# Beyond 16 U.S.C. § 1247(d): The Scope of Congress's Power to Preserve Railroad Rights-of-Way

## Introduction

As early as 1968, Congress recognized the need to preserve railroad rights-of-way[1] to meet the nation's future transportation needs.[2] The need arose because of the pervasive abandonment of railroad lines. Whereas in 1920 the nation's railroad system reached its peak of 272,000 miles, in 1990 only about 141,000 miles remained, and experts predicted that 3,000 miles per year would continue to be abandoned through the end of this century.[3] The National Trails System Act[4] is a current manifestation of the policy to preserve railroad rights-of-way. Part of the Trails Act directs the Interstate Commerce Commission (ICC)[5] to refrain from categorizing a railroad as "abandoned" if state and local agencies or private interests wish to establish trails on the right-of-way and the railroad owner assents to the trail establishment.[6] This procedure is popularly known as "interim trail use."[7]

The railroad owners do not bring fifth amendment takings claims[8] because no transfer of property rights is forced upon them by the Trails Act, which requires the railroad owners' assent to interim use.[9] The

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1. A right-of-way, "in reference to a *railway* . . . is a mere easement in the lands of others, obtained by lawful condemnation to public use or by purchase. It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee-simple of lands to be used for a railway . . . ." BLACK'S LAW DICTIONARY 1489 (rev. 4th ed. 1968) (emphasis in original).

2. *See* National Wildlife Fed'n v. I.C.C., 850 F.2d 694, 697 (D.C. Cir. 1988).

3. Preseault v. I.C.C., 110 S. Ct. 918, 914 (1990).

4. 16 U.S.C. § 1241-1251 (1988) [hereinafter Trails Act]. The right-of-way remains subject to ICC control. *Id.* § 1247(d). This means that the ICC retains the power to regulate future operations over the right-of-way.

5. The ICC is a federal "[c]ommission created by the Interstate Commerce Act . . . to carry out the measures therein enacted." BLACK'S LAW DICTIONARY 955 (rev. 4th ed. 1968). The Act is "designed to regulate commerce between the states, and particularly the transportation of persons and property, by carriers, between interstate points . . . ." *Id.*

6. 16 U.S.C. § 1247(d) (1988).

7. Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986).

8. U.S. CONST. amend. V: "[N]or shall private property be taken for public use, without just compensation."

9. *See, e.g.*, Southern Pacific Transportation, Inc.—Abandonment Exemption—In El Dorado County, Cal, No. AB-12, Sub-No. 128X, slip op. (I.C.C. July 16, 1990) (the Trails Act "only permits voluntary interim trail use").

owners have an incentive to assent, because the interim use provision frees the railroads from tax and tort liability.[10] Trails Act litigation at the appellate level has raised only the issue of whether the holder of a reversionary interest in the right-of-way has a valid takings claim against the federal government pursuant to a Trails Act transaction.[11] Most cases and commentators answer the question in the affirmative.[12]

This Note argues that under prevailing Supreme Court doctrine, Congress has the power to prevent indefinitely any property owner from obstructing rights-of-way that the ICC deems necessary to the nation's future transportation needs—whether the interests are held in fee or subject to future interests. The relevant congressional power is important because it allows Congress to free the ICC from obtaining railroad owners assent to interim use.[13]

Historical authority to preserve rights-of-way derives from two sources, each of which uniquely avoids potential takings claims. One source covers rights-of-way that Congress provided through land grants during the nineteenth century.[14] Railroad companies holding these rights-of-way are subject to the qualified requirement that they "subserve the public interests" in transportation.[15] Preserving rights-of-way is an apposite method of meeting the requirement. In this context, a grantee's takings claim against the federal government must fail because the government retains the right to control the use and disposition of rights-of-way if doing so helps meet national transportation needs.[16]

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10. *Rail Abandonments*, 2 I.C.C.2d at 602-13.

11. *See* Preseault v. I.C.C., 110 S. Ct. 914, 924 n.9 (1990).

12. *Id.* at 926-28 (O'Connor, J., concurring); Lawson v. State, 107 Wash. 2d 444, 730 P.2d 1308 (1986); McKinley v. Waterloo Railroad Co., 368 N.W.2d 131, 133-36 (Iowa 1985); Comment, *The Use of Discontinued Railroad Rights-of-Way as Recreational Hiking and Biking Trails: Does the National Trails System Act Sanction Takings?*, 33 ST. LOUIS U.L.J. 205 (1988); Cain, *Unhappy Trails—Disputed Use of Railroad Rights-of-Way Under the National Trails System Act*, 5 J. LAND USE & ENVTL. L. 211 (1989).

13. The owners' assent is not always forthcoming. *See, e.g.*, Southern Pacific Transportation, Inc.—Abandonment Exemption—In El Dorado County, Cal, No. AB-12, Sub-No. 128X, Slip Op. (I.C.C. July 16, 1990) (Railroad declined to assent).

The ICC does not believe that it must wait for prospective trail operators (those who control use of the trails) to assume property tax and tort liability for the rights-of-way in question. Rather, 18 U.S.C. § 1247(d) (1988) "requires not that all interim trail users be *subject to* tort liability, but that the abandoning railroad be *protected from* liability if it retains its interest in the right-of-way." *Rail Abandonments*, 2 I.C.C.2d at 608.

14. *See* T. ROOT, RAILROAD LAND GRANTS FROM CANALS TO TRANSCONTINENTALS (1987) (this work cites numerous federal land grant statutes).

15. The relevant federal land grant statutes are applied in United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893); Leo Sheep Co. v. United States, 440 U.S. 668, 683 (1979).

16. *See, e.g., Denver & Rio Grande Ry. Co.*, 150 U.S. at 14-16 (federal grants are to receive such a construction as to carry out the intent of Congress, and this intent should be ascertained by looking to the condition of the country when the acts were passed, as well as to the purposes declared on their face).

The second source of historical power to preserve "Railroad Rights-of-way," though less familiar, reaches further than the federal land grant source. The power derived from the second source is analogous to the federal "navigation servitude" doctrine.[17] This doctrine allows the federal government to keep navigable waterways passable, even at devastating expense to riparian landowners, without having to pay compensation for takings claims.[18] Though the historical roots of the navigation servitude doctrine are questionable,[19] its practical basis is the Commerce Clause.[20] Because the Commerce Clause authorizes Congress to regulate other aspects of interstate railroading,[21] an analog of the navigation servitude should apply also to the railroads' rights-of-way.

