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MARVIN M. BRANDT REVOCABLE TRUST V. UNITED STATES: TURNING A NATIONAL ASSET INTO A PRIVATE GAIN

ABSTRACT

Throughout the nineteenth and early twentieth centuries, Congress gave connected strips of land to railroad companies for the purpose of constructing a railroad system across the United States. These strips of land are called rights-of-way. As railroad use declined in the early- to mid-twentieth century, railroad companies began to close their rail lines and abandon their rights-of-way. Thus, the question arose: Who owns the land underlying the railroad right-of-way, the United States or the private landowners who own the land adjacent to the right-of-way?

In *Marvin M. Brandt Revocable Trust v. United States*, the United States Supreme Court addressed this question and specifically ruled on the nature of the property interest the railroad companies held in these rights-of-way. Without addressing contradictory evidence or conflicting precedent, the Court held that railroad rights-of-way granted to railroad companies pursuant to the General Railroad Right-of-Way Act of 1875 are easements that will terminate upon abandonment by the railroad company and revert to the private landowner of the land underlying the right-of-way.

In light of the significant historical context of these rights-of-way and the potential repercussions of this conclusion, the Court rendered a decision that will unjustly turn a national asset into a private benefit for individual landowners.

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INTRODUCTION

In *Marvin M. Brandt Revocable Trust v. United States*,[1] the United States Supreme Court addressed what happens to the land underneath railroad tracks when the trains stop running and the railroad company abandons its rail line, an issue arising from the complex history of railroads in the United States. Throughout the early development of the United States, the U.S. government granted land to railroad companies by statute to encourage, facilitate, and subsidize the construction of a system of railroads.[2] Subsequently, the government sold or gave the land surrounding the railroad tracks to private landowners.[3] As the need for railroads decreased in the early- to mid-twentieth century, railroad companies began to abandon these railways and the underlying lands.[4] This created an issue regarding who would get the land after the railroad com-

1. 134 S. Ct. 1257 (2014).
2. *See generally* Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift,"* 82 U. COLO. L. REV. 85 (2011) (providing a detailed history of federal land grants to railroad companies).
3. *See id.* at 89–91.
4. *See id.*

pany abandoned it: the people who owned the adjacent land or the U.S. government.[5]

The United States Supreme Court has addressed this question several times, and in early twentieth century cases, the Court held that the United States retained an interest in the right-of-way it granted to the railroads and that the government's interest survived the railroad's abandonment.[6] Then, in *Great Northern Railway Co. v. United States*,[7] the Supreme Court changed course and held that the rights-of-way granted after 1871 were easements that disappeared once the railroad abandoned them.[8] Since *Great Northern*, lower courts have rendered varying decisions on the issue.[9] The Supreme Court's decision in *Brandt Trust* has resolved this confusion.

The Court in *Brandt Trust* affirmed *Great Northern*'s conclusion and held that rights-of-way granted to railroad companies under the General Railroad Right-of-Way Act of 1875 were easements.[10] Unfortunately, the Court relied on precedent and did not conduct a thorough analysis of the issue. The Court missed an opportunity to re-examine the historical and jurisprudential underpinnings of *Great Northern*. This missed opportunity has the potential to disassemble a rail system that spans the United States and to subject the government to takings liability for rights-of-way that have been repurposed for other uses.[11]

This Comment argues that the *Brandt Trust* Court's unquestioning acceptance of *Great Northern*'s historical analysis and the Court's frustration with the government for changing its argument after seventy years prevented the Court from conducting a thorough analysis of the evidence, which resulted in a decision based on incomplete evidence that could have several negative implications. Part I of this Comment summarizes the history of federal land grants to railroad companies and describes significant case holdings that preceded *Brandt Trust*. Part II details the factual background, the procedural history, and the majority and dissenting opinions from *Brandt Trust*. Part III presents the historical evidence that the Court in *Brandt Trust* did not consider and shows how this evidence could have led the Court to a different conclusion. Part III also discusses the potential effects of this decision.

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5. *Id.*

6. *See* Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44, 45–47 (1915) (holding that land grants made pursuant to the General Railroad Right-of-Way Act of 1875 (the "1875 Act") were limited fees with an implied condition of reverter in the United States), *abrogated by* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

7. 315 U.S. 262 (1942).

8. *Id.* at 279.

9. Roberts, *supra* note 2, at 103. *See also infra* notes 61–63 and accompanying text.

10. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1264 (2014).

11. *See id.* at 1272 (Sotomayor, J., dissenting).

I. BACKGROUND

A. History of Land Grants to Railroads

Throughout the development of the United States, the federal government used land grants as a means of financing internal improvements.[12] One of these improvements was a railroad system that spanned the United States.[13] Starting in the 1830s, the United States government initiated a practice of giving narrow strips of land to states and railroad companies for the construction of railroads.[14] Congress enacted individual statutes for each distribution of land; the statutes granted to the railroad company a strip of land that ran across the public lands upon which a railroad company could construct its roadbed.[15] These strips of land

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12. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 341, 345–46 (1968) ("Congress early recognized that public aid for the construction of roads, canals, river improvements, and railroads was necessary to make possible the settlement of the interior lands and that these internal improvements would increase the demand for the public lands and enhance their selling price."). The United States was land-rich and cash-poor, so Congress chose to use land to subsidize the construction of canals and roads instead of financing them with cash;

> [States] were planning internal improvements and were pleading for Federal aid in the form of alternate sections of land . . . . Congress having established the principle, at least for the time, that interstate canals and roads were fit projects for Federal appropriations, one might expect it to have made money grants for these interior states but, with an abundance of fertile land available, it seemed easier to use that.

Id. at 345.

> Congress also decided not to build and operate the improvements itself despite pressure for the United States to become the owner and operator of internal improvements. Congress, however, chose to subsidize rather than to own. . . . Sectional rivalry between the States, disagreement over the constitutional role of the federal government regarding internal improvements and the effect such a federal role would have upon State's [sic] rights made subsidies the only acceptable alternative.

THOMAS E. ROOT, RAILROAD LAND GRANTS FROM CANALS TO TRANSCONTINENTALS 12 (1987).

13. *See* GATES, *supra* note 12, at 350, 356–57.

14. *Id.* at 345, 350, 352, 357, 368 ("Congress had been granting railroads rights-of-way through the public lands since 1835—the width ranged from 60 to 100 feet—and in 1852 it adopted a general law giving 100-foot rights of way and authorizing companies to use earth, stone, and timber from adjacent public lands and to have additional lands for depots and water tanks."); Roberts, *supra* note 2, at 88–89, 110. The railroad companies also obtained rights-of-way through purchase from private landowners and through powers of eminent domain, PAMELA BALDWIN & AARON M. FLYNN, CONG. RESEARCH SERV., RL32140, FEDERAL RAILROAD RIGHTS OF WAY, Summary (2006), *available at* http://atfiles.org/files/pdf/Federal-Rights-of-Way-CRS2006.pdf, but the federally-granted rights-of-way are the subject of this Comment.

15. GATES, *supra* note 12, at 357, 368; Roberts, *supra* note 2, at 108–09. The Act of July 2, 1836 provides a good example of what many right-of-way statutes looked like throughout the nineteenth century until 1871 when Congress started changing its land-grant practices for railroad construction. *Id.* at 113. The Act provided:

> That there be, and is hereby granted to [the railroad company] . . . the right of way through such portion of the public lands as remain unsold, *Provided*, That the portion of the public lands occupied therefor, shall not exceed eighty feet in breadth . . . .
>
> *And be it further enacted*, That for such depots, watering places and work-shops as may be essential to the convenient use of the said road; there shall also be granted to the said company, such portions of the public land . . . on either side of the road . . . .
>
> *And be it further enacted*, That so long as the public lands in the vicinity of the said road shall remain unsold, the said company shall have power to take therefrom, such materials of earth, stone, or wood, as may be necessary for the construction of the said road . . . .

Act of July 2, 1836, ch. 255, 5 Stat. 65.

were called rights-of-way.[16] This practice gained momentum in the 1860s as public support for a railroad extending to the Pacific Ocean grew, and Congress wanted to facilitate the construction of a transcontinental railroad and encourage development of the West.[17]

In 1850, Congress started granting land subsidies to railroad companies as an additional method of financing railroad construction.[18] These subsidies were large tracts of land, which consisted of "alternate sections" of land on either side of the right-of-way forming a "'checkerboard' land grant pattern"[19] that the railroad company could develop or sell to finance construction of the railroad.[20] Between 1850 and 1871, Congress granted over forty-five million acres of land to states and railroad companies to finance the railroads.[21]

Railroad companies were slow to sell these land subsidies, and this interfered with settlers' abilities to obtain their own land; by the late 1860s, the public strongly resented these land subsidies.[22] Succumbing to

16. Roberts, *supra* note 2, at 88–89, 110 (discussing the development of the actual language granting the right-of-way beginning with the earliest right-of-way statutes). "The term 'right of way' has two distinct meanings. In law it is synonymous with 'easement'—a legal concept. But it is often used in railroad parlance and in lay speech to refer to the actual physical layout of the railroad—its grade, roadbed, and tracks." Philip A. Danielson, Comment, *The Real Property Interest Created In a Railroad Upon Acquisition of Its "Right of Way,"* 27 ROCKY MTN. L. REV. 73, 74 (1954). *Black's Law Dictionary* confirms that "right-of-way" has more than one meaning and provides three definitions for the term: "1. The right to pass through property owned by another. . . . 2. The right to build and operate a railway line or a highway on land belonging to another, or the land so used. . . . 3. The strip of land subject to a nonowner's right to pass through." BLACK'S LAW DICTIONARY 1440 (9th ed. 2009).

17. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1260–61 (2014); GATES, *supra* note 12, at 356 ("By the mid-19th century, . . . the West was demanding railroads, exhibiting a remarkable confidence in their potential for economic progress."). Because of the Civil War, the government lacked sufficient cash to fund a transcontinental railroad, so it continued "to support the project through the now well-established practice of land grant subsidies." Roberts, *supra* note 2, at 123–24. For a general description of the typical structure of the statutes granting the rights-of-way and the land subsidies for these transcontinental railroads, see ROOT, *supra* note 12, at 23.

18. *Brandt Trust*, 134 S. Ct. at 1261; GATES, *supra* note 12, at 357; ROOT, *supra* note 12, at 13.

19. Roberts, *supra* note 2, at 106 (internal quotation marks omitted).

20. *Brandt Trust*, 134 S. Ct. at 1261. Congress began this practice of granting lands that the railroad company could sell or develop to finance construction, also called grants in aid of construction, in the 1820s to develop canals and roads. GATES, *supra* note 12, at 345–50. The initial practice involved granting "alternate sections of one half of the land within a strip along the line of the project and reserving the other half for sale." *Id.* at 345–46. "There is a fairly straight line of development from the first of these canal grants in 1827 to the railroad grants . . . ." *Id.* at 358.

21. THOMAS DONALDSON, THE PUBLIC DOMAIN 287 (1884). This method of financing construction "was equal to a cash advance by the Nation." *Id.* at 258. In 1880, a survey estimated that it would require 215,000,000 acres of public land to fulfill the subsidies Congress had granted to railroad companies if the companies built all of the roadbeds and sold all of the land subsidies that they received from the granting statutes. *Id.* at 268.

