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DOING A DOUBLE TAKE: RAIL-TRAIL TAKINGS LITIGATION IN THE POST-*BRANDT TRUST* ERA

Danaya C. Wright*

INTRODUCTION

In March of 2014, the Supreme Court decided *Marvin M. Brandt Revocable Trust v. United States*,¹ a takings case cleverly masquerading as a statutory interpretation case. In the last few minutes of the oral argument, Justice Ruth Bader Ginsberg asked about the potential takings liability lurking in the case, only to have the lawyers and her colleagues on the Court develop a sudden, temporary hearing loss. No one responded to her, and there was no other mention of the issue in the oral argument, or in either the plaintiff's or the government's briefs. Only Justice Sonia Sotomayor, in her lone dissent, raised the possibility of hundreds of millions of dollars in takings liability, more as an afterthought than as a compelling objection to the statutory issue at hand.² But ask any lawyer at the Justice Department and they will tell you that this was a full-on takings case, and the decision in favor of the landowner just made their jobs that much harder. Besides the fact that everyone side-stepped the takings issue, what is perhaps most troubling is the Court's stunted view of the depth and complexity of the property rights questions upon which *Brandt Trust*, and the hundreds of other rail-trail takings claims, depend.

The *Brandt Trust* case came to the Court as a quiet title dispute. A right-of-way had been granted by the United States to the Laramie, Hahn's Peak, and Pacific Railroad ("LHP&P") in 1908 pursuant to the 1875 General Railroad Right of Way Act.³ This Act gave a right-of-way 200 feet wide across public lands to any charter railroad, subject to certain conditions.⁴ Nearly seventy years later, the United States patented an

* Clarence J. TeSelle, Professor of Law, University of Florida, Levin College of Law. I would like to thank John Echeverria, Peter Byrne and the faculty and attendees of the 2013 and 2014 annual Takings Conferences, co-sponsored by Vermont Law School and Georgetown Law Center. I would also like to thank the University of Florida, Levin College of Law for its support of my research on rail-trail issues, as well as my colleagues Michael Allan Wolf, Grayson McCouch, Mark Fenster, Christine Klein, and Alyson Flournoy for their invaluable comments and hallway conversations. I have benefitted greatly from the tireless work of the lawyers in the Department of Justice and Andrea Ferster of the Rail to Trails Conservancy, as well as Chuck Montange and Darwin Roberts. And I want to thank Katherine Hambley and the rest of the staff of the *Vermont Law Review* for encouraging me to write this article, and for their tireless work making it presentable. Despite their hard work, all errors are mine.

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

2. *Id.* at 1272 (Sotomayor, J., dissenting).

3. 43 U.S.C. §§ 934-939 (2012).

4. The Act was expected to construct the railroad within a designated period of time, the railroad could not refuse to permit other railroads access to the rights of way in canyons and narrow

eighty-three acre parcel of land surrounded by the Medicine Bow-Rout National Forest to Marvin M. Brandt's parents, Melvin and Lulu Brandt.⁵ The LHP&P right-of-way traversed this eighty-three acre parcel, and the patent was granted to the Brandts "subject to" the railroad's right-of-way.⁶ The patent did not preserve any other interest in the railroad corridor, although it did preserve rights of way for certain forest roads that ran through the Brandts' land.⁷ When the successor to the LHP&P decided that it was no longer economical to operate the railroad, even as a scenic tourist train, it petitioned the Surface Transportation Board ("STB") for authorization to abandon the line.⁸ In lieu of abandonment, the STB authorized the preservation of the corridor through a process of railbanking⁹ and issued a Notice of Interim Trail Use ("NITU"). Railbanking permits a qualified trail manager to take over the railroad corridor and use it for interim recreational trail purposes while preserving the corridor intact for possible future rail reactivation.¹⁰

In 2006, the government initiated a quiet title suit against the Brandts' successors in interest, the Marvin M. Brandt Revocable Trust (*Brandt Trust*), asserting that the United States had sufficient reversionary property rights in the 200 foot right-of-way such that conversion to a recreational trail could be undertaken without impeding any property rights of the patentee who, the government argued, had no property interests in the

passes, and the railroad's rights could be amended or terminated at any time by the United States. *Id.* §§ 935, 939.

5. A patent is the equivalent of a deed conveying exclusive rights to real property from a sovereign entity. It is securely signed and issued under seal of the sovereign.

6. *Marvin M. Brandt Revocable Trust*, 134 S. Ct. at 1262 (quoting Appendix to Petition for Writ of Certiorari at 78, *Marvin M. Brandt Revocable Trust*, 134 S. Ct. 1257 (No. 12-1173)).

7. *Id.* (quoting Appendix to Petition for Writ of Certiorari, *supra* note 6, at 76-77).

8. *Id.* at 1263 (citing ROBERT A. KING, *TRAILS TO RAILS: A HISTORY OF WYOMING'S RAILROADS* 90 (2003)).

9. Danaya C. Wright, *Rails-to-Trails: Conversion of Railroad Corridors to Recreational Trails*, in 11 *POWELL ON REAL PROPERTY* §§ 78A, 78A.01 (Michael Allan Wolf ed., 2014) [hereinafter *Rails-to-Trails*]. The STB is the successor to the Interstate Commerce Commission. It authorizes nearly all regulatory actions regarding railroads, including the decision to abandon, railbank, reactivate, or alienate real estate assets.

10. See 49 C.F.R. § 1152.29 (2015) (providing that a railroad in the process of abandonment or a qualified trail manager may petition the STB for the issuance of a Notice of Interim Trail Use (NITU)). This regulation permits the railroad and the trail manager to negotiate a trail use agreement through which the corridor is transferred to the trail manager who takes over all financial liability for the corridor, while the railroad retains a right to reenter and reactivate rail services. *Id.* So long as the NITU is effective, the abandonment of the railroad's property rights are forestalled. The NITU may expire, in which case the railroad may move forward to consummate its abandonment and some state-law property rights may thereby vest, or a trail use agreement will be executed, transferring the rail corridor, and state-law property rights will be held in abeyance pursuant to the railbanking statute. 16 U.S.C. § 1247(d) (2012).

railroad's corridor land.¹¹ Both the District Court and the Tenth Circuit Court of Appeals ruled in favor of the government, holding that the United States retained a sufficient property interest in federally granted railroad rights of way ("FGROWs") to allow it to reclaim possession of the railroad corridor upon abandonment and convert it to a recreational trail without liability to adjacent landowners.¹² Thus, there would be no *taking*¹³ of private property if the government: (1) reclaimed possession of the land it had given to the railroad over a hundred years ago once the railroad no longer needed it, and (2) re-used that land for other public transportation purposes (rail preservation and interim trail use).¹⁴

What is missing from this brief summary of the facts of the case, and the Court's recitation of the relevant facts, is that there is a long history of disputes between landowners, railroads, and the government regarding ownership of FGROWs, disputes over what happens to that land upon forfeiture or abandonment, and whether patentees have constitutionally protected property interests in these public lands if the government exercises continued dominion over them.¹⁵ The Supreme Court itself had been asked, numerous times, to rule on the property interests involved in 1875 Act FGROW grants, as well as earlier FGROW grants under other federal statutes. The Court obliged, but handed down conflicting decisions about the property rights involved in these federal land grants.¹⁶ These

11. *United States v. Marvin M. Brandt Revocable Trust*, No. 06-CV-184-J, 2008 WL 7185272, at *1-2, *4 (D. Wyo. Apr. 8, 2008), *aff'd in part, rev'd in part sub nom.* *United States v. Brandt*, 559 F. App'x 717 (10th Cir. 2014).

12. *Id.* at *7; *United States v. Brandt*, 496 Fed. App'x 822, 825 (10th Cir. 2012) (per curiam), *rev'd and remanded sub nom.* *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014).

13. Although we tend to use the term "taking" when referring to a regulatory action that substantially interferes with property rights, the Fifth Amendment only prohibits the taking of private property for public use *without just compensation*. U.S. CONST. amend V. Thus, when a governmental body takes property rights for public use, it must compensate the property owner. The more precise question is whether the government seeks to regulate without a duty to compensate, or whether the property rights are so substantially interfered with that compensation and the acquisition of the property through an exercise of eminent domain is required. *See Pa. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978) (contemplating the extent to which a municipality can regulate development without triggering a compensatory payment). Because landowners usually bring these suits against the governmental body, demanding damages and an explicit exercise of eminent domain or the removal of the regulation, they are categorized as *inverse condemnation* actions. Ironically, some of the first inverse condemnation actions occurred in the nineteenth century when landowners complained that railroads built across their lands without purchasing the land or paying damages. *See Rails-to-Trails, supra* note 9, § 78A.06(2)(b) (describing various state law classifications of railroad land acquisitions).

14. 16 U.S.C. § 1247(d) (2012).

15. *See Rails-to-Trails, supra* note 9, § 78A.07(1)(b) (describing various judicial classifications of FGROWs and their correlative property rights).

16. *Id.* § 78A.07(4)(c).

interpretations of the railroad's, and by implication the United States', property interests led Congress to pass legislation in reliance on the Court's characterization of the property rights transferred to the railroads by the federal railroad grants.¹⁷ Labeling some FGROW grants to be fee simple absolute,¹⁸ others to be fee simple subject to a condition subsequent,¹⁹ and others to be easements in the railroads,²⁰ the Court has been less than clear on the subject of the railroad's interests, and even less clear or completely silent on the issue of the United States' retained property rights, if any, in FGROW lands. In the course of its reinterpretations, the Court generally did not address the myriad ancillary issues about the potentially competing rights of the United States and adjacent landowners that arose as a result of its redefining the railroad's property rights.

The *Brandt Trust* case stepped squarely in the middle of the proverbial mess the Court helped create in the first half of the twentieth century during a period of extensive railroad abandonments and before the move had been made to preserve rail corridors for future railroad reactivation.²¹ And not surprisingly, the Roberts Court did not deem the issue worthy of a thorough analysis of the lengthy history and jurisprudence of federal railroad law despite the purported commitment of many Justices to doctrines of originalism and adherence to legislative intent.²² Simply following an ill-

17. For instance, in 1880 the Supreme Court ruled that a pre-1871 Act FGROW was a transfer of a fee simple absolute to the railroad. *R.R. Co. v. Baldwin*, 103 U.S. 426, 429–30 (1880). In 1903, the Court ruled that a pre-1871 Act FGROW was a transfer of a limited fee upon an implied condition of reverter. *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903). In 1915, the Court extended that interpretation to 1875 Act FGROW. *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44, 45, 47 (1915). But *Stringham* was reversed in 1942 when the Court interpreted the railroad's interest in 1875 Act FGROW to be a mere easement in *Great N. Ry. Co. v. United States*, 315 U.S. 262, 278–79 (1942). The limited fee interpretation led Congress to enact at least two pieces of legislation in response: 43 U.S.C. §§ 912, 913 to dispose of FGROW corridors that reverted back to the United States. 43 U.S.C. §§ 912, 913 (2012). For a more detailed explanation, see *Rails-to-Trails*, *supra* note 9, § 78A.07(1)(b) and § 78A.10(2)(d) (describing judicial interpretations of FGROW).

18. *Baldwin*, 103 U.S. at 429–30.

19. *N. Pac. Ry. Co.*, 190 U.S. at 271; *Stringham*, 239 U.S. at 47.

20. *Great N. Ry. Co.*, 315 U.S. at 262, 277, 279.

21. Federal statutes currently include provisions that attempt to stanch the loss of vital railroad corridors through abandonment by allowing for the imposition of a public use condition. *E.g.*, 49 U.S.C. § 10905 (2012) (originally passed as The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31); 16 U.S.C. § 1247(d) (2012) (passed as The 1983 Amendments to the National Trails System Act, Pub. L. 98-11, § 208(2)).

22. For a thorough discussion of the legal history of FGROW, see Darwin 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, 86, 150, 151, 164–65 (2011) and 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., Sept./Oct. 2014, at 2, 5, 9–10. Although Justices Antonin Scalia and Clarence Thomas both purport to be originalists, neither one expressed any dismay over Chief Justice John Roberts's complete lack of historical basis for the Court's decision. Although the Court cited to Congress's supposed shift in

conceived ruling of 1942 that was arguably on a much narrower legal issue,²³ the Court reversed the Eleventh Circuit decision and ruled that the government gave an easement to the railroad via the right-of-way grant. The Court then held that the government gave all retained interests in the land to the Brandts when it issued the patent “subject to” the railroad’s right-of-way despite the fact that there was no discussion of the merits or consequences of that issue in the briefs or the opinion.²⁴ Consequently, the determination that the railroad obtained only an easement resulted in a holding that the government retained no interests whatsoever in 1875 Act FGROWS.²⁵ And following the Court’s unique logic, this meant that upon abandonment, railbanking, and conversion to interim trail use, the government *took* the private property of the plaintiff and other similarly situated patentees and now may owe compensation potentially in the hundreds of millions of dollars.²⁶

The Court misapplied the law and misinterpreted history in *Brandt Trust*.²⁷ The Court’s resulting precedent on takings, specifically the holding that the railroad received an easement in its FGROW, has notable and quite expensive implications. The Court of Federal Claims (CFC) has routinely held that if a railroad received only an easement in its corridor lands, whether by private deed or government grant, and it subsequently abandons or railbanks the corridor, which is then converted to a trail under the federal railbanking process, then adjacent landowners are entitled to compensation for a taking of their property rights.²⁸ That takings equation, however,

1871 away from the land grants, it did not cite any of the abundant legislative history of the 1875 Act that clearly showed Congress did not intend to create a different interest in the rights of ways.

23. See *Great N. Ry. Co.*, 315 U.S. at 270–71 (holding that “[t]he Act of March 3, 1875 . . . clearly grants only an easement, and not a fee,” in a case where a railroad company sought rights “to the oil and minerals underlying its right of way . . .”).

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

25. *Id.* at 1268.

26. *Haggart v. United States*, 116 Fed. Cl. 131, 136 (Fed. Cl. 2014). The value of the Brandt’s land is not in the hundreds of millions, but if the taxpayer has to pay landowners for the purported property rights taken of all FGROW that is converted to a recreational trail, the bill will be well over \$100 million. In fact, the CFC has authorized over \$140 million in compensation for a single trail in Washington State. *Id.* at 149.

27. See generally Wright, *supra* note 22 (arguing that the holding in *Brandt Trust v. United States* is against the public’s interest); Danaya C. Wright, *Reliance Interests and Takings Liability for Rail-Trail Conversions: Marvin M. Brandt Revocable Trust v. United States*, 44 ENVTL. L. REP’R. 10173, 10181–83 (2014) (describing the history relevant to *Brandt Trust v. United States*); *Rails-to-Trails*, *supra* note 9, § 78A.10 (surveying the history and relevant law surrounding the rails-to-trails movement).

28. *E.g.*, *Rasmuson v. United States*, 109 Fed. Cl. 267, 368–69 (Fed. Cl. 2013); *Burgess v. United States*, 109 Fed. Cl. 223, 239 (Fed. Cl. 2013); *Howard v. United States*, 106 Fed. Cl. 343, 368–69 (Fed. Cl. 2012); *Rhutasel v. United States*, 105 Fed. Cl. 220, 229–30 (Fed. Cl. 2012); *Toscano v. United States*, 107 Fed. Cl. 179, 188 (Fed. Cl. 2012); *Thomas v. United States*, 106 Fed. Cl. 467, 485–

depends on two notable fallacies: that adjacent landowners have compensable property rights in rail corridors held as easements simply by virtue of being adjacent landowners, and that the railroad easement is so narrow in scope that it does not permit conversion to a trail. What *Brandt Trust* does to the deluge of takings cases filed in the CFC is expand the potential universe of claims by adding the tens of thousands of miles of railroad corridor that were built using federal railroad grants.²⁹ Therefore, this analysis focuses more on the takings cases themselves and less on *Brandt Trust* because at a basic level all of the cases suffer the same flaws. *Brandt Trust* merely adds new categories of land into the class for which takings claims are being made.

