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DOES THE RAILS-TO-TRAILS ACT EFFECT A TAKING OF PROPERTY?*

By Richard A. Allen**

In 1983, Congress enacted legislation, commonly known as the Rails-to-Trails Act,[1] that has resulted in the creation of more than 11,000 miles of recreational trails throughout the United States.[2] These trails are enjoyed by millions of people, and they would not exist today but for that legislation.[3] Twenty years after its enactment, however, the cost of the legislation to the taxpayer is unknown, because a basic legal issue still has not been definitively resolved, although it is pending in many cases: whether the Rails-to-Trails Act effected a "taking" of property, and therefore, whether the United States must compensate the previous owners for the fair value of that property.

In 1990, the Supreme Court held that the Rails-to-Trails Act was constitutional, but it did not decide the takings question because, it held, if the Act does effect a taking, property owners may recover just compensation in suits against the United States under the Tucker Act.[4] The lower courts are divided on the takings question.[5] The Second Circuit held the Act does not effect a taking.[6] The Federal Circuit, in a plurality opinion, and a number of district courts have held that the Act can effect a taking in certain circumstances, depending on the claimant's property interests under state law.[7]

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[1] National Trails Systems Act Amendments, Pub. L. No. 98-11, § 208, 97 Stat. 42, 48 (1983). The Rails-to-Trails Act was enacted as part of this Act (codified as amended at 16 U.S.C. § 1247(d) (2004)).

[2] *Reviving Railbeds Which Were Converted to Nature Trails*, U.S. RAIL NEWS, May 23, 2001, at 81.

[3] *See* Rails-to-Trails Conservancy, Benefits of Trails, *at* http://www.railtrails.org/benefits/recreation/default.asp (last visited Sept. 7, 2004); Interview by Darren Smith with Steve Elkinton, Program Leader for the National Trails System, *at* http://usparks.about.com/library/weekly/aa060599.htm (last visited Sept. 12, 2004).

[4] Preseault v. I.C.C., 494 U.S. 1, 11 (1990) [hereinafter *Preseault I*].

[5] *See, e.g.*, *Preseault I*, 494 U.S. 1 (1990); Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) [hereinafter *Preseault II*]; Glosemeyer v. United States, 45 Fed. Cl. 771 (2000); Toews v. United States, 53 Fed. Cl. 58 (2002).

[6] Preseault v. I.C.C., 853 F.2d 145, 152 (2d Cir. 1988), *aff'd on other grounds*, 494 U.S. 1 (1990).

[7] *Preseault II*, 100 F.3d at 1552; *Glosemeyer*, 45 Fed. Cl. at 781; *Toews*, 53 Fed. Cl. at 63; Schmitt v. United States, No. IP-1852-Y/S, 2001 U.S. Dist. LEXIS 22935, at *29-*32 (S.D. Ind., Mar. 5, 2003); Schneider v. United States, No 8:99CV315, 2000 U.S. Dist. LEXIS, at *5-*13 (D. Neb. Aug. 29, 2003).

The takings question is a conceptually difficult one, because it is not easy to identify the property interests at stake and how various federal statutes over the years have affected those interests. For that reason, courts and commentators have had difficulty in finding their way through what the Federal Circuit aptly called a "legal morass,"[8] and in articulating a coherent analysis of the takings question.

It is the thesis of this paper that the Federal Circuit and the courts following its lead are wrong in holding that the Rails-to-Trail Act can sometimes affect a taking and are wrong that the takings issue turns on issues of state property law. Even in circumstances in which the claimant's state law property interests are most favorable to a takings claim, the Act does not effect a taking of those interests under the federal law of takings in view of the nature of the claimant's interests, the very substantial restrictions that federal law has placed on the property rights of such a claimant with respect to railroad rights-of-way since at least 1920 and the fairly modest change to that legal regime effected by the 1983 Act.

I. BACKGROUND

The Rails-to-Trails Act provides a means by which railroad rights-of-way that are no longer needed for railroad operations may be used as recreational trails for hikers and bikers pending possible future reactivation for rail use.[9] The Act does so by abolishing whatever rights adjacent landowners might have under state law to possess the rights-of-way upon the cessation of rail operations.[10] To analyze properly whether the abolition of such rights amounts to a taking of property for which the Constitution requires compensation, it is necessary first to understand (1) the nature of the property interests railroads have in their rights-of-way; (2) the pre-Rails-to-Trail Act federal law governing the rights of railroads to use and dispose of their rights-of-way; and (3) the changes in federal law effected by the Rails-To-Trails Act.

A. Property Interests in Railroad Rights-of-Way

Railroads' rights-of-way vary in size, but are typically 100 feet wide.[11] Historically, railroads in the United States have acquired their rights-of-way in one of four ways: by negotiated purchase, by grants from federal or state governments, by condemnation pursuant to state statutes granting eminent domain power to railroads and by prescription (*e.g.*, adverse possession).[12]

The kinds of interests railroads have acquired in their rights-of-way vary widely. At one end of the spectrum are rights-of-way acquired by the railroad in fee simple.[13] Rights-of-way in which railroads acquired fee simple interests present no takings issue when such rights-of-way

[8] *Preseault II*, 100 F.3d at 1538.
[9] Clifford J. Villa, *Cleaning Up at the Tracks: Superfund Meets Rails-to-Trails*, 25 HARV. ENVTL. L. REV. 481, 484 (2001).
[10] 16 U.S.C. § 1247(d) (2004).
[11] Salvatore Massa, *Surface Freight Transportation: Accounting for Subsidies in a "Free Market,"* 4 N.Y.U. J. LEGIS. & PUB. POL'Y 285, 289-90 (2000).
[12] Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 441 (2001).
[13] *See id*.

are dedicated to trail use under the Rails-To-Trail Act.[14] Because (as will be explained further below), the Act does not require railroads to dedicate rights-of-way to trail use under the Act and all such dedications are agreed to by the railroad, no one can claim that his property has been taken when a railroad agrees to dedicate its own fee simple property to trail use under the Act.

At the other end of the spectrum are cases in which the railroad did not acquire a fee interest in the right-of-way but acquired only a limited easement from the fee owner of the underlying property – that is, only acquired a right to use the right-of-way for railroad transportation purposes.[15] Rights-of-way in which railroads acquired only an easement limited to railroad transportation present the most difficult takings issue when they are dedicated to trail use under the Rails-To-Trails Act.[16]

Between the two ends of the spectrum fall other kinds of interests. An illustrative example is the right-of-way involved in *Chevy Chase Land Co. v. United States*.[17] In that case, the railroad acquired a right-of-way in 1911 for $4000 from the Chevy Chase Land Company pursuant to a deed which conveyed to the railroad "a free and perpetual right of way, one hundred (100) feet wide, over the land and premises hereinafter designated . . . ."[18] The Maryland Court of Appeals, in construing the deed, rejected the argument of the United States that the deed conveyed a fee simple interest in the right-of-way to the railroad, and the court accepted the argument of the land company that it conveyed only an easement – a right of passage – over the land company's property.[19] The court, however, rejected the land company's argument that it had conveyed an easement that only authorized *railroad* operations by the grantee and its heirs and assigns.[20] Because the deed contained no language limiting the use to which the right-of-way could be put, the court concluded that the easement broadly authorized use by the public for other transit purposes, including hiking and biking.[21]

In cases in which railroads acquired their rights-of-way by deed, as is almost always true when the acquisition is by negotiated purchase, the scope of the railroad's property interest will depend on the language of the deed, as in the *Chevy Chase Land Company* case.[22] Where the rights-of-way were acquired by land grant or by eminent domain, the scope of the interest acquired will depend on the terms of the grant or the authorizing statute.[23] Most state statutes by which railroads have acquired rights-of-way have been construed to grant the railroad only an easement limited to railroad transportation uses.[24]

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[14] *See id*.
[15] *See id*.
[16] *See id*.
[17] 733 A.2d 1055 (Md. 1999).
[18] *Id*. at 1065.
[19] *Id*. at 1059.
[20] *Id*. at 1073.
[21] *Id.* at 1073-80. Based on this interpretation of the railroad's property interest, the Federal Circuit found that dedication of the right-of-way to trail use under the Rails-To-Trail Act was within the scope of the railroad's property interest, and therefore resulted in no taking of any property interest of the land company. Chevy Chase Land Co. v. United States, 158 F.3d 574 (Fed. Cir. 2000), *cert. denied,* 531 U.S. 957 (2000).
[22] *Chevy Chase Land Co*., 733 A.2d at 1065.
[23] *See* Wright, *supra* note 13, at 423-29.
[24] *See, e.g.,* Lillich v. Lowery, 320 N.W.2d 463, 464 (Neb. 1982).

When rights-of-way are acquired by deed from private parties or pursuant to state grants or state eminent domain power, the scope of the railroad's property interest is a matter of state law, although there are federal regulatory statutes which govern the way the property may be used and disposed of.[25] When they are acquired by federal land grant or federal eminent domain authority, the scope of the interest is created and defined by federal law.[26]

In the situation where the railroad's interest in a right-of-way is only an easement for railroad purposes,[27] it seems to be universally recognized by all state and federal courts that the easement is of a very special kind. It is not simply a non-exclusive right of passage, as an individual might have across a neighbor's property to access his own. A railroad easement grants the railroad exclusive use and possession of the right-of-way, with the right to exclude all others from the property, including the grantor.[28] Furthermore, it grants the railroad permanent and perpetual use of the right-of-way for railroad operations, without limiting such things as frequency, amount, or type of cargo.[29] As the Supreme Court said in *Western Union Telegraph v. Pennsylvania Railroad*:[30]

> A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co*. . . .We there said that if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property."[31]

As a matter of state property law, railroad easements, like other easements, terminate when the holder of the easement, sometimes referred to as "the servient owner," terminates the use for which the easement was granted and to which it was limited.[32] The term most often used for the termination of use that results in the extinction of the easement is "abandonment" of the easement.[33] It is generally held that mere cessation of use of the easement for some temporary period of time will not, without more, effect an abandonment of the easement.[34] Rather, there must be evidence that the holder of the easement intends *permanently* to cease using the easement for the purpose to which it was limited.[35] Courts and the Surface Transportation Board

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[25] *See* Villa, *supra* note 10, at 492-93.

[26] *See* Mauler v. Bayfield County, 309 F.3d 997 (7th Cir. 2002) (discussing the pertinent federal statutes and holds that the United States, not adjacent landowners, owns all reversionary rights with respect to federally-granted rights-of-way that are subsequently abandoned).

[27] For ease of reference, easements that are limited to railroad operations only will be referred to hereafter as "railroad easements", although, as the *Chevy Chase Land Co.* case shows, there are also easements that permit railroad operations but are not limited to such operations. *Chevy Chase Land Co*., 733 A.2d at 1076.

