

**WHEN THE COMMON LAW RUNS INTO THE
CONSTITUTION: THE TRAIN WRECK AVOIDED IN
*MARVIN M. BRANDT REVOCABLE TRUST V.
UNITED STATES***

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INTRODUCTION

On March 10, 2014, the U.S. Supreme Court issued its decision in the quiet title case, *Marvin M. Brandt Revocable Trust v. United States*.¹ In an 8-1 decision, the Court sided with a Wyoming property owner, the Marvin M. Brandt revocable trust, in a dispute over a proposed recreational trail that would follow the route of an abandoned railroad line bisecting the Brandts' land.² The issue decided was a narrow—but extremely important—question of property law: Who owns the land underlying a railroad right-of-way after it stops being used as a railway?³

On that question, the Court ruled that railroad rights-of-way are subject to the same common law rules as any other easement.⁴ In so ruling, the Court rejected the government's argument that federal land grants operate under an entirely different set of rules from other property.⁵ The government had asked the Court to rule that it retained "an implied reversionary interest" in the railroad easement, such that when the railway was abandoned, ownership would vest in the federal government, not the underlying property owner.⁶ There were many problems with the government's argument, including that it had successfully argued the opposite position—that railroad rights-of-way are common law

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1. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1263 (2014).

2. *Id.* at 1269.

3. *See id.* at 1260 ("This case presents the question of what happens to a railroad's right of way granted under a particular statute—the General Railroad Right-of-Way Act of 1875—when the railroad abandons it: does it go to the Government, or to the private party who acquired the land underlying the right of way?").

4. *Id.* at 1264.

5. *Id.*

6. *Id.*

easements—more than seventy years ago in the case *Great Northern Railway Co. v. United States*.⁷ The government’s claim was further hindered by the fact that “an implied reversionary interest” simply cannot exist under the common law of estates and servitudes. Thus, applying the common law of property, the Court explained that the right-of-way crossing the Brandts’ land was extinguished upon abandonment, and by operation of law, the Brandts held the property free of any servitudes.⁸

The *Brandt* decision, with its discussion of easements and fee estates, is certainly destined for property law textbooks. But it is another aspect of the decision that has drawn much public attention and criticism. Immediately upon the Court issuing the decision, commentators and trail advocates jumped to the conclusion that the decision was a referendum on the National Trails System Act Amendments of 1983 (“Rails-to-Trails Act”)⁹—several predicting that a decision in favor of Brandt would spell doom for rail-trail conversions across the nation.¹⁰ That reaction is not entirely unwarranted. Although the majority opinion did not discuss “takings” or “rails-to-trails,” underlying the case was the claim that the government’s popular rails-to-trails policies violate the Fifth Amendment’s mandate that private property may not be taken for public use “without just compensation.”¹¹ Indeed, both issues provided the policy underpinnings for Justice Sonia Sotomayor’s sole dissent, in which she cautioned that by treating railroad rights-of-way as common law easements, the Court would expose the public to hundreds of millions of dollars in just compensation

7. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 266, 271 (1942).

8. *Brandt Revocable Trust*, 134 S. Ct. at 1265.

9. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42, 42 (1983) (codified as amended at 82 Stat. 919; 16 U.S.C. §§ 1241–1251 (1983)) (explaining that the purpose of the Act is “[t]o amend the National Trails System Act by designating additional national scenic and historic trails, and for other purposes”).

10. See, e.g., Linda Greenhouse, *What Lies Beneath*, N.Y. TIMES (March 19, 2014), <http://www.nytimes.com/2014/03/20/opinion/greenhouse-what-lies-beneath.html> (noting the Court did a poor job of explaining the broader implications of reversionary interests); Richard Frank, *U.S. Supreme Court Deals Blow to National Rails-to-Trails Movement*, LEGAL PLANET (March 10, 2014), <http://legal-planet.org/2014/03/10/u-s-supreme-court-deals-blow-to-national-rails-to-trails-movement/> (explaining the decision could have “profound, long-term impacts on public access rights, land use trends and private property rights.”); David G. Savage, *Supreme Court Deals Setback to Rails-to-Trails Movement*, L.A. TIMES (March 10, 2014, 9:37 PM), <http://www.latimes.com/nation/la-na-scotus-rails-trail-20140311-story.html> (predicting that it may be harder to build bike paths and trails on several thousand properties housing railroads); Bill Chapel, *Family Trust Wins Supreme Court Fight Against Bike Trail*, NPR (March 10, 2014, 1:32 PM), <http://www.npr.org/blogs/thetwo-way/2014/03/10/288584936/family-trust-wins-supreme-court-fight-against-bike-trail> (speculating that the *Brandt* decision will undermine the legality of the public trails converted from former railways).

11. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

claims.¹² Echoing the position of government lawyers and trail advocates, Justice Sotomayor argued that the only way to avoid this public financial impact would be to suspend common law understandings of property ownership when the federal government transfers land to private ownership.¹³ According to her, the federal government should be allowed to convey an “easement” that does not operate like an easement in order to advance costly public policies like the Rails-to-Trails Act.¹⁴

Those objections, however, run headlong into the Takings Clause. Of course, there would be no conflict with the Fifth Amendment if we were to conclude that property transferred from the federal government is ordinarily outside normal common law understandings. But that conclusion would counter the entire body of U.S. Supreme Court cases from *West River Bridge v. Dix*¹⁵ to the modern cases where the Court notes that definitions of property are informed by state law understandings.¹⁶ In other words, unless the granting act, deed, or statute somehow explicitly constrained the property interest there would be a conflict.¹⁷ Indeed, a unanimous Court highlighted that larger point almost twenty-five years ago in *Preseault v. Interstate Commerce Commission* when it upheld the Rails-to-Trails Act against a facial takings challenge.¹⁸ In that case, the Court cautioned that some of the abandoned railroad rights-of-way may be held in private ownership, which will require just compensation before converting the land

12. *Brandt Revocable Trust*, 134 S. Ct. at 1272 (Sotomayor, J., dissenting).

13. *Id.*

14. *Id.*

15. See 47 U.S. 507, 507 (1848) (“The Constitution of the United States intended to prohibit all such laws impairing the obligation of contracts as interpolate some new term or condition, foreign to the original agreement.”).

16. See, e.g., *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot.*, 560 U.S. 702, 707 (2010) (plurality opinion) (“Generally speaking, state law defines property interests.”).

17. *Leo Sheep Co. v. United States*, 440 U.S. 668, 678–79 (1979); see also *Hash v. United States*, 403 F.3d 1308, 1314 (Fed. Cir. 2005) (“[P]roperty rights that are not explicitly reserved by the grantor cannot be inferred to have been retained.”). Typically, when Congress uses a term of art taken from the common law—as it did in the 1875 Act by granting a “right of way through the public lands of the United States,” General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482 (codified as amended at 43 U.S.C. § 934)—it is presumed that Congress intended for the term to have its ordinary, common law meaning:

Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Evans v. United States, 504 U.S. 255, 259–60 (1992) (quoting *Morrisette v. United States*, 342 U.S. 246, 263 (1952)); see also *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (“Congress is understood to legislate against a background of common-law adjudicatory principles.”).

18. *Preseault v. Interstate Commerce Comm'n (Preseault I)*, 494 U.S. 1, 12 (1990).

into public recreational trails.¹⁹ Justice Sotomayor’s dissent in *Brandt*—and all of the commentary it inspired—forgets Justice Holmes’s famous warning “that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”²⁰

This Article will review the consequences of the *Brandt* Court’s decision to adhere to common law rules and definitions of property with particular regard to the constitutional implications of the ruling. Part I provides background on the split of authority regarding ownership of patented lands subject to railway rights-of-way. Part II provides an overview and analysis of the Supreme Court’s decision in *Brandt*. In Part III, the Article discusses the implications of applying common law rules of property to federal land grants. Finally, in Part IV, the Article discusses application of common law rules for determining ownership of an abandoned right-of-way and why that rule is the better of the two options.

I. THE *BRANDT* CASE

The facts of the *Brandt* case can be boiled down to a few essential points. In 1908, the United States granted a “right-of-way” to the Hahn’s Peak and Pacific Railway Company to build and operate a sixty-six mile railway from Laramie, Wyoming to Colorado.²¹ Later, the government sold Marvin and Lulu Brandt an eighty-acre tract ““subject to those rights for railroad purposes as have been granted to the [railroad company].””²² Years later, the railroad abandoned the track and the United States sued the Brandts, claiming ownership of the right-of-way so that it could build a recreational trail on the old track.²³ So, who owns the abandoned right-of-way? The railroad? The federal government? The Brandts? To answer that question, we need to journey back to the nineteenth century.

A. *The Long Way to the Supreme Court*

The *Brandt* case finds its roots in the nineteenth century policies that drove the westward expansion and settlement of the United States—in particular, the General Railroad Right-of-Way Act of 1875, a statute that

19. See *id.* at 13 (finding that the Trails Act authorized just compensation claims; implying that private parties may now hold abandoned rights-of-way).

20. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

21. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1262 (2014).

22. *Id.* (quoting Petition for Writ of Certiorari at 10–11, *Brandt Revocable Trust*, 134 S. Ct. 1257 (No. 12-1173), 2013 WL 1225990).

