s?*, Wall St. J., Dec. 27, 1989, at A1 (quoting Fred L. Smith, policy analyst for the Competitive Enterprise Institute).

9. Our surface transportation system is a prime example of government policy with enormous environmental costs that could be significantly reduced through the use of market concepts. The public pays for roads chiefly through an excise tax on gasoline and diesel fuel. Although this is commonly regarded as a "user fee," it bears no direct relation to congestion, deterioration, or pollution—the three major cost factors associated with highways. Because highway consumers fail to associate "user fees" with "use," they perceive highways as a free good and tend to overuse and abuse them, while at the same time polluting the atmosphere. *See* NATIONAL TAXPAYERS UNION FOUND., MARKETING INCENTIVES: DRIVING TRANSPORTATION POLICY INTO THE 1990's 4-5 (1990); K. SMALL, C. WINSTON & C. EVANS, ROAD WORK: A NEW HIGHWAY PRICING AND INVESTMENT POLICY (1989).

This gap between regulation and conservation is a kind of environmental nightmare. If automobile drivers had to pay for peak hour use of roads, if heavy trucks had to pay for highway deterioration attributable to them based on their axle weights, and if an emissions fee were charged based on air pollution from our current fleet of cars and trucks, then the country would likely have fewer roads. Correspondingly, the existing roads would be used more efficiently, thus reducing maintenance costs. In addition, our transportation bill would be lessened, deforestation and urbanization of the landscape would be reduced, and pollution would be decreased. Side benefits would also abound: there would be some check on suburban sprawl, the chance for at least some public mass transit systems to operate without enormous public subsidies would increase, and the economic incentives for technological breakthroughs in transportation would be enhanced. Finally, rail transportation, which is far less subsidized than motor-vehicular modes, would be much more competitive, and we would be faced with far fewer railroad right-of-way abandonments. But, in an important sense, this is all an argument to preserve railroad rights-of-way for future use in the event the United States decides to pursue more market-based and environmentally sensitive surface transportation systems.

do not promote liberty or foster economic growth and efficiency if they effectively preclude government regulation aimed at internalizing environmental costs and securing diffuse environmental benefits. Instead, they leave us with unredressable environmental injuries and an even more harsh and stagnant world.

The counterproductive tension between property rights and the environment is my primary concern with the approach taken by Professor Rita M. Cain in a recent article[10] addressing the viability of the National Trails System Act.[11] Her article describes the existence of trails as inevitably "unhappy" within a legal system necessarily hostile to corridor preservation efforts under the fifth amendment.[12] Fortunately, the legal system is not as bleak or unresponsive as Professor Cain's article implies. Although the situation with respect to trails could be considerably happier, it is not nearly as "unhappy" as Professor Cain would suggest.

II. THE CONSERVATION OF RIGHTS-OF-WAY

Specifically applicable to railroad rights-of-way, section 1247(d) of the National Trails System Act (Trails Act) deals with a problematic land use issue in an increasingly populous society—the conservation of linear rights-of-way.[13] The United States has been losing railroad rights-of-way to private ownership at an average rate of approximately three thousand miles per year, as the federal railroad regulatory agency, the Interstate Commerce Commission (ICC), considers them for "abandonment."[14]

A rail line in the United States ordinarily may not be abandoned by a railroad without prior ICC authorization.[15] Originally, ICC regulation of abandonments was relatively stringent: the ICC refused to authorize cessation of service without the unanimous agreement by all shippers and local governments located along a rail line.[16] The ICC based such refusal upon its apparent authority to enforce state corporate charters requiring carriers to provide certain rail services.[17]

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10. Cain, *Unhappy Trails—Disputed Use of Railroad Rights-of-Way Under the National Trails System Act*, 5 J. LAND USE & ENVTL. L. 211 (1989).

11. National Trails System Act, 16 U.S.C. §§ 1241-1251 (1988).

12. *See* Cain, *supra* note 10.

13. 16 U.S.C. § 1247(d) (1988). This section is commonly referred to as "8(d)" due to its origination in Pub. L. No. 90-543, § 8, 82 Stat. 925 (1968).

14. *See* Preseault v. ICC, 110 S. Ct. 914, 918 (1990) (citing Comment, *Rails to Trails: Converting America's Abandoned Railroads into Nature Trails*, 22 AKRON L. REV. 645 (1989)).

15. 49 U.S.C. §§ 10,903-10,904 (1988).

16. T. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 39 (1983) (citing Harris, *Economic Analysis of Light Density Rail Lines*, 16 LOGISTICS & TRANS. REV. 3-29 (1980)).

17. *Id.*

By the decade of the 1970's, competition from the trucking industry, high railroad labor rates, and other factors combined to force a number of major rail systems into bankruptcy. The ICC and Congress responded by easing economic regulation of the railroad industry with respect to rate setting and abandonments.[18] Accordingly, ICC rail abandonment policy changed dramatically. The ICC became much more concerned with relieving railroads of unprofitable lines, even if service to shippers terminated as a result.[19] Since 1979, the ICC has rarely refused to authorize a rail abandonment.[20] Although the basic legal test for abandonment has never been altered, Congress has facilitated the ICC's policy shift in favor of permitting right-of-way abandonment through the adoption of several statutes, commencing with the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act).[21] This Act specifies strict deadlines for action on railroad abandonment applications[22] and authorizes the ICC to grant exemptions from full economic regulation of abandonments.[23]

Rail corridors are prone to rapid disintegration after authorized abandonment. Rail carriers tend to own rail corridors in a hodgepodge of property interests ranging from fee simple absolute[24] or fee simple determinable (base fees)[25] to transportation easements[26] and railroad right-of-way easements.[27] Under the law of some states, base fees revert automatically to the original grantor or, in some cases, to

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18. The basic thrust of regulatory policy shifted from a willingness to cross-subsidize to a disdain for such practice. Cross-subsidization is a practice in which losses incurred through below-cost rates for one commodity are made up through excessive rates for some other commodity, or in which losses incurred from a low-density branch line are made up through higher profits from trunk lines.

19. This approach has gained acceptance in the appellate courts. *See, e.g.*, Cartersville Elevator, Inc. v. ICC, 735 F.2d 1059 (8th Cir. 1984); Mississippi Public Service Comm'n v. ICC, 650 F.2d 551 (5th Cir. 1981).

20. T. KEELER, *supra* note 16, at 105.

21. Pub. L. No. 94-210, 90 Stat. 31 (codified as amended in scattered sections of 49 U.S.C.).

22. 49 U.S.C. § 10,904 (1988).

23. *Id.* § 10,505. Another important deregulatory statute was the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

24. A fee simple absolute is an estate in which the owner is entitled to the entire property, with unconditional power of disposition during the owner's life. BLACK'S LAW DICTIONARY 554 (5th ed. 1979).

25. A fee simple determinable is created by a conveyance which contains words sufficient to create a fee simple and, in addition, a provision for automatic expiration of the estate on the occurrence of a stated event. *Id.*

26. An easement is a right of use over property of another. *Id.* at 456. A transportation easement authorizes such use for any transportation purpose.

