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New Era of Lavish Land Grants: Taking Public Property for Private Use and *Brandt Revocable Trust v. United States*

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A New Era of Lavish Land Grants

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By Danaya C. Wright

On March 10, 2014, the Supreme Court issued its decision in *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014) (No. 12-1173), handing the government a stunning 8 to 1 defeat on an issue of statutory construction of an 1875 act that granted rights-of-way over public lands to railroads. The Court held that the government retained no reversionary property interest in these federally granted rights-of-way (FGROWs) once it patented the adjoining property to settlers and therefore could not repurpose those lands for rail corridor preservation or interim recreational trail use. Without even acknowledging 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, the decision provides a windfall to today's landowners: it either gives them land they never bought, expected, or received a deed for, or compensation for *not* receiving land they never bought, expected, or received a deed for.

The Court in *Brandt Revocable Trust* was faced with a circuit split. The Court of Appeals for the Federal Circuit had held that railroads received only easements in these 1875 act FGROWs, and if the government did not reserve its servient fee interest when it patented the adjoining land, then it could not retake possession on railroad abandonment and convert the corridor into a recreational trail, despite federal statutes authorizing it to do so. *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005). The Tenth Circuit, however, had ruled that the government retained a reversionary interest in all FGROWs, regardless of whether they were fee interests or easements in the railroads, and therefore it could repurpose the land for continuing public uses. *United States v. Brandt Trust*, 496 Fed. Appx. 822 (10th Cir. 2012).

Although the government prevailed in the Tenth Circuit, it supported the petition for certiorari in the hopes that the Supreme Court would overrule what the lower courts had called the "wrongly decided" and "poorly reasoned" opinion in *Hash*. It was a dangerous strategy, especially because the issues are complex, the history is dense, and the Court's renewed fondness for the Takings Clause suggested it would not blink at opening the federal treasury to hundreds of millions of dollars in potential takings liability.

At the end of the day, however, the decision did not rely on the law, the history, or the policy of preserving public lands; it relied instead on the supposed audacity of the government to change its mind. As Justice Roberts said: "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*." *Brandt Revocable Trust*, 134 S. Ct. at 1264. Under such narrow punitive thinking, we would still be living under the laws of *Plessy v. Ferguson*, *Bowers v. Hardwick*, or *Lochner v. New York*. In this case, however, it wasn't the government that got it wrong; it was the Court.

This article summarizes the historical context for the decision, including public policy considerations over time, and provides critical analysis of the *Brandt Revocable Trust* opinion. An expanded version of this article, including full citations, appears in the Lexis/Nexis, Expert Commentary Series on *Hash v. United States* and *Brandt Revocable Trust v. United States*. For a fuller discussion of all of these matters, see Danaya C. Wright, *Rails to Trails: Conversion of Railroad Corridors to Recreational Trails*, Powell on Real Property ch. 78A (Michael Allan Wolf ed., 2009).

