Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court’s Fifth Amendment Takings Jurisprudence

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Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?

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I. INTRODUCTION

In 1993, the Santa Cruz County California planning commission and local trails advocates were poised to unveil a dynamic trails master plan that would link together parks, beaches, schools, and shopping centers by...
establishing a county-wide series of pedestrian and bicycle trails. The plan was a wish list for proponents of alternative transportation and environmentalists, but it could not be accomplished by creating trails solely on publicly owned land. Where necessary, the planning commission drew paths on the map traversing private land, and the text indicated that “[p]rivate property which underlies a trail corridor . . . may require a trail easement dedication as a condition of developmental permits.” Within weeks of learning of the proposed map from his trails advocate mother, Ken McCrary, whose family owned Big Creek Lumber, had organized a grassroots opposition movement calling itself “Citizens for Responsible Land Use” (CRLU). The principal point of contention was a belief by CRLU members that the trails plan was nothing more than a land grab by the government, that it further eroded their fundamental right to privacy, and was nothing less than “extortion” when the government required a trail easement as a condition for granting a development permit. Within months the donations were pouring in, CRLU had a database of several thousand addresses, and as many as 200 people were showing up at its meetings. As the due date for release of the draft plan neared in the winter of 1993, opposition rose to such a high level that the county Board of Supervisors unanimously passed a resolution: any trail easement actions by the county must comply with state and federal law and constitutional property rights protections. But a promise to comply with current law was not enough for trail opponents. After sufficient pressure, at a Supervisors’ meeting on January 25, 1994, the Board unanimously voted to shelve the plan, disband the Trails Advisory Committee, and wipe the contested maps off the county records.

Perhaps most perplexing to the trails advocates was the strength and hostility of the opposition to what they perceived to be an important step in improving quality of life in the county, especially in light of the plan’s compliance with state and local laws requiring public access to beaches,
open space zoning, development restrictions, alternative transportation mandates, and the like.\(^6\) As cities grow, residents inevitably desire greater and greater open spaces, parks, and recreational land to offset the strain on current facilities caused by population growth and the expansion of suburban developments. How, thought the Santa Cruz trail advocates, could anyone object to an amenity as beneficial as an off-road bicycle or pedestrian trail?

Santa Cruz County is by no means the only area that has seen landowner opposition to open space and recreational trail requirements; they are just one in a growing movement of private property owners who use a constitutional due process or takings rhetoric to claim trail development violates their property rights.\(^7\) Developers and private landowners who desire minimal restrictions on developing their lands are organizing grass roots groups to increase political opposition to a variety of land use restrictions under the banner of Fifth Amendment rights.\(^8\) One property rights advocacy group in El Dorado County, California, operates under the slogan, “Fifth... or Fight.”\(^9\) Other members include business owners who see that survival in a growing economy means jobs, and jobs require high density or industrial uses, heavy investment in streets and highways, and, heaven forbid, the possible sacrifice of spotted owls and

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\(^6\) The California Coastal Act, which created the California Coastal Commission, requires public access from the nearest road to the shoreline as a condition for the approval of coastal development projects. Local coastal acts often mandate such exactions. Plus, the California constitution states that no “individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water.” Cal. Coastal Act, Cal. Pub. Resources Code div. 20, §30212 (Deering, 2001); CAL. CONST. art. X, § 4. The Santa Cruz County 1980 general plan included instructions for generalized trail corridors on the County General Plan Land Uses and Facilities Maps.

\(^7\) For example, the Monon Trail in Indianapolis, Indiana, fell victim to a tremendous amount of opposition by landowners who blocked the trail with debris, posted “no-trespassing” signs, and loudly decried the project at all possible opportunities. See Dennis Royalty, Public Benefits of the Monon Trail are Worth the Trials, INDIANAPOLIS STAR, Apr. 21, 1998, at N3. On the Pumpkinvine Trail in northern Indiana, landowners actually placed pumpkins along the trail and then used them for target practice, leaving the remains of the pumpkins strewed along the corridor. See Martin DeAgostino, Group Says Trespassers Use Corridor to Get on Private Land, S. BEND TRIB. Dec. 18, 1997, at C2. Along the Missouri KATY trail, opponents set fire to a number of wooden bridges that were being restored as each new mile was opened. In many cases, however, once the trail in question opened, opposing landowners changed their tune and found new ways to gain from the trail near them. See John Cutter, Old Rails Finding New Life as Trails, at City Times; Pinellas Trail: From Rails to Recreation, ST. PETERSBURG TIMES, Aug. 13, 1989, at 1.


\(^9\) POLLAK, supra note 1, at 60.
snail darters. Takings has become the organizing rhetoric that represents the most serious challenge to trail planning. As Molly Ivins explains: "The property rights movement ... is not so much an actual group of citizens of like mind in this country as it is the deliberate creation of the big timber, big mining, big oil and big cattle industries. The industries built this AstroTurf (meaning phony grassroots) movement to help lobby against repealing outrages like the 1898 mining law, cut-rate grazing fees, cut-rate oil royalties on public lands, etc."11

While governments routinely use eminent domain to build parks or to require that developers leave certain percentages of land undeveloped or dedicated to green uses, government land use regulations in favor of recreational trails seem to have met with unusually stiff opposition from landowners. Paradoxically, trails fall in the gap between land use regulations for roads and transportation and those for parks and recreational uses. But while the public has strongly embraced trails as a beneficial quality of life amenity, politicians have backed away from them. The property rights movement has identified trails as a particularly important battleground; yet little scholarship has been devoted solely to the way in which governmental land use powers have been used to develop recreational trails or have been hindered in doing so. This article attempts to locate the legal aspects of recreational trail development within the increasingly powerful property rights movement.12 The most complex result of this rising property rights rhetoric is a clear shift in constitutional takings doctrine to be more sympathetic to landowners' arguments. Thus, the interplay of takings decisions and trails development will be the focus of most of this article.

Two aspects of the current rise in property rights organizing and its opposition to trails are of interest. The first is the rhetorical appeal of the language of constitutional rights and takings prohibitions. To many landowners, government limitations on land use have simply become too excessive; to these landowners, the potential threat of a public trail or an open space exaction is the proverbial straw that broke the camel's back.13

10. POLLAK, supra note 1, at 58.
13. As one landowner stated: "This country has the habit to nibble away our rights. People in
Far greater restrictions on land use have been accepted with less opposition, as with zoning, building set-backs, upgraded sewer rules, exactions for roads and sidewalks, and even certain wetlands restrictions. By contrast, a pedestrian trail or an open space requirement is generally not a heavy burden on a landowner. Moreover, in the case of trails traversing privately-owned land, as was proposed on the Santa Cruz County maps, the government was willing to pay compensation for the trail easement. But to many landowners, compensation simply is not enough. Trails raise the specter of long lines of public trespassers loitering and littering, breeding crime, and destroying private property while allowing their dogs to foul the footpaths. The banner has thus become the right to privacy, the right to exclude, the right to prevent physical intrusion on one’s fiefdom, and ultimately the right to control and limit access to scarce natural resources.

The second aspect is the remarkable resurgence of local, grass-roots political opposition that often leaves county commissioners reeling. Local governments are caught in the crossfire between increasing federal and state environmental mandates to regulate growth; local interest groups promoting everything from bicycling, protecting endangered redwoods, and limiting urban sprawl; to business leaders, real estate interests, and professional sports franchises advocating for their special interests. One side is calling for regulations that promote conservation and preservation while the other is calling for smaller government and private, rather than public, initiatives to achieve quality of life enhance-

general are feeling afraid of government. It’s getting so big. It feels like a machine.” POLLAK, supra note 1, at 48.

14. These regulations did not pass uncontested, yet the public use and necessity requirements were easier to show. See, e.g., Lois Shiffer, Taking Stock of the Takings Debate, 38 SANTA CLARA L. REV. 153 (1997); Note, Supreme Court Validates Open Space Preservation, Postpones Question of Inverse Condemnation, 10 ENVTL. L. REP. 10125 (1980); John Vandlik, Waiting for Uncle Sam to Buy the Farm . . . Forest, or Wetland? A Call for New Emphasis on State and Local Land Use Controls in Natural Resource Protection, 8 FORD. ENVTL. U. 691 (1997); Note, Techniques for Preserving Open Spaces, 75 HARV. L. REV. 1622 (1962).

15. Rural landowners are especially adamant that trails bringing city folks into the country are ruining the peace and quiet that they sought when they escaped from the city. See Cutter, supra note 7, at 1; Traci Carl, Crossing Paths: Some Property Owners Rail at Public Proposals for Using Abandoned Tracks, CHI. TRIB., Mar. 9, 1997, at 51.

16. The group “Oregonians In Action,” for instance, spent more than $880,000 on the November 2000 election promoting Measure 7, that would constitutionalize compensation whenever a land-use regulation affects property values. The group also sponsored the Dolan v. City of Tigard litigation to the U.S. Supreme Court, which ultimately resulted in the City of Tigard paying compensation of $1.5 million for a bike path and flood plain across the Dolan’s 1.67-acre downtown parcel. Dave Hogan, Land-Use Wins Buy Oregonians in Action, PORTLAND OREGONIAN, Dec. 25, 2000, at A1.
ments. In the realm of local politics, governmental land use restrictions and the exercise of eminent domain have a very different currency than they do in the courts.

17. City and county planners feel like they are caught "in a crossfire" between environmental groups and property rights advocates and developers. See Jeff Barnard, Groups Want Land-Use Laws Kept Up, THE COLUMBIAN, Dec. 20, 2000, at C3. The El Dorado County, California Planning Commission experienced an eye-opening level of opposition to its draft general plan. Changes between Draft 2 and Draft 3 of its general plan show the influence of local property rights interests. The underlined passages in the following were added in draft 3 and the strike-outs were removed.

1) "The development of these visions and strategies serves to provide for the underlying approach of the General Plan. This approach is the identification of distinct planning concept areas where growth will be directed and where growth will be limited as a means of providing for a more manageable land use pattern .... Specifically, the Plan will direct planned growth to Community Regions and Rural Centers and limit provide for planned growth within Rural Regions."

2) Mandatory developer contributions of bicycle and pedestrian paths, transit stops, parking, and open space for sensitive habitats were changed to "negotiable design features."

3) The "Rural Residential Low Density (RRL)" designation was eliminated, which would have required minimum parcel sizes of at least 40-160 acres, and replaced with the "Rural Residential" category that would allow one unit per 10 acres.

4) With regard to the "Natural Resource" category, the plan was changed as follows: "The purpose of this land use designation is to protect the purpose of the Natural Resources (NR) designation is to identify areas that contain economically viable natural resources and to protect the economic viability of those resources and those engaged in harvesting/processing of those resources from interests that are in opposition to the managed conservation and economic, beneficial use of those resources. The important natural resources of the County include...".

5) Mandatory open space requirements were eliminated for the Planned Development Combining Zone Districts.

6) The revised plan eliminated prohibitions on development on steep slopes: "Disturbance of slopes forty (40) percent or greater shall be prohibited discouraged to minimize the visual impacts of grading and vegetation removal. Setback restrictions or building envelopes shall be designed on all development projects prohibiting development on slopes forty (40) percent or greater."

7) The revised plan eliminated setback requirements for streams, rivers, lakes, and wetlands.

8) In the section on rare, threatened and endangered species, the revised plan eliminated a policy calling for the preparation of Habitat Conservation Plans to protect sensitive plant and animal species and their habitats. Also eliminated were policies to map sensitive species habitat and maintain an inventory of listed rare and endangered species. El Dorado County General Plan Third Administrative Draft (annotated), October 1993, reprinted in POLLAK, supra note 1, at 61-62.

Although many of these changes were eliminated in the final version, enough remained to support the Earthjustice Legal Defense Fund's lawsuit on the grounds that the 1996 General Plan's environmental impact report violated the California Environmental Quality Act (CEQA), the Planning and Zoning Law, and the Public Trust Doctrine. POLLAK, supra note 1, at 65.

18. See Dick Welsh's Political Actions for a Property Rights Activist Website, at http://www.halcyon.com/dick/election.html (last modified Apr. 7, 1997). Mr. Welsh explains that being loud and visible at local elections, and stacking the audience, is effective. Id. He also says that "local elections are much easier to influence than the nationals. Besides, not much media atten-
The property rights movement is a product of the 1990s, a period that, not coincidentally, saw significant population growth and suburban sprawl in uneasy juxtaposition with a commitment to environmental regulations and "smart growth" land planning policies. The tension between the "development as usual" proponents and middle-class yuppie environmentalists continues to be played out in many venues, from environmental regulations, species and habitat protection, historic preservation, open space and recreational uses, to alternative transportation mandates, and smart growth planning. These battles overlay a complex legal structure of eminent domain, regulatory takings, zoning, and police power jurisprudence that, according to the movement's literature, enables big government to run roughshod over the small landowner.

The property rights movement also has had its victories. Much scholarship has focused on the last fifteen years of Supreme Court takings decisions that have, according to some, radically limited the power of governments to regulate or limit land uses. Between the 1930s and the

tion is focused on the local elections." Id. There are countless newspaper articles noting that local councils and commissions voted against trail development when large organizations, like the local farm bureau, oppose them. See, e.g., Carl, supra note 15, at 51.


20. Florida passed a constitutional amendment to mandate a high speed train (to begin construction by 2003) linking its major cities. See Laura Kinsler, High Speed Rail Backer Prepares Funding Plan, THE TAMPA TRIB., Dec. 1, 2000, at 4. Yet, at the same time, Oregon, a leader in the smart growth movement, just passed a constitutional amendment that threatens to gut its land-use regulations by requiring compensation for every regulation that affects property values. See Gragg, supra note 12, at F03.


1980s the Supreme Court has been reluctant to interfere with governmental land-use regulations, either under due process or takings. But after the watershed decisions of 1987, the Court has elevated scrutiny in cases involving exactions or conditions for the granting of development permits, and may do so in basic land use regulations as well, which historically received very deferential review by the Court. Two principal Supreme Court cases, *Nollan v. California Coastal Commission* (1987) and *Dolan v. City of Tigard* (1994), have established what appears to be a distinctly new test with elevated scrutiny for governmental exactions, a mechanism routinely used by planners to extend and develop trail networks. Recreational trails will be at great risk if they are not seen as falling squarely within police power boundaries.

The current trend of property rights advocacy has created a schism over, what I will term in this paper, "quality-of-life commitments" by local governments. Open space requirements in dense inner cities clearly meet a police power health, safety, and welfare standard. However, it is not entirely clear that a pedestrian and bicycle path to the beach, an open space requirement for suburban developments which are already land intensive, or a buffer zone between the Appalachian Trail and neighboring land uses meets that clear public purpose test. Nevertheless, much of the recent "smart growth" movement is centered around normative evaluations about the quality of urban life, including access to rural ar-


28. City of Monterey v. Del Monte Dunes, 119 S.Ct. 1624 (1999); Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999), cert. denied 526 U.S. 1131 (1999); Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), cert. denied 115 S.Ct. 2268 (1995) (Justice Thomas's dissent in the cert. denial notes that the states are hopelessly divergent in their positions on the applicability of *Nollan* and *Dolan*).


Eminent Domain, Exactions, and Railbanking

Easements, alternative transportation modes, safe and aesthetically pleasing parks and forests, historic preservation, cultural and ethnic diversity and integration, and a replication of small-town American public life.\textsuperscript{31}

The viability of the use of eminent domain, exactions, open space requirements, growth limitations, and historic preservation laws for enhancing quality-of-life features in our urban environments has not been faced head-on by the Supreme Court. Yet quality-of-life decisions are too important to leave to the fickle marketplace; it is a perfectly legitimate role of the police power to enhance life as well as preserve it. How that may be done within current takings jurisprudence is rather unclear, however. The purpose of this article, therefore, is to focus on the legal foundation of land-use regulations in the specific area of recreational trails and their buffer-zone greenbelts. Of course, the legal foundation does not always correspond to political reality. Despite the ultimate legality and justification for quality-of-life features, the property rights movement often mounts a formidable campaign: threats of costly litigation, takings challenges, and an appealing property rights rhetoric prevents the state from, as they see it, pandering to a small interest group of lycra-clad cyclists, crunchy tree huggers, urban snobs, and European wannabes.\textsuperscript{32}

Perhaps the most serious threat to recreational trails comes in the form of opposition to the popular rails-to-trails program that recycles abandoned rail corridors into trails and greenways.\textsuperscript{33} Rail-trails are being attacked in the courts on the ground that conversion to a trail is an additional burden on adjacent land that deserves compensation. In many cases, landowners are challenging the railroad’s ownership of the corridor in the first place, even though a railroad may have been peacefully running trains along its corridor for more than a century. And the federal railbanking law that facilitates conversion has been found to work a taking in one hotly-contested case.\textsuperscript{34} Because rail-trails comprise the lion’s share of new trail development, this article will thoroughly analyze the federal railbanking law under the Court’s newest regulatory takings doc-

31. See James Charles Smith, \textit{Law, Beauty, and Human Stability: A Rose is a Rose is a Rose}, 78 CAL. L. REV. 787 (1990); JOHN COSTONIS, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE (1989).
32. I have heard the smart growth movement labeled just one “cultural value” with comments like “Americans don’t want to live like the Japanese or the French.” However, many trail advocates use comparisons to Europe, especially Denmark, for models of bike-friendly urban growth. See Carolyn Lockhead, \textit{An Illusion of Auto Freedom}, S.F. CHRON., June 4, 2000, at 221; \textit{Despite Congestion, U.S. Isn’t Prepared to go Full Cycle–Letters}, CLEVELAND PLAIN DEALER, Feb. 27, 2000, at 4G.
33. See infra Pt. IV (discussion of railbanking).
trines.

Part II provides a brief account of the legal structure of governmental land use controls and the current state of takings jurisprudence to form a basic background for the different ways in which recreational trails have been developed. Part III gives a brief summary of the Supreme Court's regulatory takings jurisprudence and the way in which it identifies the property interests and the mechanisms for restraining governmental excess. Parts IV through VI examine three of the particular legal avenues of trail development currently in use: eminent domain, developer exactions, and the federal railbanking program. Part VII looks more closely at the politics of the property rights movement and the legal tactics used to derail trail projects. In the end, although all three methods of obtaining the land necessary for trails are legal, the necessity of dealing with the heightened emotions and political pandering that trail projects engender requires a more subtle approach. Part VIII suggests a number of different ways to enhance the political climate in favor of trails.

II. LAND ACQUISITION FOR DEVELOPING RECREATIONAL TRAILS

Because of the "smart growth" planning movement, rising gas prices, a greater attention to health and safety, and dismay with oceans of parking lots and eight-lane roads, ever-growing numbers of Americans are walking and riding bicycles for recreation and transportation.35 The popularity of alternative transportation has translated into a tremendous impetus for developing new trails within urban settings, linking urban centers with rural areas, and in rural parks and wildernesses for more rugged cycling, horseback riding, and hiking opportunities.36 And because much

35. The National Rails-to-Trails Conservancy estimated that people visited their local rail-trails 96 million times in 1996. See Rails to Trails Conservancy Website, at http://www.railtrails.org/RTC_active_pages/Home/Main.asp (current rail-trail statistics printed on map). This number is five times greater than the number of people who attended every pro NFL football game combined during the same period. See NFL Attendance on the Decline, ALBANY TIMES UNION, Mar. 11, 1997, at C2. Yet, while the cost of building a trail is often a fraction the cost of building a stadium, construction of trails is often seen as promoting an elite special interest while stadiums are viewed as grand public assets. The Transportation Efficiency Act (TEA21) recognizes that bicycling is an important form of transportation and provides that ten percent of federal highway funds be made available for enhancements of transportation alternatives, such as bike trails. Transportation Enhancement Act, Pub. L. No. 105-206, § 3037(a), 112 Stat. 107, 387-88 (1998) (codified at 49 U.S.C. § 5309).

36. Canada is building a ten thousand-mile trail network linking the Atlantic, Pacific, and Arctic oceans, with relay runners expected to converge near Ottawa with flasks of water from all three oceans for the inauguration in 2001. The publicity devoted to the trail is staggering. One commentator called "the construction of a cross-country recreational trail . . . a 21st-century exercise in nation building." James Brooke, Trail Burnishes Canada's Self-Image: A 10,000-Mile Network Cross-
of the urban and suburban growth of the past thirty years did not include venues for alternative transportation, trail advocates believe we have almost a moral imperative to catch up by building trails along as many pre-existing roads as are practicable. Some cities have mandated that all new streets must be built to accommodate bicycles.

Once a governing body determines that a bicycle trail linking parks and schools, or a wilderness trail to a pristine fishing pond should be built, it can set about acquiring the necessary land or trail easements. If the landowners are willing to sell or donate either the land or a trail easement, the government can simply purchase it. But a single dissenting landowner can break the link in a trail by refusing to sell if the government has no mechanism for appropriating the land. Unlike traditional parks that are usually block-shaped and can be created from the holdings of a single landowner, trails require thin parcels across multiple tracts of land. And although a trail may be only ten feet wide, a 100 foot easement may be necessary to construct adequate buffer zones of vegetation, fences, or embankments to protect neighboring uses and achieve the desired effect for trail users. Yet even a relatively narrow trail can easily require hundreds of small parcels or easements.

