RAILROAD RIGHT-OF-WAY EASEMENTS, UTILITY APPORTIONMENTS, AND SHIFTING TECHNOLOGICAL REALITIES

JEFFERY M. HEFTMAN

This note explores the controversy that arises when railroads attempt to apportion their linear corridor interests in land to communications providers. Landowners often dispute the apportionments and demand compensation for the burdens placed on their land by the new uses. Recognizing that a significant part of today's debate centers around the nature of the interests held by railroads and their successors in interest, the author looks to the past to explore the nature of the interests originally granted by landowners to the railroads. The author observes that a significant amount of variation exists in the interests originally granted to railroads. Courts differ in how they interpret these interests and gauge whether the new owners have overstepped their bounds. Specifically, the author divides the approaches taken by courts into three categories: the traditional view, the incidental use doctrine, and the shifting public use doctrine. After analyzing all three, the author concludes that the shifting public use doctrine is the soundest approach in light of both accepted property law principles and also the public interest in benefiting from new communications technology.

I. INTRODUCTION

At the close of the nineteenth century, the courts entertained a significant volume of litigation seeking to determine the rights of fee owners on whose land railroads and utility providers had been granted easements.[1] The impetus of the litigation was the railroad companies' apportionment of their easement rights to third parties, namely telegraph and telephone companies, who sought access to established linear corridors.[2] The use of existing corridors avoided the expense of high transaction costs which would accompany negotiation with countless individual landowners.

1. *See, e.g.*, W. Union Tel. Co. v. Pa. R.R., 195 U.S. 540 (1904); Hartford Fire Ins. Co. v. Chi., Milwaukee & St. Paul Ry. Co., 175 U.S. 91 (1899); Cater v. Northwestern Tel. Exch. Co., 63 N.W. 111 (Minn. 1895); White v. Kansas City & Memphis Ry. & Bridge Co., 45 S.W. 1073 (Tenn. 1898).

2. *See* Elizabeth Amon, *Simple Property Case Sparks 25 Class Actions Against Railroads, Telecomms.*, NAT'L L.J., Aug. 16, 1999, at A1.

The question of whether a change of use, or an expansion upon an existing use, of an easement results in termination has taken on new significance, and is receiving greater attention.[3] The rapidly expanding telecommunications industry has similarly sought the use of existing utility easements for the siting of communications systems. As a result of the declining profitability of railroad lines due to increased competition and a severe decrease in operational railway lines,[4] railroad companies have apportioned their easements to utilities such as communications or power providers.[5] The existing linear corridors are valuable commodities to rapidly expanding industries seeking to lay thousands of miles of communications equipment, such as digital cable. Parcels were acquired by multiple means, including through statutory authorization and transactions with individual title holders. As a result, each parcel has a variety of interests attached.

For example, suppose that a farmer in the nineteenth century granted an easement a hundred yards wide through his or her property for the siting of railroad track. The easement passed on to the successor of the railroad, and this new easement owner now seeks to contract with a telecommunications company for the laying of the underground fiber optic cable. The successor in interest to the owner of the underlying fee seeks a declaratory judgment that the additional use of the easement constitutes a burden not contemplated at the time of granting, which requires either that the fee landowner be compensated or that the easement be extinguished.[6] Herein lies the controversy, as the landowner's reversionary interest threatens the apportionment of the easement to utility providers.

This note will assess whether railroad easement owners can apportion their interests to third-party entities without terminating the easements or incurring an obligation to provide additional compensation to the owners of the underlying fee. To answer that question, this note will

3. *See generally* 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 (2000) (examining means of railroad land acquisition in the context of subsequent cessation of use and an expansive public use doctrine); Jill K. Pearson, Note, *Balancing Private Property Rights with Public Interests: Compensating Landowners for the Use of Railroad Corridors for Fiber-Optic Technology*, 84 MINN. L. REV. 1769 (2000) (examining the issue of lease agreements between railroads and telecommunication providers and concluding that owners of the underlying fee were entitled to compensation for additional burdens).

4. *See* Preseault v. ICC, 494 U.S. 1, 5–6 (1990).

5. *See* Amon, *supra* note 2, at A1.

6. This fact pattern models that of *Buhl v. U.S. Sprint Communications Co.*, 840, S.W.2d 904, 905–06 (Tenn. 1992); *see also* Amon, *supra* note 2, at 1; Brian O'Reilly, *Telecom's Real Estate Problem: This Land Is Their Land. Maybe*, FORTUNE, July 5, 1999, at 30. O'Reilly observes:

> Peer idly out the window of a moving train, and you might catch a glimpse of small warning signs posted along the track. Fiber-optic cables, owned perhaps by AT&T, MCI, Sprint or Qwest, are buried here, the signs announce, and woe betide anyone who rips them up or damages them. The warning works. Even farmers living along the track are afraid to plow too close, for fear of running afoul of the mighty railroads and telecom companies that apparently control the land.

Id.

examine the nature of the interests currently held by railroads and utilities, as well as provide background on the common law of property rights and easements. Further, the courts' historical treatment of railroad companies' attempts to apportion right-of-way access to telephone and telegraph entities will shed light on current disputes concerning analogous issues of property law. Part II will examine the nature of railroads' past property interests, observing that the lack of uniformity in the rights granted to railroads has contributed to disparate judicial interpretations.[7] The economic difficulties facing the national rail system and usefulness that existing linear corridor easements provide to the expanding telecommunications industry are also examined. The various manners of treatment by the courts and the doctrines employed to justify the range of views regarding the scope of commercial easements are detailed in part III.[8] Ultimately, part IV advocates the adoption of what has been termed the "shifting public use" doctrine, a theory recognizing that conceptions of property rights, and the burden imposed upon the owners of the fee underlying the easement cannot be reasonably fixed to what was contemplated at the time of the easement's formation.[9] Part V concludes.

II. BACKGROUND

This part examines three principle issues. First, the easements addressed in this note are introduced and defined. Then, the means of acquisition of easements by railroad companies over the course of time are explored. Finally, the part concludes with an analysis of the burden that the easement is permitted to impose on the underlying fee owner, which is constrained by the conveyance.

A. Property Law

The common law of property and subsequent statutory enactments both create and encompass a range of varying interests possessed by landowners and users of the property, including fee simple ownership, easements, and covenants.[10] Generally, an easement provides the holder a right to use or take from the land, subject to restrictions.[11] An easement gives its holder the right to use another's land for a specific purpose.[12] "A primary characteristic of an easement is that its burden falls upon the possessor of the land from which it issued and that characteris-

7. *See infra* Part II.A–C.
8. *See infra* Part III.A–C.
9. *See infra* Part IV.
10. *See generally* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY (1984).
11. *See* Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 564 (1997) ("Easements, as opposed to possessory estates in land, do not impart a right of possession and full use, but rather, a specifically defined right to use land which is owned and possessed by another.").
12. *See* Hunter v. McDonald, 254 N.W.2d 282, 285 (Wis. 1977).

tic is expressed in the statement that the land constitutes a servient tenement and the easement a dominant tenement."[13]

Two specific types of easements warrant discussion. The most common type of easement, and the one courts favor, is an easement appurtenant, in which one holding an adjacent tract of land enjoys the benefits of the use of a parcel of land.[14] For example, an easement over a neighbor's land allowing an adjacent property owner to pass through the easement to link his or her property to the street benefits the adjacent property owner directly.

In contrast, easements in gross provide benefits to the holder, unrelated to the holder's interest in any specific parcel of land.[15] "An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another."[16] Although easements in gross are generally considered nonassignable, a well-grounded exception exists for commercial easements in gross.[17] One noted property professor has characterized the exception as follows:

> Since certainty is one objective of property law, the simplest rule is to ban all transfers of easements in gross. However, certainty has a way of conflicting with social utility at times and the merit of English rule becomes questionable if B is a railroad company, a public utility, etc., rather than a private person. Why shouldn't such vast commercial easements in gross be transferable like any other interest in land? American courts saw no reason to deny alienability generally and, while results have not always been consistent, they have made a case-by-case approach to the problem with satisfactory results. Most commercial easements in gross are readily assignable.[18]

Railroad easements fall into the latter of the two categories and will be the focus of this note. If an easement was intended to be used exclusively by the dominant tenement, in relation to the underlying fee, then the easement in gross will be found to be apportionable.[19] In the case of a private conveyance, it is likely that a railroad company served as the drafter of an agreement with a landowner, justifying an interpretive

13. BLACK'S LAW DICTIONARY 509 (6th ed. 1990); *see also* Richards v. Land Star Group, Inc., 593 N.W.2d 103, 106 (Wis. Ct. App. 1999) ("An easement is an interest in land in the possession of another.").

