2014

Reliance Interests and Takings Liability for Rail-Trail Conversions: *Marvin M. Brandt Revocable Trust v. United States*

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On October 1, 2013, the U.S. Supreme Court granted certiorari in a relatively obscure case, *Marvin M. Brandt Revocable Trust v. United States*.[1] On its face, the case involves an interpretation of the property rights created by the General Railroad Right of Way Act of 1875, which gave to any railroad, chartered by a state or territory, "[t]he right of way [200 feet wide] through the public lands of the United States."[2] The 1875 Act was passed after a brief hiatus in congressional support for railroads following the era of lavish land grants between 1862 and 1871, in which over 94 million acres of public lands were given over to the transcontinental and other state-chartered railroads for sale to assist in financing the road's construction.[3] Besides being an obscure case based on an equally obscure law, the procedural posture of the case is even more unusual, as the government prevailed in the U.S. Court of Appeals for the Tenth Circuit, and yet it supported the grant of certiorari.[4]

But in the oral argument, where the lawyers and Justices were focused on the simple issue of the property rights granted pursuant to this 1875 legislation, there was a collective holding of breath for fear someone would mention the elephant in the room: the potential for hundreds of millions of dollars in takings liability lurking under the case. In fact, the case could undermine the popular rails-to-trail program, it could upset one century of property rights upon which states and local governments have built roads and highways and municipalities have held and transferred land, and it could cost the U.S. Treasury untold millions of dollars in compensation liability. This is no exaggeration. After the U.S. Court of Appeals for the Federal Circuit ruled in 2005 that the United States retained no interest in an 1875 Act federally granted right-of-way (FGROW),[5] the takings liability for a portion of the 83-mile Weiser River Trail in Idaho consisting primarily of FGROW came out at $883,000 for the land and $2.39 million for attorney fees.[6] At that price tag, this case deserves far more attention than it is getting.

So, let me back up and explain the legal issue, how it arose, and why it is so important that the court carefully consider the history and implications of the case. I also want to address some of the questions raised in the oral argument on January 14, 2014, for which neither side had a complete answer, particularly the reliance interests and the government's argument about relativity of property rights. Part of the difficulty of this case is that the last time the Supreme Court heard a case relating to FGROW was in 1957,[7] back when most of the current Justices were children. The unique character of railroad property rights, and the heavy involvement of the federal government in supporting and regulating the railroads harkens back more to Abraham Lincoln's time than to the present. But as I explain below, a decision in favor of the petitioners could undermine two centuries of government participation in internal infrastructure, including the use of these lands for current communications, recreational, or highway purposes, as well as their availability for future high-speed rail or new transportation or communication technologies.

I. A Brief History of FGROW

In the early years of the republic, there was a profound disagreement between the Federalists, who believed that the

1. No. 12-1173 (2013).
2. Act of Mar. 3, 1875, 18 Stat. 482, codified at 43 U.S.C. §934-939.
3. *See* Paul Gates, History of Public Land Law Development 384-85 (1968). An additional 223 million acres were turned over to the states for railroads, canals, and other improvements.
4. *See* United States v. Marvin M. Brandt Revocable Trust, 496 Fed. Appx. 822 (10th Cir. Wyo., Sept. 11, 2012) (not selected for publication in the *Federal Reporter*, No. 09-8047).
5. Hash v. United States, 403 F.3d 1308, 35 ELR 20072 (Fed. Cir. 2005).
6. *See* Hash v. United States, 2012 WL 1252624 (D. Idaho 2012).
7. United States v. Union Pacific RR. Co., 353 U.S. 112 (1957).

powers of the federal government included the power to finance and construct highways, canals, or other internal improvements within the sovereign domains of the states, and the Anti-Federalists, who believed that the federal government could give money to the states, but could not dictate how it would be spent or on what internal projects.[8] In 1808, Secretary of the Treasury Albert Gallatin issued a report calling for a vast system of internal roads and canals, to be financed by the federal government. But the plans were stalled by a variety of succeeding Administrations, some claiming the unconstitutionality of federal expenditures on local projects, others fearing favoritism and pork barrel policies that would give certain locales undue advantages over others.[9] Caught in the constitutional divide over the strength and powers of the early federal government, internal improvements proceeded in haphazard fashion with some direct federal financial support, but most often in the form of financial contributions to states to develop their own projects.

With the construction and success of the state-supported Erie Canal in 1825, however, the demand for federal aid to assist states with transportation infrastructure reached unprecedented levels. Competition between Baltimore, Boston, New York, and Philadelphia to provide the most profitable transportation link between the western territories and eastern and European markets was fierce, but political factions at the national level prevented any kind of systematic and rational development until the 1850s. Canal projects were the first beneficiaries of a new kind of federal largesse on which the U.S. Congress could agree: grants of public land on which to build the canals (rights-of-way) as well as alternate sections of land to be sold to finance construction. In a land-rich but cash-poor country, the practice made sense. If the government gave away one-half of its land adjacent to a canal or road, its remaining lands would more than double in value and could be sold to settlers for a sufficiently higher price to offset the value of the lands given away. The first canal grants were made directly to states to overcome any constitutional questions about federal power to direct internal improvements, but the states were unequipped to survey the lands, construct the canals, and sell the adjoining lands to settlers, so they immediately passed the lands through to the incorporated canal companies.

Railroads were relative latecomers to the federal trough. Throughout the 1830s and 1840s, there was great demand for federal support of railroads, but the iron road had not yet emerged as the superior transportation technology of the 19th century. Yet, not wanting to stand in the way of progress, Congress granted railroads rights-of-way across public lands starting in the 1830s,[10] but it did not yet grant them the alternate sections of land, called grants in aid, for sale to raise construction funds. In 1850, however, Congress succumbed to heavy pressure from railroad lobbyists and transferred to the states a generous land grant, including alternate-section grants in aid, from a defunct canal company in order to construct a railroad from Chicago, Illinois, to Mobile, Alabama.[11] That opened the floodgates. In the second session of the 31st Congress alone, railroad bills to grant rights-of-way and land grants in aid requested an estimated 3,090 miles of right-of-way and nearly 14 million acres of land.[12] In 1852, still resistant to the demand for grants in aid, Congress passed its first general railroad right-of-way statute giving to any state-chartered railroad, macadamized turnpike, or plank road a 100-foot-wide right-of-way across the public lands, but it reserved for individual bills any land grants in aid.[13]

But between 1852 and 1862, numerous railroads succeeded in obtaining individual bills granting alternate sections of land as well as right-of-way for location of the road.[14] And in 1862, with the removal of the southern congressmen during the Civil War, there were enough votes to authorize substantial land grants for the federally chartered transcontinental railroads to open up the western territory. Between 1862 and 1871, hundreds of millions of acres were granted to the states or directly to the railroads and withdrawn from settlement until the railroad had either filed its map of definite location or constructed its road. But dissatisfaction with the speed with which the lands were being brought to market, railroad corruption generally (like the Credit Mobilier Scandal), and the government land office's withdrawal policy led Congress to cease making land grants in aid altogether.

