The 1875 General Railway Right of Way Act and *Marvin M. Brandt Revocable Trust v. United States*: Is This the End of the Line?

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I. INTRODUCTION

At one point in time, railroad corporations were collectively the largest private landholder in the country, holding the rights to nearly ten percent of the land comprising the continental United States as a result of a series of congressional acts meant to encourage westward expansion.[1] The acts achieved their goals and resulted in many positives: railroads encouraged settlement, fostered economic growth, and created a reliable method of transport for people and freight.[2] However, the acts also had their downsides. Railroad corporations acquired excessive amounts of land, frustrating the public and leading to the construction of an overabundance of railroad corridors.[3] Over the years, railroads

1. William S. Greever, *A Comparison of Railroad Land-Grant Policies*, 25 AGRIC. HISTORY 83, 83 (1951); *see infra* Part II (discussing the various grants and the westward expansion).

2. *See generally* Rick Ewig, *The Railroad and the Frontier West,* 3 OAH MAGAZINE OF HISTORY, Spring 1988, at 9–10 (discussing the goals of the country, and noting that "[i]n only a generation, the country had experienced tremendous growth and the western railroad played a leading role").

3. *See* Greever, *supra* note 1, at 84 (noting that more than 180 million acres of land were granted to the railroads by 1871); *See* David Maldwyn Ellis, *The Forfeiture of Railroad Land Grants, 1867–1894*, 33 THE

have abandoned massive numbers of corridors[4]—usually because the lines became unprofitable or unneeded as a result of railroad acquisitions and mergers.[5] Nevertheless, rail transport remains strong today and is on an upward trend: Class I Freight Railroads added nearly 1,500 miles of track to the network between 2009 and 2011.[6]

But a potential problem looms on the horizon: despite a strong national policy in favor of preserving abandoned railroad rights-of-way for future reinstatement,[7] a recent Supreme Court decision puts the thousands of miles of rights-of-way granted under the General Railway Right of Way Act of 1875[8] at risk for complete dissolution should the railroad cease operations on them.[9] Despite the unique qualities of railroads,[10] the Court held that rights-of-way under the 1875 Act are mere easements.[11] As courts continue to interpret the property rights of railroad rights-of-way within a common law framework,[12] our need to instill a way to prevent the abandonment and subsequent extinguishment of those same rights-of-way becomes more apparent, so that we can protect the full capacity of railroads for future generations.

Part II of this Comment will look briefly at the history of congressional railroad land grants and the shift in the public and the Supreme Court's attitudes

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MISS. VALLEY HIST. REV. 27, 38 (1946) ("The opponents of land grants found it necessary throughout the decade of the seventies to prevent further raids on the public domain and the Treasury by the railroads."); BUREAU OF TRANSP. STAT., NATIONAL TRANSPORTATION STATISTICS § 1–1 (2014) [hereinafter NATIONAL TRANSPORTATION STATISTICS]. In 1960, Class I railroads—a classification based on revenue—had 207,334 miles of track, not including side track, yard trackage, or parallel tracks. This figure also does not include miles of track held by numerous smaller non-Class I railroads. *Id.*

4. NATIONAL TRANSPORTATION STATISTICS*, supra* note 3, at § 1–1. Class I railroad track mileage decreased by fifty-four percent over fifty years. By 2011, Class I railroads had 95,387 miles of track. *Id.*

5. BUREAU OF TRANSP. STAT., TRANSPORTATION STATISTICS ANNUAL REPORT 2012, at 14 (2013); *see also* NATIONAL TRANSPORTATION STATISTICS, *supra* note 3, at § 1–2. In 1960, there were 106 Class I Railroads; today there are seven. *Id.*

6. NATIONAL TRANSPORTATION STATISTICS, *supra* note 3, at § 1–1. Railroads are classified according to amount of annual operating revenue. Class I Railroads have the highest annual operating revenue of all classes of railroads. 49 C.F.R. § 1201.1–1 (1978); ASS'N OF AMERICAN RAILROADS, CLASS I RAILROAD STATISTICS 1 (July 15, 2014).

7. *See* 16 U.S.C. § 1247(d) (2012) (confirming the Legislature's recognition of a "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").

8. 43 U.S.C. §§ 934–940 (2012). The General Railway Right of Way Act will hereinafter be referred to within the text as the 1875 Act. No one knows exactly how many miles of right-of-way exist under the 1875 Act. The Bureau of Land Management, the federal governmental agency in charge of managing public land, estimates that "[t]housands of miles of 1875 Act ROWs . . . exist on public land in the western United States." *BLM Issues Guidance on Uses of Railroad Rights-of-Way Land*, BUREAU OF LAND MGMT. (Aug. 12, 2014), *available at* http://www.blm.gov/wo/st/en/info/newsroom/2014/august/nr_08_12_2014.html (on file with *The University of the Pacific Law Review*).

9. *Infra* Part III.

10. *See infra* Part III.C (comparing the common law property framework with the rights granted to railroads).

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

12. *Infra* Part III.

toward them.[13] Part III of this Comment will delve into the recent U.S. Supreme Court decision *Marvin M. Brandt Revocable Trust v. United States*, its negative effects on railroad right-of-way abandonment, and the possibility of reinstatement.[14] Part IV of this Comment proposes a broader interpretation of the "railroad purposes" doctrine in order to prevent permanent extinguishment of the 1875 Act's rights-of-way.[15] Congress should enact law expanding the scope of activities that qualify as "railroad purposes" to include leases made by the railroad to third parties for activities undertaken on the right-of-way that serve a clear public utility purpose and generate revenue for the railroad.[16] Such a law would protect the railroad easement from dissolution, allowing railroads to reinitiate operations as needed.[17]

II. THE TRACK OF RAILROAD LAND GRANTS: A HISTORICAL AND LEGAL OVERVIEW

Over the span of the nineteenth century, the United States tripled the size of its land surface area.[18] Due to the vastness of the new American frontier, westward travel was treacherous.[19] In order to satisfy the national hunger for expansion, the federal government needed to determine not only how to use all of this new land, but also how to access it—that is where railroads and congressional land grants came into the picture.[20]

This Part first gives a brief overview of the history of congressional railroad land grants,[21] before turning to the early Supreme Court interpretations of the property rights these grants conveyed to the railroad.[22]

A. *Railroads on the Rise: Early Land Grants*

Intent on creating a reliable national transportation system to aid the growth of the country and the economy,[23] Congress began granting federally held public

13. *Infra* Part II.

14. *Brandt*, 134 S. Ct. 1257 (2014); *infra* Part III.

15. *Infra* Part IV.

16. *See infra* Part IV (providing support for such an interpretation).

17. *Infra* Part IV.

18. Guillaume Vandenbroucke, *The U.S. Westward Expansion*, 49 INT'L ECON. REV. 81, 81 (2008); *see also* Greever, *supra* note 1, at 83 (noting the "eagerness . . . to see the West developed as rapidly as possible.").

19. James E. Vance, Jr., *The Oregon Trail and Union Pacific Railroad: A Contrast in Purpose*, 51 ANNALS OF THE ASS'N. OF AM. GEOGRAPHERS 357, 358 (1961) (noting that the Oregon Trail served "as a migration way for a population estimated at above 300,000, of whom over a tenth died").

20. *See generally* Greever, *supra* note 1, at 90 (finding that "the role . . . land-grant railroads played as landsellers or colonizers in developing the West was a vital and creditable one.").

21. *Infra* Part II.A–B.

22. *Infra* Part II.B–C.

23. *See* Vandenbroucke, *supra* note 18, at 81 (discussing the rapid growth of the United States).

lands to the states in order to subsidize rail corridor development and construction.[24] In turn, the states handed the land over to private railroad corporations as an incentive for the construction of railroads between cities around the country.[25]

By the 1860s, the push for a transcontinental railroad reached its height: "[t]o the public . . . federal loans and land grants to the pioneer Pacific railroads represented aid necessary to secure an economically and politically desirable technological feat."[26] Caught in the midst of the Civil War, the northern states saw how desperately they needed "the construction of said railroad . . . to secure the safe and speedy transportation of mails, troops, munitions of war, and public stores thereon."[27] Once the Southern states seceded, Congress had the opportunity to set the transcontinental railroad route across the Northern states without any pushback from the Southern Congress members.[28] To fast-track the process, Congress decided to cut out the state middle-men and began making grants directly to the private railroad corporations.[29]

The first major land grant was the Pacific Railroad Act of 1862.[30] This Act followed the general framework of earlier state grants.[31] In exchange for the construction of a railroad, the railroad corporations earned alternating plots of land adjacent to the right-of-way for every mile of railway constructed, in addition to the tract for the right-of-way itself.[32] The Pacific Railroad Act of 1862 conveyed "the *right and title* to said lands to said [railroad] company" for each forty miles of railway completed, with the exception of mineral lands.[33]

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24. *See, e.g.*, 9 STAT 466–67 (granting land to Illinois, Mississippi and Alabama); *see also* 10 STAT 8–10 (granting lands to Missouri in 1852); 10 STAT 155 (Arkansas and Missouri in 1853); 11 STAT 9 (Iowa in 1856); 11 STAT 21 (Michigan in 1856).

25. Maldwyn Ellis, *supra* note 3, at 28; *see* Greever, *supra* note 1, at 83 (arguing that "capitalists refused to finance railroads built in advance of traffic but probably would invest if the companies had the right to considerable land as an additional asset").

26. Heywood Fleisig, *The Central Pacific Railroad and the Railroad Land Grant Controversy,* 35 THE J. OF ECON. HISTORY 552, 552 (1975).

27. 12 STAT. 492.