14. *See* Martin v. Music, 254 S.W.2d 701, 703 (Ky. 1953).

15. *See generally* Stockdale v. Yerden, 190 N.W. 225 (Mich. 1922) **(**finding an easement in gross to be personal because it is not appurtenant to another premises**)**; Loch Sheldrake Assoc. v. Evans, 118 N.E.2d 444, 447 (N.Y. 1954); RESTATEMENT OF PROP. §§ 454, 455 (1944).

16. BLACK'S LAW DICTIONARY 510 (6th ed. 1990).

17. *See* JOHN CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 342 (2d ed. 1975).

18. *Id*.

19. *See* Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 804 (1985); *see also* RESTATEMENT OF PROP. § 493 ("The apportionability of an easement in gross is determined by the manner or the terms of its creation.").

guideline construing all language in favor of the grantor.[20] The language of the granting clause itself largely determines the nature of the property interest conveyed.[21] For example, the presence of "its successors and assigns forever," has been held sufficient to sustain a finding of the right to apportion.[22] Commercial easements devoted to business use or possessing independent economic value are freely alienable to third parties.[23] The right to further divide an easement, however, is subject to the original limitations of the granting clause, such as its proposed use or the burden to be imposed upon the owner of the underlying fee.[24] Although holders of commercial easements can assign or divide their interests to other parties, the subsequent conveyance is traditionally limited to uses foreseen when the easement was created.[25] The focus of this note is the permissible scope of apportionment or expansion of easements.[26]

The courts generally interpret deeds and conveyances as permitting the alienability of easements in gross.[27] "This policy arises from a belief that the social interest is promoted by the greater utilization of the subject matter of property resulting from the freedom of alienation of interests in it."[28] Over time, property may be used more efficiently if (or when) devoted to an alternate purpose; alienability furthers this social interest by allowing property to be used in accordance with modern commercial requirements.

The easement's duration, as with all restrictions concerning the extent of the grantee's control, is determined by the language of the conveyance which evidences his or her intent.[29] In the case of railroad right-of-way easements, the nature of their use precluded express time limits upon their duration.[30] The early stages of the development of a large scale, capital investment heavy initiative, such as railroad lines, demanded that land use easements allow for a long-term, possibly perpetual, use.

20. *See* Brunt Trust v. Plant 2, 458 N.E.2d 251 (Ind. App. 1983).

21. *See id*.

22. *See* Cent. Cable Television Co. v. Cook, 567 N.E.2d 1010 (Ohio 1991).

23. Chevy Chase Land Co. v. United States, 37 Fed. C.L 545, 564 (1997).

24. *Id.*

25. *Id*.

26. *See infra* Part III.

27. *See* Hennick v. Kansas City S. Ry. Co., 269 S.W.2d 646, 651 (Mo. 1954) (noting that "it is well settled that an easement may be conveyed as an interest in land") (citing Fla. Blue Ridge Corp. v. Tenn. Elec. Power Co., 106 F.2d 913, 915 (5th Cir. 1939)).

28. RESTATEMENT OF PROP. § 489 cmt. a (1944).

29. *See* Kansas City Area Transp. Auth. v. Ashley, 485 S.W.2d 641 (Mo. Ct. App. 1972); *see also* A.E. Korpela, Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3D § 10 (1966) ("In those cases in which the deed is found to be ambiguous, the courts have relied upon circumstances surrounding the execution of the deed and various extrinsic evidence to arrive at the intention of the parties.").

30. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 62–63 (5th ed. 1998) (noting that the high transaction costs associated with commercial right-of-ways preclude short-term retention).

The primary means of termination of a railroad right-of-way easement is through abandonment.[31] Upon abandonment, the interest reverts to the grantor, and the burden formerly imposed on the land terminates.[32] Although simple nonuse of an easement is insufficient to prove that an abandonment has occurred, evidence indicating an intention not to continue use of the right-of-way, or use of the right-of-way in a manner inconsistent with railroad purposes supports a finding of abandonment, at which time the reversionary interest is triggered.[33] In addition, easements may be extinguished through misuse or overuse,[34] such as use beyond that which was previously envisioned by the grantor. Misuse and overuse will be the focus of part IV below.

B. Railroad Right-of-Way Easement Acquisition and Issues of Interpretation

Initially, railroads acquired much of the land required for the construction of trackage through state or federal condemnation proceedings, in which legislatures granted railroad companies condemnation authority for the purpose of acquiring right-of-ways.[35] In those cases, railroads were rarely required to limit their use of the right-of-ways to railroad uses, and sometimes the legislature explicitly required concurrent use of the right-of-way by public utilities.[36] "Acts of Congress in the nineteenth Century required railroads that been granted right-of-way passage through United States lands to make their telegraph facilities broadly available for governmental, commercial and all other purposes."[37]

The present day conflict concerning use of right-of-ways largely concerns private acquisitions of right-of-ways. These subsequent acquisi-

31. *See* Consol. Rail Corp. v. Lewellen, 682 N.E.2d 779, 782 (Ind. 1997).

32. *See id*.

33. Preseault v. United States 24 Cl. Ct. 818, 827 (1992). Although construction of property rights is based upon state law, a determination of whether an abandonment of a railroad easement has occurred is a federal determination. "From 1920 forward, the federal government has retained exclusive jurisdiction over the interstate operation of this nation's railroads beginning with the enactment of the Transportation Act of 1920. This Act granted the ICC exclusive and plenary jurisdiction over abandonment, construction and operation of the nation's interstate railroad lines." Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 553 (1997); *see also* Transit Comm'n v. United States, 289 U.S. 121, 127 (1933). Questions of abandonment, and the proposed transition of those lines to recreational trails, was addressed in *Preseault v. ICC*, 494 U.S. 1 (1990). While the analysis falls outside the scope of this note, for an analysis of the legislative interest in the preservation of railroad lines and the policy goals of the Rails-to-Trails Act, see *id*. at 5–7.

34. *See* Chevy Chase Land Co. v. United States, 733 A.2d 1055, 1064 (Md. Ct. Spec. App. 1999); JON W. BRUCE & JAMES M. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 9.02 (1988).

35. *See* Forwood v. Delmarva Power & Light Co., 1998 WL 136572, at *4 (Del. Ch. 1998).

36. *See, e.g.*, *Chevy Chase Land*, 733 A.2d at 1059.

37. Davis v. MCI Telecomm. Corp., 606 So.2d 734, 736 (Fla. Dist. Ct. App. 1992). Land grants to railroads in the later part of the nineteenth century totaled 150 million acres in the form of outright fee simple transfers. *See* Richard Welsch, *The National Association of Reversionary Property Owners (NARPO)* (Nov. 22, 2000), *at* http://www.halcyon.com/dick/row.htm. The General Rights of Way Grant, passed by Congress on March 3, 1875, was a shift in this policy and provided railroads with an easement for railroad purposes only. *See id*. at 3.

tions were necessitated by railroad expansion and the cessation of federal condemnation authority. Congress ceased granting the railroads federal condemnation authority with the General Rights of Way Grant of 1875.[38] Future railroad expansion occurred through private negotiation for right-of-way easements.[39] Private entities negotiated deeds across the nation, therein creating the present dilemma. A lack of national uniform treatment in interpreting the scope of these deeds exists. The absence of uniformity has complicated modern disputes concerning the interpretation of both the scope of easements and the viability of apportionment.

Disparity in treatment rests on two grounds: the dominant tenement owners' rights are determined by different state laws governing deed interpretation, and the deeds contain different language.[40] Although the federal government, under the auspices of the Interstate Commerce Commission (ICC), had complete jurisdiction over the operation of interstate railroad lines,[41] state law is operative in interpreting the scope, duration, and use of land acquired for railroad purposes. The varying histories of state property law doctrine and the absence of federal preemption in the field account, in part, for the current diversity of treatment of such cases.[42] In addition, acquisition through condemnation spanned a variety of interests, ranging from fee simples, easements, and licenses.[43]

One difficulty facing courts as they ascertain the intentions of parties is the lack of uniformity in the usage of the term "right-of-way." The term in the legal context denotes an easement, whereas its general meaning in the railroad parlance signifies a possessory interest in the land on which track is constructed.[44]

> A "right-of-way" in its legal and generally accepted meaning with respect to the interest of a railroad company in land is a mere easement for railroad purposes in the land of others; and therefore, as a general rule, where land obtained by purchase or agreement is conveyed by an instrument which purports to convey a right of way only, it does not convey title to the land itself, but the railroad com-

38. *See* Welsch, *supra* note 37, at 3.