After the grants in aid ended, however, pressure continued to grant rights-of-way for railroad construction, and Congress continued to oblige by passing individual bills. To reduce the pressure from individual bills however, Congress passed another general railroad right-of-way act in 1875, the statute at issue in this case, now codified in 43 U.S.C. §§934-939. Congressional estimates are that roughly one-half of all railroad miles are constructed on FGROW, and that two-thirds of those FGROW were established under the 1875 Act, while one-third was established under the earlier 1852 general statute, or the pre-1852 or 1862-1871 individual grants.[15] At its peak in the 1920s, there were 270,000 miles of railroad corridor. If the estimates are fairly accurate, this would mean there was somewhere in the neighborhood of 135,000 miles of FGROW, of which 90,000 miles were granted under the 1875 Act and 45,000 miles under earlier grants. Over one-half of those 270,000 railroad miles have already been abandoned and were not

8. *See* Gates, *supra* note 3, at 341-46.
9. *See* John Lauritz Larson, "*Bind the Republic Together": The National Union and the Struggle for a System of Internal Improvements*, 74 J. Am. Hist. 363, 381-87 (1987).
10. It seemed that few roads could be built at all without traversing public lands at some point. *See* H.R. Rep. No. 24-1460, at 530-31 (granting a right-of-way out of New York City because there was no private land available).
11. Illinois Central Grant, Act of Sept. 20, 1850, 9 Stat. 466.
12. John Bell Sanborn, *Congressional Grants of Land in Aid of Railways*, 2 Bull. U. Wis., 300 (1899); Appendix to Cong. Globe, 32d Cong., 1st Sess., Apr. 14, 1852, at 428.
13. Act of Aug. 4, 1852, 10 Stat. 28.
14. *See* Sanborn, *supra* note 12, at 300-17.
15. *See* H.R. Rep. No. 11-572, 100th Cong., 2d Sess., p. 3 (Apr. 18, 1988); Pamela Baldwin & Aaron M. Flynn, *Federal Railroad Rights of Way*, Cong. Research Serv., RL 32140 (May 3, 2006).

preserved for other public transportation and communications purposes. But in 1983, with amendments to the National Trails Systems Act (NTSA),[16] Congress provided a mechanism for preserving as many miles as possible, a mechanism that has been under steady attack by adjacent landowners who want to take over these priceless national corridors and who claim a taking when they cannot.

II. Judicial Interpretations of FGROW

Although every congressional statute involving FGROW used the same term of granting a right-of-way to the railroads, the federal courts have not been entirely consistent in their interpretation of that term or in defining the nature of that interest. For example, in 1881, the Supreme Court in *Railroad Co. v. Baldwin*[17] referred to an 1866 right-of-way grant[18] as

> a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms.[19]

This language has since been interpreted to mean that the railroad received absolute, unqualified fee ownership of the FGROW in certain 1862-1871 grants.[20]

But in a case brought by an adjacent landowner who was adversely possessing into the railroad's corridor, the Supreme Court in 1903, in *N. Pac. Ry. v. Townsend*,[21] stated that the interest the railroad received in its FGROW was "[i]n effect the grant . . . of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."[22] As in *Baldwin*, *Townsend* also concerned a grant of FGROW from the 1862-1871 period. In 1915, the Supreme Court extended its limited fee interpretation to 1875-Act FGROW in *Rio Grande W. Ry. v. Stringham*.[23] After 1915, the law was relatively clear that railroads received fee interests in their FGROW, but most came with a possibility of reverter that would result in return of the land to the government when or if railroad services terminated, regardless of the period of the grant.

Stringham was overruled in 1942, however, when the government argued that the Great Northern Railway only received an easement in its 1875-Act FGROW on which the railroad was threatening to extract oil and gas. The Supreme Court agreed without discussing what that nomenclature might mean beyond who had the rights to the minerals.[24] Citing a congressional shift in policy between the grants in aid of 1871 and the mere rights-of-way granted under the 1875 Act, the Court relied on the fee/easement distinction because limited fee interests would normally carry mineral rights, and easements would not. The Court did not address earlier interpretations of 1862-1871 Act FGROW or the role of intervening legislation on the characterization of the railroad's property right as an easement. Nor did it address whether the easement characterization changed the government's retained interest in some or all FGROW.

In 1957, when the Union Pacific Railroad attempted to extract oil and gas from its 1862 Act right-of-way, the government again argued that the railroad only had an easement. The Union Pacific grant of right-of-way, however, was from the period covered by *Baldwin* and *Townsend*, which had not been overruled by *Great Northern*'s recharacterization of the property interest as an easement. The 1957 Court was much more careful in its articulation of the issue in *United States v. Union Pacific RR. Co.*,[25] holding that the railroad did not receive any rights to minerals, but carefully not referring to the character of the railroad's interest in its FGROW. The case did not overrule *Townsend*, nor hold that pre-1871 FGROW was an easement. In fact, the Court did not refer to the property rights the railroads acquired in its FGROW at all.

This changing landscape as to what property rights exist in FGROW has made it very difficult to figure out what rights the government retains in this land, and what rights, if any, may have passed to later patentees of the land traversed by the FGROW. Under traditional common-law categories, if the railroad acquired a fee simple absolute, the government retained no interest in the land that would prevent its alienation to private parties, and adjacent landowners would acquire no interests in a subsequent patent of the section traversed by the right-of-way because all available property rights had been transferred to the railroad. Furthermore, a railroad with a fee simple absolute interest in its FGROW could alienate the land to anyone it chose upon termination, which is what the Union Pacific did with a spur line it abandoned in Atoka, Oklahoma, as recently as 2000.[26] On the other hand, if the FGROW was a fee simple determinable, then the government retained a possibility of reverter or a power of termination and could reacquire possession of the land when the railroad ceased operating rail services. The question would then remain open whether the government retained its possibility of reverter when it subsequently granted the adjoining land to settlers via patents that merely reserved or excepted the railroad's right-of-way or the government gave its interest away. And finally, if the FGROW was a mere common-law easement, then the government retained its fee interest

16. 16 U.S.C. §1247(d).
17. 103 U.S. 426 (1881).
18. Act of July 23, 1866, 14 Stat. 210 to the St. Joseph & Denver City RR. Co.
19. 103 U.S. at 429-30.
20. MKT Ry. v. Roberts, 152 U.S. 114 (1894) (1866 U.P. Grant); New Mexico v. U.S. Trust, 172 U.S. 171 (1898) (1866 A&P Grant); MKT Ry. v. Oklahoma, 271 U.S. 303 (1926) (1866 U.P. Grant); MKT Ry. v. Early, 641 F.2d 856 (10th Cir. 1981) (U.P. Grant); U.P. v. City of Atoka, 6 Fed. Appx. 725 (10th Cir. 2001) (1862 U.P. Grant).
21. 190 U.S. 267 (1903).
22. 190 U.S. at 271.
23. 239 U.S. 44 (1915).
24. Great N. Ry. Co. v. United States, 315 U.S. 262 (1942).
25. 353 U.S. 112 (1957).
26. Union Pacific RR. Co. v. City of Atoka, 246 F.3d 682, 2001 WL 273298 (10th Cir. 2001).