[28] *See* W. Union Tel. v. Pennsylvania R.R. Co., 195 U.S. 540, 570 (1904).

[29] *Id*.

[30] 195 U.S. 540 (1904).

[31] *Id*. at 570 (internal citations omitted).

[32] *See, e.g., Lillich*, 320 N.W.2d at 465.

[33] RESTATEMENT OF PROP. § 504 (1944).

[34] Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 434-35 (2000).

[35] *See, e.g., Chevy Chase Land Co.,* 733 A.2d at 1082*;* Illinois Cent. Gulf R.R. Co.—Abandonment—DeWitt & Piatt Counties, IL, 5 I.C.C.2d 1054, 1061 (1988). To reduce uncertainties about whether abandonment of a railroad

have held that railroads have not abandoned their railroad easements even in cases where there have been no rail operations for a number of years and where the railroads have removed the rail, ties and other track structures.[36]

When a railroad easement has been abandoned, the easement terminates and the owner of the underlying property, sometimes referred to as the "dominant owner," becomes entitled to full and exclusive use of the property.[37] Plaintiffs in takings cases contend that the Rails-to-Trails Act operates to prevent their right to full and exclusive use of former railroad rights-of-way in situations which would otherwise amount to abandonment of the right-of-way under state law and operates instead to require that the right-of-way be used by the general public for recreational purposes.[38]

To determine whether those consequences of the Rails-Trail-Act amount to a "taking" of the plaintiff's property requires a consideration of the pre-Act legal constraints on the use and disposition of railroad rights-of way. That is so because the Supreme Court has held that whether or not a challenged governmental action amounts to a taking rather than a permissible regulation will depend on a number of factors, including "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[39] And, in determining a landowner's property rights and whether they have been "taken" by governmental action, courts must consider "existing rules or understandings that stem from an independent source such as state law" and other "relevant background principles."[40] The cases indicate that the "background principles" that define the scope of a claimant's property interests include federal and well as state law.[41]

As we shall see, since at least 1920, federal law has very substantially limited the residual rights of landowners with respect to railroad rights-of-way. The real issue in the takings cases is whether the Rails-To-Trails Act in 1983 added enough incremental limitations on those rights to amount to a taking.

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easement has occurred, the Surface Transportation Board in 1996 promulgated a rule which requires railroads, within one year of obtaining permission to abandon a rail line, to notify the Board in writing when it consummates the abandonment. If no notice is filed within that year, the authority to abandon lapses, and the railroad must apply anew for such authority when it wishes to exercise it. 49 C.F.R. § 1152.29(e)(2) (2004).

[36] *See, e.g.,* Buffalo Township v. Jones*,* 813 A.2d 659, 665-66 (Pa. 2002), *cert. denied*, 124 S.Ct. 134 (2003); Birt v. Surface Transp. Bd., 90 F.3d 580, 586 (D.C. Cir. 1996)*;* Wisconsin Cent. Ltd.—Abandonment Exemption— Brown County, WI, STB Docket No. AB-303 (Sub-No. 13X), 2000 WL 195115 (Feb. 17, 2000).

[37] *See Birt*, 90 F.3d at 581-82. Courts frequently refer to such situations as a "reversion" of the property to the owner, but it seems more accurate to say that the owner becomes entitled to full and exclusive possession of the property.

[38] *See, e.g., Preseault I*, 494 U.S. at 9.

[39] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980). *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[40] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992).

[41] *See*, *e.g*., Scranton v. Wheeler, 179 U.S. 141 (1900) (cited with approval in *Lucas*, 505 U.S. at 1029); M & J Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 808 (1995).

B. Federal Law Governing the Use and Abandonment of Railroad Rights of Way Before the Rails-to-Trail Act

Substantial federal involvement in and regulation of railroad rights of way goes back to the dawn of railroads in the 1830s.[42] Much of the nation's western railroads were created by land grants by the federal government in the 1860s and 1870s.[43]

For present purposes, the most significant federal legislation was the Transportation Act of 1920.[44] Before 1920, railroads were generally free to terminate operations on particular lines and to dismantle those lines.[45] Before 1920, if a railroad holding only an easement in its right of way took actions amounting to an "abandonment" of the easement as a matter of state law, the easement would generally terminate, and the owner of the underlying fee interest could evict the railroad and regain exclusive possession of the property.[46]

The Transportation Act of 1920 radically changed all that. That Act provided that a railroad could discontinue rail service and/or abandon its rail lines only if the Interstate Commerce Commission ("ICC") – now the Surface Transportation Board ("STB")[47] – found that the public convenience and necessity permitted such discontinuance or abandonment. [48] The Act further provided that the ICC could "attach to the issuance of the certificate [authorizing abandonment] such . . . conditions as in its judgment the public convenience and necessity may require."[49]

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[42] *See* Act of July 7, 1838, ch. 172, 5 Stat. 271; Act of Mar. 3, 1853, ch. 146, 10 Stat. 255; Act of June 8, 1872, ch. 335, 17 Stat. 283 (declaring railroads within the United States to be post routes or roads).

[43] Massa, *supra* note 12, at 289-91.

[44] Transportation Act of 1920, ch. 91, 41 Stat. 456.

[45] Wright & Hester, *supra* note 35, at 434-35.

[46] *Id*.

[47] Congress abolished the ICC effective January 1, 1996 and replaced it with the STB. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995). The STB exercises all the powers and functions of the former ICC that are relevant to the issues in this case. *Id*. at § 10501.

[48] 49 U.S.C. § 10903(d) (2004). As the Supreme Court explained, there is a well recognized distinction between "abandonment of a rail line and the "discontinuance of service. *Preseault I*, 494 U.S. at 5-6, n.3. If the agency authorizes abandonment and the railroad consummates the abandonment, the federal agency's jurisdiction over the line ends and the railroad may dispose of the property any way it wishes or is permitted to by state law. *Id*. If the agency only authorizes discontinuance of service, however, that authority, as the Court explained, "allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future." *Id*.

[49] *See* Transportation Act of 1920, ch. 91, § 20, 41 Stat. 456. ICC and STB orders authorizing railroads to abandon their lines or discontinue service are permissive, not mandatory. The railroad obtaining such authority is not required to exercise it, and to effect an abandonment, it must do something in addition to obtaining the order authorizing abandonment to evince its intent permanently to terminate rail operations and thus to consummate the abandonment. This situation has given rise to a number of cases where railroads have obtained abandonment authority from the ICC and STB but it is uncertain, and is disputed, whether the railroad has consummated the authorized abandonment. *See supra* note 36. The STB has attempted to reduce that uncertainty by promulgating a rule requiring railroads to file with the STB a written notice when they have consummated the abandonment within one year of obtaining the authority, and, if they do not, the abandonment authority automatically lapses. *See supra* note 37; 49 C.F.R. § 1152.29(e)(2).

Since 1920, state law has played no role in determining when and whether a railroad can discontinue service or abandon lines or when and whether a railroad can be required to do so.[50] State law, including the rights of persons under contracts and deeds, has been completely preempted by federal law.[51] For example, if events occur that, as a matter of state law, would extinguish a railroad's easement and entitle the fee owner to reoccupy the property, or would give someone a contractual right to demand that the railroad cease operations, those rights under state law could not be enforced if the ICC, now the STB, has not issued a certificate of discontinuance or abandonment.[52]

Nor, since 1920, have people been able to enforce rights under state law that would conflict with conditions imposed by the ICC or STB in the certificate of abandonment.[53] The federal agency's conditioning authority under the 1920 Transportation Act has been extraordinarily broad and has always included the power to require that the right of way be dedicated to various public uses, both rail and non-rail, following the abandonment. For example, as early as 1927, the ICC conditioned its issuance of an abandonment certificate on the requirement that the railroad had to sell the line or any portion of it "to any person or persons desiring to purchase the same for continued operation and offering to pay therefor not less than its fair net salvage value."[54] In *Norfolk & Western Railway Co. Abandonment,*[55] the ICC conditioned an abandonment certificate on the requirement that the railroad would donate a portion of the right of way to a county, which wanted to use it to improve a highway.[56]

Particularly pertinent to the takings question presented by the Rails-to-Trail Act is the case of *Reed v. Meserve.*[57] In that case, the ICC authorized abandonment of a line used for interstate freight operations on condition that it be resold "to any responsible person for the purpose of continued operation," and a federal district court enforced the condition by ordering 8.5 miles of the line sold to a party who wanted to use it to operate an intrastate tourist train.[58] The First Circuit rejected the abandoning railroad's claim that the condition exceeded the ICC's

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[50] *See, e.g.,* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321 (1981); Colorado v. United States, 271 U.S. 153, 165-66 (1926); Nat'l Wildlife Fed'n v. I.C.C., 850 F.2d 694, 703 (D.C. Cir. 1988); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 163 (5th Cir. 1966).

[51] *See*, *e.g.*, *Colorado*, 271 U.S. at 165-66.

[52] *See, e.g.,* Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146-47 (1946) (explaining that person cannot enforce contractual right to terminate a railroad's operations if ICC has not authorized discontinuance); Louisiana & Arkansas Ry. Co. v. Bickham, 602 F. Supp. 383, 384 (M.D. La.), *aff'd*, 775 F.2d 300 (5th Cir. 1985) (explaining that state law cannot cause a railroad right of way to revert in the absence of a ICC certificate unconditionally granting abandonment authority). Similarly, if a railroad, without ICC authority, took actions that would amount to an abandonment of its line under state law (for example, ceased service and removed its track), its action would violate federal law, and it could be required by the ICC to restore the track and resume service, regardless of whatever reversionary rights the railroad's action might have otherwise triggered under state law. Without ICC or STB authority, the occurrence of an "abandonment" under state law simply has no legal effect. *See* Wright, *supra* note 13, at 434-35.

[53] *See* Rutland Ry. – Abandonment of Entire Line, 317 I.C.C. 393, 424-25 (1962).

[54] *See* Abandonment of Part of Branch By Pennsylvania Railroad Company, 131 I.C.C. 547, 556 (1927). *See also* Rutland Ry.-Abandonment of Entire Line, 317 I.C.C. at 425.

[55] 193 I.C.C. 363 (1933).

[56] *Id*. at 368.

[57] 487 F.2d 646 (1st Cir. 1973).