39. *See, e.g.*, Amon, *supra* note 2, at 1; O'Reilly, *supra* note 6, at 30.

40. *See* Keokuk Junction Ry. Co. v. IES Indus. Inc., 618 N.W.2d 352, 356 (Iowa 2000); *see also* Richmond County v. Palmetto Cablevision, 199 S.E.2d 168, 173 (S.C. 1973).

41. *See* Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 553 (1997); *see also* Transit Comm'n v. United States, 289 U.S. 121, 127 (1933).

42. *See* Louisiana v. Sprint Communications Co., 892 F. Supp. 145, 147 (M.D. La. 1995) (noting that although "Congress has extensively provided for the regulation of railroads in certain areas, there is no indication that the Congress . . . sought to somehow impair state law property rights pertaining to servitudes") *Id*. at 150.

43. *See* Forwood v. Delmarva Power & Light Co., 1998 WL 136572, at *4 (Del. Ch. 1998).

44. *See Chevy Chase Land Co.*, 37 Fed. Cl. at 568; *see also* BLACK'S LAW DICTIONARY 1326 (6th ed. 1990) ("[R]ight-of-way" is sometimes "used to describe a right belonging to a party to pass over land of another, but it is also used to describe that strip of land upon which railroad companies construct their road bed, and, when so used, the term refers to the land itself, not the right of passage over it." (quoting Bouche v. Wagner, 293 P.2d 203, 209 (Or. 1956))); *see also* John O. Dyrud, *Railroad Right of Way—Types of Interests Acquired*, 22 MD. L. REV. 57, 62 n.21 (1952).

> pany acquires a mere easement in the land for right-of-way purposes, leaving the fee subject to such servitude in the owner, particularly where the deed provides for reverter to the grantor if the land is not used for such purposes.[45]

As a matter of interpretation of railroad conveyances, some courts have held that "[t]he estate acquired by the railroad company is to be determined from the intentions of the parties gathered from the deed construed in connection with the company's charter, or governing statutes, and in case of ambiguity, if any, in the light of the circumstances surrounding the execution of the deed."[46] To further complicate matters, in addition to the absence of uniformity in interpreting the term "right-of-way" as a means of conveyance, the term is also used simply as a description of the physical space to be occupied. As the Supreme Court noted in *Joy v. City of St. Louis*,[47] "[i]t sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed."[48] In some states, the presence of the phrase "right-of-way" creates a presumption that the interest received by the railroad is only an easement.[49] The disparity in deeds and their respective conveyance language makes the application of general principles governing their interpretation problematic.[50]

45. 74 C.J.S. *Railroads* § 84 (1951). *Compare* State Highway Comm'n v. Union Elec. Co., 148 S.W.2d 503, 506 (Mo. 1941) ("A right of way, in its legal and generally accepted meaning in reference to a railroad company's interest in land is a mere easement for railroad purposes in the lands of others."), *with* 74 C.J.S. *Railroads* § 84 (1951) (defining fee simple: "A grant or conveyance to a railroad company which has power to acquire by purchase such real estate as may be necessary for the construction and operation of its road, and to take a fee-simple title thereto will be held to convey a fee-simple title in the land and not a mere easement where such appears to be the intention of the parties as gathered from the entire instrument, particularly where the conveyance is in the usual form of a general warranty deed, or quitclaim deed, without any words of limitation or restriction and without purporting to convey merely a right of way; or where the only reservation made is the use of the granted premises by the grantor for ingress and egress to and from adjoining lands.").

46. Buhl v. U.S. Sprint Communications Co., 840 S.W.2d 904, 907 (Tenn. 1992).

47. 138 U.S. 1 (1891).

48. *Id.* at 44.

49. *See* Tazian v. Cline, 686 N.E.2d 95, 98 (Ind. 1997) ("The general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put or in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to a right of way in such conveyance generally leads to its construction as conveying only an easement." (quoting L. & G. Constr. Co. v. Indianapolis, 139 N.E.2d 580, 585 (Ind. App. 1957))); Ill. Cent. R.R. Co. v. Roberts, 928 S.W.2d 822, 825 (Ky. Ct. App. 1996) ("Where, by instrument or deed, land is purportedly conveyed to a railroad company for the laying of a rail line, the presence of language referring in some manner to a 'right of way' operates to convey a mere easement notwithstanding additional language evidencing the conveyance of a fee."); Schuermann Enter. Inc. v. St. Louis County, 436 S.W.2d 666, 667 (Mo. 1969).

50. *See* Hallaba v. MCI Telecomm. Corp., No. 98-CV-895-H, 2000 U.S. Dist. LEXIS 13974, at *637 (N.D. Okla. Mar. 31, 2000).

> Many deeds purporting to convey land to railroad companies contain various types of references to a right of way in various parts of the deed or with or without such references, contain references to the purpose of the conveyance or, with or without references to right of way or railroad purposes, contain other provisions which may be relevant on the issue of whether a fee or easement was intended. There appears to be considerable conflict in the cases as to the construction of deeds purporting to convey land, where there is also a reference to a right of way. Some of the

In contrast, other jurisdictions have concluded that the presence of the term "right-of-way" is not determinative of the conveyance of an easement, unless the phrase is included within the granting clause itself.[51] Further, right-of-ways granted to utilities and like providers have been broadly defined in a manner that allows their use to evolve over time.[52] Absent an express clause within the grant, the easement's use will not be limited to methods of use known solely at the time of the granting.[53]

An element unique to deed construction of railroad right-of-ways, as contrasted from the general treatment of easements, is the presence of language granting the railroad exclusive use of the easement.[54] Generally, an easement confers upon the holder only limited uses and allows the fee owner the concurrent right to use the land in a manner which does not interfere with the holder's activities.[55] However, the nature and use of railroad easements demand that actual use exclusively be within the railroad's control.

The inherent risk facing trespassers around the operation of railroad tracks precludes any safe uses of the land available to the landowner holding the underlying fee.[56] The danger to a trespasser from a fast-moving train, lacking the ability to stop suddenly, is the basis for the exclusivity of use. "[A]n easement for a railroad right-of-way differs in important respects from other easements, that the right of possession of the right-of-way is exclusive in the railroad."[57]

There are two critical distinctions between right-of-way easements obtained by railroads and those acquired by individuals. In the former's case, the public benefits from their existence.[58] First, railroad companies were created with the notion that they would serve a public benefit.[59] "[R]ailroads are not viewed strictly as private corporations since they are publicly regulated common carriers. Essentially, a railroad is a highway

conflict may arise by virtue of the twofold meaning of the term "right of way," as referring both to land and to a right of passage.

A.E. Korpela, Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3D § 3(a) (1966) (citations omitted).

51. *See* City of Manhattan Beach v. Superior Court, 914 P.2d 160, 164–72 (Cal. 1996) (noting deed giving right-of-way to railroad to be ambiguous); Maberry v. Gueths, 777 P.2d 1285, 1288 (Mont. 1989) (holding that railroad had acquired fee simple, despite presence of "right-of-way" in the conveyance); Dep't of Transp. v. Tolke, 586 P.2d 791, 795–96 (Or. Ct. App. 1978) (finding that the presence of the phrase "right-of-way" did not limit railroad's interest to an easement).

52. *See* Schnabel v. County of Du Page, 428 N.E.2d 671 (Ill. App. Ct. 1981).

53. *See* Faus v. City of Los Angeles, 431 P.2d 849, 854 (Cal. 1967); Bernards v. Link, 248 P.2d 341, 349 (Or. 1952).

54. *See Schnabel*, 428 N.E.2d at 561–62.

55. Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 565 (1997).

56. *See* Campbell v. Southwestern Tel. & Tel. Co., 158 S.W. 1085, 1086 (Ark. 1913) (noting that "[s]o long as the railroad company occupied any portion of its right of way, it had exclusive use and right of control coextensive with the boundary described in the deed").

57. Midland Valley R.R. Co. v. Sutter, 28 F.2d 163, 166 (8th Cir. 1928) (quoting Chi. Great W. R.R. Co. v. Zahner, 177 N.W. 350, 351 (Minn. 1920)).

58. *See* Preseault v. United States, 24 Cl. Ct. 818, 834 (1992).