In the face of an unwilling seller, the trail builder has three options. First, it can exercise the power of eminent domain, condemn the necessary land, and pay the landowner the fair market value of the property rights being taken. This forced appropriation of the land has the benefit of being quick and relatively inexpensive, but it requires that the builder

37. In the 1970s and 1980s, because of the tremendous growth in automobile use, and the inefficiency and sometimes outright danger of walking, many cities stopped building sidewalks in suburban areas, forcing the few lone pedestrians and cyclists onto the shoulders of sometimes very busy streets. But cyclists are attempting to "take back" the streets. See Ross Petty, The Impact of the Sport of Bicycle Riding on Safety Laws, 35 AMER. BUS. LJ. 185 (1998). Even in a city as small as Gainesville, Florida, cyclists die at an alarming rate along busy stretches of highway. The response seems to be a call for more educated and considerate motorists as well as better and safer bicycle lanes. See Cindy Swirko, Cyclist Death Prompts Worries, GAINESVILLE SUN, Aug. 3, 1999, at A1; Erich Spivey, 441 Cyclists Killed on Paynes Prairie, GAINESVILLE SUN, Jan. 23, 2001.

38. Tucson, Arizona, for instance, adopted in its Dec. 10, 1999 Comprehensive Plan a section on urban trails. Tucson transportation policy also requires that new streets being built include a marked bike-lane shoulder or separate bicycle path. See PAG Regional Transportation Overview, at http://www.pagnet.org/TPD/tpdoverview.html (last updated 04/19/01).

39. On average, the author estimates that it takes approximately twelve acres of land to construct a one mile stretch of trail one hundred feet wide. A one-mile length of trail could therefore easily require land from twenty to thirty separately-owned parcels.
have the power of eminent domain and the political backbone to use it. All utility companies and departments of transportation have eminent domain power, as do most county and municipal governments. But some states do not allow the use of eminent domain solely for constructing a trail, though a trail built as part of a new road may be permitted. While most governing bodies have general eminent domain powers, many landowners question whether trail use meets the "public necessity" or "public use" test required for exercising that power. Moreover, many parks departments and private non-profit trail groups usually do not have eminent domain powers. Even where a local parks board might have the power to condemn private land, sometimes exercising that power can be political suicide when local elections are often won and lost on single issue campaigns. Taking private land for a road is one thing; taking it for a trail can be another.

The second method of obtaining land for trails is to impose the dedication of a trail easement as a condition in building permits or development plans. These "exactions" commonly require subdivision developers to provide streets and parks within the subdivision, and perhaps to pay for widening of access roads and land for expansion or construction of local schools. While these exactions are relatively common, they are being scrutinized more closely in recent years under the Supreme Court's Nollan/Dolan line of cases. Moreover, while courts generally find it reasonable to require a developer to set aside up to fifteen percent of its land for open spaces, parks, schools, and streets, when bicycle trails are thrown in there often isn't any land left. Trails are often the last to be added and the first to go when the minimum set-asides have been

40. See East Oaks Develop. Inc. v. Iowa DOT, 603 N.W.2d 566 (Iowa, 1999).
41. See Carl, supra note 15, at 51.
44. See infra Pt. IV (discussion on exactions). Traditionally, takings and due process challenges called for a minimum standard of scrutiny of the legitimacy of the governmental regulation, but that scrutiny has been elevated in the exactions context to at least some type of middle tier scrutiny. See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).
reached. The justification for exacting land for parks is that the additional population brought into an area by the development will place additional strains on pre-existing facilities. Thus, it seems only fair to require developers to bear their fair share of the new burden for public facilities. But trails often bring outsiders into newly developed areas, particularly urban dwellers who want easy access to the countryside. Developers may dissent from exactions that appear to benefit residents from outside the subdivision who want access to the development’s new facilities and resources. What they fail to consider, however, is that their development affects urban dwellers who cannot reach rural open spaces except by driving through the new developments that ring most cities.

These exactions can take three different forms. The government can require the landowner to actually dedicate the land to the public body, thus removing it from the private tax roles and relieving the owner of liability for maintenance. Or the landowner can simply be required to leave certain lands undeveloped though no ownership transfer occurs. A third option falls in between, and may entail conveyance of an easement, though fee title will remain with the landowner. If the land is dedicated, the landowner no longer may exclude the public from use of the facilities.

45. Trails suffer when landowners complain about exactions. One survey of California city and county land planners showed that after Nollan and Dolan these agencies stopped their practice of requesting trail and public access exactions more often than any other exaction. The study also showed that the agencies listing landowner objections to certain exactions listed objections to open space, parks, and trails as second only to exactions for modifying or building roads. The study indicates that landowners were very likely to complain (roughly thirty-five percent of agencies reported objections) about trails, and forty-two percent of counties and sixteen percent of cities modified their exactions for trails in response to these objections. POLLAK, supra note 1, at 19, 20, 24.

46. While some rural landowners may complain about city-dwellers invading rural areas, on a reciprocity of advantage analysis, urban and rural centers provide cross-benefits to each other’s population. However, one of the problems of suburban sprawl is that it tends to sever the linkages between the rural and the urban, making residents of each less likely to venture into the other’s territory. Trails can easily be viewed as a sort of compensation to urban landowners who have lost their access to rural areas because of ever-widening circles of suburban development. Trails help re-link the urban and the rural in ways that recreate some of the peacefulness and safety that was associated with earlier times. As Frank Michelman explained, "[e]fficiency-motivated collective measures will regularly inflict on countless people disproportionate burdens which cannot practically be erased by compensation settlements. In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance that over time the burdens associated with collectively determined improvements will have been distributed 'evenly' enough so that everyone will be a net gainer." Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law, 80 HARV. L. REV. 1165, 1225 (1967). See also STEVEN EAGLE, REGULATORY TAKINGS (1996) §8-2(g)(1).

47. This was attempted by the city in Dolan v. City of Tigard, 512 U.S. 374, 380 (1994), with regard to the bicycle trail.
Unlike streets and parks, trails pose unique problems. With the development of streets, many subdividers choose to retain control over the streets and then transfer that control to homeowners’ associations to limit governmental interference within their development. In other cases, those streets are dedicated to the city or county so that local maintenance, snow removal, and upkeep costs are not assessed solely to the development’s residents. Some developers that are required to devote a certain amount of land to parks can opt to privatize the parks and limit access to residential owners and still satisfy the public open space requirement.

Trails, however, cannot be closed effectively. They are not very functional if they simply circle around the development. Most trail users need long stretches of trail to gain access to other areas. So when local planners demand that developers reserve a portion of land for a trail, it is usually to link trails to neighboring areas. The landowner most likely will lose all power to regulate or restrict public access.

With both eminent domain and exactions, the government effectively appropriates either the land or at least a trail easement. But local master plans do not provide for compensation in the case of exactions, only appropriations. As a result, exactions fall in the narrow space between outright appropriations and government regulations that limit uses of land under what is termed the general police power. In the latter category, the courts have held that most regulations that have incidental effects on land values are necessary and constitutional, but that regulations that “go too far” in imposing onerous burdens on landowners effectively “take” the land and therefore require compensation. The zoning plan that completely zones a parcel into disutility will often be held to have “taken” the land even though the government never attempted to appropriate directly the title to the land. Under such “regulatory takings,” the government must compensate the landowner if the restrictions are excessive. If not, they are deemed legitimate police power actions that balance the benefits and burdens of living in a civilized society.

Deciding where a trail exaction falls, however, can be a tricky exercise.

49. The police power is generally viewed as the power of the legislature to pass laws to further the general health, welfare, safety, and morals of the citizenry. It is based on sovereignty. The Fifth and Fourteenth Amendments to the U.S. Constitution place limits on that power. U.S. Const. amend. V; U.S. Const. amend. XIV.
The railbanking statute, which allows for the conversion of abandoned rail corridors to trails, is ostensibly a regulation on the procedures that railroads must follow under the Surface Transportation Board's abandonment jurisdiction. The effect of railbanking, according to some, is to prevent land from reverting to adjacent landowners. When a corridor is banked instead of abandoned, adjacent landowners who have a reversionary interest in the corridor land claim their land has been "taken" and they seek compensation. When the dispute is viewed as a pre-emption of state-defined property rights, it might appear that the statute has interfered with the right to possession or the right to exclude which are core property rights. But when viewed as the destruction of a contingent future interest, as I argue below, the regulation does not "take" any property because the landowner had no property right to begin with. To determine exactly how the statute operates on the relevant property rights, however, we must delve into the Court's extremely complex regulatory takings jurisprudence.

Ideally, all local land planners would like to regulate land use in such a way as to achieve the normative values of a thriving and healthy environment without having to pay for every action. A healthy and desirable community benefits everyone, even those landowners whose uses are restricted. Yet people complain when property taxes climb. Walking the fine line between when a regulation is deemed a legitimate police power and when it rises to the level of a regulatory taking is not easy given the Supreme Court's recent attempts to create new bright line rules. At least one federal regulation, the rails-to-trails program, attempts to "regulate" land use and promote trails by converting abandoned rail corridors to multiple-use greenways. However, determining whether an exaction or a regulation must be compensated requires understanding the constitutional framework of the Takings Clause.

53. The author notices that most local governments are in a Catch-22 situation: their budget is often directly tied to property values, so until public amenities are available to raise local land values, the funds to create the amenities are not available.


56. The Rails to Trails program uses abandoned railroad corridors for recreational trails while preserving the corridors intact for possible future reactivation. See infra Pt. V.
III. REGULATORY TAKINGS: A CONSTITUTIONAL PANDORA’S BOX

The Fifth Amendment to the U.S. Constitution provides that 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.” The Fourteenth Amendment makes both provisions applicable to the states.\(^{57}\) Until 1922, the Supreme Court adhered to a bright-line rule that takings cases were limited to the archetypical situation of the government physically appropriating land through the exercise of eminent domain while the due process clause pertained to the legitimacy of police power regulations enacted to promote the public welfare.\(^{58}\) The bright-line test was easy to apply insofar as the takings clause would require compensation when land was appropriated for public use; the due process clause would require nullification of regulations that did not meet the requisite public use standards. Hence, land taken for railroads, highways, courthouses, and even easements for the preservation of civic health and safety, like sewers or utilities, were considered within the scope of the takings clause. But police power regulations—like the power to regulate industrial pollution and discharge into rivers, the power to outlaw certain trade practices like brothels and distilleries, and the power to pass zoning laws—were not believed to fall within the takings clause protections because although they deprived property of value, they did not “take” the property for public use.\(^{59}\) As Justice Brennan explained, “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”\(^{60}\)

That bright-line rule began to blur in 1922 with Justice Holmes’ opinion in *Pennsylvania Coal v. Mahon.*\(^{61}\) In this case a Pennsylvania statute had been enacted that prohibited mining for coal beneath certain structures and in residential areas because it caused subsidence and dangerous cave-ins.\(^{62}\) The coal companies argued that the act took away their rights

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58. EAGLE, supra note 46, at 2.
60. Penn Cent., 438 U.S. at 124 (citations omitted).
61. 260 U.S. 393 (1922).
62. Id.
to mine for coal in areas where they had purchased both the mineral and the support estate, thus impairing both property and contract rights. Justice Holmes, writing for the majority, held that the regulation impermissibly impaired those rights and reversed the grant of an injunction preventing the coal company from continuing to mine as planned. Holmes' opinion has become famous for its oft-quoted passages recognizing the difficult balance between the police power and impermissible takings: "Government 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," and "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In a strong dissent, Justice Brandeis criticized Holmes for staking a new path that would require compensation in cases in which the owner retained ownership of the property. Contrasting regulations and appropriations, Brandeis explained: "Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the state of rights in property without making compensation. . . . [But t]he property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public." Because the coal company retained the coal, Brandeis did not see how this regulation appropriated its property.

Although this may be perhaps one of the most commented-on decisions in Supreme Court history, it is an odd little case. It was decided during the heyday of Lochner-era substantive economic due process and appears to proceed more in the line of due process analysis than any prior takings analysis the Court had used. The coal company never asked for

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63. Pennsylvania recognizes three estates in land: the surface estate, the support estate and the mineral estate. In this case the coal company had purchased the latter two. Id.

64. Id. at 413.

65. Id. at 415.

66. Id. at 416 et seq.

67. Id.


nor received compensation, the remedy for a takings violation. And because the state was not a party to the suit, compensation could not have been ordered. It is also notable that Holmes did not refer to the arguably most relevant precedent, *Mugler v. Kansas*, in which a Kansas law prohibiting alcohol sales and manufacture rendered a brewery, and its equipment, entirely worthless. The property owner was denied compensation on the grounds that the Court had to uphold a law if it "promoted a legitimate public end in a rational way."  

Regardless of the scholarly critiques of *Mahon*, it has acquired a pivotal role in regulatory takings doctrine, which holds that governmental regulation could have such detrimental impact on property that compensation might be required even if title to land is not appropriated outright. Though the case was neglected for nearly fifty years, when the Court began looking back to *Mahon* in the sixties as a source for constitutional limitations on excessive governmental interference with property rights, the Holmesian "goes too far" language proved difficult to apply. After struggling for nearly twenty years, the Court admitted in 1978 that the test involved "essentially ad hoc, factual inquiries." In *Penn Central Corp. v. New York City*, Justice Brennan listed three factors the Court considered important in making the ad hoc determination of when a regulation "goes too far." Those factors are: 1) the economic impact on the claimant, 2) the extent to which the regulation interferes with reasonable investment-backed expectations, and 3) the character of the governmental action. *Penn Central* involved a New York City historic preservation law that prohibited Penn Central from building a fifty-five-story office complex cantilevered above the historic Grand Central Terminal. Although some called the proposed building an "aesthetic joke," Penn Central claimed unsuccessfully that its inability to build in the airspace over its building worked a taking.

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70. 123 U.S. 623 (1887).

71. *Id.* See also JUERGENSMEYER & ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 423 (1998).


74. *Id.* at 123.

75. *Id.* at 118.
Two years later, in 1980, the Court articulated a somewhat different test when considering a California ordinance that limited development of open space in order to slow urbanization in *Agins v. City of Tiburon*. Instead of looking to the *Penn Central* balancing factors, the Court articulated a new test that suspiciously resembled the traditional due process principles that had been spelled out in the early zoning challenges of the late 1920s. The Court in *Agins* stated that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." One way to reconcile these two different tests would be to apply the *Agins* test when analyzing facial challenges to a regulation, and the *Penn Central* balancing test when engaging in as-applied challenges that claim a particular application of a regulation works an undue hardship on a single property owner. Unfortunately, the Court has not remained true to this distinction, sometimes applying the *Agins* test to as-applied challenges.

In the first important exactions case, *Nollan v. Calif. Coastal Commission*, the Court applied the "substantially advance" prong of the *Agins* test to a conditional exaction case, and elided due process and takings analyses into one big muddle. In this case a landowner was told he could build a larger house on his beachfront lot but only if he provided a beach easement allowing the public to walk back and forth between two public beaches on either side. The Court struck down the condition because the state's action—demanding a lateral public easement across the beach—did not substantially advance the stated goal of the Coastal Commission Act—protecting the public's view of the beach from the nearby highway. *Nollan* thus uses the "substantially advance" language from *Agins* to inquire into the justification of imposing on a single

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78. This is not entirely unjustified, as Justice Powell mentioned in *Agins* that the zoning was valid on its face. 447 U.S. at 259.
81. Numerous scholars have written on the muddling of the Court's takings jurisprudence, which is primarily caused by what appears to be an importation of due process analyses into takings cases. See generally Bristow, *supra* note 69, and articles cited therein.
82. Id. at 828.
83. Id. at 837. The Coastal Commission's purported state interest was to protect the public's ability to see the beach from the street, break down the psychological barrier to use of the beach caused by extensive private development, and protect the public's view of and access to the beach.
landowner a restriction that essentially forces her to contribute her land for public use. The actual language in Nollan is the "essential nexus" test, i.e. whether there is an essential nexus between the harm caused by the landowner's use of her land and the solution exacted by the government.\textsuperscript{84}

The essential nexus test was further refined in 1994 in another exaction case, Dolan v. City of Tigard.\textsuperscript{85} In Dolan the owner of a hardware store sought a permit to expand the size of her store and pave a portion of her parking lot. The city conditioned the permit on her dedication of a portion of her land along Fanno Creek to the city for a flood plain, plus an additional fifteen-foot wide section for a bicycle and pedestrian trail.\textsuperscript{86} The two amounted to roughly ten percent of Dolan's property and could be used to meet the fifteen percent open space requirement mandated in the Central Business District general plan.\textsuperscript{87} The Court found that the City's exaction met the essential nexus Nollan element because the flood plain dedication was clearly related to the extra stormwater runoff that would result from her additional building and paving projects, and the bicycle dedication was clearly related to the additional traffic that would be generated by her larger store.\textsuperscript{88} Yet the Court struck down the conditions on the ground that besides meeting the "essential nexus" requirement of Nollan, a government must show a "rough proportionality" between the problems generated by the landowner's use and the solution sought through the exaction.\textsuperscript{89} Thus, because the same goals could be achieved by simply forbidding Ms. Dolan from developing the land in the flood plain, the requirement that she dedicate that portion to the City violated the rough proportionality test. Likewise, although her enlarged store would likely generate more traffic downtown, the City failed to show that either a bike trail or a dedication of the bike trail land would in fact mitigate the traffic problem.

The Nollan/Dolan test of essential nexus and rough proportionality heightens scrutiny from the traditional rational basis test previously used under due process tests to challenge the legitimacy of the governmental action, though it is unclear if the test will remain applicable only in the

\textsuperscript{84} Id. at 837.  
\textsuperscript{85} 512 U.S. 374 (1994).  
\textsuperscript{86} Id. at 379-80.  
\textsuperscript{87} Id. at 380.  
\textsuperscript{88} Id. at 387.  
\textsuperscript{89} "Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations."" Id. at 389-90 (citations omitted).
narrow set of exactions, or will be extended to land use regulations in general. At this point, the lower courts generally are not elevating scrutiny in non-exactions cases. But insofar as the Nollan/Dolan test purports to more closely scrutinize the validity of the government's legislative goals and means, and derives from Agins and its line of due process cases, it threatens to import a stricter takings test into facial challenges of regulations and replace deferential minimum scrutiny under due process.

That prediction is not unwarranted given the current Court's penchant for elevating scrutiny and moving away from the Penn Central ad hoc balancing test. At the same time as the Agins test was somehow metamorphosing into the stricter essential nexus and rough proportionality tests, the Court was creating a set of bright-line rules for finding when a regulation will cause a per se taking. In most as-applied challenges, the Court under Penn Central looks to the three-factor balancing test to determine whether the regulation asks the property owner to bear a burden that, in all fairness, should be borne by all. In 1982, however, the Court created an exception for regulations that cause permanent physical invasions of a landowner's property, in Loretto v. Teleprompter Manhattan CATV Corp. Here the Court ruled that compensation was due to a landowner for physical invasion caused by New York's rule requiring landowners of residential property to permit the installation of cable television facilities on their buildings. Although the property taken was minimal—just the area required for the thin cable wires and the roughly two cubic feet needed for the cable transformer—and caused no economic impact (it even arguably increased the value of the units), the character of the government's action was deemed to require compensation because it permitted a permanent physical invasion.

Although the Loretto rule raises the specter that governmental exactions of park land, open space, or trail dedications could be deemed per

90. The Court indicated that it will not extend the test outside of exactions, but that promise may be short-lived given the likely make-up of the Court in the next few years. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) ("[W]e have not extended the rough-proportionality test of Dolan beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.").

91. Santa Monica Beach Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999), cert. denied 526 U.S. 511 (1999).

92. See generally Ferguson v. Skrupa, 372 U.S. 726 (1962). See also Braunes, supra note 69; Bristow, supra note 69; McBeth, supra note 69; Summers, supra note 69 (all on the conflation of due process and takings).


95. Id. at 441.
se takings because they invite the public to invade privately-owned land, the Court in *Nollan* provided an exception for cases in which the landowner's use of the property contributes to the problem the exaction seeks to remedy. 96 For trail purposes, the *Nollan* exception may help if the exaction directly addresses a burden created by the development, as with subdivision residents putting strains on pre-existing trail facilities. But where the trail is more a trade-off for increased burdens on other facilities, like streets or sewers, the *Nollan* exception may not save the exaction.

In creating a second per se exception, in *Lucas v. South Carolina Coastal Council*, 97 the Court combined the economic impact factor from *Penn Central* and the "denies an owner economically viable use of his land" prong from *Agins*, to hold that when a regulation deprives an owner of *all* economically viable use of her land, a per se taking will result unless the regulation does no more than could be achieved through background principles of nuisance or was an inherent limitation on title. 98 In *Lucas*, the landowner was denied the power to build residences on two beachfront lots he had purchased, because a newly adopted setback rule, adopted to deter beach erosion, placed his entire parcels in the no-development zone. Justice Scalia articulated a new rule that once an owner can show complete and total economic loss, a per se taking will be found unless the state can show that the landowner could have been prevented from so using her land in a nuisance suit by neighbors or the state. 99 Because no one has the right to commit a nuisance, prohibitions against actions that cause a nuisance do not take from a landowner any right she had to begin with. Similarly, if one acquires title to land subject to certain limitations or servitudes, a regulation that outlaws the activity already prohibited by the servitude takes nothing from the landowner. Her title was already limited.

From this necessarily brief summary, we can begin to see how trails might be analyzed under exactions and regulatory takings doctrines. For instance, a trail exaction would squarely fit within the *Nollan/Dolan* cases and must meet the essential nexus and rough proportionality requirement in order to avoid compensation. The federal railbanking law

96. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987). This exception would not apply in *Loretto*, however, where using one's land for residential rental purposes does not exacerbate the problem of tenants not having adequate access to cable TV facilities. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
98. Id. at 1029.
99. Id.
that promotes conversion of abandoned rail corridors to recreational trails is a far more complex legal issue. It's application could either constitute a permanent physical invasion under *Loretto*, require heightened scrutiny under *Nollan/Dolan*, be challenged as a denial of all economically viable use of that portion of the land under *Lucas* or *Agins*, or call for a simple ad hoc balancing under *Penn Central* because the character of the government action is the postponement of the removal of a rail servitude, not the taking of a trail easement. Recognizing that the law of regulatory takings is far more complex than presented here, and that numerous additional factors can affect the takings analysis, this framework should allow a sufficiently nuanced calculus within which to view both trail exactions and the railbanking law. Thus, with the foregoing basic framework, the different mechanisms for achieving recreational trail land acquisition under the three broad categories of eminent domain, exactions, and regulation can be explored.