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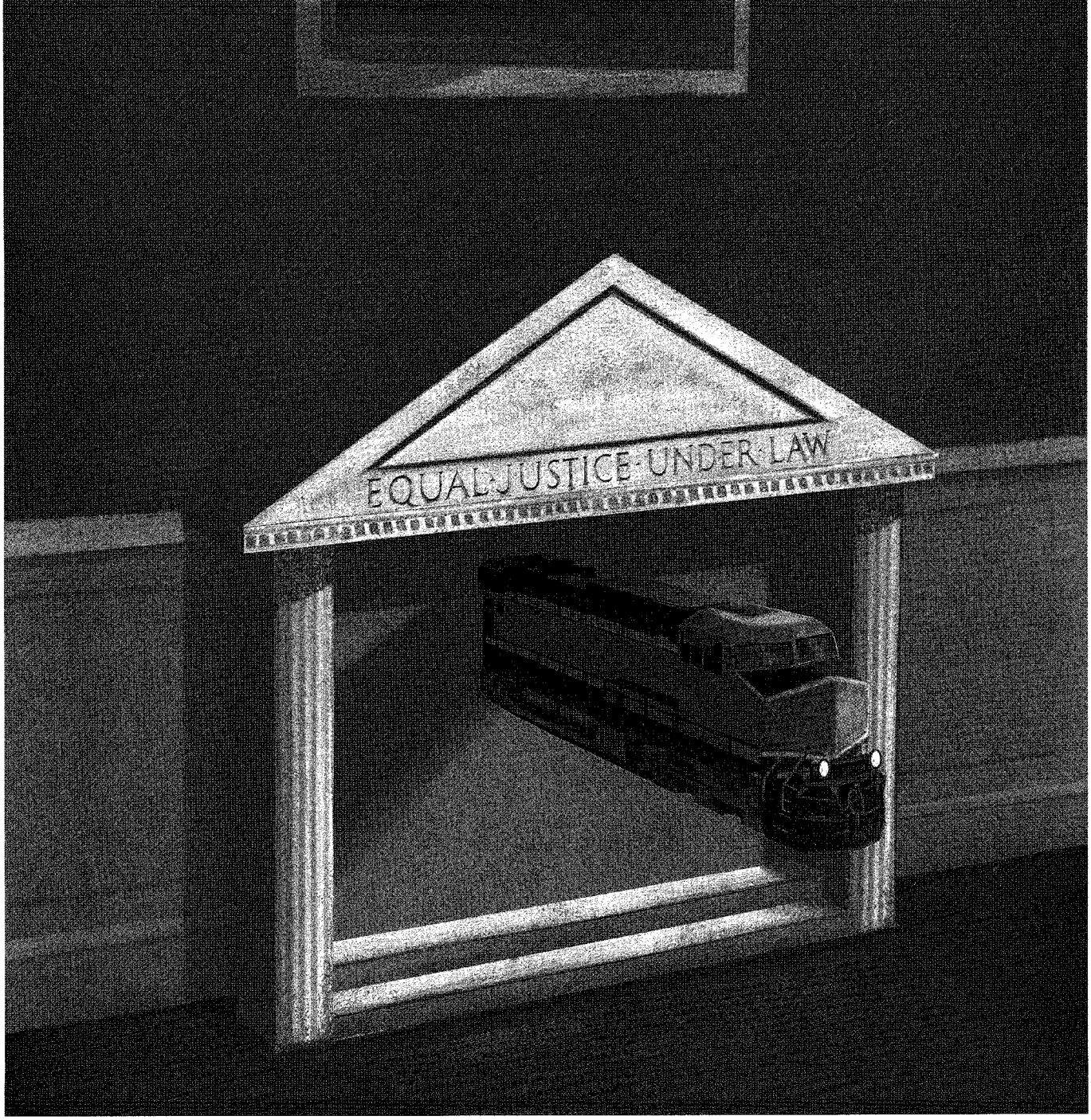


Jon Krause

A Little Railroad History

From the earliest years of railroad development in the 1830s, Congress authorized the conveyance to any charter railroad company of a "right-of-way" across the public lands for the construction of a railroad (federally granted right-of-way, or FGROW). In 1852, Congress passed a general right-of-way act that gave to the railroads a 100 foot right-of-way. Then, between 1862 and 1871, through individual acts, Congress gave railroads not only a 100 foot or 200 foot right-of-way but also the fee ownership in alternating sections for 10 or 20 miles on each side of their roadbed for sale to raise construction funds. Then in 1875, discontinuing the checkerboard grants-in-aid, Congress passed another general right-of-way act to give a 200 foot right-of-way to railroads across all public lands.

Once a FGROW grant was made, the remaining adjacent lands available for settlement in the vicinity of the grant would be worth far more than lands further out. But to prevent conflicts between railroads and settlers, who would rush to claim lands in an area through which a railroad would be constructed, the land office would temporarily withdraw all the lands in the vicinity of the railroad grant to give the railroad time to map its corridor and lay claim to the public lands it required. Once the map was filed, the adjacent land was made available for settlement and patents were given, *subject to* the priority of the railroad's rights. Because surveying was still rough and the terrain was unimproved, it was easier to make the patents subject to the railroad corridor rather than providing explicit metes and bounds descriptions describing the exact dimensions

of the railroad land that was being excluded.