59. *See* Lawson v. State, 730 P.2d 1308, 1311 (Wash. 1986).

dedicated to the public use. This dedication imports to the railroad the status of a quasi-public corporation."[60] This status warrants special consideration for railroads, such that their decisions affecting rights and obligations be made in the context of the public interest.[61]

Further, right-of-way easements held by railroads are transferable.[62] The courts have long recognized that railroad right-of-ways are of different nature and quality than traditional right-of-ways.[63] "A railroad right-of-way is a very substantial thing. It is more than a mere right of passage. [A right-of-way] is more than an easement. . . . [I]f 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.'"[64]

C. Apportionment of Railroad Right-of-Ways to Utility Providers

The proliferation of railroad lines represented a major step in the technological and economic development of the U.S. economy.[65] At its apex in the 1920s, a total of 272,000 miles of railroad track spanned the United States—the largest rail system in the world.[66] Currently, less than one-half of the American rail system remains in operation,[67] and of that total of 141,000 miles of track, 3,000 miles are lost per year.[68] The railroad industry's profits from leases to the utility industry are significant.[69] It is estimated that railroads have collected over $2 billion from utilities over the past twenty-five years for leases along right-of-ways.[70]

Much of the income generated from the leasing of railroad right-of-ways has come from the telecommunications industry, which uses fiber optics technology to transmit information.[71] Fiber optics are the conduit for the information superhighway in the twenty-first century.[72] The cur-

60. Marthens v. Balt. & Ohio R.R. Co., 289 S.E.2d 706, 711 (W. Va. 1982).

61. *See id.*

62. *See* Wash. Wildlife Pres. v. State, 329 N.W.2d 543, 546 (Minn. 1983).

63. *See* Mellon v. S. Pac. Transp. Co., 750 F. Supp. 226, 230 (W.D. Tex. 1990).

64. W. Union Tel. Co. v. Penn. R.R., 195 U.S. 540, 570 (1904) (quoting New Mexico v. United States Trust Co., 172 U.S. 171, 183 (1898)).

65. Given their speed and capacity for transporting large volumes, railroads were a quantum leap from animal transport. *See also* Lawson v. State, 730 P.2d 1308, 1311 (Wash. 1986) ("[R]ailroad companies were created on the theory that they will provide a public benefit.").

66. Preseault v. ICC, 494 U.S. 1, 5 (1990); *see also* David Burwell, *The Truth About Railbanking*, TRAFFIC WORLD, Jan. 11, 1999, at 43.

67. *See Mellon*, 750 F. Supp. at 230.

68. *Preseault*, 494 U.S. at 5; Charles H. Montange, *Conserving Rail Corridors*, 10 TEMP. ENVTL. L. & TECH. J. 139, 139 (1991).

69. *See infra* note 70 and accompanying text.

70. *See* Frank N. Wilner, *Selling the Brooklyn Bridge*, J. COM., Aug. 30, 1999, at 28. MCI WorldCom's 1999 projected payments totaled $1.151 billion directed towards "Telecommunications Facilities and Rights of Way." *See* Hallaba v. Worldcom Network Serv., Inc., No. 98-CV-895-H, 2000 U.S. Dist. LEXIS 13974, at *2 n.1 (N.D. Okla. Mar. 31, 2000).

71. *See supra* note 70; *see also infra* note 75–76 and accompanying text.

72. *See* Frank N. Wilner, *Railroads: Not Just for Trains Any Longer*, 65 J. TRANSP. L. LOGISTICS & POL'Y 273, 275–76 (1988). Fiber optics is

rent state of technology requires that optical lines be laid in linear corridors.[73]

To avoid the transaction costs incurred by individual negotiation with countless landowners, utilities have demonstrated a willingness to pay a high premium for leases of preexisting linear corridors. Lease rates, in some instances, are reported at $25,000 per mile.[74]

In instances where railroads maintain operations on right-of-ways, lease revenues have flowed exclusively to the railroads.[75] The prospect of costly litigation looms large for many telecommunication industry leaders, as significant portions of their fiber optic lines run through railroad right-of-ways.[76] Namely, more than one-half of MCI's and Sprint's fiber optic lines run parallel to right-of-ways.[77] Qwest, a telecommunications competitor and former subsidiary of Union Pacific, placed more than two-thirds of its 20,000 miles of lines along railroad right-of-ways and other easement corridors.[78]

In what may prove to encourage future suits against utilities currently apportioning right-of-ways, AT&T agreed to a settlement concerning its use of seventy miles of abandoned railroad right-of-ways.[79] In consideration of continued use of the parcels, and in compensation for past use, AT&T agreed to pay $45,000 per mile to landowners owning tracts in fee simple.[80] Although the above suit concerned abandoned right-of-ways, the financial gains possible from suits aimed at terminating easements for exceeding their scope, or for compensation, have ensured that the scope of these suits will not be limited to previously abandoned easements.[81] Bolstered by the success in achieving settlement, the number of class action suits concerning railroad right-of-ways, both at a national and state level, is expected to continue increasing.[82]

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the pulsing of light by laser through a dark cable that can carry thousands of digital voice circuits. The cable must not break (as light would enter) and it must not be bent (as the light would be compromised). If the cable must be buried, it must be buried beneath the frost line so that the freeze-thaw cycle does not create kinks in the line that affect the light signal.

Id. at 278; *see also* Williams Telecomm. Co. v. Gragg, 750 P.2d 398, 401 (Kan. 1988) ("Fiber-optics is a technology which uses glass wire to transmit simultaneously thousands of conversations from point A to point B without mix-up. Fiber-optic technology . . . use[s] electric energy to convert electric communications signals into light energy which travels though the fiber-optic cable, and electricity is used to reconvert the light energy into a signal for delivery at the other end of the system.").

73. *See* Wilner, *supra* note 72, at 272.

74. *See* O'Reilly, *supra* note 6, at 30.

75. *See* Wilner, *supra* note 72, at 278.

76. *See id.* at 274–79.

77. *See* O'Reilly, *supra* note 6, at 30.

78. *See id*.

79. *See* Wilner, *supra* note 70, at 28.

80. *See id*.

81. *See* Amon, *supra* note 2, at A1.

82. *See id*. At least seven national and eighteen statewide class action lawsuits have thus far been filed, and additional suits at a national and state level are anticipated. *See id*.

III. ANALYSIS

This part will evaluate three doctrines espoused by the courts in resolving easement disputes between landowners, railroad companies, and telecommunications providers. In the context of different methods of deed interpretation and different definitions of the term "right-of-way," courts have applied a range of doctrines, with varying results, to determine whether a proposed use would constitute an impermissible burden on the easement.[83] First, the traditional viewpoint is that the apportionment of a railroad right-of-way to a telecommunications provider always constitutes an impermissible addition to the easement, entitling the servient owner to additional compensation.[84] Second, the incidental use doctrine posits that an additional use of an easement that does not interfere with the servient tenement does not constitute an additional burden.[85] Lastly, the shifting public use doctrine provides that the burden contemplated at the time of the easement's formation should not serve as a static baseline, but rather should be viewed in light of changing technological demands.[86]

A. Traditional View

The traditional doctrine concerning the scope of easements is that there can be no expansion of the use beyond what was envisioned at the time of granting; any use beyond what was envisioned is impermissible.[87] The Tennessee Supreme Court in *Buhl v. U.S. Sprint Communications Co.*[88] adopted a traditional approach in which the railroad's use of the right-of-way was limited to actions necessary to the railroad operation itself.[89] The facts of the case are typical of these types of disputes. The plaintiff was a landowner whose predecessors in title had conveyed a right-of-way to the Knoxville and Kentucky Railroad Company in 1857.[90] The Knoxville and Kentucky Railroad subsequently conveyed its interest

83. *See* Keokuk Junction Ry. Co. v. IES Indus., Inc., 618 N.W.2d 352, 356 (Iowa 2000). The court noted:

> The states which have addressed the present question have come to no less than five different conclusions. The possible outcomes are: (1) utility poles are within the highway easement; (2) utility poles are within the highway easement, but only if they are used to furnish power for reasons directly related to travel; (3) utility poles are within the highway easement, but only in relation to urban areas; (4) utility poles are within the highway easement if they (a) are necessary for travel purposes, and (b) the highway is in an urban area; or (5) utility poles are not within the highway easement.

Id. The distinction noted between urban and rural areas, however, has been largely rejected by the majority of jurisdictions. *See* Fox v. Ohio Valley Gas Corp., 235 N.E.2d 168, 173 (Ind. 1968).

84. *See infra* notes 87–102 and accompanying text.

85. *See infra* notes 103–33 and accompanying text.

86. *See infra* notes 134–56 and accompanying text.

87. *See* Buhl v. U.S. Sprint Communications Co., 840 S.W.2d 904, 910 (Tenn. 1992).

88. *Id.*

89. *See id.* at 910.