### IV. TRAILS BY EMINENT DOMAIN

Since 1898, the Franciscan Friars of the Atonement, at the Graymoor monastery in Garrison, New York, have owned their monastery and 400 acres of undeveloped land about ninety minutes north of New York City. Only recently, however, their ownership has been threatened by, of all things, the close proximity of the Appalachian Trail. The trail runs along the Hudson River for more than a mile along a fifty-eight-acre easement that the National Park Service (NPS) purchased from the friars in 1984 for $116,500. But the easement is only fifty-feet wide in some places and the Park Service is attempting to purchase from the friars about eighteen acres of buffer land. After fifteen years of frustrated negotiations, the NPS has referred the case to the Justice Department to begin proceedings in eminent domain. While the friars sympathize with the Park Service’s goal of maintaining the land in its natural, preserved state, and they have no future plans to develop the land themselves, they disagree with the NPS that federal acquisition of the land is the only way to ensure that no development will ever encroach on the trail. Currently the NPS is holding off the condemnation proceedings, from pressure by politicians intervening on behalf of the monastery, but doing so runs afool of the National Trails System Act (NTSA) which has placed the Appala-

100. Consider the denominator problem, the distinction between temporary and permanent takings, and vested and non-vested rights. EAGLE, supra note 46, at §§ 7-6(e), 8-2(h)(5), 6-5.

Chian Trail at the center of a fight to preserve a historic legacy of American individualism. The end of the year 2000 was the hoped-for completion date of all land acquisitions along the 2,500 mile trail, running from Georgia to Maine.

Whether or not a governmental entity can acquire land for recreational trails by eminent domain is not as straightforward as it would seem. Of course, when land or an easement is acquired through formal condemnation processes, the governmental entity pays for it. The question, therefore, is whether a particular entity has the authority to condemn land for such a purpose; i.e. are recreational trails a valid public purpose? While the answer to that question might seem rather obvious, the law proves otherwise. Insofar as the relevant legislative body has mandated that recreational trails are an important public welfare goal, the courts seem comfortable permitting such a taking. But absent a clear legislative mandate, some state courts will not permit local parks boards, state parks departments, or departments of transportation (DOT) to exercise eminent domain power over private land solely for a recreational trail under “general” eminent domain authority. Condemnation authority specifically for trails may be needed.

As a part of the National Trails System Act, the Secretary of the Interior has authority to condemn land both for the actual width of a recreational trail, and for a buffer between developed neighboring uses, for most of the trails designated under the Act. Since the NTSA’s enactment in 1968, twelve national historic (NHT) and eight national scenic trails (NST) have been designated by Congress, as well as hundreds of other local and regional trails that have been catalogued, surveyed, and

102. Secretary of the Interior, Stewart Udall, prefaced his national trails legislation proposal with the following comment: "A nationwide system of trails will open to all the opportunity to develop an intimacy with the wealth and splendor of America’s outdoor world for a few hours at a time, or on one-day jaunts, overnight treks, or expeditions lasting a week or more. A system of trails carved through areas both near to, and far from, man and his works will provide many varied and memorable experiences for all who utilize the trails." March 31, 1966 Letter from Udall to Senator Hubert Humphrey (transmitting the proposed trails legislation), in Thomas Downs, The National Trails System: A Model Partnership Approach to Natural Resources Management, 30 ENVTL. L. REP. 10,091, 10,093 (2000). The Appalachian Trail is perhaps the most enduring American symbol of personal achievement. Though most of us won’t climb Mt. Everest, even seventy-year-old grandmothers have hiked the Appalachian Trail. See Story of Grandma’s Heroic Hike, CLEVELAND PLAIN DEALER, Oct. 18, 1998, at 4J; Grandmother Hikes Appalachian Trail, PATRIOT LEDGER (Quincy, Mass), Sept. 23, 1995, at 16. See also Patrick Miller, Bikes Replace Wagons on the Santa Fe Trail, ALBUQUERQUE J., Aug. 23, 1998, at 7 (seventy-year-old bikes from Santa Fe to Missouri).


105. See Downs, supra note 102.
recognized by the Department of the Interior as national recreation trails.\textsuperscript{106} Although the authority of the Secretary to condemn land has changed over the years by Act of Congress, all the NSTs and NHTs were open for land acquisition from willing sellers, by condemnation, and by other agreement under the 1968 Act.\textsuperscript{107} In the 1978 amendments to the NTSA, Congress increased the amount of land that could be condemned to 125 acres per mile of trail rather than the twenty-five originally allowed, and further funded the land acquisitions from $5,000,000 to $95,000,000 for existing trails,\textsuperscript{108} but all new trails designated between 1978 and 1983 would be individually prohibited from using federal funds for land acquisition. The prohibition attached to the new trails created a greater role for volunteer agencies and non-governmental organizations (NGOs) which could purchase the land from willing sellers through donated funds.\textsuperscript{109} In 1983, Congress authorized land acquisition and expenditures of federal funds, but only from "willing sellers."\textsuperscript{110} And federal law now prohibits condemnation with respect to seven trails.\textsuperscript{111}

A number of states along the Appalachian Trail have also granted independent legislative authority to parks departments or land commissioners to use eminent domain within the state to help fill in the trail.\textsuperscript{112} However, some limit that power to twenty-five acres/mile for buffer land

\textsuperscript{106} The first two National Scenic Trails, the Appalachian Trail and the Pacific Crest Trail, have since been joined by the creation of the Continental Divide NST, the Florida NST, the Ice Age NST, the Natchez Trace NST, the North Country NST, and the Potomac Heritage NST. The National Historic Trails were a new category added in the 1978 amendments and comprise the California NHT, the Iditarod NHT, the Juan Bautista de Anza NHT, the Lewis and Clark NHT, the Mormon Pioneer NHT, the Nez Perce NHT, the Oregon NHT, the Overmountain Victory NHT, the Pony Express NHT, the Santa Fe NHT, the Selma to Montgomery NHT, the Trail of Tears NHT, the El Camino Real de Tierra Adentro NHT, and the Ala Kahakai NHT. 16 U.S.C. § 1244 (a) (2001).


\textsuperscript{109} See Downs, supra note 102, at 10,096-98.

\textsuperscript{110} The Natchez Trace NHT and the Selma to Montgomery NHT are the exceptions. See id. at 5.


or, as in Connecticut, limit the total allowable land obtainable through eminent domain to 200 feet in width. No other National Scenic or National Historic Trail has received even this limited state support. While federal eminent domain power is generally available for National Scenic Trails, the same is not true for National Historic or national recreation trails. Many of the latter are local, intra-state trails and rail-trail conversions that are governed by state departments of natural resources, parks departments, local trail managers, or departments of transportation, and few of these agencies have specific condemnation power.

A few states have followed the federal lead, and created comprehensive trail maps that show a variety of types of trails, from wilderness hiking and horseback trails to urban bicycle paths and cross-state rail-trails. Most of these maps are only wish lists, however, depicting the ideal location of trail networks, and serve as guides for Departments of Natural Resources (DNR) and DOTs in their future land acquisition and planning processes. Where necessary, two trails might be linked on the map by connecting lines that traverse private property. The line may be on the map even though the trail is not yet on the ground (and may never be). But it is precisely this type of governmental foresight that has provoked the ire of landowners. Many private property owners do not want their land identified on maps as being the possible site of a future trail linkage as they believe such a mark will lower their property values. When politicians respond like those in Santa Cruz County, local land planners

113. Id.

114. The Appalachian Trail is one of eight National Scenic Trails, which are extended trails providing for “maximum outdoor recreational potential and for conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass.” National Historic Trails follow, as closely as possible, “original trails or routes of travel of national historical significance.” 16 U.S.C. § 1242 (a)(2) & (3) (2000).

115. The current statute provides that condemnation proceedings against privately-owned land can be undertaken only in cases where “all reasonable efforts to acquire such lands … by negotiation have failed, and in such cases … [shall include] only such title as . . . is reasonably necessary to provide passage across such lands.” 16 U.S.C. § 1242 (a)(2) & (a)(3) (1994 & Supp. 1999). National Historic Trail land acquisition by the federal government is limited to only those areas indicated by the study report or by the comprehensive plan as high potential route segments or high potential historic sites. Id.

116. In some instances, maps setting out future roads have been held to constitute a taking if land values are sufficiently reduced, or uses are limited, as a direct result of the demarcation. See Nichols, On Eminent Domain § 6.05[4][a] (3d ed. 2000). In the Santa Cruz County conflict over the Trails Master Plan the contested maps were to be wiped off the County records and all mention of a Trails Map was to be deleted from the General Master Plan. Pollak, supra note 1, at 47. Under the amended General Plan, any trail easements obtained by the County were not to be put on any published trail maps until “a complete trail from beginning to end has been obtained legally from the respective property owners, and only after adequate funds exist to implement a trail maintenance plan.” Id.
find their hands tied as they are unable to foresee and plan for land acquisition for additional trail linkages. Such opposition results in greater reliance on using rail corridors for trails which, as discussed later, generally provide uninterrupted corridors that readily link up with other trails and transportation facilities and can be acquired with minimal impact on privately-owned land. To the extent rail-trails are also under attack, however, county planners may find themselves blocked at every step of the way.

As a categorical rule, recreational trails, like parks, meet the public use requirement of the Fifth Amendment. Assuming it is not going to be used for limited access, a trail that is open to the public clearly meets the public use test. But the constitutionality of eminent domain does not guarantee that it will be used. Only six states appear to have some sort of legislative regime in place to develop state-wide trail systems. They are Georgia, Maine, Minnesota, Nebraska, New Jersey, and Tennessee, yet not all have granted eminent domain power to construct the system. Other states give powers to establish trails on state lands and in state parks but do not give authority to extend those trails beyond the borders of government-owned lands. Moreover, a number of states prohibit outright the use of eminent domain for any trail purposes.

117. The Fifth Amendment requires that public property taken under eminent domain be taken only for “public use.” U.S. CONST. amend. V. Although the definition of public use has changed over the centuries, it generally means “for the public good, the public necessity, or the public utility.” ROTUNDA & NOWAK, CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 15.13 (1999).
119. GA. CODE ANN. § 12-3-113 (2000) (giving the Georgia DNR power to create the Georgia Scenic Trails System but denying the power of eminent domain); ME. REV. ST. ANN. tit. 12 § 1982 (2000) (granting eminent domain powers for the creation of a Maine Trails System, but requiring the consent of the governor for all eminent domain acquisitions, and limiting those to twenty-five acres per mile); MINN. STAT. § 85.015 (2000) (giving the Commissioner of Natural Resources the power to establish state trails using eminent domain—but the statute was amended in 2000 to a specific trail-by-trail description of what is permissible in each circumstance and, now, in only a very few cases is the eminent domain power granted by the state or its agencies); NEB. REV. STAT. § 37-1006 (2000) (Trail Development Assistance Act, which does not limit eminent domain power of state or its agencies); N.J. STAT. ANN. § 13:8-37 (2000) (giving the Parks Department eminent domain power for State Trails System); TENN. CODE ANN. § 11-11-112 (2000) (giving eminent domain power for the Tennessee Trails System, though limiting that power to twenty-five acres per mile).
legislatures have even removed eminent domain powers in the past decade or so under pressure from private property owners.\(^{122}\)

My own anecdotal evidence and the trend in many states limiting eminent domain powers for all but the most necessary streets and highways show that DNRs, DOTs, or local governing agencies are very reluctant to use eminent domain to establish trails. Some states commonly use condemnation when one or two recalcitrant landowners derail a popular trail project.\(^ {123}\) They are even more likely to do so if those parcels are the remaining lots needed to fill in a trail from an abandoned rail corridor that was acquired from a voluntary sale. But few governmental entities will condemn every parcel needed to construct a trail, even though it would not hesitate to do so to construct a highway. On the other hand, many state DOTs are warming up to the idea of using eminent domain to build trails alongside roadways so that the land acquisition for both occurs at the same time.\(^ {124}\) One state even viewed the DOT's power to acquire land for "ways open to travel by the public" to include bike and pedestrian walkways.\(^ {125}\) Yet not all state agencies are as creative in their thinking about trails.

Despite legislative limitations and recent trends to restrict using eminent domain for trail purposes, state courts appear to construe their own

\(^{122}\) Minn. Stat. § 85.015 (2000); Mich. Comp. Laws § 474.58 (2000) (removing in 1984 the power of DOT and DNR to use eminent domain with regard to rail corridors for conversion to trails); Colo. Rev. Stat. § 33-11-104 (which was amended in 1984 and 1990 to limit eminent domain powers to dealing with pre-existing trails).

\(^{123}\) There was a lengthy dispute in Crawfordsville, Indiana, over a small rail-trail. One landowner along the route contested the railroad's title to the land, taking the case to the Indiana Supreme Court. The Court ruled that the landowner held fee simple to the land and the railroad only an easement. The Court further found that the easement had been abandoned and the trail group had purchased nothing from the railroad. After the ruling, the county parks board decided to condemn the parcel at issue. In condemnation proceedings the fair market value of the land was determined to be $300. See Consol. Rail Corp. v. Lewellen, 682 N.E.2d 779 (Ind. 1997). I suspect that the legal fees to litigate the issue to the state supreme court level greatly exceeded the value of the land at issue.

\(^{124}\) See Fla. Stat. ch. §§337.27(1), 334.03(7) (1977), as interpreted in West Gate Shopping Ctr. Inc. v. Div. of Admin., State Dept. of Transp., 363 So.2d 407 (Fla. Dist. Ct. App. 1978). This is made even easier through TEA21 enhancement funding that provides that ten percent of all federal highway dollars be used for enhancements such as trails. By combining the funding sources and linking trails to roads, local governments can reinforce the idea that trails are simply alternate, but equally valuable, transportation venues. Transportation Enhancement Act, Pub. L. No. 105-206, § 3037(a), 112 Stat. 107, 387-88 (1998) (codified at 49 U.S.C. § 5309).

\(^{125}\) Id. See also Munson v. City of S. Burlington, 648 A.2d 867 (Vt. 1994) (the highway condemnation process is different from the bikeway condemnation process, though combined condemnation appears permissible through the highway process). Accord generally Lincoln Branch, Inc. v. City of Lincoln, 512 N.W.2d 379 (Neb. 1994); State v. Holmquist, 1996 WL 722107 (Minn. Ct. App. 1996).
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statues relatively broadly. Colorado, for instance, does not grant eminent domain authority in its Recreational Trail System Act, but Colorado courts have interpreted the Act as simply not giving specific eminent domain authority for trail acquisition, rather than as prohibiting all use of eminent domain for trails. The distinction is subtle, but the Colorado courts would allow a local government to use eminent domain for a recreational trail so long as there is independent authorization to do so (perhaps via DOT highway or municipal park condemnation powers). Other states might interpret their general eminent domain statutes to include trail purposes under a broad reading of “public purpose.” Wisconsin readily permits use of eminent domain power for recreational trails because “the establishment of the trail will benefit the public, [and therefore] a public purpose exists.” Under the Wisconsin Court’s interpretation, a “court can conclude that no public purpose exists only if it is clear and palpable that there can be no public benefit.” Since the public will use the trail, it meets the public purpose requirement.

The Iowa Supreme Court has held that the Iowa Department of Transportation does not have general eminent domain authority for establishing recreational trails or bikeways, but the Iowa DOT could condemn private land for a bike trail when a pre-existing trail was interrupted by a road-widening project. The road project justified rebuilding the interrupted trail, even if it had to be done through condemning private land. A Minnesota court also has held that because the Commissioner of Transportation has the power to develop a statewide bikeway system, land condemned for a highway could also be used for a bike trail.

States like these are proving themselves to be more creative than others in finding ways to permit appropriation of private land for trails. Another way in which state authorities have used eminent domain for trails is to exercise it against a railroad, rather than against private landowners. By doing so, the state’s action usually falls under relatively

126. See C.R.S. § 33-11-104(4), which provides in pertinent part that: “[n]othing in this article shall permit the acquisition of recreational trails by proceedings in eminent domain by any state agency or any unit of local government or any agency thereof . . . .”.


128. Id. at 536.


130. Id.


generous rules allowing for additional public use of already dedicated public land.\textsuperscript{134} Most states have rules allowing public utilities easy access to street and highway corridors or state-owned lands to lessen the burden on private landowners.\textsuperscript{135} Similarly, utilities may condemn the right to string poles and wires along rail corridors. State parks may be required to cede land for roads and highways where the alternative would be condemnation, at great cost, of private land for road expansion projects. As one court explained, an “implied right to condemn public property under a general grant may be found where the condemnor’s use is not substantially inconsistent with that of the condemnee. . . . This implied power may not be invoked, however, when the proposed use of the railroad property would destroy or essentially impair the railroad’s existing use of the property.”\textsuperscript{136} The key is that both the railroad and the local trail body are exercising use and access rights over land devoted to a public purpose.\textsuperscript{137} When a local governing body condemns land alongside an operating rail line for location of a trail, it does so only on the guarantee that the trail will not inconvenience or impair rail operations.\textsuperscript{138}

Although courts uniformly hold that trails do meet the “public purpose” requirement of the takings clause, trails often are not viewed as politically viable candidates for exercise of eminent domain. Many people do not deem trails to be sufficiently worthy of taxpayer expenditures to warrant a grant of eminent domain powers. And states are even less likely to allow use of eminent domain to provide greenbelt buffers between trails and developed neighboring land uses than to build the trails in the first place.

Nevertheless, the Franciscan Friars of the Atonement are unlikely to win their legal battle against the National Park Service’s effort to condemn eighteen acres of monastery land as a buffer to the Appalachian Trail.\textsuperscript{139} Congressional approval under the NTSA, as well as the privi-


\textsuperscript{135} Long Island R.R., 479 N.Y.S.2d at 165-66.


\textsuperscript{137} Although railroads are considered quasi-public entities, their use of the land is considered a public purpose and therefore open to additional public uses by utilities and now trails. Fogle v. Richley, 378 N.E.2d 472 (Ohio 1978).


\textsuperscript{139} See Park Service, Friars Fight for Ownership of Land, GAINESVILLE SUN, Aug. 8, 2000, at A3.
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leged place of the Appalachian Trail in the American legal system and psyche, means the NPS can condemn the monastery land. In the court of public opinion, however, the issue could have a different outcome. Just as many states do not think trails are a wise or politic use of taxpayer funds, the Franciscans' appeals to Senator Charles Schumer and Representative Sue Kelly may throw some additional factors into the "public purpose" analysis.

V. TRAILS BY EXACTIONS

While many might agree with the Franciscans that eminent domain for recreational trails is not an appropriate use of taxpayer money, the story may change in discussion on exactions of trail easements from developers and sub-dividers whose new projects will bring additional users to burden pre-existing parks, beaches, and recreational areas. The legal justification behind exactions is that if it would be permissible to prohibit a development outright, based on its detrimental impact on public facilities, then approval subject to mitigating conditions, like a dedication of ten percent of the land to open spaces, is also permissible. As Justice Scalia put it: "If a prohibition [would be] a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." Developers have routinely been subject to stringent land use restrictions limiting the density of their development and mandating certain percentages of open space both on individual lots and within the entire development generally to mitigate the urban congestion to which their development contributes. They also routinely build or fund construction for new streets. But does this rationale extend to recreational trails?

Most trail exactions before the mid-1990s proceeded under the clear


rationale of Agins v. City of Tiburon, in which the Court upheld zoning ordinances that required a reasonable amount of land be left undeveloped in order to promote the open space needs of the growing city. In that case, the State of California had determined that the development of local open-space plans would discourage the "premature and unnecessary conversion of open-space land to urban uses." Because the developer's use of the land would directly exacerbate the problem of dwindling open spaces, the zoning ordinance was held to not violate the Takings Clause and therefore not trigger compensation. Only regulations that do not "substantially advance legitimate state interests ... or deny an owner economically viable use of his land," would be deemed unconstitutional under Agins. Furthermore, the State of California had recognized that the preservation of open space is necessary "for the assurance of the continued availability of land for ... recreation and for the use of natural resources." To the extent that trails are a form of open space and, like parks, serve a recreational function, they would seem logical candidates for a developer exaction.

Two problems immediately arise, however. First, where a typical zoning ordinance mandates that ten or fifteen percent of land be left open, by the time exactions are made for streets, utility corridors, a neighborhood park, and a flood plain, there may be none left over for a trail. Second, where the developer is not the large residential subdivider, but is instead the single landowner who seeks a building permit to expand his house, build a garage, or expand a pre-existing business, an exaction for a trail may not be sufficiently related to the burden caused by the developer's use. This lack of fit was precisely the issue in Dolan v. City of Tigard in which the Court found the Oregon city's exaction for a trail constituted a taking for which compensation was required.