27. A railroad right-of-way easement authorizes use of property for railroad purposes. It is important to emphasize that the term "railroad right-of-way" is not synonymous with the term "railroad right-of-way easement."

adjacent property owners upon formal abandonment.[28] Similarly, under the law of other states, railroad right-of-way easements automatically extinguish upon consummation of an abandonment approved by the ICC.[29] Whether ownership of a particular rail corridor reverts to the original grantor or vests in other parties is generally irrelevant. Since rail carriers are frequently eager to sell any developable parcel in the former right-of-way, rapid demise of the corridor is usually assured.

Congress recognized that new policies facilitating abandonment approvals would result in an increased loss of rail corridors and that such loss posed both a problem and an opportunity. Rail transport has several environmental and energy advantages,[30] the former making it both desirable and prudent to preserve corridors for future use.[31] Rail corridors may be used for a variety of alternative public purposes: highways, utility corridors, wildlife habitat, and recreational trails.[32]

Recognizing the environmental advantages of former rail corridors, Congress adopted a variety of measures to encourage corridor preservation without causing an undue burden to the abandoning rail carrier. As part of the 4-R Act, Congress moved to ease rail abandonment regulation by providing for a study of alternative uses for railroad rights-of-way and by establishing a highly successful demonstration program to encourage conservation of corridors as recrea-

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28. *See, e.g.*, State Dep't of Transp. v. Tolke, 36 Or. App. 751, 758-59, 586 P.2d 791, 795-96 (Ct. App. 1978) (title to the underlying land vests in the railroad and the grantor retains only a "possibility of reverter" upon cessation of rail service).

29. *E.g.*, McKinley v. Waterloo R.R., 368 N.W.2d 131 (Iowa 1985) (possibility of reverter cut off by marketable title act, but easement automatically extinguishes).

30. Indeed, Congress has recognized rail transport as among the most environmentally benign transportation modalities. 45 U.S.C. § 701 (1988).

31. In the words of one court:

> To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.

Reed v. Meserve, 487 F.2d 646, 649-50 (1st Cir. 1973).

32. *See* 49 U.S.C. § 10,906 (1988); PRESIDENT'S COMMISSION ON AMERICANS OUTDOORS, AMERICANS OUTDOORS: THE LEGACY, THE CHALLENGE 142-48 (1987); Mills, *Clearing the Path for All of Us Where Trains Once Ran*, SMITHSONIAN, Apr. 1990, at 132 (advantages of linear parks from rail corridors); Montange, *NEPA in an Era of Economic Deregulation: A Case Study of Environmental Avoidance at the Interstate Commerce Commission*, 9 VA. ENVTL. L.J. 1, 16-17 & nn. 85-87 (1989).

tional trails.[33] Congress also adopted legislation requiring the ICC, in any case where it authorizes abandonment, to make a finding as to whether a particular rail line is suitable for alternative public purpose.[34] This legislation further authorizes the ICC to facilitate such public use by barring nonpublic disposal of the right-of-way for up to 180 days unless it is offered for sale "on reasonable terms."[35]

Another provision of the 4-R Act was interpreted to prevent the ICC from encouraging the sale of a corridor proposed for abandonment to a short line for possible continued rail service.[36] When this occurred, Congress promptly amended the Interstate Commerce Act to confirm that the ICC, upon timely request, could establish the terms and conditions (including price) for mandatory transfer of a line from the rail carrier to a third party for railroad purposes.[37] Congress also authorized federal financial assistance to subsidize low density lines[38] and to assist states in preserving other lines for future use.[39]

A number of provisions in the 4-R Act were aimed at facilitating conservation of rail corridors proposed for abandonment. The results of these provisions, especially efforts to preserve corridors for possible future reactivation, have been erratic for two primary reasons. First, from an economic point of view, preservation for future use places significant economic burdens upon rail carriers, including management responsibility—weed control, fences, crossing maintenance, *etc.*—potential tort liability for injuries, as well as tax liability. More importantly, the carrier could suffer substantial loss-of-opportunity costs,[40] which (according to the ICC) are usually greater than ten per-

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33. *See* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 809(a)-(b), 90 Stat. 31, 144-45; NATIONAL PARK SERVICE, RAILS TO TRAILS GRANT PROGRAM, AN EVALUATION OF ASSISTANCE PROVIDED UNDER PUBLIC LAW 94-210 TO ASSIST IN THE CONVERSION OF ABANDONED RAILROAD RIGHTS OF WAY TO PARK AND RECREATION USE (Aug. 1985); B. NEVEL & P. HARNIK, RAILROADS RECYCLED (1990).

34. 49 U.S.C. § 10,906 (1988).

35. For reasons never adequately explained, the ICC has neither established procedures for determining whether a railroad has made its property available on "reasonable terms" nor otherwise sought to enforce this portion of section 10,906. *See* Montange, *supra* note 32, at 20-27.

36. *See* Chicago & N.W. Trans. v. United States, 582 F.2d 1043, 1049 (7th Cir. 1978).

37. *See* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 49 U.S.C. § 10,905 (1988)).

38. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 402, 90 Stat. 31, 139-40 (codified at 45 U.S.C. app. § 1654 (1988)) (this provision provides for financial assistance for preserving lines for future use, arguably rendering § 810 of the 4-R Act redundant).

39. Pub. L. No. 94-210, § 810, 90 Stat. 31, 146-47 (1976), *repealed by* Pub. L. No. 97-449, § 7(b), 96 Stat. 2413, 2443-45 (1983).

40. The ICC defines "opportunity costs" as:

> [T]he economic loss experienced by a carrier from foregoing a more profitable alternative use of its assets [devoted to the line sought to be abandoned]. [Opportunity

cent in the railroad industry.[41] Even if one assumed that the land in a railbanked corridor was worthless, the steel track, cross-ties and other portions of the roadbed could have a salvage value of perhaps $10,000 per mile. If the carrier's loss-of-opportunity rate is ten percent, the owner could suffer an annual opportunity cost of $1,000 per mile to hold the investment. Additionally, major rehabilitation would likely be required to restore service on branch lines, many of which have deteriorated as railway transportation utility declined.

In the face of high out-of-pocket and opportunity costs, as well as prospective rehabilitation expenses, any potential future rail business would have to be both relatively certain to occur in the near term—no later than five or six years away—and substantial enough to make railbanking economically feasible for a private rail carrier. The carriers, after all, must maximize value for their shareholders to the extent permitted by regulatory constraints. They are not in the business of voluntarily taking on costs and burdens in order to protect the public's interest in preserving corridors for future use. The historic response to this tension between private gain and public obligation was to deny abandonment and require the carrier to maintain the line intact.[42] This response, however, is contrary to the policy against cross-subsidization favored since the mid-1970's.

The second major problem with respect to preserving railroad rights-of-way for possible future use is that once an ICC-authorized abandonment occurs, the rail corridor tends to disintegrate rapidly. Thereafter, restoration of a corridor to support future rail use may be inordinately expensive and possibly futile.

Theoretically, both of these problems can be readily resolved, at least for some corridors. The economic attractiveness of railbanking may be markedly enhanced by encouraging interim use of the right-of-way in manners compatible with the railbanking purpose. Where interim uses are available and sufficiently attractive, they could defray

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costs] are computed from an investment base that is the sum of: (1) allowable base year working capital; (2) current income tax benefits (if any) resulting from abandonment; and (3) the net liquidation value (NLV) of the line. The investment base is then multiplied by the appropriate rate of return to establish the opportunity cost.