This Article focuses on three principal points in the takings cases. The first concerns the claims by adjacent landowners that they have some viable property rights in the land underlying the railroad easement itself. Of course, without a property right in the corridor lands, they would have no takings claim. That threshold question has received very little scholarly treatment and, in the context of conversions of rail corridors to trails, the CFC has adopted a position that adjacent landowners will be deemed to have a property interest if the railroad holds only an easement under a very shaky rule: the *centerline presumption*.³⁰ The origin of the centerline presumption, the strip and gore doctrine, shows that the presumption should not be applied to railroad rights of way, and yet the CFC and some state courts have simply ignored the legal history altogether, as though these are

86 (Fed. Cl. 2012); *Macy Elevator, Inc. v. United States*, 105 Fed. Cl. 195, 199 (Fed. Cl. 2012); *Buford v. United States*, 103 Fed. Cl. 522, 533 (Fed. Cl. 2012); *Haggart v. United States*, 108 Fed. Cl. 70, 95 (Fed. Cl. 2012); *Beres v. United States*, 104 Fed. Cl. 408, 457 (Fed. Cl. 2012); *Dana Hodges Trust v. United States*, 101 Fed. Cl. 549, 561 (Fed. Cl. 2011); *Thompson v. United States*, 101 Fed. Cl. 416, 434 (Fed. Cl. 2011); *Ybanez v. United States*, 98 Fed. Cl. 659, 671 (Fed. Cl. 2011); *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 735 (Fed. Cl. 2011); *Rogers v. United States*, 90 Fed. Cl. 418, 434 (Fed. Cl. 2009).

29. It has been estimated that as much as half of all railroad miles were constructed on FGROW, and that two-thirds of that construction occurred on 1875 Act FGROW. By the 1920s, there were over 270,000 miles of active railroad corridor. See PAMELA BALDWIN & AARON M. FLYNN, CONG. RESEARCH SERV., RL32140, FEDERAL RAILROAD RIGHTS OF WAY 2, 3 (2006) (discussing “railroad rights of way granted by the federal government . . . under the 1875 right of way statute”). That would mean that as much as 90,000 miles were built on 1875 Act FGROW, and if one-third of all the 256 railbanked corridors were on 1875 Act FGROW, that could mean as many as 1,500 miles have been railbanked and have been or could be converted to trails. See RAILS TO TRAILS CONSERVANCY, RAILBANKING AND RAIL TRAILS: A LEGACY FOR THE FUTURE 1 (2006), available at <http://www.railstotrails.org/resourcehandler.ashx?id=3489> (summarizing statistics on railbanking nationwide). Given that a mere twenty-five mile corridor in *Haggart* resulted in \$140 million in liability, the potential for 1,500 miles is staggering. *Haggart*, 116 Fed. Cl. 131, 136. And 1,500 miles are so few compared to the 140,000 miles that have been abandoned since 1920.

30. For a discussion of the centerline presumption, see *infra* Part III.B (defining and describing the application of the centerline presumption).

new issues, never having arisen in the nearly 200 years of railroad operation in this country.³¹

The second flaw concerns the scope of the railroad's easement and whether it is expansive enough to encompass rail preservation and trail use without triggering an abandonment or arguably exceeding the scope of the servitude. Ironically, in the over 100 decisions issued by the CFC on the takings claims in these rails-to-trails cases, the court has never yet used the term *commercial easement in gross*, which is the type of easement that is acquired by railroads when they do not acquire fee interests in their corridor lands.³² The history of the commercial easement in gross and its broad scope both support an expansive interpretation of the railroad easement to include other public transportation purposes. If the courts fully analyzed the history, purpose, and scope of the commercial easement in gross, they would discover that under most state laws a railroad easement is broad enough to encompass other public transportation uses without triggering takings liability when a railroad easement is preserved and used for other, non-conflicting public transportation uses.

Third, the CFC has ordered compensation for the property rights that are supposedly interfered with by conversion of abandoned rail corridors to trails as though the landowner's land was completely unencumbered by any commercial easement or railroad use whatsoever, and that the property interest taken by the government is not only a trail easement, but a new easement for future railroad reactivation. Without acknowledging the uniform law that non-user does not extinguish an easement,³³ the CFC is ordering that landowners be compensated for a taking of a completely new railroad easement, which seems to defy the physical facts on the ground: that land owners knowingly acquired land adjacent to an active railroad corridor on which there were permanent structures.³⁴ Landowners were

31. See *infra* notes 69–76 and accompanying text (explaining the evolution of property labels).

32. In a Westlaw search of all federal cases, the term “commercial easement in gross” produced only six cases, none of which involved a railroad. The CFC, in *Toscano v. United States*, does refer to the railroad corridor as a subeasement but fails to accord that finding any weight. *Toscano v. United States*, 107 Fed. Cl. 179, 187 (Fed. Cl. 2012). On the other hand, a Westlaw search of all state cases produced sixty cases involving easements in gross that referenced the robust nature of railroad easements.

33. *Wash. Sec. & Inv. Corp. v. Horse Heaven Heights, Inc.*, 130 P.3d 880, 884–85 (Wash. Ct. App. 2006); *Netherlands Am. Mortg. Bank v. E. Ry. & Lumber Co.*, 252 P. 916, 918 (Wash. 1927); *S. Ry. Co. v. Bd. of Comm'rs of Vanderburgh Cnty.*, 426 N.E.2d 445, 447 (Ind. Ct. App. 1981). See also *Rails-to-Trails*, *supra* note 9, § 78A.10(2)(a) (stating the uniform law).

34. *Whispell Foreign Cars, Inc. v. United States*, 106 Fed. Cl. 635, 638 (Fed. Cl. 2012); *Nordhus Family Trust v. United States*, 106 Fed. Cl. 289, 293 (Fed. Cl. 2012); *Macy Elevator, Inc. v. United States*, 105 Fed. Cl. 195, 199 (Fed. Cl. 2012); *Ingram v. United States*, 105 Fed. Cl. 518, 541 (Fed. Cl. 2012); *Toscano*, 107 Fed. Cl. at 188; *Carolina Plating Works, Inc. v. United States*, 102 Fed.

compensated thoroughly in the nineteenth century when railroad easements were acquired in the first place.³⁵ To now treat those easements as fully extinguished, requiring additional compensation for the continuation of a new railroad easement, means that the public taxpayer has to pay again to preserve what was already paid for in full over a hundred years ago.

After providing a brief explanation of railroad development, railbanking, the takings cases, and the *Brandt Trust* decision, this Article will explore the implications of each of these three legal issues at the heart of the takings disputes. What makes the decision in *Brandt Trust* particularly disappointing is not that the Court came to the wrong conclusion in its interpretation of the railroad's interest in FGROW granted pursuant to the 1875 Act, but that its wrong interpretation adds all of the 1875 Act FGROW lands to the class of potential takings cases that already suffer serious legal and logical infirmities. The Court's hasty decision simply compounds the disastrous effects of the CFC's already disastrous takings jurisprudence in this area.

I. A WHIRLWIND TOUR OF RAILROAD HISTORY, LAW, AND PROPERTY RIGHTS

In the nineteenth century when the railroads were being built, most acquired land for their corridors either through a private deed from individual landowners, eminent domain, adverse possession, or via a state or federal land grant.³⁶ In most cases, the mechanism of land acquisition did not indicate anything about the property rights in the land that were actually transferred to the railroads. Many private grants used the same form deeds as were used for other transfers of fee interests in land prevalent in the local jurisdiction.³⁷ Most eminent domain petitions indicated that the railroad was

Cl. 555, 560 (Fed. Cl. 2011); *Rogers v. United States*, 101 Fed. Cl. 287, 296 (Fed. Cl. 2011); *Ybanez v. United States*, 102 Fed. Cl. 82, 84 (Fed. Cl. 2011).

35. See *Rails-to-Trails*, *supra* note 9, § 78A.03 (describing the typical structure of property sales involving easement land).

36. *Id.* § 78A.06(2); Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Jurisprudence?*, 26 COLUM. J. OF ENVTL. L., 399, 441 (2001); 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, 365–72, 379 (2000); JAMES ELY, JR., *RAILROADS AND AMERICAN LAW* 37, 282 (2001).

37. See, e.g., *Gilbert v. Mo., K. & T. Ry. Co.*, 185 F. 102 (8th Cir. 1911) (“[T]he deed that was executed for the purpose of conveying the land, when construed with reference to the laws of Oklahoma, conveyed an estate in fee.”); *Radetsky v. Jorgensen*, 202 P. 175, 176 (Colo. 1921) (“[W]e cannot arrive at any other conclusion than that an estate in fee simple was conveyed.”); *Nesral Prod. Co. v. St. Louis, B. & M. Ry. Co.*, 84 S.W.2d 805, 809 (Tex. Civ. App. 1935) (recognizing fee estate land grants as a fee-simple title interest).

condemning the land for its railroad, and requested appraisal of two sets of damages: for the corridor land taking, and ancillary damages to retained land by having a long strip cut out of someone's farm.³⁸ If a railroad could not identify the landowner, it would simply enter, build, and expect the landowner to come complaining, seeking compensation in what was called inverse condemnation.³⁹ In such cases the railroad usually would pay the damages and the landowner would give a deed, but in some cases the landowner never made a claim or refused to accept the tendered damages.⁴⁰ And in the case of virtually all federal and many state grants to the railroads, the legislation stated that a right-of-way was granted, without spelling out whether the term referred to a corridor of land or a specific property right, like an easement.⁴¹

Throughout most of the nineteenth century, the actual character of the railroad's property rights acquired were not carefully identified, either in deeds or court judgments. Cases referred to *land*, *title*, or *possession* without identifying whether the railroad received a fee simple absolute, a fee simple subject to a condition subsequent, an easement, a license, or

38. See *Rails-to-Trails*, *supra* note 9, § 78A.06(2)(b) (noting landowner's demand for compensation at the outset of construction). See also ELY, *supra* note 36, at 190 (describing eminent domain compensation); John L. Plattner & Kenneth F. Johannson, Note, *Railroad, Grants and Condemnation: Title and Interest Acquired in Railroad Rights-of-Way*, 37 N.D. L. REV. 266, 277-82 (1961) (summarizing the law governing land acquired by a railroad under eminent domain); Philip A. Danielson, *The Real Property Interest Created in a Railroad upon Acquisition of its "Right of Way,"* 27 ROCKY MTN. L. REV. 73, 75-76 (1954) (describing an eminent domain decree).

39. Today, *inverse condemnation* is most often used for government regulation that negatively affects value or development rights. However, the term originates from the nineteenth century in the context of turnpikes, canals, railroads, and mills where the entity with eminent domain powers entered land and constructed improvements but failed to exercise its eminent domain power and condemn the land. Landowners brought suit to force the entity to condemn the land and pay for it. See, e.g., *Steele v. W. Inland Lock Nav. Co.*, 2 Johns. 283, 283 (N.Y. Sup. Ct. 1807) (describing the construction events leading up to a landowner's complaint); *Gedney v. Inhabitants of Tewksbury*, 3 Mass. 307, 307 (Mass. 1807) (granting relief to landowners whose property was disrupted by highway construction).

40. In the first case, the railroad simply went on operating and, after the statutory period for adverse possession ran, a long lost landowner who showed up would not be entitled to an action for ejectment, but might receive some compensation for the damages caused by the railroad's trespass. In either event, the railroad's title would be affirmed. In the second case of the landowner who refused to accept the tendered damages, the railroad would initiate condemnation proceedings. See *Rails-to-Trails*, *supra* note 9, § 78A.06(2)(B) (describing the temporal element in compensation awards). For example, see *Lawrence and Others' Appeal*, 78 Pa. 365, 369 (Pa. 1875) (recognizing that a railroad's title vested upon railroad's entry and construction); *Detroit, H & I.R. Co. v. Forbes*, 30 Mich. 165, 167 (1874) (holding that a deed conveyed land even though the court discussed the conveyance as a right of way).

41. The Supreme Court has acknowledged that the term right of way has two common meanings. *Joy v. City of St. Louis*, 138 U.S. 1, 44 (1890) ("[T]he term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed.").

some other hybrid property right.⁴² Many deeds and court judgments might refer to the *land* acquired as a *right-of-way*, usually using the term right-of-way to refer to the physical corridor: for example, when a landowner retained the right to a grade crossing across the right-of-way.⁴³ The use of the term *right-of-way* was not equated with an easement until the end of the nineteenth century when other legal changes had occurred to make the easement a sufficient property right for an operating railroad, and long after many of the deeds, statutes, and court judgments had been issued.⁴⁴

Although most private deeds conveyed a *strip of land*, or the *following premises*, virtually all federal and state railroad grants used the term *right-of-way* to refer to the property given to the railroads for corridor and road construction.⁴⁵ This term underwent a tremendous transformation during the last half of the nineteenth century as industrialization and rapid expansion revealed that the old common law categories of property law were inadequate for protecting the myriad competing interests in a burgeoning America.⁴⁶ Under the common law of Blackstone's day, a right-of-way was a personal right of passage over the land of another.⁴⁷ It was an incorporeal hereditament that was not considered a real property interest, it often terminated with the death of the right holder, and it was non-exclusive.⁴⁸ Blackstone explained the right-of-way as follows:

A fourth species of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be granted on a special permission; as when the owner of land *grants* to another the liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone: it dies with the person . . . A

42. *Rails-to-Trails*, *supra* note 9, § 78A.06(3).

43. *See, e.g.*, *Faus v. City of Los Angeles*, 431 P.2d 849, 854 (Cal. 1967) (describing a physical corridor's many uses); *Bouche v. Wagner*, 293 P.2d 203, 209 (Ore. 1956) (describing judicial interpretation of conveyances as rights of way).

44. *See* discussion *infra* Part III.A.

45. *Rails to Trails*, *supra* note 9, § 78A.06(3)(b).

46. *Id.* § 78A.06(2)(f); Roberts, *supra* note 22, at 94.

47. 2 WILLIAM BLACKSTONE, COMMENTARIES *35-36.

48. *Id.*

way may be also by *prescription* . . . [or] by act and operation of law.⁴⁹

In Blackstone's day, the common law recognized that there were private ways, which were private easements, and there were public ways, which encompassed the king's highways or other public thoroughfares.⁵⁰ Neither adequately defined the rights of a private railroad that needed to alter drainage, build permanent structures, dig into the subsurface of the land for support, locate ballast for tracks and ties, or extend into the airspace for all variety of structures from bridges to cranes to water towers. Railroads also needed exclusive possession of their corridor lands because many state laws required that they fence their roads to protect livestock on adjoining land,⁵¹ mow their corridors to reduce the threat of fires,⁵² and fence out landowners who allowed their cattle on the tracks or drove their farm equipment over the tracks because they posed serious threats to public safety.⁵³ Thus, the right-of-way easement of Blackstone's day was simply ill-equipped to provide the necessary protection for the operating railroad.

From the 1830s to the 1870s, as the railroads were rapidly being built, the exact contours of the property rights being acquired by the railroads were not the issue usually litigated. In very few cases did the courts actually identify the property rights the railroads acquired; in most, the court simply ruled that the railroad was acting within the scope of its property rights or had exceeded the scope, very often, by reference to the public character of the railroad's operation.⁵⁴ This was a period in which the railroads prevailed in virtually all disputes about the use and operation of the land, although

49. *Id.*

50. *See id.* at *36 (describing access to public and private right of ways).