The withdrawal policy made sense if the railroad was relatively quick in mapping its route and constructing its road. But in the case of the transcontinental railroads in the 1862–71 period, which received large checkerboard grants of land with the right to take alternate sections further out

THROUGHOUT THE 19TH AND 20TH CENTURIES, THE FEDERAL COURTS WERE ADAMANT THAT WITHDRAWN LANDS WERE NOT CONSIDERED PUBLIC LANDS AVAILABLE FOR PATENTING TO HOMESTEADERS.

if the adjacent sections had already been patented, the amount of land withdrawn could stretch as wide as a hundred miles and run halfway across the continent. This withdrawal policy frustrated settlers and land speculators and fueled opposition to the railroad grants, particularly the checkerboard grants-in-aid. But the cessation of checkerboard grants did not alter the withdrawal policy after passage of the 1875 act which granted only rights-of-way. Throughout the 19th and 20th centuries, the federal courts were adamant that withdrawn lands were not considered *public lands* available for patenting to homesteaders.

All of these federal grants used the same term, a *right-of-way*, to describe the land given to the railroads for construction of their roads, and no limitations were placed on the grants of the property other than that the railroad be built within a specified period of time. Moreover, the congressional history of these land grants makes it clear that Congress intended that all the FGROWs, regardless of the period of the grant, be treated the same. As public sentiment turned against the checkerboard grants-in-aid, Congress debated whether the 1875 act rights-of-way would be different from the earlier rights-of-way.

During floor debate on the bill, Congressman Hoar acknowledged prior court decisions construing FGROWs to reserve a property interest in the United States that could defeat state law even if the United States later parted with all its public lands in the vicinity. If the United States had patented all the adjoining land to settlers, and the railroad forfeited its right-of-way, Hoar thought the corridor should pass to the state or be governed by state law and not remain within the dominion of the federal government. Giving control to the states also would be a change from the way the earlier rights-of-way had been granted. He explained:

> [W]hat would be the condition of the road-bed? It is a tract of land owned by the United States, over which a railroad under the authority of the United States passes. Now, if the State undertakes to meddle with that location, it is meddling with lands within its limit the property of the United States, and with a right of way within its limits granted by the United States. The United States may in the course of years or generations have parted with all its public lands in the State or in the vicinity of the road, and still, whenever the State undertakes to exercise the ordinary local authority of permitting a highway across the track of the road, or a bridge to be built over it, . . . or another of those acts which State authorities exercise, *the railroad will meet the State with the constitutional objection that this land you are dealing with is the property of the United States*; the eminent domain did not come from your State to us as in ordinary cases, and the right of way with which we are clothed was given by the United States. In that case the people of the State would either have to come to Congress for a remedy or be without it.

Congressman Townsend, the floor manager for the bill, responded:

> Is not that the condition in which the Union Pacific Railroad stands in Kansas and has stood, and in California too?

Congressman Hoar replied:

> Undoubtedly; and I desire to say, as my friend puts the question, that I regard as a most lamentable fact in our history the carelessness with which between 1863 and 1865, or 1870, Congress dealt with the great function of incorporating these great highways. . . . I think one of the most distressing facts in our history is the example of carelessness and fraud which was set in the organization of these roads.

Cong. Rec. 2217–18 (Mar. 3, 1875) (emphasis added).

Hoar then offered an amendment, accepted by the House, that future rights-of-way would be treated as though the grants had come from the states, not the federal government. Had Congressman Hoar's amendment gone into law, it would have made the 1875 act FGROWs different from the earlier FGROWs. The Conference Committee report, however, deleted the amendment, the House accepted the conference report, and the original bill was signed into law the next day. Notably, under Congressman Hoar's amendment, and the understanding of Congress in 1875 when it rejected the amendment and passed the act, there was a retained interest in these FGROWs that would permit subsequent state or federal control on termination of the railroad's interest.

Nearly 140 years later, the situation presented in *Brandt Revocable Trust* is precisely the situation anticipated by Congressman Hoar, which is what would happen after the FGROW was granted to a railroad, the adjacent land was patented to private settlers subject to the railroad's right-of-way, and then the railroad's interests were forfeited or otherwise terminated. Would the land return to federal control based on some reversionary interest retained by the federal government, or would possession of the land pass to the adjacent landowner whose patent granted the entire section of land but was made subject to the railroad's right-of-way? Congressmen Hoar and Townsend believed the land returned to federal control. The federal courts, however, had a different response, viewing the outcome as dependent on the nature of the property rights the railroad received in these different FGROW grants.