23. *Brandt Revocable Trust*, 134 S. Ct. at 1262.

encouraged expansion of railroads by granting “rights-of-way” to railroad companies to run tracks and build supporting infrastructure over public lands.²⁴ By the 1920s, the nation’s railway system reached its peak of 272,000 miles of track, crisscrossing the nation.²⁵ Since then, however, the utility of rail transport has declined. By the mid-1980s, the federal government estimated that at least 130,000 miles of track had been abandoned, with an estimated 3,000–4,000 more miles of track being abandoned every year.²⁶ All across the country, there are thousands of miles of abandoned track running through private lands, like the Brandts’ acreage.

This new reality resulted in competing claims for the land. Homeowners and farmers sought to make use of their property free of the disused railways.²⁷ But the federal government had different plans for the land; it adopted a “rails-to-trails” program with the goal of converting old tracks into recreational trails.²⁸ The problem with the government’s plan was that the statute it enacted to advance that policy—the Rails-to-Trails Act—contained no provision for compensating the underlying property owners for the land, contrary to the Fifth Amendment’s command.²⁹

Had *Brandt* followed the normal course for a rails-to-trails case (i.e., a notice of the government’s intent to convert a right-of-way to a recreational trail followed by a compensation trial at the Court of Federal Claims), it would have been an open and shut win for the Brandts. As discussed below, the Federal Circuit courts have repeatedly concluded that railroad rights-of-way granted under the 1875 Act are easements subject to the rules and definitions established by the common law of property.³⁰ Under the common law of property, an easement will extinguish upon abandonment and the title will be unencumbered by the right-of-way.³¹ If, in that

24. General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482, 482 (1875) (codified as repealed in part at 43 U.S.C. § 934).

25. *Preseault v. Interstate Commerce Comm’n (Preseault I)*, 494 U.S. 1, 5 (1990).

26. *Id.*

27. *Brandt Revocable Trust*, 134 S. Ct. at 1261.

28. *Preseault I*, 494 U.S. at 6.

29. *Id.* at 12–13.

30. *See, e.g., Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (stating that the *Preseault* precedent established that rights of way for railroads are still subject to property rights of common law); *Hash v. United States*, 403 F.3d 1308, 1317 (Fed. Cir. 2005) (noting legislation that dictated how a railroad easement should be handled under common law); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004) (“After evaluating the entire deeds of grant, the trial court held that these grants constituted easements”); *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1541 (Fed. Cir. 1996) (en banc) (determining if a question involving “easements granted to the railroad” can be answered with Vermont case law “either in this century or the last”).

31. The grant of an easement transfers no ownership interest in the underlying land to the holder of the right-of-way. Instead, an easement creates a servitude on the land—an incorporeal hereditament—that grants the holder “a right to make use of the land over which the easement lies for

circumstance, the government still wants to convert the abandoned right-of-way into a recreational trail, it must compensate the owner.³²

But *Brandt* is far from ordinary. Instead of commencing the trail conversion process—which would have landed the case within the jurisdiction of the Federal Circuit—the government filed a quiet title action in a Wyoming district court.³³ The strategy was to take advantage of a thirty year-old summary judgment decision, wherein an Idaho district court found that the federal government held “an implied reversionary interest”—a property interest that does not exist at common law³⁴—in rights-of-way conveyed to railroad companies under the 1875 Act.³⁵ The federal government’s strategy worked initially. The Tenth Circuit, in *Brandt*, adopted the summary judgment decision as law of the circuit—expressly rejecting decisions from the Federal Circuit—and held that the federal government owned “an implied reversionary interest” in the land underlying the right-of-way,³⁶ meaning that it could open a public recreational trail on the Brandts’ land without compensating them.

1. The Federal Government Grants Railroad Companies Hundreds of Thousands of Acres as “Rights-of Ways”

Throughout the early to mid-nineteenth century, the U.S. Congress adopted a policy to give incentives to infrastructure investment by granting private railroad companies rights-of-way over public lands in order to encourage the settlement and development of the West.³⁷ In response to

the purposes for which it was granted.” *Preseault II*, 100 F.3d at 1545. Thus, the interest that the fee holder has in an easement is properly characterized as “a present estate in fee simple, subject to the burden of the easement.” *Id.* at 1533; see also *Louis W. Epstein Family P’ship v. Kmart Corp.*, 13 F.3d 762, 766 (3d Cir. 1994) (“[T]he owner of land, who grants a right of way over it, conveys nothing but the right of passage and reserves all incidents of ownership not granted.” (quoting *Mercantile Library Co. v. Fidelity Trust Co.*, 83 A. 592, 595 (1912))); *Bd. of Cnty. Supervisors of Prince William Cnty., Va. v. United States*, 48 F.3d 520, 527 (Fed. Cir. 1995) (“[A] fee simple estate is not an easement, or vice versa.”).

32. *Hash*, 403 F.3d at 1318; *Beres v. United States*, 64 Fed. Cl. 403, 407 (Fed. Cl. 2005).

33. *United States v. Marvin M. Brandt Revocable Trust*, No. 06–CV–184–J, 2008 WL 7185272, at *1 (D. Wyo. Apr. 8, 2008), *rev’d in part*, 559 F.App’x. 717 (10th Cir. 2014) (explaining that “the United States . . . seeks to quiet title to the abandoned railroad right-of-way in the Government”).

34. *Hash*, 403 F.3d at 1318; *Beres*, 64 Fed. Cl. at 407.

35. *Ohio v. Or. Short Line R.R. Co.*, 617 F. Supp. 207, 212 (D. Idaho 1985).

36. *Brandt Revocable Trust*, 2008 WL 7185272, at *17, *18 (explaining that “under Tenth Circuit case law, this statement must be disregarded at the summary judgment stage and the Government must prevail on its motion” (citing *Argo v. Blue Cross and Blue Shield of Kan.*, 452 F.3d 1193, 1200 (10th Cir. 2006)).

37. Between 1852 and 1862, the government granted rights-of-way pursuant to a general statute giving charter railroads a right-of-way 100-feet wide, plus timber, gravel, and the right to build

pressure from railroad lobbyists, Congress enacted a series of statutes granting to railroad companies rights-of-way through the public domain, accompanied by outright grants of land along those rights-of-way.³⁸ The land grants authorized the railroads to either develop their lots or sell them to settlers in order to finance construction of rail lines.³⁹ Under this policy, the federal government gave so much land to the railroad companies that, by the latter half of the nineteenth century, private railroads had become one of the largest secondary sellers of public lands, after the states.⁴⁰ Public dissatisfaction with the lavish land grants and the railroad companies' delays in bringing those lands to market for settlers and farmers led Congress to discontinue the land grant incentives.⁴¹

Still wishing to encourage railroad construction, however, Congress passed at least fifteen special acts between 1871 and 1875 granting to designated railroads “the right-of-way” through public lands, without any accompanying land subsidy.⁴² In 1875, Congress enacted the less-generous but still incentive-rich policy embodied in the General Railroad Right-of-

suitable drains. Act of Aug. 4, 1852, ch. 80, 10 Stat. 28. Between 1862 and 1871, the government granted 100-foot or 200-foot rights-of-way to the transcontinental railroads via individual acts of Congress, in addition to alternating sections of land on either side of the roadway for sale to raise construction funds. General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482, 482 (1875) (codified as repealed in part at 43 U.S.C. §§ 934–939). The 1875 Act has remained unchanged as 43 U.S.C. §§ 934–939, even though there are no modern railroads engaged in new construction. *See also* PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 341, 357 (Pub. Land L. Rev. Comm., 1968) (explaining how “Congress had been granting Railroads rights-of-way since 1835 . . . and in 1852 it adopted a general law giving 100-foot rights of way”); THOMAS E. ROOT, *RAILROAD LAND GRANTS: FROM CANALS TO TRANSCONTINENTALS* 21–25 (1987) (describing the West’s fervor for, then hostility to, land grants to railroads); JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 51–59 (2001) (detailing nineteenth century developments in property law regarding railroads).

38. *See* Danaya C. Wright, *Reliance Interests and Takings Liability for Rail-Trail Conversions: Marvin M. Brandt Revocable Trust v. United States*, 44 ENVTL. L. REP. 10173, 10174 (2014) (citing John Bell Sanborn, *Congressional Grants of Land in Aid of Railways*, 2 BULL. U. WIS., 300, 300 (1899) (describing series of congressional grants to railroad companies); *see also* GATES, *supra* note 37, at 357 (“Congress had been granting Railroads rights-of-way since 1835 . . . and in 1852 it adopted a general law giving 100-foot rights of way,” and in 1850, Congress gave a “grant of land in addition to a right-of-way for a projected railroad” for the first time.).

39. GATES, *supra* note 37 at 357.

40. *See id.* at 379 (“Next to the states, the railroads were the greatest secondary dispensers of lands in the United States.”).

41. *Id.* at 380 (explaining how in 1870 the House adopted the Holman Resolution, which discontinued public land subsidies for the railroads, and instead gave land incentives to settlers); *see also* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1261 (2014) (“That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.” (quoting Cong. Globe, 42d Cong., 2d Sess., 1585 (1872))).

42. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 274 & n.9 (1942).