28. Ewig, *supra* note 2*,* at 9; Dr. James McPherson, *A Brief Overview of the American Civil War: A Defining Time on Our Nation's History*, CIVIL WAR TRUST (Jan. 1, 2015), *available at* http://www.civilwar.org/education/history/civil-war-overview/overview.html (on file with *The University of the Pacific Law Review*). Eleven Southern States seceded and formed the Confederate in between 1860–61. *Id.; see also* Greever, *supra* note 1, at 83 (noting that the South's "obstructionism was, obviously, removed by the Civil War").

29. Maldwyn Ellis, *supra* note 3, at 28–29.

30. 12 STAT. 489.

31. *See, e.g.*, 10 STAT 8; 10 STAT 155; 11 STAT 9; 11 STAT 21 (each laying out similar grants of the land adjacent to the right-of-way).

32. 12 STAT. 489. The grants of alternating sections of land along the right-of-way are commonly referred to as "checkerboard grants," which the railroad often sold in order to fund construction of the right-of-way. Greever, *supra* note 1, at 84–85.

33. 12 STAT. 492 (emphasis added).

Congress amended, expanded, and otherwise altered the Pacific Railroad Act several times over the next few years.[34] By 1871, the federal government had granted more than 175 million acres of land to the railroads, and the states had granted nearly another 50 million acres.[35] All in all, the railroads held some form of property rights to nearly ten percent of the total land area of the continental United States.[36]

B. The End of Lavish Land Grants and Introduction of the 1875 Act

At the turn of the 1870s, the public's one-time support for the construction of the transcontinental railroad transformed into mounting contempt toward the massive land grants made to the private railroad corporations.[37] The public realized how much developable land had been granted and how much was still waiting to be put to use by dozens of different railroad companies.[38] As a result, others could not settle the land until the railroads had either claimed their rights through construction or forfeited the reserved land.[39] In response to the public outcry, the House of Representatives unanimously adopted a resolution that discontinued the policy of granting land subsidies to railroads.[40]

Notwithstanding the shifting public sentiment towards the "lavish" land grants, the need for railroad expansion continued—in 1875, Congress enacted the General Railway Right of Way Act.[41] The Act ended checkerboard land grants and placed a one-year limit on the railroads to file profiles of the planned right-of-way and a five-year limit on construction, thus addressing the public concern earlier grants caused.[42] Failure to meet these deadlines resulted in land grant forfeiture and released the land back into the public domain.[43]

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34. *See* 12 STAT. 807 (Pacific Railroad Act of 1863); 13 STAT. 356 (Pacific Railroad Act of 1864); 13 STAT. 504 (Pacific Railroad Act of 1865); 14 STAT. 66 (Pacific Railroad Act of 1866).

35. Greever, *supra* note 1, at 84.

36. *Id.*

37. *See* Maldwyn Ellis, *supra* note 3, at 38 ("The opponents of land grants found it necessary throughout the decade of the seventies to prevent further raids on the public domain and the Treasury by the railroads.").

38. *See* Greever, *supra* note 1, at 84 (stating that the "Department of the Interior then withdrew the [land] . . . from public entry in the government land offices until the railroad's rights were satisfied").

39. Maldwyn Ellis, *supra* note 3, at 30.

40. *Id.* at 38 (noting that "[f]arm groups, labor organizations, land reformers, and politicians were bringing pressure on Congress" to reform the land grants); CONG. GLOBE, 42D CONG., 2D SESS. 1585 (1872) ("stating that "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"). William S. Holman of Indiana set forth the resolution. *Id.*

41. 43 U.S.C. §§ 934–940 (2012).

42. *Id.* at §§ 934, 937 (limiting grants to "the extent of one hundred feet on each side of the central line of said road" and lands adjacent to the right-of-way for railroad buildings and stations "not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road").

43. *Id.*

Beyond these changes, the 1862 and 1875 Acts are not that different from one another on their face.[44] In 1903, the Court in *Northern Pacific Railway Company v. Townsend* determined that the pre-1871 acts granted the railroads a "limited fee, made on an implied condition of reversion [to the federal government] in the event that the company ceased to use or retain the land for the purpose for which it was granted."[45] Twelve years later in *Rio Grande Western Railway Company v. Stringham*, the Supreme Court handed down the first major decision regarding the scope of railroad rights under the 1875 Act.[46] The Court recognized the similarities between the 1875 Act and its predecessors,[47] and followed the earlier *Townsend* ruling[48] holding that:

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.[49]

Rather than categorizing the pre-1871 and the 1875 acts as different types of property interests, the *Stringham* Court found that all congressional railroad land grants conveyed the same interest—a limited fee.[50]

*C. The Not-So-*Great Northern *Change of 1942*

Lower courts typically followed the *Townsend-Stringham* limited-fee view of railroad property rights when resolving land disputes under the Acts until 1941.[51] However, in 1942, the Supreme Court derailed the consistency that the *Stringham* decision brought to the railroad's property interests.[52] The Court granted certiorari in *Great Northern Railroad Co. v. United States* in order to determine whether the railroads or the United States government held the title to

44. *Compare* 12 STAT. 489, *with* 43 U.S.C. §§ 934–940 (2012); *see generally* Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift,"* 82 U. COLO. L. REV. 85, 92 (2011) (noting that courts later misinterpreted the 1875 Act because "they confused the more well-known railroad land subsidy grants, which did end in 1871, with the more obscure right-of-way grant policy, which had a distinct history before, during, and after the land grants").

45. 190 U.S. 267, 271 (1903).

46. 239 U.S. 44 (1915).

47. *Supra* Part II (discussing the various land grants).

48. *See Townsend*, 190 U.S. at 271 (classifying pre-1871 grants as "limited fee, made on an implied condition of reverter").

49. *Stringham,* 239 U.S. at 47.

50. *Id.*

51. *See* MacDonald v. United States, 119 F.2d 821, 824 (9th Cir. 1941) (holding that "as a general rule a railroad company is recognized as having something of greater dignity than the easement known at common law").

52. Great N. R.R. Co. v. United States, 315 U.S. 262 (1942).

the right-of-way subsurface lands.[53] The Roosevelt Administration argued that the railroad did not have the right to drill oil and gas deposits on a right-of-way granted under the 1875 Act.[54] The Supreme Court agreed, and went one step further, finding that the Act granted only easements to the railroads.[55]

Justice Murphy, writing for the Court, made the sweeping generalization that "[s]ince [the 1875 Act] was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches."[56] And with that simple statement, nearly thirty years after it was decided, the Supreme Court all but overruled *Stringham*—1875 Act rights-of-way were no longer considered to be limited fees.[57]

Since its inception, scholars have criticized *Great Northern*.[58] Some believe that the *Great Northern* interpretation of the 1875 Act was plainly wrong: the decision was inapposite to the historical context, legislative intent at the time of enactment, and language of the Act itself.[59] Unlike earlier grants, which expressly reserved the rights to mineral lands to the government, the 1875 Act was completely silent on the matter.[60] Notwithstanding, the *Great Northern* Court held that if the language of the Act did not specifically grant something, then the railroad had no right to it.[61] The fact that such rights were not specifically excluded, as they had previously been, was of no matter to the Court.[62]

Other *Great Northern* critics have suggested that courts ought to narrowly interpret the decision and apply it solely to issues regarding the railroad's subsurface rights as against the government.[63] A narrow application might have

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53. *Id.* at 270.

54. Noah Feldman, *Supreme Court Wakes Up in 1875*, BLOOMBERG VIEW (Mar. 10, 2014, 12:21 PM), *available at* http://www.bloombergview.com/articles/2014-03-10/supreme-court-wakes-up-in-1875 (on file with *The University of the Pacific Law Review*).

55. *Great Northern,* 315 U.S. at 277.

56. *Id.* at 275.

57. *Id.*

58. *See, e.g.*, Roberts, *supra* note 44, at 86 (arguing that "the entire notion of an '1871 shift' in federal railroad right-of-way law is a fallacy, derived from the Supreme Court's 1942 adoption of a faulty historical analysis advanced by the Solicitor General.").

59. *See supra* note 58 and accompanying text.

60. *Compare* 12 STAT. 489 (providing that "all mineral lands shall be excepted from the operation of this act") *with* 43 U.S.C. §§ 934–940 (2012) (failing to include a specific exception of mineral lands, as in past Acts).

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

62. *Id.*

63. Norman A. Dupont, *The Supreme Court Decides Rails to Trails Case: A New Governmental Attorney Estoppel Doctrine or a Case of Revisionist History?*, ABA TRENDS, July/Aug. 2014, at 9–13; *see also* 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 ENV'T. L. 711, 729 (2008). Ms. Wright gives a thorough explanation of the perceived problems with the *Great Northern* decision:

> There are numerous problems with the *Great Northern* decision, not least of which is its failure to acknowledge the fact that all federal railroad grants of right-of-way across the public lands had used

eased some of the confusion and uncertainty of the interests granted by pre- and post-1872 Acts.[64] However, the modern day Supreme Court had different plans for the 1875 Act.[65]

III. THE *BRANDT* EFFECT: COMMON LAW ABANDONMENT ISSUES

One hundred and forty years after Congress enacted the 1875 Act, and seventy years post-*Great Northern*, remaining questions regarding the property rights held by the railroads, the federal government, and private owners of land adjacent to the 1875 Act right-of-way resulted in a deep circuit split.[66] Shockingly, a dispute over a paltry ten acres became the tie-breaker and forever changed the course of the 1875 Act rights-of-way.[67]

This Part will first look at *Marvin M. Brandt Revocable Trust v. United States*' path through the lower courts and will then discuss the Supreme Court's majority and dissenting opinions.[68] Next, this Part will explain the effects of *Brandt*'s ruling on the Rails-to-Trails Program, a program aimed at preserving abandoned rights-of-way for future railroad use.[69] Lastly, this Part will explore a few less-than-satisfactory solutions to minimize or resolve *Brandt*'s effects on the 1875 Act rights-of-ways.[70]

> the same term-a—"right-of-way"—and so it made little sense to identify some as fee simple absolute, some as fee simple determinable, and others as easements. To justify a finding that different property rights were intended despite use of the same property terminology, the Court had to rely on changing legislative attitudes that somehow could be characterized as evidencing intent to create three distinct property interests. But of course, there is no such legislative history, and the fact that Congress discontinued the checkerboard grants does not mean it intended to give a different property right to the railroads in their corridor grants, especially since Congress did know how to limit corridor grants to easements, which it routinely did in legislation pertaining to railroad access across Indian lands.