In Dolan the City had conditioned the grant of a permit to expand Ms. Dolan's downtown hardware store on the dedication of a fifteen-foot wide strip along a flood plain for a bicycle trail. Although the city made a finding that the increased traffic caused by the larger store was likely to generate as much as 435 additional trips per day through the downtown area, the Court was skeptical that the bicycle trail would in fact reduce any of those trips. Perhaps Justice Scalia had a hard time envisioning

145. Id. at 261.
146. Id.
147. Id. at 262 n. 7, citing CAL. GOV'T CODE ANN. §65561(a) (1979).
149. Id. at 395.
any of Ms. Dolan's customers returning home on their bicycles with their newly purchased 2x4s, sheets of plywood, or kitchen sinks. An obvious flaw with Scalia's image, however, is that while few of Ms. Dolan's customers might in fact use the trail, it would likely be used by customers of neighboring businesses who found the increased traffic caused by her bigger store made parking and access to downtown too difficult. Those customers, who were accustomed to driving downtown, might be deterred by the additional traffic and ride their bicycles or walk.150

Nonetheless, the Court's requirement that exactions meet a strict "essential nexus" and "rough proportionality" test means that bike paths are likely to lose support from local planners simply because they are hard to prove. Moreover, because most bike path exactions are for new trails or trail extensions,151 it may be difficult for land planners to show that the development will increase the burden on public facilities if the trails are not yet in existence.152 On the other side of the scale, however, is the argument that an urban bike trail like the one in Dolan will likely have some mitigating impact on the traffic caused by a new development, no matter how small, whereas residential bike paths will probably have little mitigating function on traffic because suburban users are likely to use them solely for recreation and not for transportation to work, shopping, or entertainment centers.153

Some scholars have suggested that Dolan's rough proportionality requirement is likely to result in more permits simply being denied rather than granted subject to conditions if those conditions are going to be strictly scrutinized.154 Furthermore, in areas in which recreational tourism constitutes a significant percentage of the local economy, the importance of trails may have more to do with the community image and availability of transportation alternatives than with any quantifiable reduction in automobile trips to the grocery store. To the extent that bicy-

150. Just exactly how direct must the impact of development be on pre-existing services? Where increased traffic requires widening the road, the impact is direct and clear; where it may displace other more passive uses, the state may have a harder time meeting its Dolan rough proportionality requirement.
152. This problem may lead local planners to shy away from bold new efforts to mitigate a development's effects, instead resorting to conservative, tried and true methods, like road widening and new traffic control devices.
153. Obviously, if the trail does not lead to any commercial establishments, it will function more as a park or open space rather than as an alternative transportation corridor. However, having a local bike path will certainly reduce the automobile traffic of those cyclists who have to drive to get to a safe cycling area.
cle trails actually bring customers to the area, trail exactions would seem justifiable even if they do not meet the rough proportionality requirement of *Dolan*. And even more importantly, *Dolan* may inhibit communities that would like to develop along greater recreational lines more than those that have already capitalized on the growing demand for greater recreational facilities and can show the nexus between customers and trails.

Notably, while the Court is comfortable stating that property rights are the creatures of state law, and that property rights can differ dramatically across state lines, *Dolan* makes it very difficult for states to experiment with their land use plans in order to promote local assets, natural resources, and normative plans for future development. Recent scholarship has confirmed that the *Nollan/Dolan* cases have had a chilling effect on state and local planners seeking to implement quality-of-life mandates.

In the only case that has apparently looked at a trail exaction after *Dolan*, the Wisconsin Court of Appeals determined that no taking had occurred because the developer did not have to dedicate the trail land outright. In that case, *Hoepker v. City of Madison Plan Commission*, the court refused to treat the bike path reservation for a residential subdivision as a facility "designed for travel," as had been argued in *Dolan*. The court instead viewed the trail as equivalent to any other park, playground, or greenspace that would generally meet the rough proportionality test of *Dolan*.

A strong dissent noted, however, that forcing the

156. Matthew Cholewa, *Federalism and Land Use After Dolan: Has the Supreme Court Taken Takings from the States?* 28 URB. L. W. 401 (1996). Some states have already seen a chilling effect in their application of Dolan rough proportionality to exactions that require land dedications as well as those that do not, arguably stretching Dolan more than is necessary. See generally Clark v. City of Albany, 904 P.2d 185 (Or. Ct. App. 1995) rev. den. 912 P.2d 375 (Or. 1996); POLLAK, supra note 1.
157. See Cholewa, supra note 156. See also generally Holloway & Guy, supra note 42; Nancy Stroud & Susan Trevarthen, *Defensible Exactions After Nollan v. California Coastal Commission and Dolan v. City of Tigard*, 25 STETSON L. REV. 719 (1996); Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), cert. den. 115 S.Ct. 2268 (1995) (Justice Thomas's dissent in the cert. denial notes that the states are hopelessly divergent in their positions on the applicability of *Nollan* and *Dolan*).
158. The lack of causes would seem to be evidence of the chilling effect of Dolan on trail exactions.
160. Id. at 8.
subdivision to reserve a broad corridor to extend a pre-existing recreational trail "makes it difficult, if not impossible, for the [town] to require Hoepker to dedicate streets, school sites, playgrounds, tot-lets, and other open spaces required to serve the subdivision."162 The dissent had a hard time seeing the trail extension as a facility closely linked to the development's residents. The dissent also pointed out that pursuant to a different Wisconsin statute, areas "reserved" by plat are automatically conveyed to the local municipality in fee. Hence, the land would in fact be dedicated and would thus require a Dolan analysis.163

Nevertheless, the future of trail exactions is both bright and bleak. The growing demand for trails as well as other open spaces has induced many planners to make plans for future acquisitions, as in Hoepker. As a trail is built into the suburbs, outlying new developments may very well have to continue the trail as a condition of developing. Yet under Dolan, recreational trail exactions are likely to be scrutinized very carefully and may not be permitted if the essential nexus and rough proportionality tests cannot be met. In the end, however, the experiences of local planners, as those in Santa Cruz County, will decide the fate of recreational trails in their areas. Even if the exaction is constitutional, many planners may not exercise that power under fear of landowner protest.

An additional obstacle to trail exactions may arise simply from the existence of the trail on a planning map; courts have held that the indication on a map of a portion of land that might potentially be needed for road widening affects market value of that land and thus might require compensation.164 Where a map might freeze further development or effectively "bank" land, compensation may be required.165 Because a typical trail corridor is fifty to one hundred feet in width, an entire residential lot may be sacrificed for each block of trail being exacted.166 Moreover, the lack of studies on the market value of land adjacent to trails makes it difficult to argue that the trail exaction actually benefits the retained land and therefore does not require compensation.167

163. Id. at 69.
166. The exaction could be less extensive where the trail is built in the road right-of-way or shoulder, however, where only twenty to thirty feet running laterally along the lots would be all that is required (author's estimation).
167. See The Pennsylvania Study, Rails to Trails Conservancy Website, at
While the experiences of the Santa Cruz County Board of Supervisors may have been extreme, they were not unique. In 1980, the Santa Cruz County general plan called for the designation of general trail corridors on the Land Uses and Facilities Map to indicate areas for future trail development. Between 1980 and 1993 trail exactions were regularly made in exchange for development permits. The County did not give back any trail easements exacted from homeowners and developers prior to removal of the trails from the maps, even after the debacle of 1993-94. However, after the trail maps were expunged from the general plan, provisions were explicitly made that land acquired for trails would be acquired only from willing sellers. No more exactions would be allowed.

VI. RAILBANKING

One of the most innovative federal programs designed to mitigate the losses of rail corridors caused by the nation's shrinking rail industry and to encourage use of abandoned corridors for recreational trails and greenways is the 1983 amendment to the NTSA that permits a recycling of rail corridors through what is termed railbanking. Although the Interstate Commerce Commission (ICC) has had the authority since 1976 to impose trail uses on abandoned rail corridors through the Railroad Revitalization and Regulatory Reform Act (4-R Act), it was the 1983 amendment to the National Trails System Act that gave the program the necessary incentive to make it viable for the railroads. That incentive


168. POLLAK, supra note 1, at 47.
169. Id.
171. National Trails System Act, 16 U.S.C. 1247(d) (added in 1983) reads: "Interim use of railroad rights-of-way. 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. Consistent with the purposes of
was an explicit provision continuing rail servitudes and easements during interim trail use, easements that might otherwise terminate under state law when a railroad discontinued services and removed tracks and ties. The Act essentially holds the railroad's property rights in abeyance during trail use rather than allowing them to terminate or revert back to adjacent landowners, which would cause fractionation and destruction of the corridor. The justification for holding the railroad's easements in limbo is the explicit preservation of the rail corridor for possible future reactivation, which would be prohibitively expensive if corridors had returned to private ownership and required repurchase at today's market prices.172 Section 1247(d) of the NTSA provides that in the meantime, interim trail uses can be made of the corridor so long as they are not inconsistent with the primary purpose of preservation for rail service.173 If

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 interim 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 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 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.”

172. Id. See also Charles Montange, Conserving Rail Corridors, 10 TEMP. ENVTL. L. & TECH. J. 139 (1991).

173. Some commentators have characterized the operation of the statute as a “pre-emption” of adjacent landowners’ state property rights, but that is not exactly the best way to describe the legal process involved. Specifically, when a railroad holds a servitude in land owned by another, it has the right to current exclusive possession and use, while the landowner holds title to the underlying fee with right to future possession if the rail servitude is ever terminated. The landowner has no power to control whether or not the servitude will be terminated. In property law parlance we can think of the railroad as owning a current use and possessory right, but the landowner owns the remaining sticks in the bundle of rights that make up fee simple absolute. State property laws determine the conditions on which the railroad’s servitude will terminate and the railroad’s rights will transfer back to the fee owner. Generally, only a railroad can own a rail servitude and if a railroad is going to transfer its easement, it can transfer it only to another railroad or back to the landowner. What the railbanking statute allows is for the railroad to transfer its current rights in the easement to a third party for an indefinite period, usually a government or a non-profit trail group (not just anyone), while retaining a small stick, a repurchase option. See generally Sheila Bryant, The Constitutionality of Rails-to-Trails Conversions Under the National Trails Systems Act Amendments of 1983: Preseault v. ICC, 26 TULSA L.J. 295, 301-02 (1990). To the extent that state law prohibits a railroad from transferring its easements to anyone other than another railroad or the fee owner, the railbanking statute changes the rules with regard to the rights transferred to the trail group, but it has no effect on the future interest the railroad retains in the repurchase option. See id.; Thomas Duda, The Use of Discontinued Railroad Rights-of-Way as Recreational Hiking and Biking Trails: Does the National Trails System Act Sanction Takings? 33 ST. LOUIS U. L.J. 205, 214 (1988); Stephen Miller,
the railroad reactivates, however, the trail must give way.¹⁷⁴

Rail-trails are incredibly popular. On October 19, 1998 the 1000th trail was opened in Greene, Rhode Island, raising the total number of rail-trail miles to 10,000 across the United States.¹⁷⁵ The railbanking act was vital to this success. Unfortunately, it is currently under attack in numerous federal courts across the country. A team of lawyers out of Washington, D.C., funded by a variety of property-rights-based organizations, are filing class action lawsuits against whatever trail, whether proposed or on the ground, for which they can find landowners willing to be class representatives.¹⁷⁶ These suits have taken a number of different permutations against the railroads, telecommunication companies, and the U.S. government alleging everything from slander of title, trespass, and conversion, to intentional infliction of emotional distress and a taking.¹⁷⁷ One set of recent attacks are leveled at railbanked trails and specifically allege that the federal law works a taking of the adjacent landowners' state property rights when it prevents the termination of the railroad's property rights and the shifting of those rights to adjacent landowners.¹⁷⁸ At least eight cases are pending in various stages of liti-

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¹⁷⁵ STB procedures on railbanking provide that a reactivation by a railroad must be undertaken in a way that minimizes the effect on the trail. However, if the trail cannot be accommodated with the rail service, the rail ultimately prevails. See 62 Fed. Reg. 53,508 § 1152.29(c)(2), (3), (d)(2) & (3). See also Montange, supra note 172, at 155.

¹⁷⁶ See Rails to Trails Conservancy Website, at http://www.railtrails.org/RTC_active_pages/Home/Main.asp (current rail-trail statistics printed on map; these statistics show that not all of the rail-trail miles were "banked"). As of Jan. 2001, those numbers had risen to 1090 railtrails comprising 11,582 miles. Id.


¹⁷⁸ The takings claim has been supported by a number of scholarly commentators who take, at face value, the claim that postponement of a reverter interest is an interference with a property right that is deserving of compensation. See generally Duda, supra note 173; Bryant, supra note 173; Jill K. Pearson, Balancing Private Property Rights with Public Interests: Compensating Landowners for
gation across the country challenging railbanked trails filed by this legal team alone. These cases are proceeding slowly, however, because of the complex interplay of federal railroad regulation, common carrier duties and liabilities, and state property rights that come into play with any railroad issue.

Although the railbanking program has been in existence for nearly twenty years, only one decision has held that the federal statute worked a taking, and that was after extremely lengthy litigation over Paul and Patricia Preseault’s land near Lake Champlain. The Preseault dispute entailed two trips to the Vermont Supreme Court, one trip to the U.S. Supreme Court, two decisions out of the Court of Claims, and an en banc reversal of an earlier 2-1 decision by the Court of Appeals for the Federal Circuit. In the first three of the four decisions addressing the takings claim, no taking was found. But the most recent decision in Preseault may be heralding a change in legal attitudes toward rail-trails. Most courts that have faced these takings challenges have tried to resolve the dispute on other grounds, wisely not wanting to venture into the quagmire of federal regulatory takings doctrine on top of ICC regulation and 150-year-old state railroad charters and statutes. While Preseault may be the only precedent, it also presented a unique set of facts that are unlikely to arise in typical railbanking cases. Moreover, if the matter is properly understood, Preseault will be unlikely to cause further damage to the popular railbanking program.

To properly understand the railbanking process and place the relevant property interests in their proper light, one must understand railroad land acquisition practices. Railroad development was complex in the nine


teenth century and unraveling the property rights today is especially complicated. Knowing the history helps explain why adjacent landowners have no compensable property rights affected by the law. The next section thus outlines the railroads’ history, the state laws affecting their property rights, the unique questions presented in Preseault, the fundamental flaws with Judge Plager’s plurality opinion, and then it analyzes the railbanking law in light of the Court’s regulatory takings doctrine.

A. Railroad Land Acquisition Practices

Not surprisingly, the railroads developed differently in different parts of the country at different times, making any blanket summary impossible. The first railroads were chartered in the eastern states in the 1830s and 1840s by special acts of each state’s legislature. They were funded by private financiers who hoped to make a profit by supplying the transportation needs of the outlying agricultural areas to the urban centers of Boston, Philadelphia, and New York. By the 1840s railroads were expanding into the Midwestern and Southern states and began to compete with inland canals as the preferred mode of transportation for moving goods and people into the agricultural heartland. While the federal government heavily subsidized the canals by granting the canal companies easements over public lands and by granting them large swaths of land outright which they could then sell to homesteaders to finance construction, such federal support of railroads did not begin until 1852. However, between 1852 and 1862 the federal government only granted access rights to public lands to railroads in Midwestern and Southern states for their corridors only; no land was given outright for sale to raise funds. By contrast, the states were often very generous in donating land and encouraging railroads to open up new areas for homesteading and development.

The early railroads tended to be small, running local routes that were


183. GATES, supra note 182, at 354-59.

184. Id.


established by land agents knocking on the doors of landowners seeking to purchase whatever land was needed between outlying towns and nearby ports or urban centers. Where possible, the railroads would try to stay on state or federal land because that was generally donated to the railroad. Also, before receiving a charter, the railroad would have surveyed the territory and likely received promises of local municipal or county support in the form of donated land for depots and elevators, tax abatements, or low interest loans through government bonds. The state charter would always give the railroad engineers the access rights to survey the line over private land and eminent domain power to condemn whatever private land was necessary to fill in the parcels not obtained by voluntary sale. By the Civil War, most of the eastern states had extensive rail services and the Midwestern and Southern states were frantically building. But the west had yet to be opened up.

In 1862, in the crunch of wartime economics, Congress finally passed the first federal railroad grant for construction of a transcontinental line from Omaha, Nebraska to San Francisco, California linking the Missouri River and the Pacific Ocean. This Act was followed in 1864 by the Northern Pacific grant linking Lake Superior and Puget Sound, and the Southern Pacific grant linking Springfield, Missouri and San Diego in 1866. These federal grants gave to the railroads limited fee interests in their corridor lands and alternate sections, sometimes as much as forty miles wide, on either side of the corridor, for sale to raise construction funds. By 1871, the federal government had granted to a variety of

187. Id. See generally GATES, supra note 182.
188. This grant was made by legislation chartering the Union Pacific and Central Pacific Railroads and clearly envisioned a transnational transportation and communication corridor. The legislation was entitled: An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes (Pacific R.R. Act of July 1, 1862, ch. 120, 12 Stat. 489, amended by ch. 216, 13 Stat. 356 (1864)).
190. Act of July 27, 1866, ch. 278, 14 Stat. 292 (This grant was originally to the Atlantic and Pacific Railroads, but upon going into bankruptcy the A&P forfeited the grant which was converted to the Southern Pacific which actually finished the road.).
191. What motivated the federal government to be so generous to these private corporations? In 1820 Illinois had a scattered 55,000 people with a property tax base and state income that would not pay the Governor's salary today. GATES, supra note 182, at 350. States like Indiana and Illinois simply could not afford the tremendous cost associated with the extensive internal developments represented by a railroad line. Costs for constructing a mile along the Northern Pacific Route could be as much as $100,000 per mile. Obviously, a state like Indiana could not afford the investment by itself. Instead, the federal government reasoned that by conveying the land to the railroad, the value of its retained land would more than double, from the $1.25/acre they had originally been asking, to $2.50/acre. As it turned out, productive cropland that had been unmarketable at $1.25/acre for decades, sold for more than $11.00/acre once announcements of the railroad's coming were made. J. L.
railroads, or to states for conveyance to the railroads, over 130 million acres for sixty-one railroad companies.\(^9\) After 1875 federal land grants to the railroads ceased, but charter railroads were still allowed two-hundred-foot wide easements on all federally-owned lands.\(^9\)

The demands of reconstruction and the booming expansion of the western states, with the growing importance of the telegraph, caused many small railroads to be absorbed into larger conglomerate railroads that could provide lower rates for longer-distance shipping. From 1875 to 1900, tremendous changes in the economy and population led to a complex series of laws enacted by Congress to regulate rates and services and to establish the Interstate Commerce Commission (ICC) in an effort to make the railroads nationally rather than regionally focused.\(^9\)

Though the 1887 ICC Act was supposed to simplify railroad operations by locating regulatory power in a single entity, the imposition of federal control on top of state property rights dramatically complicated the jurisdictional conflicts and multiplied the layers of analysis necessary for determining the effect of the railbanking statute on state property rights.

Determining whether a property right was taken, however, requires determining what interests the parties had in the mid-nineteenth century, which depends to a great extent on nineteenth-century conveyancing practices. It is first year property law that the intent of the parties at the time of the original transaction governs the interpretation of the property right that was transferred, and the modern reader must try to determine the intent of the parties in light of a relative scarcity of case precedents in the area of railroad deed interpretation and rather arcane terminology.\(^9\)

Consequently, if the railroad did not acquire fee simple absolute title to

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RINGWALT, DEVELOPMENT OF TRANSPORTATION SYSTEMS IN THE UNITED STATES 155 (1888). The cash value of farms increased in Indiana from an aggregate in 1850 of $188,388,173 to an aggregate in 1860, after the railroads had arrived, of $314,902,776. Id. at 155. In ten years the value of farmlands nearly doubled, an increase due almost entirely to the arrival of the railroads. The same was true of the canal lands. For many lines, therefore, the railroads received their land originally from the federal or state governments, or from defunct railroads or canal projects. Id.

192. GATES, supra note 182, at 384-85; WILNER, supra note 185, at 27; Thomas Root, Railroad Land Grants from Canals to Transcontinentals, Monograph series no. 4, Natural Resources Law Section of American Bar Ass'n, (1987).


Eminent Domain, Exactions, and Railbanking

its corridor land, then the subsequent transfer of the land for a trail may affect reversionary interests in the land that the original grantor re-

tained.\textsuperscript{196}

The railroads typically acquired their property through one of four methods: private deed, condemnation, prescription, or state or federal land grant.\textsuperscript{197} For the sake of simplification, we can collapse the interests into three rough categories, though in doing so we must realize that state property rules differ and that two identically-worded deeds might fall into different categories depending on state rules of deed construction. The first category that has evolved from state case law is a fee simple absolute for the railroad, leaving no property rights in the original grantor.

The second category involves the grant of a defeasible fee to the railroad in which the original grantor retained either a possibility of reverter or a right of re-entry that would cause the railroad's property rights to terminate and shift back to the grantor upon the occurrence of a condition. The typical condition is failure to use for railroad purposes. Although the railbanking statute does not explicitly address these reversionary rights, it implicitly would prevent the reversion by providing that railbanking is a continuing railroad purpose.\textsuperscript{198}

The third category is a grant of a perpetual or limited easement to the railroad in which the grantor retained ownership of the underlying fee simple absolute. Both the perpetual and limited easements give to the railroad an exclusive present right to possession which can be terminated only by the railroad abandoning its rights. Abandonment, as discussed in greater detail later, is a complex legal determination that the railroad is giving up its property rights to those parcels of its corridor held as easements. In the few cases where the railroad acquired only a license,
which is a revocable right to enter and use land, construction of tracks on the land is generally considered sufficient investment by the railroad to estop the grantor from revoking the license, thus turning it into what is generally called an easement by estoppel. Because an easement is a right to use land, the railbanking statute's explicit provision that interim trail use will not be treated as abandonment shows that it is primarily concerned with easements.