Way Act of 1875.⁴³ The 1875 Act governed railroad rights of access across public lands for the ensuing century:

[T]he right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, . . . to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.⁴⁴

Section 4 of the 1875 statute provided that:

[A]ny railroad-company desiring to secure the benefits this act, shall . . . file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.⁴⁵

The 1875 Act remained in effect until 1976, when the provisions governing the issuance of new rights-of-way were repealed by the Federal Land Policy and Management Act.⁴⁶

2. Rails-to-Trails Policy Calls Into Question the Ownership of Lands Subject to Railway Rights-of-Way

The federal government conveyed many of the same public lands that it granted for railway use to homesteaders and other settlers, subject to the railroads' rights-of-way. Indeed, at the same time the government was

43. General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482, 482 (1875) (codified as repealed in part at 43 U.S.C. §§ 934–939); *see also* Hash v. United States, 403 F.3d 1308, 1310–11 (Fed. Cir. 2005) (referring to sections of the General Railroad Right-of-Way Act of 1875).

44. Ch. 152, 18 Stat. 482, 482.

45. *Id.* at 483.

46. Federal Land Policy Management Act of 1976, Pub. L. No. 94–579, § 706(a), 90 Stat. 2743, 2793 (1976) (codified as amended at 43 U.S.C. § 1701 *et. seq.*).

encouraging the construction of railroads via statutory incentive programs, the nation was also encouraging settlement of the western lands through the Homestead Act of 1862.⁴⁷ The Homestead Act entitled qualifying settlers to acquire up to 160 acres of public land by “enter[ing] one-quarter section, or a less quantity, of unappropriated public lands”⁴⁸

Over time, the settlers remained, but many of the railroads did not. With the development of motor vehicle transport, rail traffic diminished. Since 1920 almost half of the nation’s estimated 270,000 miles of rail lines have gone out of use.⁴⁹ This changing reality resulted in competing claims for the land. Homeowners and farmers sought to make use of their property free of the disused railways. In response, in 1922, Congress passed the Abandoned Railroad Right-of-Way Act, which granted to landowners adjacent to previous railroad right-of-way grants any right and title that the United States would have retained upon abandonment.⁵⁰ Those rights, of course, depended upon the terms of the grant—at certain times in history, the federal government granted the railroad companies rights-of-way as limited fee estates; at other times, it granted them as easements.⁵¹ At issue in *Brandt* were the rights reserved in the land underlying an easement, which is to say, none. Nonetheless, beginning in the 1960s, government and conservationists looked to the growing number of abandoned railways as an opportunity to expand or link green spaces with recreational trails. Congress implemented its rail-trail policy by enacting the National Trails System Act Amendments of 1983 (“Rails-to-Trails Act”), which provides for the preservation of discontinued railway rights-of-way, by “banking” the rights-of-way for possible future reactivation.⁵² The Rails-to-Trails Act then authorizes “interim” use of the rights-of-way as recreational trails.⁵³

47. See Homestead Act of 1862, 43 U.S.C. § 161 (repealed 1976) (making land available for purchase, including land in western territories).

48. 43 U.S.C. § 161.

49. *Preseault v. Interstate Commerce Comm’n (Preseault I)*, 494 U.S. 1, 5 (1990).

50. Abandoned Railroad Right-of-Way Act, ch. 94, 42 Stat. 414, 414–15 (1922).

51. See, e.g., *Great N. Ry. Co. v. United States*, 315 U.S. 262, 273–74 (1942) (describing how Congress first granted large land grants to railroad companies before merely granting rights-of-way); *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) (discussing how rights of a grant depend on the terms and that the terms of the grant-in-question “explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof”); see also Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 *ECOLOGY L.Q.* 673, 686–89 (2011) (chronicling the federal government’s treatment of rights-of-way as easements).

52. See National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42, 48 (1983) (codified as amended at 16 U.S.C. §§ 1241–1251 (1983)) (explaining that the Act is designed to preserve “rights-of way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation”).

53. *Id.*

The problem with the government's plan was that, by the mid-1980s, an estimated 130,000 miles of track had been abandoned, with an estimated 3,000–4,000 more miles of track being abandoned every year—much of it running across private property.⁵⁴ And, by modifying the policy established by the Abandoned Railroad Right-of-Way Act, the United States sought to prospectively acquire all rights and interests in abandoned railroad rights-of-way that would have been otherwise granted to adjacent landowners so long as those rights-of-way had not been utilized as a public highway within one year of abandonment.⁵⁵

Unsurprisingly, the government quickly found itself defending its rails-to-trails program before the U.S. Supreme Court in *Preseault v. Interstate Commerce Commission (Preseault I)*.⁵⁶ In that case, the property owners alleged that the Rails-to-Trails Act was unconstitutional on its face because it affected a taking of landowners' ownership interests in abandoned railroad rights-of-way without payment of just compensation.⁵⁷ The Court rejected the facial challenge, but in doing so concluded that, although the program itself was a valid exercise of federal commerce power, converting an abandoned right-of-way to a trail could "giv[e] rise to just compensation claims" under the Takings Clause.⁵⁸ Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy elaborated, explaining that the conversion to trail use "may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights."⁵⁹ However, Congress's failure to include a compensation provision was not fatal to the program because the U.S. Supreme Court had "always assumed that the Tucker Act is an 'implied promiss[e]' to pay just compensation which individual laws need not reiterate."⁶⁰

54. See *Railbanking*, RAILS-TO-TRAILS CONSERVANCY, <http://www.railstotrails.org/build-trails/trail-building-toolbox/railbanking> (last visited Apr. 9, 2015) (explaining "38,000 miles of track were abandoned in the 45 years from 1930 to 1975. Yet, in the next 15 years until 1990, railroads abandoned nearly double that amount—65,000 miles—in only a third of the time.").

55. See Pub. L. No. 98-11, 97 Stat. 42, 42–48 (explaining that there is a long list of "amendments" made to the Act which make it easy for the government to acquire rights and interests in land: "[I]f a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way . . . then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act.").

56. *Preseault v. Interstate Commerce Comm'n (Preseault I)*, 494 U.S. 1, 12 (1990).

57. *Id.* at 10.

58. *Id.* at 13.

59. *Id.* at 22 (O'Connor, J., concurring).

60. *Id.* at 13 (quoting *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940)).

In the subsequent just compensation case, the Federal Circuit held the Government liable for compensation when recreational trail use exceeds the scope of the original railroad right of way.⁶¹ That decision set out the elements of a rails-to-trails takings case:

[T]he determinative issues for takings liability are (1) who owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate; (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and (3) even if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement (abandonment of the easement).⁶²

Thus the threshold question in any rails-to-trails case is in regards to the character of the property interests held by the railroad company and the underlying landowner. And that question was the subject of an irreconcilable split of authority among the circuit courts of appeals.

a. The Federal Circuit Interprets Railway Grants in Accordance with the Common Law of Property

Historically, ownership was determined under common law understandings of property. Indeed, the common law guided the Supreme Court in construing the 1875 Act in *Great Northern Railway Company v. United States*.⁶³ In that case, the federal government sought an injunction to stop a railroad company from drilling for or removing gas, oil, and other materials from lands underlying an 1875 Act right-of-way.⁶⁴ The railroad argued that the 1875 Act conveyed a fee interest, giving the railroad the right to extract oil from its land.⁶⁵ The government, relying on the common law definitions of easements and fee estates, argued that 1875 Act grants

61. See *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1541 (Fed. Cir. 1996) (explaining that “if the Government’s use of the land for a recreational trail is not within the scope of the easements, then that use would constitute an unauthorized invasion of the land”).

62. *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (citing *Preseault II*, 100 F.3d at 1533).

63. See *Great N. Ry. Co. v. United States*, 315 U.S. 262, 271 (1942) (using common-law language to discuss the rights held by the railroad).

64. *Id.* at 270.

65. *Id.*

were strictly limited in scope and conveyed “a mere right of passage across the public domain.”⁶⁶ Significantly, the United States contended that, because the railroad had taken only an easement, the fee itself—including all minerals and subsurface rights—remained federal property.⁶⁷ The government’s argument focused on § 4 of the 1875 Act, which provided that “all such lands over which such right of way shall pass shall be disposed of subject to such right of way.”⁶⁸ The United States argued:

To construe the right of way grant as a fee in the land would be to rob this provision of all meaning. It surely would have been novel, as well as wholly unnecessary, for Congress, after it granted a fee, to declare that the adjacent lands are to be conveyed “subject to” the prior grant in fee.⁶⁹

The *Great Northern* Court agreed that “[t]his reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee.”⁷⁰ Thus, following traditional principles of property law, the Court concluded that the Act “grants only an easement, and not a fee.”⁷¹

In fact, a series of administrative land decisions contemporaneous with the land grants viewed railroad rights-of-way as common law easements. These decisions relied on traditional principles of property law to define the nature and scope of federal land grants when the property is traversed by a railroad right-of-way. For example, an 1888 decision instructed that patentees must pay for the full area purchased with no deduction for the right-of-way easement because the patentee was taking title to the entire tract, including the land underlying the easement:

The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee . . . All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full

66. Brief for the United States at 5, *Great N. Ry. Co. v. United States*, 315 U.S. 262 (1942) (No. 149).

67. *Id.* at 5, 10.

68. *Id.* at 11 (emphasis omitted).

69. *Id.*

70. *Great N. Ry. Co.*, 315 U.S. at 271.