Chicago & N.W. Transp.—Abandonment—Between Steamboat Rock and Hampton in Hardin and Franklin Counties, Iowa, No. AB-1 (Sub-No. 217) at 6 (Feb. 8, 1989) (LEXIS, Trans library, ICC file).

41. The opportunity cost rate of return, which varies each year, was 12.6% as of August 1988. Abandonment of Rail Lines—Use of Opportunity Costs, *Ex Parte* No. 274 (Sub-No. 3F), 4 I.C.C.2d 829 (served August 11, 1988).

42. *See* T. KEELER, *supra* note 16, at 39.

the costs of railbanking.[43] In other words, future interstate commerce could be fostered without imposing significant economic burdens on present carriers and shippers.

With respect to the problem of corridor collapse, the theoretical solution is to authorize relief to the carrier tantamount to discontinuance of service but not full abandonment of the corridor. Until the corridor is fully abandoned, the ICC retains jurisdiction and collapse of the corridor is prevented.

Glen Tiedt, an official with the now defunct Bureau of Outdoor Recreation of the United States Department of Interior, was the first to publicly propose linking interim use of railroad rights-of-way with the railbanking purpose.[44] The concept, as developed within the Interior Department, was embodied in section 208 of the National Trails System Act Amendments of 1983.[45] Currently, section 1247(d) provides that if certain conditions are met, the ICC may not authorize abandonment, but shall instead authorize preservation of a corridor for future rail reactivation and interim trail use. These conditions require that a railroad be relieved of the costs of the railbanking so that preservation of the corridor will benefit rather than burden interstate commerce.[46]

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43. The longer the [railroad right-of-way] must be banked before being redeveloped as a railroad or as some other transport corridor, the higher will be the costs and the less the likelihood of the project having a positive net present value. At the same time, if interim uses can be identified and initiated before this redevelopment occurs, the project is more likely to have a positive net present value. The abandoned [right-of-way] may also provide significant soil, water and wildlife conservation benefits that may justify the retention of [the right-of-way] for such purposes alone.

J. BARNARD & D. BECKMANN, FEASIBILITY OF LAND BANKING RAILROAD RIGHT-OF-WAY 41-42 (1981) (pamphlet published by the Legislative Environmental Advisory Group, University of Iowa).

44. Tiedt, *From Rails to Trails and Back Again: A Look at the Conversion Program*, PARKS & RECREATION, Apr. 1980, at 43.

45. Pub. L. No. 98-11, § 208, 97 Stat. 42, 48 (codified at 16 U.S.C. § 1247(d) (1988)).

46. Divided into its three component sentences, section 1247(d) of the National Trails System Act provides as follows:

1. The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage state and local agencies and private interests to establish appropriate trails using the provisions of such programs.

2. 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 the National Trails System Act, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or

Initially, the ICC was slow to implement section 1247(d). When the statute was invoked, the ICC would simply authorize abandonment but retain jurisdiction to regulate the line in question as soon as rules implementing the new law were issued.[47] Eventually, rules were issued. In accordance with a provision in the Code of Federal Regulations,[48] the ICC can implement section 1247(d) of the Trails Act by issuing a Certificate of Interim Trail Use (CITU) or Notice of Interim Trail Use (NITU), depending upon the kind of rail abandonment proceeding involved.[49] A CITU or NITU operates much like an authorization for a discontinuance of service: it ends the common carrier's obligation to provide service on demand, while preserving the corridor intact.[50] From an economic standpoint, the major difference between the two is that under a discontinuance, the carrier remains responsible for the corridor, while under a CITU or NITU, the trail sponsor must assume responsibility for the right-of-way.[51]

The ICC's regulatory approach places the agency in a very passive role. The ICC requires a trail sponsor to invoke the statute in a timely fashion.[52] If the railroad voluntarily agrees to negotiate an interim trail use and railbanking agreement, the agency will afford 180 days for such negotiations.[53] If an agreement is voluntarily negotiated

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rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

3. If a State, political subdivision, or qualified private organization is prepared to assume 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 Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

See 49 U.S.C. § 1247(d) (1988).

47. *E.g.*, Denver & R.G. W. R.R.—Abandonment—in Utah, Sanpete and Sevier Counties, Utah, No. AB-8 (Sub-No. 8) at 45 (May 17, 1985) (LEXIS, Trans library, ICC file).

48. 49 C.F.R. § 1152.29 (1989).

49. There are basically three kinds of rail abandonment proceedings: ordinary or "regulated" abandonments which are pursued by the filing of a formal application to abandon, 49 U.S.C. §§ 10,903-10,904 (1988); petitions for an exempt abandonment which are handled on an *ad hoc* basis, *id.* § 10,505; and "notices of exemption" which are an expedited form of abandonment approval for lines out of service, other than for overhead traffic, for at least two years, 49 C.F.R. § 1152.50 (1989). The ICC issues a "certificate of interim trail use" or "CITU" in ordinary or "regulated" abandonment proceedings, and a "notice of interim trail use" or "NITU" in both petition for exemption and notice of exemption proceedings. *Id.* § 1152.29.

50. Supplemental Trails Act Procedures, 54 Fed. Reg. 8011 (1989) (ICC policy statement noting similarity between discontinuances and railbanking).

51. *See id.* (ICC policy statement comparing discontinuances and railbanking/interim trail use arrangements).

52. The agency has amended its regulations to permit late-filed requests for the application of section 1247(d) so long as it retains jurisdiction. *See* 49 C.F.R. § 1152.29(e) (1989).

53. 49 C.F.R. § 1152.29(b)(1), (d)(1) (1989).

within that time, or within such extensions of that time as the agency authorizes, the ICC retains jurisdiction over the corridor until the trail sponsor formally terminates the CITU or NITU. If no agreement is voluntarily negotiated, the CITU or NITU authorizes full abandonment.[54]

III. THE ICC'S "VOLUNTARY" CONSTRUCTION OF SECTION 1247(d)

Much of the controversy surrounding the constitutionality of section 1247(d) of the Trails Act has flowed not so much from the provision itself, but from the Interstate Commerce Commission's (ICC) passive interpretation of the law, a point Professor Cain appears to overlook. The ICC originally interpreted the statute to apply in *all* cases of rail abandonment,[55] even though section 1247(d) required parties interested in preserving a rail corridor for recreational purposes to interject themselves into a carrier's abandonment proceedings.[56] More importantly, however, the statute speaks in mandatory terms. Section 1247(d) of the Trails Act provides that when a party is prepared to assume all future costs and liabilities associated with a right-of-way, including its operation as a recreational trail subject to reactivation for rail purposes, then the ICC "shall not" authorize an abandonment "inconsistent or disruptive" with trail use and railbanking, but instead "shall impose" terms and conditions providing for the transfer of the right-of-way for interim trail use.[57] "Shall" when used in a statute ordinarily means mandatory.[58] Furthermore, the legislative history of section 1247(d) confirms that this section is mandatory and must be applied despite the objection of an abandoning carrier.[59]

The Association of American Railroads and the Department of Transportation[60] took the contrary position that mandatory application of section 1247(d) might constitute a taking of private property

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54. *E.g.*, *id.* § 1152.29(g).

55. Rail Abandonments—Use of Rights-of-Way as Trails, 50 Fed. Reg. 7200 (1985).

56. *See, e.g.*, Seaborg, *Trails Bill Could Turn Rails into Trails*, AM. HIKER, June 1983, at 1.