Part I of this Note discusses the history of railroad land grants and the Supreme Court holdings that suggest federally granted rights-of-way are subject to the federal government's plenary power to protect interstate commerce. Part II discusses the evolution of the navigation servitude. This part also illustrates how the servitude should apply to railroads and, to some extent, how courts already have applied the servitude to railroads. An analog of the navigation servitude would nullify takings claims in the area of railroad rights-of-way. Part III shows that even under a conventional fifth amendment takings clause analysis, the navigation servitude analog prevents takings claims against the federal government in railroad rights-of-way cases. Part IV argues that the current statutory method of preserving rights-of-way is poorly adapted to the aforementioned authority.

## I. An Implied Condition in Federal Land Grants for Railroads

Congress's earliest land grants to railroads served to promote settlement of the nation's newly acquired lands.[22] This narrow purpose may have been justified by the physical dangers that accompanied early railroading.[23] Before long, "[r]ailroads provided a regular and speedy method for transportation of volumes of people and goods not previously

17. *See generally* Note, *Determining the Parameters of the Navigation Servitude Doctrine*, 34 VAND. L. REV. 461 (1981). The Note explains that upon finding that waters are navigable, the Court assumes that the waters may be taken for public use without compensation. *Id.*

18. *See infra* notes 74-79 and accompanying text.

19. *See infra* notes 48-50 and accompanying text.

20. U.S. CONST. art. I, § 8, cl. 3. For the practical basis analysis, *see infra* notes 51-52 and accompanying text.

21. *See, e.g.*, Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (abandonments); Dayton-Goose Creek Ry. v. United States, 263 U.S. 456 (1924) (rates); Pennsylvania Co. v. United States, 236 U.S. 351 (1915) (interchange of cars).

22. T. ROOT, supra note 14, at 4.

23. *See id.* at 11. Whether Congress had other reasons for limiting the grants is beyond the scope of this Note.

Less hazardous means of transportation, particularly canals and roads, received most of the early land grants. *Id.*

achieved."[24] By the time of the Pacific railroad grants,[25] congressional policy favored railroad development "as the primary component of a transcontinental transportation system"[26] that would serve not only the needs of frontier settlers but the needs of the military and the postal service.[27] Thus, the point of the federal railroad land grants was not to help the railroads but to help their customers. The last federal railroad grants,[28] in contrast to the earlier grants,[29] provided only enough land for the rights-of-way and adjacent structures necessary to operate the railroads.[30] The change occurred because the railroad companies were slow in selling the surrounding lands to homesteaders.[31]

Because Congress favored transportation generally rather than the railroads specifically, Supreme Court cases favor a conclusion that the government has retained an interest in the property sufficient to protect future commerce.[32] Government grants to private parties should be narrowly construed against the grantee.[33] The Court applies this rule when so construing the grant will serve the particular public advantage that Congress intended to promote.[34] For example, the Court has held that the continued use of a right-of-way for railroad purposes was an implied condition of a railroad land grant.[35] The need for present and future transportation is no less than the need at the time of the original land grants particularly given the nation's great increase in population since the time of the original land grants.[36] Accordingly, the government still holds one stick "in the bundle of rights that are commonly characterized

24. *Id.* at 10 (footnote omitted).

25. The Pacific railroad grants promoted the building of transcontinental railroads. Congress made the grants from 1850 to 1871. T. ROOT, *supra* note 14, at 42.

26. *Id.* at 17.

27. *Id.* at 22.

28. Grants made near 1872, when Congress made its last grant to a railroad. *Id.* at 25.

29. Grants occurring prior to the late 1860s, when the political environment began to disfavor granting large amounts of land to railroads. *Id.* at 23-24.

30. *Id.*

31. *Id.* at 23-24.

32. This is not to say that the railroads actually owe the government land grant repayments in the form of transportation; Congress itself has relinquished any such claim. Wilner, *History and Evolution of Railroad Land Grants*, 48 I.C.C. PRAC. J. 687, 693-96 (1981).

33. Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604, 617 (1978).

34. United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1 (1893); *cf.* Leo Sheep Co. v. United States, 440 U.S. 668, 682-83 (1979), which held that a federal railroad land grant was not resolved for the government when the federal government claimed that an implied easement existed across land that was originally granted to the Union Pacific Railroad. The declared purpose of the grant was to subsidize construction of a transcontinental railroad. Since the alleged easement would only have allowed non-railroad access to a public reservoir area, it was inconsistent with the declared purpose of the grant.

35. Northern Pac. Ry. Co. v. Townsend, 190 U.S. 267, 271 (1903).

36. For example, in enacting the Trails Act, Congress clearly intended to preserve as many transportation corridors as possible as an important national resource. *See* H.R. REP. No. 28, 98th Cong., 1st Sess. 8-9 (1983).

as property,"[37] in effect the right to protect commerce. If the government is merely preserving its own property interest, railroads can make no valid claim under the Takings Clause.[38]

## II. Applicability of the Navigation Servitude Doctrine

### A. History of the Doctrine

The origin of the navigation servitude doctrine[39] is unclear. The doctrine is coextensive with the admiralty jurisdiction of the United States.[40] The jurisdiction apparently flows from the United States' sovereign property interest in navigable waters.[41] The cases that describe the navigation servitude as a property interest, however, rely heavily on the federal government's power to regulate commerce.[42] As this section will show, these lines of reasoning may be reconciled under the theory that government exercise of the commerce power to keep existing transportation routes open can never give rise to a claim under the Takings Clause of the Fifth Amendment.

History provides the best starting point for this analysis. In the 1851 case of *The Propeller Genesee Chief v. Fitzhugh*,[43] the Supreme Court held that admiralty jurisdiction applies to all navigable waters in the United States.[44] The case concerned the collision of a steamboat and a sailboat on Lake Ontario,[45] far from tidal waters. As a preliminary matter, the Court was confronted with the fact that its prior decisions, following the English cases, had extended admiralty jurisdiction only to tidal waters.[46] Chief Justice Taney asserted that admiralty jurisdiction nevertheless extended to Lake Ontario and all other navigable waters in the United States because

37. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

38. As much is clear from the language of the Takings Clause itself. That is, if the railroad owns a right-of-way subject to the federal power to protect commerce, the federal government has "taken" nothing when it asserts this power. U.S. CONST. amend. V.