Id.

64. Dupont, *supra* note 63, at 9–13.

65. *Infra* Part III.

66. *See, e.g.*, Hash v. United States, 403 F.3d 1308, 1317 (Fed. Cir. 2005) (holding that "[t]he 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"); *see also,* Samuel C. Johnson 1988 Trust v. Bayfield Cnty, 649 F.3d 799, 806 (7th Cir. 2011) (holding that abandoned right of ways reverted to private landowner rather than federal government). *But see* Marshall v. Chi. & Nw. Transp. Co., 31 F.3d 1028, 1032 (10th Cir. 1994) (finding that in enacting 42 U.S.C. § 912, "Congress clearly believed that it had authority over 1875 Act railroad rights-of-way").

67. *Brandt*, 134 S. Ct. 1257. A full discussion of the facts of the *Brandt* dispute is beyond the scope of this Comment. For a more complete background of the case, see Justin G. Cook, Comment, *How the Supreme Court Jeopardized Thousands of Miles of Abandoned Railroad Tracts with a Single Opinion [Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014)]*, 54 WASHBURN L. J. 227 (2014).

68. *Infra* Parts III.A–C.

69. *Infra* Part III.D; 16 U.S.C. §§ 1241–1251 (2012).

70. *Infra* Part III.E.

A. Brandt*'s Track through the Lower Courts*

The federal government initiated a quiet title action against landowners adjacent to a non-operative right-of-way where a small, local railroad company abandoned its line after it became unprofitable.[71] The Wyoming District Court and the Tenth Circuit both held that the federal government retained a reversionary interest in abandoned 1875 Act rights-of-way.[72] While recognizing *Great Northern*'s determination that the 1875 Act granted easements, the Tenth Circuit applied two laws that both provide that all abandoned congressional act rights-of-way revert to the federal government.[73] This decision further deepened the circuit split regarding the 1875 Act property rights, and, as a result, the Supreme Court granted certiorari in an action disputing just ten acres of land.[74]

B. Brandt *and the Supreme Court: (Almost) All Aboard!*

With an eight-justice majority, Chief Justice Roberts wrote the *Brandt* opinion, reversing the lower courts, affirming *Great Northern*, and holding that all 1875 Act rights-of-way are nothing more than "simple easements."[75] Unlike *Great Northern*, the *Brandt* decision is not only concerned with a limited portion of the land rights.[76] Under *Brandt*, any time a railroad abandons an 1875 Act

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71. *See* Lyle Denniston, *Argument Preview: Rights to Old Rights-of-way*, SCOTUSBLOG (Jan. 13, 2014 12:06 AM), *available at* http://www.scotusblog.com/2014/01/argument-preview-rights-to-old-rights-of-way/ (on file with *The University of the Pacific Law Review*) (noting that "[e]veryone except [the Brandt] trust either settled with the government or did not appear to contest the federal claim").

72. United States v. Marvin M. Brandt Revocable Trust, No. 06–CV–184–J, 2008 WL 7185272, at *2 (D. Wyo. Apr. 8, 2008), *aff'd in part, rev'd in part;* United States v. Brandt, No. 09–8047, 496 F. App'x 822, 825 (10th Cir. 2012), *rev'd sub nom*. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

73. *Brandt*, 496 F. App'x at 825. The court applied 43 U.S.C. § 940 and 16 U.S.C § 1248(c). In 1906, Congress enacted 43 U.S.C. § 940, which termed the federal grants as easements, but provided that "the United States resumes the full title to the lands covered thereby free and discharged from such easement[s]." This right allowed the federal government to take possession of the lands in the event the railroad ceases operations—similar to the limited fee reversionary interests in the 1862 Act land grants. 43 U.S.C. § 940 (2012). The latter, enacted in 1988, provides that "any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of Title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof." 16 U.S.C § 1248(c) (2012).

74. Lyle Denniston, *Argument Recap: Oh, Give Me Land, Lots of Land . . . ,* SCOTUSBLOG (Jan. 14, 2014 4:10 PM), *available at* http://www.scotusblog.com/2014/01/argument-recap-oh-give-me-land-lots-of-land/ (on file with *The University of the Pacific Law Review*); *see Brandt*, 134 S. Ct. at 1257, 1262.

75. *Brandt*, 134 S. Ct. at 1259, 1268. Justice Sotomayor was the single dissenter among her fellow Justices. Many of her arguments against the majority decision were similar to those of the *Great Northern* critics. *Id.* At 1269–72.

76. *Compare id.*, *with* Great N. R.R. Co. v. United States, 315 U.S. 262 (1942). The *Great Northern* decision was primarily focused on subsurface rights, while the *Brandt* decision affects the entire right-of-way, including both the subsurface and surface.

right-of-way, the underlying land reverts back to the adjacent landowner rather than the federal government.[77]

The Court heavily based its decision upon the arguments made by the federal government seventy years earlier in *Great Northern*:

> The Government . . . maintains that the 1875 Act granted the railroads something more than an easement, reserving an implied reversionary interest in that something more to the United States. 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. v. United States*.[78]

The decision has a tone akin to a mother scolding her child—the Court punished the federal government representatives for rejecting the arguments made by their predecessors.[79] The Court supported its reprimand of the government with a nod towards "the special need for certainty and predictability where land titles are concerned."[80] Ironically, the precedent the Court relied upon was responsible for disaffirming the most predictable, consistent, and certain view we had of congressional land grants since their enactment.[81]

C. Brandt*'s Lone Dissenter: Common Law Principles Put Us on the Wrong Track*

What began as a dispute over ten acres will have a variety of consequences for cases involving 1875 Act rights-of-way.[82] As adjacent landowners become aware of their new rights under *Brandt*, a rise in railroad abandonment litigation is almost certainly coming down the tracks.[83] Even if narrowly applied, the *Brandt* decision will have a profound effect on any action regarding

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77. *Brandt*, 134 S. Ct. at 1257. Railroad rights-of-way are usually abandoned for economic purposes, such as when a line becomes unprofitable. *See generally*, Steven R. Wild, *A History of Railroad Abandonments*, 23 TRANSP. L.J. 1 (1995-96) (discussing the evolution of laws and regulations affecting railroad abandonments).

78. *Brandt*, 134 S. Ct. at 1264.

79. *See* Dupont, *supra* note 63, at 10 (noting that "[d]uring oral argument, other members of the Court chastised the Assistant Solicitor General . . .").

80. *Brandt*, 134 S. Ct. at 1268 (quoting Leo Sheep Co. v. United States, 440 U.S. 668, 687 (1979)).

81. Great N. R.R. Co. v. United States, 315 U.S. 262 (1942); N. Pac. Ry. Co. v. Townsend, 190 U.S. 267, 271 (1903). The *Townsend* decision provided consistency by finding that all federal land grants, including the 1875 Act, had granted limited fee titles with reversionary interests held by the federal government. *Townsend*, 190 U.S. at 271.

82. *Infra* Part III.C.

83. *See* Richard Wolf, *Court Ruling in Land Dispute Could Threaten Bike Trails*, USA TODAY (Mar. 10, 2014 7:22 PM), *available at* http://www.usa today.com/story/news/nation/2014/03/10/supreme-court-railroad-land-dispute/6252835/ (on file with *The University of the Pacific Law Review*) ("Brandt's victory has implications for about 80 other cases involving about 8,000 claimants.").

abandonment of an 1875 Act right-of-way.[84] Justice Sotomayor recognized the high potential for negative effects and stood alone as the only dissenter of the Court.[85]

Rather than reading *Great Northern* to hold that 1875 Act grants were "easements,"[86] Justice Sotomayor embraced a narrow application of *Great Northern* to subsurface rights alone and found that it did not overrule the existence of the federal reversionary interests recognized by the prior decisions.[87] She also acknowledged the unique properties of the railroad right-of-way, finding it to be a "*sui generis*" property right that the majority forced into a poorly fitting framework of common law principles.[88]

At common law, easements give the holder the right to enter another's land.[89] However, this right is non-possessory, and it does not confer any estate in the land to the holder.[90] Most importantly, for the purposes of this Comment, easement holders can only use the land for purposes that are reasonably related to the scope of the easement,[91] and such uses cannot unreasonably increase the burden on the possessory owners' estate.[92] When the holder of a common law easement ceases to use it for its intended purpose, the easement "may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude."[93]

Justice Sotomayor recognized some of the negative implications that the Court's decisions could have on 1875 Act rights-of-way:

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

85. *Id.* at 1269.

86. Great N. R.R. Co. v. United States, 315 U.S. 262 (1942).

87. *See Brandt*, 134 S. Ct. at 1270 (Sotomayor, J., dissenting). Justice Sotomayor stated:

> "This case [] turns on whether, as the majority asserts, *Great Northern* "disavowed" *Townsend* and *Stringham* as to the question whether the United States retained a reversionary interest in the right of way. *Great Northern* did no such thing. Nor could it have, for the Court did not have occasion to consider that question . . . . All that *Great Northern* held . . . was that the right of way did not confer one particular attribute of fee title. Specifically . . . the right of way did not confer the right to exploit subterranean resources").