57. 16 U.S.C. § 1247(d) (1988).

58. *See, e.g.*, Board of Pardons v. Allen, 482 U.S. 369, 377-78 (1987); American Fed'n of Gov't Employees v. Federal Labor Relations Auth., 739 F.2d 87, 89 (2d Cir. 1984); Association of Am. R.Rs. v. Costle, 562 F.2d 1310, 1312 (D.C. Cir. 1977) ("'shall' is the language of command in a statute").

59. *See, e.g.*, H.R. REP. No. 28, 98th Cong., 1st Sess. 8-9, *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 112, 119-20 (if interim trail user agrees to cover costs, "then the route will not be ordered abandoned").

60. Association of American Railroads comments filed in ICC dkt. *Ex Parte* No. 274 (Sub-No. 13) (Mar. 25, 1985); U.S. Dept. of Transportation comments filed in ICC dkt. *Ex Parte* No. 274 (Sub-No. 13) (Mar. 29, 1985) (these comments are on file in ICC public documents room).

without just compensation. Possibly to avoid this problem, the ICC in its final regulations made the application of section 1247(d) fully voluntary on the part of the railroad. This construction has been upheld by three courts of appeal and the mandatory language of the statute essentially ignored.[61] As Judge Ginsberg indicated in *National Wildlife Federation v. ICC*, "mandatory construction of section 1247(d) as applied to railroads did not smack of sufficient accommodation of the railroads' special interests, but instead suggested that Congress would blithely fail to mention that it intended the trails program to operate without regard to the objections and interests of the abandoning railroads."[62] In short, these courts had difficulty believing that Congress would "roll" the railroads in such a fashion.[63]

By ignoring the mandatory language of the statute, however, these appellate courts are actually "rolling" Congress. The statute allows for accommodation of legitimate interests of the railroads without eviscerating the mandatory language of section 1247(d). Specifically, because the ICC is in the business of valuing an abandoning railroad's interests in a right-of-way, it could appropriately value the carrier's interest for purposes of railbanking and require some payment by the trail sponsor to avoid a taking through the mandatory application of section 1247(d). After all, section 1247(d) does expressly empower the ICC to set "terms and conditions" for trail use. This approach would give some meaning to the mandatory language of the statute yet preclude the ICC from authorizing an abandonment.

As a matter of public policy, mandatory application of the railbanking law makes sense. A key economic justification for railroad regulation is that railroads

> have achieved their market position . . . by virtue of government intervention that allowed them to assemble the necessary interests in land. Railroads typically resorted to government power to obtain the original land grants. . . . All these takings must be for a public purpose, so the question is, who is entitled to the surplus created by the redeployment of resources under the eminent domain power? If the . . . railroads could operate in a wholly unregulated fashion, their original shareholders could appropriate the surplus to

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61. *See* National Wildlife Fed'n v. ICC, 850 F.2d 694 (D.C. Cir. 1988); Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479 (2d Cir. 1988); Washington State Dept. of Game v. ICC, 829 F.2d 877 (9th Cir. 1987).

62. 850 F.2d 694, 701 (D.C. Cir. 1988).

63. In a sense, the three decisions indicate how cynical the judiciary may be with respect to the special interest bargaining process so rampant in federal regulation. The three courts could not conceive, despite the clear language of the statute, how Congress could have failed to protect the railroad industry.

> themselves, in violation of the public use requirement that demands its even distribution.[64]

By analogy, if a railbanking agreement is voluntary on the part of the carrier, the railroad could seek the payment of a premium to enter into the agreement, notwithstanding the fact that the property in question only existed by virtue of the public eminent domain power in the first place. This premium payment might "violat[e] the public use requirement that demands its even distribution."[65]

The ICC's decision to apply section 1247(d) to railroads on a voluntary rather than mandatory basis fueled many of the objections to the statute subsequently presented by trail and railbanking opponents. The shift in ICC policy created an obvious tension.[66] While protecting the railroads' ability to prevent corridor conservation on grounds of possible takings problems, the ICC withheld that ability from adjacent landowners having similar takings questions. Challengers also complained that the voluntary nature of the statute frustrated broad applicability of the law and rendered its professed railbanking purpose a "smoke screen."[67] Objectors charged that the ICC interpretation empowered the railroads to sell to trail advocates what had been adjacent landowners' interests in the corridor and also raised the possibility of double payments by trail sponsors in the event the adjacent landowners were successful in pursuing compensation claims.[68]

It should be noted that these objections are not problems or defects in the statute as conceived by proponents of railbanking and trail use. Rather, the criticisms flow directly from the ICC's interpretation of the statute (embraced by the Association of American Railroads) as totally voluntary on the part of rail carriers. The best solution to the problem would be to make the statute fully mandatory on abandoning carriers. If the railroads were compensated for their interests,[69] the in-

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64. R. EPSTEIN, TAKINGS 274-75 (1985).

65. *Id.* at 275.

66. National Wildlife Fed'n v. ICC, 850 F.2d 694, 707 n.19 (D.C. Cir. 1988).

67. *E.g.*, Petitioners' Petition for Certiorari at i-ii, 23-24, Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316 (8th Cir. 1989) (No. 89-564), *cert. denied*, 110 S. Ct. 1295 (1990).

68. *See* Response of the National Association of Reversionary Property Owners (NARPO) to the ICC's Notice of Policy Statement and Request for Comments, ICC dkt. *Ex Parte* No. 274 (Sub-No. 13B) at 2-3 (Feb. 23, 1990) ("One would think that the railroads wrote . . . the ICC rules emanting [sic] from the Trails Act.").

69. The ICC will order the mandatory transfer of rail lines for continued rail use, with the agency setting the terms of compensation at the constitutional minimum required to satisfy the "just compensation" requirement. 49 U.S.C. § 10,905 (1988); *see* Chicago & N.W. Transp. Co. v. United States, 678 F.2d 665 (7th Cir. 1982). In effect, the objections to the ICC's interpretation of the statute could be resolved by treating "railbankers"—persons interested in preserving a line for future rail use—as equivalent to persons seeking a line for current rail use.

dustry would not be unduly burdened and the purposes of the 4-R Act—with which section 1247(d) was intended to comport—would be accommodated. In addition, compensation would eliminate the potential problem of double payments by trail sponsors, preserve more rights-of-way, and prevent payment of a premium to accomplish a public purpose. Finally, if railroads were paid constitutionally required compensation, adjacent landowners and carriers would not be dissimilarly treated.

IV. THE CONSTITUTIONALITY OF SECTION 1247(d)

In her article, Professor Cain considered the constitutionality of section 1247(d) under both the commerce clause and the takings clause. Although it appeared she regarded the recreational objectives of the statute as local concerns,[70] she nevertheless concluded that the new law was constitutionally permissible under Congress' power to regulate interstate commerce. Court decisions, however, including the recent United States Supreme Court ruling in *Preseault v. ICC*, have viewed the statute as a legitimate exercise of congressional authority furthering recreational or railbanking objectives.[71] Because the Supreme Court's analysis in *Preseault* contains overtones regarding the takings issue, it is important to consider it in some detail.

