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Note

Balancing Private Property Rights with Public Interests: Compensating Landowners for the Use of Railroad Corridors for Fiber-Optic Technology

Jill K. Pearson*

The invention of fiber-optic cable has resulted in a myriad of benefits for consumers. In addition to improving the quality of long-distance and cellular communication, fiber-optic technology has provided more efficient Internet access and is leading to significant advances in the visual entertainment industry. Companies like Sprint, Qwest, MCI, and AT&T, while reaping the benefits of this fiber-optic revolution, must continually strive to keep up with the competition and consumer demand in the fast-paced telecommunications market. In

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1. Fiber-optic cable is an alternative to conventional metal cable and is comprised of very fine strands of glass. See Philip Elmer-DeWitt, Take a Trip into the Future on the Electronic Superhighway, TIME, Apr. 12, 1993, at 50, 53. Fiber-optic cable has been described as "the most perfect transmitter of information ever invented." Id.

2. See Stephen Koepp, London Calling, on a Beam of Light: Undersea Fiber-Optic Cables Will Bring Continents Closer Together, TIME, Jan. 19, 1987, at 52, 52 (indicating that in contrast to satellite connections, fiber-optic technology "delivers a comparatively pure sound"); Tyler Maroney, Info Pipelines, TIME, Feb. 3, 1997, at 40, 40 (stating that, compared to traditional satellite transmission, fiber-optic cable communication is "faster, cheaper, more reliable and subject to less interference").

3. See Karl Taro Greenfeld, Ma Everything! With One Astonishing Deal, AT&T Hopes to Become a Communications Colossus—Again. This Is What It May Mean for You, TIME, May 17, 1999, at 58, 60 (explaining that AT&T's use of fiber-optic cable allows data to be transferred 50 to 100 times faster than traditional Internet dial-up access).

4. See Elmer-DeWitt, supra note 1, at 51, 55 (discussing advances in cable television and video games made possible by fiber-optic cable).

5. See Brian O'Reilly, This Land Is Their Land. Maybe. Telecom's Real Estate Problem, FORTUNE, July 5, 1999, at 30, 30-31 (implying that the “haste”
their attempt to meet the needs of consumers, telecommunications companies face a common problem: finding available space in which to bury their fiber-optic cable.6 One preferred location is railroad corridors, which provide miles and miles of uninterrupted linear tracts.7

Today, most telecommunications companies lease these corridors from railroad companies that obtained easement rights to the land over a century ago.8 However, the limited nature of the railroad's property interest presents the question whether railroads have the authority to apportion these rights to third parties or whether that right ultimately belongs to private property owners.9 Several state and federal courts have addressed this matter but differ somewhat in their reasoning and ultimate conclusions.10 These differences, and a recent outbreak of class action lawsuits by landowners against railroad and telecommunications companies,11 prompt a closer look of telecommunications companies to install fiber-optic lines in a fraction of the usual time may have been a factor leading to their current legal problems).


7. See Danaya C. Wright & Jeffrey L. Hester, Pipes, Wires, and Bicycles: Utility Licenses and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries, 27 ECOLOGY L.Q. (forthcoming May 2000) (manuscript at 42, on file with author). Railroad corridors, the narrow tracts of land adjacent to the railroad tracks, are ideal for fiber-optic cable because of their straight, level-grade quality. See id.; see also infra note 115 and accompanying text.

8. See discussion infra Part I.A.

9. Many of these historic easements were conveyed for railroad purposes only; therefore, if the railroad company leases a portion of the easement land for an unrelated commercial use, it may constitute a trespass. See infra notes 47-51 and accompanying text.


11. See Elizabeth Amon, Working on the RRs: Simple Property Case Sparks 25 Class Actions Against RRs, Telecoms, NAT'L L.J., Aug. 16, 1999, at A1; O'Reilly, supra note 5, at 30-31; see also Nels Ackerson, The Ackerson Group (last modified Apr. 1, 2000) <http://www.ackersonlaw.com> (providing information on lawsuits involving railroad right of ways and identifying the team of lawyers, led by Nels Ackerson, assisting landowners in their class action suits against the federal government, railroads and telecommunications
at the underlying issues and the possibility of a more uniform solution that adequately recognizes the rights of the property owner.12

This Note considers the debate surrounding the leasing agreements between the railroads and telecommunications companies, and the rationales that have been advanced to excuse the resulting intrusion into the private property rights of the landowner. Part I discusses the historical context and property law concepts relevant to this debate, as well as the case law regarding the scope of railroad easements. Part II analyzes these decisions in light of the claims presented in the current class action suits and generally argues that the property rights of the individual are unjustifiably being ignored when telecommunications companies bury their fiber-optic cables within railroad corridors without compensating landowners. This Note concludes that private property owners must be adequately reimbursed for this particular use of their land and

companies). The Ackerson Group, located in Washington, D.C., is currently involved in twenty-five pending class actions. See E-mail from R. Andrew Myers, Paralegal, The Ackerson Group, to Jill Pearson, Staff Member, Minnesota Law Review (Feb. 29, 2000) (on file with author).

12. The recognition of private property rights is advantageous for society because it promotes efficient use of resources. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 53 (4th ed. 1998). This efficiency stems from the innate human drive to acquire assets for the benefit of oneself and one’s loved ones; such a desire to accumulate wealth encourages productivity and responsible use of resources. See Cass R. Sunstein, On Property and Constitutionalism, 14 CARDOZO L. REV. 907, 911-12 (1993). Alternatively, “a system without private property stifles incentives and thus induces sloth and waste.” Id. at 912 (noting further that “[w]hen property is unowned, no one has sufficient incentive to use it to its full advantage or to protect it against exploitation”). Furthermore, private property has been said to serve the function of “nourish[ing] individuality and healthy diversity,” DUKEMINIER & KRIER, supra, at 53-54, as well as allowing one to maintain “independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.” Charles A. Reich, The New Property, 73 YALE L.J. 733, 771 (1964). Finally, protection of such rights has been viewed as a precondition for democracy because citizens will be unwilling to participate in the process if they are not assured of some degree of security against public intrusion. See Sunstein supra, at 913-14. In fact, the Supreme Court once noted that “[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions.” Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897). But cf. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT, A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 4, 9 (2d ed. 1998) (indicating that despite constitutional protection against the taking of one’s property, citizens do not enjoy “absolute dominion” over it and that such protection “does not imply the unrestrained liberty to enjoy the maximum economic advantages of property under all circumstances”).
considers possible methods by which this could be accomplished.

I. THE HISTORY, NATURE AND SCOPE OF RAILROAD EASEMENTS AND RIGHT OF WAYS

A. RAILROAD LAND ACQUISITION AND RESULTING PROPERTY INTERESTS

Railroad companies acquired land for the construction of their rail lines in a variety of ways.13 Beginning in the mid-1800s, federal and state grants provided private railroads with public lands in anticipation of the significant societal benefits that would result from improved transportation.14 The General Railroad Right-of-Way Act of 1875 further enabled railroad companies to acquire public land on which to lay their tracks.15 Conversely, railroads resorted to traditional real estate transactions with individual landowners in order to obtain private land within the proposed route.16 As a consequence of these negotiations, the railroads did not always acquire uniform rights to the property over which their lines traversed.17


14. See 2 HOWE ET AL., THE AMERICAN PEOPLE: CREATING A NATION AND A SOCIETY 618 (Gary B. Nash & Julie Roy Jeffrey eds., 4th ed. 1998) (indicating that federal and state governments actively encouraged railroad construction by providing grants of public land); Swenson, supra note 13, at 456-59 (discussing railroad land-grant history); Wright & Hester, supra note 7 (manuscript at 5-6) (noting that state and federal governments came to the aid of railroads in light of the great public benefits that would result from their construction).

15. See 43 U.S.C. §§ 934-939 (1994) (stating that a right of way shall be provided to railroad corporations through public lands of the United States for the construction of the railroad). Although these right-of-way privileges were once viewed as providing the railroad companies with a "limited fee" in the property, it was subsequently held that the Act conveyed only an easement right. See City of Aberdeen v. Chicago & N.W. Transp. Co., 602 F. Supp. 589, 592-93 (D.S.D. 1984) (discussing the Supreme Court's holdings in Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44 (1915) and Great N. Ry. Co. v. United States, 315 U.S. 262 (1942)).

16. See Wright & Hester, supra note 7 (manuscript at 6-7).

17. See infra notes 20-23 and accompanying text.
owners were willing to voluntarily relinquish title to that portion of their land, speculating that the benefits of living in close proximity to the railroad would soon outweigh the value of the lost property. Others challenged the railroads, only to have their land taken through formal condemnation proceedings.

The real estate transactions among the railroads and private landowners often produced deeds that ambiguously described the type of rights conveyed to the railroads. Some deeds vaguely referred to right-of-way privileges while others transferred land explicitly limiting its use for railroad purposes only. While common terminology such as fee or easement may have been used, a single deed might reference more than one seemingly incompatible type of interest, requiring consideration of surrounding circumstances to determine the intent of the parties.

Because of the poorly worded deeds, state and federal courts have had difficulty determining the precise nature of the property interest owned by the railroads when one of the parties litigates its rights under the deed. To illustrate the wide range of property interests that could be implicated, courts have relied on an analogy of property rights as a bundle of sticks, with fee title absolute representing conveyance of all

18. See Wright & Hester, supra note 7 (manuscript at 6). At the time railways were built, being located along a proposed route meant immediate access to transportation and increased land values. See id.