Id.

88. *Id.* at 1271. ("[The majority] concludes that we are bound by the common-law definitions that apply to more typical property. In doing so, it ignores the *sui generis* nature of railroad rights of way.").

89. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (AM. LAW INST. 2000).

90. *Id.*; 6 MILLER & STARR, CAL. REAL EST. § 15:4 (3d ed. 2006). ("An easement merely creates an *interest* in real property that is not an estate.")

91. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. d (2000).

92. Atchison, Topeka & Santa Fe Ry. Co. v. Abar, 275 Cal. App. 2d 456, 464 (Ct. App. 1969).

> "The grant of an unrestricted easement, not specifically defined as to the burden imposed upon the servient land, entitles the easement holder to a use limited by the requirement that it be reasonably necessary and consistent with the purpose for which the easement was granted. This permits a use consistent with 'normal future development [w]ithin the scope of the basic purpose, but not an abnormal development, one which actually increases the burden upon the servient tenement."

Id.

93. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. d (2000).

> By changing course today, 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.[94]

However, the effect of the *Brandt* decision is not limited to the public and its recreational activities; the decision will affect the railroad and its ability to reinstate operations any time an 1875 Act right-of-way is abandoned.[95]

D. Uncoupled by Brandt*: the Rails-to-Trails Program and Protection of the 1875 Act Right-of-Way*

In 1983, Congress enacted the Rails-to-Trails Act.[96] The federal program sought to allow interim uses on abandoned rights-of-way, while simultaneously preserving the rights-of-way for reinstatement of railroad operations—a process known as "rail-banking."[97] The rail-banking clause provides that:

> [I]n 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.[98]

The statutory scheme incentivizes the railroad to preserve its right-of-way by making it able to do so in a cost-efficient manner,[99] while preventing dissolution

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

95. *Infra* Section IV.

96. 16 U.S.C. §§ 1241–1251 (2012).

97. *Id.* § 1248(d). *See Railbanking*, RAILS-TO-TRAILS CONSERVANCY, *available at* http://www.railstotrails.org/build-trails/trail-building-toolbox/railbanking/ (last visited Jan. 1, 2015) (on file with *The University of the Pacific Law Review*) (rail-banking is a "[c]ondition allowing a railroad to 'bank' a corridor for future rail use if necessary. During the interim, alternative trail use is a viable option").

98. 16 U.S.C. § 1248(d).

99. *See* Charles H. Montange, *Conserving Rail Corridors*, 10 TEMP. ENVTL. L. & TECH. J. 139, 154 (1991) ("[T]he statute permits a carrier not only to relieve itself of any costs or risks associated with preserving a line, but also to realize more value for a line than would be possible from a simple discontinuance . . . The cost of corridor preservation for possible rail re-use is borne by trail users, in return for use of the corridor in the interim as recreational or commuting trails.").

of easement land into the underlying servient estate.[100] As of July 2009, more than 5,000 miles of abandoned rail corridor had been rail-banked under the Rails-to-Trails Act.[101]

However, *Brandt* has potentially rendered the Rails-to-Trails program inoperative with regard to abandoned 1875 Act rights-of-way[102] by holding that the government has no reversionary interest to lands it patented to private individuals subject to an 1875 Act right-of-way.[103] The federal government will be subject to Fifth Amendment takings liability[104] for all currently rail-banked 1875 Act rights-of-way for which it does not hold the underlying estate[105] and for any rights-of-way granted under the Act that the government attempts to rail-bank in the future.[106] This risk of "opening the federal treasury to hundreds of millions of dollars in potential takings liability" could result in the government's unwillingness to rail-bank abandoned 1875 Act rights-of-way.[107] More importantly, it places railroads at risk for complete extinguishment of their opportunity to reinitiate operations.[108]

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100. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1265 (2014) ("[I]f the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.").

101. Marianne Fowler, *Review of Federal Railbanking: Successes, Statistics, and Landowner Impacts*, AMERICAN TRAILS (July 8, 2009), *available at* http://www.americantrails.org/resources/railtrails/fowler-railbanking-testimony-STB-July-2009.pdf (on file with *The University of the Pacific Law Review*).

102. *Brandt*, 134 S. Ct. at 1268 ("[I]f there is no 'right, title, interest, [or] estate of the United States' in the right of way, then the statutes simply do not apply.").

103. *Id.* at 1264.

104. U.S. CONST. amend. V (" . . . nor shall private property be taken for public use, without just compensation."). *See also* Danaya C. Wright, *A New Era of Lavish Land Grants: Taking Public Property for Private Use and Brandt Revocable Trust v. United States*, 28 PROB. & PROP. 30 (Sept./Oct. 2014) (noting that the Court did not "even [acknowledge] the potential takings liability that the government may have to pay when it seeks to preserve these lands, once granted for public transportation purposes and now reused for a different public transportation purpose . . .").

105. *See supra* Part III.C for a discussion of basic easement property principles.

106. *See* Brief for the United States at 19–20, Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) (No. 12–1173), 2 ("Actions involving 1875 Act rights-of-way are often brought against the United States by landowners seeking just compensation for actions taken to preserve railroad rights-of-way for future rail use under the National Trails System Act Amendments of 1983 . . . To date, thousands of claims pertaining to 1875 Act rights-of-way have been filed."); *see also* Wolf, *supra* note 83 ("Brandt's victory has implications for about 80 other cases involving about 8,000 claimants.").

107. Wright, *supra* note 104. *See* ENV'T. & NATURAL RES. DIV., U.S. DEP'T. OF JUSTICE, ENRD ACCOMPLISHMENTS REPORT FISCAL YEAR 2013, at 100 (2013) (noting that by the close of 2013, "[t]he Division continue[d] to defend nearly 10,000 claims brought under the Fifth Amendment deriving from the implementation of the National Trails System Act").

108. *See* 25 AM. JUR. 2D *Easements and Licenses* § 95 (1962) (noting that "[g]enerally, once an easement is extinguished, it is gone forever").

E. Trying to Get Back on Track after Brandt*: The Search for a Solution*

The simplest solution to avoid the myriad of problems resulting from *Brandt* is also the least achievable. If the Supreme Court overruled its decision, the easement abandonment problem would disappear—but, with an eight to one majority, it is unlikely that the Court will overrule itself in the near future.[109] Consequently, other solutions must be explored.

1. Using Eminent Domain to Recover Extinguished Easements

Without rail-banking, the path to reinstitution of railroad operations on the abandoned rights-of-way would become a long litigation-filled process for the railroad.[110] Recognizing the importance of railroad transport, the federal government and many states have given private railroad corporations eminent domain powers to construct and operate a railroad right-of-way.[111] While condemnation may seem like an ideal solution to the *Brandt* right-of-way abandonment issue,[112] it can be a costly and time-consuming process.[113] Forcing the railroad to initiate proceedings against several landowners to reinstate operations along one abandoned corridor will be burdensome, and as one scholar has noted, it will give the newfound *Brandt* landowners "compensation for *not* receiving land they never bought, expected, or received a deed for."[114] Although many condemnation proceedings typically settle out of court,[115] just one or two

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109. *See generally* James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. OF POL. 1091, 1095, 1097 (2011) (noting that rulings based on statutory, as opposed to constitutional, interpretation, and rulings with strong majorities are less likely to be overruled).

110. *Infra* Part III.E.2.

111. *See, e.g.*, CAL. PUB. UTIL. CODE § 611 (West 1976); MO. ANN. STAT. § 523.010 (Vernon 2012); VA. CODE ANN. § 56-347 (West); MINN. STAT. § 222.27 (West) (all granting railroad power to condemn land necessary for its operations); Robert Meltz, *CRS Report for Congress: Delegation of the Federal Power of Eminent Domain to Nonfederal Entities*, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS (May 20, 2008) (discussing several congressional acts that gave condemning powers to the railroad, including early land grant acts).

112. *Supra* Part III.C–D.

113. *See generally* David Berger, *Current Problems Affecting Costs of Condemnation*, 26 LAW & CONTEMP. PROBS. 85 (1961) (discussing the high costs of condemnation for the condemner in addition to paying for the value of the condemned land, such as the costs of litigation and paying attorney fees for the condemned party where required).

114. Wright, *supra* note 104, at 30.

115. EVALUATION OF STATE CONDEMNATION PROCESS, FEDERAL HIGHWAY ADMINISTRATION, http://www.fhwa.dot.gov/real_estate/uniform_act/acquistion/cndmst.cfm (last visited Sept. 5, 2014) (on file with *The University of the Pacific Law Review*). Eighty percent of right-of-way acquisition proceedings generally end in settlement, however that number is lower in states that require the condemning authority to pay the condemnee's attorney costs. While this report is based on acquisitions by the States for highway and street rights-of-way, the statistics would likely be similar for railroad right-of-way condemnations. *Id.*

non-settling landowners can increase costs substantially with litigation and appeals.[116]

California's high speed rail project serves as a prime example of the cost and time required to acquire land for rail construction through eminent domain: the California High Speed Rail Authority needs approximately 1,100 parcels, at an expected cost of $776 million, for a 130-mile segment of its project.[117] After two years of efforts, it has only acquired 106—less than ten percent—of the needed parcels.[118] Considering the economic, environmental, and safety benefits the railroad provides the nation as a whole, the costs of eminent domain are simply unacceptable—we must consider other options to aid in railroad operation reinstatement.[119]

2. *Narrow Application of* Brandt *and Changing the Language of Future Conveyances*

One scholar, Justin G. Cook, proposes that a narrow application of *Brandt* would lessen its negative effects on the thousands of miles of 1875 Act rights-of-way.[120] The federal government's deed to the Brandt family contained a provision that the conveyance was made "subject to those rights for railroad purposes."[121] Mr. Cook proposes applying the *Brandt* decision only to cases in which the adjacent landowners' deed contains the "subject to" language.[122] However, "subject to" clauses are commonplace in deeds conveying land encumbered by easements.[123] Consequently, applying *Brandt* in such a fashion is unlikely to limit its effects in most cases. Mr. Cook further suggests that "the United States Government should be careful to expressly reserve an interest in all 1875 Act rights of way that traverse federal lands."[124] While this suggestion would successfully carve out the reversionary interest that the *Brandt* Court refused to

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116. Berger, *supra* note 113, at 99–103 (discussing the high costs of condemnation for the condemner in addition to paying for the value of the condemned land, such as the costs of litigation and paying attorney fees for the condemned party where required).