in the corridor land, subject only to the encumbrance of the railroad easement. This servient fee interest could have been retained by the government upon transfer of the section to settlers, or it could have passed in patents that only reserved the right-of-way for the railroad. This latter argument is the one made by the petitioners in this case.[27]

However, the better interpretation is that the nature of the FGROW is not limited to the common-law categories but, like interests in trusts, can be customized by Congress to carry with it certain powers and not others. It might revert upon abandonment like a limited fee and possession return to the government, but it might include only surface rights and not subsurface rights like easements. It can carry exclusive possession like a fee interest, but be restricted to a particular use like an easement. Because these FGROW grants are both legislation and property rights, there is no requirement that the interest must conform to the age-old common-law categories developed prior to the advent of the railroads themselves. Because railroads require exclusive possession and because the use is infused with a public interest, the character of the property right does not comfortably fit into any of the common-law categories created for private property rights.[28] The extensive regulatory power of the government over railroads, as well as the mixed uses authorized by the legislation (such as telegraph, post, military, and competing railroad uses), suggests that the property rights railroads received are heavily imbued with public trust characteristics and that the government retains ongoing property as well as regulatory rights in these corridor lands. This was the interpretation endorsed by two attorneys for the Congressional Research Service in their 2006 Report for Congress on Federal Railroad Rights of Way.[29]

That the railroads acquired some hybrid property interest is supported by numerous factors raised in the briefs and discussed at oral argument. First, the federal courts themselves have referred frequently to the interest in FGROW as not needing to be shoehorned into any common-law categories of defeasible fee or easement. The District Court of Idaho explained that:

> Congress could pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests. In other words, even if the 1875 Act granted only an easement, it does not necessary follow that Congress would or did not intend to retain an interest in that easement . . . . The precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law.[30]

The Supreme Court has also stated,

> [t]he phrase "right of way," besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes and another thing in a grant to a railroad for public purposes, as different as the purposes and uses and necessities, respectively, are.[31]

One court stated, "[a] railroad's right of way has, therefore, the substantiality of the fee."[32] The Supreme Court has referred to it as having the "attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and like it corporeal, not incorporeal property."[33] Congress' power to structure the property rights in any way it chooses through legislation is a well-established one. "A legislative grant operates as a law as well as a transfer of the property, and it has such force as the intent of the legislature requires."[34]

Second, the easement the Court referred to in *Great Northern* is not a common-law easement, but a *railroad easement*, a property interest that state and federal courts both agree is more robust and exclusive than a typical driveway easement. Easements as they developed under the common law were mere nonexclusive rights of passage. They did not include the right to exclude the owner of the fee or the right to dig under the land, alter drainage patterns, excavate gravel and take timber, build tunnels, or affix bridge structures. The heavy and burdensome, exclusive use of rail corridors was at odds with the common-law easement that preexisted the coming of the mass transportation age. But as railroads acquired eminent domain powers to take private land, and often failed to construct their roads as promised, state courts looked to two important characteristics of easements in construing and labeling these interests. Easements terminate upon abandonment, which is not true of most fee interests in land unless a condition subsequent is explicitly created.[35] And easements are limited to a particular type of use being undertaken on the land. State courts thus developed what came to be called a railroad easement to indicate a property right that had fee-like qualities (exclusivity, possession, and the power to dramatically alter the physical landscape) and easement-like qualities (terminated upon abandonment and limited to certain uses).[36]

27. *See* Brief of Petitioners, No. 12-1173.
28. For additional citations and explanation of this point, see Danaya C. Wright, *Rails-to-Trails: Conversion of Railroad Corridors to Recreational Trails*, Ch. 78A, at 78A.09, *in* Powell on Real Property (Michael Allan Wolf, ed. 2012).
29. Baldwin & Flynn, *supra* note 15, at 4-5 (explaining that congressional legislation operates differently from a common-law property right).
30. State of Idaho v. Oregon Short Line RR. Co., 617 F. Supp. 207, 212 (D.C. Idaho 1985).
31. New Mexico v. U.S. Trust, 172 U.S. 171, 181-82 (1898).
32. Midland Valley RR. Co. v. Sutter, 28 F.2d 163, 165 (8th Cir. 1928).
33. New Mexico v. U.S. Trust, 172 U.S. 171, 183 (1898).
34. Schulenberg v. Harriman, 21 Wall. 44, 62 (1874).
35. Conditions subsequent were rarely included in railroad deeds because, as is true of interstate highways today, the idea that a fully constructed and operational railroad would cease to be used was barely imaginable. There were many reversionary clauses for return of the land if the railroad was not built.
36. *See* Wyoming v. Udall, 379 F.2d 635 (10th Cir. 1967), explaining that the concept of "limited fee" was no doubt applied in *Townsend* because under the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession the need for the "limited fee" label disappeared.

Although the term easement was often used to refer to this property interest, courts were quick to point out that the railroad had fee-like powers in their easements. While the railroad was operating, the interest was essentially that of a fee with the right to exclude adjacent landowners entirely, and even immunity from adverse possession claims because of the railroad's public purpose. But once the railroad ceased operations, the interest acted more like an easement in that it would terminate if abandoned without an express condition subsequent drafted into the deed. When the Supreme Court referred to the railroad's interest as an easement in 1942, therefore, it did so on the basis of nearly one century of jurisprudence recognizing that a railroad easement was a unique hybrid property interest developed to fit the changing times and technologies of the railroad age.

Third, this property right is rather chameleon-like; it looks like a fee when adjacent property owners try to adversely possess into the corridor or claim rights to authorize third-party uses, and it looks like an easement when the grantor government is claiming the power to regulate and control use and disposition of the land. If one analyzes the plethora of cases involving railroad property rights, either under state law or in FGROW cases, the confusion clears when viewed from the perspective of the challenger claiming rights adverse to the railroads. When challengers are adjacent landowners, they almost always lose because the rights of the railroad are deemed to be superior to the private neighbor.[37] Thus, neighbors who try to adversely possess into the corridor are denied that power because the railroad is infused with a public purpose, and congressional grants of FGROW are deemed to be quasi-government property rights that trump claims of private landowners. When the railroads attempt to exercise property rights contrary to the interests of the government grantor, however, the courts usually subordinate their rights in the name of the public welfare and congressional regulatory power under which the land was granted to the railroads in the first place.[38]

In the oral argument, Justices Antonin Scalia and Stephen Breyer seemed to express skepticism about the government's claim that the property right was a fee vis-à-vis certain claimants, and an easement vis-à-vis other claimants. As Justice Scalia quipped: "I've never heard of a property right that is a fee sometimes and an easement at others." And Justice Breyer, trying to remember what the venerable Prof. A. James Casner had taught him about the relativity of property rights, mused at length about how fee interests were different from easements. But neither attorney was able to give them a satisfactory answer. How could the government be arguing that the railroad's interest in FGROW was an easement when the matter involved minerals, but a defeasible fee when it involved adjacent landowners trying to preclude conversion of the corridor to a recreational trail?