19. See id. at 6-8. Railroads were given the authority to initiate eminent domain proceedings as a result of federal, and later state, legislation; thus, they were able to acquire property from willing and nonwilling sellers. See id; see also Wright, supra note 13, at 725 (pointing out that a landowner's only choice was to sell the land or have it taken under eminent domain).

20. See JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 1.062[d], at 1-47, 1-48 (rev. ed. 1995) (addressing the variety of language found in railroad conveyances making interpretation problematic); see also Wright, supra note 13, at 725 (discussing the ambiguity of railroad deeds).

21. See BRUCE & ELY, supra note 20, ¶ 1.062[d], at 1-47.

22. See id. at 1-38; see also Bouche v. Wagner, 293 P.2d 203, 209-10 (Or. 1956) (en banc) (resorting to a consideration of the parties' intent because of ambiguities in the language of the deed).

23. See, e.g., Preseault v. United States, 100 F.3d 1525, 1532-37 (Fed. Cir. 1996); Buhl v. U.S. Sprint Communications Co., 840 S.W.2d 604, 906-10 (Tenn. 1992). Both cases required the court to interpret and analyze the language of historic deeds in order to clarify the property interest at issue. See also BRUCE & ELY, supra note 20, ¶ 1.062[d], at 1-47. See generally A.E. Korpela, Annotation, Deed to Railroad Company as Conveying Fee or Easement, 6 A.L.R.3d 973 (1966).

24. See Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (charac-
the sticks and easement rights equivalent to a transfer of only a few sticks. Despite this continuum of possibilities, the legal debate in this context is often narrowed to whether the railroad holds fee simple absolute title to the land or a more limited easement right. If the railroad acquired the land in fee simple absolute, it would be entitled to the property described in the deed "forever without limitation or condition." Thus, few problems arise when the railroad establishes fee title ownership because the railroad is free to use the land in virtually any manner it sees fit. However, in those cases where it appears only an easement has been granted, courts have struggled to ascertain the scope of the railroad's rights to the land.

B. THE NATURE OF EASEMENTS AND RIGHT OF WAYS

An easement is typically defined as "[a]n interest which one person has in the land of another" and "gives no title to the land upon which it is imposed." Essentially, it is the right to use another's land, known as the servient estate, for a specific purpose and "does not displace the general possession of the land by its owner." In light of this standard definition, courts interpreting documents conveying land "for railroad..."
purposes only” have tended to find an easement right.\textsuperscript{34} Similarly, instruments granting a “right of way”\textsuperscript{35} are generally held to create mere easements.\textsuperscript{36}

Specifically, easements conveyed to the railroads for the construction of their tracks are termed easements in gross. Unlike an appurtenant easement\textsuperscript{37} that benefits the possessor of an adjacent tract of land, known as the dominant estate,\textsuperscript{38} an easement in gross belongs to the easement holder irrespective of his ownership of any specific parcel of land.\textsuperscript{39} However, unlike a typical easement in gross that exists totally separate and independent of the land,\textsuperscript{40} the railroad easement is not purely personal; rather, the easement is limited to a specific portion of the servient estate.\textsuperscript{41} Thus, a railroad easement presents some unique features that add to the already complicated process of defining the boundaries of the property rights held by the railroads and private property owners.

One such unique characteristic of a railroad easement is its exclusive nature.\textsuperscript{42} In this context, the term “exclusive” refers

\textsuperscript{34} BRUCE & ELY, supra note 20, \S 1.06[2][d], at 1-47.
\textsuperscript{35} The term “right of way,” hereinafter used synonymously with the term “easement,” describes the right of a party to pass over land of another. \textit{See} BLACK'S LAW DICTIONARY 1326 (6th ed. 1990). It may also describe the specific piece of land upon which a railroad constructs its railway. \textit{See} Bouche v. Wagner, 293 P.2d 203, 209 (Or. 1956) (en banc) (citation omitted).
\textsuperscript{36} \textit{See} BRUCE & ELY, supra note 20, \S 1.06[1], at 1-39; \textit{see also} State v. Oregon Short Line R.R. Co., 617 F. Supp. 207, 212 (D. Idaho 1985) (“Congress, in granting ... rights-of-way, did not intend to convey to the railroads a fee interest in the underlying lands.”); \textit{supra} notes 15, 26 (discussing historical debate concerning whether railroads obtained a limited fee or a mere easement). \textit{But cf} Bouche, 293 P.2d at 209-10 (concluding that the intent of the parties implied that fee title in the land was passed even though the conveyance included the term “right of way”).
\textsuperscript{37} \textit{See} RESTATEMENT OF PROPERTY: SERVITUDES \S 453 (1944).
\textsuperscript{38} \textit{See} Schadewald, 570 N.W.2d at 795; BLACK'S LAW DICTIONARY 485-86 (6th ed. 1990).
\textsuperscript{39} \textit{See} RESTATEMENT OF PROPERTY: SERVITUDES \S 454, \S 454 cmt. a (1944).
\textsuperscript{40} \textit{See id.} \S 454 cmt. a.
\textsuperscript{41} \textit{See}, e.g., Preseault v. United States, 100 F.3d 1525, 1534-35 (Fed. Cir. 1996) (examining language of the documents conveying particular “strip[s]” of land to the railroad); Buhl v. U.S. Sprint Communications Co., 840 S.W.2d 904, 907 (Tenn. 1992) (specifying the tract of land granted for railroad purposes).
\textsuperscript{42} \textit{See} Wright & Hester, supra note 7 (manuscript at 22-26); \textit{see also} Midland Valley R. Co. v. Sutter, 28 F.2d 163, 166 (8th Cir. 1928) (“[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 . . . .”) (quoting Chicago Great W. R. Co. v. Zahner, 177 N.W. 350, 351
not to the number of different easements that may exist on the particular tract of land, but instead describes the nature of the railroad’s possession in relation to the landowner. Typically, the owner of a servient estate may continue to use the portion of his land that is subject to an easement for any purpose so long as it does not unreasonably interfere with the rights of the easement holder. However, in the case of a railroad easement, the servient land owner is usually excluded from occupying that portion of the property subject to the easement and must even seek approval from the railroad to modify it. The reasons for this arrangement are numerous but generally revolve around safety and liability concerns inherent in the railroad industry.

Another distinguishing feature of a railroad easement is its unique and limited purpose. While some easements provide rather broad guidelines, allowing for any reasonable use that

(Minn. 1920))); Campbell v. Southwestern Tel. & Tel. Co., 158 S.W. 1085, 1086 (Ark. 1913) (indicating that “[s]o long as the railroad company occupied any portion of its right of way, it had the exclusive use and right of control coextensive with the boundary described in its deed”).

43. See supra note 42; see also Henley v. Continental Cablevision of St. Louis County, Inc., 692 S.W.2d 825, 828 (Mo. Ct. App. 1985) ("[I]nsofar as it relates to the apportionability of an easement in gross, the term 'exclusive' refers to the exclusion of the owner and possessor of the servient tenement from participation in the rights granted, not to the number of different easements in and over the same land.").


45. See Sennewald, supra note 44, at 1411 ("In the interest of safety, among other reasons, a railroad easement is an exclusive use easement."); Wright & Hester, supra note 7 (manuscript at 22-23) (citing Puett v. Western Pac R.R. Co., 752 P.2d 213 (Nev. 1988) (per curiam), in which the owner of land burdened by a railroad easement was required to obtain approval from the railroad before a private grade crossing could be erected).

46. See Midland Valley, 28 F.2d at 167-68 (observing that "exclusive possession is necessary to enable the railroad company to safely conduct its business and meet the duty of exercising that high degree of care which the general law and administrative rules enjoin upon it"); see also Brian P. Patchen, Public Acquisition of Existing Right of Way, 40 A.L.I.-A.B.A. 477, 483 (1999) (discussing the inherent dangers of railroad operations). A few states have allowed exceptions to this rule of exclusivity, such as to allow for agricultural uses when it is farmland that is burdened by the easement. See Wright & Hester, supra note 7 (manuscript at 23).
does not overly burden the servient estate, many railroad easements are construed to permit use only for railway purposes, even in the absence of an express provision to that effect. "Railway purposes" have been defined as those activities related to the "construction, maintenance, or operation of the railroad," and have been held to include the erection of "side tracks, building[s], telegraph lines, and other structures necessary for its business." When the scope of an easement is limited in this way, an easement holder becomes a trespasser to the extent that his use exceeds that which was authorized and intended.

Railroad easements may also be differentiated from other easements in the way in which they are terminated. In general, once an easement is created it may endure forever in the absence of any specified term or condition. As a consequence of the limited scope of a railroad easement, however, termination may result when the purpose for which it was originally granted ceases to exist, even if the document failed to indicate the parties' intent in this regard. Upon termination of the easement, full rights to the parcel revert to the owner of the

47. See 25 AM. JUR. 2D Easements and Licenses in Real Property § 83 (1996). "Reasonable use" is not clearly defined but must be determined in light of surrounding circumstances. Id.; see also BRUCE & ELY, supra note 20, ¶ 8.02[1][a], at 8-6 (stating, "[w]hat constitutes reasonable usage is a question of fact."). But cf. Schadewald, 570 N.W.2d at 795 (adopting a more restrictive view on the scope of easements prohibiting any new additional burden not originally contemplated).

48. See BRUCE & ELY, supra note 20, ¶ 1.06[2][d], at 1-49 (indicating that a "railroad purpose" limitation may be implied by surrounding circumstances).