22. *Brandt Trust*, 134 S. Ct. at 1261; GATES, *supra* note 12, at 375–76, 380; Roberts, *supra* note 2, at 126–28.

the increasing pressure to cease giving land grants, Congress granted the last land subsidy in 1871.[23]

However, this did not end railroad construction, just the means that Congress used to subsidize the construction.[24] The country still needed railroads,[25] so Congress continued to pass individual statutes granting rights-of-way that were unaccompanied by land subsidies.[26] This practice became cumbersome,[27] so in 1875, Congress passed the General Railroad Right-of-Way Act of 1875 (the "1875 Act").[28] The 1875 Act included several sections; the first section granted the right-of-way to the railroad, and the fourth section explained the procedure the railroad company needed to follow to obtain the right-of-way:

> The right of way through the public lands of the United States is granted to any railroad company . . . to the extent of one hundred feet on each side of the central line of said road.[29]
>
> . . . .
>
> Any railroad company desiring to secure the benefits of . . . this title, shall, within twelve months after the location of . . . its road . . . file with the officer . . . of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.[30]

Between 1875 and 1883, Congress made 149 grants to railroad companies under the 1875 Act.[31]

In the early- to mid-twentieth century, railroad companies began to cease operation and abandon these rights-of-way.[32] As early as 1920, Congress started passing statutes to regulate abandonment[33] and preserve the rail corridors. These statutes operated to maintain federal jurisdiction over the rights-of-way until Congress could determine the best use of the

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23. Roberts, *supra* note 2, at 129, 131–32. Congress finally agreed to the cessation of this land grant policy: "Resolved, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued . . . ." *Id.* at 132 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 1585 (1872)). For a more detailed discussion about the progression from the lavish land grants in the 1860s to the cessation of this policy, see Roberts, *supra* note 2, at 126–34.

24. ROOT, *supra* note 12, at 25.

25. Roberts, *supra* note 2, at 130, 140.

26. *See* Great N. Ry. Co. v. United States, 315 U.S. 262, 273–74 (1942); ROOT, *supra* note 12, at 25.

27. Roberts, *supra* note 2, at 142.

28. 43 U.S.C. §§ 934–939 (2012).

29. *Id.* § 934.

30. *Id.* § 937.

31. DONALDSON, *supra* note 21, at 769–771, 1263.

32. Roberts, *supra* note 2, at 89–91, 148.

33. *Id.* at 148.

right-of-way.[34] If the right-of-way would not be useful as a highway or to the local municipality, it would pass to the underlying landowner.[35]

Today, railroad rights-of-way still exist, but most of the land surrounding the rights-of-way belongs to individual landowners.[36] As railroads companies continue to abandon their rights-of-way, the question arises: Who owns the land underlying the abandoned right-of-way, the United States government or the private owner of the land adjacent to the right-of-way?[37] Answering this question necessarily involves determining what kind of property interest Congress granted to the railroad.[38] The Supreme Court has addressed this question, but has come to varying conclusions.[39]

B. The Railroad Received a Limited Fee

In *Northern Pacific Railway Co. v. Townsend*,[40] homesteaders claimed title to a portion of a railroad company's right-of-way granted under an 1864 statute, and the railroad company sought to eject them.[41] The Court held that the railroad received "a limited fee, made on an implied condition of reverter."[42] Congress granted the right-of-way to the railroad company for the purpose of constructing and operating a railroad, and an individual's attempt to acquire that land for private use could not override that public purpose.[43] The Court premised its conclusion on the fact that once a railroad company had filed a map of the location of its right-of-way and constructed its railway, that land was "taken

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34. *Id.* at 148–49.

35. *Id.* at 148.

36. *Id.* at 89. The government conveyed some of its public lands to homesteaders and to other subsequent occupants of the land. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1260 (2014). The railroad rights-of-way burdened the lands that were in the vicinity of those rights-of-way. *Id.*

37. *See* Roberts, *supra* note 2, at 89–91 (discussing the possible results after a railroad company abandons its right-of-way); Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History:* Hash v. United States *and the Threat to Rail-Trail Conversions*, 38 ENVTL. L. 711, 721–23 (2008) [hereinafter Wright, *Shifting Sands*].

38. Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 440 (2001) [hereinafter Wright, *Railbanking*].

39. *See* Roberts, *supra* note 2, at 94.

40. 190 U.S. 267 (1903).

41. *Id.* at 267–69.

42. *Id.* at 271. The "limited fee" is also referred to as a "defeasible fee." Wright, *Shifting Sands*, *supra* note 37, at 725. "With a defeasible fee, the possibility of reversion remains in the original grantor and usually passes to his or her heirs rather than to successors in interest of the adjoining land." Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L. Q. 351, 383 (2000). *Black's Law Dictionary* defines "fee simple defeasible" as "[a]n estate that ends . . . because a special limitation, condition subsequent, or executory limitation takes effect before the line of heirs runs out." BLACK'S LAW DICTIONARY 692 (9th ed. 2009). A "possibility of reverter" is "a future interest retained by a grantor after conveying a fee simple determinable, so that the grantee's estate terminates automatically and reverts to the grantor if the terminating event ever occurs." *Id.* at 1284.

43. *Townsend*, 190 U.S. at 272.

out of the category of public lands . . . and the land department was therefore without authority to convey the rights therein" to another party.[44]

The Supreme Court applied this holding to a right-of-way grant made under the 1875 Act in *Rio Grande Western Railway Co. v. Stringham*.[45] In *Stringham*, a railroad company appealed a judgment declaring that the company owned the right-of-way over a mining claim and asserted that it owned a fee simple in the land.[46] The railroad company specifically presented "the question respecting the nature of its title" in that land to the United States Supreme Court.[47] Disagreeing with the railroad company, the Court cited *Townsend* and characterized the 1875 Act right-of-way as "neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter" if the company stopped using the land for the purposes specified in the grant.[48]

C. The Railroad Received an Easement

In *Great Northern Railway Co. v. United States*, the Supreme Court changed its course.[49] This case arose from a dispute between a railroad company and the United States to determine the owner of the oil and mineral rights underneath an 1875 Act right-of-way.[50] The government asserted that the 1875 Act only granted an easement, meaning that the United States retained ownership of the subsurface rights that the railroad was trying to exploit.[51] Agreeing with the government's argument, the Court held that the railroad did not own the rights to the subsurface oil and minerals.[52] In support of its holding, the Court stated that the rights-of-way granted under the 1875 Act were easements[53] because, in 1871, Congress stopped granting land subsidies to railroads, and this marked a "sharp change in Congressional policy with respect to railroad grants."[54]

The Court based its conclusion predominantly on language in section 4 of the 1875 Act, which provided that the land traversed by the right-of-way would "be disposed of subject to [the] right of way"[55] and asserted that this clause was "wholly inconsistent with the grant of a

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44. *Id.* at 270; *see also* Charles Melvin Neff, *The Possibility of Reverter in Colorado*, 18 DICTA 220, 220 (1941).

45. 239 U.S. 44 (1915), *abrogated by* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

46. *Id.* at 45–46.

47. *Id.* at 47.

48. *Id.* Justice Van Devanter, who the Supreme Court characterized as "our foremost expert on public land law," United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957), wrote the opinion. *Stringham*, 239 U.S. at 45.

49. Roberts, *supra* note 2, at 96.

50. Great N. Ry. Co. v. United States, 315 U.S. 262, 270 (1942).

51. *Id.*

52. *Id.* at 279.

53. *Id.* at 271.

54. *Id.* at 274–75.

55. *Id.* at 271 (quoting 43 U.S.C. § 937 (2012)) (internal quotation mark omitted).

fee."[56] The Court dismissed the contradictory holding from *Stringham*, finding that the Court in *Stringham* had been unaware of the policy shift in 1871 and had based its conclusion on cases concerning statutes granting rights-of-way enacted prior to 1871.[57] The Court also explained that when a grant is ambiguous, it should be "resolved favorably to a sovereign grantor—'nothing passes but what is conveyed in clear and explicit language.'"[58] Because nothing in the 1875 Act purported to convey oil and mineral rights to the railroad and because subsurface rights were unnecessary for the construction of a railroad, the Court explained that the right-of-way conveyed an easement.[59]

D. Post-Great Northern

Since *Great Northern*, there has been significant confusion among lower courts regarding what type of interest the railroad received in post-1871 right-of-way grants.[60] Some courts have relied on *Great Northern* and held that the railroad received an easement,[61] while other courts have held that the United States retained an interest in the right-of-way.[62] Still other courts have overlooked that issue altogether and considered instead whether the United States gave away its rights in the land underlying the right-of-way when it subsequently sold or gave the adjacent land to private parties.[63]

As to the nature of 1875 Act rights-of-way, the decision in *Brandt Trust* has resolved this confusion.[64] The following Part examines the *Brandt Trust* decision in detail.

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56. *Id.*

57. *Id.* at 279.

58. *Id.* at 272 (quoting Caldwell v. United States, 250 U.S. 14, 20 (1919)).

59. *Id.*

60. Roberts, *supra* note 2, at 103.

61. *E.g.*, Samuel C. Johnson 1988 Trust v. Bayfield Cnty., 649 F.3d 799, 803–04 (7th Cir. 2011); Hash v. United States, 403 F.3d 1308, 1313–18 (Fed. Cir. 2005); Beres v. United States, 64 Fed. Cl. 403, 421–24, 426–28 (Fed. Cl. 2005); Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999, 1017–19 (D. Ind. 2005); City of Aberdeen v. Chi. & N. W. Transp. Co., 602 F. Supp. 589, 593 (D.S.D. 1984) (concluding that pursuant to *Great Northern*, the right-of-way granted to the railroad company was an easement).

62. *E.g.*, Marshall v. Chi. & Nw. Transp. Co., 31 F.3d 1028, 1032 (10th Cir. 1994) (concluding that the land conveyance to individuals of the whole tract traversed by the right-of-way did not also convey the government's interest in the right-of-way); *see also* Wyoming v. Andrus, 602 F.2d 1379, 1382–83 (10th Cir. 1979); Idaho v. Or. Short Line R.R. Co., 617 F. Supp. 207, 212–13 (D. Idaho 1985) (holding that the United States retained an interest in railroad rights-of-way granted before and after 1871 even when the United States had subsequently patented that land away).

63. *See, e.g.*, *Hash*, 403 F.3d at 1312–13 (explaining that the primary issue for landowners who obtained their land from the government after the railroad company had obtained its right-of-way was whether ownership of the land underlying the right-of-way ever left the United States and thus whether the United States transferred that ownership to the settlers in their Homestead Act patents).

64. *See* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1265 (2014).