A Little Railroad Law

In 1880, the Supreme Court held that an 1862–71 FGROW conveyed to the railroad a fee simple absolute interest. *St. Joseph & Denver City Railroad Co. v. Baldwin*, 103 U.S. (13 How.) 426 (1880). If the railroad received a fee simple absolute from the government, there was no retained reversionary interest in the federal government and no interest in the corridor land could have passed via patent to the adjoining landowners.

But the fee simple absolute was troublesome when the railroads were not constructed or when telegraph companies wanted access to the FGROW lands to place communications facilities that were expressly made part of the grants. The 1875 act also provided that railroads could not prohibit other companies from using their corridor lands in canyons or narrow passes. A fee simple absolute is inconsistent with a limitation that requires the railroad to share its FGROW with others.

By the turn of the century, as pressure was building in Congress to forfeit many of the grants to unbuilt railroads, the Supreme Court modified its fee simple absolute interpretation, in *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267 (1903), and held that a different 1862–71 FGROW conveyed a "limited fee made on an implied condition of reverter." The limited fee interpretation was followed in 1915 for an 1875 act FGROW in *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44 (1915). In *Townsend* and *Stringham*, the Supreme Court recognized what the lower courts had been holding for decades, that a FGROW is

> a grant made on a condition subsequent,—that the road shall be completed by a prescribed time,—but no one can take advantage of a breach of this condition but the government,—the grantor,—and in the nature of things it can only do so by judicial proceedings authorized by law, or a legislative resumption of the grant.

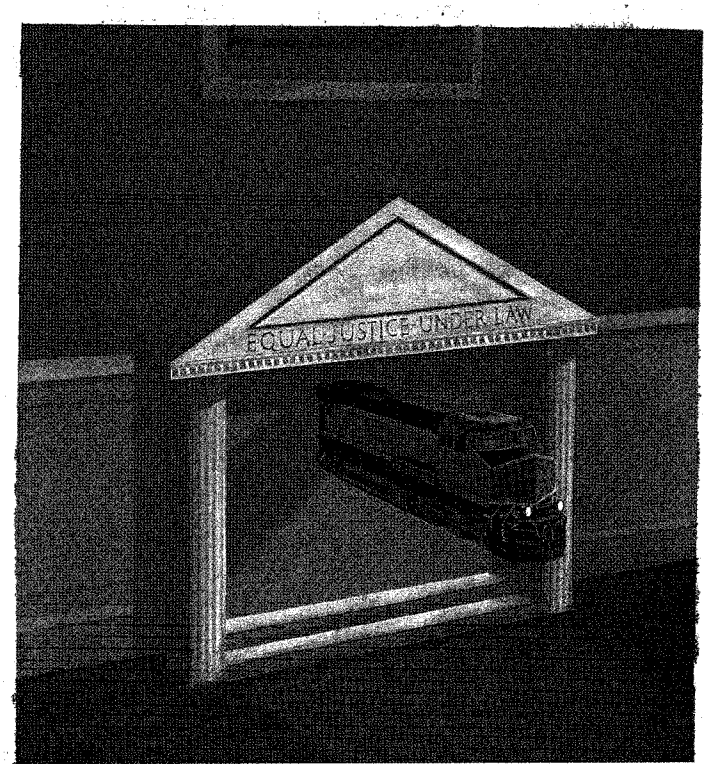
Bybee v. Oregon & C. Ry. Co., 26 F. 586, 588 (C.C. D. Or. 1886).

The limited fee concept made a lot of sense. Because the grant was initially from the government, only the government would be able to exercise its power of termination and declare a forfeiture or an abandonment. The federal courts made it quite clear that a private landowner did not have standing to enforce this reversionary interest because the land was infused with an important public purpose. The reversion could not be automatic just because the railroad missed its construction deadline. The country needed railroads, and so their interests took priority over the interests of private settlers.

A Little Railroad Policy

In 1920, Congress passed a comprehensive transportation act to return the railroads to private ownership after World War I. The act created incentives for the railroads to shed unprofitable lines and consolidate to become more efficient. The railroads responded by abandoning thousands of miles of corridor in the subsequent decades. Many of these miles were lands originally granted by the federal government through FGROW, and their disposition depended on federal, not state law. The country was squarely in the situation Congressman Hoar had described. But Congress had not provided for the disposition of these regained lands in its 1920 transportation act, or in any previous legislation.