90. *Id*. at 906–07.

to Southern Railroad. In 1988, Sprint contracted with Southern Railroad for the placement of fiber optic telephone cable along Southern's right-of-way.[91] The cable, placed within the right-of-way's boundaries, was buried forty-two inches beneath the ground and was less than one inch in diameter.[92] The lease between Sprint and Southern Railroad covered 780 miles of Southern rail system, at the cost of $1,200 per mile per year, for a term of twenty-five years.[93]

The Tennessee court stated the following rule for third-party uses of right-of-ways: "Not only must the third party's use be consistent with that of the railroad and not interfere with its use, [but it] must also be 'needful and helpful to the operation of the [rail]road itself.'"[94] The court determined that the plaintiff's deed conveyed only an easement and that the cable was not used in the operation of the railroad.[95] "The critical requirement is that the [cable] be used in connection with the operation of the railroad upon and across the encumbered property."[96] Accordingly, it found that the installation of the telephone cable constituted a taking, which entitled the fee simple owners to compensation.[97] For this court, the absence of a link between the operation of the railroad and the fiber optic cable, beyond the economic benefit from the lease terms, was dispositive.[98] This viewpoint exemplifies the traditional belief that any additional burden upon the right-of-way, peripheral to the originally intended use, creates a corresponding right to compensation by the owner of the underlying fee for the increased burden.[99] The *Buhl* court, citing an antecedent case, noted that "[i]t is almost everywhere held that the erection of a line of telegraph over the right of way of a railroad company, not to be used in the operation of the railroad, but for purely commercial purposes, imposes an additional burden on the fee, and the landowner is entitled to additional compensation."[100]

The requirement that the communication system be directly beneficial to the dominant tenement, an interpretation that excludes the collection of revenue, was rarely an issue in antecedent cases, in which the railroad actually used telegraphs in their daily operations. However,

91. *Id*. at 905–06.
92. *Id*. at 906.
93. *Id*.
94. *Id*. at 910.
95. *Id.* at 908–11 ("The language of the instrument and the relevant circumstances, particularly the absence of any evidence of an intention to convey more than a right of way, show that York's deed conveyed an easement for railroad purposes only.").
96. *Id*. at 911; *see also* Pearson, *supra* note 3 (examining the issue of lease agreements between railroads and telecommunication providers and concluding that owners of the underlying fee were entitled to compensation for additional burdens).
97. *Buhl*, 840 S.W.2d at 912–13.
98. *See id.* at 911.
99. *See id*. at 912.
100. *Id.* (quoting W. Union Tel. Co. v. Nashville, Chattanooga & St. Louis Ry. Co., 237 S.W. 64 (Tenn. 1921), *cert. denied*, 258 U.S. 626 (1922)).

the modern operating systems of railroads have no such dependence upon utilities running parallel to railroad lines. Under the traditional viewpoint, the apportionment of the right-of-way is severely restricted.[101] "[A] railroad company, owning only an easement for railroad purposes, cannot 'license the appropriation' of any part of the right-of-way for any use, private or public, not related to the construction, maintenance, or operation of the railroad."[102]

The *Buhl* court's restrictive interpretation poses significant economic consequences. The economic efficiency achieved through the use of existing linear corridors would be lost, resulting in increased transaction costs. Further, there is a risk that owners of the underlying fee would retard the continued growth of the communications industry through protracted negotiations of license fees; this result is clearly contrary to the public interest.

B. Incidental Use Doctrine

The incidental use doctrine views the anticipated burden to be imposed upon the servient land owner as the key point of inquiry; a supplemental use, without regard to whether such use was actually envisioned, that does not exceed the burden originally envisioned, is permissible. The "incidental use doctrine" posits that a railroad is permitted to grant an easement within the railroad's right-of-way "without entitling the owner of the subservient estate to compensation."[103] In an era when railroads employed telegraph lines in their operation, deeds granting right-of-ways necessarily envisioned the scope of such grants to include support equipment. Now, in an age when rail travel is not dependent upon these communication systems, the doctrine contends that if a use of an easement, such as for the siting of communication lines, was contemplated at the time of granting, then its continued use, or modern-day equivalent, irrespective of a linkage to the functioning of the easement's primary purpose, is acceptable. In *Grand Trunk Railroad v. Richardson*,[104] the Supreme Court examined the question of whether structures, not used exclusively for railroad purposes, could be located on railroad right-of-ways. The Court noted:

> [W]hile it must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway, . . . we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. . . . Such erections would not have been inconsistent with the purposes for which its charter was granted. And, if

101. *See id.* at 910.
102. *Id*.
103. Mellon v. S. Pac. Transp. Co. & MCI Telecomm., 750 F. Supp. 226, 229 (W.D. Tex. 1990).
104. 91 U.S. 454 (1875).

> the [railroad] company might have put up the buildings, why might it not license others to do the same thing . . . ?[105]

The doctrine of incidental use was the subject of considerable attention by the courts at the end of the nineteenth century.[106] Railroads acquired some rail corridors through federal and state statutes that explicitly linked the railroad right-of-way easements' deeds to concurrent telephone and telegraph use.[107] The twin uses of transportation and communications, both vital to the public interest, were ensured, and the nation gained the economic advantage of dual development.[108]

In later stages, expansion of railroad lines occurred through the private acquisition of right-of-way easements. These deeds largely permitted the use of the telegraph not as an independent utility burden upon the land, but due to its role within railroad operations.[109] Beyond the obvious economic advantages associated with the dual uses of easements, however, early railroad companies depended upon the telegraph for railroad communication purposes, scheduling, and operational control.[110] Although that has ended, it is evident that landowners who granted easements during this time would have contemplated a granting clause such as "for railroad purposes only" to include the use of a communications system such as a telegraph.[111] What was contemplated at the time of the grant serves as a baseline for the accepted burden to be imposed upon the land today.[112] Accordingly, the use of railroad easements by modern communication systems, although not directly supporting the actual operation of railroads, is unlikely to exceed the burden that was contemplated at the time of granting.[113]

In a scenario closely paralleling the modern day apportionment of railroad right-of-ways to the telecommunications industry, nineteenth-century telegraph and, later, telephone entities sought entry into linear railroad corridors.[114] In some cases, state legislation provided for the incidental use of railroad right-of-ways for telegraph and telephone lines.[115]

105. *Id*. at 468–69.

106. *See* Cater v. N.W. Tel. Exch. Co., 63 N.W. 111, 112–14 (Minn. 1895).

107. *See* Davis v. MCI Telecomm. Corp., 606 So. 2d 734, 736 (Fla. Dist. Ct. App. 1992) (citing particular statutes that "authorized telecommunications lines in railroad rights-of-ways").

108. *See Cater*, 63 N.W. at 113–14.

109. *See infra* notes 110–12 and accompanying text.

110. *See Davis*, 606 So. 2d at 736; *see also* GEORGE H. DRURY, THE HISTORICAL GUIDE TO NORTH AMERICAN RAILROADS 8–9 (1985).

111. *See Davis*, 606 So. 2d at 736–37; St. Louis, Iron Mountain & S. Ry. Co. v. Cape Girardeau Bell Tel. Co., 114 S.W. 586, 587 (Mo. App. 1908) ("[T]he railroad company may construct and maintain such telephone or telegraph line on the right of way for its own purpose . . . and furnish the required telephonic or telegraphic service to the end of transmitting intelligence with respect to the operation of its trains, carriage of traffic, passengers and other needs of its calling.").

112. *See* Buhl v. U.S. Sprint Communications Co., 840 S.W.2d 904, 906 (Tenn. 1992).

113. *See id*.

114. *See* W. Union Tel. Co. v. Postal Tel. Co., 217 F. 533 (9th Cir. 1914).

115. *See* Ft. Worth & Rio Grande Ry. Co. v. S.W. Tel. & Tel. Co., 71 S.W. 270 (Tex. 1903).

The legislature's motivation, in the court's view, stemmed from the fact that

> [t]elegraph lines were in existence upon rights of way of railway companies throughout the country, and it was common knowledge that they did not impede, but rather facilitated, the business of the carriers. . . . [T]elegraph lines can exist upon the rights of way of railroad companies, consistently with the right of the latter.[116]

Although railroads are no longer dependent upon these types of land-based communications systems for their operation, it is significant that the dependency existed when easements were granted. Even a limiting clause in an easement restricting use to railroad purposes to the exclusion of other purposes would necessarily permit related activities essential to achieving the easement's primary purpose.[117] Any burden associated with activities such as the construction of telegraph lines through the easement would have been within the contemplation of the grantor. However, this same analysis would exclude application of the shifting public use doctrine in cases in which granting occurred at a time when railroads did not require additional communications assistance, and the granting clause excluded additional uses.[118] Under the incidental use doctrine, however, were a granting clause in a conveyance to permit the placement of a structure that was related to the operation of the railroad, then for purposes of modern interpretation, the crucial factor is that the use was envisioned, regardless of its purpose. Insofar as modern day use of the right-of-way imposes no greater burden than what was envisioned at the time of the granting, then the question of whether the use is for a related purpose specified in the granting clause is of no consequence.