117. Allen Young, *High-Speed Rail Authority Has 30 Eminent-Domain Cases Pending . . . And It's Just Getting Started*, SACRAMENTO BUS. JOURNAL (Nov. 7, 2014, 7:27 A.M.), *available at* http://www.bizjournals.com/sacramento/news/2014/11/07/high-speed-rail-authority-has-30-eminent-domain.html?page=all (on file with *The University of the Pacific Law Review*).

118. *Id.*

119. *See generally* OVERVIEW OF AMERICAN FREIGHT RAILROADS, ASS'N OF AMERICAN RAILROADS (Apr. 2014) (discussing the wide range of benefits that freight railroads offer, including economic growth, job creation, and environmental benefits).

120. Cook, *supra* note 67, at 251.

121. Brief of Petitioners at 12, Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) (No. 12-1173).

122. Cook, *supra* note 67, at 251.

123. Robert Kratovil, *Easement Draftsmanship and Conveyancing*, 38 CALIF. L. REV. 426, 431 (1950).

124. Cook, *supra* note 67, at 252.

recognize,[125] it would only apply to future grants incorporating such advice. These proffered "narrow application" and "future conveyance language" solutions do very little, if anything, to protect the thousands of miles of rights-of-way that Brandt placed at risk. A proper solution will apply retroactively to protect currently existing 1875 Act rights-of-way, in addition to any such rights-of-way created in the future.

IV. Expanding the "Railroad Purposes" Doctrine to Prevent Abandonment and Keep Rights-of-Way on Track

If 1875 Act rights-of-way must be labeled as "easements," perhaps the best solution lies in common law property principles. As previously noted, easement holders can only use the land for purposes that are reasonably related to the scope of the easement and such uses cannot unreasonably increase the burden on the possessory owners' estate.[126] Consequently, a broader interpretation of "railroad purposes" would prevent permanent extinguishment of 1875 Act rights-of-way and allow railroads to reinitiate operations as needed.

This Part will first look at the basic concepts of railroad abandonment and the "railroad purposes" doctrine.[127] Then, this Part will focus on a plausible solution to the problems presented by *Brandt*: the expansion of the "railroad purposes" doctrine to include leases to third parties performing activities with a clear public utility purpose on the rights-of-way.[128] Finally, this Part will argue that Congress is best suited to adopt this expanded view and will set forth the ideal statutory language to accomplish this task.[129]

A. *Abandonment and Railroad Purposes*

The law regarding abandonment of railroad rights-of-way is unclear. Because of the wide variety of railroad property rights in existence, there is no single correct method of analysis when such issues arise.[130] Abandonment analyses require a fact-based inquiry.[131] The Third Restatement of Property notes that

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125. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1268 (2014).

126. *See supra* notes 89–93 and accompanying text.

127. *Infra* Part IV.A.

128. *Infra* Part IV.B.

129. *Infra* Part IV.C.

130. *See* Wendy Lathrop, *Sharing the Railroad Corridors: A Question of Ownership*, RIGHT OF WAY, Jan./Feb. 2010, at 32, 33, *available at* https://www.irwaonline.org/eweb/upload/Web_ RailroadCorridors.pdf (on file with *The University of the Pacific Law Review*) (recognizing the inconsistency of land rights along any particular corridor: "[T]hree tracts in a row might be owned in fee by the railroad, then one or two tracts only allow easement rights, and then back to fee ownership. There may even be a few leases thrown in for good measure, just to confuse the matter.").

131. *See* J. A. Connelly, Annotation, *What Constitutes Abandonment of a Railroad Right of* Way, 95 A.L.R. 2d 468 § 2 (1964) ("Abandonment of a railroad right of way has been said to be a matter of intent . . .

"[r]esolution of the controversies varies widely depending on the language of the instrument granting rights to the railroad, the actions of the parties, and . . . the actions of various governmental bodies."[132]

In the case of federally granted right-of-ways, the Abandoned Railway Right of Way Act (ARRWA) is the sensible starting point for analysis.[133] ARRWA provides that the government will consider such right-of-ways abandoned or forfeited when they cease to be used for the purpose granted.[134] However, when looking to the language of the grants themselves, the pre-1871 grant language was clear on the purposes of the grant, whereas the 1875 Act was much less specific.[135] Consequently, there are an abundance of cases and administrative orders purporting that the grants were made for "railroad purposes."[136] A broad interpretation of what right-of-way activities qualify as "railroad purposes" could be instrumental in preventing the extinction of railroad easements where the railroad stops operating trains on the right-of-way.[137]

1. What Qualifies as a Railroad Purpose?

Because of the very nature of the railroad and it operations, its activities necessarily consist of far more than just operating trains—but how much more? As with other areas of railroad law, courts have debated the exact scope of railroad purposes.[138] A recent California Court of Appeals decision found that "[f]or something to be a railroad purpose, it must be used to construct and

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the issue in most cases is reduced to the question of what factors or circumstances are sufficient to justify an inference that there existed an intent to abandon.").

132. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4, cmt. f (2000).

133. 43 U.S.C. § 912 (2012); *See* Marshall v. Chi. & Nw. Transp. Co., 31 F.3d 1028, 1032 (holding that § 912 applies to 1875 Act rights-of-way).

134. 43 U.S.C. § 912 (2012). The statute reads:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress.

Id.

135. *Compare* 12 STAT. 489, *with* 43 U.S.C. §§ 934–940 (2012). The Pacific Railroad Act of 1862's title alone conveys much more about the purpose of the Act than the 1875 Act as a whole.

136. *See, e.g.*, The Ellamae Phillips Co. v. United States, 99 Fed. Cl. 483, 486 (2011) (noting that the "legislative history of the 1875 Act indicates that the easement was limited to railroad purposes only."); *see also* Use of Railroad Right of Way for Extracting Oil, 56 Interior Dec. 206 (1937) ("A right of way through the public domain granted to a railroad by Congress [under the 1875 Act] may be used only and exclusively for railroad purposes.").

137. *Infra* Part IV.

138. *See, e.g.*, Cash v. S. Pac. R.R. Co., 123 Cal. App. 3d 974, 979 (1981) (holding that a lease by railroad to third party for a team track was a railroad purpose because it attracted more customers to the line and the revenue generated helped "[defray] the [railroad's] costs in operating and maintaining the railroad"). ***But see*** Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc., 231 Cal. App. 4th 134, 180 (2014) (holding that lease to pipeline company was not a railroad purpose, although the railroad used the fuel transported by the line).

operate a railroad and to use the land for such other purposes as are necessary and incident to railroad construction, maintenance and operation."[139]

Under this definition, several activities are within the scope of "railroad purposes" under the 1875 Act: making substantial changes to the land in order to construct and maintain its right-of-way;[140] gathering the "material, earth, stone, and timber necessary for . . . construction" from adjacent public lands;[141] maintaining "station-buildings, machine shops, side-tracks, turn-outs, and water-stations" along the right-of-way;[142] and for storage.[143]

Courts have considered other activities to be for railroad purposes if the activities are incidental to the construction or operation of the railroad.[144] Incidental activities are those that "derive from or further a railroad purpose."[145] Historically, courts have deemed a wide variety of commercial activities to be within the scope of the incidental purpose doctrine.[146] And it is these incidental purposes, if given a broad reading, which may protect the railroad right-of-way from dissolving under the *Brandt* ruling.[147]

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139. *Union Pacific*, 231 Cal. App. 4th at 180 (quoting Cash v. Southern Pacific R. Co., 123 Cal. App. 3d 974, 977 (1981)) (internal quotations omitted).

140. Kan. City S. Ry. Co. v. Ark. La. Gas Co., 476 F.2d 829, 834–35 (10th Cir. 1973)

> [The railroad] acquires the right to excavate drainage ditches; to construct beneath the surface supports for bridges and other structures; to erect and maintain telegraph lines and supporting poles with part of the poles beneath the surface; to construct passenger and freight depots, using portions of the land below them for foundations; to construct signals; to make fills and cuts to decrease the grades of their rail lines, and to use material from the land covered by the right of way to make such fills; and to construct a roadbed and lay its ties and rails thereon.

Id.

141. 18 STAT 482 § 2.

142. 18 STAT 482 § 2.

143. State v. Or. Short Line R.R. Co., 617 F. Supp. 213 (D. Idaho 1985).

144. Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999, 1024 (S.D. Ind. 2005).

145. Memorandum from the Office of the Solicitor to Assistant Secretary for Land and Minerals Management, Assistant Secretary for Water and Science, and Director of the Bureau of Land Management (Nov. 4, 2011), *available at* http://www.doi.gov/solicitor/opinions/M-37025.pdf [hereinafter Solicitor's Opinion M-37035] (on file with *The University of the Pacific Law Review*). It is difficult to get past the circular nature of the scope of railroad purposes—an activity is for railroad purposes if it is incidental and its incidental if it derives from or furthers a railroad purpose.