A. Commerce Clause

The Supreme Court's commerce clause analysis implicitly rejects claims that cases such as *Nollan v. California Coastal Commission*[72] and *First English Evangelical Lutheran Church v. County of Los Angeles*[73] presaged limitations on the exercise of congressional power when possible takings of property may be entailed. Relying on the general rule that a statute passes constitutional muster if the "means selected by Congress are 'reasonably adapted to the end permitted by the Constitution,'"[74] the Court noted that the statute evinces two congressional purposes: first, to promote development of recreational trails, and second "'to preserve established railroad rights-of-way for

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70. Cain, *supra* note 10, at 214 ("Congress is using railbanking as a facial commercial link to regulate a local activity outside its authority.").

71. 110 S. Ct. 914 (1990), *aff'g*, 853 F.2d 145 (2d Cir. 1988); National Wildlife Fed'n v. ICC, 850 F.2d 694 (D.C. Cir. 1988); Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108 (E.D. Mo. 1988), *aff'd*, 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990).

72. 483 U.S. 825 (1987).

73. 482 U.S. 304 (1987).

74. *Preseault*, 110 S. Ct. 914, 924-25 (1990) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S 241, 262 (1964))).

future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.'"[75] The Court concluded that these purposes were "valid congressional objectives to which the Amendments are reasonably adapted."[76]

The Court then turned to specific claims that railbanking was a sham, either because section 1247(d) was not mandatory on the part of the railroads or because it was only applicable to lines which the ICC was prepared to authorize for abandonment.[77] The Court stated that "we are not at liberty under the rational basis standard of review to hold . . . [section 1247(d)] invalid merely because more Draconian measures . . . might advance more completely the rail banking purpose."[78] Instead, the Court noted that legislation frequently involved "tradeoffs, compromises, and imperfect solutions."[79] The Court in *Preseault* similarly rejected claims that the railbanking purpose stated in section 1247(d) was somehow tainted by the recreational trails objective, noting that the latter was a legitimate congressional concern, and "[t]here is no requirement that a law serve more than one legitimate purpose."[80] More to the point, the Court squarely rejected the argument that the statute does not serve a railbanking purpose: "Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable. Given the long tradition of congressional regulation of railroad abandonments, that is a judgment that Congress is entitled to make."[81]

B. Fifth Amendment

Professor Cain regarded section 1247(d) as a taking whenever the statute operated to preserve corridors encompassing railroad right-of-way easements.[82] She endorsed either revision of the ICC's administration of the statute or congressional intervention to require participation by underlying fee holders in the bargaining process.[83] At the same time, Professor Cain acknowledged that involvement of such landowners could frustrate corridor preservation efforts because some fee

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75. *Id.* at 925 (quoting H.R. REP. No. 28, 98th Cong., 1st Sess. 8-9, *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 112, 119-20.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 926 (citation omitted).
82. Cain, *supra* note 10, at 220.
83. *Id.*

holders would refuse to sell their underlying interests.[84] Alternatively, she suggested that Congress simply abandon efforts to encourage conservation of rail corridors.[85]

Professor Cain's analysis of the takings issue is fundamentally flawed and leads to proposals which opponents of corridor conservation might advocate as policy positions, but which certainly do not flow as legal conclusions. With regard to legal questions surrounding the taking issue, Professor Cain focused on whether the federal regulation altered a property interest recognized by state law.[86] Admittedly, under the law of some[87] (but not all)[88] states, trail use of a railroad right-of-way would not preserve a railroad easement. In addition, some states may not recognize retention of corridors for future rail use as a reasonable railroad purpose. It does not follow, however, that section 1247(d) operates as a taking in states that do not recognize the interchangeability of public transportation uses, or which do not acknowledge railbanking as a legitimate railroad purpose. Certainly, railbanking is not constitutionally suspect simply because it may effectuate a taking under a particular set of circumstances.

1. Compensation Under the Tucker Act

The fifth amendment does not bar takings—only those without just compensation. Professor Cain's analysis ignores, as did the *National Wildlife Federation v. ICC* decision on which she relies, the availability of just compensation under the Tucker Act[89] to remedy any taking resulting from the application of section 1247(d). The Tucker Act functions as a safety net under federal environmental, economic, and

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84. *Id.* at 223.

85. *Id.* at 223-24 ("Congress reasonably could conclude that the nature trails and railbanking purposes of the Trails Act are not strong enough federal interests for the government to protect . . . .").

86. *Id.* at 218-20 (arguing that state law governs rights granted and the circumstances covering reversion, and that the ICC takes property when it expands the rights granted).

87. *E.g.*, McKinley v. Waterloo R.R., 368 N.W.2d 131 (Iowa 1985); Lawson v. State, 107 Wash. 2d 444, 730 P.2d 1308 (1987).

88. *E.g.*, State *ex rel.* Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543 (Minn. 1983), *cert. denied*, 463 U.S. 1309 (1983); Rieger v. Penn Central Corp., No. 85-CA-11 (Ohio Ct. App. May 21, 1985).

89. 28 U.S.C. § 1491 (1988). Professor Cain mentions the Tucker Act in two footnotes, but fails to acknowledge its applicability or the legal consequences of the availability of the Tucker Act remedy. Cain, *supra* note 10, at 220 n.67, 223 n.84. Perhaps this represents an unargued policy judgment on her part that any reliance on the Tucker Act to remedy a taking should be avoided. Should such a policy be adopted across the board, it would threaten a host of federal environmental programs.

public interest regulation.[90] Unless expressly withdrawn by Congress, the Tucker Act remedy operates as an implicit promise to pay just compensation in the event a congressionally authorized federal regulatory action goes too far and constitutes a taking.[91]

Under the Tucker Act, a party challenging a federal regulatory action as a taking can file an action in the United States Claims Court, or in the appropriate U.S. District Court,[92] seeking just compensation for the alleged taking.[93] The Supreme Court in *Preseault* unanimously held that the Tucker Act was applicable to remedy any taking problem posed by section 1247(d).[94] In sum, if a particular application of section 1247(d) results in a taking, the United States will pay for the property interests taken. As a result of this compensation, section 1247(d) of the Trails Act clearly passes fifth amendment muster.[95]

The court in *National Wildlife Federation v. ICC* directed the ICC to reconsider whether the application of certain rules implementing section 1247(d) might result in a taking and, if so, how compensation might be provided.[96] In response, the ICC issued a policy statement acknowledging that the Tucker Act provided the appropriate remedy in the event of such a regulatory taking.[97]

2. *The Taking Issue*

It is far from clear that the application of section 1247(d) to parcels held as easements by railroads effectuates a compensable taking. Much ink has been spilled on the subject of takings and regulation,[98] with the result that no bright line exists between what constitutes legit-

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90. *See* Armijo v. United States, 663 F.2d 90, 93 (Ct. Cl. 1981) ("the Court of Claims under § 1491 is more or less the clean-up man to take care of . . . all . . . instances where Congress has taken property and inadvertently, or purposely, failed to provide just compensation anywhere along the line").

91. United States v. Riverside Bayview Homes, 474 U.S. 121, 127-29 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 94 n.39 (1978); Regional Rail Reorganization Act Cases, 419 U.S. 102, 148-49 (1974). *See also* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 187-95 (1985).

92. 28 U.S.C. § 1346(a)(2) (1988) (creating jurisdiction in district courts for claims not exceeding $10,000.)

93. 28 U.S.C. § 1491 (1988).