The transition from telephone or telegraph use of a railroad right-of-way to its use for the siting of digital cable lines is one that has been accepted by some courts. In *Mellon v. Southern Pacific Transport Co.*,[119] the court compared these technologies, noting that:

> [T]he right of telephone companies to bury their long distance telephone lines on the right-of-way of public streets was guaranteed by the same statutes allowing the erection of telephone poles and lines above the surface. MCI's fiber optic cable buried on Southern Pacific's right-of-way pursuant to an agreement with Southern Pacific is the modern application of its antecedent the telegraph line.[120]

116. *Id*. at 274.

117. *See id.*

118. *See* Keokuk Junction R. Co. v. IES Indus., Inc., 618 N.W.2d 352, 357 (Iowa 2000) (declining to adopt the shifting public use doctrine on the grounds that the easement at issue was formed in 1993, and its granting clause making no reference to utility lines commonly in use).

119. 750 F. Supp. 226 (W.D. Tex. 1990).

120. *Id*. at 230.

Similarly, *City of Colombia v. Tatum*[121] examined the proposed transition of a public easement from an electric streetcar system to busing.[122] As a matter of interpretation, the court construed the statute conveying the easement from a modern perspective, so as not to impede the public interest.[123] Embracing the concept of shifting technological uses, the court in *Leppard v. Central Carolina Telephone Co*.[124] observed: "When new modes of travel and new means of communication become necessary, the public have a right to use them, and they impose no new burden on the soil unless they are inconsistent with the old use."[125] The court concluded that the easements granted for public purposes, such as streets or highways, were not constrained by the purposes and uses existing at the time of their granting.[126] Rather, uses of public easements are permitted, provided that they are consistent with the nature of the easement's purpose of servicing the public and do not result in actual harm to the servient tenement.[127]

Shifting economic and technological conditions justify judicial activism in the form of a shift away from property laws requiring reversion of interests to the servient landowner so that modern societal demands can be satisfied.[128] Courts examining the burden imposed on railroad easements by telegraph providers endorsed the incidental use doctrine due to the commonalities of serving a public benefit, a link also present in evaluating the railroad and telecommunications industries.[129] "A nexus between railroad and commercial telegraph facilities is found throughout

121. 177 S.E. 541 (S.C. 1934).

122. *See id*. at 549.

123. *See id*.

124. 30 S.E.2d 755 (S.C. 1944).

125. *Id*. at 756; *see also* Fox v. Ohio Valley Gas Corp., 235 N.E.2d 168, 171–73 (Ind. 1968) (holding that the addition of a gas pipeline on a public street easement did not impose an additional burden upon the servient tenement); Bernards v. Link, 248 P.2d 341, 350–52 (Or. 1952) (holding that a conversion of logging railway to road for logging trees was consistent with technological development and was not an abandonment).

126. *Leppard*, 30 S.E.2d at 757.

127. *See id*.; *see also Fox*, 235 N.E.2d at 172–73 (holding that the placement of a gas pipeline along public street was not an additional burden on servient estates of abutting landowners); *Bernards*, 248 P.2d at 346 (holding that conversion of logging railway to road for logging trucks was not abandonment of easement, as conversion to trucks was not an increased burden, but the product of technological evolution), *aff'd on reh'g*, 263 P.2d 794 (Or. 1953).

128. *See* Faus v. City of Los Angeles, 431 P.2d 849, 852 (Cal. 1967); *see also* City of Santa Monica v. Jones, 232 P.2d 55 (Cal. Dist. Ct. App. 1951). California, in the nineteenth century, was similarly disposed to accept a doctrine of shifting uses. In *Montgomery v. Santa Ana & Westminster Railway Co*., 37 P. 786, 788 (Cal. 1984), the court noted:

> The trend of judicial opinion, except where overshadowed and incrusted by stare decisis, is to a broader and more comprehensive view of the rights of the public in and to the streets and highways of [a] city . . . and, while carefully conserving the rights of individuals to their property, the courts have not hesitated to declare the shadowy title which the owner of the fee holds to the land in a public street or highway, during the duration of the easement of the public therein, as being subject to all the varied wants of the public, and essential to its health, enjoyment, and progress.

129. *See* W. Union Tel. Co. v. Postal Tel. Co., 217 F. 533, 538 (9th Cir. 1914) (noting that "[i]n the present age of progress, the telegraph is as essential to the needs and comforts of the public as the railroads themselves").

the historical record. Acts of Congress in the nineteenth Century required railroads that had been granted right-of-way passage through United States lands to make their telegraph facilities broadly available for governmental, commercial and all other purposes."[130] The Florida Court of Appeal, in *Davis v. MCI Telecommunications Corp*., held that a state eminent domain statute controlled, rather than give credence to an "incidental use" doctrine.[131] The statute, in pertinent part, provided that:

> any telegraph or telephone company now organized, or which may hereafter be organized under the laws of this or any other state, shall have the right to construct, . . . along and upon the right of way of any railroad in the state, and to that end is granted all powers for the exercise of the right of eminent domain.[132]

Underlying the contention of property owners seeking the extinguishment of railroad right-of-way easements on the grounds of an excessive burden is a view that new technological realities are constrained by the intention of the parties to the conveyance, at the time of its execution.[133] This viewpoint imposes a limit on the utility of the incidental use doctrine. Although a concurrent use may fail to impose an additional burden on the easement, as it was envisioned at the time of granting, this constraint is inapposite to society's demand for a modern telecommunications infrastructure. New developments, such as modern fiber-optic communications systems, may prove to impose no greater burden on the holder of the underlying fee, but would fall outside permissible contemplated uses of the easement.

C. Shifting Public Use Doctrine

The shifting public use doctrine rejects the position that permitted uses of an easement are only those contemplated at the time of its granting.[134] Rather, it posits that if a purpose were contemplated, the specific means of execution can develop as technology allows and society demands.[135] The rationale underlying the shifting public use doctrine extends to all phases of industrial and technological development.[136] Throughout all phases of society's advancement, new methods of transportation, communication, and transmission have been developed. The doctrine asks whether such advances warrant the negotiation of property interests properly acquired by earlier generations for the purpose of ac-

130. Davis v. MCI Telecomm. Corp., 606 So. 2d 734, 736 (Fla. Dist. Ct. App. 1992).

131. *See id*. at 737.

132. FLA. STAT. ANN. § 362.02 (1999).

133. *See* RESTATEMENT OF PROP.: SERVITUDES § 493 (1944) ("The apportionability of an easement in gross is determined by the manner or the terms of its creation."). The argument posits that the servient tenement is authorized to "[p]rohibit any use made under it in excess of that authorized by the manner or terms of its creation." *Id.*

134. *See* Leppard v. Cent. Carolina Tel. Co., 30 S.E.2d 755, 757 (S.C. 1944).

135. *Id.*

136. *See id.*

complishing the same goal in a more efficient manner.[137] The noted railroad scholar, Edward L. Pierce provided a useful exposition on the doctrine:

> The use of property taken by the right of eminent domain is not confined to the precise mode or kind of use which was in view at the time of the taking, but may extend to other modes which were then unpracticed and unknown. When property was taken for a public use, and full compensation made for the fee or a perpetual easement, its subsequent appropriation to another public use—certainly if one of a like kind—does not require further compensation to the owner. Nor is such compensation required when there is a change in the person or body enjoying or controlling the property taken, or in the conditions upon which the public may use it. Accordingly, the adjoining owner is not deprived of any constitutional right when a highway is transferred to a private corporation charged with the duty of maintaining it and invested with the power of taking tolls, nor when a turnpike becomes free to public travel. There is no change of use involving a new taking when, under legislative authority, the location of a plank-road or canal is converted into that of a highway, or of a railroad. . . . The purpose of opening a highway or street is to provide the public with a right of passage for persons on foot or riding in carriages or other kinds of vehicles. The use for which this public right is obtained is not confined to the same species of vehicles, drawn by the same kind of power that prevailed at the time of the dedication or appropriation, but admits of the passage and repassage of such other vehicles, operated in such a mode and by such a force as an advanced civilization may require . . . .[138]

Implicit in the doctrine is the "premise that a shifting public use will occur only when there is minimal disruption in continuity between one use and another."[139] Thus, the doctrine is inapplicable in instances in

137. As the *Leppard* court stated:

> "Is the telephone equipment an unnecessary or unreasonable obstruction, and a new and additional servitude? Will it suffice to say that because a street was dedicated or condemned 50 years ago, before electrical inventions for lighting, communicating oral and telegraphic messages, and propelling street cars were thought of, it could not therefore, have been condemned or dedicated in contemplation of the uses therein of such inventions; or that, because gas could not have been contemplated; or that because water, for protection against fire, had not been forced through pipes in the streets, such use could not have been contemplated; and so on as to the uses of the street for sewerage, for natural gas piping, for telegraph and telephone lines, above or below the surface of the street, or for the possible future uses of pneumatic tubes for the transmission of mails or parcels, and the distribution of steam or electricity for heating, etc? If what was actually contemplated at the time of the dedication should be found to answer the question in every case, many of the uses common to the streets of every city would be additional servitudes, for which the fee owner would be entitled to compensation."