71. *Id.* (“Apter words to indicate the intent to convey an easement would be difficult to find.”) (quoting *MacDonald v. United States*, 119 F.2d 821, 825 (9th Cir. 1941)); see also *Smith v. Townsend*, 148 U.S. 490, 499 (1893) (“Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the company, and if ever the use of that right of way was abandoned by the railroad company the easement would cease, and the full title to that right of way would vest in the patentee of the land.”).

area of the subdivision entered, there being no authority to make deductions in such cases.⁷²

The United States continued to rely on the common law when defending its rails-to-trails policy against a takings challenge in *Preseault I.*⁷³ In that case, discussed above, the federal government argued, in part, that its rails-to-trails policy should not be subject to facial invalidation because the nature of each landowner's property interests will change based on the terms of the deeds and the applicable common law rules:

In this case, the nature of petitioners' property interest, if any, has not yet been determined. Petitioners and the State of Vermont dispute whether the interest acquired in 1899 by the State's predecessor in interest, the Rutland-Canadian Railway, was an easement or an estate in fee simple. If the interest was acquired in fee simple, then petitioners have no right in the property whatsoever and, consequently, no basis for a takings claim. Moreover, even if the railroad acquired only an easement, the question whether petitioners have a colorable claim of a taking would depend upon the terms of that easement. The document creating an easement may specify the events on which a reversionary interest will vest in possession, may speak in ambiguous terms, or may be completely silent on the issue. And

72. *Great N. Ry. Co.*, 315 U.S. at 275 n.13 (quoting 12 Pub. Lands Dec. 423, 428 (Jan. 13, 1888)). Many other decisions from that period apply common law principles to resolve disputes concerning railroad rights-of-way. *See, e.g.*, John W. Wehn, 32 Pub. Lands Dec. 33, 33 (D.O.I. 1903) (noting that the rights-of-way granted under 1875 and 1891 acts were mere easements and that the applicant to purchase land over which they passed would therefore be required to pay for the entire tract); *Brucker v. Buschmann* (on review), 21 Pub. Lands Dec. 114, 115 (D.O.I. 1895) (finding railroad right-of-way does not diminish the acreage held in fee by the homesteader); Mary G. Arnett, 20 Pub. Lands Dec. 131, 132 (D.O.I. 1895) (noting that a grant under the 1875 Act conveyed "an easement and not the land"); *Pensacola & Louisville R.R. Co.*, 19 Pub. Lands Dec. 386, 388 (D.O.I. 1894) ("[L]ands across which a right of way is claimed by a railroad company [under federal land grants] may be disposed of by patent Patentees will take the servient tenement, subject to whatever servitude may exist, and they will find ample protection in the courts, should any attempt be made to deprive them of the use or occupancy of their land"); *Fremont, Elkhorn and Missouri Valley Ry. Co.*, 19 Pub. Lands Dec. 588, 590 (D.O.I. 1894) ("That the right of way granted by the [1875] act in question is a mere easement can not be questioned, for the fourth section provides that 'thereafter all such lands, over which such right of way shall pass, shall be disposed of, subject to such right of way.'"); *Eugene McCarthy*, 14 Pub. Lands Dec. 105, 109 (D.O.I. 1892) (title to mineral claim would become unrestricted upon abandonment of federal land grant right-of-way); *Right of Way*, 12 Pub. Land Dec. 423, 428 (D.O.I. 1891) (under the 1875 Act, settlers take the full tract of land that is subject to the right-of-way); *Wyo. Interior Dec.*, 27 IBLA 137, 178 (IBLA 1976) ("[I]t is settled that the railroad received only an easement under the General Right-of-Way Act of 1875.").

73. *See Preseault v. Interstate Commerce Comm'n (Preseault I)*, 494 U.S. 1, 8 (1990) (discussing how state law applies to property interests subject to railroad easements).

in all cases, state law will guide the inquiry into the intent of the parties and whether that intent will be respected. Thus in some cases, interim trail use may cause an easement to revert; in other cases, it may not.⁷⁴

Again, the Court agreed with the government's arguments, holding that it was necessary for a court to determine the parties' common law property interests before deciding who owns the land over which the right-of-way runs:

[The rails-to-trails statute] gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations. State law generally governs the disposition of reversionary interests, subject of course to the ICC's "exclusive and plenary" jurisdiction to regulate abandonments.⁷⁵

Following *Preseault I*, both the Federal and Seventh circuits held that determining the character of the right-of-way is a necessary first step before deciding ownership of the land because not all railroad rights-of-way involve the same property interest.⁷⁶ However, as the Court of Federal Claims recently noted, there may still be room to argue just what the U.S. Supreme Court meant when it characterized a right-of-way as an "easement":

74. Brief for the Federal Respondents at 23–24, *Preseault v. Interstate Commerce Comm'n (Preseault I)*, 494 U.S. 1 (1990) (No. 88-1076) (emphasis added) (citations omitted); see also *Preseault I*, 494 U.S. at 24 (O'Connor, J., concurring) ("Even the federal respondents acknowledge that the existence of a taking will rest upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest.").

75. *Preseault I*, 494 U.S. at 8 (quoting *Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981)); see also *id.* at 24 (O'Connor, J., concurring) ("Well-established principles will govern analysis of whether the burden the ICC's actions impose upon state-defined real property interests amounts to a compensable taking.").

76. See, e.g., *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (noting factors that determine the type of "takings liability" that applies); *Hash v. United States*, 402 F.3d 1308, 1312 (Fed. Cir. 2005) (discussing characteristics of various rights-of-way categories); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004) ("[U]se of these easements for a recreational trail . . . is not the same use made by a railroad . . ."); *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (explaining how the nature of the right-of-way in question would change the outcome of the case based on the railroad's property interest in the land).

Since the Supreme Court's decision in *Great Northern*, cases have generally defined the right-of-way interest in 1875 Act as an easement. Unfortunately, however, the Supreme Court, in *Great Northern*, and in subsequent cases, has not provided a more specific definition of the term "easement" in the 1875 Act context.⁷⁷

b. The Tenth Circuit Holds that Federal Railways Grants Create Property Interests Unlike the Common Law

Contrary to the Federal Circuit, the Tenth Circuit had long-held that the common law of property does not apply to disputes over ownership of railroad easements.⁷⁸ The circuit rule traces back to the thirty-year-old summary judgment opinion resolving a dispute over ownership of an abandoned right-of-way easement from the Federal District Court for Idaho, *Idaho v. Oregon Short Line Railroad Co.*⁷⁹ Key to the dispute in that case was whether the federal government held an implied reversionary interest in the easement.⁸⁰ Although an implied reversionary interest is not recognized by the common law,⁸¹ the Idaho Federal District Court ruled that the federal government could create a new property interest.⁸² The trial court explained that the government, in authorizing grants for right-of-way easements, had the authority to "pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests" in order to create an "implied condition of reverter" on all such conveyances.⁸³ Because of that, the court refused to consider the common law rules regarding easements, holding instead that "the precise nature of [the] retained interest need not be shoe-horned into any specific category cognizable under the rules of property law."⁸⁴ Thus, the trial court concluded that the federal government, in enacting the 1875 Act, had implicitly suspended the common law and had impliedly reserved a reversionary interest in all railroad right-of-way easements.⁸⁵ The Tenth

77. *Beres v. United States*, 64 Fed. Cl. 403, 422 (Fed. Cl. 2005).

78. *Marshall v. Chicago & Nw. Transp. Co.*, 31 F.3d 1028, 1030–32 (10th Cir. 1994) (adopting the "result and rationale" of *Idaho v. Or. Short Line R.R. Co.*, 617 F. Supp. 207, 212 (D. Idaho 1985)).

79. *Or. Short Line*, 617 F. Supp. at 208–09.

80. *Id.* at 209, 211–12.

81. *Beres*, 64 Fed. Cl. at 413.

82. *Id.* at 411.

83. *Id.* at 421, 424.

84. *Id.* at 424.

85. *Id.*

Circuit adopted the rule of *Oregon Short Line* without question or analysis.⁸⁶

The split of authority regarding ownership of abandoned railroad rights-of-way had been growing for decades and was well-documented in case law and legal scholarship.⁸⁷ Indeed, *Powell on Real Property* stated that the conflict between the Tenth Circuit and the Federal Circuit engenders a “fundamental contradiction” on the law of property, “a ‘mess [that] is not entirely fixed’ and in need of ‘thorough analysis.’”⁸⁸ Even commentators who support the modern rails-to-trails policy acknowledged that *Oregon Short Line* created a property interest that is neither recognized nor bound by common law principles.⁸⁹

B. The Brandt Case

In 1946, Melvin M. Brandt purchased a sawmill in Fox Park, Wyoming, which he and his family owned and operated until the mill closed in 1991.⁹⁰ Later, in 1976, Melvin and Lulu Brandt purchased an eighty-three acre parcel of patented land in Fox Park.⁹¹ The patent granted

86. *Marshall v. Chicago & Nw. Transp. Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994).

87. *See, e.g.*, *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005) (discussing split of authority); *see also* *Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 649 F.3d 799, 803 (7th Cir. 2011) (concluding that the Federal Circuit’s approach to rails-to-trails disputes “make[s] better sense” than the Tenth Circuit’s conclusion that the government holds an implied reversionary interest in all railroad rights-of-way).

88. Brief Amicus Curiae of Pacific Legal Foundation in Support of Petition for Writ of Certiorari at 3, 11, *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014) (No. 12–1173) (quoting ROGER CUNNINGHAM, ET AL., *THE LAW OF PROPERTY* § 8.9 (2d ed. 1993) (noting decisions concerning railroad rights-of-way “are in considerable disarray”).