[58] *Id*. at 646-47.

authority and upheld the condition specifically on the ground that it served to preserve priceless rights-of-way for future interstate rail use.[59] The court said:

> To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.[60]

The Railroad Revitalization and Regulatory Reform Act of 1976[61] codified the ICC's practice of imposing conditions on abandonment certificates for public purposes and required the agency to consider imposing such conditions in every abandonment case.[62] Section 10905 specifically directs the agency, before authorizing abandonment or discontinuance, to determine "whether the rail properties . . . are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation."[63] If it so finds, section 10905 further provides that the "properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board."[64]

As will now be discussed, the 1983 Rails-to-Trail Act did not enlarge the broad pre-existing power of the ICC to condition the post-abandonment disposition of railroad rights-of-way. That Act merely directed the ICC, and now the STB, to exercise that power in certain ways in certain circumstances.

C. The Rails-to-Trail Act

Congress enacted the Rails-to-Trail Act in 1983[65] in a further effort to preserve railroad corridors for possible future rail use. As the Supreme Court noted in *Preseault I*, experts had predicted that some 3000 miles of railroad rights of way would be abandoned annually through the year 2000.[66] These are transportation resources that would be extraordinarily difficult to reassemble if they are ever needed for railroad operations in the future. To help preserve these transportation resources, section 8(d) of the Act,[67] established a mechanism, often referred to as "railbanking" whereby railroads wishing to cease operations on particular lines would be encouraged, but not required, to convey those lines to States, local governments, or qualified private organizations, which would manage and operate the rights of way as recreational trails in

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[59] *Id*. at 646-50.
[60] *Id*. at 649-50.
[61] Railroad Revitalization and Regulatory Reform Act, Pub. L. 94-210, § 809(c), 90 Stat. 146 (1976).
[62] 49 U.S.C. § 10905 (2003).
[63] *Id*.
[64] *Id*.
[65] National Trails Systems Act Amendments, Pub. L. 98-11, 97 Stat. 42 (1983) (codified as amended at 16 U.S.C. § 1247(d)).
[66] *Preseault I*, 494 U.S. at 5.
[67] National Trails Systems Act Amendments § 8(d).

the interim, pending "future reactivation of rail service."[68] Under the statute as implemented by ICC and STB regulations, if a railroad seeking abandonment authorization notifies the agency of its willingness to negotiate an agreement with a State, political subdivision, or qualified private organization for railbanking and interim trail use, the agency will issue a Certificate of Interim Trail Use ("CITU").[69] If no agreement is reached within 180 days after the trail use condition is issued, the CITU provides that the railroad may fully abandon the line.[70] If an agreement is reached, however, the CITU provides that the right of way will be transferred to the trail operator for interim trail use, "subject to future restoration of rail service."[71]

Under the Rails-to-Trails Act, the STB has no discretion. If the railroad wishes to transfer the right-of-way to a qualified organization for railbanking and interim trail use and the organization is willing to "assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use. . . ."[72] then the agency must permit the transfer for such use[73] and "shall not permit abandonment or discontinuance inconsistent or disruptive of such use."[74] Moreover, under the Rails-to-Trail Act and the implementing regulations, persons claiming an ownership interest in the land underlying the right-of-way have no say in whether the railroad and a qualified trail operator enter into an interim trail use agreement.[75] Furthermore, and this is the provision that gives rise to takings claims, the statute provides that "if such interim use [as a trail] 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."[76] In other words, even if cessation of rail operations and use of the right-of-way as a recreational trail would otherwise extinguish the railroad's easement as a matter of state law, this federal law provision overrides any such state law and any rights the owner of the underlying fee might have to exclusive use and possession of the property.[77]

Although the Rails-to-Trail Act removed the agency's discretion in certain circumstances, it did not enlarge the broad and preemptive statutory powers that the Transportation Act of 1920 conferred on the agency to authorize or decline to authorize

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[68] 16 U.S.C. § 1247(d) (2004).

[69] 49 C.F.R. § 1152.29(b)(1)(ii) (2003). The Federal Circuit has ruled that, for purposes of the six-year statute of limitations for filing takings claims against the United States under 28 U.S.C. §2501, a takings claim accrues upon the STB's issuance of a CITU. Caldwell v. United States, 391 F.3d 1226, 1235 (Fed. Cir. 2004)

[70] 49 C.F.R. § 1152.29(c)(1) (2003).

[71] 49 C.F.R. § 1152.29(c)(2).

[72] 16 U.S.C. § 1247(d) (2004).

[73] *See* Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1150-52 (D.C. Cir. 2001) (agreeing with the 8th Circuit in *Goos v. I.C.C.* that the Board's role in issuing a CITU is ministerial); Goos v. I.C.C., 911 F.2d 1283, 1285 (8th Cir. 1990) (agreeing with the ICC interpretation of the statute that the ICC has little to no discretion to refuse a voluntarily negotiated conversion).

[74] 16 U.S.C. § 1247(d) (2004).

[75] *Citizens Against Rails-to-Trails*, 267 F.3d at 1149.

[76] 16 U.S.C. § 1247(d) (2004).

[77] Initially, there was some question whether the ICC could require a railroad seeking authority to abandon a right of way to transfer it to a qualified organization for railbanking and interim trail use against the railroad's will. Early on, however, the ICC concluded that the Rails-to-Trails Act gave it no such authority. The ICC said it would not construe the statute as authorizing it, in effect, to take the railroad's property in the absence of explicit statutory language to that effect, and the D.C. Circuit affirmed that construction. Rail Abandonments – Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 593-97 (1986), *aff'd in part, Nat'l Wildlife Fed'n*, 850 F.2d at 699-702 (D.C. Cir. 1988).

abandonments of rail lines and discontinuance of rail service and to impose "such terms and conditions as in its judgment the public convenience and necessity may require."[78] As discussed earlier, the ICC had frequently imposed conditions on abandonment certificates for the purpose of preserving transportation corridors for future rail (and in some cases highway) use, and its authority to do so was consistently upheld by the courts.[79] If the ICC declined to issue a certificate of discontinuance or abandonment, the line remained subject to ICC jurisdiction and parties could not insist that rights of way revert to them on the ground that abandonment had occurred as a matter of state law.[80]

The only effect of the 1983 Rails-to-Trails Act was to direct the ICC not to authorize abandonment of a right of way in any case in which the railroad is willing to transfer the right of way to a qualified entity willing to manage it as a trail until it is reactivated for rail operations.[81] Importantly, the Trails Act does not require the railroad to transfer the right of way for that purpose, nor does it impose any new obligations or restrictions on the railroads.[82] After 1983, just as before, it has remained entirely the railroad's choice and decision whether merely to discontinue rail operations "for an indefinite period while preserving the rail corridor for possible reactivation of service in the future"[83] or fully to abandon the right of way and thereby permit state law rights of reversion to take effect.[84] Before 1983, as well as after, landowners could not terminate easements or compel reversion of the property until the railroad had made that decision and the federal agency had approved it.[85]

II. THE PERTINENT TAKINGS JURISPRUDENCE

The Fifth Amendment to the Constitution provides: "[N]or shall private property be taken for public use, without just compensation."[86] The Supreme Court, however, has long held that not every law or other governmental action that restricts a person's use of his property constitutes a "taking" of the property.[87] Much of the complex regulatory regime of modern government involves restrictions on the use of property, and government could hardly function if every such regulation were treated as a taking for which the government had to pay the property owner. In *Pennsylvania Coal Co. v. Mahon,*[88] the Court laid down the "general rule . . . that

[78] Transportation Act of 1920, ch. 91, § 20, 41 Stat. 456.
[79] *See Reed*, 487 F.2d at 649-50.
[80] *Bickham*, 602 F. Supp. at 384.
[81] 16 U.S.C. § 1247(d) (2004).
[82] *Id*.
[83] *Preseault I*, 494 U.S. at 6.
[84] Rail Abandonments – Use of Rights-of-Way As Trails, 5 I.C.C.2d at 371. As the ICC noted:

> A railroad's decision to enter into a Trails Act agreement is similar to a carrier's decision to seek discontinuance rather than full abandonment authority for a particular line. Discontinuance authority, like rail banking, allows a railroad to cease operating a line for an indefinite time while preserving the rail corridor for the possible reactivation of rail service in the future.

Id.
[85] *See* cases cited *supra* notes 53 & 85.
[86] U.S. CONST. amend. V.
[87] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1986).
[88] 260 U.S. 393 (1922).

while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[89]

The Court has consistently declined to develop any fixed formula for determining when regulation goes "too far" and becomes a taking, but it has held that many quite restrictive regulations have not gone too far and are not takings. These regulations include most zoning laws,[90] laws permanently prohibiting any building on parts of property,[91] laws prohibiting owners from altering the exteriors of buildings deemed to be historical landmarks,[92] laws prohibiting any development of property for substantial periods of time,[93] and, of particular relevance to takings claims involving the Rails-to-Trails Act, laws requiring property owners to open their property to unwanted activities or persons.[94]

Although it has eschewed any fixed formula, the Supreme Court has identified a number of factors that it deems relevant to determining whether a regulation has gone too far and has become a taking. In the *Penn Central Transportation Co. v. New York City*[95] case, the Court enumerated several as having "particular significance:"[96]

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action. 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.[97]

At least five of the current justices are of the view that the nature of the claimant's asserted property rights and the existing legal restrictions on those rights when the claimant acquired his property are also relevant in determining whether a regulation has gone "too far" and becomes a taking.[98] The Fifth Amendment requires compensation only for takings of "private property."[99] Private property, however, is no more nor less that the bundle of legal rights a person has with respect to a parcel of land or some other tangible or intangible thing.[100] If a person acquires a parcel of land that is subject to an existing legal restriction, for example a public easement or a restriction on development, a subsequent regulation that does not increase

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[89] *Id*. at 415.
[90] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-89 (1926) (prohibiting industrial use of property).
[91] *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 621-22, 654 (2001); Gorieb v. Fox, 274 U.S. 603, 608 (1927).
[92] *See, e.g.*, *Penn Central Transp. Co.*, 438 U.S. at 116-22, 129.
[93] *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*,* 535 U.S. 302, 302, 306, 321 (2002).
[94] *PruneYard Shopping Ctr.*, 447 U.S. at 83; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964).
[95] 438 U.S. 104 (1978).
[96] *Penn Central*, 438 U.S. at 124.
[97] *Id.* S*ee also PruneYard Shopping Ctr.*, 447 U.S. at 83 (addressing some of the factors set forth in *Penn Central*); *Ruckelshaus*, 467 U.S. at 1005 (recognizing the factors set forth in *Penn Central*).
[98] *See infra* note 105.
[99] U.S. CONST. amend. V.
[100] *See* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1011 (2003).

the restriction, or does so only modestly, is not likely to be held to have taken that person's property even if the regulation would be found a taking in the absence of the preexisting restriction.[101] Thus, in determining a landowner's property rights and whether they have been "taken" by governmental action, the Supreme Court has said that courts must consider "existing rules or understandings that stem from an independent source such as state law" and other "relevant background principles."[102] The "existing rules" and "background principles" that define the scope of a claimant's property interests include federal and well as state law,[103] and the ones that are relevant are the ones in effect when the claimant purchased his property.[104]

III. APPLICATIONS OF TAKINGS JURISPRUDENCE TO THE RAILS-TO-TRAILS ACT

How should these principles apply in the situation most favorable to a person claiming that the Rails-to-Trail Act has effected a taking of his property – that is, where the claimant (or more typically, his predecessor in interest) granted only an easement over the right-of-way that was specifically limited to railroad operations and where the railroad takes actions that arguably amount to an abandonment of the easement as a matter of state law? In this writer's view, they strongly suggest that the Act does not effect a taking. The question is a difficult one to grasp conceptually because it is not easy to fit the challenged governmental action, prohibiting "abandonment" of the right-of-way and the claimant's property interests, a right to regain possession of property upon the occurrence of future events that the grantor of the easement had no basis for expecting would ever occur into the concepts employed and applied in the Supreme Court taking cases.[105]

The analysis is best begun by identifying the claimant's best arguments in favor of a taking. The main argument runs as follows: The claimant has a right under state law to exercise full possession and ownership of the right-of-way when the railroad takes actions amounting to an abandonment of its easement – specifically, actions evidencing its intention permanently to

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[101] *Lucas*, 505 U.S. at 1004.