II. *MARVIN M. BRANDT REVOCABLE TRUST V. UNITED STATES*

A. Facts

In 1908, a Wyoming railroad company received a right-of-way under the 1875 Act.[65] The company completed construction of its railway in 1911, but the railroad was unsuccessful and changed owners several times through the 1900s.[66] In 1996, the then-owner decided to abandon the right-of-way.[67] The railroad company followed the appropriate procedure for abandoning a right-of-way and finalized its abandonment in 2004.[68]

Meanwhile, in 1976, the government granted an eighty-three-acre parcel of land to Melvin and Lulu Brandt.[69] The Wyoming railroad company's railway covered ten acres of this parcel.[70] The patent conveying the land to the Brandt's gave them "fee simple title," but it included several provisions that reserved to the United States rights-of-way through that parcel for specified purposes.[71] The reservation at issue in this case provided that the land conveyed by the patent was "subject to those rights for railroad purposes as have been granted to the . . . Railway Company, its successors or assigns."[72] The patent did not address what would result if the railroad abandoned the right-of-way.[73] The future of the abandoned right-of-way that crossed the Brandts' land was the subject of this lawsuit.[74]

B. Procedural History

In 2006, the government brought an action against several landowners who owned land that embraced the abandoned right-of-way.[75] The government's claim sought to declare that the United States, and not the adjacent landowners, owned the abandoned right-of-way.[76] Marvin Brandt, as trustee, filed a counterclaim asserting that, upon abandonment, the Brandts took ownership of the portion of the right-of-way that trav-

65. *Id.* at 1262.
66. *Id.* at 1262–63.
67. *Id.* at 1263.
68. *Id.*
69. *Id.* at 1262.
70. *Id.* The right-of-way only crossed the Brandts' land for a half mile, but it was 200 feet in width amounting to a ten-acre parcel of land at issue. *Id.*
71. *Id.* A "patent" is a "governmental grant of a right, privilege, or authority" or "[t]he official document" granting that right. BLACK'S LAW DICTIONARY 1234 (9th ed. 2009). Therefore, in this context, the patent the Brandts received was a document "by which the government convey[ed] a grant of public land to a private person." *Id.*
72. *Brandt Trust*, 134 S. Ct. at 1262 (quoting the petition for certiorari) (internal quotation marks omitted).
73. *Id.*
74. *Id.* at 1263.
75. *Id.*
76. *Id.* The other landowners either settled with the government or had a default judgment entered against them, and their potential interest in the abandoned right-of-way was much smaller than the Brandts'. *Id.* at 1263 & n.2.

ersed their land.[77] Brandt contended that the railroad's right-of-way was an easement "that was extinguished" once the railroad abandoned it, so the land was now unencumbered by the easement.[78] The government responded that it "retained a reversionary interest" in the right-of-way.[79]

The United States District Court for the District of Wyoming ruled in the government's favor and awarded the title to the right-of-way to the United States.[80] The United States Court of Appeals for the Tenth Circuit affirmed that decision, but it acknowledged the existence of a split between lower courts in determining whether the government had any interest in abandoned rights-of-way granted under the 1875 Act and a disagreement as to what the nature of that interest might be.[81] The Tenth Circuit court followed its own precedent and held that the United States "retained an 'implied reversionary interest'" in 1875 Act rights-of-way.[82]

The Supreme Court granted certiorari to determine "the nature of the interest the United States conveyed to the [Wyoming Railway Company] in 1908 pursuant to the 1875 Act."[83]

C. Majority Opinion

In an eight-to-one decision authored by Chief Justice Roberts, the Court held that rights-of-way granted by the 1875 Act were easements, which terminated upon a railroad company's abandonment, unburdening the underlying land.[84] As such, the Brandts had unencumbered ownership of the full eighty-three-acre parcel.[85]

The Court relied primarily on *Great Northern*'s conclusion that the 1875 Act granted easements.[86] The Court also looked to common law principles, defining an easement as a "nonposessory right to enter and use land in the possession of another [that] obligates the possessor not to interfere with the uses authorized by the easement."[87] When "the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land."[88] Chief

77. *Id.* at 1263.
78. *Id.*
79. *Id.*
80. United States v. Marvin M. Brandt Revocable Trust, No. 06–CV–184–J, 2008 WL 7185272, at *7 (D. Wyo. 2008).
81. United States v. Brandt, 496 F. App'x 822, 825 (10th Cir. 2012) (per curiam).
82. *Id.* at 824 (citing Marshall v. Chi. & Nw. Transp. Co., 31 F.3d 1028, 1032 (10th Cir. 1994)).
83. *Brandt Trust*, 134 S. Ct. at 1263–64.
84. *Id.* at 1259, 1265–66.
85. *Id.*
86. *See id.* at 1264–65.
87. *Id.* at 1265 (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (1998)) (internal quotation marks omitted).
88. *Id.*

Justice Roberts wrote, "Those basic common law principles resolve this case."[89]

The *Brandt Trust* Court emphasized how the *Great Northern* Court had fully accepted the government's argument that the policy behind land grants changed in 1871, so cases determining the nature of rights-of-way granted under pre-1871 statutes were irrelevant for determining the property interested granted by the 1875 Act.[90] The Court then scolded the government for its stark change of position from its argument in *Great Northern*—that a grant under the 1875 Act was an easement—to its argument in *Brandt Trust*—that a grant under the 1875 Act conveyed "something more than an easement."[91] Chief Justice Roberts wrote, "The Government loses that argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago."[92]

The government argued that similar language in pre-1871 statutes and the 1875 Act evinced Congress's intent to retain a "reversionary interest" in 1875 Act rights-of-way "just as it did in the pre-1871 statutes."[93] The Court responded that "*Great Northern* stands for the proposition that the pre-1871 statutes . . . have little relevance to the question of what interest the 1875 Act conveyed to railroads."[94] The Court then dismissed the holdings of two Supreme Court cases that the government cited in support of its position because the Court in those cases did not address the nature of the interest granted by the 1875 Act.[95] Finally, the government cited several statutes governing the disposal of the United States' interests in abandoned or forfeited rights-of-way.[96] The govern-

89. *Id.* at 1266.
90. *Id.* at 1264.
91. *Id.* at 1264, 1266.
92. *Id.* at 1264.
93. *Id.* at 1266.
94. *Id.*
95. *Id.* at 1266–67. In *Stalker v. Oregon Short Line Railroad Co.*, the issue involved competing claims to the same property. 225 U.S. 142, 144 (1912). A homesteader filed a claim for land after the railroad had filed its map of location for those lands but before the land department had withdrawn those lands from the grantable public lands, so the Court had to determine whether the homesteader's patent conveyed a title. *Id.* at 144–45, 150–51. The Court held that when the railroad filed its map of location, those lands were no longer eligible to be granted, so the homesteader's patent failed to convey title to the land. *Id.* at 154. The Court addressed a similar issue in *Great Northern Railway Co. v. Steinke*. 261 U.S. 119, 120 (1923) ("This is a suit . . . to determine conflicting claims to a small tract of land adjoining [a] right of way . . . ."). Because the defendants should have been "on inquiry respecting the nature and extent of the company's claim," the defendants' title did not transfer the land that had already been granted to the railroad company, and the railroad company owned the land. *Id.* at 131–32. In *Brandt Trust*, the government contended that "[i]f the right of way were a mere easement, . . . the patent would have passed title to the underlying land subject to the railroad's right of way." 134 S. Ct. at 1267.
96. *Brandt Trust*, 134 S. Ct. at 1267–68. Two of the statutes the government cited were sections 912 and 940 of title 43 of the U.S Code. *Brandt Trust*, 134 S. Ct. at 1267–68. Section 940 addressed forfeiture of rights-of-way granted under the 1875 Act if the railroad did not build its railway within five years of obtaining the right-of-way and provided that the government's retained interest in the right-of-way would "inure to the benefit of" the adjacent landowner. 43 U.S.C. § 940 (2012). Section 912 addressed abandonment and forfeiture, providing that any right that the United States retained in a right-of-way would vest in the municipality if located therein or in the adjacent

ment argued that these statutes were evidence of Congress's belief that the interest granted under the 1875 Act would revert to the United States once relinquished by the railroad since the statutes would have been meaningless if the government had not retained any interest.[97] The Court explained that those statutes only described how to dispose of interests the United States possessed, not whether the United States retained an interest or what type of interest the 1875 Act conveyed.[98] Emphasizing "the special need for certainty and predictability where land titles are concerned,"[99] the Court refused to "endorse" the government's "stark change in position."[100]

D. Dissenting Opinion

Justice Sotomayor was the sole dissenter.[101] She contended that the majority made two errors in its decision.[102] First, the majority did "not meaningfully grapple with prior cases that expressly concluded that the United States retained a reversionary interest in railroad rights-of-way."[103] Second, the majority "relie[d] on 'basic common law principles,' without recognizing that courts have long treated railroad rights of way as *sui generis* property rights not governed by the ordinary common-law regime."[104]

Citing the holdings from *Townsend* and *Stringham*—that post-1871 railroad rights-of-way were limited fees with an implied condition of reverter—Justice Sotomayor explained that if those cases were still "good law on that point," the government should have won this case.[105] Thus, the real issue according to Justice Sotomayor was "whether . . . *Great Northern* 'disavowed' *Townsend* and *Stringham*" on that point.[106] She concluded that it did not.[107] *Great Northern*, she asserted, involved deciding whether the United States conveyed subsurface mineral rights to the railroad when it granted a right-of-way pursuant to the 1875 Act; it did not involve deciding the nature of that right-of-way.[108] She then high-

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landowner if the right-of-way were not legally converted into a public highway within one year of abandonment. 43 U.S.C. § 912.

97. *Brandt Trust*, 134 S. Ct. at 1267–68.

98. *Id.* at 1268.

99. *Id.* (quoting Leo Sheep Co. v. United States, 440 U.S. 668, 687 (1979)) (internal quotation marks omitted).

100. *Id.* It is notable that none of the eight Justices in the *Brandt Trust* majority were concerned that the *Great Northern* decision had disregarded prior holdings that rights-of-way were limited fees. *See infra* notes 103,105–13.

101. *See id.* at 1269 (Sotomayor, J., dissenting).

102. *Id.*

103. *Id.* (citation omitted)

104. *Id.* (citation omitted) (quoting *id.* at 1266 (majority opinion)).

105. *Id.* at 1269–70.

106. *Id.* at 1270.

107. *Id.*

108. *Id.*

lighted lower courts' treatment of railroad rights-of-way as unique property interests, not defined by "traditional property terms."[109]

Finally, Justice Sotomayor illustrated how the government's arguments in *Great Northern* actually supported its position here.[110] She explained that the policy shift of 1871, the policy behind the 1875 Act, and "the conventional rule that 'a grant is to be resolved favorably to a sovereign grantor'" did not support the conclusion that the 1875 Act granted the subsurface mineral rights to the railroad in *Great Northern*.[111] Nor did those arguments support the conclusion that the 1875 Act granted an indefeasible fee in *Brandt Trust*.[112] She reasoned that those arguments supported the conclusion that Congress did not stop granting a limited fee in 1871 because an indefeasible interest would have been a more generous interest than a limited fee.[113]

III. ANALYSIS

The Supreme Court's opinion in *Brandt Trust* presented an issue of technical property law: What property interest did the railroad receive in its right-of-way, an easement or a limited fee?[114] Furthermore, it is a case about the federal government's power to manage the public lands of the United States for the benefit of the public, with the issue being whether the government has the power to construe railroad rights-of-way for the benefit of the public. By focusing on the technicalities of railroad rights-of-way and by relying only on *Great Northern*, the Court avoided addressing this difficult issue and failed to consider all of the relevant evidence, case precedent, and the broader implications of its ruling.

The Court's decision provides certainty for landowners whose property is subject to an 1875 Act railroad right-of-way, but there are problems with the decision that might override the benefits of certainty. The Court accepted *Great Northern*'s conclusion that 1875 Act rights-of-way are easements without questioning the case's accuracy, without evaluating contradictory evidence, without considering the unique nature of railroad rights-of-way, and without addressing Supreme Court precedent that held the opposite. By focusing on the change in the government's argument from *Great Northern* to *Brandt Trust* instead of the underlying arguments the government raised, the Court did not address the complicated law and complex issues surrounding property interests in railroad rights-of-way.