Following the Supreme Court's lead that all FGROWs were either a fee simple absolute or a limited fee with an implied condition of reverter, Congress passed 43 U.S.C. § 912 in 1922 to dispose of any corridor land that is abandoned and returns to federal control. Section 912 provided that, on abandonment by the railroad, the federal interest would pass either



to a municipality through which the road runs, to a highway department that chooses to convert the roadbed into a public highway within a year of abandonment, or to the adjacent landowner. Moreover, the transfer

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of the federal interest under § 912 would not occur until abandonment by the railroad. The act of abandonment was to be determined only by an act of Congress or a decision of a court of competent jurisdiction. This requirement of § 912 continued the common law practice of requiring a judicial or congressional determination to exercise the government's power to terminate a railroad's interest in FGROW grants.

For the next 20 years the federal courts were in agreement that, in the case of limited fee FGROWs, § 912 operated after the FGROW had been declared terminated by an act of Congress or a judicial declaration and the fee vested back in the United States. Until 1942, the statutory scheme worked according to plan. But, in a case involving a dispute between the railroad grantee and the government grantor over subsurface mineral rights in an 1875 act FGROW, the Supreme Court again changed course in its interpretation of the property rights conveyed to the railroads. On a plea by the government that FGROW interests were only surface interests, the Court reversed its 1915 *Stringham* decision and interpreted the railroad's interest to be an easement that would terminate on abandonment and that did not include the minerals. That case, *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), was based on a long history of state common law cases interpreting railroad rights-of-way to be easements.

If 1875 act FGROWs were mere easements, then a whole host of new issues arose around the disposition of the land on abandonment. More precisely, if the railroad only obtained an easement by a FGROW, did the federal government retain the servient fee, and would § 912 apply to both servient fee and reversionary interests or only to reversionary interests following the limited fees? And were there still some FGROWs held as limited fees with an implied reversionary interest and others as easements, even though the terminology of the grants was the same? And if the FGROW was an easement and the government retained the servient fee, did it convey that servient fee interest to subsequent patentees of the adjoining land or was the servient fee considered previously granted lands unavailable for patenting?

Takings Challenges to the NTSA

None of this technical legal conundrum really mattered when § 912 gave the federal interest in abandoned FGROW lands to adjacent landowners. That changed in 1983 when Congress passed an amendment to the National Trails System Act (NTSA) to promote the preservation of abandoned rail corridors for future reactivation and to allow interim recreational trail use in the meantime. 16 U.S.C. § 1 247(d). The act provided that all of the railroad's property rights, whether created under federal or state law, would remain intact during the period of interim trail use if the corridor was "railbanked" during the abandonment process. In 1988, further amendments to the NTSA provided that the federal government's interests in any FGROW would be retained for railbanking purposes, and not be subject to disposal under § 912 to a municipality or to adjacent landowners, although they could continue to be embraced in a public highway.

Faced with claims by adjoining landowners that they were entitled to unencumbered possession of abandoned FGROW land, numerous courts, especially the Tenth Circuit courts, held that regardless of whether the government's retained interest was the underlying servient fee or a power of termination, § 912 governed the disposition of that interest. Relying heavily on the easement as a property right that terminates automatically, in 2005 the Federal Circuit, in *Hash v. United States*, held that if the land office did not reserve the underlying fee in the FGROW when it made the land patents to homesteaders, the government's servient fee interest transferred at the time of the patent.

Consequently, on railroad abandonment, the government had no interest in the abandoned corridor land, and if the corridor is railbanked and converted to an interim trail, takings liability accrues. Set aside, for the moment, the absurdity of requiring the government to reserve its servient fee interests from patents issued before 1942 when the government first learned it even had servient fee rather than reversionary interests in some of its FGROWs.