Id. (quoting Magee v. Overshiner, 49 N.E. 951, 951–52 (Ind. 1898)). The *Magee* court adopted a favorable view towards an expansive use doctrine, noting that "such methods of travel and communication, in addition or in substitution for those, as might come in vogue and be accepted and recognized as proper and important uses of the street in the varying needs and demands of commerce. *Magee*, 49 N.E. at 952.

138. Preseault v. United States, 24 Cl. Ct. 818, 833 (1992) (quoting E.L. PIERCE, A TREATISE ON THE LAW OF RAILROADS 233, 234 (1881)).

139. *Preseault*, 24 Cl. Ct. at 833.

which the railroad has already discontinued its use of the right-of-way, or manifested an intention to abandon, thereby severing continuity between the past and proposed use of the easement.[140] The shifting public use doctrine posits that altering the use of an easement from one public purpose to another should not be regarded as an impermissible use resulting in the extinguishment of the easement.[141] The doctrine is premised on the public policy contention that the expanded scope of an easement is warranted when the proposed use is a new technology not anticipated at the time of the granting.[142] Thus, while the doctrine would prove inapplicable in the proposed transition of railroad right-of-ways to recreational trails, which cannot be construed as a new method of transportation, the use of new telecommunications equipment on right-of-ways falls within the doctrine's scope.[143] As the South Carolina Supreme Court noted in *Leppard v. Central Carolina Telephone Co.*:[144]

> The public easement, it is asserted, may be utilized for the transmission of intelligence, as well as for travel and transportation. When new modes of travel and new means of communication become necessary, the public have a right to use them, and they impose no new burden on the soil unless they are inconsistent with the old use.[145]

Had courts throughout the nation's economic development fixed the scope of an easement to uses contemplated at the time of drafting, the impact on economic and technological development would have been devastating. The shifting public use doctrine accommodates the very real possibility that the grantor could not have foreseen the shift in communications technology from communications moved by human and coal power to communications via electrical line.[146] "[T]he mere fact that the grantor could not have foreseen the great progress in modern life did not prevent the governing body from saying that the highways may be adapted to these uses."[147]

Opponents of the shifting public use doctrine contend that its adoption would render property owners largely defenseless against encroachment.

> [E]mploying concepts of the advancement of civilization, and proper and consistent uses of highways in light of human progress, seems severely to compromise the rights of landowners. . . . Any

140. *See* Consol. Rail Corp. v. Lewellen, 682 N.E.2d 779, 783 n.6 (Ind. 1997) (noting that "[b]ecause we hold that the easement was abandoned, we do not address the viability of the doctrine of shifting public use in Indiana").

141. *See* Preseault v. United States, 100 F.3d 1525, 1559 (Fed. Cir. 1996) (Clevenger, J., dissenting).

142. *See Preseault*, 24 Cl. Ct. at 833.

143. *See id.* at 833–34.

144. 30 S.E.2d 755 (S.C. 1944).

145. *Id.* at 756.

146. *See* Lay v. State Rural Electrification Auth., 188 S.E. 368 (S.C. 1936).

147. *Id.* at 370.

> private roadway dedicated for use as a public thoroughfare thus becomes a pathway for whatever use a county authority, in its sole discretion, deems fit to impose, regardless of the detriment to the adjacent landowners. Little imagination is required to summon up possible uses which would be severely detrimental, if not completely destructive, of surrounding farm land; uses which, according to the majority view, could be imposed without the necessity of compensation whatsoever.[148]

The objections noted above are largely overstated. Application of the shifting public use doctrine would preclude expansion of the easement beyond the physical confines of a right-of-way.[149] Further, the expansion of the scope of an easement to include uses not contemplated at the time of its formation does not preclude an analysis of whether the burden on the underlying fee has increased beyond what was initially contemplated, thereby entitling the fee owner to additional compensation or a finding that the easement has been extinguished. So, even though the use may be changed, the overall burden must not increase beyond what was originally contemplated.[150] Lastly, the actions of any local authority would necessarily be constrained by judicial review.

A focus on the purpose served by a use of an easement rather than the physical form it embodied at the time of the conveyance lends itself to a more expansive interpretation of granting clauses. If, prior to the introduction of modern communication systems, railroads were utilized as a means of conveying information—such as the delivery of newspapers, parcels, or mail—then a granting clause permitting the use of an easement would have envisioned a broad range of purposes. While encapsulated under the guise of "railroad purposes," a grantor may well have interpreted such a clause as permitting the easement to be used for both transportation and communication purposes. In 1936, the South Carolina Supreme Court in *Lay v. State Rural Electrification Authority*[151] examined this issue. The analysis, however dated, is telling, particularly in light of technological developments since the ruling. In *Lay*, a farmer who had previously granted the state an easement for the construction of a highway sought to enjoin the easement's use for the placement of telephone lines.[152] Noting the easement had been formed in the "horse and buggy days," it was unlikely that the grantor would have envisioned the use of automobiles, or the increase in noise or traffic, upon the right-of-way.[153] Communications delivered by post, or heat and light conveyed by

148. Pickett v. Cal. Pac. Util., 619 P.2d 325, 328 (Utah 1980) (Hall, J., dissenting).

149. Both the incidental and shifting public use doctrines focus on permitted activities within clearly defined right-of-way easements. Neither posit the actual physical expansion of the easement onto property held in fee.

150. *Pickett*, 619 P.2d at 327.

151. 188 S.E. 368 (S.C. 1936).

152. *Id*. at 368.

153. *Id*. at 368–69.

coal or oil, were reasonable activities envisioned at the time of the granting.[154]

The court held that if a use such as the delivery of communications or power resources had been envisioned, then the specific means of delivery employed at the time did not impose a static limitation upon the easement.[155] Modern inventions that enabled communications by wire need not have been foreseen, so long as the easement had previously been employed to effectuate the same ends through different, albeit archaic, means.[156]

IV. RESOLUTION

This note advocates the shifting public use doctrine as a means for courts to reconcile the competing interests of landowners, railroad companies, and telecommunications providers. Subpart A posits that adoption of a shifting public use doctrine would not result in an impermissible expansion of the burden imposed on the easement. In Subpart B, the doctrine's economic efficiency is evaluated, concluding that its adoption would minimize transactional costs for all parties and ensure that easements are utilized so as to maximize economic value.

A. The Shifting Public Doctrine Would Not Excessively Burden the Underlying Estate

The conveyance vesting a right-of-way to a railroad serves as the baseline for determining the extent of the burden imposed upon the servient tenement. Courts generally agree that after the establishment of an easement, its use must not exceed the burden that was envisioned at its granting.[157] In evaluating whether a proposed use would be consistent with the easement, "[t]hree considerations are: (1) the physical character of past use compared to the proposed use; (2) the purpose of the easement compared to the purpose of the proposed use; and (3) the additional burden imposed on the servient land by the proposed use."[158]

The burden imposed on the owner of the underlying fee encompasses several factors. Initial installation or construction necessary to begin the use aside, an easement for potentially indefinite commercial use cannot be said to exclude contemplation of maintenance, repair, or replacement of equipment necessary for the continued use of the ease-

154. *Id*. at 370.

155. *See id*.

156. *Id*.; *see also* Miller v. Street, 663 S.W.2d 797 (Tenn. App. 1983) (noting that the right to take water from a spring could change over time to allow defendants to make use of modern plumbing).

157. *See* Keokuk Junction Ry. Co. v. IES Indus. Inc., 618 N.W.2d 352, 355 (Iowa 2000).