[102] *Id*. at 1030 (quoting Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972)).

[103] *See, e.g.*, *Scranton*, 179 U.S. at 163; *M & J Coal Co.*, 47 F.3d at 1154.

[104] In *Palazzolo*, the Court's opinions addressed, but did not clearly resolve the question whether a claimant who acquired property *after* the governmental action alleged to effect a taking, and who had at least constructive notice of the action when he acquired the property, could assert that the action took his property. *See Palazzolo*, 533 U.S. at 626-27. All justices appeared to endorse the notion in *Lucas* that the claimant's property interests are defined by "background principles" of law. *Id*. at 629. Four justices joining Justice Kennedy's opinion for the Court seemed to believe that such background principles would normally not include the challenged action, and that if the challenged action was a taking, the claimant could claim compensation even if he acquired the property after the challenged action occurred (and, perhaps, acquired it for much less than its market price before the challenged action). *Id*. at 626-30. Five justices, however, opined that the timing of the claimant's acquisition would be relevant, though not dispositive, in determining whether the challenged action interfered sufficiently with "investment backed expectations" to amount to a regulatory taking under the *Penn Central* factors. *Id.* at 632-36 (O'Connor, J., concurring), 637-39 (Stevens, J., concurring and dissenting), 654 n.3 (Ginsburg, J., dissenting); 655 (Breyer, J., dissenting). *See also* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (takings claimants must "demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.")

[105] *See PruneYard Shopping Ctr.*, 447 U.S. at 83. *See also Ruckelshaus*, 467 U.S. at 1005; *Penn Central*, 438 U.S. at 123-25.

cease using the right-of-way for railroad purposes.[106] In the typical Rails-to-Trails Act case, the railroad has done just that, by applying to the ICC, now the STB, for full abandonment authority and then by transferring the right-of-way to an entity that plans to use it for non-rail purposes.[107] Although the Rails-to-Trails Act *asserts* that abandonment may not occur because the purpose of the transfer is to preserve the right-of-way for possible future rail use, in almost all cases the railroad has no present intention of resuming such service, and there is no reason to believe that rail operations will resume over the right-of-way in the foreseeable future.[108] When all events necessary to activate the claimant's state law right to possession and ownership of the right-of-way have occurred, the federal government cannot prevent and indefinitely forestall that activation merely by *declaring* that those events have not occurred;[109] at least it may not do so without effecting a "taking" of the claimant's property and paying just compensation for it.[110] This argument would lead to the conclusion that the government has taken the right-of-way from the claimant when a transfer for trail use occurs and must pay the claimant the full fair market value of that right-of-way.

A secondary argument for the claimant runs as follows: Even if the federal government could validly prevent the abandonment of the easement without effect a taking of it, the Rails-to-Trail Act requires that the right-of-way be used for purposes other than those for which the claimant or his predecessor granted the easement to the railroad, such as hiking and biking by the public.[111] Accordingly, the government has at least taken an additional easement from the claimant for which it must pay.[112] This argument would lead to the conclusion that the government must pay the claimant not the full market value of the right-of-way but only the cost of the incremental burden, if any, that the additional easement imposes on the claimant over and above the burden imposed by its use for railroad operations.[113]

These arguments can be evaluated in two ways. One way, which reflects the Supreme Court's current approach to regulatory takings questions, calls for "essentially ad hoc, factual

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[106] *See, e.g., Lillich*, 320 N.W.2d at 464 (citing Roberts v. Sioux City & Pac. R.R. Co., 102 N.W. 60, 65 (1905).
[107] *Chevy Chase Land Co.*, 733 A.2d at 1060.
[108] Although there may be no reason to expect that rail service will be reactivated in most cases, the Supreme Court in *Preseault I* rejected the landowners' claim that the stated statutory purpose to preserve rail corridors for the future was merely a sham and a pretext for taking private property for public recreation. *Preseault I*, 494 U.S. at 17-19. Moreover, in at least five cases, rail service has been reactived over rights-of-way that had been converted to trails under the Rails-to-Trails Act. *See* Norfolk & W. Ry. Co. — Abandonment Between St. Marys & Minister in Auglaize County, Ohio, 9 I.C.C.2d 1015 (1993); Missouri Pac. R.R., Co. — Abandonment Exemption — in St. Louis County, Missouri, No. AB-3 (Sub-No. 98X), 1997 STB LEXIS 2969 (Apr. 18, 1997); Iowa Power, Inc. — Constr. Exemption— Council Bluffs, Iowa, 8 I.C.C.2d 858 (1990); Georgia Great S. Div., South Carolina Cent. R.R. Co. – Abandonment & Discontinuance Exemption — Between Albany & Dawson, in Terrell, Lee, & Dougherty Counties, Georgia, No. AB-389 (Sub-No. 1X), 2003 STB LEXIS 274 (May 9, 2003); BG & CM R.R. – Exemption From 49 U.S.C. Subtitle IV, Finance Docket No. 34399, 2003 STB LEXIS 652 (Oct. 17, 2003).
[109] *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("[the government], by *ipse dixit*, may not transform private property into public property without compensation . . . .").
[110] This argument seems to reflect the views expressed by Justice O'Connor, joined by Justices Kennedy and Scalia, in *Preseault I*. *Preseault I*, 494 U.S. at 20-25 (O'Connor, J., concurring).
[111] 16 U.S.C. § 1247(d) (2004).
[112] U.S. CONST. amend. V.
[113] This conclusion is based on the principle, recently reaffirmed by the Court, that "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." Brown v. Legal Found. of Washington, 538 U.S. 216, 235-36 (2003).

inquiries" into such matters as the nature of the governmental action, the governmental interests at stake and the impact of the governmental actions on the reasonable investment-backed expectations of the claimant.[114] Another way is a more categorical approach, which attempts to decide whether the governmental action in issue is by its nature a "taking" of property.[115] Although most of the analysis that follows employs the ad hoc inquiry favored by the Court, a preliminary consideration of the question from a categorical perspective may be helpful in framing the issues.

A. A Categorical View of the Question

In the situation most favorable to a takings claim, the Rails-to-Trails Act prevents the activation of the claimant's right to possession and full ownership by providing that, if a railroad is willing to transfer of the right-of-way to a qualified transferee for interim trail use subject to future restoration of rail service, the STB shall not permit "abandonment" of the right-of-way and by decreeing that such interim trail use shall not be deemed an "abandonment" of the right-of-way for purposes of state law or any other law.[116] In effect, in those circumstances, what the statute is doing is prohibiting the agency from permitting the railroad to "abandon" the right of way.[117]

Looking at the matter categorically, it is difficult to see how a federal law prohibiting a railroad from taking actions that would amount to an "abandonment" under state law, thereby preventing the activation of the claimant's right to possession, could plausibly be regarding as a "taking" of the claimant's rights. To use a simple illustration, if A granted B a perpetual lease of A's property so long as B did not use the premises to sell narcotics, no one could plausibly contend that a subsequently enacted federal law prohibiting anyone from selling narcotics would amount to a "taking" of A's potential right to regain possession of his property.

Abandonment was initially a state law concept, and it generally meant, in the railroad context, acts by a railroad signifying its intention permanently to cease rail operations over a particular line.[118] But federal law adopted the concept when, in the Transportation Act of 1920, it prohibited railroads from effecting an abandonment of their rights-of-way in a large category of circumstances, namely, in any case where the ICC and STB have not found that abandonment was in the public interest and therefore have not authorized such abandonment. [119] Where the ICC and STB have not authorized abandonment the railroad retains a federal common carrier obligation to provide rail service to shippers on reasonable demand;[120] and even where no

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[114] *Penn Central*, 438 U.S. at 124.
[115] *See* i*d*. at 123.
[116] 16 U.S.C. § 1247(d) (2004).
[117] The ICC made this clear in two cases in which it authorized the reactivation of rail service over a line previously transferred to a trail user for interim trail use under the Rails-to-Trails Act. In those cases, the ICC held that the transfer of the right-of-way to a qualified trail user under the Act does not terminate the transferring railroad's obligation to preserve the right-of-way for possible future rail use. Norfolk & W. Ry. Co. — Abandonment Between St. Marys & Minister in Auglaize County, Ohio, 9 I.C.C.2d at 1018; Iowa Power, Inc. — Constr. Exemption — Council Bluffs, Iowa, 8 I.C.C.2d at 866.
[118] 49 C.F.R. § 1152.29(e)(2) (2004).
[119] Transportation Act of 1920, ch. 91 § 18, 41 Stat. 456.
[120] This obligation is not frequently enforced by the agency through the issuance of orders requiring the railroad to provide the service and the award of damages to shippers from railroads' breach of the obligation. *See, e.g.*, GS

shipper is requesting service and the line is not being used, the railroad's obligation, absent abandonment authority from the agency, is to take no action, such as selling all or part of the right of way, that would make it impossible for it to provide service when it is demanded.[121] Since 1920, it has been within the statutory power of the agency to deny abandonment for the reason that, even though there is no present demand for service, there is a sufficient public interest in potential *future* use of the line that the railroad should maintain the integrity of the right-of-way and not do anything that would make future rail use of the line impossible.[122] This is essentially what the agency has done when it has exercised its power under the Transportation Act of 1920 to authorize only discontinuance of service but not full abandonment of a line.