Brandt Revocable Trust Affirmed *Hash*

The lower courts, especially Judge Baskir in *Ellamae Phillips Co. v. United States*, 77 Fed. Cl. 387, 395 (2007), felt that *Hash* was wrongly decided and poorly reasoned, but nonetheless conformed to the mandate that because the FGROW was an easement and not a limited fee, the government had no retained interest in the land and owed compensation when it authorized preservation of the corridor for future rail and interim trail use. The Tenth Circuit, however, had the most cases involving FGROW and § 912 and had developed extensive precedent that § 912 applied to both

defeasible fee and easement FGROWs because the railroad easement of *Great Northern* had fee-like and easement-like qualities. In *United States v. Brandt*, 496 Fed. Appx. 822 (10th Cir. 2012), the Tenth Circuit simply declined to follow *Hash* and, instead, held that the government had a sufficient reversionary interest in an 1875 act FGROW to allow for preservation of the corridor and interim trail use.

Despite significant lower court concerns articulated in numerous cases following the decision in *Hash* on § 912's applicability to abandonment, takings liability when the federal government continues to exercise dominion over railbanked FGROW, and the clear congressional understanding of a retained federal interest in FGROWs, the Supreme Court affirmed *Hash* and overturned the Tenth Circuit's long line of precedents. Reciting at length the government's argument in *Great Northern* that the railroad acquired only an easement and that easements terminate by abandonment, leaving the servient fee owner with an unencumbered possessory estate, eight Justices agreed that if the government did not reserve its underlying fee interest, it passed to patentees.

As in *Hash*, the *Brandt Revocable Trust* Court did not address the long-standing line of cases, including its own *Townsend* decision, holding that FGROW lands were not public lands available for transfer to patentees. Furthermore, in 1903, the Supreme Court had held exactly to the contrary in *Townsend* that:

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

190 U.S. at 269.

The decision in this *Townsend* case should have resolved the entire issue in *Hash* and *Brandt Revocable Trust*. Regardless of whether the FGROW was an easement or a limited fee, the homesteader who acquired the adjoining land acquired no interests in the FGROW because, once granted to the railroad, that land was withdrawn from the category of public lands available for patenting to private landowners. Amazingly, here was a case involving precisely the issue being litigated in *Hash* and *Brandt Revocable Trust*, in which the Supreme Court had explicitly stated that the homesteaders acquired no property rights, and Justice Roberts didn't even cite the case for this point. Although *Townsend* dealt with 1862–71 act FGROWs, no decision before *Hash* had ever held that the limited fee/easement difference mattered in the question of homesteaders taking an interest in the FGROW or the applicability of § 912 on the government's retained interest.