94. 110 S. Ct. 914, 922-23 (1990).

95. *Id.*

96. 850 F.2d 694, 708 (D.C. Cir. 1988).

97. Supplemental Trails Act Procedures, 54 Fed. Reg. 8011 (1989).

98. *E.g.*, R. EPSTEIN, *supra* note 64; Lawrence, *Means, Motives, and Takings: The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L. REV. 231 (1988); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

imate regulation and what constitutes a compensable taking. Regulation frequently focuses on limiting what may be done with respect to property. As the Supreme Court has aptly noted, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[99] Whether a taking has occurred "depends largely 'upon the particular circumstances [in that] case,'"[100] and requires "essentially ad hoc, factual inquiries" in each instance in which a taking is alleged.[101]

The Supreme Court identified two factors that have special significance with regard to whether governmental action constitutes a taking. The first is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[102] The emphasis here is that *some* economically-viable use remains—the fact that there may have been a substantial or virtually total diminution of property value is not controlling.[103] The second factor is whether "the interference with property can be characterized as a physical invasion by government."[104] The Supreme Court has generally found that a permanent physical occupation of real property by the government amounts to a taking, regardless of actual economic impact on the owner or extent of benefit to the public.[105]

The Supreme Court's decision in *Preseault* regarding the commerce clause issue points firmly in the direction of viewing railbanking and interim trail use as legitimate regulation, fully consistent with an owner's reasonable investment-backed expectations. While alluding to historical congressional concern with rail abandonments, the Court found that Congress could legitimately view "every line [a]s a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable."[106] The Court further noted that Congress need "not distinguish between short-term and long-

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99. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

100. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)).

101. *Id.*

102. *Id.*

103. *See, e.g.*, Gorieb v. Fox, 274 U.S. 603, 608 (1927) (set-back zoning ordinance requiring portion of parcels be left undeveloped was valid exercise of police power); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law not a taking).

104. *Penn Central*, 438 U.S. 104, 124 (1978).

105. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).

106. Preseault v. ICC., 110 S. Ct. 914, 926 (1990).

term rail banking."[107] If the "long tradition of congressional regulation of railroad abandonments"[108] sanctifies the railbanking statute for commerce clause purposes, it should have precisely the same effect for purposes of the takings clause when evaluating the impact of the statute on reasonable investment-backed expectations. This confirms the view expressed by Judge Pratt of the Second Circuit when he indicated that railbanking is a railroad purpose and thus permissible under the commerce clause.[109] "[I]t does not matter whether that purpose is immediate or in the future. To distinguish between future railroad use and immediate railroad use would serve no purpose but to stifle [C]ongress's creative effort to exercise foresight by preserving existing corridors for the future railroad needs of our country."[110] Another message from the Supreme Court's discussion in *Preseault* of the legitimacy of Congress' railbanking purpose is a rejection of Judge Ginsberg's assumption in *National Wildlife Federation v. ICC* that railbanking is in many instances a "fiction."[111]

There is another point to be made concerning the impact of section 1247(d) on investment-backed expectations. In *National Wildlife Federation v. ICC*, both the ICC and the National Wildlife Federation argued that the burden placed upon reversionary interest holders by section 1247(d) "is comparable to that imposed on railroads by regulations that have been sustained by the courts."[112] Judge Ginsberg distinguished ordinary railroad regulation, under which abandonment authority may be withheld, as resulting in only a temporary burden on the railroad's estate.[113] This explanation is wholly inadequate, however, since as Professor Cain pointed out, even temporary burdens may be suspect under the Supreme Court's ruling in *First English Evangelical Lutheran Church v. County of Los Angeles.*[114] But more to the point, Judge Ginsberg was comparing apples—the burden on a railroad's interest—with oranges—the burden on a reversionary clai-

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107. *Id.* at 925.

108. *Id.* at 926.

109. Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988), *aff'd*, 110 S. Ct. 914 (1990).

110. *Id.* at 151.

111. In *National Wildlife Federation* an adjacent landowner argued that railbanking was a fiction. Judge Ginsberg noted that in one case the application of section 1247(d) had been in conjunction with a public utility seeking to preserve a corridor for possible future use to deliver coal to a projected power generation facility and "decline[d] to find that rail banking is necessarily a 'fiction.'" 850 F.2d 694, 707 (D.C. Cir. 1988). He then proceeded to object to the failure of the ICC to make any finding of foreseeability of future rail reactivation or to provide an express means for a reversionary landowner to challenge foreseeability of rail reactivation, intimating that railbanking could be fictional in many instances. *Id.*

112. *Id.*

113. *Id.* at 707-08.

114. Cain, *supra* note 10, at 223 n.83.

mant's interest. The proper focus should be the effect of governmental regulatory action on the reversionary claimants. There is no real difference between the impact on reversionary claimants under section 1247(d) of the Trails Act and that of other unquestioned policies of the ICC relating to rail abandonment authority. For example, federal rail regulatory policy has always sanctioned indefinite postponement of rail abandonments for railroad purposes.[115] That is the precise objective of section 10,905 which provides for mandatory preservation of rail service as long as an ICC-determined subsidy or other compensation is paid to the carrier seeking abandonment authority.[116] Furthermore, ever since its first involvement in rail abandonment regulation, the ICC has had the power to authorize "discontinuance of service" rather than full abandonment.[117] Under a discontinuance certificate, a carrier is authorized to cease service, but may not abandon, tear up or sell off the right-of-way.[118] Under section 1247(d) in particular, the right-of-way remains subject to ICC jurisdiction and state law is preempted.[119] Discontinuance authority can be employed for the same railbanking purposes as section 1247(d), with the important difference that under railbanking, maintenance costs remain on the rail carrier and continue to burden current interstate commerce, while in the case of a discontinuance, the costs are assumed by a third party under section 1247(d).[120] The point is that the burden imposed by section 1247(d) upon reversionary interest holders is, in fact, no different from that imposed by other features of federal rail regulation.

One response to these observations may be to characterize all federal railroad abandonment regulation as the taking of property from reversionary interest holders. In other words, if section 1247(d) is to be considered a taking of reversionary interests, so then logically must

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115. *See* Reed v. Meserve, 487 F.2d 646 (1st Cir. 1973) (preference for preserving railroad right-of-way).

116. Judge Ginsberg mentioned this section in a footnote, but failed to grasp its implications in his analysis. National Wildlife Fed'n v. ICC, 850 F.2d 694, 708 n.20 (D.C. Cir. 1988).

117. 49 U.S.C. § 10,903 (1988).

118. *Id.*

119. Under the supremacy clause of the United States Constitution, federal statutes and regulations within the scope of congressional authority under the Constitution preempt conflicting state or local requirements. Federal railroad regulation, including railroad abandonment regulation, has long been viewed as comprehensive and plenary. Thus, federal law relating to the abandonment of railroads preempts state law until after the ICC has authorized an abandonment and that authorization has become effective. *E.g.*, Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320 (1981). To this end, the second sentence of section 1247(d) expressly preempts any contrary state or local law. 16 U.S.C. § 1247(d) (1988).