89. *See, e.g.*, Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress’s “1871 Shift”*, 82 U. COLO. L. REV. 85, 101 (2011) (“Congress had authority to grant railroad easements ‘subject to its own terms and conditions.’”) (quoting *Idaho v. Ore. Short Line R.R. Co.*, 617 F. Supp. 207, 212 (D. Idaho 1985)); Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History*: *Hash v. United States and the Threat to Rail-Trail Conversions*, 38 ENVTL. L. 711, 731–32 (2008) (“[A] new railroad easement is substantially different from a common-law easement, so different that it looks like a fee simple, because it has the ‘attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.’”) (quoting *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 183 (1898)); Gregg H. Hirakawa, *Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State*, 25 SEATTLE U. L. REV. 481, 504 (2001) (explaining that because “federal ‘easements’ on public land are granted by Congress, the easements are subject to Congressional desires rather than common law”).

90. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1262 (2014).

91. *Id.* A federal land patent passes “a perfect and consummate title” to the owner. *Wilcox v. Jackson*, 38 U.S. 498, 516 (1839) (“nothing but a patent passes a perfect and consummate title” to a party); *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 331 (1924) (“[W]hen a patent issues in accordance with governing statutes, all title and control of the land passes from the United States.”). A federal land patent “is intended to quiet title to and secure the enjoyment of the land for the patentees

the Brandts a fee simple interest in the land ““with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto said claimants, their successors and assigns, forever.””⁹² The patent did, however, state that, among other exceptions, the patent was ““subject to those rights for railroad purposes as have been granted to the Laramie[,] Hahn’s Peak & Pacific Railway Company, its successors or assigns.””⁹³ The grant did not state what would occur if the railroad abandoned its right-of-way.

The Laramie, Hahn’s Peak & Pacific Railway Company obtained the sixty-six-mile right-of-way in 1908, under the 1875 Act.⁹⁴ A half-mile portion of the right-of-way traverses the Brandts’ property, covering a total of ten acres of their land.⁹⁵ At the time Laramie, Hahn’s Peak & Pacific Railway completed construction of its railway over the right-of-way in 1911, “[i]ts proprietors had rosy expectations, proclaiming that it would become ‘one of the most important railroad systems in this country.’”⁹⁶ The railroad never met those expectations however. Instead of transporting coal and ores, the line was primarily used for timber and cattle.⁹⁷ And as a result, the Laramie, Hahn’s Peak & Pacific Railway was not as lucrative as hoped and was sold several times between 1914 until 1935, until it was finally purchased by the Wyoming and Colorado Railroad Company in 1987 with the intent of using the line as a tourist attraction.⁹⁸ That proved to be unprofitable as well and in 1996 Wyoming and Colorado notified the federal government of its intent to abandon the right-of-way, which was completed in 2004.⁹⁹

In 2006, the United States filed a quiet title lawsuit against the Brandts and several other landowners whose property was crossed by the railway, seeking an order stating that the United States owned the abandoned right-of-way.¹⁰⁰ The government either settled with or obtained default judgment

and their successors.” *Grainger v. United States*, 197 Ct. Cl. 1018, 1024 (Ct. Cl. 1972) (citing *Dominguez De Guyer v. Banning*, 167 U.S. 723, 743–44 (1897)).

92. *Brandt Revocable Trust*, 134 S. Ct. at 1262 (quoting App’x to Petition for Certiorari at 76, *Brandt Revocable Trust*, 134 S. Ct. 1257 (No. 12–1173)).

93. *Id.* (citing App’x to Petition for Certiorari, *supra* note 92, at 78) (alteration in original) (capitalization omitted).

94. *Id.*

95. *Id.*

96. *Id.* (quoting LARAMIE, HAHNS PEAK AND PACIFIC RAILWAY SYSTEM: THE DIRECT GATEWAY TO SOUTHERN WYOMING, NORTHERN COLORADO, AND EASTERN UTAH 24 (1910)).

97. *Id.* at 1262–63 (citing R. KING, TRAILS TO RAILS: A HISTORY OF WYOMING’S RAILROADS 90 (2003)).

98. *Id.* 1262–63 (citations omitted).

99. *Id.*

100. *Id.*

against all of the property owners except the Brandts.¹⁰¹ The Brandts filed a counterclaim, arguing that, under the common law, the railroad right-of-way was an ordinary easement and that, upon its abandonment, the easement was extinguished and the Brandts took possession of full title to the land.¹⁰² The government countered that it had retained an implied reversionary interest in the railroad right-of-way—“a future estate that would be restored to the United States if the railroad abandoned or forfeited its interest.”¹⁰³

The District Court quieted title to the right-of-way in the United States.¹⁰⁴ The Tenth Circuit Court of Appeals affirmed.¹⁰⁵ In so ruling, the Tenth Circuit recognized that there was a split of authority among the lower courts regarding the character of a property interest in an abandoned 1875 Act rights-of-way.¹⁰⁶ But the court concluded that, based on the law of the Circuit, the government had retained an “implied reversionary interest” in the railway grant, and thus gave the United States title to the land when the right-of-way was abandoned.¹⁰⁷

C. Brandt Litigation Exposes a Split of Authority Threatening Title to Property Obtained Under a Federal Land Patent

Since *Preseault I* concluded that a rail-trail conversion could give rise to a taking, the federal government had refused to accept adverse precedent, reasserting its failed arguments about an “implied reversionary interest” (among other arguments) over and over, leading the Federal Circuit to wonder “exactly what all this *sturm und drang* is about” in rails-to-trails cases.¹⁰⁸ The court criticized the government’s questionable strategy:

And even more puzzling is why the Government . . . pursued the course it chose in the district courts and in this appeal, seeking with every possible argument—even if so thin as to border on the frivolous—to avoid acquiescing in plaintiffs’ effort to have the

101. *Id.*

102. *Id.*

103. *Id.*

104. Marvin M. Brandt Revocable Trust, No. 06–CV–184–J, 2008 WL 7185272, at *18 (D. Wyo., Apr. 8, 2008), *rev’d in part*, 559 F. App’x. 717 (10th Cir. 2014).

105. United States v. Brandt, 496 F. App’x 822, 822 (10th Cir. 2012).

106. *Id.* at 824–25.

107. *Id.* at 824.

108. Evans v. United States, 694 F.3d 1377, 1381 (Fed. Cir. 2012) (citation omitted).

district court judgments put aside and to proceed on the merits in the Court of Federal Claims.¹⁰⁹

This is not an isolated example of the government's zeal. In 2002, Congress directed the government to resolve rails-to-trails cases more quickly and more fairly than it had been resolving them.¹¹⁰ As described by a noted property owners' lawyer in a recent law review article, "[i]n the first several years following the *Preseault II* decision, the Department of Justice (DOJ) continued to challenge the United States' liability by recycling the unsuccessful argument it had made in *Preseault II*."¹¹¹ The article continues:

After losing several liability arguments, culminating in a second Federal Circuit decision, *Toews v. United States*, the DOJ's challenges to the government's liability subsided. Beginning around 2003, the DOJ started stipulating to liability—or waiving the issue—instead of pursuing challenges in the courts. But the reprieve was brief.

The DOJ has resurrected its challenges to the government's liability in recent years. In an apparent coordinated litigation strategy, the DOJ now routinely raises arguments that the Federal Circuit previously rejected. Worse for the attorneys and courts who do not typically deal with these Tucker Act cases, the DOJ advances these arguments without acknowledging the contrary law that was established during its earlier attempts to escape the government's liability.¹¹²

The author further noted that:

The DOJ's strategy relies on the marginalization of *Preseault II* as purportedly being limited to the facts in that case, glancing over the fundamental principles laid out in *Preseault I*, and ignoring *Toews* altogether. Accordingly, by recycling the arguments it made in *Preseault II* and *Toews*, the government persists in arguing in various guises that recreational use is no

109. *Evans*, 694 F.3d at 1381 (citing *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010)).

110. See *Litigation and its Effect on the Rails-to-Trails Program: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. 82–83, 85–86 (2002) (statements of Rep. Bob Barr, Member, H. Comm. on the Judiciary), available at http://commdocs.house.gov/committees/judiciary/hju80320.000/hju80320_0f.htm (strongly hinting that Justice Department should resolve the *Preseault* case as quickly as possible).

111. *Fex*, *supra* note 51, at 675–76 (citations omitted).

112. *Id.* at 676.

different from railroad use, or that railbanking *is a* “railroad purpose,” so that nothing was taken from the landowner when the right of way became a recreational trail. In arguing that hikers and bikers are the same as railroad locomotives, the government sweeps several decades of contrary law under the rug.¹¹³

The Court of Federal Claims has repeatedly rejected the government’s strategy, finding it “obvious,”¹¹⁴ and concluding that there is a “clear consensus” that trail use is “fundamentally different”¹¹⁵ and “clearly different”¹¹⁶ than a railway.¹¹⁷

Unsuccessful in reasserting the losing arguments on liability, the government shifted its strategy to making the same argument in the context of calculating just compensation, claiming that owners are entitled only to recover the value of the land encumbered by a trail easement. But the Court of Federal Claims rejected this argument, too.¹¹⁸

113. *Id.* (emphasis in original).

114. *Anna F. Nordhus Trust v. United States*, 98 Fed. Cl. 331, 338 (Fed. Cl. 2011) (“To state the obvious, removing tracks to establish recreational trails is not consistent with a railroad purpose, and cannot be regarded as incidental to the operation of trains.”).