The answer is quite simple, however. In the hierarchy of property rights, the government grantor's rights are superior to the railroads', and the railroad's rights are superior to adjacent landowners'. This is the well-established doctrine that property rights are relative. One in possession has superior rights over one out of possession, but not superior to the rights of the true owner.[39] Whatever the government gave to the railroads, it did not include the right to freely alienate the property, the right to operate a petunia farm on the land instead of a railroad, or the right to exclude the government or grantees of the government who need to use the land for other public purposes. And the government never gave to the railroads an interest that they could transfer to private parties. This hybrid property right, with its fee-like and easement-like qualities, is not only subject to a superior federal regulatory dominion, but it is infused with a public purpose that removes it entirely from the category of common-law property rights that developed in the context of private land interests. When the sovereign exercises its constitutional authority to make rules regarding the disposition of federal lands, it may construct the property rights to fit the public purposes for which the grants are made.[40]

III. The Effects of Intervening and Subsequent Federal Legislation

This case is made even more confusing by a series of statutes enacted in the early 20th century to manage and dispose of FGROW that was forfeited or abandoned. After the frenzied pace of railroad incorporation and construction of the last two decades of the 19th century, the new century opened to the reality that many railroads that had been granted alternate sections of land, as well as many that had simply filed maps of definite location with the land office for FGROW under the 1875 Act, had not been built, and were unlikely to ever be built. In 1890, Congress passed legislation to cause forfeiture of land grants in aid if the road was not built, and subsequent cases treated the duty to construct and operate as a condition subsequent that would permit Congress to retake ownership of the land.[41] But the statute did not apply to FGROW acquired under the 1875 Act. Under continuing pressure from settlers and competing railroads, Congress passed legislation in 1909[42] to cause forfeiture of any portions of FGROW for unbuilt railroads. Upon forfeiture, the land returned to

37. The Supreme Court affirmed this in *Townsend* and in *Stringham*.
38. This is the reasoning of *Great Northern* and *Union Pacific*.
39. *See* Tapscott v. Lessee of Cobbs, 52 Va. (11 Grant.) 172 (1854). This idea was also recognized by the Supreme Court in *I.N.S. v. A.P.*, 248 U.S. 215 (1918), when the Court held that a news-collecting service had no property rights vis-à-vis the public, but substantial property rights vis-à-vis a competitor.
40. U.S. Const., art. IV, §3 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States.").
41. Act of Sept. 29, 1890, ch. 1040, 26 Stat. 496 (eliminated at 40 U.S.C. §§83-84 (1982)). Schulenberg v. Harriman, 88 U.S. (Wall.) 44 (1875); A&P RR. Co. v. Mingus, 165 U.S. 413 (1897).
42. Act of Feb. 25, 1909, 35 Stat. 647, codified at 43 U.S.C. §940.

the land bank and could be regranted to another railroad or patented to settlers.

In 1916, however, World War I intervened, the railroads were disorganized, and they were ultimately nationalized and operated by a federal agency intent on making the system rational and efficient. When the railroads were returned to private ownership in 1920, Congress passed a comprehensive national transportation act that gave the Interstate Commerce Commission (ICC) the authority to regulate railroad abandonments and incentivized the railroads to shed unprofitable lines and streamline the system.[43] Amendments in 1922 addressed what would happen to FGROW that was abandoned after having been constructed, a prospect that was barely imaginable in the 19th century.[44] That Act, codified in 43 U.S.C. §912, provides that any FGROW that is declared to be abandoned by an act of Congress or a court of competent jurisdiction, will pass to a municipality in which the FGROW is located, may be transferred to a state or local government for any road or highway purposes within a year of the declaration of abandonment, and if not converted to a highway, will vest in the adjacent landowner owning the section traversed by the corridor.

Although §912 does not identify the interests the railroads acquired in the FGROW as easements or limited fee interests, nor does it identify the government's interest in FGROW as a possibility of reverter or a servient fee, the legislative history of the statute suggests that it operates when the government's reversionary interests are triggered and the United States reacquires possession of FGROW land.[45] Acting Secretary, E.C. Finney, of the U.S. Department of the Interior wrote in a letter to N.J. Sinnott, Chair of the Committee on the Public Lands, that the bill is in response to

> the prevailing decisions of the courts [that] the railroad companies to which grants of rights of way have been made of the character under consideration take a base or qualified fee with an implied condition of reverter in the event that the companies cease to use the land for the purpose for which it is granted.[46]

Finney's letter cites to *Townsend* and *Stringham*. He goes on to write that

> [i]t follows as a result of the rulings above cited that upon the abandonment by any railroad company of any right of way or any portion of any right of way granted to it the legal title to the land included in such right of way reverts to and becomes the property of the United States and does not pass to any patentee or patentees to whom patents were issued for the full area of the subdivisions subject to the railroad company's prior right of use and possession.[47]

Under §912, the land is to be transferred to the state and local governments for highway purposes pursuant to 43 U.S.C. §913, and if not, it will vest automatically, upon the official determination of abandonment, in either the municipality or adjoining landowner. And for 66 years, the statute operated to do precisely that. Once a FGROW was determined to be abandoned, local governments had one year to finalize any transactions regarding highways, and then the land automatically vested in municipalities or adjacent landowners and no one cared whether the FGROW was an easement or a limited fee, because the government essentially gave its interests away once the railroad's interests had terminated. For 66 years, §912 operated smoothly, and without contest to dispose of the government's interest in terminated FGROW.

But in 1988, Congress realized the policy conflict between §912, that gave away the government's interest in abandoned FGROW to adjoining landowners, and the 1983 NTSA Amendments that articulated a national policy favoring the preservation of rail corridors and allowed for their use for interim recreational trails.[48] The NTSA authorized the conversion of rail corridors to recreational trails if, during the process of ICC (now the Surface Transportation Board (STB))[49] abandonment, the railroad entered into an agreement to transfer the corridor for interim trail use, and the railroad retained the right to reenter and resume rail services. If the ICC/STB issued a trail use certificate, the corridor would be *railbanked* for possible future reactivation, all state-law property rights that might be triggered upon abandonment would be held in abeyance, interim trail use would be deemed a permissible public use, and the corridor would be preserved intact in case the need for future rail use demanded its reactivation.[50]

In response to the policy conflict between the two statutes, Congress passed an amendment to the NTSA to provide that any abandoned FGROW not embraced for public uses, including trail uses, would "remain in the United States" rather than passing to municipalities or adjoining landowners.[51] State and local governments retained their power to use abandoned FGROW for highways, but otherwise the land would be retained for preservation and railbanking purposes. In effect, Congress continued its long-standing position that if the railroads no longer needed their FGROW lands, they could be disposed of, or retained, at the discretion of the United States.