49. Buhl v. U.S. Sprint Communications Co., 840 S.W.2d 904, 910 (Tenn. 1992) (discussing the ruling in Mobile & O.R. Co. v. Postal Tel. Cable, 46 S.W. 571 (Tenn. 1898), that a railroad company may construct a telegraph line along its right of way so long as it is used in the operation of the railroad).


51. See BRUCE & ELY, supra note 20, ¶ 8.03[5][a], at 8-24; see also Calumet Nat'l Bank v. American Tel. & Tel. Co., 682 N.E.2d 785, 788 (Ind. 1997) (defining trespass as the "unauthorized" use of another's land).

52. See BRUCE & ELY, supra note 20, ¶ 10.01, at 10-2 to 10-3.

53. See id. ¶ 1.06[2][d], at 1-48 (stating that an easement for railway purposes ends when it is no longer used for such purposes); id. ¶ 10.08[1], at 10-12 to 10-13 (discussing the "cessation of purpose doctrine"); see also State ex rel. Fogle v. Richley, 378 N.E.2d 472, 474 (Ohio 1978) (per curiam) (noting that although the language of a railroad easement may not specify a reversion in the event of use for any other purpose, courts have held that use of the land for other than railroad or public purposes results in a revival of fee owners' rights).
servient land. Such termination, however, may be complicated by the concept of abandonment, which requires a further inquiry into the intended future use of the easement and does not result simply from current nonuse. The process of abandonment with respect to railroad corridors is regulated by state and federal law, and will be discussed only peripherally in this Note. This issue has become highly litigated in recent years as a result of the government's efforts to slow the rate.


"The general rule is that the right and title to a mere easement in land acquired by a quasi-public corporation, either by purchase, condemnation or prescription, for a public purpose is dependent upon the continued use of the property for that purpose, and when such public use is abandoned the right to hold the land ceases, and the property reverts to its original owner or his successors in title." (quoting Maryland & Pa. R.R. Co. v. Mercantile-Safe Deposit & Trust Co., 166 A.2d 247, 250 (Md. 1960)) (emphasis omitted). This effect is unique to railroad easements as easements are not typically accompanied by a right of reverter. See National Wildlife Fed'n v. ICC, 850 F.2d 694, 703 n.13 (D.C. Cir. 1988).

55. Abandonment occurs when an easement holder ceases to use the easement and clearly indicates an intention to relinquish it by taking affirmative action consistent with that intention. See BRUCE & ELY, supra note 20, ¶ 10.05[1], at 10-27. This Note will address only peripherally the installation of fiber-optic cable in abandoned railroad lines.

56. See BRUCE & ELY, supra note 20, ¶ 10.03[1], at 10-14.


58. This may be due in part to the momentum of the private property rights movement. See ELY, supra note 12, at 154-55 (describing the renewed push in the 1990s by private landowners for legislative relief from severe land use controls). For a discussion on the resurgence of the "property rights" issue from a political perspective, see generally John D. Echeverria, The Politics of Property Rights, 50 OKLA. L. REV. 351 (1997). Many cases have resulted from the 1983 enactment of the National Trails System Act (known as the Rails-to-Trails Act, 16 U.S.C. § 1247(d) (Supp. 1997)), which attempts to preserve railroad corridors through "railbanking," a process which allows their conversion into recreational trails as an interim use pending possible future reactivation. See BRUCE & ELY, supra note 20, ¶ 1.06[2][d], at 1-47 (noting that this issue is frequently litigated); Wild, supra note 57, at 11-12. Landowners with reversionary rights to the railroad property claim this non-railway use, in lieu of full abandonment proceedings, constitutes a taking for which they are entitled to compensation. See, e.g., Preseault v. United States, 100 F.3d 1525, 1552 (Fed. Cir. 1996) (upholding the legislation but concluding that it could effect a taking requiring just compensation if the railroad's interest in the property
at which abandonment occurs and to preserve these rail lines for potential future use.\textsuperscript{60} Many landowners view these delay tactics as an intrusion on their reversionary rights,\textsuperscript{61} denying them full use of their property and constituting a taking.\textsuperscript{62}

C. THE SCOPE OF RAILROAD EASEMENTS

Presuming a railroad is granted an easement right that has not yet been abandoned, questions about the nature of this right still remain; primarily, defining the scope and allowable uses of a railroad easement including the right of apportionment, or division, of the easement.\textsuperscript{63} Although a review of case

was limited to an easement or right of way). For more information regarding the concerns of these landowners and their pending lawsuits, see Implementation of the Rails to Trails Act: Hearings Before the Subcomm. on R.R.s of the Comm. on Transp. and Infrastructure, 104th Cong., 152-72 (1997) [hereinafter Hearings] (testimony of Jayne Glosemeyer, Richard Welsh and Nels Ackerson); Ackerson, supra note 11; Richard Welsh, The National Association of Reversionary Property Owners (NARPO) (last modified Apr. 14, 2000) <http://www.halycom.com/dick>.

59. See Montange, supra note 57, at 139 (noting that the rate of railroad abandonments remains at a level of about 3000 miles per year). Railroads seek to vacate unused tracks because of the financial drain caused by maintenance obligations, property taxes and potential legal liability. See Sennewald, supra note 44, at 1406 (explaining that one of the benefits of the Rails-to-Trails Act is that it shifts such costs from railroad operators to willing organizations).

60. See 16 U.S.C. § 1247(d) (Supp. III 1997) (stating the purpose behind the statutory provision as the “furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service”). For a discussion on this and other methods by which the government has sought to preserve railroad corridors, see Sennewald, supra note 44, at 1405-07; Wild, supra note 57, at 11-13.

61. See Welsh, supra note 58 (providing information and a source of communication for owners of reversionary property interests). But cf: Sennewald, supra note 44, at 1410 (criticizing “reversionary interest” terminology as an inaccurate and improper characterization of the interest possessed by the owner of a servient estate).

62. “Takings” claims refer to allegations that an action violates the Fifth Amendment of the Constitution which provides that “No person shall be... deprived of... property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The purpose of the Takings Clause is to prevent the government from forcing individuals to bear public burdens that, in all fairness, should be shared by society as a whole. See Armstrong v. United States, 364 U.S. 40, 49 (1960).

63. See Henley v. Continental Cablevision of St. Louis County, Inc., 692 S.W.2d 825, 827 (Mo. Ct. App. 1985) (discussing apportionment as the “divided utilization” of easement rights); RESTATEMENT OF PROPERTY: SERVITUDES § 493 cmt. a (1944) (explaining that “[t]he apportioning of an easement in gross consists in so dividing it as to produce independent uses or operations”).
law pertaining to railroad and similar easements reveals no clear answers, it provides a foundation of doctrines and policies from which to analyze the easement controversies that have emerged with respect to the fiber-optic industry.

1. Mineral Rights

The scope of railroad easements with respect to mineral rights is well established. Courts have consistently held that landowners, rather than easement holders, retain the rights to underground minerals. For instance, in United States v. Union Pacific Railroad, the Supreme Court held that the right of way granted to the railroad under federal law for construction of a railway and telegraph line over public lands did not include mineral rights. The Court concluded that enjoining the railroad from drilling oil and gas on right-of-way land was proper since such activity did not constitute a "railroad purpose" within the meaning of the statute. Similar conclusions have been reached even when the deed granting the right of way expressly included the right to take minerals.

Although landowners may retain an interest in the minerals underlying a railroad easement, their right to excavate and exploit those minerals does not necessarily follow. There have been two schools of thought in this area. Some jurisdictions

64. See United States v. Union Pac. R.R., 353 U.S. 112, 120 (1957); Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg., 157 S.W. 737, 739 (Tex. 1913). But see United States v. Illinois Cent. R.R., 187 F.2d 374, 375 (7th Cir. 1951) (contradicting the general rule denying railroad access to underground minerals).
66. See id. at 120. Much of the Court's opinion focused on the interpretation of the "mineral lands" exception found within the federal statute granting railroad rights of way. Id. at 114-18.
67. Id. at 114. But cf. Illinois Cent. R.R., 187 F.2d at 375, (finding that the railroad's interest, described as "a limited fee subject to an implied condition of reverter" should the right of way cease to be used for railroad purposes, was sufficient to entitle it to extract gas and oil from beneath the right-of-way land).
68. See Right of Way Oil Co., 157 S.W. at 740 (Tex. 1913). The deed granted a right of way "together with the right to take and use all the timber, earth, stone, and mineral[s]... that may be found within [it]." Id. at 738 (emphasis added). But the deed's stated purpose of railroad operation was influential in the court's decision denying the railway company oil and other mineral rights in the right-of-way land. See id. at 739-40.
69. See Midland Valley R.R. v. Sutter, 28 F.2d 163, 165 (8th Cir. 1928) (recognizing the split among the nation's courts with regard to concurrent uses of right-of-way land). The Midland court adopted the majority approach and
allow the owner of the servient estate to use the land in any manner which does not interfere with its use for railroad purposes. However, a majority of jurisdictions permit the railroads to enjoy exclusive use and possession of the right of way, allowing them to deprive the servient landowner of any use of the land, including the landowners' right to exploit the minerals within the easement.

2. Pipelines

Disputes over the rights to other subsurface uses, such as the laying of underground pipeline, have also been a source of litigation. For example, in *Energy Transportation Systems, Inc. v. Union Pacific Railroad,* the Eighth Circuit Court of Appeals held that the state, having been granted servient land for school purposes, had sufficient rights to convey a pipeline easement interest in the subsurface of the estate underlying a railroad's right of way. Thus, in contrast to the general weight of authority in the mineral rights cases, the court deemed concurrent uses acceptable. Furthermore, the servient landowner, rather than the easement holder, was entitled to subject the right-of-way parcel to more than one easement.