To this writer's knowledge, no court or agency decision has ever suggested that these long-established restrictions on a railroad's right to abandon its rights-of-way might constitute a taking of a landowner's state law right to repossess the right-of-way in the event of full abandonment.[123] Nor is this surprising. There is no question that Congress' constitutional power to regulate railroads includes the power to require them to provide reasonable service and to maintain the integrity of their lines, even when they might prefer to abandon them.[124] The mere fact that these mandated duties may preclude a state of affairs that would permit a landowner to reclaim possession should not convert the federal mandate into a taking of the landowner's property.[125]

Nothing in the Rails-to-Trails Act of 1983 warrants a different analysis or conclusion. The Rails-to-Trails Act merely reflects a direct *congressional* prohibition of abandonment in certain circumstances, namely, where the railroad is willing to transfer the right-of-way to a qualified transferee for interim trail use subject to the future restoration of rail service.[126] The fact that Congress made the determination that the public interest warrants the preservation of

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Roofing Prods. Co. v. STB, 262 F.3d 767 (8th Cir. 2001); Louisiana Railcar, Inc. v. Missouri Pac. R.R. Co., 5 I.C.C.2d 542 (1989).

[121] *See* Transportation Act of 1920, ch. 91 § 21, 41 Stat. 456.

[122] *Id*.

[123] Justice O'Connor's concurring opinion in *Preseault I* could be read to suggest that the ICC's general power to deny abandonment and thereby delay property owners' enjoyment of their reversionary rights might amount to a taking of that property, although the focus of her opinion was on the exercise of that power under the Rails-to-Trails Act in connection with authorizing an interim trail use agreement. *Preseault I*, 494 U.S. at 20-25 (O'Connor, J., concurring).

[124] *See, e.g., Preseault I*, 494 U.S. at 17-19 (holding that Congress clearly had the constitutional power to enact the Rails-to-Trail Act).

[125] It is true that the federal government cannot circumvent its obligations under the Takings Clause by mere *ipse dixit*, that is, merely by declaring that circumstances that would activate state property rights have not taken place. *See Webb's Fabulous Pharmacies, Inc*., 449 U.S. at 164; *cf. Preseault I*, 494 U.S. at 22-23 (O'Connor, J., concurring). But what the Transportation Act of 1920 and the Rails-to-Trails Act did was not merely to *declare* the absence of abandonment in circumstances that would otherwise amount to abandonment; rather, those statutes have forbidden the railroad from taking *actions* (for example, selling the right-of-way to housing developers) that would preclude future use of the right-of-way for railroad purposes. *See, e.g.,* Iowa Power, Inc. — Constr. Exemption — Council Bluffs, Iowa, 8 I.C.C.2d at 866 ("When a railroad enters into a Trails Act arrangement, the Commission retains jurisdiction (that it would have otherwise lost) over the right-of-way and the railroad forgoes the ability to dispose of the property in any other way . . . . [and] risks the possibility that it will not be allowed later to abandon the line . . . ."). A statute that prohibits certain actions which, if taken, might trigger someone else's rights to property is very different from one that merely declares that the rights do not exist or that the property has not been taken.

[126] 16 U.S.C. § 1247(d) (2004).

rail corridors in all such situations does not make its mandate prohibiting abandonment any more of a taking than the mandates imposed by the agency on a case-by-case under the authority of the Transportation Act of 1920.

In sum, a strong argument can be made that the Rails-to-Trails Act does not effect a taking by the very nature of the governmental action. [127] As will be discussed presently, applying the ad hoc, fact-specific inquiry[128] favored by the Supreme Court's regulatory takings cases, which focuses on the impact of the Rails-to-Trails Act on the investment-backed expectations of the claimants also leads to the conclusion that the Act does not effect a taking. Before undertaking that inquiry, however, one other threshold question, also of a somewhat categorical nature, needs to be addressed: whether the Act amounts to a *per se* taking under certain Supreme Court cases establishing that category of takings.

B. Does The Rails-to-Trails Act Effect a *Per Se* Taking?

In *Loretto v. Teleprompter Manhattan CATV Corporation*,[129] *Nollan v. California Coastal Commission*,[130] and other cases, the Supreme Court has held that where the governmental action is not merely a restriction on how the claimant can use its property but results in a permanent physical occupation of the claimant's property, the action should be deemed a taking *per se*, and it is not necessary to consider and balance the factors identified in *Penn Central*, *Lucas*, and other cases to determine whether it is a taking or a permissible regulation.[131] *Loretto*, for example, involved a city ordinance requiring landlords to allow cable television companies to install cables and other facilities on the landlords' buildings.[132] *Nollan* involved a state law requiring landowners to provide a public easement across their property as a condition for obtaining a building permit.[133] Relying on these cases, plaintiffs in Rails-to-Trails Act cases argue that the Trails Act effects a *per se* taking because it requires the plaintiffs to allow the right of way to be physically occupied by members of the public.[134]

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[127] Employing a somewhat similar categorical analysis, Professor Danaya Wright also concludes that the Rails-to-Trails Act cannot effect a taking of landowners' property rights. She argues that when the Rails-to-Trails Act was enacted, the owners of property underlying railroad easements had no *present* interest in exclusive possession of the rights-of-way, but only a *future* interest in such possession, which would vest only upon the abandonment of the easement. Because the Rails-to-Trails Act did not take away any present property interest but only deferred the enjoyment of a future interest, it cannot have effected a taking of property for purposes of the Takings Clause. Wright, *supra* note 13, at 450. The proposition that governmental interferences with unvested future interests cannot, categorically, effect a taking of property for Fifth Amendment purposes, seems questionable, however. Although not deciding the ultimate takings question, the D.C. Circuit rejected this very argument in *National Wildlife Federation*. *Nat'l Wildlife Fed'n*, 850 F.2d at 704. As that court noted, it seems unlikely, for example, that the Government could enact a statute extending the term of a lease indefinitely without implicating the Takings Clause merely because the lessor's right to resume exclusive possession was only a future interest that had not vested when the statute was enacted. *Id*.

[128] *Penn Central*, 438 U.S. at 124.

[129] 458 U.S. 419 (1982).

[130] 483 U.S. 825 (1986).

[131] *See Loretto*, 458 U.S. at 434-35.

[132] *Id*. at 421.

[133] *Nollan*, 483 U.S. at 827.

[134] As will be discussed more fully, the plurality opinion in *Preseault II* adopted this view. *See Preseault II*, 100 F.3d at 1539-40.

The difficulty with this argument is that the situation in Rails-to-Trails Act cases is very different from cases where governmental action requires property that had previously been strictly private and subject to the owner's exclusive use and control to be used by the public or by other persons. Rather, even in cases most favorable to taking claims, a landowner or his predecessor has already conveyed an easement for certain purposes, moreover, a permanent and exclusive easement; the challenged governmental action merely requires that it be used for other purposes as well – in this case, use by the public, including the claimant, as a recreational trail. The situation in Rails-to-Trail Act cases is thus more analogous to cases like *PruneYard Shopping Center v. Robins*[135] and *Heart of Atlanta Motel, Inc. v. United States*[136] than to *Loretto* and *Nollan.* In *PruneYard,* a private shopping center opened its property to the public but wished to prohibit certain members of the public from distributing handbills in the shopping center, and it claimed that a state constitutional provision requiring it to permit that activity on its property constituted a taking of its property.[137] The Supreme Court unanimously rejected the claim and ruled that the state constitutional requirement was a permissible regulation, not a taking.[138] The Court observed that the fact that the handbill distributors "may have 'physically invaded' [the shopping center's] property cannot be viewed as determinative."[139] Similarly, in *Heart of Atlanta Motel*, a motel owner contended that a federal law prohibiting it from excluding persons from its motel based on their race amounted to a taking of its property.[140] The Court summarily rejected this argument as lacking "any merit."[141]

These cases stand for the proposition that laws requiring landowners to open their property to unwanted persons and activities are not *per se* takings if the landowners have already opened that property to other persons and activities.[142] That is the situation in Rails-to-Trails Act cases. It is therefore appropriate to analyze the takings question on the basis of the ad hoc inquiry into the factors identified in *Penn Central* in deciding whether the Act effects a taking.

C. The Incremental Effect of the Rails-To-Trails Act on Reasonable Investment-backed Expectations

As noted earlier, *Penn Central* and other cases call for an examination of a number of factors in deciding whether a regulation goes "too far" and becomes a taking. Chief among these is "the extent to which the regulation has interfered with distinct investment-backed expectations. . . ."[143]

In considering the impact of the Rails-to-Trails Act on the reasonable investment-backed expectations of claimants, it must be kept in mind, first, that even in cases most favorable to a claimant, the claimant or his predecessor had granted a perpetual easement to another entity to conduct unlimited railroad operations *forever* over the right-of-way, and to exclude all other

[135] 447 U.S. 74 (1980).
[136] 379 U.S. 241 (1964).
[137] *PruneYard Shopping Ctr.*, 447 U.S. at 80.
[138] *Id*. at 84.
[139] *Id.*
[140] *Heart of Atlanta Motel Inc.*, 379 U.S. at 243-44.
[141] *Id*. at 261.
[142] *See PruneYard Shopping Ctr.*, 447 U.S. at 83; *Heart of Atlanta Motel Inc.*, 379 U.S. at 258.
[143] *Penn Central*, 438 U.S. at 124.

persons, including the claimant himself, from even going on the right of way.[144] In all such cases, therefore, neither the claimant nor his predecessor had any basis for expecting to be able to reclaim exclusive use of the right-of-way at any future time.