146. Grand Trunk R.R. Co. v. Richardson, 91 U.S. 454, 468 (1875) ("erection of buildings . . . by other parties, for convenience in delivering and receiving freight"); *Home on the Range*, 386 F. Supp. 2d at 1021 ("installation . . . of telegraph or other communications technology for the purpose of facilitating the operation of the railroad"); Mellon v. S. Pac. Transp. Co., 750 F. Supp. 226, 231 (W.D. Tex. 1990) (installation of fiber optic cables).

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

2. *The Incidental Purpose Doctrine: Saving the Railroad's Caboose?*

The same case Chief Justice Roberts cited to support his decision in *Brandt—Leo Sheep Co. v. United States*—also supports a broad reading of the scope of railroad activities allowed under the 1875 Act.[148] *Leo Sheep* states:

> When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.[149]

Under this reasoning, courts and administrative agencies should find that railroad rights-of-way are being used for "railroad purposes" even when the railroad is non-operational in a traditional sense.[150]

Other case law also supports such a finding. The language of the *Stringham* decision recognized the permanency of the railroad right-of-way by implying that the railroad's property interest would not revert back to the federal government so long as the railroad held on to the land for railroad purposes, even if it failed to use the land for such purposes.[151] If Congress defined "railroad purposes" in a liberal manner, it would keep rights-of-way from being deemed abandoned.[152]

3. *How Expansive Should a Broad Interpretation Be?*

The broadest interpretation that the court could adopt would find any type of revenue-generating activity to be within the scope of the incidental railroad

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148. Leo Sheep Co. v. United States, 440 U.S. 668 (1979). *See* Richard Pildes, *Commentary: John Roberts's Quiet Homage to William Rehnquist*, SCOTUSBLOG (Mar. 12, 2014, 2:31 PM), *available at* http://www.scotusblog. com/2014/03/commentary-john-robertss-quiet-homage-to-william-rehnquist/ (on file with *The University of the Pacific Law Review*) (noting the prevalence of the *Leo Sheep Co v. United States* opinion penned by Rehnquist, for whom Justice Roberts served as a law clerk beginning in 1980).

149. *Leo Sheep Co*., 440 U.S. at 683 (quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)).

150. By "non-operational in the traditional sense," the author means operating trains on the tracks.

151. Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44, 47 (1915). (The language, "in the event that the company ceases to use *or retain* the land for the purposes for which it is granted," suggests that the railroad can prevent reversion by retaining the land) (emphasis added).

152. The Abandoned Railway Right of Way Act provides that right-of ways will be considered abandoned or forfeited when they cease to be used for the *purposes* granted. 43 U.S.C. § 912 (2012). If railroad purposes continue on the right-of-way, it is not abandoned.

purpose doctrine.[153] Undoubtedly, money is required to construct, operate, and maintain a railroad;[154] therefore, one could easily argue that activities which generate revenue are well within the incidental purpose doctrine because they further railroad purposes by generating the income needed to continue investing into the railroad's operations.[155] Further, the Department of the Interior has held that "[a] railroad's right to undertake activities within an 1875 Act Right of Way includes the right to authorize other parties to undertake those same activities."[156]

Of course, this is a drastic interpretation: the railroad could cease operations, lease its right-of-way for organizations to use be used as a zoo, and still be within the scope of "incidental railroad purposes," because the rent received from the lease to the zoo generates revenue.[157] Scenarios such as this are indicative of why courts will never adopt such a broad interpretation of "railroad purposes." However, a more limited approach to the revenue-generation concept may be suitable to carry out the "intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable" when enacting the 1875 Act.[158]

To find success in the incidental purposes doctrine, landowner and railroad interests must be balanced in order to determine the ideal definition of "railroad purposes." A United States Bureau of Land Management memorandum issued just five months after the Supreme Court decided *Brandt* offers some guidance.[159] The Memo outlines processes and guidelines for determining whether 1875 Act right-of-way activities serve a "railroad purpose."[160] These guidelines suggest

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153. *See* Union Pac, R.R. Co. v. Santa Fe Pac. Pipelines, Inc., 231 Cal. App. 4th 134, 180 Cal. Rptr. 3d 173, 199 (2014) (quoting Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999, 1021 fn. 10 (S.D. Ind. 2005)) ("If 'railroad purpose' were defined so broadly as to encompass anything that generates revenue for the railroad, it would be 'hard to imagine anything the railroads would be unauthorized to do within the right of way.'").

154. For example, Union Pacific Railroad Company's total operating expenses (including wages, fuel, equipment, rents, etc.) topped fourteen billion dollars in 2013. UNION PAC. CORP., UNION PACIFIC CORPORATION 2013 INVESTOR FACT BOOK 39 (2013), *available at* http://www.up.com/investors/attachments/factbooks/2013/fact_book.pdf (on file with *The University of the Pacific Law Review*).

155. Incidental activities are those activities that "derive from or further . . . railroad purpose[s]." Solicitor's Opinion M-37025, *supra* note 145.

156. *Id.* "The Department of the Interior manages public lands and minerals, national parks, and wildlife refuges and upholds Federal trust responsibilities to Indian tribes and Native Alaskans." The Department is also responsible for oversight of the Bureau of Land Management. *Department of the Interior (DOI)*, USA.GOV, http://www.usa.gov/directory/federal/department-of-the-interior.shtml (page last reviewed or updated Nov. 14, 2014) (on file with *The University of the Pacific Law Review*).

157. *See supra* note 153.

158. Leo Sheep Co. v. United States*,* 440 U.S. 668, 683 (1979) (quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)).

159. BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2014-122, EVALUATION OF ACTIVITIES WITHIN RAILROAD RIGHTS-OF-WAY GRANTED UNDER THE GENERAL RAILROAD RIGHT-OF-WAY ACT OF MARCH 3, 1875, DEPT. OF THE INTERIOR (Aug. 11, 2014), *available at* (on file with the *The University of the Pacific Law Review*).

160. *Id.*; BUREAU OF LAND MGMT., PROCESS FOR EVALUATION OF AN ACTIVITY LOCATED WITHIN A RIGHT-OF-WAY GRANTED UNDER THE GENERAL RAILROAD RIGHT-OF-WAY ACT OF MARCH 3, 1875, *available*

looking at the right-of-way activity with "specific consideration given to . . . how [the activity] promotes [railroad purposes] and any inconsistency it may have with railroad operations."[161] Following this framework, a valid railroad purpose must promote railroad operations and cannot interfere with those operations.[162] Furthermore, the activity must not be so inconsistent with the right-of-way's scope of purposes that it results in the takings liability that this very solution seeks to prevent.[163]

Clearly, the zoo scenario would not qualify under this framework.[164] While leasing land to the zoo would generate revenue for the railroad, it would make it extremely difficult to reinstate operations simply because the railroad could not operate safely in tandem with a zoo located on its right-of-way.[165] In addition, while zoos serve a public purpose by providing public education and entertainment,[166] this purpose is too far attenuated from the transportation and public utility purposes that a railroad provides.[167] Further, it would be difficult to find a judge who would find that a zoo's interim use of the right-of-way did not further burden the subservient easement.[168] It is clear that if courts broaden the scope of railroad purposes, they still must sufficiently limit the definition to workable interpretation.[169]

B. *Striking a Balance: Third-Party Activities Serving a Clear Public Utility Purpose*

This Comment proposes that the ideal interpretation of "railroad purposes" would encompass railroad revenue-generating activities performed by third

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at http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2014.Par.37040.File.dat/IM2014-122_att1.pdf (on file with the *The University of the Pacific Law Review*).

161. BUREAU OF LAND MGMT., PROCESS FOR EVALUATION OF AN ACTIVITY LOCATED WITHIN A RIGHT-OF-WAY GRANTED UNDER THE GENERAL RAILROAD RIGHT-OF-WAY ACT OF MARCH 3, 1875, *available at* http://www.blm.gov/style/ medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2014.Par.37040.File.dat/IM2014-122_att1.pdf (on file with the *The University of the Pacific Law Review*).

162. *Id.*

163. *See, e.g.*, Preseault v. I.C.C., 494 U.S. 1, 110 S. Ct. 914 (1990) (holding that Rails-to-Trails subjected federal government to takings liability because recreational trails were outside the scope of the purposes for which a private easement was granted to the railroad).

164. *Supra* Part IV.A.3.

165. *See* 18 STAT 482. The 1875 Act granted 200-foot wide rights-of-way. One might imagine that a zoo located on the right-of-way would present clearance and environmental safety issues, among a host of other problems for an operational railroad.

166. *See* JOHN H. FALK ET AL., WHY ZOOS & AQUARIUMS MATTER: ASSESSING THE IMPACT OF A VISIT 3, ASS'N OF ZOOS & AQUARIUMS (2007), *available at* https://www.aza.org/uploadedFiles/Education/why_zoos_matter.pdf (on file with *The University of the Pacific Law Review*) (discussing the benefits of zoos and aquariums to public visitors).

167. *See, e.g.*, 12 STAT. 489 (The Pacific Railroad Act of 1862 was subtitled: *"An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean . . ."*).

168. *See supra* note 92.

169. *See infra* Part IV.B (discussing an ideal proposed balance).

parties that serve a *clear public utility purpose*. Such an interpretation would protect the 1875 Act easements from extinguishment, while also eliminating the possibility of the zoo scenario occurring.[170]

1. *Clear Public Utility Purpose Defined*

To create a useful bright-line rule, the meaning of "clear public utility purpose" must be plainly delineated. Black's Law Dictionary offers a good starting point: it defines a "public utility" as "[a] business enterprise that performs an essential public service and that is subject to governmental regulation . . . such as telephone lines and service, electricity, and water."[171] Statutory and judicial interpretations in several jurisdictions have similarly defined "public utilities" as business organizations that indiscriminately provide necessary services to the public within their service area.[172] These concepts provide the basis for determining whether a railroad's lease to a third-party activity on the right-of-way would qualify as a "railroad purpose" and still prevent takings liability.