In another case involving pipelines, private landowners sought to enjoin two railroad companies from laying pipeline necessary for the operation of their railroad switchyards. Because the railroad had the right of eminent domain to condemn the right of way, the property owners were ultimately unsuccessful in their efforts to obtain equitable relief. However, the Tennessee Supreme Court acknowledged that laying the pipes created an additional servitude upon the land and concluded

awarded the railroad exclusive use of the land, enjoining landowners from engaging in mineral-excavating activities. See id. at 168.
70. See id. at 165.
71. See id.
72. 619 F.2d 696 (8th Cir. 1980).
73. See id. at 699.
74. See id.
75. See id.
77. See id. at 216.
78. See id. at 219. Eminent domain refers to the government's authority to order transfers of property from owners to itself or other entities vested with the power of eminent domain. See *DUKEMINIER & KRIER, supra* note 12, at 1102 n.3.
79. See *Lea*, 188 S.W. at 217.
that such action amounted to a taking of private property for public use.80

3. Telegraph and Telephone Lines

Beginning in the nineteenth century, cases emerged involving whether shared use of railroad easements by telegraph and telephone companies constituted an authorized use. Despite the seemingly vital connection between these utilities and the initial operation of railroads, results in the courts were mixed. In American Telephone & Telegraph Co. v. Smith,81 the Maryland Court of Appeals reviewed a decision of the trial court in favor of ten landowners seeking to enjoin a telegraph company from erecting its poles along the rail line without their permission or consent.82 The landowners complained that such action was injurious to their property and constituted an appropriation of private property for public use without compensation.83 The court, recognizing the necessity of compensating landowners for any additional burden on their property outside of the original easement, also acknowledged the usefulness of telegraph and telephone lines in the operation of a railroad, which would seem to fall within the intended purpose.84 The court cautioned, however, that if the main objective in erecting the lines was general commercial business, such action would require a new easement.85 Because the lines in this case

80. See id. at 219. The court recognized that there was not a consensus among authorities at this time as to what constitutes a taking within the meaning of statutes granting the right of eminent domain. See id. However, the court dismissed the strict construction requiring a seizure, or direct dispossession of the owner, in favor of a rule providing that "any destruction, restriction, or interruption of the common and necessary use and enjoyment of the property in a lawful manner may constitute a taking." Id. (quoting 15 CYCLOPEDIA OF LAW & PROCEDURE 652 (1905)). But cf. Campbell v. Southwestern Tel. & Tel. Co., 158 S.W. 1085, 1086 (Ark. 1913). In Campbell, a telegraph company inadvertently erected three of ten telephone poles outside the railroad right of way in which their activity was authorized. See id. Since the intrusion of the fee owner's rights was claimed to be accidental, and the damage could presumably be undone by relocation of the poles, not even nominal damages were awarded. See id. at 1087.

81. 18 A. 910 (Md. 1889).
82. See id. at 911.
83. See id. at 912.
84. See id. at 918; see also Western Union Tel. Co. v. Rich, 19 Kan. 517, 518 (1878) (holding that a telegraph line used for railroad purposes is within the scope of the railroad right of way and does not entitle landowner to further damages).
85. See American Tel. & Tel., 18 A. at 913.
RAILROAD CORRIDORS

were intended to primarily serve non-railroad customers, the court upheld the trial court's injunctions concluding that this additional burden constituted as much a taking for public use as the original easement had, thus requiring that the landowners be further compensated. 86

Consistent with this holding, the Tennessee Supreme Court in Western Union Telegraph Co. v. Nashville, Chattanooga & St. Louis Railway Co. 87 made it clear that an easement granted to a railroad is not as broad as the type of easement that a city has in its streets, and thus, did not authorize the railroad to permit the erection of purely commercial telegraph lines along its right of way. 88 The court followed what had become the majority rule in holding that such activity imposes a further burden on the fee, entitling the landowner to additional compensation from the telegraph company. 89 The court clarified the nature of the railroad right of way by quoting Mobile Railroad v. Postal Telegraph Co. which stated that the railroad "cannot license the appropriation of . . . such right of way to private business purposes, nor to public purposes, except so far as needful, and helpful to the operation of the [rail]road itself." 90

In contrast, some courts in more recent years have employed a "shifting public use" theory, holding that so long as the land continues to be used for a public purpose the landowner is not entitled to additional payment. 91 In State ex rel. Fogle v.

86. See id. at 914, 916; see also Potomac Edison Co. v. Routzahn, 65 A.2d 580, 585 (Md. 1949) (holding that erecting telephone lines on a railroad right of way for use by the railroad itself is proper, but any general commercial business use "constitutes an additional servitude upon the land . . . for which the landowner is entitled to redress at law or by injunction").
87. 237 S.W. 64 (Tenn. 1922).
88. See id. at 65.
89. See id.
90. Id. (quoting Mobile & Ohio R.R. v. Postal Tel. Cable Co., 46 S.W. 571 (Tenn. 1898)).
91. E.g., State ex rel. Fogle v. Richley, 378 N.E.2d 472, 475 (Ohio 1978) (Celebrezze, J., concurring) ("The owner of the fee, who has received compensation for a perpetual easement in the land, is in no position to require that the public use continue precisely the same. . . . [H]e is not entitled to any compensation for a change which did not in fact cause damage." (quoting NICHOLS ON EMINENT DOMAIN (rev. 3d ed. 1964)); 26 AM. JUR. 2D Eminent Domain § 90 (1996) (indicating that other public uses may be made of railroad rights of way). This "shifting public use" theory has provided justification for the conversion of railroad tracks to recreation trails and the transition from telephone poles to underground cable. Id. § 96 (noting that the right of eminent domain granted to telegraph and telephone companies has been deemed applicable to
Richley,\textsuperscript{92} the Ohio Supreme Court reviewed a case in which a railroad company had acquired an easement over a tract of land using its eminent domain power, providing just compensation to the landowner.\textsuperscript{93} Soon thereafter, the state brought an action seeking to appropriate the railroad easement so that a portion of the land could be used for the construction of a highway.\textsuperscript{94} After compensating the railroad, the state converted the property into part of the public highway system.\textsuperscript{95} The landowners sought a writ of mandamus requiring the state to commence a new condemnation action for this change in use of the property owned by them in fee simple.\textsuperscript{96} They claimed the action was necessary since the original taking was for the purpose of constructing and operating a railroad only, a purpose that had now been abandoned.\textsuperscript{97} The state, however, successfully argued that its taking of the railroad’s easement interest for highway purposes represented substantially the same transportation use and that it did not create a greater burden on the land.\textsuperscript{98} In other words, the public use of the easement had simply shifted from a railway to a roadway, a use sufficiently similar to justify a denial of additional compensation.\textsuperscript{99}

4. Television Cable

Easement disputes involving cable companies address many of the same issues that arise in railroad easement litigation. In this context, most courts have held that the addition of a new appurtenance, such as cable wire, to existing exclusive easements is permissible. For example, in Henley v. Continental Cablevision of St. Louis County, Inc.,\textsuperscript{100} the Missouri Court of Appeals examined the nature of easements conveyed to a telephone and an electric company and considered whether they were apportionable.\textsuperscript{101} Plaintiffs, as trustees of the servient land, claimed that the easement privileges were not in-

\textsuperscript{92} 378 N.E.2d 472 (Ohio 1978).
\textsuperscript{93} See id. at 473.
\textsuperscript{94} See id.
\textsuperscript{95} See id.
\textsuperscript{96} See id.
\textsuperscript{97} See id. at 474.
\textsuperscript{98} See id. at 475.
\textsuperscript{99} See id.
\textsuperscript{100} 692 S.W.2d 825 (Mo. Ct. App. 1985).
\textsuperscript{101} See id. at 827.
tended to be shared with third parties and sought an injunction and compensation following the discovery that television cables had been erected upon the easements.\textsuperscript{102} The utility companies, on the other hand, contended that because these easements were exclusive in nature they were subject to division; therefore, they had the right to grant the cable company a license to enter and run its wires over the land.\textsuperscript{103} Rejecting the landowner's argument and affirming the circuit court's dismissal of the action, the court of appeals concluded that even though the easements did not mention television cables, the language was broad enough to support this use.\textsuperscript{104} Furthermore, the court held the addition of the cable to the already existing poles did not increase the burden on the servient estate beyond that originally authorized and intended.\textsuperscript{105} The exclusive nature of the utility easement also led to a presumption of apportionability, further strengthening the court's determination that consent of and payment to the landowner was unnecessary.\textsuperscript{106}

Several years later in Centel Cable Television v. Cook,\textsuperscript{107} the Ohio Supreme Court also held that the stringing of a cable by a television company along a public utility easement was allowable and did not increase the burden already imposed on the servient estate because the uses were sufficiently similar.\textsuperscript{108} While acknowledging that apportionability of an easement depends upon the intention of the parties, the court held that easement rights could be partially assigned to a third party even when the grantor was silent regarding his intent.\textsuperscript{109} Like the Missouri Court of Appeals in Henley, the Ohio Supreme Court relied in part on the presumption that apportionment is allowed where the easement rights granted are exclusive of the

\begin{itemize}
  \item \textsuperscript{102} See id.
  \item \textsuperscript{103} See id.
  \item \textsuperscript{104} See id at 829 (indicating that the expressed intention of the easement was to "obtain for the homeowners ... the benefits of electric power and telephonic communications" which the court of appeals concluded should extend to unforeseen technological advances in visual and audio communication).
  \item \textsuperscript{105} See id. at 828.
  \item \textsuperscript{106} See id. at 829. This presumption rests upon the rationale that since the landowner is already excluded from using the servient land, he sustains no additional loss if the easement holder shares his right with others. See id. at 827.
  \item \textsuperscript{107} 567 N.E.2d 1010 (Ohio 1991).
  \item \textsuperscript{108} See id. at 1015.
  \item \textsuperscript{109} See id. at 1013.
\end{itemize}
servient owners' participation therein. Furthermore, the court employed a rule of construction allowing for divided utilization of such rights when it increases the value of the easement to the holder. Because the cable company's use of the poles meant additional revenue for the utility easement holder, application of this rule granted them a right to apportion.