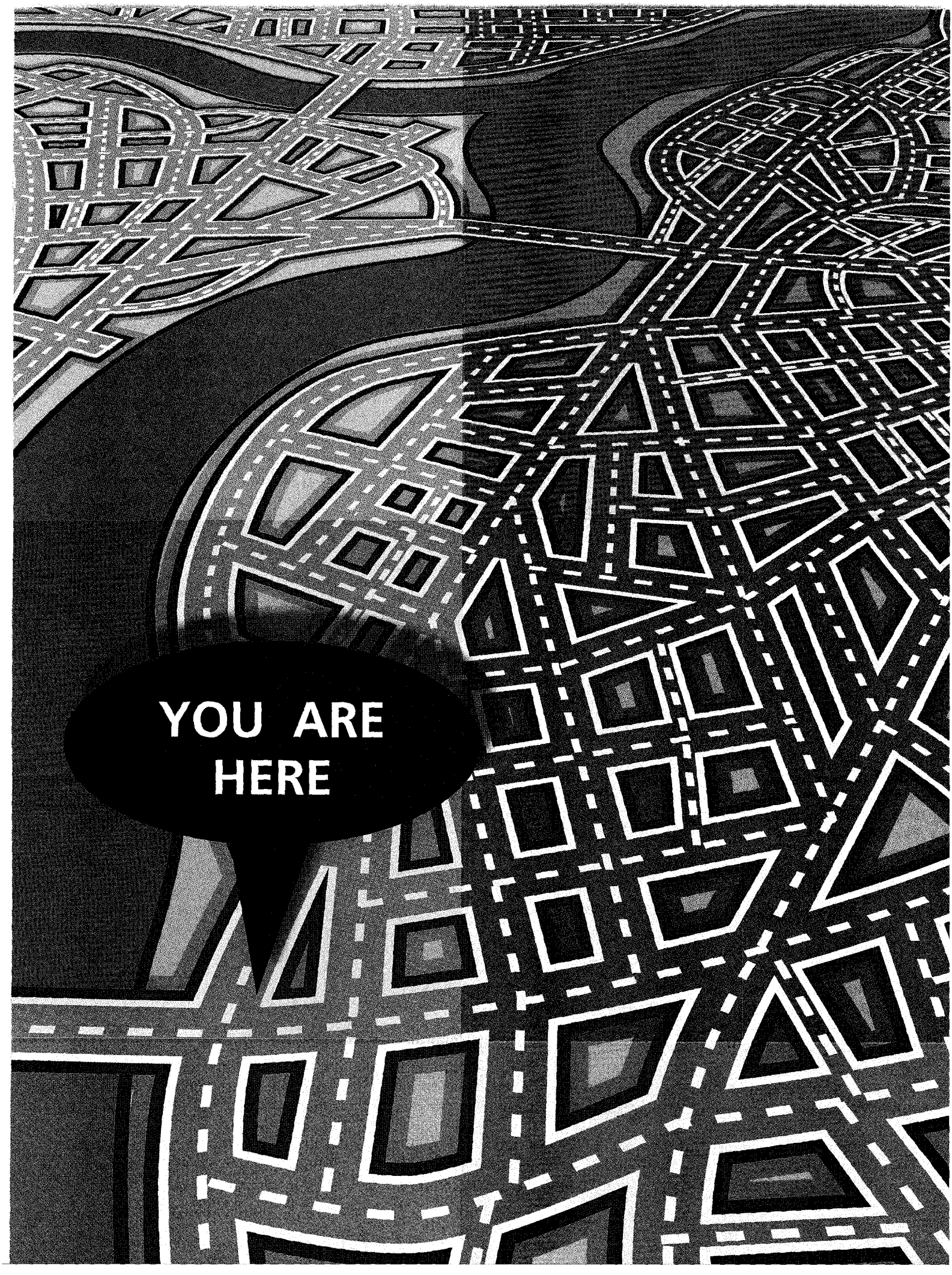
Focusing solely on the fact that an easement terminates on abandonment to unburden the servient fee, the majority opinion held that the government had no retained interest in 1875 act easement FGROWs. But the fact that the railroad has an easement tells us nothing about who owns the servient fee. Citing only to an Indian land case involving a very different type of FGROW, and an Attorney General opinion that predated the right-of-way act itself, the majority held that the government gave its servient fee interest to homesteaders, without even acknowledging that there was direct Supreme Court precedent, holding to the contrary, on the precise issue before the Court.

The decision is simply wrong. Apparently, it was more important to Justice Roberts to rebuff the government for refashioning its 1942 argument in *Great Northern* than to actually research the law and ascertain Congress's intent. The takeaway: results-oriented decision making can be accomplished easily by simply ignoring the precedents and the unsupported rationale with which the lower courts were struggling. What's hundreds of millions of dollars in takings liability when one can smugly put the government in its place?

Justice Sotomayor, the lone dissenter, engaged the issue of whether the government retained a reversionary interest in 1875 act easement FGROW. She concluded that the Court's 1942 *Great Northern* decision that an 1875 act FGROW was an easement says nothing about whether the government retained its servient fee interest or conveyed that interest to homesteaders in subsequent patents. She is correct. Noting that railroad easements are hybrid property rights, with fee-like and easement-like characteristics, and that there is absolutely no evidence supporting the view that the government intended to give away its ultimate control over these public transportation corridors, she argued that the government retained a reversionary type interest in all FGROWs and that § 912, and its 1988 amendments, apply to them all equally.

Conclusion

Hash and *Brandt Revocable Trust* are wrong on the law, wrong on the history, and wrong on the policy. It is disappointing that only Justice Sotomayor looked into the complex legal issues deep enough to see some of the problems and contradictions with the majority's decision. While the Department of Justice continues to be slammed with case after case of adjacent landowners claiming a taking of their property when their expectations of a windfall are thwarted by continued use of an adjacent railroad corridor for trail use, the federal treasury continues to be tapped to replace that windfall to adjacent landowners with an added bonus to their lawyers. As the Court has done so many times before, it could fix the error it has perpetuated by overruling *Hash* and *Brandt Revocable Trust* in a subsequent case. But in the meantime, greed and politics have once again trampled the public interest and taken public property for private use. ■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