IV. Takings Liabilities

Since 1983, adjacent landowners have been partially successful at challenging the Railbanking Act as a taking of their state-law property rights in adjoining railroad cor-

43. Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456.
44. Act of Mar. 8, 1922, ch. 94, 42 Stat. 414, codified as 43 U.S.C. §912.
45. *See*, *e.g.*, H.R. Rep. No. 217, 67th Cong., 1st Sess., at 2, stating that "[w]here the forfeited or abandoned right of way which would otherwise *revert* to the United States . . . ."
46. Letter of E.C. Finney, Acting Secretary of the Department of the Interior, to the Hon. N.J. Sinnott, dated June 9, 1921, reproduced in H.R. 217, *id.*
47. *Id.* at 2-3.
48. Pub. L. No. 98-11, tit. II, §208, Mar. 28, 1983, 97 Stat. 48, codified at 16 U.S.C. §1247(d).
49. I.C.C. Termination Act, Pub. L. No. 104-88 §201, 109 Stat. 803 (1995).
50. For further discussion of the NTSA, see Wright, *supra* note 28, at 78A.11.
51. Pub. L. No. 100-470, §3, Oct. 4, 1988, 102 Stat. 2281, codified at 16 U.S.C. §1248(c).

ridors, for which they are entitled to just compensation from the United States. They have argued that, but for the Railbanking Act, the railroad would have consummated its abandonment and reversionary or servient fee interests would have vested, ripening their rights to acquire possession of abandoned corridor land. Although the Supreme Court upheld the validity of the NTSA amendments in 1990 in *Preseault v. Interstate Commerce Comm'n*[52] as a valid exercise of Congress' Commerce Clause power, the Court ducked the takings issue, stating that whether the statute worked a taking depended on the state-law property rights, for which a remedy was available under the Tucker Act. Since the mid-1990s, landowners have taken up the Court's invitation to file compensation claims, and the government's costs slowly have been escalating, although liability for a taking of state-law property rights ultimately depends on state laws. Thus, in some cases, the courts have found no liability when applying state law to define the scope and nature of the property interests in the corridors, and in others, the courts have imposed liability essentially for taking a trail easement from landowners whose railroad encumbrances would have been removed via abandonment.[53]

But a finding of federal liability for railbanking and interim trail use over FGROW would take a sizable chunk out of the railbanking statute. If one-half of the abandoned railroad miles in the country originated as FGROW, and two-thirds of that FGROW was granted under the 1875 Act, then there would be per se takings liability for thousands of miles of abandoned railroad corridor converted to recreational trails if there is a determination that the government had no interest in the corridor land after the FGROW was abandoned. But that per se takings rule depends on a finding that §912, and its 1988 Amendment, did not apply to 1875 Act FGROW because the government had no retained interest in this land after it had patented the adjoining land to settlers. If the government gave away whatever interest it had underlying the thousands of miles of 1875 Act FGROW that it granted in the 19th century when it patented the adjoining land to private landowners, then §912 was simply inoperative and the landowners would take unfettered possession of FGROW upon abandonment, just as they did for those parcels acquired by the railroads under state law as easements. And, ironically, the seeds of this argument were sown by the government's own argument in 1942 that the railroads only acquired easements in FGROW. Without also reserving either the government's possibility or reverter or servient fee interest from the patents, the government had, albeit inadvertently, opened itself to the argument that it had given away all federal interests in FGROW. And what a pickle the government found itself in.

V. Applicability of §912 to Abandoned FGROW

As I mentioned earlier, adjacent landowners never questioned the applicability of §912 to any and all abandoned FGROW because the landowners received the government's interest in the land upon abandonment by the railroad. But after 1988, the government had decided to keep these rights-of-way when they returned to federal control and use them for trails. So, the same lawyers that had been arguing that the railbanking statute worked a taking because it intercepted state-law property rights that would have vested but for the NTSA began arguing that interim trail use of preserved FGROW also worked a taking because it interfered with federal property rights that would otherwise pass to adjacent landowners. If abandoned FGROW was not used for trails, adjacent landowners wanted the land back, not retained and preserved for some unknown future use.[54] If retained FGROW was converted to a trail use, landowners wanted compensation.

The glitch, however, was that if landowners relied on §912 as the basis for their claim to a property right in FGROW upon termination, then they really could not complain when §912 was amended to discontinue the federal giveaway. What they needed to argue was that §912 did not apply *at all* to their FGROWs, and that the government's retained interest (if any[55]) in FGROW passed to them directly via their patents. Such an argument would render an act of Congress (§912) irrelevant and is based on the dubious logic that the government's servient fee interest passed to patentees if it was not expressly reserved in the patents that were granted in the late 19th and early 20th centuries. There are numerous problems with that argument, however. It goes against a long series of precedents holding that adjacent landowners did not receive any interest in FGROW in their patents because that land had been withdrawn and was unavailable for conveyance to private settlers.[56] It ignores the legislative history of §912, which makes it clear that the statute was intended to operate on the government's retained reversionary interests in FGROW, and that it gave the land to adjacent landowners precisely because they had not received it in their patents.[57] It also passes right over the fact that the government did not know until 1942, when the Supreme Court redefined the interest in FGROW as an easement, that it had servient fee interests it should have been reserving during the century before. Although omnipotence may be attributed to the federal government, omniscience is a bit harder to swallow, especially in light of the complexity of the legal issues,

52. 494 U.S. 1, 20 ELR 20454 (1990).
53. *See* Wright, *supra* note 28, at 78A.13, for a more detailed breakdown of states that do and do not impose liability for rail-trail conversions.
54. *See* Vieux v. E. Bay Reg'l Park Dist., 906 F.2d 1330 (9th Cir. 1990); Samuel C. Johnson 1988 Trust v. Bayfield County, Wis., 520 F.3d 822 (7th Cir. 2008), *rev'd*, 649 F3d 799 (7th Cir. 2011).
55. Remember, some FGROW was held to be fee simple absolute and so there were no retained government interests in that land, nor could patentees acquire any interest in it.
56. *Townsend*, 190 U.S. 267 and cases cited *infra* note 58.
57. *See* Secretary Finney's letter, *supra* note 46.

the changing character of railroad property rights, and the general decline of railroad jurisprudence and scholarship.

Logic has rarely stopped a takings lawyer. Focusing on the sea change in congressional policy between 1871 and 1875 to strengthen the idea that the railroads only received easements in their 1875 Act FGROW, landowners argued that servient fee interests underlying easements were functionally different from possibilities of reverter. The question then became, what rights, if any, did the government retain in any of its FGROWs. If the government retained an interest, was it a typical reversionary interest or a servient fee interest? Since §912 was passed when Congress thought it retained only reversionary interests, arguably the statute would not apply to servient fee interests. Thus, trying to exploit the distinction between 1862-1871 Act limited fees and 1875-Act easements, landowners and railroads argued that §912 either applied only to the pre-1875 FGROW, or to none, because in no instance did the government reserve any interest in private patents to settlers other than the railroad's right-of-way.