5. Fiber-Optic Cables

The most recent area of contention yet to be resolved with regard to the scope of railroad easements focuses on the contractual relationships between telecommunications companies and railroads for partial use of railroad easement rights for the purpose of burying fiber-optic cable. Fiber-optic cables are preferred to conventional metal cables because they can transmit information at a much greater speed, however, their technological design requires that they be buried in long, straight, uninterrupted tracts of land. The trans-continental quality of railroad easements and the urgent need for subsurface cable space led to negotiations between the railroads and telecommunications giants such as AT&T, MCI, Qwest, and Sprint Communications. Dealing with the railroads appealed to these companies because it was much simpler to agree to terms with one entity than with thousands of individual landowners. Within the last decade, however, property owners along the rail lines became increasingly aware that the

110. See id. at 1014 (citing Henley v. Continental Cablevision of St. Louis Cty., Inc., 692 S.W. 2d 825, 827 (Mo. Ct. App. 1985)).
111. See id.
112. See id.
113. See Amon, supra note 11, at A12; O'Reilly, supra note 5, at 30-31.
114. See Joint Hearing, supra note 6, at 44-45 (noting that fiber-optic cables are smaller and more efficient than metal cables).
115. See id. at 50 (explaining that information is passed through fiber-optic cables via pulses of laser light). Since bends in the cable may interfere with the laser light pulses, the long, straight tracts of land that make up railroad corridors are especially attractive to telecommunications companies. See Wright & Hester, supra note 7 (manuscript at 42).
116. See O'Reilly, supra note 5, at 30 (reporting that, "[i]n their haste to install tens of thousands of miles of fiber-optic lines, telecom companies have paid millions to pipeline companies and electric utilities, as well as the railroads, for permission to use the rights of way"). The number of miles of cable installed by the telecommunications companies varies: 45,000 for MCI WorldCom, 18,815 for Qwest, and 30,000 for Sprint. See Amon, supra note 11, at A12.
117. See O'Reilly, supra note 5, at 31.
railroads were profiting from their land in ways that may not have been contemplated by the creators of the underlying easements. This led to the filing and subsequent certification of several class action lawsuits beginning in 1992. These certified classes of landowners brought claims of trespass, slander of title, and unjust enrichment. To date, only one class action suit has settled.

While the publicity surrounding these class actions against the railroads and telecommunications companies may suggest that this fact pattern is a completely novel one, several jurisdictions have already addressed these issues. In *Mellon v. South Pacific Transport Co.*, a federal court for the Western District of Texas considered whether a railroad could grant a telecommunications company an easement for installation of its fiber-optic cable beneath its right of way without compensating

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118. Although the landowners claim that the original grants conveyed only an easement right, in some cases this remains a point of contention. *See*, e.g., Amon, *supra* note 11, at A12 (indicating that AT&T maintains the position that the railroad owns the land in fee simple).

119. *See* id.

120. *See* The Ackerson Group, *Landowners Nationwide Class Action Against AT&T* (Aug. 21, 1998) (visited Mar. 3, 2000) <http://www.ackersonlaw.com/pr02.html>. The trespass claim likely results from allegations that the railroad exceeded the scope of its easement. *See* notes 47-51 and accompanying text. Slander of title, defined as an act in which a false statement is made “in disparagement of a person’s title to real or personal property,” would coincide with the landowners’ contention that the railroads disregarded their fee ownership when they leased the corridors to telecommunications companies. *BLACK’S LAW DICTIONARY* 1388 (6th ed. 1990). Finally, the unjust enrichment claim evidences the landowners’ belief that the railroads have “retain[ed] money or benefits which in justice and equity” belong to them. *BLACK’S LAW DICTIONARY* 1535 (6th ed. 1990).

121. *See* O'Reilly, *supra* note 5, at 30 (indicating that a partial settlement was reached in one of the class actions based in Indiana when AT&T agreed to pay $45,000 per mile to landowners); E-mail from R. Andrew Myers to Jill Pearson, *supra* note 11 (confirming settlement of only one class action lawsuit thus far).


the owner of the servient estate. The buried cable provided communication services to both the railroad and to public customers. Although Mellon argued that this third-party use constituted an additional burden on the railroad's easement for which he should be compensated, the court disagreed and granted summary judgment in favor of the defendants.

The *Mellon* court relied upon the “incidental use” doctrine, a concept that broadens the scope of authorized right-of-way uses and allows railroads to contract with third parties. The Texas courts adopted this doctrine in the early 1900s as a means of granting approval for the erection of telegraph and telephone lines on right-of-way property. Based on the doctrine, the *Mellon* court reasoned that the telecommunication company's incidental use was acceptable because it facilitated the business of the railroads. Although it acknowledged previous case law denying railroads mineral rights in the easement estate, the court concluded that application of the incidental use doctrine extended to below ground uses of the right of way. Furthermore, the *Mellon* court theorized that the fiber-optic cable was simply the modern day equivalent of the telegraph line. Because laying fiber-optic cable within the easement land was not inconsistent with the purposes for which the right of way was granted, the *Mellon* court deemed this use of the land acceptable.

In *Davis v. MCI Telecommunications Corp.* the District Court of Florida reached a similar conclusion, although it rejected the incidental use doctrine. The Davises, owners of the servient land, contended that MCI acted illegally when it failed to obtain permission or to compensate them before laying cable along an existing railroad right of way. In an opinion largely

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124. *See id.* at 228.
125. *See id.*
126. *See id.* at 233.
127. *Id.* at 229.
129. *See id.*
130. *See id.* (recognizing the Supreme Court's conclusion in *United States v. Union Pac. R.R.*, 353 U.S. 112 (1957), that the railroad generally cannot make use of minerals found within its right of way).
132. *See id.*
133. 606 So. 2d 734 (D. Fla. 1992).
134. *See id.* at 735.
RAILROAD CORRIDORS

devoted to resolving issues of statutory interpretation, the Florida court ultimately affirmed the circuit court's judgment dismissing the claim. 135 Instead of employing the incidental use theory, the court relied on a state law granting telephone companies eminent domain power to construct their telephone lines. 136 The controlling statute, taken within its historical context, 137 had the practical effect of adding telecommunication privileges to all Florida railroad rights-of-way. 138 Consequently, although the cable was being used primarily for non-railroad purposes, 139 MCI was permitted to maintain its cable without compensating the Davises. 140

While the outcomes in the above cases seem to minimize the importance of private property rights relative to the accommodation of technological advances, a case decided in the same year as Davis appears to be more sympathetic to the interests of the fee owner. In Buhl v. U.S. Sprint Communications Co., 141 three landowners brought an action against a telephone company claiming that the installation of fiber-optic cable within the existing railroad rights of way constituted a taking under the law of eminent domain. 142 Sprint installed the cables pursuant to an agreement with the railroad in which annual payment was made on a per-mile basis. 143 After determining that the plaintiffs held fee title to the land, 144 leaving the railroad with a limited easement interest, the Tennessee Supreme Court concluded that the installation of the cable without the landowner's consent amounted to a taking of the property for which he was entitled to compensation. 145

135. See id. at 738.
136. See id. at 737 (referring to FLA. STAT. § 362.02 (1989) which reads, in part: "[any [organized] telegraph or telephone company . . . 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").
137. See id. at 736 (noting that, "[a] nexus between railroad and commercial telegraph facilities is found throughout the historical record").
138. See id. at 737.
139. See id. at 735.
140. See id. at 738.
141. 840 S.W.2d 904 (Tenn. 1992).
142. See id. at 905.
143. See id. at 906 (describing the "license agreement" whereby Sprint agreed to pay Southern Railway for the right to lay its fiber-optic cable under its right of way at a cost of $1,200 per mile per year for a term of 25 years).
144. See id. at 908-09.
145. See id. at 913.
In reaching its decision, the court acknowledged the great latitude imparted to railroads with respect to the uses of their rights of way: "[T]he easement for railroad purposes includes the right to allow third parties to use portions of its right of way provided such use is not inconsistent with and does not interfere with the railroad's use of the property."\textsuperscript{146} However, the court emphasized that this right is conditioned upon the additional requirement that the third party's use be "needful and helpful to the operation of the [railroad itself]."\textsuperscript{147} Ultimately, the court concluded that because the cable installed by Sprint was not in any way related to railroad business, plaintiffs were entitled to compensation.\textsuperscript{148}