158. *Id.* at 356 (citing RESTATEMENT (FIRST) OF PROP. § 478 (1944 & Supp. 1993)).

ment.[159] In the context of railroad right-of-ways, the burden must necessarily include the rail traffic and noise that accompanies railroad operation.[160]

A factor normally associated with burden analysis in determining the scope of an easement is whether the additional or shifting use proposed would interfere with the fee owner's use of the easement.[161] This consideration is inapplicable in the case of railroad right-of-ways.[162] "Obviously, a railroad company must have exclusive access to its tracks and machinery. The ingress and egress of the general public, however, are limited by the nature of the use of the easement."[163]

The argument frequently made by landowners seeking either the extinguishment of the railroad's easement or a portion of profits received through the apportionment of the right-of-way, is that the addition of utility lines creates an additional impermissible burden upon the servient tenement.[164] This argument, when applied to a scenario in which a utility seeks merely to add a cable or wire to an existing pole, is tenuous in that any burden imposed upon the servient tenement is likely to be exceedingly minimal.

In the context of a railroad however, the use of the right-of-way by utilities or telecommunications providers is likely to amount to a greater degree of intrusion. "Obviously, excavation upon a homeowner's property for the installation of underground cable poses a much greater burden than the attachment of an aerial cable to existing poles."[165] No greater burden, in terms of visual interference or unsightliness, can be attributed to buried fiber optic cables. Further, intrusion or the imposition of a temporary burden caused by maintenance or repair of existing equipment, coupled with daily disruptions relating to travel are already within the contemplation of the owner of the underlying fee.[166] That intrusion, however, is minimized by the limited duration required for installation.[167]

The exclusive nature of railroad right-of-way easements, due to the inherent danger associated with railroad operations, are such that the

159. *See* Mo. Pac. R.R. Co. v. Buenrostro, 853 S.W.2d 66, 78 (Tex. Ct. App. 1993) (noting that a right-of-way easement gives its holder the right to use and maintain).

160. *See* Lawson v. State of Washington, 730 P.2d 1308, 1319 (Wash. 1986) (Pearson, J., dissenting) (indicating that the "volume or frequency" of rail traffic could exceed what was contemplated at the time of granting and impose an additional unforeseen burden on the easement).

161. *See* Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 565 (1997).

162. *See* Campbell v. S.W. Tel. & Tel. Co., 158 S.W. 1085, 1086 (Ark. 1913).

163. Preseault v. United States, 24 Cl. Ct. 818, 826 (1992). The safety justification for exclusion of the general public would apply equally to the owner of the underlying fee.

164. *See* Buhl v. U.S. Sprint Communications Co., 840 S.W.2d 904, 910–11 (Tenn. 1992).

165. *See* Henley v. Cont'l Cablevision, Inc., 692 S.W.2d 825, 828 (Mo. Ct. App. 1985).

166. *See* Mo. Pac. R.R. Co. v. Buenrostro, 853 S.W.2d 66, 68 (Tex. Ct. App. 1993).

167. An easement granted for railroad purposes, even exclusively, would encompass routine maintenance, repair and track replacement; an imposition similar to that imposed by the siting of underground fiber-optic cable.

underlying estate's use of the easement is minimal.[168] The mere addition of a use to an existing right-of-way, particularly when such right is exclusive as between the holder of the right-of-way and the servient tenement, is not determinative of an additional burden. A finding of extinguishment requires "a permanent interference or an act of such a nature such that thereafter exercise of the easement cannot be made without severe burden upon the servient tenement."[169] An additional use of an easement, when access to it by the owner of the underlying estate was previously limited, fails to impose a burden justifying extinguishment of the easement.

Further, the use of the dominant tenement must be in a manner imposing "as slight a burden as possible on the servient tenement."[170] The rights of the owner of the easement, however, are not static, in as much as the owner "may make any use of the easement (including maintenance and improvement) that is reasonably necessary to the enjoyment of the easement, and which does not cause unreasonable damage to the servient estate or unreasonably interfere with the enjoyment of the servient tenement."[171]

B. Employment of the Shifting Public Use Doctrine Would Be Economically Beneficial to Society

The primary benefits associated with the adoption of a shifting public use doctrine over an approach favoring the traditional rights of landowners are the economic and ancillary advantages afforded to telecommunications companies and railroads. A finding that fiber-optic placement constituted an additional burden upon an easement would require compensation to the underlying fee owners. This approach would result in significantly higher transaction costs[172] and could impair the growth of the telecommunications industry. Fragmented negotiations between individual landowners and a corporation concerning individual parcels would create bilateral monopolies and encourage landowners to hold out for excessive costs.[173] These negotiations could be onerous bur-

168. *See supra* notes 161–64 and accompanying text.

169. Buechner v. Jonas, 228 Cal. App. 2d 127, 132 (1964).

170. Baker v. Pierce, 100 Cal. App. 2d 224, 226 (1950).

171. Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229, 1238 (Colo. 1998); *see also* Knudson v. Frost, 139 P. 533, 535 (Colo. 1914).

172. *See* WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 7 (2d ed. 1988) ("By transaction costs economists mean real resources employed in bargaining, getting information, and formalizing and enforcing agreements—costs that interfere with the working of competitive markets.").

173. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 62–63 (5th ed. 1998). Judge Posner examines the advantage facing present holders of a right-of-way, noting:

> Once the railroad . . . has begun to build its line, the cost of abandoning it for an alternative route becomes very high. Knowing this, people owning land in the path of the advancing line will be tempted to hold out for a very high price—a price in excess of the opportunity cost of the land . . . . Transaction costs will be high, land-acquisition costs high, and for both reasons the right-of-way company will have to raise the price of its services. The higher price will induce some consumers to shift to substitute ser-

dens on telecommunications providers given their apparent haste to install fiber-optic lines along right-of-ways.[174]

The consequences of higher transaction costs would result in a decrease of future expansion initiatives by telecommunications providers.[175] "Reliable high-speed transmission of telecommunications is more than a convenience to our modern society—it is essential to the transaction of public and private business including national defense."[176] In addition, the loss of lease fees presently enjoyed by railroad companies[177] may increase the rate of abandonment of the national rail line, a result contrary to past legislative initiatives aimed at curtailing track loss.[178]

Given the nature of the easements at issue, the addition of a proposed use such as the siting of telecommunications cable appears within the burden envisioned at the time of granting. The exclusive nature of railroad easements owing to safety risks would have severely limited the owner's rights to concurrent use of the servient land. The absence of visual interference or increased noise further support the position that the proposed use is within the scope of the permissible burden.

V. CONCLUSION

Throughout time, society's advancement has witnessed the transition from older technologies to methods which were better, faster, and cheaper. That evolution continues today in the area of the telecommunications industry, which deemed the use of existing right-of-ways to be the most expedient means of delivering fiber-optic cable technology at a national level. In light of the spate of class action lawsuits brought by landowners seeking either termination of the underlying easement, or compensation for the additional use,[179] the courts will be faced with reconciling the rights of the holders of the underlying fees with the interests of the railroad industry, telecommunications providers, and society at large.

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vices. Right-of-way companies will therefore have a smaller output; as a result they will need, and buy, less land than they would have bought at prices equal to the opportunity cost of the land. Higher land prices will also give the companies an incentive to substitute other inputs for some of the land they would have bought. As a result of all this, land that would have been more valuable to a right-of-way company than to its present owners will remain in its existing, less valuable uses, and this is inefficient.

Id. at 62–63.

174. *See* O'Reilly, *supra* note 6.

175. *See* Kristi Robbins Rezabek, Buhl v. U.S. Sprint Communications Co.*: Ascertaining the Rights of Fee Owners on Whose Land a Railroad Easement Exists*, 22 MEMPHIS ST. U. L. REV. 843, 853 (1992).

176. Williams Telecomm. Co. v. Gragg, 750 P.2d 398, 403 (Kan. 1988).

177. *See* Amon, *supra* note 2, at A12.

178. *See* 16 U.S.C. § 1247(d) (1994).

179. *See* Amon, *supra* note 2, at A1.

The shifting public use doctrine offers a legally and economically sound solution to this national problem.[180] Just as the courts saw the advantage of sanctioning and facilitating the spread of the telephone and the telegraph to spread a public benefit, courts must recognize that a national telecommunications system, unencumbered by dated interpretations of right-of-way easements, would maximize societal benefit.[181] By consolidating telecommunications license fees among railroads, the purposes of the Rail-to-Trails Act—preservation of the national rail system—will be furthered. Additionally, telecommunications providers will be able to avoid high transaction costs with individual fee holders which would impair the development of the burgeoning telecommunications industry.

180. *See supra* notes 134–55 and accompanying text.
181. *See supra* notes 156–76 and accompanying text.