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109. *Id.* at 1270–71 (providing the Massachusetts Supreme Judicial Court's explanation "that although the right acquired by a railroad was 'technically an easement,' it 'require[d] for its enjoyment a use of the land permanent in its nature and practically exclusive'" (quoting Hazen v. Boston & Me. R.R., 68 Mass. 574, 580 (1854))).

110. *Id.* at 1271–72.

111. *Id.* (quoting Great N. Ry. Co. v. United States, 315 U.S. 262, 272 (1942)).

112. *Id.*

113. *Id.*

114. *See id.* at 1260 (majority opinion).

Moreover, the Court failed to address the bigger picture of public policy. The government granted rights-of-way to the railroad companies to facilitate the construction of a railroad system that would benefit the country and the people as a whole.[115] These narrow, connected strips of land can also serve other public purposes and have been used to run telegraph, telephone, and power lines and to bury fiber-optic cables and fuel lines.[116] Abandoned railroad corridors have been repurposed as highways, canals, tramways, and recreational trails.[117] With its decision in *Brandt Trust*, the Court undermined the public-serving purpose of these grants by allowing them to revert to the private landowner.[118] Ultimately, this decision could increase litigation in future instances where the government or another party wants to use an abandoned right-of-way for a public purpose.[119] In addition, it could instigate litigation regarding prior conversions of abandoned rights-of-way to public uses.[120] Potentially most unfortunate, the decision could perpetuate the destruction of a unique national asset—a system of connected strips of land that has spanned the United States since the nineteenth century.[121] Because of the historical significance and the public nature of railroad rights-of-way, the Court should have been more thoughtful in its decision.

A. The Court Did Not Conduct a Thorough Analysis of the Merits of the Case

The decisions construing rights-of-way granted by post-1871 statutes leading up to the decision in *Brandt Trust* are inconsistent.[122] Courts have disagreed about what interests the United States, the railroad companies, and the adjacent landowners held in those rights-of-way.[123]

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115. *See Supreme Court Hands Down Disappointing Decision for Trails*, RAILS-TO-TRAILS CONSERVANCY TRAILBLOG (Mar. 10, 2014), http://www.railstotrails.org/trailblog/2014/march/10/supreme-court-hands-down-disappointing-decision-for-trails-in-us [hereinafter *Disappointing Decision for Trails*]; *see also* Roberts, *supra* note 2, at 108, 111, 146.

116. Wright & Hester, *supra* note 42, at 356–57, 359, 361.

117. *Id.* at 356–57.

118. *See Disappointing Decision for Trails*, *supra* note 115.

119. Andrea C. Ferster, *Rails-to-Trails Conversions: A Review of Legal Issues*, 58 PLAN. & ENVTL. L. 3, 7–8 (2006).

120. *Id.*

121. *Id.* at 3. General counsel for the Rails-to-Trails Conservancy explained the predicament:

> Our nation's rail corridor system, "painstakingly created over several generations," was at risk of becoming irreparably fragmented. . . . [I]t would be virtually impossible to recreate our national rail corridor system after it was broken into hundreds of parcels of land, due to the difficulties and costs of assembling land in a more populous, increasingly urbanized 21st century America.

Id. (footnote omitted) (quoting Reed v. Meserve, 487 F.2d 646, 650 (1st Cir. 1973)); *see also What the* Marvin M. Brandt *Case Means for America's Rail-Trails*, RAILS-TO-TRAILS CONSERVANCY TRAILBLOG (Mar. 17, 2014), http://www.railstotrails.org/trailblog/2014/march/17/what-the-marvin-m-brandt-case-means-for-america-s-rail-trails; *Disappointing Decision for Trails*, *supra* note 115.

122. *See* Roberts, *supra* note 2, at 94; *see also supra* notes 61–63 and accompanying text.

123. *See* Roberts, *supra* note 2, at 94, 103; Robert W. Swenson, *Railroad Land Grants: A Chapter in Public Land Law*, 5 UTAH L. REV. 456, 460 (1957) ("There was always considerable doubt as to the nature of the railroad's interest in the land.").

Brandt Trust presented the Court with an opportunity to address these conflicting opinions and the complicated law underlying federally-granted railroad rights-of-way. Instead, the Court unquestioningly affirmed *Great Northern* and focused on its disapproval of the government for changing its argument from *Great Northern* to *Brandt Trust*.[124] In doing so, the Court failed to consider the vast body of complex evidence that suggests it should have reached a different conclusion. The following Subpart addresses the historical background and case precedent that the *Brandt Trust* Court disregarded.

1. The Historical Backgrounds of the 1875 Act and of Railroad Rights-of-Way Suggest a Different Conclusion

a. The Nature of the Right-of-Way Did Not Change in 1871

The *Brandt Trust* decision affirms *Great Northern*'s conclusion that there was a "sharp change in Congressional policy with respect to railroad grants after 1871" leading to a change in the nature of the rights-of-way granted after 1871.[125] It is uncontested that railroad companies received a limited fee from rights-of-way granted prior to 1871.[126] However, the only policy that changed in 1871 was that Congress stopped granting outright land subsidies to railroad companies.[127] The nature of the right-of-way did not change.[128]

In 1871, Congress granted its last land subsidy to a railroad.[129] Leading up to this and to the 1875 Act, there was strong support in Congress to cease the practice of granting land subsidies to railroads.[130] However, though anti-subsidy supporters still recognized the importance of continuing the expansion of the railway system,[131] they disagreed with

124. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1264 (2014).

125. Great N. Ry. Co. v. United States, 315 U.S. 262, 271, 274–75 (1942).

126. *See id.* at 271, 277–78.

127. Brief for Rails to Trails Conservancy et al. as Amici Curiae Supporting Respondent at 12, Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) (No. 12-1173), 2013 WL 6858293, at *12 [hereinafter RTC Amicus Brief] ("Congress's 'shift' in policy in 1871 was the elimination of the land grant; what remained constant in grants both before and after 1871 was the creation of transportation corridors—designated as a 'right of way' in each grant—which was placed in the present possession of the railroad to satisfy public transportation needs."); Roberts, *supra* note 2, at 137.

128. Roberts, *supra* note 2, at 130–41 (providing a detailed history of railroad rights-of-way and concluding that there was no change in the nature of these rights-of-way in 1871).

129. *Id.* at 129.

130. *See id.* at 129–34, 138–39; Swenson, *supra* note 123, at 459. One of the land grants to a transcontinental railroad in 1864 involved the withdrawal of a strip of land between 30 and 50 miles wide stretching from Nebraska to California. GATES, *supra* note 12, at 364. This meant that these lands were not available for homesteaders. *Id.* These large withdrawals of lands from the lands that individuals could settle increased the price of the lands that were available for settling. *Id.* at 365–66. The railroad companies brought these massive land grants onto the market very slowly, which further frustrated individuals' efforts to settle in the West and resulted in strong resentment towards the railroads. *Id.* at 375.

131. Roberts, *supra* note 2, at 130; RTC Amicus Brief, *supra* note 127, at 11 ("While the 'grants in aid' were themselves unpopular, the desire for additional railroad lines had not diminished.").

the pro-railroad contingent about how to do it.[132] Thus, the debates in Congress leading up to this last land subsidy focused on how to continue this goal of expanding the railway system while ensuring that settlers had access to sufficient land.[133] The debates were not focused on the nature of the property interests in the rights-of-way, but on the excess land attached to the rights-of-way that were being sold to the settlers to subsidize railroad construction.[134] Because of this strong opposition to land subsidies, "grant[ing] no land" was a phrase frequently used to describe new railroad grants.[135] In this heated context, the phrase reiterated the fact that no land subsidy accompanied the right-of-way; however, it did not change what the government was granting as a right-of-way.[136]

To support its conclusion that the 1875 Act granted an easement, the Court in *Great Northern* relied on a conversation between senators about the language that eventually became section 4 of the 1875 Act to support its conclusion that the 1875 Act granted an easement.[137] The Court quoted an excerpt of the conversation, which stated that the language of section 4 "grant[ed] no land to any railroad company."[138] What the Court did not do was provide the statement that followed: "The bill follows the uniform precedents in bills of this character."[139] These statements highlight the pro-railroad contingent's effort to ease the fears of the anti-subsidy contingent by ensuring that the 1875 Act granted no excess lands to the railroads but preserved the railroads' ability to construct productive rail systems.[140] The full disclosure of this conversation suggests that while the land subsidy disappeared, the nature of the right-of-way granted under the 1875 Act stayed the same—"uniform."

Other congressmen also made comments about statutes granting rights-of-way between 1871 and 1875: "This bill does not grant a single acre of land for any purpose whatever *except for* the right of way,"[141] and "There is no land grant *further than* a hundred feet on each side of the road."[142] These statements emphasized that the statutes granted no more

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132. Roberts, *supra* note 2, at 133, 137.
133. *See id.*
134. *Id.* at 138–41.
135. *Id.* at 138 (alteration in original) (quoting Great N. Ry. Co. v. United States, 315 U.S. 262, 271 n.3 (1942)) (internal quotation marks omitted).
136. *Id.* at 141.
137. *Great Northern*, 315 U.S. at 271 & n.3 (1942).
138. *Id.* (quoting CONG. GLOBE, 42d Cong., 2d Sess. 2137 (1872)).
139. Roberts, *supra* note 2, at 156 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 2137 (1872)).
140. *Id.* at 156–57.
141. *Id.* at 139 (emphasis added) (quoting CONG. GLOBE, 42d Cong., 2d Sess. 2951–52 (1872)).
142. *Id.* at 140 (emphasis added) (quoting CONG. GLOBE, 42d Cong., 2d Sess. 2138 (1872)). Representatives made these statements in debates in Congress in 1872 about passing individual bills granting the right-of-way to railroad companies. *Id.* at 138–40. Even the staunchest objector to land subsidies described a right-of-way grant as a grant of land. *Id.* at 140.

land than what was necessary for the right-of-way, but the statutes still granted the right-of-way and all that was necessary for that purpose.[143]

Furthermore, the underlying purpose for granting railroad rights-of-way did not change in 1871. Congress passed the pre-1871 statutes so that railroad companies could build railroads that would benefit the public.[144] Similarly, Congress passed the 1875 Act for the construction of a railroad to benefit the public.[145] In *Great Northern*, the Court explained that this purpose did not require granting the mineral rights to the railroad.[146] The same reasoning applies in *Brandt Trust*. The purpose of the 1875 Act did not require Congress to change its policy of retaining a reversionary interest in railroad rights-of-way.[147] As Justice Sotomayor wrote in her dissent, "[n]othing about the purpose of the 1875 Act suggests Congress ever meant to abandon that sensible limitation."[148] It does not follow that the nature of the right-of-way changed when the underlying purpose did not.

This more expansive view of the history surrounding the railroad rights-of-way, the cessation of granting land subsidies to railroads, and the 1875 Act suggest that Congress did not change the nature of the right-of-way in 1871; rather, it only stopped granting land subsidies.[149] By failing to consider this evidence, the *Brandt Trust* Court missed an opportunity to question *Great Northern*, a decision that only focused on the underlying mineral rights and was based on an incomplete view of the facts, and to provide a more historically accurate basis for its decision.

b. Railroad Rights-of-Way Are Not Common Law Property Interests

The Court further erred by applying common law property principles of easements to the rights-of-way granted under the 1875 Act. Evidence and case precedent suggest that railroad rights-of-way are unique property interests that defy common law definitions.[150]

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143. *See id.* at 139–41.