II. DISMISSING JUSTIFICATIONS FOR INFRINGEMENT AND RESTORING LANDOWNERS' RIGHTS

Although it may be difficult to reconcile the holdings of \textit{Mellon}, \textit{Davis}, and \textit{Buhl}\textsuperscript{149} into consistent rules of law and apply them to the recent class action suits, these cases, and the others discussed above, help to identify some of the relevant issues that deserve consideration. One of the factors complicating the analysis is the influence of state law in the determination of whether the landowner is entitled to additional compensation for certain uses of right-of-way land.\textsuperscript{150} The majority of jurisdictions appear to be leaning toward allowing railroads to lease unused portions of their right of ways to telecommunications companies,\textsuperscript{151} perhaps considering the strong public interest served by encouraging improvements in the telecommunications industry. This tendency, however, un-

\begin{itemize}
\item \textsuperscript{146} \textit{Id.} at 910.
\item \textsuperscript{147} \textit{Id.} (quoting Mobile & Ohio R.R. v. Postal Tel. Co., 46 S.W. 571, 572 (1898)).
\item \textsuperscript{148} \textit{See id.} at 913.
\item \textsuperscript{149} \textit{See Wright & Hester, supra note 7} (manuscript at 44) (concluding that it is impossible to harmonize \textit{Mellon}, \textit{Davis}, and \textit{Buhl}).
\item \textsuperscript{150} \textit{See, e.g.}, Mellon v. South Pac. Transp. Co., 750 F. Supp. 226, 231 (W.D. Tex. 1990); Buhl v. U.S. Sprint Comm. Co., 840 S.W.2d 904, 913 (Tenn. 1992). The court in \textit{Mellon} found influential a Texas law giving telephone companies "preferred utility" status, allowing them to condemn a right of way over railroad property without compensating landowners for the additional burden. \textit{Mellon}, 750 F. Supp. at 231 (citing TEX. REV. CIV. STAT. ANN. art. 1416, 1417 (West 1980)). In the absence of a similar Tennessee law, the court in \textit{Buhl} held that use of railroad right-of-way land by the telecommunications company without the landowners consent constituted a taking for which they were entitled to payment. \textit{See Buhl}, 840 S.W.2d at 913.
\item \textsuperscript{151} \textit{See Wright & Hester, supra note 7} (manuscript at 47).
\end{itemize}
avoidably infringes on the property owner's right to control the
use of his land and those who enter upon it, striking at the
heart of the historically protected liberties inherent in property
ownership.152

A. THE PROBLEM WITH TELECOM'S USE OF RAILROAD
CORRIDORS

1. Fiber-Optic Cables Are Not Simply "Modern Day
Telegraphs"

Previous decisions, such as Mellon, justify the infringe-
ment on private property rights by examining the past practice
of granting telephone and telegraph companies access to rail-
road corridors.153 Under this reasoning, fiber-optic cables are
viewed as simply the modern-day equivalent of the telephone
and telegraph,154 therefore, their installation does not present
any new or troubling issues regarding access. Reminiscent of
the "shifting public use" concept,155 the telecommunication
companies' intrusion is excused as sufficiently similar to that
which was deemed acceptable in the past. However, the
placement of fiber-optic cables along a rail line presents a new
and different use for several reasons.

First, the societal context in which the advancement of fi-
ber-optic technology has emerged is significantly different from
that which existed at the time the telegraph and telephone
were introduced in the nineteenth century. Back then, Amer-
ica was in the throes of an industrial revolution, requiring ac-
companying changes in transportation and communication to
facilitate the transition from a primarily agricultural economy
to one increasingly dependent on an expanding business and
entrepreneurial market.156 Just as the construction of railroads

152. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights" (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)).
153. See supra note 131 and accompanying text.
154. See supra note 131 and accompanying text.
155. See State ex rel. Fogle v. Richley, 378 N.E.2d 472 (Ohio 1978) (per cu-
riam); discussion supra Part I.C.3.
156. See JAMES A. HENRETTA ET AL., AMERICA'S HISTORY SINCE 1865, at
513-14, 553-54 (1987) (describing the emergence of an industrial economy, the
importance of the railroads to industry, and how the telephone facilitated
business by connecting "urban decision makers"); 2 HOWE ET AL., supra note
14, at 616, 618 (indicating that "the completion of a national transportation
represented a momentous advance in transportation, the invention and installation of the telegraph and telephone lines were significant developments in the communications industry. Although private property interests were of no less importance in that era, they were seemingly outweighed by the public interest in supporting this new mode of communication and finding a means to justify its development and implementation. In contrast, the fiber-optic revolution of today, while certainly introducing advances in information transmission is, nonetheless, simply an improvement. The traditional means of communication is still functional, thus there is little, if any, need in today's market for government intervention and promotion of fiber-optic technology at the expense of the rights of property owners.

Furthermore, at the turn of the twentieth century there was a necessary connection between the operation of the railroads and the telegraph and telephone lines erected along its corridors: railroads depended on communication through the lines to safely and effectively carry out their business.

and communications network was central to economic growth” and recognizing the key role of railroads in rising productivity and big business).

157. See HENRETTA ET AL., supra note 156, at 514 (indicating that railroads were “far better” than their predecessors, barges and riverboats, at providing rapid, reliable transportation); 2 HOWE ET AL., supra note 14, at 618 (identifying railroads as the “pioneers of big business and a great modernizing force in America”); see also BOSTON CITY COUNCIL, THE RAILROAD JUBILEE 5 (1852) (providing an account of the celebration marking the opening of the railroad between Boston and Canada, referring to the accomplishment as a “mighty work” and “final triumph”).

158. See HENRETTA ET AL., supra note 156, at 554 (indicating that the telephone “sped up communication beyond anything imagined previously”); JASON H. SILVERMAN, AMERICAN HISTORY BEFORE 1877, at 169-70 (1989) (describing both the railroad and the telegraph as “technological marvel[s]” and noting that, along with the railroads, “the telegraph dramatically expedited the speed with which information traveled”).

159. A similar balancing of interests, ultimately favoring the interest of the public, was evidenced by the government’s willingness to grant land and eminent domain powers for railroad construction. See supra notes 14, 19 and accompanying text.

160. See supra notes 1-3, 115 and accompanying text (identifying the improved characteristics of fiber-optic communication over traditional metal wire and satellite communication).

161. See VINCENT REH, RAILROAD RADIO 3-6 (1996) (noting that dispatchers relied on telegraphed information regarding a train’s location for safe and efficient routing); see also Railroad Safety Hearings, Hearing on S. 539 and S. 1401 Before the Senate Comm. on Interstate and Foreign Commerce, 83rd Cong., 4-5 (1953) (letter from Charles D. Mahaffie, Acting Chairman of the Committee on Legislation and Rules, Interstate Commerce Commission, dated
ever, modern-day fiber-optic cables running along the railways are not necessary for the railroad’s operation, and although cellular phone use by railroads has increased in recent years, many railroads continue to rely on various radio networks for reliable and effective communication. In short, it is difficult to justify this underground cable as “modern-day” telegraph lines crucial for the railroad industry. Moreover, the incidental use doctrine upon which courts previously relied has lost its merit over the years. Fiber-optic technology is not necessary to facilitate the business of the railroads as telegraphs and telephones once were, thus, use of the easement land for this new technology is not merely “incidental” and should not be excused by a broad interpretation of the authorized scope of the easement.

2. “For Railroad Purposes” Excuse Is Not Sufficiently Limiting

While cases such as Buhl indicate that the scope of the railroad easement is not unlimited, they hint that even minimal use of fiber-optic technology by the railroad is sufficient to justify an intrusion of the servient landowner’s rights. Although the Buhl court did not expressly consider whether Sprint’s laying of fiber-optic cables in the railroad corridors still would have constituted a taking under such circumstances, the court relied on authority holding that an appurtenance could be within the scope of the railroad easement, “even though it was beneficial to others also.” Similar to the Mellon court, the

Mar. 10, 1953) (noting that the telegraph and telephone are among those systems contributing to increased safety in railroad operations and urging legislation authorizing the Interstate Commerce Commission to make mandatory the installation of certain railroad communication systems); GEORGE H. DRUBY, THE HISTORICAL GUIDE TO NORTH AMERICAN RAILROADS 8-9 (1985) (describing the impact of technology on the railroads from 1870-1910, including the instant communication the telegraph provided).

162. See REH, supra note 161, at 21-56 (discussing modern railroad radio communication systems and their use in rail operations); Steve Grande, Trainweb (visited Apr. 16, 2000) <http://www.trainweb.com> and <http://www.trainweb.com/radio> (providing information and resources pertaining to the professional rail industry including details on radio communication and frequencies).


164. See id. (describing the underlying rationale of the incidental use doctrine).

165. Buhl v. U.S. Sprint Comm. Co., 840 S.W.2d 904, 911 (Tenn. 1992) (referencing the court’s findings in both Grand Trunk R.R. v. Richardson, 91 U.S. 454 (1875) and City of Knoxville v. Kaiser, 33 S.W.2d 411 (Tenn. 1930)).
Buhl court distinguished between lines of communication used solely for non-railroad purposes and those benefiting the railroad to some degree. Thus, any appurtenance even minimally advantageous to the railroad could seemingly be justified under the purpose of the easement since it is in some way related to the "construction, maintenance, and operation of the railroad."167

Arguably, from a public policy perspective, the reasoning of the Buhl and Mellon courts is flawed because it permits railroads to defend their profitable contractual relationships with telecommunications companies on the basis of what may be an imperceptible amount of actual railroad use in comparison to the wealth of general commercial business conducted on the fiber-optic cables. In short, the "railroad purposes" may be minimal compared to the public's use of these lines. Considering some of these tracks may not even be active,168 the railroad connection becomes even more tenuous.