Second, since at least 1920, no owner of land adjacent to a railroad could have any reasonable expectation that the desire of the railroad to cease railroad operations would automatically entitle the owner to regain exclusive possession of the right-of-way under the terms of the easement and state law. Under the Transportation Act of 1920, a railroad wishing to *abandon* a right-of way (*i.e.*, to cease using it permanently for rail operations) has had to get permission from a federal agency to do so and that permission might be denied if the agency concludes that the public interest in continued rail service outweighs the railroad's interest in abandoning the line.[145] Alternatively, the agency might, and frequently did, impose conditions on its grant of abandonment authority that required that the right-of-way be preserved for future rail use, and even future highway use, and a landowner could not enforce any asserted property rights that would be inconsistent with such federally-imposed conditions.[146]

Furthermore, under the same statute, a railroad wishing merely to *discontinue* rail operations but to retain the right at some unspecified future time to resume rail service could elect to seek only discontinuance authority from the agency, in which case federal law would preclude the landowner from possessing the right of way even if the terms of the original easement and state law would have given him that right in the absence of the federal law.[147]

Although it would be inaccurate to say the Rails-to-Trails Act of 1983 made no significantchanges to the pre-existing legal and regulatory regime, the changes were quite limited. First, the Act did not enlarge the rights of the federal agency to deny or condition the abandonment of rights-of-way.[148] Nor did it in any way curtail the discretion of railroads in any way.[149] As noted earlier, railroads after 1983 have the same discretion they had before 1983 to choose either to abandon lines, upon receiving appropriate authority, or merely discontinue service, thereby reserving the right to resume rail service later.[150] In sum, before 1983 and since 1920, no owner of land adjacent to a railroad right-of-way could have had any reasonable expectation that the railroad's easement would terminate; that the railroad, if it wished to terminate operations, would seek abandonment rather than the lesser discontinuance authority from the ICC or STB; or that, if the ICC or STB did authorize abandonment, it would not impose conditions requiring preservation of the right-of-way for future transportation uses. Since the reasonable expectation of an adjacent landowner ever to regain exclusive possession of the right-

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[144] *See, e.g., W. Union Tel. Co*., 195 U.S. at 270-71.
[145] Transportation Act of 1920, ch. 91, 41 Stat. 456.
[146] *Reed*, 487 F.2d at 647. *See also* 49 U.S.C. § 10905 (2004).
[147] In theory, a landowner in those circumstances who wished to regain possession of the right of way could have filed an abandonment application himself (known as an "adverse abandonment") and could have attempted to persuade the agency to authorize abandonment despite the railroad's opposition. Although that was a theoretical option that the Rails-to-Trails Act eliminated, it is doubtful whether the ICC, before 1983, would have granted an adverse abandonment to a private landowner wishing to use the right-of-way for private purposes in any case in which the railroad asserted a plausible claim that it might want to reactivate rail service over the right-of-way in the future.
[148] 16 U.S.C. § 1247(d) (2004).
[149] *Id*.
[150] *Id*.

of-way was minimal, the extent to which the 1983 Rails-to-Trails Act interfered with that expectation is likewise necessarily minimal.[151]

What changes did the 1983 Act bring about, then? There were three main changes, two legal and one more practical. The first is that the Act *requires* the agency to deny full abandonment authority in any case in which the railroad elects to transfer the right-of-way to a qualified trail operator for interim trail use, whereas under prior law the agency had discretion to grant or deny full abandonment.[152] This was not a very significant change, however, since a railroad's election to transfer the right-of-way to an interim trail user under the Rails-to-Trails Act is functionally similar, if not equivalent, to an election to seek discontinuance rather than abandonment authority, which choice railroads had since 1920.[153]

The second and more significant change is that the Rails-to-Trails Act authorizes a use of the easement by persons and for purposes quite different from the use that the landowner originally granted the easement. The question is whether the imposition of that new use amounts to a taking. Several courts have held that it does.[154] The Supreme Court's decisions in *PruneYard* and *Heart of Atlanta Motel,* however, establish that government actions requiring owners to open their property to persons and activities not authorized and not wanted by the owner do not necessarily constitute takings of the owner's property.[155] Whether it does or not probably depends on the degree of the intrusion on the owner's interests and the government's interest in requiring it. That is obviously a difficult and largely subjective assessment, but the focus of the takings cases on *investment*-backed expectations suggests that in Rails-to-Trails Act cases, the assessment favors the no-takings conclusion. While most courts would probably conclude that the government's interest in requiring public recreational access to rights-of-way[156] is not as great as its interest in permitting leafletting in shopping malls[157] or its interest in ensuring unwanted minorities access to public accommodations,[158] at the same time the impact of recreational trail use on the investment value of the claimant's property will in most cases be substantially less than the impact to which he or his predecessor voluntarily consented in the first place, namely, noisy and dangerous freight train operations of potentially unlimited frequency and permanent duration.[159]

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[151] *Id*.
[152] *Id*.
[153] *See* Rail Abandonments – Use of Rights-of-Way As Trails, 5 I.C.C.2d at 371 (expressly noting this similarity). It is true, as noted earlier, that before 1983, if a railroad sought only discontinuance authority in circumstances presenting no foreseeable prospect of future rail service, a landowner with reversionary rights could have filed an adverse abandonment application which, if successful, would have enabled him to regain possession. *See supra* note 148. The Rails-to-Trails Act extinguished this possibility. Research has revealed no case in which such a landowner filed such an adverse abandonment application, however, and the likelihood of a landowner's prevailing in such a case would probably have been quite small.
[154] *See Schneider*, 2000 U.S. Dist. LEXIS, at *5-*13; *Toews*, 53 Fed. Cl. at 62-63; *Glosemeyer*, 45 Fed. Cl. at 781-82; *Schmitt*, 2001 U.S. Dist. LEXIS 22935, at *29-*32.
[155] *See PruneYard Shopping Ctr.*, 447 U.S. at 84; *Heart of Atlanta Motel, Inc.*, 379 U.S. at 260.
[156] 16 U.S.C. § 1247(d) (2004).
[157] *PruneYard Shopping Ctr.*, 447 U.S. at 83-84.
[158] *Heart of Atlanta Motel, Inc.*, 379 U.S. at 252-53.
[159] Furthermore, if a court concludes that what has been taken by the Rails-to-Trails Act is merely the additional right of the public to use the easement for recreational purposes, then the measure of the claimant's compensation should merely be the additional injury to the plaintiff, *if any*, of the recreational use of the right-of-way over and

The third significant change effected by the Rails-to-Trails Act does not relate to the reasonable investment-back expectations of landowners but concerns instead the Act's effect on the decision-making of railroads. The Act created a regime in which railroads contemplating abandonment of rail rights-of-way consisting mainly of railroad easements have nothing to lose from transferring the line to qualified trail users; by doing so, the railroads eliminate liabilities and risks associated with the property while preserving the right-of-way for possible restoration of rail operations should the need for them arise in the future.[160] Before 1983, railroads who wished to preserve such lines for possible future rail service could elect to obtain only discontinuance authority, but doing so left them liable for property taxes and, possibly, for injuries to trespassers.[161] In theory, if a trail user was willing to assume all responsibility for taxes and injuries, railroads before 1983 could have entered into lease arrangements similar to agreements authorized by the Rails-to-Trails Act, but doing so would have left them, and the trail user, exposed to law suits or adverse abandonment applications contending that the arrangements evidenced an abandonment of the easement. Unless the railroad actually foresaw the likelihood of restoring rail service in the future, it was usually simpler to obtain and full abandonment authority from the ICC and consummate it. The 1983 Act eliminated all such uncertainties, made transfers for trail use a no-lose proposition for railroads, and provided administrative procedures that fostered the conversion of rail lines to trails. While these aspects of the Rails-to-Trails Act made conversion of rail lines to trails much more common than they were before, they did not effect much change to the reasonable expectations of landowners with respect to any particular line.

Another consideration relevant to the takings question is that, to the extent claimants have any interests in railroad rights-of-way affected by the Rails-to-Trails Act, those interests are based on the claimants' ownership of larger parcels of which the rights-of-way once formed a part. The Supreme Court's takings decisions, however, apply the principle that, in deciding whether governmental action constitutes a taking, what is relevant is the impact of the action on the claimant's parcel as a whole.[162] Thus, for example, it has long held that setback ordinances, prohibiting any building within a certain distance of the street or adjacent properties, do not constitute takings of those portions of the property.[163] Since the property at issue in takings claims involving the Rails-to-Trail Act are 100-foot wide strips across larger parcels owned by the claimants, this principle further supports the conclusion that the Act's impact on the claimant's interests and reasonable expectation does not amount to a taking.

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above the injury caused by railroad freight operations. As the Court recently reaffirmed, the measure of compensation for a taking is the injury to the property owner, not the benefit to the government, resulting from the taking. *Brown*, 538 U.S. at 235-36. In Rails-to-Trails Act cases, such injury should be minimal or negative.

[160] 16 U.S.C. § 1247(d) (2004).

[161] Transportation Act of 1920, ch. 91, § 20, 41 Stat. 456.

[162] *PruneYard Shopping Ctr.*, 447 U.S. at 82-83. *See also Ruckelshaus*, 467 U.S. at 1004-06; *Penn Central,* 438 U.S. at 124-25.

[163] *Gorieb*, 274 U.S. at 608. Similarly, in *Palazzolo*, the Court held that local zoning actions that prohibited any development of a substantial part of the claimant's twenty acre property (that part designated by the zoning authority as coastal wetlands) did not amount to a taking if the value of the remaining portion that the claimant could develop was substantial. *Palazzolo*, 533 U.S. at 616. The Court employed a similar "parcel as a whole" analysis in *Tahoe-Sierra Preservation Council* to hold that ordinances imposing a thirty-two month moratorium on all development of certain property did not constitute a taking of the property. *Tahoe-Sierra Pres. Council, Inc*., 535 U.S. at 326-27.

In sum, the limited impact on the reasonable investment-backed expectations of takings claimants effected by the Rails-to-Trail Act seems substantially less than the impact of other governmental actions that the Supreme Court has found not to constitutes takings, such as laws prohibiting any development on parts of a persons property, laws prohibiting alteration of structures deemed to have historical significant, laws requiring owners to open their property to unwanted persons and activities, and laws prohibiting any development for substantial periods of time.

At the same time, the manifest public interest in preserving priceless transportation resources underlying the Rails-to-Trails Act is at least as important as the public interests underlying the actions in those cases. The public interest underlying railbanking is much more than merely having to condemn and pay for railroad rights-of-way whenever in the future the public interest warrants their restoration for railroad purposes. If rights-of-way are fully abandoned, over time they are likely to be built upon or used for various non-rail purposes. Any future attempt to use eminent domain powers to reassemble the rail corridor will not only cost much more; in many cases it will be impossible as a practical matter, and in most cases it is likely to be much more disruptive of private interests than if the corridor had been preserved in tact.

All of these considerations support the conclusion that the Rails-to-Trails Act does not effect a taking of property even in situations most favorable to the takings claimant.

D. Does the Aggregate Effect of the Rails-To-Trails Act and Prior Federal Law Effect a Taking of Property?

The preceding analysis has proceeded from the premise that the appropriate inquiry is whether the *incremental* impact of the Rails-to-Trails Act on the claimant's property interests and investment backed expectations, over and above the restrictions on those interests and expectations imposed by pre-existing law, is enough to amount to a taking of property. It is appropriate to consider more carefully whether this premise is correct? Two judges of the Federal Circuit in *Preseault II* thought not.[164] Concurring with the plurality opinion's holding that the Act did take the plaintiffs' property, Judges Rader and Lourie opined that, even if the *incremental* effect of the Rails-to-Trails Act might not constitute a taking of landowners' property, the *aggregate* effect of that Act combined with the effects of prior federal law going back to the Transportation Act of 1920 has resulted in a taking of that property.[165] They said: "In this case, the offending laws are Transportation Act of 1920, . . . the Rail Revitalization and Regulatory Reform Act [of 1976], . . . and the National Trails System Act Amendments of 1983 . . . each of which took or authorized a complicit state government to take a share of the property right."[166]

There is certainly some intuitive appeal to this argument. If a big governmental bite into one's property rights amounts to a taking of that property, the government should not be able to avoid its constitutional obligation to pay compensation merely by taking a series of little bites

[164] *Preseault II*, 100 F.3d at 1553 (Rader, J., concurring).
[165] *Id*. at 1553-54 (Rader, J., concurring).
[166] I*d*. This view was not endorsed by the three judges joining the plurality opinion, which rejected the suggestion that the 1920 and 1976 statutes effected a taking. *Id*. at 1537-38s.

over time. The argument is not, however, consistent with the takings principles endorsed by at least five of the current justices of the Supreme Court. Moreover, even if accepted, the argument would benefit only a small class of claimants, namely, those who acquired their property and granted easements over it before 1920.