144. *Id.* at 108, 111.

145. Great N. Ry. Co. v. United States, 315 U.S. 262, 272 (1942); Roberts, *supra* note 2, at 146.

146. *Great Northern*, 315 U.S. at 272.

147. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1271 (2014) (Sotomayor, J., dissenting).

148. *Id.*

149. Roberts, *supra* note 2, at 141. In pre-1871 statutes granting railroad rights-of-way, the right-of-way and the land subsidy were granted in different sections of the statute. Swenson, *supra* note 123, at 460. Therefore, ceasing land subsidies would not necessarily change the nature of the right-of-way.

150. Wright & Hester, *supra* note 42, at 385 ("Fitting the interests into common-law categories is counter productive."); *id.* at 394 ("[C]ourts have agreed that the railroad easement is a unique and difficult-to-define property right that does not clearly fit into the easement or fee categories.").

Justice Sotomayor wrote, "[T]his Court and others have long recognized that in the context of railroad rights of way, traditional property terms like 'fee' and 'easement' do not neatly track common-law definitions."[151] The Court in *Stringham* wrote, "The right of way granted by [the 1875 Act] and similar acts is neither a mere easement, nor a fee simple absolute."[152] The United States District Court for the District of Idaho addressed this same concern and wrote, "The term 'right-of-way,' in the context of railroad property interests, is a *term of art* signifying an interest in land which entitles the railroad to the exclusive use and occupancy in such land."[153]

In *New Mexico v. United States Trust Co.*,[154] the Supreme Court addressed the question: "What . . . is meant by the phrase 'right of way'?"[155] The Court held that the right-of-way was "real estate of corporeal quality"[156] and described a right-of-way as "the land itself, not a right of passage over it."[157] The Court continued, "But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted . . . ."[158] In support of its conclusion, the Court quoted several informative descriptions of railroad rights-of-way:

> Now, the term "right of way" has a two-fold signification. It is sometimes used to describe a right belonging to a party,—a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.
>
> . . . .

151. *Brandt Trust*, 134 S. Ct. at 1270 (Sotomayor, J., dissenting); *see also* Richard A. Allen, *Does the Rails-to-Trails Act Effect a Taking of Property?*, 31 TRANSP. L.J. 35, 39 (2003) ("[I]t seems to be universally recognized by all state and federal courts that the easement is of a very special kind. It is not simply a non-exclusive right of passage, as an individual might have across a neighbor's property to access his own. A railroad easement grants the railroad exclusive use and possession of the right-of-way, with the right to exclude all others from the property, including the grantor."); Wright & Hester, *supra* note 42, at 388 ("[C]ourts have had great difficulty defining the railroad easement because it so closely resembles the exclusive dominion and control of fee simple ownership.").

152. Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44, 47 (1915), *abrogated by* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

153. Idaho v. Or. Short Line R.R. Co., 617 F. Supp. 207, 210 (D. Idaho 1985) (emphasis added). *See also* Wright & Hester, *supra* note 42, at 378 ("While the term easement was commonly known, it was rarely used because the common law easement of the nineteenth century did not permit the easement holder to have exclusive rights in the land. . . . Use of the term easement did not generally appear in original railroad deeds until the turn of the century . . . .").

154. 172 U.S. 171 (1898).

155. *Id.* at 181.

156. *Id.* at 184–85.

157. *Id.* at 182.

158. *Id.* at 183.

> The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad, which is usually a permanent improvement,-a perpetual highway of travel and commerce . . . .[159]

These excerpts are from Supreme Court decisions that were more contemporaneous with the 1875 Act than either *Great Northern* or *Brandt Trust*. The explicit descriptions of railroad rights-of-way show that "basic common law principles"[160] do not apply, or at least that common law principles do not sufficiently describe the property interest the railroad obtained in a right-of-way. The right that railroads received in a right-of-way was much more than a common law easement; it included "exclusive use and possession."[161] Thus, the "basic common law principles" applied by the Court in *Brandt Trust* are misplaced.

c. The Government Could Not Alienate the Land Underlying the Right-of-Way

Even if railroad rights-of-way are easements and common law principles apply, this does not guarantee the conclusion that the United States did not retain an interest in that right-of-way. What the railroads received does not determine who owns the abandoned right-of-way.[162] The *Brandt Trust* Court decided that the nature of the right-of-way is dispositive as to what happens to the land underlying the right-of-way upon abandonment. However, case precedent suggests that the government could not alienate the land underlying the right-of-way after the government had given the land to the railroad. Without being able to patent away the underlying land, it necessarily follows that upon abandonment by the railroad, the government is the only party that retains interest in the land.

In *Townsend*, the Court held that the government retained an interest in the right-of-way and explained that the government could not patent away land it had already given to the railroad for its right-of-way.[163] The Court found that once the government had granted the right-of-way and the railroad had filed a map of location for its railway and built its tracks, "the Land Department was . . . without authority to convey rights therein."[164] Therefore, regardless of whether the right-of-way was an

159. *Id.* at 182–83 (quoting Joy v. St. Louis, 138 U.S. 1, 44 (1891) and Smith v. Hall, 72 N.W. 427, 428 (Iowa 1897)) (internal quotation marks omitted); *see also supra* note 16 (providing the definition of "right-of-way").

160. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1266 (2014).

161. Wright, *Shifting Sands*, *supra* note 37, at 731.

162. Danaya C. Wright, *A New Era of Lavish Land Grants: Taking Public Property for Private Use and* Brandt Revocable Trust v. United States, PROB. & PROP., September/October 2014, at 30, 35 [hereinafter Wright, *Lavish Land Grants*] ("[T]he fact that the railroad has an easement tells us nothing about who owns the servient fee."); *see also* Hash v. United States, 403 F.3d 1308, 1312 (Fed. Cir. 2005) (phrasing the determinative issue as what property interest the adjacent landowner received from her patent).

163. *See* N. Pac. Ry. Co. v. Townsend, 190 U.S. 267, 270 (1903).

164. *Id.*; *see also* Stalker v. Or. Short Line R.R. Co., 225 U.S. 142, 145, 153–54 (1912) (applying that same rationale to rights-of-way granted under the 1875 Act and holding that when the rail-

easement or a limited fee, the underlying land could not be granted to another party because the land had been "taken out of the category of public lands subject to preemption and sale . . . ."[165]

In contrast, the Court in *Great Northern* explained that language in section 4 of the 1875 Act meant that the government could sell or give the lands underlying the right-of-way to a third party after granting those same lands to a railroad company.[166] The relevant language of section 4 provided that after a railroad had filed its map of location, the lands encompassing the right-of-way "shall be disposed of subject to [the] right of way."[167] The argument is that providing for the disposal of the lands underneath the right-of-way implies that these lands were eligible to be granted to another party.[168] However, section 4 of the 1875 Act covered the logistics of how the railroad could "secure the benefits of [the] act."[169] It did not address what would happen to the land after it was granted to the railroad. Section 1 of the 1875 Act contained the language that actually granted the right-of-way.[170] Section 1 granted "the right of way" to the railroad company "through the *public lands* of the United States."[171] This language highlighted the public nature of the lands granted to the railroad companies, not the lands' subsequent occupancy by private individuals.[172] The language further supports the conclusion from *Townsend* that the lands were public lands that could not be patented to another party.[173] This land was necessary to maintain a system of transcontinental transportation and commerce, so it is unlikely that the United States would have subsequently given or sold the land to a private party without any means of maintaining the system. It is more likely that those strips of land belonged to the United States and were on loan to the railroads to facilitate the government's objectives of developing the West and would remain under governmental control if the railroad ceased to operate.

2. The *Brandt Trust* Court Did Not Address Precedent That Contradicted *Great Northern*

Prior to *Great Northern*, *Townsend* held that railroads received a "limited fee, made on an implied condition of reverter in the event that

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road's map of location was approved, "the grounds so selected were segregated from the public lands," so a subsequently filed patent for the same lands was inoperable to transfer title).

165. *Townsend*, 190 U.S. at 270.

166. *See* Great N. Ry. Co. v. United States, 315 U.S. 262, 278 (1942).

167. General Railroad Right-of-Way Act of 1875, ch. 152, § 4, 18 Stat. 482, 483 (codified at 43 U.S.C. § 937 (2012)).

168. *See Great Northern*, 315 U.S. at 271 ("This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee.").

169. General Railroad Right-of-Way Act of 1875 § 4, 18 Stat. at 483.

170. *Id.* § 1, 18 Stat. at 482.

171. *Id.* (emphasis added).

172. *See id.*

173. *See* N. Pac. Ry. Co. v. Townsend, 190 U.S. 267, 270, 273 (1903).

the company ceased to use or retain the land for the purpose for which it was granted."[174] *Stringham* affirmed this holding for rights-of-way granted under the 1875 Act.[175] The *Great Northern* Court explained that *Stringham* was not "controlling" because "it [did] not appear that Congress' change of policy after 1871 was brought to the [*Stringham*] Court's attention" and because the Court in *Stringham* relied on cases that interpreted pre-1871 right-of-way grants that were inapplicable to construing post-1871 grants.[176] The *Great Northern* Court reasoned that the *Stringham* Court did not notice the 1871 shift because neither party in *Stringham* had filed a brief.[177] The Court in *Brandt Trust* accepted this conclusion without questioning its validity.[178] Chief Justice Roberts wrote that the *Great Northern* Court "disavowed the [*Stringham*] characterization of an 1875 Act right of way . . . ."[179]

The Court in *Brandt Trust* did not question *Great Northern*'s rejection of a prior holding that had made an unequivocal statement regarding the nature of railroad rights-of-way granted under the 1875 Act despite *Great Northern* not addressing contradictory precedent.[180] Instead, *Great Northern* fashioned a new interpretation of events that occurred seventy years ago, without the support of any cases that were contemporaneous with the 1875 Act.[181] This approach is problematic because the *Great Northern* Court did not explain why the holding in *Stringham* was wrong, thus it failed to clarify why 1875 Act rights-of-way were not limited fees.[182] Additionally, the *Great Northern* Court's statement that rights-of-way granted under the 1875 Act were easements was dicta since the nature of the right-of-way was not the issue at the focus of *Great Northern*.[183] The Court in *Brandt Trust* had the chance to explain and support *Great Northern*'s dismissal of *Stringham* and to provide a more thorough, objective analysis, but it missed this opportunity.

Furthermore, the Court's reliance on *Great Northern* was misplaced. *Great Northern* involved a dispute between the railroad company and the United States regarding the right to exploit the oil and minerals

174. *Id.* at 271.

175. Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44, 47 (1915), *abrogated by* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

176. Great N. Ry. Co. v. United States, 315 U.S. 262, 277–79 (1942).

177. *Id.* at 279 & n.20.

178. *See generally* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

179. *Id.* at 1264–65.

180. *See Great Northern*, 315 U.S. at 278–79 (explaining that *Stringham* was not controlling but not providing a legal basis for that conclusion).

181. Roberts, *supra* note 2, at 103 ("*Great Northern* . . . introduced the notion of an '1871 shift' in right-of-way law.").

182. *Great Northern*, 315 U.S. at 279 (explaining that *Stringham* was inapplicable because the *Stringham* Court did not consider the 1871-shift but not providing a legal analysis).