3. No Additional Burden Does Not Mean No Misuse of the Easement

Despite potential abuse of the "railroad purposes" justification, some might argue that even if the fiber-optic cables are being utilized only negligibly for railroad purposes, the landowner is not entitled to any compensation because the use does not constitute an additional burden on the servient land.169 This reasoning was evident in the cable television cases. Nevertheless, courts have found misuse, even in the absence of an increased encumbrance on the property, in the context of appurtenant easements. For example, in Brown v. Voss,171 a court continued:

"It 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 from the telegraph company." 

Id. at 912 (quoting from Western Union Tel. Co. v. Nashville, Chattanooga & St. Louis Ry., 237 S.W. 64 (1921)) (emphasis added).

166. See id. at 911-12.
167. Id. at 910.
168. Many rail lines are being maintained simply as a result of government preservation programs and not because of current use. See supra notes 58-60 and accompanying text.
landowner was granted an appurtenant easement across his neighbor's property in order to reach his land.\textsuperscript{172} Subsequently, the landowner purchased an adjacent lot, expanding the size of his residential estate.\textsuperscript{173} Although he utilized the driveway easement no more than before this acquisition,\textsuperscript{174} frustrating the "additional burden" theory, the Washington Supreme Court held that such use exceeded the scope of the easement.\textsuperscript{175} Similar facts were presented in Schadewald v. Brulé.\textsuperscript{176} Unlike Brown, in which the court ultimately determined damages to be insubstantial,\textsuperscript{177} the Michigan Court of Appeals in Schadewald granted an injunction to stop misuse of the easement, concluding that the trial court erred in denying relief simply because there was no evidence of an increased burden on the servient property.\textsuperscript{178} Thus, failing to show a further encumbrance on the land does not necessarily preclude a claim for unauthorized use of an easement.

Furthermore, the argument that the use places no additional burden on the servient estate is easier to accept in cases in which telephone and electric companies are apportioning their easement rights to cable television companies than in the fiber-optic cases. In the former situation, such division merely results in an additional wire being placed on already existing telephone and electrical poles.\textsuperscript{179} Although this violates the rights of the landowner to exclude others from his property, its disruptiveness is minimal. On the other hand, digging new trenches for fiber-optic cable is a substantial intrusion. The

\textsuperscript{172} See id. at 515.
\textsuperscript{173} See id.
\textsuperscript{174} See id. at 518.
\textsuperscript{175} Id. at 517.
\textsuperscript{176} 570 N.W.2d 788 (Mich. Ct. App. 1997). In this case, the dominant landowner built a garage on the tract of land neighboring that served by the appurtenant easement. See id. at 792. Subsequently, the servient landowner sought an injunction against the dominant landowner and the township claiming that the variance granted for the construction of the garage and the use of the easement to access the additional tract of land constituted an unconstitutional taking. See id. at 793.
\textsuperscript{177} See Brown v. Voss, 715 P.2d 514, 517-18 (Wash. 1986) (recalling the $1 award of the trial court that was not challenged on appeal and affirming the trial court's denial of an injunction). However, additional factors such as comparative hardship to the parties and questionable incentives behind the claims may have influenced the court's conclusions in this case. See id. at 518.
\textsuperscript{178} See Schadewald, 570 N.W.2d at 796.
court in *Henley*, considering the addition of television cable to an existing easement, acknowledged this difference by concluding that the plaintiffs' reliance on precedent involving underground cable was misplaced: "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."\(^{180}\)

4. Exclusive Easements Are Not Per Se Apportionable

Even if use of the railroad easement by telecommunications companies is not specifically within its scope, cases involving the apportionment of utility easements might suggest that its exclusive nature creates a presumption that such action is permissible.\(^{181}\) As the Missouri Court of Appeals explained in *Henley*, the underlying rationale for this rule is that if the owner of the servient land does not retain the right to occupy the land concurrent with the easement holder, he sustains no loss if the easement is shared with others.\(^{182}\) As also noted by the court, however, this right is subject to the specifications expressed in the grant.\(^{183}\) Although the railroad easements do provide some latitude regarding the measures that may be taken to support the construction and operation of the railroad, they typically do not provide rights to the railroads' "successors and assigns" as explicitly stated in the utility easements.\(^{184}\) Consequently, this argument fails when applied to railroad easements, even though they are exclusive in nature.

\(^{180}\) *Henley*, 692 S.W.2d at 828.

\(^{181}\) *See*, e.g., *id.* at 827 (holding that when the rights granted to an easement owner are exclusive in nature, apportionment by the easement owner is "presumptively allowable").

\(^{182}\) *See id.*

\(^{183}\) *See id.; see also* RESTATEMENT OF PROPERTY: SERVITUDES, § 493 (1944) ("The apportionability of an easement in gross is determined by the manner or the terms of its creation."). Comment c of § 493 further indicates that while the owner of an exclusive easement has the sole privilege of making use of it, the possessor of the servient land "is affected in some degree by any increase in the use authorized by [it]. He is entitled, therefore, to prohibit any use made under it in excess of that authorized by the manner or terms of its creation." *Id.*

\(^{184}\) *Henley*, 692 S.W.2d at 828.
5. Flexible Interpretation of Easements Should Not Extend to Newly-Created Property Interests Outside Its Scope

Critics of the litigation against telecommunications and railroad companies argue that easements should not be interpreted so narrowly as to limit their application in light of new technology. Accordingly, the critics contend that the rights and privileges contemplated at the time the easement was created should not strictly dictate the future scope of the interest conveyed but should allow for "the natural evolution of communications technology." While it is certainly hard to dispute the importance of scientific progress, this does not necessitate a result in which the landowner's rights are totally eclipsed.

The primary issue currently being litigated in the fiber-optic cases is not whether new technology should be stifled, or whether telecommunications companies should be forced to look elsewhere for land in which to bury their cable, but rather who is best positioned to claim ownership of this novel interest, this new "stick" in the bundle of property rights. The easements granted to railroad companies over a century ago were limited to the purpose of establishing and maintaining a system of transportation and surely did not contemplate a society obsessed with obtaining more efficient Internet access and clearer cellular phone communication. The scope of allowable uses was made sufficiently broad to give railroads the freedom to take measures necessary for safe, reliable, and efficient

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185. See, e.g., id. at 829 ("Just as we must accept scientific advances, we must translate the rights of parties to an agreement in the light of such developments" (quoting Crowley v. New York Tel. Co., 363 N.Y.S.2d 292, 294 (1975)).

186. Id. (quoting Salvaty v. Falcon Cable Television, 212 Cal. Rptr. 31, 34 (1985)).

187. See supra note 24 and accompanying text. See generally Harold Demsetz, Toward a Theory of Property Rights, in PERSPECTIVES ON PROPERTY LAW 150 (Robert C. Ellickson et al., 2d ed. 1995). Demsetz explains the emergence of new property rights, what prompts their creation, and the corresponding considerations that arise as a result:

Changes in knowledge result in changes in production functions, market values, and aspirations. New techniques, new ways of doing the same things, and doing new things—all invoke harmful and beneficial effects to which society has not been accustomed .... [T]he emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities.

Id.

188. See supra notes 48-50 and accompanying text.
transportation;\textsuperscript{189} however, the authority granted was not meant to open the door for largely unrelated business deals, especially if they become the predominant source of revenue maintaining the railroad industry.\textsuperscript{190}

Critics of the litigation against telecommunications companies and railroads also argue that a flexible interpretation of railroad easements, permitting installation of fiber-optic cables, is necessary to provide railroads with an incentive to maintain financially burdensome rail lines. Over the past few decades, the consumer demands on railroads have decreased, and in fact, many routes have been eliminated due to their lack of profitability.\textsuperscript{191} Congress has attempted to slow this process by requiring railroads to comply with complicated and time-consuming abandonment procedures and with legislation, such as Rails-to-Trails, allowing for interim uses in lieu of full abandonment.\textsuperscript{192} Thus, agreements between railroad and telecommunications companies, if permitted, serve the interests of both groups, providing railroads with an instant pecuniary incentive to maintain their lines\textsuperscript{193} and lessening the federal government’s burden of creating additional programs to encourage preservation of the corridors.\textsuperscript{194} However, what benefits these entities translates into a lost economic opportunity for the landowner and further delays the reversion of that property back into the landowner’s estate. Allowing the railroads to exploit this new subsurface use of the right-of-way land exceeds the bounds of their easement, much like their former attempts to profit from underground minerals.\textsuperscript{195} The fact that the current leasing arrangements provide a “quick fix” to problems

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\textsuperscript{189} See supra notes 48-50 and accompanying text.
\textsuperscript{190} See infra notes 191-93 and accompanying text.
\textsuperscript{191} See Montange, supra note 57, at 139-40 (stating that America’s rail system has shrunk “from roughly 300,000 miles around 1920 to about 150,000 miles in 1986” and discussing how railroads have a difficult time competing with other forms of surface transportation).
\textsuperscript{192} See supra notes 57-58; see also Bandini, supra note 13, at 2004-09.
\textsuperscript{193} Arguably, these leasing agreements with telecommunications companies may be as lucrative as mining for oil and gas. See, e.g., Buhl v. U.S. Sprint Comm. Co., 840 S.W.2d 904, 906 (Tenn. 1992) (stating that U.S. Sprint Communications Company agreed to pay Southern Railway Company $1,200 per mile per year for the original term of 25 years); O’Reilly, supra note 5, at 30 (observing that the railroads lease land to telecommunications companies for as much as $25,000 per mile).
\textsuperscript{194} See supra notes 57-60 and accompanying text.
\textsuperscript{195} See discussion supra Part I.C.1.
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vexing the government and railroads does not justify the overshadowing of private property rights.