Nonetheless, this argument routinely failed, as federal and state courts simply held that it did not matter whether the interest was characterized as an easement or a limited fee, the United States retained an interest in all FGROW sufficient enough to justify application of §912.[58] After all, Congress would not have passed §912 if Congress did not believe it had retained a federal interest in most, if not all, FGROW, and the Supreme Court's changing characterization of the railroad's interest did not necessarily change the government's retained interest. Since the railroad's interest does not need to be shoehorned into any common-law property category, neither did the government's.

However, in 2005, the argument worked before the Federal Circuit, which had been routinely finding takings liability under the Railbanking Act for intercepted state-law property rights in rail-trail conversion cases. In *Hash v. United States*, Judge Pauline Newman held that a patent to a landowner that merely reserves the railroad's right-of-way does not reserve the federal government's underlying servient fee interests in 1875 Act FGROW, which had passed to the landowner via a patent in the 19th century.[59] Applying existing Federal Circuit precedent for adjudicating liability, the Court held that when the corridor was railbanked and used for interim trail use, the government's continued assertion of dominion over abandoned FGROW resulted in takings liability for the government.

The *Hash* decision relied heavily on the characterization of the 1875 Act FGROW as an easement, and acknowledged that the outcome might be different for 1862-1871-Act FGROW, which the courts continue to characterize as a limited fee interest. One basis for this distinction goes back to the land office's withdrawal policy, and the characterization of FGROW land as no longer public land available for settlement. There were numerous cases between settlers and railroads as to who had priority of claim when a private patent was accidentally issued to a settler for land that was covered in a railroad grant.[60] The courts determined that upon the filing of the map of definite location or construction, the railroad's land claims were perfected, and any accidental later grant to a settler of the same land was ineffective because the land covered in the railroad grant (including FGROW) was no longer public land available for patent. But these cases occurred well before 1942, when the easement characterization was introduced into the mix. Thus, the standard mechanism for denying that any retained government interest in FGROW passed to patentees had not been litigated after 1942, in large part because the government was not issuing a lot of patents after that date.[61] By deeming railroad FGROW land as not available for private patent because it was no longer public land, the courts avoided the issue of having to characterize the government's retained interest in FGROW and parsing whether or not that interest passed via early patents.

Thus, the issue boils down to whether the government's retained interest in 1862-1871 FGROW is fundamentally different from its retained interest in 1875-Act FGROW, and if so, whether that difference affects the applicability of §912 to terminated FGROW. If the courts treated all FGROW as being withdrawn from the public lands and unavailable for patent to private parties, then §912 would arguably apply to all terminated FGROW, and the interest would indisputably remain with the United States unless embraced within a public highway following abandonment. But if the 1942 easement characterization somehow results in the government's retained interest being deemed sufficiently different from the implied possibility of reverter in limited fee FGROW such that the withdrawal from public lands argument does not protect it from having been transferred via patent, then the *Hash* decision would hold that the government gave away all its interest in forfeited or abandoned easement FGROW when it patented the adjoining land.

Suffice it to say that if 1875 Act FGROW for some reason is not deemed to be subject to the same withdrawal policies as 1862-1871 Act FGROW, and somehow the government's retained interest was not reserved when the section of land was patented to private landowners,[62] the

58. Idaho v. Oregon Short Line RR. Co., 617 F. Supp. 207 (D. Idaho 1985) (1875 Act FGROW); Marshall v. Chicago & Northwestern Transportation Co., 31 F.3d 1028 (10th Cir. 1994) (1875 Act FGROW); Phillips Co. v. Denver & Rio Grande Western R.R., 97 F.3d 1375 (10th Cir. 1996) (1875 Act FGROW); Mauler v. Bayfield County, 309 F.3d 997 (7th Cir. 2002) (pre-1875 Act FGROW); Nicodemus v. Union Pac. Corp., 440 F.3d 1227 (10th Cir. 2006) (pre-1875 Act FGROW).

59. Hash v. United States, 403 F.3d 1308, 35 ELR 20072 (Fed. Cir. 2005). For a critique of the case, see 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 (2008).

60. *Townsend*, 190 U.S. 267; Jamestown & Northern R. Co. v. Jones, 177 U.S. 125 (1900); Stalker v. Oregon Short Line RR., 225 U.S. 142 (1912).

61. Although homesteading did not officially end until 1976, with the Federal Land Policy and Management Act, most homesteading along transportation corridors and waterways had ended in the early 20th century.

62. The court in *Hash* relied on constructional rules that hold that ambiguities in grants operate against the grantor, so that if the government did not expressly reserve its own interest in the FGROW when it reserved the railroads' interests in subsequent patents, it cannot come back later and claim an implied right was reserved. But there are other equally important con-

government is in a sticky spot. It not only has been asserting regulatory control over abandonments since 1920 that arguably affect underlying private-property rights, but its granting of abandoned FGROW to municipalities and state and local governments for highway purposes since 1922 may have been ultra vires.

The *Hash* decision was subsequently followed by some lower courts, as well as the Supreme Court of South Dakota, which reversed an earlier decision holding that §912 applied to 1875-Act FGROW.[63] I will not comment on the U.S. Court of Appeals for the Seventh Circuit decision of Judge Richard Posner, finding that §912 did not apply to an 1852-Act FGROW on the basis of *Great Northern*'s articulation of the seismic shift in congressional attitudes 23 years after the grant was made.[64] In the takings context, these cases have all ordered compensation for trail uses over abandoned FGROW that was made pursuant to the 1875 Act, and did not result in the landowners actually getting the land back. This point is relevant to the issue of reliance interests posed by several Justices at the *Brandt* oral argument, which I take up below.

The Tenth Circuit, however, which has the majority of §912 precedents and had directly addressed the question of §912's applicability to 1875 Act FGROW, as well as to 1862-1871 Act FGROW, refused to follow the *Hash* reasoning, holding instead that its prior precedents required a finding that §912 applied to all FGROW, regardless of the label of the railroad's interest. Earlier Tenth Circuit decisions helped develop the precedents that all FGROW is a hybrid, robust property right in the railroads, that it is subject to continued federal control, and that upon abandonment, the corridor land returns to the United States for subsequent disposition or retention, in line with the public welfare. That case, *Brandt Trust v. United States*,[65] cemented the split among the circuits that led to the government supporting the grant of certiorari to resolve the nature of the property interest retained by the government in FGROW and the applicability of §912, and its 1988 NTSA Amendments, on all publicly granted railroad rights-of-way.

VI. Reliance Interests

One of the most prominent questions asked at the oral argument in this case was what reliance interests would be most affected by the different possible judgments. If §912 is held to be inapplicable to some FGROW, then municipalities and state and local highway uses of this land could be undermined. On the other hand, Justice Breyer imagined that if the Court ruled in favor of the government, landowners who had built houses on abandoned FGROW might find a bicycle trail being run right through their living rooms. Neither attorney could say how many miles of highways had been built on abandoned FGROW, nor how many acres of land had passed to municipalities or adjacent landowners during the 83 years that §912 had operated to vest the federal interest in abandoned FGROW in others. But the Court seemed very interested in the amicus brief of the state and local governments that supported the government's position and was worried that a decision finding §912 to be inapplicable would undermine decades of settled property rights in municipalities, and in state and local highways.[66]

Although several Justices seemed concerned at the fact that the government could not state with any reasonable degree of precision how much FGROW had been converted to highways or given to municipalities, the problem of reliance interests dissolves quickly in favor of the government when one stops and thinks about the nature of the claimed property rights in this case. We can see this by working out who would have the various property rights at different historical periods based on the different rights being claimed.