115. *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483, 487 (Fed. Cl. 2011) (“There is clear consensus that recreational trail use is fundamentally different in nature than railroad use.”).

116. *Ybanez v. United States*, 98 Fed. Cl. 659, 668 (Fed. Cl. 2011) (“The original parties to railroad conveyances between 1887 and 1891 would not likely have contemplated use of the right-of-way as a recreational trail. Such a use would be ‘clearly different’ from railway operations.” (quoting *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1542 (Fed. Cir. 1996))); *see also Biery v. United States*, 99 Fed. Cl. 565, 576 (Fed. Cl. 2011) (“Indeed, a recreational trail is only viable where the operation of trains has ceased. As such, recreational trail use is outside the scope of a railroad purpose easement.”); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 145 (Fed. Cl. 2011) (“A railroad . . . has the primary purpose of transporting goods and people. The purpose of a recreational trail is fundamentally different. A bicycle trail does not exist to transport people but rather to allow the public to engage in recreation and enjoy the outdoors. The two uses are distinct and an easement for a recreational trail is not like in kind to an easement for railroads.”); *Farmers Co-op. Co. v. United States*, 98 Fed. Cl. 797, 804 (Fed. Cl. 2011) (explaining that railway “purposes are distinct from, and inconsistent with, use of the right-of-way as a recreational trail”); *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 730 (Fed. Cl. 2011) (“[T]he taking arises because recreational trail use does not fall within the scope of the original railroad easement.”).

117. *See Howard v. United States*, 964 N.E.2d 779, 780 (Ind. 2012) (holding that under Indiana law, railbanking and interim trail use are not within scope of railway easements).

118. *See, e.g., Ingram v. United States*, 105 Fed. Cl. 518, 541 (Fed. Cl. 2012) (“The measure of just compensation to the plaintiffs for the takings of plaintiffs’ property should capture the value of the reversionary interests in their ‘before taken’ condition, unencumbered by the easements.”); *Ybanez v. United States*, 102 Fed. Cl. 82, 88 (Fed. Cl. 2011) (“The measure of just compensation is the difference between the value of plaintiffs’ land unencumbered by a railroad easement, and the value of plaintiffs’ land encumbered by a perpetual easement for recreational trail use.”); *Rogers v. United States*, 101 Fed. Cl. 287, 294–95 (Fed. Cl. 2011) (noting the court’s dismissal of Defendant’s argument that the property should be valued as though encumbered by an easement); *Raulerson v. United States*, 99 Fed. Cl. 9, 12 (Fed. Cl. 2011) (“[T]he appropriate measure of damages is the difference between the value of plaintiffs’ land unencumbered by a railroad easement and the value of plaintiffs’ land encumbered by a

Given this history, the *Brandt* litigation will likely be viewed as the latest wrinkle in the government's larger litigation strategy: If, as the Tenth Circuit concluded, property owners are deemed to not possess "property," then they have no takings claims.¹¹⁹ This issue turns on "the nature of the original conveyance that established the railroad's right to operate a railroad on the property at issue."¹²⁰ In the Tenth Circuit, the court's decision in this case has virtually swallowed up every rails-to-trails takings case where the property owner's rights are based on a grant subject to the 1875 Act. This has continued the lower court split and results in similarly-situated landowners nationwide being subject to different federal rules based only on the location of their land.

II. THE DECISION

The U.S. Supreme Court granted certiorari on the narrow—but extremely important—question of property law: Who owns the land

perpetual trail use easement subject to possible reactivation as a railroad.”). The government's arguments in the rails-to-trails cases are reminiscent of the frivolous arguments it advanced in *Florida Rock Industries, Inc. v. United States*, to which the Federal Circuit responded:

Appellant also attacks the decision below on the curious ground that the comparable sales, used as the trial court's base to compute the fair market value of the land it held taken, were sales of rockland near the Florida Rock site, but free of government restrictions on mining. The law, says appellant, requires land taken to be valued subject to all existing legal restrictions on its use. Thus, if the regulation constituting the taking reduced the value of land subject to it to zero, the very severity of the economic injury would relieve the taker of all but nominal fifth amendment liability. We suppose appellant added this contention to provide a little humor for an otherwise serious and scholarly brief, and say no more about it.

Fla. Rock Indus., Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986). The Government's rails-to-trails strategy has also needlessly increased the cost of resolving many of these cases, often beyond reason. For example, in *Hash v. United States*, No. 1:99-CV-00324-MHW, 2012 WL 1252624, at *2, *24 (D. Idaho Apr. 13, 2012), the court awarded the plaintiffs \$2.24 million in attorney's fees and costs under the Uniform Relocation Assistance and Real Estate Acquisition Act, 42 U.S.C. § 4654(c) (1971), meaning that to secure an \$883,312 just compensation award, it cost the plaintiffs more than two-and-a-half times that amount, and the taxpayers even more.

119. *See Preseault II*, 100 F.3d at 1533 (“[I]f the Railroad obtained fee simple title to the land over which it was to operate, and that title inures, as it would, to its successors, the [property owners] . . . would have no right or interest in those parcels and could have no claim related to those parcels for a taking.”).

120. *Rogers*, 101 Fed. Cl. at 291 (citing *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373–74 (Fed. Cir. 2009)). *See Preseault v. Interstate Commerce Comm'n (Preseault I)*, 494 U.S. 1, 21 (1990) (O'Connor, J., concurring) (“Determining what interest petitioners would have enjoyed under [state] 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.”).

underlying an 1875 Act right-of-way after it stops being used as a railway?¹²¹

On that question, the Court ruled that railroad rights-of-way are subject to the same common law rules as any other easement.¹²² In so ruling, the Court rejected the government's argument that federal land grants like the 1875 Act operate under an entirely different set of rules from other property.¹²³ The government had asked the Court to rule that it retained an "implied reversionary interest" in the railroad easement, such that, when the railway was abandoned, ownership would vest in the federal government, not the underlying property owner.¹²⁴ There were many problems with the government's argument, not the least of which was that the government had successfully argued the opposite position—that railroad rights-of-way are common law easements—in *Great Northern Railway Co. v. United States*.¹²⁵

Additionally, there was nothing in the 1875 Act that evinced an intent to reserve any interest in a right-of-way grant.¹²⁶ Indeed, contrary to the government's argument in *Brandt*, the Act provided that "all such lands over which such right of way shall pass shall be disposed of *subject to* such right of way"¹²⁷—language that is consistent with the grant of an easement and "wholly inconsistent" with a grant of a fee interest.¹²⁸ An "implied reversionary interest" simply cannot exist under the common law of estates and servitudes.¹²⁹ Thus, applying the common law of property, the Court explained that the right-of-way crossing the Brandts' land was extinguished

121. See *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1260 (2014) ("This case presents the question of what happens to a railroad's right of way granted under a particular statute—the General Railroad Right-of-Way Act of 1875—when the railroad abandons it: does it go to the Government, or to the private party who acquired the land underlying the right of way?").

122. *Id.* at 1265.

123. *Id.* at 1268.

124. *Id.* at 1266–67.

125. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 266, 271 (1942); see *Brandt Revocable Trust*, 134 S. Ct. at 1264 ("The Government loses that argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago, in the case of *Great Northern Railway Co.* . . .").

126. *Brandt Revocable Trust*, 134 S. Ct. at 1264.

127. *Id.* at 1262 (quoting the General Railroad Right-of-Way Act of 1875, 18 Stat. 482, codified as amended at 43 U.S.C. § 937).

128. *Id.* at 1264 (quoting *Great N. Ry. Co.*, 315 U.S. at 271); see also *Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 649 F.3d 799, 803 (7th Cir. 2011) (noting that the 1875 Act did not provide even a "hint" by which an owner "would suspect a lurking governmental right so unsettling to the security of private property rights").

129. *Id.* at 1264.

upon abandonment, and by operation of law, the Brandts hold the property free of any servitudes.¹³⁰

In all likelihood, *Brandt* will be relied on for its thorough and decisive discussion of estates and servitudes, but another aspect of the decision warrants thoughtful discussion. Although the majority opinion did not make a single reference to “takings” or “rails-to-trails,” those two issues provided the policy underpinnings for Justice Sotomayor’s sole dissent, in which she cautioned that, by treating railroad rights-of-way as common law easements, “the Court undermines the legality of thousands of miles of former rights of way that the public now enjoys as means of transportation and recreation. And lawsuits challenging the conversion of former rails to recreational trails alone may well cost American taxpayers hundreds of millions of dollars.”¹³¹

Echoing the policy arguments of the United States and amicus curiae briefs filed by local and state governments, trail advocates, and similar interests,¹³² Justice Sotomayor concluded that she would suspend common law understandings of property ownership when the federal government transfers land to private ownership to avoid a large public financial impact.¹³³ According to her, words like “fee” and “easement”—which establish the precise ownership interest conveyed and all legal rights and expectations arising therefrom—“do not neatly track common-law definitions” when the government is involved.¹³⁴ Thus, she concluded that the federal government should be allowed to convey an “easement” that doesn’t operate like an easement in order to advance costly public policies like the Rails-to-Trails Act.¹³⁵

III. CONSEQUENCES OF THE COMMON LAW?

The implications of the Supreme Court’s decision are far-reaching. The common law relies on a predictable and well-understood system for

130. *Id.* at 1259.