183. *See Brandt Trust*, 134 S. Ct. at 1270 (Sotomayor, J., dissenting).

beneath a right-of-way granted under the 1875 Act.[184] *Brandt Trust* involved a dispute between a private landowner and the United States regarding the property interest in the right-of-way itself.[185] The circumstances and the issues are distinct and warrant different treatment.

Despite the positive treatment of *Great Northern*, the *Brandt Trust* Court dismissed two other Supreme Court cases because they did not address the property interest in the right-of-way granted by the 1875 Act.[186] The Government cited two cases where the railroad obtained title to the land over homesteaders as support for its position that the United States retained a reversionary interest in the 1875 Act right-of-way, but the *Brandt Trust* Court dismissed them because those cases did not address the nature of the right-of-way granted under the 1875 Act.[187] If the *Brandt Trust* Court would not allow the government to rely on cases because they did not address the issue of the nature of the right-of-way granted by the 1875 Act, it does not follow that the Court would then rely on a case that did not address that specific issue either. In fact, the dispute in those two cases—"competing claims to the right to acquire and develop the same tract of land"—is more aligned with the dispute in *Brandt Trust*—competing claims to the right to acquire the land underlying the abandoned right-of-way—than the dispute in *Brandt Trust* is aligned with the dispute in *Great Northern*—competing claims to the underlying oil and mineral rights.[188] *Great Northern*, in all aspects, provided a weak basis for the *Brandt Trust* Court's conclusion.

3. The Court in *Brandt Trust* Focused on the Government's Change of Position Instead of the Underlying Arguments

The Court's disfavor for the government was evident from the first paragraph of its analysis: "The Government loses [its] argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago . . . ."[189] What followed was not a neutral consideration of the merits of the case. Instead, the Court scolded the government at every opportunity: "Contrary to that straightforward conclusion, the Government now tells us that *Great Northern* did not really mean

184. *Great Northern*, 315 U.S. at 270 ("We are asked to decide whether petitioner has any right to the oil and minerals underlying its right of way acquired under the general right of way statute.").

185. *Brandt Trust*, 134 S. Ct. at 1264 ("This dispute turns on the nature of the interest the United States conveyed to the [Wyoming railroad company] in 1908 pursuant to the 1875 Act.").

186. *Id.* at 1267.

187. *Id.* ("[I]t does not appear that the Court in either case considered—much less rejected—an argument that the railroad had obtained only an easement in the contested land . . . ."). The two cases, cited above in footnote 96, involved a homesteader's and a railroad company's competing claims to a portion of land for which the railroad company had filed its map of location before the homesteader had filed his patent. *Id.* The Court in those cases ruled that the patent to the homesteader could not pass title because the land was unavailable to be patented to someone else since the railroad had already claimed it. *Id.* According to the *Brandt Trust* Court, the Court in those two cases "did not purport to define the precise nature of the interest granted under the 1875 Act." *Id.*

188. *Id.*

189. *Id.* at 1264.

what it said";[190] "We cannot overlook the irony in the Government's argument";[191] "We decline to endorse such a stark change in position . . . ."[192] Those and similar remarks, dismissing the government's arguments and emphasizing the government's change of position, were scattered throughout the opinion and gave the *Brandt Trust* opinion a tone of admonishment.

The Court did not objectively address the government's arguments. For example, the government highlighted the similarity between the language granting the right-of-way in the 1875 Act and the language granting the right-of-way in pre-1871 statutes and offered this similarity as evidence that Congress intended for right-of-way grants to convey the same interest before and after 1871.[193] The Court dismissed this argument solely because it was "directly contrary" to what the government had argued in *Great Northern*.[194] The Court did not consider the merits behind this argument. The Court explained that "*Great Northern* stands for the proposition that the pre-1871 statutes . . . ha[d] little relevance to the question of what interest the 1875 Act conveyed to railroads."[195]

Congress did not significantly alter the language granting the actual right-of-way in statutes it enacted after 1871.[196] For example, several statutes enacted in 1836 included the language that was the precursor to the language used in the 1875 Act.[197] Those statutes granted a "route" to the railroad "through the public lands of the United States . . . one hundred and eighty feet wide."[198] The Act of July 27, 1866 provided "[t]hat the right of way through the public lands be . . . granted to the [railroad company] . . . for the construction of a railroad."[199] The language from 1866 is substantively identical to the language in section 1 of the 1875 Act.[200] Additionally, a discussion in Congress regarding the final version of the 1875 Act highlighted similarities between the 1875 Act right-of-way and the rights-of-way granted by pre-1871 statutes, under which the United States definitely retained an interest in the right-of-way.[201] Without any mention of significant change, Congress used the same language to convey the rights-of-way in the 1875 Act as the pre-1871 statutes—

190. *Id.* at 1266.
191. *Id.* at 1268.
192. *Id.*
193. *Id.* at 1266; Brief for Respondent at 32–34, *Brandt Trust*, 134 S. Ct. 1257 (No. 12–1173), 2013 WL 6665052, at *32–34 (listing several statutes that were predecessors to the 1875 Act).
194. *Brandt Trust*, 134 S. Ct. at 1266.
195. *Id.* at 1266.
196. *See* Roberts, *supra* note 2, at 143.
197. *See id.* at 110.
198. *Id.* (alteration in original) (quoting S. 66, 24th Cong. § 1 (1836)) (internal quotation marks omitted).
199. Act of July 27, 1866, ch. 278 § 2, 14 Stat. 292, 294.
200. "The right of way through the public lands of the United States is granted to any railroad company . . . ." General Railroad Right-of-Way Act of 1875, ch. 152 § 1, 18 Stat. 482 (1875) (codified at 43 U.S.C. § 934 (2012)).
201. Roberts, *supra* note 2, at 144.

indicating an intent to preserve the nature of the right-of-way grants. The *Brandt Trust* Court failed to weigh the evidence the government presented and make a merit-based conclusion simply because the government's argument contradicted what it argued seventy years earlier.

In *Great Northern*, the government sought to enjoin the railroad from drilling for oil underneath its right-of-way and argued that the right-of-way was a mere easement, not granting the railroad any rights to the subsurface oil.[202] In *Brandt Trust*, the government sought to quiet title in the United States to an abandoned right-of-way and argued that the 1875 Act granted more than an easement, ultimately "reserving an implied reversionary interest" to the United States.[203] Remove the term "easement," and the government argued the same thing in both cases—that it retained some type of interest in the right-of-way. The government just phrased its argument two different ways. The Court called it a "self-serving" argument;[204] however, the government granted those lands to the railroads to create a system of transportation throughout the United States to benefit the public,[205] and the government should be entitled to repurpose those lands for another public benefit when railroad service ceases to fulfill that public goal. The Court relied so heavily on the word "easement" that it did not look beyond the seemingly inconsistent government arguments to conduct a significant analysis of reasoning behind the government's claim it retained an interest in the right-of-way.

The Court in *Great Northern* held that the United States retained an interest in the right-of-way it granted to the railroad,[206] but the Court in *Brandt Trust* concluded that the United States lost an interest in the right-of-way when it was abandoned. The Court's decision in *Brandt Trust* allows private landowners to undermine the longstanding history of public lands providing public benefit.[207] This system of connected railroad rights-of-way that have traversed the United States since the nineteenth century is a significant public asset that is now in jeopardy of being disassembled.[208]

B. Potential Effects of the Court's Decision

Now that the Supreme Court has determined that a railroad right-of-way granted under the 1875 Act reverts to the underlying landowner

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202. Great N. Ry. Co. v. United States, 315 U.S. 262, 270–71 (1942).

203. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1264 (2014).

204. *Id.* at 1266.

205. Roberts, *supra* note 2, at 111; Great N. Ry. Co. v. Steinke, 261 U.S. 119, 124 (1923) ("[The 1875 Act's] purpose was to enhance the value and hasten the settlement of the public lands by inviting and encouraging the construction and operation of needed and convenient lines of railroad through them. Nothing was granted for private use or disposal, nor beyond what Congress deemed reasonably essential, presently or prospectively, for the quasi public used [sic] indicated.").

206. *Great Northern*, 315 U.S. at 272.

207. *See generally* Wright, *Lavish Land Grants*, *supra* note 162, at 30, 35.

208. *See* Ferster, *supra* note 119, at 3–4.

when the railroad company abandons it, the issue becomes: What effect does this have on previously-abandoned rights-of-way and on future abandonments? In the dissenting opinion in *Brandt Trust*, Justice Sotomayor wrote that the *Brandt Trust* decision "undermines the legality of thousands of miles of former rights of way that the public now enjoys as means of transportation and recreation."[209] Justice Sotomayor's comment alludes to the effects that this ruling might have on roads, highways, and trails built on abandoned rights-of-way, and to the possibility that adjacent landowners could seek compensation for the right-of-way that traversed their property and now serves as a highway or recreational trail. Justice Sotomayor explained that this could lead to takings claims against the government that could total "hundreds of millions of dollars."[210]

1. Scope: The *Brandt Trust* Decision Will Likely Apply to Other Post-1871 Rights-of-Way

The *Brandt Trust* Court confirmed that rights-of-way granted pursuant to the 1875 Act are easements.[211] By applying common law principles to these easements, the Court confirmed that the owner of land underlying an 1875 Act right-of-way will enjoy full, unburdened ownership of her land if and when the railroad abandons its right-of-way.[212] Although this decision technically applies only to 1875 Act rights-of-way, lower courts may also construe it to apply to other rights-of-way granted by statutes enacted between 1871 and 1875.

Brandt Trust affirmed *Great Northern*,[213] which based its holding on a Congressional policy shift that occurred in 1871 when the government stopped granting anything "more than a right of passage."[214] Because *Great Northern* focused on the policy shift of 1871 instead of on the 1875 Act, courts will be able to point to that policy shift as evidence that all railroad rights-of-way granted after 1871 were nothing "more than a right of passage." The conclusion that all rights-of-way granted after 1871 were easements logically follows from that reasoning. This will expand the pool of landowners that can rely on *Brandt Trust* for clarification about their property interests.

2. Repurposing Abandoned Rights-of-Way

Rights-of-way have many potential public uses when the railroad company no longer needs them.[215] A state or local municipality can con-

209. *Brandt Trust*, 134 S. Ct. at 1272 (Sotomayor, J., dissenting).
210. *Id.*
211. *Id.* at 1266 (majority opinion).
212. *Id.* at 1265–66.
213. *See id.* at 1265.
214. Great N. Ry. Co. v. United States, 315 U.S. 262, 275 (1942).
215. Roberts, *supra* note 2, at 89.

vert the right-of-way into a public highway.[216] The local government or an independent organization can purchase or lease the right-of-way and repurpose it for a recreational trail, road, or other purpose; [217] or a third party can assume financial and legal responsibility for the right-of-way and convert it into a recreational trail through the Rails-to-Trails Act.[218] The holding in *Brandt Trust* could undermine the highways, roads, and trails already established from abandoned rights-of-way, and the holding could frustrate efforts to repurpose them in the future.