For the most part, only limited easements are affected by the federal statute, though reversionary rights conditioned narrowly on use for railroad purposes enter the umbrella of the railbanking statute's savings clause. Land obtained in fee simple absolute and most land held subject to a condition subsequent are unaffected by railbanking. Moreover, land obtained by the railroads from states, municipalities, or the federal government are not affected by the railbanking law.

Perhaps the most difficult aspect of these cases is that different economic, geographic, and population patterns in different states, as well as the different circumstances surrounding the development of the railroads, has led to significant variations in the legal definitions of the railroads' property rights and the rules governing abandonment of those rights.

201. See infra Pt. IV (discussion on railbanking and regulatory takings).
202. Until roughly the last decade of the nineteenth century, the railroads and private landowners used only a handful of terms to refer to land acquired by the railroads for corridor purposes. These terms were: "a right of way," "a strip of land," "the following real estate," or "a strip over, through and across." These references to the physical land were the predominant language used in these deeds. The term "easement" almost never appears in the nineteenth century and the reason is clear. The common-law easement, as it was defined by the case law of the time, was modeled on the private driveway or right of passage. WILLIAM STOEBUCK & DALE WHITMAN, THE LAW OF PROPERTY 458-63 (3d ed. 2000). It was a non-exclusive right to pass over, but did not include the right to exclude, use gravel, build embankments and drains, the right to fence, or the right to bring an action in ejectment, because it was an incorporeal hereditament. See State of Wyoming v. Udall, 379 F.2d 635 (10th Cir. 1967). Because the common-law easement simply did not satisfy the railroad's needs, virtually all nineteenth century deeds refer to the land, or when they use the term "right of way" they clearly mean it as a synonym for the strip of land. See Joy v. City of St. Louis, 138 U.S. 1 (1890). The vast majority of nineteenth century deeds, and this is consistent with the railroads' and the landowners' intentions, would appear to be fee simple or defeasible fee deeds, the latter including a reversion clause (which is not necessary when easements are being conveyed). Consol. Rail Corp. v. Lewellen, 682 N.E.2d 779, 782 (Ind. 1997).

Around the turn of the century, however, with the increase in railroad abandonments, courts realized the difficulties caused by finding that the railroads had acquired fee simple title to their land. Small skinny strips of land would be transferred to others, or might remain in the grantors' heirs, while adjacent landowners would be unable to reabsorb the parcels into their backyards. Consequently, interpretations of railroad deeds around the turn of the century began to find that the railroad had acquired only an easement (often when the deed used the same language as fee simple deeds interpreted earlier), but they turned to the "right of way" language as being ambiguous and
Generally, the rules governing the property relationship between the grantor-landowner and the grantee-railroad are products of state law.\textsuperscript{203} But the vagaries of local politics have created variations in state law. For example, two similarly-situated Midwestern states, Indiana and Ohio, have had very different attitudes toward the railroads resulting in dramatically different legal structures, and the consequence that Ohio has over 400 miles of rail-trails while Indiana has less than 50 miles.\textsuperscript{204} These differences are the result of different rules on deed interpretation, as well as different rules that cause termination of the railroad’s property interests in its corridor when they are deemed abandoned.

providing some sort of new property right that was unique to the railroad. \textit{See} New Mexico v. U.S. Trust, 172 U.S. 171 (1898). This new right, sometimes called an easement and sometimes called just a right of way, was more than a common-law easement and is, in fact, quite close to a fee. As the Court, referring to the term “right of way” in a federal land grant to the railroads, stated:

The phrase ‘right of way,’ besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes, and another thing in a grant to a railroad for public purposes . . . [A railroad’s] use would be continuous, not occasional, and which would embrace the entire beneficial occupation and improvement of the land. . . . [For a mere easement perhaps an action of ejectment would not lie; but wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an action of ejectment will lie. . . . The interest granted [herein] is real estate of corporeal quality, and the principles of such apply. Id. This language was repeated in the interpretation of a private grant in Western Union Telegraph Co. v. Penn R.R. Co., 195 U.S. 540, 570 (1904), when the telegraph company tried to acquire rights to string its cables on the railroad corridor. The Court said: “A railroad’s right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in all else but an interest and benefit in its uses.” \textit{Id.} An excellent case that details the changing structure of the railroad easement under traditional legal doctrines is \textit{Udall}, 379 F.2d 635.

The fact that the legal notion of a railroad easement changed around the turn of the century confirms what appears to be an across-the-board reassessment of railroad property rights at this time. Consistent with this change were changes in eminent domain statutes in some states that precluded railroads from acquiring corridor land in fee simple after that date. \textit{E.g.}, Act of Feb. 27, 1905, ch. 48 § 1, 1905 Ind. Acts 59, 59-60 (codified as amended at Ind. Code § 32-11-1-1 (1993)). Also, the language in many private deeds that had been interpreted to convey fee simple were slowly being reinterpreted to convey an easement now that the easement was legally sufficient to protect the railroad’s property interests. A.E. Kopola, \textit{Deed to Railroad Company as Conveying Fee or Easement}, 6 A.L.R.3d 973 (1966). And much of this transformation came about as a result of the newly-recognized importance of mineral rights. Because minerals transferred with fee simple absolute and fee simple determinable but not with easements, as newly discovered minerals were found on western land, there was a tremendous spate of litigation over the nature of the railroad’s title. In general, the railroads lost, and minerals were held to be retained by the federal government or the private original grantor. \textit{See} United States v. Union Pacific R.R. Co., 353 U.S. 112 (1957).

\textsuperscript{203} Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992); \textit{see also} Cholewa, \textit{supra} note 156, at 406-08.

\textsuperscript{204} These numbers are constantly changing. In 1996 Indiana had less than fifteen miles of rail-trails. It now has over one hundred miles on the ground or in progress. \textit{See} Indy Greenways, \textit{at} http://www.indygreenways.org; Rails to Trails Conservancy, \textit{at} http://www.RailTrails.org/OH/; Trail Link (a part of the Rails to Trails Conservancy), \textit{at} http://www.traillink.com.
B. Abandonment

One person can acquire the property rights of another through a limited number of processes. One can purchase another’s ownership interest in a piece of land and obtain a deed. One can also acquire ownership rights to land when a condition subsequent occurs causing the prior owner’s interest to terminate (or “determine”). A property interest can terminate naturally, as with a life estate, a leasehold, or a term of years. And finally, one can simply abandon one’s property interest by essentially throwing it away, a process that implies a relinquishment of one’s own property rights in the thing and an intent or understanding that those rights will vest in whoever comes along and chooses to claim them. Because an easement owner does not own the actual fee simple title to the land, but rather a right to use the land, abandonment of an easement results in the removal of the servitude so that the fee owner has unencumbered right to use her land without interference by the easement owner. This can be thought of as the shifting of the railroad’s easement to the fee owner, which merges to create a free, unencumbered title. A railroad’s property rights will terminate, or shift to an adjacent landowner, either upon the occurrence of a condition subsequent (as when it reverts for failure to use for railroad purposes), or upon the abandonment of an easement. These two events have distinct legal consequences that must be understood separately.

Moreover, until the railroad’s property interest is abandoned, the adjacent landowner’s interest is not yet vested; it is a contingent future interest that will vest upon the termination of the railroad’s interest. What actions will cause the contingent interest to vest depends on state common-law or statutory rules of abandonment. Every state’s common-law rules defining abandonment of railroad easements are essentially the same; the railroad must have intent to abandon and must consummate that intent through actions either clearly manifesting that intent or actions inconsistent with retaining the property interest. Some states have changed

205. BLACK'S LAW DICTIONARY 3 (6th ed. 1990) (“‘Abandoned property’ in a legal sense is that to which owner has relinquished all right, title, claim and possession, but without vesting it in any other person, and with intention of not reclaiming it or resuming its ownership, possession or enjoyment in the future. There must be concurrence of act and intent, that is, the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. Relinquishment of all title, possession, or claim; a virtual intentional throwing away of property.”) (citations omitted).

their common-law rules by statute or have narrowly defined what actions and intent are necessary to find abandonment. Some states have strict rules that would terminate the railroad's property interest upon relatively slight indications of non-use, while others will protect the railroad's property rights even through long periods of inaction, bankruptcy, sale, and consolidation that might lead to significant restructuring of the tracks, sidings, and other facilities.\textsuperscript{207}

To further complicate matters, state-law abandonment is often intertwined with federal ICC abandonment, which occurs through relinquishment of federal ICC jurisdiction.\textsuperscript{208} In 1920, amendments to the Interstate Commerce Act gave the ICC jurisdiction over railroad abandonments.\textsuperscript{209} Abandonment pursuant to the 1920 Act is fundamentally different from abandonment of the state common-law property rights in the rail easement.\textsuperscript{210} The former entails a lengthy analysis of inter-state commerce consequences of discontinuation of service, including a determination that the public convenience and necessity do not require continued service,\textsuperscript{211} while the latter concerns only intent and actions to abandon the relevant property right.\textsuperscript{212} The former concerns railroad services and the latter concerns the real estate on which the railroad provides its services. Federal jurisdiction over abandonment procedures was actively sought by railroads that felt state laws were too stringent\textsuperscript{213} and


\textsuperscript{208.} Interstate Commerce Clause Regulations Act, Feb. 4, 1887, ch. 104, 24 Stat. 379 (1887).


\textsuperscript{211.} See Transportation Act of Feb. 28, 1920, ch. 91, § 402, 41 Stat. 456, 477-78. This Act says that "[n]o carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or operation thereof, 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." \textit{See also} 49 U.S.C.A. § 10903 (2000).

\textsuperscript{212.} A railroad could easily, therefore, discontinue services but retain the property assets for later sale, salvage, or reactivation of rail service when doing so is more profitable.

\textsuperscript{213.} Prior to 1920, a railroad that sought to abandon a particular line had to meet relatively stringent state requirements before it was permitted to stop services, sell its assets, and (most likely) go bankrupt. \textit{See Montange, supra note 172, at 160. "[P]rior 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. 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." Sennewald, supra note 210, at 1402. Many states tried to hold the railroads hostage to continue providing services because of the subsidies they had received and the importance of the railroad to the local economy. \textit{Id.} Since the ICC took over abandonment ju-
that federal control would impose fair and uniform conditions on all covered railroads by considering national over parochial needs.\textsuperscript{214} The ICC was replaced by the Surface Transportation Board (STB) in 1998,\textsuperscript{215} so current abandonments will occur under the auspices of the STB while past abandonments will have been overseen by the ICC (further compounding the confusion).

Under the federal abandonment law, once a certificate of discontinuance is granted affirming that the public convenience and necessity do not require continued rail services, the railroad has one year to complete abandonment proceedings by taking whatever steps it desires to terminate services. It need not sell any real estate, nor does it have to remove tracks and ties. In most cases the salvage value will encourage such actions, but they are not required by the STB. If the railroad decides at the end of a year that it has no future interest in the discontinued line, the discontinuance certificate will be converted to an abandonment certificate and the railroad will no longer be liable to the shipping and traveling public along the abandoned route;\textsuperscript{216} it cannot be forced to resume active rail services later. Only when federal jurisdiction is lifted, however, will the property rights of the railroad be governed solely by state law.\textsuperscript{217} At that point, a determination of whether the railroad has abandoned its easement interests can be made, but it is done using the test of intent and consummation rather than the federal test of public necessity.

To simplify the discussion, assume that under state law a railroad easement will be deemed abandoned when a railroad holds the requisite intent (as for instance when the officers determine that the line is unprofitable and a determination is made to discontinue services) and when that intent is consummated through some action (let's say removal of tracks and ties, selling the stock, and otherwise closing the books on the line).\textsuperscript{218} If we assume that those two elements rarely occur simultaneously, it makes sense to assume that most railroads first form an intent and then later consummate that intent through the required actions.

For purposes of determining when the railroad's property interests

\textsuperscript{214} See Sennewald, \textit{supra} note 210, at 1402.


\textsuperscript{216} 49 U.S.C. § 10903(d) (1996).

\textsuperscript{217} See Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995).

\textsuperscript{218} See \textit{REST. (FIRST) OF PROPERTY} § 504; \textit{REST. (THIRD) OF SERVITUDES} § 7.4.
terminate, however, the relevant question is whether discontinuation of services, removal of tracks and ties, receipt of an abandonment certificate from the STB, or some other act constitutes the necessary elements for abandonment of a railroad easement under state law. 219 When that occurs, the easement is extinguished and the underlying fee owner regains the right to undisturbed possession of the easement land. Traditionally, offering to sell a portion of a corridor was deemed a clear, unequivocal act indicating intent not to retain any property rights in the easement portions of a corridor. 220 But removal of tracks and ties while continuing to pay taxes or maintain the right to control grade crossings has been deemed, in some states, evidence of intent not to abandon. 221

Those parcels held as defeasible fees, subject to reversion if railroad uses cease, may or may not pose similar questions under state law. 222 Although the interest is not being abandoned or terminated, as with an easement, the railroad’s defeasible fee may “determine” by the occurrence of the condition subsequent that causes the reversionary interests to become possessory. Some states, however, will terminate the reversionary interest prior to discontinuation of rail services so that the railroad will be deemed to own the corridor land in fee simple absolute. 223 Other states have treated the reversionary right as an unenforceable restraint on alienation, thus converting the railroad’s property into fee simple absolute. 224

As mentioned above, the railbanking statute serves to continue federal jurisdiction over the corridor and to prevent abandonment under state law even though the traditional elements of abandonment might be met under some states’ laws when the corridor is converted to a recreational trail. 225

219. See Montange, supra note 172, at 160-64.


222. See also infra Pt. VI, Sec. B (discussing defeasible fees).


By retaining federal jurisdiction under circumstances that might result in termination of the railroad's property rights under the old legal regime, some adjacent landowners claim their property rights have been taken. In other words, their argument is that but for the railbanking statute maintaining federal jurisdiction over the railroad corridor and preventing termination of the railroad's property rights, they would have benefited from the acquisition of those rights, either by the triggering of their reversionary interests or by the removal of the rail servitudes. Of course, the same argument could be made with respect to the 1887 and 1920 federal statutes. This argument is flawed, however, by the fact that the adjacent landowners do not have a vested right to possession or to exclude the public prior to the operation of the railbanking statute. The railbanking statute does not take a property right that was owned by the adjacent landowners; it merely postpones their receiving a benefit to which they had no legal right and no expectation of receiving. Mere expectancies based on the continuation of a particular statutory regime, without reliance, are not property rights protected by the takings clause.

Before explaining the details of this analysis, it will help to understand a relatively typical railroad case and the complex legal issues it raised. The Preseault case is the only one to date that has found railbanking to work a taking but, for reasons that shall be made clear, it is simply wrong. Judge Plager did not understand the legal consequences of federal ICC jurisdiction over state property rights or the character and scope of the landowner's property rights in the rail corridor. Moreover, even if the landowners are deemed to have a compensable property right in the rail corridors, he applied the wrong takings test to determine whether compensation was due.


226. Often these adjacent landowners claim to have a reversionary interest in a rail corridor, or claim to own the fee encumbered by a rail easement, even though they rarely offer proof of their title. They claim that the law should just give them to the center-line of the corridor whether they have deeds describing that land or not, simply because they are adjacent landowners. They base this claim on dicta in many railroad cases that it is against public policy to have isolated strips of abandoned land unusable by adjacent landowners. See, e.g., Ross v. Legler, 199 N.E.2d 346 (Ind. 1964).

227. And they were rejected by Judge Plager in Preseault when he argued that it would be absurd to find that a taking occurred in 1887 or 1920 because so long as the railroad was still operating, the rights that were allegedly taken were contingent and not possessory. 100 F.3d at 1537-38.

228. See infra Pt. VI, Sec. D (discussing the interplay of state abandonment and railbanking laws).
C. The Preseault Saga

The Preseaults’ twenty-year legal battle may be setting the most important legal precedent for the future of recreational trails across the country and could spell the end of the railbanking program. In 1962 the State of Vermont purchased the corridor at issue from one railroad company and leased it to another. In 1975 the second company discontinued rail service for the portion of the track adjacent to the Preseault’s land and removed all the tracks and ties. In 1981 the Preseaults brought a quiet title action alleging that the railroad held only an easement, that it had been abandoned, and that they were now entitled to unencumbered use of the property. The trial court dismissed the action, holding that the ICC had continuing jurisdiction of the rail line and that under Vermont State law no abandonment had occurred. Without abandonment of the railroad’s property rights, the Preseaults had no claim to the former rail corridor under state law. The Vermont Supreme Court affirmed in 1985.

In 1987 the Preseaults sought a certificate of abandonment from the ICC, but pursuant to an application by the State of Vermont under the NTSA, the ICC railbanked the corridor and granted a Certificate of Interim Trail Use (CITU) to the State for operation of a recreational trail along the corridor. The Preseaults appealed the ICC order to the U.S. Court of Appeals for the Second Circuit arguing that the railbanking was not a valid exercise of Congress’ Commerce Clause powers and worked an unconstitutional taking of their property. The Second Circuit rejected both of these arguments and the U.S. Supreme Court affirmed in 1990 as to the commerce clause issue.

229. The issue of whether the railroad owned fee simple absolute title to the corridor or only an easement was not resolved until the second Vermont Supreme Court decision, 163 Vt. 38 (Vt. 1994).

230. This is important because it raises the question of whether the recognition of ICC superauthority pre-empts or is incorporated into state law. To the extent that Justice Scalia would not find a taking in instances where there are inherent limitations on title, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992), then pre-existing regulatory limitations, whether state or federal, exist as a part of state-defined property rights. See, e.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979) (navigational servitude as a limitation on title). Judge Nettesheim addressed this in her cogent analysis of the interplay of federal railroad law and state-defined property rights. Preseault v. U.S., 27 Fed. Cl. 69, 88-89 (Fed. Cl. 1992) (recognizing that Lucas’ inherent limitations on title can include federal as well as state regulatory limitations).


233. Preseault v. ICC, 494 U.S. 1 (1990). The main substance of the Preseault’s objections were: (1) that Congress’s idea of a federal ‘rail bank’ is an “utter fiction” because the ICC does not retain jurisdiction over the railway carrier and, therefore, cannot require the carrier to resume service over the route in the future; (2) that the true purpose of §1247(d) is merely to prevent reversion of the
tional basis deference to the commerce clause issue, found that the Trails Act "serves two purposes: 1) preserving rail corridors for future railroad use and 2) permitting public recreational use of trails. Both purposes are legitimate congressional goals under the commerce clause."234

With regard to the takings claim, the Second Circuit held there was no taking of the Preseaults' property rights because no state property rights existed that could have been taken; if there even were any "reversionary interests," they were mere expectancies that continuing ICC jurisdiction precluded. In other words, because the ICC could have kept the railroad from abandoning, thus preventing any state property right from vesting, the ICC's decision to bank the corridor did not affect any property right the Preseaults had because their rights were contingent.235 As the Court explained:

Preserving railway corridors for future railway use is a function that congress has recently delegated to the ICC, and it is, as discussed earlier, permissible under the commerce clause. For as long as it determines that the land will serve a 'railroad purpose', the ICC retains jurisdiction over railroad rights-of-way; it 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 Congress's creative effort to exercise foresight by preserving existing corridors for the future railroad needs of our country.236

The Second Circuit had found the Preseaults had no property right because denial of the abandonment could have achieved the same laudable goal of rail corridor preservation without triggering any property right, so approval subject to railbanking could not interfere with a right they had either. On appeal to the U.S. Supreme Court, Justice Brennan stated, with regard to the Commerce Clause claim, that even if the only purpose of the legislation had been promotion of recreational trails, that alone would satisfy the legitimate state purpose requirement of the rational basis test.237 Yet he reversed and remanded on the takings claim because a Tucker Act procedure was available to determine whether or not a prop-
The takings challenge was premature. The Supreme Court did not find that a taking had occurred; it simply held that a taking claim should be brought through the Tucker Act in the Court of Federal Claims, and not through an action challenging the power of Congress to pass the railbanking law.

In the meantime, the State of Vermont sued the Preseaults for trespass and sought an injunction because they had excavated and removed large amounts of soil from the railroad corridor. The Chittenden Superior Court, in 1993, granted a permanent injunction and held that the Preseaults' property interests in the corridor would not vest until the railbanking ended and the ICC issued an unconditional certificate of abandonment; until then, the State owned the railroad's exclusive possessory interest in the corridor and was entitled to an action in ejectment to exclude even the fee owner if he had sold to another the right to present possession.

The Vermont Supreme Court affirmed, holding that, under Vermont state law, the railroad's interest in its corridor was exclusive, that because Congress's intent in preserving the corridor would be frustrated if the state construed the railroad's interest to be anything less than it was when it was operating rail services, the interest would remain exclusive throughout the railbanked period. Because the Preseaults' activities impinged on the original railroad easement, they were to be enjoined despite the fact that they did not impinge on the current trail use.

After prompting by the U.S. Supreme Court, the Preseaults filed suit under the Tucker Act in the Court of Federal Claims in 1990 alleging that the Railbanking Act "took" their property by preventing the unburdening of their servient estates that would have occurred had the railroad simply abandoned its interest rather than railbanked it. In the first decision out of the Claims Court, Judge Nettesheim held that, if the entire dispute were solely a matter of state law, the original railroad had only acquired easements across the relevant parcels of land, and that those easements would not vest until the railbanking ended and the ICC issued an unconditional certificate of abandonment.