39. For a general discussion of the doctrine, see Note, *supra* note 17. *See also* Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399, 400 (1961) (The "navigation servitude" is the power to control navigation and navigable waters. It includes the power to destroy navigability, to prevent navigation, to generate electricity even where navigability is impaired, and to protect navigable capacity by preventing diversion of water, obstruction by bridges, dams, or flood control measures in tributaries or watersheds).

40. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U.L. REV. 513, 588-93, 595-96 (1975).

41. *See infra* discussion accompanying notes 61-71.

42. *See infra* discussion accompanying notes 73-97.

43. 53 U.S. (12 How.) 443 (1851).

44. *Id.* at 457.

45. *Id.* at 450.

46. MacGrady, *supra* note 40, at 569 n.304.

> [i]n England . . . there was no navigable stream in the country beyond the ebb and flow of the tide . . . . In England, therefore, tide-water and navigable water are synonymous terms, and tide water . . . meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river.[47]

Legal scholarship has shown that the factual and legal premises behind Chief Justice Taney's reasoning are flawed. Specifically,

> it is not true that tidewaters and navigable waters in England were factually and legally equivalent . . . . [M]any nontidal streams in England were (and are) navigable in fact. As early as Glanville (c. 1187) the obstruction of "public" streams was recognized to be a purpresture. Apparently, the streams in England, both tidal and nontidal, were being choked by kydells, weirs, and other fishing devices; and originally the complaint voiced against kydells, many of which were located in nontidal streams, was they interfered with navigation.[48]

Admiralty jurisdiction in England was limited to tidal waters by a 1389 statute, largely because English admiralty courts had usurped jurisdiction over inland "business and profits" that the common law and local courts had previously enjoyed.[49] Moreover, Chief Justice Taney's broad interpretation of admiralty jurisdiction conflicted with Supreme Court precedent, which had held appropriately that admiralty jurisdiction was limited to tidal waters.[50]

Why did Chief Justice Taney so broadly construe the constitutional grant of admiralty jurisdiction? In a word, commerce. Today, "[i]n cases dealing with navigability[,] the Supreme Court indiscriminately cites cases from the areas of admiralty, commerce clause regulation, and submerged bed ownership—often, it seems, without realizing it."[51] The tests for these identified areas of control center around navigability-in-fact.[52] The similarity of the tests was warranted from the start because a primary goal of the Constitution was to promote commerce among the states.[53] Commerce was a central concern of the *Genesee Chief* Court.[54] Because Lake Ontario lay far inland, the need for transportation in the

47. *Genesee Chief*, 53 U.S. (12 How.) at 454-55.

48. MacGrady, *supra* note 40, at 571 (footnotes omitted).

49. *Id.* at 577.

50. *Id.* at 569 n.304 (citing Waring v. Clarke, 46 U.S. (5 How.) 441 (1847); The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175 (1837); Peyroux v. Howard, 32 U.S. (7 Pet.) 324 (1833); The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825)).

51. *Id.* at 587 n.401.

52. *Id.* at 587-96.

53. *See, e.g.*, Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456, 470 (1874) ("No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well.").

54. *Genesee Chief*, 53 U.S. (12 How.) at 454:

growing nation gave rise to federal regulation in areas unforeseen when the original Constitution was signed.[55] Specifically, canals and roads had pushed their way far beyond the tidewaters by the early 1800s, and commerce along inland rivers was similarly on the upswing.[56] Regulation of commerce was in order, but existing jurisdictional doctrine did not yet allow the Court to exercise fully its commerce clause power:

> the conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with *the growing commerce on the lakes and navigable rivers of the western States.* And the difficulties which the language and decisions of this court had thrown in the way, of extending it to these waters, have perhaps led to the inquiry whether the law in question could not be supported under the power granted to Congress to regulate commerce. . . . [But the] extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce . . . . If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted.[57]

Thus the needs of commerce gave Chief Justice Taney reason to take a position inconsistent with fact and law.

*Genesee Chief* addressed admiralty jurisdiction, not the federal government's authority to keep navigable waterways open. This authority arises from the navigation servitude doctrine.[58] The connection between the two concepts is that the Court's commerce-oriented explanation of *Genesee Chief*, taken with the navigation servitude cases,[59] supports the conclusion that the navigation servitude doctrine is rooted in the Commerce Clause.

Some cases suggest that the navigation servitude, as its name implies, is a proprietary grant of an interest originally held by the United States.[60] The proprietary grant theory finds support in a line of Supreme Court cases that describe navigable waters subject to the Commerce

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> The union is formed upon the basis of equal rights among all the States . . . . That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution secures to the States bordering on the Atlantic.

55. For a view of the expanding scope of the federal commerce power, compare Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456 (1874), with Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886).

56. *See* J. STOVER, AMERICAN RAILROADS 1-10 (1961).

57. *Genesee Chief*, 53 U.S. (12 How.) at 451-53 (emphasis added).

58. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

59. *See supra* notes 61-109 and accompanying text.

60. *Cf.* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 68 (1985) ("The government is not vested ipso facto with any rights at all.").

Clause as "public property of the nation."[61] *Gilman v. Philadelphia*[62] was the first case in which the Court described navigable waters in this way. In *Gilman*, the Court refused to enjoin Philadelphia's building of a bridge across a tidal, navigable river.[63] Yet the Court left intact Congress's authority to prevent such a bridge from being built.[64] In dicta, the Court described the source of this authority as follows:

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstructions to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.[65]

The *Gilman* Court cited no authority for its history of the "public property" interest. However, *Martin v. Waddell*[66] discusses the public property doctrine's origin. First, at English common law the Court noted that the "dominion and property in navigable waters, and in the lands under them, [were] held by the king as a public trust."[67] Then, as the Court stated, "when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use . . . ."[68] The Court said that a sufficient property interest was nevertheless reserved to Congress to keep the waterways open to navigation.[69]

*Genesee Chief*[70] is in accord, stating that "[i]f the water was navigable it was deemed to be public . . . ."[71] Yet as noted earlier, the decision was rooted in the need for commerce, whereas the property concept was

61. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 725 (1865); The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1870); *In re* Debs, 158 U.S. 564, 586 (1895); Philadelphia Co. v. Stimson, 223 U.S. 605, 634 (1912); United States v. Chandler-Dunbar Co., 229 U.S. 53, 63 (1913).

62. 70 U.S. (3 Wall.) 713 (1865).

63. *Id.* at 732.