51. ELY, *supra* note 36, at 120–21.

52. *Id.* at 123–24.

53. *See id.* at 122 (describing railroad liability for failure to erect protective fencing). *Rails-to-Trails*, *supra* note 9, § 78A.06(3)(b).

54. *See generally* A.E. Korpela, Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3d 973, 973–1039 (1966) (describing the property rights of railroads). The vast majority of the cases cited in this ALR occurred after the 1890s. *Id.* Prior to that, many of the cases simply held that the railroad was acting within its lawful rights. *See, e.g.,* *Detroit, H. & I.R. Co. v. Forbes*, 30 Mich. 165, 175 (1874) (describing a railroad's rights in a corridor 100 feet in width as a floating right that operates as a conveyance of title by the actual construction of the road); *Coe v. Columbus, P. & I.R. Co.*, 10 Ohio St. 372, 402–03 (1859) (enforcing a railroad's property rights); *Babcock v. W.R. Corp.*, 9 Metcalf 553, 556 (Ma. 1845) (allowing railroad to expand culverts and ditches into adjoining land); *Luderbrun v. Duffy*, 2 Pa. 398, 400 (1845) (involving right of railroad to access adjacent land within the scope of railroad charter).

they would be required to pay damages to landowners for harm to land and for land taken for railroad purposes.⁵⁵

But a series of economic depressions in the 1880s and 1890s caused many railroads that had been chartered, and may have been partially constructed, to fail.⁵⁶ They might have acquired some of the land for their road but not completed all parcel acquisition before they went into bankruptcy, receiverships, or disappeared; or they might have acquired the land but not had sufficient economic resources to complete construction of the roads.⁵⁷ Their failure left landowners with a strip of land taken out of their farms that were simply abandoned by the railroads or, worse, subject to sale by receivers to pay creditors. If the company held a fee interest, it could transfer its corridor lands to strangers, resulting in permanent bisection of a grantor's farm. But if the land returned to the original grantor via a reversion, the landowner would be able to reclaim possession upon the railroad's failure. When considering the effects of a failed railroad, the nature of the property rights it received suddenly mattered a great deal, where it had mattered very little with an operating railroad so long as the railroad had exclusive possession and control.

Unfortunately, however, few landowners had thought to include any reversionary language in their deeds, deeds that were usually drafted by the railroad's agents. State laws mandating a presumption that fee interests pass unless a lesser interest was clearly articulated resulted in the railroads' ability to retain and transfer any corridor lands they had acquired in fee simple. This was to the detriment of the original landowners, many of whom donated the land to the railroads in the first place because of the expected benefit of a nearby railroad.⁵⁸ But the hardship to landowners who had conveyed a strip of land for a railroad that was never built was manifest. It was also true that if the railroad was actually constructed, few ever imagined it would go out of service and be abandoned. Thus, the benefits to adjoining land of having the nearby access of a railroad was often a sufficient enough benefit to justify protecting the railroad's property rights as fee-like interests if the railroad was actually built. But with the late-nineteenth century reality that the railroad network was over-constructed and that far more railroads were planned and chartered than

55. ELY, *supra* note 36, at 190, 192. "Until about 1870 railroad law was largely promotive in character." *Id.* at 41.

56. *Id.* at 175.

57. *Id.* at 175, 177.

58. *Id.* at 37. For cases holding that the statutory form of a deed governed, see *Keen v. Cleveland, C., C. & St. L. Ry. Co.*, 64 N.E.2d 499, 502 (Ill. 1945); *Rockford Trust Co. v. Moon*, 18 N.E.2d 447, 448 (Ill. 1938); *In re Battelle*, 97 N.E. 1004, 1006 (Mass. 1912).

would ever be built, judges, railroads, legislators, and landowners awoke to a new reality: The property rights the railroads received mattered more in the context of forfeitures than in the context of operating roads.

The deceptively simple answer was a judicial shift in the interpretation of a *right-of-way* as an *easement*, rather than a fee interest.⁵⁹ Leaving the burdened land intact, easements terminate upon abandonment and simply disappear. If a railroad received only an easement rather than a fee interest, the landowner would be deemed to have retained the underlying fee to the corridor lands and could retake possession upon forfeiture by the railroads without having to initiate any legal proceedings. If landowners retained a possibility of reverter or a power of termination through explicit reversionary language in their deeds, that was great. But for the thousands and thousands of landowners whose land was taken by eminent domain or adverse possession, or whose deeds granted a right-of-way, the judicial answer to the growing forfeiture problem was the easement. However, that Blackstonian easement was a non-exclusive property right that did not adequately provide for the needs of an operating railroad.

Over the next thirty to forty years, state and federal courts grappled with the two-headed problem: how to define a property right that was sufficiently robust for operating railroads that needed a fee-like interest of exclusive possession, but that also terminated automatically upon forfeiture or failure and allowed the grantor landowner to retake possession. That property right needed to be freely transferable as railroads merged or changed ownership, and it needed to be divisible to permit one railroad company to allow another company's trains on its tracks. But that exclusive dominion and control needed to inure to the benefit of the original landowner when the use ceased. The answer was the *railroad easement*, a hybrid property right that matched the other kinds of commercial easements in gross that were evolving as a result of industrial development throughout the country for public service entities.⁶⁰ The common law of Blackstone's

59. See Korpela, *supra* note 54, at 1013 ("The general principle that a deed to a railroad company which conveys a 'right' rather than a strip . . . must be construed as conveying an easement rather than a fee . . .").

60. The history of the commercial easement in gross is interesting. Many courts just accepted the railroad easement as a completely different kind of easement in gross that was fully alienable and divisible without batting an eye. Others balked at the use of the term *easement* to describe a property right that was more robust than the Blackstonian private right of way, which was a personal easement in gross. It wasn't until the 1920s that scholars began to recognize the division in the case law. See W.R.V., Comment, *Assignability of Easements in Gross*, 32 YALE L.J. 813, 814, 816-17 (1923). And it really was not until the 1940s before the issue received much attention at all. See George Kloek, *Assignability and Divisibility of Easements in Gross*, 22 CHI.-KENT L. REV. 239, 239-40 (1944) (noting variance in judicial interpretation of easements); Gerald E. Welsh, *The Assignability of Easements in Gross*, 12 U. CHI. L. REV. 276, 276 (1945). In 1944 the RESTATEMENT (FIRST) OF PROPERTY

day did not recognize a species of easement that was exclusive, that could be easily transferred as companies grew, merged, consolidated, and expanded both in services and in technologies, and which allowed for placement of permanent structures. Due to the rapid growth of public services during the turn of the century, the American common law quickly developed a property right that was exclusive, but that terminated if the right was no longer being used for its given public purpose.

However, this new property right did not come without its own share of confusion. As one commentator explained:

It should be pointed out that if the railroad's interest is construed as an easement, it is very different from the usual easement. It is a commercial easement in gross, which can be freely assigned. The railroad is entitled to exclusive possession of the land, and can bring ejectment, even though an easement is not a possessory estate in land. And while possession of the fee by a servient owner is not usually considered adverse to the owner of an easement thereon, nevertheless the servient owner of the fee under a railroad easement can adversely possess parts of the railroad right of way. These similarities between the railroad easement and possessory estates in land are a cause of a great deal of the confusion in this whole area, and should be kept carefully in mind.⁶¹

The history and scope of commercial easements in gross are addressed later in Part IV. For now it is important to understand that the easement interest that evolved in the late nineteenth century was not the Blackstonian right of passage, but rather was a robust and exclusive property right that had fee-like and easement-like qualities.⁶² Consequently, as the railroad easement evolved, courts explained that the easement had the “attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.”⁶³ Railroads did not care about the label of the property right so long as they were protected

acknowledged the existence of commercial easements in gross, stating that whether an easement in gross is freely alienable, divisible, or apportionable depended on whether it was exclusive or non-exclusive. RESTATEMENT (FIRST) OF PROP. §§ 489, 493 (1945). But the RESTATEMENT did not use the term “commercial” to characterize exclusive easements in gross. A pithy history of the easement in gross is provided by Alan David Hegi, Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109 (1986).

61. Danielson, *supra* note 38, at 74–75 (citations omitted).

62. See Plattner & Johansson, *supra* note 38, at 268 (“The implications are that the interest created in a railroad’s right-of-way lies somewhere between a qualified fee and an easement.”).

63. *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 183 (1898).

in their exclusive rights to possession. Landowners cared deeply because the railroad easement inured to their benefit upon termination, while fee interests inured to the benefit of the railroads upon termination of rail services.

As a result of the development of the railroad easement, many state courts imposed limits on the property rights railroads could acquire by adverse possession or eminent domain. Courts held that the railroad only needed the bare minimum property right necessary to accomplish its purpose, and the railroad easement fit that requirement.⁶⁴ When only fee interests entailed exclusive possession, the railroads needed to condemn fee interests.⁶⁵ But as the railroad easement evolved, states began passing laws limiting the property rights railroads could acquire by condemnation or by donation to mere easements.⁶⁶ State courts also interpreted deeds that used the term *right-of-way* to mean that only an easement passed, and not a fee interest.⁶⁷ Where deeds did not use the term *right-of-way*, and conformed to statutory requirements for fee interests, the courts were bound to hold that fee interests passed to the railroads. Even in such cases, courts sometimes imposed an implied possibility of reverter in the case of a termination of the railroad's operations to prevent the railroad from transferring strips of land to the detriment of adjacent landowners' farms.⁶⁸

II. CONFUSION CONFOUNDED: PROPERTY RIGHTS IN FGROW

Not surprisingly, the federal and state courts jumped on the easement bandwagon when interpreting government grants of right-of-way to the railroads. As the railroad easement evolved into a robust hybrid property right that protected the needs of the railroads, there was no reason to conclude that the land, or title to corridor lands, had passed to railroads via government grants any more than they did via private deeds. And this evolution is starkly illustrated in the Supreme Court's own interpretations of FGROW over this period. In 1880, the Court interpreted an 1866 right-of-way grant to have passed a fee simple absolute interest to the railroad.⁶⁹ By 1903, however, in a case involving a claim of adverse

64. *Rails-to-Trails*, *supra* note 9, § 78A.06(b).

65. Many states actually mandated that railroads acquire fee interests by condemnation in the middle of the nineteenth century. *Id.*

66. *Id.*; ELY, *supra* note 36, at 37.

67. *Rails-to-Trails*, *supra* note 9, § 78A.07(1)(c).

68. *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903). See Korpela, *supra* note 54, at 989 (“The interest conveyed by the instrument is limited by the use for which the land is acquired, and when that use is abandoned the property reverts to the owner of the fee.”).

69. *R.R. Co. v. Baldwin*, 103 U.S. 426, 428–30 (1880).

possession by the adjoining landowner into the railroad corridor, the Court held that the railroad received a fee simple subject to a condition subsequent.⁷⁰ The Court called it a “limited fee, made on an implied condition of reverter.”⁷¹ Case law of the period, however, makes it quite clear that the Court meant a defeasible fee simple that would terminate and inure to the United States upon forfeiture or termination.⁷² In fact, only the United States could assert its power of termination for breach of the conditions in the grant.⁷³ In 1915, the Court interpreted an 1875 Act FGROW to affirm the limited fee holding.⁷⁴

In 1942, although the railroad easement was fully formed, the Supreme Court faced a dispute between the railroad and the government over access to subsurface mineral rights. The Court held that 1875 Act FGROWs only transferred an easement to the railroad; the underlying fee owner, the government, retained the mineral rights in the corridor land itself.⁷⁵ In reversing the 1915 *Stringham* decision holding 1875 Act FGROWs to be limited fee interests, the Court stated:

The [1875] Act was designed to permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement. The achievement of that purpose does not compel a construction of the right of way grant as conveying a fee title to the land and the underlying minerals; a

70. *N. Pac. Ry. Co.*, 190 U.S. at 270–71.

71. *Id.* at 271.

72. In *Bybee*, the lower court explained how this worked:

This act is a present grant, but the particular sections that pass to the company under it cannot be ascertained until the route is definitely located; but, when ascertained, the title attaches from the date of the act. It is also a grant made on a condition subsequent,—that the road shall be completed by a prescribed time,—but no one can take advantage of a breach of this condition but the government,—the grantor,—and in the nature of things it can only do so by judicial proceedings authorized by law, or a legislative resumption of the grant. This well-settled rule of law concerning the operation of a condition subsequent annexed to an estate in lands in fee, and the effect of a breach thereof, has been uniformly applied by the supreme court to the grants of the public lands made by congress in aid of the construction of railways, with the condition annexed that they should be completed within a specified time.

Bybee v. Or. & C. Ry. Co., 26 F. 586, 588 (C.C.D. Or. 1886) (citing *Railroad v. Smith*, 9 Wall. 97 (1869); *Mo. Ry. Co. v. Kan. Pac. Ry. Co.*, 97 U.S. 496 (1878)); *Leavenworth Ry. Co. v. U.S.*, 92 U.S. 740 (1875); *Schulenberg v. Harriman*, 21 Wall. 60 (1874).

73. *Id.*

74. *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44, 45, 47 (1915).

75. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 270, 279–80 (1942).

railroad may be operated though its right of way be but an easement.⁷⁶

This decision was not particularly momentous at the time because the robust exclusive railroad easement fully protected the needs of the operating railroad. In fact, as the Tenth Circuit explained twenty-five years later, the label of the railroad's property rights is not relevant to the similarities between the railroad easement and the limited fee. The court stated:

For the purposes of this case, we are not impressed with the labels applied to the title of the railroads in their rights-of-way across the public lands of the United States. 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.⁷⁷

In 2014, the Court affirmed the easement label for 1875 Act FGROWs in *Brandt Trust*, but added another level of confusion when it indicated its support for the petitioner's claim that these are mere "common law" easements.⁷⁸ Citing the *Restatement (Third) of Property: Servitudes*, Chief Justice John Roberts explained that: "An easement is a 'nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.' . . . Those basic common law principles resolve this case."⁷⁹ By equating the railroad easement with basic common law principles, Chief Justice Roberts perpetuated the confusion that has been adroitly exploited

76. *Id.* at 272.

77. *Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967) (citations omitted).

78. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1266 (2014). There is no doubt that Congress's intent controls the interpretation of the 1875 Act. *Mo., Kan. & Tex. R. Co. v. Kan. Pac. R. Co.*, 97 U.S. 491, 497 (1878) ("It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress."). Yet, common law principles are still important. *Shaw v. Merchants' Nat'l Bank*, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."). "Nothing in the language of the 1875 Act suggests that 1875 Act ROWs are anything but common law easements." Brief for Petitioner at 31–32, *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014) (No. 12-1173).

79. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1265–66 (2014) (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (1998)).

by petitioner landowners in these takings cases. They have tried to collapse the robust, common law, exclusive railroad easement with the common law, incorporeal, Blackstonian non-exclusive right-of-way, in order to minimize the property rights obtained by the railroads and thereby bolster the property rights in the servient estate holder.

Moreover, both the railroad easement and the Blackstonian private way are creatures of the common law, and both share the critical characteristic of termination upon abandonment. What they do not share, and which is explained further in Part III below, is that the private way of Blackstone's common law is a personal, non-exclusive, non-assignable and non-divisible easement in gross. In contrast, the railroad easement is an exclusive, robust public commercial easement in gross that is freely assignable, divisible, and apportionable. That difference is crucial to a correct understanding of the scope of these easements and whether they can be properly repurposed for other public transportation needs.