As cars and trucks took over as the predominant means of transportation in the early twentieth century, railroad companies wanted to close and abandon their unprofitable lines.[219] Railroad operations were regulated by federal law, so to close its line, a railroad company had to get permission from a federal agency.[220] However, once the closure of the rail line was approved, state property law applied to the disposal of the right-of-way.[221] Various state regulations frustrated or prevented this abandonment, so Congress enacted the Transportation Act to remedy the inconsistencies created by the application of state law to railroad property interests.[222] In the 1970s, railroad companies continued to close their unprofitable rail businesses and abandon their railways.[223] Concerned about the fast rate of right-of-way abandonment and the potential destruction of the rail system, Congress enacted several statutes aimed at preserving the rail corridors.[224] One of the statutes that Congress implemented to preserve the rail corridors was section 8(d) of the 1983 Amendments to the National Trails System Act (the Trails Act).[225] The next Subsections discuss the evolution of some of the federal laws governing abandonment and repurposement of railroad rights-of-way.

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216. 43 U.S.C. § 912 (2012) (providing for the construction of a public highway within one year of right-of-way abandonment or forfeiture of a right-of-way).

217. *See* 49 U.S.C. § 10905 (2012) (providing a means for railroad companies to sell abandoned rights-of-way for public purposes).

218. 16 U.S.C. § 1247(d) (providing that a third party can negotiate with a railroad company to convert an unused right-of-way into a recreational trail as long as the trail is subject to the potential future reactivation of rail service).

219. Wright & Hester, *supra* note 42, at 374–75, 435; *see also* Ferster, *supra* note 119, at 1 ("[A]s the miles of rail line peaked, other methods of increasingly popular transport—most notably, the trucking industry—began eclipsing the rail industry's dominance, and a long period of decline began.").

220. Wright & Hester, *supra* note 42, at 434–36.

221. *Id.* at 436; *see* Ferster, *supra* note 119, at 1, 4 (explaining that state law applies after railroad companies have legally abandoned their rights-of-way).

222. Wright & Hester, *supra* note 42, at 435.

223. Ferster, *supra* note 119, at 1.

224. *Id.* at 2; *see also* Wright, *Shifting Sands*, *supra* note 37, at 721–22.

225. The National Trails System Act Amendments of 1983, Pub. L. 98–11, sec. 208, § 8(d), 97 Stat. 42 (codified as amended at 16 U.S.C. § 1247(d) (2012)).

a. The Transportation Act of 1920 Established Federal Jurisdiction Over Abandoned Rights-of-Way

The Transportation Act of 1920 imposed federal jurisdiction over the abandonment process of railroad rights-of-way.[226] The Surface Transportation Board (STB) has the authority to determine whether a railroad company may abandon its railway.[227] The STB may permit abandonment if abandonment would not significantly hinder "public convenience and necessity."[228] After such a determination, the STB can attach a condition to the certificate of abandonment if "public convenience and necessity [may] require."[229] Some examples of the conditions include using the abandoned rail corridor as a highway, as a passageway for energy transmission, or as a form of recreation.[230] The scope of the STB's authority under this Act is broad.[231] The Transportation Act preempted any state law in the realm of railroad right-of-way abandonments.[232]

b. The Rails-to-Trails Act and Takings

The Trails Act provides a means for the government to establish a system of trails to meet the nation's needs for outdoor recreation, preservation, and enjoyment.[233] Creation of recreational trails requires connected narrow strips of land that traverse multiple tracts of land,[234] and abandoned rights-of-way are ideal to serve this purpose.[235] In response to "shrinking rail trackage," Congress amended the Trails Act in 1983 to simultaneously facilitate the creation of this system of trails and preserve the abandoned rights-of-way for potential future railroad use by using the rights-of-way as recreational trails in the interim.[236] Commonly referred to as the Rails-to-Trails Act,[237] section 8(d) of the amendments provides:

> [I]n furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service [and] to protect rail transportation corridors, . . . in the case of interim use of any es-

226. Transportation Act of 1920, ch. 91, 41 Stat. 456 (codified in scattered sections of 49 U.S.C.).
227. 49 U.S.C. § 10501 (2012).
228. *Id.* § 10903(d).
229. *Id.*
230. Allen, *supra* note 151, at 44.
231. *Id.* at 43.
232. *Id.* at 42.
233. National Trails System Act, 16 U.S.C. § 1241(a) (2012).
234. Wright, *Railbanking*, *supra* note 38, at 409.
235. Ferster, *supra* note 119, at 3; Roberts, *supra* note 2, at 89.
236. Preseault v. Interstate Commerce Comm'n (*Preseault I*), 494 U.S. 1, 5–6 (1990). "The principal goal of the rails-to-trails program is to preserve from fractionation valuable rail corridors that were assembled at a tremendous cost to the public." Wright & Hester, *supra* note 42, at 357. "[A] strong public interest exists in preserving these corridors for trails and utilities. . . . Many of these corridors were assembled with public funding, public land, and eminent domain powers. They are, in a fundamental way, public assets." *Id.* at 385.
237. Allen, *supra* note 151, at 35.

> tablished railroad rights-of-way . . . in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.[238]

This means that a railroad company seeking to abandon its right-of-way can negotiate with another party that is willing to take control of the right-of-way to construct, finance, and manage a recreational trail.[239] If the parties agree, the railroad may transfer the right-of-way to the third party to operate the trail.[240] The effect of this statute is that interim use of a railroad right-of-way as a trail pursuant to section 8(d) does not constitute abandonment.[241] By precluding a determination of abandonment, section 8(d) preserves federal jurisdiction over the right-of-way and prevents the application of state law that could operate to prevent the rail-trail conversion.[242] Since its enactment in 1983, various organizations have built over 20,000 miles of recreational trails under the Rails-to-Trails Program.[243]

The landmark case that affirmed the constitutionality of the Rails-to-Trails Act was *Preseault v. Interstate Commerce Commission* (*Preseault I*).[244] In the *Preseault* line of cases, landowners claimed an interest in an abandoned railroad right-of-way that crossed their property and sought to quiet title to that right-of-way.[245] The State of Vermont intervened and obtained permission pursuant to section 8(d) of the Trails Act to use the abandoned railway as a public trail.[246] The landowners then challenged the constitutionality of section 8(d) and alleged that it violated the Fifth Amendment by authorizing a taking of private property without just compensation.[247] Addressing "the constitutionality of a federal 'rails-to-trails' statute," the United States Supreme Court held that section 8(d) was "a valid exercise of congressional power."[248]

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238. National Trails System Act Amendments of 1983, Pub. L. 98–11, sec. 208, § 8(d), 97 Stat. 42 (1983) (codified as amended at 16 U.S.C. § 1247(d) (2012)).

239. *Preseault I*, 494 U.S. at 6–7.

240. *Id.* at 7.

241. *Id.* at 8.

242. Ferster, *supra* note 119, at 4–5.

243. *History of RTC and the Rail-Trail Movement*, RAILS-TO-TRAILS CONSERVANCY, http://www.railstotrails.org/about/history/ (last visited Feb. 10, 2015).

244. 494 U.S. 1 (1990). There are "eight reported court decisions in the state and federal courts" regarding the Preseaults' efforts to secure compensation for the rail-trail conversion of the abandoned right-of-way that ran across their property. Ferster, *supra* note 119, at 6. For a more detailed discussion about the background and the different dispositions of *Preseault* line of cases, see Marc A. Sennewald, Note, *The Nexus of Federal and State Law in Railroad Abandonments*, 51 VAND. L. REV. 1399, 1412–18 (1998).

245. *Preseault I*, 494 U.S. at 9.

246. *Id.*

247. *Id.* at 10.

248. *Id.* at 4–5.

The Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."[249] When the government appropriates an individual's land for a public purpose, it is called a taking. The Constitution does not prohibit the government from doing this, but it requires the government to provide just compensation to the individual who lost her land.[250] Providing just compensation means compensating the landowner for the fair market value of the property on the day the government appropriated the land.[251]

In *Preseault I*, the Court explained that the language of section 8(d) that precluded interim trail use from constituting abandonment "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests."[252] "By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law."[253] The Court did not address whether Vermont's use of section 8(d) was a taking, but it found that "rail-to-trail conversions giving rise to just compensation claims are clearly authorized by § 8(d)[,]" so the landowners could seek compensation through an available remedy.[254]

A section 8(d) conversion is not a taking per se.[255] It effects a taking when the landowner resumed fee simple ownership of the underlying property interests after the railroad company abandoned the right-of-way but before the right-of-way was appropriated to be a trail.[256] If the conversion happened before any interests reverted to the underlying landowner, then there might not be a taking.[257] "By explicitly halting the abandonment process, [section 8(d)] allows railroads to prevent the removal of federal jurisdiction and thus the reinstitution of state property law rules that might lead to the extinguishment of their property rights in the corridor land."[258]

By preserving federal jurisdiction over the right-of-way, this statute provides a means for parties seeking to convert an abandoned right-of-

249. U.S. CONST. amend. V.
250. *Preseault I*, 494 U.S. at 11.
251. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984).
252. *Preseault I*, 494 U.S. at 8.
253. *Id.* (citation omitted).
254. *Id.* at 13, 17.
255. *See id.* at 16 ("[U]nder any view of takings law, only some rail-to-trail conversions will amount to takings."); Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (explaining the "determinative issues for takings liability," one of which was whether the landowner ever "held a fee simple unencumbered by the easement" because the railroad's easement terminated before the taking happened and concluding that whether a rail to trail conversion amounted to a taking depended on the "prior conclusion that the railway abandoned the right-of-way"); *see also* Sennewald, *supra* note 244, at 1407 (explaining that a taking per se is a "permanent physical taking" versus a regulatory taking).
256. *Ellamae*, 564 F.3d at 1373.
257. *See id.*
258. Wright, *Shifting Sands*, *supra* note 37, at 735.

way into a trail to circumvent the application of state law. This is important because under the decision in *Brandt Trust*, rights-of-way revert to the underlying landowner once a railroad abandons them, subjecting the land to state property laws and removing any federal jurisdiction.

3. Rails-to-Trails Conversions Are Safe While Other Conversions Are More at Risk

According to the Rails-to-Trails Conservancy, the Court's decision in *Brandt Trust* will not affect trails already built under section 8(d) because they were built pursuant to a constitutional statute.[259] However, the decision could affect trails that were not built under the Rails-to-Trails Act, and it will likely increase litigation over future trail projects.[260]

Several scholars argue that the Rails-to-Trails Act does not effect a taking.[261] These scholars base their conclusions on the fact that the organization assuming control of the rail corridor appropriates the corridor to be a trail before the railroad abandons the right-of-way, so the right-of-way remains under federal jurisdiction.[262] Preservation of federal jurisdiction prevents state law from applying to the right-of-way, so the adjacent landowner's future interest in the right-of-way never vests.[263] Therefore, the conversion from a rail to a trail does not take a present property interest from the underlying landowner.[264]

In the cases that challenge a rail-trail conversion under the Rails-to-Trails Act, the landowners contend that the Rails-to-Trails Act operates as a taking.[265] They argue that the rail-trail conversion takes their property by preventing them from obtaining full, unburdened ownership of their land, which should occur when the railroad abandons its rail line.[266] However, all that the Rails-to-Trails Act does is postpone the vesting of that interest.[267] If the landowner has any interest in the right-of-way, it is the expectancy that she will obtain full ownership of the underlying land upon the happening of a condition, abandonment of the right-of-way.[268] By perpetuating federal jurisdiction over the right-of-way, the Rails-to-Trails Act prevents abandonment from occurring, and thus, it postpones the vesting of any interest the adjacent landowner may have.[269] Addition-

259. RAILS-TO-TRAILS CONSERVANCY TRAILBLOG, *supra* note 121.
260. *Id.*
261. *See* Allen, *supra* note 151, at 49–61; Wright, *Railbanking*, *supra* note 38, at 455–68.
262. Wright, *Railbanking*, *supra* note 38, at 455–57.
263. Allen, *supra* note 151, at 51–54.
264. *Id.*; Wright, *Railbanking*, *supra* note 38, at 444–47, 455–57; Sennewald, *supra* note 244, at 1410 ("The perpetuation of an easement pursuant to federal law, therefore, does not destroy or 'take' a future interest without just compensation. Instead, the owner of the servient estate continues to hold the land in fee simple subject to an easement for railroad purposes.").
265. Allen, *supra* note 151, at 40, 49.
266. *Id.*
267. Wright, *Railbanking*, *supra* note 38, at 444.
268. *Id.* at 456.
269. *Id.* at 447.

ally, scholars contend that the adjacent landowners bought or received their land with the expectation that railroad service would never stop.[270] These scholars contend that the destruction of the future expectancy of an event that might never happen does not constitute a taking because there is no present interest.[271] However, because a later *Preseault* decision found that the Rails-to-Trails Act did effect a taking,[272] landowners could be eligible for just compensation for rail-trail conversions.