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239. Preseault, 494 U.S. at 17.
240. Id.
242. Id.
243. Id.
244. United States v. Preseault, 24 Cl. Ct. 818, 830 (1992). Though I disagree with the analysis of these deeds, that is an issue best left for another article.
easements would have been abandoned under Vermont state law through its abandonment rule of "non-use plus." That rule states that a railroad easement is abandoned upon non-use for a sufficient period of time plus "other factors [that] give rise to an inference that the right-of-way is being used for a purpose inconsistent with its being a railroad, or when there is clear and objective indication that there is no present intent on the part of the railroad to use its right-of-way." This is essentially the common-law test requiring intent to abandon and consummation. The Claims Court held that if it were only looking to Vermont state law, the railroad had acquired only an easement and the easement would have been extinguished some time not later than 1975 when the tracks and ties were removed.

A second opinion by Judge Nettesheim, however, attempted to ascertain the legal consequences of superimposing federal railroad law on the Preseaults' state property rights. She found that because of ongoing federal ICC jurisdiction over this corridor, the Preseaults had no "historically rooted expectation" in the removal of the rail servitude at the time they acquired the property, and therefore had no property right that could be taken. The suit was dismissed. Judge Nettesheim wrote a lengthy analysis of federal jurisdiction over railroad services, discontinuation of those services, and abandonment. In the end, she agreed with the Second Circuit that the Preseaults had no cognizable property claim under state law because Vermont would not find abandonment and the triggering of state property rights without ICC termination, that the property was heavily regulated and therefore came with state law limitations on title, and that because the taking, if any, was temporary, the Preseaults could show no interference with reasonable investment-backed expectations.

245. Id. at 832.
246. Id. The non-use plus test for easement abandonment in Vermont is similar to all other states that, under their common law, provide for some combination of intent and actions evidencing that intent. A few states, however, have codified a new rule that removes the intent element when non-use occurs for a sufficiently long period of time and is accompanied by removal of tracks and ties. See IOWA CODE § 327G.76 (1999), IND. CODE. ANN. § 32-5-12-6 (2000), N.C. GEN. STAT. § 1-44.1 (2000).
247. Preseault, 24 Cl. Ct. at 832.
248. By this she included the original 1887 ICC Act, the 1920 amendments, the 1976 4R Act that established the practice of trail use, and the 1983 NTSA that specifically stated that rail use easements would not be terminated by banking. Preseault v. United States, 27 Fed. Cl. 69 (1994).
249. Id. at 87.
250. See Nollan v. Cal. Coastal Comm’n, 483 U.S. 825 (1992) (where Justice Scalia announced that no takings claim would arise when a landowner’s property was already burdened by inherent limitations on title).
under the *Penn Central* balancing test.\(^{251}\)

On appeal to the Court of Appeals for the Federal Circuit, Judge Nettesheim's decision was affirmed, though on different grounds.\(^{252}\) The majority in that case felt that *Penn Central* balancing was not the appropriate test under takings doctrine, but that under *Lucas*, no property right was taken because rights are determined as of the purchase date. Because the Preseaults purchased most of their land after 1983, they had no expectation the corridor would not be railbanked. This opinion was subsequently withdrawn, however, when the court, *sua sponte*, decided to rehear the case en banc.\(^{253}\)

The rehearing resulted in a lengthy opinion by Judge Plager, joined by only three judges, a concurring opinion by Judge Rader joined by one judge, and a blistering dissent by Judge Clavenger, joined by two other judges.\(^{254}\) This means that there is no majority for the reasoning, though there is for the outcome. Plager held that because the railroad easement would have been deemed abandoned under Vermont State law in 1975, the Preseaults' property rights had vested at that time, and with the ICC's railbanking order, the property rights were pre-empted, and therefore taken. For a number of reasons this is patently illogical, not the least being that the railroad's property rights could be deemed extinguished eleven years before the ICC permitted discontinuance and removed itself from jurisdiction over rail operations.\(^{255}\) How could the property right be extinguished if the ICC could have ordered resumption of rail service at any time? Such an event would have required the railroad to repurchase its easement.\(^{256}\)

The concurrence argued a slightly different version of state law: that the State of Vermont, the current owner of the railroad's moribund rights, could not shift the use from railroads to trails and still claim that the present use was consistent with the purpose for which the original easement was granted. Thus the shift caused the easement to be abandoned when the State railbanked and built the trail in 1985 even though the declared purpose of railbanking is to preserve the corridor for future rail service.\(^{257}\) Since neither opinion focused on the role played by the

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\(^{251}\) *Preseault*, 27 Fed. Cl. at 84.


\(^{254}\) *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

\(^{255}\) *See also* Sennewald, *supra* note 210, at 1418-21.

\(^{256}\) *Id.*

\(^{257}\) Some states have held that shifting the use of an easement from the permitted use to a different use is permissible, while others have held that doing so forces the first easement to be aban-
federal transportation laws, there is no majority on how federal law, including the NTSA, affects state property rights.

Finally, the dissent quite cogently argued there had been no abandonment under Vermont state law, either through non-use and removal of tracks and ties, or through the shift in use from rails to trails. Judge Clavenger noted that Vermont, along with numerous other jurisdictions, would not find that shifting a publicly-used easement from rail service to trail use constituted abandonment. Viewing the rail corridor as a “public way,” the dissent would find that under Vermont law no right was taken because no property right existed to exclude the public in the first place.

In many ways, this conflict shows the difficulty of determining the effect of the railbanking statute on state property rights and whether that effect rises to the level of a taking requiring just compensation. To break down the issue, the first question is whether or not the claimant has a property right that has been interfered with by the Act. Ironically, in Preseault, the Vermont Supreme Court held there was no property right when it refused to quiet title to the corridor in the claimants. Yet subsequent federal decisions, purporting to defer to Vermont State law, found that there would be state property rights in the absence of federal regulatory oversight, yet there was disagreement as to whether the federal limitations would be deemed incorporated into and a part of state property law, or would be deemed ancillary to it or superimposed on top of it. Hence, it is difficult to say exactly how property rights are creatures of state law when federal regulations affect and limit those rights.

doned. See Wright & Hester, supra note 186, at 441-47.

258. *Preseault*, 100 F.3d. at 1560 (Clavenger, J., dissenting). See also Wright & Hester, supra note 186, at 447-53.

259. Of course, Clavenger’s interpretation of state law, *Preseault*, 100 F.3d. at 1560 (Clavenger, J., dissenting), is no more authoritative than Plager’s interpretation, *Id.* at 1525. Yet, when the Vermont Supreme Court states that the easement has not been abandoned, one would think that their interpretation of state law would be the final word. *State v. Preseault*, 163 Vt. 39 at 41 (1994).

260. United States v. Preseault, 24 Cl. Ct. 818, 836 (1992) (“plaintiffs accordingly retained, as successors to the original grantors, reversionary rights in these easements”); *Preseault*, 100 F.3d at 1550 (“the Preseaults have interests under state property law that have traditionally been recognized and protected from governmental expropriation”).

261. Nettesheim’s opinion holds the former. *Preseault v. U.S.*, 27 Fed. Cl. 69, 88 (1994) (“[in Lucas] the Court did not restrict its approach to limitations on title imposed by state law”). Plager’s opinion holds the latter. *Preseault*, 100 F.3d at 1539 (“Nothing in Lucas suggests that the background principles of a state’s property law include the sweep of a century of federal regulatory legislation.”).

262. The question here is whether state property rights are defined solely by reference to state law or can include federal restrictions, like railroad jurisdiction or federal navigational servitudes. Justice Scalia implies that property rights cannot be limited by federal law under Kaiser-Aetna v. United
D. The Interplay of State Abandonment and Railbanking Laws: The Problem of Vesting

The Second Circuit, the Court of Claims, and the variety of judges on the Federal Circuit all came up with different answers and different reasons for their takings analysis because they all missed the main point: the effect of the statute is not to take a property right away, but to fail to confer a benefit by preventing the vesting of a contingent future interest. If we view the issue in terms of vesting of the future interest, then the whole dispute takes on a vivid clarity that brings it within the scope of traditional rules terminating contingent future interests. In many respects, these takings cases are the result of a late twentieth-century aversion to those old arcane rules governing estates and future interests.²⁶³ For clarification, there is a four-stage analysis we must follow to analyze the legal issue presented by railbanking.

The first stage is determining whether or not the claimant has a property right in the rail corridor in the first place. In most cases brought before the courts, the existence of the property right is relatively straightforward; Mr. Lucas has a right to build houses on his lots and Ms. Dolan has a right to continue owning her land and expand her hardware store. The landowner presumably has the present right and the government now seeks to restrict it. However, with railbanking, the existence of a property right in a soon-to-be-abandoned rail corridor is not about a present right to possession or a present right to exclude. Rather, it is about the conditions under which a contingent right will vest.²⁶⁴ Analyzing vesting

States, 444 U.S. 164 (1979). But the Vermont Supreme Court explicitly found that the Preseaults’ state property rights were defined in part by federal railroad ICC jurisdiction. State v. Preseault, 163 at 41. See also Preseault, 100 F.3d at 1556 (Clavenger, J., dissenting).


²⁶⁴. We must also determine whether the current adjacent landowner owns the reversionary interest or the fee underlying the railroad easement. Most landowners have deeds describing the land only up to the edge of the rail corridor and it is a matter of state common law or statute as to whether the adjacent landowner will be deemed to own to the centerline or the heirs of the original grantor will own the narrow strip under the rail servitude. Most grantees of land adjacent to railroad corridors did not receive a deed indicating the corridor land because in most instances their grantors did not believe they had title to convey. See Wright, Private Rights and Public Ways, supra note 195, at 378-79. See also City of Manhattan Beach v. Los Angeles Super. Ct., 914 P.2d 160 (Cal.), cert. denied, 117 S.Ct. 511 (1996) (the court looked to several subsequent documents executed by the grantor as evidence that the grantor conveyed fee simple absolute to the railroad). This is done on an assumption that the original grantor intended to convey all of his or her interest to successors in interest, including reversionary rights or the land encumbered by the rail servitude. Other states hold that unless the grantor explicitly deeded the corridor land to a successor, he must have retained title and it therefore passes to his heirs. See McDonalds Corp. v. Dwyer, 432 S.E.2d 165 (N.C. Ct. App. 1993) (holding that statute giving title of the fee to adjacent landowners was an unconstitutional taking of the property rights of the grantor’s heirs). Ohio law provides that reversionary interests are
requires knowing if the railroad owns only an easement or a defeasible fee and the conditions or actions that will terminate the railroad’s rights and transfer them to the adjacent landowner.\textsuperscript{265}

Identifying the conditions for termination is the second stage of the analysis and requires a close look at state laws on abandonment.\textsuperscript{266} Until abandonment, the possibility of reverter, right of re-entry, or future possessory right in the rail corridor land is a mere expectancy, or contingent future interest in the right to possession.\textsuperscript{267} Upon abandonment, the right vests in interest, though it may not vest in possession until the grantor exercises her right of re-entry, or until she complies with state laws on personal and do not pass to successors in interest. See Walker v. Bd. of Comm’rs of Lucas County, 598 N.E. 2d 101, 106 (Ohio Ct. App. 1991) (“One does not acquire a reversionary interest solely by virtue of being an owner of property which abuts property held by a railroad in fee.”).

265. Although the plaintiffs in most of the class action cases challenging the railbanking law are adjacent landowners, some courts have held that adjacent landowners do not have standing to sue if they do not have a deed describing the actual corridor land. See, e.g., Walker, 1991 WL 110372 (Ohio Ct. App. 1991). In many instances, there is a serious question as to whether the original grantor’s heirs should be deemed to hold the reversionary interests or the adjacent landowners should. With both defeasible fees and easements, it was common for a grantor who, after selling the railroad its land, then sold his retained land to a successor in interest. Because many states had rules on the non-transferability of future interests, the retained possibility of reverter would not transfer to the new owner. It would be retained by the grantor to pass to his heirs. Later, states developed rules, both statutory and common-law, that would find a presumption that a grantor conveyed all interest in the land that a grantor had, or that in the absence of a known deed, interests in a rail corridor would be deemed transferred to the adjacent landowner. These rules potentially “take” the property rights from the grantor’s heirs and transfer them to the adjacent landowner, even one whose deed does not actually describe the corridor land. See McDonalds Corp. v. Dwyer, 432 S.E.2d 165 (N.C. Ct. App. 1993). Additionally, many grantors would not include rail corridor land in subsequent conveyances because of uncertainty about the interest the grantor retained. Thus, when giving a warranty deed, few landowners would risk describing the actual corridor land in a subsequent conveyance. Moreover, because the legal definitions of these property rights differed in the nineteenth century, particularly the easement, the grantor’s intent when making subsequent conveyances was likely to NOT include the corridor land. The claims of adjacent landowners to have a property right in a rail corridor, therefore, should be scrupulously examined before allowing the upset to possessory rights that goes along with most forfeiture actions.

266. In some instances the railroad may own a defeasible fee and the landowner a reversionary right that is triggered if the railroad use ceases. But some states, under a public policy against reversionary future interests, will interpret defeasible fee deeds to convey to the railroads only easements, even though such interests were clearly not the intentions of the parties at the time. See Paine v. Consumers’ Forwarding & Storage Co., 71 F. 626 (6th Cir. 1895); Daugherty v. Helena & N.W. Ry., 252 S.W.2d 546 (Ark. 1952); Askew v. Spence, 79 S.E.2d 531 (Ga. 1954).

267. States differ on the rules regarding abandonment that will cause the landowner’s interests in the rail corridor to become possessory. Some states construe the term “for railroad purposes” narrowly to permit only railroad operations; others broadly to include conversion in light of modern technological advancements, including electric railways, automobile highways, canals, plank roads, or even recreational trails. See generally Faus v. City of Los Angeles, 431 P.2d 849 (Cal. 1967); Bernards v. Link, 248 P.2d 341 (Or. 1952); Strycker v. Richardson, 77 Pa. Super. 252 (1921); Kan. Elec. Power Co. v. Walker, 51 P.2d 1002 (Kan. 1935); Lawson v. State of Washington, 730 P.2d 1308 (Wash. 1986).
recording or notice.

Assuming the adjacent landowner does have a reversionary or fee interest in the railroad corridor land, and the railroad's contemplated actions would constitute abandonment under state law, the third stage requires determining the effect of the railbanking law on the landowner's property interest in future possession; that is, what the effect of preemption or prevention of the vesting is on the landowner's property right. Thus, does the adjacent landowner have a legal complaint if the law establishes a procedure to prevent the condition from occurring that, without the procedure, would have resulted in the termination of the railroad's rights and vesting of the landowner's rights? This is a further clarification of the question of whether or not the prevention or postponing of the future interest by the statute is in fact an infringement, deprivation, or a taking of a property right.

The fourth stage is premised on an affirmative answer to the prior questions. If the interest that the adjacent landowner purports to have in a not-yet-abandoned rail corridor is a sufficiently robust property right, whether vested or contingent, what takings test should we apply to decide if compensation is due in any given situation? In essence, the question raised by railbanking is whether a change in a statutory regime, that prevents a right from vesting when it otherwise would have vested under the old statutory regime, is compensable under the just compensation clause. The appropriate way to view the effect of the railbanking statute is to analyze it within traditional doctrines of vested rights. Thus, if the railroad has already abandoned, the adjacent landowner's right to possession is vested and interference with that right might require compensation. But if the statutory regime is merely changed to prevent the vesting of the landowner's interest, prior to its vesting, the prolongation of the expectancy is merely the failure to confer a benefit and not a deprivation of a property right.

Readers who are familiar with the doctrine of vested rights will immediately note that I am using the notion of vesting in both senses: of vested and contingent future interests, and vested rights doctrine from zoning and land use law that arises from reliance on a particular statutory regime. By combining these we can see how the railbanking law's interference with a mere expectancy is not compensable.

In the first sense of the term, vesting is a legal determination that a person has a legally fixed right of present or future enjoyment or possession. With regard to estates in land, a future interest can be vested or

268. See BLACK'S LAW DICTIONARY 1401 (3d ed. 1969) ("vest").
contingent, and if it is vested it can be vested in interest or vested in possession. 269 An estate that is vested in interest only means that the future interest holder has a legally fixed right to future possession, as with a remainderman who is unconditionally entitled to property upon the death of a life tenant. An estate that is vested in possession is one in which the holder is entitled to immediate possession, as when the life tenant dies and the remainderman moves into possession immediately. Until a future interest is vested, it is a mere expectancy and can be destroyed by any number of contingencies or legal rules.

A right to ownership of land if a railroad stops using it for railroad purposes is a contingent executory interest or possibility of reverter; it may never vest. With this example, if the railroad stops using the land for railroad purposes, the future interest vests in interest. If the reversionary interest is a possibility of reverter then it also vests in possession immediately upon cessation of railroad use because the land automatically reverts upon occurrence of the condition. Yet if the reversionary interest is merely a right of re-entry (which is preferred in most states), 270 the adjacent landowner’s interest will not vest in possession until the right of re-entry is exercised, which must be exercised within a reasonable period of time. Thus, cessation of rail use would cause the future interest to vest in interest, but the future interest owner must also exercise the right to re-enter before the right vests in possession.

The most common contingent future interests created in these railroad cases is when a railroad will have acquired some form of conditional fee from its nineteenth-century grantor that will terminate upon cessation of railroad services. 271 Conditional or defeasible fees require clear language

269. The distinction between vesting in interest and vesting in possession is important. When a remainder follows a life estate we know that the remainder is vested in interest at the creation of the remainder, but is not vested in possession until the termination of the prior life estate. Vesting in interest and vesting in possession can occur at different times only in situations in which a condition subsequent terminates the prior interest but an additional condition precedent must occur before the future interest becomes possessory. See REST. (SECOND) DONATIVE TRANSFERS § 1.4 comm. b. For instance, a grant “to X for life, then to Y if she has married Z,” can result in a bifurcation where Y’s interest is vested in interest (when she marries Z and the condition precedent to her estate occurs) but it has not vested in possession (because X has not died). Vesting refers to the removal of conditions precedent.

270. California has a statute that converts all possibilities of reverter into rights of re-entry. See CAL. CIVIL CODE § 885.020. See also RICHARD R. B. POWELL, POWELL ON REAL PROPERTY, §20.03[2], 20-26 (1968) (on the tendency to convert possibilities of reverter into rights of re-entry); Forsgren v. Sollie, 659 P.2d 1068 (Utah 1983).

271. Defeasible fees are distinguishable from life estates and terms of years because the condition that will terminate the estate is indefinite rather than definite. With definite conditions, the future interest corresponding to a life estate or term of years is a remainder rather than a possibility of reversion or executory interest. Remainders are often vested and therefore would not be extinguish-
of reversion in the event of the occurrence of the condition; for example, "if the land is not used for railroad purposes it reverts back to me." Some states hold that operation for a reasonable period of time satisfies the condition and it is terminated, resulting in fee simple absolute in the railroad. Other reverter clauses, however, create a reversion if the line is not built within a given period of time or if the railroad fails to maintain fences, grade crossings, or the like. These reverter interests expire naturally. The reversion originally inured to the original grantor, not a third party. If it were given to a third party, that interest, called an executory interest, would be terminated by the rule against perpetuities.

Many states have modified their rules against perpetuities and on non-transferability of future interests, however, in conjunction with the passage of marketable title acts or stale uses and reversions acts. As most

272. See McKinley v. Waterloo R.R. Co., 368 N.W.2d 131 (Iowa 1985) (for a thorough discussion of the different types of conditional fees that are usually created in railroad deeds). See also Walker v. Bd. of Comm’rs of Lucas County, 598 N.E. 2d 101, 105 (Ohio Ct. App. 1991) (for the rule that “purpose” language alone, without identifying what happens upon occurrence of the condition, is not sufficient to create a defeasible fee).


274. The rule in most states in the nineteenth century was that possibilities of reverter and rights of re-entry (the future interests corresponding to defeasible fees with the reversion in the grantor) were non-transferable to successors in interest; that is, when the original grantor subsequently sold his land the reverter rights remained behind and did not transfer to the subsequent grantee. The reason for this was obvious. If a grantor could not create a fee simple determinable in X with a reversionary interest in Y because the future interest would be extinguished under the rule against perpetuities, the grantor should not be permitted to get around the rule by conveying the possibility of reversion to Y in a later conveyance. Since the rule against perpetuities does not apply to reversionary interests in the grantor, most states would not allow the grantor to get around the rule by conveying that interest to a third party; instead, it would pass to the grantor’s heirs. For states that retain this rule, the adjacent landowners have no right to the land underlying the rail corridor because the reversionary interest is owned only by the grantor’s heirs. Walker, 598 N.E. 2d at 106.

commentators agree, there is no particularly logical reason for terminating executory interests in third parties under the rule against perpetuities while keeping alive contingent reversionary interests in the grantor. Both can lead to indeterminacy of estates and forfeiture of the present estate by events occurring far in the future when the purpose behind the condition has in many cases disappeared. Thus, many states have adopted some sort of marketable title act that will terminate all reversionary interests, regardless of who holds them, if they are not regularly recorded.\textsuperscript{277} Title examiners only have to search for encumbrances on the title back a certain number of years. If there are no recorded future interests or encumbrances, then the grantor can convey full marketable title without fear of liability for long lost future interests causing forfeiture. In effect, these acts are statutes of limitation that prescribe a period within which a right of reverter or re-entry may be enforced. The impetus behind these laws is to get rid of stale claims, precisely the kind of reversionary interests that nineteenth-century grantors retained when they conveyed land to the railroads.

So long as these statutes provide a reasonable period for recording one's interests in land and thereby preserving it, they have been found to be constitutional.\textsuperscript{278} It has been said that they "reflect the appraisal of the state legislature of the actual economic significance of outstanding interests weighed against the inconvenience or expense caused by their continued existence for unlimited periods of time without regard to altered circumstances."\textsuperscript{279} Moreover, interests like easements will be kept alive without recording so long as the owner of the easement retains possession or is visibly using the servient estate.\textsuperscript{280} Thus, railroad easements will not be terminated under these statutes. The statutes are specifically designed to cut off non-possessory interests in land, whether vested or


\textsuperscript{279} Wichelman, 83 N.W.2d at 808.