In denying the railroad mineral rights underlying its FGROW in 1942, the Court adhered to numerous doctrines that protected the United States' interests, especially the presumption that nothing passes out of the government's ownership except property rights that are expressly noted.⁸⁰ What the decision expressly did not decide, however, was whether the government's mineral interests or servient fee interests in FGROW passed to patentees of the adjoining land via subsequent patents. In other cases involving different era FGROWs, the Court had expressly held that the government's reversionary rights in FGROWs did not pass to patentees of the land through which the railroad right-of-way passed.⁸¹ But in 1942, the Court did not consider ownership of the underlying fee if the government had issued a patent for the land traversed by the railroad's right-of-way. And that is the next step in this complicated jurisprudential story.

III. IF THE RAILROAD ACQUIRES ONLY AN EASEMENT, WHO OWNS THE SERVIENT FEE?

This unanswered question is at the heart of the *Brandt Trust* case, and subsequent takings challenges to railbanked corridors. In the case of FGROW lands, regardless of whether they passed as easements or limited fee interests, the ultimate question was not the railroad's interest in the land, but the rights, if any, of subsequent patentees who took title to the land

80. For further discussion, see *infra* Part III.C.

81. *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 272 (1903); see *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44, 46–47 (1915) (affirming the trial court's holding that the railway company received a limited fee and not a fee simple absolute).

from the government subject to the railroad's pre-existing right-of-way. The entire discussion in *Brandt Trust* focused on whether the railroad received an easement or a limited fee; although Justices Stephen Breyer and Anthony Kennedy were both confounded by the meaning of a limited fee.⁸² In following the 1942 *Great Northern* case and affirming that 1875 Act FGROW passed an easement to the railroad, the Court did nothing new. The real issue was whether the power of termination, implied reversionary right, or servient fee interest retained by the government grantor passed by virtue of subsequent patents to private landowners, or whether these rights and interests were either expressly or impliedly reserved by the government as a result of various doctrines protecting public land interests. And on this crucial subject, the Court's complete treatment of the issue was the following:

When the United States patented the Fox Park parcel to Brandt's parents in 1976, it conveyed fee simple title to that land, "subject to those rights for railroad purposes" that had been granted to the LHP & P. The United States did not reserve to itself any interest in the right of way in that patent. Under *Great Northern*, the railroad thus had an easement in its right of way over land owned by the Brandts.⁸³

The fallacy of arguing that because the railroad received an easement, the Brandts received the underlying fee lies in the lack of any cogent support for that conclusion. The mere fact that the railroad acquired an easement simply means that the grantor retained the servient fee and not a power of termination. Whether the grantor, the United States in this case, conveyed its servient fee when it conveyed the adjoining land is an issue that certainly does not follow from the easement analysis, nor was it addressed in this case. Moreover, there is a significant body of law holding to the contrary, that the government does not transfer property rights unless explicit language is used in the patents. In fact, one of the most detailed discussions of why property rights do not pass from the United States into private ownership without explicit language in a deed or statute occurred in the very case the Court used to justify its decision: *Great Northern Railroad Co. v. United States*.⁸⁴ Without the servient fee having transferred to the

82. *Marvin M. Brandt Revocable Trust*, 134 S. Ct. at 1264–68. In oral arguments Justice Scalia stated that he had never heard of a limited fee. Transcript of Oral Argument at 56, *Marvin M. Brandt Revocable Trust*, 134 S. Ct. 1257 (No. 12-1173).

83. *Marvin M. Brandt Revocable Trust*, 134 S. Ct. at 1265.

84. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 272 (1942) ("But the Act is also subject to the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign

Brandts, they would not have had standing to object when the railroad abandoned its right-of-way and the corridor was converted to a recreational trail because they would have had no property rights in the corridor land itself upon which to ground a takings claim.

But the Court's treatment of this issue is, unfortunately, as sloppy as the CFC's treatment of similar issues in state law created railroad easements. Without a property right in the corridor land underlying the easement, landowners have no takings claim. But just because the railroad does not have the property right because it received only an easement, does not mean the patentee or adjoining property holder has the servient fee. That is a completely different issue, and one that was not briefed or argued before the Court in 1942 in *Great Northern* or in 2014 in *Brandt Trust*.⁸⁵ As with so many of these complex takings issues, the courts are quick to draw certain conclusions from the single issue of the property rights the railroad received without acknowledging the complex history of railroad easements, the burden of proof in property disputes generally, and the presumptions against implicit grants from the government. And those are the questions that should have been answered by the Court in *Brandt Trust*.

A. Burden of Proof—Landowners Need a Property Right to Support a Takings Claim

As the Supreme Court and the CFC have acknowledged, in order to pursue a claim for compensation of a taken property right, the petitioner must have a property right that was taken or interfered with.⁸⁶ In cases

grantor—“nothing passes but what is conveyed in clear and explicit language” (quoting *Caldwell v. United States*, 250 U.S. 14, 20 (1919)).

85. Although the petitioners in *Brandt Trust* argued that the government did not reserve any reversionary interests in the right of way when it issued the patent, they failed to engage with the clear presumption that only what is expressly in a grant from the sovereign passes any property rights. *Marvin M. Brandt Revocable Trust*, 134 S. Ct. at 1264. This argument is used to deny the railroad a right greater than an easement but is not likewise applied to the private patentee who is claiming to have received the United States' servient fee interests when the patent does not include such a grant. *Id.*

86. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 21 (1990) (O'Connor, J., concurring) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–04 (1984)) (“Determining what interest petitioners would have enjoyed under Vermont law, in the absence of the ICC's recent actions, will establish whether petitioners possess the predicate property interest that must underlie any takings claim.”); *Burgess v. United States*, 109 Fed. Cl. 223, 228 (2013) (stating that if the railroad held a fee interest in its corridor, the adjoining landowner “would have no right or interest in those parcels and could have no claim related to those parcels for a taking” (quoting *Preseault v. United States*, 100 F.3d 1525, 1533 (1996))); *Sutton v. United States*, 107 Fed. Cl. 436, 438 (Fed. Cl. 2012); see *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 514 (Fed. Cir. 2011) (inquiring into whether plaintiffs had a property right in the contested land); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1212 (Fed. Cir. 2005) (“We have developed a two-part test for determining whether ‘fairness and justice’ require compensation for burdens imposed by a particular government action.”).

where land is taken by eminent domain to build a highway or a courthouse, it is straightforward that a private property right is acquired by the government because title to the land itself is taken. In these rail-trail takings cases, however, the issue is far from straightforward. There is no doubt that if the railroad acquired fee simple absolute title to land for its road, and it conveys that title to a trail group to operate a trail, adjacent landowners have no cause for complaint.⁸⁷ Where the railroad acquired only an easement, and a private landowner continues to own the servient fee, the calculation becomes confusing when taking historical practices into account.

Historically, in the average situation when a nineteenth-century railroad planned to pass through an area, the railroad's agents would precede the construction crews and purchase or condemn the necessary land identified by the surveyors.⁸⁸ As mentioned above, most of the deeds used to transfer this land could reasonably have been understood to transfer fee simple title to the railroads because the railroads required exclusive possession in their corridor lands. But if the deed or the condemnation is interpreted to pass only an easement, even an exclusive railroad easement, the grantor has retained a non-possessory servient fee interest in the land underlying the easement. This is true if the grantor is a private entity or the United States pursuant to a FGROW grant. When and if the easement terminates, the servient fee is unburdened and full unfettered possession returns to the servient fee owner. That is straightforward property law.

Things begin to get complicated when the grantor of the servient fee either transfers his land or dies. In most cases, the grantor will transfer his retained land using a deed that describes the transferred land by reference to the outer edge of the railroad corridor and does not include the actual land underlying the railroad's easement for a very simple reason: In most cases the grantor believed he had transferred a fee interest to the railroad. Remember, it was not until late in the nineteenth century that the easement interpretation came into being, so most subsequent transfers by the grantor of his retained land would expressly exclude the railroad corridor, either through a metes and bounds description or by reference to the outer edge of the railroad corridor.⁸⁹ Now we have a problem. Do we assume that the

87. *Sutton v. United States*, 107 Fed. Cl. 436, 438 (Fed. Cl. 2012). They might have a nuisance claim or some other tort action if the adjoining landowner causes harm by using the land in an unreasonable way.

88. *See Rails-to-Trails*, *supra* note 9, § 78A.06(2)(b) (describing pre-construction land negotiations).

89. *See Rails-to-Trails*, *supra* note 9, § 78A.07(4) (characterizing the period's understanding of common law easements). Even if the grantor believed he granted only an easement to the railroad and that he had retained the servient fee in the railroad's corridor land, his lawyer would likely have been

grantor retained the servient fee underlying the railroad easement, in which case the grantor's remote heirs or devisees are likely to be owners of the servient fee? Or do we assume that the grantor intended to transfer his adjoining interest in the servient fee when he transferred the adjoining land to his successors but expressly excluded the corridor land? And unfortunately, in the absence of evidence of intent on the part of the grantor, the answer to this question is far from clear, and there are good reasons to support both interpretations.

In support of the grantor's heirs, there is the express language of the deed granting to successors only the adjoining land and not the land underlying the railroad's easement. In the case of possibilities of reverter and powers of termination (those future interests retained by the grantor when he grants to the railroad a defeasible fee interest), most states prohibited inter vivos transfers of these contingent future interests because it was understood that they were primarily of interest only to the grantor, and because free transferability would allow grantors to easily evade the effects of the rule against perpetuities.⁹⁰ Since the deeds do not specify that anything but the adjoining property was transferred, there is a strong presumption that the grantor retained the underlying servient fee and that it passed to his heirs or devisees upon his death.⁹¹ This presumption is also bolstered by the fact that the United States' powers of termination underlying FGROWs were held not to pass to patentees who received

risk-averse in drafting subsequent deeds because claiming property rights in the railroad's land that he did not have could open the grantor up to a claim of slander of title by the railroad. Since the railroad had exclusive possession and the grantee was unlikely to be paying for the fee interest underlying the railroad tracks, most landowners would simply except out the railroad corridor, figuring that the railroad was there to stay and that it just did not matter. Besides, the grantor had been compensated for the corridor land by the railroad, usually in an amount equal to or exceeding the value of the land in fee simple. *Id.*

90. See, e.g., *Cathedral of the Incarnation v. Garden City Co.*, 697 N.Y.S.2d 56, 59 (App. Div. 1999) (distinguishing between a right of reentry and a possibility of reverter); POWELL ON REAL PROPERTY: MICHAEL ALLAN WOLF DESK EDITION § 21.02(3)(b) (LexisNexis Matthew Bender 2014) [hereinafter POWELL] (describing interpretation of transferability); See also *Rails-to-Trails*, *supra* note 9, § 78A.08(3) (discussing powers of termination).

91. See *Buck v. Squiers*, 22 Vt. 484, 493 (1850) (explaining that the deed description should prevail). Deeds that "except" certain lands or rights should be deemed to expressly exclude that land, while deeds that "reserve" certain lands or rights should be deemed to include the land subject to the reservation.

In general, an "exception" means that some physical part of the grantor's real estate has not been parted with. It is a withdrawal from the operation of the grant of some part of the property which has been granted. A "reservation" does not affect the basic conveyance of the real estate in question, but instead reserves or recreates in the grantor some special interest in the land conveyed.

POWELL, *supra* note 90, §81A.05 (noting that the distinction between an exception and a reservation, although less important today, has historical significance).

patents to the land “subject to” the railroads’ right-of-way unless they were expressly identified.⁹² Moreover, there is also a presumption that where the deed description is explicit (expressly defining the outer edge of the corridor) rather than merely using the railroad corridor as a general boundary (defining the “xyz railroad corridor” as the boundary) the grantor retained his interests in the corridor.⁹³

In support of the adjoining landowners, there is a legal presumption that a grantor transfers all property interests he possesses when he grants an interest in land without expressly retaining lesser interests.⁹⁴ That presumption evolved, however, in the context where a landowner might convey a fee interest in a parcel and forget to include an appurtenant easement over adjoining land that benefits the transferred land.⁹⁵ Or, it applies when grantors impose restrictions on the use of land but fail to explicitly provide that possession will terminate and return to the grantor as a possibility of reverter.⁹⁶ Thus, a grant of land for hospital or park purposes, without express termination language and gift-over language, is usually interpreted to pass a fee simple absolute.⁹⁷ This presumption does not easily fit the case of servient fee interests in adjoining railroad corridors because the servient fee interest is a fee simple absolute interest in land, not an appurtenant incorporeal hereditament (as in the case of an easement), nor does it involve a non-possessory future interest like the possibility of

92. *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271–72 (1903) (quoting *Grand Trunk R.R. Co. v. Richardson*, 91 U.S. 454, 468 (1875)).

93. See discussion of strip and gore rule *infra* Part III.B. Furthermore, per POWELL ON REAL PROPERTY:

The rule that a boundary line will generally extend to the center of a monument with width will not apply in every case where property abuts a street, stream or right-of-way. In order for the canon to apply, the description must refer to the street, stream or right-of-way as a monument. Thus, if a grantor uses a metes and bounds description which coincidentally abuts a street or stream, the conveyance is controlled by the metes and bounds description.

POWELL, *supra* note 90, § 81A.05(3)(i)(iv) (citing *Roeder Co. v. Burlington N. Inc.*, 716 P.2d 855 (1986); *Northlake Marine Works, Inc. v. City of Seattle*, 857 P.2d 283 (1993)).

94. POWELL, *supra* note 90, § 81A.05(3)(b).

95. See 26A C.J.S. *Deeds: Generally* § 285 (2011) (noting that failure of a warranty deed to mention appurtenances does not prevent rights appurtenant to the land from being conveyed).

96. *W. Pittson v. Clear Spring Coal Co.*, 22 Pa. D. 190, 191–92 (Ct. Com. Pl. 1907); *Wood v. Bd. of Cnty. Comm’rs*, 759 P.2d 1250, 1251, 1253 (Wyo. 1988).

97. See *Little Miami, Inc. v. Wisecup*, 468 N.E.2d 935, 938 (Ohio. Ct. App. 1984) (“[W]here, as here, the granting clause conveys all the described real estate and contains no words of condition or forfeiture, there is no reverter clause or provision for a right of re-entry, and the only words of limitation appear in a prefatory clause describing the purpose of the acquisition . . . the intention of the parties is to convey, and the deed, in effect, does convey, an indefeasible fee simple interest in the property.”); *Walker v. Bd. of Comm’rs of Lucas Cnty.*, 598 N.E.2d 101, 102 (1991) (recognizing the effect of limiting language in a conveyance).

reverter. The servient fee interest is a fee simple absolute title to a valuable and possibly quite large piece of land. We normally would not deem it to have passed to a transferee in contradiction of express deed language and in violation of the Statute of Frauds. Nonetheless, although freehold interests in land cannot be abandoned, it is likely that the grantors' heirs have not kept track of their potential interests in retained railroad corridor land and do not generally make claims for it. This suggests that laches or prescription might be appropriate defenses to any claims they might make and that a presumption favoring adjacent landowners over remote heirs makes sense.

Thus, to pursue a takings claim for compensation, adjoining landowners either need to prove that they have title to the land underlying the railroad easement through written instruments like a deed, or they have to rely on a presumption or some statutory source giving them title to this land. At least four states have passed legislation providing that adjoining landowners will be deemed to own to the centerline of abandoned railroad corridors (where the railroad held only an easement): Arkansas, Indiana, Iowa, and North Carolina.⁹⁸ But the Indiana legislation applies the rule only in the absence of a valid claim by someone with a deed to the contrary.⁹⁹ It would seem, although the legislation has not been tested, that the grantor's heirs should be able to prove title simply by showing that their remote grantor transferred only the adjoining land and not the servient land in the corridor. The legislation in North Carolina was struck down as unconstitutional precisely because it purported to take land from the grantor's heirs and give it to adjoining landowners who had no legal title to the land.¹⁰⁰ The court followed the well-known doctrine that a person cannot lay claim to land based on the weaknesses of his neighbor's title but only on the strength of his own.¹⁰¹ Just because the railroad does not own

98. ARK. CODE ANN. § 18-15-1304 (2014); IND. CODE. § 32-23-11-10 (2014); IOWA CODE 327G.77(1) (2014); N.C. GEN. STAT. § 1-44.2(a)–(b) (2014) (noting the repeal of sub-section (c)).