64. *Id.* at 731.

65. *Id.* at 724-25 (footnote omitted).

66. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

67. *Id.* at 411.

68. *Id.* at 410.

69. *Id.*

70. 53 U.S. (12 How. 443 (1851); *see supra* notes 43-47 and accompanying text.

71. *Genesee Chief*, 53 U.S. (12 How.) at 457.

a tool for circumventing the limits of common law admiralty jurisdiction. Accordingly, the historical approach is suspect. Indeed,

> there was virtually no support for such a doctrine in English common law at the time of the American Revolution—or even when Chief Justice Taney was writing in 1842. Moreover, the submerged bed doctrine ultimately adopted by the English courts after . . . 1868 . . . was not a substantive rule of absolute Crown ownership; it was an evidentiary rule of prima facie Crown ownership. Thus the public trust doctrine, though purportedly rooted in old English soil, is an American invention, stemming from the creative misconceptions of [Chief Justice] Taney.[72]

It is therefore not surprising that the Supreme Court later used the navigation servitude under a commerce rationale.[73] The 1913 case of *Lewis Blue Point Oyster Cultivation Co. v. Briggs* provides a prime illustration of this point.[74] Blue Point sought to restrain the defendant, Briggs, from dredging along the Great South Bay in New York because "the dredging of such a channel would destroy the oysters of the plaintiff, not only along the line of the excavation, but for some distance on either side, and greatly impair the value of his leasehold for oyster cultivation."[75] Blue Point's leasehold was based on "royal patents made when the state of New York was a colonial dependency of Great Britain."[76] The lower court, however, had held that Blue Point's title was qualified, and subject to Congress's right to deepen the channel for navigation.[77] On appeal, Blue Point claimed that a taking had occurred for which compensation was due under the Fifth Amendment.[78]

The Court rejected Blue Point's takings claim, holding that

> [w]hatever power the several States had before the Union was formed, over the navigable waters within their several jurisdictions, has been delegated to the Congress, in which, therefore, is centered all of the governmental power over the subject, restricted only by such limitations as are found in other clauses of the Constitution . . . . The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep water channel across it, entitles him to demand compensation as a condition.[79]

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72. Macgrady, *supra* note 40, at 610-11.

73. In this context, *In re* Debs, 158 U.S. 564, 586 (1895) directly connects the "public property" language of *Gilman* with the broader "duty of keeping . . . highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control." *Debs* applies this "duty" to railroads.

74. 229 U.S. 82 (1913).

75. *Id.* at 85.

76. *Id.* at 86.

77. *Id.* at 85.

78. *Id.*

79. *Id.* at 87-88.

The *Lewis* Court's analysis is problematic because the navigation servitude doctrine lacks support in historical fact.[80] Although *Lewis* implies that the Commerce Clause memorializes the conveyance of the navigation servitude from the states to the United States,[81] the historical insufficiency of the navigation servitude suggests that states had nothing to convey in the first place.[82]

The Court's interpretation is justified in light of the nature of the property interest supposedly conveyed by the states. A key case in this area is *Shively v. Bowlby*.[83] *Shively* concerned a dispute over title to submerged lands under the Columbia River. Shively claimed title through the United States, while Bowlby claimed title through the State of Oregon.[84] In the process of holding that Bowlby's grant took precedence,[85] the Court asserted that waters affected by the tide, and the lands under them, "[b]y the common law . . . are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects."[86] This characterization conflicts with *Lewis*. In *Lewis*, Blue Point was "fishing," a fact that demanded the Court's attention.[87] The *Lewis* Court conceded that "[t]he cultivation of oysters . . . has become an industry of great importance,"[88] but it ignored the effects this fact might have on the question whether the federal government must make some allowance for the continuance of fishing.[89] Whereas *Shively* did not prioritize fishing and commerce, *Lewis* favored commerce to the exclusion of fishing—even though the right to fish in public waters had been a distinct property interest under *Shively*.[90]

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80. *See supra* notes 48-53 and accompanying text.

81. "Whatever power the several states had before the Union was formed, over the navigable waters within their several jurisdictions, has been delegated to the Congress . . . ." *Lewis*, 229 U.S. at 87-88.

82. The Court nevertheless currently subscribes to the dubious property interest interpretation of the navigation servitude. *See, e.g.*, United States v. Cherokee Nation, 480 U.S. 700, 704-05 (1987) ("[I]n *Lewis* . . . [the Court] observed that [petitioner's] very title to the submerged lands 'is acquired and held subject to the power of Congress to deepen the water . . . .' ") (quoting *Lewis*, 229 U.S. at 88).

83. 152 U.S. 1 (1894).

84. *Id.* at 9.

85. *Id.* at 58.

86. *Id.* at 11.

87. *See* Moulton v. Libbey, 37 Me. 472, 489-90 (1854):

> In all the treatises respecting that common right [of fishery], the general term "*piscaria*," or its equivalent, is used as including all fisheries, without any regard to their distinctive character, or to the method of taking the fish. . . . Shell fisheries have ever been regarded as a part of the public fisheries of England . . . .

88. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 86 (1913).

89. *See* United States v. Cherokee Nation, 480 U.S. 700, 704 (1987) ("The application of these [navigation servitude] principles to interference with streambed interests has not depended on balancing this valid public purpose [the servitude] in light of the intended use of those interests by the [riparian] owner.").

90. *See supra* note 87 and accompanying text.

Realistically, the "public property" analysis is a red herring because the Court simply gives the Commerce Clause priority over the Takings Clause—at least where navigation is concerned. In fact, in 1956 the Supreme Court admitted that "[t]he interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That clause speaks in terms of power, not property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one."[91]

More recently, *Kaiser Aetna v. United States*[92] laid the "public property" rationale to rest. The Court held that a taking occurred where the federal government deprived the owner of a privately developed marina of the right to exclude the public from its waters.[93] In so holding, the Court pointed to the numerous non-navigational areas in which it had affirmed congressional power to regulate under the Commerce Clause.[94]

Today's Court merely views the navigation servitude as "an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation."[95] The Court views the navigation servitude's origin as constitutional because the servitude "exists by virtue of the Commerce Clause . . . ."[96] Accordingly, the *Kaiser Aetna* court said in dicta that the power to "[remove] obstructions to navigation" would not give rise to a takings claim if imposed on the private owners of the marina, even though the Court found a taking when the government used its commerce power to deprive the owners of "the right to exclude others."[97]

Even though the Court may have abandoned the public property rationale, determining how public property entitlement had expanded prior to *Kaiser Aetna* provides some insight into the navigation servitude's applicability in other areas.