120. *See* Supplemental Trails Act Procedures, 54 Fed. Reg. 8012-13 (1989) (notice of ICC policy statement comparing discontinuances and application of section 1247(d)).

any denial of abandonment authority, application of section 10,905[121] or use of discontinuance authority to preserve a line. Certainly, such a response sweeps too broadly. No reversionary interest holder can legitimately claim to have invested in property encumbered with a railroad right-of-way on the expectation that the railroad was not subject to effective government regulation. Not only have railroads historically been treated as common carriers susceptible to extensive regulation, but railroad rights-of-way have historically also been treated as public highways.[122] If railroads and their partners under private contracts—*e.g.*, leases and deeds—could render such regulation inordinately expensive, economically viable governmental regulation of common carriers would effectively be ended. Accordingly, it has consistently been held that federal transportation regulation can vitiate private contracts impairing the effectiveness of the regulation.[123] Thus, the very idea that reversionary interest holders could reasonably expect non-interference by the government flies in the face of decades of regulatory precedent.

3. *Character of the Government's Action*

An analysis of the character of government action under section 1247(d) provides even more persuasive evidence that the application of the statute does not constitute a taking. Railroad rights-of-way are public highways.[124] Section 1247(d) only retains the public highway in-

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121. 49 U.S.C. § 10,905 (1988).

122. *E.g.*, Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641, 657 (1890) ("a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control and regulation").

123. *See, e.g.*, New York v. United States, 257 U.S. 591, 601 (1922); Philadelphia, B. & W. R.R. v. Schubert, 224 U.S. 603, 614-15 (1912); Louisville & N. R.R. v. Mottley, 219 U.S. 467, 481-82 (1911); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 230 (1899); Moeller v. ICC, 201 F. Supp. 583, 589-90 (S.D. Iowa 1962); North Carolina v. United States, 210 F. Supp. 675, 679 (M.D.N.C. 1962). In *Chicago & Alton Railroad Co. v. Toledo, Peoria & Western Railway Co.*, the ICC required that an abandonment authorization be obtained prior to cessation of service even though such cessation was required under the terms of a lease. 146 I.C.C. 171 (1928). In rejecting the contention that the parties' lease was binding for regulatory purposes, the ICC explained that if its jurisdiction over abandonments were limited or circumscribed by the provisions of private contracts, or was exercisable only as provided under those contracts, then its jurisdiction "could be entirely defeated by short-term contracts made renewable at the option of the parties." *Id.* at 181.

124. Railroads are not only common carriers, but . . . are public highways governed in large measure by legal principles relating to highways. The status of railroads as public highways makes them subject to public regulation, in some instances even where such regulation would otherwise be indefensible interference with private rights.

65 AM. JUR. 2D, RAILROADS, § 5 (1972); *see also* White River Turnpike Co. v. Vermont Cent. R.R., 21 Vt. 590, 594 (1849); Marthens v. B. & O. R.R., 289 S.E.2d 706 (W. Va. 1982). A variety of consequences flow from the status of a rail line as a public highway. For example,

tact. This type of regulation has never before been viewed as some sort of noxious intrusion which would constitute a taking.[125] Furthermore, section 1247(d) does not impress upon reversionary interest holders a use that imposes burdens any more egregious than those already embodied in railroad use. Indeed, railroad use of a right-of-way is regarded as the most burdensome of all uses on other interest holders.[126] Specifically, owners of abutting lands lose all rights of access to the property within the boundaries of the right-of-way.[127] In contrast, trail use parallels ordinary highway use. Abutting landowners may not only use the trail, but also generally gain increased rights of access under section 1247(d) in the event of interim trail use.

The burdensome nature of the railroad's interest in its right-of-way has another implication for takings claims. Because the use of property for railroad purposes "require[s] a permanent and substantially exclusive occupation of the surface,"[128] compensation equivalent to the full market value of the land is initially paid to the owner of the property in eminent domain proceedings, regardless of whether an

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shifting a public highway from one form to another in many, if not most, states is not regarded as a taking requiring any additional compensation to abutting property owners claiming to hold a residual fee interest. *E.g.*, Faus v. City of Los Angeles, 67 Cal. 2d 350, 431 P.2d 849, 62 Cal. Rptr. 193 (1967) (railroad to road); Faus v. Los Angeles County, 256 Cal. App. 2d 604, 64 Cal. Rptr. 181, 185 (Ct. App. 1967) (railroad to road); Kansas Elec. Power Co. v. Walker, 142 Kan. 808, 51 P.2d 1002 (1935) (railroad to road—change in method of transportation and motive power is not an abandonment); State v. State, 329 N.W.2d 543, 545, 547 (Minn. 1983), *cert. denied*, 463 U.S. 1209 (1983) (railroad to trail—use of right-of-way as recreational trail deemed consistent with purpose for which easement originally acquired); State *ex rel.* Fogle v. Richley, 55 Ohio St. 2d 142, 378 N.E.2d 472 (1978) (per curiam) (railroad to road—where property has been appropriated for exclusive use it is immaterial whether the use is limited to use as a railroad or extends to a public highway purpose); Hatch v. Cincinnati & I. R.R., 18 Ohio St. 92 (1868) (canal to railroad); Rieger v. Penn Central Corp., No. 85-CA-11 (Ohio Ct. App. May 21, 1985) (railroad to trail); Bernards v. Link, 199 Or. 579, 248 P.2d 341 (1952) (railroad to logging road); Anderson v. Knoxville Power & Light Co., 16 Tenn. App. 259, 64 S.W.2d 204, 205 (Ct. App. 1933) (track to trackless trolleys); Brainard v. Missisquoi R.R., 48 Vt. 107 (1874) (trail to railroad); 43 U.S.C. §§ 912-913 (1988) (federally-granted railroad rights-of-way may be converted to other public highways). Similarly, use of the railroad right-of-way, like any other public highway, for compatible public purposes is generally permissible without raising takings issues or requiring compensation to abutting landowners. *E.g.*, Proctor v. Central Vt. Pub. Serv. Corp., 116 Vt. 431, 433, 77 A.2d 828, 830 (1951) (utility corridor as well as railroad corridor); 43 U.S.C. §§ 912-913 (1988) (joint railroad/road).

125. Indeed, the law of many, if not most, states favors preservation of public highways against claims by adverse possession or otherwise. *E.g.*, Sieling v. State Roads Comm'n, 160 Md. 407, 153 A. 614 (1931); Tainter v. Mayor of Morristown, 19 N.J. Eq. 46, 59-60 (1868).

126. State *ex rel.* Fogle v. Richley, 55 Ohio St. 2d 142, 146, 378 N.E.2d 472, 475 (1978). *See* 3 NICHOLS ON EMINENT DOMAIN § 11.1[1] (J. Sackman 3d ed. 1990).

127. *E.g.*, Missouri-Kansas-Texas R.R. v. Freer, 321 S.W.2d 731 (Mo. Ct. App. 1958); Jackson v. Rutsland & B. R.R., 25 Vt. 150, 159 (1853) (railroad may exclude all concurrent occupancy by former owners "in any mode and for any purpose").