99. IND. CODE. § 32-23-11-10(b) (2014). “If a railroad abandons its right to a railroad right-of-way, the railroad’s interest vests in the owner of the right-of-way fee with a deed that contains a description of the real property that includes the right-of-way.” *Id.*

If a deed described in subsection (b) does not exist, then the railroad’s interest vests in the owner of the adjoining fee. The interest of the railroad that vests in the owner of the adjoining fee is for the part of the right-of-way from the center line of the right-of-way to the adjoining property line.

Id. § 32-23-11-10(c). For an example of landowners who did not have deeds into the corridor, but based their property interests on the centerline presumption, see *Macy Elevator Inc., v. United States*, 97 Fed. Cl. 708, 710–11 (Fed. Cl. 2011) and *Howard v. United States*, 100 Fed. Cl. 230, 234 (Fed. Cl. 2011).

100. *McDonald’s Corp. v. Dwyer*, 450 S.E.2d 888, 891–92 (N.C. 1994).

101. 65 AM. JUR. 2D *Quieting Title and Determination of Adverse Claims to Receivers* § 72 (2011) (citing *Tester v. Tester*, 3 P.3d 109 (Mont. 2000)); *Ochsenbine v. Cadiz*, 853 N.E.2d 314 (Ohio App. 2005) (“In a quiet title action or a proceeding to remove a cloud from title, the burden of proof

the servient fee of the land does not mean that the adjoining landowner owns land not included in his deed any more than one owns his neighbor's house just because his neighbor has not paid his mortgage. Weaknesses in the railroad's title, especially as the party in possession, do not give an adjoining landowner a right to claim possession unless he has superior title.

Many state courts, and sometimes the CFC, are diligent in requiring that adjacent landowners prove their property rights in railroad corridor lands before they can make a takings claim.¹⁰² Courts state that the mere fact that a landowner owns the adjacent land is not a sufficient base for a takings claim when the railroad easement is converted to a trail.¹⁰³ In disputes between adjacent landowners and successors in interest to the original grantor or his heirs, the successors' heirs generally win.¹⁰⁴ This is appropriate because the adjacent landowner should be estopped from claiming that the description on his deed is inaccurate where there is

rests with the complainant as to all issues that arise upon the essential allegations of his or her complaint. Thus, the complainant must prove title in himself or herself”)

102. *See, e.g.*, *Asmussen v. United States*, 304 P.3d 552, 559–60 (Colo. 2013) (en banc) (discussing the burden on an adjacent landowner to prove ownership of property before the landowner may claim title to an abandoned right of way); *Blausey v. Norfolk S. Corp.*, No. OT-04-056, 2005 WL 2334680, ¶ 17 (Ohio App. Sept. 23, 2005) (describing appellants' lack of property rights); *Smith v. Malone*, 742 N.E.2d 785, 789–90 (Ill. App. Ct. 2000) (analyzing plaintiff's title to the land under the disputed right of way); *Marlow v. Malone*, 734 N.E.2d 195, 202, 205 (Ill. App. Ct. 2000) (describing requirement that landowner of property adjacent to a right of way must produce title to the land underlying the right of way to have a cause of action); *Keife v. Logan*, 75 P.3d 357, 360–61 (Nev. 2003) (describing appellant's lack of ability to prove private property rights in the land underlying the right of way); *Brown v. Washington*, 924 P.2d 908, 916 (Wash. 1996) (en banc) (describing lack of adjacent property owners' rights to abandoned railroad lands); *Burgess v. United States*, 109 Fed. Cl. 223, 228 (2013) (citing *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996)) (recognizing the importance of determining the type of property right in the contested corridor).

103. *See, e.g.*, *Blausey*, 2005 WL 2334680, ¶ 17 (requiring proof of title to establish the original conveyance as an easement); *Asmussen*, 304 P.3d 559 (Colo. 2013) (“The burden of proving title or ownership of real property falls on the person alleging ownership. This court has held that, in title disputes, ‘the plaintiff must rely on the strength of his own title rather than on the weakness in or lack of title in defendants.’” (quoting *Morrissey v. Achziger*, 364 P.2d 187, 189 (Colo. 1961) (en banc))). The CFC has not always upheld this requirement. *See Haggart v. United States*, 108 Fed. Cl. 70, 84 (Fed. Cl. 2012) (rejecting the government's argument that plaintiffs must show record title back to the grantor of the underlying fee). The court explained:

[P]laintiffs must only present the original deeds granting a right-of-way to the predecessor railroad and the deeds that show plaintiffs owned the property abutting the right of way at the time the NITU was issued. As long as those deeds do not contain language evincing the grantor's intent to withhold any interest in the abutting right of way, plaintiffs' burden is satisfied and the presumption that plaintiffs hold title to the center line of the right-of-way applies.

Id.

104. *McDonald's Corp.*, 450 S.E.2d at 891; *Ball v. Bailey*, No. 97CA2514, 1998 WL 282967, at *4 (Ohio Ct. App. Dec. 10, 1998); *Ball v. Crabtree*, No. 97CA2557, 1998 WL 895911, at *4 (Ohio Ct. App. Dec. 10, 1998).

evidence that the grantor intended to retain the servient fee underlying the railroad corridor. To the extent the North Carolina statute took the heirs' land and gave it to the adjacent landowner, the court held the statute unconstitutional.¹⁰⁵

The more likely scenario, however, is that there is not a successor to the original grantor, or that a court cannot find the grantor's heirs, and the only two parties claiming title are the railroad (or its successor the trail manager) and the adjacent landowner. In that case, adjacent landowners have successfully argued that they should benefit from a legal presumption that, in the absence of someone with better title, they own the servient estate under railroads, highways, streams, canals, and other rights of way to the centerline.¹⁰⁶

B. The Origins of the Centerline Presumption

The takings petitioners have pressed firmly for adopting what they call the centerline rule in the context of railroad corridors. And without even a cursory glance at the history, the CFC has readily applied it,¹⁰⁷ even in cases where there is no state law on the presumption. Petitioners argue that in the absence of a better claimant, the adjoining property owner should be deemed to own to the centerline of an abandoned railroad corridor where the railroad held only an easement.¹⁰⁸ That rule, a version of the strip and gore rule, is based on the idea that narrow strips of land carved out of larger pieces serve little public function.¹⁰⁹ But a little unpacking of the history of the strip and gore rule shows that claim's weakness. Even if the application of the presumption makes sense as a matter of public policy, the courts do

105. *McDonald's Corp.*, 450 S.E.2d at 892.

106. See *Asmussen*, 304 P.3d at 560–61 (applying the centerline presumption to railroad easements); *Rails-to-Trails*, *supra* note 9, § 78A.10(2)(a) (recognizing centerline presumption).

107. See, e.g., *Buford v. United States*, 103 Fed. Cl. 522, 528 (Fed. Cl. 2012) (confirming that Mississippi law recognizes the centerline rule); *Haggart*, 108 Fed. Cl. at 86 (applying the centerline presumption); *Thomas v. United States*, 106 Fed. Cl. 467, 479–80 (Fed. Cl. 2012) (recognizing the centerline presumption as a general state law principle).

108. See *Calumet Nat'l Bank v. Am. Tel. & Tel. Co.*, 682 N.E.2d 785, 788–90 (Ind. 1997) (addressing the argument that railroad's abandonment created a property right in adjacent owners); *Asmussen*, 304 P.3d at 559 (“Plaintiffs argue that, under the centerline presumption, they have established ownership of the land underlying right-of-way by the mere fact of their adjacency . . .”).

109. 23 AM. JUR. 2d *Deeds* § 254 (2013) (“It is presumed that a party granting land does not intend to retain a narrow strip between the land sold and the boundary line in the absence of express provision to that effect in the deed, especially where the strip is so narrow as to be of no practical use to the grantor. This presumption, sometimes also referred to as the ‘strip and gore’ rule or doctrine, is, however, rebuttable, the question being purely one of intention; and when the intention is ascertainable from the face of the instrument or a record, other evidence is not admissible. The presumption is inapplicable where the strip is commercially valuable property.” (footnotes omitted)).

not acknowledge the irony of landowners asking for the law to give them a property right they did not purchase and did not expect in order to bolster a takings claim for compensation when the windfall of the property right is denied to them. It is rather paradoxical for landowners to claim the law should give them the property but then pay them if it does not.

The strip and gore rule was historically applied only to highways and streams, and even in that narrow context it was not unanimously embraced. The Vermont Supreme Court rejected the rule in 1850, citing numerous cases that refused to apply the rule at all, explaining that the court should look to the grantor's intent in construing any deed.¹¹⁰ Where the deed explicitly referenced the outer edge of a highway, the court would not go against that explicit language.¹¹¹ This simply follows the well-established rule under the Statute of Frauds that the writing should not contradict any parole agreements.¹¹² However, Justice Redfield, dissenting, argued that the rule has valid purposes. He said:

[I]ts chief object, is to prevent the existence of innumerable strips and gores of land, along *the margins* of streams and highways, to which the title, for generations, shall remain in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up, to vex and harass those, who in good faith had supposed themselves secure from such embarrassment.¹¹³

The rule makes perfect sense in the case of streams, where grants of land often describe various markers along the edge of the waterway, especially where riparian rights are involved. If the edge of the stream changes because of avulsion or accretion, a landowner who was once abutting the water source might no longer have access to the water if the stream moves away from his land and the grantor gains title for the newly created strip.¹¹⁴ Highways also tended to wander and vary as time passed. If a deed referenced the outer edge of the highway, and the highway shifted away from the conveyed land, a small strip or gore might arise to “vex and

110. *Buck v. Squiers*, 22 Vt. 484, 491–92 (1850).

111. *Id.* at 493.

112. See POWELL, *supra* note 90, § 81A.02 (referencing the Statute of Frauds' requirement that conveyances must be in writing).

113. *Buck*, 22 Vt. at 494 (Redfield, J. dissenting) (emphasis added).

114. See POWELL, *supra* note 90, § 81A.05(3)(b)(i)(iii) (describing the potential change in a property rights when the property boundary is a natural monument).

harass” those who thought their land abutted the highway.¹¹⁵ The rule was meant to address land that arose in the margins between streams or highways and the conveyed land because that strip or gore could defeat the landowner’s access to the stream or the highway. The strip and gore rule was not originally applied to the land underlying the stream or highway itself, although the extension to the underlying land was not altogether illogical. But where deeds expressly described to a particular boundary, settled expectations and the primacy of the written instrument lent force to the majority opinion in *Buck v. Squiers*, which stated that the rule should not apply to the land underlying a roadway.¹¹⁶

By the end of the nineteenth century, however, courts began to apply the strip and gore rule to appurtenant incorporeal hereditaments, like mineral rights or easements, as well as to the fee in the land underlying a stream or road.¹¹⁷ In a case where the grantor of a street transferred the adjoining land and attempted to retain the mineral rights that were expressly reserved when the street was dedicated, the Supreme Court of Missouri cited Kent’s Commentaries as follows:

Says Kent: “The established inference of law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road, as part and parcel of the grant. The idea of an intention in the grantor to withhold his interest in a road, to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would be contrary to universal practice. *** It would require an express declaration, or something equivalent thereto, to sustain such an inference; and it may be considered as the general rule that a grant of land bounded upon a highway or river carries the fee in the highway or river to the center of it, provided the grantor at the time owned to the center, and there be no words of specific description to show a contrary intent.”¹¹⁸

Even at this time, the strip and gore rule was not applied when the adjacent landowner had a deed that expressly described to the outer edge of

115. *Id.* § 81A.05(3)(i)(i).

116. *Buck*, 22 Vt. at 490 (“[the centerline] doctrine cannot be sustained”). Today we speak of the stream or highway being used as a monument rather than simply an element in a metes and bounds description to determine whether the strip and gore rule should apply. POWELL, *supra* note 90, § 81A.05(3)(i)(iv).

117. See *Rails-to-Trails*, *supra* note 9, § 78A.06 (explaining the bifurcated approach to analyzing ownership of railroad corridors: fee or easement).

118. *Snoddy v. Bolen*, 25 S.W. 932, 933–934 (Mo. 1894) (quoting 3 JAMES KENT, COMMENTARIES *433) (citation omitted).

the roadway. It would be more appropriately used for a deed that conveyed land “bounded by county road 12 on the north, the land of X on the east, etc.”¹¹⁹ There is a difference between a deed description that uses a road as a generic boundary, and a description that expressly states that the grant is of land to the “eastern edge of the XYZ railroad.”¹²⁰ Both Kent and Redfield stated that it was inappropriate to apply the strip and gore rule in cases where a specific description of the land, especially one by metes and bounds, indicated a conveyance of only the adjoining land.¹²¹

Additionally, the strip and gore rule only applied to public roads and waterways, not private ways, because the adjacent landowner had a particular interest in free access to the road and the stream. This was not true of private ways where the adjacent landowner was excluded from access, as with a railroad.¹²² The strip and gore rule was not applied to a railroad until the twentieth century, and in most situations not until many decades after the transfers that established the property rights of the adjoining landowners in the first place.¹²³ In 1930, the Maine Supreme Judicial Court declined to apply the strip and gore rule to railroads, explaining:

Not only can we see no reason which compels us because of analogy to extend the highway rule to railroad rights of way, but there are cogent reasons why this should not be done. The instant case is a striking example that considerations of public policy cut both ways. In reliance on the usual and ordinary rules of construction the defendants in this case accepted deeds from the supposed owners of this railroad right of way. They have built permanent structures on it of large value; and the railroad location has become incorporated in an important business center of the city of Portland. To disturb land titles there over a large area, *to give to property owners land which for many years they never thought that they owned*, and to take it from those who had every reason to suppose it was theirs, is a result which only

119. *See id.* (describing the conveyance that results from a deed that describes boundaries generally).

120. *See id.* (noting that the centerline presumption applies when a conveyance uses general boundaries).

121. *See id.* (providing support for the argument that a specified boundary removes the centerline presumption).

122. *See* *Vought v. Columbus, H.V. & A. Ry. Co.*, 50 N.E. 442, 449 (Ohio 1898) (applying the centerline rule to streets, but not canals and railroads).

123. *See* R.E.H., Annotation, *Boundary Under Conveyance of Land Bordering on Railroad Right of Way*, 85 A.L.R. 404, 404–05 (1933) (describing applicability of the center line test to a railroad right of way).

compelling reasons of public policy can justify. These we do not find. The deed to this adjoining property bounding it on the railroad location was given in 1886. Except for the dicta in the two Vermont cases previously noted, no case had to that time intimated that land so bounded would extend beyond the exterior lines of that way. The parties to that deed presumably knew the rule governing boundaries on highways, streams, and tidewater, and that Maine had not extended the presumptions there applied to the case of boundaries on private ways. They were justified in assuming that the usual rules would apply to the interpretation of their deed. Moreover, if there had been any change in the law, which we do not hold, the deed should be construed in the light of the law existing at the time when it was made. . . . In our opinion the safe rule, which in the long run will do justice, is to rely on the language used by the parties interpreted in the light of established rules.¹²⁴

There are many states that have applied the strip and gore rule to railroad corridors rather blindly, calling it the centerline rule and without considering the differences between private railroads and public streams or highways. The states that have not applied the strip and gore rule to benefit landowners adjacent to railroad corridors have been more aware in their decisions of the history and character of the doctrine. First, the railroad right-of-way is an exclusive private way, and not a public way to which the adjacent landowners have access. With public ways like roads and streams, the adjacent landowner has a valuable interest in access to the public way. With an exclusive private way, the adjacent landowner has no property rights or access to the railroad corridor. Without some equitable interest to justify giving this land to the adjacent landowners, the public/private way distinction makes sense.