Professor Epstein[98] argues that an original property interest in navigable waters would entitle the government to maintain the *status quo ante*, to "without compensation enjoin activities by riparians that reduce the ease of passage along navigable rivers . . . ."[99] Epstein, however, also

91. United States v. Twin City Power Co., 350 U.S. 222, 224-25 (1956).

92. 444 U.S. 164 (1979).

93. *Id.* at 179-80.

94. *Id.* at 174 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (labor); United States v. Darby, 312 U.S. 100 (1941) (manufacture); Wickard v. Filburn, 317 U.S. 111 (1942) (agriculture)).

95. *Id.* at 175.

96. *Id.* at 177.

97. *Id.* at 174-76.

98. R. EPSTEIN, *supra* note 60.

99. *Id.* at 70.

observes[100] that the Court did not require the government to compensate the owner of a hydroelectric power plant situated on a navigable portion of a river, when the government raised the water level so as to render the plant inoperable.[101] Because hydroelectric power was unimagined in the eighteenth century, this holding upsets not only the *status quo ante*, but expands the original entitlement. As the Supreme Court later expressed, "It is not true . . . that only structures in the bed of a navigable stream which obstruct or adversely affect *navigation* may be injured or destroyed without compensation by a federal improvement of navigable capacity."[102] Of important note is that the government did not deprive the plant owner of title—it merely interfered with the owner's ability to use its property. This is precisely what occurred in *Lewis*.[103]

The "use" exception to the Fifth Amendment appears to have originated in *Transportation Co. v. Chicago*,[104] in which the plaintiff owned a dock and wharfing rights and privileges on the Chicago River. The government constructed a dam which made it impossible for the plaintiff "to bring its boats up to the dock or to land freight and passengers thereat."[105] Moreover, the excavation "greatly damaged and injured the warehouse."[106] Despite the seriousness of the plaintiff's injuries, the Court held them to be *damnum absque injuria*:[107] "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the [Fifth Amendment]."[108] *Transportation Company* concerned a permissible restriction on the *use* of property. This restriction must be distinguished from limitations on other incidents of property ownership, which may well violate the Takings Clause.[109] Restricting the *use* of property is the only exercise of governmental power on which this Note focuses.

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100. *Id.* at 71.

101. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

102. United States v. Chicago, Milwaukee, St. P. & P. Ry., 312 U.S. 592, 599 (1940) (emphasis added).

103. *See supra* notes 74-79 and accompanying text.

104. 99 U.S. 635 (1878).

105. *Id.* at 636.

106. *Id.*

107. "Damnum absque injuria: Loss, hurt, or harm without injury in the legal sense." BLACK'S LAW DICTIONARY 354 (5th ed. 1979).

108. *Transportation Co.*, 99 U.S. at 642.

109. For example, the Court has held, in the maritime context, that eliminating the right to exclude others gave rise to a Takings claim. Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1980) (taking occurred where government deprived owner of privately developed marina of the right to exclude others).

## B. Applying the Navigation Servitude

The governmental powers contained in the navigation servitude doctrine should not apply exclusively to navigable waters, because these powers rest on the commerce power rather than on notions of public property. The navigation servitude is merely a means of expressing the dominance of the Commerce Clause over the Takings Clause.[110] The term naturally came about in the context of navigation because that was a prevalent mode of transportation when the Court decided *Gilman*.[111] In 1865, there were few interstate railroads to which a navigation servitude analog could have applied. American railroad construction had not begun in earnest until the 1830s,[112] and the first transcontinental railroad was not completed until four years after *Gilman*.[113] The transcontinental railroads became more important in the latter half of the nineteenth century when the "canal era" drew to a close.[114] Further, railroads never required the evolution of an analogous servitude doctrine because they could protect their own interests in maintaining their rights-of-way.[115] This situation gave rise to few cases in which landowners' rights conflicted with the needs of interstate commerce.[116] Of course, the state and federal governments have regulated railroads since the late nineteenth century, but the need for such regulation arose largely with regard to rates.[117] In this context, the Court may view applying a navigation servitude analog to railroads as mere regulation, which would not amount to a taking.[118]

The word "navigation" is significant only because the physical parameters of the navigation servitude doctrine depend on whether the waterway in question meets the test of navigability.[119] Thus, legal theory does not impede the Court's application of the servitude doctrine to railroads. The test of "navigability" is simply analogous to the question of how wide a corridor Congress must preserve in order to protect future

110. United States v. Chicago, Milwaukee, St. P. & P. Ry., 312 U.S. 592, 596-99 (1941) (government may exercise the navigation servitude to the exclusion of takings claims, even if doing so does not further navigation); *see also supra* note 102 and accompanying text.

111. *See* T. ROOT, *supra* note 14, at 6-9.

112. *See* J. STOVER, *supra* note 56, at 19, 22-23.

113. *Id.* at 74.

114. *See* T. ROOT, supra note 14, at 42-43.

115. Of course, some railroads received states' financial assistance for this purpose. J. STOVER, *supra* note 56, at 30-31.

116. *Cf.* Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (no taking occurred where the operation of a recently constructed railway caused the value of adjacent property to fall).

117. *See* Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017 (1988).

118. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980); *see also infra* notes 141-45 and accompanying text.

119. *See* Note, *supra* note 17.

railroad operations. The commerce clause issue presents no problem because the Commerce Clause indisputably applies to interstate railroad operations.[120]

Given that the Commerce Clause applies to railroads, the constitutional prioritization may take place in the context of railroad rights-of-way. Specifically, a titleholder of a right-of-way, or of the estate subservient to the right-of-way, would have no takings clause claim if the government deprived the titleholder of the right to use the property in a manner inconsistent with future railroad use. The titleholder would be in precisely the same position as was the plaintiff in *Lewis*.[121] Nor could the titleholder argue that the government failed to provide notice of the servitude prior to the commencement of railroad use on the rights-of-way in question. Original owners of many submerged estates did not have government notice of the navigation servitude, yet the Court has not hesitated to apply it to these cases.[122]

The Court has deemed that constructive notice of navigation servitude restrictions flows from the Commerce Clause.[123] The Commerce Clause applies with no less force to railroads than to navigable waterways.[124] There is little need to draw a parallel between railroads and navigation because "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved."[125]

Thus, the navigation servitude doctrine demands that the Commerce Clause should take precedence over the Takings Clause where the need to keep paths of interstate commerce open is at stake. Railroad rights-of-way are paths of interstate commerce, since railroads have traditionally been the subject of commerce clause regulation. Yet as Part III will show, the Commerce Clause need not occupy such a prominent place in the analysis.