We can begin by assuming, as the petitioners argue, that the government retained no property rights in 1875 Act FGROW once it patented the adjoining land to settlers (i.e., that the railroad received only an easement and the servient fee interest was patented to adjoining landowners). What would result upon termination of the railroad's right-of-way? Prior to 1922, when there was no process for disposing of abandoned FGROW, Congress routinely retook forfeited FGROW and regranted them to other railroads, just as it had done with forfeited canal grants. Or, if no other railroad was interested in the land, it would be returned to the land bank and made available for settlement. At that point, the FGROW would be terminated and subsequent patents would be free and clear of any encumbrance. Those landowners' rights would not be jeopardized by a determination of the Court either way. But what happened to forfeited FGROW when the adjacent section had already been patented prior to 1922? That land, if it was not encompassed in some other public transportation or communications use, passed to adjacent landowners.

But in1922, when Congress passed 43 U.S.C. §912, the government made two important changes. First, it specified that abandonment could only be determined by an act of Congress or a decision of a court of competent jurisdiction. This imposed a procedural hurdle on the unburdening of the servient land that could, arguably, have been a taking without just compensation in any instance when the railroad's actions would have met a determination of aban-

structional rules that grants by the government are construed in favor of retaining property rights for the public, even when they are not expressly retained. This issue is beyond the scope of this Article, but it should be understood that there is plenty of authority for the proposition that grants by the government to private parties should be construed narrowly.

63. Beres v. United States, 64 Fed. Cl. 403 (2005); Blendu v. United States, 75 Fed. Cl. 543 (2007); Ellamae Phillips Co. v. United States, 564 F.3d 1367 (Fed. Cir. 2009); Brown v. N. Hills Reg. RR. Authority, 732 N.W.2d 732 (S.D. 2007); Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999 (S.D. Ind. 2005).

64. Samuel C. Johnson Trust v. Bayfield County, Wis., 649 F.3d 799 (7th Cir. 2011).

65. Brandt Trust v. United States, 496 Fed. App'x 822 (10th Cir. 2012).

66. Brief of the National Conference of State Legislatures, National League of Cities, National Association of Counties, International City/County Management Association, United States Conference of Mayors, International Municipal Lawyers Association, and American Planning Association as Amici Curiae in Support of Respondent.

donment but for the failure to meet the procedural requirements of abandonment under §912. The Petitioner in this case has filed such a claim, and the statute of limitations on such a claim might very well have run, but the point is important. If the government had no property interest in the FGROW, then arguably it could not place procedural requirements in the way of the railroads' and the landowners' legal rights upon abandonment.

The statute also purported to grant the right-of-way land to municipalities or state or local governments that converted the corridor to a public highway within one year. If the government had no interest in the land after patenting it to settlers, then all claims of municipalities and local highway departments to this land arguably would be without legal foundation and could constitute takings without just compensation. In the legislative history of §912, it was noted that there are already hundreds of miles of highways within FGROW.[67] Moreover, this would be the case not just for highways placed longitudinally in rail corridors, but for the thousands of road crossings that were negotiated solely between the railroads and the counties and states. Assuming road crossings were negotiated while the railroad was still active, the landowner would arguably have needed to participate in those negotiations if the road was to remain upon the railroad's termination. If the road crossing was negotiated after abandonment, then only the landowner would have been authorized to grant a road crossing and the statute authorizing transfer of abandoned FGROW to state and local governments for highways also would be ineffective.[68] Yet, thousands of road crossings exist across FGROW without reference to the adjoining landowners' rights, and §§912 and 913 clearly give the government the authority to make the relevant contracts and deeds to transfer road rights to local governments. All of those arrangements would be at risk if the statutes were deemed to be inapplicable.

Moreover, any municipality that acquired FGROW pursuant to §912 would also be at risk of a takings challenge. Since its peak in the 1920s of over 270,000 miles of rail corridor, the national rail network has shrunk to less than one-half, at approximately 120,000 miles today. Assuming that one-third of the lost 150,000 miles was 1875 Act FGROW, it is unquestionable that thousands of municipalities and local governments have received property interests pursuant to §§912 and 913 that could be undermined if the Court determines that the government did not have the authority to exercise power over the disposition of this land.

The reliance interests of state and local governments, when one considers the land acquired by municipalities and land used for highway and road crossings, as well as service roads or public access roads, are immense. Municipalities that acquired rights to abandoned FGROW have disposed of this land or used it for other public purposes in reliance on §912 for 66 years, between 1922 and 1988. Although the true extent of the reliance interests are difficult to determine without examining the records of all the defunct railroads, or culling through hundreds of thousands of valuation maps on file in the National Archives, there is no question that state and local governments have relied for nearly one century on a legal regime in which the railroads and the federal government were the only parties they needed to consult in order to utilize their rights under the statute.[69] Even after 1988, when amendments to §912 took away the rights of municipalities and adjacent landowners to receive abandoned FGROW, state and local governments still retained rights to this land for road and highway purposes, including road crossings. A finding that the government had no interest in FGROW once it patented the adjoining land would upset nearly one century of settled property rights in the very same transportation networks and internal improvements created by the federal grants at issue.

But what about the landowners' reliance interests under a finding that the government did indeed retain control over FGROW? If a FGROW was abandoned prior to 1922, and the landowners retook possession of the land, they would have been in possession for close to or more than 100 years, and any attempt by the government now to assert rights to the land would be barred by the statute of limitations. After 1922, landowners received abandoned FGROW pursuant to §912 for all lands not in a municipality and not used for road or highway purposes. Because a large percentage of FGROW that was abandoned between 1922 and 1988 passed to landowners anyway by virtue of §912, a finding that the statute was effective will not upset their expectations because they received the land already. It is only if §912 is deemed to be inapplicable that the landowners who received land pursuant to the statute might find their interests undermined, because the quieting of their property rights under §912 would not have occurred. In essence, since landowners received most of this land anyway under §912, a finding that §912 is valid will not have any negative effect on their reliance interests.

But of course, §912 was amended in 1988 to no longer give landowners any rights in FGROW upon abandonment. If §912 is deemed applicable to all FGROW, then landowners after 1988 could not have formed any reliance interests because they did not get possession of the land. They might be entitled to compensation as a result

67. H.R. Rep. No. 843, 66th Cong., 2d Sess., p. 4, noting
> [i]n many cases, especially in the State of California, there are many hundreds of miles of State and county highways built along and on the rights of way belonging to some one of the land-grant railroads, and the improvement of these highways is very seriously impeded because neither the State nor the counties can obtain a title to the right of way for the roads.