Second, the strip and gore rule applied primarily in cases where the boundary of the right-of-way was subject to change, and strips or gores would arise in the margins and cut off a landowner's access to water or a road. If the landowner owns to the centerline of the stream, his riparian rights and access are protected because any strips will inure to his benefit. This is not an issue with railroads where the boundaries are not subject to shifting, and there is no threat of the adjacent landowner losing access to the stream or highway.

Third, the vast majority of adjacent landowners have deeds that expressly exclude the railroad corridor land. For the proper settlement of

124. *Stuart v. Fox*, 152 Me. 413, 418 (1930) (emphasis added) (citations omitted).

property rights, the deeds should prevail, even if that means that the grantor's heirs are deemed to own the servient fee interest. Protecting the rights of peaceful possessors usually prevails when land ownership is indeterminate. Rather than giving the land underlying railroad corridors to adjacent landowners whose deeds expressly exclude this land, the courts should instead be protecting the rights of peaceful possessors. In many cases, these are the railroads or the successors to the railroads. In addition, many states have adopted marketable title acts or stale uses and reversions acts to cut off non-possessory future interests in real property precisely because they pose mischief to the marketability of land.¹²⁵ It makes more sense to apply those laws to cut off the claims of the grantor's heirs or the adjacent landowners' servient fee interests, resulting in continued possession for the railroads and not a windfall for adjacent landowners. As a policy matter, stability of property rights and protection of settled expectations would suggest that the strip and gore rule not be applied in the context of railroad easements.

Nonetheless, the CFC has ruled that the centerline presumption would apply even in states that have expressly disallowed the application of the strip and gore rule to railroad easements.¹²⁶ They do so without realizing that the centerline rule is derived from the strip and gore rule, either on some misguided belief that they are different rules, or because the court never actually researched the issue of the applicability of the rule in the state. Given the cogent reasons for not extending the strip and gore rule to private ways, the potential constitutional problems of taking private property from the grantor's heirs and giving it to adjacent landowners, and the well-established property doctrine that one must prove a property right based on the strength of one's own title and not the weakness of title of one's opponent, there should be more thought on whether the centerline rule should be applied.

One of the most inexplicable results of these takings cases is that landowners receive a windfall when the centerline rule is applied.

125. *Rails-to-Trails*, *supra* note 9, § 78A.08.

126. The centerline rule as applied to railroad corridors has been rejected in Alabama, Georgia, Illinois, Louisiana, Maine, Michigan, Pennsylvania, Texas, and Wisconsin. See cases cited in R.E.H., *supra* note 123, at 407–10. Nonetheless, the CFC has applied the centerline rule in Texas and Michigan. See *Dana Hodges Trust v. United States*, 101 Fed. Cl. 549, 556 (Fed. Cl. 2011) (distinguishing the case at issue from the Michigan Court's decision based on the centerline rule in *Dep't of Natural Res. v. Leukuma*, No. 287802, 2009 WL 5194517, at *4 (Mich. App. Ct. Dec. 17, 2009)); *Thompson v. United States*, 101 Fed. Cl. 416, 428 (Fed. Cl. 2011) (relying on the Michigan Supreme Court's decision in *Quinn v. Pere Marquette Ry. Co.*, 239 N.W. 376, 378 (1931)); *Ybanez v. United States*, 98 Fed. Cl. 659, 664 (Fed. Cl. 2011) ("The presumption under Texas law [is] that an abutting landowner owns to the center line of a railroad right-of-way . . .").

Specifically, they receive a property interest in land they did not purchase, have a deed for, or rely on. Then, they demand compensation when they are not given that windfall. Surely the taxpayer does not have a duty to compensate landowners when the law chooses not to give an unearned windfall. Only by drawing a veil between the history of the strip and gore rule and the now-renamed centerline rule have adjacent landowners been able to claim a property right on which to buttress their takings claims.

*C. What Rule Gives Adjacent Landowners Property Rights
in Abandoned FGROWs?*

But how does the centerline rule apply in the context of FGROW? The answer is that it does and it does not. In the case of FGROW, the federal government was the original grantor of the railroad easement, and it retained the servient fee interest when it conveyed a right-of-way to the railroad. Subsequent to the grant to the railroad, the government issued patents to private individuals for land traversed by the right-of-way. Those patents would usually be for sections, or quarter-sections of land.¹²⁷ These patents would convey the land “subject to the railroad’s right of way.”¹²⁸ If the government granted the servient fee underlying the railroad right-of-way to the patentee, the United States presumably retained no reversionary interest in the land underlying the railroad’s easement.¹²⁹ The Court in *Brandt Trust* held that the government gave away its servient fee interest when it patented the land to private landowners.¹³⁰ However, that issue was not briefed or discussed in the case, which only turned on what interest the

127. Under the public land surveying system, by which most of the United States was surveyed, land would be patented by section and quarter-section of thirty-six square mile townships. A typical patent would describe land as the SW 1/4 of the NE 1/4 of Sec. 32, twp. 14, range S for instance. See BUREAU OF LAND MGMT., DEP’T OF INTERIOR, MINING CLAIMS AND SITES ON FEDERAL LANDS 8 (2011) (stating the preferred method for describing the legal location of land claims). A section of land is approximately one square mile and consists of 640 acres, and a quarter section is a quarter of a square mile, or 160 acres.

128. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1267 (2014).

129. This does not mean that the United States does not retain an interest in the right of way easement itself. Although this is a technical property point best left for another day, it can be argued that the United States intended to create multi-use transportation and communications corridors across the country. In doing so, it granted sub-easements to the railroads while also retaining the power to authorize telecommunications uses, postal uses, and other transportation uses within those same corridors. It also retained the right to cancel the railroad’s right of way and reclaim it for a forfeiture. In this regard, the multi-use corridor more accurately resembles a broad public service commercial easement in gross that is apportioned to a variety of public users by the government, who arguably holds the master easement.

130. *Marvin M. Brandt Revocable Trust*, 134 S. Ct. at 1257, 1264.

railroad received. The Court erred in its holding, and even a cursory analysis of the issue would lead to the opposite conclusion.

If the private patentee did receive the United States' servient fee interest, then successors to the patentee are in precisely the same position as all other adjacent landowners. Do they acquire title to the servient fee by virtue of the centerline presumption, or do the heirs of the original patentee retain that title? That question has already been addressed above, but we need to back up a step to determine if the United States intended to give away its servient fee interests in FGROW when it patented the land to private landholders. Not surprisingly, there is no clear answer to that question. A quick analysis of the cases and history shows that the United States most likely did not intend to give away its interest underlying any FGROWS.

If the railroad received a limited fee interest, a fee simple subject to a condition subsequent with a retained power of termination in the United States, the Supreme Court held in 1903 that the patentee of the adjoining land does not receive any property interest in the railroad's right-of-way via the patent.¹³¹ In *Northern Pacific Railway Co. v. Townsend*, a case involving an 1862–1871 Act FGROW, the Court held that:

At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.¹³²

The Court in *Townsend* held that because the railroad's right-of-way grant removed that land from the category of public lands available for patenting to settlers, the homesteaders could not receive any interest in the railroad corridor lands even though they received a patent that purported to grant them the full legal subdivision.¹³³

The same argument could be applied to FGROW easement grants under the 1875 Act, although the Court has not explicitly held that to be the

131. *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271, 273 (1903).

132. *Id.* at 270.

133. *Id.* at 272.

case. In part, it has not so held because it was not until 1942 that the Court interpreted 1875 Act FGROW to be easements.¹³⁴ Prior to 1942, the Court had interpreted 1875 Act FGROW to be the same kind of limited fee interests as in *Townsend*, which logically means that the same language in the same kinds of patents to private settlers would also not transfer the government's interest in the railroad corridor land. But the main reason for the Court's holding in *Townsend* was that the FGROW grant removed the entire corridor land from the land available for patenting to private settlers. There is no reason to treat 1875 Act FGROW grants as not withdrawing the corridor land but the pre-1875 FGROW grants as withdrawing the corridor lands. So under the withdrawal policy, there is no indication that Congress intended to treat the easement and limited fee FGROW grants differently.

It was not until 1942, when the Supreme Court reversed its holding that 1875 Act FGROWs were limited fees, and instead held that the 1875 Act FGROWs passed only easements, that the retained interests would be considered different from the power of termination retained in the early grants of FGROWs.¹³⁵ The 1942 reinterpretation left open the question whether subsequent patents to homesteaders with the same "subject to the railroad's right of way" language would also not pass the servient fee interest just as it did not pass the power of termination, or whether it would pass the servient fee interest because the servient fee was a present estate and not a future interest.¹³⁶ Not surprisingly, the Court has not directly addressed that question, but it should be noted that the vast majority of patents were issued before 1942 when the land office could assume that the United States' retained interests in FGROWs did not pass to homesteaders via their patents.¹³⁷

Moreover, the presumption in favor of the sovereign would suggest that unless the patents expressly passed the servient fee interest, that it should be deemed retained. In 1942, the Court in *Great Northern* held that the United States' mineral interests did not pass to the railroad via the FGROW grant. It explained at length that there is a presumption that unless

134. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 277 (1942).

135. *Id.* at 271, 279.

136. *See id.* at 270–71 (asking "whether petitioner has any right to the oil and minerals underlying its right of way acquired under the general right of way statute"); *see generally* PAUL GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 393–399, 422–434 (1979) (describing the Homestead Act and the first Public Land Commission).

137. Under the Homestead Act of 1862, a private landowner could settle on land, improve it, and over time acquire a patent. Although patents under the Homestead Act were officially discontinued in 1976 by the Federal Land Policy and Management Act, the practice of issuing homestead patents and other federal land patents tapered off significantly in the 1940s. *See* GATES, *supra* note 136, at 394–99.

there is explicit language to the contrary, the United States retains all property rights not expressly conveyed.

But the Act is also subject to the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign grantor—“nothing passes but what is conveyed in clear and explicit language.”¹³⁸

In 1903, the Court in *Northern Pacific Railroad Co. v. Soderberg* stated: “Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.”¹³⁹ It is ironic that the two principal decisions on FGROW interpretation, including the case which the Court referenced repeatedly as controlling in *Brandt Trust*, were completely ignored on the question of whether the sovereign’s servient fee interests should be deemed to have passed to the patentees, unmentioned, in their patents. Both courts, whose decisions were affirmed and upheld in *Brandt Trust*, engaged the question of what interests pass to patentees and grantees of the sovereign, and both held that nothing passes except what is expressly granted.¹⁴⁰

In 2006, the Court of Appeals for the Federal Circuit addressed this issue directly in *Hash v. United States*. In *Hash*, which set up the circuit split that sent *Brandt Trust* to the high Court,¹⁴¹ the Federal Circuit held that the government gave away its servient fee interest to patentees if it did not expressly reserve the interest.¹⁴² In a brief and profoundly unsatisfactory explanation, the court stated:

The appellants stress the well-recognized rule that property rights that are not explicitly reserved by the grantor cannot be inferred to have been retained. The land patents granted pursuant to the Homestead Act reserved to the United States certain specified rights, *viz.* previously vested and accrued water rights, previously granted mineral rights, and rights-of-way for ditches or canals. None of these patents mentions retaining or reserving to the United States any title or other ownership interest or reversion

138. *Great N. Ry. Co.*, 315 U.S. at 272 (quoting *Caldwell v. United States*, 250 U.S. 14, 20 (1919)).

139. *N. Pac. R.R. Co. v. Soderberg*, 188 U.S. 526, 534 (1903).

140. *Great N. Ry. Co.*, 315 U.S. at 272.

141. *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 272 (1903). *See Hash v. United States*, 403 F.3d 1308, 1314, 1318 (2005) (holding that the government did not retain a fee interest in the land when it did not explicitly reserve that interest).

142. *Hash*, 403 F.3d at 1314, 1318.

right in the land underlying previously granted railroad rights-of-way.

The 1875 Act contemplated that public land carrying a railway right-of-way would be “disposed of,” and provided that existing rights-of-way would be preserved if they were registered in the Interior Department’s local land office. Section 4 of the 1875 Act, quoted *ante*, recognized that: “all such lands over which such right of way shall pass shall be disposed of subject to such right of way.” By making the disposition of such lands “subject to” the right-of-way, the Act explicitly negated the theory that these lands were not included in the “disposition.” To the contrary, the Act recognized the future disposition of the lands over which the right-of-way passes. The government nonetheless insists—and the district court held—that the government retained ownership of the underlying lands.¹⁴³

Ignoring the long-standing policy that sovereign grants are construed strictly in favor of the government, the *Hash* court instead relied on common law deed rules for private deeds, holding that unless a grantor expressly reserves property rights, they will be deemed to have passed to grantees.¹⁴⁴ Remarkably, the *Hash* court was just as blind as the Court in *Brandt Trust* to the clear language of *Townsend* and *Great Northern* that grants and patents from the government are to be construed in favor of the sovereign.¹⁴⁵ Instead, the Court held:

143. *Id.* at 1314–1315 (citations omitted). The *Hash* court relied heavily on land department policies, explaining: “A contemporaneous Interior Department regulation reinforces this view of the statute.” *Id.* at 1314. The Court applied the regulation in support of plaintiff landowner’s claim:

A railroad company to which a right-of-way is granted does not secure a full and complete title to the land on which the right-of-way is located. It obtains only the right to use the land for the purposes of which it is granted and for no other purpose The Government conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad company’s right of use and possession.

Id. at 1314–15 (quoting 43 C.F.R. § 243.2 (1909) (repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701)).

144. *Id.* at 1316.

145. *Townsend*, 190 U.S. at 272; *Great N. Ry. Co.*, 315 U.S. at 272. Other non-railroad courts and commentators have supported this policy of interpreting grants strictly in favor of the sovereign. John Vaterlaus, *Stuck Between a Rock and a Hard Place: The United States Supreme Court Misapplies Statutory Construction Precedent in Bedroc Ltd. v. United States*, 38 CREIGHTON L. REV. 1263, 1309 (2005) (“In interpreting the Pittman Act, the *BedRoc* Court failed to apply the critical long-standing rule of statutory construction precedent governing land-grants. In 1903, the Court in *Northern Pacific* reaffirmed and explained the well established principle of land-grant construction by stating that ‘[n]othing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.’