Because the Court's decisions properly frame the regulatory takings inquiry in terms of the impact of the governmental action on the reasonable, investment-backed expectations of the *claimant*, not the claimant's predecessors in interest, they necessarily require consideration of when the claimant acquired his property interest and the legal restraints on that interest at the time he acquired it.[167] A person who, before 1920 acquired property and granted a railroad an easement over it limited to railroad purposes, might have a reasonable claim that subsequent federal legislation, including the Transportation Act of 1920 and the Rails-to-Trails Act of 1983, all had an aggregate effect on his property interests that amounts to a taking. But a person who acquired his property after 1920 acquired it subject to the restraints placed on it by the 1920 Act, and very likely paid a lower price for the property than he would have paid in the absence of those restraints. Such a person would have no persuasive basis for claiming that the 1920 legislation interfered with any reasonable investment-backed expectations he may have had either by itself or in combination with the effects of subsequent legislation.[168]

IV. COURT DECISIONS ON THE RAILS-TO-TRAILS ACT

As noted at the outset, the Supreme Court has not ruled on whether the Rails-to-Trails Act may effect a taking of property. Lower court decisions are divided on the issue and contain a variety of rationales.

The first and most significant case to raise the takings issue was brought by Paul and Patricia Preseault, landowners in Vermont.[169] The case involved a railroad right-of-way easement across the Preseaults' property; the easement was initially granted by their predecessors in 1899 and was acquired by the State of Vermont in 1962, which leased it to the Vermont Railway.[170] The Preseaults claimed that the easement had been extinguished by the termination of railroad operations by the Vermont Railway in 1975.[171] The railroad, however,

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[167] *See, e.g., Lucas*, 505 U.S. at 1027; *Loveladies Harbor, Inc.*, 28 F.3d at 1177. As noted previously, four justices expressed a somewhat different view in *Palazzolo* to the effect that the timing of the claimant's acquisition of property relative to the challenged governmental action would generally not be relevant to the takings questions. *Palazzolo*, 533 U.S. at 626-30. Five other justices, however, expressed the opinion that the timing of the claimant's acquisition of property *is* relevant for purposes of determining whether a challenged regulation effects a taking. *Id*. at 632-36. Furthermore, even those endorsing the minority view might well agree that a federal regulatory regime in place for more than eighty years qualifies as "background principles" that are relevant in deciding whether the 1983 Rails-to-Trails Act took the property of persons who acquired that property under that regime.

[168] Similarly, of course, a person who acquired his interests after 1983 would have no basis for claiming that the Rails-to-Trails Act interfered with any reasonable investment-backed expectations he might have had. *See Lucas*, 505 U.S. at 1027.

[169] *Preseault II*, 100 F.3d at 1529.

[170] There were sharp differences among the judges reviewing the case as to what interests the original 1899 deeds conveyed and whether those interests included use of the right-of-way as a recreational trail. *Preseault II*, 100 F.3d at 1532-34. A majority of the Federal Circuit in *Preseault II* held that the deeds conveyed only easements limited to railroad use. *Id*. at 1537. It will be assumed here that this state law property determination was correct.

[171] The Presaults acquired different portions of the property at issue between 1966 and 1980. *Id*. at 1537.

had never sought or obtained abandonment authority from the ICC.[172] The Preseaults therefore filed their own abandonment application with the ICC in 1985.[173] The ICC denied that application and instead granted the request of the State of Vermont and the Vermont Railway to authorize discontinuance of rail service and conveyance of the right-of-way to the City of Burlington for railbanking and interim trail use under the Rails-to-Trail Act.[174] The Preseaults sought review of the ICC's decision in the Second Circuit, where they argued that the Act effected an uncompensated taking of their property and was therefore unconstitutional.[175]

The Second Circuit held that the Rails-to-Trail Act did not effect a taking of the Preseaults' property and affirmed the ICC's decision.[176] The court's rationale for rejecting the taking claim is not entirely clear, but it seems to have reasoned that whatever state-law reversionary interests the Preseaults might have had to regain possession of the right-of-way had always been subject to the ICC's plenary authority to authorize, or refuse to authorize, abandonment, and those interests were not made worse by the Rails-to-Trails Act.[177] The court said: "[The Preseaults'] reversionary interest, if any, is not postponed any more by the operation of § 1247(d) [the Rails-to-Trails Act] than it could otherwise be affected by the ICC's continuing jurisdiction."[178] In other words, the court seems to say, since the ICC *could have* denied abandonment under the pre-Act law, the Act didn't change anything.

This rationale is similar to the analysis offered in the preceding section, but it is somewhat misleading to suggest that the Rails-to-Trail Act had *no* effect on the Preseaults' interest. Although the ICC *could have* denied abandonment under pre-Act law, it must be acknowledged that the Act withdrew the agency's discretion on that issue and *requires* it to deny abandonment whenever the railroad and a qualified trail user agree to railbanking and interim trail use.[179] The court should have acknowledged that consequence of the Act and squarely addressed whether it amounted to a taking.[180]

The Supreme Court affirmed the Second Circuit's decision but on different grounds.[181] The Court expressly declined to decide whether the Rails-to-Trail Act took the Preseaults' property but held the Act was constitutional in any event because, if it did effect a taking, the affected property owner could recover compensation from the United States in a suit under the Tucker Act.[182]

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[172] *Preseault I*, 494 U.S. at 9.
[173] *Id.*
[174] *Id.* at 10.
[175] *Id.*
[176] Preseault v. I.C.C., 853 F.2d 145, 151 (2d Cir. 1988).
[177] *Id.* at 150-51.
[178] *Id.* at 151.
[179] 16 U.S.C. § 1247(d) (2004).
[180] As discussed earlier, what seems more significant for purposes of takings analysis is the fact that, whatever effect it might have had on the *agency's* discretion, the Rails-to-Trail Act made no change in the *railroad's* discretion either to seek and consummate an authorized abandonment or seek only permission to discontinue rail operations but retain the right to resume them in the future. *See supra* pp. 20-23.
[181] *See Preseault I,* 494 U.S. at 4.
[182] *Id*. Earlier, the ICC had similarly declined to decide whether the Rails-to-Trails Act effected a taking on the dual grounds that that question is for the courts, not the agency, to decide and also that the Tucker Act would presumably

In a concurring opinion, Justice O'Connor, joined by Justices Kennedy and Scalia, expressed the view: first, that the Preseaults' property interests (*i.e.*, their right to possess the right of way in given circumstances) are determined by state law, and thus and will depend on the terms of the relevant deeds and easements as qualified by state law; second, that whether the Rails-to-Trails Act interferes sufficiently with those interests to amount to a taking must be evaluated under traditional federal takings jurisprudence.[183] The concurring opinion rejected what it conceived to be the Second Circuit's view that the ICC's power under the Rails-to-Trails Act to preempt state law by denying abandonment and requiring trail use itself circumscribed the Preseaults' property interests and therefore did not effect a taking of them; such a view, Justice O'Conner said, would "read the Just Compensation Clause out of the Constitution."[184] It is not clear from the concurring opinion whether, or to what extent, the ICC's long-standing authority abandonments under pre Rails-to-Trail Act federal law would be relevant to the takings question in the opinion of the concurring justices.[185]

In response to the Supreme Court's opinion, the Preseaults filed a Tucker Act suit against the United States for compensation in the court of claims.[186] In *Preseault II,* the Federal Circuit upheld their taking claim.[187] None of the opinions commanded a majority of the nine-judge en banc court, however, and accordingly none are entitled to precedential effect.[188]

The basis for the plurality opinion written by Judge Plager and joined by three other judges is far from clear. It appears to have concluded that the easement originally granted to the railroad authorized railroad operations only; that by requiring use of the right-of-way as a public trail, the Rails-to-Trails Act effected a physical invasion of the Preseaults' property rights; and therefore under *Loretto* the Act effected a *per se* taking and no analysis was required of the Preseaults' "investment-backed" expectations or other factors that would be relevant in the case of an alleged "regulatory" taking.[189] Two concurring judges, as discussed earlier, concluded that

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provide a remedy to claimants if it did effect a taking. Rail Abandonments – Use of Rights-of-Way As Trails, 5 I.C.C.2d at 374.

[183] *Preseault I*, 494 U.S. at 20-23 (O'Connor, J., concurring).

[184] *Id*. at 23 (O'Connor, J., concurring). Without deciding the question, a panel of the D.C. Circuit expressed the same view in *National Wildlife Federation*. *Nat'l Wildlife Fed'n*, 850 F.2d at 705.

[185] The concurring opinion's statement that "state law creates and defines the scope of the reversionary or other real property interests affected by the ICC's actions. . . ." could be read to imply that the ICC's long-standing authority over rail abandonments going back to 1920 would be irrelevant in assessing the Rails-to-Trails Acts' interference with the claimant's reasonable investment-backed expectations under traditional takings jurisprudence. *Preseault I*, 494 U.S. at 20. On the other hand, the opinion acknowledged that pre-Rails-to-Trails Act federal law could be relevant to the takings questions in certain circumstances. *Id.* The view that it would be irrelevant would be at odds with *Lucas*, which held that federal law may be part of the "background principles" which may circumscribe the claimant's property rights and reasonable expectations. *Lucas*, 505 U.S. at 1028-30.

[186] Preseault v. United States, 24 Cl. Ct. 818 (1992).

[187] *Preseault II*, 100 F.3d at 1529.

[188] *See, e.g.*, Texas v. Brown, 460 U.S. 730, 736-37 (1983); Hertz v. Woodman, 218 U.S. 205, 213-14 (1910); Commonwealth Edison Co. v. United States, 46 Fed. Cl. 29, 39-40 (2000), *aff'd*, 271 F.3d 1327, 1339 (Fed. Cir. 2001).