2. *Precedential Support for the Clear Public Utility Purpose Doctrine*

The adoption of a clear public utility purpose doctrine is supported by precedent that has allowed third-party activities on 1875 Act railroad rights-of-way[173] and deemed both public utility activities and revenue-generating activities to be "railroad purposes."[174] Furthermore, there is strong public policy support in favor of maintaining railroad rights-of-way for continuation and future reinstatement of railroad transport.[175]

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170. *Supra* Part IV.C; *See* 43 U.S.C. § 912 (2012) (providing that rights-of-way are abandoned when they cease to be used for railroad purposes).

171. BLACK'S LAW DICTIONARY (10th ed. 2009).

172. *See, e.g.*, CAL. PUB. UTIL. CODE § 216 (West 2012) ("'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof."); S. Ohio Power Co. v. Pub. Utilities Comm'n of Ohio, 143 N.E. 700, 700 (1924) ("To constitute a 'public utility,' the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state.").

173. Solicitor's Opinion M-37025, *supra* note 145 ("A railroad's right to undertake activities within an 1875 Act ROW includes the right to authorize other parties to undertake those same activities.").

174. *See supra* note 138; *see also, e.g.*, *Home on the Range*, 386 F. Supp. 2d at 1021 (permitting "installation . . . of telegraph or other communications technology for the purpose of facilitating the operation of the railroad").

175. *See* Leo Sheep Co. v. United States, 440 U.S. 668, 683 (1979) (quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)) (finding that the 1875 Act "manifest[ed] clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable" by granting land to private corporations); *see also,* 16 U.S.C. § 1248(d) (2012) (recognizing the

The presence of third-party activities on the 1875 Act rights-of-way is clearly within the scope of the incidental purpose doctrine.[176] It was foreseeable that railroads would work in tandem with other utilities from the very beginning of the federal right-of-way grants.[177] The pairing makes sense: because of the exclusivity required to operate a railroad, the railroad's right-of-way is an ideal place for other utilities to run their own cables and pipelines because they won't be subject to open access by the public.[178] Other utility companies often need to cross or run parallel to railroad right-of-ways, and they seek easements and licenses to do so.[179] In turn, the railroad grants these licenses and easements across their right-of-way to generate revenue for itself.[180]

Some courts have found that revenue generation does in fact serve a railroad purpose.[181] In *Cash v. Southern Pacific*, an adjacent landowner challenged the railroad's use of a portion of its right-of-way for a leased team track.[182] The disputed team track portion of the right-of-way had no active trains operating on it, but was adjacent to an active track.[183] The court found that the third party lease served a railroad purpose because the team track attracted more customers to the line, and the revenue gained from the lease "defray[ed] the [railroad's] costs in operating and maintaining the railroad."[184]

While the *Cash* scenario is admittedly different than a situation where the right-of-way has no train operations, policy supports a broad interpretation of the scope of railroad purposes under the 1875 Act.[185] Our nation has long recognized

existence of a "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"); 49 U.S.C § 10101(4) (2012) ("[I]t is the policy of the United States Government to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public and the national defense.").

176. *See supra* Part IV.A.1 (discussing various third-party activities deemed as railroad purposes, including warehouse leases, communication utilities, etc.).

177. *See* 12 STAT. 489 (The Pacific Railroad Act of 1862 was subtitled: "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean").

178. *See, e.g.*, Puett v. W. Pac. R.R. Co., 752 P.2d 213, 218 (Nev. 1988) ("In granting railroads a right of way pursuant to the 1875 Act, Congress intended such railroads to have exclusive use and possession of the surface thereof.").

179. Jeffrey M. Heftman, *Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities*, 2002 U. ILL. L. REV. 1401, 1410 (2002). *See infra* Part IV.B.4 (discussing the co-existence of railroads and other public utilities).

180. *See, e.g.*, Cash v. S. Pac. R.R. Co., 123 Cal. App. 3d 974 (1981) (holding that a lease by railroad to third party for a team track was a railroad purpose, because it attracted more customers to the line and the revenue generated helped "[defray] the [railroad's] costs in operating and maintaining the railroad.").

181. *Id.*

182. *Id.* at 977. A "team track" is a "[s]ide track [next to the main track] on which cars are placed for the use of the public in loading or unloading of freight." BURLINGTON NORTHERN SANTA FE, GLOSSARY OF RAILROAD TERMINOLOGY & JARGON 20, *available at* http://www.bnsf.com/customers/pdf/glossary.pdf (last visited Mar. 4, 2015) (on file with *The University of the Pacific Law Review*).

183. *Cash*, 123 Cal. App. 3d. at 977.

184. *Id.* at 979.

185. *Supra* note 149 and accompanying text.

the benefits the railroad offers—those same benefits spurred the construction of the railroad in the first place.[186] Adoption of the clear public utility purpose doctrine will preserve our rights-of-way for the benefit of future generations.

3. *The Shifting Public Use Doctrine: Avoiding Takings Liability*

The shifting public use doctrine prevents takings liability by "reject[ing] the position that permitted uses of an easement are only those contemplated at the time of its granting. Rather, it posits that if a purpose were contemplated, the specific means of execution can develop as technology allows and society demands."[187] Various jurisdictions have recognized and accepted this doctrine.[188]

Many statutory definitions of "public utility" support shifting the public use doctrine and expanding the scope of "railroad purposes" to include third-party activities that serve a clear public utility purpose. Such definitions typically include common carriers and railroads among their list of services that qualify as public utilities, which suggests that railroads and other utilities are coterminous with one another.[189] If an alternative utility use falls within the shifting public use doctrine, it does not impose a greater burden upon the subservient tenement.[190] Therefore, the alternative use precludes easement extinguishment and takings liability.[191]

The similarities between railroads and other public utilities place them well within the scope of the shifting public use doctrine.[192] Consider, for example, railroads and electricity providers. Railroads provide a method of transport for necessary goods to the general public.[193] Electric companies, on the other hand, use their rights-of-way to transport electricity, a necessary "good," to the general public.[194] Natural gas providers similarly transport their goods to the public,[195] and

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186. *Supra* Part II.A. *See supra* note 175 (citing case law and statutory support for the nation's recognition of benefits of the railroad).

187. Heftman, *supra* note 179, at 1418.

188. *See, e.g.*, W. v. Bancroft, 32 Vt. 367 (1859) (allowing the use of a highway for construction of a water reservoir, the court found that: "Besides the use of highways for the sole purpose of travel, the public may use them for many other objects necessary for the public convenience and health, such as laying water pipes and constructing drains, sewers and reservoirs"). *But see* Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (holding that use of easement for recreational purposes was outside the scope of the original easement for transportation purposes).

189. *See, e.g.*, CAL. PUB. UTIL. CODE § 211 (1996) (defining "common carrier" as used in the Code as including "[e]very railroad corporation"); OHIO REV. CODE ANN § 4905.03(J)–(L) (2012) (specifically delineating railroad and railway companies providing freight and passenger services as public utilities).

190. Heftman, *supra* note 179, at 1420.

191. *Id.* at 1418.

192. *Id.*

193. OVERVIEW OF AMERICAN FREIGHT RAILROADS, *supra* note 119.

194. ELECTRICITY REGULATION IN THE U.S.: A GUIDE, at 3, THE REGULATORY ASSISTANCE PROJECT (Mar. 2011), *available at* www.raponline.org/docs/ RAP_Lazar_ElectricityRegulationInTheUS_Guide_2011 _03.pdf (on file with *The University of the Pacific Law Review*).

sewer treatment utilities carry waste away from the public through pipeline rights-of-way.[196] The railroad could lease their right-of-way to these third-party utility companies for activities that serve a clear public utility purpose in a transportation-like fashion, thereby satisfying similar purposes to those which the railroad typically serves, albeit in a different manner.[197]

4. *Team Tracking: Peaceful Co-Existence of Railroads and Public Utilities on the Right-of-Way*

In addition to providing essential public services, a third-party activity must be able to work in tandem with the railroad when it reinstates operations to qualify as a clear public utility purpose within the scope of "railroad purposes."[198] Railroad rights-of-way are composed of, in property terms, a unique bundle of sticks.[199] Any activity performed on the railroad right-of-way must not interfere with those rights or with the safety of railroad operations.[200] However, many public utilities already operate along or across railroad rights-of-way, including gas pipelines,[201] telephone lines,[202] and fiber optic cables.[203] The co-existence of

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195. ABOUT U.S. NATURAL GAS PIPELINES–TRANSPORTING NATURAL GAS 1, ENERGY INFORMATION ADMINISTRATION (June 2007), *available at* http://www.eia.gov/pub/oil_gas/natural_gas/analysis_ publications/ ngpipeline/fullversion.pdf (on file with *The University of the Pacific Law Review*).

196. ACCESS WATER KNOWLEDGE: SANITARY SEWERS 1, WATER ENV'T FEDERATION (May 2011), *available at* http://www.wef.org/workarea/download asset.aspx?id=6442451434 (on file with *The University of the Pacific Law Review*).

197. *See supra* Part II (discussing the original purposes for which the 1875 Act land grants were made to serve).

198. *See supra* Part IV.A (discussing a variety of activities considered to be well-within the scope of "railroad purposes").