B. AN OWNER-ORIENTED SOLUTION

Prohibiting the railroads from engaging in such transactions does not, however, imply that telecommunications companies must cease using the corridors for their fiber-optic cable. Unlike the majority of mineral rights cases that rely on the exclusive nature of the railroad easements and its underlying safety rationale to restrict concurrent use or excavation, it is apparent that the coexistence of fiber-optic cable installation and railroad activity does not pose enough of a problem to hinder agreements between railroads and telecommunications companies. Accordingly, such activities should present no more of a threat to the operation of the rail lines if landowners take the place of railroads in these negotiations.

Ideally, the controversy in the class actions filed against the railroads and telecommunications companies should be resolved in a way that facilitates the continued growth and development of telecommunications technology, while at the same time acknowledging the legal rights of private property owners. One suggestion, as mentioned above, might simply be to require companies like AT&T and MCI to negotiate directly with landowners for an interest in the railroad corridors. While this process would maximize the rights of landowners and provide them complete control over the decision whether to allow this new use of their land, it could also present significant obstacles. The appeal of the railroad corridors for use by telecommunications companies is their uninterrupted, trans-continental quality. Rights to all consecutive parcels must be acquired or the overall purpose is frustrated. Thus, an individualized approach to negotiations with telecommunications companies is inevitably problematic because every landowner has veto power with regard to his property. This reality may serve to completely thwart the goals of the telecommunications companies because landowners, realizing the importance of their particular segment to the project as a whole, may be tempted to exploit their

196. See supra text accompanying note 71.
197. The Eighth Circuit Court of Appeals' analysis in Energy Transportation Systems also lends support to the assertion that the landowner, rather than the easement holder, should be the one entitled to subject the right-of-way land to multiple easements. See supra note 75 and accompanying text.
198. See supra notes 115-16 and accompanying text.
power and hold out for the highest price. Consequently, one-on-one bargaining between telecommunications companies and private property owners may make it too difficult to implement new technology and its effects could be harmful to all: transaction costs will increase, land-acquisition will be costly, and inefficient use of resources will force consumers to pay higher prices for what may be lower quality goods and services.

Regulatory safeguards are therefore needed to prevent this "hold out" problem. Although these safeguards may infringe upon a property owner's absolute right to control his land, without them, the seemingly unlimited level of control enjoyed by the private property owner would likely eliminate railroad corridors as a feasible option for the location of fiber-optic cables. Considering this possibility, a unified, national approach is appealing. Richard Posner, an expert on the economics of property law, suggests that granting an entity the

199. Richard Posner has written at length on this type of "hold out" problem, particularly in the context of similar endeavors by railroad or pipeline companies:

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 services. 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 . . . .


200. See id.

201. See Kristi Robbins Rezabek, Buhl v. U.S. Sprint Communications Co.: Ascertaining Rights of Fee Owners on Whose Land a Railroad Easement Exists, 22 MEMPHIS. ST. U. L. REV. 843, 853 (1992) (commenting on the negative ramifications of cases like Buhl which require individual landowners interests to be taken into account). The author points out:

[Communications companies like U.S. Sprint will face enormous transaction costs in ascertaining and negotiating fair rental values for their licenses, as well as simply determining the identities of a potential huge class of parties with whom they will be forced to deal . . . [t]he natural result would seem to be a dramatic decrease in the number of expansion projects instigated by communications companies . . . .

Id.
right of eminent domain may be appropriate here: "[I]n settings of high transaction costs people must be allowed to use the courts to shift resources to a more valuable use, because the market is by definition unable to perform this function. . . ."202 Congress vested this power in the railroads back in the 1800s to facilitate what was viewed as a sufficient public benefit, outweighing the rights of private landowners.203 Perhaps similar federal legislation could be introduced bestowing such privileges on telecommunications companies in recognition of the public interest in promoting prompt implementation of new and improved methods of communication. However, unlike the Railroad Right-of-Way legislation of the nineteenth century,204 this legislation should include both public and private land, and should limit right-of-way privileges to existing railroad corridors. The Florida statute205 discussed in Davis v. MCI Telecommunications Corp.,206 essentially accomplishing these same objectives, provides a good example of what could be implemented at the federal level to allow for fiber-optic cable installation.

While this type of solution may serve the public interest and reduce the potential for "hold out" problems, it admittedly deprives landowners of the opportunity to make decisions regarding their property. Perhaps it is this unfortunate reality that makes choosing an appropriate method of valuation and compensation so essential.207 The amount private property owners are compensated must reflect not only the value of the land itself, but also its potential worth as a location for fiber-optic cables. In the case of railroad corridors, this consideration of the land's "highest and best use" is likely to make a substantial difference in the amount awarded to the landowner.208 Appraisers are unlikely to find much, if any, value in long narrow tracts of land located so close to a railway because they are

202. POSNER, supra note 199, at 63.
203. See supra notes 14-15, 19 and accompanying text.
204. See supra note 15.
205. See supra notes 136-38 and accompanying text.
208. See Worstell, supra note 207, at 479.
often noisy and unsuitable for any traditional real estate purpose. However, the leasing fees collected by railroads for these strips of land clearly illustrate their potential profitability, and the system of valuation employed must account for that. In sum, landowners should be able to take advantage of the increase in demand for their land and its new use, even in the context of a uniform, rather than individualized, negotiation setting.

There are several ways in which to realize this goal of protecting and adequately compensating owners of servient land. Telecommunications companies could simply pay each landowner based upon the rate per mile they currently pay the railroad companies for the same benefit. The amount could be fixed periodically by a regulatory body such as the Federal Communications Commission to avoid the type of maneuvering seen with the "hold out" problem. However, this method still requires some contact with each individual owning land along a railway, necessitating substantial time and resulting in higher overall costs.

A system in which the telecommunications companies could deal with fewer, larger entities is preferable. The four principal attorneys handling the class action suits against the telecommunications and railroad companies have proposed that local landowners unite to form "corridor entities" allowing them to collectively control the land and its uses. In addition to the proverbial "strength in numbers" benefit of this type of arrangement, such unity would make leasing of their corridors more attractive to the telecommunication giants who could compensate many landowners in one transaction. In turn, the group of landowners could decide how best to allocate funds received: distribute them proportionately, or perhaps use some of the proceeds to promote use of their space to other telecommunications companies. A tiered approach to the fixed per-mile

209. See supra note 193.
210. See, e.g., supra note 193.
211. The Federal Communications Commission (FCC), an independent agency of the United States government, was established by the Communications Act of 1934. See Federal Communications Commission (last modified Apr. 7, 2000) <http://www.fcc.gov/aboutus.html>. The FCC is responsible for regulating interstate and international communications by various mediums including radio, television, wire, satellite and cable. See id.
212. Amon, supra note 11, at A12 (indicating that the class action attorneys, Nels Ackerson, Henry Price, Roger Nelson and John Massopust, are currently working on patenting the "corridor entity" concept).
rate discussed above could provide higher pay-offs to "corridor entities," versus individuals, in exchange for the greater efficiency of negotiating with these organized groups of landowners.

Critics of solutions that recognize individual property rights argue that such awards provide adjacent landowners with a financial windfall, particularly if these individuals are not the original grantors of the railroad easement, as is often the case. They contend that the current landowners likely purchased the property at a discount because it was burdened by an easement and providing them with compensation for this new use now would be unjust. However, this situation seems no different than one in which property values significantly increase due to the building of a nearby school or the development of an adjacent shopping district: both are unexpected and perhaps unforeseeable at the time of the original transaction, yet it would be absurd to deny the owner the right to profit from that increased value in subsequent business dealings.

Most importantly, the solutions presented eliminate the railroad "middleman" and fully recognize the landowner's contribution toward facilitating this new technology. Furthermore, these types of arrangements remove the incentive for railroads to misrepresent the extent to which they rely on the fiber-optic cable for their business, and do not constrain or delay the abandonment process if rail lines are no longer profitable. Although this may result in renewed anxieties for the railroads and the federal government with regard to profitability and rail line preservation, private property rights cannot continue to be ignored.

CONCLUSION

Historically, state and federal governments have promoted new methods of communication and technological advancements by providing grants, passing laws, or finding other justifiable means to assist companies in bringing about change for the benefit of the public. The use of railroad corridors for fiber-optic cable installation facilitates prompt consumer access to improved communication through efficient and effective land use that should be encouraged. However, there is also an important need to respect private property rights and, as here, when public interest for new technology outweighs the interest in supporting individual liberty regarding the use of land, there is an obligation to sufficiently compensate the landowner. A
valuation method that reflects the true commercial desirability of this property interest must be adopted, and the landowner, not the railroad, is entitled to the resulting compensation.

Although it is uncertain how property owners will fare in their class action suits against railroad and telecommunications companies, what is clear is that railroads should not be allowed to continue profiting from third-party business deals that are only marginally, if at all, related to railroad operation. The outdated rationales and tenuous theories advanced to justify such action contradict the high regard traditionally placed on individual property rights. The placement of fiber-optic cables along railroad corridors was not a use contemplated at the time of the original railroad deeds. Instead, it represents a novel property interest belonging to the landowner and the railroads should not be rewarded simply because the location of their easements is coincidentally favored by the telecommunications companies for their fiber-optic cables. It is a new era, in terms of technology and with regard to the rights of private landowners, and the law must find a way in this twenty-first century to balance the importance of both.