128. 4 NICHOLS ON EMINENT DOMAIN § 12D.02[2] (J. Sackman 3d ed. 1990).

easement or a fee is taken.[129] As a consequence of this initial condemnation compensation, treating section 1247(d) as a taking would amount to an invitation for yet a second payment to the reversionary interest holder.[130]

Proponents of the view that section 1247(d) constitutes a taking argue that it is an abridgement of their right to exclude,[131] citing cases such as *Kaiser Aetna v. United States*.[132] They also invoke the reasoning stated in *Nollan v. California Coastal Commission*,[133] that a taking occurs because individuals "are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[134] Unlike the properties in *Kaiser Aetna* or *Nollan*, however, the lands to which section 1247(d) applies are already public highways. Contrary to Professor Cain's charge, section 1247(d) does not "transform the affected property from a private waterfront into a public beach."[135] Individuals already have a permanent and continuous right to pass over any rail corridor provided they pay the toll. That concept is central to the common carrier nature of the railroad. Section 1247(d) does not alter the public highway character of corridor use; it merely preserves that use, giving the public the same right of access it had before.

In short, while state law is clearly germane,[136] the mere fact that rail regulation alters the enjoyment of a property interest does not amount

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129. *Id.*

130. In *National Wildlife Fed'n v. ICC*, Judge Ginsberg declined an invitation to view trail use as not 'more noxious than rail use.' 850 F.2d 694, 706 n.17 (D.C. Cir. 1988). The ICC, however, has subsequently concluded a rulemaking procedure in which it failed to find any evidence that rail trails posed a significant burden upon adjacent landowners. Rail Abandonments—Use of Rights of Way as Trails—Supplemental Trails Act Procedures, *Ex Parte* No. 274 (Sub-No. 13) at 5-6, nn. 4 & 9 (Feb. 13, 1989) (LEXIS, Trans library, ICC file) (no maintenance problems). The Commission in its ruling noted that the Department of Interior "states that trail use enhances rather than detracts from the aesthetic and economic value of surrounding property." *Id.* at 3. *See also* SEATTLE ENGINEERING DEPARTMENT, EVALUATION OF THE BURKE-GILMAN TRAIL'S EFFECT ON PROPERTY VALUES AND CRIME (May 1987) (the engineering department determined the effects of trails on property to be: steady crime rates, increased property values, and supportive adjacent neighbors).

131. *E.g.*, Petitioners' Brief at 19 and Petitioners' Reply Brief at 7-8, Preseault v. ICC, 110 S. Ct. 914 (1990) (No. 88-1076).

132. 444 U.S. 164, 179-80 (1979).

133. 483 U.S. 825 (1987).

134. *Id.* at 832, *quoted in* National Wildlife Fed'n v. ICC, 850 F.2d 694, 706 (D.C. Cir. 1988).

135. Cain, *supra* note 10, at 222 (quoting National Wildlife Fed'n v. ICC, 850 F.2d 694, 706 n.17 (D.C. Cir. 1988)).

136. If there were no property interests recognized at state law, there presumably would be no takings issue in the first place.

to a taking. If this sort of alteration was deemed a taking, the Supreme Court's test balancing the character of governmental regulation with reasonable investment-backed expectations would be meaningless. Moreover, a taking would occur in any case wherein a state property rule was violated, no matter how superficial the transgression. A taking does not turn upon whether a regulation alters the enjoyment of a property interest; rather, it hinges upon reasonable expectations and the character of the government action. Both of these factors color section 1247(d) as a reasonable regulation rather than a compensable taking of private property.

V. FIXING THE UNBROKEN AND BREAKING THE FIXED

After reasoning that application of section 1247(d) results in a taking of at least some reversionary interest, Professor Cain concluded that "some statutory and ICC rule revisions are necessary to insure that congressional policies are implemented logically."[137] She suggested either inclusion of reversionary interest holders in railbanking negotiations and clearer authorization of an eminent domain power under section 1247(d), or, alternatively, abandonment of corridor conservation efforts through compatible shared trail use.[138] The problems that Professor Cain sought to remedy are either non-existent or far less onerous than she imagined; consequently, her suggested remedies are themselves suspect.

In any event, the ICC's answer to the takings question is categorical. The ICC feels that the United States Claims Court is best situated and equipped to resolve the issue through the Tucker Act.[139] This approach makes sense as applied to claims filed by reversionary interest holders for two reasons. First, the Claims Court has extensive expertise in evaluating whether federal regulation amounts to a taking of particular property interests. Indeed, that is one of the Claims Court's responsibilities under the Tucker Act. Second, so long as the ICC adheres to its interpretation that section 1247(d) is voluntary on the part of the railroads, any other approach would render section 1247(d) surplus legislation.

In order to avoid preservation of a rail corridor, reversionary claimants primarily seek to obtain the land itself rather than compensa-

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137. Cain, *supra* note 10, at 223.

138. *Id.* at 223-24.

139. *See, e.g.*, Policy Statement on Rails to Trails Conversions, 55 Fed. Reg. 4026 (1990); Rail Abandonments; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures, 54 Fed. Reg. 8011 (1989).

tion.[140] The objective of such claimants is to render the railbanking process too onerous and expensive to be viable.[141] Railroads seeking ICC authorization to discontinue service generally want to be relieved of service and maintenance obligations in order to cut economic losses. These railroads do not want to engage in protracted administrative delay or litigation while adjoining landowners maneuver to frustrate corridor preservation projects. In fact, in only rare instances would a railroad voluntarily assent to an ICC railbanking order under section 1247(d) if the ICC was simultaneously attempting to adjudicate the claims of complaining adjoining landowners.

These facts lead to my conclusion regarding the appropriateness of Professor Cain's suggestions for modification of section 1247(d). Incorporating reversionary claimants into the negotiation process, *i.e.*, into ICC abandonment and railbanking proceedings, would result in delays and expenses that would discourage railroad participation and render section 1247(d) ineffective. That portion of Professor Cain's solution is a bird that will not fly. Fortunately, its levitation is not legally compelled.

Professor Cain's suggestion that the language of section 1247(d) should specifically direct the ICC to preserve corridors through interim trail use and railbanking is redundant. The legislative history of the statute indicates that Congress intended section 1247(d) to regulate state law reversionary interests.[142] The second sentence of section 1247(d) expressly states that intent.[143] Indeed, the courts that have reviewed this problem have evinced no question on the issue;[144] even Professor Cain admits as much.[145]

As our country becomes ever more populous and complex, its need for property corridors—for future transportation, recreation, open space or utility purposes—will necessarily grow. It is therefore prudent to preserve those in existence.[146] Section 1247(d) is a constructive effort to this end. Certainly, the ICC's interpretation of section 1247(d) as voluntary on the part of railroads is dysfunctional and un-

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140. The St. Louis Post-Dispatch stated that Gary Heldt, one of the petitioners in Glosemeyer v. Missouri-Kansas-Texas Railroad, 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990), indicated that "money is beside the point." According to the paper, he indicated that landowners simply want the property and "compensation is not the issue." St. Louis Post-Dispatch, Nov. 2, 1989, at 12A.

141. Apparently, Professor Cain sensed that such participation would entirely undercut the purposes of section 1247(d). Cain, *supra* note 10, at 223.

142. 49 U.S.C. § 1247 (1988).

143. *See* Washington State Dept. of Game v. ICC, 829 F.2d 877, 880-81 (9th Cir. 1987).

144. *E.g.*, Preseault v. ICC, 110 S. Ct. 914 (1990).

145. Cain, *supra* note 10, at 212.

146. *See supra*, note 9.

supportive of the section's purpose. That interpretation could and should be changed, but the parts that Professor Cain seeks to fix simply are not broken, and her suggested repairs would derail the entire program.