\textsuperscript{280} Id. at 814.
contingent, "growing out of ancient records which fetter the marketability of title," not currently used possessory rights. While not all states have adopted these marketable title acts, the numbers are steadily increasing. As with other statutes of limitations, constitutional prohibitions against retrospective legislation do not apply to marketable title acts so long as adequate notice is provided for. The U.S. Supreme Court has upheld similar legislation cutting off claims that were not recorded within a reasonable time limit.

For those states that have not adopted some form of marketable title act terminating stale reversionary interests, many state courts have affected the same result through interpretation of the original deeds. Where the railroad has operated for fifty or more years, some states have found that the conditions are satisfied and the possibilities of reverter are thereby extinguished. Yet even if a state has not enacted rules to terminate contingent reversionary interests, because they are contingent and not vested, their termination through the railbanking act should not raise constitutional implications. If destruction of contingent remainders and executory interests does not raise takings issues, the perpetuation of those interests certainly cannot rise to the level of a taking.

The process of vesting with regard to easements is basically the same as it is for defeasible fees, except the interest that might shift is not an ownership interest in fee simple (as with a conditional fee) but merely a right to exclusive possession. When a railroad holds an easement, or a rail servitude, in a parcel of land, an adjacent landowner who owns the fee, owns it subject to the exclusive rail servitude and she is therefore not entitled to possession of the actual land. We can say that she has a contingent future right to possession if the servitude is eventually extin-

281. Id. at 816.
282. Id.
285. Because marketable title acts are a constitutional destruction of contingent future interests, as is the rule against perpetuities, their destruction or postponement through the railbanking act should likewise not run afoul of the constitution. See Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975). See also City of Miami v. St. Joe Paper Co., 364 So.2d 439 (Fla. 1978); Wisconsin v. Messner, 83 N.W.2d 800 (Minn. 1957); Walton v. Red Bluff, 3 Cal. Rptr.2d 275 (Cal. Ct. App. 1992); Town of Brookline v. Carey, 245 N.E.2d 446 (Mass. 1969); Cline v. Johnson County Bd. of Educ., 548 S.W.2d 507 (Ky. 1977); Lane v. Travelers Ins. Co. of Hartford, Conn., 299 N.W.553 (Iowa 1941); Bennett v. Whitehouse, 690 F. Supp. 955 (W.D. Okla. 1988) (all cases referring to constitutionality of marketable title acts).
guished. But she also owns the encumbered fee. Hence, unlike the adjacent landowner who owns only a contingent possibility of reverter in the case of a defeasible fee in the railroad, in the case of a railroad easement, the landowner owns the entire fee minus the present right to possession. She owns the right of future possession.

Of relevance to railroad easements is whether they are limited in scope to a particular use—depot, side lot, or corridor—or are perpetual general easements for public transportation purposes. Insofar as perpetual easements can be transferred to other public entities for utility, highway, or trail uses, the change does not threaten to terminate the easement. With a limited easement for railroad purposes, some states have held that a shift in use from railroad to other public uses can constitute abandonment of the easement; other states have found that the shift does not. However, this analysis has yet to incorporate the effects of federal STB jurisdiction and railbanking.

Before 1983, the only method by which a railroad could abandon was to form the intent to abandon, apply to the ICC for a discontinuation certificate, consummate that abandonment by removing tracks and ties and other assets, notify the ICC that it had consummated, and then sell the real estate. Until consummation occurred, however, no state property rights of adjacent landowners vested because under state and federal law the elements of abandonment had not been met. Thus, if a railroad de-

286. Breach of the scope or terms of the easement, as with any servitude, results only in a claim for damages and not forfeiture of the easement. The scope of the easement is defined by physical boundaries—width, depth, length, and height—but also in terms of permissible uses—running trains and not planting petunias on the land. Uses that exceed the physical boundaries are remedied by trespass actions. Uses that exceed the use restrictions are remedied by damages actions, as when a railroad adds an additional use by installing a telegraph line in the easement. Some states, finding the railroad easement to be the most burdensome use possible, will permit additional lesser uses without requiring compensation to the landowner from the railroad or new user. See, e.g., Mitchell v. Illinois Cent. R.R. Co., 51 N.E.2d 271 (Ill. 1943); Mellon v. S. Pac. Transp. Co., 750 F. Supp. 226 (W.D. Tex. 1990).


290. One could view the process in these terms. The state establishes two elements for abandonment, intent and consummation. Before the railroad can consummate, however, it must receive permission to do so. The federal overlay does not change the state rule; it simply regulates the behavior that constitutes the second element. Denial of permission to consummate could not work a taking of anyone’s property rights because the actions that make up consummation are squarely within the federal government’s commerce clause power. If denial of permission to consummate does not affect the adjacent landowner’s property rights, then approval subject to certain conditions certainly

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cided not to consummate, the landowner was out of luck. The landowner was also out of luck if the ICC refused to allow the abandonment. The landowner was also out of luck, for that matter, if the railroad never formed the requisite intent and never pursued abandonment proceedings at all. The landowner’s interest, in all three scenarios, is exactly the same: a contingent interest in the possible removal of the rail servitude that is a mere expectancy until the elements of abandonment are met under state law.

The railbanking statute did an interesting thing. It gave the railroad a second choice. It could abandon its line as described above, or it could discontinue services, sell the corridor, but retain a right of re-entry or an option to repurchase. This process effectively disproves the intent element under state abandonment laws. Rather than somehow step in and prevent the landowner’s rights from vesting after the railroad has formed the requisite intent and consummated its abandonment, the railbanking act enables the railroad to sell the real estate without meeting the elements of abandonment, not by changing the rules, but by providing that intent cannot be inferred from sale of the corridor and discontinuation alone.

The statute also provides a clear, unequivocal procedure for manifesting an intent not to abandon. Because the railbanking act is permissive on the part of the railroad, the act of railbanking must be deemed evidence of intent not to abandon because it gives the railroad a way to retain a future interest. If the corridor were abandoned, that interest would be destroyed. Retention of a future interest, therefore, is clear evidence of intent not to destroy the property right on which the future interest depends. For if the easement were deemed abandoned, the fu-

292. Nat’l Wildlife Fed’n v. ICC, 850 F.2d 694 (D.C. Cir. 1988) (finding that railbanking and conversion to a trail are voluntary on the part of the railroad and not mandatory on the part of the ICC).
293. One could argue that the railbanking act changes the state-law rules on abandonment insofar as it rebuts a finding of intent which often occurs solely from the extrinsic evidence of those consummating actions like discontinuance of services, non-use, and removal of tracks and ties. Because such actions are often interpreted as evidence of intent, such actions alone can give rise to a presumption of intent to abandon under state law. But every state provides that clear evidence of intent not to abandon will rebut the presumption. So the railbanking statute does not change the state law elements; it merely provides a procedure which, if followed, shows lack of intent sufficient to rebut...
ture right of re-entry would also be destroyed.

The second notion of vested rights has developed in the law of zoning. Under that doctrine, a landowner who has invested a sufficient amount of time and money in reliance on the ability to develop land, will be allowed to continue despite a change in zoning laws or land-use restrictions. The doctrine of vested rights has evolved along two axes: a type of zoning estoppel which focuses on the government’s action in limiting a landowner’s development rights and the notion of pure vested rights which focuses on the character of the private property interest. As a general rule, a developer who obtains a building permit or invests sufficiently in the pre-existing zoning scheme will be able to proceed according to the permit even if the land he is developing is downzoned soon after receiving the permit. There are, of course, nuances and refinements dealing with whether filing for a building permit should trigger the vesting of the development right, or approval of the permit, or simply a high probability of issuance of a permit. Nonetheless, the overriding concern in the field of vested rights is whether the property owner has acted in good-faith reliance on an act or omission of government by making a substantial change in position or incurring expenses to such an extent that fundamental fairness requires a continuance of such a right.

We can view the railbanking law within this context to decide if an adjacent landowner has acted in good-faith reliance on the statutory regime that would have yielded the removal of the rail servitude. If the landowner had no reasonable expectations that the railroad would abandon its corridor, or made no investment dependent on the future removal of the servitude, then no vested rights are likely to exist. Perhaps the most

the presumption established by state law. And since it hasn’t changed the laws, it hasn’t interfered with even the expectancy of adjacent landowners, much less any vested rights they might have. If it does change the state property law, it does so indirectly, through superior authority under interstate commerce. Because the federal government can regulate interstate commerce, it can regulate rail services, and thus have in indirect effect on state property rights, just as the federal navigational servitude can affect state property rights. But changes in federal law regarding rail services have not been found to work a taking because the effect on the state property rights are only indirect. See Rieger v. Penn Cent. Corp., 1985 WL 7919 at *3 (Ohio Ct. App. 1985) (“We do not find that the language in the deeds evinced any intention on the part of the appellee to unequivocally abandon its right-of-way, especially in light of the language reserving the right to renew railroad operations.”).

294. Delaney & Vaias, supra note 291, at 32.

295. Few in the nineteenth century could have predicted the decline in the railroads that resulted from the increase in automobile traffic and the subsidization of highway construction (author’s conclusion). Likewise, no one today can predict whether or not railroad services will again become economic or desirable. Laws must be able to adapt to changing circumstances without raising constitutional concerns at every step. The bright-line between vested rights and mere expectancies has proved a workable distinction for constitutional due process protections.

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important underlying rationale for vested rights doctrine is that government must be able to change land-use rules without having to pay for every restriction that comes about. As one court explained: "A party has no vested right in the continuation of existing statutory law."296

A landowner who has invested in a particular statutory or zoning regime has acquired an equitable interest in the continuation of that regime. But a landowner, who has not invested in reliance on a particular set of rules, is not entitled to compensation when those rules change to limit her ability to develop her land. Note, the limitation is not to current uses of the land, but rather to her ability to engage in new, more burdensome uses. Similarly, the railbanking statute changes the regulatory regime governing railroad abandonments but it does not take away any current use or right the adjacent landowner has. It merely changes the rules under which future rights might be exercised.

Since an adjacent landowner has no present right to possession or use prior to the railroad’s abandonment, the railbanking statute does not interfere with any presently-exercisable property right. Since the landowner does not have the right to possession, she cannot turn her expectancies into vested rights to possession solely on the basis of a particular statutory scheme. Because it is the operation of state abandonment rules that will cause a landowner’s rights to vest, changing the rules before they have in fact vested merely continues her current property rights unchanged. As a result, there can be no Fifth Amendment violation because her expectancies are based entirely on an ever-changing set of property laws. Until her rights vest, either through operation of the law or through good-faith reliance and investment, her expectancies can be destroyed without running afoul of the Takings Clause.

A number of other property rules recognize that expectancies do not rise to the level of a property right that is protected by the Fifth Amendment. For instance, expectancies cannot form the res of a trust.297 Likewise, expectancies that arise from a will are not rights that will be recog-

296. Omega Nat'l Ins. Co. v. Marquardt, 799 P.2d 235, 244 (1990). See also Phillips Petroleum, 16 Ill.App.2d at 565, 149 N.E.2d 344 ("... there is no vested right in the continuance of a law or ordinance, and that where the law or ordinance has been changed pending an appeal the case must be disposed of by the reviewing court upon the law as it then exists"). There is also no vested right in a prior zoning scheme without reliance. See Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996); First of Amer. Trust Co. v. Armstead, 664 N.E.2d 36 (III. 1996).

297. REST. (SECOND) OF TRUSTS § 86; BOGERT, TRUSTS AND TRUSTEES, vol. 1, § 112 (1977). REST. (SECOND) OF TRUSTS § 85 notes that a contingent future interest can be the rest of a trust, but not expectancy. This is consistent with the idea that a right of re-entry or possibility of reverter, though contingent, is a stronger property right than the expectancy that an easement will be abandoned.
nized until the will becomes effective and irrevocable through the death of the testator; i.e. until they are vested.\textsuperscript{298} And so long as the present estate holder has the power to prevent the termination of the present estate and the vesting of the future interest, we cannot say that the holder of the expectancy has lost a property right when the present estate holder chooses to retain it.\textsuperscript{299} In other words, by creating this new process called railbanking, the STB simply offers the railroad a way to do those actions that would otherwise look like consummation (removal of tracks and ties and sale of the real estate) without causing the termination of the servitude because it disproves, prima facie, the intent element.\textsuperscript{300} The railroad may choose not to consummate, or it may choose an unequivocal method of showing lack of intent.\textsuperscript{301} In neither event does the servient

\textsuperscript{298} A will, by its nature, is amulatory and revocable during the testator's lifetime. \textit{In re Estate of Brown}, 507 S.W.2d 801, 803 (Tex. Ct. App. 1974).

\textsuperscript{299} If it seems that intent and consummation of state property easements seem to blur into one another, consider this example. Under current law, when I place a bag of garbage on my front sidewalk with the intent that it will be collected by the garbage service, I have effectively abandoned it and relinquished all property rights to it. \textit{See AM. JUR. 2D Abandoned, Lost and Unclaimed Property} § 1 (2000). I have the requisite intent and I have taken steps, each of which is an unequivocal indication that I am abandoing my property rights in the contents (I have placed them in a garbage bag routinely used for exactly this purpose and put it on the curb the morning of my curbside collection). Now imagine that I have some items that I am tired of looking at, but I do not want to lose my property rights in them. I can stack them in my garage, or rent a storage facility, and pay to retain possession of them. But what if the government decided that preserving these items actually has an important national purpose? The government understands that I do not want the clutter in my house—but taking them to the landfill is wasteful. Instead, the government is going to create a program whereby I can put the items in a specially marked bag, then set them on my curb, and they will be labeled for future reference, collected and retained for me by someone who, in the meantime, might be able to put the items to good use. Whenever I want them back, I simply notify the proper authority. Under such a scheme, no one would imagine that I intended to abandon my property rights in them. Quite the contrary. My compliance with the procedures of the program would prove that I intended to keep an interest in them, that I intended to treat them differently than garbage, and that I actually took steps to make it clear that I had no desire to treat the items like garbage. In fact, in the absence of the program, I might never have placed the items out on the street in the first place.

\textsuperscript{300} In essence, the railbanking law does not change the state statutory definition of abandonment, so there really is no context in which vested rights doctrine could arise. \textit{See 16 U.S.C.} § 1247(d) (2000). On one reading, the law merely provides a way for the railroad to comply with long-standing abandonment rules by creating a way to disprove the intent element — retaining a future interest. On a slightly different reading, the railbanking statute marginally changes the rules on abandonment by removing certain actions from the purview of abandonment so they are not interpreted to result in the termination of the railroad's property rights — sale of the land for a trail use. In either event, the public policy behind preservation of the corridor for future rail use, which is clearly within the scope of an easement for railroad purposes, supports these minor modifications to state laws on abandonment as within the purview of the legislature. Legislatures must be able to adjust the benefits and burdens of life in our complex inter-dependent world.

\textsuperscript{301} Certain actions can be deemed unequivocal indications of intent to abandon, as selling off
landowner lose a property right because her interest will not vest until both intent and consummation have occurred.

The fallacy in the Preseaults' argument is that they assume that the railroad would have abandoned its property rights in the absence of the program to recycle them. The railbanking program is in essence a form of recycling. The crucial element of the program, however, is that the railroad's property rights are split when the corridor is railbanked. The new grantee or trail group acquires the current ownership and right to possession, but the railroad retains a future interest allowing it to repurchase the corridor if necessary. It is this interest, retained by the railroad, that disproves the intent necessary to find abandonment of a rail corridor. For how can I have an intent to abandon my entire property rights if I have attempted to retain a property right? And why would I bother retaining a right to repurchase if my other actions essentially destroyed all the property rights on which that repurchase right depended?

The railbanking statute does not interpose a third, federal arm to snatch away the landowner's property rights after, or immediately before, final abandonment occurs under state law. Instead, it offers a mechanism through which, if the railroad chooses, it may undertake the actions of parcels throughout a corridor, or not protesting a landowner who claims legal title to a portion by adverse possession. Similarly, certain actions can be deemed unequivocal indications of intent not to abandon, like maintenance of the land and drains, putting up no trespassing signs asserting ownership, or prosecuting trespassers. The difficulty lies when the actions are not unequivocal as when tracks and ties are removed, but not ballast and bridges, and taxes are paid, but there's no assertion of ownership against adjacent users. Notably, the railbanking process provides railroads with a mechanism for legally registering their intent not to abandon, which should take precedence over ambiguous actions, though perhaps not over unequivocal actions of abandonment. Because railbanking and obtaining a NITU or CITU requires that the railroad retain a right to repurchase, and retaining a repurchase option alone has been deemed evidence of intent not to abandon, so too should railbanking. See Rieger v. Penn Central, 1985 WL 7919 (unpubl. opinion) (Ohio Ct. App. 1985).

302. "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." Sennewald, supra note 210, at 1411.


304. There can be significant financial advantages to railbanking for the railroads besides the opportunity to repurchase an intact corridor sometime in the future. Some states and counties have ordinances that require a railroad to return the corridor land to its natural state before it can abandon. See Sennewald, supra note 210. These rules are harbingers to the late nineteenth and early twentieth century when the states imposed onerous duties on railroad to discourage abandonments. In most cases, returning the land to its natural state would most likely cost well over ten times the salvage value of the tracks, ties, and land if there is ballast or embankments that must be removed.
abandonment without those actions being interpreted to satisfy the intent element. Creation of the railbanking procedure does not remove or change the criteria under which abandonment authorization is granted. The landowner’s lottery ticket retains the same odds. Railbanking a corridor, however, simply means the railroad changed its mind about its desire to abandon because it was given the option of retaining a right of repurchase. Allowing the railroad to keep a stick in its bundle of property rights may prevent the entire bundle from shifting to the landowner because it signals that the railroad did not want to simply abandon its entire bundle of rights. Retention of that stick disproves the intent element.

E. Finding the Right Takings Test

Assuming, as did Judge Plager, that the landowner’s rights in an abandoned railroad corridor are more than expectancies and are recognizable property rights protected by the Fifth Amendment, it is unclear what takings rule should apply. Plager simply asserted that the Preseaults had lost their right to exclude because people were suddenly bicycling through their backyard without their permission. Without explicitly stating that Loretto would be the proper analysis, Plager asserted that the railbanking act caused a physical invasion of the Preseaults’ property.\(^{305}\) Notably however, in Loretto the landowner possessed the current right to exclude cable companies before the regulation was passed which destroyed this right. In this case, the Preseaults did not have the right to exclude anyone because their predecessors in interest had sold the right to exclusive possession to the railroad.

Although it may seem that the effect of the railbanking act is to interfere with the landowners’ right to exclude the public, the fundamental difference between Preseault and Loretto is that in the latter the landowner had a right to exclude before the statute destroyed it.\(^{306}\) In the railbanking situation, the landowner did not have a right to exclude until the rail easement was abandoned, an event forestalled by railbanking. Justice Scalia’s opinion in Lucas provides for precisely the kind of situation that occurs when an active railroad banks its corridor. “Where ‘permanent physical occupation’ of the 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, [citing Loretto] though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner’s ti-

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Furthermore, to the extent that federal law "interfered" with state property rights in 1887, 1920, 1976, or 1983, it did so to protect the vested possessory rights of railroads against the nonvested, contingent rights of adjacent landowners who sought to terminate the railroads' rights prematurely. If the imposition of federal jurisdiction in 1887 did not work a taking, it is illogical to claim that continuation of that jurisdiction through railbanking works a taking. Because the right to exclude is not a right most adjacent landowners have, the per se rule of Loretto is inapposite.

Judge Plager also strongly disagrees with the notion that the federal railroad laws could somehow be incorporated into the inherent limitations on title exception that Lucas created for "background principles of the State's law of property." Plager asserts that the "background principles referred to by the Court in Lucas were state-defined nuisance rules." But they also include inherent limitations on title, as for example state-defined riparian rights. To the extent that the state laws on railroad abandonment require intent and consummation, a railroad that banks its corridor is precisely not abandoning because banking shows lack of intent under state law. The railbanking statute could not "take" any rights defined by state law because the railbanked railroad acted in compliance with state abandonment laws in an effort to preserve their own rights. By failing to abandon its corridor, the railroad's rights remain intact and the landowner acquires nothing.

Judge Clavenger, on the other hand, noted that under the 1982 Vermont "mini-railbanking act," the Preseaults' expectancy rights had already been terminated. Thus, if the federal railbanking law is not a part of those "background principles of state property law," surely state statutes are. The Preseaults, at least, who purchased most of their property under a state regulatory regime that permitted the railroad to bank or abandon, never acquired the right to prevent the railroad from choosing an option it was permitted to choose under state law.