131. *Id.* at 1272.

132. *See, e.g.*, Brief for Rails to Trails Conservancy et al. as Amici Curiae Supporting Respondent at 34, *Brandt Revocable Trust*, 134 S. Ct. 1257 (No. 12-1173) (describing the cost and long history of public rights-of-way); Brief for National Conference of State Legislatures et al. as Amici Curiae Supporting Respondent at 5–6, *Brandt Revocable Trust*, 134 S. Ct. 1257 (No. 12-1173) (describing the importance of public highways to states and municipalities, specifically describing “existing transportation corridors as a kind of natural resource”).

133. *Brandt Revocable Trust*, 134 S. Ct. at 1272.

134. *Id.* at 1270.

135. *Id.* at 1272.

characterizing the various types of interests in property.¹³⁶ The terms used by the common law have precise definitions and a complex system of rules flows from those definitions.¹³⁷ Landowners rely on those definitions and terms to establish ownership of property.¹³⁸ Thus, the Supreme Court has “traditionally recognized the special need for certainty and predictability where land titles are concerned, and [is] unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.”¹³⁹ That rule is particularly appropriate when considering a federal land patent, which passes “perfect and consummate title” to the owner.¹⁴⁰ A federal land patent “is intended to quiet title to and secure the enjoyment of the land for the patentees and their successors.”¹⁴¹ Once a parcel is patented and sold as private property, the federal government “is absolutely without authority” to alter the property interests transferred.¹⁴² And one of the primary objects for which the national government was formed was to secure a citizen’s right to ownership of their property.¹⁴³ Accordingly, the Supreme Court had previously condemned the very idea that the government can hold an

136. *See, e.g.*, *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1533–34 (explaining how the court relies on tradition and “traditional terminology” to maintain “consistency” within property law disputes).

137. *Id.*

138. *Leo Sheep Co. v. United States*, 440 U.S. 668, 687–88 (1979) (“Generations of land patents have issued without any express reservation of the right now claimed by the Government.”).

139. *Id.* (citations omitted); *see Beres v. United States*, 64 Fed. Cl. 403, 427 (Fed. Cl. 2005) (“A fundamental precept of our property ownership system and system of laws includes certainty of ownership upon purchase, whether by receipt of a land patent from the federal government or a deed from private party.”).

140. *Wilcox v. Jackson*, 38 U.S. 498, 516 (1839); *see Nichols v. Rysavy*, 610 F. Supp. 1245, 1254 (D.S.D. 1985) (“A patent to land, issued by the United States under authority of law, is the highest evidence of title, something upon which its holder can rely for peace and security in his possession. It is conclusive evidence of title against the United States and all the world, until cancelled or modified by an action brought for this purpose.” (quoting 2 THE AMERICAN LAW OF MINING, § 1.29 (1984))), *aff’d*, 809 F.2d 1317 (8th Cir. 1987).

141. *Grainger v. United States*, 197 Ct. Cl. 1018, 1024 (Ct. Cl. 1972) (citations omitted).

142. *Moore v. Robbins*, 96 U.S. 530, 533–34 (1877); *see also United States v. Eaton Shale Co.*, 433 F. Supp. 1256, 1267 (D. Colo. 1977) (“The [government] loses its jurisdiction over the land as soon as a valid patent is issued.”).

143. *See JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT—A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 156 (3d ed. 2008) (“The Supreme Court, for all practical purposes, has eliminated the ‘public use’ requirement of the Fifth Amendment as a check on the power of government to appropriate private property by means of eminent domain.”); *see also Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (“[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . That rights in property are basic civil rights has long been recognized.”).

implied property interest that is inconsistent with the terms of a property grant absent payment of just compensation.¹⁴⁴

Between 1781 and 2010, the United States conveyed approximately 816 million acres of public lands into private ownership (e.g., individuals and railroads).¹⁴⁵ The federal government transferred another 328 million acres to the states generally and an additional 142 million acres to Alaska.¹⁴⁶ Of that land, there are an estimated millions of acres of privately-owned land and tens of thousands of individual landowners encumbered by a railway established under the 1875 Act. If courts are unwilling to give effect to titles, then the owners' interests and expectations in their property become potentially worthless.¹⁴⁷ And in that circumstance, "titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, [are] always subject to the fluctuating, and in many cases unreliable, action of the [government]."¹⁴⁸

Certainly, as Justice Sotomayor noted, there is a cost to maintain a stable real property environment—a cost that could arguably reach into the hundreds of millions of dollars.¹⁴⁹ But, just as certainly, the government's shifting policies toward public lands "cannot operate to create an interest in

144. *Leo Sheep Co. v. United States*, 440 U.S. 668, 687–88 (1979); *Hardin v. Jordan*, 140 U.S. 371, 400–402 (1891).

145. BUREAU OF LAND MGMT., U.S. DEPT. OF THE INTERIOR, PUBLIC LAND STATISTICS 2010, at 5 tbl.1–2 (2011), available at http://www.blm.gov/public_land_statistics/pls10/pls10.pdf. Most transfers to private ownership (97 percent) occurred before 1940. Homestead entries, for example, peaked in 1910 at 18.3 million acres but dropped below 200,000 acres annually after 1935, until being fully eliminated in 1986. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 428–29 ser.J 8–15 (1975). The homesteading laws were repealed in 1976, although homesteading was allowed to continue in Alaska for 10 years. See Federal Land Policy Management Act of 1976, Pub. L. No. 94–579, § 706(a), 90 Stat. 2743, 2793 (1976) (codified as amended at 43 U.S.C. § 1701 *et. seq.*) (repealing homesteading laws of the General Railroad Right-of-Way Act of 1875).

146. BUREAU OF LAND MGMT., *supra* note 152, at 5 tbl.1–2.

147. *Hardin*, 140 U.S. at 401 (explaining that an attempt to impute an unexpressed reversionary interest into a government land grant "is calculated to render titles uncertain, and to derogate from the value of [the property]"). Responding to a district court opinion that had embraced the "implied reversionary interest" theory, the American Land Title Association named the *Brandt* district court decision one of the six most important court decisions with "significant ramifications on the title insurance industry." ALTA Title Counsel Comm., *Top Lawsuits Impacting the Title Industry*, TITLE NEWS, May 2010, at 10, 12–13. The land title association did so because "[m]any title examiners have relied on the acts of a U.S. agency . . . and the direct acts of the U.S. . . . to insure titles free of the interest of the U.S. and those claiming under them. [The district court's decision] could prove that reliance . . . misplaced." *Id.* at 13.

148. *Moore v. Robbins*, 96 U.S. 530, 534 (1877).

149. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1272 (2014) (Sotomayor, J., dissenting).

land that the Government had already given away.”¹⁵⁰ Indeed, that limitation on government authority is one of the cornerstones of takings law: A person’s rights in his or her property exist regardless of subsequently enacted restrictions that seek to burden those rights.¹⁵¹

At its core, the argument advanced in Justice Sotomayor’s dissent is simply a criticism of the Fifth Amendment’s mandate that private property may not be taken for public use without just compensation. By no stretch of the imagination does the compensation mandate create the public crisis laid out in the dissent. To the contrary, as Professor Richard Epstein recently pointed out, protecting private property does not stand in opposition to the public welfare; it is consistent with it.¹⁵² In circumstances like these, the just compensation requirement forces the community to ask the right questions—like, “Can we afford this?”—when deciding whether or not to engage in costly public projects. Indeed, it is one of the only ways for the public at large to learn of the impacts being imposed on individual landowners.

The purpose of the Takings Clause is to prohibit the government from forcing “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁵³ It is well-established “that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”¹⁵⁴ The government’s rails-to-trails policy is just such a public project, which is why the Supreme Court, in *Preseault I*, explained that converting an abandoned railroad right-of-way to a public recreational trail could “giv[e] rise to just compensation claims.”¹⁵⁵ The government cannot avoid its obligation to pay just compensation by recharacterizing established property law in such a way as to negate

150. *Id.* at 1268 (majority opinion).

151. *Cf.* *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (explaining that government cannot extinguish a person’s rights in his or her property by regulation); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) (“The government does not have unlimited power to redefine property rights.”); *see also* *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928) (“[T]he districting of the plaintiff’s land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole City”); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (“The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee’s property any of the restrictions, limitations or conditions.”).

152. Richard E. Epstein, *Our Property Principle*, HOOVER INST. (March 10, 2014), <http://www.hoover.org/research/our-property-principle>.

153. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

154. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

155. *Preseault v. Interstate Commerce Comm’n (Preseault I)*, 494 U.S. 1, 13 (1990).

previously recognized rights.¹⁵⁶ Thus, even though recreational paths on former railroad easements may be good and desirable and fun, it does not mean that the public should get the land for free. If paying for private property is a consequence of remaining true to common law rules and definitions of property, then it is a price this nation both anticipated and agreed to in its Constitution.