The text of the 1875 Act, and the omission of any reservation or retention or reversion of the fee by the United States, negate the now-asserted intention on the part of the United States to retain ownership of the lands underlying railway easements when the public lands were disposed of. We have been directed to no suggestion, in any land patent, deed, statute, regulation, or legislative history, that can reasonably be construed to mean that the United States silently retained the fee to the land traversed by the right-of-way, when the United States granted that land to homesteaders.¹⁴⁶

Although there is support in common law rules governing private deed interpretation that the land conveyances should be read to pass everything the grantor possessed unless expressly reserved,¹⁴⁷ those common law rules have not been applied to sovereign patents in disputes over whether the United States transfers mineral rights or other interests via patents that are silent on the issue. It is supremely confounding that the principal precedent before the Court in *Brandt Trust* and *Hash* were the two cases of *Townsend*, involving pre-1871 Act FGROW, and *Great Northern*, involving 1875 Act FGROW, which both expressly discussed the rule that nothing passes via the patent except what is expressly stated therein. Instead of assuming, *sub silentio*, that the government's servient fee interest passed to the homesteaders, in contradiction to the most glaring precedents before the

The Court must not ignore the general principle that grants from the government should receive a strict interpretation, supporting the claim of the sovereign rather than the individual.”) This precedent, the long recognized principle of law that nothing is conveyed except what was stated in clear language of the conveying text, enabled the *Western Nuclear* Court to conclude gravel was a mineral reserved to the government in lands patented under the Stock-Raising Homestead Act. *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 59 (1982) (quoting *United States v. Union Pac. Ry. Co.*, 353 U.S. 112, 116 (1957)). In *Western Nuclear*, the Court reaffirmed the long held statutory interpretation principle that land-grants are interpreted in favor of the United States. *Id.* In *Western Nuclear*, the Court echoed the opinion in *Northern Pacific*. It explained that nothing was conveyed to the settler aside from what was specifically conveyed in unequivocal language of the text of the land-grant statute. *Id.* The *Western Nuclear* Court also noted if there were any doubts about what exactly was being conveyed, the doubts were resolved in favor of the United States. *Id.* Like the *Northern Pacific* and *Western Nuclear* decisions, the United States Court of Appeals for the Tenth Circuit in *Amoco Production Co. v. S. Ute Indian Tribe* also noted the widely recognized statutory construction principle that any ambiguity or uncertainty in the words used in conveying lands should be determined in favor of the sovereign. *S. Ute Indian Tribe v. Amoco Prod. Co.*, 151 F.3d 1251, 1257 (10th Cir. 1998) (citing *W. Nuclear*, 462 U.S. at 59). The Tenth Circuit also recognized the long established rule that land-grants are interpreted so that nothing passes to the settler except what is specifically conveyed in clear language and any uncertainty is resolved in favor of the United States. *Id.*

146. *Hash*, 403 F.3d at 1317.

147. See POWELL, *supra* note 90, §81A.05[3][h][i] (discussing the “modern principle that a deed will be construed as a conveyance of all that the grantor owns unless a clear limitation is placed thereon”).

Court, the Justices at least should have acknowledged the issue, since that is the key issue of the case, not whether the railroad received an easement or a limited fee interest.

If the United States' power of termination did not pass to homesteaders in *Townsend*, there is no reason to hold that the United States' servient fee interests passed to homesteaders. Although the issue of whether the government's retained fee interest passed to the Brandts was not briefed, argued, or discussed in the case, Chief Justice Roberts' statement that the "United States did not reserve to itself any interest in the right of way in that patent"¹⁴⁸ suggests that the Court is adopting the common law private deed rule of *Hash* and not the contrary presumption articulated in *Townsend* and *Great Northern* that nothing passes but what is explicitly granted.

When thinking about the takings claims of landowners adjacent to a FGROW, like the Brandts, it is perplexing that the courts apply a common law presumption of deed interpretation to hold that, contrary to well-established precedents about construing government patents narrowly, the United States' retained servient fee interest in FGROW passed to the patentees. Then, the courts apply the questionable centerline presumption to find that adjacent landowners somehow succeeded to the servient fee interests of the original grantors contrary to express exceptions in their own deeds. When one piles presumptions atop presumptions, these takings claims appear to be based on a rather unstable house of cards. But the questionable presumptions continue to stack up when we consider the nature of these railroad easements.

IV. SCOPE OF THE COMMERCIAL EASEMENT IN GROSS

The next issue that raises eyebrows is the CFC's stilted reading of the scope of the railroad easement in these rail-trail takings cases and whether they involve a state law railroad easement or the "common law easement" of *Brandt Trust*. As discussed above, railroad easements are not common law Blackstonian easements or private ways, but are commercial easements in gross. As such, they are exclusive and freely transferable, divisible, and apportionable.¹⁴⁹ They exist to serve both the private benefits of the parties, in addition to the greater public benefit of commercial utility and transportation service. Railroads, electric and telephone lines, gas pipelines, and even highway easements are commercial easements in gross that have fee-like qualities and easement-like qualities. What distinguishes the

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

149. See RESTATEMENT (FIRST) OF PROP. §§ 489–491 (1945) (stating that commercial easements are entirely alienable).

commercial easement in gross from the personal easement in gross is its robust scope to adapt to new technologies and its free alienability to adapt to changing needs. Commercial easements in gross are generally expansive to incorporate new technologies and are interpreted broadly to accommodate public interests in commercial services.¹⁵⁰

Commercial easements in gross are the product of the common law. Under the English law of Blackstone's day, there was no such thing as an *easement in gross*.¹⁵¹ There were appurtenant easements that were attached to land, and there were personal in gross rights of way, but the term easement was not used to describe the personal right-of-way.¹⁵² Although the courts recognized the right to maintain pipe lines, sewers, and to occupy pews not attached to a dominant estate, careful courts called them "rights in gross analogous to easements."¹⁵³ Yet over time, the careful characterization was shortened to an easement, and the term *easement in gross* came to describe the private rights not attached to a dominant estate.¹⁵⁴ However, through most of the nineteenth century, courts deemed the easement in gross to be personal and therefore not assignable,¹⁵⁵ although courts regularly allowed commercial *rights in gross* to be assignable if that was the clear intent of the parties.¹⁵⁶ This strange anomaly, that *easements in gross* were not assignable because they were deemed to be personal, but that commercial profits and railroad or telephone *rights in gross* were deemed to be freely alienable, led commentators to argue in favor of clarifying the terminology.¹⁵⁷ Because commercial rights in gross for public utilities and railroads clearly functioned like an easement, there was no reason to use the term easement in gross only for private rights of way. But there had to be some way to

150. Hegi, *supra* note 60, at 117. See also Wright & Hester, *supra* note 36, at 421–25, 441–47 (discussing the incidental use doctrine and the shifting public use doctrine).

151. JOHN LEYBOURN GODDARD, A TREATISE ON THE LAW OF EASEMENTS 10 (8th ed. 1921) ("There can be no easement properly so called unless there be both a servient and a dominant tenement." (quoting *Rangeley v. Midland Ry. Co.*, L.R. 3 Ch. 306, 310 (1868))).

152. See W.R.V., Comment, *supra* note 60, at 815 (describing judicial interpretations of interests in land).

153. *Id.* at 814–15 (citations omitted).

154. The term easement has been subject to a significant amount of mauling by courts, or, as my colleague Michael Wolf refers to it, "term creep." Michael Allan Wolf, *Conservation Easements and the "Term Creep" Problem*, 2013 UTAH L. REV. 787, 788 (2013). Courts have a tendency to use a term like easement to refer to a new property right because a particular characteristic of an easement is relevant in a particular context. *Id.* But then subsequent courts formalistically apply all the characteristics of the easement to the new property right without accounting for the lack of appropriate fit. *Id.*

155. See POWELL, *supra* note 90, § 34.16; Hegi, *supra* note 60, at 113.

156. Wolf, *supra* note 154, at 799.

157. Welsh, *supra* note 60, at 276; W.R.V., Comment, *supra* note 60, at 814–15; Kloek, *supra* note 60, at 239.

distinguish between the freely alienable easement in gross of the commercial entity and the private easement in gross of the personal right-of-way.

Citing to numerous conflicting cases, scholars in the first half of the twentieth century suggested recognizing two categories of easements in gross: (1) personal easements in gross that were not freely alienable unless there was clear intent to the contrary, and (2) commercial easements in gross that were freely alienable and apportionable without requiring express evidence of intent.¹⁵⁸ Commentators argued that courts should stop citing to the rule of non-alienability for easements in gross since commercial rights in gross were being alienated all the time. They encouraged the courts to focus on the commercial/non-commercial distinction when determining which easements in gross should be deemed alienable and which should be deemed non-alienable. Non-commercial easements in gross were typically rights granting access for recreational hunting and fishing. Commercial easements in gross were typically granted for public utilities and railroads, as well as non-public business purposes like billboards or private water rights.

By the middle of the twentieth century, courts were also distinguishing between *private* commercial easements in gross and *public* commercial easements in gross. The private commercial easement in gross merely benefitted a single individual or business, like a billboard. The public commercial easement in gross provided benefits to the entire community, like a railroad or utility. Public commercial easements in gross were held to be especially valuable and deserving of protection through presumptions of free alienability, divisibility, and apportionability.¹⁵⁹ In 1945, the *Restatement (First) of Property* provided that easements in gross would be deemed freely alienable, divisible, and apportionable if they were exclusive commercial easements.¹⁶⁰

Citing to railroads as the quintessential commercial easements in gross, Professor Kloek notes:

One type of easement that has been favored above all others, however, is the one given to a railroad for right of way. . . . The general reason given though, is that an easement for railroad purposes forms a unique type distinct from other easements

158. Wolf, *supra* note 154, at 799. See also Kloek, *supra* note 60, at 240 (describing the rights associated with each easement category); Welsh, *supra* note 60, at 276–77 (distinguishing an easement in gross from an easement appurtenant).

159. Hegi, *supra* note 60, at 118–19.

160. RESTATEMENT (FIRST) OF PROP. § 493 (1945).

because the dominance of the railroad over the strip so granted is exclusive. This view has undoubtedly arisen because of the exigencies of the railroad business, for it is in the interest of public safety and convenience that the railroad should be permitted to exclude all persons from the right of way including even the owner of the underlying fee. Even though a right of way acquired by a railroad company is ordinarily designated as an easement, it is well settled that, as one writer has stated, it is an interest in land of a special and exclusive nature and of a high character, and so far as the right of possession for railroad purposes is concerned, it has most of the qualities of an estate in fee, including perpetuity and exclusive use and possession.¹⁶¹

The railroad easement, because of its exclusive and public character, is no doubt a public service easement, like those of utility companies and gas pipeline companies, deserving of the highest protection and the greatest flexibility to serve continuing public interests. Courts have routinely held that such easements can accommodate changing technologies, are divisible to accommodate more extensive uses, and are apportionable to accommodate other public service uses.¹⁶² And historically, courts have held that railroad uses are broadly divisible and apportionable to permit placement of other, similar public service infrastructure, including: electric, phone, and water lines; billboards; cattle pens; and grain silos and grain elevators.¹⁶³ Whether they adopted the shifting public use doctrine, or the incidental use doctrine, courts in the early decades of the twentieth century recognized that the commercial easement in gross for railroad purposes necessarily includes a wide array of other public purposes.¹⁶⁴

State courts are split on the direct question of whether a recreational trail is such a public purpose, encompassed in a railroad easement. Some courts hold that a railroad easement is a public transportation easement that easily accommodates other public transportation uses, while other courts hold that railroad easements should be narrowly construed to permit only

161. Kloeck, *supra* note 60, at 247 (footnote) (internal quotation marks omitted). The author further noted: “damages ‘are assessed on the theory that the easement will be perpetual, so that, ordinarily, the fee is of little or no value, unless the land is underlaid by quarry or mine.’” *Id.* at 247 n.45 (quoting *Smith v. Hall*, 72 N.W. 427, 428 (1897)).

162. *See* RESTATEMENT (FIRST) OF PROP. § 489 (1945) (rationalizing alienability based on its ability to advance social interests).

163. *See* Wright & Hester, *supra* note 36, at 421–23 (describing the incidental uses that railroads can utilize for unused portions of their easements).

164. *Id.* at 421–23, 441–47; *Rails-to-Trails*, *supra* note 9, § 78A.14.

train service and its ancillary needs.¹⁶⁵ Because railroads need electricity to operate switches and telephone lines to send signals, railroad easements are generally deemed broad enough in scope to encompass such incidental uses but not recreational trail uses in these states.¹⁶⁶ Recreational trails are a completely different technology according to the CFC.¹⁶⁷ That is a particularly ahistorical understanding of the unique nature of railroad easements and goes against the state laws in virtually every state that has adopted the public commercial easement in gross for railroad purposes.

Even if state law does not provide for an expansive scope for railroad easements, courts considering the issue today should do so precisely because railroads are public transportation infrastructure that exist primarily to serve the public good. Railroads received eminent domain power, large tax incentives, and were often granted land for free on which to locate their roads precisely because they served a larger public transportation need.¹⁶⁸ In the nineteenth century this country did not have the roads and highways of today, nor did it have the money to build such infrastructure. Only in the twentieth century did the public investment in roads, particularly the interstate highway system, exceed the private capital investment in railroads.¹⁶⁹ Although railroads were built with private money, the understanding was that they were public facilities that served the greater public welfare. Their common carrier obligations and their eminent domain powers, as well as the great amounts of public investment in their construction, all support the characterization of railroads as public service

165. *Durango & Silverton Narrow Gauge R.R. Co. v. Wolf*, No. 12CA1632, 2013 WL 3943245, at *1, *4 (Colo. App. 2013) (extending application of an easement to recreational trails); *Dale Henderson Logging, Inc. v. Dep't of Transp.*, 48 A.3d 233, 239 (Me. 2012) (converting a rail into a trail does not constitute easement abandonment); *Chevy Chase Land. Co. v. United States*, 733 A.2d 1055, 1076 (Md. 1999) (justifying subsequent trail use); *Dept. of Nat. Res. v. Leukuma*, No. 287802, 2009 WL 5194517, at *1, *4–5 (Mich. Ct. App. Dec. 17, 2009) (holding that trail use is permissible in the absence of limiting language in the conveyance); *Wash. Wildlife Pres., Inc. v. State*, 329 N.W.2d 543, 548 (Minn. 1983) (recognizing the railroad easement as appropriate for later trail use because that use is in keeping with the original public-travel grant); *Moody v. Allegheny Valley Land Trust*, 976 A.2d 484, 493 (Pa. 2009) (allowing rail-trail conversion, but requiring conformity with statutory requirements). *But see* *Howard v. United States*, 964 N.E.2d 779, 782–83 (Ind. 2012) (holding that trail use is not within the scope of a railroad easement); *Lawson v. State*, 730 P.2d 1308, 1311–12 (Wash. 1986) (stating that railroad right of ways are not perpetual).

166. *See Rails-to-Trails*, *supra* note 9, § 78A.14.

167. *Toews v. United States*, 376 F.3d 1371, 1376, 1381 (Fed. Cir. 2004); *Howard v. United States*, 106 Fed. Cl. 343, 365 (Fed. Cl. 2012) (quoting *Howard v. United States*, 964 N.E.2d 779, 784 (Ind. 2012)); *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 730 (Fed. Cl. 2011); *Rogers v. United States*, 90 Fed. Cl. 418, 433 (Fed. Cl. 2009).

168. *Rails-to-Trails*, *supra* note 9, § 78A.03(1)(b)–(c); ELY, *supra* note 36, at 19, 32–34.

169. *See* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *TRANSP. L.J.*, 235, 245 (2003) (summarizing both government and private investments in infrastructure); ELY, *supra* note 36, at 265 (describing public spending on transportation infrastructure).

entities. In 1939, the Fifth Circuit Court of Appeals tied the scope of a commercial easement in gross to its public character. The court explained that the easement should have a longer life serving the public, even than the company itself:

If any part of the right of way of a railroad company, telephone company, or electric power and light or a water company be acquired by condemnation the enterprise would become disrupted by the mere transfer of the property at public or private sale, or by the failure of the company, or by the expiration of the charter. . . . The service to the public which justified the condemnation would thus be made limited and precarious. The life expectancy of the person, and the term of a charter of a corporation would become factors in valuing what is taken. No such thing has ever been supposed to be the law. . . . When a corporation fails, its easements by condemnation are assets for creditors, the court may sell them with the other property and the business may go on serving the public.¹⁷⁰

First, this court quite correctly noted that the public interest that justified the grant of eminent domain power justifies the preservation of these easements for continuing public purposes when the initial purpose has been satisfied.