199. United States v. Craft, 535 U.S. 274, 278, 122 S. Ct. 1414, 1420 (2002) (stating "[a] common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."). *See* Territory of N.M. v. U.S. Trust Co. of N.Y., 172 U.S. 171, 183 (1898) (describing railroad rights of way: "if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted,—one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property."); *see also* W. Union Tel. Co. v. Pa. R.R. Co., 195 U.S. 540, 570 (1904) (stating "[a] railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement.").

200. The railroad land grants bestowed a great number of rights upon the railroads that are not held by common law easement owners. The right of exclusive use and possession is a prime example, especially in light of the fact that easements are typically non-possessory interests. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (2000). *See, e.g.*, Puett v. W. Pac. R.R. Co., 752 P.2d 213, 218 (Nev. 1988) ("In granting railroads a right of way pursuant to the 1875 Act, Congress intended such railroads to have exclusive use and possession of the surface thereof."). In addition, the law fully protects congressionally granted railroad rights-of-way from claims of adverse possession. N. Pac. Ry. Co. v. Ely, 25 S. Ct. 302 (1904).

201. *See* Union Pacific R.R. Co. v. Santa Fe Pac. Pipelines, Inc., 180 Cal. Rptr. 3d 173, 199 (2014) (relating to a gas pipeline operating in the subsurface along more than one thousand miles of railroad right-of-way).

202. *See* Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999, 1021 (S.D. Ind. 2005) (permitting "installation . . . of telegraph or other communications technology for the purpose of facilitating the operation of the railroad").

railroad rights-of-way and other public utilities is so common that many states have clear guidelines regulating their mutual accommodations.[204] Considering that other public utility providers already operate on many railroad rights-of-way, allowing third-party activities serving a clear public utility purpose to operate on the railroad right-of-way presents no interference issues—the railroad and public utility can co-exist on the right-of-way prior to the railroad ceasing operations and after reinstatement.[205] Finally, the fact that the two already co-exist on many railroad rights-of-way further supports a finding that broadening the scope of "railroad purposes" to include these third-party activities would not place further burden on the subservient tenement owner's rights.[206]

C. Expanding the Scope: Who Can Get the Job Done?

The right to determine the scope of railroad property rights under congressional land grants falls squarely in the federal government's lap: the Supreme Court has been creating federal common law on the topic for more than a century,[207] and Congress clearly has jurisdiction over the railroad as an instrumentality of interstate commerce under the Commerce Clause.[208] This jurisdiction extends over all aspects of the railroad, including "transportation by rail carriers, and . . . the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State."[209] Because both the Court and Congress have the jurisdiction to bring change in the scope of railroad property rights, the only question is, which one is better suited for the job?

The answer is simple: for the Supreme Court to reinterpret the scope of railroad purposes, it first must grant certiorari in a case whose facts allow such an

203. *See* Mellon v. S. Pac. Transp. Co., 750 F. Supp. 226, 231 (W.D. Tex. 1990) (allowing installation of fiber optic cables along the railroad right-of-way).

204. *See, e.g.*, UTILITY ACCOMMODATION MANUAL 1, NEW HAMPSHIRE DEPT. OF TRANS. (Feb. 2010), *available at* https://www.nh.gov/dot/ org/projectdevelopment/highwaydesign/documents/UAM_complete.pdf (on file with *The University of the Pacific Law Review*) (enumerating regulations for co-existence and noting that "[u]tilization of such rights-of-way [by other public utilities] is recognized as being in the public interest provided that such occupancy does not adversely affect highway or railroad safety, operation, and maintenance or otherwise impair the highway or railroad or its aesthetic quality."); UTILITY ACCOMMODATION ON GDOT OWNED RAILROAD RIGHT OF WAY, GEORGIA DEPT. OF TRANS. (revised Nov. 20, 2008), *available at* http://www.dot.ga.gov/doingbusiness/utilities/Documents/Utility_Accommodation_on_DOT_Owned_Railroad _RW.pdf (on file with *The University of the Pacific Law Review*) ("prescrib[ing] policies and standards for the accommodation of utilities and . . . for coordinating the use of GDOT owned railroad right of way").

205. *See supra* note 202–04 and accompanying text.

206. *See supra* Part IV.C (discussing burden on the subservient tenement).

207. *See, e.g.*, Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014); Great N. R.R. Co. v. United States*,* 315 U.S. 262 (1942). N. Pac. Ry. Co. v. Townsend, 190 U.S. 267, 271 (1903) (all decisions determining the scope of railroad property rights under Congressional land grants).

208. U.S. CONST. art. I, § 8, cl. 3; 49 U.S.C. § 10501 (2012).

209. 49 U.S.C. § 10501(b) (2012).

outcome.[210] The odds of the Court granting a writ of certiorari are extremely low: during the October 2013 Term, the Court granted certiorari in seventy-six actions, a mere one percent, of the 7,586 petitions it considered.[211] The odds of the Supreme Court ever hearing a case with the correct facts are too low to make it a viable option for the adoption of a new scope of "railroad purposes" any time soon.[212]

Adoption of the expanded scope through congressional action presents its own unique hurdles, but it is likely the best option for the timely adoption of a broader interpretation of "railroad purposes."[213] The language of the Rails-to-Trails "Rail-banking" Clause serves as the perfect guide for the language of the proposed legislation.[214] The ideal Act of Congress is as follows:

> (1) 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 transfer, lease, or sale to a third-party public utility entity serving a clear public utility purpose, 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.
>
> (2) As used in this chapter, a "clear public utility purpose" is one which utilizes the railroad right-of-way to provide, through transport or transmission, necessary services to the general public, including, but not limited to, natural gas, electricity, communications technology, water, and sewer treatment services.
>
> (3) To qualify as a railroad purpose under this chapter:
>
> > (a) The sale, lease, or transfer of the right-of-way to the third-party must generate revenue for the railroad corporation.

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210. *See* SUPREME COURT PROCEDURES, U.S. COURTS (last visited Feb. 9, 2015), http://www.uscourts.gov/educational-resources/get-informed/supreme-court/supreme-court-procedures.aspx (on file with *The University of the Pacific Law Review*) (noting that "[t]he Court usually is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value").

211. *The Supreme Court—The Statistics*, 128 HARV. L. REV. 401, 410 (2014).

212. If the odds of the Court granting certiorari in any case are one percent, the odds of the Court granting certiorari in a perfect case for the adoption of the suggested "clear public utility purpose" doctrine proposed in this Comment are incalculable.

213. Generally, anywhere from one to seven percent of bills introduced in Congress are actually enacted into law. *Historical Statistics about Legislation in the U.S. Congress*, GOVTRACK.US, https://www.govtrack.us/congress/bills/statistics (last visited Oct. 6, 2015) (on file with *The University of the Pacific Law Review*).

214. *See supra* note 98 and accompanying text.

> (b) The activities of the third-party public utility must not interfere with the subsequent reinstatement of railroad operations on the right-of-way.

This proposed language would keep 1875 Act railroad rights-of-way active even if the railroad temporarily ceases operations, thereby preserving these rights-of-way for future reinstatement so that future generations may reap the benefits of rail transport.[215] At the same time, the language sufficiently limits qualifying third-party activities to those that provide a clear benefit to the public similar to those benefits provided by the railroad: transport or transmission of public necessities and revenue generation for the railroad.[216]

V. CONCLUSION

Railroads affect our daily lives whether we realize it or not: They transport the ingredients in the food we eat and components of items we use every day.[217] They cut down on traffic and emissions, helping to protect our environment.[218] They may provide a job and income to one of our loved ones or acquaintances.[219] The list goes on. Something that is so beneficial to our country's continued livelihood and that is such a crucial component of our national heritage is worthy of protection.

The key to ensuring the continuance of rail transport in the future lies in protecting the existence of its rights-of-way today. If our courts continue to label 1875 Act railroad rights-of-way as easements, our lawmakers must adopt a broader interpretation of "railroad purposes"—one which recognizes third-party activities which serve clear public utility purposes—to protect those easements from being unnecessarily extinguished and to protect our rights-of-way for future railroad operations. This can be accomplished without requiring the Court to overrule *Brandt*, because such an interpretation is in complete alignment with the Court's determination that 1875 Act rights-of-way are easements.[220]

If Congress enacts legislation expanding the scope of "railroad purposes," a railroad would be able to lease or license its right-of-way to third parties for

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215. *See infra* Part V (discussing briefly the many benefits of rail transport).

216. *Supra* Part IV.

217. *See* AM. ASS'N. OF RAILROADS, OVERVIEW OF AMERICA'S FREIGHT RAILROADS 1 (Apr. 2014) (stating "[a]s an indispensable part of America's transportation system, freight railroads serve nearly every industrial, wholesale, retail, and resource-based sector of our economy . . . From the food on our tables to the cars we drive to the shoes on our children's feet, freight railroads carry the things America depends on").

218. *Id.*

219. *See id.* ("The more than 180,000 freight railroad employees are among America's most highly paid workers."); *see also* NATIONAL TRANSPORTATION STATISTICS, *supra* note 3, at §§ 3–25 (Of the reported modes of transport—including air, water, and truck—average fulltime railroad employee wages in 2012 were second only to pipeline wages.).

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

activities that derive from or further railroad purposes, and the right-of-way would be maintained so long as the third-parties continue their clear public utility purpose activities,[221] even if the railroad ceases operations on the track. The third-party activities would still be serving a public purpose and the policy reasons behind the Act of 1875 would remain fulfilled, all while protecting the national interest in preserving our railroad rights-of-way for future reinstatement.[222]

221. *See* 43 U.S.C. § 912 (2012) (noting that abandonment or forfeiture occurs when "use and occupancy of said lands for such purposes has ceased or shall hereafter cease").

222. *See supra* note 175.