## III. Claims Under Conventional Takings Theory

Even under conventional takings theory, owners of railroad rights-of-way or of the estates subservient to rights-of-way would have no takings clause claim. For present purposes, "conventional" theory is the theory the Supreme Court has developed to interpret the Takings Clause without applying the navigation servitude. The Commerce Clause, however, remains relevant to the conventional analysis.

120. *See* Baltimore & O. Ry. v. United States, 345 U.S. 146 (1953).
121. For the facts of *Lewis*, see *supra* notes 74-78, and accompanying text.
122. *Lewis*, 229 U.S. 82 (1913); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913).
123. *See* United States v. Union Bridge Co., 143 F. 377, 390-94 (W.D. Pa. 1906).
124. *See* Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 323.
125. Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).

The Court has "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[126] This section deals separately with three of the Court's major formulae. The first formula determines whether the government's right-of-way preservation would be a "taking per se,"[127] the second formula addresses whether the preservation is the kind of zoning for which compensation is unnecessary,[128] and the third formula examines whether a property owner would have a property interest worthy of protection under the Fifth Amendment.[129]

### A. Takings Per Se

The first formula is that of "takings per se."[130] When governmental action entails an intrusion and a permanent physical occupation of property,[131] a taking is deemed to have occurred.[132] An easement may constitute a taking per se, at least when it is a public easement.[133] Thus in *Nollan v. California Coastal Commission*,[134] the Court held that a taking would occur if the government, in order to create access to the ocean, created a public easement through a beachfront landowner's property.[135]

Preserving railroad rights-of-way involves neither invasion nor occupation. To the contrary, it involves maintenance of the status quo. Such preservation does create an easement in favor of the public, but it is akin to a negative easement.[136] *Nollan* concerned a public easement that

126. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

127. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

128. Agins v. City of Tiburon, 447 U.S. 255 (1980).

129. There are differing opinions concerning just what the "formulae" are. This Note does not necessarily cover all of them but concerns itself with those most relevant to the question whether owners of railroad rights-of-way, and the estates subservient to those rights-of-way, can bring takings clause claims when the federal government seeks to keep the rights-of-way open to future transportation use. For a different formulation concerning different facts, see Brownstein, *The Takings Clause and the Iranian Claims Settlement*, 29 UCLA L. REV. 984, 1017-73 (1982).

130. *Loretto*, 458 U.S. at 426. The "per se" language actually appears in the dissent. *Id.* at 442 (Blackmun, J., dissenting).

131. *See* Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985) ("He [Madison] intended the clause to apply only to direct, physical taking of property by the federal government.").

132. *Loretto*, 458 U.S. at 441 (law requiring a landowner to allow cable television lines to be installed on the landowner's apartment building was a compensable taking per se).

133. A public easement is one in which the right to enjoyment is vested in the public generally or in an entire community. BLACK'S LAW DICTIONARY 488 (5th ed. 1979).

134. 483 U.S. 825 (1989).

135. *Id.* at 831-32.

136. A negative easement exists when the owner of the servient estate is prohibited from doing something otherwise lawful upon his estate because it will affect the dominant estate. BLACK'S LAW DICTIONARY, *supra* note 133, at 488.

upset the status quo.[137]

The "per se" category should not apply to negative easements in the status quo, because the history of the Takings Clause limits it chiefly to departures from the status quo ante. The original just compensation requirements appeared in state constitutions in apparent response to state legislatures' expropriation of an individual citizen's title to and use of property, particularly for the building of roads.[138] Thus landowners could expect compensation when the state actually took their property.[139] But preservation of railroad rights-of-way is not an equivalent situation, it is the preservation of the status quo ante. In other words, preserving railroad rights-of-way is regulation, which speaks to the zoning formula.[140]

## B. Zoning

The second formula is that of zoning. *Agins v. City of Tiburon* is the leading case supporting this theory.[141] The *Agins* appellants had acquired five acres of unimproved land in Tiburon, California.[142] The City of Tiburon then enacted a zoning ordinance that prevented the appellants from building more than five single-family residences on their tract.[143] The appellants claimed that a taking had occurred because the unusually high value of the land was "completely destroyed."[144] The Court, however, held that Tiburon's zoning did not give rise to a taking because it substantially advanced legitimate state interests and did not deny the appellants legitimate use of the land.[145] A right-of-way preservation statute would arguably meet the *Agins* requirements.

The preservation of railroad rights-of-way substantially advances the legitimate state interest of protecting commerce. If the legitimate state interest requirement means anything, it must include interests embodied in the Constitution. If the term "substantial" means anything, it must include interests worthy of mention in the Constitution. Since the Commerce Clause empowers Congress to protect commerce by regulat-

137. *Nollan*, 483 U.S. at 831-32. For a discussion of the importance of the status quo, *see* R. EPSTEIN, *supra* note 60, at 70-73.

138. Note, *supra* note 131, at 698.

139. *Id.*

140. *See infra* notes 141-172, and accompanying text. A similar form of regulation is that of forcing a railroad to maintain operations on a line. Such an action does not give rise to a takings claim unless the railroad is losing money overall. *See* Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981).

141. 447 U.S. 255 (1980).

142. *Id.* at 257.

143. *Id.*

144. *Id.* at 258.

145. *Id.* at 260.

ing railroads,[146] the first requirement of *Agins* merely describes another facet of the commerce power.