Trails that were not built under the Rails-to-Trails Act are vulnerable to lawsuits that could prevent the construction of the trail or require the closure of an existing trail.[273] These non-Rails-to-Trails conversions do not have the protection of a federal statute that prevents abandonment of the right-of-way from occurring and thus preserves federal jurisdiction over the right-of-way.[274] Therefore, when a railroad abandons its right-of-way, state property law applies, and the adjacent landowner obtains unencumbered ownership of that land.[275] Because the landowner's future interest vests, the landowner obtains ownership of the land, so any subsequent conversion of that land to another use could constitute a violation of the Fifth Amendment.[276] This entitles a landowner to seek destruction of an already-converted trail, prevention of future conversions, or just compensation for either.

4. Just Compensation Could Be Expensive

Preseault I explained that the Fifth Amendment did not preclude the government from taking an individual's land, but the government must provide a reasonable means for the landowner to obtain compensation.[277] The Court in *Preseault I* clarified that a landowner has to "avail[] itself of the process" to obtain compensation before it can file a takings claim against the government.[278] The Tucker Act provides the process for individuals to pursue claims against the United States to recover damages for constitutional violations in the United States Claims Court.[279]

Providing just compensation "requires that the property owner be put 'in as good a position pecuniarily as if his property had not been taken. He must be made whole but is [not] entitled to . . . more.'"[280] After

270. Allen, *supra* note 151, at 57.
271. Wright, *Railbanking*, *supra* note 38, at 448.
272. Preseault v. United States (*Preseault II*), 100 F.3d 1525, 1552 (Fed. Cir. 1996) (en banc) (plurality opinion).
273. Ferster, *supra* note 119, at 7.
274. *See* Wright, *Railbanking*, *supra* note 38, at 457.
275. *Id.* at 444.
276. *Id.* at 465.
277. *Preseault I*, 494 U.S. 1, 11–12 (1990). "[T]he sole remedy available to the claimant is payment of just compensation; trail use cannot be halted or disrupted." Ferster, *supra* note 119, at 7.
278. *Preseault I*, 494 U.S. at 11.
279. 28 U.S.C. § 1491(a)(1) (2012); *Preseault I*, 494 U.S. at 11–12.
280. Preseault v. United States, 52 Fed. Cl. 667, 672 (Fed. Cl. 2002) (alteration in original) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

the Supreme Court concluded that the Rails-to-Trails Act was constitutional, the Preseaults sought just compensation in the United States Court of Federal Claims.[281] The federal claims court awarded the landowners $234,000 as compensation for their property plus interest to accrue from the date of the taking.[282] Vermont built the trail in 1986, and the claims court awarded compensation in 2002, which means interest accrued for fifteen years.[283] The Court of Federal Claims also awarded the landowners $894,855.60 in attorney's fees.[284] This amounts to over $1.7 million for one compensation claim.

Throughout its practice of granting lands to railroad companies, the federal government granted thousands of miles of rights-of-way and over one million acres in land grants.[285] At the height of the railroad era, there were over 270,000 miles of railroad tracks that traversed the United States,[286] and under the 1875 Act, the government granted "thousands of miles of land for right of way across the public domain for transportation and communications purposes."[287] These rights-of-way ranged from sixty feet in width[288] to four hundred feet in width.[289] There is no record that identifies how many of the 1875 Act grants have been abandoned,[290] but the high amount of the compensation award in *Preseault* multiplied by thousands of miles of rights-of-way suggests that the potential compensation claims resulting from abandoned 1875 Act rights-of-way would be substantial. Further, if the *Brandt Trust* holding does apply to all post-1871 rights-of-way, then this only increases the financial burden on the government, which could result in "hundreds of millions of dollars."[291]

Preseault I instigated a "flood of takings claims" for rail-trail conversions under the Rails-to-Trails Act.[292] By 2010, relatively few cases had reached the point of determining whether the rail-trail conversion resulted in takings liability.[293] Since 2010, however, takings claims in the

281. Wright, *Railbanking*, *supra* note 38, at 451.
282. *Preseault v. United States*, 52 Fed. Cl. 667, 670, 684 (2002).
283. *Id.* at 669–70, 684.
284. *Id.* at 684.
285. Roberts, *supra* note 2, at 88–89.
286. Ferster, *supra* note 119, at 3.
287. 11-78A POWELL ON REAL PROPERTY § 78A.15 (Michael Allan Wolf ed., LexisNexis Matthew Bender & Co., Inc., 2014).
288. GATES, *supra* note 12, at 357.
289. *Id.* at 364. The typical width of a railroad right-of-way is one hundred feet. Allen, *supra* note 151, at 37.
290. Alice M. Noble-Allgire, Brandt Revocable Trust v. United States*: A Victory for Private Landowners in an Abandoned Right-of-Way Case*, PROB. & PROP., September/October 2014, at 10, 14.
291. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1272 (2014) (Sotomayor, J., dissenting).
292. POWELL ON REAL PROPERTY, *supra* note 287, § 78A.15.
293. *Id.*

federal claims court have resulted in "millions of dollars in compensation."[294]

The decision that certain railroad rights-of-way are easements coupled with the decision that conversion of an abandoned right-of-way to create a recreational trail can trigger a takings claim has a twofold effect. First, there is the future effect where the government might have to pay just compensation if it wants to reclaim abandoned rights-of-way for trail use or other purposes. Second, there is the retroactive effect where individuals whose land underlying a right-of-way now serves another purpose might be able to bring a takings claim against the government. In either scenario, the government would have to pay private individuals for land that it gave gratuitously to the railroads over a century ago for the purpose of constructing a railroad for the public benefit. This is the unappealing result of the Court's holding in *Brandt Trust*; the government now has to pay individuals to preserve something that it once owned but gave away for free to benefit the public. This effectively converts a public asset into private gain.

C. Congress Should Make the Ultimate Decision About the Disposition of Railroad Rights-of-Way

The Court in *Brandt Trust* focused on the technical property question of whether the railroad received an easement or a limited fee;[295] however, railroad rights-of-way are part of a bigger picture. These rights-of-way once belonged to the United States and were part of the public lands that the government used and gave away for internal improvements to benefit the American people.[296] They are a public asset.[297] As a public asset, the difficult issue underlying the technical property issue is: Who can determine what is in the best interests of the people of the United States regarding this asset, Congress or the courts?

The Constitution gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[298] "When *Congress* grants a property interest, the grant is both a grant of property and a law and Congress is free to specify terms or elements different from those that otherwise would apply either by virtue of the common law or in other statutes."[299] The police power enables Congress to enact legislation to advance public purposes, the most common of which include the health,

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294. *Id.*

295. *Brandt Trust*, 134 S. Ct. at 1264.

296. *See generally* GATES, *supra* note 12, at 356–86.

297. *See* Wright & Hester, *supra* note 42, at 385 ("Many of these corridors were assembled with public funding, public land, and eminent domain powers. They are, in a fundamental way, public assets.")

298. U.S. CONST. art. IV, § 3, cl. 2.

299. BALDWIN & FLYNN, *supra* note 14, at 4.

safety, and welfare of the people.[300] With the responsibility to promote public welfare and make laws regarding U.S. territory, it seems that the future of abandoned rights-of-way is best left to Congress's discretion. The First Circuit addressed Congress's role regarding rights-of-way and gave deference to the legislature to govern abandonment.[301] Here, the First Circuit explained:

> To assemble a right of way in our increasingly populous nation is no longer simple. . . . A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.[302]

The decision in *Brandt Trust* perpetuates the trend in federal courts to favor the claims of individual property owners "at the expense of the public interests in preserving rail corridors for future reactivation and allowing interim trail use on land."[303] This results in the government having to pay to preserve the railroad rights-of-way that it initially gave away for free.[304] This shows "the Court's utter disregard for the public's interest in these important public lands."[305]

Railroad rights-of-way are part of a complex history of national expansion, interstate commerce, public benefit, and Congressional legislation.[306] Granted from the public lands of the United States, these rights-of-way have served important public purposes. The Court in *Brandt Trust* disregarded the broad historical context of these lands in order to uphold the property rights of the individual.

CONCLUSION

When making a decision that will affect the property rights of individuals and the government alike, it is important to consider all available evidence. The Court in *Brandt Trust* affirmed the statement from *Great Northern* that railroad rights-of-way are easements without question.[307] The Court failed to consider significant contradictory evidence; it did not

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300. Wright, *Railbanking*, *supra* note 38, at 412 & n.49.

301. Reed v. Meserve, 487 F.2d 646 (1st Cir. 1973).

302. *Id.* at 649–50; *see also* N. Pac. R.R. Co. v. Smith, 171 U.S. 260, 275 (1898) ("By granting a right of way 400 feet in width, [C]ongress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only 25 feet thereof were occupied for railroad purposes, in the face of the grant . . . .").

303. POWELL ON REAL PROPERTY, *supra* note 287, § 78A.15.

304. *Id.* ("[This decision] in effect requir[es] the government to buy back lands that it granted for public transportation purposes in order to continue using them for public transportation purposes.").

305. *Id.*

306. *See generally* Roberts, *supra* note 2.

307. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1264–66 (2014).

address precedent that had held the opposite of *Great Northern*; and it focused on the change in the government's arguments from *Great Northern* seventy years before to *Brandt Trust* instead of on the merits of those arguments.[308] This disregard for the merits of the underlying arguments has resulted in a decision that will benefit private landowners at a substantial expense to the government and thus the public.

Former railroad rights-of-way now serve a multitude of purposes including highways and recreational trails. This decision undermines those new uses and could preclude future conversions of rights-of-way to other purposes. Instead, private landowners will receive compensation in the event that a right-of-way traversing their property is converted to another use, and the public will lose the opportunity to benefit from this great asset. This is an unjust result, especially when a thorough analysis of the underlying evidence does not support it. Furthermore, these railroad rights-of-way are part of a much larger historical context than just technical property law.[309]

In light of the significance of the potential repercussions and the importance of the historical context, the Court did not give the issue the attention it was due. As a result, the *Brandt Trust* holding will unjustly convert a unique national asset created for the public benefit into a private gain for individual landowners.

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308. *See supra* Part III.A.

309. *See supra* Part III.C.

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