Second, technologies change. Just as canals have generally been replaced by highways, railroads have also had to adapt to changing technologies. They have been replaced by highways, trails, and utility line easements precisely because they serve multiple public uses. They cause minimal harm to private landowners that would otherwise have to give up even more land for the growing infrastructure of our American cities and highways. Courts have readily allowed wagon roads to accommodate cars, canals to accommodate railroad uses, and utility line easements to accommodate buried fiber optic cables. While some may argue that bicycles and walkers do not reflect a changing technology, the modern trail user is rejecting the congested highway and the automobile in favor of a more healthy transportation alternative. This is progress, made necessary by the ubiquity and dangers of the predominant automobile.¹⁷¹

Third, railroad easements entail exclusive rights to possession of land, which means that they have nearly fee-like control over their corridors.

170. Fla. Blue Ridge Co. v. Tenn. Elec. P. Co., 106 F.2d 913, 916 (5th Cir. 1939).

171. See U.S. CENSUS BUREAU, MOTOR VEHICLE ACCIDENTS – NUMBER AND DEATHS: 1990 TO 2009 (2012), available at www.census.gov/compendia/statab/1210/tables/12s1103.pdf (summarizing automobile deaths by year and type of vehicle).

When a railroad has acquired exclusive possession of land, it is difficult to imagine an easement use that would unduly burden or exceed the easement's scope. Under such circumstances, the scope of the commercial easement in gross should be deemed to be expansive, unless there is evidence of a contrary intent by the remote grantor. And public policy that favors settled property rights and militates against forfeitures would protect the rights of the peaceful possessor and not a remote grantor. In cases between adjacent landowners and public entities succeeding to the rights of the railroad, it seems hardly possible that courts would prefer the former when they do not even have title to the land they are claiming. The strip and gore and centerline presumption should operate in favor of adjacent landowners only when the public has no further need for the highways, streams, canals, or railroads on which the easement operates. So long as there continues to be a public purpose for these valuable properties, private rights should give way under the expansive scope of the commercial easement in gross and the law should not create windfalls for private property owners contrary to the public's interest.

Finally, public policy suggests that a narrow interpretation of the scope of railroad easements goes against most states' laws on the scope of commercial easements in gross. The CFC, however, has never acknowledged the railroad easements in the rail-trail takings cases as public commercial easements in gross, nor has it addressed the lengthy and consistent common law doctrines that such easements are to be interpreted to further public service needs.¹⁷² The CFC's stilted and narrow reading of the railroad easement in gross negates the public purpose of these valuable corridors while prioritizing dubious private property claims. Unfortunately, the Court's stilted language in *Brandt Trust* is likely to lead lower courts to apply the same narrow reading of the FGROW easements as well.

V. HOW MUCH IS THAT TRAIL EASEMENT WORTH?

Another major issue plaguing these rail-trail takings cases regards valuation of the property right that the government allegedly takes. The issue arises when a trail group preserves a rail corridor and uses it for interim trail use. The question is whether the taxpayer should pay for an

172. See generally *Burgess v. United States*, 109 Fed. Cl. 223 (Fed. Cl. 2013) (applying state law); *Haggart v. United States*, 108 Fed. Cl. 70 (Fed. Cl. 2012) (recognizing the common law center-line doctrine, but not a public-interest oriented common law doctrine); *Thomas v. United States*, 106 Fed. Cl. 467 (Fed. Cl. 2012) (recognizing the common law reversionary interest, but not a public service-oriented easement); *Beres v. United States*, 104 Fed. Cl. 408 (Fed. Cl. 2012) (failing to note common law doctrine).

entirely new railroad easement or just the additional cost of a superimposed trail easement. On the one hand it seems quite odd that the taxpayer has to purchase a new railroad easement for possible future reactivation when there is a pre-existing railroad easement on the encumbered land in the first place. But, so the landowners' arguments go, the pre-existing easement would have terminated but for the railbanking statute, and therefore the continuation of the easement should require further compensation.

In general, the CFC has held that, but for the new procedure of banking the rail corridor for preservation purposes and using it in the interim for a trail, the railroad would have abandoned the easements and the servient fee owners would have been able to retake unencumbered possession of the land.¹⁷³ The easement would have been removed and therefore the old easement's continuation is essentially a new servitude that requires compensation.¹⁷⁴ Consequently, the CFC has held that the calculation of damages requires that the initial value of the land taken is analyzed as pristine land, unencumbered by any railroad easement. Then, compensation is due for the diminished value after both a new recreational trail and a future rail easement are imposed.¹⁷⁵ The taxpayer has to pay for two new easements because the old easement is supposedly gone: the interim trail use easement and the future railroad easement.

The government has unsuccessfully argued that the starting point for the valuation should be land encumbered by a railroad easement. This in itself is more than what landowners acquired when they purchased land adjacent to a railroad corridor and received the benefit of the servient estate into the corridor by virtue of the centerline presumption.¹⁷⁶ They did not expect that the railroad would be abandoned, resulting in a windfall, and they especially did not expect that they would receive unencumbered land.

173. See, e.g., *Macy Elevator, Inc. v. United States*, 105 Fed. Cl. 195, 199 (Fed. Cl. 2012) (noting a property-rights-altering effect of converting railways into trails); *Ingram v. United States*, 105 Fed. Cl. 518, 538 (Fed. Cl. 2012) (describing railbanking and the results of abandonment of railroad easements); *Rogers v. United States*, 101 Fed. Cl. 287, 293–94 (Fed. Cl. 2011) (describing railbanking and how it blocks an abandonment allegation).

174. *Macy Elevator*, 105 Fed. Cl. at 201; *Ingram*, 105 Fed. Cl. at 538; *Rogers*, 101 Fed. Cl. at 293–94.

175. See *Macy Elevator*, 105 Fed. Cl. at 199 (“Plaintiffs argue in response that the Indiana law of abandonment does not control the outcome of the valuation question. According to plaintiffs, regardless of whether the railroad purpose easements were legally abandoned under Indiana law, the ‘before’ status of their properties for valuation purposes is their properties unencumbered by any easements. Plaintiffs contend that once the railroad purpose easements across their properties were used as a recreational trail, the easements terminated, and plaintiffs should have received possession of their properties unencumbered by any railroad purpose easements. The imposition of recreational trail use by the NITU, plaintiffs argue, blocked those reversionary interests. The court agrees with plaintiffs.”).

176. *Id.* at 198 (“[T]he government argues that the ‘before’ condition of plaintiffs’ properties should be properties that remain encumbered by a railroad purpose easement.”).

Moreover, there is no mythic land unencumbered by any railroad easement except in the CFC's wholly implausible universe. Although one can imagine the hypothetical bundle of sticks and the difference between an unencumbered fee simple absolute and a servient fee burdened by a trail and railroad easement, translating the hypothetical legal interest into just compensation is nonetheless impossible.

Compensation should be based on the value of land on the ground because the land initially acquired was burdened by a railroad servitude, and the land itself was permanently and physically altered. That is, the initial value should be a strip of land with a defunct railroad on it, and the subsequent value should be a strip of land with a recreational trail on it. While landowners may have had the right to sole possession of the defunct railroad land before the supposed taking and now must share the land with recreational trail users, the land itself is most likely cleaner and better maintained, has valuable improvements on it, and is of higher value with a trail than with abandoned tracks, ties, and ballast. In addition, because the railbanking statute operates to keep railroad easements intact, compensation should only be due, if at all, for the additional burden of the trail easement and not the future rail easement.

Despite this practical valuation, the CFC magically waved its wand and held that the taxpayer has to pay for a recreational trail and a future rail easement over land that was completely unburdened without reference to the physical damage the land incurred. The CFC has adopted the most expensive valuation method possible based on the unrealistic hypothesis that the termination of the railroad easement which leaves the "unburdened fee simple absolute" actually reflects the physical state of the land. Although the title may be magically restored to its pristine state, the land itself cannot be.

Ironically, the CFC's interpretation directly contradicts the railbanking statute that provides that the old railroad easements are not extinguished. They do not terminate only for new ones to be purchased in their stead. The statute explicitly provides that the old railroad easements continue unaffected:

Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise 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.¹⁷⁷

The CFC's valuation calculation points to an endemic problem with the way these takings cases are characterized. By characterizing the takings event as the taking of a new trail *and* a new railroad easement to replace the old railroad easement that would have terminated but for railbanking, the CFC's calculation opens the door to claims for additional compensation if other public uses are made of these corridor lands.¹⁷⁸ For instance, in one case the Seattle Port Authority acquired a railbanked corridor and granted a license to a public utility company to use the corridor for placing electric cables. Then it transferred the corridor to a trail manager to operate an interim trail alongside the power company's electric lines. The adjacent landowners claimed a taking of a trail easement and a new railroad easement in the CFC and received over \$100 million in compensation.¹⁷⁹ Then, the landowners sued the Seattle Port Authority for the taking of an additional power line easement.¹⁸⁰

If we treat the easement as a single, continuous railroad easement, there would be no additional compensation due because railroad easements in Washington may be apportioned to allow for other incidental public uses, including power lines.¹⁸¹ But if we treat it as the termination of the old railroad easement and the imposition of two new easements, for current trail use and future rail reactivation, it is not clear that the current power line easement would be incidental to either of those because the railroad easement is one for future reactivation, not present use. Moreover, the laws in existence when the original railroad easement was created would have allowed for an expansive scope that the laws today might not permit. Naturally, the landowners believe that an additional burden has been placed on their land and that they should be compensated. But the reality is that the corridor never stopped being a railroad corridor encumbered by a railroad easement, a public commercial easement in gross that the common law

177. 16 U.S.C. § 1247(d) (2012).

178. If the old railroad easement would have accommodated additional incidental public uses, but was terminated to be replaced by a new railroad easement, it is not clear that the new easement would accommodate the additional public uses because the law today tends to interpret railroad property rights more narrowly.

179. *Haggart v. United States*, 116 Fed. Cl. 131, 149 (Fed. Cl. 2014).

180. Brian Beckley, *Landowners Sue to Stop Powerlines in Railroad Easement*, RENTON REPORTER (May 8, 2014, 1:11 PM), <http://www.rentonreporter.com/news/258523261.html>.

181. *Wash. Sec. & Invest. Corp. v. Horse Heaven Heights, Inc.*, 130 P.3d 880, 886 (Wash. 2006) (describing the flexibility that is characteristic of railroad easements).

deemed to be freely apportionable for other public utility uses for well over a hundred years. The only real difference is that control over the easement has shifted from the railroad company to the local trail manager, a change consistent with the free alienability of commercial easements in gross.

This points to a further problem with these railbanking cases and that is the question of who holds title to these easements. Although the federal government is paying the compensation for the continuation and preservation of these state-law railroad easements, the trail groups actually hold the title to these easements. Thus, although the federal taxpayer is paying fee-like amounts to adjacent landowners, the federal government does not take title to the land rights being purchased. If a local highway department wanted to place highway infrastructure, or a power company wanted to locate utility infrastructure on these corridors, with whom would they negotiate? It would seem logical that local governments would want to simply purchase these corridor lands outright in fee simple in order to use the land for multiple public purposes, especially if the landowners are being compensated at fee-like rates. But could the local governments exercise eminent domain over land encumbered with a railroad easement subject to federal common carrier liabilities? And would the amounts already paid these landowners be credited against the condemnation damages? These takings cases are quite unique in the manner by which the federal government is paying compensation for title disputes between private landowners and state and local governments.

These takings cases can make one dizzy with their circular reasoning. But at the end of the day the taxpayer is forced to repurchase the railroad easement that was already paid for in full in the nineteenth century, or give away land through a misapplied presumption of title. This strange outcome results in the federal government paying for the effects of a federal statute that prevented state law property rights from vesting in adjacent landowners when the railroad conveys its property rights to a state or local entity. This means that the federal government does not get title to the railroad easement or the trail easement, but the taxpayer has to pay for it. And pay it is doing. Justice Sotomayor was not exaggerating when she claimed that the cost of the *Brandt Trust* decision could be in the hundreds of millions of dollars. In May of 2014, the CFC authorized compensation in the amount of \$140 million for a 25.45-mile trail in Washington.¹⁸² This money was given to landowners adjoining the trail when their land grab was interfered with and the railroad adjoining their property was converted to a public recreational trail that might be reactivated for railroad use.

182. *Haggart*, 116 Fed. Cl. at 149.

CONCLUSION

There are numerous additional problems with the CFC's takings jurisprudence in these rail-trail cases, from the double-dipping of lawyers with their lawyer fees to the CFC's allowance of lawyer fees for the time expended by class-action lawyers to solicit petitioners in these cases.¹⁸³ The CFC has also refused to apply clear state law doctrines on the interpretation of the scope of railroad easements and has applied the centerline presumption in states that have clearly rejected the strip and gore doctrine in their state courts. The CFC has reinterpreted railroad source deeds to be easements even though the state courts interpreted the exact same deed to have passed a fee interest to the railroad.¹⁸⁴

The proper question in the takings cases should have been simple: Is continued existence of a railroad easement despite non-user permissible under state law? If the answer is yes, then the railroad easement would not be deemed abandoned, and no state-law property rights of adjoining landowners or servient fee owners should vest. But Justice Sandra Day O'Connor's cryptic remark in *Preseault v. United States*,¹⁸⁵ that takings liability might attach if the state-law property rights of adjacent landowners were sufficiently compromised, opened the door to parsing out each legal issue and analyzing each landowner's property rights individually. In *Preseault*, the Court affirmed the constitutionality of the railbanking statute and noted that Congress had not removed its operation from Tucker Act protection for a taking of private property without just compensation. Justice O'Connor, however, asserted that whether a taking occurred would depend on an analysis of state law property rights. Despite her reference to state law property rights, the CFC has created its own jurisprudence of railroad property rights unmoored from virtually all state law property doctrines, a jurisprudence that sacrifices the public's property rights to a tangled web of presumptions and hypotheticals and for which the taxpayer is paying a costly price.

183. This is a particularly troublesome point. Attorneys are compensated by contingency fee agreements with their clients. See *Voth Oil Co. v. United States*, 108 Fed. Cl. 98, 106 (Fed. Cl. 2012). In many of these cases, the attorney fees are significantly higher than the value of the award for the landowner. See *Gregory v. United States*, 110 Fed. Cl. 400, 403 (Fed. Cl. 2013) (providing that lawyers deserved compensation for virtually all of their work in the class action, even though only 8% of the landowners had viable claims). Additionally, the plaintiffs' lawyers are being compensated for the time they spend soliciting potential clients to such class action suits. *Thomas v. United States*, Nos. 10-54L & 10-459L, 2014 WL 1347221, at *1, *4 (Fed. Cl. Apr. 4, 2014).

184. *Beres v. United States*, 97 Fed. Cl. 757, 809 (Fed. Cl. 2011).

185. *Preseault v. United States*, 494 U.S. 1, 20 (1990) (O'Connor, J., concurring).

And while private landowners are compensated when they are unable to absorb railroad corridors adjacent to their property, the lawyers get the windfall of compensation for their time drumming up business, their time writing amicus briefs in related cases, and their time litigating these claims as well as their 30% or 40% contingency fees out of the compensation awards that they negotiated with their clients. If people thought the checkerboard grants to the railroads characterized a period of lavish land grants of public lands to private ownership, today's rail-trail jurisprudence is characterized by an even more lavish grant of public lands or public taxpayer funds to private landowners who were fortuitous enough to acquire land neighboring a railroad.