The second test of *Agins*, legitimate use of land, can be met in a manner consistent with future railroad operations while still providing income to landowners. For example, in urban areas, local governments may wish to use the railroad rights-of-way for transit purposes[147] or for public passage.[148] Under present law, municipalities may take the latter option in exchange for relieving the railroads of tort and tax liability.[149] The railroad owner could make more money using the property for housing developments, but *Agins* does not demand that the state allow the landowner to make the most profitable use of the land.[150]

If the landowner is a railroad company, it cannot bring a valid takings claim even if the government denies the railroad company the opportunity to make the most profitable use of its rights-of-way. *Penn Central Transportation Co. v. City of New York*[151] held that no takings claim arose from a zoning requirement that prohibited alterations to Grand Central Terminal in New York City, even though altering it would have made the property more profitable than its sole use as a rail terminal.[152] New York City, acting out of concern for the preservation of historical structures, had adopted a Landmarks Preservation Law.[153] The city applied the law to Grand Central Terminal, which was owned by Penn Central Transportation Company.[154] The city's application of the statute precluded Penn Central from building an office building atop the existing terminal structure.[155] The statute, however, granted "development transfer rights,"[156] which allowed Penn Central to transfer to nearby buildings whatever air rights would have been available on the Grand Central property. Penn Central owned several other buildings in the midtown Manhattan area, at least eight of which were eligible to receive development rights denied the terminal by virtue of the designation.[157] Penn Central nevertheless argued that a taking of its air rights

146. *See, e.g.*, Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (Commerce Clause allows Congress to grant the Interstate Commerce Commission plenary power over railroad abandonments).

147. For example, the Los Angeles Regional Transit District has proposed paving over at least one former rail line to run buses. Baden, *Editorails*, FLIMSIES, Mar. 11, 1991, at 21.

148. Especially as bicycle paths. *See also* Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986).

149. *See* 16 U.S.C. § 1247(d) (1988).

150. For a broad reading of the Takings Clause in the context of railroads, see Gibbons v. United States, 660 F.2d 1227, 1238 n.19 (7th Cir. 1981).

151. 438 U.S. 104 (1978).

152. *Id.* at 122-35.

153. *Id.* at 108-09.

154. *Id.* at 115.

155. *Id.* at 116.

156. *Id.* at 114.

157. *Penn Central*, 438 U.S. at 115.

above the terminal had occurred.[158]

The Court denied the takings claim in part because Penn Central could not "establish a 'taking' simply by showing that they have been denied the ability to exploit a single property interest that they heretofore had believed was available for development."[159] Rather, the Court focused "both on the character of the action and on the nature and extent of the interference with rights in the parcel *as a whole*."[160]

In the *Penn Central* context, it is useful to view the right-of-way as part of "a whole," the larger piece of property that is the whole railroad system. Various rights-of-way of a railroad are at least as interrelated as are various property interests associated with a single building. The Court has sanctioned aggregate treatment of the nation's railroads in the context of rate regulation.[161] Under this aggregate theory, no taking occurs unless the entire railroad system operates at a loss.

For example, in *Gibbons v. United States*,[162] the ICC had ordered the bankrupt Rock Island railroad to maintain rail service.[163] The Seventh Circuit held that directing Rock Island to provide rail service did not constitute a taking even though it delayed Rock Island's sale of its own property, because "this postponement involves no recognizable loss to the defaulting carrier because the government is at the same time subsidizing the discharge of the carrier's public service obligation through directed service."[164]

In a more practical context, if the right-of-way is surrounded by separately owned, developed parcels, few legitimate uses—indeed, few uses at all—will exist apart from transportation, including rail use. This situation exists because railroad rights-of-way are often too narrow to accommodate ordinary buildings or to allow access to them. But if the right-of-way is surrounded by separately owned, undeveloped parcels, the narrow strip of land constituting the right-of-way would hardly be a magnet for transportation-impeding structures. Finally, if the right-of-way is part of a larger parcel under single ownership, *Agins* is precisely on point because it held that building restrictions on a substantial portion of the tract in question did not give rise to a taking.[165]

Does the Commerce Clause speak to whether land use is "legitimate"? The Supreme Court suggested an affirmative answer in *Richards v. Washington Terminal Co.*[166] The *Richards* plaintiffs, landowners adja-

158. *Id.* at 122, 130.
159. *Id.* at 130.
160. *Id.* at 130-31 (emphasis added).
161. Dayton-Goose Creek Ry. v. United States, 263 U.S. 456 (1924).
162. 660 F.2d 1227 (7th Cir. 1981).
163. *Id.* at 1236-38.
164. *Id.* at 1238.
165. Agins v. City of Tiburon, 447 U.S. 255, 257 (1980).
166. 233 U.S. 546 (1914).

cent to a recently constructed railway, brought a takings claim against the federal government based on diminished value of land because of railway operations.[167] The land value had fallen because of the railroad operations.[168] A parcel adjacent to a tunnel had become valueless because exhaust gases from the tunnel were pumped directly onto plaintiff's land.[169]

The Court held that a takings claim could be based only on the property adjacent to the tunnel.[170] The other property could not form the basis of a takings claim because operating a railroad would become impossible if the railroad had to bear the costs of numerous takings claims.[171] The *Richards* Court's rationale applies with equal force to the preservation of railroad rights-of-way because it is unlikely that a right-of-way would be rendered valueless solely because of a requirement that it remain in its current state.[172] The cost of purchasing rights-of-way, especially through developed areas, would be so immense that preserving existing rights-of-way may be the only economically feasible way in which the government can meet future mass transportation needs.

### C. Uncertain Property Interests

The third formula addresses whether the property interest itself was uncertain from the outset. The property interest becomes uncertain when constitutional interests would be served by a court's finding that no taking had occurred. For example, *Duke Power Co. v. Carolina Environmental Study Group*[173] held that the federal Price-Anderson Act,[174] which limited the right to recover damages for nuclear accidents, did not give rise to a takings claim.[175] The Court held that Congress had limited potential liability to encourage the private sector to participate in the development of nuclear power.[176] Although the Court did not emphasize the Commerce Clause, preserving the nation's power grid is surely a legitimate area for congressional regulation under the Commerce

167. *Id.* at 548-51.
168. *Id.* at 549-50.
169. *Id.* at 550.
170. *Id.* at 556-58.
171. *Id.* at 553-55. The Court later applied this rationale to air transportation. In United States v. Causby, 328 U.S. 256 (1946), the Court held that although low flights over private property gave rise to a takings claim, high flights would not impinge upon private property interests because the "doctrine . . . that at common law ownership of the land extended to the periphery of the universe . . . has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits." *Id.* at 260-61.
172. *See supra* notes 147-50 and accompanying text.
173. 438 U.S. 59 (1978).
174. 42 U.S.C. § 2210 (1988).
175. 438 U.S. at 84.
176. *Id.* at 63-66.