IV. APPLICATION OF *BRANDT* IN FUTURE RAIL-TRAIL LITIGATION

The *Brandt* decision has an upside for all parties involved in rail-trail litigation: It simplifies the question “Who owns what?” by adhering to the well-understood and predictable common law rules and definitions of property.¹⁵⁷ Determining the character of a right-of-way is a necessary step before deciding ownership of the land because not all railroad rights-of-way involve the same property interest.¹⁵⁸ At certain times in history, the federal government granted the railroad companies rights-of-way as limited fee estates.¹⁵⁹ At other times, the government granted the railroad companies rights-of-way as easements.¹⁶⁰ The type of right-of-way owned by a railroad depends upon the specific terms and conditions of the original conveyance, which, in turn, relies on common law understandings of easements and fee estates.¹⁶¹

At common law, there is a stark difference between a fee estate and an easement. A grant of a limited fee estate (also known as a fee simple determinable, base fee, or qualified fee) creates a fee simple subject to a special limitation, such as a requirement that the property be used only for

156. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992) (“We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.”); *see also* *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env'tl. Prot.*, 560 U.S. 702, 713–14 (2010) (plurality opinion) (stating that the Fifth Amendment prohibits state courts from redefining property rights out of existence unless compensation is paid); *Id.* at 735 (concurring opinion) (“[A] judicial decision . . . [eliminating] an established property right, [may be] set aside as a deprivation of property without due process of law.”).

157. Prior to *Brandt*, advocates of the government’s position argued that railroad rights-of-way were a hybrid property interest that acted like a fee in some circumstances and an easement in others, so ordinary rules of property law were inapplicable. *See* sources cited *supra* note 89.

158. *See* *Fex*, *supra* note 51, at 686.

159. *See, e.g.,* *Great N. Ry. Co. v. United States*, 315 U.S. 262, 273 (1942) (describing how Congress first granted large land grants to railroad companies); *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) (explaining how the grant within the case “was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted”).

160. *Great N. Ry. Co.*, 315 U.S. at 271.

161. *Id.*

railroad purposes.¹⁶² Upon the occurrence of the special limitation, the fee estate will automatically terminate, and the property will revert to the grantor or his successors in interest.¹⁶³ But, until the condition for reverter is triggered, the owner of the limited fee is considered the “absolute owner of the land.”¹⁶⁴

A conveyance of an easement transfers no ownership in the underlying land to the holder of the right-of-way.¹⁶⁵ Instead, an easement creates a servitude on the land that grants the holder “a right to make use of the land over which the easement lies for the purposes for which it was granted.”¹⁶⁶ And when the easement is abandoned, the easement is extinguished and the underlying fee becomes unburdened.¹⁶⁷

According to those common law principles, ownership of an abandoned right-of-way depends on the character of the right-of-way. Where the railroad acquired a fee interest in the right-of-way, title no longer remained in the United States.¹⁶⁸ The federal government held a possibility of a reverter (by operation of the special limitation in the grant), but the land itself belonged to the railroad company.¹⁶⁹ Therefore, a subsequent grant of the surrounding property could not transfer title to the land

162. *Mount Olivet Cemetery Ass’n v. Salt Lake City*, 164 F.3d 480, 485 (10th Cir. 1998) (citing CHESTER H. SMITH & RALPH E. BOYER, *SURVEY OF THE LAW OF PROPERTY* 8 (2d ed. 1971)); *see also* Wyo. Interior Dec., 27 IBLA 137, 164 (IBLA 1976) (Frishberg, Chief Admin. J., dissenting) (citing L.M. SIMES, *LAW OF FUTURE INTERESTS* 28–29 (2d ed. 1966)) (describing a limited fee estate as a “fee simple created with a special limitation”).

163. *Mount Olivet Cemetery Ass’n*, 164 F.3d at 485; *Wyoming*, 27 IBLA at 164 (citing L.M. SIMES, 1 *TIFFANY REAL PROPERTY* § 220 (3d ed. 1939)).

164. *Choctaw Okla. & Gulf R.R. Co. v. Mackey*, 256 U.S. 531, 538–39 (1921).

165. *See Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1550–52 (Fed. Cir. 1996) (explaining that when a party has an easement on a parcel of land, that party can either use the land within the scope of the easement, or not use the land, and thereby abandon the easement; but there is no circumstance in which conveyance of the easement alone transfers ownership of the underlying land to the holder); *see also* *Louis W. Epstein Family P’ship v. Kmart Corp.*, 13 F.3d 762, 766 (3d Cir. 1994) (“[T]he owner of land, who grants a right of way over it, conveys nothing but the right of passage and reserves all incidents of ownership not granted.”); *Bd. of Cnty. Supervisors of Prince William Cnty., Va. v. United States*, 48 F.3d 520, 527 (Fed. Cir. 1995) (“[A] fee simple estate is not an easement, or vice versa.”).

166. *Preseault II*, 100 F.3d at 1545 (citing 7 *THOMPSON ON REAL PROPERTY* § 60.02(c), (d) (1994)).

167. *Id.* (“The usual way in which such an easement ends is by abandonment, which causes the easement to be extinguished by operation of law.”); *Carney v. Bd. of Cnty. Comm’rs of Sublette Cnty.*, 757 P.2d 556, 562–63 (1988).

168. *See Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 270 (1903) (explaining how through adverse possession “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”).

169. *See id.* at 271 (explaining that the grant had an implied possibility of reverter “in the event that the company ceased to use or retain the land for the purpose for which it was granted”).

underlying the right-of-way.¹⁷⁰ And the owner of the surrounding lands did not acquire a reversionary interest in the railroad right-of-way.

However, where the railroad acquired a right-of-way easement, title to the underlying property remained in possession of the United States.¹⁷¹ Thus, a subsequent patent of the property conveyed the entire tract, including the easement and the reversionary interest therein, to the patentee.¹⁷² The patent of land underlying a railroad right-of-way “conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues . . . such patentee takes the fee subject only to the railroad company’s right of use and possession.”¹⁷³ In that circumstance, the government grantor cannot retain an *implied* reversionary interest in an abandoned easement located on private property without affecting an uncompensated taking of the fee holder’s property rights.¹⁷⁴

Had the Court approved the Tenth Circuit’s rule, the decision would have had adverse impacts far broader than the current owners of patented lands. The federal government conveyed millions of acres of land into private ownership with patents that did not reserve any reversionary rights to the United States. No prospective purchaser of the patented lands could have found a right-of-way reservation from examining either the underlying legislation, the patents, or the public land records over the years following the issuance of the patents.¹⁷⁵ The Tenth Circuit’s rule, by repudiating the common law rules of property in favor of a rule that grants the federal government an unexpressed reservation in federal land patents, would not only impair the rights of the patentees but would also impact bona fide purchasers succeeding to their titles, long after the time when their rights should have been deemed vested by title.

170. *See id.* (explaining how the “grant [to the government] was explicitly stated to be for a designated purpose, one which negated the existence of the [company’s] power to voluntarily alienate the right of way or any portion thereof”).

171. *Hash v. United States*, 403 F.3d 1308, 1320–21 (Fed. Cir. 2005) (explaining a right-of-way is “an easement, not a transfer”).

172. *Railroad Co. v. Baldwin*, 103 U.S. 426, 430 (1880); *see Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 619 F.2d 696, 698–99 (8th Cir. 1980) (quoting *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 606 F.2d 934, 937 (10th Cir. 1979) (ruling that a servient estate to a railway’s right-of-way grant passed when state acquired federal lands)); *see also Boesche v. Udall*, 373 U.S. 472, 477 (1963) (“[A] land patent . . . divests the [g]overnment of title.”).

173. *Hash*, 403 F.3d at 1314–15 (quoting 43 C.F.R. §§ 2842(a) (1909) (repealed by the Federal Land Policy and Management Act, 43 U.S.C. 35 § 1701–87 (1976))).

174. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668, 687–88 (1979); *Hash*, 403 F.3d at 1314 (“[P]roperty rights that are not explicitly reserved by the grantor cannot be inferred to have been retained.”).

175. *Beres v. United States*, 64 Fed. Cl. 403, 427 (Fed. Cl. 2005) (“The average citizen, the reasonable man, expects that a contract to transfer land, whether from a public or private owner, is effective and will not be retroactively changed many years after the land transfer.”).

CONCLUSION

Without question, *Brandt* constitutes a major step forward in protecting property rights. The decision rejected the government's attempt to create an "implied reversionary interest" in thousands of miles of abandoned railway easements across the Western states. If successful, that strategy would have redefined the very words that establish ownership of property, allowing the government to seize hundreds of millions of dollars' worth of private land without paying any compensation. Simply put, it was an attempted end-run around the Takings Clause.

The decision does not by any stretch of the imagination doom the Rails-to-Trails Act. Indeed, immediately after the decision was announced, national rail-trail advocates, the Rails-to-Trails Conservancy, issued a press release refuting commentary predicting the demise of the trail program.¹⁷⁶ The only impact that *Brandt* will have on the government's rails-to-trails policy is that, where the railway right-of-way was acquired as a common law easement, the government will have to condemn the land and pay the owner just compensation.

To property owners, however, the ramifications of redefining the words that establish property rights would have been disastrous. Landowners rely on titles to establish ownership of property. If courts were unwilling to give effect to titles, the owners' interests and expectations in their property would become potentially worthless. Indeed, if the words of conveyance were not conclusive of ownership and could be altered by implied reservations, all property traceable to a federal land grant would have a cloud on its title. In that light, *Brandt* follows the Supreme Court's longstanding policy of upholding certainty and predictability in land titles.

176. *Supreme Court Hands Down Disappointing Decision for Trails in U.S.*, RAILS-TO-TRAILS CONSERVANCY (March 10, 2014), <http://www.railstotrails.org/trailblog/2014/march/10/supreme-court-hands-down-disappointing-decision-for-trails-in-us/>.