[189] *Preseault II*, 100 F.3d at 1539-40. The opinion also expressed the following views, apparently in *dicta*: The Transportation Act of 1920 and the 4-R Act of 1976 did not effect any taking of the Preseaults' property. *Id.* at 1537-38. It is not appropriate to consider federal regulatory law as part of the "background principles" defining a claimant's property rights; only state law is relevant. *Id.* at 1538-39. As a matter of state law, the railroad easement had been abandoned by the railroad in 1975, ten years before abandonment authority was sought from the ICC. *Id.* at 1549.

all federal legislation since 1920 effected, in the aggregate, a taking of the Preseault's property.[190] Three dissenting judges concluded that, as a matter of Vermont law, the easement conveyed to the railroad, and later to the trail user, permitted recreational trail use and had never been abandoned.[191]

Courts since *Preseault II* have rejected some takings claims and accepted others.[192] Either expressly or implicitly adopting the views expressed in Justice O'Connor's concurring opinion in *Preseault I* and the Federal Circuit's plurality opinion in *Preseault II,* the courts in most of the cases seem to have regarded the dispositive questions to be questions of state law.[193] The main state law questions have been whether the interest initially conveyed to the railroad was a fee interest or an easement; if an easement, whether the easement authorized use of the right-of-way as a recreational trail by the public; and whether the easement was abandoned, and therefore terminated, as a matter of state law when the railroad applied for abandonment authority to the ICC or STB and then conveyed the right-of-way to a trail user pursuant to the Rails-to-Trails Act.[194] In several cases, takings claims have been rejected because one or more of the state law questions have been decided against the claimants.[195]

In all cases since *Preseault II* in which the state law questions have all been decided in favor of the takings claimants, the courts have held that the Act effected a compensable taking with little, if any, further analysis of the question under the Supreme Court's takings jurisprudence.[196] These courts seem erroneously to have assumed without further analysis that, if the state law questions are resolved in favor of the claimant, Justice O'Connor's concurring opinion in *Preseault I* and/or the Federal Circuit's decision in *Preseault II* require a finding against the United States on the ultimate takings question.

With the state law issues viewed as largely dispositive, the litigation of takings claims involving the Rails-to-Trails Act has tended to be complex, time-consuming, and fact-intensive

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[190] *Id.* at 1553 (Rader, J., concurring).

[191] *Id.* at 1554-76 (Clevenger, J., dissenting). In a recent opinion, a three-judge panel of the Federal Circuit disagreed with the Government's characterization of *Preseault II* as a plurality opinion. Judge Plager's opinion for the panel expressed the view that "[e]ven a cursory reading of [the concurring opinion in *Preseault II*] shows that there was no disagreement on any of the issues, as well as the result" and that "the holding of the case reflects the considered view of a substantial majority of the court." Toews v. United States*,* 376 F.3d 1371, 1380 n.6 (Fed. Cir. 2004) As discussed in the text, however, the concurring opinion in *Preseault II* concluded that the taking of the Preseault's propery was effected by all federal laws since 1920, whereas the plurality opinion specifically held that the Transportation Act of 1920 had *not* effected a taking, demonstrating a significant difference of opinion. *Preseault II*, 100 F.3d at 1537-38.

[192] *See, e.g.*, Chevy Chase Land Co. v. United States, 158 F.3d 574 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 957 (2000); Hubbert v. United States, 58 Fed. Cl. 613, 615-16 (2003); Moore v. United States, 58 Fed. Cl. 134, 138 (2003); Amaliksen v. United States*,* 55 Fed. Cl. 167, 175 (2003) (rejecting takings claims); *Glosemeyer; Toews; Schmitt* (accepting takings claims).

[193] S*ee Preseault I*, 494 U.S. at 18-20 (O'Connor, J., concurring); *Preseault II*, 100 F.3d at 1570. In at least one case, however, the Federal Circuit upheld the dismissal of a takings claim because it was filed more than six years after the alleged taking and was thus barred by the federal statute of limitations for takings claims in 28 U.S.C. § 2501. The court held that the alleged taking occurred when the STB issues a CITU. Caldwell v. United States, 391 F.3d 1226, 1235 (Fed. Cir. 2004).

[194] *See, e.g.*, cases sited in n. 192.

[195] *See, e.g.* cases cited in n. 192.

[196] *See, e.g.*, *Glosemeyer,* 45 Fed. Cl. at 781-78*; Toews,* 53 Fed. Cl. at 59-62*; Schmitt*, 2001 U.S. Dist. LEXIS 22935, at *29-*32.

requiring close examination of deed language, title histories, and facts bearing on the railroad's acquisition and disposition of the rights-of-way.[197] It has been especially complex in class actions, some of which involve thousands of members of the plaintiff class.[198]

It is the thesis of this paper that the state law questions are not dispositive for the reasons discussed at length; indeed, even if all the state law questions decided in favor of the claimant, it is submitted that the Rails-to-Trails Act would not effect a taking of the claimants property as a matter of federal constitutional law reflected in the Supreme Court's takings cases. If this thesis is correct, the complex, fact-intensive litigation that has burdened the litigation of takings claims under the Rails-to-Trails Act would be largely unnecessary and irrelevant.

Contrary to the apparent assumption of some courts, nothing in the Supreme Court's majority or concurring opinions in *Preseault I* suggest otherwise. The majority opinion specifically declined to reach the question.[199] The concurring opinion only opined that the Rails-to-Trails Act itself does not require a no-takings answer and that the answer must instead be resolved under the Court's traditional takings jurisprudence, but it did not suggest what that answer should be.[200]

Although a majority of the then-judges of the Federal Circuit in *Preseault II* held that the Act effected a taking on the facts of that case, the decision is not controlling precedent even in cases appeallable to that court because none of the opinions commanded a majority of the court.[201] Furthermore the decisional grounds of the plurality opinion are singularly murky. The plurality opinion made no assessment of the Preseault's reasonable investment-backed expectations when they acquired their property and it gave no consideration to the "parcel as a whole" principle reflected in the set-back cases and *Tahoe-Sierra Preservation Council.*[202] To the extent the plurality concluded that the Act effects a *per se* taking because it entails a physical invasion, the opinion failed to address the import of *PruneYard* and *Heart of Atlanta Motel*, which found no takings in analogous circumstances.[203] To the extent the plurality based its

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[197] With regard to the railroads' actions in disposing of the rights-of-way, the courts are divided on the relevance of the railroads' invocation of the Rails-to-Trails Act on the issue of state law abandonment. In *Chevy Chase Land Co.*, the Maryland Court of Appeals held, among other things, that the railroad had not abandoned its easement as a matter of state law in part because, it said, "a railroad's participation in a rails-to-trails program implies that it does not intend to fully abandon the line, but rather to retain the right-of-way while permitting interim trail use." *Chevy Chase Land Co.,* 733 A.2d at 1092. Additionally, the Federal Circuit rejected the land company's taking claim based on the Maryland Court of Appeals' determinations of state law. Chevy Chase Land Co. v. United States, 158 F.3d 574 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 957 (2000). In *Schneider*, the court followed the Maryland Court of Appeals' reasoning to find that the railroad had not abandoned its easements, but nevertheless concluded that the Rails-to-Trails Act resulted in a taking of some of the plaintiffs' parcels. *Schneider*, 2000 U.S. Dist. LEXIS 19822, at *5-*13. In *Glosemeyer* and *Toews*, the courts found the easements had been abandoned as a matter of state law despite the use of the Rails-to-Trails Act, as did the plurality opinion in *Preseault II*. *See Glosemeyer*, 45 Fed. Cl. at 776; *Toews*, 53 Fed. Cl. at 62-63; *Preseault II,*100 F.3d at 1549. In *Schmitt,* the court made conflicting findings on the issue of state law abandonment. *Schmitt*, 2001 U.S. Dist. LEXIS 22935, at *29-*32.

[198] The complex questions concern not only the scope of the claimants' state law property rights, but also, when a taking has been found, the proper valuation of the property taken or of the just compensation due the claimant from the taking. *See, e.g.,* Illig v. United States, 58 Fed. Cl. 619 (2003); Moore v. United States, 54 Fed. Cl. 747 (2002).

[199] *Preseault I*, 494 U.S. at 4.

[200] *Id.* at 20 (O'Connor, J., concurring).

[201] *See, e.g.*, *Brown*, 460 U.S. at 737; *Hertz*, 218 U.S. at 213-14; *Commonwealth Edison Co*., 46 Fed. Cl. at 39-40.

[202] *See Tahoe-Sierra Preservation Council, Inc.,* 535 U.S. at 342.

[203] *See PruneYard Shopping Ctr.*, 447 U.S. at 83; *Heart of Atlanta Motel*, 379 U.S. at 260-61.

decision on its view that federal transportation law cannot constitute part of the "background principles" defining the plaintiffs' property interests, that view is at odds with the Supreme Court's opinion in *Lucas* indicating that federal law may do so.[204] In *Lucas*, the Court stated: "[W]e assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title" in defense of a taking claim,[205] and it cited in support of that proposition *Scranton v. Wheeler*,[206] which was a case finding that the Government's navigational easement was a pre-existing *federal* law limitation on a landowner's title.[207] Moreover, the Federal Circuit itself has found that pre-existing federal law limitations on takings claimants' rights respecting their property are relevant in determining whether the challenged action constituted a taking.[208]

V. CONCLUSION

In sum, twenty years after Congress enacted legislation that has resulted in the creation of more than 11,000 recreational trails in the United States, the difficult and often-litigated question of whether the Rails-to-Trails Act can effect a taking for which the United States must pay compensation has not yet been definitively resolved by any controlling appellate court decision. For the reasons discusses in this paper, viewing the matter either categorically or in terms of the case-by-case analysis favored by the Supreme Court of investment-backed expectations and other factors, the answer to that question should be no. As a categorical matter, it hardly seems a "taking" when a federal law, not only the Rails-to Trails Act but also basic regulatory law going back to 1920, does nothing more than prohibit a railroads from taking actions which, if taken, would entitle a landowner to exclusive possession of property by the terms of deeds and state law. And as a matter of expectations, it is difficult to see how a landowner whose ancestor granted a railroad an exclusive an perpetual right to right to operate an unlimited number of trains over his property can claim much of a reasonable expectation that he would ever enjoy exclusive possession of the railroad's right of way.

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[204] *See* Preseault II, 100 F.3d at 1538-39; *Lucas*, 505 U.S. at 1028-29.
[205] *Lucas*, 505 U.S. at 1028-29.
[206] *Scranton*, 197 U.S. at 163.
[207] *Id*.
[208] S*ee, e.g.*, *M & J Coal Co*., 47 F.3d at 1154*;* California Hous. Sec., Inc. v. United States*,* 959 F.2d 955, 958-60 (Fed. Cir. 1992).