Clause.[177]

The contravening constitutional interest need not be the protection of commerce. This point is illustrated by *Dames & Moore v. Regan*.[178] The *Dames & Moore* Court rejected the claim that the federal government had "taken" the plaintiff's prejudgment attachments against Iranian assets by nullifying them.[179] These attachments were "in every sense subordinate to the President's power under the [International Emergency Economic Powers Act]."[180] As one commentator has expressed, "businesses conducting trade with foreign countries should not rely on the availability of foreign-owned assets in the United States, because in times of trouble those assets would become bargaining chips in a game of diplomatic poker."[181] Thus, the *Dames & Moore* Court subordinated the Takings Clause to the President's constitutional power to conduct foreign policy.[182]

### D. The Takings Clause, the Commerce Clause, and Railroads

Under the Commerce Clause, Congress has regulated railroads for over 100 years.[183] Rate-setting has served as a major form of regulation.[184] Congressional regulation has substantially affected the use of railroad property.[185] For example, the Interstate Commerce Commission "has plenary authority to regulate, in the interest of interstate commerce, rail carriers' cessation of service on their lines. And at least as to abandonments, this authority is exclusive."[186] These and other forms of government regulation share the common theme of maintaining the integrity of the nation's rail transportation system, a goal that legitimately falls under the Commerce Clause.[187] Under the Court's takings formulae which address zoning and uncertain property interests, preserving rail-

177. *See* Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979) (Commerce Clause embraces "a wide spectrum of economic activities").

178. 453 U.S. 654 (1981).

179. *Id.* at 674 n.6.

180. *Id.* The International Emergency Economic Powers Act appears at 50 U.S.C. §§ 1701-1706 (1988).

181. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 612 (2d ed. 1988).

182. U.S. CONST. art. II, § 2, cl. 1.

183. *See* Hovenkamp, *supra* note 117.

184. *Id.*

185. *See, e.g.*, Pennsylvania Co. v. United States, 236 U.S. 351, 368-69 (1915) (no taking occurred where government ordered railroad to stop refusing to interchange cars with a connecting carrier).

186. Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 323 (1981).

187. Congressional policy has expressed this goal repeatedly. For example, certificates of railroad abandonment issue "not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination." Colorado v. United States, 271 U.S. 153, 162 (1926). Similarly, in enacting the Trails Act, Congress intended to further "the national policy to preserve established railroad rights-of-way for future reactivation of rail service [and] to protect rail transportation corridors . . ." 16 U.S.C. § 1247(d) (1988).

road rights-of-way cannot give rise to a valid takings claim because the contravening commerce clause interest in transportation outweighs the alleged property interest. Nor does a taking arise under the Court's "per se" formula, which does not require a balancing of property and commerce clause interests.

## IV. Suggested Modifications to the Preservation Statute

If Congress may preserve railroad rights-of-way without landowners' consent, it should do so directly. The present system calls for a three-party agreement among the railroad, the ICC, and a private or public trail operator. Under the proposed agreement: (1) the railroad would allow the right-of-way to be used as a trail, (2) the ICC would refrain from listing the line as abandoned, and (3) the operator would assume tax and tort liability for the right-of-way.[188] The present system is problematic because it may give rise to a valid takings claim by a landowner who has a reversionary interest in the right-of-way. As Justice O'Connor recently wrote, "[t]he ICC may possess the power to postpone enjoyment of reversionary interests, but the Fifth Amendment and well-established doctrine indicate that in certain circumstances the Government must compensate owners of those property interests when it exercises that power."[189] Because a central interest of Congress is to preserve railroad routes,[190] Congress should concentrate on doing so simply by prohibiting landowners from using the rights-of-way in a manner that impedes their future use for transportation. Trail use plainly does not merit the protection available to right-of-way preservation because trail use is not the kind of interstate commerce which Congress seeks to preserve under the Trails Act. Trail use, though important in its own right, gives rise to its own takings problems, particularly under the Court's "per se" analysis.[191] These takings problems should be addressed at the local level.[192]

188. 16 U.S.C. § 1247(d) (1988). A detailed discussion of the relevant regulations appears in Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 602-13 (1986).

189. *See* Preseault v. I.C.C., 110 S. Ct. 914, 926-28 (1990) (O'Connor, J., concurring).

190. *See* 16 U.S.C. § 1247(d) (1988), which administers the Railroad Revitalization and Regulatory Reform Act [RRRRA], 45 U.S.C. §§ 801-855. One purpose of the RRRRA is to maintain the physical facilities of the railroad system of the United States. *Id.*, § 801(a).

191. See *Preseault*, 110 S. Ct. at 926-28 (O'Connor, J., concurring), which applies Nollan v. California Coastal Comm'n, 428 U.S. 825 (1987), to reach the conclusion "that a taking would occur if the Government appropriated a public easement." *Preseault*, 110 S. Ct. at 928 (O'Connor, J., concurring). The concurring opinion also cites Kaiser Aetna v. United States, 444 U.S. 164 (1979), for the proposition that trail use, at least where it holds up reversions, impinges on " '[t]he right to exclude' . . . universally held to be a fundamental element of the property right." *Preseault*, 110 S. Ct. at 928 (O'Connor, J., concurring) (quoting *Kaiser Aetna*, 444 U.S. at 179).

192. That is, since trail use is for the local benefit, it should not burden the federal government by way of takings claims. Local governments are better equipped to weigh the benefits

## V. Conclusion

Preserving railroad rights-of-way not only falls within Congress's authority under the Commerce Clause but also does so without giving rise to takings claims.[193] This statement denotes a prioritization of the Commerce Clause over the Takings Clause when the preservation of railroad rights-of-way is concerned. The preeminence of the Commerce Clause finds expression either as an analog to the "navigation servitude" or in the context of a conventional takings clause analysis.[194]

Railroad rights-of-way, which were the subject of federal land grants, require a different analysis. The federal government made the grants with the implied condition that the national transportation needs would continue to be met. This condition prevents disposition of rights-of-way in manners inconsistent with the national transportation policy. Under any of the three theories presented,[195] the result is the same: Congress may—and should—preserve vital railroad routes by imposing use restrictions on them. Congress should not try to preserve railroad rights-of-way by permitting intervening trail use, which presents takings problems of its own.

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and burdens of trail use. They would have incentive to do so if the financial burdens of trail use were felt at the local level.

193. *See supra* notes 22-187 and accompanying text.

194. *See supra* notes 39-187 and accompanying text.

195. The three theories are implied conditions in federal land grants (Part I of this Note), an analog of the federal navigation servitude doctrine (Part II), and conventional fifth amendment takings formulae (Part III).

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