Because of the interplay of the railbanking law and state abandonment rules, the Second Circuit and Judge Nettesheim were both correct that the

308. Id.
309. Preseault, 100 F.3d at 1538.
310. We could say that, in railbanking, the railroad acted pursuant to state laws on abandonment and, by doing so, did not have the intent to abandon. Or, after 1887, 1920, or 1983, we could argue that the federal railroad jurisdiction is an inherent limitation on title, which apparently has been accepted by the Vermont Supreme Court. See Trs. of Diocese v. State of Vermont, 496 A.2d 151 (Vt. 1985).
311. Preseault, 100 F.3d at 1567-68.
Preseaults did not suffer a taking because they had no property right in the corridor to begin with. But they were mistaken in seeing the issue as a question of whether Vermont State law recognizes shifts in use for public easements, or whether the easement would have been deemed abandoned in the absence of the federal railroad laws. The correct analysis is whether the railroad’s actions could be interpreted to result in abandonment under existing state law when it intentionally railbanked its interests. There is simply no abandonment because the railroad did not have the requisite intent, and the lack of intent is unequivocally shown by the retention of a future interest in the servitude. To the extent the railbanking law makes it possible for the railroad to bifurcate its interests and sell the present interest while retaining a future interest, the effect on the landowner is irrelevant because the landowner had no vested rights in the pre-existing statutory scheme controlling abandonment. There was no reasonable investment-backed expectation or detrimental reliance on the pre-1983 law defining railroad abandonment. Hence, under *Lucas* there can be no taking because railroad jurisdiction is an inherent limitation on the landowner’s title and because a pre-existing rail servitude exists. Compensation is not required when a landowner is prevented from receiving a gratuitous benefit.

Finally, if *Loretto* does not apply because the right to prevent the physical invasion did not exist before the regulation, and *Lucas* does not apply as a per se taking because a pre-existing limitation on title defeats the landowners’ expectation, then another potential test is *Penn Central’s* protection for interferences with reasonable investment-backed expectations. The courts have developed a set of rules distinguishing between mere expectancies and vested rights under *Penn Central’s* “interference with reasonable investment-backed expectations” prong. In that case, Justice Brennan did not find a taking when a New York City landmarks law prevented future development of Grand Central Station, but permitted the continued use to which the land had been put for over a century. As he noted:

> this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. . . . [T]his Court has dismissed ‘taking’ challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with

312. *PruneYard Shopping Ctr. v. Robins*, 100 S.Ct. 2035, 2042 (1980), also supports the view that unless the landowner had a historically rooted expectation in the right to exclude, limitations on that right in the name of other fundamental rights do not rise to the level of a takings.

the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes.\(^{314}\)

A wide body of scholarship and case law has evolved out of Brennan’s assertion that economic expectancies do not rise to the level of “property” absent reasonable investment-backed expectations.\(^{315}\)

For most landowners adjacent to rail corridors, as in Preseault, purchasing property after all relevant regulations have been enacted should undermine any claim they have to reasonable investment-backed expectations. In most instances, a landowner who purchases heavily regulated property cannot complain when those regulations are not lifted. If anyone had a property right, it was the landowner at the time the regulations were enacted.\(^{316}\) As Judge Nettesheim explained in Preseault: “Plaintiffs hardly can argue that their reasonable investment-backed expectations were disturbed when the ICC acted to suspend their reversionary interests in a manner authorized by federal and state law in effect when they acquired their property.”\(^{317}\)

Reasonable minds certainly have differed on which, if any, regulatory takings test ought to apply to the interference with the vesting of the landowners’ property rights by the railbanking law. Understanding the way easements operate and the traditional rights acquired by the railroads pursuant to state law enables us to see that most of the landowners alleging a taking are hard-pressed to define a property right that has been taken. The right to have a servitude removed is not a historically-protected property right like the right to exclude, but is a contingent future interest that more closely resembles an expectancy than even a reversionary right. For that reason, the railbanking statute does not work a taking since the railroad’s voluntary actions to railbank do not affect a vested right.

The opportunity to railbank a railroad corridor and use it for interim trail use is a brilliant way to solve a variety of difficult legal problems. But opposition to the program has come from the railroads, who for decades only wanted to remove themselves from liability for their corridors;

314. Id. at 125.
315. STEVEN EAGLE, REGULATORY TAKINGS, § 6-5(a)-(f); Delaney & Vais, supra note 291; Ruckelshaus v. Monsanto, 467 U.S. 986, 1005 (1984).
316. Most states had a rule on the non-transferability of choses in action that would prevent a subsequent landowner from recovering from a trespasser railroad damages that accrued to the predecessor in title. Since the successor took the land on notice that the rail servitude existed, she can hardly complain that the railroad did not pay for the right from her predecessor. McKinley v. Waterloo R.R. Co., 368 N.W.2d 131 (1985); Indiana, B. & W. Ry. Co. v. Allen, 100 Ind. 409 (1884); Fed. Land Bank of Louisville v. Luckenbill, 13 N.E.2d 531 (Ind. 1938).
317. 27 Fed. Cl. at 95.
adjacent landowners, who would rather acquire the corridor land than see it used for continued public purposes; politicians, who have paid more attention to land developers and heavily-regulated industries than their urban health-conscious constituents; real estate developers, who do not wish to contribute any land toward parks, schools, open spaces or trails; and lawyers, who see trails opposition as a way to build a niche practice that could exploit the rhetoric of the property rights movement. Though the railbanking program was an attempt to sidestep many of the state law property problems associated with abandonment of rail easements, challenges under the Takings Clause threaten to derail these trails. Because the program attempts to create a federal solution to local property situations, it is more vulnerable to attack than governmental exactions and exercises of eminent domain. Yet, only by ignoring legal rules on contingent future interests and vested rights, and by neglecting the history of the railroads can opponents to railbanking argue that the program is unconstitutional. Moreover, interim trail use on railbanked corridors can also make possible grand-scale trail systems that could not be created through exactions and eminent domain. Thus, rail-trails are the only viable way to create a truly effective national infrastructure for alternative transportation.318

VII. THE POLITICS OF THE PROPERTY RIGHTS MOVEMENT

Behind much of the rhetoric against recreational trails by developers and by landowners adjacent to rail-trails is a feeling that government has gotten too big.319 They feel government has gone too far in interfering with traditional use rights in the name of some unusual notion of the public good that merely panders to radical environmentalists and elitist urban values.320 That intervention also is believed to contravene the clear language of the Fifth Amendment. Yet if one talks to the average homeowner, she is in favor of strict restrictions on development, on industrial

318. The goal of the National Rails-to-Trails Conservancy is to have a system of inter-connected trails with thousands of spur trails leading to cross-state core trails such that every person in the continental U.S. would live within a mile of a trail that could take her anywhere in the country. Using railroad corridors, this goal could become a reality. See Rails to Trails Conservancy Website, available at http://www.railtrails.org/.

319. See Gragg, supra note 12, at F03; Roach, supra note 12.

320. There is, of course, an underlying racist element in the isolationism of most trails opponents. Trails, like subways or highways, allow access by the underprivileged to mostly-white middle-class suburbs. See, e.g., Martin Kasindorf, LA Spinning Its Wheels over Transit Plan: Progress Held Up by Political, Racial Divisions, USA TODAY, July 3, 1997, at 14A. For links between the property rights movement and the militia movement, see Tharp & Holstein, Report Links Anti-Enviros to Militia Movement, U.S. NEWS & WORLD REP., Apr. 21, 1997.
pollution, and on wetlands and species destruction.  

So where exactly is the impetus behind the so-called property rights movement?  

The property rights movement, which until recent years consisted of a fringe coalition of die-hard western cowboys, Midwestern family farmers, and urban libertarians, has now become a multi-billion dollar political movement. The faces are of small-time homeowners, struggling farmers, and senior citizens worried about property crimes. Yet the money behind the faces comes from the National Mining Association, the Chemical Manufacturers Association, the National Association of Manufacturers, the American Petroleum Institute, the American Independent Refiners Association, the American Forest and Paper Association, and the International Council of Shopping Centers, in league with think tanks like the Cato Institute, the Defenders of Property Rights, and the Competitive Enterprise Institute. Molly Ivins calls it "astro-turf organizing": big businesses funding public relations groups to market their opposition as green or as coming from the grass roots level. These groups are bankrolling litigation, buying legislation, and funding judicial junkets with a very simple message: any decline in one's property values constitutes a taking for public use and must be compensated. Even where there has been no diminution in market value but a use right is restricted, as with many historic preservation projects, landowners want a piece of the taxpayer's pie.  

The explosion in takings and property rights legislation at both the
federal and state levels is quite astounding. At the federal level the beginning of the movement was Ronald Reagan’s Executive Order 12630 in 1988 that required all federal regulations and agency actions be analyzed for takings consequences.\(^\text{326}\) That was swiftly followed in 1990 by a house bill that would apply Executive Order 12630 to future regulations, and bills followed every year thereafter that broadened the application to all federal agencies. In 1994 a compensation bill was introduced for American Heritage Areas, a program that gives federal money to designated areas. The biggest boost to the property rights movement was the 1994 Republican Contract with America that included a property rights provision. In response to that, the Private Property Protection Act of 1995 (HR 925) was introduced. HR 925 demanded compensation if the value of any affected portion of land was diminished by ten percent or more. On the House floor this was changed to twenty percent but the House rejected an amendment that would look at all of the property, not just the affected portion, despite the Supreme Court’s long-standing insistence that takings analysis cannot focus just on the affected portion.\(^\text{327}\) HR 925 never made it out of the House. But that didn’t stop Senator Bob Dole from introducing the Omnibus Property Rights Act of 1995 (SB 605) that would have required payment for any regulatory action that reduced by one third or more the speculative value of any affected portion of a real, personal, or intangible piece of property.\(^\text{328}\) That bill died as well, the result of Senate opposition. Coincidentally, landowners do not seem willing to compensate the government every time a regulation results in an increase in market value of their land, though they are quick to demand compensation when regulations decrease their market value.\(^\text{329}\)

Not surprisingly, most senators and representatives do not look favorably on converting the federal treasury into a cash cow for every person affected by a regulation, and all these bills were rejected either in

\(^{326}\) This history of property rights legislation is most thoroughly detailed in Sugameli’s *Takings Bills* article. See Sugameli, *supra* note 19.


\(^{328}\) This leaves the question: would the government would have to compensate a landowner who buys land with the intent, or dream, or expectation, or even fantasy, of developing it for a vast profit, regardless of the reasonableness of those expectations?

\(^{329}\) If landownership is essentially a lottery, some parcels will appreciate and some will depreciate; some as a result of governmental action and some as a result of other forces. Why should the taxpayer have to insure themselves for all detrimental effects caused by regulations but not receive the benefits in higher taxation, or a surcharge, whenever values increase?
committee or in full-body votes. None made it to the other house on an affirmative vote. However, legislation at the state level has been far more successful. Every state has had at least one takings bill introduced, and currently twelve states have enacted assessment legislation requiring that state agencies undertake a thorough takings assessment to determine the impact on every potential property owner. As expected, the legislation effectively chills broad agency activities. Five other states have adopted compensation-type legislation that either provides for compensation when regulations diminish property rights in ways that don’t rise to the level of a constitutional taking or that requires greater than one hundred percent compensation for takings under eminent domain or reductions in market value over and above a certain percentage. Notably, until 2000, the only two states that put the issue to public referenda, Arizona and Washington, discovered that the public was skeptical of the true protections to property rights these laws would provide. In 2000, Oregon voters adopted the first property rights referendum in the country, which is truly ironic given Oregon’s position as one of the leaders in well-managed and smart growth.

As a general rule, the individual private landowner favors broad regulatory powers because she does not want to be subjected to large-scale environmental nuisances caused by cement plants, chemical refineries, mines, logging, farm effluent, and other industrial uses. Despite the image of the private landowner told she cannot protect her home from forest fires because the kangaroo rat lives nearby, these takings bills are designed to protect corporate landowners. It is very revealing that seventy-eight percent of all privately held land in the U.S. is owned by only 2.65% of private landowners. In contrast, the nearly sixty million owners of residential property own only three percent of all private land.

These takings bills are designed to protect the large landowner with the resources and sophistication to influence legislatures and bankroll litiga-
tion at the expense of the vast majority of small and residential landowners whose land will pay the cost of deregulation and whose pockets will fund the buyout.335

From the political side, these property rights groups are pulling out all the stops. The website of Dick Welsh, founder of the National Association of Reversionary Property Owners (NARPO) gives details on how to get environmentally friendly politicians out of office and property rights advocates in.336 It suggests ways to disrupt town and county commission meetings by "stacking" the audience with one's family members, including children, just to take up the seats that would otherwise be occupied by members voicing opposing views. It recommends being loud and vocal to attract the news media and reminds us that "local elections are much easier to influence than the nationals. Besides, not much media attention is focused on the local elections" and therefore more influence can be imposed with less oversight. A trip to the NARPO website can lead one on a seemingly endless journey to property rights sites loaded with information about how to influence local politics. Interestingly, the site for the American Land Rights Association (ALRA) lists the financial sponsors of its yearly congressional vote index that tallies the federal legislators and their voting records on property rights issues. The list of sponsors is a predictable medley of forestry, logging, mining, farming, cattle ranching, free enterprise, and development interests. On the 1998 co-sponsors list, there are 228 corporate sponsors to thirty-four individual sponsors, nearly seven to one, further supporting the claim that this is a movement primarily funded by corporate development interests who use the woeful stories of individuals to appeal to politicians while seeking to halt land-use controls that would restrict their development and exploitation rights.337

Despite the property rights movement, can land use restrictions that promote quality-of-life values survive? There is certainly no reason to believe that all legal avenues are soon to be foreclosed. In fact, despite the tremendous amount of money invested in litigation, lobbying of legislatures, and propaganda stirring up landowners, the successes have been few and far between. From a legal perspective, recreational trails would appear safe. While numerous state legislatures have taken pains to deny eminent domain for trail acquisition in the past few years, times

337. See American Land Rights Ass'n., supra note 323. If the monetary value of investments were calculated, the differential would be much greater than seven-to-one.
eventually change. For just as the NTSA prohibited use of eminent do-
main between 1978 and 1983, it looks like the Appalachian Trail may
soon be completed, though not by the hoped-for deadline of the end of
2000.338 Perhaps the best way is a concerted public relations movement
to redefine the issue as a promotion of property values and protection of
property rights rather than the deprivation or the taking of property.339
For limitations on my neighbor's rights to develop her land is a protec-
tion of my right to be free of unwanted and burdensome development
and to retain market value of my land.

VIII.A FEW SUGGESTIONS

One way to promote the development of recreational trails is for the
states to explicitly permit the use of eminent domain power for the acquisi-
tion of trail land, and to encourage the development of state-wide trails
systems. It is unfortunate that a beneficial public good like trails cannot
be achieved solely through the beneficence of willing sellers and donors.
A single landowner can frustrate and stymie a trail since a small portion
of interconnected parcels are necessary to make the trail work. Thus, for
the same reason railroads and highway authorities needed the power of
eminent domain, so too do parks departments and trail developers.
While state law can limit the property right taken to a trail easement, it
may be more beneficial to the landowner if the state simply takes the un-
derlying fee as well. In that case, recreational user statutes would not be
needed to absolve landowners of potential liability for injuries to trail us-
ers.340 A statutory regime that allowed for appropriation of a fee simple
determinable would protect the landowners' rights to get the land back if
it ever was abandoned. Similarly, generous tax incentives can encourage
landowners to donate or sell trail easements, thus minimizing the need
for condemnation proceedings.

A second way to promote the development of trails would be to extend
the eminent domain powers of the NTSA to National Historic and na-
tional recreation trails as well as National Scenic Trails. While the Fran-
ciscan Friars of Graymoor may disapprove of the Park Service's appro-
priation of their land for a buffer zone, doing so does not generally take

338. See Fitzgerald, supra note 101, at A19.
339. See Louise Halper, Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of
340. See Robin Miller, Effect of Statute Limiting Landowner's Liability for Personal Injury to
Recreational User, 47 A.L.R.4th 262 (2001); John C. Becker, Landowner or Occupier Liability for
Personal Injuries and Recreational Use Statutes: How Effective is the Protection? 24 IND. L. REV.
pre-existing uses of landowners; it simply takes the possibility of future development. As with the Graymoor Monastery, the eighteen acres being appropriated is currently undeveloped land which the Friars had no intention of developing in the near future. Hence, appropriation projects could work closely with landowners to grant them continuing agricultural and low impact uses for as long as they continue to own their land. And upon sale, those rights would cease. Ranchers abutting the National Forests can hardly complain if they are permitted to continue making agricultural use of their land, even if they may be denied the right to exploit it in ways that are contrary to the values protected by open space, park, and trail regulations.

Currently, the federal government makes ten percent of all federal highway funds available solely for the use of enhancements. These enhancements can include everything from a bicycle trail to an underpass mural. Oddly, some states have refused to take advantage of the program because the state transportation agencies consider the comparatively small enhancement projects to be more trouble than they are worth. When a state department of transportation has a budget of a $100 million for a road project, it finds that a $100 thousand trail project is not worth the engineering, regulatory, and public-relations efforts it requires. This is especially true if the DOT engineers expect trail developers to go through all the same engineering, environmental, and structural processes that go into building a highway. The State of Indiana DOT, for instance, required that all proposed trails meet the same structural specifications as highways, thus requiring nearly a foot of cement foundation under the asphalt of what is, in most instances, nothing but a glorified sidewalk. Removing bureaucratic obstacles and providing an expedited bidding process for small projects like trails can greatly increase the likelihood that small contractors will be willing to bid on those projects.

The Federal Highway Administration has provided guidelines to state DOTs to help them streamline the trail development process. Yet bureaucratic inertia has often prevented those guidelines from having any effect. To the extent a new commissioner can create incentives, trails projects can flourish. It is not a coincidence that in the past thirty years most state DOTs have been renamed from their earlier nomenclature as

“highway departments.” Transportation in the twenty-first century will necessarily include an expanded role for railroads as well as increased avenues for public transportation and alternative transportation like cycling and walking. As DOTs embrace their new functions, they will find ways to promote trails and still maintain our superhighways.

The use of railroad corridors is an unparalleled example of combining efficiency with good sense. Because most railroad corridors already contain numerous utility lines, sewer lines, and even flood plain controls, they are often not suitable for fractionation and reversion to landowners anyway. They were generally acquired with extensive public donations and consequently retain a semblance of public ownership. To the extent that utility companies will open their easements to recreational trail use, cities and landowners can trade future utility access rights in rail corridors. Moreover, shared utility use can often make a trail costless to the taxpayer because royalties can cover maintenance and security costs. A single fiber-optic cable in a trail shoulder can raise enough annual revenues to maintain the trail. To the extent that railroads, utilities, and municipalities can work together, we can probably reach the Rails-to-Trails Conservancy’s goal of having a dedicated trail within a mile of everyone’s front door.

And finally, these railbanking challenges need to be stopped. While the legal team filing these class action suits simply prints another complaint off the word processor and files it in a different federal district court each time it loses in another court, a decisive ruling that the railbanking act does not work a taking would halt these cases in their tracks. Doing so is a recognition of the railroad’s future property interests as well as the public’s, who have at least as much claim to the property rights of abandoned railroad corridors as landowners who purchased the land only recently with no reasonable expectation that the railroad would abandon.

IX. CONCLUSION

While the importance of recreational trails in the grand scheme of environmental regulation and land-use controls may not seem as pressing as other projects vying for limited tax dollars, the truth is that trails are the new venues for public recreation. Neighborhood parks have lost much of their earlier appeal because they are localized and confined, thus not allowing for changes in scenery, the flexibility to combine recreation

344. See Amon, supra note 176.
with shopping or commuting, or the capacity to meet changing modes of recreation and exercise. Trails can serve the needs of a wide diversity of users, from after-dinner strollers to long-distance marathon runners, cyclists, and inline skaters. Unlike parks that require special facilities like baseball diamonds, basketball courts, and playgrounds, a linear trail can meet the needs of hundreds of users simply by being long and conveniently located. With increased use of automobiles, cyclists and pedestrians cannot safely share most urban streets. For the outdoors adventure-seeker, wilderness trails provide some of the last remaining experiences of a rugged and long-lost American past. Trails link us to our future as well as our past. By preserving railroad corridors for future rail use, we provide a way of linking people that gets them out of their cars and into the public world.

Trails are a legal paradox, however, because to the extent courts view them as recreational facilities rather than transportation corridors, they can be defeated in Dolan-type situations. Yet to the extent they are viewed as transportation and not recreation, they are open to Hoepker criticisms that roads already cover transportation needs and mandated park space covers the recreational needs, and that trails are simply quality-of-life amenities that developers should not have to provide. At this point, while trails have been determined to meet the public use requirement for the exercise of eminent domain on the grounds that they are like parks and open spaces, that narrow analogue may prevent the use of exactions in business and single-residence development, as occurred in Dolan and Nollan. Moreover, if legal challenges to rail corridor conversions remain successful, the benefits of trails and future rail transportation needs will be sacrificed.

While I certainly agree with Justice Holmes that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change," state legislatures, under pressure from the property rights movement, have foreclosed even the possibility of paying to improve the public condition by denying the power of eminent domain in trails land acquisition. Yet because of their unique linear character, trails cannot feasibly be built if they can only be purchased from willing sellers, except in the case of rail corridor conversions where the willing seller is deemed to own the entire corridor. As Preseault reminds us, however, ownership of rail corridors is a highly contentious proposition.

It is ironic that when the railroads came through in the nineteenth cen-

tury, they were hailed as the harbingers of the future. They opened up land for homesteading, they provided markets for agricultural products, and they dramatically reduced travel time across this vast country. People were in such a hurry for the railroads that they courted new companies, heavily subsidized them, and promised unbounded rewards in land and business. Yet as the promises of railroad riches failed to materialize, Americans were mesmerized by a new technological innovation, the automobile. Yet after nearly a century of vast public expenditures on roads and highways, the automobile has now become one of our biggest environmental and cultural threats. Trails, however, offer a way to link the investment and history of past generations, with the demands for individual freedom and convenience of the present generation, and with the promises and commitments we owe to future generations. Converting a rail corridor to a trail for interim use while preserving it for future transportation needs is, as Judge Pratt put it, a "remarkably efficient and sensible way" to further both goals.  