68. 43 U.S.C. §913.

69. One of the reasons the government is unlikely to have this information easily at hand is that both before enactment of §912, and after, there was no need for a government patent or transfer of title with regard to these lands; they transferred automatically by operation of §912. Although the government knows how much land it gave away, it does not know how much has been embraced in road crossing or highways by agreement with the railroads. The thousands of service roads on active rail corridors simply cannot be estimated.

of the delay in regaining possession, but they did not build houses on that land that might now be overrun by bicycles. Since every court between 1988 and 2005 held that §912 was applicable to 1875-Act FGROW, landowners were unable to take possession of adjoining railroad land and therefore could not form any reliance interests in land they did not receive.

It is only after 2005, when the Federal Circuit determined in *Hash* that the adjacent landowners were entitled to possession of FGROW, that reliance interests might have begun to accrue. Since 2005, a few courts have followed the decision in *Hash*, finding that landowners had rights to this land. The Court of Federal Claims was required to follow the Federal Circuit decision in *Hash*, which resulted in a finding of takings liability in three cases where the corridor was railbanked and converted to a trail.[70] One of those regarded an individual parcel on the same trail as that litigated in *Hash*. The Seventh Circuit and the Supreme Court of South Dakota also followed the *Hash* reasoning, ultimately giving possession of the land to adjoining landowners in quiet title actions.[71] If the Supreme Court reverses *Hash*, and determines that those landowners in fact were not entitled to possession of the land upon abandonment, their reliance interests would be jeopardized. However, in the takings cases, the landowners in fact did not get the land back; they were compensated for a taking of property rights they did not have. Whether the government would demand that they refund their compensation, since it was later discovered they were not actually entitled to it, is a question of first impression.

Because §912 actually gave most of this land to the landowners upon abandonment, a finding that §912 is valid will not upset any of their reliance interests; in fact, it will settle them. And since 1988, when landowners were not entitled to take possession of abandoned FGROW, they did not form reliance interests because they could not have reasonably expected to get that land back. Only since 2005 might reliance interests have been formed, but in most of those cases, compensation was paid. On the other hand, state and local government and municipalities have extensive reliance interests for their lands and rights acquired under §912. Upsetting those interests could wreak havoc on local governments and those landowners who have acquired the land from them.

VII. Conclusion

As one can see, the history and jurisprudence behind this case are quite complex, and I have not even discussed the reams of legislative history behind both the 1875 Act and §912 in 1922.[72] It is tempting simply to rely on *Great Northern*'s articulation of FGROW as an easement and hold that the government has no retained interest in abandoned FGROW, as the court did in *Hash*, and assume that compensation will settle the confusion. The problem with doing so is that the *Great Northern* decision limited the railroad's property rights in order to bolster the government's rights in these transportation corridors. If a decision in *Brandt Trust* would result in negating the government's property rights in FGROW because of a narrow reading of what a common-law easement entails, the Court will be further compounding the confusion and will open the government to takings liability that will destroy the possibility of preserving rail corridors for continuing transportation and communication purposes, which was the public justification for the grants in the first place.

It is not necessary to overrule *Great Northern*, or any prior Supreme Court decisions, however, if the Court simply affirms that the term easement, when used in conjunction with railroad interests, is not a common-law right-of-way, but rather a robust hybrid property interest that has fee-like and easement-like characteristics. Thus, the fact that Congress used the same language to grant FGROW over a period of one century, and that the congressional shift in policy in 1875 relates to the grants in aid and not the right-of-way grants, suggests that there is no functional difference between 1862-1871 Act FGROW and 1875-Act FGROW. This means that if Congress passed §912 to dispose of its retained interest in 1862-1871 Act FGROW in 1922, that statute should also dispose of the government's functionally identical interest in 1875-Act FGROW. Settling the confusion of the limited fee/easement nomenclature would be a far step in the right direction of correcting the confusion about the congressional shift in policy toward the railroads in 1875.

The Court still needs to determine whether a patent to a private landowner for a section of land, reserving only the railroad's right-of-way, also conveyed to the patentee the federal interest in that right-of-way. The Federal Circuit in *Hash* decided that it did. The Tenth Circuit decided that it did not. But there is plenty of precedent suggesting that the withdrawal process of the land office precluded the transfer of any property rights in FGROW that was mapped and reserved to the railroads, because that land was no longer public land available for transfer. There is also a lengthy congressional history suggesting that Congress intended to retain ultimate final dispositive control over FGROW, both during railroad use and occupation, and afterwards. Once the Court gets past the largely irrelevant easement/limited fee moniker and retained reversion/servient fee distinctions to realize that FGROW was always a government grant for public transportation and communication purposes, then the right-of-way itself can be seen as a free-standing property right that inheres in the government, and is shared with the railroads, the telegraphs, the post office, and other public users, including today's cyclists. The right-of-way returns to the government for continuing public uses, and only when all public purposes have been waived by an act of Congress, or a determination of a court of competent

70. *Beres*, *Blendu*, and *Ellamae Phillips Co.*, *supra* note 63.
71. *Samuel Johnson Trust*, *supra* note 64, and Brown v. N. Hills Reg. Rail Auth., 732 N.W.2d 732 (S.D. 2007).
72. That history is covered in great detail in the briefs and in Darwin Roberts, *The Legal History of Federally Granted Railroad Rights of Way and the Myth of Congress' "1871 Shift,"* 82 U. Colo. L. Rev. 85 (2011).

jurisdiction, will the land underlying these FGROWs be available for disposition to private owners.

But if the Court rules in favor of the petitioner in *Brandt Trust*, then potentially all FGROW would be lost forever for public transportation purposes or could be subject to takings liabilities when converted to a highway, transferred to a municipal government, or retained and banked for future rail reactivation. The government would not be able to change the uses of this land as new technologies are developed without compensating adjoining landowners. On the other hand, if the Court rules in favor of the government, all reliance interests will be protected, the public's interest in these quasi-public corridors will be protected in the future, there will be no takings liability if a rail corridor is converted to a highway or a trail pursuant to the railbanking law, and the only landowners with reliance interest will be those who have relied on the mis-rule of *Hash*, and most of that small number received generous compensation for property rights they did not have. Since these were final judgments, the government probably could not reclaim the compensation paid. But it would not be inappropriate to turn off the compensation spigot that has seriously threatened the public's interest in a vibrant national rail and transportation network that was created through donations of public lands for transportation and communications purposes. It is ironic that the constitutional qualms of the early republic that stalled federal investment in internal improvements should come full circle to requiring compensation to landowners when those internal improvements continue to be used for the very transportation purposes for which they were granted. It is also ironic that the change in federal policy against the lavish land grants for the railroads could result in lavish compensation for adjoining landowners who have no reliance interests or reasonable investment-backed expectations that the railroad use would ever cease. These landowners would reap a windfall by a finding that they had some heretofore unknown property rights in federally granted rights-of-way that no one knew existed until more than one century after the property rights were created.